

## CRYING HAVOC OVER THE OUTSOURCING OF SOLDIERS AND DEMOCRACY'S SLIPPING GRIP ON THE DOGS OF WAR

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*He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.*<sup>†</sup>

*Whenever a people . . . entrust the defence of their country to a regular, standing army, composed of mercenaries, the power of that country will remain under the direction of the most wealthy citizens.*<sup>‡</sup>

### INTRODUCTION

On September 16, 2007, as U.S. diplomats met at a secured compound in Baghdad, a bomb exploded a few hundred yards away.<sup>1</sup> In response, the diplomats were moved out of the compound toward the “Green Zone.” As they traveled through Nisour Square, a security convoy attempted to block traffic to ensure that the diplomats could pass through the area; some of the diplomats’ guards exited the convoy to patrol the street. One guard shot at an oncoming car and killed the vehicle’s driver, along with a mother cradling her infant in the passenger seat.<sup>2</sup> The car caught fire but continued rolling forward, prompting other guards to shoot—killing seventeen and wounding twenty-four.<sup>3</sup>

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<sup>†</sup> THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

<sup>‡</sup> “A Frammer,” Letter to the Editor, INDEP. GAZETTEER (Phila.), Jan. 29, 1791, at 2.

<sup>1</sup> See James Glanz & Sabrina Tavernise, *Blackwater Role in Shooting Said to Include Chaos*, N.Y. TIMES, Sept. 27, 2007, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9A02E1DA1531F93BA1575AC0A9619C8B63&sec=&spn=&pagewanted=all> (link).

<sup>2</sup> See Dina Temple-Raston, *All Things Considered: Iraq Victims, Witness Recount Blackwater Shooting* (NPR radio broadcast Dec. 17, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=17284785> (link).

<sup>3</sup> See James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1, available at

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The guards insisted that they fired out of self-defense, but an FBI inquiry found that the shootings were unprovoked.<sup>4</sup> Indeed, the Iraqi government announced its intention to prosecute those responsible.<sup>5</sup> But these guards could be neither criminally prosecuted nor court-martialed under the Uniform Code of Military Justice (UCMJ) because they were not members of the U.S. armed services.<sup>6</sup> As privately paid soldiers of Blackwater Worldwide (Blackwater),<sup>7</sup> the guards fell into a “legal Bermuda Triangle.”<sup>8</sup> In other words, they were not subject to Iraqi law due to an immunity order granted to private military firms (PMFs), were not subject to the UCMJ for the U.S. military, and were not subject to United States criminal laws because they were outside its territorial jurisdiction.<sup>9</sup>

This is an especially troubling dilemma because private soldiers’ duties in modern warfare are virtually indistinguishable from their public counterparts’. For example, private soldiers have provided security to U.S. Administrator of Iraq (and later-Ambassador) L. Paul Bremer, helped train the

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[http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?\\_r=1&oref=slogin&pagewanted=all](http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?_r=1&oref=slogin&pagewanted=all) (link).

<sup>4</sup> See David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1, available at <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=all> (link).

<sup>5</sup> See *Blackwater Men ‘Given Immunity’*, BBC NEWS, Oct. 30, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/7068600.stm](http://news.bbc.co.uk/2/hi/middle_east/7068600.stm) (link).

<sup>6</sup> See, e.g., John M. Broder, *Rice Says ‘Hole’ in U.S. Law Shields Contractors in Iraq*, N.Y. TIMES, Oct. 25, 2007, at A6, available at <http://www.nytimes.com/2007/10/26/washington/26contractor.html> (link).

<sup>7</sup> Although originally named “Blackwater USA,” the company changed its name and logo in October 2007 to “Blackwater Worldwide” to improve its public image. See Paul von Zielbauer, *Blackwater Softens Its Logo From Macho to Corporate*, N.Y. TIMES, Oct. 22, 2007, at C3, available at [http://www.nytimes.com/2007/10/22/business/media/22logo.html?\\_r=1&scp=1&sq=blackwater%20softens%20its%20image&st=cse&oref=slogin](http://www.nytimes.com/2007/10/22/business/media/22logo.html?_r=1&scp=1&sq=blackwater%20softens%20its%20image&st=cse&oref=slogin) (link).

<sup>8</sup> Nonna Gorilovskaya, *Contracting Justice*, DAILY MOJO, June 11, 2004, [http://www.motherjones.com/news/dailymojo/2004/06/06\\_513.html](http://www.motherjones.com/news/dailymojo/2004/06/06_513.html) (“The fallout from Abu Ghraib exposed the legal Bermuda Triangle that has so far protected civilian contractors from being tried on charges of abuse, rape, and even murder in U.S. courts—a situation that the U.S. government has long refused to remedy.”) (link).

<sup>9</sup> See, e.g., K. Elizabeth Waits, Note, *Avoiding the “Legal Bermuda Triangle”: The Military Extraterritorial Jurisdiction Act’s Unprecedented Expansion of U.S. Criminal Jurisdiction Over Foreign Nationals*, 23 ARIZ. J. INT’L & COMP. L. 493, 494 (2006), available at <http://www.law.arizona.edu/journals/ajicl/AJICL2006/vol232/Waits%20note.pdf> (“The U.S. Army [can] not prosecute because, except in very narrow circumstances, civilians are not subject to prosecution under the Uniform Code of Military Justice (UCMJ). Similarly, U.S. civilian authorities [can] not prosecute because the crimes were committed outside the territorial jurisdiction of the United States.”) (link). But see Del Quentin Wilber & Karen DeYoung, *Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting*, WASH. POST, Aug. 17, 2008, at A01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081601967.html?nav=rss\\_email/components](http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081601967.html?nav=rss_email/components) (link); Posting of Laura Dickinson to Balkinization, <http://balkin.blogspot.com/2007/10/prosecuting-military-contractors-more.html> (Oct. 1, 2007, 9:34 EST) (discussing the extension of the Military Extraterritorial Jurisdiction Act (MEJA) as a possible solution to this dilemma) (link).

Iraqi army, interrogated military prisoners,<sup>10</sup> used helicopters and chemical weapons,<sup>11</sup> operated in Louisiana after Hurricane Katrina,<sup>12</sup> and fought off insurgents in combat.<sup>13</sup> This blending of responsibilities has put the legality of private soldiers' actions in limbo.

Of course, such a commingling of roles is inevitable given the United States' increasing reliance on PMFs. Since the end of the Cold War, the Pentagon's use of private soldiers has more than quadrupled.<sup>14</sup> During the Gulf War, only 10% of soldiers in the war zone were privately paid.<sup>15</sup> From 1994 to 2002, however, the Department of Defense contracted with PMFs more than 3,000 times for a total of more than \$300 billion.<sup>16</sup> By 2008, the "estimated 180,000 private contractors outnumber[ed] the 160,000 US troops stationed in [Iraq]."<sup>17</sup> Indeed, the conflicts in Iraq and Afghanistan are now the central stage for the world's preeminent PMFs: DynCorp International has about 1,500 employees in Iraq; Blackwater has more than 1,000 employees; Military Professional Resources, Inc. has about 500 employees; and Kellogg Brown and Root, Inc. has more than 50,000 contractors and subcontractors in Iraq, Afghanistan, and Kuwait.<sup>18</sup>

<sup>10</sup> See William D. Hartung, Comment, *Outsourcing is Hell*, NATION, June 7, 2004, at 6, available at <http://www.thenation.com/doc/20040607/hartung> (link); Siobhan Gorman, *CIA Likely Let Contractors Perform Waterboarding—Interrogation Work Outsourced Heavily; Legality Uncertain*, WALL ST. J., Feb. 8, 2008, at A3, available at <http://online.wsj.com/article/SB120241180470751381.html> (link).

<sup>11</sup> See James Risen, *'05 Use of Gas by Blackwater Leaves Questions*, N.Y. TIMES, Jan. 10, 2008, at A1, available at <http://www.nytimes.com/2008/01/10/world/middleeast/10blackwater.html> (link).

<sup>12</sup> See Jeremy Scahill, *Blackwater Down*, NATION, Oct. 10, 2005, at 19, available at <http://www.thenation.com/doc/20051010/scahill/single> ("Blackwater is operating under a federal contract to provide 164 armed guards for FEMA reconstruction projects in Louisiana. . . . Before the contract was announced . . . they were already on contract with [the] DHS and that they were sleeping in camps organized by the federal agency. . . . 'It strikes me . . . that that may not be the best use of money.'") (quoting Sen. Obama) (link); Posting of Noah Shachtman to WIRED NEWS Danger Room Blog, <http://blog.wired.com/defense/2008/08/officials-made.html> (Aug. 31, 2008, 10:21 EST) (observing how Blackwater, "which famously patrolled New Orleans after Katrina—is 'compiling a list of qualified security personnel for possible deployment into areas affected by Hurricane Gustav'") (link).

<sup>13</sup> See, e.g., DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 21–22 (2005); Dana Priest, *Private Guards Repel Attack on US Headquarters*, WASH. POST, Apr. 6, 2004, at A01, available at [http://www.sandline.com/hotlinks/Wash\\_Post-Private\\_guards.html](http://www.sandline.com/hotlinks/Wash_Post-Private_guards.html) (link).

<sup>14</sup> COL. GERALD SCHUMACHER, A BLOODY BUSINESS: AMERICA'S WAR ZONE CONTRACTORS & THE OCCUPATION OF IRAQ 12 (2006).

<sup>15</sup> See JEREMY SCAHILL, BLACKWATER xv (2007).

<sup>16</sup> Laura Peterson, *Privatizing Combat, the New World Order*, in MAKING A KILLING: THE BUSINESS OF WAR 5, 6 (2002), available at <http://projects.publicintegrity.org/bow/report.aspx?aid=148> (link).

<sup>17</sup> Tom Baldwin, *Blackwater Denies Rogue Mercenary Charge*, TIMES (London), Oct. 3, 2007, at 31, available at [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article2577900.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2577900.ece) (discussing the testimony of Erik Prince, founder of Blackwater, to the House of Representatives Oversight Committee) (link). See also SCAHILL, *supra* note 15, at xvii (commenting that by the beginning of 2007, there was "an almost one-to-one ratio [of private contractors] to active-duty U.S. soldiers").

<sup>18</sup> See Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at

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Despite this heavy reliance on PMFs, they are subject to little official oversight and not much information about PMFs is publicly available through Freedom of Information Act requests. The scant information that is now available was not provided by the government until after a series of tragedies sparked public calls for regulation.<sup>19</sup>

Nevertheless, a law already exists that could significantly decrease the government's employment of PMFs: the Anti-Pinkerton Act (Section 3108).<sup>20</sup> Enacted in 1893 in response to violence involving the Pinkerton National Detective Agency, Section 3108 proscribes the government from employing mercenary strike-breakers.<sup>21</sup> The Act has since been interpreted to apply only to quasi-military forces, and this limitation appears to include the PMFs currently employed by the United States.<sup>22</sup>

When a democratic government has a monopoly on physical force and coercion,<sup>23</sup> institutions are normally in place to prevent that government from exercising military force without public oversight. In contrast, however, the United States' current use of PMFs sidesteps such oversight by obfuscating the military's public accountability. This provides the government with a great deal of unaccountable, anti-democratic power. Applying Section 3108 to PMFs could prevent the government from surreptitiously using private militaries to generate clandestine military outcomes.

Part I reviews the modern American history of PMFs. Part II examines the only direct court interpretation of the Anti-Pinkerton Act and explains why this law has not yet been applied to PMFs. Part III discusses how ap-

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D01, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR2006120401311.html> (link).

<sup>19</sup> See Robert O'Harrow, Jr., *Blackwater Contracts, Short on Detail*, WASH. POST, Dec. 8, 2007, at D01, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/07/AR2007120702320.html> ("The State Department has released copies of its contracts for private security services with Blackwater Lodge and Training Center and Blackwater Security Consulting. It's a hefty 323-page stack, and it comes with a catch: About 169 of the pages are blank or mostly blank.") (link).

<sup>20</sup> 5 U.S.C. § 3108 (2000).

<sup>21</sup> See *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 462 (5th Cir. 1977). In the nineteenth century, the Pinkerton's operated as both a detective agency and as a private bodyguard or military force for large business owners. See, e.g., ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA, 1870 TO THE PRESENT* 12 (1978) ("[D]uring this period the Pinkerton Detective Agency, the most notorious private police force available for hire, had more men than did the U.S. Army.").

<sup>22</sup> See *infra* Part II.B.

<sup>23</sup> Interestingly, the statute's legislative history reveals underpinnings similar to Max Weber's conception of the state as defined by the government's monopolization of physical force and coercion. Compare MAX WEBER, *THE THEORY OF SOCIAL & ECONOMIC ORGANIZATION* 154 (A.M. Henderson & Talcott Parsons trans., Oxford University Press 1964) (1947) (defining a government as "a 'state' if and insofar as its administrative staff successfully upholds a claim on the *monopoly* of the *legitimate* use of physical force in the enforcement of its order"), with 23 CONG. REC. 4225 (1892) (statement of Rep. Bryan) (stating that "law and order should be maintained by the lawful authorities," and that the use of armed soldiers "should not be transferred to private individuals . . . until we are ready to acknowledge government a failure").

plying Section 3108 to PMFs would increase democratic accountability by creating transparency in the government's use of PMFs.

### I. THE MODERN AMERICAN HISTORY OF PRIVATE MILITARIES

Private militaries are as old as organized warfare. The American military's dependence on them, however, has been relatively limited until recent times. Although the U.S. military used private contractors in every major engagement since the American Revolutionary War, it was not until the twenty-first century that PMFs began to come into "close[r] proximity to hostile enemy forces" than ever before.<sup>24</sup> Now the private military industry has become so ubiquitous that private soldiers give combat orders to U.S. soldiers<sup>25</sup> and even provide espionage and intelligence-gathering services.<sup>26</sup>

The modern private military industry stems from a series of military developments in the 1990s. After the Cold War, professional standing armies reduced their numbers all over the world.<sup>27</sup> Without the Cold War to motivate the propping up of satellite nations, armed conflicts in developing countries became more disorganized and unprofessional. The resulting troop deficiencies led many national militaries to rely on PMFs.<sup>28</sup> And with the corresponding decline of communism, the ideological shift toward privatization exacerbated these developments by motivating many governments to turn past state responsibilities over to the private market.<sup>29</sup>

PMFs generally provide three types of services.<sup>30</sup> Some firms offer tactical military support, providing actual combat forces for their clients.<sup>31</sup> Others are consulting firms, offering strategic guidance and training services.<sup>32</sup> Finally, there are firms supplying logistical support, allowing their

<sup>24</sup> Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONTR. L.J. 233, 234 (1999).

<sup>25</sup> SCAHILL, *supra* note 15, at 123.

<sup>26</sup> See, e.g., TIM SHORROCK, SPIES FOR HIRE (2008); TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 512–13 (2007); Jeremy Scahill, *Blackwater's Private Spies*, NATION, June 23, 2008, at 11–16, available at <http://www.thenation.com/doc/20080623/scahill> (noting how "70 percent of the US intelligence budget is going to private companies") (link).

<sup>27</sup> See SCHUMACHER, *supra* note 14, at 12–13.

<sup>28</sup> See, e.g., ADAM ROBERTS, THE WONGA COUP 8–13 (2006); P.W. Singer, *Outsourcing War*, FOREIGN AFFAIRS, Mar.–Apr. 2005, at 120, available at <http://www.foreignaffairs.org/20050301faessay84211/p-w-singer/outsourcing-war.html> (link); *Conflict, Inc.: Selling the Art of War* (PBS television broadcast Dec. 7, 1997), transcript available at <http://www.cdi.org/adm/1113/transcript.html> (link).

<sup>29</sup> See Singer, *supra* note 28, at 120; see also David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1188 (1999) (discussing the privatization of police functions).

<sup>30</sup> See Singer, *supra* note 28, at 120.

<sup>31</sup> See *id.*; see also ROBERT YOUNG PELTON, LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR 5 (2007).

<sup>32</sup> See, e.g., Singer, *supra* note 28, at 120; SCAHILL, *supra* note 15, at 167–79 (noting how President Bush "waived" a congressional ban on military assistance to Azerbaijan and in 2003 began a project called "Caspian Guard" where PMFs would help train local forces to help those countries protect the

client's soldiers to focus on actual combat and reducing the need for additional troops.<sup>33</sup> These categories might earlier have been cleanly defined and self-contained, but have since blurred after September 11, 2001—when PMFs saw a golden opportunity to sell more combat-oriented services.<sup>34</sup> By March 18, 2004, PMFs were no longer responsible for merely providing logistical or consulting support to the U.S. military; the government had become so dependent on PMFs that they were being solicited to actively defend U.S. forces.<sup>35</sup>

## II. THE HISTORY AND LIMITED APPLICATION OF THE ANTI-PINKERTON ACT

The only current restriction on the government's use of PMFs is that the government cannot contract for a security force "at the expense of unit readiness."<sup>36</sup> This restriction, however, is a virtual nullity given the current shortage of military personnel. Indeed, the Department of Defense changed its policies in March 2008 to authorize private soldiers' direct participation in hostilities rather than for self-defense alone.<sup>37</sup> But there is another current federal statute that might be able to limit the government's use of

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Baku-Tbilisi-Ceyhan oil pipeline running through Azerbaijan, Georgia, and Turkey); Charles Clover & Demetri Sevastopulo, *US Military Trained Georgian Commandos*, FIN. TIMES, Sept. 6, 2008, at 4 ("The US military provided combat training to 80 Georgian special forces commandos only months prior to Georgia's army assault in South Ossetia in August. . . . The training was provided by senior US soldiers and two military contractors. . . . The contractors—MPRI and American Systems, both based in Virginia—recruited a 15-man team of former special forces soldiers to train the Georgians at the Vashlijvari special forces base on the outskirts of Tbilisi, part of a programme run by the US defence department."); *Private US Companies Train Armies Around the World*, U.S. NEWS & WORLD REP., Feb. 8, 1997, at 13; Robert D. Kaplan, *Outsourcing Conflict*, ATLANTIC UNBOUND, Sept., 2007, <http://www.theatlantic.com/doc/200709u/kaplan-blackwater> (link).

<sup>33</sup> See, e.g., Singer, *supra* note 28, at 120; *Brown & Root Supports U.S. Forces in Albania*, FED. TIMES, May 10, 1999, at 13.

<sup>34</sup> See PELTON, *supra* note 31, at 31 ("The chief of the CIA's Special Activities Division called . . . the next day and asked him to start recruiting contractors to be inserted into Afghanistan for paramilitary actions against bin Laden and company.").

<sup>35</sup> See Walter Pincus, *More Private Forces Eyed for Iraq*, WASH. POST, Mar. 18, 2004, at A25, available at [http://www.sandline.com/hotlinks/Wash\\_Post-Green\\_Zone.html](http://www.sandline.com/hotlinks/Wash_Post-Green_Zone.html) (link). A U.S. solicitation explained how "[t]he current and projected threat and recent history of attacks directed against coalition forces, and thinly stretched military force requires a commercial security force that is dedicated to provide Force Protection security." David Barrow, James Glanz, Richard A. Oppel, Jr., & Kate Zernike, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9A06E4DA113BF93AA25757C0A9629C8B63&sec=&spon=&pagewanted=all> (link).

<sup>36</sup> 10 U.S.C. § 2465(b)(1) (2000); see also U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 237.109 (1998) [hereinafter DFARS] (touching upon DFARS 237.102-70(a)(1), the implementing regulation for 10 U.S.C. § 2465).

<sup>37</sup> See DFARS 252.225-7040(b)(3)(ii) (2008) ("Contractor personnel performing security functions are also authorized to use deadly force when such force reasonably appears necessary to execute their security mission . . .").

PMFs: The Anti-Pinkerton Act (Section 3108).<sup>38</sup> The following two sections introduce the historical background of Section 3108 and discuss its only significant treatment in court.

#### A. *The Historical Basis for the Anti-Pinkerton Act*

Congress's impetus for Section 3108 was the infamous Homestead Strike. When the Amalgamated Association of Iron and Steel Workers went on strike in Homestead, Pennsylvania, their employers retained a private army of three-hundred Pinkertons to protect the mill.<sup>39</sup> A deadly fire-fight began as the Pinkertons approached the picketed mill on floating barges. In response to the violence and upset that businessmen could hire armed soldiers to discourage labor strikes,<sup>40</sup> Congress launched investigations into the employers' reliance on mercenaries in these labor disputes.<sup>41</sup>

Congressional investigating committees heard testimony about the Pinkertons and other similar organizations. Like the House investigating committee, the Senate investigating committee's report disapproved of the use of private armies and characterized the industry as an "assumption of the State's authority by private citizens."<sup>42</sup> Accordingly, the legislative fruit of the committees' reports—Section 3108—states, in its entirety, that: "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia."<sup>43</sup> Although Congress did not believe it could ban mercenaries altogether, it did proscribe itself from employing such forces.<sup>44</sup>

#### B. *United States ex rel. Weinberger v. Equifax*

Section 3108 lay relatively dormant until 1977, when a Mr. David P. Weinberger sought a declaratory judgment that the government's contract with a credit reporter for information about its employees violated the nearly-forgotten law. He made a textual argument, alleging that Equifax was "similar" to the Pinkerton detectives because it used comparable investigative techniques. After reviewing Section 3108's legislative history, howev-

<sup>38</sup> See Davidson, *supra* note 24, at 252–56.

<sup>39</sup> See *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 461 (5th Cir. 1977).

<sup>40</sup> After a thirteen-hour battle between the two sides, approximately twenty Pinkertons and forty strikers had been shot. Seven Pinkertons and nine striking workers eventually died. MILTON MELTZER, *BREAD—AND ROSES 1865–1915* 97–99 (1991). By the time of the Homestead incident in July 1892, the Pinkerton National Detective Agency had "2,000 trained men and 30,000 reserves" which "had been used by industrialists whenever there were strikes to be broken or unions to be smashed." *Id.* at 94.

<sup>41</sup> See S. REP. NO. 52-1280 (1893); H.R. REP. NO. 52-2447 (1893). See also S. REP. NO. 88-447, at 8 (1963) (providing a report on a bill to repeal the Anti-Pinkerton Act, as well as describing the congressional actions surrounding the passage of that Act).

<sup>42</sup> See S. REP. NO. 52-1280, at I, XV (1893).

<sup>43</sup> 5 U.S.C. § 3108 (2000).

<sup>44</sup> See *Equifax*, 557 F.2d at 461–62; see also Davidson, *supra* note 24, at 253.

er, the Fifth Circuit concluded that it should look to the Pinkerton Detective Agency of 1892 when it was used as an exemplar.<sup>45</sup>

In an effort to assess which organizations could fall into this category, the Fifth Circuit used a purposive interpretation to determine that the statute prohibited the federal government from contracting with any Agency that “*offered for hire mercenary, quasi-military forces . . . and armed guards.*”<sup>46</sup> The court relied on the congressional debates to support its narrower reading: “The original proposition adopted by the House was a very broad one . . . [that] prohibited the employment of the *Pinkerton force or any similar quasi-military organization* by any officer of the Government or the District of Columbia . . . .”<sup>47</sup> Although some of the Fifth Circuit’s language seems sweeping, this was a narrower interpretation of Section 3108 because the government regularly conducts background checks through private companies or employs private security guards.<sup>48</sup>

*United States ex rel. Weinberger v. Equifax, Inc.* is the only direct judicial interpretation of Section 3108,<sup>49</sup> and in light of its narrow interpretation, the statute has not been relied upon frequently. Many federal facilities today employ private security guards, and investigative work is regularly delegated to detective agencies.<sup>50</sup>

Ironically, however, the Fifth Circuit’s seemingly narrow interpretation is favorable to a modern-day argument against the government’s employment of PMFs.<sup>51</sup> *Equifax*’s language prohibits the government from contracting out “quasi-military armed forces,” which presumably would include contracting with PMFs for combat-intensive tactical support. Therefore, under the *Equifax* interpretation of Section 3108, military “leaders must still consider [Section 3108’s] restrictions when implementing the Army’s . . . contractual authority.”<sup>52</sup>

<sup>45</sup> See *Equifax*, 557 F.2d at 462.

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Id.* at 462–63 (quoting S. REP. NO. 88-447, at 8 (1963) (including description of the 1893 conference) (emphasis added)).

<sup>48</sup> See, e.g., *Robinson v. United States*, 422 F. Supp. 121, 123 (M.D. Tenn. 1976) (using the Anti-Pinkerton Act to dismiss the plaintiff’s tort action against the United States and the Pinkerton company when its employees were hired to be security guards, but failing to directly interpret that statute).

<sup>49</sup> See Sklansky, *supra* note 29, at 1215 n.297.

<sup>50</sup> See *id.*

<sup>51</sup> See Alec Klein & Steve Fainaru, *Judge Halts Award Of Iraq Contract*, WASH. POST, June 2, 2007, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/01/AR2007060102261.html> (“A federal judge yesterday ordered the military to temporarily refrain from awarding the largest security contract in Iraq [based on the Anti-Pinkerton Act].”) (link). *But see* *Scott v. United States*, 78 Fed. Cl. 151, 156–57 (Fed. Cl. 2007) (finding that the plaintiff lacked standing as an interested party to the bidding because he could not show that he had any expertise or a substantial chance of being awarded the contract).

<sup>52</sup> Major Gregory L. Bowman, *Transforming Installation Security: Where Do We Go From Here?*, 178 MIL. L. REV. 50, 60 (2003).

### III. THE DEMOCRATIC BENEFITS TO APPLYING THE ANTI-PINKERTON ACT TO MODERN PRIVATE MILITARY FIRMS

Applying Section 3108 to bar the use of PMFs for tactical operations would create significant democratic benefits—benefits that would far outweigh any difficulties such an application might entail. Indeed, preventing the government from outsourcing tactical operations to PMFs and treating private soldiers as separate from the costs of war would generate more accurate political accountability.

#### A. *The Need for Greater Democratic Accountability*

Very little information is available to the public about the extent of the United States' current reliance on PMFs.<sup>53</sup> Tragedies like the Nisour Square incident are reminders of the responsibilities with which PMFs are entrusted. Sadly, only the most egregious mistakes of PMFs are adequately reported.<sup>54</sup> Furthermore, when these mistakes are entangled with the military's own scandals, the public's irritation is mainly targeted on public officials—while the ire towards PMFs is comparatively subdued.<sup>55</sup>

While it is true that scandalous incidents have brought the debate on PMFs into the democratic conversation,<sup>56</sup> the consideration of whether to apply Section 3108 to this industry would spark more robust political debate about the proper role of PMFs in American warfare. In addition, such debate would shift the onus of PMF approval to Congress.<sup>57</sup> While Congress certainly might decide to repeal the Act and continue the United States' extensive reliance on PMFs, their investigations would probably compile exact figures of the many wounded or killed private soldiers, the

<sup>53</sup> See, e.g., John M. Broder & James Risen, *Contractor Deaths in Iraq Soar to Record*, N.Y. TIMES, May 19, 2007, at A2, available at [http://www.nytimes.com/2007/05/19/world/middleeast/19contractors.html?\\_r=1&oref=slogin&pagewanted=all](http://www.nytimes.com/2007/05/19/world/middleeast/19contractors.html?_r=1&oref=slogin&pagewanted=all) (link).

<sup>54</sup> For example, the massacre of four Blackwater soldiers in the town of Falluja was initially reported in an incorrect manner. See, e.g., Jeffrey Gettleman, *4 From U.S. Killed in Ambush in Iraq*, N.Y. TIMES, Apr. 1, 2004, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9E06E4DC1539F932A35757C0A9629C8B63&sec=&pon=&pagewanted=all> (characterizing the private soldiers as merely “[f]our Americans working for a security company”) (link).

<sup>55</sup> See SCAHILL, *supra* note 15, at 157. During the Abu Ghraib scandal, for instance, it went unreported that two of those involved in the abuses were privately employed: “[P]rivate contractors from two U.S. corporations . . . [A private] interrogator . . . and a [private] translator . . . ‘were either directly or indirectly responsible for the abuses at Abu Ghraib.’” *Id.* (quoting Deborah Hastings, *Military Reports Match Some Lawsuit Details*, ASSOCIATED PRESS, Oct. 21, 2004).

<sup>56</sup> See, e.g., Editorial, *End the Shadow War*, NATION, Oct. 15, 2007, at 3–4, available at <http://www.thenation.com/doc/20071015/editors> (link).

<sup>57</sup> Cf. Bonnie Goldstein, *Blackwater Unplugged*, SLATE, Oct. 3, 2007, <http://www.slate.com/id/2175210/> (quoting Rep. Waxman's opinion of how “[t]he State Department is acting as Blackwater's enabler”) (link).

facts from lawsuits filed against PMFs,<sup>58</sup> and the questions of the companies' professionalism.<sup>59</sup> This compiled information would increase the political accountability of the government's use of PMFs and might also lead to an informed and meaningful oversight system.

Other than what is provided by the PMF industry itself, the public currently has access to very little information about the government's use of private soldiers. Indeed, with so many private security companies operating in Afghanistan and Iraq, calculating the exact number of PMF casualties is practically impossible. Legislation was introduced last year by Representative Jan Schakowsky of Illinois to force the government to release detailed statistics on the use, names, and job descriptions of contractors in Iraq, including information on those killed and injured.<sup>60</sup> Representative Schakowsky articulated the bill's rationale as one of democratic accountability: "By keeping the knowledge of [PMFs] hidden, it changes one's perception and one's evaluation of the war. . . . I think it masks the fact that we are privatizing the military in this country."<sup>61</sup> The bill is an example of the public's desire for accurate information about the private military industry, as well as the importance of having an informed public dialogue about the use of PMFs.

### *B. The Democratic Results of Applying the Anti-Pinkerton Act to Private Military Firms*

At the end of the day, PMFs operate in a demand-based market that requires military conflicts to survive. But if courts apply Section 3108 to effectively ban the use of PMFs for tactical military operations, much of this demand would—at least temporarily—be cut off. In the wake of such a ruling, Congress would have to examine the extent of the role that PMFs should occupy in the modern military.

It is true that PMFs are integrated with the military system; however, courts applying Section 3108 to prohibit use of PMFs in tactical missions would allow Congress to reassess how dependent the armed services should be on private soldiers. Furthermore, this reassessment, in light of the current military situations in Iraq and Afghanistan, would publicize more accu-

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<sup>58</sup> See SCAHILL, *supra* note 15, at 227–36, 246–52.

<sup>59</sup> See, e.g., Michael Duffy, *When Private Armies Take to the Front Lines*, TIME, Apr. 12, 2004, at 32, available at <http://www.time.com/time/magazine/article/0,9171,1101040412-607775,00.html> (link); Barry Yeoman, *Dirty Warriors*, MOTHER JONES, Nov.–Dec. 2004, at 30, available at [http://www.motherjones.com/commentary/notebook/2004/11/11\\_200.html](http://www.motherjones.com/commentary/notebook/2004/11/11_200.html) (link); see also James Hider, *Soldiers of Fortune Rush to Cash In on Unrest*, TIMES (London), Mar. 31, 2004, at 12, available at <http://www.timesonline.co.uk/tol/news/world/iraq/article1053944.ece> (“[T]he massive demand for protection, and the fear of almost daily killing of foreign workers, has overstretched market supply, spawning an upsurge in cowboy contractors and drawing on a pool of international guns for hire that, according to reputable firms, are as much a liability to themselves and Iraqis as to their clients.”) (link).

<sup>60</sup> See Iraq & Afghanistan Contractor Sunshine Act, H.R. 897, 110th Cong. (2007).

<sup>61</sup> Broder & Risen, *supra* note 53 (quoting Rep. Schakowsky).

rate information about how PMFs are actually used, allowing the electorate to make better-educated choices about whether to deploy military forces. At minimum, if the U.S. continues employing PMFs in Iraq, the electorate should know this fact in order to gauge effectively its desire for a longer and costlier military engagement.

Finally, with many PMFs carrying out tactical functions, it is likely that these forces could detract from (or be a distraction to) the U.S. military's own objectives.<sup>62</sup> Such a conflict certainly occurred when Blackwater soldiers were massacred in Falluja in 2004.<sup>63</sup> The Iraqis responsible believed that they were exacting revenge on American soldiers, failing to distinguish between public and private military operatives.<sup>64</sup> Nevertheless, the U.S. military eventually had to resolve their resulting image problems in Falluja.<sup>65</sup> This sort of scenario is an everyday risk for the U.S. military, and it is ultimately the American public that must bear the costs when PMF actions are unsuccessful. The proper functioning of American democracy would be better served by forcing a congressional debate on PMFs.

#### CONCLUSION

Given the U.S. military's current reliance on PMFs, an open and informed debate on which roles, if any, are appropriate for private soldiers is best for the American people. While tragic actions by PMFs have provided an impetus for greater regulation of the private military industry, application of the Anti-Pinkerton Act could force a national political debate. And with greater political accountability, officials might become more cautious when mediating future military engagements.<sup>66</sup> Consequently, the statute could force Congress to exercise its Article I power under the War Powers Clause and provide for a proper accounting of PMFs and the U.S. military's

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<sup>62</sup> See Eric Westervelt, *Morning Edition: Troops and Contractors Come into Conflict in Iraq* (NPR radio broadcast June 13, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4700516> (reporting that some private contractors were detained for allegedly shooting at both U.S. soldiers and Iraqi civilians) (link).

<sup>63</sup> See SCAHILL, *supra* note 15, at 91–105.

<sup>64</sup> Cf. Renee Montagne & Dina Temple-Raston, *Morning Edition: Iraqis See U.S. Contractors, Troops the Same* (NPR radio broadcast Dec. 17, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=17307607> (noting how the Iraqi victims at Nisour Square do not distinguish between the private Blackwater soldiers and the public U.S. soldiers) (link).

<sup>65</sup> See Edward Wong, *8 Months After U.S.-Led Siege, Insurgents Rise Again in Falluja*, N.Y. TIMES, July 15, 2005, at A1, available at <http://www.nytimes.com/2005/07/15/international/middleeast/15falluja.html?scp=10&sq=fallujah&st=se> (link).

<sup>66</sup> See, e.g., SCAHILL, *supra* note 15, at 213; cf. John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1420 (1988) (“It should be well within the capacity of most federal judges (certainly it is within the Supreme Court’s capacity) to write an opinion explaining that the Constitution entrusts decisions on war and peace to Congress, and that because the conflagration in question meets the statutory criteria, it has become Congress’s constitutional duty to decide whether it should continue—an opinion that Congress simply could not ignore.”).

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integration of such firms in the war on terrorism. The present—and unacceptable—legal void in dealing with the private military industry might be successfully remedied if a meaningful, honest, and open debate were allowed to occur.