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Statement of Kenneth L. Wainstein
Nominee for Assistant Attorney General for National Security
Before the Senate Select Committee on Intelligence
May 16, 2006

Chairman Roberts, Vice Chairman Rockefeller, Members of the Committee:

I am honored and privileged to come before you today as the President’s nominee to be the first Assistant Attorney General for National Security. As a long-time federal prosecutor, I have devoted my career to protecting this nation and its communities against crime and defending our civil liberties. Now, I hope to have the opportunity to continue that service as the AAG for the National Security Division.

When Congress passed the USA PATRIOT Improvement and Reauthorization Act, it created a new National Security Division within the Department of Justice. The new Division combines for the first time all of the Department’s primary national security elements: the Counterterrorism and Counterespionage Sections of the Criminal Division, as well as the experts from the Office of Intelligence Policy and Review (OIPR) who specialize in the Foreign Intelligence Surveillance Act (FISA). The Division’s creation responds to and completely fulfills a key recommendation of the March 31, 2005, report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (WMD Commission). The Department is particularly appreciative of your efforts Mr. Chairman, and the efforts of this Committee, to enact the legislation creating this Division and the position for which I have been nominated.

The new Division brings together all the strengths of the Counterterrorism and Counterespionage Sections with OIPR’s expertise in FISA, and will enable us to fight threats to our national security more effectively and efficiently. Prevention of another terrorist attack remains the Department’s highest priority. The prevention strategy implemented following the tragic events of 9/11 has served the Department well, but it demands constant coordination and information flow. The National Security Division is the next evolution of that strategy; it will improve coordination and unity of purpose against terrorism within the Department of Justice. By consolidating the intelligence lawyers in OIPR with the national security prosecutors in CES and CTS, the Department is now situated to take full advantage of the information flow between law enforcement and intelligence personnel that was authorized by the USA PATRIOT Act. Moreover, by placing those personnel in a single division under one AAG, the Department is positioning itself to drive the changes necessary to continue enhancing our counterterrorism program.

Of importance to this Committee, our integration will also make the Department more responsive to the needs of the Intelligence Community. Having one senior official at DOJ, whose title and responsibilities enable that person to represent DOJ in interagency processes related to national security, is a significant advantage: it provides one point of coordination and one point of contact for our colleagues in the Intelligence Community. If fortunate enough to be confirmed, I will act as the primary liaison to the ODNI. Indeed, I have already met with senior leadership at the ODNI, and I look forward to fostering that relationship.

Furthermore, the Division will facilitate coordination with Congress and congressional oversight, as it will serve as the central location for congressional inquiries relating to our national security programs.

This reorganization also makes good management sense for the Department of Justice. Prior to this reorganization, no official below the Deputy Attorney General (DAG) had complete responsibility for all the core national security issues that the Department handles. With responsibility for the entire Department, the DAG had many responsibilities besides addressing the myriad national security issues that arise each day. It made sense to consolidate handling of those issues in the hands of a single AAG, who can then provide informed advice and recommendations up the leadership chain.

This new position will be one of challenges, but it will also be one of great opportunity. If confirmed, I look forward to using this opportunity to build on the strong efforts and progress of the past few years, and to explore new ways by which the Department can serve its role as protector of national security and defender of civil liberties.

I have been a Department employee for 17 years, and it has been a tremendous privilege to serve the nation in every position I have held. It will be a particular honor to work with the Department’s fine and dedicated counterterrorism and counterespionage professionals to help ensure the safety and security of our homeland.

In closing, I want to thank the President and the Attorney General for honoring me with this nomination. I am humbled by the trust and faith they have placed in me. I want to assure this Committee that if I am confirmed, I will devote all my energies to the mission of protecting our national security and defending civil liberties and the freedoms that we hold so dear.

I look forward to answering any questions the members of this Committee may have.
Committee on Homeland Security, Peter King, Chairman
For Immediate Release

Four major King-led Homeland Security Measures to Become Law
Port Security, Border Fence, FEMA reform and Chemical Plant Security passed by Congress

Washington, D.C. (Saturday, September 30, 2006)—Over the course of the last 24 hours, Congress has enacted four major homeland security initiatives; and in each case, legislative efforts were led by U.S. Rep. Peter T. King (R-NY), Chairman of the Committee on Homeland Security.

“Congressman King has been a great ally in the effort to protect our nation from terrorist attacks,” said Senator Susan Collins (R-ME), Chair of the Senate Committee on Homeland Security and Government Reform. “By securing the passage of such historic legislation as port security, chemical plant security and FEMA reform, Pete King has achieved more in just one year as Homeland Security Chairman than most members of Congress do in a lifetime.”

The measures, which will now be sent to President Bush to be signed into law, include the Secure Fence Act of 2006, the Security and Accountability for Every (SAFE) Port Act, Chemical Plant Security legislation, and Federal Emergency Management Agency (FEMA) reform.

H.R. 4954, the SAFE Port Act, will serve to enhance port security nationwide, authorizing $400 million per year for port security grants, fully authorizing and codifying the Domestic Nuclear Detection Office (DNDO), and requiring the Department of Homeland Security (DHS) to deploy nuclear and radiological detection systems to cover 98% of all incoming cargo. The bill also establishes three pilot programs to evaluate the feasibility of conducting 100% scanning of cargo containers for nuclear and radiological material at foreign seaports.

The Secure Fence Act of 2006, H.R. 6061, is an emergency measure that will mandate operational control of all borders through enhanced Border Patrol operations, physical barriers, and state-of-the-art technology. This includes providing for over 700 miles of two-layered reinforced fencing along the southwest border.

“I’ve never seen the American people as adamant about any two issues as they have been about border security and port security,” King said. “The correspondence I’ve received—letters, calls, and e-mails—has been overwhelming. And I’m happy to say that we acted in accordance with those requests by enacting these two comprehensive measures into law.”

The Chemical Plant Security language, passed as part of the Fiscal Year 2007 DHS Appropriations bill, provides DHS with the authority to regulate security at our nation’s high-risk chemical security plants. The measure directs DHS to establish risk and performance-based standards for chemical facilities; requires chemical plants to conduct vulnerability assessments and create and implement site security plans based on their specific vulnerabilities; and gives DHS the authority to require compliance, including shut-down authority.

Federal Emergency Management Agency reform, also enacted as part of the Fiscal Year 2007 DHS Appropriations bill, will elevate the standing of FEMA within DHS by promoting the Administrator of FEMA to the level of Deputy Secretary and granting the agency Coast Guard-like autonomy within the Department. Furthermore, it requires that the Administrator be an experienced emergency manager, and takes steps to improve disaster preparedness and response capabilities nationwide, enhance communication and coordination at the federal, state, and local levels, and eliminate waste, fraud, and abuse.

“I’d like to thank my House and Senate colleagues on both sides of the aisle for their hard work on these initiatives,” King said. “I believe these four measures show how dedicated this Committee and this Congress are to enacting legislation that will better protect our country and its citizens. It is quite an achievement, and I’m very proud to have had an active role in it.”

Senator Warner said, “I am humbled and honored to have served on this historic committee for twenty eight years, 12 of which as either Ranking Member or Chairman. This strong, bipartisan bill will provide the resources to our men and women in uniform, and their families, as they stand guard the world over – in some 60 countries – to keep America safe. Our forces are protecting us at great personal sacrifice, and we in Congress have a very sacred and constitutional obligation to care for them, and their families. This bill provides our military with the resources to fight the war on terror and defend our security interests around the globe, thereby safeguarding the liberty and freedom we have in America.”

“In this bill – the last bill of my six-year tenure as Chairman, under the rules of the Republican caucus – I am particularly pleased that we have focused on the priorities of enhancing force protection for our troops facing asymmetrical threats in the field; re-setting essential equipment for all the Services, particularly the Army and the Marine Corps; modernizing the force, including strengthening the shipbuilding program and the industrial base; enhancing the Department’s homeland defense capabilities and authorities; improving the quality of life for our dedicated service members and their families; and fulfilling our responsibility to exercise strong congressional oversight of the Department and the ongoing operations in Iraq and Afghanistan,” added Senator Warner.

Senator Levin said, “I am pleased that this bill supports our service members and families by improving health care and increasing military pay and benefits. We expand eligibility for TRICARE to all members of the Selected Reserve and their families without regard to active duty service, and we prohibit increases in TRICARE fees until we can complete a study of TRICARE costs. We also have taken steps to address predatory payday lending practices that target our service members and their families, and we require DoD to implement full replacement value for household goods lost or damaged in military moves. These measures will significantly improve the quality of life we have in America.”

“The conference report also strengthens Congressional oversight over current operations in Iraq and Afghanistan by requiring future budgets to include the costs of ongoing military operations there and by strengthening the oversight authorities of the Special Inspector General for Iraq Reconstruction,” Senator Levin added.

Senator Levin concluded, “I want to congratulate Senator Warner on leading us for one last time through the Defense Authorization conference and producing his usual excellent results. I have had the pleasure to work with him for almost 28 years and I commend him for being guided by the principle of doing what is right for our nation and its military members. It is most fitting that this bill is being named after Senator Warner.”

**FUNDING LEVELS**

The conferees authorized funding of $462.8 billion in budget authority for defense programs in fiscal year 2007, an increase of $21.2 billion – or 3.6% in real terms – above the amount authorized by the Congress for fiscal year 2006. The conferees authorized $84.2 billion in procurement funding, a $1.3 billion increase above the President’s budget request; $73.6 billion in funding for research, development, test and evaluation, a $452.0 million increase over the request; $155.3 billion for operation and maintenance and other programs; and $110.1 billion for military personnel.

The conferees also authorized $70.0 billion in emergency supplemental funding for fiscal year 2007 for activities in support of operations in Iraq, Afghanistan, and the global war on terrorism. The emergency supplemental funding includes $23.8 billion to help reset Army and Marine Corps equipment, $2.1 billion for the
Joint Improvised Explosive Device Defeat Fund, $1.7 billion to help train and equip Iraq Security forces, and $1.5 billion to help train and equip Afghanistan Security forces.

CONFERENCE REPORT HIGHLIGHTS
The conferees emphasized a number of defense priorities in this year’s bill. Specifically, the conferees included provisions:

- To provide the Department of Defense with resources and authorities needed to win the global war on terrorism, including:
  - Authorizing a $70.0 billion supplemental to cover the cost of ongoing military operations in Iraq, Afghanistan, the global war on terrorism, and Army and Marine Corps reset of equipment in fiscal year 2007.
  - Adding more than $135.0 million over the President’s budget request for combating terrorism.
  - Adding nearly $2.5 billion over the President’s budget request for force protection research and equipment for service members.

- To address the Quadrennial Defense Review (QDR) priorities of strengthening interagency operations and providing greater flexibility in the U.S. government’s ability to partner directly with nations in fighting terrorism, including:
  - Authorizing expanded funding and authority for the Department to train and equip foreign military forces.
  - Authorizing expanded authority for geographic combatant commanders to provide urgent humanitarian relief and reconstruction assistance to foreign nations in their areas of responsibility.
  - Authorizing expanded Department authority to provide logistics support, supplies and services to allies and coalition partners.
  - Authorizing expanded Department authority to lease or lend equipment for personnel protection and survivability to allies and coalition partners participating in combined military operations with U.S. forces.
  - Authorizing a provision that would eliminate the limitations in the American Servicemembers’ Protection Act of 2002 on the provision of International Military Education and Training to foreign nations.
  - Authorizing the QDR-related request for an eleven percent increase for the fiscal year 2007 Special Operations Command budget.
  - Requiring the President to submit a report on building interagency capacity to address 21st century national security missions, including the development of procedures for Federal agencies to plan and conduct stability, security, transition, and reconstruction operations.
  - Authorizing the creation of one additional Assistant Secretary of Defense, bringing the total number to nine, to facilitate a reorganization of the Office of the Undersecretary of Defense for Policy. The conferees also directed the Secretary of Defense to submit a detailed description and explanation of the proposed reorganization, including a response to a list of concerns enumerated by the conferees.

- To enhance the Department’s homeland defense capabilities, notably:
  - Authorizing the Secretary of Defense to expand the types of emergencies for which the Weapons of Mass Destruction-Civil Support Teams (WMD-CSTs) could be deployed to include the intentional or unintentional release of nuclear, biological, radiological, toxic or poisonous chemical materials; or natural or manmade disasters.
  - Requiring the Secretary of Defense, in consultation with the Secretary of Homeland Security, to develop plans to support civilian authorities, and to maintain a database of emergency response capabilities resident in each State’s National Guard that could be deployed in response to a natural or manmade disaster.
  - Authorizing the Secretary of Defense to preposition prepackaged food, water, communications equipment, and medical supplies to improve the ability of the Department of Defense to respond to requests from civil authorities.
  - Revising and updating the Insurrection Act, to clarify the President’s authority to use the armed forces in cases where, as the result of natural disaster, terrorism, or other event, public order has broken down and is beyond the capacity of the constituted authorities to restore.
To enhance Congressional oversight of ongoing operations in Iraq and Afghanistan, and the global war on terrorism including:
- Requiring the President to submit, for each fiscal year after 2007, a request for funds for ongoing military operations in Afghanistan and Iraq as part of the annual budget submission to Congress.
- Extending the operation and oversight of the Special Inspector General for Iraq Reconstruction, and requiring submission of a detailed transition plan to ensure robust contract oversight by the Inspectors General of the Department of Defense, the Department of State, and the U.S. Agency for International Development.

To improve the quality of life for those who serve and their families, including:
- Providing a 2.2 percent pay raise for all military personnel plus targeted pay raises for senior enlisted personnel and warrant officers.
- Authorizing expansion of eligibility for TRICARE to all members of the Selected Reserve.
- Approving significant increases in recruiting and retention incentives for military medical personnel.
- Limiting to a maximum of 36 percent the interest rate charged on payday loans to servicemembers and their dependents, and prohibiting predatory practices by creditors who loan to military personnel.

To ensure the Department provides needed equipment and has authorities necessary to protect our deployed forces, including:
- Authorizing $2.1 billion for the Joint Improvised Explosive Device Defeat Fund to facilitate the rapid development of new technology and tactics and the rapid deployment of equipment to counter the IED threat, including $209.7 million for persistent surveillance platforms and IED electronic countermeasures.
- Authorizing an additional $66.2 million for the Counter Rocket, Artillery, and Mortar platforms.
- Authorizing an additional $2.5 billion for force protection equipment including $1.7 billion for up-armored high mobility multi-purpose wheeled vehicles (HMMWVs), and $700.0 million for interceptor body armor.
- Directing the Department to ensure that all vehicle movements in Iraq and Afghanistan are protected by counter-IED jammers.

To continue necessary modernization and transformation efforts, including:
- Authorizing $3.4 billion for the Future Combat Systems (FCS) program including $322.9 million for the Non-line of Sight Launch System and $112.3 million for the Non-line of Sight Cannon, and requiring the Department to submit an independent cost estimate of the core FCS program, FCS spinouts and FCS complementary systems.
- Adding $71.0 million for UH-60 Black Hawk helicopters and $333.1 million for CH-47 Chinook helicopters to replace Operation Iraqi Freedom battle losses.
- Strengthening the shipbuilding program and the industrial base by: authorizing $11.1 billion for the construction of 7 ships, including 2 lead ships of the DD(X) destroyer class, the lead ship of the LHA-Replacement amphibious assault ship class, and follow ships of the Virginia class, T-AKE auxiliary class, and the Littoral Combat Ship class; authorizing advance procurement for the lead ship of the CVN-21 class of aircraft carriers and continued construction of the San Antonio amphibious ship class; and authorizing an additional $54.6 million for Virginia class submarine design to improve affordability and support efforts to accelerate increased submarine build rates.

Authorizing $4.4 billion for strategic air lift capability for a total procurement of 22 C-17 aircraft, and establishing a minimum strategic airlift aircraft inventory of 299 C-5 and C-17 aircraft.

Authorizing $3.3 billion for Navy/Marine Corps airlift assets, for total procurement of 43 MH-60R/S helicopters, 14 MV-22 Ospreys, and 18 UH-1Y/AH-1Z helicopters; and authorizing multiyear procurements for MH-60 helicopters and MV-22 Ospreys to achieve program savings and efficiencies.

To increase Congressional oversight of U.S. policy on North Korea, the conferees included a provision requiring the President to appoint a senior coordinator of U.S. policy on North Korea, and to submit to Congress a semi-annual report on the nuclear and missile programs of North Korea.
The Pentagon and Postwar Contractor Support: Rethinking the Future

James Jay Carafano, Ph.D.

Postwar duties are not optional operations. They are part of the military’s mission to fight and win wars. Operations in Iraq are no exception. There are important lessons to be learned from the occupation of Iraq. One of the most vital is understanding the private sector’s potential to address critical security needs. Learning this lesson will require bold rethinking by the Department of Defense.

What Is to Be Done? Nation building is a task for which military forces are neither well-suited nor appropriate. In addition, prolonged occupation ties up valuable military manpower that might be needed elsewhere. Yet, in any post-conflict operation, the United States will have moral and legal obligations to restore order, provide a safe and secure environment for the population, ensure that people are being fed, and prevent the spread of infectious diseases. During World War II, this was appropriately called “the disease and unrest formula.”

Implementing the formula is never easy. Predicting the requirements for implementing “the disease and unrest formula” is the often the greatest challenge. Iraq has proven a case in point, which is why private sector efforts are so important. They can supply the means to rapidly expand the military’s capacity, provide unanticipated services, and assist in reconstruction. Most important, contract support can free up military forces to focus on their core missions and speed the transition to normalcy.

Among the many tasks that the private sector can perform, security assistance is the most essential. Establishing security is a precondition for implementing the disease and unrest formula. In particular, establishing effective domestic security forces must be the highest priority. Private sector firms have a demonstrated capacity to provide essential services including logistical support, training, equipping, and mentoring, as well as to augment indigenous police and military units. In particular, private sector assets can assist in providing an important bridging capability during the period when American military forces withdraw and domestic forces take over.

Marrying the private sector’s capacity to innovate and respond rapidly to changing demands with the government’s need to be responsible and accountable for the conduct of operations is not an easy task. Improving on the occupation of Iraq
will require the Pentagon to think differently about how best to integrate the private sector into public wars. However, the Pentagon cannot do this thinking in isolation. Post-conflict operations are an interagency activity that requires the support of many branches of the federal government. Congress has a significant role to play as well. Operations need to be conducted in a manner that informs the appropriations process and strengthens congressional ability to provide oversight of Defense Department activities.

Changing the status quo will mean learning the war's lessons. The United States needs to prepare more effectively for the post-conflict period. Someone must have clear responsibility for the doctrine, detailed coordination, force requirements, and technologies needed to conduct these operations. Today, in the halls of the Pentagon and the staff rooms of the combatant commands, roles and missions are dispersed too diffusely and only intermittently gain the attention of senior leaders. One of the services needs to be tasked with developing a core competency in post-conflict operations. (The Army is probably the best candidate.) In addition, a standing joint and interagency structure needs to be created for properly managing these missions. Part of this new competency must be the judicious use of contractor support. Specifically, the military needs to learn and apply three lessons:

Lesson #1: Rewrite Doctrine. The American military has an innate prejudice against contracting security operations, which it comes by honestly. The modern state was built on transforming military activities from a private enterprise to a public responsibility. Civil supremacy and control of the military is the hallmark of 20th century Western democracy. Yet the 21st century is a different place. The private sector of the 21st century has the means to compete with the military. The Pentagon needs to become more comfortable with the idea that companies can provide security services without threatening democratic institutions. The doctrine of the armed forces needs to acknowledge the importance of getting post-conflict activities right, including integrating the role of the private sector. This is a prerequisite for getting the military to make companies part of the plan rather than an afterthought.

Lesson #2: Gain the Confidence of Congress. The Pentagon will be unable to exploit the capacity of the private sector if doubts persist about the efficacy and legitimacy of contractor support. In any private sector activity, people understand the marketplace and make smart decisions when there is transparency. Security services are no different. Companies providing contractor support must help build trust and confidence in their services. They must establish best practices and professional standards—measures by which their actions should be judged.

Lesson #3: Restructure the Military. Contracting in Iraq was on a scale and complexity never imagined by Pentagon planners. Simply having the capacity to manage the contracts being let could have solved many of the most perplexing challenges. The military needs to build into its force structure the means to rapidly expand its ability to oversee private sector support. This might be done through building additional force structure in the National Guard or a reserve civilian contracting corps.

Conclusion. Learning these lessons will not be easy. They require thinking very differently about how to fight wars and win the peace. However, they are lessons that the Pentagon must learn if it truly wishes to leverage the advantages of the private sector.

—James Jay Carafano, Ph.D., is Senior Research Fellow for National Security and Homeland Security in the Kathryn and Shelby Cullom Davis Institute for International Studies at The Heritage Foundation.
BEYOND ACCOUNTABILITY: THE CONSTITUTIONAL, DEMOCRATIC, AND STRATEGIC PROBLEMS WITH PRIVATIZING WAR

JON D. MICHAELS

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I. INTRODUCTION

In late 2002, while grabbing headlines for boldly promising to slash the federal civilian workforce in half, the Bush Administration was at the same time discreetly hiring private contractors to relieve Special Forces troops of their duty to protect President Hamid Karzai in Afghanistan. In the more celebrated declaration regarding workforce reductions—perhaps the culmination of a decade-long, bipartisan initiative to reinvent and streamline government—the president attempted to allay concerns by
stressing that the proposed job cuts would not intrude on any functions that are “inherently governmental;” these cuts would instead be focused more narrowly on reaping economic benefits by privatizing commercial responsibilities such as catering, gardening, and clerical work. Unfortunately, in replacing Special Forces troops with private military contractors, the Administration offered no comparable words of comfort.

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

Who would have thought that when the modern wave of government privatization began decades ago with cities experimenting with the contracting out of their sanitation responsibilities,5 it would swell to encompass the privatization of prisons and welfare services,6 let alone privatization of foreign policy and national defense? Even staunch libertarians, proponents of the Nozickean night-watchman’s state, have long-conned that when stripped to its core, a nation still must maintain its public commitments to national defense.7 Indeed, just a few years ago, leading privatization scholars dismissed as implausible the idea that we privatize national security functions.

These individuals, like many others,8 would thus not have expected Washington—over the past decade under Democrats and Republicans alike—to employ private agents to do its military bidding in the Latin American drug wars, the Balkans, the Middle East, Rwanda, Afghanistan, and now, in Iraq. In short, since the first Persian Gulf War, private soldiers working for “military firms” under contract with the U.S. government have seen active duty in most conflicts involving the United States (and also some in which the United States has had no official military involvement). In another era, we would call these agents “mercenaries” and label their sponsor governments immoral and illegitimate; could it be that, today, these actors are just another set of government contractors, and the United States is just outsourcing one more governmental function?

Observers who react with dismay over the outsourcing of military functions might see it as the modern, or perhaps post-modern, embodiment of President Eisenhower’s famous warning in 1961, when the former Supreme Allied Commander portended the rise of the military-industrial complex.9 But while Eisenhower’s prescient words continue to resonate today—9—as we witness the awarding of hundreds of contracts to private firms, often to those quite friendly with high-ranking government officials, to rebuild the infrastructure and restore the institutions of Iraq and Afghanistan as well as scores of additional contracts for defense hardware10—even he could not have foreseen the government’s current policy of delegating highly sensitive responsibilities to private soldiers in near zones of conflict.11

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4. They track terror to its roots . . . I ask all of you, do you want to contract out the Capitol Police? Do you want to contract out the U.S. Marines? Do you want to contract out the F.B.I.

5. See supra note 6, at 885 (noting that “even in the most minimal accounts, the liberal state encodes rights into laws and uses threats and acts of physical coercion to enforce them . . . The state has, must have, or should have a monopoly of force”).


7. It is a tragedy that this statement was made by a Democrat; however, the trend was accelerated by a Republican administration.

8. See SAVAS, supra note 3, at 71, 303 (detailing the fact that in times past some conflicts were fought using mercenaries and indicating that the area of national security is “the last refuge of privatization forces”); Freeman, supra note 3, at 1300 describing foreign policy and national defense as fields “where privatization seems unfeasible”); Oliver Hart et al., The Proper Scope of Government: Theory and an Application to Prisons, 112 Q.J. ECON. 1127, 1156-58 (1997) (noting that contracting out foreign policy responsibilities is too dangerous for private providers could refuse to carry out their responsibilities in an effort to seek better contractual terms). Michael J. Trubnikoff & Elizabeth Kettl, Privatization and Accountability, 116 HARV. L. REV. 1422, 1443 (2003) (“An extreme example of a government activity too difficult and sensitive to outsource is the formulation and implementation of a country’s foreign policy, because complex objectives and unforeseeable contingencies render delegations of these functions to private actors highly problematic.”); see also Jedd Breaklin & James Gains, Contractors in Private Law Enforcement, 75 N.Y.U. TIMES, May 7, 2004, at A15 (“Thomas E. White, who was secretary of the Army until April 2003 and a leading advocate of privatization in the military said in an interview Thursday that he was surprised when he learned this week that employees of private companies were not involved in intelligence work, which suggests how abruptly the trend took off.”) (emphasis added); Norman Macrae, A Farce in Intelligence, 66 GEO. L.J. 2019, 2045 (2002) (suggesting that military protection is a core public good, not suitable for privatization).

9. See supra note 3, at 153 (“the trend was accelerated by a Republican administration.”)

10. See supra note 4, at 885.

11. See infra note 28 and accompanying text.

12. See supra note 27 and accompanying text.


14. They track terror to its roots . . . I ask all of you, do you want to contract out the Capitol Police? Do you want to contract out the U.S. Marines? Do you want to contract out the F.B.I.

15. It is a tragedy that this statement was made by a Democrat; however, the trend was accelerated by a Republican administration.

Indeed the delegation of combat responsibilities presents a qualitatively different and more dangerous privatization agenda than that which troubled Eisenhower. His concerns would be reflected today in the recent allegations of “sweetheart” deals between the federal government and the likes of, say, Halliburton for energy services in Iraq14 or Boeing for Tanker aircraft.15 But the harms that flow from those types of contracts, however troubling and possibly even scandalous, fit comfortably within the conventional privatization framework of outsourcing functions that are not inherently governmental, but rather are commercial in nature.16 They are problems of accountability, and result mainly from poor oversight, improper contract management, and insufficient fidelity to (or simply inadequate) conflict-of-interest laws.17 And although these contracts and the harms that may accompany them are worrisome from an array of policy perspectives, conceptually speaking they are unremarkable: Driven by the same market-efficiency impulses that motivate the outsourcing of sanitation, catering, and even prison management responsibilities, the contracts to rebuild roads and schools in failed states and to manufacture new weapons do not compel us to rethink our basic understandings of American privatization.18

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

In those instances, it would not necessarily be the cheaper price tag or specialized expertise that makes private contractors desirable. Rather, it might be the status of the actors (as private, non-governmental agents) vis-à-vis public opinion, congressional scrutiny, and international law that entices policymakers to turn to contracting. Indeed, “military privatization,” as it was characterized, is motivated by the same market-efficiency impulses that motivate the outsourcing of sanitation, catering, and even prison management responsibilities. In those instances, it would not necessarily be the cheaper price tag or specialized expertise that makes private contractors desirable. Rather, it might be the status of the actors (as private, non-governmental agents) vis-à-vis public opinion, congressional scrutiny, and international law that entices policymakers to turn to contracting. Indeed, “military privatization,” as it was characterized, is motivated by the same market-efficiency impulses that motivate the outsourcing of sanitation, catering, and even prison management responsibilities. But the harms that flow from those types of contracts, however troubling and possibly even scandalous, fit comfortably within the conventional privatization framework of outsourcing functions that are not inherently governmental, but rather are commercial in nature.

It is, therefore, the present aim of this Article to identify in the words of the actors (as private, non-governmental agents) vis-à-vis public opinion, congressional scrutiny, and international law that entices policymakers to turn to contracting. Indeed, “military privatization,” as it was characterized, is motivated by the same market-efficiency impulses that motivate the outsourcing of sanitation, catering, and even prison management responsibilities. But the harms that flow from those types of contracts, however troubling and possibly even scandalous, fit comfortably within the conventional privatization framework of outsourcing functions that are not inherently governmental, but rather are commercial in nature.

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

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

In Part III, I commence with the inquiry’s critical analysis: understanding these structural harms. In this Part, I describe how the Executive can use military contractors to direct national security policy with greater impunity and less oversight than it could if it only had U.S. troops at its disposal. To the extent that Congress’s warmaking authority is tied primarily to its regulatory and war-authorizing powers over the American military qua U.S. Armed Forces, a president interested in exercising more unilateral control might hire private contractors in lieu of U.S. soldiers and hence avoid having to collaborate with the legislative branch. In circumventing congressional authority, the Executive violates the two principal constitutional imperatives: limited government—by bypassing Congress and preventing it from checking the ambitions of the president—and democratic government—by acting covertly (i.e., without congressional or, by extension, the People’s input) and thus failing to make inclusive policy decisions legitimated by popular consent. While a structural assessment of the virtues and vices of using private soldiers. Note that whereas the harms explored in Part III chiefly occur when Congress’s role is subordinated, the problems analyzed in Parts IV and V do not necessarily depend on circumventing congressional participation in decisionmaking.

Then, in Part IV, I characterize how the introduction of private troops, either integrated into a larger contingent of U.S. military personnel or instructed to operate independently, creates considerable institutional harms, strategic liabilities, and morale problems. First, because privatizers are not bound by the dictates of the Uniform Code of Military Justice, and their relative impunity from courts-martial could destabilize the delicately balanced constitutional arrangements associated with civil-military relations and democratic warmaking. And, second, I examine how the presence of contractors (to the extent they are publicly perceived as profit-seekers rather than as patriots) on the same hostile terrain as regular soldiers may ultimately threaten the privileged and honored status the military has historically enjoyed among the American public.

In Part V, the penultimate part, I discuss the international/diplomatic harms privatization engenders. I describe how military privatization can exacerbate foreign critics’ worst fears and suspicions about the United States: No longer will the United States retain the moral high ground by risking its own young men and women of a volunteer army in the name of freedom. Instead, a critic assumes, outsourcing gives Washington freer rein by allowing the government to indemnify itself against casualties and other “stinky” political situations and therefore permits it broader license to pursue strategic objectives. Moreover, privatization, to the extent that it allows the United States to bypass international agreements and Security Council authorization, undermines the legitimacy and vitality of collective security. Although these harms are felt primarily by the outside, non-American world, they nevertheless have adverse consequences for American foreign policy, for American integrity, and for the interests of containing and regulating the proliferation of even more odious strains of military profiteering that exist in other parts of the world. Therefore, I argue, these international implications should weigh heavily on any important arguments and prescribes a set of structural reforms that merit consideration.

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

II. THE MODERN AMERICAN EXPERIENCE WITH MILITARY PRIVATIZATION

By way of introduction, this Part offers some background on defense-related contracting over the last few decades, during which time it has expanded from an exclusively commercial arrangement to one that now
includes the delegation of sensitive combat responsibilities. Throughout much of the Cold War era, defense “ privatization” mainly involved the federal government purchasing weapons and hardware from the private sector and contracting out some clerical, custodial, and other support functions. The specter of that military-industrial complex imbued with the fear that defense industrialists (or, perhaps, war profiteers) were influencing foreign policymaking. Yet, alone, those concerns could not have prepared us for the range of problems that now arise as modern mercenaries emerge on the contemporary American national security landscape. Indeed, over the last ten years, the federal government has entrusted such private agents to throw the trade in Latin America, interrogate enemy combatants and safeguard American installations in Iraq, provide personal security for President Karzai in Afghanistan, train and advise military forces in the Balkans, and protect American diplomats in the Middle East. Since exchanging gunfire with Iraqi insurgents, Serbian irredentists, and Colombian drug lords is a far cry from staffing the mess halls or even building Army helicopters, it is helpful to commence this study with a brief look at the advent of combat-related military privatization. Accordingly, Section A describes some of the more conventional patterns and practices associated with commercial military privatization. Section B then introduces some of the new concepts in combat-related privatization emerging in the United States and explores the key conceptual differences between military and more conventional forms of privatization.

23. This is not to say that military privatization is in any way a distinctively modern phenomenon. Its long and varied history is, however, well beyond the scope of this inquiry. In this Article, I am exploring a particularly modern and particularly American strain of military privatization, which is distinguishable from the longer history not just because of its recent vintage, but also because it arises today from the ashes of a wholly delegitimized landscape. In centuries past, there was not the same taboo as exists now regarding mercenaries. But their re-emergence, today, in light of the relatively recent repudiation, marks a new chapter. See, e.g., R. BENNETT I. DOWNEY & TREVOR N. DOWNEY, THE ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT 6 (2d ed. 1986); G.T. GRIFFITH, THE MILITARY PRIVATIZATION OF THE HELLENISTIC WORLD (1953); CHARLES W. INGRAIO, THE HESIAN MERCENARY STATE: IDEAS, INSTITUTIONS, AND REFORM UNDER FREDERICK II (1706–1735) (1951). ANTHONY MCKELLER, THE NEW MERCENARIES 5, 6, 45, 58 (1985); LYNN MONTROSE, WARS THROUGH THE AGES (1960); H.W. PARKE, GREEK MERCENARY SOLDIERS FROM THE EARLIEST TIMES TO THE BATTLE OF IPOMUS (1933); MAJ TOUL S. MILLIARD, OVERCOMING POST-COLONIAL MINDS: A CALL TO RECOGNIZE AND REGULATE PRIVATE MILITARY COMPANIES, 176 MIL. L. REV. 1 (2003); ROCKY, supra note 6, at 913.


29. See, e.g., P.W. Singer, supra note 15; Singer, supra note 20; Edmund L. Andrews & Elizabeth Becker, Bush Guts $500 Million from Companies That Got Contracts, Study Finds, N.Y. TIMES, Oct. 31, 2003, at A8; Baum, supra note 14; (“Of the 30 members of the Defense Policy Board—the influential Pentagon advisory panel from which Richard Perle was recently forced to resign—at least nine are directors or officers of companies that won $76 billion in defense contracts in 2001 and 2002.”); Bryan Bender, Study Finds Cronyism in Iraq, Afghanistan Contracts, BOSTON GLOBE, Oct. 31, 2003, at A1; Bob Herbert, Editorial, Spots of War, N.Y. TIMES, Apr. 10, 2003, at A27 describing former Secretary of State Shultz's role as both a director of Bechtel and as chairman of the advisory board of the Committee for the Liberation of Iraq, a fiercely pro-war group with close ties to the White House; that in committed ... work beyond the liberation of Iraq to the reconstruction of its economy. See, e.g., P.W. Singer, Editorial, Spots of War, N.Y. TIMES, Feb. 2, 2003, at A22; Tim Weiner, A War Against Builders, N.Y. TIMES, Mar. 16, 2002, at A8; James Dao, Bush Sees Big Rise in Military Budget for Next 5 Years, N.Y. TIMES, Feb. 2, 2002, at A1; James Dao, Wartime Bills Rise to $70 Billion, N.Y. TIMES, Feb. 13, 2002, at A22; Ellen McCarthy, Post-9/11 Money Bought Problems: Government Service Firms Offer Firms $10 Billion More Contracts in Return for Access, WASH. POST, Aug. 16, 2004, at A1; see also the Pentagon, N.Y. TIMES, Feb. 10, 2003, at A22; Leslie Wayne, Rundefender Warns He Will Ask Congress for More Billions, N.Y. TIMES, Feb. 6, 2003, at A22; Tim Weiner, A War Against Builders, N.Y. TIMES, Mar. 16, 1999, at A1; see also Anthony Bianco & Stephanie Anderson Forest, Outsourcing War, biz. wk., Sept. 15, 2003, at 68 describing the Pentagon's heavy reliance on private military companies). Day, supra note 13 describing KBR's growing responsibilities as a result of the Defense Department's desire to reduce costs and downsize its payroll; James Szwarcovski, whom I am grateful for discussing the issue of the U.S. military in "more like a complex partnership between the armed forces and a select group of private companies; one half expects to see the C.E.O.s of Halliburton and Bechtel on the Joint Chiefs of Staff." See generally P.W. Singer, Corporate Warriors: The Rise of the Privatized Military Industry and its Ramifications for...
likewise ever promoted by those who will most benefit from new lucrative opportunities to sell weaponry in untapped markets.31 And finally, to query whether any of the impetus behind so-called “nation building” in failed states is led by those very contractors who will, ultimately, bid for the rights also to rebuild the nation?32

But this story and the questions it provokes, however politically exciting and scandalous, actually belong in yesterday’s news cycle—at least when it comes to privatization. Academically speaking, these commercial defense contracts, which range from building satellites to emptying latrines, introduce few, if any, novel problems from the standpoint of understanding and theorizing privatization as a legal or normative phenomenon.33 Instead, these arrangements, precisely because they are commercial in nature and do not involve the delegation of sensitive (let alone lethal) policy discretion,34 are conceptually indistinguishable from other, “garden-variety” contracting-out initiatives currently coursing through the veins of American government.35 Thus, notwithstanding the fact that the privatized tasks may bring contractors to international hotspots, authorize them to work on top secret projects, and (as an essential, or sole-source, supplier) even give them leverage over the U.S. government,36 the tasks themselves still comport well with the current President Bush’s promise to outsource only those services that are not “inherently governmental.”37 Indeed, any harms that may flow from this sort of privatization result principally from poor contract management, inadequate oversight, and insufficient fidelity to conflict-of-interest laws;38 they speak mainly to issues of corruption and mismanagement rather than to improper delegations of government responsibilities.39 After all, food, custodial, maintenance, and even construction projects characterize what is ancillary to America’s national security apparatus—or, for that matter, to America’s public policymaking prerogatives more generally.

B. Transferring to Combat-Related Privatization

But, of late, a radical new development in military privatization has quietly and slowly begun to take hold—adding new complexity to the military-industrial dyad. Conflated for decades strictly to commercial functions, defense-oriented privatization over the past ten years has expanded in directions that would seemingly belie any stock assurances of the military-industrial complex’s continued desirable nature and do not involve the delegation of

34. See id. (noting that “contracting out of support goods and services does not raise serious accountability issues”); Guttmann, supra note 3, at 896 (indicating that “[w]hen [contractors] are relied upon solely for commercial products or services (e.g. janitorial service, office supplies, utilities, weaponry) there is less to go through government than simply direct rules of site.”); Kosky, supra note 6, at 106 (emphasizing that “only defense contractors were [not] private military institutions . . . They did not fight wars; they produced military equipment and supplies”). See also Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 2(a), 112 Stat. 2382 (requiring executive agencies to submit lists of non-inherently governmental jobs to the Office of Management and Budget to have them earmarked for potential outsourcing); Circular No. A-76, supra note 1 (John J. Dilulio, Jr., Response Government by Proxy: A Faithful Overview, 116 HARV. L. REV. 271 (2003); Freeman, supra note 15; Mierow, supra note 15).

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

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

37. See, e.g., Guttmann, supra note 3, at 389–91; Stevenson, Government, supra note 1, at 48 C.F.R. § 7.301 (1991) (“it is the policy of the Government to . . . rely generally on private commercial sources for supplies and services except where required by public interest, national security, or some other overriding governmental interest.”); for similar reasons the public interest doctrine in the field of national security is often found to be indistinguishable from this


39. See Beermann, supra note 33, at 1522; Guttmann, supra note 3, at 921–22; Gillian E. Metzer, Privatizing the Defense Industry, 86 COLUM. L. REV. 1367, 1382 (2006); Improper, of course, may not mean illegal or unconstitutional. The non-delegation doctrine has not been robustly interpreted, and moreover, it applies chiefly to congressional delegations, rather than executive ones. See, e.g., Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (noting that the non-delegation doctrine ensures that important decisions are made by “the branch of our government that is accountable to the political processes of the joysticks of power, the Congress,” and not by “an appointed official but by the body immediately responsible to the people”); Field v. Clark, 143 U.S. 449, 492 (1892) ("[T]hat Congress cannot delegate legislative power to the President is a principle universally recognized as valid to the integrity and maintenance of the system of government ordained by the Constitution."); see also Developments in the Law, supra note 6, at 187. 111. "The line between national security and privatization is not always an easy one . . . ."
that "inherently governmental" responsibilities would remain untouched and unaffected by the current privatization revolution.40

1. “[T]hey are not just running the soup kitchens.”

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

In a word, then, we are witnessing the emergence of contemporary “mercenaries” carrying out the assignments that were previously and exclusively reserved for uniformed American soldiers entrusted with combat-related responsibilities and disciplined through the military chain-of-command. For what it is worth, today’s military contractor operating in the United States has come to resemble the baggage of and disavowing kinship to his predecessors, largely known as pirates and scoundrels who would offer their murderous service to the highest bidder.44 But, however civilized, skilled, and professional he may be, he is still not an American soldier, sworn to uphold the Constitution and governed by the Uniform Code of Military Justice; instead, he is a private agent, principally motivated by profit.45

2. The Advent of Combat-Related Privatization

Combat-related military privatization arose in the 1990s at a time when considerable cutbacks in the size of the U.S. Armed Forces were underway,46 when technological and geostategic changes transformed national security practices,47 and when traditional types of covert operations, utilized in Southeast Asia in the 1970s and Latin America in the 1980s, had fallen into serious disfavor.48

Suhigg, Carrying a Big Cavs: Linking Multilateral Disarmament and Development Assistance, 91 COLUM. L. REV. 993, 1038 (1991); McGurty Bumby, From Gold War Toward Treating Peace, FOREIGN AFF., Jan. 1990, at 197; Alan Tauchman, Superpower Without a Sword, FOREIGN AFF., Feb. 1993, at 66; see also Methe, supra note 13 (describing the heavy downsizing that began in 1991 as a “push to privatize anything and everything” (quoting P.W. Singer)).

Between the first Gulf War and the months leading up to Operation Iraqi Freedom in 2003, U.S. Army personnel numbers were nearly cut in half, from 700,000 to 480,000 during the same period, the overall active military shrunk by $50 billion. See Wayne, supra note 2, see also Tepperman, supra note 13 (noting that this shrinkage has not only “caused manpower shortages within the services [but also] a glut of retired officers flooding the private sector”).

47. During the 1980s, the Pentagon began shifting away from a “forward deployed” Army with sizable military forces positioned overseas as a “smaller, ‘projection’ Army with most of its personnel stationed in the United States. This change in force size and force location created a number of sensitive military jobs that—because they are far removed from the frontlines—have the apparent trappings of commercial service provision, but actually involve the exercise of inherently governmental, lethal responsibilities. See DANA GRIFFIN, THE MISSION (2003); Gibson, supra note 44 (suggesting that in modern warfare, the frontlines is becoming an increasingly irrelevant term since much of it has been privatized”). Karlsson, supra note 20, at 17; Simply put, no longer are the frontline soldiers with guns and grenades the only real combatants in a military campaign. See Matthew Buzerkinsi, The Unnamed Army, N.Y. TIMES, Apr. 20, 2003, at A3 (quoting a high-ranking Air Force official as saying that “[i]t’s possible, that in our lifetime we will be able to run a conflict without ever leaving the United States’’; Wayne, supra note 2 (noting the sensitive work private agents perform and how critical such work is to successful combat operations); see also Michael N. Schmitt, Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict, 94 MIAMI L. REV. 107 (2000) (suggesting that in modern warfare, the frontlines is becoming an increasingly irrelevant term since actions traditionally understood as “assault” may be the ones launching the missiles).

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

...
Today’s contractors, for their part, have taken considerable steps to upgrade the image of what has historically been an unsavory profession, thus helping to make the outsourcing of combat responsibilities more palatable. Indeed, contemporary American outfits are not dyed-in-the-wool bands of ruthless warriors, but rather they are incorporated businesses often headed by retired generals and colonels who have traded in their fatigues for pinstripes and left the barracks for the Beltway. Their employees, in turn, are not a rag-tag lot pulled from the ranks of society’s denizens like the French Foreign Legion of yesteryear,63 but are likewise often recruited from among the most decorated echelons of the American military establishment.

For example, one notable contractor, MPRI, a major participant in the Balkans during the war-ridden 1990s as well as in the Latin American drug wars, boasts of having “more generals per square foot than the Pentagon.”64 Indeed, MPRI’s veritable “dream team” includes General Carl Vuono, former Army chief of staff during the invasion of Panama and the first Gulf War, Lt. General Harry Soyster, a onetime director of the Pentagon and later the first Gulf War, Lt. General Harry Soyster, a onetime director of the Pentagon and then Chief of Staff of the Army, and Lt. General Charles “Chick” Varrone, former Army chief of staff during the invasion of Panama and the first Gulf War. Also on MPRI’s roster are former Joint Chiefs of Staff members, former CIA directors, former National Security Advisers, former members of the United States Congress, former senior officials of the Department of State, former ambassadors, former generals, admirals, and colonels. There are also former U.S. military personnel who have served in Bosnia, Kosovo, and the former Yugoslavia. They have been joined by former foreign service officers, former diplomats, former embassy personnel, and former senior officials of the U.S. Agency for International Development.

In addition to their all-star rosters, these firms have gained credibility and legitimacy because of their corporate ties. Many of the major contracting firms have close connections not only to the Pentagon but also to Wall Street, and are actually divisions or subsidiaries of such prominent businesses as Northrop-Grumman, Booz Allen Hamilton, the Carlyle Group, and Bechtel. Hence, corporate oversight and shareholder pressure may provide external sources of discipline and conformity.52

3. A Survey of Recent Combat-Related Private Contracts

As mentioned above, in recent years, private military firms have protected the Karzai administration in still-unstable Afghanistan, secured American civil and military installations and served as interrogators in Iraq, bolstered and then counterbalanced the military capabilities of both the Bosnians and Croats in the Balkans, engaged in surveillance, reconnaissance, and coca-crop destroying as well as in counter-insurgency missions in Latin America, staffed security details for American officials in, among other areas, the Middle East, and attempted to bring some stability to war-ravaged Rwanda. The policy of federal contracting with private forces to serve in an array of critical zones of conflict to support American national security and foreign policy interests involves the delegation of not simply commercial responsibilities but also moral responsibilities.65 Accordingly, there is a need for a more rigorous examination of the conduct of private forces in the exercise of responsibility.

The United States’ lukewarm commitment to fighting the War on Drugs at its sources has set the stage for the introduction of military contractors. With stringent limitations imposed by Congress regarding the number of U.S. Armed Forces personnel and the scope of their activities in Colombia,66 and therefore only a relatively modest contingent of U.S. military forces, particularly in the fight against drug trafficking, the use of contractors has become an attractive alternative. The military presence in Colombia has been criticized by human rights groups and by international organizations such as the Inter-American Commission on Human Rights. The use of private contractors in Colombia has been seen as a way to avoid the political and legal consequences associated with the deployment of U.S. military forces. However, the use of contractors raises serious concerns about accountability and transparency, as well as the potential for human rights abuses.

51. See supra note 13.

52. See supra note 13.

53. See supra note 2.


55. See supra note 2.

56. See supra note 2.

57. See supra note 2.

58. See supra note 2.
troops and officials present on the ground, the Clinton administration turned to contractors, awarding them over $1.2 billion in contract work to slow down the production and exportation of narcotics. 6 In this capacity, private agents, notably from DynCorp and MPRI, have helped train local enforcement agents in counter narcotics work; but they have been more than just advisors: these contractors have flown sensitive reconnaissance missions, patrolled the skies to turn back (under the threat of force) smugglers, and piloted crop-dusters to destroy coca fields. 7 Their efforts have not gone unchallenged and, as a result, military contractors have at times been drawn into firefights with narco-traffickers and even leftist rebels, 8 some of whom had no direct connection to the drug trade. 9

In the course of their dangerous work, a number of American contractors have been killed; 10 these casualties have largely escaped public notice, media attention, and congressional scrutiny. 11 Indeed, relatively little is known about the extent of America’s involvement in Colombia, let alone details regarding the delegation of specific activities to private firms. And, although the GAO rated DynCorp’s performance in Latin America as “unsatisfactory” over several years, the State Department repeatedly renewed the firm’s contract. 12

b. The Balkans

In the Balkans during the mid-1990s, the bloody contests between and amid Serbs, Croats, and Bosnian Muslims produced unspeakable carnage and threatened to destabilize the entire region. The Clinton administration, hamstrung by U.N. arms embargos, 13 resisted allies’ 14 warnings 15 and, also, its desire to retain the appearance of an honest, neutral broker in the region 16 was militarily limited in its ability to help quell the violence. Nevertheless, the Administration actively wanted to resolve the conflicts and chose, in part, to augment the relatively military strength and self-sufficiency of the Croats and, later, the Bosnian Muslims to counter Serb aggression. 17

Unable, for the reasons mentioned above, to provide direct assistance through much of the years of fighting (but also unwilling to remain fully on the sidelines), the United States turned to private solutions. First, it sought to bolster the fledgling Croatian state and arranged for the American firm, MPRI, to provide strategic and tactical military training as well as instruction in modern weaponry. 18 In working “under the guise of a private commercial enterprise, MPRI could achieve what would otherwise be impermissible military objectives.” 19 Since directly supplying training and materiel to the Croats would have violated the U.N. arms embargo, and perhaps prompted Russia, in turn, to foster its traditional ally, the Serbs, 20 the United States’s use of MPRI effectively permitted it to remain neutral yet still pursue its unilateral humanitarian and geostrategic interests in the region. 21 Then, later, to enrage the Bosnian Muslims to accept the Dayton Peace Accords, the need arose to strengthen their position, too, vis-à-vis the Serbs. 22 Again, the United States—intent on remaining ostensibly neutral—played matchmaker and, interestingly, recommended MPRI’s services. 23 As a matter of fact, the Bosnians ultimately conditioned their acceptance of the Dayton Peace Accords on the United States ensuring that MPRI was present in the region. 24

6. In this capacity, infra text note 4, at 43 (noting that “since the late 1990s, the United States has paid private military companies an estimated $1.2 billion . . . to eradicate coca crops and to help the Colombian army put down rebels who use the drug trade to finance their insurgency”); see also Krantel, supra note 30; Pepe & Pepet, supra note 2; Tippeman, supra note 13, at 10; Wayne, supra note 2.
7. See, e.g., supra note 4 at 206-08; Gailey, supra note 47, at 127; Juan Forero, 3 Americans on Search Mission Killed in Colombian Plane Crash, N.Y. TIMES, Mar. 27, 2001, at A3 (describing the civilian contractors’ assignment to rescue American citizens held in hostage region of Colombia); Tippeman, supra note 13, at 10-11; Wayne, supra note 2 (noting the dangers associated with the flight assignments of private military employers).
8. See Gailey, supra note 47, at 127 (noting DynCorp’s involvement in wildfires with FARO leftist guerrillas) Rockey, supra note 6, at 911 n.141; see also GAO, AVIATION REPORT, supra note 58 (estimating that between 1998 and 2000 alone, military contractors for the U.S. government in Latin America came under fire nearly seventy times).
9. See Victoria Brummet et al., From Building Camps to Gathering Intelligence, Dozens of Tasks Once in the Hands of Soldiers Are Now Carried Out by Contractors, FIN. TIMES, Aug. 11, 2003, at 13; Catan et al., supra note 20; Forero, supra note 20; Gary Marx, U.S. Civilians Wage Drug War From Colombia’s Shire, OH. REP., Nov. 3, 2002, at A4; see also Wayne, supra note 2 (reporting that on one occasion, contractors shot down a plane over Peru carrying American missionaries, who were mistaken for drug traffickers).
10. Catan et al., supra note 20; Krantel, supra note 20 (noting the deaths of at least eight American contractors).
11. See, e.g., supra note 47, at 127 suggesting that the lack of media attention notwithstanding the contractors’ deaths is a main reason why the project in Colombia is still in existence and quoting a Colombian general as saying “Imagine 30 American troops got killed there. Plan Colombia would be over); Forero, supra note 20 (“my complaint about use of private contractors is that they fly under the radar and avoid any accountability”); (quoting Congresswoman Jan Schakowsky; Tippeman, supra note 13, at 12; Wayne, supra note 2.

66. See, e.g., supra note 56 (describing the indigenous and heterospecific among European allies regarding more forceful interactions); Fowler & Frye, supra note 66, at 334 (noting Europe’s fear that lifting the embargo would create greater instability and threaten to fracture the NATO alliance).
67. See infra note 74 and accompanying text.
69. See WOODWARD, supra note 67, at 255-60 (emphasizing how diplomatically important it was for the United States to appear neutral); John J. Mearsheimer & Stephen Van Evera, When Peace Means War, NEW REPUBLIC, Dec. 18, 1995, at 46 (indicating that the United States could not arm the underdog Bosnian Muslims without sacrificing its status as a neutral peace broker).
70. See infra note 76 and accompanying text.
Fortunately, while the participation of such advisors did not lead to an escalation of America’s involvement in Bosnia, the US president and his cabinet were tangible and ever-present. The military detail that occurred between February 29 and July 14, 1996, while the US forces were stationed in the region as part of the American-led intervention, was a relatively modest engagement. In fact, some reports suggested that at the time of the intervention, the total number of active U.S. Special Forces personnel was between 40,000 and 50,000 strong. The military detail also provided security services in Bosnia. While there, DynCorp personnel were involved in activities that would be considered security services in Bosnia. While there, DynCorp personnel were involved in activities that would be considered security services in Bosnia.

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

As an additional note regarding contractors in Afghanistan, it has also recently come to light that private contractors working as interrogators in American military prisons in Afghanistan have been deemed responsible for brutal beatings (and even deaths) of al-Qaeda and Taliban inmates. There is even evidence of Americans running "private" detention centers, possibly—but not definitively—in some loose affiliation with the CIA, purportedly to acquire information regarding terrorism.103

103. See Print, supra note 4.

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


107. See Print, supra note 4, at A1.

108. See The Baghdad Boom, ECONOMIST, Mar. 27, 2004, at 56; Cooper, supra note 22; Dao, supra note 20.

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

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

e. Rwanda

Another interesting but not widely reported case of military privatization involved the United States supporting the very limited use of private agents in Rwanda. In the midst of that horribly brutal genocide campaign,116 an extremely small (and admittedly insignificant) group of private agents under the employ of the Romeo firm were dispatched to protect some villages, to provide some humanitarian relief, and to offer training to the fledging Rwandan Patriotic Army.117 Contrasting the magnitude of the travesties against the modest deployment of private agents, it is safe to conclude that Romeo did not make much of a dent in stopping intertribal violence.118 It is even safer to say, that the United States, like most other nations, did almost nothing else to stop the genocidal massacre.119 Indeed, General Dallaire, a Canadian commander of U.N. peacekeepers in Rwanda who condemned his own leadership as well as that of the entire Western world, said:

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

Nevertheless, despite its extremely limited scope and even more limited success, the Rwanda-Ronco project provides a powerful if incomplete model of possibilities. Irrespective of any U.N. hesitancy,121 it is doubtful that the American public would have countenanced U.S. servicemen and women being sent to Central Africa to stop intertribal violence—especially on the heels of the recent defeat in Somalia.122 On the other hand, the public might be more comfortable with—or less aware of—dispatching contractors, who specifically agreed to sign up for such a dangerous mission, than with sending over regular U.S. soldiers whose defense of American sovereignty and interests does not (as the public might believe) legitimately extend to humanitarian police actions.123 Dangerous humanitarian work such as what may be warranted today in the Darfur region of Sudan may, accordingly, prove to be a new growth industry of assignments for contractors who consent to enter dangerous situations well outside of the scope of what is conventionally understood as core American national security interests.124

f. Gaza Strip

A recent illustration of military privatization on a very small scale involved the terrorist attacks on U.S. consular attaches in Gaza.125 In October 2003, a caravan of U.S. diplomats was shepherded through a virtually lawless area of Palestinian-controlled Gaza by DynCorp security forces, not State Department Diplomatic Service agents or U.S. Marines, who otherwise often guard embassies and overseas diplomats.126

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

111. See SINGER, supra note 20; Pepperman, supra note 13, at 10–12; Wayne, supra note 2; see also Rosly, supra note 9, at 908 characterizing the private military industry as assisting that its contracts largely confine themselves to defensive and logistical tasks.

112. Thom Shanker & David E. Sanger, The Struggle for Iraq: Constraints, Pentagon Drafts Iraq Troop Plan To Meet Violence, N.Y. TIMES, Apr. 23, 2004, at A1 (noting that estimates in the Spring of 2004 indicated that American forces in Iraq were short by about 20,000 the number of troops requested by General Abzaad, head of the U.S. Central Command).


115. See supra note 57, see also supra note 85.

116. Within a matter of one hundred days, over 800,000 Tutsis were slaughtered. See MICHAEL BARNETT, EVERYTHING IS A GENOCIDE: THE UNITED NATIONS AND RWANDA 1 (2002); SAMANTHA POWELL, “A PROBLEM FROM HILL,” AMERICA AND THE AGE OF GENOCIDE 362, 381–82 (2002).


118. See Millerd, supra note 23, at 18–19 (noting that while it is "unlikely that any modern
killing of three American contractors on the security detail did make the news for a day or so,\textsuperscript{126} but it did not become a serious media or diplomatic story, and little was ultimately made of the attack in terms of creating an impetus for a counter-strike, or even a rethinking of U.S. Middle East policy. Perhaps, for better or worse, if it were American soldiers killed, a different response would have been forthcoming.\textsuperscript{127}

C. Conceptualizing Tactical Privatization

Without having looked at these specific case studies, one might readily assume that economic efficiency, the sine qua non of privatization, explains the evolution and expansion of military outsourcing.\textsuperscript{128} But these examples, which paint a vivid though still incongruous and fragmented picture of military privatization, actually suggest that there might be alternative (or at least additional) reasons why policymakers employ contractors. Examining the six examples above, we begin to realize that not only must we grapple with the implications of the dynamic transformations from outsourcing strictly commercial functions to ones involving the exercise of considerable discretion of the sort normally considered "inherently governmental;" we must also come to terms with the possibility that conventional, economic justifications do not explain the full breadth of normative reasons for soliciting private soldiers.

Traditionally, the lens of privatization scholarship has focused on economic efficiency, how competitive market forces and profit incentives can inject cost-savings and quality-enhancing measures into the provision of government services and functions.\textsuperscript{129} Scholars have also examined ways in which contracting out may generate additional cost-savings benefits. For example, contractors are not subject to the costly and time-consuming notice-and-comment requirements of the Administrative Procedure Act or to the disclosure mandates of the Freedom of Information Act.\textsuperscript{130} Nor are they necessarily deemed "state actors" for purposes of Bivens or 42 U.S.C. § 1983 liability.\textsuperscript{131} Finally, employees of contracting firms are less likely to have union protection, and thus they can be made more responsive to market incentives (and more easily fired) than can civil servants.\textsuperscript{132} Accordingly, the lower costs associated with contracting out are thus a function not only of competition and innovative business planning, but also of public-private status differentials. Even though they provide cost-savings too, these incidents of privatization, which permit contractors to bypass channels of accountability and to use more "casualized" labor, are, especially since the government is outsourcing increasingly sensitive functions, a growing source of concern.

In the military context, non-economic status differentials can emerge as all-important in (rather than incident to) decisions to privatize. Private actors qua private actors may be sought—not because they are situated in a more efficient market or even because they command lower market wages, but because legally, politically, and symbolically they are not soldiers. Military privatization can allow the government to achieve national security and even humanitarian ends that would be more difficult, if not impossible, to accomplish using American soldiers.\textsuperscript{133} Perhaps, at various times, a desire, however latent, to avoid instituting a draft, to lessen public awareness, to dilute casualty counts, to bypass congressional troop limitations, and/or to evade international arms embargoes, entice policymakers to outsource because private actors are not regulated, controlled, or even mourned to the same extent that public soldiers are. But, if a decision to outsource does reflect "tactical" aims to circumvent political and legal obstacles associated with the conventional deployment of regular, U.S. troops, an entire set of problems for constitutional principles and democratic virtues—independent of any actual, tangible misdeeds that privatizers may perpetrate in a zone of conflict—must be anticipated. It is in these structural problems, deeper than just accountability concerns, which command my attention.\textsuperscript{134} Indeed, these structural problems are so great in the context of military privatization that even absent any express intent by the Executive to leverage or exploit status differentials between contractors and soldiers, many of the chief constitutional and democratic harms would still arise.

Economic privatization is, ostensibly speaking, ideologically agnostic. Its advocates may have particular agendas, but efficiency-driven privatization per se mainly creates an alternative process for carrying out government contracts that strive to replicate government provision—only at a fraction of the cost (and perhaps less government red-tape). On the other hand, "tactical" privatization, which may seek to exploit status differentials, is predicated on substantive rather than administrative or bureaucratic reform. Privatization, in this latter case, could be used to achieve objectives materially different than those that could be—for a number of reasons—achieved within the public sector. For example, a conflict may prompt an outsourced response if it would otherwise be difficult for the president to secure congressional and/or international support to deploy members of the U.S. Armed Forces. In such scenarios, it is not the cheaper price tag, but rather the status of the private actors (as distinct from U.S. military personnel) vis-à-vis congressional oversight, better than sovereign governments... it’s that we can do it without any of the spin-offs that make military intervention unpalatable to governments, casualties among [private military companies] do not have the same emotive impact as those from national forces." Yeoman, supra note 4 (indicating that privatization is a way of bypassing Congress and the American people).

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

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

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

1. Using Private Troops To Minimize Political and Legal Contests

As will be explored at length in the course of the discussions in subsequent parts of this Article, privatization expands the horizon of executive policymaking discretion in the context of military affairs. Using privateers, whose legal status differentiates them from regular, U.S. soldiers, could help enable the president to bypass congressional oversight and even international collective security arrangements. Indeed, outsourcing may be undertaken to exploit this legal gap between what is the official state policy (say, non-intervention, limited involvement, or limited troop deployment) and what military goals can actually be accomplished through private channels. If contractors operate within these interstices, the president can presumably satisfy national security aims without expending the time and political capital to secure formal approval at home or internationally.

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

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

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

If a country were to utilize the services of private contractors, it could thus facilitate a Security Council vote—or possibly evade an already passed resolution prohibiting intervention by member states. Thus, the use of private troops in lieu of the U.S. military may free the Executive from having to depend on the support of the Security Council in order to initiate a foreign deployment. This privatization agenda is explored at greater length in Part V.

2. The Optics of Military Privatization

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

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

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

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

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138. See, e.g., Diller, Forms, supra note 6; Diller, Resolution, supra note 6, at 1166–72; Michaels, supra note 6.

139. See, e.g., Zarate, supra note 30, at 116–44 (describing some of the successes and limitations of regulating private military actors through the United Nations and other international bodies).

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

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

142. See, e.g., Jim Dwyer, Troops Told To Carry Freedom, Not the Flag, N.Y. TIMES, Mar. 20, 2003, at A3 (noting that the U.S. military leadership instructed American soldiers not to raise the American flag in Iraq in order to avoid appearing as conquerors); Emily Wax & Alia Ibrahim, TV Images Stir Anger, Shock and Warnings of Backlash, WASH. POST, Apr. 10, 2003, at A4 (describing how poorly received the image of the American flag draped over a statue of Saddam was on the "Arab street"); Bernard Weinraub, Display of U.S. Flag Buried After Unfurling on Statue, N.Y. TIMES, Apr. 11, 2003, at B13 (highlighting the appearance problem associated with hanging the American flag in Iraq).
associated with exploiting these sets of status differentials will be addressed more fully in Part IV.

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

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

An attitude of risk-aversion and faith in what is the now-popularized “zero-casualty,” force-protection military paradigm146 constrains the effective exercise of military power—but not as much as if the overriding concern among Americans were purely pacifist in nature. This distinction between a zero-casualty and pacifist mentality may be less meaningful in the context of sending American troops into a conflict zone: either way, if things go wrong, the line of blame to the government is more attenuated than if the overriding concern among Americans were purely pacifist in nature. This distinction between a zero-casualty and pacifist mentality may be less meaningful in the context of sending American troops into a conflict zone: either way, if the narcotraffickers shot American soldiers down, you could see the headlines: ‘U.S. Troops Killed in Colombia.’ But when three DynCorp employees were shot down during an anti-drug mission in Peru, their deaths “merited exactly 113 words in the New York Times.”151 And, as Doug Brooks, a private military industry spokesperson explains, if an American soldier is killed overseas, it is front-page news. If he is not a soldier, and instead is a private contractor who “is shot wearing blue jeans, it’s page fifty-three of their hometown newspaper.”152

Private firms can undertake dangerous missions on behalf of the U.S. government without the attention, media coverage, or official sponsorship; if things go wrong, the line of blame to the government is more attenuated and the casualties would not be patriotic American soldiers serving under (and being carried home under) the American flag, but rather defense contractors whose deaths are not officially reported.153 As former U.S. Ambassador to Colombia Myles Frechetter noted: “If the narcotraffickers shot American soldiers down, you could see the headlines ‘U.S. Troops Killed in Colombia.’ But when three DynCorp employees were shot down during an anti-drug mission in Peru, their deaths ‘merited exactly 113 words in the New York Times.’”151 And, as Doug Brooks, a private military industry spokesperson explains, if an American soldier is killed overseas, it is front-page news. If he is not a soldier, and instead is a private contractor who “is shot wearing blue jeans, it’s page fifty-three of their hometown newspaper.”152

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

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

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

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


147. See infra Part V.B.

148. See Andrew Gilligan, Jessica L. Col. Spicer’s New Model Army, SUNY AT TELEGRAPH, Nov. 22, 1998, at A1; see also Howe, supra note 44, at 5 (“Private security forces can enter situations where Western governments are presently for too timid, especially after the world’s intervention into Somalia”).


150. See, e.g., Brenneman, supra note 47 (noting that “[y]et since Vietnam, the American public’s threshold for casualties has been thought to be very low”); Nancy Gibbs, Can the Pro-War Consensus Survive?, TIME, Feb. 18, 1998, at 32 (speculating that public support for military operations can rapidly dissipate once the death toll begins to mount, as did in Vietnam).

151. See Gilligan, supra note 148 quoting Tim Spicer; see also Jonathan Alter, Does Bloody Footage Lose Wars?, NEWSFweek, Feb. 11, 1991, at 34 (describing the public’s low tolerance level for American casualties); Brenneman, supra note 47; Kenneth L. Cain, Editorial, The Legacy of Black Hawk Down, N.Y. TIMES, Oct. 3, 2003, at A27 (describing the anguish felt by the soldiers who were pinned down in the streets of Mogadishu); Clark, supra note 45; noting America’s impotence to risk inverse after Vietnam and how that aversion was strengthened in wake of Somalia; Andrew Kohut & Robert C. Tho, Arms and People, FOREIGN AFF., Nov./Dec. 1994, at 47 (describing television’s impact on Americans’ aversion to casualties).
American soldiers does not lower the likelihood of death. But their acting in lieu of soldiers does perhaps lower the likelihood of the unacceptable imagery of American soldiers coming off cargo planes in bodybags draped with the flag. It is possible that, at least in terms of small-scale operations (such as in Rwanda or Sudan), this gives the president greater discretion to place troops on the ground for humanitarian peacekeeping or even hostage-rescue assignments that the public would deem too remote an interest to worry about. It is possible to feel that giving the president enhanced discretion to use military force in the course of trying to save money—the enhanced discretion that the president is claiming to have—will make the American military more effective agents of foreign policy than would soldiers, whose presence in places such as Kosovo or Colombia. And, in Iraq, as contractors become more commonplace on the battlefield and more closely associated with the American commitment there, the symbolic differences between them and soldiers may lose some currency. Accordingly, to the extent the differences lose meaning, however, so does the policymakers’ perceived flexibility to employ privates as less politically costly stand-ins (and hence contractors may become less useful).

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

b. Lowering the American Profile Abroad

Moreover, at times U.S. expertise and strength may be warranted—and even solicited by foreign leaders—but the symbolic meaning of American soldiers may prove too problematic in those situations. The country is now deploying contractors to do America’s dirty work in order to let soldiers, reservists, and members of the National Guard go home and to spare them from “getting grinded up.”

III. Threatening the National Security Constitution

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


But see infra Part VI.

66. See supra note 109. It is possible that, at least in terms of small-scale operations (such as in Rwanda or Sudan), this gives the president greater discretion to place troops on the ground for humanitarian peacekeeping or even hostage-rescue assignments that the public would deem too remote an interest to worry about. It is possible to feel that giving the president enhanced discretion to use military force in the course of trying to save money—the enhanced discretion that the president is claiming to have—will make the American military more effective agents of foreign policy than would soldiers, whose presence in places such as Kosovo or Colombia. And, in Iraq, as contractors become more commonplace on the battlefield and more closely associated with the American commitment there, the symbolic differences between them and soldiers may lose some currency. Accordingly, to the extent the differences lose meaning, however, so does the policymakers’ perceived flexibility to employ privates as less politically costly stand-ins (and hence contractors may become less useful).

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

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

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

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

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

Vesting war-making decisions—to authorize war, fund war, and supply and regulate the personnel involved in war—in Congress advanced, as I have intimated above, the two chief aims of the American experiment in constitutional democracy. The United States would be a limited government: its Commander-in-Chief would be constrained by sets of laws, deliberative processes, and by other, equally ambitious leaders in coordinate branches. And the United States would also be a great democracy: its decisions would reflect the will of the citizenry. Hence, Congress as the most direct representatives of the People, would necessarily be involved in military policy, simultaneously promoting the virtues of limited government by checking the perceived natural inclinations of the strong Executive and upholding the ideals of democracy by remaining the true servants of the People. Moreover, decisions by the president to wage war could not be undertaken without first benefiting from the deliberative insights of a legislative assembly and...
without concomitantly securing the tacit blessings and consent of the citizenry. 173

Military privatization threatens this framework of coordinate decisionmaking. The potential to outsource combat roles necessarily carries with it opportunities for the Executive to wield powers unimaginable were it limited to the use of regular, U.S. troops. By shifting responsibilities away from America’s armed forces and delegating them to private contractors, the president can circumvent constitutional obligations to share war-making authority with Congress. Privatization, therefore, may destabilize the delicate balance of powersharing built into what Dean Harold Koh calls the National Security Constitution,174 by weakening a critical check on presidential power—a failure of constitutional governance—and also by engendering a level of distrust and sense of disenfranchisement among the population writ large—a failure of democratic legitimacy. In the process, the People lose effective control over the helm of national security policy; and, institutionally speaking, once lost, such control will take time and considerable effort for Congress to regain.

B. The Futility of Imperial Warming and the Reality of Coordinate Powersharing

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

The exact contours of congressional-presidential powersharing need not be explored here; nor need we debate which branch, if either, has the preponderant say in decisions to commit troops. Those critically important questions are beyond this inquiry’s ken. The more modest aim is simply to establish the existence and persistence of a strong congressional role in military affairs both as a vital check on the Executive and as a necessary conduit to ensure the continued informed consent of the American people.

In what follows directly below, I describe the principal ways in which Congress typically plays a prominent role in shaping military policy and, concomitantly, in constraining presidential unilateralism. Then, in Section C, I will discuss how privatization allows the Executive greater leave to bypass congressional oversight and authorization in those key domains. I do note at the outset, however, that congressional authority over the affairs of the U.S. Armed Forces is not perfect; nor is Congress entirely unable to oversee the activities of military contractors. Accordingly, though I do want to highlight the important differences between Congress’s influence over the Armed Forces and its influence over military contractors (both in theory and in practice), I recognize that at times these differences are ones of degree, rather than of kind.

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

Indeed, by possessing power over the conception of American civilization179 and by regulating the standards of reserve activations,180 Congress can potentially limit the size of a conflict and its relative

173. Montesquieu, who is so intimately associated with the theory and architecture of separation of powers, was not unaware of the democratic reasons—and not just the limited-government reasons—why legislatures should be entrusted with considerable war-making powers. He articulated the need for popular consent in such weighty policy decisions: “To prevent the executive power from being able to oppress, it is requisite that the armies with which it is intrusted should consist of the people, and have the same spirit as the people. .. To obtain this end, .. if there be a standing army, .. the legislative power should have a right to disband them as soon as it pleased.” C. MONTESQUIEU, THE SPIRIT OF THE LAWS (C.T. Nugent trans., 1949). Moreover, Blackstone noted that “[o]ne of the principal bulwarks of civil liberty .. was the limitation of the king’s prerogative by bounds so certain and notorious, that it cannot be supposed he would ever exceed them, without the consent of the people .. or without .. a violation of that original contract.” I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 7 (1st ed. 1765); see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. 14, para. 360 (P. Laslett rev. ed., New American Library 1963) (34 ed. 1689) (characterizing the term “prerogative” as one including executive authority over military affairs). Madison took exception with the longstanding Lockean theory of executive prerogative in making martial decisions and recognized that “the power to declare war .. is not an execution of law.” It, is, on the contrary, one of the most weighty acts that can be performed.” James Madison, Letters of Helvidius, No. 1 Aug.-Sept. 1790, reprinted in 6 THE WRITINGS OF JAMES MADISON supra note 172, at 130.

174. Koh supra note 170. Dean Koh has asserted that the National Security Constitution grows out of the power that the system of checks and balances is not suspended simply because foreign affairs are at issue . .. [T]he Constitution requires that we be governed by separate institutions sharing foreign policy powers. As has evolved, the National Security Constitution assigns to the president the predominant role in the process, but affords him only a limited realm of exclusive powers, with regard to diplomatic relations and negotiations and to the recognition of nations and governments. Outside of that realm, government decisions regarding foreign affairs must transpire within a sphere of concurrent authority, under presidential management, but bounded by the check provided by congressional consultation. Id. at 69 (emphasis added); see also DeBrunner v. Bush, 752 F. Supp. 1141, 1148 (D.D.C. 1990) (noting that the deployed forces were construed to be of such a magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat); Harold Hongju Koh, The Causethen and the War Power: A Response, 41 DUR. L.J. 122, 121 (1991) (“[The Constitution directs] not permit the President to order U.S. armed forces to make war without meaningful consultation with Congress and receiving its affirmative authorization . ..”).
duration. Without the prospects of an unlimited, fresh supply of troops as replacements and reinforcements, the president may feel constrained in initiating and continuing unilateral engagements. 181 Also, Congress can impose rules regarding the internal governance of the military, set terms for the conduct of war, and establish restrictive guidelines for engagement. 182 In the absence of this set of Article I powers, the president—as Commander-in-Chief—presumably would possess the exclusive authority to determine the acceptable contours of soldierly conduct. 183 And, finally, still within this first set of powers, Congress can limit the politicization of the military by legislating hierarchical promotional guidelines 184 and by organizing units around civilian and military leaders whose positions require Senate confirmation pursuant to the Appointments Clause. 185 In all, this first category of checks constrains the exercise of unbridled presidential warmaking and adds layers of transparency vis-à-vis fixed rules of military conduct and decisionmaking that ensure greater public awareness of military policymaking.

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

181. Though, of late, Congress has at times professed a larger military than the president, this disagreement is one often shaped by local politics and an unwillingness among members of Congress to allow base closings in their respective districts. See, e.g., Elizabeth Becker, Senate Rejects Pentagon's Request to Close More Bases, N.Y. TIMES, Aug. 27, 1999, at A2; Andrew Rosenthal, Leonardsworth To Press Home Bases, N.Y. TIMES, Jan. 27, 1996 at A13. Such considerations reveal how any one congressional power may not be a sufficient or effective check on the president since external considerations (such as preserving local jobs and securing re-election) may be prioritized by the People's representatives.

182. SeeLRoyng v. United States, 517 U.S. 748, 768 (1996) ("[w]e give Congress the highest defense in ordering military affairs."); Gilgian v. Morgan, 413 U.S. 1, 10 (1973) ("[t]he decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject only to civilian control of the Legislative and Executive Branches."); see also U.S. CONST. art. I, § 8, cl. 14; Uniform Code of Military Justice, 10 U.S.C. §§ 901-946 (2000).

183. As Commander-in-Chief, the president's powers are undisturbed. See, e.g., THE FEDERALIST No. 54, at 447 (Alexander Hamilton) (Clarion Rev. ed. 1961) ("[T]he direction of war most positively demands those qualities which distinguish the exercise of power by a single hand"); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS PuRBoS 126-29 (1915) ("It casting of the war as Commander-in-Chief, it is he who is to determine the movements of the army and navy. Congress could not . . . themselves . . . carry on campaigns"); William Howard Taft, The Boundaries Between the Executive, the Legislative, and the Judicial Branches of the Government, 25 YALE L.J. 598, 610-12 (1916).

184. Congress has control of the administration and structuring of the military, which can be exercised in ways to thwart presidential aims. See, e.g., WORCEST E & FRITMAG, supra note 172, at 91 (outlining how Congress's senatory rules as applied to the promotion of military officers limited Lincoln's flexibility in appointing certain generals); Richard Hartman, Congressional Control of the Military in a Multilateral Context, 162 MIL. L. REV. 50, 98-100 (1999) (describing Congress's efforts

185. See U.S. CONST. art. I, § 7, cl. 17. Appropriations power can effectively limit a president's power of the purse to command troops and sustain armies abroad. See, e.g., W. HOWARD TAFT, supra note 183, at 126; and U.S. CONG. APPRAISALbrief 19 (Feb. 1993) ("[S]ince Congress controls the purse strings, the President's ability to employ the armed forces directly will depend on the availability of funds. The President has no power to order or direct money into battle.") Note also that while Congress does not have the power to make war, Congress may, to some extent, also impinge on command functions. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952); see also id. at 646 (Jackson, J., concurring) ("[n]o penance would ever expiate the sin against freedom of holding that a President can exercise control of executive powers by law through assuming his military role"); Es parte奎int, 317 U.S. 126 (1942) (noting that to know the president has the power to fire for cause and to exercise command functions for the conduct of war and for the government and regulation of the Armed Forces."); LOUB, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 337 n.11 (2d ed. 1999); ABRAHAM SOFFER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 3 (1956) (asserting that it is most accurate to understand the president as Commander-in-Chief as an "agent of the legislature").

186. Congress has the power to form structures of the military, which can be exercised in ways to thwart presidential aims. See, e.g., WORCEST E & FRITMAG, supra note 172, at 91 (outlining how Congress's senatory rules as applied to the promotion of military officers limited Lincoln's flexibility in appointing certain generals); Richard Hartman, Congressional Control of the Military in a Multilateral Context, 162 MIL. L. REV. 50, 98-100 (1999) (describing Congress's efforts

187. U.S. CONST. art. I, § 8, cl. 12 ("[b]ut no Appropriation of Money to that [military] Use shall be made . . . without the Consent of the Senate.") See infra note 188.

188. Stith, supra note 186, at 153.

189. Id. at 1341. In a 1973 appropriations bill, Congress told the President to stop bombing Cambodia August 15 and had said. See Charles L. Black, Jr., The Working Balance of the American Political Departments, 1 HASTINGS CONST. L.Q. 13, 15-16 (1974). Professor Black added that "[i]f the will had not been made the same thing four, or six or eight tragic years ago—at any time they really had wanted it." Id., see also Koh, supra note 190, at 126.
rule19 ensuring that the collective judgment of both elected branches will apply to military intervention in a manner consistent with the intent of the framers,196 the president must consult with Congress and ultimately seek its approval to deploy and retain U.S. military forces in zones of combat.197 Despite opposition to this statutory framework and a refusal to concede that Congress has any role to play in military engagements short of formal war,198 recent administrations have nevertheless consulted with Congress—and sought formal authorization—before deploying troops for combat duty abroad. For example, both President George H.W. Bush in the Gulf War and President Clinton in the Balkans and Iraq aligned themselves with, rather than against, the powerful argument that Congress should take responsibility [in war decisions]. Each President submitted his defining military action to Congress along with a request for congressional approval in advance. Thus, highly publicized congressional debates characterize the present arena for resolving questions about putting the military in harm’s way.199

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

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

Privatization, accordingly, creates unprecedented opportunities for the Executive to circumvent Congress and act unilaterally in military affairs. By opting to employ private contractors—rather than members of the U.S. Armed Forces—the president can avoid triggering many of Congress’s commonly exercised war powers, which are by-and-large specifically linked to constitutional authority over America’s military branches.202

Hence, the utilization of private agents has led scholars such as Professor Jules Lobel to suggest engagement without U.S. troops could be a shortcut around “democratic decisionmaking that distorts the democratic process and is fundamentally incompatible with the demands of our constitutional system.”203

Whether bypassing Congress is an intentional aim or an inadvertent byproduct (perhaps, the Executive sought to reap cost-efficiencies), this damages the tenets of separation of powers, even if temporary—until Congress can revise its background assumptions and seek to establish formal authority over privates—could compromise the strategic and physical security of the nation, the well-being of individuals appropriately endangered, and the confidence of the People in the democratic practices and institutions of this nation. Below, I describe how privatization enables the Executive to bypass many of the avenues through which Congress typically exercises its constitutional authority over military affairs.

1. Denial of Congress’s Regulatory Role

a. Size of Military

As mentioned above, Congress can preemptively constrain the excesses of a hawkish president by limiting the number of available troops.204 With a finite-sized public military, the president must deploy troops judiciously, or otherwise be forced to ask Congress to authorize a draft, liberalize reservist activation policies, or slowly expand through recruitment and retention programs.205 Any such request by the president to Congress would invite questions and criticisms of current strategies and priorities.206

The president’s expectation of political opposition provides crucial ex ante checks on executive adventurism and thus has the effect of counseling caution in how soldiers are deployed around the world. The other option for a president constrained by the size of the military is also disastrous politically: The overextended president (unwilling to request a draft) might be forced to withdraw troops from a conflict zone prematurely, and face the inevitable criticism for starting a war that could not be successfully completed.

If, on the other hand, there were some external, elastic source of troops, who could complement and supplement the U.S. Armed Forces, provide needed reinforcements, and help the president avoid having to activate reservists and/or reinstituting a military draft, the costs of not acting conservatively and judiciously are lowered. Privatization, at least at the margins, therefore presents a great alternative to lobbying Capitol Hill and the American people for permission to increase the size of the military quickly.207 While contractors could not “discreetly” command an entire theater in a major conflict, smaller outfits can be selectively positioned to provide the president with much greater flexibility—to continue, for instance, an unpopular or unexpectedly demanding war (that neither the president nor Congress would want to bolster with fresh newly conscripted soldiers) would handle); Tracy Wilkinson, U.S. To Provide Bosnia 116 Heavy Cannons, WASH. POST, May 5, 1997, at A2 (noting that the House had drafted funding cutoffs and was prepared to vote on them if the President had expanded U.S. military involvement in Bosnia); id. at 13-14 (describing Senator Dale’s proposal that would guarantee congressional decision making over what type of military work U.S. soldiers would handle). Tracy Wilkinson, U.S. To Provide Bosnia 116 Howie Cannons, WASH. POST, May 5, 1997, at A2 (noting that pure military work, not nation building, was what Congress specified Senator Dale’s plan); see also Hartman, supra note 184, at 95 (describing congressional efforts in the 1990s to limit the number of U.S. troops dispatched for U.N. peacekeeping to 1000 at any one time and to limit their function to guarding, observing, and other non-combatant roles); id. at 95-96 (characterizing other bills limiting the president’s ability to deploy military officials to foreign countries or to have them participate in joint military actions). Tidier, supra note 191, at 25 n.89 (describing Congress’s refusal to support Eisenhower’s request for combat involvement in Korea in 1954). But see Talmage, supra note 168, at 702-03 (outlining modern presidents have not deferred to congressional authority in matters of engaging troops in hostile environments).
solders). Hence with lower political opportunity costs for waging war, the president may be more apt to overcommit American capital—human, monetary, and diplomatic—in ways that would be less likely to occur were Congress and the American people (through their legislators) given a more direct say.

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

Accordingly, turning into an external, elastic supply of contract personnel could breach a tacit—and, no doubt, often hard fought—agreement between the Executive and Congress on the size of the military. This harm is, immediately: a fiscal one: it might be the case that Congress would be more willing to agree to keep the military comparatively small to reduce expenditure and reap peace dividends after, for example, the thawing of the very costly Cold War.211 But, the harm is also a political and legal one: Perhaps Congress kept the military small to dissuade an overly interventionist president from participating in far-flung engagements. Moreover, Congress might have agreed to authorize specific war powers requests only with the knowledge that the engagement would be of a limited scope commensurate with the manpower resources it assumed were available.212 Again, to the extent that the president could extend the duration and expand the magnitude of war by employing private contractors and to the extent that Congress had not been anticipating the wholesale reliance on military privates, privatization provides opportunities to subvert these carefully arrived at arrangements.

b. Reporting and Oversight

Another key constraint on the president’s conduct of war forms the bounds of Congress’s reporting and oversight functions.213 Consultation with, written reports to, and oversight hearings before Congress represent important ways in which military policy is subject to considerable scrutiny and accountability.214 Typically, Congress has opportunities to debate and hold hearings on matters of national security—shedding light and imposing accountability on the Executive Branch. If any given deployment of forces would be received critically, say, as overly dangerous, destructive, or antithetical to American principles of democracy,215 an administration might be deterred from pursuing such ends in the first place.216 And, even if the Executive, wanting to avoid the use of actual soldiers (because of the reporting requirements under the War Powers Resolution) used CIA operatives,217 a framework of reporting and oversight statutes are in place to ensure a modicum of accountability and transparency over those individuals too.218 But when neither members of the U.S. Armed Forces nor other government officials are intimately involved in a particular engagement, it is quite possible that members of Congress would not be as fully informed about the activities being undertaken by private contractors.219

210. See, e.g., Edmunds, The Coalition of the Willing, N.Y. TIMES, Feb. 19, 2003, at A24 (characterizing the U.S.-led coalition against Iraq as lacking in the cohesive legitimacy that would exist were the United Nations Security Council included); Michael Dobbs, Concur in Grove Over U.S. Need for Allies, WASH. POST, Jan. 27, 2003, at A1 (describing the United States’ willingness to invade Iraq by itself while taking note of the benefits that could be achieved were a broader coalition included); Michael R. Gordon, Serving Notice of a New U.S. Point of His First and Alone, N.Y. TIMES, Jan. 27, 2003, at A1 (describing President Bush’s willingness to do “almost anything” to support the assistance or support of the international community); Elizabeth Kohert, Solo Act, NEW YORKER, Oct. 6, 2003, at 43; Patrick E. Tyler, Aron Foster Bush To Avoid a Rush To War, N.Y. TIMES, Nov. 14, 2002, at A1; Patrick E. Tyler & Felicity Barringer, Aron Says U.S. Will Visit Chosun If It Acts Without Approval, N.Y. TIMES, Mar. 11, 2003, at A10; Very Wolf, Alone—Dealing with Iraq, DEFENSE, Mar. 15, 2003, at 3 (noting how the Anglo-American initiative in Iraq lacked widespread international support).
211. See supra note 46 and accompanying text.
212. After Mondale, of course, it may be the case that Congress will be more careful and precise with respect to what it actually authorizes in terms of presidential warmaking. See Mondale, 124 S. Ct. at 2641–42 (plurality opinion) (holding that the 2001 congressional authorization of military force provided the Executive with sufficient legal grounding to detain enemy combatants); id. at 2656–59 (Souter, J., concurring) (arguing that the force authorization statute was too narrow so as not to grant the Executive blanket detention powers over individuals within the United States); see also infra notes 246–63 and accompanying text.
214. See, e.g., RAUL BIBBER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 108–09 (1974) (“in the entire armor y of war powers only one has been exclusively conferred upon the President, the power as ‘First General’ to direct the conduct of war once it has been commenced. Even in this area, the military and naval command were not immune from parliamentary inquiry into the conduct of the war.”); see also BARRY M. BLUMHAN, THE POLITICS OF NATIONAL SECURITY 3–22 (1990); ALLAN R. MELLET, THE AMERICAN POLITICAL SYSTEM AND CIVILIAN CONTROL OF THE MILITARY: A HISTORICAL PERSPECTIVE 47–48 (1979); Darby, supra note 184, at 379 (“Since the Vietnam War . . . Congress has sought to become much more active in the management and oversight of military affairs . . . .”) [Since 1974, Congress annually makes 750,000 inquiries of the Pentagon and demands 7,500 yearly reports. Furthermore, the Congress created support agencies like the General Accounting Office (GAO) a huge, 5,000 person investigatory organization that frequently targets the military.]. Carl Hulse, Brief Questions Use of Money for Iraq, N.Y. TIMES, Apr. 21, 2004, at A11 (noting the senator’s desire that the Administration “might have broken the law by failing to inform Congressional leaders in mid-2002 of its use of emergency assistance dollars to begin operations for an invasion of Iraq.”).
Private firms thus permit the president to conduct military operations (especially small-scale ones not involving many, or any, U.S. troops) without having the same obligations to notify and involve Congress as would exist were American soldiers used.220 Privateers can, moreover, be contracted into service through third-party nations, host countries, or quasi-independent agencies, as has been the case with some American-based firms operating in the Balkans and even in Iraq. In these instances, Congress has comparatively little oversight authority. Indeed, the principal federal law, the Arms Export Control Act ("AECA"),221 which, inter alia, sets the terms by which information about American contractors working for foreign nations must be disclosed to Congress, currently requires the State Department to notify Congress only when a contract it authorizes exceeds $50 million.222

And, even if the privateers were operating directly for the federal government, their contracts might (purposefully or unintentionally) have been indirectly routed through the Commerce, Interior, or the State Department,223 rather than the Defense Department. The congressional committees that principally oversee Commerce and Interior, for example, may not be sufficiently informed or interested, and may not have developed the requisite expertise to be effective monitors of such contracts.224 Finally, even if the contracts were issued through the Pentagon, matters of military privatization may not arise per se—short of a massive fiasco such as the Iraq prison-abuse scandal—that would warrant congressional interest from the Armed Services committees.225 This is, again, not to say Congress is unflaggingly vigilant with respect to oversight of "public" military affairs, and entirely enfeebled with respect to overseeing military contractors. But while recognizing that the differences in congressional oversight are qualitative rather than quantitative, they are nevertheless important.

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

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

And, as Washington Post journalists have recently observed:

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

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

Latin America; see also Ely, supra note 196, at 1100 (noting that wars may not need to be authorized by Congress if they are not fought by regular members of the U.S. Armed Forces).

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

220. SINGER, supra note 20, at 214.


222. Only if a contract between an American military firm and a foreign state exceeds $50 million does the State Department even have to notify the Speaker of the House and the Chair of the Senate Foreign Relations Committee prior to effectuating it. At the time of notification, a notice of the contract is also published in the Federal Register. Congress has between 15 and 30 days to reject by passing a joint resolution; otherwise the contract will automatically take effect. See 22 U.S.C. § 276 (2000). Anything short of $50 million—and many sizable contracts, of course, can be broken down into several smaller contracts under $50 million—does not require any active involvement by Congress, though the president must update the Speaker and the Senate Foreign Relations Chair on a quarterly basis. Id.; see also Gau, supra note 33 (noting that "[t]he AECA provides little public accountability for non-classified contracts that commit the entire nation to acts of war."); Kurlantzick, supra note 20; Kevin P. O'Rourke, Evasive Answer: The Use of the AECA to Protect Certain U.S. Contractors in Iraq, 21 INT'L L. REV. 29, 53 (2006) (discussing AECA's restrictive jurisdiction).

223. SINGER, supra note 20, at 208 (describing Columbia contracts that are routed through the State Department's anti-narcotics section); Gellhorn, supra note 43, at 127 (noting that DynCorp's contracts in Colombia have been routed through the State Department); Robert O'Harrow, Jr. & Ellen McCarthy, Private Sector Has From Role in the Pentagon, WASH. POST, June 8, 2004, at A1 noting that the contracts for interrogators at Abu Ghraib were overseen by the Interior Department, which had little expertise in knowing how to monitor or define the role of such intelligence work; see also infra notes 236, 227, and 251 and accompanying text.

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

225. Even in a highly publicized, nationally televised committee hearing in the immediate wake of the Abu Ghraib scandal, the Senate Armed Services Committee members could not get any answers from top Pentagon officials about what contractors and what contracting firms were involved in the brutal activities. See Testimony of Secretary of Defense Donald H. Rumsfeld, Testimony as Prepared by Secretary of Defense Donald H. Rumsfeld Before the Senate and House Armed Services Committees, U.S. Department of Defense Speech (May 7, 2004), available at http://www.defenselink.mil/speeches/20040507-0607-0144.html (last visited Dec. 12, 2004) (indicating that the Secretary of Defense and Chairman of the Joint Chiefs of Staff could not respond to Senator McCain's request for the names of the military firms under contract to work at Abu Ghraib); see also Avant, supra note 109; Joel Brinkley, Army Policy Bars Interrogations by Private Contractors, N.Y. TIMES, June 12, 2004, at A1.

226. Avant, supra note 109; see Editorial, Contractors in Iraq Need Strict Oversight, DENVER POST, June 20, 2004, at 6b (noting that CACI's contract governing its interrogation work in Abu Ghraib was embedded in a computer services contract with the Department of the Interior); see also Cooper, supra note 22 describing loopholes that contractors and the executive branch use to help evade congressional oversight on "[t]he issue of accountability to the American public.

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

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Washington Post.
requests by Congress to disclose certain information regarding its Tanker contract with Boeing.229

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

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

c. The Appointments Clause: Senate Confirmation of Military Officers

Since military officers are “appointed in the manner of principal officers [of the United States],”231 every individual, holding at least the rank of second lieutenant or ensign must be nominated by the president and confirmed by the Senate.232 The Senate must also confirm the commissions of all reservists above the level of major.233 And each time an officer is promoted to a higher rank, another round of Senate confirmations is required.234

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

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

229. Senator McCain, a senior member of the Senate Armed Services Committee, has repeatedly requested that the Pentagon turn over its communications with Boeing regarding negotiations over a new fleet of Air Force Tankers. The Pentagon has refused to do so, citing the need to preserve its contractors’ proprietary information. McCain, in turn, blocked the confirmation of all civilian nominees to the Defense Department and promised to continue to do so until those documents were disclosed. Philip D. Freeman, Probe Continues on Boeing Lease/Pentagon Official Says Investigation Could Hold Up Tanker Deal, ST. LOUIS POST-DISPATCH, Feb. 12, 2004, at B1 (noting Senator McCaill’s frustration with the Defense Department for its refusal to disclose communications between the Pentagon and its contractors); Renea Meric, Pentagon Refuses To Give Panel Documents on Tanker Contracts, WASH. POST, Dec. 17, 2003, at E6 (describing the Pentagon’s refusal to share contract documents with the Senate Armed Services Committee because of Boeing’s need to protect its proprietary information); see also supra notes 132 and 137 and accompanying text.

230. See supra notes 20 and 231. Senator J. Conrad Burns, Jr., a senior member of the Senate Armed Services Committee (Chairman of which position he held from 1995 to 2001), consistently argued for the importance of Senate confirmation of many military officers. Senator Burns stated in 1997 that “you can’t just have a Secretary of Defense make these appointments,” Senate Armed Services Committee, 105th Cong., 1st Sess., Military Commissions and the Civilian Military Balance: Hearing Before the Committee on Armed Services, 105th Cong., 1st Sess. 53 (1997) (statement of Sen. Conrad Burns, Jr.). Senator Burns’s concern of the importance of Senate confirmation of military officers has been echoed by many others. See, e.g., Daniel B. & Sheila A. Delaney & William E. Dunlop,战备法官：如何构建战备法官制度，防务法律网, 26 Mar. 2006, at 13 (proposing that the Senate have greater control over the appointment of military judges to protect the independence of the military justice system); see also id. at 14 (noting that the Senate should have greater control over the appointment of military judges). Senator Burns also emphasized the importance of Senate confirmation in 1995, stating that “the Senate is the only body in the government that exercises an independent check of the executive branch in all its appointments,” Senate Armed Services Committee, 104th Cong., 1st Sess., 105th Cong., 1st Sess., Military Commissions and the Civilian Military Balance: Hearing Before the Committee on Armed Services, 105th Cong., 1st Sess. 35 (1997) (statement of Sen. Conrad Burns, Jr.).

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

d. Governance and Discipline of the Military

Finally, the Constitution authorizes Congress to establish codes of governance for members of the U.S. Armed Forces.\footnote{247} Congress sets disciplinary guidelines for soldiers and authorizes the imposition of penalties in the event that they violate their oaths of duty or engage in any other form of proscribed behavior. Citizen soldiers are not (and perhaps cannot be) effectively regulated to the same extent—and thus this status differential between contractors and soldiers may provide the Pentagon with opportunities to permit practices and behaviors (such as physical abuse for the purpose of extracting information) that are otherwise off-limits to U.S. troops.\footnote{248} Leaving that insidious possibility aside, this issue of discipline via Congress is important because the Constitution separates the command of the military from the governance of the military, presumably to prevent an aggrandizement of war powers. But military discipline is broader than a separation-of-powers matter because the president, even as Commander-in-Chief, also may not be able to control contractors to a satisfactory extent. Part of this difficulty in disciplining contractors as if they were soldiers is that the Supreme Court has given Congress virtually plenary power to regulate the behavior of military personnel, and it is at least an open question whether the Court would also permit Congress to impose similarly strict rules backed by criminal punishments on top of—or in lieu of—contractual arrangements with privateers absent a formal declaration of war.\footnote{249} Accordingly, because of its complexity and because it is not just a separation-of-powers concern, this subject will be treated at greater length and with broader sweep in Part IV.

2. Denial of the Appropriations Role

By using private contractors, the president may also reduce the likelihood of Congress easily terminating military funding.\footnote{250} The sources of funds for private guards in Afghanistan, for coop-crop dusters in Colombia, and for security forces in Iraq may be outside the formal scope of Defense Department appropriations budgets, and hence may be buried within longer-term funding sources that are not as readily apparent to Congress. As noted above in the context of identifying oversight difficulties, when contracts with privateers are scattered throughout or among executive agencies, it becomes very difficult for Congress to detect, target, and—if need be—attract particular streams of funding in order to influence policy via the purse.\footnote{251} Congress could, of course, always strike at the Pentagon’s budget wrat large in the interest of trying to track down discrete funding sources to privateers, but the political fallout for not appearing to support America’s troops and war effort may be too great of a disincentive.\footnote{252}

And perhaps most troubling from a legal-control vantage point, sometimes military operations are funded off-shore, by host countries or sympathetic third-parties. This was the case in Bosnia, where for a variety of reasons, a coalition of Muslim nations paid the American contractors for services rendered.\footnote{253} Obviously, when engagements are financed from sources outside of the U.S. Treasury, Congress’s power of the purse may not be an effective constraint.\footnote{254} This is also somewhat of the case in Iraq, where a percentage of the funding for operations (including security operations) administered through the CPA supposedly came from Iraqi oil sales and thus was disconnected from the federal fisc.\footnote{255} Hence from an appropriations standpoint, there may be occasions where Congress’s influence is quite weak. Therefore, without yet another check, Congress and the American people not only have fewer means of halting operations they deem to be counterproductive, but they also have a more limited appreciation of how well-funded select operations in general may actually be.
Regulating military personnel and patrolling funding allocations are secondary weapons in Congress’s quiver. The degree to which Congress can regulate personnel and require testimony and briefings may have a modest impact on fundamental presidential decisions to deploy and direct forces in zones of conflict. This is not to diminish the importance of these congressional powers, but rather to acknowledge their individual limitations in terms of influencing and altering executive policymaking. When aggregated, however, these powers loom larger: Congress’s cumulative ability to limit troop size and to curtail funding and to insist on oversight briefings weaves a thick web of checks possibly sufficient to constrain unilateral action (and more certainly sufficient to provide incentives for the Executive to want to work closely with Congress).

When we turn to the issue of express authorization, however, Congress’s power is immediately evident. While often insisting that congressional authorization is unnecessary, presidents—especially over the last decade—have routinely if begrudgingly sought congressional authorization, it circumvents primary avenues through which the People are informed and blocks off primary channels (namely Congress) through which the People can register their approval or voice their misgivings.

264. See supra note 48.

265. See supra notes 38–64 and accompanying text.


D. Bypassing the People Through Privatization: Harms to Democracy

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

In short, the legitimacy of military policymaking depends not just on broad congressional involvement, but also on democratic input and popular consent. In a liberal democracy, the consent of the People is necessary and ought to be more express in entering war than at almost any other time (or in any other policy matter) both because of the adversity the war will bring (the bodies of the population are subject to the risk of great injury) and also because the existence of the nation (the elemental social pact) is itself at risk. Thus, when, or even if, the public is potentially precluded from taking part in such discussions, the democratic integrity of the country is greatly compromised. As Kant argued:


366. See, e.g., EDWARD S. MOORE, INVENTING THE PEOPLE (1988); Woodrow Wilson, Congressional Government: A Study in American Politics 303 (1910) (suggesting that the duty to inform the public in Congress is the most important function and noting that “[t]he only really self-governing people is that people which discusses and investigates an administration”); Gordon S. Wood, The Creation of the American Republic 1776–1817 (1969); Brandon, supra note 365, at 1856–57 (characterizing popular sovereignty and self-government as principal features of American constitutionalism); Frank Michelman, Law’s Republic, 97 Yale L.J. 1493 (1988); see also Bruce A. Williams, War Rhetoric’s Toll on Democracy, CRON. OF HIGHER EDUC., Apr. 16, 2004, at B15 (describing the imperative to gain popular support for war in democratic societies).
Every nation must be so organized internally that not the head of the nation—for whom, properly speaking, war has no cost (since he puts the expense off on others), namely the people—but rather the people who pay for it have the decisive voice as to whether or not there should be war. 

Privatization creates opacities that may obscure the ready awareness of events. Americans who are unwittingly kept ill-informed of their country’s involvement in matters overseas cannot serve their necessary roles in shaping the State representative and responsible. Conversely, when they are made aware of such engagements, they can express opposition or consent, organize parades or protests, enlist in the military as a sign of support or burn draft cards as a sign of disapproval. However inconvenient it might be for the Executive to be constrained by the opinions of the People, public participation is a necessary and valued component of the republican system as evidenced in the Constitution, culture, and customs of the United States. To use privatization to limit public disclosures and curtail public debates is to diminish popular sovereignty. But even without that intent on the part of the Executive, privatization has the effect of circumscribing not only Congress’s deliberative role, but also its oversight role, and thus, could end up limiting the information that reaches the People.

Congress’s constitutional role in preserving popular sovereignty is, of course, critical—and revealing. Far from simply serving as an institutional counterbalance to the president, the architecture of congressional responsibility in warmaking bespeaks an express recognition of the imperative to keep the public informed and to keep elected officials responsive. Just as it is endowed to do in the context of presidential treaty-making or ministerial appointments, the Senate, on its own, could have been exclusively entrusted to resist the tendencies of an imperial president bent on unilaterally sending troops into zones of hostility. At the Founding, however, Senators, like the president, were not directly elected by the People—only the House was. So if congressional warmaking authorities were vested only in the Senate (as Hamilton originally proposed),

one might read the Constitution as saying that although the Executive must be kept in check by a competing branch of government, there is no corresponding responsibility to ensure that the People (through their biennially elected representatives in the House) would be given a say. But, because the entire Congress was and is empowered in matters of authorizing and funding wars, evidently there is a competing democratic element to the allocation of war powers that complements the limited-government analysis discussed above in Part III.C.

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

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

Indeed, the Second Amendment gave the People a physical “say” over the conduct of war by limiting the capacity of the federal executive to aggrandize central military power. In providing for the dispersed ownership of weapons by the citizens, the Founders envisioned the existence of a people’s army, and thus vested decisions over matters of defense in the hands of people, and communities. Since, at least in the premodern era of warfare, weapons had to be carried onto the field by persons, the leaders [had to] address the population and persuade them to carry those guns.

This understanding comports with Akhil Amar’s as well. Professor Amar understands the Second Amendment as originating out of Locke’s recognition that “the people’s right to alter or abolish tyrannous government invariably required a popular appeal to arms,” and as reflecting a deep anxiety about a centralized military.


272. See Scarry, supra note 267, at 1269 (discussing the burdens of democratic deliberation on matters of foreign conflict). Professor Scarry writes:

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

273. See supra, note 267, at 1269 (discussing the two-year limitation provision “the best possible precaution against the danger from standing armies”); Delaplace, supra note 184, at 343, 348 (noting that among those defending the values of the 1787 Constitution, the “danger posed by a permanent military establishment was a preeminent concern”); “Bonnie” X, That Dangerous Enemy of Despotism, A Standing Army, N.Y.J., Jan. 24, 1788, reprinted in THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES, AND LETTERS

274. See supra, art. 2, 4, 2, cl. 2.

275. See supra, art. 1, § 2.

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

277. See, e.g., Scarry, supra note 267, at 1269 (describing Article I, section 8 of the Constitution, which calls for a “deliberate assembling of the representatives of the people for a voiced affirmation of war,” as endorsing America’s “Social Contract” and suggesting with regard to the Second Amendment that “if as a nation-state we are to have injuring power, the authorization over the action of injuring (as well as over the risk of receiving injury in return) must be dispersed throughout the population in the widest possible way”); see also U.S. CONST., art. I, § 8, cl. 12. Section 12 imposes limits on the general power to tax and spend by ensuring military appropriations must be debated and reauthorized at least every two years. Hence, Congress cannot lock in long-term plans for say, a standing army, but must have to monetize funds with regularity. See, e.g., THE FEDERALIST NO. 41, at 299 (James Madison) (Clinton Rossiter ed., 1961) (calling the two-year limitation provision “the best possible precaution against the danger from standing armies”); Delaplace, supra note 184, at 343, 348 (noting that among those defending the values of the 1787 Constitution, the “danger posed by a permanent military establishment was a preeminent concern”); “Bonnie” X, That Dangerous Enemy of Despotism, A Standing Army, N.Y.J., Jan. 24, 1788, reprinted in THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES, AND LETTERS

Today, of course, the role of the militia (and the relevance, at least in this context, of the Second Amendment) has been diminished by the needs of a standing professional army. But that spirit of popular sovereignty has endured and surfaced elsewhere, often at the intersection of war and voting: “Apparently it takes war to open the eyes of America to the injustice she imparts to her young men. For it is surely unjust and discriminating to command men to sacrifice their lives for a decision which they had no part in making.”

Hence, as early as the Revolutionary War, the franchise has been expanded and enlarged at times of combat to accommodate not only the service of soldiers for their patriotic labor, but also out of recognition for their desire to have a say over the conduct of the war. That tradition of expanding and protecting the franchise for soldiers has continued throughout the decades and centuries. President Lincoln insisted, for example, that the nation hold presidential elections in 1864, in the midst of the Civil War, even though he knew that his defeat would likely lead to the abandonment of efforts to preserve the Union. And during World War II, the United States passed [the Soldier Voting Acts of 1942 and 1944] that not only guaranteed soldiers and sailors overseas the right to vote during World War II, but also served as an opening wedge in the battle for poll tax repeal and other congressional action to guarantee the voting rights of blacks more generally.

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

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

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

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

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

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

1. The Notion of “Separate Community”

Regardless of whether she is stationed in Tikrit or Fort Dix and whether she is rounding up POWs or walking her dog on the base, the American soldier—from private to four-star general—lives in a “separate community.” Members of the U.S. Armed Forces operate within a
The UCMJ is more than a simple legislative enactment, but rather has the effective character of a "super-statutes," as described by Professor John Ferejohn. It is, therefore, considered a system of decentralized governance and discipline necessary to the special and distinct qualities of the U.S. military, including the unique constitutional framework of governance and discipline necessary to the special and distinct qualities of this governing regime and defer to the special and distinct constitutional liberties in ways unmanageable if ever applied to civilians. Given the intrinsically special scope of the UCMJ, and the courts' emphasis on Congress's special Article I powers over the Armed Forces, it may be impossible for courts to apply the UCMJ as "super-statutes" if used in place of the Constitution itself.

Accordingly, for generations, the American military community has been a social, legal, and economic entity onto itself; systems have been in place—indeed, in form or in substance—since the dawning days of the American Revolution to treat members of the U.S. Armed Forces qua members of the military community. Thus, the UCMJ was intended to be more than a simple legislative enactment, but rather has the effective character of a "super-statutes," as described by Professor John Ferejohn. It is, therefore, considered a system of decentralized governance and discipline necessary to the special and distinct qualities of the U.S. military, including the unique constitutional framework of governance and discipline necessary to the special and distinct qualities of this governing regime and defer to the special and distinct constitutional liberties in ways unmanageable if ever applied to civilians. Given the intrinsically special scope of the UCMJ, and the courts' emphasis on Congress's special Article I powers over the Armed Forces, it may be impossible for courts to apply the UCMJ as "super-statutes" if used in place of the Constitution itself.

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

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

It is with this context and history in mind that the blithe introduction of civilian contractors into positions involving the exercise of sensitive military authority seems particularly dangerous and counterproductive—violating the carefully crafted arrangements established over time precisely to minimize the possibility that agents of combat will disobey their principals' commands and/or abandon their comrades in the heat of battle.

2. Privatization's Harms

Civilian contractors, not similarly subject to the dictates of military law or to the constitutional oath of office, cannot necessarily be expected or permitted to exercise the authority, judgment, or lethal force entrusted to soldiers. Contractors are not governed and disciplined by the same legal and socio-cultural obligations of duty and loyalty required to ensure the effective subordination of soldiers' own interests and to guarantee the success of a given endeavor. No legal contract between the Pentagon and a private firm can hope to imitate, let alone replicate, this sacred relationship. Otherwise, why would U.S. military personnel be treated so differently than, say, civil servants working in the Department of Veterans Affairs? If American servicemen and women could be trusted to do their job as effectively without the UCMJ, then the entire legal and cultural architecture of the "separate community" would largely be unnecessary. The fact, however, that the separate community is so important to maintaining order and ensuring fidelity gives us a sense of why merely tightening contractual obligations and increasing contractor oversight might be all that would be needed when the government outsources commercial responsibilities at Veterans Affairs, but that those measures may not be enough when it comes to privatizing military functions.

Indeed, constitutionally speaking, it is at least questionable whether contractual penalties for violating many of the terms of a private military agreement can rise to the threat-level of an impending court-martial. Thus, given, for example, the Court's historical jurisprudence invalidating laws that criminalize the mere breaking of private employment contracts, one might suppose that there would be some resistance to penalizing contractors as if they were U.S. soldiers (for all sorts of small infractions). Since private agents are not controlled and disciplined by their governmental principals to the extent Congress requires and the Supreme Court allows for U.S. soldiers within the chain-of-command, it would seem inappropriate to delegate to private actors crucial military

304. See infra notes 444–46.

305. Studies suggest troop camaraderie appears to strengthen the resolve of military units more than any other bond (including nationalism or political ideology). See, e.g., J. C. COFFIN, THE WARRIORS 27 (1959) (characterizing the strength of ties within military units as "unequaled in forging links among people of unlike desire and temperament"); Oorah, supra note 291, at 105–55 (highlighting how the basic units of military association provide core groupings for displays of loyalty, bravery, and self-sacrifice); cf. Reo. Strains, supra note 96 (emphasizing differences between units of regular soldiers and national guard units in terms of trust and unit cohesion).

306. Oorah, supra note 291, at 955.


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

309. See, e.g., Singer, supra note 20, at 213 (noting that prisoners do not take an oath to uphold the Constitution). Christopher Marquis, Inquiry on Pervs Looks at C.J.A. Contractor, N.Y. TIMES, Apr. 28, 2004, at A4 (describing how an Alabama-based private military company was responsible for the killing of civilians in Peru and characterizing the official who took note that the privates were not operating under the Constitution, but rather "were just businesses"); Singer, supra note 16, at 517 (noting that contractors cannot be disciplined under the UCMJ).

310. The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel, 169 MIL. L. REV. 92, 95–101 (2001); Singer, supra note 306, at 537–46; to make the UCMJ too comprehensive and too broad in its applicability to contractors, could pose constitutional questions regarding Congress's ability to regulate non-military personnel. See infra notes 312, 339, 444–45.

311. But see Vanesa Brin, Dead's New War Zone Rules for Contractors, L. TIMES, Apr. 21, 2004, at 1. Brin notes that the Pentagon has proposed rules to place greater liability on contractors and also to permit military commanders to alter government contracts in the field, thus "reducing[ing] red tape for companies working under increasingly dangerous conditions."). Id. The increased level of corporate liability may, however, make it more likely that contractors, knowing the government may not cover losses, will flee rather than suffer personal injury as well as damage to sensitive equipment. Moreover, giving military commanders authority to alter contracts opens the door for even less civilian control and legal oversight of military personnel.

312. See supra notes 305–07. For sake of brevity, all references to the same citations are incorporated by reference. See supra note 308, since many are former members of the U.S. Armed Forces, they may very well have been instilled with the same esprit de corps. Yet because they no longer face the same rigid discipline and command structure and are no longer embedded in a separate community of soldiers, it is uncertain what degree of commitment and self-sacrifice exists among contractors.

313. See Metges, supra note 34, at 1462 (noting that permitting a private actor to carry out tasks "on behalf of government is what makes ... private delegations particularly threatening to the principle of constitutionally-constrained government" and suggesting that private actors "effectively step into the government's shoes in its dealings with third parties, private entities are more likely to have access to powers that are distinctively governmental"); see also Dilks, supra note 6, at 151–57 (contending that in the context of prison management, the profit motive is incompatible with the types of non-essential services being administered; Michaels, supra note 6, at A20; in the wake of the horrific sex-slave scandal perpetrated by DynCorp officials in Bosnia, no employees—save the whistleblowers—were fired. See Singer, supra note 83, at 525–38; Jennifer Murray, Note, Who Will Police the Peace-Builders?, 34 COLUM. BERNSTEIN REV. L. & POLICY 475, 805–06 (2001) (noting the dismissal of a DynCorp employee for disclosing evidence that her colleagues were involved in sex-trafficking practices); Antony Barnett & Solomon Hughes, "The Debtor as Modern Day Peon: A Problem of Corporate Liability May, However, Make It More Likely That Contractors, Knowing The Government May Not Cover Losses, Will Flee Rather Than Suffer Personal Injury As Well As Damage To Sensitive Equipment. Moreover, Giving Military Commanders Authority To Alter Contracts Opens The Door For Even Less Civilian Control And Legal Oversight Of Military Personnel."

314. Courts historically have been reluctant to support statutory or private schemes whereby satisfactory performance of contracts can be enforced by threat of imprisonment. See Bailey v. Alabama, 219 U.S. 219, 243 (1911); Karen Gross, The Debtor as Modern Day Peon: A Problem of Corporate Liability May, However, Make It More Likely That Contractors, Knowing The Government May Not Cover Losses, Will Flee Rather Than Suffer Personal Injury As Well As Damage To Sensitive Equipment. Moreover, Giving Military Commanders Authority To Alter Contracts Opens The Door For Even Less Civilian Control And Legal Oversight Of Military Personnel."

315. See supra notes 305–07.
responsibilities, which require not only the careful exercise of life-and-death discretion, but also the internalization of civilian-military protocols regarding fidelity to officers' orders. In short, contractors are not necessarily appropriately situated within the delicately woven legal and constitutional fabric that both endows the military with authority to serve as an effective fighting force and, at the same time, severely curtails soldiers' freedom to deviate in any way from their explicit charge.}\(^{314}\)

\[a. \text{ Potential Strategic Liability} \]

First, privateers may at times prove ineffective, if not harmful. As previously discussed, the legal status and consequences for contractors engaged in military operations differ from those for military personnel. Contractors are not considered soldiers and, as such, are not entitled to the protections afforded to military personnel. The legal framework for contractors is determined by the laws of the countries in which they operate, and contractors are subject to the laws of the countries in which they are located, even if those laws are不同的. This can lead to situations where contractors are not held to the same standards as military personnel.

\[\] As civilians, contract employees are not subject to military command and discipline. Workers who refuse an assignment can be fired by their employers but not tossed into the brig. The Pentagon's only recourse is to sue—no comfort at all to a commander in chief.\(^{315}\)

Immune from the harsh measures of military justice intended to ensure no soldier will prioritize self-preservation over the good of the mission, it is more likely that key contractors, engaged in surveillance flights, responsible for caravanning necessary materiel to the frontlines, or otherwise assisting the military effort, are not punished for their actions.

The Pentagon is not unaware of the fact that when contractors are deployed, there is a greater likelihood of desertions and refusals to obey orders.\(^{316}\) As early as 1976, when tensions flared up on the Korean peninsula, a number of Defense Department civilian and contract personnel (rendering commercial services) made a mass exodus. Military officers could not "order" the contractors to stay and, as a result, their absence—to the extent their services were missed—compromised American and South Korean interests.\(^{317}\) More recently, the Pentagon commissioned a study that found commercial contractors might have fled the Persian Gulf theater during the first war against Iraq, were gunflint to have intensified or were Saddam Hussein to have unleashed chemical or biological weapons.\(^{318}\)

With this historical sensitivity to civilian desertions in mind, it seems somewhat reckless for the current Administration to have leveraged the battlefield and the post-war occupation with private contractors in Iraq—especially since this invasion was largely predicated on the U.S. government's conviction that Saddam had (and was prepared to use) Weapons of Mass Destruction.\(^{319}\) As Colonel Steve Zamparelli has argued:

If death becomes a real threat, there is no doubt that some contractors will abandon their responsibilities were their lives endangered. American military personnel have too been accused of desertions and of failing to report for duty. But in those situations, they are exposed to criminal punishments. See, e.g., Army Supts SEnt to Push Pentagon, N.Y. TIMES, Oct. 21, 2004, at A10 (noting that a number of soldiers will be prosecuted as a result of the convoy incident); Boneqoy & Hart, supra note 96 (noting the decision of eighteen reservists for refusing to go on a convoy mission in Iraq, James Dao, Soldier Who Served In Iraq Is Convicted of Armed Robbery, NEW YORK TIMES, July 30, 2004, at A4), see also Ricks, supra note 96 (describing how members of a South Carolina National guard unit were detained for going AWOL, to see their families on the night before they shipped out to Iraq); see also Eric Schmitt, U.S. Recruits Gods: Pressing, the Army Will Face Some Standards, N.Y. TIMES, Oct. 1, 2004, at A24 (describing the criminal charges filed against soldier officers who failed to mobilize when called up as members of the Individual Ready Reserve).

One essential difference between exit by private employees and by those in public institutions is that leaving a PMF post is not desertion—punishable by prosecution and even death, but merely the breaking of a contract with limited enforceability. The simple matter is that no equivalent order or threat exists for PMFs to prevent desertion by their employees. See supra note 96, 308-09.

\[b. \text{ As a Costly Backstop} \]

Contrary to the Pentagon's assertion that there is no need to punish contractors for their actions, there are several reasons why it is important to hold contractors accountable for their actions. First, contract employees may at times prove ineffective, if not harmful. As previously discussed, the legal status and consequences for contractors engaged in military operations differ from those for military personnel. Contractors are not considered soldiers and, as such, are not entitled to the protections afforded to military personnel. The legal framework for contractors is determined by the laws of the countries in which they operate, and contractors are subject to the laws of the countries in which they are located, even if those laws are不同的. This can lead to situations where contractors are not held to the same standards as military personnel.

As a result, contractors may be less likely to prioritize the good of the mission and more likely to engage in behavior that is detrimental to the mission. This is particularly concerning given the sensitive nature of the work that contractors perform, such as surveillance, logistics, and maintenance. Contractors are not subject to the same level of scrutiny and accountability as military personnel, which can lead to a lack of accountability and a failure to hold contractors responsible for their actions.

Moreover, contractors are not subject to the same degree of discipline as military personnel. While military personnel are subject to the military justice system, contractors are typically subject to civil laws and regulations. This can lead to a lack of consistent and effective enforcement of rules and regulations, which can further contribute to a lack of accountability.

In conclusion, it is important to hold contractors accountable for their actions. While contractors may be less likely to prioritize the good of the mission, contractors are still subject to the same laws and regulations as other employees. As a result, contractors must be held to the same standards as other employees, and any breaches of those standards must be addressed accordingly.

\[c. \text{ As a Cause for Concern} \]

It is important to consider the impact of contractors on the military and the overall mission. Contractors are not subject to the same level of scrutiny and accountability as military personnel, which can lead to a lack of accountability and a failure to hold contractors responsible for their actions. This can have a negative impact on the overall mission and the ability of the military to achieve its objectives.

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\[d. \text{ As a Challenge for Policy Makers} \]

The use of contractors in the military is not a new phenomenon, but the scale of their involvement in recent conflicts has raised important questions about their role and responsibilities within the military. There are several reasons why it is important to consider the impact of contractors on the military and the overall mission. Contractors are not subject to the same level of scrutiny and accountability as military personnel, which can lead to a lack of accountability and a failure to hold contractors responsible for their actions. This can have a negative impact on the overall mission and the ability of the military to achieve its objectives.

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compliance” task such as weapons-system maintenance . . . have left and gone home .323

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

b. Perceived Strategic Liability/Morale Problem

Moreover, even if the contractors do not appreciably undermine a campaign, regular U.S. troops’ misgivings may not subside—and for a justifiable reason: there’s always the threat that the contractors will walk out during the next siege. For the reason expressed above, the mere belief that contractors may flee is enough to introduce uncertainty and distrust among the U.S.-troops—which is probably already high given the host of other existing morale problems currently plaguing the service ranks.325 And, the soldiers’ insecurity and their misgivings about privateers must be tragically serious; the army goes on such extensive lengths to ensure the appropriate level of discipline, training, and camaraderie326 that it seems inexplicable why the Pentagon would sacrifice those goals in the name of outsourcing.327

Parenthetically speaking, there is, of course, a real irony here regarding military morale. For years, the Pentagon has been consumed with the fear that the presence of gay soldiers might destroy morale,328 perhaps it has failed to consider the negative ramifications of engaging non-U.S.

military personnel in essential positions alongside regular troops when those private actors have not labored through basic training nor spent years drilling and dwelling with their military counterparts.329 Soldiers are aware that not only do privateers often get compensated at a higher rate, but that those who orchestrated it (and even if the contractors are themselves veterans, that spirit may have long since diminished and been superseded by the mores of the marketplace.) As one recent observer of DynCorp’s behavior in Kabul noted, “[C]ontactors do not live by the same constraints as active-duty soldiers . . . [T]heir burning of the military-civilian line serves as a reminder that military discipline not only keeps up morale, but encourages moral behavior.”330 American soldiers today (though admittedly not all model citizen-soldiers themselves) are taught the lessons of, for example, the My Lai massacre, and are told that those who helped stop the bloodshed were given medals; but those who orchestrated it (and even those who just followed
orders), were court-martialed.334 Situating soldiers in a storied tradition of honor may not eradicate all instances of criminal or excessively brutal behavior, but that educational process may inform the soldiers of the institutional condemnation that will be affixed to any such transgressions.335 It should not therefore be surprising that privatizers, though hardly alone, were nevertheless at the center of the Abu Ghraib scandal in Iraq—invoking the brutal torturing of Iraqi civilians—just not as participants, but as supervisors.336 Whereas courts-martial quickly followed for the U.S. soldiers involved,337 thus signaling (albeit belatedly) the government’s intolerance toward such behavior,338 it was reported that even after the news of the scandal broke and courts-martial were being convened, the contractors were still on the job, just as was the case with those DynCorp employees who ran a sex-slave operation in Bosnia.339 In the wake of that travesty in the Balkans, the only prophylactic measure taken by the company was to insist that each employee sign a statement saying she understands “human trafficking and prostitution are ‘immoral, unethical, and strongly prohibited.’”340 Recall, too, that DynCorp similarly fired rather than whistleblower the trial attorney in that case.341 Since misdeeds like what happened at Abu Ghraib342 rekindle the regular ranks of the military and lead to disillusionment and demoralization,343 the government, at least by staging investigations and courts-martial, can at least try to embrace a zero-tolerance policy and hope to rebuild confidence among the rank and file and offer credible reassurances to Iraqis and the global community that such behavior is not condoned.344

### c. Perverse Incentives To Prolong/Expand War

An additional harm, which I discuss even though it may seem to be simply a conventional accountability concern, is the possibility that the incentive differential between soldiers and contractors could lead to mission distortions. Such an incentive differential (and the corresponding threat of policy distortions) is common, of course, in any number of other policy domains in which privatization has been introduced.345 Money after Bosnia.346 In the wake of that travesty in the Balkans, the only prophylactic measure taken by the company was to insist that each employee sign a statement saying she understands “human trafficking and prostitution are ‘immoral, unethical, and strongly prohibited.’”340 Recall, too, that DynCorp similarly fired rather than whistleblower the trial attorney in that case. Since misdeeds like what happened at Abu Ghraib rekindle the regular ranks of the military and lead to disillusionment and demoralization,343 the government, at least by staging investigations and courts-martial, can at least try to embrace a zero-tolerance policy and hope to rebuild confidence among the rank and file and offer credible reassurances to Iraqis and the global community that such behavior is not condoned.344


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

### 336. Id. at 160-61 (describing the government’s attempt to punish such transgressions by way of military investigations and courts-martial). McCaffrey, supra note 318, at 232 (emphasizing the important lessons instilled in soldiers to prevent any recurrences of human rights violations such as occurred in My Lai); Steve Sheppard, Passion and Nation: War, Crime, and Guilt in the Individual and Collective, 78 NOTRE DAME L. REV. 751, 779 (2003) (noting that “the only saving grace from this worldly passageway [in My Lai] is that the U.S. military’s established training regimes to enhance compliance with the laws of war”); see also Colin Powell, The Day We Stopped the War, NEWSDAY, Jun 20, 1992, at 18 (suggesting that it would be “un-American and unsoldierly” to attack returning Iraqis during the first Gulf War).

### 337. See, e.g., Peter Singer, Editorial, Beyond the Law: The Abuse of Iraqi Prisoners By US Personnel Show that Outrages Military Job Has Gone Too Far, GUARDIAN (London), May 3, 2004, at 16 (“We’re appalled [by the prison abuse scandal]. These are our fellow soldiers—... they wear the same uniform as we... those acts may reflect the actions of individuals but, by God, it doesn’t reflect my army.” [quoting Brigadier General Mark Kimmit]); see also Addicks & Hudson, supra note 245, at 180 (noting that “criminalized societies will not provide the necessary homefront support for an army that it perceives to be acting in violation of the law of war.”); Cox, supra note 298, at 10-11 (noting that during World War II, over two million countercultural soldiers were commissed, indicating the importance of the UCMJ in regulating military behavioral patterns).

### 338. See supra note 83 and accompanying text.

### 339. See supra notes 83 and 84 and accompanying text.

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

### 341. See supra note 83 and accompanying text.

### 342. See supra note 3 and accompanying text.

### 343. See supra note 3 and accompanying text.

### 344. See supra note 3 and accompanying text.

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

### 346. The Path of the Military in Post-Conflict Situations: What Have We Learned? 042

### 347. See supra note 3 and accompanying text.

### 348. See supra note 3 and accompanying text.

### 349. See supra note 3 and accompanying text.

### 350. See supra note 3 and accompanying text.

### 351. See supra note 3 and accompanying text.

### 352. See supra note 3 and accompanying text.
unnecessary supply convoys through Iraq because it gets paid by the trip.350 If true, this wasteful practice not only endangers the lives of Halliburton employees, but also U.S. troops, who may be dragged into the fray were an insurgent attack to occur. Hence, just as in other privatization contexts where monitoring is difficult or costly, private military contractors may deliberately take longer, say, to train and certify the competency of a domestic police force; or they may slow down their rate of coca-burning work to get paid for a few extra days or weeks.351 Alternatively, instead of sitting on their hands, they may have the converse—but no more acceptable—agenda: to be as destructive as possible. In this scenario, there may be an impulse to level rather than preserve since oftentimes it is the same (or related) firms providing security services in a zone of conflict that are also key players in physical reconstruction.352 A particularly devastated area may create the need for a government to issue contracts for road-building, public works projects, and security training. As Enrique Bernal Balaresteros, a high-ranking official with the United Nations, has noted:

Once a greater degree of security has been attained, the firm apparently begins to exploit the concessions it has received by setting up a number of associates and affiliates which engage in such varying activities as air transport, road building, and import and export, thereby acquiring a significant, if not hegemonic, presence in the economic life of the country in which it is operating.3

Again, this is not to say perverse incentives are unique to a military-contracting context. But because flying surveillance missions, destroying coca-fields, and providing security details abroad are not linear tasks that lend themselves to precise contractual regimentation and oversight, the agreements between the government and the firms must necessarily be somewhat open-ended;3 recognizing the uncertainties of dangerous assignments and crediting the service providers with the ability to adapt and change course when exigencies require doing so leaves the government vulnerable to more than economic abuses of the contractual relationship. (Among such non-economic concerns would be (1) the erosion of confidence among regular, U.S. soldiers, who do not trust the motives or reliability of self-interested contractors,352 and (2) extra violence, if it is profitable but otherwise unnecessary to be more violent.)

B. Debunking the Normative Iconography of the Citizen-Soldier

The introduction of private contractors—and their attempted integration into the American fighting forces—may also create a gap 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, up arms will be viewed even more widely as yet another commercial relationship, not totally unlike catering or maintaining public grounds.350

Historically, Americans have looked to the moral authority of their country's foreign policy and based it, on no small part, on the willingness of its citizens to put down their ploughshares and fight (and die) for a cause. To disaggregate that connection and commodify the role of a soldier as for-profit contractor may further separate the bounty of service has changed over time, American soldiers and veterans have almost always enjoyed a preeminence status in our society. In a country of equals, founded on the rejection of titles, inherited or even merited, military officers are, perhaps uniquely, addressed by their command ranks long after their tenure in the military ends—a testament to their esteem in the eyes of the State and its citizenry as well as to the value of those titles above all others. True patrons from generals like Washington350 to grunts like Truman350 have taken up arms when their country has needed their service. And, like the ancient Cincinnatus, they returned home to civilian life when the fighting was done.351 This restraint, this willingness (if not eagerness) to beat their swords back into ploughshares and resume the use of their hands after his victories in war... The greatest act of... Washington stunned the world when he surrendered his sword to the Congress on December 21, 1783... That is, at a time when that connection is already tenuous—due in part to the replacement of a universally conscripted military with one comprised of volunteers—further disassociation through the practice of contracting out may prove quite disruptive.

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

Many believe that military service is inextricably linked to citizenship, and vice versa.357 Accordingly, although this nation's conception of service has changed over time, American soldiers and veterans have almost always enjoyed a preeminence status in our society. In a country of equals, founded on the rejection of titles, inherited or even merited, U.S. military officers are, perhaps uniquely, addressed by their command ranks long after their tenure in the military ends—a testament to their esteem in the eyes of the State and its citizenry as well as to the value of those titles above all others. True patrons from generals like Washington to grunts like Truman have taken up arms when their country has needed their service. And, like the ancient Cincinnatus, they returned home to civilian life when the fighting was done. This restraint, this willingness (if not eagerness) to beat their swords back into ploughshares and resume the use of their hands after his victories in war... The greatest act of... Washington stunned the world when he surrendered his sword to the Congress on December 21, 1783... That is, at a time when that connection is already tenuous—due in part to the replacement of a universally conscripted military with one comprised of volunteers—further disassociation through the practice of contracting out may prove quite disruptive.

De Grazia, Political Equality and Military Participation, 7 ARMED FORCES & SOC'Y 181, 185 (1981) ("The possessor of equal political rights, . . . the citizen, was in origin a soldier. . . ."); Karst, supra note 206, at 568 (noting the special, privileged place the Armed Forces occupy in the United States).


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

359 As Gordon Wood notes: George Washington, of course, was the perfect Cincinnatus; the Roman patriot who returned to his farm after his victories in war. . . . The greatest act of [Washington's] life was the one that changed his home forever: his resignation as commander in chief of the American forces. . . . Washington stunned the world when he surrendered his sword to the Congress on December 21, 1783; and retired to his farm at Mount Vernon. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 544 (1975) (describing the American tradition of intimately connecting citizenship and military service).
especially if one is an able-bodied male who intentionally avoided military hierarchy in America that makes the Pentagon's refusal to permit gays into the military service has also been directly rewarded with the military's formal recognition as part of the war effort in World War I that helped solidify support for female voting during critical stages of the suffrage movement.

In the Founding years of the Republic, it was non-property holding veterans of the War of Independence who sought and were given the franchise—well before the Jacksonian Revolution ushered in an era of universal (white) manhood suffrage; it was black soldiers’ service in the Union armies during the war. No country with integrity could accept a person’s service in arms to save the nation and then repudiate that same individual by denying him the right to vote.

In the Vietnam War, it was women’s participation and sacrifices as part of the war effort that helped to secure female voting rights, but the battle for this right was not won without struggle. The Nacional Association for the Advancement of Colored People (NAACP), for example, has long been advocating for the extension of voting rights to women. In the 1960s and 1970s, the NAACP and other civil rights organizations worked tirelessly to secure the right to vote for all Americans, regardless of gender.

The relationship between obligations and rights of citizens is complex and has evolved over time. In the post-Vietnam era, when military service has lost some of its appeal and much of its status as an intuitive obligation of citizenship, but, throughout the longer history of this country (and perhaps increasingly again today), it is undeniable that the military—"he be a patriot-plant of the Eighteenth Century, a universal

364. See Richard Herrnstein, Anti-Intellectualism in American Life 194 (1993) (citing Theodore Roosevelt as saying the "good American" would possess the humble virtues of a soldier: "the little fighting qualities without which no nation ... can ever amount to anything").


366. KERBER, supra note 363 (describing how women’s lack of military experience disadvantages them in the workplace and more dramatically in their quests for elected office).

367. See, e.g., Singer, supra note 20, at 204. Singer notes: In the United States, the military is the most respected government institution in the American public’s judgment, consistently ranking among the highest esteemed professions. This stems from the perceived integrity and values of the soldiers within it and the spirit of selfless service embedded in their duty on behalf of the country.

368. See, e.g., Duguzgal, supra note 184, at 354 (quoting a Harris poll spokesperson reporting in 1993 that "no other major institution, profession, or interest group comes close to the military" in terms of public approval ratings).

369. See, e.g., KERR, supra note 375, at 518–20 (describing civil rights advancements linked to the Vietnam War as something unique to the Armed Forces); Steven V. Roberts & Bruce Auster, Colin Powell, Superman, U.S. News & World Rep., Sept. 20, 1993, at 48 ("A time when a growing number of Americans are disillusioned with government ... the military stands in singular contrast to that view of the country.")

370. See, e.g., Peter Karsten, The Naval Aristocracy: Some Reflections on Culture, Courts, and Feminism, 7 WOMEN’s Rts. L. REP. 175, 190 (1982) (noting how not giving women opportunities to participate in combat details deprivates them of taking part in some of the principal responsibilities of citizenship); see also Mike Kelber, Combat in the Erroneous Zone, Nation, July 25–Aug. 1, 1981, at 71 (discussing a NOW legal brief that detailed how women’s exclusion from the draft and combat duty "injures their self-perception, endangers the stereotypes of women as weak" and also noting how failing to serve in the military diminishes women’s social and economic standing in the United States).

371. See, e.g., Duguzgal, supra note 184, at 365–66 (noting that since Congress ended the draft, service is no longer considered to be a "near-universal obligation"); Mazur, supra note 307, at 406; Elliot A. Cohen, After the Battle: A Defense Primer for the Next Century, NEW REPUBLIC, Apr. 1991, at 19; see also Charles Moskos, From Citizens’ Army to Social Laboratory, Wilson Q., Winter 1991, at 83, 86–87 (laying that military service is no longer a rite of passage for "American politicians").


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

I do not want to oversate this point as "soldier-worship," especially in the post-Vietnam climate, when military service has lost some of its appeal and much of its status as an intuitive obligation of citizenship. But, throughout the longer history of this country (and perhaps increasingly again today), it is undeniable that the military—"he be a patriot-plant of the Eighteenth Century, a universal...
families have often been more comprehensive and popularly supported than those designed to aid the country’s poor and infirm.379

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

379. During World War II, Congress passed the G.I. Bill and rewarded veterans with pensions, housing and education subsidies, as well as health-care benefits. See, e.g., Servicemen’s Readjustment Act of 1944, Pub. L. No. 80-338, 58 Stat. 284 (1944) (providing education stipends, favorable loans for home and business purchases, and generous unemployment benefits). And prior to that, Civil War veterans were offered an “entire edifice of honorable income supplements and institutional provision[s].” SKOOLPOLL supra note 371, at 7. Indeed, even the National School Lunch Program—and improving the nutrition of low-income families more generally—was championed by General Halsey, who was the director of the Selective Service during World War II. It is helpful to see Susan Lyon Roberts, Note, School Food: Does the Future Call for New Food Policy or Can the Old Still Hold True? 7 DRAKE J. AGRIC. L. 587, 593–94 (2002) (noting that America’s war efforts were severely hampered by high rates of malnutrition among entering conscripts). See also Stephen Burt, Advocates for Activated Guards, Reserve Troops Renewing Calls for Pay Relief, WASH. POST, Nov. 11, 2004, at B2; Barbara Ehrenreich, Bush’s Old War: Longevity, PROGRESSIVE, Apr. 2004, at 24 (noting that many soldiers require food stamp supplements to make ends meet and indicating that President Bush had suggested the possibility that he would propose cutting soldiers’ combat pay). Ian Williams, Bush’s War Against the Military, In THESE TIMES, Nov. 15, 2004, at 22 (noting the Administration’s recent attacks on disability benefits and pensions for veterans).


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

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

382. See Adams, supra note 323 (a military force that is drawn from the people of a given nation and dedicated only to the defense of that nation is seen as an expression of the consent of the governed. They legitimate their government by their desire to defend it.); Kent, supra note 236, at 599. “Our public culture repeatedly confirms our attachment to its democratic, fulfilling ideal [of the U.S. military]. Consider the typical war movie, in which the soldiers’ faces tactfully represent our ethnic diversity, and the roll call reminds us explicitly that our many cultures add up to one nation: Abrams, Anderson, Antellia, Censhaw, Dekeminter, Garcia, Gismat, Matisa, Muner, Waram.”; Paul, supra note 386; Tower, supra note 369; World News Tonight with Peter Jennings (ABC NEWS television broadcast, Apr. 30, 2004) (quoting a spokesperson for the Veterans of Foreign Wars as saying that “[w]e try to remember those faces [of the killed soldiers], know their names...” America should get on board on the job.); John Isaac on the Reece South Gate; The New York Times, Oct. 2, 2004, at 19.

383. See Rocky, supra note 6, at 922–23 (emphasizing the alliance of symbols and rituals within citizen-military culture); Clark, supra note 45 (emphasizing the moral symbols of America’s all-volunteer army as “citizens first, soldiers second”); Michael J. Sandel, What Money Can’t Buy: The Moral Limits of Markets, in THE TANNER LECTURES ON HUMAN VALUES 89, 122–144 (1998), available at https://w.w.w.tannerlectures.uchicago.edu/tanner/sandel/tanner09.pdf (visited June 27, 2004) (contending that there are great civic virtues in citizen armies that cannot be replicated when armies become for-hire institutions).

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

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

386. Whether it actually does so or not, privatization appears to weaken this connection between soldier and citizen—a connection that might, as suggested above, already be tenuous in a military era characterized by an all-volunteer fighting force, which includes many who enlist, at least in part, for financial reasons. Simply stated, the outbreak of war constitutes an economic windfall for contractors. With this profit-motive comes a perversion: As Colonel Thomas Dempsey has put it, when an American soldier kills, it is “because [his] president told [him] to.” If a contractor shoots someone, it’s for another reason: “to get paid.”

387. This distinction, though perhaps overstated here, may not be lost on the American people, especially given the tenor of the news coming out of Iraq in 2004. During the same week that Pat Tillman, a former NFL standout died in Afghanistan, news broke of the central role private contractors play in the war effort.
had in abusing Iraqi prisoners. The contrast between an All-American gridiron hero who gave up millions of dollars and his prime years as a professional athlete to enlist in the Army and an unscrupulous contractor brutalizing Iraqi detainees could not be starker.

The damage here could run beyond morale concerns just on the frontlines; Americans’ pride in their “boys and girls” may be dampened not just by the dismay felt at the appalling acts of brutality perpetrated under the American flag (by soldiers and contractors alike), but also by what they may view as the commodification of war, killing for money.890

In large part, the laurels bestowed on soldiers are premised on their endangering their lives to promote an ideal, preserve justice, or introduce freedom.93 Even knowing that, for many, their service is economically driven, i.e., performed with an eye toward learning trade skills or seeking the military’s help to pay for further education, we still consider today’s soldiers to be citizen-patriots. But we do not as readily reconcile economic self-interest and public service when it comes to contractors.94 If soldiers serve as liberators while incurring great personal sacrifices, then they are heroic; if they instead do so for profit, then they may tarnish the entire enterprise.95 Moreover, if the country’s pride and respect for its military...
breed resentment and a weakening of ties, a response not altogether lost on American leaders. Congressman Tom Lantos and Henry Hyde had this precise concern in mind when they questioned the wisdom of contracting out President Karzai’s security detail. In a joint statement, they noted: “[T]he presence of commercial vendors [protecting Karzai] would send a message to the Afghan people and to President Karzai’s adversaries that we are not serious enough about our commitment to Afghanistan to dispatch U.S. personnel.”

Other allies too may be dissatisfied by the conduct of military engagements by private troops. No doubt the Bosnians would have preferred to receive the help of DynCorp contractors, without their extracurricular involvement in sex-trafficking operations. Moreover, perhaps pro-American leaders in the Middle East similarly feel betrayed, today, by the conduct of American privatizers toward Iraqi prisoners. Leaders who endorse American foreign policy aims, often at great domestic peril,399 are then placed in an even more difficult situation at home when forced to defend their support in the face of American acts of brutality.402 Of course, transgressions by American soldiers certainly do occur. But, at least those acts can be reported up the chain of command and, in turn, can be swiftly punished, thus demonstrating the U.S. government’s commitment to justice and self-restraint;403 as we have discussed, comparable firmness with contractors is much more difficult to achieve.404

2. Would-Be Allies

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

And, finally, America acts not just as an intervener or liberator, but also as an occupier. While on the ground, in Kabul or Baghdad, the U.S. personnel must work to win the hearts and minds of the locals.406 If American contractors were to act in an undignified, or offensive manner, it would only hamper the process of gaining the trust of the people. (Again, this assumes that because of the UCMJ and because of the military’s ethos of honor, soldiers are less likely to act inappropriately.)

3. Adversaries

And, among those who already consider America a corrupting force in the world, the privatization of military might, especially in efforts to circumvent U.N. agreements and arms embargoes, only further fan the flames of international dissent and discontent.409 The manical bombers of September 11 undertook diabolical deeds purportedly in the name of the United States,408 the presence of commercial vendors [protecting Karzai] would send a message to the Afghan people and to President Karzai’s adversaries that we are not serious enough about our commitment to Afghanistan to dispatch U.S. personnel.400

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

The U.N. Security Council is widely viewed as the principal venue for deliberating on matters of collective security. Though hamstrung by internecine fighting among the permanent members during most of the Cold War, the Security Council emerged as an authoritative and relatively effective body in the early 1990s, serving as the centerpiece of the post-Cold War era.

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

1993, 1125 U.N.T.S. 3. A.P.V. ROGERS, LAW ON THE BATTLEFIELD (1996) describing ways in which national armies are instructed and expected to preserve human life and refrain from excessively destructive practices while waging war.


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

42. Ivo L. Claudel, Jr., The Gulf War and Prospects for World Order by Collective Security, in THE PERSIAN GULF CRISIS: POWER IN THE POST COLD WAR WORLD 23 (Robert F. Helms II & Robert J. Dorff eds., 1991); "[T]he end of the Cold War, creating the expectation of a United Nations Security Council no longer paralyzed by conflict between the superpowers, has inspired the suggestion that the Council can now become what it was presumably intended to be, an agency for the collective enforcement of the ban on aggression.")

43. See, e.g., LAWRENCE FREEDMAN & ERIK KARSH, THE GULF CONFLICT, 1990-91: DECENCY AND WAR IN THE NEW WORLD ORDER (1997); Transcript of President's State of the Union Message to Nation, WASH. Q. Jan. 30, 1991, at A12 ("[T]he end of the Cold War is making it clear that the world has a strong new system to work with an array of issues of vital concern."); (in) America, when the world is complex and dangerous.

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


46. The United States can abide by the Security Council's decisions, but not entirely. Facing opposition on a proposal to intervene in Kosovo in 1999 and again, in 2002-03, on a decision to invade Iraq, the United States has forsaken the imprimatur of the Security Council and sought legitimation elsewhere. For Kosovo

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45. Todd Gitlin, America's Age of Empire: The Bush Doctrine, MOTHER JONES, Jan. 1, 2003, at 34; G. John Ikenberry, America's Imperial Ambition, FOREIGN AFF., Sept./Oct. 2002, at 44; John J. Ikenberry, Two Steps Backward: Unilateralism Revisited, AM. PROGRESS, Aug. 12, 2002, at 84; Pared Zarkas, The Trouble with Being the World's Only Superpower, NEW YORKER, Oct. 14, 2002, at 72; America secured NATO's approval, and for Iraq, the United States cobbled together a band of allies, euphemistically called the "Coalition of the Willing." In the process of circumventing the United Nations, however, the United States has damaged the Security Council's authority and called into question the credibility of collective security writ large.

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

For instance, the United States or another member proposes a resolution in support of intervening in a small country, perhaps besieged by a humanitarian crisis or laboring under civil war. Such a resolution fails. The United States can abide by the decision not to intervene formally, yet can still make available to the country in question a private American outfit to carry out the objectives that the Council rejected.

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

But the problem with contracting to avoid a Security Council veto is bigger than the mere issue of avoiding responsibility in any particular engagement. What is worse is that the nation would be turning its back on the legitimate collective security apparatus it helped found and promote, and would not even be doing so in a transparent way, i.e., calling for reforms to the Council's procedures and operations or publicly shaming obstinate members. It would be more honest and responsible for the United States, if it were dissatisfied with some aspect of the Security Council, to seek direct reform. Such reform efforts would demonstrate
the United States’s faith in the system of collective security and international law. But, to continue to operate outside its bounds, either via makeshift coalitions or private operations, while still purporting to respect the institution is to make a mockery of the Security Council and, moreover, to jeopardize the integrity of America’s foreign policy. 425

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

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

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

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

Private military firms help prop up rogue regimes, resist struggles for self-determination, and contribute to the proliferation and diffusion of weaponry and soldiers around the world—axiomatically a destabilizing and thus undesirable phenomenon. 433 The existence of armaments held by stateless groups complicates the task for responsible countries who (for purposes of self-defense and collective security) keep track of and seek to contain the spread of weapons. The availability and acceptability of contractors makes it more difficult for countries to assess the relative strengths of rival nations, since one phone call to a group of out-of-work Ukrainian fighter pilots could radically alter a region’s balance of power. 434 Of course, the existence of one such outfit also spawns greater demand—as every government would like the security of a few Ukrainian fighter pilots on retainer. 435 Moreover, to the extent that privateers, especially those operating in Africa, may frequently be foreign nationals, the political and human costs of war may be quite low. 436

All of these factors point toward dangerous forms of military proliferation and thus threaten peace and stability. By all accounts, this global trend should be one the United States vociferously condemns. But can it do so credibly with thousands of its own privateers under contract? Even if the United States were to draw distinctions and make exceptions for its “professional” contractors, it probably still would be unable to lead a campaign against privateers. Therefore, privatization by the United States helps set a bad, enduring precedent and lends the global practice an unwarranted veneer of legitimacy. 437

VI. CONCLUSION

Given my analysis in the preceding parts, I might be tempted to conclude with the utmost of economy—and use only three letters: Q.E.D. However, despite the litany of structural (not to mention accountability-based) harms that private contractors introduce onto the national security landscape, it is doubtful that this new phenomenon—however much decrèd—will quickly fade away. Indeed, the combination of America’s extensive overseas military commitments, its already taxed store of reservists, and its inability to stomach a universal draft will probably ensure the continued need for an elastic supply of private troops for the foreseeable future. 438 Hence, although this inquiry would rather conclude by way of proscription than prescription, realism preaches the latter approach might prove more prudent.

Appreciating the staying power of military privatization, critics and apologists alike have started to propose reforms centered on greater...
imperiled by the threat of a presidential veto and, perhaps, even a constitutional challenge (at least with respect to congressional insistence on its power to authorize contractor-led military engagements). 441

2. Disciplining Contractors As Soldiers

The next step would be for Congress to reduce the status disparities between U.S. troops and private contractors in the context of military discipline and control. Currently, these disparities generate reliability and dependability gaps: the government cannot impose the requisite discipline and penalties on privateers to ensure that they do not deviate from, undermine, or otherwise jeopardize a military mission through acts of insubordination and desertion. Such conduct disparities also spawn broader, structural concerns for the effective control and subordination of the U.S. military to the civilian federal government. As discussed at length in Part IV, whereas the UCMJ creates for U.S. troops an entire framework of discipline, under pains of severe punishment, there are no comparable disincentives that exist in the realm of contract law. The threat of a civil breach, even if its consequences ever run to the breaching privateer (and not just to the firm), cannot compare to the threat of being thrown in the brig. 442

Congress, of course, can extend the jurisdictional reach of the codes of American criminal law to contractors overseas—and has already done so with the Military Extraterritorial Jurisdiction Act of 2000. 443 But for a variety of constitutional reasons, it may have more difficulty extending some of the unique rights-infringing provisions of the UCMJ to private contractors, or to any other civilians for that matter (at least in the absence of a concomitant congressional declaration of war). 444 I have in mind here for purposes of exploiting legal gaps to circumvent collective security agreements would also be reduced.

441. For strategic and political reasons, however, Congress would be unlikely to undo extant presidential deployments. See, e.g., Ely, supra note 193, at 53-55; Louis Fisher, Congressional Abdication: War and Spending Powers, 43 ST. LOUIS U. L.J. 901, 1006 (1999); John O. McGinnis, Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers (Treanor, supra note 168, at 704). At best, and explaining away any constitutional challenges for the moment, Congress would probably have to wait for a conflict to arise and then legislate in its wake. See, e.g., Spino, supra note 193, at 726 noting that Congress can rarely criticize and legislate to limit the president during the course of military engagement, only afterward; see also Koh, supra note 186. 442. See supra notes 309-18 and accompanying text.

443. See supra note 189 and accompanying text.

444. See Reid v. Givant, 554 U.S. 335 (2008) ("[A] statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."). See also Gishin v.
those behaviors or practices such as insubordination, criticism of military policy, and desertion that are not criminal acts (and arguably could not, constitutionally speaking, be criminalized) if applied to civilians, but which the Supreme Court has allowed Congress, in essence, to criminalize as component active members of the Armed Forces precisely because of the military's special, subordinated positioning in the architecture of American governance.

To narrow this gap, therefore, would probably require more dramatic measures than could be achieved through ordinary legislation. Perhaps, a constitutional amendment limiting the rights of overseas military contractors, an explicit step to "deputize" contractors and incorporate them into the larger fold of the American military community, or a congressional declaration of war, which definitely extends military law to contractors working overseas with members of the Armed Forces, would be required to achieve effective control on par with what currently disciplines U.S. military personnel.

3. Cultural Conflation: Publicization of Contractors

The final step, then, would be to smooth out the symbolic differences between public and private troops. This would require (1) instilling in contractors a sense of their public charge (what Professor Jody Freeman has called "publicization") and (2) converting to the American people the sense that soldiers and contractors, symbolically speaking, are one and the same. Accomplishing these twin aims might increase morale among public troops worried that their private compatriots will not perform ably and reduce the status disparities that currently allow the president to overcommit forces for a given engagement, respectively.

In some ways, of the three sets of reforms, this is the most difficult task, because it is quite difficult for policymakers to legislate a change in perceptions (either among the contractors or among the American public more generally). It would be pointless, or at least inefficacious, to regulate how people go about valuing one life compared to another when any such exercise is inherently subjective and, likely, also idiosyncratic. But, on the other hand, perhaps the "publicization" follows closely—and somewhat effortlessly—on the heels of the foregoing tangible reforms. Perhaps with the incorporation of private soldiers into the regulatory framework already established for the Armed Forces, with the combining and conflating of soldier and contractor casualty counts, with comparable requirements of oversight and formal authorization, and, moreover, with some measures taken to discipline contractors like soldiers, contractors could feel more closely aligned with the American military and embrace its esprit; and the public, in turn, might begin to view contractors as more closely integrated into the American military community. Indeed, it may be the case that the symbolic differences are largely a function of status differences, and to the extent privateers are limited in their ability to act (comparatively speaking) ultra vires, they may not see themselves—or be perceived—as all that distinct from members of the Armed Forces.

Of course, some residual disparities of no small import will remain. For example, the social and emotional bonds forged while training and serving in military units, emphasized above as instrumental in fostering selflessness, valor, and an esprit de corps, cannot be transmitted to privateers just because they would now be governed by the same disciplinary standards and counted as soldiers for purposes of calculating force projections and body counts. Nor can the public be immediately persuaded that contractors and soldiers are one and the same just because they are similarly regulated. Ultimately, therefore, additional affirmative steps to integrate the two distinct cultures, such as by having privateers eat, train, and live with soldiers, by minimizing salary differentials, and by circumscribing opportunities for privateers to serve foreign clients (terry minimizing reasons for the public to perceive them as mercenaries) would be necessary to reduce further the symbolic differences in a more meaningful way.

B. Coming Full Circle: Arriving at a Place Where Issues of Accountability and Efficiency Are (Again) Paramount

Assuming arguendo that the difficulties associated with devising and implementing the reform measures are overcome—and a comprehensive set of prescriptions do help eliminate many of the structural distortions that currently correspond with military privatization initiatives—there is an additional concern: Would closing these structural gaps destroy military privatization's raison d'etre? In other words, does military outsourcing exist principally to leverage status differentials?

Closing the status gaps would indeed add to the "publicization" of private contractors. As mentioned above, if regulated and disciplined like U.S. troops and if the American people start thinking of them as comparable to U.S. troops, contractors may not be used as readily (or successfully) to exploit legal and symbolic asymmetries. This means, however, that policymakers could not rely on them to accomplish military objectives otherwise difficult to obtain, if not unobtainable, using U.S. soldiers. Yet room would still exist for private actors on the national security landscape: The economic-efficiency virtues of privatization would largely remain unaffected by the structural sets of policy reforms. Indeed, it is possible that contractors from the private sector could still offer the Pentagon high-quality services and lower prices. They could also provide the Defense Department with force-multiplying and specialization capabilities if additional troops are needed.

Arriving at that point, where the principal reasons for privatization center on economic efficiency gains, would, actually, permit scholarly analysis to come full circle as well. Once military privatization is stripped of its potential to be structurally damaging, it could then be scrutinized principally on accountability and efficiency grounds. That is, once the legal, constitutional, and symbolic concerns are allayed, we can be in a position to evaluate the true economic virtues of privatization (and the "inherently governmental" tradeoff), an inquiry I expressly bracketed for

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445. See supra note 44, but also some substantive ones. To criminalize the breach of contract per se would pose an interesting challenge to the long-held anti-poisoning jurisprudence of the Thirteenth Amendment. See, e.g., United States v. Reynolds, 233 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Holcomes v. United States, 236 U.S. 1, 20 (1916); Perlak, supra note 390, at 114-15; Schlender, supra note 313 ("Because the UCMJ does not apply to contractor employees (except potentially in a declared war), and because the [Military Extraterritorial Jurisdiction] Act addresses only civilian criminal statutes, there appears to be no relationship that could result in 'discipline' over a contractor. Clearly, the options that the government has to ensure proper performance by contractors do not include any actual ability to punish individual contractor employees.") (emphasis added).

446. See, e.g., Grisham, 361 U.S. at 278; McElroy, 361 U.S. at 281; Averette, 19 C.M.A. at 363; Perlak, supra note 390, at 114. Note that in many situations it would simply be imprudent to declare war, and certainly not worth the status-revealing advantages.

447. Freeman, supra note 3.

448. See id.

449. See supra notes 332–38 and accompanying text.
the purposes of this Article. It is then—and perhaps only then—that conventional discussions centering on costs and benefits, transparency, and accountability (all of which are very important) should resume in earnest.
Additional sources for Panel III – Accountability of Contractors on the Battlefield

Acts, Laws, and Regulations:
- http://www.law.cornell.edu/uscode/html/uscode10/uscode10_sec_00000802----000-.html#a
- http://thomas.loc.gov/cgi-bin/query/F?c109:20:./temp/~c109RlLBFT:e29920:

Books:

Articles:
DETERMINING ACCOUNTABILITY AND LIABILITY

Allan Gerson

United States courts are being increasingly called upon to deal with justice for victims of terrorism and genocide: holding the perpetrators and their abettors accountable and assessing the proper measure of damages. In dealing with damages—

unbearable pain and suffering, scars that will not heal, and hearts forever torn asunder—one person’s pain must be measured against another’s. This is no easy task, yet one that lawyers and judges are regularly called upon to perform. In this calculus, genocide emerges as the most horrific. Terror’s victims can still cling to community and a belief that government hears their cries. In genocide, the assault on the person is compounded by the destruction of community. Recently, charges of terrorism and genocide have coalesced. This presents unique issues of accountability and damages, especially where foreign governments and officials are implicated.

my exposure to this emerging field began in 1979. I had joined the newly established U.S. Department of Justice Office of Special Investigations (OSI). Its task was to find and then strip alleged Nazi collaborators of their U.S. citizenship (“denaturalization”). On the grounds that they had entered the United States illegally through misrepresentation of their true identities and wartime record, the alleged collaborators (mainly from East European countries) would then be subjected to deportation—usually to the USSR, a short trial, and often a firing squad. I was one of the trial attorneys handling OSI’s first major case, United States v. Ostlach. The defendant, police chief of Rawa Ruska (a town in the Ukraine adjoining my childhood home), was joined the newly established U.S. Department of Justice Office of Special Investigations (OSI). Its task was to find and then strip alleged Nazi collaborators of their U.S. citizenship (“denaturalization”). On the grounds that they had entered the United States illegally through misrepresentation of their true identities and wartime record, the alleged collaborators (mainly from East European countries) would then be subjected to deportation—usually to the USSR, a short trial, and often a firing squad. I was one of the trial attorneys handling OSI’s first major case, United States v. Ostlach. The defendant, police chief of Rawa Ruska (a town in the Ukraine adjoining my childhood home), was

Like other cases at OSI, Ostlach dramatized the role facilitators played in perpetration of the Holocaust. Individuals of every stripe and color—police chiefs, clergymen, petty politicians, and senior government officials—lent themselves to the Final Solution. Afterwards, each seemed to have his own rationale to support their exoneration. Most popular was the refrain that the Jews were doomed anyway. By this logic, whatever assistance they provided was deemed insignificant. Osiadcz, for example, cited the promise of self-determination and freedom for his beloved Ukraine from the Soviet yoke of oppression as reason enough to cooperate with the Nazis. As from 1942 to 1943 the fate of Europe’s Jews seemed sealed, Osiadcz claimed he was but an inconsequential cog in their destruction. The U.S. District Court viewed matters differently, and stripped Osiadcz of his U.S. citizenship. He died before deportation could be effectuated.

Two decades later, upon entering private practice (after stints as Counsel to the U.S. Delegation to the United Nations and as Deputy Assistant U.S. Attorney General) I again faced arguments similar to those Osiadcz raised. This time, the refrain came from those charged with helping to finance terrorism, claiming that what they did hardly mattered. Moreover, they claimed, in any event they were immune from liability, as their actions were undertaken in a “sovereign” capacity. Thus, in the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, killing all of the 259 passengers aboard and 11 people on the ground, Libya invoked sovereign immunity to shield it from accountability and liability.

A decade later, a three-judge tribunal of Scottish judges sitting in the Netherlands convicted Abdel Baset Ali al-Megrahi, a Libyan national, of having planted the sophisticated sixteen-ounce Semtex plastic explosive which took down the 200-ton jumbo jet. No one with knowledge of the region believed that Libya’s leader, Colonel Muammar
Qaddafi, could have been unaware of what al-Megrahi was plotting against the flagship airline of the United States. But foreign leaders, except for the hapless Manuel Noriega (captured by U.S. forces in Panama in 1992 after his fall from office), are not hauled into U.S. courts to answer for past crimes. As to Qaddafi, he had merely to “accept responsibility” without admitting culpability and all would be forgotten, if not forgiven.

In 2003, Libya entered into a £2.7 billion settlement ($10 million per family) accompanied with the proviso that it did not constitute an admission of culpability. The United Nations, and then the United States (for the most part), lifted economic sanctions. Trade relations were quickly resumed. Visiting heads of state made their way to Tripoli. Clearly, Colonel Qaddafi’s wrongdoing hardly served as an example to foreign governmental leaders that sovereign immunity will not shield them from responsibility for mass murder. Sadly, it was the Executive Branch of the United States that asked the federal courts to honor Libya’s sovereign immunity defense rather than face the prospect of reciprocal accountability.

8. Libya’s acceptance of responsibility consisted of a letter presented to the president of the United Nations Security Council, stating that Libya “has facilitated the bringing to justice of the two suspects charged with the bombing of Pan Am 103 and holds any accountability for the actions of its officials. See, e.g., Felicity Barringer, Libya Admits Culpability In Crash of Pan Am Plane, N.Y. TIMES, Aug. 16, 2003, at A1. Families of the victims often face an agonizing question about whether to settle or press for judicial vindication with all its attendant risks. This question must be resolved by each individual plaintiff. See generally THE PRICE OF TERROR, supra note 5, at 296-301.


15. Id. at vol. 14, 784, 863, 868. Rasche was found guilty of spoliation of Czech and Polish assets. Id. at 784. A deputy of the German Reichsbank, Emil Puhl, was also convicted of coordinating the deposit of gold, jewelry, and foreign currency taken from Nazi victims. Id. at 609-21. In Puhl’s case, the tribunal found that [what] was done was pursuant to a governmental policy, and the thefts were part of a program of extermination and were one of its objectives. It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he knowingly took part in disposing of the loot must be on the Reihe held not guilty as a participant in a crime against humanity.

Sudan. The complaint alleged Talisman had built airfields and roads intended for use by the Sudanese Government, which was at the time engaged in a genocidal war against the Muslim population of Southern Sudan. Talisman was also accused of transferring to the Sudanese government revenues obtained from oil rigs established through the displacement and 'ethnic cleansing' of the Southern Sudanese population. Talisman objected to the exercise of jurisdiction by United States courts over an allegedly non-U.S. matter. Talisman claimed that, in any event, it had no knowledge of the Sudanese government's 'ethnic cleansing' campaign, and that the 'ethnic cleansing' would have occurred regardless of what Talisman did.

The District Court, claiming jurisdiction under the Alien Tort Claims Act, dismissed Talisman's arguments. Citing (among other sources) the Nuremberg precedent, it ruled the plaintiffs had pleaded a 'putta facie' violation of the law of nations, as required by the Act. Moreover, the Court, applying Nuremberg precedent, ruled that actual knowledge of the genocidal activities did not have to be shown; constructive knowledge, which could be inferred from the circumstances, was deemed sufficient. The Talisman Energy ruling, in dismissing motions for summary judgment, thus cast a wide net for holding individuals and corporations liable for the facilitation of terrorism and genocide.

Talisman subsequently moved for reversal and summary judgment on the pleadings, citing the United States Supreme Court's recent ruling in Sosa v. Alvarez-Machain. The district court affirmed the earlier ruling, deeming "misguided" Talisman's argument that "corporate liability under international law is not sufficiently accepted in international law," as to the court reaffirmed that corporations can be held liable for gross human rights violations because claims brought under the Alien Tort Claims Act relates to genocide and crimes against humanity. The court's interpretation of the Supreme Court's holding in Alvarez-Machain (finding the United States government not liable for the violation of customary international law in the kidnapping and detention of Sosa, a Mexican wrongly assumed to be responsible for the death of an American DEA agent) was deemed a misreading of the Court's intent. Finally, citing the recent ruling in In re: Agent Orange Product Liability Litigation, the court held that corporate liability extends to secondary liability: aiding and abetting.

As we look toward the future, it becomes clear that the United States courts will have to increasingly grapple with the circumstances in which complicity in terrorism engenders civil liability. The horrors of Darfur and Islamic Jihad have come inside the courtroom. How judges rule in these cases will set a significant not merely because it constitutes a basis for finding corporate liability for violations of international law, but because the language ascribes to the corporations involved the necessary mens rea for the commission of war crimes and crimes against humanity."

That is as good a definition of complicity as I have heard. At stake is whether an ethos of accountability or political expediency will prevail in U.S. courts. Where economic and political interests come to the fore, the U.S. government's capacity to act effectively on behalf of victims of terrorism or genocide becomes severely circumscribed. To fill this vacuum, courts will need to rise to the challenge of meting out justice for the families of victims of the scourge of the twenty-first century: international terrorism, often with genocidal overtones.
Count Seven of the Little Complaint; and Count Five of the Coulter Complaint). The court expressly rejected the view that in order to state a claim under the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333 et seq., the plaintiffs must show that each individual attack can be directly connected to a specific transaction involving Arab Bank. Id. at *6 ("Defendant's argument that plaintiffs must allege that they were injured by reason of Arab Bank's conduct simply misstates the statutory requirement."). The proper standard, the court held, is "whether the Bank can be held liable, directly or secondarily, for its conduct in allegedly assisting the terrorists. . . ." Id. The court further held that an act may violate the ATA "without a showing that the funds were actually used to carry out the predicate act of terrorism," id. at *7, and that the ATA "does not limit the imposition of civil liability only to those who directly engage in terrorist acts." Id. at *8. The court then held specifically that both aiding and abetting liability and civil conspiracy liability are available under the ATA. Id. The court rejected the approach set out in Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994), and advocated by Arab Bank as the appropriate standard for laying out the scope of civil aiding and abetting liability. Id. at *8-9. The Court held that:

It is not necessary for the plaintiffs to allege that Arab Bank either planned, or intended, or even knew about the particular act which injured the plaintiff. . . . Administering the death and dismemberment benefit plan further supports not only the existence of an agreement but Arab Bank's knowing and intentional participation in the agreement's illegal goals. No more is required.

Id. at *9. The court deferred until a later date ruling directly on the Almag v. Arab Bank case involving Israeli citizens bringing claims under the ATA. Id. at *1 n.1.

In addition, the U.S. District Court for the Southern District of New York refused to grant the Talisman Energy defendants' motion for judgment on the pleadings on the basis of international comity, foreign policy, or political question grounds. Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 04-Civ.-0862, 205 WL 2082846 (S.D.N.Y. Aug. 30, 2005) (see discussion supra p. 84.). The court held that the Judicial Branch need not automatically defer to Executive Branch determinations or those of a foreign nation, that foreign policy objectives will be compromised by permitting victims' civil action suits predicated on terrorism or genocide; id. at *3. Instead, the court ruled that the victims' allegations of aiding and abetting genocide overrule, absent specific proof, mere claims of intangible impairments to diplomacy. Id. at *7.
There has been a dramatic evolution in anti-terrorism evolution since I brought the first successful case for the state sponsorship of terrorism against US citizens in 1996. I have seen this evolution occur literally before my own eyes beginning with my first case Flatow v. Islamic Republic of Iran and one of my more recent cases, Little v. Arab Bank. We have seen the field of anti-terrorism litigation grow from a handful of cases against states like Iran to a flood of cases against states and recently a diversification into cases against foundations and corporations charged with aiding and abetting acts of terrorism.

Today, U.S. victims of international terrorism have a robust, legal right against the terrorists that attack them, their state sponsors, and private individuals or organizations that knowingly support or facilitate terrorism. Despite inconsistent and conflicting signs of support or hostility from the Executive Branch and law enforcement and investigatory officials, the field of anti-terrorism litigation has stabilized and continues to evolve as our understanding of international terrorism increases.

If I were to characterize the evolution of anti-terrorism civil litigation with one phrase it would be: “Follow the money.”

Anti-terrorism civil litigation has always been about hitting those who bankroll terrorism. Terrorists from Abu Nidal to al-Zarqawi have all relied on someone else to provide their support. Some of these sponsors are states like Iran and some are small foundations with a “charitable organization” front. Prior to 2001, I don’t think many realized that terrorist organizations and charitable fronts were operating in the United States to raise money for activities against the US. I was intimately involved with the FBI investigation of Sami Al-Arian at the University of South Florida in the late 90s for raising money for Palestine Islamic Jihad, an organization that killed the daughter of Stephen Flatow, my first client that was a victim of terrorism.

These kinds of flows of money are now under attack by civil litigators in the US, as well as criminal investigators and law enforcement.

The continuing focus on terrorist money trails has led anti-terrorism litigators increasingly away from state sponsors toward the groups that act as fund raisers and the banks that participate. Also while acts of international terrorism continue to increase, acts of state sponsored terrorism against US citizens seem to be waning.

I say seem to be because today the vast majority of acts of terrorism against US citizens continue to occur in Iraq, and may yet turn out to be state sponsored. At present, indications are that there is an Iraqi insurgency, supported by Iran and Syria, as well as foreign fighters supported by extra-national groups. My latest lawsuit against a state-sponsor revolves around that issue, a lawsuit against Syria for its role in support of al-Zarqawi during his reign of terror in Iraq.

Financial institutions are a classic deep pocket and are inherently, though sometimes innocently, involved in every terrorist network. Every international terrorist operation and attack involves the international movement of funds and at some point this movement crosses through legitimate financial institutions. Civil litigators have recently become more willing to take on the banks that participate in the financing of terrorism.

BRIEF OVERVIEW OF ANTI TERRORISM LITIGATION

Prior to 1996, civil recourse for the victims of international terrorism effectively did not exist. While there were several laws on the books, attorneys were unwilling to represent U.S. citizens who had suffered death and personal injury as a result of international terrorism largely because of the minimal hope of recovery. The success of Flatow v. Islamic Republic of Iran, opened the transitory phase from inaction to the frenetic innovations that characterize today's litigation on behalf of the victims of terrorism. As channels of recovery have been uncovered after several groundbreaking cases, this hesitation to litigate has diminished.

While no one is saying that litigation would stop Iran or Libya from pursuing their foreign policy by any means necessary, but I am saying that these countries now know that their overseas assets are vulnerable to valid US judgment holders. These suits are also useful because they give the victims a voice in a transaction that otherwise chewed them up and spit them out.

In a moment I will explain how the war on terrorism fought by civil litigators has expanded from the state sponsors of terrorism to its individual supporters and facilitators. But first some background material on the early years of anti-terrorism litigation.

The war on international terrorism has become the nation's top priority. As Congress increases the number and reach of the laws designed to fight international terrorism, more individual actors find their activities potentially
under the scrutiny of the criminal law enforcement community. The expansion in criminal liability greatly factors in the future expansion of civil liability.

We are talking about the progression of civil litigation against state sponsors of terrorism to the recent focus upon individual sponsors and facilitators. As more actors find their activities regulated under the scrutiny of criminal statutes, they should be aware of the implications this has for their civil liability.

**Bitter Disappointment Leads to the Passage of 28 U.S.C. § 1605 (a)(7)**

There was a time when U.S. victims of terrorism had no explicit civil recourse for acts of international terrorism.

And so we saw decisions like *Tel-Oren v. Libyan Arab Republic*, a 1984 DC Circuit opinion, where victims of horrendous attacks learned that they had no suitable remedy despite identifiable defendants. On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization landed by boat in Israel and captured two buses, and a few carloads of hostages. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded.

In a per curiam opinion with three concurring written decisions, the court found that the trial court correctly dismissed the case for lack of subject matter jurisdiction. The court looked at both the Foreign Sovereign Immunities Act ("FSIA") and the Alien Tort Claims Act ("ATCA") and found no jurisdictional basis for the court to adjudicate these acts of international terrorism. The case was dismissed.

In 1992, Congress passed 18 U.S.C. § 2333, allowing a person "injured in his or her person, property, or business by reason of an act of international terrorism" to sue to recover damages. The key to understanding § 2333 is to know that "international terrorism" is defined by a separate statute, 18 U.S.C. § 2331, as "activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States." As we discuss later, this open-ended definition has led to an expanding class of potential defendants in civil proceedings.

Despite the presence of this statute, civil litigation didn't materialize because the attacks often occurred abroad, were carried out by individuals without identifiable assets, and supported by foreign states shielded by the impenetrable shroud of sovereign immunity. U.S. citizens cannot sue a foreign state in the United States unless the basis of the suit fits within several enumerated exceptions, listed in 28 U.S.C. § 1605, the FSIA, which was passed in 1976. Hence the result in *Tel-Oren*.

The FSIA begins with blanket immunity for foreign states and then strips it away in certain circumstances, codified in its exceptions to foreign sovereign immunity. For example, 28 U.S.C. § 1605 (a)(6), the "non-commercial tort" exception to the FSIA, allows lawsuits against foreign states or their officials based upon torts that occur in the United States.

As recently as 1995, plaintiffs' lawyers were not able to find an applicable exception to foreign sovereign immunity to allow a suit based upon an act of terrorism abroad. Thus, in 1995, the Eastern District of New York dismissed a lawsuit, *Smith v. Socialist People's Libyan Arab Jamahiriya*, against Libya based upon its complicity in the 1988 destruction of Pan Am 103 over Lockerbie, Scotland. This case followed on the footsteps of another case that remains noteworthy for the inhumanity of the crimes involved and the exasperation and despair that resulted when it was dismissed. In 1994, the District of Columbia Circuit dismissed *Princz v. Federal Republic of Germany*, a case that I brought against Germany and several German corporations, based upon their exploitation of captured U.S. passport holders for slave labor in concentrations camps. It was dismissed for principally the same reason as the Pan Am case—the case did not fit within an applicable exception to the FSIA.

However, the attorneys for the *Princz*, Pan Am 103 cases, and the Brothers to the Rescue case in Florida were able to extract a measure of victory from the jaws of defeat with some help from Congress. After their courtroom defeats, the attorneys successfully exerted a great deal of effort at cultivating an appropriate congressional response. Subsequently, in 1996, over strident State Dept. objections, Congress passed a new exception to the FSIA, 28 U.S.C. § 1605 (a)(7), for lawsuits "against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking." This exception denied sovereign immunity to any foreign state that sponsored a terrorist attack upon U.S. citizens, as long as the state had already been officially recognized as a state sponsor of terrorism by the U.S. Department of State.

As a footnote, *Princz* finally settled after vigorous protests by members of the U.S. government and after I named several large German corporations that profited from Mr. Princz' slave labor.

The passage of this new exception to the FSIA set the stage for some spectacular fireworks. The victims of terrorism were about to learn that their most frequent courtroom opponent would not be the government of Iran, but the U.S. Department of Justice acting on behalf of the Department of Treasury and the Department of State.
Civil Litigation Gets a Running Start After the Passage of 28 U.S.C. § 1605 (a)(7)

Civil litigators struck their first blows against international terrorism by documenting the links between foreign states and individual acts of terrorism carried out against U.S. citizens.

In 1995, the Shaqaqi faction of the Palestine Islamic Jihad detonated a bomb that vaporized an Israeli bus and killed twenty year old Alisa Flatow. Our efforts, together with co-counsel Thomas Fortune Fay, on behalf of Stephan Flatow, Alisa's father, paid off in Flatow v. Islamic Republic of Iran.\(^6\) For the first time, a court found a foreign state liable for its sponsorship of a terrorist group that killed a U.S. citizen and awarded damages of roughly $229 million. The Flatow case documented the links between the terrorist group that carried out the attack and Iran, which acted as a sponsor for the group through the provision of support and training.

There have since been numerous cases since Flatow that have documented the ties between Iran, Iraq, Syria, the Sudan, and Libya and individual acts of terrorism.

While the nature of civil litigation against international terrorism has changed since the Flatow case, the cases against the state sponsors of terrorism continue. We brought a case in the District Court for the District of Columbia against Iran for its complicity in the 1983 marine barracks bombing in Beirut, Lebanon that caused the death of over 240 servicemen, captioned Peterson v. the Islamic Republic of Iran.\(^7\) Judge Royce Lamberth authored a May 30, 2003 opinion that adjudged Iran liable based upon the mountain of evidence we unearthed that linked Iran to the 1983 attack. While the damages phase of the trial continues, we expect compensatory damages alone to rise over $2 billion.

A final word about litigation against state sponsors. Recent adverse precedent, in my opinion incorrectly decided for several reasons that I wont go into here for the sake of time, poor reasoning the description of which would take a few days much less 20 minutes, has hindered litigation against state sponsors of terrorism. A case called Cicippio Puleo recently came out in the DC Circuit and proclaimed that legislation that Congress passed in 1996 as a measure against state sponsored terrorism is not applicable against the state sponsors, only the bombers themselves, if you can understand that logic.

The bottom line is that there is currently legislation pending in Congress that would correct this decision and its passage is vital to victims of state sponsored terrorism. Senator Specter and Congressman Saxton have dropped companion bills into the House and Senate. If you are interested in helping the legislative push please contact me.

Getting a 28 U.S.C. § 1605 (a)(7) Judgment is Easier Than Collecting It or The Empire Strikes Back

Another reason that litigation against state sponsors is slowing a bit is that collection efforts have been hampered by the lack of accessible foreign state assets as well as the numerous court appearances by the State Dept., who never lose in proceedings like these.

Unsurprisingly, the foreign state defendants deny that U.S. courts have the ability to judge their sovereign acts, even when those sovereign acts include training and support of militia groups that murder and injure unarmed, innocent civilians.

The foreign state defendants either do not defend the lawsuits at all or melt away after mounting a myriad of unsuccessful procedural challenges. Iran does not make any appearances in any proceeding that deals with its liability for murder or personal injury under the FSIA, but Iran does vigorously defend its assets when we try to execute against them in an effort to satisfy the Flatow judgment and other outstanding judgments. This leaves plaintiffs with few options after obtaining a final judgment.

After the Flatow case, we began an arduous journey to collect Mr. Flatow's judgment against Iran. Our initial collection efforts focused upon Iranian property frozen within this country since the 1979 Iranian revolution. Our client was surprised and disappointed, as were all subsequent victims of Iranian terrorism who hold a final judgment, to find that our attachment efforts were strenuously resisted by the U.S. government. The reason given for this resistance has always been to preserve these frozen assets for use as bargaining tools by the Department of State with Iran. We vehemently disagree with any strategy that includes negotiation with terrorists.

Among the targeted frozen assets that were defended by attorneys from the Department of Justice were the former Iranian embassy, former Iranian embassy officials' residences, over $400 million in frozen funds in the Foreign Military Sales account,\(^8\) and over $1 billion in funds awaiting transfer to Iran to settle arbitration awards Iran has won against the United States in international tribunals. The legal defenses raised against the attachments on the diplomatic property was the resulting conflict with the obligations of the United States under the Vienna Convention on Diplomatic Relations, a treaty to which the United States is a signatory.\(^9\) The U.S. position is that permitting attachment of these properties would violate its treaty commitments. The defense raised against the attachments on Iranian funds sitting in U.S. accounts is sovereign immunity. According to prevailing case law, an attachment on money in a U.S. account destined for Iran is still an attachment on U.S. money, irrespective of its ultimate destination, and therefore fails against sovereign immunity.\(^10\)
In a series of decisions, the district court that originally granted the writs of attachment in Flatow dismissed them by granting the U.S. government's motions to dismiss.\textsuperscript{11} We took an appeal of each decision and were prepared to fight, but voluntarily dismissed the appeals as part of the deal brokered by Congress in 2000 that netted our clients partial compensation for their final judgments.\textsuperscript{12}

Another option for satisfaction of outstanding final judgments is hunting for foreign state investments across the United States. This is a difficult task also because countries such as Iran layer their investments in holding companies and shell corporations to escape detection of the numerous creditors that hold judgment against them. After Mr. Flatow received his final judgment in 1998, as part of our collection efforts we attached three Iranian assets throughout the country: an international arbitration award that Iran attempted to enforce against a U.S. company in California\textsuperscript{13}; the proceeds from a land sale owned by a subsidiary of an Iranian national bank called Bank Saderat Iran\textsuperscript{14}; and three pieces of property owned by the Alavi Foundation, a U.S. nonprofit corporation ostensibly operating as a Muslim charitable foundation for the needy.\textsuperscript{15} The Alavi Foundation may sound familiar to some. As recently reported by the Washington Post, "David Cohen, the New York City Police Department's intelligence chief, said in a recent court document that the Alavi Foundation is 'totally controlled by the government of Iran' and 'funds a variety of anti-American causes,' ... [t]hese organizations, said Cohen, a 35-year veteran of the CIA, have affiliates that support Hezbollah and the Islamic Resistance Movement, or Hamas, two groups the U.S. government has deemed terrorist."\textsuperscript{16}

Unfortunately, these initially promising efforts at judgment collection ended in frustration for Mr. Flatow. An international law doctrine called the Bancec doctrine served to block our attachment efforts in the Bank Saderat Iran case, which involved the land sale proceeds, and the Alavi Foundation case. The Bancec doctrine respects decisions of foreign nations to establish government agencies separately from the state and protects separately established entities from judgments creditors of the state.\textsuperscript{17}

The Bank Saderat Iran case exemplifies one of the difficulties inherent in this collection strategy. Bank Saderat Iran is wholly owned by the state of Iran, as are all banks in Iran, due to the nationalization of banks in 1979 after the revolution. We registered the Flatow judgment and obtained a writ of execution in the district where Bank Saderat Iran was attempting to collect the proceeds of a land sale by its subsidiary. The Southern District of California and the Ninth Circuit agreed that the Bancec doctrine prevented execution against an entity established separate from the state by the state, unless the plaintiff can show the state exercises extensive or "day to day" control over the formally separate entity. Thus, judgment creditors who proved in open court that Iran murdered their family members cannot attach the assets of a nationalized Iranian bank because the law sees it as an entity separate from the Iranian state. Our litigation to attach the international arbitration award in the Ninth Circuit ended.\textsuperscript{18}

Another option in our quest to satisfy the outstanding judgments in cases such as these has been to call on Congress to free up any available frozen assets of the foreign state defendant. On October 28, 2000, the Congress of the United States enacted the Victims of Trafficking and Violence Protection Act.\textsuperscript{19} This legislation was the culmination of extensive negotiations between the Clinton administration and the victims’ families, brokered by several members of Congress. The Victims Protection Act mandated that the Department of Treasury pay a specified portion of Mr. Flatow's judgment, subrogated against frozen Iranian assets, in consideration for his relinquishment of his right to attach against certain categories of Iranian property within the United States. The legislation gave Mr. Flatow, and all other claimants covered by the statute, a choice between two options in a bifurcated payment scheme. Mr. Flatow could choose one of two options:

This law allowed victims who had final judgments against Iran to effectively sell their judgments to the United States.\textsuperscript{20} The United States in turn has the right to enforce these judgments against Iran as relations become normalized between the two countries. The payments to the victims were drawn against the balance left over from 1979 in the Foreign Military Sales ("FMS") account. Today, the Iranian FMS account has been effectively depleted and cannot act to compensate victims any longer.

In 2001, Congress passed the Terrorism Risk Insurance Act in an attempt to clarify the ability of the victims of terrorism to seize frozen assets in the United States.\textsuperscript{21} The act provides "... in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism ... the blocked assets of that terrorist party [including the blocked assets of any agency or instrumentality of that terrorist party] shall be subject to execution or attachment...." Prior to the Act's passage, based upon the Department of Justice's resistance to the Flatow judgment satisfaction efforts, it was unclear to the victims of terrorism what their rights were to the frozen assets of the terrorists who injured them. Victims of Iraqi terrorism used this law in the months preceding the second Gulf War to successfully attach millions in frozen Iraqi funds.
NEEDED LEGISLATIVE REFORM

So we can see that while some success has been achieved with lawsuits brought under the FSIA, recurrent problems have manifested that threaten to derail these suits and nullify any possible deterrent effect. Over the past couple years, a small group of law firms and lobbyists have banded together to attempt to push a package of legislative remedies as a band aid for these lawsuits.

For example, the Bancec problem as we discussed before creates obstacles for victims of terrorism who have been able to win their cases in federal courts. The Bancec doctrine would protect Iran’s assets, or the assets of any other state sponsor of terrorism, from judgment creditors if the assets were properly invested through separately established entities. A foreign state that sponsors terrorism, such as Iran, can easily invest in the United States, as long as it sufficiently layers its investments in separately established entities. It is nearly impossible to meet the day-to-day control test necessary to pierce the presumption of the Bancec doctrine. Thus, we need to clarify the doctrine to lower the burden of proof. Altering the Bancec test will make investments of state sponsors of terrorism appropriately vulnerable to those victims that obtain valid judgments in US court. The day-to-day test is a reasonable limitation when applied in normal commercial litigation. However, where the intent of Congress is to deter terrorism and the limitations of the Bancec doctrine hamper the accomplishment of Congress’s goal.

The legislation would change the legal standard of the Bancec doctrine from day to day-managerial control to one of beneficial ownership, only as it applies to states sponsors of terrorism for their terrorist acts against U.S. citizens. The families of victims of terrorism would be able to attach the hidden assets of terrorist states held within the United States.

The legislation is currently in front of the House of US representatives as HR 865 and in front of the Senate as S 1257.

The pursuit of the assets of state-sponsors of terrorism in foreign jurisdictions is but one predictable result of this legislative impasse, which brings us all the way back to the Flatow case. We have been pursuing Iranian assets for over four years in Italy in an effort to resolve the outstanding judgment debt owed to my clients by Iran.

The attachment program consisted of two phases. First we applied to the proper Italian court that had jurisdiction over the question of domestication. Once the court officially recognized the judgment, we engaged in search for Iranian assets. Then we attached several Iranian assets. The first attachment created quite the political firestorm, something we have come to anticipate in these sorts of groundbreaking legal maneuvers.

Despite Italy’s official stance in the War on Terrorism, the Italian Foreign Ministry actively supported the Iranian position. The judge dismissed the attachment and the question is now before the Italian Supreme Court. While our case has not attracted political support in Italy, we are confident of our legal position and so in the meantime, we have attached several more Iranian assets. The battle continues…

THE NEXT WAVE: GOING AFTER NON-STATE SPONSORS

Emboldened by extraordinarily large damage awards, plaintiffs' attorneys are now investing more time and resources into the development of novel theories to tie increasing numbers of defendants to acts of international terrorists and to find ways to tap into available pools of assets.

Baim v. Quranic Literacy Institute, a case against a terrorist group and its financial sponsors, is symbolic of the evolutionary path leading from cases against the state sponsors of terrorism and the role played by the increasing number of anti-terrorism criminal statutes. In Baim, the Seventh Circuit ruled that a provider of even small amounts of funds or support to a terrorist organization could be held liable for a murder or injury if the provider was generally aware of the organization's activities and the murder was a reasonably foreseeable result of that support. The court supported its ruling with reference to criminal anti-terrorism laws. The evolutionary path for civil liability was partially determined by a preceding expansion in criminal liability.

In Baim, the family of 17 year old David Baim, who was shot to death at an Israeli bus stop, defeated a motion to dismiss filed by two of the defendants in the case. The defendants were not the shooters themselves or their state sponsors. The defendants were private non-profit Muslim organizations: the Quranic Literacy Institute ("QLI"), an Illinois corporation, and the Holy Land Foundation for the Relief and Development ("HLF"), a California corporation. The Boims alleged that these organizations, ostensibly devoted to charitable fund raising and humanitarian missions, were fronts for fundraising in America for missions of terror abroad. These organizations allegedly solicit contributions in the United States for terror abroad; their leaders arrange for the money to be laundered and wired overseas; and then Hamas terrorists in Gaza and the West Bank use the money for violent acts of terrorism. The Boims allege that these defendants raised the money to pay for the training and weapons for their son's murderers, and for a stipend for the shooter's family.

The Boims wielded the little used anti-terrorism statute, 18 U.S.C. § 2333, against these defendants; allowing "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of
international terrorism, or his or her estate, survivors, or heirs, may sue..." The defendants filed a motion to dismiss charging that the anti-terrorism statute only covered violent acts of terrorism by the perpetrators of the actual terrorist act. The Boims argued:

- § 2333 creates liability for injury resulting from international terrorism;
- international terrorism is defined in another statute, 18 U.S.C. § 2331, as activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States;"
- the defendants in this case have provided support to Hamas, a formally identified terrorist organization;
- thus, civil liability under § 2333 exists because the provision of support to terrorists "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States."

The Seventh Circuit also found that a violation of an anti-terrorism criminal statute could, per se, lead to § 2333 liability. The criminal statute, 18 U.S.C. § 2339A or 2339B, outlaws the provision of material support to terrorists and their organizations. The court agreed that proof of support or facilitation of terrorism, a criminal violation of § 2339A or § 2339B, would satisfy the definition of international terrorism in § 2331, as acts that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States." Funding terrorism involves a violent act — the eventual terrorist attack — and is per se a violation of § 2339A or § 2339B. The court noted that the Senate Report accompanying 18 U.S.C. § 2333 sought to interrupt or imperil the flow of money from sponsor to terrorist "at any point along the causal chain of terrorism."(emphasis added). The district court and then the court of appeals found that funding that meets the definition of "aiding and abetting" an act of terrorism does create liability under § 2333.

Why should anyone care about the Boim result, as long as they aren't raising funds for weapons and training for Hamas or Hezbollah? What the financial community might be curious about is the court's ruling that a violation of an anti-terrorism statute, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B in this case, satisfied the definition of international terrorism under 18 U.S.C. § 2333, perhaps opening the way for civil liability for an injury resulting from a violation of other anti-terrorism statutes.

Banks have long operated under the regulatory gaze of criminal anti-money laundering statutes, such as the Bank Secrecy Act of 1970 and the Money Laundering Control Act of 1986. The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("IMLA Act"), or Title III of the Patriot Act of 2001, extends new and old anti-money laundering laws to a broad range of financial institutions with new exacting requirements. This expansion of anti-money laundering prohibitions under the auspices of the Patriot Act reflects our increasing understanding of the role money laundering plays in international terrorism. Certainly the role overseas financing from terrorist sources played in the tragedy of September 11th highlighted the importance of scrutinizing anti-money laundering mechanisms with an eye to its role in international terrorism.

Those institutions that will feel the greatest burden in complying with Title III of the Patriot Act will not be banks whose internal compliance programs already had to meet pre-2001 anti-money laundering compliance standards, but the newly covered financial institutions such as credit card firms and the money service industry, which previously had not been forced to bear the burden of anti-money laundering compliance. The inexperience these institutions may have with the creation and maintenance of internal anti-money laundering standards will inevitably lead to breakdowns in compliance.

How Substantial is This Specter of Litigation for Banks and Other Financial Institutions?

On February 20, 2003, the FBI arrested University of South Florida Professor Sami Amin Al-Arian for allegedly serving as the conduit for funneling money from the United States to the Palestinian Islamic Jihad in the Middle East. We played a role in the FBI's investigation of the U.S. operations of the Palestinian Islamic Jihad, the group that murdered Alisa Flatow, by providing evidence to the FBI collected during our pre-trial investigation of the causes of Alisa's murder. The 121-page indictment of Al-Arian and his co-defendants is striking for many reasons, not the least of which is the length of time the terrorist cell engaged in sponsorship of Middle Eastern terrorism while based in Florida. The number of references to major U.S. banking institutions used by Al-Arian to transact the everyday banking that facilitated terrorism in the Middle East also catches one's attention. In the Boim case, the appellate court recognized that money laundering plays a critical role in the transmittal of funds from the United States to the Middle East. Inevitably, major financial institutions in America will play an inadvertent role in this process. The Al-Arian indictment illustrates one example of how a pipeline connects money in the United States to Middle East terrorism. This sort of pipeline may be replicated by dozens of other terrorist cells throughout the United States.

Almost as inevitable as the inadvertent role played by honest bankers and financial institutions, is an occurrence of a failure in compliance with anti-money laundering statutes at a financial institution. This seems particularly likely considering the great numbers of financial institutions that will be forced to adopt unfamiliar
internal compliance standards as a result of the wide-ranging extension of anti-money laundering regulations by the Patriot Act.

I originally posed the following hypothetical in a piece I wrote for the Journal of Bank and Lender Liability in June 2003.

What if it turns out that Sami Al-Arian transferred the funds that bought the bomb that killed Alisa Flatow through a U.S. financial institution that had a criminally inadequate anti-money laundering system? An interesting issue arises when there is a terrorist atrocity in combination with evidence of a violation of an anti-terrorist, anti-money laundering, criminal statute by a financial institution. The victims of the terrorism act would allege that their injury was a foreseeable result of the breach of the criminal statute by the financial institution. While the plaintiffs would have to overcome several obstacles, we can't think of any financial institution that would feel happy having to litigate against victims of terrorism.

This 2003 hypothetical has turned into a 2004 lawsuit. Last year my firm joined with several other law firms to bring dozens of claims against the Arab Bank of Jordan, located in New York City, headquartered in Amman, Jordan. The case is captioned Litle v. Arab Bank and was brought in the Eastern District of New York. Listen to the following from a Wall Street Journal article written by Glen Simpson on April 20, 2005.

NETANYA, Israel – Two blocks from the beach on a spring day here in March 2003, a 20-year-old Palestinian named Rami Ghanem walked up to the London Cafe and blew himself up, shattering the cafe’s 15-foot-high windows and seriously wounding more than 35 people.

A few weeks afterward, Mr. Ghanem's father received at least $14,000 from an account at Jordan's Arab Bank PLC -- money that was delivered thanks to a local Islamic charity, according to Israeli documents.

The lawsuit is based upon the transfer of millions of dollars from various fundraisers on Saudi Arabia and elsewhere to both charitable front groups for terrorist organizations and to families of Palestinian suicide bombers. The same Wall Street Journal identifies 20 million dollars worth of suspect transfers, to or from more than 45 suspected terrorists or terrorist groups. As most of you know, during the Second Intifada, or Palestinian uprising, any Palestinian who blew himself or herself up, or was imprisoned while trying, was eligible to receive a cash amount from Middle Eastern donors, usually from Saudi Arabia. The Arab Bank funneled a majority of these funds through its New York branch, where the funds were converted to US dollars, to the Bank’s Palestinian branches where family members could present martyr certificates and collect their martyr subsidy. Palestinians knew that their families would be paid $5300.00 dollars should they perform a suicide bombing. This funding scheme was nothing short of a solicitation for murder.

When I wrote the article for the journal in 2003 I never expected to find a bank that knowingly and willingly transferred funds in this manner. To update everyone on the litigation, we have defeated the Bank’s 12b motion to dismiss and are wading into discovery against the Bank so we can find further proof of its complicity in the Second Intifada. And two new lawsuits based upon the same fact pattern against two banks separate from the Arab Bank have been brought by a number of the Arab Bank plaintiffs. Strauss v. Credit Lyonnais and Weiss v. NatWest have both survived a motion to dismiss in the United States District Court for the Eastern District of New York. So the idea is spreading. If we can strike at banks that send monies to terrorist groups, we will do a lot to increase the transaction costs for the terrorists.

Perhaps the signal achievement of anti-terrorism litigation came this year as we heard Hamas complain about the Arab Bank’s refusal to hold PA government out of fear of consequential litigation. After Hamas became part of the Palestinian system of governance, several banks severed their ties to the PA or refused to hold PA money. A large part of the banks’ fears of litigation was derived as a result of the Arab bank litigation.

It’s a shame however that it took a lawsuit to convince banks they should not transfer money to terrorists.

Conclusion

Civil litigators are now playing a role in the war on international terrorism, partially shaped by the tools given to them by Congress and partially shaped by their own creativity and ambition. The evolution of civil liability has proceeded briskly, keeping pace with our changing understanding of the world of international terrorism and how it operates against our citizens. It is safe to say that the field of anti-terrorism civil litigation has innovated its way out of the quiet period that preceded 1996.
The main target these days has become the non-state groups that funnel money or support to terrorist although suits against state-sponsors continue. International financial institutions should especially be aware of the burgeoning field of litigation. International terrorism inherently and unknowingly involves financial institutions in the transfer of funds for a terrorist attack or in the money laundering that is critical to the criminal enterprise. The stiff penalties resulting from anti-money laundering criminal statute violations would pale in comparison to the costs of big stakes litigation and to the financial institution's reputation should it be named in a complaint.

Footnotes


4 26 F.3d 1166 (D.C. Cir. 1994).

5 Early disappointment gave way to ultimate vindication for Mr. Perles' client, Hugo Princz. After the U.S. Court of Appeals for the District of Columbia Circuit dismissed the suit against Germany, the attorneys for the Princz plaintiffs maintained the pressure on the German government by amending the complaint to include four prominent German corporations, current day successors in interest to the German corporations that enslaved Mr. Princz in Auschwitz. While the court refused to allow Mr. Princz' suit against Germany to go forward, the suit was allowed to proceed against the German corporations. Mr. Perles also orchestrated a publicity campaign that coordinated public outrage with support from Congress and the Clinton Administration to force the Federal Republic of Germany to the settlement table. Mr. Princz and all similarly situated victims received a share of a $23 million settlement.


8 The Foreign Military Sales program is governed by the Arms Export Control Act, 22 U.S.C. §§ 2751 et seq., under which the President and the Department of Defense enter into agreements with eligible foreign governments and international organizations to sell them defense articles and defense services. The FMS Trust Fund account contains funds on deposit in the United States Treasury. The account is credited with receipts from FMS customers. At the U.S. Treasury, the corpus of the FMS Fund represents the total aggregation of balances for all FMS customers. At the country or customer level, there are 183 separate accounts used by the DoD to separately account for each FMS customer's deposits, other collections or deposits, payment of customer-related bills, refunds and adjustments. As payments are received, the United States deposits them in the foreign customer's FMS Fund account. The United States subsequently makes disbursements from the customer's account to pay for all of the obligations incurred by the U.S. for each contract for that customer. At the end of the 1970's, Iran had one of the largest FMS programs with the United States. In 1978 and into 1979, Iran was, however, behind in making the required payments under the program. In February 1979, the Iranian program was restructured, with Iran canceling orders for major weapons systems and other items it purchased through the FMS program. On November 4, 1979, the U.S. Embassy and hostages were taken in Iran. On November 19, 1979, Iranian officials repudiated Iran's foreign obligations. Since then, the United States has continued to credit the Iran FMS program account with funds received from diversions (i.e., sales to others) and to debit it for disbursements for termination and other costs.


12 Senator Frank Lautenberg (D.-N.J.) was instrumental in the passage of the compromise legislation. He has been and continues to be a friend of the victims of terrorism and has supported them in their various battles for help from our government.

14 Flatow v. Islamic Republic of Iran, 308 F.3d 1065 (9th Cir., 2002).
20 The Victims Protection Act also covered a single lawsuit against the Republic of Cuba, Alejandre v. Republic of Cuba, based upon the Cuban Air Force shoot-down of a small unarmed civilian plane and the resulting deaths of its four passengers. 996 F. Supp. 1239 (S.D.Fla., 1997). The Victims Protection Act allowed the plaintiffs in this case to draw directly from frozen Cuban assets to satisfy their outstanding compensatory damages. 114 Stat. 1464 (2000). The Victims Protection Act's compensation mechanism covered only this lawsuit in addition to the several lawsuits against Iran.
23 Boim v. Quranic Literacy Inst., 291 F.3d 1000 (7th Cir. 2002).
The Right to a Fair Trial in the War on Terror

Joseph Margulies

Thank you very much. I'm really pleased to be here. I love Seattle, and I always say that when the sun is shining, Seattle is the prettiest city in the country.

Our objective is to talk with you about the contours of the administration's post-9/11 detention policy, and we've decided to organize our remarks in this way. There are four components to this policy. If we're talking about fair trial norms, what you will see is that the administration manipulates these four components to ensure that a trial will never occur.

Those four components represent four different categories of prisoners. First, there are prisoners in Department of Defense (DOD) custody, principally at Guantánamo and Afghanistan. I'm contrasting now war on terror captives and Iraq captives, and the reason I make that distinction is because in Iraq, the administration takes the position that the Geneva Conventions apply, so that provides a separate set of rules that ostensibly operate in Iraq. There is no question that in many respects we are not complying with the Geneva Conventions in Iraq, but there is a difference between abuse that takes place because there are no policies, and abuse that takes place in spite of policies. And in Iraq, they say they are complying with the Geneva Conventions and in many respects, that's true. In Afghanistan and in Guantánamo, by contrast, the DOD is not holding people in compliance with the Geneva Conventions, because they claim the Conventions do not apply in the war on terror.

The second major component of the administration's detention policy involves CIA detentions. Presently, there are approximately 30 people in CIA custody in facilities scattered throughout the world, the precise locations of which are unknown.

The third component of the administration's detention policy is "extraordinary rendition," sometimes provocatively called "rendition to torture." This is the practice of picking people up in one country and transferring them to another country for the purpose of interrogation and detention. So unlike the traditional practice of bringing them back here for a trial, which is the practice of rendition to justice, rendition to torture sends them to third countries where they will be interrogated.

The fourth component of the detention policy is the military commissions. When the administration first announced its intention to use Guantánamo as a place for military detentions, the expectation, apparently held in good faith on the part of the administration, was that they were going to subject a number of the people at Guantánamo to military commissions, or war crimes trials. They were very explicitly thinking back to the legacy of Nuremberg and, at least, what we now perceive in popular sentiment as the extraordinarily successful war crimes trials of World War II, not just in Nuremberg, but in the Japanese theatre as well. The expectation was that they were going to hold a great number of military commission proceedings. But for a variety of reasons these commissions did not come to pass. Presently, there are only ten people who are potential candidates for military commission proceedings, and no trials have gone forward.

Before I continue, however, I want to take a moment to echo what Professor Bazyler said in his remarks, and I say this to you as lead counsel in Rasul. I say this to you as someone who has been involved in the Guantánamo litigation, and other dimensions of the post-9/11 detention litigation. I say this to you as a person who drafted the petition in Rasul, who filed it in February of 2002, who has worked on it more or less full time as a pro bono endeavor until it cost me my private practice, and I closed that and joined the faculty of the University of Chicago. I say this to you in the spirit of de Tocqueville, who in Democracy in America, reminded us that we do not listen to our enemies; we only listen to our friends, and so it is our friends who must be most candid with us.

Any intimation, any suggestion, any even oblique proposal that what the administration is doing in its detention policy is similar in quality or in kind, in extent or in degree, with the Holocaust, or the system of Soviet gulags, simply cannot be maintained. Any suggestion that those things are akin to what is happening today is not simply ahistorical. It is extraordinarily misguided. It is the most certain way to guarantee that you will marginalize whatever
otherwise valid critiques you are inclined to make. The suggestion that Guantánamo is the gulag of our times, the
suggestion offered by Senator Durbin on the floor of the Senate that this is something we would've expected from
Pol Pot, is certain to make your message utterly lost in the noise that follows.

I was speaking with some of the other people in attendance here yesterday, and I am astounded at how a-historical,
how mindless, and how utterly ignorant the administration seems to be of the lessons of history, and how they have
ignored the lessons of episodes like the Korean War. That period was the progenitor of many of the interrogation
techniques that are now being used. They were first developed by the Communists in North Korea and used against
U.S. troops, and the echo of that experience is now replicated in places like Afghanistan and Guantánamo. The fact
that the administration is so indifferent to that history, so indifferent to the history of Viet Nam, where torture was
widespread, so indifferent to the experience of other Western democracies like France in Algiers after the Second
World War, is deeply disturbing. And for us to be similarly a-historical and to suggest that the Holocaust is similar
in kind or quality to what is going on at Guantánamo is simply wrong. I have been to Guantánamo, and I have sat in
one of those rooms with a man who was shackled hand and foot, and tried to explain to him how we were going to
get him out, and to suggest that that is similar in kind to the Holocaust or to Soviet Gulags is simply offensive. No
one should suggest that. We should not take much comfort in the fact that we are better than Joseph Stalin; I would
suggest that should never be the test. What we should focus on is not whether we are as bad as the worst that world
history has ever produced, but rather whether we are as good as this country has produced, and in that there is very
little dispute.

Let's talk about the administration's detention policy. There is a tendency to think of the detention policy in terms of
its legal justifications, as though the legal justifications sprung forth from the mind of Minerva without some policy
explanation supporting it. That's misguided, and it seems to me especially important at a lawyer's conference to talk
about why the law developed to serve this policy preference. So when you have the discussion about what it is that
the administration does, you understand what the ostensible justification is, what the ostensible logic behind it is,
and you can engage the debate at the level which it's offered to you. And it requires that you understand this. The
administration perceives 9/11 fundamentally as an intelligence failure. In their estimation, it is not principally a
crime, and it will not be responded to principally as a law enforcement matter. It is an intelligence failure - a failure
to comprehend a dark, deep, impenetrable enemy. That is their perspective.

Driven by that perspective, the administration believes that we respond to intelligence failures differently than we
respond to a crime. The prosecution of a crime requires that you establish culpability within an existing set of rules
for an event that took place in the past. In our system we're going to have a public trial, and the rules that gird the
development and presentation of the evidence of that crime protect against abuse because we have a belief that a
trial cannot be fair unless the evidence is of a certain rigor, a certain integrity. And so we surround it with rules
about voluntariness of confessions and representation by accused, and open and public proceedings, because that's
what we require in order to have confidence in judicial resolutions.

But that is not the administration's orientation. Their orientation is that we are not trying to solve an event that took
place in the past. Instead, we are trying to prevent an event that may take place in the future. We do not care about
criminal proceedings. There may be some criminal proceedings that come up, but that is almost coincidental, and
not the intended consequence. What we are trying to do is ascertain the extent and existence of Al Qaeda and its
various permutations. We are trying to figure out where it is and what its plans are. It's a many-headed Hydra, and
we want to know what it represents and how to prevent future acts from taking place here and elsewhere.

I will suggest to you that this is not an inherently irrational view. If you separate yourself now from the more
offensive and loathsome facts about the implementation of this view, some of the things that have gone wrong, you
will see there's nothing inherently wrong with approaching it, at least in part, as an intelligence problem. So given
this proposition, the overriding goal of the administration in the war on terror is to assemble all the information they
possibly can. And of course, that is what the NSA wiretapping program is. It is a matter of vacuuming up
intelligence signals including thousands and thousands of communications in the form of e-mails and various other
forms of electronic communications. They claim this is necessary in order to learn more about this dark and
impenetrable and foreign foe. This may or may not lead to prosecutions. However, that is not their interest. They're
not interested in that at all.
And another piece of this information gathering, and the most worrisome piece, from my professional perspective, is interrogations. Interrogations are a way to get information. Does the administration get this information involuntarily? Perhaps. Why? Because we don't care about whether it will ever be used in court. You simply want to get points of data, and we will later determine whether it is reliable and admissible. First you've got to get the data. That's their orientation; that's their perspective. So when you think about the administration's detention policy, when you think about Guantánamo and Afghanistan and rendition, and CIA facilities, you think about counterintelligence interrogations. This is all, in their estimation, about counterintelligence interrogations.

From their perspective, the key to a successful counterintelligence interrogation is to create an environment of utter despair. All of you should study a famous CIA interrogation manual, known as the Kubark Manual, which is really the font from which all that you saw at Abu Ghraib emerged. The Kubark manual was unearthed after a long and acrimonious Freedom of Information battle between the CIA and wonderful reporters from the Baltimore Sun, who finally, in 1997 got this 1963 manual. The Kubark Manual distilled the lessons of research, funded by the CIA, into coercive confessions. This research asked how an interrogator can get people to confess without using some of the more loathsome practices that had been used throughout history. This produced a theory of what we now call "touchless interrogations," or "touchless torture." In the Kubark Manual, this research distilled a set of practical lessons for CIA agents in the field, and in that way, Kubark became, as one very experienced observer in this whole matter described it, the Bible of coercive interrogations. If you read Kubark, you will hear the echo of Abu Ghraib and other places.

Fundamentally, the idea of the Kubark Manual is that a person confesses when you create an environment of, in their words (and even back then, they were mindful of alliterations and trilogies), "dependence, debility and dread." They want to create this environment of despair, abandonment, confusion, and disorientation that will drive people to believe and fear that unless they cooperate, unless they divulge whatever it is that they know, they will be left in this confusing, anxious, terrifying world forever. And so they come to the conclusion that they must "voluntarily" cooperate. That's why they use what's called the 'stress and duress techniques,' where the primary objective is to exhaust someone. That's why they use sleep deprivation and other methods to disorient them, and that is why they will make threats against their family if they don't cooperate. All of these are techniques that we have seen. It is to create the sense of disorientation, despair and dread until the person just finally succumbs. Is it a world that will ever be acceptable in any courtroom? No. And because they could never get a judge to approve the environment that they're creating, that is why they will never bring these prisoners to trial.

If that is their belief, then it follows that you cannot comply with the Geneva Conventions because the Geneva Conventions don't allow that sort of treatment. So the legal world that they developed emerged out of the idea that we need to create a certain type of interrogation environment. That need - that policy preference - eventually produced the memos in January of 2002, stating that the Geneva Conventions don't apply. Is it good scholarship? Of course not and its purpose is not to be good scholarship. Its purpose is to validate this world they wanted to create. So the torture memo in August of 2002 by Jay Bybee and John Yoo is appalling. They are not necessarily bad lawyers, actually they are pretty bright guys, but they were charged with a mission, and that was to build a legal regime that lets interrogators torture prisoners if they want to. It was a policy judgment for which there was a legal construct supporting it.

Well, that is the world they've created at Guantánamo. That's the world they've created in Afghanistan. There's a limit to their success with this, however, and that limit was imposed by Rasul. Rasul ultimately said that lawyers would get to go to the base. Well, lawyers are inconsistent with the idea of the hermetically sealed environment they wanted to create. And that produced a counter-response by the administration: the really important people, the people they care about most, are not in DOD custody. And they probably never will be. The Abu Zubaidahs of the world, the Ramzi Bin al-Shibs, the Khaleed Sheikh Mohammeds-they're in CIA custody, and they are in what's called 'black sites.' We don't even know where they are. They were first in Thailand, but when that prison became known, the CIA moved them. Then for a while they were in Afghanistan, but when that facility became known, they moved them again. They were in Guantánamo for a while. But when the Supreme Court granted certiorari and there was some likelihood that they might be subject to scrutiny by federal courts, they moved them once more. They moved them to Eastern Europe; they were apparently in Poland and Romania, although those countries deny this. And when that became known, they were moved again. Now the rumor is that they are in the North African
Desert. The CIA black sites are the ultimate refinement of the administration's detention policy. These guys are in absolute isolation. It's not merely solitary confinement; these individuals never see another living soul.

To see just what the interrogation techniques are, look up the words, 'enhanced interrogation techniques.' ABC got a copy of a memo which described the enhanced interrogation techniques used by the CIA. It includes an ascending menu of coercive interrogations, the last of which is water boarding, which, if you understand the policy, you understand what they are trying to do. They needed a memo that says, "this is lawful," and they got it. The memo says that it is okay to strap a guy to a board, invert him so that his feet are higher than his head, wrap his head in cellophane, and pour water on his face to create the misperception of suffocation. That's what the memo calls it: to induce the misperception of suffocation. Well, what it actually does is create the sensation of drowning. Water boarding was done to U.S. soldiers in North Korea, and in fact, has a long history. It is astounding that we have now taken to this form of torture.

In summary, when thinking about the administration's detention policy, and even though we are lawyers, I encourage you not to focus on the legal justifications because legal justifications are insignificant. Focus on the policy, the policy to put people beyond the reach of the law.

Thank you.

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Military Commissions Act of 2006

S. 3930—2

VI. Post-Trial Procedure and Review of Military Commissions

§ 948a. Definitions.

"IN THIS CHAPTER:

(1) UNLAWFUL ENEMY COMBATANT.—(A) The term 'unlawful enemy combatant' means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

(B) A 'lawful enemy combatant' means a person who is—

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war;

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

(3) ALIEN.—The term 'alien' means a person who is not a citizen of the United States.

(4) CLASSIFIED INFORMATION.—The term 'classified information' means the following:

(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.

(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

VII. Punitive Matters

§ 948b. Military commissions generally

(a) PURPOSE.—This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

(b) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.—The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.

(c) CONSTRUCTION OF PROVISIONS.—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.

(d) INAPPLICABILITY OF CERTAIN PROVISIONS.—(1) The following provisions of this title shall not apply to trial by military commission under this chapter:

(A) Sections 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.

(B) Sections 853(a), (b), and (d) (article 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.

(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by this chapter.

(e) TREATMENT OF RULINGS AND PRECEDENTS.—The findings, holdings, interpretations, and other precedents of military commissions established under this chapter may be introduced or considered in any hearing, trial, or other proceeding of a court-martial convened under chapter 47 of this title. The findings, holdings, interpretations, and other precedents of military commissions established under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under that chapter.

(D) STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.—A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions.

(G) MILITARY COMMISSIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

§ 948c. Persons subject to military commissions

Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.
§ § 948d. Jurisdiction of military commissions

(a) DETAILED MILITARY JUDGE.—A military judge shall be detailed for each military commission under this chapter if he is the accuser or a witness or has acted as an investigator or counsel in the same case. No person who has acted for the prosecution before a military commission under this chapter may perform such other duties as defense counsel or military defense counsel in the same case. No person who has acted for the defense before a military commission under this chapter may consult with the members of the commission or act later as trial judge or defense counsel.

(b) DETAIL OF MEMBERS.—When convening a military commission under this chapter, the convening authority may perform such other duties as defense counsel or military defense counsel, in the same case.

(c) INDEMNITY OF CERTAIN INDIVIDUALS.—No person who has been appointed as military judge or military defense counsel under this chapter may act later as trial judge or defense counsel, unless he is the accuser or a witness or has acted as an investigator or counsel in the same case.

(d) PREVENTION OF RECUSAL.—No person who has been appointed as military judge or military defense counsel under this chapter may act later as trial judge or defense counsel, unless he is the accuser or a witness or has acted as an investigator or counsel in the same case.

§ § 948e. Annual report to congressional committees

(a) ANNUAL REPORT TO CONGRESSIONAL COMMITTEES.—Military commissions under this chapter shall submit an annual report to the congressional committees of jurisdiction upon the activities of the military commissions under this chapter. The report shall include the following:

(1) The number of trials conducted by military commissions under this chapter.

(2) The number of convictions obtained.

(3) The number of dismissals and acquittals.

(4) The number of cases in which the military commissions exercised their discretion to dismiss or acquit.

(5) The number of cases in which the military commissions exercised their discretion to dismiss or acquit.

(6) The number of cases in which the military commissions exercised their discretion to dismiss or acquit.

(7) The number of cases in which the military commissions exercised their discretion to dismiss or acquit.

(8) The number of cases in which the military commissions exercised their discretion to dismiss or acquit.

§ § 948f. Who may serve on military commissions

(a) RECRUITMENT.—Military commissions under this chapter shall be recruited from among individuals who are qualified by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission unless he is qualified by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission unless he is qualified by reason of age, education, training, experience, length of service, and judicial temperament.

(b) QUALIFICATIONS.—Military commissions under this chapter shall be recruited from among individuals who are qualified by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission unless he is qualified by reason of age, education, training, experience, length of service, and judicial temperament.

(c) SERVICE.—Military commissions under this chapter shall be recruited from among individuals who are qualified by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission unless he is qualified by reason of age, education, training, experience, length of service, and judicial temperament.

§ § 948g. Detail of military judge of a military commission

(a) DUTIES.—A military judge shall have jurisdiction to try any offense made punishable by this chapter or the law of war. A military judge shall have jurisdiction to try any offense made punishable by this chapter or the law of war. A military judge shall have jurisdiction to try any offense made punishable by this chapter or the law of war.

(b) JURISDICTION.—A military judge shall have jurisdiction to try any offense made punishable by this chapter or the law of war. A military judge shall have jurisdiction to try any offense made punishable by this chapter or the law of war.

(c) PREVENTION OF RECUSAL.—A military judge shall have jurisdiction to try any offense made punishable by this chapter or the law of war. A military judge shall have jurisdiction to try any offense made punishable by this chapter or the law of war.

§ § 948h. Who may convene military commissions

(a) AUTHORITY.—The President, the Secretary of Defense, or the Judge Advocate General of the Army may convene military commissions under this chapter. The President, the Secretary of Defense, or the Judge Advocate General of the Army may convene military commissions under this chapter. The President, the Secretary of Defense, or the Judge Advocate General of the Army may convene military commissions under this chapter.

(b) CONVENING.—Military commissions under this chapter may be convened by the President, the Secretary of Defense, or the Judge Advocate General of the Army. Military commissions under this chapter may be convened by the President, the Secretary of Defense, or the Judge Advocate General of the Army.

(c) PROCEDURE.—Military commissions under this chapter shall meet the requirements set forth in section 948a of this title, trial counsel, and defense counsel.

§ § 948i. Who may serve on military commissions

(a) AUTHORITY.—The President, the Secretary of Defense, or the Judge Advocate General of the Army may convene military commissions under this chapter. The President, the Secretary of Defense, or the Judge Advocate General of the Army may convene military commissions under this chapter. The President, the Secretary of Defense, or the Judge Advocate General of the Army may convene military commissions under this chapter.

(b) CONVENING.—Military commissions under this chapter may be convened by the President, the Secretary of Defense, or the Judge Advocate General of the Army. Military commissions under this chapter may be convened by the President, the Secretary of Defense, or the Judge Advocate General of the Army.

(c) PROCEDURE.—Military commissions under this chapter shall meet the requirements set forth in section 948a of this title, trial counsel, and defense counsel.
§ 948m. Number of members; excuse of members; absent and additional members.

(a) Number of members.—(1) A military commission under this chapter shall, except as provided in paragraph (2), have at least five members.

(2) In a case in which the accused before a military commission under this chapter may be sentenced to a penalty of death, the military commission shall have the number of members prescribed by section 948p(q) of this title.

(b) Excuse of members.—No member of a military commission under this chapter may be absent or excused after the military commission has been assembled for the trial of a case unless excused—

(1) as a result of challenge;

(2) by the military judge for physical disability or other good cause; or

(3) by order of the convening authority for good cause.

(c) Absent and additional members.—Whenever a military commission under this chapter is reduced below the number of members required by subsection (a), the trial may not proceed unless the convening authority details new members sufficient to provide not less than such number. The trial may proceed with the new members present after the recorded evidence previously introduced before the members has been read to the military commission in the presence of the military judge, the accused (except as provided in section 949d of this title), and counsel for both sides.

SUBCHAPTER III—PRE-TRIAL PROCEDURE

§ 948q. Service of charges.

The trial counsel assigned to a case before a military commission under this chapter shall cause to be served upon the accused and military defense counsel a copy of the charges upon which trial is to be had. Such charges shall be served in English and, if appropriate, in another language that the accused understands. Such service shall be made sufficiently in advance of trial to prepare a defense.

SUBCHAPTER IV—TRIAL PROCEDURE

§ 948s. Service of charges.

(a) Charges and specifications.—Charges and specifications against an accused in a military commission under this chapter shall be signed by a person subject to chapter 47 of this title under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

(2) that they are true in fact to the best of the signer’s knowledge and belief.

(b) Notice to accused.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements.

(a) In general.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(b) Exclusion of statements obtained by torture.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Detainee Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

§ 948s. Service of charges.

(a) Service of charges shall be made sufficiently in advance of trial to prepare a defense.

(b) Notice to accused.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

§ 948t. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements.

(a) In general.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(b) Exclusion of statements obtained by torture.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

§ 948u. Service of charges.

(a) Service of charges shall be made sufficiently in advance of trial to prepare a defense.

(b) Notice to accused.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

§ 948v. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements.

(a) In general.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(b) Exclusion of statements obtained by torture.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

§ 948w. Service of charges.

(a) Service of charges shall be made sufficiently in advance of trial to prepare a defense.

(b) Notice to accused.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

§ 948x. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements.

(a) In general.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(b) Exclusion of statements obtained by torture.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements obtained after enactment of Detainee Treatment Act of 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

§ 948y. Service of charges.

(a) Service of charges shall be made sufficiently in advance of trial to prepare a defense.

(b) Notice to accused.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.
the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949(c) of this title.

(ii) Hearsey evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

(P) The military judge shall exclude any evidence the probative value of which is substantially outweighed—

(i) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or

(ii) by considerations of undue delay, waste of time, or needlessly presentation of cumulative evidence.

(3) Paragraphs (1) and (2) do not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by military judge or counsel.

(b) PROHIBITION ON CONSIDERATION OF ACTIONS IN SESSION IN EVALUATION OF FITNESS.—In the preparation of an effectiveness, fitness, or efficiency report, any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

(2) give a less favorable rating or evaluation to any commissioned officer because of the action with which such officer is, in acting as counsel, represented any accused before a military commission under this chapter.

§ 949c. Duties of trial counsel and defense counsel

(a) TRIAL COUNSEL.—The trial counsel of a military commission under this chapter shall prosecute in the name of the United States.

(b) DEFENSE COUNSEL.—(1) The accused shall be represented by military counsel detailed under section 948k of this title.

(2) The accused shall be represented by military counsel detailed under section 948k of this title if the military judge determines that counsel is necessary to provide the accused a fair opportunity to meet the evidence under subsection (a) of this section.

(3) The accused may be represented by civilian counsel if retained by the accused, but only if such civilian counsel—

(D) is an officer of the armed forces, including a reserve or National Guard officer; and

(E) has been determined to be eligible for access to classified information that is classified at the level of Secret or higher, and has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court and procedure, and any other regulations or instructions applicable to the conduct of military commission proceedings.

(4) Civilian defense counsel shall protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information and may not divulge such information to any person not authorized to receive it.

(5) If the accused is represented by civilian counsel, detailed military counsel shall act as associate counsel.

(6) The accused is not entitled to be represented by counsel under regulations prescribed under section 948k of this title to detail counsel, in that person’s sole discretion, may detail additional military counsel to represent the accused.

§ 949d. Sessions

(a) SESSIONS WITHOUT PRESENCE OF MEMBERS.—(1) At any time after the service of charges which have been referred for trial by military commission under this chapter, the military judge may call the military commission into session without the presence of the members for the purpose of—

(A) conducting a pretrial conference;

(B) finalizing any pretrial agreements;

(C) finalizing any temporary agreements;

(D) conducting a preliminary hearing;

(E) determining any pretrial motions;

(F) conducting any other pretrial proceedings;

(G) reviewing the list of witnesses and their exhibits; or

(H) conducting any other business that may be connected with the preparation for trial.

(2) The military judge shall adjourn the session and notify the members of the adjournment if the military judge determines that the session without the presence of the members is not necessary.

(b) TERMINATION OF SESSIONS.—(1) The military judge shall adjourn the session and notify the members of the adjournment if the military judge determines that the session is not necessary.

(2) The military judge shall terminate the session and notify the members of the termination if the session is not necessary.

(c) DISMISSAL OF DISTURBANCE.—Upon the dismissal of a disturbance, the military judge shall resume the session if the military judge determines that the session is not necessary.

(d) TERMINATION OF SESSIONS.—(1) The military judge shall terminate the session and notify the members of the termination if the military judge determines that the session is not necessary.

(2) The military judge shall adjourn the session and notify the members of the adjournment if the military judge determines that the session is not necessary.

(3) The military judge shall adjourn the session and notify the members of the adjournment if the military judge determines that the session is not necessary.

(4) The military judge shall adjourn the session and notify the members of the adjournment if the military judge determines that the session is not necessary.

(e) CLOSURE OF PROCEEDINGS.—(1) The military judge may close to the public all or a portion of the proceedings under paragraph (1) only upon making a specific finding that such closure is necessary to—

(A) protect the safety of the commission or any member thereof; or

(B) protect the physical and property safety of the commission or any member thereof.

(2) The military judge may close to the public all or a portion of the proceedings under paragraph (1) only upon making a specific finding that such closure is necessary to—

(A) protect the physical and property safety of the commission or any member thereof; or

(B) protect the physical and property safety of the commission or any member thereof.

(3) A finding under paragraph (2) may be based on a presentation, including a presentation of evidence or information, made by any party to the proceedings.

(4) The military judge shall direct that evidence or information presented under paragraph (3) be made public unless the military judge determines that such evidence or information is inappropriate for public disclosure.
the military judge, the accused persists in conduct that justifies exclusion from the courtroom—

(1) to ensure the physical safety of individuals; or

(2) to prevent disruption of the proceedings by the accused.

(2) PROTECTION OF CLASSIFIED INFORMATION.—

(A) NATIONAL SECURITY PRIVILEGE.—(A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the preceding sentence applies to all stages of the proceeding and shall not apply to information classified under this chapter.

(B) The privilege referred to in subparagraph (A) may be claimed by the head of the executive or military department or government agency concerned based on a finding by the head of that department or agency that—

(i) the information is properly classified; and

(ii) disclosure of the information would be detrimental to the national security.

(C) A person who may claim the privilege referred to in subparagraph (A) may authorize a representative, witness, or trial counsel to claim the privilege and make the finding described in subparagraph (B) on behalf of such person. The authority of the representative, witness, or trial counsel to do so is presumed in the absence of evidence to the contrary.

(3) INTRODUCTION OF CLASSIFIED INFORMATION.—

(A) ALTERNATIVES TO DISCLOSURE.—To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(i) the deletion of specified items of classified information from documents to be introduced as evidence at the military commission;

(ii) the substitution of a portion or summary of the information for such classified documents; or

(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES.—The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that—

(i) the sources, methods, or activities by which the United States acquired the evidence are classified and the information for such classified documents is not reliable; or

(ii) the information is properly classified; and

(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

(C) CHALLENGES AGAINST ADDITIONAL MEMBERS.—Whenever additional members are detailed to a military commission under this chapter, and after any challenges for cause against additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

§ 949g. Oaths

(a) IN GENERAL.—(1) Before performing their respective duties in a military commission under this chapter, military judges, members, trial counsel, reporters, and interpreters shall take an oath to perform their duties faithfully.

(2) The form of the oath required by paragraph (1), the time and place of taking the oath, and the manner of recording the same, and whether the oath shall be taken for all cases in which duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary of Defense. Those regulations may provide that—

(A) an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for that duty; and

(B) if such an oath is taken, such oath need not again be taken at the time the judge advocate or other person is detailed to that duty.

(b) WITNESSES.—Each witness before a military commission under this chapter shall be examined on oath.

§ 949h. Former jeopardy

(a) ENTRY OF PLEA OF NOT GUILTY.—If an accused in a military commission under this chapter after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the military commission shall proceed as though the accused had pleaded not guilty.

(b) FINDING OF GUILT AFTER GUILTY PLEA.—With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote. The finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

§ 949i. Pleas of the accused

(a) ENTRY OF PLEA OF NOT GUILTY.—If an accused in a military commission under this chapter after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the military commission shall proceed as though the accused had pleaded not guilty.

(b) FINDING OF GUILT AFTER GUILTY PLEA.—With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote. The finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

§ 949j. Opportunity to obtain witnesses and other evidence

(a) RIGHT OF DEFENSE COUNSEL.—Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.

(b) PROCESS FOR COMPILATION.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(1) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(2) shall run to any place where the United States shall have jurisdiction thereof.

(c) PROTECTION OF CLASSIFIED INFORMATION.—(1) With respect to the discovery of documents or records of any kind, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(i) the deletion of specified items of classified information from documents to be made available to the accused;

(ii) the substitution of a portion or summary of the information for such classified documents; or

(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.
(2) Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. However, a military judge may change his ruling at any time during the trial.

(2) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to keep a separate, verbatim, record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the signature of the trial counsel or by a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided in regulations prescribed by the Secretary of Defense, the record of a military commission under this chapter may contain a classified annex.

(2) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure to the accused classified information that the classified information would tend to prove.

(2) Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. However, a military judge may change his ruling at any time during the trial.

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§ 950a. Error of law; lesser included offense.

(a) ERROR OF LAW.—A finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) LESSER INCLUDED OFFENSE.—Any reviewing authority with power to approve or affirm a finding of guilty by a military commission under this chapter may convert the offense into one carrying a lesser degree of punishment.

§ 950b. Review by the convening authority.

(a) NOTICE TO CONVENCING AUTHORITY OF FINDINGS AND SENTENCE.—The findings and sentence of a military commission under this chapter shall be reported in writing promptly to the convening authority after the announcement of the sentence.

(b) SUBMITTAL OF MATTERS ACCUSED TO CONVENCING AUTHORITY.—(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence of the military commission under this chapter.

(ii) the record shows improper or inconsistent action by the military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused.

(c) The convening authority may, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) find the accused not guilty of a specification or a ruling which amounts to a finding of not guilty by the military commission.

§ 950c. Appellate referral; waiver or withdrawal of appeal.

(a) AUTOMATIC REFERRAL FOR APPELLATE REVIEW.—Except as provided under subsection (b), in each case in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the United States Court of Military Commission Review. Any such referral shall be made in accordance with procedures prescribed under regulations of the Secretary.

(b) WAIVER OF RIGHT OF REVIEW.—(1) In each case subject to appellate review under section 950f of this title, except a case in which the sentence as approved under section 950b of this title extends to death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review.

(2) A waiver under paragraph (1) shall be signed by both the accused and a defense counsel.

(3) A waiver under paragraph (1) must be filed, if at all, within 10 days after notice on the action is served on the accused or on defense counsel under section 950b(c)(4) of this title. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

(c) WAIVER OR WITHDRAWAL OF APPEAL.—Except in a case in which the sentence approved under section 950b of this title extends to death, the accused may file a notice of appeal within 30 days after notice on the action is served on the accused or on defense counsel under section 950b(c)(4) of this title.

(d) EFFECT OF WAIVER OR WITHDRAWAL.—A waiver of the right of appeal or withdrawal of an appeal under this section bars review under section 950f of this title.

§ 950d. Appeal by the United States.

(a) INTERLOCUTORY APPEAL.—(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that—

(A) terminates proceedings of the military commission with respect to a charge or specification; or

(B) excludes evidence that is substantial proof of a fact material in the proceeding; or

(C) relates to a matter under subsection (d), (e), (f), or (g) of section 949g of this title or section 949(c) of this title.

(2) The United States may not appeal under paragraph (1) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.

(b) NOTICE OF APPEAL.—The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

(c) APPEAL.—An appeal under this section shall be forwarded, by means prescribed in section 949d(c) of this title, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court may act only with respect to matters of law.
§ 950. Review of sentence of death by Court of Military Commission Review

(a) Establishment.—The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions under this chapter, the court may sit in panels, or as a whole in accordance with rules prescribed by the Secretary.

(b) Appellate Military Judges.—The Secretary shall assign appellate military judges to a Court of Military Commission Review. Each appellate military judge shall meet the qualifications for military judges prescribed by section 948j(b) of this title or shall be a civilian with comparable qualifications. No person may be serve as an appellate military judge in any case in which that person acted as a military judge, counsel, or reviewing official.

(c) Cases To Be Reviewed.—The Court of Military Commission Review, in accordance with procedures prescribed under regulations of the Secretary, shall review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter of law raised by the accused.

(d) Scope of Review.—In a case reviewed by the Court of Military Commission Review under this section, the Court may act only with respect to matters of law.

§ 950a. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

(a) Exclusive Appellate Jurisdiction.—(1) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

(c) Scope of Review.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

(2) to the extent applicable, the Constitution and the laws of the United States.

(d) Standard for Review.—In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

§ 950b. Appellate counsel

(a) Appointment.—The Secretary of Defense shall, by regulation, establish procedures for the appointment of appellate counsel for the United States and for the accused in military commissions under this chapter. Appellate counsel shall meet the qualifications for counsel appearing before military commissions under this chapter.

(b) Representation of United States.—Appellate counsel appointed under subsection (a)—

(1) shall represent the United States in any appeal or review proceeding under this chapter before the Court of Military Commission Review, and

(2) may, when requested to do so by the Attorney General or the convening authority acting on the case (if other than the Secretary), represent the United States before the United States Court of Appeals for the District of Columbia Circuit or the Supreme Court.

(c) Representation of Accused.—The accused shall be represented by appellate counsel appointed under subsection (a) before the Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court, and by civilian counsel if retained by the accused. Any such civilian counsel shall meet the qualifications under paragraph (3) of section 949b(b) of this title for civilian counsel appearing before military commissions under this chapter and shall be subject to the requirements of paragraph (4) of that section.

§ 950c. Execution of sentence of death

(a) In General.—The Secretary of Defense is authorized to execute a sentence imposed by a military commission under this chapter in accordance with such procedures as the Secretary may prescribe.

(b) Execution of Sentence of Death Only Upon Approval by the President.—If the sentence of a military commission under this chapter extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.

(c) Execution of Sentence of Death Only Upon Final Judgment of Legality of Proceedings.—(1) If the sentence of a military commission under this chapter extends to death, the sentence may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death, approval under subsection (b)).

(2) A judgment as to legality of proceedings is final for purposes of paragraph (1) when—

(a) the time for the accused to file a petition for review by the Court of Appeals for the District of Columbia Circuit has expired and the accused has not filed a timely petition for such review; or

(b) the review is completed in accordance with the judgment of the United States Court of Appeals for the District of Columbia Circuit and—

(i) a petition for a writ of certiorari is not timely filed; or

(ii) such a petition is denied by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(d) Suspension of Sentence.—The Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), may suspend the execution of any sentence or part thereof in the case, except a sentence of death.

§ 950d. Finality or proceedings, findings, and sentences

(a) Finality.—The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, agencies, and officers of the United States, except as otherwise provided by the President.

(b) Provisions of Chapter Sole Basis for Review of Military Commission Proceedings and Actions.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction...
Military Commissions Act of 2006

§ 950t. Attempts

(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punishable as a military commission under this chapter may direct.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

§ 950u. Solicitation

Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.

§ 950v. Crimes triable by military commissions

(a) DEFINITIONS AND CONSTRUCTION.—In this section:

(1) MILITARY OBJECTIVE.—The term 'military objective' means—

(A) combatants; and

(B) those objects during an armed conflict—

(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability; and

(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

(2) PROTECTED PERSON.—The term 'protected person' means any person entitled to protection under one or more of the Geneva Conventions, including:

(A) civilians not taking an active part in hostilities;

(B) military personnel placed hors de combat by sickness, wounds, or detention; and

(C) military medical or religious personnel.

(3) PROTECTED PROPERTY.—The term 'protected property' means property specifically protected by the law of war (such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.

(4) CONSTRUCTION.—The intent specified for an offense under paragraph (1), (2), (3), (4), or (12) of subsection (b) precludes the applicability of such offense with regard to—

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

(1) MURDER OF PROTECTED PERSONS.—Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

(2) ATTACKING CIVILIANS.—Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.

(3) TAKING HOSTAGES.—Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

(4) ATTACKING PROTECTED PROPERTY.—Any person subject to this chapter who intentionally engages in an attack upon protected property shall be punished as a military commission under this chapter may direct.

(5) PILLAGING.—Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct.

(6) DENYING QUARTER.—Any person subject to this chapter who, with effective command or control over subordinate groups, declines or refuses to permit the reception by those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct.

(7) TAKING HOSTAGES.—Any person subject to this chapter who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain any natural person or persons with the intent of compelling any natural person or person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(8) ATTACKING CIVILIAN OBJECTS.—Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.

(9) MILITARY COMMISSIONS ACT OF 2006.—Title I of the Military Commissions Act of 2006 is deemed to be declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

§ 950s. Conviction of lesser included offense

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

§ 950r. Accessory after the fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

§ 950q. Principals

Any person is punishable as a principal under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, procures, or procures its commission;

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

(3) is a superior commander with respect to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

§ 950p. Statement of substantive offenses

(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

§ 950n. Accessory after the fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

§ 950m. Conviction of lesser included offense

Any person is punishable as a principal under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, procures, or procures its commission;

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

(3) is a superior commander with respect to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

§ 950l. Accessory after the fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

§ 950k. Conviction of lesser included offense

Any person is punishable as a principal under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, procures, or procures its commission;

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

(3) is a superior commander with respect to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(9) USING PROTECTED PERSONS AS A SHIELD.—Any person subject to this chapter who, with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(10) USING PROTECTED PROPERTY AS A SHIELD.—Any person subject to this chapter who, with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished as a military commission under this chapter may direct.

(11) TORTURE.—

(A) OFFENSE.—Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(B) DEFINITIONS.—In this paragraph:

"(i) The term 'serious mental pain or suffering' means bodily injury which involves—

(1) a substantial risk of death;

(2) serious physical pain;

(3) serious mental pain or suffering;

(4) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises);

(5) the term 'significant loss or impairment of the function of a bodily member, organ, or mental faculty.'
(a) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in connection with, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

"(B) MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term 'material support or resources' has the meaning given that term in section 2339A(b) of title 18.

(2) WORONGLY AIDING THE ENEMY.—Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretense for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

(28) CONCENTRATION OF FORCES AT SEA.—Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, conceals or attempts to conceal information by clandestine means or while acting under false pretense for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

"§ 950w. Perjury and obstruction of justice; contempt

"(a) PERJURY AND OBSTRUCTION OF JUSTICE.—A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice relating to military commissions under this chapter.

"(b) CONTEMPT.—A military commission under this chapter may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

2. TREATY OBLIGATIONS NOT ESTABLISHING GROUNDS FOR CERTAIN CLAIMS.

(a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the person is a party or former employee, officer, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its territories or

(b) GENEVA CONVENTIONS DEFINED.—In this section, the term "Geneva Conventions" means—

1. THE GENEVA CONVENTIONS OF 1949.

(1) The Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(2) The Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(3) The Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and


SEC. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.

(a) IMPLEMENTATION OF TREATY OBLIGATIONS—

(1) IN GENERAL.—The acts enumerated in subsection (b) of section 2441 of title 18, United States Code, as added by subsection (b) of this section, and in subsection (c) of this section, constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law.

(2) PROHIBITION ON GRAVE BREACHES.—The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.

(3) INTERPRETATION BY THE PRESIDENT.—

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(B) The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.

(C) Any Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations.

(D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.
(ii) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(B) THIRD GENEVA CONVENTION.—The term “Third Geneva Convention” means the international convention referred to in subparagraph (A)(iii).

(b) REVISION TO WAR CRIMES OFFENSE UNDER FEDERAL CRIMINAL CODE.—

(1) IN GENERAL.—Section 2441 of title 18, United States Code, is amended—

(A) in subsection (c), by striking paragraph (3) and inserting the following new paragraph (3):

“(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or; and

(B) by adding at the end the following new subsection:

“(d) COMMON ARTICLE 3 VIOLATIONS.—

(1) PROHIBITED CONDUCT.—In subsection (c)(3), the term ‘grave breach of common Article 3’ means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

(A) TORTURE.—The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, thereby coercing, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

(B) CRUEL OR INHUMAN TREATMENT.—The act of a person who commits, or conspires or attempts to subject, one or more persons within his custody or physical control to biohazard experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

(C) MURDER.—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

(D) SERIOUS BODILY INJURY.—The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

(E) MUTILATION OR MAIMING.—The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

(F) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

(G) RAPE.—The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

(H) SEXUAL ASSAULT OR ABUSE.—The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.

(I) TAKING HOSTAGES.—The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons in the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of persons.

(2) DEFINITIONS.—In the case of an offense under subsection (a) by reason of subsection (c)(3)—

(A) the term ‘serious bodily injury’ shall be applied for purposes of paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340(2) of this title;

(B) the term ‘serious bodily injury’ shall be applied for purposes of paragraph (1)(B) in accordance with the meaning given that term in section 1118(2) of this title;

(C) the term ‘sexual contact’ shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246(3) of this title;

(D) the term ‘serious physical pain or suffering’ shall be applied for purposes of paragraph (1)(D) as meaning bodily injury that involves—

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) the permanent disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

(iv) severe physical pain or suffering.

(Sec. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section with the meaning given the term ‘severe mental pain or suffering’ (as defined in section 2540(2) of this title), except that—

(i) the term ‘serious’ shall replace the term ‘severe’ where it appears; and

(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term ‘serious and non-transitory mental harm (which need not be prolonged)’ shall replace the term ‘prolonged mental harm’ where it appears.

(3) INAPPLICABILITY OF CERTAIN PROVISIONS WITH RESPECT TO COLLATERAL DAMAGE OR INCIDENT OF LAWFUL ATTACK.—

The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

(4) INAPPLICABILITY OF TAKING HOSTAGES TO PRISONER EXCHANGE.—Paragraph (1)(I) does not apply to an offense under subsection (a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime.

(5) DEFINITION OF GRAVE BREACHES.—The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.

(6) ADDITIONAL PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT.—

(1) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(2) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this subsection, the term “cruel, inhuman, or degrading treatment or punishment” means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

(3) COMPLIANCE.—The President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.

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1005(e)(1) of Public Law 109–148 (119 Stat. 2742) and the subsection (e) added by section 1405(e)(1) of Public Law 109–163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

SEC. 8. REVISIONS TO DETAINEE TREATMENT ACT OF 2005 RELATING TO PROTECTION OF CERTAIN UNITED STATES GOVERNMENT PERSONNEL.

(a) COUNSEL AND INVESTIGATIONS.—Section 1004(b) of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1(b)) is amended—

(1) by striking "may provide" and inserting "shall provide";
(2) by inserting "or investigation" after "criminal prosecution"; and
(3) by inserting "whether before United States courts or agencies, foreign courts or agencies, or international courts or agencies," after "described in that subsection".

(b) PROTECTION OF PERSONNEL.—Section 1004 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1) shall apply with respect to any criminal prosecution that—

(1) relates to the detention and interrogation of aliens described in such section;
(2) is grounded in section 2441(c)(3) of title 18, United States Code; and
(3) relates to actions occurring between September 11, 2001, and December 30, 2005.

SEC. 9. REVIEW OF JUDGMENTS OF MILITARY COMMISSIONS.


(1) in subparagraph (A), by striking "pursuant to Military Commission Order No. 1. dated August 31, 2005 (or any successor military order)" and inserting "by a military commission under chapter 47A of title 10, United States Code";
(2) in subparagraph (B), by striking "pursuant to such military order" and inserting "by the military commission"; and
(3) in subparagraph (C)—

(A) in clause (i)—

(i) by striking "pursuant to the military order" and inserting "by a military commission"; and
(2) in clause (ii), by striking "pursuant to such military order" and inserting "by the military commission"; and
(3) in subparagraph (D), by striking "specified in the military order" and inserting "specified for a military commission".

SEC. 10. DETENTION COVERED BY REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.

Senator Dodd has introduced S. 4060, a bill to revise the recently enacted MCA by, among others things, providing habeas corpus jurisdiction for GTMO detainees. An earlier draft was titled the “Military Commission Civil Liberties Restoration Act,” but it appears that someone has thought better of the politics of that one, and S.4060 as actually introduced is to be known as the “Effective Terrorists Prosecution Act of 2006.”

I’ve posted the text of S. 4060 below the jump, along with commentary describing how each proposed change departs from the MCA.

Does this have a chance of becoming law? It is difficult to see how, given the certainty of a veto and the long odds on super-majority support in both houses. It also may not end up being the main Democratic vehicle for MCA reform, as Senator Leahy apparently is working on his own reform proposal, which would face similar obstacles. On the other hand...should the Supreme Court ultimately strike down some important aspect of the MCA, forcing the issue back into Congress, things would of course look quite different with respect to whichever bill becomes the focus of Democratic support. That’s all a long way off, however. The D.C. Circuit (Boumediene, Al Odah) and the Fourth Circuit (al-Marri) are a ways off from their rulings on the MCA. While it is possible that we’ll see the Supreme Court get to this issue in the current term, I’m not holding my breath.

For the text of S.4060, see below the jump:

From the Congressional Record, with my comments added in *bold italics* below:

S. 4060

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Effective Terrorists Prosecution Act of 2006”.

**SEC. 2. DEFINITION OF UNLAWFUL ENEMY COMBATANT.**

Paragraph (1) of section 948a of title 10, United States Code (as enacted by the Military Commissions Act of 2006 (Public Law 109-366)), is amended to read as follows:

“(1) **UNLAWFUL ENEMY COMBATANT.**—The term ‘unlawful enemy combatant’ means an individual who directly participates in hostilities as part of an armed conflict against the United States who is not a lawful enemy combatant. The term is used solely to designate individuals triable by military commission under this chapter.” [*In comparison to the MCA definition, the key here is the requirement of “direct” participation and the dropping of coverage for those engaged in conflict not against us but against U.S. allies. Also note the clarification that the definition is for use only in identifying persons subject to commission jurisdiction, and should not be read as authority for detention too.*]

**SEC. 3. DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS BY COMBATANT STATUS REVIEW TRIBUNAL NOT DISPOSITIVE FOR PURPOSES OF JURISDICTION OF MILITARY COMMISSIONS.**

Section 948d of title 10, United States Code (as enacted by the Military Commissions Act of 2006 (Public Law 109-366)), is amended--

(1) by striking subsection (c); and

(2) by redesignating subsection (d) as subsection (c). [*Self-explanatory*]
SEC. 4. EXCLUSION FROM TRIAL BY MILITARY COMMISSION OF STATEMENTS OBTAINED BY COERCION.

Section 948r of title 10, United States Code (as enacted by the Military Commissions Act of 2006 (Public Law 109-366)), is amended by striking subsections (c) and (d) and inserting the following new subsection (c):

“(c) Exclusion of Statements Obtained by Coercion.--A statement obtained by use of coercion shall not be admissible in a military commission under this chapter, except against a person accused of coercion as evidence that the statement was made.”  [The MCA requires exclusion of statements obtained by “torture”.  As for lesser coercion, the statement could still be admitted if the judge found sufficient reliability in the circumstances and, for statements made after passage of the DTA but not before, that the coercion did not constitute cruel, inhuman, or degrading treatment.  This proposed change would, presumably, preclude introduction of quite literally all non-voluntary admissions any detainees have made.  That’s sure to draw fire.]

SEC. 5. DISCRETION OF MILITARY JUDGE TO EXCLUDE HEARSAY EVIDENCE DETERMINED TO BE UNRELIABLE OR LACKING IN PROBATIVE VALUE.

Section 949a(b)(2)(E)(ii) of title 10, United States Code (as enacted by the Military Commissions Act of 2006 (Public Law 109-366)), is amended by striking “if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value” and inserting “if the military judge determines, upon motion by counsel, that the evidence is unreliable or lacking in probative value”.  [This isn’t nearly as clear as it ought to be, but I think the goal here is to shift the burden on whether hearsay is sufficiently reliable from the opponent to the proponent of the evidence.]

SEC. 6. DISCRETION OF MILITARY JUDGE TO TAKE CERTAIN ACTIONS IN EVENT THAT A SUBSTITUTE FOR CLASSIFIED EXCUSATORY EVIDENCE IS INSUFFICIENT TO PROTECT THE RIGHT OF A DEFENDANT TO A FAIR TRIAL.

Section 949j(d)(1) of title 10, United States Code (as enacted by the Military Commissions Act of 2006 (Public Law 109-366)), is amended by adding at the end the following: “If the military judge determines that the substitute is not sufficient to protect the right of the defendant to a fair trial, the military judge may--

“(A) dismiss the charges in their entirety;

“(B) dismiss the charges or specifications or both to which the information relates; or

“(C) take such other actions as may be required in the interest of justice.”  [This provision fills a gap in the MCA, which did not specify what the trial judge should do where there is exculpatory but classified evidence for which an adequate substitute cannot be created.  This provisions brings the commission procedure more clearly into line with CIPA, though it is possible a judge would have construed the original language to similar effect in any event.]

SEC. 7. REVIEW OF MILITARY COMMISSION DECISIONS BY UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES RATHER THAN COURT OF MILITARY COMMISSION REVIEW.

(a) Review.--

(1) IN GENERAL.--Section 950f of title 10, United States Code (as enacted by the Military Commissions Act of 2006 (Public Law 109-366)), is amended to read as follows:”§950f. Review by Court of Appeals for the Armed Forces

“(a) Cases To Be Reviewed.--The United States Court of Appeals for the Armed Forces, in accordance with procedures prescribed under regulations of the Secretary, shall review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter of law raised by the accused.

“(b) Scope of Review.--In a case reviewed by the United States Court of Appeals for the Armed Forces under this section, the Court may only act with respect to matters of law.”
(2) **CLERICAL AMENDMENT.**--The table of sections at the beginning of subchapter VI of chapter 47A of such title (as so enacted) is amended by striking the item relating to section 950f and inserting the following new item:

“950f. Review by Court of Appeals for the Armed Forces.”

(b) **Conforming Amendments.**--

(1) **IN GENERAL.**--Chapter 47A of title 10, United States Code (as so enacted), is further amended as follows:

(A) In section 950c(a), by striking “the Court of Military Commission Review” and inserting “the United States Court of Appeals for the Armed Forces”.

(B) In section 950d, by striking “the Court of Military Commission Review” each place it appears and inserting “the United States Court of Appeals for the Armed Forces”.

(C) In section 950g(a)(2), by striking “the Court of Military Commission Review” each place it appears and inserting “the United States Court of Appeals for the Armed Forces”.

(D) In section 950h, by striking “the Court of Military Commission Review” each place it appears and inserting “the United States Court of Appeals for the Armed Forces”.

(2) **UNIFORM CODE OF MILITARY JUSTICE.**--Section 867a(a) of title 10, United States Code (article 67a(a) of the Uniform Code of Military Justice), is amended by striking “Decisions” and inserting “Except as provided in sections 950d and 950g of this title, decisions.” [The idea here is that appeal from a military commission decision will be to the Ct of Appeals for the Armed Forces rather than to a newly-created Ct of Military Commission Review.]

**SEC. 8. IMPLEMENTATION OF TREATY OBLIGATIONS.**

(a) **In General.**--Section 6(a) of the Military Commissions Act of 2006 (Public Law 109-366) is amended--

(1) in paragraph (2)--

(A) in the first sentence, by inserting after “international character” the following: “and preserve the capacity of the United States to prosecute nationals of enemy powers for engaging in acts against members of the United States Armed Forces and United States citizens that have been prosecuted by the United States as war crimes in the past”; and

(B) by striking the second sentence; [i.e., the sentence in the MCA that says that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d)” of the War Crimes Act] and

(2) in paragraph (3)--

(A) in subparagraph (A)--

(i) by striking “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate” and inserting “the President has the authority, subject to congressional oversight and judicial review, to promulgate”; [self-explanatory, but important]

(ii) by striking “higher standards and”;

(B) in subparagraph (B), by striking “interpretations” and inserting “rules”; and

(C) by amending subparagraph (D) to read as follows:

“(D) The President shall notify other parties to the Geneva Conventions that the United States expects members of the United States Armed Forces and other United States citizens detained in a conflict not of an international character to be treated in a manner consistent with the standards described in subparagraph (A) and embodied in section 2441 of title 18, United States Code, as amended by subsection (b).” [That’s interesting. Can Congress compel the President to issue that sort of statement? Is there a “sole organ” objection to be made? Clever choice of substantive message to include, in any event, as who wants to oppose that?]

(b) **Modifications of War Crimes Offenses.**-- [Note that this seems to have been added since the earlier version of the bill linked in the text up above]
(1) **INCLUSION OF DENIAL OF TRIAL RIGHTS AMONG OFFENSES.**--Paragraph (1) of section 2441(d) of title 18, United States Code (as enacted by the Military Commissions Act of 2006), is amended by adding at the end the following new subparagraph:

“(J) **DENIAL OF TRIAL RIGHTS.**--The act of a person who intentionally denies one or more persons the right to be tried before a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples as prescribed by common Article 3 of the Geneva Conventions.” **[Self-explanatory]**

(2) **DEFINITION OF SERIOUS PHYSICAL PAIN OR SUFFERING.**--Clause (ii) of subparagraph (D) of paragraph (2) of such section (as so enacted) is amended to read as follows:

“(ii) serious physical pain;”. **[replaces MCA version: “extreme physical pain”]**

**SEC. 9. RESTORATION OF HABEAS CORPUS FOR INDIVIDUALS DETAINED BY THE UNITED STATES.**

(a) **Restoration.**--Subsection (e) of section 2241 of title 28, United States Code, as amended by section 7(a) of the Military Commissions Act of 2006 (Public Law 109-366), is repealed. **[This would restore the status quo post-Rasul, with statutory habeas extending to GTMO detainees at least (and possibly elsewhere in light of Rasul's potentially broad rationale) and with other civil actions by detainees, renderees, and others also being possible. Of course, the DTA's jurisdiction-stripping rules would still apply as to post-enactment filings....]**

(b) **Conforming Amendment.**--Subsection (b) of section 7 of the Military Commissions Act of 2006 (Public Law 109-366) is repealed.

**SEC. 10. EXPEDITED JUDICIAL REVIEW OF MILITARY COMMISSIONS ACT OF 2006.**

Notwithstanding any other provision of law, the following rules shall apply to any civil action, including an action for declaratory judgment, that challenges any provision of the Military Commissions Act of 2006 (Public Law 109-366), or any amendment made by that Act, on the ground that such provision or amendment violates the Constitution or the laws of the United States:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard in that Court by a court of three judges convened pursuant to section 2284 of title 28, United States Code. **[The DTA/MCA review framework skips over the DC district court; this bill skips the DC Circuit....]**

(2) An interlocutory or final judgment, decree, or order of the United States District Court for the District of Columbia in an action under paragraph (1) shall be reviewable as a matter of right by direct appeal to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after the date on which such judgment, decree, or order is entered. The jurisdictional statement with respect to any such appeal shall be filed within 30 days after the date on which such judgment, decree, or order is entered.

(3) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any action or appeal, respectively, brought under this section.

**SEC. 11. EFFECTIVE DATE.**

The amendments made by this Act shall take effect on October 17, 2006, the date of the enactment of the Military Commissions Act of 2006 (Public Law 109-366), immediately after the enactment of that Act and shall apply to all cases, without exception, that are pending on or after such date. **[Congress is getting good at this effective date business....]**
Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear this morning to discuss whistleblower protections available to members of the military personnel, Department of Defense (DoD) civilian employees, and employees of DoD contractors. Accompanying me are Ms. Jane Deese, Director of Military Reprisal Investigations, and Mr. Dan Meyer, Director of Civilian Reprisal Investigations.

My comments address three general areas I believe to be of interest to the Subcommittee:

1. Personnel actions involving an individual’s security clearance;
2. The general availability of whistleblower protection, and
3. Our procedures for investigating complaints of reprisal for whistleblowing.

The hearing invitation letter stated that the Subcommittee wanted to discuss “revocation of an employee’s national security clearance as a method of retaliation against those who attempt to point out wrongdoing in security agencies.”

In preparation for this testimony we reviewed our Defense Hotline records. Based on this review, I can say that reprisal complaints involving security access/clearance decisions are rare. We identified 19 cases submitted to the Hotline during the past fifteen years that included allegations involving abuses of security clearances. The allegations were either not substantiated or were closed after a preliminary inquiry determined there was insufficient evidence to warrant a full investigation.

I. PERSONNEL ACTIONS INVOLVING SECURITY CLEARANCES

One reason why so few whistleblower reprisal allegations involve the suspension or revocation of security access or clearance may be due to the significant due process protections provided to personnel holding security clearances. Additionally, most security adjudications are conducted by individuals external to the immediate environment where the alleged reprisal occurred.

Due to the significance of an unfavorable personnel security decision can have on an employee’s career, the DoD has established due process and appeal procedures in DoD regulation 5200.2-R, “Personnel Security Program,” dated January 1987.

This regulation implements Executive Order No. 12968, “Access to Classified Information” (August 4, 1995) which prescribes a government-wide uniform system for determining eligibility for access to classified information. DoD Regulation 5200.2-R provides that no unfavorable administrative action may be taken against an employee unless the employee is provided a written statement of the reasons as to why the unfavorable administrative action is being taken. The statement of the reasons is to be as comprehensive and detailed as privacy and national security concerns permit and should contain the following information:

(1) A summary of the security concerns and supporting adverse information,
(2) Instructions for responding to the statement of reasons, and
(3) Copies of the relevant security guidelines.

An agency representative is assigned to ensure that the employee understands the consequences of the proposed action and the necessity to respond in a timely fashion. The employee is advised how to obtain time extensions, how to procure copies of investigative records, and how to file a rebuttal to the statement of the reasons. The employee is further advised that he or she can obtain legal counsel or other assistance at his or her own expense.

The most critical protection provided the employee is that the supervisor recommending any unfavorable action against an employee’s security clearance is not part of the adjudication process. Instead, security clearance decisions are adjudicated by experienced security specialists who work in the eight Central Adjudication Facilities (CAFs) that DoD has established in the Departments of the Army, Navy, and Air Force, and the Washington Headquarters Services (WHS), the Defense Office of Hearings and Appeals (DOHA), the Joint Chiefs of Staff, the Defense Intelligence Agency (DIA), and the National Security Agency (NSA).

The chief of each CAF has the authority to act on behalf of the head of the component regarding personnel security determinations. CAFs are tasked to ensure uniform application of security determinations and to ensure that DoD personnel security determinations are made consistent with existing statutes and Executive orders.

The CAF must provide a written response to an employee’s rebuttal stating the reason(s) for any final unfavorable administrative decision. The CAF’s response must be as specific as privacy and national security considerations permit. The CAF’s response, known as the Letter of Denial (LOD), may be appealed with or without personal appearance to the DoD Component Personnel Security Appeals Board (PSAB). Personal appearances are heard before a Defense Office of Hearings and Appeals (DOHA) Administrative Judge (AJ).

After review of the employees appeal package and/or the Administrative Judge’s recommendation, the PSAB must provide a final written decision including its rationale for the final disposition of the appeal.

These due process and appeal procedures provide reasonable assurance that an unfavorable personnel
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Subcommittee on National Security, Emerging Threats, and International Relations of the House Committee on Government Reform on National Security Whistleblower Protection

security decision was made for proper reasons in an objective fashion, and not as a form of reprisal.

II. GENERAL AVAILABILITY OF WHISTLEBLOWER PROTECTION

The Office of Inspector General (OIG) has the authority to investigate adverse security clearance and access decisions as part of its broad responsibility for investigating allegations that individuals suffered reprisal for making disclosures of fraud, waste and abuse to certain authorities. These responsibilities derive from both the Inspector General Act of 1978 and various statutory provisions applicable to specific classes of individuals. These laws were enacted and amended various times since 1978, and while similar in many respects they are not uniform in the protections they afford. However, they do provide a quilt of legislative provisions organized by the status of individual alleging they were reprimed against as a result of their protected activity. A brief description of the protections available to whistleblowers follows.

Military Whistleblower Protection Act

Public Laws 100-456, 102-190, and 103-337 (codified in Title 10, United States Code, Section 1034 (10 U.S.C. 1034) and implemented by DoD Directive 7050.6, “Military Whistleblower Protection,” June 23, 2000) provide protections to employees of the Armed Forces who make or prepare to make a lawful communication to a Member of Congress, an Inspector General, or any member of a DoD audit, inspection, investigative or law enforcement organization, and any other person or organization (including any person or organization in the chain of command) designated under Component regulations or other established administrative procedures for such communications concerning a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Section 1587 requires that the Secretary of Defense prescribe regulations to carry out that Statute. Those regulations are set forth as DoD Directive 1401.3, “Reprisal Protection for Nonappropriated Fund Instrumentality Employees/Applicants.”

Employees of Nonappropriated Fund Instrumentalities (NAFI)

Title 10, United States Code, Section 1587 (10 U.S.C. 1587), “Employees of Nonappropriated Fund Instrumentalities: Reprisals,” prohibits the taking or withholding of a personal action as reprisal for disclosure of information that a NAFI employee or applicant reasonably believes evidences a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Section 1587 requires that the Secretary of Defense prescribe regulations to carry out that Statute. Those regulations are set forth as DoD Directive 1401.3, “Reprisal Protection for Nonappropriated Fund Instrumentality Employees/Applicants.”

Employees of Defense Contractors

Title 10, United States Code, Section 2409 (10 U.S.C. 2409), “Contractor Employees: Protection from Reprisal for Disclosure of Certain Information,” as implemented by Title 48, Code of Federal Regulations, Subpart 3.9, “Whistleblower Protections for Contractor Employees,” provides that an employee of a Defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract.

U.S. Office of Special Counsel (OSC)

Pursuant to 5 U.S.C. § 1214, the U.S. Office of Special Counsel (OSC) has jurisdiction over prohibited personnel practices committed against most employees or applicants for employment in Executive Branch agencies including the Department of Defense. Current and former federal employees and applicants for federal employment may report suspected prohibited personnel practices to the OSC. The matter will be investigated, and if there is sufficient evidence to prove a violation, the OSC can seek corrective action, disciplinary action, or both. OSC has determined that a federal employee or applicant for employment engages in whistleblowing when the individual discloses to the Special Counsel or an Inspector General or comparable agency official (or to others, except when disclosure is barred by law, or by Executive Order to avoid harm to the national defense or foreign affairs) information which the individual reasonably believes evidences the following types of wrongdoing: a violation of law, rule, or regulation; gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

While OSC has broad jurisdiction, it has no jurisdiction over prohibited personnel practices (including reprisal for whistleblowing) committed against employees of the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President, (see 5 U.S.C. §2302(a)(2)(C)(ii)).

Protections Available for Intelligence and Counterintelligence Personnel

For civilian employees of intelligence agencies who are exempted from OSC jurisdiction, Title 5 states that the heads of agencies should implement internal policies regarding merit systems principles and whistleblower reprisal protections. Specifically, these agencies are required to use existing authorities to take any action, “including the issuance of rules, regulations, or directives; which is consistent with the provisions of [title 5] and which the President or the head of the agency … determines is necessary to ensure that personnel management is
DoD Regulation 5240.1-R, “Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons” (December 11, 1982), requires that the heads of DoD agencies that contain intelligence components shall ensure that no adverse action is taken against employees that report a “questionable activity” (defined as “any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any Executive order or Presidential directive . . . or applicable DoD policy.”) [See, DoD Regulation 5240.1-R, Procedure 14, “Employee Conduct,” and Procedure 15 “Identifying, Investigating and Reporting Questionable Activities.”]

The Assistant to the Secretary of Defense for Intelligence Oversight (ATSD I/O) administers this regulation. In discussions with the staff of the ATSD I/O, we were informed that very few of the complaints filed by DoD employees involved in intelligence and counterintelligence activities have included allegations of reprisal for whistleblowing activities.

Intelligence Community Whistleblower Protection Act of 1998

One statute that is often confused as providing protection from reprisal for whistleblowing is the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA), enacted as part of the Intelligence Authorization Act for FY 1999 and which amended the Inspector General Act of 1978, 5 U.S.C. App. § 8H.

Despite its title, the ICWPA does not provide statutory protection from reprisal for whistleblowing for employees of the intelligence community. The name "Intelligence Community Whistleblower Protection Act" is a misnomer; more properly, the ICWPA is a statute protecting communications of classified information to the Congress from executive branch employees engaged in intelligence and counterintelligence activity.

ICWPA applies only to employees of, and military personnel assigned to, the four DoD intelligence agencies: the Defense Intelligence Agency (DIA), National Geospatial-Intelligence Agency (NGA), the National Reconnaissance Office (NRO) and the National Security Agency (NSA). The ICWPA does not apply to intelligence or counterintelligence activities of the Military Services, Unified Commands or the Office of the Secretary of Defense. As an example, an intelligence analyst working for the Department of the Army would not have recourse to this statute.

The ICWPA may be used when an employee wants to communicate with the Congress, and:
- The complaint/information involves classified material;
- The employee does not want agency management to know the source of classified complaint/information or does not believe management will transmit it to Congress.

Not all disclosures are germane to the ICWPA. It is limited to complaints of “urgent concern.” While the ICWPA has no “whistleblower protection” clause, it does define as an “urgent concern,” instances of violation of Section 7(c) of the IG Act which prohibits the act or threat of reprisal against those who complain/disclose information to an IG. OIG DoD will conduct an appropriate inquiry in these instances to ensure that Section 7(c) was not violated. Only three complaints filed under the auspices of the ICWPA have been made to our office since 1998, and none involved the suspension or revocation of a security clearance.

III. INVESTIGATION OF COMPLAINTS OF REPRISAL FOR WHISTLEBLOWING

Currently, within the DoD OIG, two Directorates are responsible for conducting and overseeing investigations of complaints that military personnel or civilian employees suffered reprisal for making a disclosure protected by applicable statute. The Military Reprisal Investigations Directorate has conducted such investigations for over twenty years. Additionally, in 2003 we established a separate Civilian Reprisal Investigations Directorate to examine the role the DoD OIG should play in investigating allegations of reprisal made by civilian appropriated fund employees. Establishing the proper role and appropriate staffing for the Directorate is an ongoing process as we seek to determine the best utilization of limited resources. A brief description of each Directorate follows.

Military Reprisal Investigations Directorate (MRI)

The Military Reprisal Investigations (MRI) Directorate conducts and oversees investigations of reprisal complaints submitted under three whistleblower protection statutes. For over 20 years, the DoD OIG has addressed complaints of whistleblower reprisal submitted by members of the Armed Forces, nonappropriated fund employees (employees of the military exchanges, recreational facilities, etc.) and employees of Defense contractors. Although the Military Department IGs receive and investigate about 75% of reprisal complaints made by military members, MRI has the statutory responsibility to oversee these investigations and approve the findings. In addition, MRI investigates all reprisal complaints submitted by NAF and Defense contractor employees. The number of reprisal complaints received from military members, NAF and Defense contractor employees has steadily increased from under 20 complaints in FY 1991 to 552 complaints in FY 2005. Currently MRI has a staff of 17 administrative investigators. MRI has developed efficient procedures to conduct preliminary inquiries and investigations to ensure that
all whistleblower reprisal complaints are thoroughly addressed, and in a timely manner. The Military IGs have
established similar procedures. MRI works closely with the Military IGs on all aspects of the investigative process.

The preliminary inquiry entails an in-depth interview with the complainant, followed by fact-finding and
analysis of available documents and evidence. The investigator determines whether the allegations meet the criteria
for protection under the governing statute. The investigator then writes a Report of Preliminary Inquiry that
documents the answers to the following three questions:

- Did the complainant make a communication protected by statute?
- Was an unfavorable action subsequently taken or withheld?
- Was the management official aware of the communication before taking the action against the
  complainant?

The investigator presents the results of the preliminary inquiry to a Complaint Review Committee, comprised of
the five senior MRI managers. If the MRI Complaint Review Committee determines that sufficient
evidence exists to pursue a full investigation of the reprisal allegations, MRI will conduct an on-site investigation
that includes sworn interviews with the complainant, the management officials responsible for the unfavorable
personnel actions taken, and any other witnesses with relevant knowledge.

In a full investigation, a fourth question must be answered: Would the responsible management official
have taken the same action absent the complainant’s protected communication? We analyze the evidence and form
a conclusion based on a preponderance of the evidence.

Civilian Reprisal Investigations Directorate (CRI)

Under the Inspector General Act of 1978 (as amended by Public Law 97-252), the DoD OIG is given broad
authority to investigate complaints by DoD employees concerning violations of law, rules, or regulations,
concerning mismanagement, gross waste of funds, or abuse of authority (see §7(a), IG Act). Congress also
mandated that DoD employee shall not take reprisal action against an employee who makes such a complaint (see
§7(c), IG Act). Under this broad grant of authority, the DoD OIG has authority to investigate allegations of reprisal
for whistleblowing received from civilian appropriated fund employees, both employees covered by OSC’s
protections and those excluded from such coverage (i.e., members of intelligence community).

CRI was established in 2003 to provide an alternate means by which DoD civilian appropriated fund
employees could seek protection from reprisal. This is done in coordination with the U.S. Special Counsel. CRI
was established with the goal of providing limited protection for DoD appropriated fund employees, who also have
recourse to OSC, and DoD intelligence and counterintelligence employees, who do not.

There are several areas where CRI has assisted DoD appropriated fund employees. First, CRI provides the
information and assistance for employees who seek to file a complaint for alleged reprisal or a disclosure of a
violation of law, rule and/or regulation. Second, CRI is available to assist DoD intelligence and counterintelligence
employees who seek redress for alleged reprisal, where OSC has no jurisdiction. Third, CRI assists the Inspector
General in completing his statutory obligations under the ICWPA to inform Congress of matters of “urgent
concern,” (see §8H, IG Act). Additionally, CRI is our in-house advocate for the Section 2302(c) Certification
Program administered by OSC.

CRI supports all categories of DoD civilian appropriated fund employees alleging reprisal for making a
disclosure by statute or internal regulation. Since its establishment, CRI’s efforts have concentrated in advising
whistleblowers seeking protection from the Office of Special Counsel and aiding whistleblowers in making a
disclosure alleging a violation of law, rule and/or regulation. CRI has also investigated select complaints under the
authority of Sections 7(a) and (c) of the IG Act.

Proposed DoD Civilian Whistleblower Instruction

The creation of CRI allows the DoD OIG to further publicize the message that whistleblowers will be
protected from reprisal. Additionally, it currently provides resources to investigate a limited number of individual
claims of reprisal for whistleblowing. Last month, I submitted a Department of Defense Instruction for formal
coordination within DoD. This instruction will govern the operations of CRI and formalize the procedures by which
CRI can assist DoD employees claiming reprisal for whistleblowing activities. Significantly, this instruction will
extend whistleblower protections to employees of the DoD intelligence community who are not provided statutory
protection by OSC.

With regards to protection for employees in intelligence or counter-intelligence positions, who are not
protected by OSC, CRI chose as its first investigation a matter involving a protected disclosure into alleged
intelligence activity against the United States at the Defense Intelligence Agency. This was a joint investigation by
CRI and the Office of the Inspector General at the National Security Agency (NSA). The effort provides a model
for close cooperation between the DoD intelligence community and the DoD IG.

This concludes my statement. Ms. Deese, Mr. Meyer and I would be happy to respond to your questions.
CIA Holds Terror Suspects in Secret Prisons

Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11

By Dana Priest
Washington Post Staff Writer
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The CIA has been hiding and interrogating some of its most important al Qaeda captives at a Soviet-era compound in Eastern Europe, according to U.S. and foreign officials familiar with the arrangement.

The secret facility is part of a covert prison system set up by the CIA nearly four years ago that at various times has included sites in eight countries, including Thailand, Afghanistan and several democracies in Eastern Europe, as well as a small center at the Guantanamo Bay prison in Cuba, according to current and former intelligence officials and diplomats from three continents.

The hidden global internment network is a central element in the CIA’s unconventional war on terrorism. It depends on the cooperation of foreign intelligence services, and on keeping even basic information about the system secret from the public, foreign officials and nearly all members of Congress charged with overseeing the CIA’s covert actions.

The existence and locations of the facilities -- referred to as “black sites” in classified White House, CIA, Justice Department and congressional documents -- are known to only a handful of officials in the United States and, usually, only to the president and a few top intelligence officers in each host country.

The CIA and the White House, citing national security concerns and the value of the program, have dissuaded Congress from demanding that the agency answer questions in open testimony about the conditions under which captives are held. Virtually nothing is known about who is kept in the facilities, what interrogation methods are employed with them, or how decisions are made about whether they should be detained or for how long.

While the Defense Department has produced volumes of public reports and testimony about its detention practices and rules after the abuse scandals at Iraq’s Abu Ghraib prison and at Guantanamo Bay, the CIA has not even acknowledged the existence of its black sites. To do so, say officials familiar with the program, could open the U.S. government to legal challenges, particularly in foreign courts, and increase the risk of political condemnation at home and abroad.

But the revelations of widespread prisoner abuse in Afghanistan and Iraq by the U.S. military -- which operates under published rules and transparent oversight of Congress -- have increased concern among lawmakers, foreign governments and human rights groups about the opaque CIA system. Those concerns escalated last month, when Vice President Cheney and CIA Director Porter J. Goss asked Congress to exempt CIA employees from legislation already endorsed by 90 senators that would bar cruel and degrading treatment of any prisoner in U.S. custody.

Although the CIA will not acknowledge details of its system, intelligence officials defend the agency’s approach, arguing that the successful defense of the country requires that the agency be empowered to hold and interrogate suspected terrorists for as long as necessary and without restrictions imposed by the U.S. legal system or even by the military tribunals established for prisoners held at Guantanamo Bay.

The Washington Post is not publishing the names of the Eastern European countries involved in the covert program, at the request of senior U.S. officials. They argued that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation.

The secret detention system was conceived in the chaotic and anxious first months after the Sept. 11, 2001, attacks, when the working assumption was that a second strike was imminent.

Since then, the arrangement has been increasingly debated within the CIA, where considerable concern lingers about the legality, morality and practicality of holding even unrepentant terrorists in such isolation and secrecy, perhaps for the duration of their lives. Mid-level and senior CIA officers began arguing two years ago that the system was unsustainable and diverted the agency from its unique espionage mission.
“We never sat down, as far as I know, and came up with a grand strategy,” said one former senior intelligence officer who is familiar with the program but not the location of the prisons. “Everything was very reactive. That’s how you get to a situation where you pick people up, send them into a netherworld and don’t say, ‘What are we going to do with them afterwards?’ “

It is illegal for the government to hold prisoners in such isolation in secret prisons in the United States, which is why the CIA placed them overseas, according to several former and current intelligence officials and other U.S. government officials. Legal experts and intelligence officials said that the CIA’s internment practices also would be considered illegal under the laws of several host countries, where detainees have rights to have a lawyer or to mount a defense against allegations of wrongdoing.

Host countries have signed the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as has the United States. Yet CIA interrogators in the overseas sites are permitted to use the CIA’s approved “Enhanced Interrogation Techniques,” some of which are prohibited by the U.N. convention and by U.S. military law. They include tactics such as “waterboarding,” in which a prisoner is made to believe he or she is drowning.

Some detainees apprehended by the CIA and transferred to foreign intelligence agencies have alleged after their release that they were tortured, although it is unclear whether CIA personnel played a role in the alleged abuse. Given the secrecy surrounding CIA detentions, such accusations have heightened concerns among foreign governments and human rights groups about CIA detention and interrogation practices.

The contours of the CIA’s detention program have emerged in bits and pieces over the past two years. Parliaments in Canada, Italy, France, Sweden and the Netherlands have opened inquiries into alleged CIA operations that secretly captured their citizens or legal residents and transferred them to the agency’s prisons.

More than 100 suspected terrorists have been sent by the CIA into the covert system, according to current and former U.S. intelligence officials and foreign sources. This figure, a rough estimate based on information from sources who said their knowledge of the numbers was incomplete, does not include prisoners picked up in Iraq.

The detainees break down roughly into two classes, the sources said.

About 30 are considered major terrorism suspects and have been held under the highest level of secrecy at black sites financed by the CIA and managed by agency personnel, including those in Eastern Europe and elsewhere, according to current and former intelligence officers and two other U.S. government officials. Two locations in this category -- in Thailand and on the grounds of the military prison at Guantanamo Bay -- were closed in 2003 and 2004, respectively.

A second tier -- which these sources believe includes more than 70 detainees -- is a group considered less important, with less direct involvement in terrorism and having limited intelligence value. These prisoners, some of whom were originally taken to black sites, are delivered to intelligence services in Egypt, Jordan, Morocco, Afghanistan and other countries, a process sometimes known as “rendition.” While the first-tier black sites are run by CIA officers, the jails in these countries are operated by the host nations, with CIA financial assistance and, sometimes, direction.

Morocco, Egypt and Jordan have said that they do not torture detainees, although years of State Department human rights reports accuse all three of chronic prisoner abuse.

The top 30 al Qaeda prisoners exist in complete isolation from the outside world. Kept in dark, sometimes underground cells, they have no recognized legal rights, and no one outside the CIA is allowed to talk with or even see them, or to otherwise verify their well-being, said current and former and U.S. and foreign government and intelligence officials.

Most of the facilities were built and are maintained with congressionally appropriated funds, but the White House has refused to allow the CIA to brief anyone except the House and Senate intelligence committees’ chairmen and vice chairmen on the program’s generalties.

The Eastern European countries that the CIA has persuaded to hide al Qaeda captives are democracies that have embraced the rule of law and individual rights after decades of Soviet domination. Each has been trying to cleanse its intelligence services of operatives who have worked on behalf of others -- mainly Russia and organized crime.
Origins of the Black Sites

The idea of holding terrorists outside the U.S. legal system was not under consideration before Sept. 11, 2001, not even for Osama bin Laden, according to former government officials. The plan was to bring bin Laden and his top associates into the U.S. justice system for trial or to send them to foreign countries where they would be tried.

“The issue of detaining and interrogating people was never, ever discussed,” said a former senior intelligence officer who worked in the CIA’s Counterterrorist Center, or CTC, during that period. “It was against the culture and they believed information was best gleaned by other means.”

On the day of the attacks, the CIA already had a list of what it called High-Value Targets from the al Qaeda structure, and as the World Trade Center and Pentagon attack plots were unraveled, more names were added to the list. The question of what to do with these people surfaced quickly.

The CTC’s chief of operations argued for creating hit teams of case officers and CIA paramilitaries that would covertly infiltrate countries in the Middle East, Africa and even Europe to assassinate people on the list, one by one.

But many CIA officers believed that the al Qaeda leaders would be worth keeping alive to interrogate about their network and other plots. Some officers worried that the CIA would not be very adept at assassination.

“We’d probably shoot ourselves,” another former senior CIA official said.

The agency set up prisons under its covert action authority. Under U.S. law, only the president can authorize a covert action, by signing a document called a presidential finding. Findings must not break U.S. law and are reviewed and approved by CIA, Justice Department and White House legal advisers.

Six days after the Sept. 11 attacks, President Bush signed a sweeping finding that gave the CIA broad authorization to disrupt terrorist activity, including permission to kill, capture and detain members of al Qaeda anywhere in the world.

It could not be determined whether Bush approved a separate finding for the black-sites program, but the consensus among current and former intelligence and other government officials interviewed for this article is that he did not have to.

Rather, they believe that the CIA general counsel’s office acted within the parameters of the Sept. 17 finding. The black-site program was approved by a small circle of White House and Justice Department lawyers and officials, according to several former and current U.S. government and intelligence officials.

Deals With 2 Countries

Among the first steps was to figure out where the CIA could secretly hold the captives. One early idea was to keep them on ships in international waters, but that was discarded for security and logistics reasons.

CIA officers also searched for a setting like Alcatraz Island. They considered the virtually unvisited islands in Lake Kariba in Zambia, which were edged with craggy cliffs and covered in woods. But poor sanitary conditions could easily lead to fatal diseases, they decided, and besides, they wondered, could the Zambians be trusted with such a secret?

Still without a long-term solution, the CIA began sending suspects it captured in the first month or so after Sept. 11 to its longtime partners, the intelligence services of Egypt and Jordan.

A month later, the CIA found itself with hundreds of prisoners who were captured on battlefields in Afghanistan. A short-term solution was improvised. The agency shoved its highest-value prisoners into metal shipping containers set up on a corner of the Bagram Air Base, which was surrounded with a triple perimeter of concertina-wire fencing. Most prisoners were left in the hands of the Northern Alliance, U.S.-supported opposition forces who were fighting the Taliban.

“I remember asking: What are we going to do with these people?” said a senior CIA officer. “I kept saying, where’s the help? We’ve got to bring in some help. We can’t be jailers -- our job is to find Osama.”
Then came grisly reports, in the winter of 2001, that prisoners kept by allied Afghan generals in cargo containers had died of asphyxiation. The CIA asked Congress for, and was quickly granted, tens of millions of dollars to establish a larger, long-term system in Afghanistan, parts of which would be used for CIA prisoners.

The largest CIA prison in Afghanistan was code-named the Salt Pit. It was also the CIA’s substation and was first housed in an old brick factory outside Kabul. In November 2002, an inexperienced CIA case officer allegedly ordered guards to strip naked an uncooperative young detainee, chain him to the concrete floor and leave him there overnight without blankets. He froze to death, according to four U.S. government officials. The CIA officer has not been charged in the death.

The Salt Pit was protected by surveillance cameras and tough Afghan guards, but the road leading to it was not safe to travel and the jail was eventually moved inside Bagram Air Base. It has since been relocated off the base.

By mid-2002, the CIA had worked out secret black-site deals with two countries, including Thailand and one Eastern European nation, current and former officials said. An estimated $100 million was tucked inside the classified annex of the first supplemental Afghanistan appropriation.

Then the CIA captured its first big detainee, in March 28, 2002. Pakistani forces took Abu Zubaida, al Qaeda’s operations chief, into custody and the CIA whisked him to the new black site in Thailand, which included underground interrogation cells, said several former and current intelligence officials. Six months later, Sept. 11 planner Ramzi Binalshibh was also captured in Pakistan and flown to Thailand.

But after published reports revealed the existence of the site in June 2003, Thai officials insisted the CIA shut it down, and the two terrorists were moved elsewhere, according to former government officials involved in the matter. Work between the two countries on counterterrorism has been lukewarm ever since.

In late 2002 or early 2003, the CIA brokered deals with other countries to establish black-site prisons. One of these sites -- which sources said they believed to be the CIA’s biggest facility now -- became particularly important when the agency realized it would have a growing number of prisoners and a shrinking number of prisons.

Thailand was closed, and sometime in 2004 the CIA decided it had to give up its small site at Guantanamo Bay. The CIA had planned to convert that into a state-of-the-art facility, operated independently of the military. The CIA pulled out when U.S. courts began to exercise greater control over the military detainees, and agency officials feared judges would soon extend the same type of supervision over their detainees.

In hindsight, say some former and current intelligence officials, the CIA’s problems were exacerbated by another decision made within the Counterterrorist Center at Langley.

The CIA program’s original scope was to hide and interrogate the two dozen or so al Qaeda leaders believed to be directly responsible for the Sept. 11 attacks, or who posed an imminent threat, or had knowledge of the larger al Qaeda network. But as the volume of leads pouring into the CTC from abroad increased, and the capacity of its paramilitary group to seize suspects grew, the CIA began apprehending more people whose intelligence value and links to terrorism were less certain, according to four current and former officials.

The original standard for consigning suspects to the invisible universe was lowered or ignored, they said. “They’ve got many, many more who don’t reach any threshold,” one intelligence official said.

Several former and current intelligence officials, as well as several other U.S. government officials with knowledge of the program, express frustration that the White House and the leaders of the intelligence community have not made it a priority to decide whether the secret internment program should continue in its current form, or be replaced by some other approach.

Meanwhile, the debate over the wisdom of the program continues among CIA officers, some of whom also argue that the secrecy surrounding the program is not sustainable.

“It’s just a horrible burden,” said the intelligence official.

Researcher Julie Tate contributed to this report.

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A lawyer representing fired CIA officer Mary O. McCarthy said yesterday that his client did not leak any classified information and did not disclose to Washington Post reporter Dana Priest the existence of secret CIA-run prisons in Eastern Europe for suspected terrorists.

The statement by Ty Cobb, a lawyer in the Washington office of Hogan & Hartson who said he was speaking for McCarthy, came on the same day that a senior intelligence official said the agency is not asserting that McCarthy was a key source of Priest’s award-winning articles last year disclosing the agency’s secret prisons.

McCarthy was fired because the CIA concluded that she had undisclosed contacts with journalists, including Priest, in violation of a security agreement. That does not mean she revealed the existence of the prisons to Priest, Cobb said.

Cobb said that McCarthy, who worked in the CIA inspector general’s office, “did not have access to the information she is accused of leaking,” namely the classified information about any secret detention centers in Europe. Having unreported media contacts is not unheard of at the CIA but is a violation of the agency’s rules.

In a statement last Friday, the agency said it had fired one of its officers for having unauthorized conversations with journalists in which the person “knowingly and willfully shared classified intelligence.” Intelligence officials subsequently acknowledged that the official was McCarthy and said that Priest is among the journalists with whom she acknowledged sharing information.

Priest won the Pulitzer Prize this month for a series of articles she wrote last year about the intelligence community, including the revelation of the existence of CIA-run prisons in East European countries. The Post withheld the names of the countries at the Bush administration’s request, and it attributed the information to current and former intelligence officials from three continents.

The articles sparked a wide-ranging CIA investigation that included polygraphing scores of officials who worked in offices privy to information about the secret prisons, including McCarthy and her boss, CIA Inspector General John L. Helgerson. Nowhere in the CIA statement last week was McCarthy accused of leaking information on the prisons, although some news accounts suggested that the CIA had made that claim.

Though McCarthy acknowledged having contact with reporters, a senior intelligence official confirmed yesterday that she is not believed to have played a central role in The Post’s reporting on the secret prisons. The official spoke on the condition of anonymity, citing personnel matters.

McCarthy, 61, who earlier held senior posts at the White House and the National Intelligence Council (NIC), has declined requests for comment. But Cobb said she was “devastated” that her government career of more than two decades will “forever be linked with misinformation about the reasons for her termination,” and he said that her firing 10 days before she was to retire was “certainly not for the reasons attributed to the agency.” His comments constituted the first statement from her camp since her firing became public last week.

A onetime Africa specialist who served in the early 1990s as the NIC’s senior officer responsible for warning of imminent security threats to the country, McCarthy went on to help oversee U.S. intelligence programs on the National Security Council from 1996 to 2001. In that role, she had access to details of every covert intelligence action authorized by the president.
Cobb said McCarthy had planned for some time to leave the CIA to pursue a career in public interest law. She finished night courses for a law degree at Georgetown University and passed the bar exam in November, he said. She formally began her retirement process in December, stopped going to her office on Feb. 7, and was to complete a standard retirement training course and cease employment on April 30.

Cobb said that the polygraph tests and interviews that led to her firing came after she had initiated her retirement, and that she did not quit because she anticipated the agency’s action. Although not addressing all these details, the senior intelligence official confirmed that McCarthy was preparing to retire and said she will retain her government pension despite the agency’s decision.

“Firing someone who was days away from retirement is the least serious action they could have taken,” said a former intelligence official who is friendly with McCarthy but spoke on the condition of anonymity because of speculation on the administration’s motive. “That’s certainly enough to frighten those who remain in the agency.”

Where Cobb’s account and the CIA’s account differed yesterday is on whether McCarthy discussed any classified information with journalists. Intelligence sources said that the inspector general’s office was generally aware of a secret prison program but that McCarthy did not have access to specifics, such as prison locations.

The investigation that led to McCarthy’s firing is one of several probes initiated by the Bush administration into high-profile leaks. Another is underway into the New York Times’ Pulitzer Prize-winning reporting on a warrantless surveillance program run by the National Security Agency.

But it remains unclear whether any of the investigations will result in criminal charges. A law enforcement official, who spoke on the condition of anonymity because of the sensitivity of the subject, said yesterday that the FBI has not opened a formal probe into the prisons disclosure because the CIA has yet to send a formal criminal “referral” to the Justice Department on that issue.

“‘We do have investigations going,’” FBI Director Robert S. Mueller III said during a visit to the field office in Charlotte, the Associated Press reported. “‘Leaking of classified materials is a concern for those agencies that have classified materials.’”

Fredrick P. Hitz, who was inspector general at the CIA from 1990 to 1998, said his office was the subject of a leak inquiry after The Post wrote about a classified report he submitted to Congress on the Aldrich H. Ames espionage case. “I was polygraphed several times, as were some of my staff,” Hitz said in an interview. No source for the leak was found and the investigation was terminated.

Several national security law experts said yesterday that, looking at what has been publicly disclosed so far, prosecutors would have a difficult time building a criminal case against McCarthy. Any information obtained during polygraph examinations is essentially useless to prosecutors, since generally it is inadmissible in criminal courts.

In addition, federal espionage laws do not outlaw all disclosures of classified information, at least not specifically. Instead, a collection of separate statutes prohibits unauthorized disclosures of certain categories of information -- such as intercepted communications or codes -- and violations often hinge on important details that are still unclear in the CIA prisons case.

Thomas S. Blanton, director of the National Security Archive, a nongovernmental research institute at George Washington University, said he does not think the Post article includes the kind of operational details that a prosecutor would need to build a case.

“It’s the fact of the thing that they’re trying to keep secret, not to protect sources and methods, but to hide something controversial,” he said. “That seems like a hard prosecution to me.”

Kate Martin, executive director of the Center for National Security Studies, said that “even if the espionage statutes were read to apply to leaks of information, we would say the First Amendment prohibits criminalizing leaks of information which reveal wrongful or illegal activities by the government.”

Staff writer Dan Eggen contributed to this report.
The firing of a veteran CIA officer for unauthorized contacts with the press has focused attention on the patchwork of federal laws that govern disclosures of classified information, which are written broadly but are difficult to enforce and have historically been used sparingly in cases involving journalists.

Numerous experts on national security law said Mary O. McCarthy, whom the CIA fired 10 days before her retirement for allegedly having undisclosed contacts with reporters, could conceivably be prosecuted under a number of statutes, including those governing espionage, disclosures of classified information and even theft of government property.

Yet those experts warned that any such prosecution is fraught with obstacles, including the difficulty in showing that disclosures were made with knowledge that they would harm national security or were intended to benefit a foreign power.

In addition, McCarthy’s attorney, Ty Cobb, said on Monday that she did not leak classified information to reporters, disputing a key accusation in a CIA statement issued last week. Cobb also said McCarthy did not disclose the existence of secret CIA-run prisons in Eastern Europe to a Washington Post reporter, which has been a primary focus of an internal leak investigation ordered by CIA Director Porter J. Goss.

“From the criminal side, there are a lot of difficulties with respect to this case,” said Mark S. Zaid, a Washington lawyer who has represented many former employees in disputes with the CIA and other intelligence agencies. “I wouldn’t be surprised if they decline prosecution, because it might create more problems than it’s worth.”

The case comes amid renewed debate in Congress over whether to increase penalties for leaking or to consider rewriting espionage and classified information laws. This week, the House approved a bill requiring the director of national intelligence to study yanking pensions for those caught revealing secrets.

Unlike in similar cases, such as the New York Times’s disclosure of a warrantless eavesdropping program run by the National Security Agency, the CIA has not formally asked the Justice Department or the FBI to open a criminal probe into The Post’s article on prisons, law enforcement officials said this week. Reporters at The Post and the Times were awarded Pulitzer Prizes this month for those articles.

In the latter half of the 20th century, including the Cold War years, the government prosecuted only one non-espionage leak case in federal courts. But the Justice Department has more recently signaled its willingness to test the boundaries of espionage law in a case involving two pro-Israel lobbyists, and the CIA and other intelligence agencies have launched aggressive internal probes to detect and punish leakers.

No statute in the U.S. criminal code covers all unauthorized disclosures of classified information, and Congress has debated whether an overarching law should be enacted. President Bill Clinton vetoed one such attempt shortly before he left office, and the Justice Department opposed a similar proposal in 2002, saying most, if not all, incidents can be dealt with under existing laws and administrative procedures.

The Intelligence Identities Protection Act outlaws deliberate identification of covert agents; other laws focus on electronic communications, codes, atomic secrets and other sensitive data.

The pivotal statute is the Espionage Act of 1917, which was aimed at traditional foreign spies when written but, according to the government, is broad enough to encompass a much wider array of situations.

The law outlaws unauthorized disclosure or receipt of a wide range of information “relating to the national defense” and is not explicitly limited to classified data. Many legal experts and defense lawyers argue that the law is so
expansive it may be unconstitutional and, said Syracuse University law professor William C. Banks, “shot full of holes.”

“It’s been very difficult for the government to use the Espionage Act to obtain a conviction for simply leaking information,” said Banks, who also runs the Institute for National Security and Counterterrorism at Syracuse. “It was written to cover conventional espionage and spying, not conventional leaking within the government.”

But the government was successful in using the statute in the case of Samuel L. Morison, a former Navy intelligence analyst convicted of espionage and theft during the Reagan administration for leaking secret U.S. spy satellite photographs to Jane’s Defense Weekly. A judge in the case ruled against defense assertions that the Espionage Act was unconstitutionally vague.

Currently, two lobbyists for the American Israel Public Affairs Committee (AIPAC) are accused of receiving classified information during conversations with government officials, including former Pentagon employee Lawrence A. Franklin, who has been sentenced to 12 years in prison. In bringing the case, the government for the first time indicted two nongovernmental employees under the espionage law.

Prosecutors have also alarmed journalism groups and free-speech advocates by asserting that reporters could be prosecuted under the Espionage Act for receiving and publishing classified information. The laws governing classified material do not make it illegal to publish such material except in specific circumstances; for example, one statute outlaws reproducing or publishing photographs or drawings of designated military installations without government permission.

But in a brief filed in the AIPAC case, Justice Department lawyers argued there “plainly is no exemption in the statutes for the press,” saying the Espionage Act and some Supreme Court opinions indicate that journalists can be prosecuted for revealing classified information.

At the same time, the lawyers said that prosecuting a reporter “would raise legitimate and serious issues and would not be undertaken lightly,” adding that “the fact that there has never been such a prosecution speaks for itself.”

Such disputes have renewed calls to revise the laws on classified information and espionage.

“The system is ossified, complicated and a relic of the Cold War period,” said Elizabeth Rindskopf Parker, a former CIA and NSA general counsel who is dean of the University of the Pacific’s law school and was recently named to a government board formed to oversee classification issues. “I think it needs to be looked at seriously again.”

Researcher Julie Tate contributed to this report.

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A senior CIA official, meeting with Senate staff in a secure room of the Capitol last June, promised repeatedly that
the agency did not violate or seek to violate an international treaty that bars cruel, inhumane or degrading treatment
of detainees, during interrogations it conducted in the Middle East and elsewhere.

But another CIA officer -- the agency’s deputy inspector general, who for the previous year had been probing
allegations of criminal mistreatment by the CIA and its contractors in Iraq and Afghanistan -- was startled to hear
what she considered an outright falsehood, according to people familiar with her account. It came during the
discussion of legislation that would constrain the CIA’s interrogations.

That CIA officer was Mary O. McCarthy, 61, who was fired on April 20 for allegedly sharing classified information
with journalists, including Washington Post journalist Dana Priest. A CIA employee of two decades, McCarthy
became convinced that “CIA people had lied” in that briefing, as one of her friends said later, not only because the
agency had conducted abusive interrogations but also because its policies authorized treatment that she considered
cruel, inhumane or degrading.

Whether McCarthy’s conviction that the CIA was hiding unpleasant truths provoked her to leak sensitive
information is known only to her and the journalists she is alleged to have spoken with last year. But the picture of
her that emerges from interviews with more than a dozen former colleagues is of an independent-minded analyst
who became convinced that on multiple occasions the agency had not given accurate or complete information to its
congressional overseers.

McCarthy was not an ideologue, her friends say, but at some point fell into a camp of CIA officers who felt that the
Bush administration’s venture into Iraq had dangerously diverted U.S. counterterrorism policy. After seeing -- in e-
mails, cable traffic, interview transcripts and field reports -- some of the secret fruits of the Iraq intervention,
McCarthy became disenchanted, three of her friends say.

In addition to CIA misrepresentations at the session last summer, McCarthy told the friends, a senior agency official
failed to provide a full account of the CIA’s detainee-treatment policy at a closed hearing of the House intelligence

McCarthy also told others she was offended that the CIA’s general counsel had worked to secure a secret Justice
Department opinion in 2004 authorizing the agency’s creation of “ghost detainees” -- prisoners removed from Iraq
for secret interrogations without notice to the International Committee of the Red Cross -- because the Geneva
Conventions prohibit such practices.

Almost all of McCarthy’s friends and colleagues interviewed for this report agreed to speak only on the condition of
anonymity because her case still could be referred for prosecution and because much of her work involved highly
classified information.

As a former director of intelligence programs in the Clinton administration’s National Security Council, McCarthy
was entrusted with deep secrets regarding the nation’s covert actions overseas. She was a contributor in 2004 to the
presidential campaign of Democratic Sen. John F. Kerry (Mass.), and a former colleague of two Clinton aides --
Richard A. Clarke and Rand Beers -- who had publicly assailed what they considered President Bush’s misguided
focus on Iraq.

By many accounts, those traits helped fit McCarthy precisely into the current White House’s model of a disloyal
intelligence officer: She dissented from Bush administration policy, and she let others know.
But McCarthy’s friends, including former officials who support aggressive interrogation methods, resist any suggestion that she handled classified information loosely or that political motives lay behind her dissent and the contacts she has told the agency she had with journalists. She was, in the view of several who know her well, a CIA scapegoat for a White House that they say prefers intelligence acolytes instead of analysts and sees ulterior motives in any policy criticism.

They allege that her firing was another chapter in a long-standing feud between the CIA and the Bush White House, stoked by friction over the merits of the war in Iraq, over whether links existed between Saddam Hussein’s government and al-Qaeda, and over the CIA-instigated criminal inquiry of White House officials suspected of leaking the name of covert CIA officer Valerie Plame.

“When the president nominated Porter Goss [as CIA director in September 2004], he sent Goss over to get a rogue agency under control,” Steven Simon, a colleague of McCarthy’s at the National Security Council from 1994 to 1999, said Goss’s aides told him. Simon said McCarthy’s unusually public firing appeared intended not only to block leaks but also to suppress the dissent that has “led to these leaks. The aim was to have a chilling effect, and it will probably work for a while.”

Goss himself was forced to resign earlier this month.

CIA spokeswoman Jennifer Millerwise Dyck, without naming McCarthy, denied that the firing was meant to suppress dissent. She said it was provoked solely by the officer’s admission to CIA investigators to having provided classified information to the media. “You can’t ignore an officer ignoring their secrecy agreement,” Dyck said.

Many lawmakers have said they share this viewpoint, and some have called for tougher CIA sanctions to enforce the secrecy rules.

But McCarthy, in e-mails to friends, has denied leaking anything classified. She has not denied speaking to Priest but has said she was unaware that the CIA had secret prisons in Eastern Europe, the most attention-getting detail in Priest’s articles last year. Her lawyer has said the same thing publicly.

Assessing whether politics played a role in the firing is difficult, given the reluctance of those involved to lay bare the underlying facts. The CIA has declined to disclose the evidence it collected against McCarthy. McCarthy declined to be interviewed for this article, and her attorney, Ty Cobb, said the CIA has precluded him from discussing what McCarthy said in CIA interviews and polygraph examinations between February and April 18.

Reporters at The Washington Post and other publications do not discuss sources for articles beyond what is published. Priest’s disclosures about the secret prisons were attributed to multiple current and former intelligence officials on three continents.

McCarthy was drawn into the CIA’s wrenching internal debate over treatment of foreign detainees when she was recruited by Inspector General John L. Helgerson in the summer of 2004 to oversee the agency’s criminal probe of alleged wrongdoing in the war on Iraq. CIA Director George J. Tenet requested the probe shortly before he was replaced by Goss.

Both Helgerson and McCarthy were veterans of the agency’s Intelligence Directorate; neither had worked in the Directorate of Operations (D.O.), whose employees in Iraq and Afghanistan were at the heart of the abuse allegations and whose leadership often resents independent scrutiny. But McCarthy was in some ways well prepared for the job, because she had tangled with the D.O. previously over several of its covert-action programs.

A historian by training and a passionate hockey fan, she had two brief jobs in academia and a stint at a risk-assessment firm before joining the agency’s Africa and Latin America divisions. In 1991, she became a deputy to legendary CIA analyst Charlie Allen, then the agency’s chief warning officer. After McCarthy succeeded Allen in 1994, Allen paid tribute to her “strong views” on the need for “extraordinary rigor” in analysis.

The job involved supervising a tiny staff tasked with separating wheat from chaff and calling attention to imminent crises, but afforded marginal clout in influencing the agency’s intelligence-gathering priorities. It left her frustrated, and in articles published in a small-circulation intelligence journal in 1994 and 1998, she decried the agency’s adherence to an “old analytic culture” and its reluctance to reorganize to improve its warning capability.
Much of the intelligence community was marked by “ingrown bureaucracies that have become isolated and smug” instead of risk-taking, McCarthy said in one article. She also warned that in all the reviews of major U.S. intelligence failures, “there emerges abundant evidence . . . that analysts often shaped their judgments with policy in mind.”

In 1996, then-national security adviser Anthony Lake, who shared her intense interest in Africa, recruited her to a White House job in which she helped conduct an annual review of all presidentially authorized covert-action programs. James B. Steinberg, who became deputy national security adviser at the end of that year, said McCarthy “did not see herself as carrying the water for any particular policy or perspective. . . . Is she someone I would trust to handle the information properly and sensitively? I would say, absolutely.”

As the National Security Council’s director and then senior director of intelligence programs, McCarthy helped enforce the classification rules at the White House and sometimes blocked staff access to documents or CIA programs. She also developed a reputation for bluntly expressed opinions about deficiencies in the intelligence and analysis prepared for President Bill Clinton.

“She gave the CIA a very hard time when she thought they were not doing what they were supposed to do,” a former colleague recalled. “She wasn’t snowed very easily. It is her nature to be a skeptic.”

McCarthy tangled with the Directorate of Operations over whether some covert actions were still productive. She concluded that evidence linking a Sudanese pharmaceutical plant with al-Qaeda was thin, and she lodged a dissent with the national security adviser before U.S. cruise missiles were fired at the facility in 1998. She also fought for a year with James L. Pavitt, then the head of the directorate, who opposed a White House-backed plan to deploy pilotless Predator planes over Afghanistan.

“Her personality was engaging, charming, persistent, and also loud and aggressive,” said a CIA official who experienced McCarthy’s occasionally painful grilling. “Sometimes she got a bee in her bonnet about something that others thought was not so important.” The exchanges, which one official called “head-butting,” helped harden McCarthy’s view that “the CIA is just very insular,” a former colleague said. “It is kind of a boys’ club” closed to “new ways of doing analysis.”

After Bush’s election, McCarthy stayed at the White House briefly and then accepted a temporary assignment at the CIA’s Science and Technology Directorate, where she felt “underutilized,” according to one friend. She enrolled in law classes in preparation for retirement and took a sabbatical at the Center for Strategic and International Studies.

Then Helgerson persuaded her to oversee his inquiry of detainee treatment in Iraq, and later Afghanistan.

McCarthy’s findings are secret. According to a brief CIA statement about the probe in a federal lawsuit filed by the American Civil Liberties Union, investigators set out to examine “the conduct of CIA components and personnel, including DO personnel” during interrogations. Tens of thousands of pages of material were collected, including White House and Justice Department documents, and multiple reports were issued. Some described cases of abuse, involving fewer than a dozen individuals, and were forwarded to the Justice Department, according to government officials.

Another report, completed in 2004, examined the CIA’s interrogation policies and techniques, concluded that they might violate international law and made 10 recommendations, which the agency has at least partially adopted. That report jarred some officials, because the Justice Department has contended that the international convention against torture -- barring “cruel, inhumane, and degrading” treatment -- does not apply to U.S. interrogations of foreigners outside the United States.

Little else is known publicly. The CIA inspector general’s reports have narrow circulation. When IG inquiries involve covert actions such as foreign interrogations, for example, the agency briefs only the chairmen and ranking members of the House and Senate intelligence committees, instead of the full panels. So only a handful of people in Washington knew what McCarthy knew.

The CIA has rebuffed the ACLU’s legal requests to disclose about 10,000 pages of documents, arguing that they contain sensitive material about intelligence sources and methods. The presiding judge, Alvin K. Hellerstein, said in September 2004 that “if the documents are more of an embarrassment than a secret, the public should know of our government’s treatment of individuals captured and held abroad.” But he has not forced any disclosures.
McCarthy “was seeing things in some of the investigations that troubled her,” said one of her friends, and she worried that neither Helgerson nor the agency’s congressional overseers would fully examine what happened or why. “She had the impression that this stuff has been pretty well buried,” another friend said. In McCarthy’s view and that of many colleagues, two friends say, torture was not only wrong but also misguided, because it rarely produced useful results.

Officials at the CIA and the White House declined to say whether McCarthy’s firing, which came 10 days before her planned retirement, was discussed between them in advance. But a CIA official said that when Goss himself was asked to resign two weeks later, Bush thanked Goss indirectly for the action when he said Goss had “instilled a sense of professionalism” at the agency.

CIA officials have said that McCarthy nonetheless will receive her pension. At the time of her firing, the House was considering legislation, provoked in part by The Post article about secret prisons, requiring the CIA director to study the feasibility of revoking the pensions of those who make unauthorized disclosures of classified information. The legislation was approved by the House five days after the firing became public.

Staff reporter Dafna Linzer, researcher Madonna Lebling and research editor Lucy Shackelford contributed to this report.

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