

“JEALOUSIES OF A STANDING ARMY”: THE USE OF
MERCENARIES IN THE AMERICAN
REVOLUTION AND ITS IMPLICATIONS FOR
CONGRESS’S ROLE IN REGULATING PRIVATE
MILITARY FIRMS

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ABSTRACT—The use of mercenaries during the American Revolution should inform the debate over the regulation of private military firms (PMFs) today. This Comment examines the historical use of mercenaries to demonstrate that a standing army, in the experience and understanding of the Framers, included both enlisted citizens and private enterprises who performed a wide range of essential military functions. It further argues that PMFs as they currently function in Iraq and Afghanistan fall squarely within the Framers’ broad conception of a standing army. The debates about national defense following the American Revolution show that the Framers accepted a standing army in the new nation solely on the condition that it be regulated and controlled by Congress. However, PMFs are currently governed as civilians by the terms of their contracts with the Executive Branch. This arrangement has led to a number of serious problems, including widespread waste and fraud resulting from deficient oversight, lack of accountability for brutal human rights violations, and distortion of the democratic decisionmaking process. This Comment argues that treating PMFs as civilians for the purposes of regulation is misguided, both as a constitutional and practical matter. Congress must exert control over PMFs using the same system that governs the military, in accordance with the separation of powers over national defense established at the framing.

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INTRODUCTION

On August 31, 2010, President Obama announced the end of combat operations in Iraq.¹ In the eighteen months preceding the announcement, nearly 100,000 troops returned home.² But the withdrawal of troops did not necessarily mean a reduction in U.S. military presence.³ A surge of private military firms (PMFs)⁴ arrived in Iraq as U.S. troops departed.⁵ The United States would maintain its military hegemony in Iraq beyond the end of combat operations, but it would exercise authority through the use of private military companies rather than American troops.

A deep ambivalence has accompanied the use of PMFs in Iraq and Afghanistan.⁶ As a presidential candidate in February 2008, Hillary Clinton sharply criticized military contractors, referring to them as mercenaries and sponsoring legislation to ban them.⁷ As Secretary of State in July 2010,

¹ Helene Cooper & Sheryl Gay Stolberg, *Obama Declares an End to Iraq Combat Mission*, N.Y. TIMES, Sept. 1, 2010, at A1.

² See Alexander Cockburn, *No, the Empire Doesn’t Always Win*, NATION, Aug. 30/Sept. 6, 2010, at 9, 9.

³ See *id.*

⁴ PMFs are also commonly called PMCs (private military companies). PSC (private security company) refers to the subset of PMFs that provide protective services.

⁵ See Jeremy Scahill, *Iraq Withdrawal? Obama and Clinton Expanding US Paramilitary Force in Iraq*, NATION (July 22, 2010, 10:59 AM), <http://www.thenation.com/blog/37877/iraq-withdrawal-obama-and-clinton-expanding-us-paramilitary-force-iraq>.

⁶ See, e.g., Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 995, 1004 (2005) (calling the prospect of unaccountable private military contractors both “disturbing” and “inconsistent with growing demands for compliance with human rights globally,” but acknowledging that “[i]mmediate benefits are clear”).

⁷ Scahill, *supra* note 5.

however, in the midst of the troop withdrawal from Iraq, she asked Congress to approve funding to double the number of PMFs working in Iraq under the authority of the State Department.⁸

Condemning the use of PMFs when politically expedient and then employing them when convenient is not a new phenomenon in American history. One of the complaints lodged against King George in the Declaration of Independence was that “[h]e 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.”⁹ Nevertheless, during the Revolution, American military leaders actively sought the aid of mercenaries to support their fledgling army of enlisted men.¹⁰ It would have been odd for them to do otherwise: the use of mercenaries was the norm in European warfare at that time.¹¹

The use of mercenaries during the American Revolution should inform the debate over the regulation of PMFs today. This Comment examines the historical use of mercenaries to demonstrate that a standing army, in the experience and understanding of the Framers, included both enlisted citizens and private enterprises who performed a wide range of essential military functions. It further argues that PMFs as they currently function in Iraq and Afghanistan fall squarely within the Framers’ broad conception of a standing army. The debates about national defense following the Revolution show that the Framers accepted a standing army in the new nation solely on the condition that it be regulated and controlled by Congress. If PMFs fall within the Framers’ conception of a standing army, then Congress has a responsibility under the Constitution to regulate them as part of the military.¹²

⁸ *Id.*

⁹ THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

¹⁰ See DANIEL MARSTON, *THE AMERICAN REVOLUTION: 1774–1783*, at 20 (2002). For example, the American army during the Revolution employed European officers with expertise in military technology, paid Native Americans to fight with them against the British, and sometimes even competed directly with King George for the services of the Hessian mercenaries that the authors of the Declaration so vehemently deplored. See *infra* Part I.B.2.

¹¹ See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 28–34 (updated ed. 2008). By the seventeenth century, “European armies . . . often were simple amalgamations of hired mercenary companies, all with their own specialties.” *Id.* at 28.

¹² The word “mercenary” is imbued with negative connotations, and its meaning varies substantially according to context. Because the comparison between mercenaries at the time of the Revolution and PMFs today is central to the argument of this Comment, it may be helpful to briefly address the ambiguity of the term and distinguish between its various meanings. In the context of historical scholarship, the broad concept of mercenary encompasses many types of military professionals. See, e.g., Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 7–8 (2003) (explaining that mercenaries could be “lone adventurer[s]” who fought for the highest bidder, elite guards of heads of state, and “free companies” of

PMFs are currently governed as civilians by the terms of their contracts with the Executive Branch.¹³ This arrangement has led to a number of serious problems, including widespread waste and fraud as a result of deficient oversight, lack of accountability for brutal human rights violations, and distortion of the democratic decisionmaking process.¹⁴ This Comment argues that treating PMFs as civilians for the purposes of regulation is misguided, both as a constitutional and as a practical matter. Congress must exert control over PMFs using the same system that governs the military, in accordance with the separation of powers over national defense established at the framing.

Part I examines the use of mercenaries in European militaries and the Continental Army during the American Revolution, and then examines how the military experience and political background of the Framers shaped the debates that led to the standing army provisions of the Constitution. Part II analyzes the current system of military contracting and some of the problems associated with that system. Part III argues that the most effective way to address problems in the current system involves bringing contractors under congressional military regulation. This Comment suggests regulatory changes consisting of three major components: (1) integration of PMFs into the military chain of command, (2) extension of the jurisdiction of courts martial over PMFs, and (3) strengthening of oversight by improving

private armies who sold their services to feudal lords). In modern international law, the term mercenary has a narrowly defined meaning and its application to a particular group has specific legal consequences. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, June 8, 1977, 1125 U.N.T.S. 25. Modern PMFs are adamant that the Geneva Convention definition does not apply to them, and many scholars agree. *See infra* note 220 and accompanying text.

However, it is not just the legal implications of the term that trouble PMFs. The word mercenary has long carried a derogatory connotation. Even at the time of the Constitution's framing, when mercenaries were widely employed, the word mercenary was often used to mean untrustworthy, self-serving, or motivated solely by financial gain. *See, e.g.*, JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 397 (Gaillard Hunt & James Brown Scott, eds. 1920) ("If men will not serve in the Legislature without a prospect of such offices, our situation is deplorable indeed. If our best Citizens are actuated by such mercenary views, we had better chuse a single despot at once."). In this derogatory context, the term is often merely a tool of political rhetoric, and it carries no specific legal or historical meaning. *See* SARAH PERCY, MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS 50–51 (2007) ("The word mercenary has evolved into a pejorative term used to denote a disliked soldier. The proscription against mercenary use is so strong that the word mercenary itself has become a powerful political tool . . ."). For the purposes of this Comment, the comparison of modern PMFs to their seventeenth- and eighteenth-century European counterparts—whom historians call mercenaries—does not imply that PMFs are mercenaries as defined by current international law. Neither does this Comment use the word in its derogatory sense. Instead, it seeks to show that the Framers understood standing armies to include a number of different private military enterprises as well as enlisted citizen soldiers.

¹³ *See* Deborah Avant, *Mercenaries*, FOREIGN POL'Y, July–Aug. 2004, at 20, 22 ("In the United States . . . the Federal Acquisition Regulations and additional Department of Defense rules govern contracts with private [military] firms.").

¹⁴ *See infra* Part II.C.

Congress’s access to information about PMFs. All three suggestions can be accomplished either through legislation or control over the military budget.

The historical analysis in this Comment establishes that Congress has the power, under Article I, Section 8 of the Constitution,¹⁵ to regulate PMFs as part of the military. Thus far, Congress has failed to exercise this power. Congress’s failure represents an abdication of its proper role in the constitutional system of separation of powers over the military. As the Framers well understood, the “parchment barriers” in the constitutional text are insufficient to maintain the correct balance of power among the branches of the federal government.¹⁶ Rather, each branch must protect its own institutional authority.¹⁷ Congress must exert control over PMFs in order to reestablish the proper separation of powers over the military.

I. MILITARY PRACTICE AT THE TIME OF THE AMERICAN REVOLUTION

Part I reviews the use of mercenaries in medieval and early modern Europe to establish the historical context for their use during the American Revolution. Then it examines the British and American practice of employing mercenaries during the Revolution and shows how this practice shaped political debate on both sides of the Atlantic.

A. Background: Early European Experience with Mercenaries

The use of mercenaries in Europe grew out of shortcomings in the medieval feudal system.¹⁸ In the feudal system, each social class owed military service to the class above it for a short period each year, leaving rulers with unspecialized forces on call for a limited time.¹⁹ It became common for lords to pay for the services of private military companies composed of individuals who specialized in a particular skill.²⁰ Over time, these private military companies developed into well-organized and lucrative businesses. For example, in the fourteenth and fifteenth centuries, professional infantry units and royal guards in Switzerland became

¹⁵ U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To raise and support Armies . . .”).

¹⁶ See THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 2003) (“Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? . . . But experience assures us that the efficacy of the provision has been greatly overrated . . .”).

¹⁷ See *id.* NO. 51, at 318 (James Madison) (“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own . . .”); *cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“[O]nly Congress itself can prevent power from slipping through its fingers.”).

¹⁸ See SINGER, *supra* note 11, at 22.

¹⁹ See *id.*

²⁰ *Id.* Artillerymen, for instance, formed an international trade guild with its own patron saint and zealously guarded trade secrets. *Id.*

industries that operated on an international scale.²¹ Contemporaneously in Italy, the *condottiere* system (from *condotta*, meaning “contract”) formalized business relationships between mercenary captains and the cities that hired them for protection.²²

The rise of mercenary forces sometimes posed a grave danger to the social order, as when unemployed mercenaries ravaged the French countryside after the Hundred Years’ War demanding that towns and cities pay them protection money.²³ To resolve the tension between the usefulness of mercenaries in times of war and the inherent danger they posed in times of peace, states began to bring them under control by subjecting them to legal restrictions and incorporating them into more permanent military institutions.²⁴ Thus, in the fifteenth century, the Swiss government devised strict contracts for its mercenary companies, and Charles VII of France organized mercenaries into *compagnies d’ordonnance*, a “prototype standing army.”²⁵

The gradual professionalization of European militaries reached a peak during the Thirty Years’ War, which lasted from 1618 to 1648.²⁶ In that conflict, which marked a “heyday for hired armies,”²⁷ the majority of soldiers who fought and died were mercenaries.²⁸ The Peace of Westphalia that ended the Thirty Years’ War marked the beginning of the long transition from the use of mercenaries to the use of national armies.²⁹ That treaty solidified the emergence of nation-states with exclusive sovereignty over affairs within their borders.³⁰ This new political reality provided the context in which standing armies, composed entirely of enlisted citizens, replaced private military enterprises as the new norm.³¹

The phase-out of private military enterprises after the Thirty Years’ War was very gradual, however, and nations continued to employ mercenaries well into the nineteenth century.³² It was not until 1871, when

²¹ *Id.* at 27.

²² See PERCY, *supra* note 12, at 75.

²³ *Id.* at 78.

²⁴ See *id.* at 78–93.

²⁵ *Id.* at 82–84.

²⁶ Christopher H. Lytton, *Blood for Hire: How the War in Iraq Has Reinvented the World’s Second Oldest Profession*, 8 OR. REV. INT’L L. 307, 314 (2006).

²⁷ *Id.* (quoting P.W. Singer, *The Ultimate Entrepreneur*, MIL. HIST. Q., Spring 2003, at 6, 8) (internal quotation mark omitted).

²⁸ *Id.* at 314–15.

²⁹ See SINGER, *supra* note 11, at 29.

³⁰ *Id.*

³¹ See Janice E. Thomson, *State Practices, International Norms, and the Decline of Mercenarism*, 34 INT’L STUD. Q. 23, 43 (1990) (“Two factors were crucial to the decline of mercenarism and other forms of nonstate violence: the transformation of the state into the nation-state and the rise of the citizen.”).

³² See SINGER, *supra* note 11, at 32.

“Prussia’s victory in the Franco-Prussian War demonstrated the superiority of a citizen-army” over professional military companies, that every major state in Europe began relying on their own citizens for national defense.³³ The American Revolution, which began in April of 1775, occurred in the middle of this long period of transition. When the founding generation built the framework for a new nation, the emerging ideal of the citizen soldier was taking hold, but the paid mercenary remained a staple of armed conflict.

B. Armies in the American Revolution

1. *Britain’s Use of Mercenaries.*—When the American Revolution began in 1775, Britain did not have enough troops to defeat the American forces and maintain control over its worldwide empire.³⁴ That year, the British Army stood at about 48,000 officers and men, distributed throughout North America, Ireland, Great Britain, Minorca, Gibraltar, Africa, and the West Indies.³⁵ Eight thousand of these—far too few to contain the insurrection—were stationed in North America.³⁶ Attempts to enlist more Englishmen into the regular army failed.³⁷ The problem of insufficient troops intensified when France and Spain entered the conflict and sided with the colonies.³⁸

Under these circumstances, the decision to hire mercenaries was a natural British response.³⁹ They hired roughly 10,000 Native Americans from the Iroquois and Algonquin nations to serve as scouts and raiders.⁴⁰ They also turned to the professional armies of the German principalities and

³³ See Thomson, *supra* note 31, at 32.

³⁴ See SINGER, *supra* note 11, at 33.

³⁵ See MARSTON, *supra* note 10, at 17.

³⁶ *Id.*

³⁷ See PERCY, *supra* note 12, at 152. For example, in 1778 Britain added 1000 Englishmen to the ranks of the army by imposing a parish quota, but they deserted en masse at the first opportunity. *Id.* One historian offers a broad explanation for the lack of military enthusiasm:

Modern nationalism not yet having appeared, and the emotions of Europe’s religious wars having burned themselves out, the European populations at large were divorced from interest in the political goals of their monarchs. . . . To have enlisted huge numbers of men into their armies would have been difficult, since most of their subjects were indifferent to the purposes of their wars.

RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 19 (enlarged ed. 1984). More specifically, in the context of the American Revolution the British may have faced difficulties raising troops because the war against the colonies was controversial. See PERCY, *supra* note 12, at 153 (noting the Duke of Chandos’s observation that British troops were reluctant “to engage against their fellow-citizens”).

³⁸ See MARSTON, *supra* note 10, at 17.

³⁹ See PERCY, *supra* note 12, at 149 (“By the time the American Revolution began, there was no question that Britain would send foreign troops as part of its army, because foreigners had always been used in the past.”).

⁴⁰ See MARSTON, *supra* note 10, at 19.

ultimately hired nearly 30,000 German mercenaries.⁴¹ The decision to use mercenaries may have followed the prevailing norm, but it met with dissent from some English political leaders, who challenged the hiring of German troops on both moral and pragmatic grounds.⁴² This criticism reflects a broader trend: the emerging belief that citizen armies were superior to mercenaries.⁴³

The use of mercenaries against English subjects particularly disturbed critics.⁴⁴ Such resistance had very deep roots in English history. As long ago as 1215, rebellious barons forced King John to banish mercenary soldiers “who have come with horses and arms, to the kingdom’s hurt.”⁴⁵ In the aftermath of the English Civil War, which lasted from 1642 to 1651, fear of standing armies prompted the revival of the militia system, a regime in which local citizen volunteers enforced domestic security.⁴⁶ Consistent with the preference for local militias, the Bill of Rights that emerged from the Glorious Revolution of 1688 forbid the “raising and keeping [of] a Standing Army within this Kingdome in time of Peace without Consent of Parlyament”⁴⁷ There can be little doubt that the standing armies addressed in this document were widely understood to include mercenaries; the English army in Flanders in the 1690s was nearly half mercenary, and that number rose in the following decade.⁴⁸ Generally, it appears that the British did not have a problem with mercenaries per se, but rather with the Crown’s use of mercenaries at home against English subjects. The preference for local militias over standing armies at home would inform the American constitutional debates a century later.⁴⁹

2. *America’s Use of Mercenaries.*—In 1775, most of Washington’s soldiers went home in December upon the expiration of their enlistments.⁵⁰ Washington reorganized the army on January 1, 1776, but not enough men

⁴¹ See SINGER, *supra* note 11, at 33. Because approximately two-thirds were from the Hesse-Kassel region, the German forces became known as “Hessians” by the Americans. *Id.*

⁴² See PERCY, *supra* note 12, at 152–55. For instance, some argued that mercenarism was akin to slavery; others pointed out that the presence of foreign troops would solidify American resistance. *See id.*

⁴³ *Id.* at 149–52.

⁴⁴ *Id.* at 153 (quoting Mr. Alderman Bull, who exhorted, “[L]et not the historian be obliged to say that the Russian and the German slave was hired to subdue the sons of Englishmen and of freedom” (internal quotation marks omitted)).

⁴⁵ A. E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 18, 48 (revised ed. 1998).

⁴⁶ See Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 968–970 (1975).

⁴⁷ An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne (Bill of Rights), 1688, 1 W. & M., c.2 (Eng.).

⁴⁸ PERCY, *supra* note 12, at 149.

⁴⁹ *See infra* Part I.C.

⁵⁰ Holly A. Mayer, *The Continental Army*, in A COMPANION TO THE AMERICAN REVOLUTION 308, 309 (Jack P. Greene & J.R. Pole eds., paperback ed. 2004).

volunteered, and none of the regiments were at full strength for the 1776 campaign.⁵¹ The personnel problem continued throughout the war,⁵² but Congress and the military command attempted to combat it in part by hiring mercenaries.⁵³

Although the number of paid foreign troops fighting for the Americans was always lower than the number of Hessian mercenaries on the British side, the Continental Army did employ foreign corps to ameliorate their manpower shortage.⁵⁴ They also competed with the British for the services of the Native Americans and Hessians. For instance, Ethan Allen, the Colonel Commandant of the Vermont militias, sent a message to the Caughnawagas in Canada, urging them that the British king was in the wrong and offering to give them “Money Blankets Tomehawks Knives and Paint and the Like as much as you say” if the Caughnawagas would join Allen’s troops.⁵⁵ After the Hessians arrived at Staten Island, Congress formed a committee to devise plans for encouraging them to defect to the American side⁵⁶ and periodically distributed leaflets offering them land and livestock in exchange for their service.⁵⁷

In addition to facing a troop shortage, the continental army lacked expertise in key areas.⁵⁸ The Americans addressed this problem by engaging the professional services of European military officers.⁵⁹ According to one historian, this practice became so widespread that Congress “seemed to be dispensing commissions wholesale to foreign adventurers.”⁶⁰ Washington felt obliged to remind Congress that a background of service in a foreign army was not a guarantee of competence, but he too recognized the army’s

⁵¹ *Id.*

⁵² *Id.*

⁵³ See MARSTON, *supra* note 10, at 20.

⁵⁴ See *id.* The foreign corps included “Pulaski’s Legion, Von Heer’s Provost Corps and Brigadier-General Charles Tuffin Armand’s Independent Chasseurs.” *Id.*

⁵⁵ BARBARA GRAYMONT, *THE IROQUOIS IN THE AMERICAN REVOLUTION* 68 (1972) (quoting a message from Ethan Allen of Vermont).

⁵⁶ See CHARLES PATRICK NEIMEYER, *AMERICA GOES TO WAR: A SOCIAL HISTORY OF THE CONTINENTAL ARMY* 52 (1996).

⁵⁷ EDWARD J. LOWELL, *THE HESSIANS AND OTHER GERMAN AUXILIARIES OF GREAT BRITAIN IN THE REVOLUTIONARY WAR* 286 (Heritage Books 2008). One 1778 proclamation promised “fifty acres of land to every soldier that will come over, and any captain who brings forty men with him shall receive eight hundred acres of woodland, four oxen, one bull, two cows, and four sows.” *Id.*

⁵⁸ See WEIGLEY, *supra* note 37, at 64–65 (“Washington continued to lack officers sufficiently versed in combat tactics and experienced in the stress of combat to make the right decisions consistently and promptly . . .”).

⁵⁹ *See id.*

⁶⁰ *Id.* at 65; see also Aram Bakshian, *Foreign Adventurers in the American Revolution*, 21 *HIST. TODAY* 187, 187 (1971) (noting the efforts of Silas Deane and Benjamin Franklin to recruit professional officers from Europe and describing the “swarms of adventurers of many nationalities [who] repaired to America uninvited, presenting themselves to a Congress that gradually grew weary of the seemingly endless supply of martial counts, barons, and marquises, many of them self-ennobled.”).

necessities.⁶¹ His engineering corps was adequate only because he hired foreign military professionals with the necessary expertise,⁶² and he received valuable help from foreign officials in a number of areas that were vital to the American campaign.⁶³ With the help of contributions by foreign military professionals, by 1781 Washington's forces became a small standing army based on the model of eighteenth-century European militaries.⁶⁴

Given both their own experience building the American army and their familiarity with European practice at the time of the Revolution, it is reasonable to infer that the Framers and other well-informed citizens understood that a standing army included a wide range of military professionals beyond the enlisted citizen.

C. *The Debates About Standing Armies in America*

The debates over the use of standing armies in America during the Revolution and its aftermath reveal a deep tension between the value of liberty and the demands of security.⁶⁵ The terms of the debate drew heavily on the competing views of radical and moderate Whigs in seventeenth-

⁶¹ See WEIGLEY, *supra* note 37, at 65.

⁶² *Id.* at 70. For example, Polish engineer Tadeusz Kosciuszko contributed to the defensive works at Saratoga, and French military engineers led by Louis Duportail helped assemble a set of portable bridges, design the fortress at West Point, and establish three companies of combat engineers to train Americans. See *id.*; Robert K. Wright, Jr., “*Nor Is Their Standing Army To Be Despised*”: *The Emergence of the Continental Army as a Military Institution*, in *ARMS AND INDEPENDENCE: THE MILITARY CHARACTER OF THE AMERICAN REVOLUTION* 50, 61–62 (Ronald Hoffman & Peter J. Albert eds., 1984).

⁶³ For example, he relied on the Prussian officer Friedrich Wilhelm Baron von Steuben to develop a system of drill regulations and tactics for his army. See Wright, *supra* note 62, at 69–70. Baron von Steuben personally trained a company of officers and dispatched them to transmit his ideas throughout the Continental Army. See WEIGLEY, *supra* note 37, at 64. He also established the office of inspector general, which strengthened Washington's control of the army and “gradually eliminated the need for most existing administrative officials.” See Wright, *supra* note 62, at 71.

⁶⁴ See Wright, *supra* note 62, at 72.

⁶⁵ It may be helpful at this point to address an ambiguity in the term “standing army.” On one hand, “standing” implies permanent, as opposed to an army raised in the midst of war and then disbanded in times of peace. However, in eighteenth-century debates and correspondence, the term standing army did not always mean permanent. See, e.g., Letter from George Washington to the President of Congress (Sept. 2, 1776), in 6 *THE WRITINGS OF GEORGE WASHINGTON* 4, 5 (John C. Fitzpatrick ed., 1932) (“[O]ur Liberties must of necessity be greatly hazarded, If not entirely lost, If their defence is left to any but a permanent standing Army, I mean one to exist during the War.”). Instead, a standing army refers to an army of full-time professional soldiers, as opposed to a militia composed of volunteer citizens serving part-time. In this sense, a standing army is permanent because it serves for the duration of the war. As discussed above, the early manpower shortages of the Continental Army were caused in part by the need to reenlist soldiers every year. See *supra* notes 50–52 and accompanying text. A standing army could solve this problem without necessarily continuing beyond the duration of the war. The distinction between a professional standing army, which included mercenaries, and a volunteer militia, which did not, informed the debate during the Revolutionary Era.

century England.⁶⁶ Radical Whigs associated standing armies with mercenaries, which they in turn associated with the king's arbitrary exercises of power.⁶⁷ By contrast, they believed that a militia of citizen soldiers "stood at the heart of the stable and balanced constitution."⁶⁸ Moderate Whigs, on the other hand, argued that standing armies were both necessary and compatible with the survival of a free society, as long as "the safety of the realm required it and Parliament consented."⁶⁹ Both of these visions found expression in the debates over standing armies in America before, during, and after the Revolution.

In the years immediately preceding the Revolution, radical Whig rhetoric decrying the British army's depravity in the colonies was an important part of the discourse driving America toward revolution.⁷⁰ In the midst of the war, however, exigencies that required the skill of military professionals brought American views more in line with moderate Whig acceptance of standing armies,⁷¹ in part because the militia proved unreliable as the war progressed.⁷² In the battles of Long Island, Kip's Bay, and White Plains during the summer and fall campaign of 1776, the militia "[threw] down its weapons and [ran] away in the face of the enemy."⁷³ Washington's frustration with the militia became apparent in a letter to the Continental Congress:

To place any dependance upon Militia, is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestick life; unaccustomed to the din of Arms; totally unacquainted with every kind of Military skill, which being followed by a want of confidence in themselves,

⁶⁶ See LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 34 (1982) ("Certainly the competing English arguments over the nature of military institutions and their impact on civil society touched the consciousness of the colonists."). Radical and moderate Whigs were two competing groups of political theorists in eighteenth-century England. See *id.* at 15–18. The radical Whigs considered themselves heirs to classical republican thought and developed a historical critique that purported to explain the decline of English liberty. See *id.* at 15–17. To the radical Whigs, the emergence of standing armies out of the old feudal order was a sign of society's increasing decadence and corruption. *Id.* at 17. Moderate Whigs rejected the classical republican model and took a more positive view of historical progress. *Id.* at 15. In their view, military professionalism was just one manifestation of the specialization that was critical to the operation of modern society, and therefore acceptable. See *id.* at 15–16.

⁶⁷ See *id.* at 18.

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 25–26.

⁷⁰ *Id.* at 53; E. Wayne Carp, *The Problem of National Defense in the Early American Republic*, in *THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS* 14, 21 (Jack P. Greene ed., 1987) ("Americans' denunciations of standing armies became commonplace after British regulars arrived in Boston in 1768.").

⁷¹ See CRESS, *supra* note 66, at 53.

⁷² See Carp, *supra* note 70, at 24 ("The much vaunted militia, reputedly composed of virtuous farmers who fought selflessly for the commonwealth, evaporated in the face of prolonged conflict.").

⁷³ *Id.*

when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge, and superior in Arms, makes them timid, and ready to fly from their own shadows. . . .

. . . .

The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote; . . . but the consequence of wanting one . . . is certain, and inevitable Ruin⁷⁴

Largely as a result of Washington's distrust of the militias, he built a standing army that included mercenaries.⁷⁵

The tension between the standing army's utility and its potential to endanger liberty drove the postwar debate as well. During the Constitutional Convention of 1787 and the ratification debates that followed, the Framers considered whether the new nation should rely primarily on militias or on a standing army for the national defense, and views differed on how each sort of military unit should be managed.⁷⁶ Opponents of the standing army, such as Eldridge Gerry and Luther Martin, feared that there would be no check on its power and proposed that restrictions be written into the Constitution to limit both the size of the army and the amount of revenue that Congress could appropriate to support it.⁷⁷ The Federalists, who favored the standing army, argued that such restrictions would be shortsighted because "[t]he circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."⁷⁸ Echoing Washington's concerns during the war, the Federalists also maintained that a militia would prove ineffective against a professional European army: "The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind."⁷⁹

Yet even the Federalist James Madison feared that a powerful standing army controlled by the Executive might endanger liberty. He argued in the Constitutional Convention debates that "[a] standing military force, with an overgrown Executive will not long be safe companions to liberty."⁸⁰ These fears were also repeatedly expressed by the Antifederalists, who revived

⁷⁴ Letter from George Washington to the President of Congress (Sept. 24, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 65, at 106, 110, 112.

⁷⁵ See *supra* Part I.B.2.

⁷⁶ See Gary L. Hoffman, *Court-Martial Jurisdiction and the Constitution: An Historical and Textual Analysis*, 21 CREIGHTON L. REV. 43, 91–94 (1987).

⁷⁷ *Id.* at 92.

⁷⁸ THE FEDERALIST NO. 23, *supra* note 16, at 149 (Alexander Hamilton).

⁷⁹ *Id.* NO. 25, at 162 (Alexander Hamilton).

⁸⁰ James Madison, *Friday June 29th in Convention*, in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 461, 465 (Max Farrand ed., 1966).

radical Whig arguments against standing armies in the hands of an ambitious Executive and exalted state-controlled militias as “the bulwark of a free people.”⁸¹

The Framers answered this problem by granting Congress broad powers over the military.⁸² The Federalists argued that frequent elections and the tension between opposing parties in Congress would keep the Legislative Branch responsive to public concerns over the danger of a large standing army. Hamilton explained:

As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time. Is it probable that such a combination would exist at all? Is it probable that it would be persevered in, and transmitted along through all the successive variations in a representative body, which biennial elections would naturally produce in both houses? . . . If such presumptions can fairly be made, there ought to be at once an end of all delegated authority.⁸³

Thus, the acceptance of a standing army in the new constitutional system depended on legislative control.

Considering that mercenaries figure prominently in the Declaration of Independence, it is perhaps curious that the debates over standing armies in the Constitutional Convention do not specifically mention them. Perhaps the Framers, who constantly used the word “mercenary” in its derogatory sense in their political rhetoric against the British,⁸⁴ did not want the word associated with their own military institutions. Yet there can be little doubt that at the time of this debate, they understood mercenaries to be part of a standing army. Besides the fact that both sides used mercenaries during the war, the association between mercenaries and standing armies was prevalent in the political debates taking place outside of the convention.

⁸¹ Weatherup, *supra* note 46, at 986 (quoting Letter from John De Witt to the Free Citizens of the Commonwealth of Massachusetts, AM. HERALD (Boston), Dec. 3, 1787); *accord Speeches of Patrick Henry (June 5 and 7, 1788)*, in THE ANTI-FEDERALIST PAPERS 199, 214 (Ralph Ketcham, ed. 2003) (“The army will salute him Monarch; your militia will leave you and assist in making him King, and fight against you: And what have you to oppose this force?”).

⁸² THE FEDERALIST NO. 26, *supra* note 16, at 166 (Alexander Hamilton) (“[W]hen they referred the exercise of that power [over the military] to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.”).

⁸³ *Id.* at 167–68.

⁸⁴ For instance, in General Orders dated January 1, 1777, George Washington wrote, “[I]t is expected that humanity and tenderness to women and children will distinguish brave Americans, contending for liberty, from infamous mercenary ravagers, whether British or Hessians.” THE WRITINGS OF GEORGE WASHINGTON, *supra* note 65, at 466.

Speakers at the time seemed to treat “mercenary” and “standing army” as interchangeable terms; at the very least, they presumed the inclusion of mercenaries in the term “standing army.” In a pre-Revolution town hall meeting in Boston, for example, one citizen who protested the quartering of soldiers explicitly equated standing armies with mercenaries and opposed them to the ideal of citizen militias: “Standing Armies have forever made Shipwreck of Free States and no People Jealous of their liberties ever patiently suffered Mercenary Troops to be quarter’d & maintained within their Populous Cities; the Militia of the Colony are its best and natural defense[.]”⁸⁵ Similarly, the Virginia Convention drafted a resolution stating that “a Militia in this Colony would for ever render it unnecessary for the Mother Country to keep among us, for the purpose of our defence, any Standing Army of mercenary forces, always subversive of the quiet, and dangerous to the liberties of the people.”⁸⁶ The pseudonymous writer Caractacus, in the pamphlet *On Standing Armies*, referred to standing armies as mercenaries even while acknowledging that they were necessary under certain circumstances:

I shall only mention one political evil to which there is too great a propensity in the *American* Colonies, and that is, a willingness to trust the defence of our country to mercenary troops. I would not be understood here to insinuate the least reflection upon our brave countrymen who are now encamped around *Boston*: a mercenary army was absolutely necessary in that place, as the militia of that country were unequal to the toil and expense of besieging and watching the motions of our enemies.⁸⁷

Mercenaries’ ubiquity in armies during the American Revolution, as well as their prevalence as a topic of political debate, demonstrates that the Framers and other well-informed citizens at the time understood that standing armies were not limited to enlisted citizens. The fact that the Framers nevertheless provided for the limited use of a standing army in the Constitution shows that they accepted that the nation’s military resources could include military professionals other than the citizen soldier. However, they were only willing to make this provision on the condition that Congress have broad power over the military. The next section examines the extent of Congress’s power over the armed forces.

⁸⁵ A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON CONTAINING THE BOSTON TOWN RECORDS, 1770 THROUGH 1777, at 133 (Boston, Rockwell & Churchill 1887).

⁸⁶ *Petition and Memorial of the Assembly of Jamaica* (Mar. 23, 1775), in 2 AMERICAN ARCHIVES, FOURTH SERIES 167 (Peter Force ed., Washington, D.C. 1837), available at <http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?var/lib/philologic/databases/amarch/.2178>.

⁸⁷ *Caractatus On Standing Armies* (Aug. 21, 1775), in 3 AMERICAN ARCHIVES, FOURTH SERIES 219 (Peter Force ed., Washington, D.C. 1837), available at <http://lincoln.lib.niu.edu/cgi-bin/philologic/getobject.pl?c.6216:1.amarch>.

D. Congress’s Authority over the Armed Forces

The Constitution’s provisions for a standing army reflect a compromise between radical Whig idealism and moderate Whig pragmatism.⁸⁸ The Founders’ fear of a standing army, like that of the English theorists a century earlier,⁸⁹ was rooted in the danger that such an army would pose in the hands of an unchecked Executive.⁹⁰ The solution was to divide power over the standing army between the Executive and the Legislature.⁹¹ The Constitution granted Congress the power to “raise and support Armies” and “[t]o make Rules for the Government and Regulation of the land and naval Forces,” but limited that power by requiring that “no Appropriation of Money to that Use shall be for a longer Term than two Years.”⁹² With this authority, Congress can “check any propensity of the President for self-aggrandizement and tyranny” by preventing “the establishment or continuation of a [permanent] standing army in times of peace.”⁹³

These provisions amount to a very broad grant of power to Congress. No restrictions other than the two-year limit on appropriations bind that body’s ability to raise armies.⁹⁴ Congress is not limited to raising an army in times of war, as some in the Constitutional debates proposed,⁹⁵ but may do so in times of peace in order to be prepared for the eventuality of war.⁹⁶ Furthermore, the language makes it clear that Congress’s power to raise an army is exclusive.⁹⁷ The Executive has no power to raise a private army or navy in the absence of congressional authorization.⁹⁸

Congress’s power to regulate the armed forces it raises is similarly extensive. It is empowered to impose rules on the internal governance of the

⁸⁸ CRESS, *supra* note 66, at 53 (“Americans developed during the Revolutionary War a constitutional and institutional structure that reflected both a sensitivity to radical Whig suspicions of the military in society and a recognition that military expertise was essential for the preservation of republican institutions.”).

⁸⁹ See *supra* notes 66–69 and accompanying text.

⁹⁰ See David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083, 1136 (1992).

⁹¹ See *id.* at 1137.

⁹² U.S. CONST. art. I, § 8, cls. 12, 14.

⁹³ Lewittes, *supra* note 90, at 1137–38; see also THE FEDERALIST NO. 26, *supra* note 16, at 167 (Alexander Hamilton) (“[Legislatures] are not *at liberty* to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence.”).

⁹⁴ Lewittes, *supra* note 90, at 1143.

⁹⁵ See Hoffman, *supra* note 76, at 92.

⁹⁶ See Lewittes, *supra* note 90, at 1142; see also THE FEDERALIST NO. 25, *supra* note 16, at 161 (Alexander Hamilton) (arguing that prohibiting the raising of a standing army in times of peace would create “a nation incapacitated by its Constitution to prepare for defense before it was actually invaded.”).

⁹⁷ See THE FEDERALIST NO. 24, *supra* note 16, at 154 (Alexander Hamilton) (“[T]he whole power of raising armies was lodged in the *legislature*, not in the *executive* . . .”).

⁹⁸ See, e.g., Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 324 (2008).

military and on the structure of chains of command by legislating hierarchical promotional guidelines and organizing units around civilian and military leaders whose appointments require Senate confirmation.⁹⁹ The first Congress enacted rules covering “training and tactics, the positioning of assets, the use of military force, and the treatment of prisoners”¹⁰⁰ Congress alone has the power to create a separate system of military justice,¹⁰¹ which includes setting disciplinary guidelines and authorizing penalties for violations.¹⁰² Finally, Congress has extensive oversight functions: it subjects military policy to scrutiny and accountability by requiring written reports and holding oversight hearings.¹⁰³

Despite the vast potential for Congress to exercise dominion over the United States’ standing army, it has not exercised its authority over the armed forces to control PMFs operating with the U.S. military in Iraq and Afghanistan.¹⁰⁴ The remainder of this Comment examines the use of PMFs today and argues that Congress must regulate them as part of the military.

II. THE MODERN PRIVATE MILITARY FIRM

A. *Role in Contemporary American Foreign Policy*

If mercenaries were the norm during the American Revolution, why does the use of PMFs today generate such heated debate? Two explanations seem likely. First, there was a global change in norms: mercenaries became less acceptable after the Thirty Years’ War and were generally entirely eliminated from national armies after the Franco–Prussian War ended in 1871.¹⁰⁵ Thus, mercenaries have been generally unacceptable for over a century, and the recent emergence of PMFs challenges a prevailing international norm.¹⁰⁶ Second, for most of its history, the United States was

⁹⁹ See, e.g., Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1055–56 (2004).

¹⁰⁰ Prakash, *supra* note 98, at 332–33; see also Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96.

¹⁰¹ Prakash, *supra* note 98, at 329.

¹⁰² See, e.g., Resolution of November 28, 1775, in 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 378, 381 (Worthington Chauncey Ford ed., 1905) (prohibiting desertion and the destruction of enemy papers).

¹⁰³ See, e.g., Michaels, *supra* note 99, at 1065–66. For a sense of the scale of congressional military oversight activity in modern times, see Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 379 (1994) (“Congress annually makes 750,000 inquiries of the Pentagon and demands 750 yearly reports. Furthermore, the Congress created potent support agencies like the General Accounting Office (GAO), a huge 5,000 person investigatory organization that frequently targets the military.” (footnote omitted)).

¹⁰⁴ See *infra* Part II.C.1.

¹⁰⁵ See *supra* notes 31–33 and accompanying text.

¹⁰⁶ See PERCY, *supra* note 12, at 121–22, 216–17 (explaining the shift away from mercenary use in the 19th century as a change in norms and discussing the criticism of PMFs in the context of the international norm against mercenaries).

not in a state of permanent military mobilization around the globe as it has been since World War II.¹⁰⁷ Professional military companies became necessary only as U.S. military power expanded beyond the capacity of an all-volunteer army.¹⁰⁸ Seen in that context, the controversy over PMFs arises out of a larger debate over the proper role of American military power and its relationship to democratic institutions.¹⁰⁹

The aftermath of the Cold War created the conditions necessary for the reemergence of military privatization.¹¹⁰ The downsizing of major military efforts at the end of the Cold War created a global surplus of individuals with military training. Those individuals marketed their services to governments around the world that were hoping to save costs and improve the efficiency of their defense programs.¹¹¹ In the United States, the trend of military privatization began under the administrations of George H.W. Bush and Bill Clinton, both of whom embraced it as a means of scaling back the military at the end of the Cold War.¹¹²

Privatization escalated dramatically after 9/11.¹¹³ Even before the regular military arrived, private contractors accompanied the special forces that hit the ground first in Afghanistan.¹¹⁴ Before the war in Iraq started, the Army announced that it would permit contractors to compete for 154,910 civilian jobs and 58,727 military positions, including interrogators, guards for U.S. military bases, and other functions traditionally performed exclusively by enlisted military personnel.¹¹⁵ PMFs became the second-largest military force in Iraq after the U.S. military.¹¹⁶

Currently, the Executive Branch manages PMFs through contractual relationships.¹¹⁷ Within the Department of Defense (DOD), “the office of the Assistant Deputy Undersecretary of Defense (Program Support) is

¹⁰⁷ See generally Christopher A. Preble, *The Founders, Executive Power, and Military Intervention*, 30 PACE L. REV. 688 (2010) (describing the transition from limited military engagements in the United States’ first century to the permanent military institution of today).

¹⁰⁸ See *infra* notes 125–28 and accompanying text.

¹⁰⁹ See *infra* note 128.

¹¹⁰ Minow, *supra* note 6, at 997.

¹¹¹ See *id.*

¹¹² See *id.* at 1001–03 (“The Pentagon delivered \$300 billion worth of contracts to private military industries between 1992 and 2002.”).

¹¹³ Rebecca Ulam Weiner, *Sheep in Wolves’ Clothing*, LEGAL AFF., Jan./Feb. 2006, at 23, 23, available at http://www.legalaffairs.org/issues/January-February-2006/argument_weiner_janfeb06.msp (“In the Persian Gulf war of 1991, the ratio of soldiers to contractors was 50 to 1. In the current Iraqi conflict, it is 10 to 1 and falling.”).

¹¹⁴ See Minow, *supra* note 6, at 1003.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 996.

¹¹⁷ See JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 6 (2008).

responsible for all contractor oversight¹¹⁸ In some cases, contracts are routed through the Commerce, Interior, or State Departments and are managed independently by officials in those departments.¹¹⁹

One military officer's rationale for privatization echoes the same concerns that led military commanders in the American Revolution to seek help from military professionals: "When you run out of soldiers and they don't have an expertise, one way to get that capability on the battlefield is to contract it."¹²⁰ It is certainly true that PMFs provide significant benefits to the military. They offer a "surge capability" in situations where it would be ineffective to expand the military to meet "extraordinary but time-limited need[s]."¹²¹ Contractors also often have technological expertise that the government cannot quickly duplicate, such as expertise in the operation of complex weapons systems.¹²² By employing contractors, "the military can obtain the newest technology and the staffs trained to maintain it—and even avoid the costs of retraining simply by shifting to a new team."¹²³ In conflicts such as the one in Iraq, where contractors often employ locals, privatization also provides a cultural and linguistic advantage.¹²⁴

In fact, it simply might not be possible to implement the current foreign policy of the United States without contractors.¹²⁵ Maintaining a network of over 700 military bases around the globe¹²⁶ and a long-term occupation of two countries is very likely beyond the capacity of an all-volunteer army.¹²⁷ Private contractors will probably remain a part of the

¹¹⁸ *Id.*

¹¹⁹ Michaels, *supra* note 99, at 1067.

¹²⁰ Minow, *supra* note 6, at 1003 (quoting Major Gary Tallman, an Army spokesman) (internal quotation mark omitted).

¹²¹ ELSEA ET AL., *supra* note 117, at 35.

¹²² Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 881–82 (2010). For instance, the military often hires contractors to operate complex weapons systems. *Id.*

¹²³ Minow, *supra* note 6, at 1004.

¹²⁴ ELSEA ET AL., *supra* note 117, at 36.

¹²⁵ *Id.* ("Without private contractors, the U.S. military would not have sufficient capabilities to carry out an operation of the scale of Iraq, according to many analysts."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-695, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 2 (2003) ("DOD uses contractors to provide U.S. forces that are deployed overseas with a wide variety of services because of force limitations and a lack of needed skills.").

¹²⁶ CHALMERS JOHNSON, NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC 5 (2006) ("[W]e now station over half a million U.S. troops, spies, contractors, dependents, and others on more than 737 military bases spread around . . . more than 130 countries . . .").

¹²⁷ *See* Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365, 370 (2006) ("Experts widely recognize that 'without contractors, our military simply cannot project its awesome technical superiority abroad.'" (quoting Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 554 (2005)). Deputy Secretary of Defense Gordon England testified before

American military absent a wholesale change in the way the nation organizes and uses its armed forces.¹²⁸

*B. Not Quite Civilians, Not Quite Soldiers*¹²⁹

Throughout the Cold War and its aftermath, the military maintained a distinction between civilian contractors and enlisted soldiers by separating the types of work they performed.¹³⁰ In contemporary military conflicts such as the wars in Iraq and Afghanistan, however, the line separating civilian contractor work from military work has essentially disappeared.¹³¹ Until recently, the concept of “inherently governmental functions” defined those governmental activities that could not be privatized.¹³² Congress codified this concept in the Federal Activities Inventory Reform Act of 1998 as a “function that is so intimately related to the public interest as to require performance by Federal Government employees.”¹³³ In the military context, combat is the paradigmatic “inherently governmental” function from which contractors have been excluded.¹³⁴

However, the PMFs and the government have not adhered to this rule in practice. PMF employees in Iraq and Afghanistan have repeatedly engaged in combat. On March 31, 2004, four employees of the PMF

Congress in 2008 that “contractors are vital in an all-volunteer military force.” Sullivan, *supra* note 122, at 881 (internal quotation marks omitted).

¹²⁸ Cf. Sullivan, *supra* note 122, at 881–82 (arguing that both external technology-forcing factors and domestic policy choices have made it unlikely that the military will be able to reverse the trend of privatization). For instance, Scott Sullivan points out that we could return to a policy of mass conscription, but such a change would meet massive political opposition. *Id.* at 882. Alternately, we could significantly scale back our military: for a thorough argument that “a massive military and an interventionist foreign policy” is unnecessary, departs from what the Founders envisioned, and creates “a persistent imbalance between the different branches of government,” see Preble, *supra* note 107, at 689.

¹²⁹ P. W. Singer, *Outsourcing War*, FOREIGN AFF., Mar./Apr. 2005, at 119, 126 (“Contractors are not quite civilians, given that they often carry and use weapons, interrogate prisoners, load bombs, and fulfill other critical military roles. Yet they are not quite soldiers, either.”).

¹³⁰ See Michaels, *supra* note 99, at 1013 (“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.”).

¹³¹ See *id.* at 1018–20.

¹³² See ELSEA ET AL., *supra* note 117, at 32.

¹³³ Pub. L. No. 105-270, § 5(2)(A), 112 Stat. 2382, 2384 (to be codified at 31 U.S.C. § 501).

¹³⁴ See Michaels, *supra* note 99, at 1018–20; Nelson D. Schwartz, *The Pentagon’s Private Army*, FORTUNE, Mar. 17, 2003, at 102 (explaining the principle that outsourcing noncombat tasks enables the military “to focus on its core competency: fighting”). For example, the DOD published a rule in 2006 explaining that “[i]t is the responsibility of the [military official overseeing the contract] to ensure that private security contract mission statements do not authorize the performance of any inherently governmental military functions, such as preemptive attacks, or any other types of attacks.” 71 Fed. Reg. 34,826–27 (June 16, 2006) (to be codified at 48 C.F.R. pts. 212, 225, 252).

Blackwater were attacked while guarding a convoy in Fallujah.¹³⁵ Just a week later, when Iraqi militia forces attacked U.S. headquarters in Najaf, eight Blackwater employees held them off, and Blackwater sent in its own helicopters as backup.¹³⁶

PMFs' combat activities are not limited to defensive or protective services.¹³⁷ In May 2004, employees of DynCorp helped raid Ahmed Chalabi's personal compound as well as his offices at the Iraqi National Congress in Baghdad.¹³⁸ The following September, federal agents investigated Blackwater for the apparently unprovoked killing of seventeen civilians in Nisour Square, Baghdad.¹³⁹

Rather than drawing a clear distinction between contractors and the military based on roles in combat, the Executive Branch has responded to situations like those described above by blurring the line further.¹⁴⁰ Contractors are now allowed to "use deadly force when such force reasonably appears necessary to execute their security mission"¹⁴¹ Furthermore, courts have begun extending immunity from civil suit to contractors in recognition of the role they play in combat.¹⁴² For example, the Government Contractor Defense (GCD) is a judicially created affirmative defense that applies certain provisions of the Federal Tort Claims Act to military contractors.¹⁴³ Since the 1980s, it has protected contractors involved in the manufacture or design of military equipment from product liability suits under certain circumstances.¹⁴⁴ Recent litigation

¹³⁵ David Barstow, *Security Firm Says Its Workers Were Lured into Iraqi Ambush*, N.Y. TIMES, Apr. 9, 2004, at A1.

¹³⁶ Dana Priest, *Private Guards Repel Attack on U.S. Headquarters*, WASH. POST, Apr. 6, 2004, at A1.

¹³⁷ See Zoe Salzman, Note, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT'L L. & POL. 853, 883 (2008).

¹³⁸ See Michaels, *supra* note 99, at 1033.

¹³⁹ David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1.

¹⁴⁰ See, e.g., Joshua S. Press, *Crying Havoc over the Outsourcing of Soldiers and Democracy's Slipping Grip on the Dogs of War*, 103 NW. U. L. REV. COLLOQUY 109, 114 (2008) ("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.").

¹⁴¹ 48 C.F.R. § 252.225-7040(b)(3)(ii) (2008).

¹⁴² See, e.g., *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 18–19 (D.D.C. 2005); see also Trevor Wilson, Note, *Operation Contractor Shield: Extending the Government Contractor Defense in Recognition of Modern Warfare Realities*, 83 TUL. L. REV. 255, 277 (2008) (discussing *Ibrahim's* analysis of PMCs as de facto soldiers "actually taking part in the military effort in an active role").

¹⁴³ Rakowsky, *supra* note 127, at 377. The Supreme Court first articulated the GCD in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940).

¹⁴⁴ See *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982) (articulating a three-part test to determine the applicability of the GCD: (1) whether government specifications existed for the product, (2) whether the manufacturer met the specifications, and (3) whether the government "knew as much or more than the defendant about the hazards" created by the

has expanded this doctrine to cover contractors who take part in combat.¹⁴⁵ In *Ibrahim v. Titan Corp.*, the court decided the GCD would shield the defendants if they “were essentially soldiers in all but name.”¹⁴⁶ Thus, the law now recognizes that, in some cases, no real distinction exists between the role of the military and its contractors.

The methods of modern warfare muddy the distinction between PMFs and the military even further.¹⁴⁷ Weapons technology has stretched the modern battlefield to proportions unimaginable a century ago.¹⁴⁸ A soldier sitting in front of a computer screen far removed from the point of conflict can fire a missile at enemies thousands of miles away.¹⁴⁹ Very often, civilian contractors maintain and operate these remote weapons systems.¹⁵⁰ When battles are fought with such complex technological systems, the law of war does not provide a clear definition of what constitutes direct participation in combat.¹⁵¹

Thus, in practice, the distinction between the military and the PMFs they hire has collapsed. This is not simply a result of the particular roles PMFs play in combat but also a function of contractors’ ubiquity. They have assumed such a broad range of roles that the U.S. military would have a hard time functioning without them.¹⁵² Contractors work in war zones as “communication specialists, intelligence operatives, target selectors, surveillance pilots, armed security and peacekeeping agents, hostage rescuers, interrogators, and weapon systems operators.”¹⁵³ They serve as strategic planners and military advisors in the field and in the Pentagon, and

product); *see also* *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 448–49 (9th Cir. 1983) (adopting the *Agent Orange* test).

¹⁴⁵ *See* Wilson, *supra* note 142, at 277.

¹⁴⁶ 391 F. Supp. 2d at 18.

¹⁴⁷ *See* J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 178 (2005).

¹⁴⁸ *Id.* at 179.

¹⁴⁹ *Id.* at 157.

¹⁵⁰ *See id.* at 189–90. For example, contractors operated Global Hawk and Predator Unmanned Aerial Vehicles in Afghanistan and Iraq. *Id.*

¹⁵¹ *See id.* at 178 (“While it is easy to label the gun-toting soldier a combatant, it is harder to determine the status of those who transport him to the battlefield, gather intelligence about the location of enemy military positions, or repair and maintain the sophisticated weapon systems he uses to fight.”).

¹⁵² *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 125, at 8 (“In some cases, DOD lacks the internal resources to meet all the requirements necessary to support deployed forces. The military services do not always have the people with specific skill sets to meet the mission.”). Besides providing necessary expertise, contractors have become essential for maintaining sufficient force levels because retention rates in an all-volunteer army drop during wartime. After the Iraq War began in 2003, the number of soldiers indicating their intent to leave the service at the conclusion of their present assignment went from 12.5% to 20%. Sullivan, *supra* note 122, at 871.

¹⁵³ Michaels, *supra* note 99, at 1019.

as Reserve Officers' Training Corps instructors across the United States.¹⁵⁴ In some cases, companies are tied so closely to Pentagon operations that they essentially assign contracts to themselves.¹⁵⁵ For example, KBR won its Iraq contract based on its ability to meet the U.S. Army's contingency plan for rebuilding Iraq, a plan KBR itself prepared as part of an earlier contract.¹⁵⁶ One commentator noted that contractors in Iraq and Afghanistan do "what citizens consider the stuff of government: planning, policy writing, budgeting, intelligence gathering, nation building," but under the employment relationship of a temporary worker.¹⁵⁷

In sum, modern PMFs are full-scale military companies that have been functionally integrated into the U.S. Armed Forces. As such, they are precisely analogous to the private military companies operating in Europe and America at the time of the American Revolution and the centuries preceding it.¹⁵⁸ Like Washington's foreign corps of engineers, they provide expertise and logistical support that allow the military to take advantage of the latest technology. Like Prussian officer Baron von Stueban,¹⁵⁹ they help develop and implement military policy. Like Pulaski's Legion,¹⁶⁰ they put soldiers in the field.

As shown in Part I, the Framers understood standing armies to include a broad range of military professionals beyond the enlisted citizen. The Framers nevertheless agreed to provide for a standing army for the nation's defense, but only on the condition that it be regulated by Congress. This Part has shown thus far that modern PMFs are military professionals who are so closely integrated with the regular military that it would very likely be impossible to implement current U.S. defense policy without them. As such, they fit squarely within the Framers' broad understanding of a standing army. Therefore, the regulation of PMFs is exclusively the province of Congress. Yet under the current system, executive departments assume control of PMFs and manage them through contractual relationships

¹⁵⁴ *Id.* The head of DynCorp, one of the largest military companies in the United States, has claimed, "You could fight without us, but it would be difficult Because we're so involved, it's difficult to extricate us from the process." Deven R. Desai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F. L. REV. 825, 834 (2005) (internal quotation marks omitted).

¹⁵⁵ See Desai, *supra* note 154, at 834.

¹⁵⁶ *Id.*

¹⁵⁷ Minow, *supra* note 6, at 1003–04 (footnote omitted) (quoting Dan Guttman, *The Shadow Pentagon*, CTR. FOR PUB. INTEGRITY (Sept. 24, 2004, 12:00 AM), <http://www.iwatchnews.org/2004/09/24/6623/shadow-pentagon>).

¹⁵⁸ See, e.g., Avant, *supra* note 13, at 20 ("Modern contractors most resemble the military enterprisers of the late Middle Ages."); Milliard, *supra* note 12, at 8 ("[Modern private military companies'] corporate model can be traced to Harold Hardraade's Norse mercenaries, first offered in support of the Byzantine Empire in 1032.").

¹⁵⁹ See *supra* note 63.

¹⁶⁰ See *supra* note 54.

as civilians. This arrangement violates constitutional separation of powers by giving authority to the Executive that belongs to Congress.

The remainder of this Part will examine some of the problems that have arisen under the current system. First it will look specifically at the systemic imbalances the current system creates in the constitutional scheme of separation of powers over the military. Next it will look at some of the practical problems of effective management that have arisen, including widespread waste and fraud, confusion in the chain of command, and a lack of accountability in the courts for crimes committed by PMFs. The systemic constitutional problems demonstrate why Congress must fulfill its proper role in regulating PMFs, while the practical problems suggest the shape that congressional regulation should take. Accordingly, Part III will suggest a proposal for reform.

C. *Flaws in the Current System*

The current system of regulating and managing PMFs is deeply flawed in three key areas.

First, the system distorts the balance of power between Congress and the Executive because PMFs have become a substantial private military force entirely under the control of the Executive. Thus, although Congress’s authority over the armed forces was designed to serve as a check on executive power, the use of PMFs permits the Executive to exercise plenary power over a broad range of military operations. Second, the current system lacks sufficient oversight to ensure contractual compliance and to establish a clear chain of command on the battlefield. Third, the system lacks adequate accountability for criminal behavior by PMFs because their employees often do not fall under any court’s jurisdiction.

1. PMFs and the Separation of Powers.—The current system of military contracting poses a threat to the system of checks and balances that the Framers carefully crafted to avoid vesting the Executive with excessive unilateral power over the military.¹⁶¹ As discussed earlier, the Framers were adamantly opposed to placing unchecked military power in the hands of the Executive.¹⁶² Therefore, the Constitution unambiguously separated command of the military¹⁶³ from regulation of the military¹⁶⁴ in order to prevent a tyrannical aggrandizement of executive war powers.¹⁶⁵ Military contracting subverts Congress’s regulation of the military in numerous

¹⁶¹ See Avant, *supra* note 13, at 22–24; Minow, *supra* note 6, at 1023.

¹⁶² See *supra* Part I.C.

¹⁶³ U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander of Chief of the Army and Navy of the United States . . .”).

¹⁶⁴ *Id.* art. I, § 8 (“The Congress shall have Power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces.”).

¹⁶⁵ See *supra* notes 88–93 and accompanying text.

ways, which in turn prevents Congress from acting as a check on executive power.

Congress can constrain a hawkish president by limiting the number of troops available to him. But by providing an external, elastic source of troops, PMFs allow the Executive to exercise military power where congressional opposition would otherwise prevent it.¹⁶⁶ During the Balkan conflict in the 1990s, for example, the Clinton Administration wanted to provide military support to the Croats (and later the Bosnian Muslims) to counter Serbian aggression.¹⁶⁷ Committing American troops was not possible, however, in the face of congressional opposition (as well as numerous other obstacles, including an U.N. arms embargo and hesitant international allies).¹⁶⁸ Clinton therefore turned to PMFs to accomplish his goals without the political opposition he would have faced had he sent American troops.¹⁶⁹ This situation shows how PMFs provide the Executive with an independent source of military power that allows him to circumvent the check of congressional authority over the armed forces.

Congress's power of the purse—another tool it can use to constrain the use of the military—can also be circumvented through creative funding for military contracts.¹⁷⁰ In Iraq, for example, contractors were paid, in part, directly from revenue generated by Iraqi oil sales rather than from revenue from the U.S. federal budget.¹⁷¹ Under these circumstances, Congress's ability to influence military policy through funding is nonexistent.

Contractors bypass congressional control in other ways as well. For example, while Congress traditionally exercises influence through Senate confirmation of military officers, the use of contractors nullifies the Senate's role in deciding who will implement military policy.¹⁷² And contracting limits Congress's role in authorizing the use of force: because the War Powers Resolution applies only to the deployment of U.S. Armed Forces and anti-covert operations legislation requiring congressional notification and consultation applies only to U.S. intelligence officers,¹⁷³ the Executive can avoid the requirements of these statutes by using contractors.¹⁷⁴

¹⁶⁶ Michaels, *supra* note 99, at 1062–65.

¹⁶⁷ *Id.* at 1026.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1026–28.

¹⁷⁰ See SINGER, *supra* note 11, at 214 (“It is also often possible to arrange for a PMF to be paid by other parties or use off-budget funds. Thus, there is frequently no opportunity for legislative oversight.”).

¹⁷¹ See Michaels, *supra* note 99, at 1075.

¹⁷² See *id.* at 1070–72.

¹⁷³ See *id.* at 1076–77; see also 50 U.S.C. § 1542 (2006).

¹⁷⁴ See Michaels, *supra* note 99, at 1076–77.

A fundamental problem underlying Congress’s failure to regulate PMFs is the extent to which PMFs and the Executive have successfully avoided sharing information with Congress. As noted earlier, Congress scrutinizes military policy by demanding written reports and holding oversight hearings.¹⁷⁵ However, PMFs routinely resist congressional inquiries by claiming the need to protect proprietary information.¹⁷⁶ Additionally, the Executive has often failed to keep sufficient records or has simply refused to present basic, accurate information.¹⁷⁷ The Executive also evades congressional scrutiny of PMFs by arranging for the companies to contract directly with third-party nations or host countries.¹⁷⁸ Congress’s failure to gather information about PMFs means that very basic questions—such as how many contractors are currently employed, exactly which companies are involved, and how much taxpayers spend for their services—remain unanswered.¹⁷⁹ Without such information, Congress cannot possibly regulate PMFs effectively.

A crucial unanswered question is *why* Congress has failed to insist that PMFs and the Executive share information. It seems that Congress simply lacks the political will to address the issue. This brings the discussion back to a much broader point made earlier¹⁸⁰: Congress bears the responsibility to protect and maintain its institutional role in the constitutional system of separation of powers. In other words, if it is a violation of separation of powers that the Executive currently controls PMFs, then Congress ultimately bears the responsibility for not asserting control.

Congress’s failure to assume control of PMFs has consequences for the democratic decisionmaking process. As Hamilton explained in Federalist No. 26, Congress acts as a check on executive exercise of military power largely because it was designed to be more responsive to the will of the electorate.¹⁸¹ When the President uses PMFs to enable military engagements without the knowledge or consent of Congress, it is impossible for congressional leaders to represent their constituencies on the issue. The electorate tends to be very sensitive to American casualties, for example.¹⁸² This is unsurprising, as the burden of military engagement falls primarily on the American public, not their elected officials.¹⁸³ Contractor

¹⁷⁵ See *supra* note 103 and accompanying text.

¹⁷⁶ See Minow, *supra* note 6, at 999.

¹⁷⁷ ELSEA ET AL., *supra* note 117, at 42.

¹⁷⁸ Michaels, *supra* note 99, at 1067.

¹⁷⁹ ELSEA ET AL., *supra* note 117, at 3–4.

¹⁸⁰ See *supra* notes 15–17 and accompanying text.

¹⁸¹ See *supra* notes 82–83 and accompanying text.

¹⁸² See, e.g., Sullivan, *supra* note 122, at 883 (“The memories of misbegotten military adventures over the course of the twentieth century [have] left the Western world with a pungent distaste for the death of public soldiers, especially in conflicts not considered vital to the national interest.”).

¹⁸³ See SINGER, *supra* note 11, at 214–15; Michaels, *supra* note 99, at 1079–80 (“To use privatization to limit public disclosures and curtail public debates is to diminish popular sovereignty.”).

deployments are not counted among official troop levels, however, and contractor deaths are not counted among official casualties.¹⁸⁴ In this way, the true costs of war in blood and treasure remain hidden from public view.

2. *Lack of Oversight.*—Turning now from systemic constitutional problems to more practical problems of effective management, it is clear that there are serious flaws in the oversight of PMF operations. In other words, not only is the Executive doing Congress’s job, it is doing the job incompetently. Oversight of PMFs in Iraq and Afghanistan is grossly deficient in two key respects: contractual compliance and chain of command in the field.

Numerous reports have found that failures of contractual compliance enforcement are “pervasive and basic.”¹⁸⁵ A 2004 report from the Office of the Inspector General on coalition contracts in Iraq found missing and incomplete records, as well as an inadequate system for contract review, tracking, and monitoring.¹⁸⁶ In many instances, as a result of an insufficient number of adequately trained staff,¹⁸⁷ the contracting department had no representative on site where the contractor was operating.¹⁸⁸

Further complicating the problem, the DOD often hires private companies to monitor other companies’ contracts.¹⁸⁹ For example, Aegis, a private security company, serves as a “coordinating hub” for more than fifty private security companies in Iraq and oversees a \$293 million contract.¹⁹⁰ In other cases, there are layers of subcontracting that obscure oversight.¹⁹¹

The failure to enforce contractual compliance contributes to widespread waste, fraud, and abuse because the government cannot hold contractors accountable for mistakes and overbilling if it lacks basic information.¹⁹² A 2003 GAO report found that there had been \$49 billion in errors by the DOD’s billing agency in the previous year, which cost \$34

¹⁸⁴ See Salzman, *supra* note 137, at 869.

¹⁸⁵ See Minow, *supra* note 6, at 1006.

¹⁸⁶ OFFICE OF THE INSPECTOR GEN., REPORT NO. 04-013, COALITION PROVISIONAL AUTHORITY’S CONTRACTING PROCESSES LEADING UP TO AND INCLUDING CONTRACT AWARD 2 (2004).

¹⁸⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-854, MILITARY OPERATIONS: DOD’S EXTENSIVE USE OF LOGISTICS SUPPORT CONTRACTS REQUIRES STRENGTHENED OVERSIGHT 4 (2004).

¹⁸⁸ See Minow, *supra* note 6, at 1006.

¹⁸⁹ *Id.* at 1010.

¹⁹⁰ *Id.*

¹⁹¹ See *An Oversight Hearing on Iraq Contracting Abuses: Hearing Before the S. Democratic Policy Comm.*, 108th Cong. 12–13 (2004) (statement of Marie DeYoung, former employee, KBR), available at <http://dpc.senate.gov/hearings/hearing17/transcript.pdf> (describing a multi-billion dollar logistics contract that Halliburton assigned entirely to subcontractors over which the DOD exercised no independent oversight).

¹⁹² See Minow, *supra* note 6, at 1007, 1009.

million to correct.¹⁹³ In another instance, a Halliburton employee testified that when the company subcontracted jobs to companies who in turn subcontracted, “[w]e, essentially, lost control of the project and paid between four to nine times what we needed to fund that project.”¹⁹⁴ Despite these types of problems, the government has rarely suspended or otherwise disciplined contractors for misconduct, overcharging, and other violations.¹⁹⁵

A second oversight problem arises when military commanders lack a command-and-control relationship with contractors.¹⁹⁶ A GAO official testified before Congress in 2006 that private security contractors did not coordinate with the military when they entered the “battle space” in Iraq.¹⁹⁷ As a result, it is often unclear how military commanders should “secure cooperation from contractors to promote order in the theater of operations.”¹⁹⁸ At the Abu Ghraib prison, for example, military personnel did not receive guidance about how to use contracted personnel and did not receive information about the terms and procedures specified in the contract.¹⁹⁹ Several people reported situations in which contractors held authority over military personnel.²⁰⁰ As a result, there was confusion regarding “the appropriate relationship between contractor personnel, government civilian employees, and military personnel.”²⁰¹

This confusion raises a serious concern. Without a clear chain of command, contractors may fail to do their jobs at critical moments, endangering lives and thwarting American objectives.²⁰² This problem existed even in those decades when contractors provided purely commercial or ministerial, as opposed to military, services.²⁰³ In 1976, during an outbreak of hostilities on the Korean peninsula, DOD contractors left en masse and the military officers could not order them to stay.²⁰⁴ Desertion creates an even greater risk now that contractors are indispensable to the

¹⁹³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-727, DOD CONTRACT PAYMENTS: MANAGEMENT ACTION NEEDED TO REDUCE BILLIONS IN ADJUSTMENT TO CONTRACT PAYMENT RECORDS 12 (2003).

¹⁹⁴ *An Oversight Hearing on Iraq Contracting Abuses*, *supra* note 191, at 12.

¹⁹⁵ Minow, *supra* note 6, at 1007.

¹⁹⁶ ELSEA ET AL., *supra* note 117, at 46.

¹⁹⁷ *Id.* at 47.

¹⁹⁸ *Id.* at 46–47.

¹⁹⁹ Minow, *supra* note 6, at 1005.

²⁰⁰ See GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 51–52 (2004), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>; Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 563 (2005).

²⁰¹ Schooner, *supra* note 200, at 562.

²⁰² See Michaels, *supra* note 99, at 1091–92.

²⁰³ See *id.* at 1093.

²⁰⁴ *Id.* at 1092–93.

execution of combat operations. As Colonel Steven Zamparelli, the Director of Contracting for the Air Force, has pointed out, “[T]oday, [such a desertion during battle] could mean the only people a field commander has to accomplish a critical ‘core competency’ task such as weapons-system maintenance . . . have left and gone home.”²⁰⁵

3. *Lack of Accountability.*—A second important set of practical problems that has arisen in the current system of military contracting is a lack of accountability for criminal behavior. PMF employees often escape prosecution for criminal behavior in the war zones where they operate.²⁰⁶ Until recently, civilian military contractors could not be held accountable under the Uniform Code of Military Justice (UCMJ)²⁰⁷—the legal code governing members of the U.S. Armed Forces—unless Congress had formally declared war.²⁰⁸

Prosecuting PMF employees as civilians in federal criminal courts, however, has proven problematic. The Military Extraterritorial Jurisdiction Act (MEJA) extends federal jurisdiction over persons employed by or accompanying the Armed Forces who engage in criminal conduct outside of the United States.²⁰⁹ But several significant jurisdictional gaps remain.²¹⁰ MEJA does not “cover non-felony offenses or offenses punishable by one year or less; it only applies to those persons ‘supporting the mission of the DOD’”—which means that contractors working on missions for other agencies may fall outside of the scope of the Act—and it does not extend to contractors working for the United States but paid through third-party countries.²¹¹ Separately, federal courts could have jurisdiction over PMFs in Iraq and Afghanistan through the War Crimes Act of 1996 (WCA).²¹² But that statute is limited to “grave breach[es]” of the Geneva Conventions and

²⁰⁵ *Id.* at 1093–94 (quoting Colonel Steven Zamparelli) (omission in original).

²⁰⁶ See Margaret Prystowsky, *The Constitutionality of Court-Martialing Civilian Contractors in Iraq*, 7 CARDOZO PUB. L., POL’Y & ETHICS J. 45, 51 (2008).

²⁰⁷ 10 U.S.C. §§ 801–946 (2006).

²⁰⁸ Rakowsky, *supra* note 127, at 373. Congress has already taken an important step to expand courts-martial jurisdiction over PMFs. A 2006 amendment to the UCMJ broadened the scope of the law to allow courts-martial jurisdiction over contractors during “contingency operations.” See *infra* note 231. However, the expanded jurisdiction has only been used three times in the past five years. See *infra* notes 232–34 and accompanying text. All three of the cases using the expanded jurisdiction remain pending, and the three prosecuted contractors have challenged the constitutionality of the amendment. See *infra* notes 232–34 and accompanying text. With the constitutionality of the expanded-jurisdiction amendment in doubt, it is currently an open question whether the amendment will substantially ameliorate the accountability problem.

²⁰⁹ 18 U.S.C. § 3261 (2006).

²¹⁰ See Jon Cadieux, Comment, *Regulating the United States Private Army: Militarizing Security Contractors*, 39 CAL. W. INT’L L.J. 197, 207–08 (2008).

²¹¹ Prystowsky, *supra* note 206, at 56–57 (footnote omitted).

²¹² 18 U.S.C. § 2441 (2006).

its protocols,²¹³ and to date no civilian contractor has been indicted under the WCA.²¹⁴

Further complicating the picture, if a private litigant managed to establish jurisdiction in a federal civil court and get past the Government Contractor Defense, many PMFs would still avoid accountability through indemnification clauses in their contracts.²¹⁵ A recent congressional inquiry uncovered over 120 military contracts that included indemnity clauses requiring the U.S. government to cover any liability incurred by PMFs during performance of the contract.²¹⁶ The taxpayer, therefore, would foot the bill in many cases even if a PMF faced an adverse judgment.

Efforts to prosecute PMF employees often fare no better in foreign jurisdictions. For example, the Coalition Provisional Authority, the interim government that the United States established in Baghdad after invading Iraq, issued an order shielding both U.S. forces and civilian contractors from the jurisdiction of Iraqi national courts.²¹⁷ Application of international law is also prohibitively difficult. Although PMFs could conceivably be prosecuted and otherwise regulated under treaties prohibiting mercenary activity,²¹⁸ the only broadly accepted definition of an illegal mercenary—the one contained in the 1977 revision of Protocol I of the Geneva Convention²¹⁹—is construed so narrowly that most commentators have concluded that it does not apply to PMFs.²²⁰ The prospect that new

²¹³ *Id.* § 2441(c)(1); accord Wm. C. Peters, *On Laws, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU. L. REV. 367, 392–93.

²¹⁴ See Prystowski, *supra* note 206, at 57–58. Some commentators attribute the lack of indictments to “the preference of the government to punish war crimes ‘only if they are committed by enemy nationals or by persons serving the interests of the enemy State.’” *Id.* at 58 (quoting Christopher C. Burris, *Time for Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of the Federal District Courts, Courts-Martial, and Military Commissions to Try Violations of the Laws of War*, 2005 FED. CTS. L. REV. 4, 81).

²¹⁵ See Marcus Baram, *Dozens of Major Military Contractors Granted Legal Immunity*, HUFFINGTON POST (May 25, 2011, 7:15 PM), http://www.huffingtonpost.com/2010/12/02/military-contractors-legal-immunity_n_791330.html.

²¹⁶ *Id.*

²¹⁷ COALITION PROVISIONAL AUTHORITY ORDER NO. 17 (REVISED) § 2(3) (2004), available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (“All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States . . .”); Prystowski, *supra* note 206, at 54.

²¹⁸ See Salzman, *supra* note 137, at 874–90 (arguing for accountability under anti-mercenary laws).

²¹⁹ See *supra* note 12.

²²⁰ See *supra* note 12; see also, e.g., Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429, 440 (2008); Ellen L. Frye, Note, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,”* 73 FORDHAM L. REV. 2607, 2642 (2005) (“None of the existing international legal regimes even contemplate the existence of PMFs.”); Ryan M.

international law might be adopted to impose limitations on PMFs appears unlikely.²²¹ For example, the most recent attempt to revise the Protocol I definition of mercenary is the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries,²²² but no member of the European Union or the G8 has ratified it.²²³

A lack of accountability for PMFs in the judicial system means that a number of crimes, including horrific human rights abuses, have gone unpunished. Perhaps most notorious are the incidents of prisoner abuse at Abu Ghraib prison—which were perpetrated in part by employees of CACI International—and the sex slave ring operated by employees of DynCorp in Bosnia.²²⁴ In neither case did the contractors face any criminal charges in either military or civilian courts.²²⁵ More recently, the Department of Justice has seen its efforts to prosecute Blackwater employees for murder, manslaughter, and weapons charges in federal courts fall apart under the combined pressure of immunity deals and jurisdictional complications.²²⁶ Thus, PMFs often operate on a legal fault line that exists between the various court systems that might hold them accountable. This situation has left PMFs free in many cases to operate without the threat of legal accountability.

As this Part demonstrates, the current system of regulating PMFs has failed. Leaving PMFs in the Executive's control violates separation of powers and distorts the democratic decisionmaking process. Fundamental flaws of oversight and accountability result in vast wasted resources, confusion in the chain of command, and a failure to punish serious crimes. Part IV suggests legislation by which Congress could assume control of PMFs and address these problems.

III. PROPOSAL FOR REFORM

Congress could effectively regulate PMFs by applying aspects of the existing system of military regulation. Effective regulation would have three major components. First, in the field, PMFs would be subject to the military chain of command. Integrating contractors into a clear command structure would address the operational problems caused when lines of authority are unclear between military officers and contractors who are on

Scoville, Note, *Toward an Accountability-Based Definition of "Mercenary,"* 37 GEO. J. INT'L L. 541, 553–62 (2006) (analyzing shortcomings in the Protocol I definition).

²²¹ See Salzman, *supra* note 137, at 878–79.

²²² Dec. 4, 1989, 2163 U.N.T.S. 96.

²²³ See Salzman, *supra* note 137, at 878–79.

²²⁴ See Desai, *supra* note 154, at 843.

²²⁵ *Id.* at 843–44.

²²⁶ James Risen, *Efforts to Prosecute Blackwater Are Collapsing*, N.Y. TIMES, Oct. 21, 2010, at A1. The article also points out the difficulty of obtaining evidence in a war zone. See *id.*

the same mission.²²⁷ It would also impose consequences on essential contractors if they were to abandon their duties in the course of an operation.

Second, PMFs should be subject to courts-martial jurisdiction under the UCMJ. As the recent failure of prosecutions of Blackwater employees in federal courts shows, the difficulties of prosecuting PMFs as civilians may be insurmountable.²²⁸ Military courts, on the other hand, are specifically designed to deal with the contingencies of prosecuting crimes in the context of military activity.²²⁹

As noted above, Congress has already largely addressed this issue.²³⁰ Before 2006, civilians accompanying the military in a war zone could face courts-martial jurisdiction only during a formally declared war. A 2006 amendment to the UCMJ extended the scope of courts-martial jurisdiction over civilians “serving with or accompanying an armed force in the field” beyond formal declarations of war to a “declared war or a contingency operation.”²³¹ On March 27, 2008, Alaa Mohammad Ali became the first civilian contractor prosecuted in military court under the new law.²³² Since then, prosecutors have filed charges in military court against two more civilian contractors.²³³ All three contractors have challenged the constitutionality of the 2006 amendment.²³⁴ At the time of this writing, the issue remains pending.

Whether the 2006 amendment is ultimately effective depends on whether courts accept its constitutionality.²³⁵ A decision in favor of broadened jurisdiction for courts martial would not be unprecedented. In 1956 in *United States v. Burney*, the Court of Military Appeals reasoned that civilians accompanying the military should be subject to courts-martial jurisdiction when they “receive benefits and protection from the military arm while performing their tasks, and their efforts are essential to the accomplishment of the military mission. The security of the nation may

²²⁷ See *supra* Part II.C.2.

²²⁸ See Risen, *supra* note 226.

²²⁹ See Prystowsky, *supra* note 206, at 61.

²³⁰ See *supra* note 208.

²³¹ 10 U.S.C. § 802(a)(10) (2006).

²³² Andres Healy, *The Constitutionality of Amended 10 U.S.C. § 802(a)(10): Does the Military Need a Formal Invitation to Reign in “Cowboy” Civilian Contractors?*, 62 FLA. L. REV. 519, 520 (2010).

²³³ *Id.* at 522.

²³⁴ *Id.*

²³⁵ This point raises an important caveat to the proposals in Part III: Congress will not be able to solve all of the problems raised in this Comment on its own; it will require the cooperation of the other branches. Nevertheless, because Congress’s authority over the armed forces under Article I, Section 8 extends to PMFs, it should take the lead by crafting legislative solutions.

depend on their activities, and they should answer to their immediate protector for any transgressions.”²³⁶

Thus, the *Burney* court recognized that extending courts-martial jurisdiction over civilians whose duties were essential to the success of the military was crucial for the proper functioning of the armed forces. That rationale is even more persuasive today, given how much more prevalent contractors have become in the military. However, the *Burney* court’s application of courts-martial jurisdiction to civilians outside of declared wars was foreclosed in 1970 in *United States v. Avrette*.²³⁷ That case overturned a great deal of precedent and read the phrase “in time of war” to limit courts-martial jurisdiction over citizens to actions stemming from formally declared wars.²³⁸ Courts should uphold the 2006 amendment on the basis of the *Burney* rationale, particularly given that PMFs and the military are so closely integrated today that they are functionally indistinguishable.

Finally, Congress should insist on access to full information about PMFs. While enforcing compliance from the Executive may prove difficult, Congress could use its power of the purse to attach conditions to funds used for private contracts. For example, they could refuse funding for companies that wish to withhold proprietary information. Congress has begun to take steps in this direction as well, though not nearly to the extent necessary. The War Funding Accountability Act, for example, would require the President to submit a report to Congress “in the case of a contract entered into by the United States relating to military operations in Iraq or the reconstruction of Iraq” providing “the name of the contractor and a description of the process by which the contract was awarded; the amount of the contract; and the date on which work under the contract is to begin.”²³⁹ The Stop Outsourcing Security Act would also impose stringent reporting requirements on the President as well as give congressional committees access to a copy of each contract issued in excess of \$5 million.²⁴⁰ These bills would substantially improve Congress’s ability to exercise its oversight responsibilities over PMFs operating with the U.S. military, but to date, neither has passed.²⁴¹

²³⁶ 6 C.M.A. 776, 788 (1956).

²³⁷ 19 C.M.A. 363, 365–66 (1970).

²³⁸ See *United States v. Grossman*, 42 C.M.R. 529, 530 (1970) (“As far back as the Indian Wars, court-martial jurisdiction has been exercised over civilians serving with the armies in the field during hostilities which were not formally declared wars.”); see also Peters, *supra* note 213, at 399 (“The conclusion of *Averette* that civilians are subject to courts-martial jurisdiction only during periods of congressionally declared war has little logical support and virtually no support in national historic practice.”).

²³⁹ H.R. 714, 110th Cong. § 2(b)(2)(A)–(C) (2007).

²⁴⁰ S. 3023, 111th Cong. § 6 (2010).

²⁴¹ Both bills died in committee. For a procedural history of the bills, see *H.R. 714: War Funding Accountability Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-714> (last visited Feb. 20, 2012), and *S. 3023: Stop Outsourcing Security Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-3023> (last visited Feb. 20, 2012). The Stop Outsourcing Security Act was

CONCLUSION

Congress’s role in regulating the armed forces is fundamental to the constitutional system of separation of powers over military affairs. The history of mercenary use in standing armies during the era of the American Revolution shows that the Framers understood that the nation’s armed forces could comprise various types of military professionals other than enlisted citizens. They agreed to accept a standing army solely on the condition that it be regulated by Congress.

Thus far, Congress has left PMFs almost entirely under the control of the Executive. Yet PMFs as they currently operate in contemporary military conflicts fall squarely within the Framers’ broad definition of a standing army. The regulation of PMFs is therefore a crucial part of the Congress’s authority over the military. By failing to assert control over PMFs, Congress is neglecting an important aspect of its institutional role. This situation has led to serious problems, both on a systemic level of constitutional governance and on a practical level of effective military management. If Congress continues to abdicate its responsibility in this matter, it will be creating precisely the type of situation that the Framers hoped to avoid when they debated how the new nation would secure its liberty without slipping into tyranny.

reintroduced in the 112th Congress as S. 1428, and has been referred to committee. *See S. 1428: Stop Outsourcing Security Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1428> (last visited Feb. 20, 2012).

