

Understanding the American Use of Private Military Contractors

Threats to the American Democratic Model Through
Lack of Accountability and Transparency in the
Outsourcing of American Military Functions

Jørgen Lindahl



A Thesis Presented to
The Department of Literature, Area Studies and European Languages
Faculty of Humanities
Advisor: David C. Mauk
In Partial Fulfillment of the Requirements for the MA Degree

UNIVERSITY OF OSLO
Spring 2015

Understanding the American Use of Private Military Contractors:

Threats to the American Democratic Model Through Lack of Accountability and Transparency in the Outsourcing of American Military Functions

© Jørgen Lindahl

2015

Understanding the American Use of Private Military Companies:
Threats to the American Democratic Model Through Lack of Accountability and
Transparency in the Outsourcing of American Military Functions

Jørgen Lindahl

<http://www.duo.uio.no>

Reprosentralen UiO

IV

Abstract

This thesis discusses the political and democratic consequences of the use of private military contractors by the U.S. government. The discussion is divided into three separate parts: The presidency, the executive branch and the legislative branch. The discussion is divided into three separate parts, examining the role of the presidency, the executive branch and the legislative branch, respectively. There are a total of five chapters. The first chapter gives the historical background to and an explanation of the topic. The last chapter explores possible solutions to the problems presented in the main discussion, as well as an update on recent developments with regard to my topic.

This thesis concludes that there are major threats to the American democratic model inherent in the use of private military contractors, and that the result of the use can prove dire. The outsourcing of military functions becomes a threat to the American democratic model when it allows the executive branch and the president to wage war with contractors, personnel that the U.S. Congress, and the American people, has very limited control over. This development is the result of Congress's laissez-faire attitude towards the privatization of military functions and an eagerness of the executive branch to shift the power balance in American politics in their favor in the years following September 11, 2001.

Foreword

I have chosen to write about threats to the American democratic model, and in particular the use of private military contractors, because it is a topic I have long found interesting. The military might of the U.S. has fascinated me since childhood, and a visit to the floating museum, the USS *Intrepid*, in New York City in 1998 further reinforced this interest. I have followed the developments in American military strategy during the so-called War on Terror closely, but it was not until I began my studies at UiO that I became fully aware of the extent of the use of private military contractors. I maintained the interest through my years at UiO, and when the opportunity arose to write my MA thesis on the political consequences of this use, I jumped at the chance. The premise for the thesis is based in part on a course that I took in the fall of 2013: “Critical Challenges of American Government and Politics.” This course sparked my interest in challenges facing the American political system. The course was taught by Mr. Mauk, who graciously agreed to be my thesis advisor.

The topic of this thesis is relevant for the current global political situation, where political leaders, in the U.S. and elsewhere, are deciding how to face the challenge of the rise of IS.. The use of private military contractors peaked during the combat operations in Iraq from 2003 to 2011, but it has become relevant again in the ongoing fight against IS in Iraq and Syria. My intention for this thesis is to present the complexity, and investigate the ramifications, of this use of contractors to fight wars. The pragmatic and interdisciplinary approach of North American studies has been an invaluable tool for mapping this subject matter.

Acknowledgments

There are many people that I owe thanks to for helping me achieve writing this MA thesis. First and foremost I would like to thank my advisor, David C. Mauk for his unwavering support throughout this entire process. He believed in my ideas from the start, and has been a constant source of support and help in this past year. My friends and fellow students made this process a social one, when it very easily could have been solitary, our discussions, and long lunches helped keep me on track, and for that I am thankful. Eivind Solbjell deserves big thanks for his proofreading and Ingrid Shields from the American Embassy in Oslo deserves thanks for her help in finding sources. Last, but certainly not least, I would like to thank my family for their continued support throughout my years at UiO. I would never have achieved this if it were not for your support! Thank you!

Contents

1	Introduction	1
1.1	Thesis Statement	1
1.2	Writing an MA in North American Studies	1
1.3	Why Examine PMCs?	2
1.4	What is the American Model of Democracy, and Why is Transparency and Accountability Important?	4
1.5	A Brief History of the American Use of Private Military Companies, Mercenaries and War Profiteering	7
1.6	The Reemergence of PMCs in the 1990s	9
1.7	Government Post-Cold-War Use of PMCs	10
1.8	Advantages With Contractor Use	12
1.9	Disadvantages With Contractor Use	16
2	The Presidency, War and Contractors	19
2.1	Understanding the Buildup of Executive Power from FDR to Nixon	20
2.2	From Carter to Clinton – The Resurgence Years	25
2.3	George W. Bush and the Return of the Imperial Presidency	29
3	The Role of the Executive Branch	35
3.1	The “Shadow Government”	35
3.2	The Department of Defense	38
3.3	The Case of Contractor Accountability	40
3.4	The Case of Veteran Benefits	44
4	The Role of the Legislative Branch	48
4.1	Missed Opportunities for Increased Control of PMC Use	51
4.2	Existing Legislation on PMC Use	58
4.3	The Lack of Adequate Legislation and Potential Executive Hurdles	60
4.4	The Changing State of Congressional Power	62
4.5	Conclusions	63
5	Possible Solutions, Recent Developments and Concluding Thoughts	65
5.1	Possible Solutions to the Problems of Transparency and Accountability in the Use of Contractors and PMCs Presented by Experts in the Field	65
5.1.1	Arguments against Increased Control over Contractors and PMCs	65
5.1.2	Arguments Supporting the Use of the Tools Already in Place	69
5.1.3	Arguments in Favor of New Constitutional Restrictions and Increased Governmental Control	71
5.2	Main Findings	76
5.3	Recent Developments in PMC Use	79
5.3.1	The Fight Against IS and the Return of PMCs to Iraq	79
5.4	Conclusion	81
	Bibliography	83

1 Introduction

1.1 Thesis Statement

This thesis explores the democratic and political consequences of the use of so-called private military contractors (PMCs) by the U.S. government. The focus is on two key concepts of democracy: accountability and transparency. In any functioning democracy, a public control of government, by a process whereby public officials are held accountable for their actions, is essential. In order for this to happen, there must be transparency in governmental functions. A failure on either of these levels would be devastating to the American democratic model. The following question will be examined in this thesis: In what way has the outsourcing of the American military affected accountability and transparency, and can this be a threat to the American democratic model?

1.2 Writing an MA in North American Studies

Some comments regarding writing an MA thesis in North American studies are in order. North American studies is an interdisciplinary field, combining among others political science, history, literary studies and the history of ideas. This thesis is itself interdisciplinary. The thesis has elements from several different disciplines, and although it might share some elements with an MA thesis in political science, there are some important differences. Firstly, in American studies at the University of Oslo, the topics for theses have to originate in some way from a subject taken at the BA or MA level. The topic for this thesis springs out of an MA course called “Critical Challenges of American Government and Politics,” taught by Mr. Mauk, my thesis advisor. Secondly, when writing an MA in North American studies, one is free to venture into practically any field associated with this discipline, I assume that this particular thesis leans somewhat more towards political science than other theses in the field. The topic in this thesis is presented in accordance with North American studies’ guidelines. It

is identifiable as a North American studies thesis, as it discusses threats towards and consequences for the American democratic model.

1.3 Why Examine PMCs?

A study of PMCs is interesting, and important, as the use of them has become widespread, with little or no concern for the huge threat this use poses to the accountability and transparency of democratic processes in the U.S. It is not hard to imagine that it can be difficult to ensure the accountability of both the individual contractor and the PMCs when one takes into account the complicated structure and nature of the contracts market. Contracts are often vague in their wording, with few measurable requirements that could hold the contractors accountable. Some contracts are awarded to companies in an arguably flawed bidding process, with few or no bids from competing companies. In addition, some contracts have no set limits in terms of cost. How can the government claim any control over a process that awards PMCs with blank checks and no measurable goals? The columnist Erick Eckholm have likened this to the war profiteering during the American Civil War, pointing to the fact that the PMC industry profits handsomely from the contracting business and are allowed to do so by a U.S. government that is more than willing to pay their way out of a problem it should have solved itself.¹ PMCs such as Blackwater were known to save money on for example armored vehicles for their employees, sending their contractors out on patrol in civilian vehicles. The decision to send employees out on missions in Iraq without armored vehicles and equipment suitable for a warzone is at best a tactical mistake, and at worst, war profiteering, pure and simple.² The close relationship between former and current members of the U.S. government and certain PMCs is a further cause for concern. One example is the connection between Halliburton, a military contracting firm, and former Vice President Dick Cheney: Cheney was the CEO of Halliburton from 1995 to 2000. He served as the Vice

¹ Erik Eckholm, "Democrats Step Up Criticism of Halliburton Billing in Iraq," *The New York Times*, June 28, 2014, <http://www.nytimes.com/2005/06/28/politics/28haliburton.html?pagewanted=all&module=Search&abReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D>.

² Robert Greenwald, ed., *Iraq for Sale - the War Profiteers*, vol. 1, 2006.

President during the later war in Iraq, where Halliburton was awarded contracts on a monumental scale.³

PMC personnel can be of any nationality; in Iraq and Afghanistan, as much as 50% of PMC employees are Iraqi or Afghan nationals.⁴ When contractors are hired locally, it is not clear who is responsible for their actions. Is it the DOD, who awarded the contract, the PMC who hired them, or the individual employee themselves? Furthermore, in warzones it is difficult to investigate incidents, and there is often no functioning legal system. This does not, however, mean that no one should be held accountable for the actions and consequences of the use of PMCs. A further question would be whether PMC personnel are accountable to U.S. military law, U.S. common law, local law or international law. These are all interesting points that warrant thorough research, but the main focus of this thesis is on the accountability of the U.S. government, as the client in these contracts. When these contracts are awarded on a general basis, and the public knows very little about either how much is spent or who these contractors are, the use of PMCs cannot possibly be transparent to the public.

This thesis will provide a brief overview of the history and current use of private military companies and examine how this use can affect the American model of democracy, as it was laid forth in the Declaration of Independence of 1776 and the American Constitution of 1787. PMC use has in recent years reached unprecedented levels, and is a part of what seems to be an ever-expanding move to outsource key U.S. governmental functions. Outsourcing in itself is a large topic, and so this thesis is limited to an investigation of the use of PMCs in Iraq and Afghanistan, under contract by the Department of Defense (DOD). The thesis in turn seeks to examine how the executive branch is conducting its use of PMCs and how it has chosen to oversee and regulate them. How does the widespread use of contractors affect accountability, and to what extent does the executive branch manage to keep PMC use in accordance with the concept of transparency in governmental functions? Later I will discuss the legislative branch and its role in the expanding PMC use, accounting for what part Congress plays in this. Even though the DOD is the largest client of the PMCs, the DOD still needs its funding

³ D E Rosenbaum, "A Closer Look at Cheney and Halliburton," *The New York Times*, (The New York Times, September 28, 2004), <http://www.nytimes.com/2004/09/28/national/28fact.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D>.

⁴ Moshe Schwartz and Joyprada Swain, "Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis," March 29, 2011. 17

from Congress, and so the legislative branch plays a part in this. The practice of outsourcing is systemic in the U.S. government, it permeates multiple governmental branches and departments, and consequently nearly all parts of the U.S. government are in some ways affected by it.

1.4 What is the American Model of Democracy, and Why is Transparency and Accountability Important?

The U.S. has a long and rich history of a functional democratic process, and the rights of the individual and certain democratic ideals are the very foundation of the nation. Thomas Jefferson, in the Declaration of Independence of 1776, laid forth what the representatives of the 13 original colonies in America believed to be the very essence of a democratic nation. Immediately following the famous sentence that states that all men are created equal, and that every man has the right to life, liberty and the pursuit of happiness, is the sentence that first shows how the American democratic model is supposed to function:

“Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”⁵

What this sentence states is in essence that the representatives and elected officials of the nation are accountable to the public. The representatives of government are not elevated above the law, and their actions have consequences not only for the nation, but also for themselves, personally. A breach of this bond of trust between the elected and the public would allow the public to overthrow the government to make sure the principles of democracy are followed. The intention of this system was to make sure that elected officials acted in a way that was of benefit to the nation, and to eliminate the potential for a

⁵ Thomas Jefferson, *The Declaration of Independence and the Constitution of the United States of America*, (Cato Institute, 2002).

government that made decisions out of the eye of the public. In short, the American democratic system relies on transparency and accountability.

The U.S. system of a government is divided into three branches, the judicial, the executive and the legislative. All the branches are seen as equally powerful, and one cannot rule against the will of the other two. In order to accomplish this, a system of so-called checks and balances is in place, enabling the different branches of government to limit and if necessary stop the actions of the others. This system depends on the principles of transparency and accountability. Transparency in governmental functions means that the people are informed of all-important decisions made by government officials. Accountability is essential because it makes sure the elected officials do what they were elected to do, accountability towards their position means they can be removed if they do not. Transparency in governmental functions is an absolute necessity in order for the different branches to regulate each other. The democratic theorist Jean-Jacques Rousseau famously did not believe that representative democracy could be a possibility. He did not trust representatives to make laws in the best interest of their constituents, and suspected that they rather would make laws that would benefit themselves. Those that believe in representative democracy, however, believe that it is indeed possible as long as the representatives are held accountable to the people.⁶ Accountability, and the transparency in order to achieve it, is absolutely vital to a functioning representative democracy.

From this perspective the problems inherent in the use of PMCs become apparent. The idea of military outsourcing, of allowing private companies to fill the functions of the armed forces, makes transparency extremely difficult. It creates opaque layers in the transparency “window,” and each layer makes the window more and more difficult to see through. In theory, one could argue that a well-defined contract, with oversight, defined as rudimentary control, by the government, could be acceptable without jeopardizing transparency and accountability. In reality, however, this is almost never the case. Outsourcing is difficult to control, and nothing stops the firms that are awarded a government contract to again outsource parts of their contract to other firms, further creating layers. There have been examples of government contracts that end up with five or more sub-layers of contracting firms, meaning that the actions on the ground in places such as Iraq and Afghanistan are five

⁶ William E Hudson, *American Democracy in Peril*, 7 ed., (Los Angeles: Sage, 2013). 43

layers removed from governmental control and oversight. Five or more layers, even two layers, makes it extremely difficult to have enough oversight to competently ensure that things are done in accordance with the limitations set by the contract, if indeed there are any.

This system, which allows companies that are awarded contracts to further outsource their contracts to new subcontractors, is a direct threat to the transparency of governmental functions. A lack of transparency in the chain of contracts is obviously a problem in itself, but this lack of transparency leads to further problems. When there is very poor transparency, as would be the result of a multi-layered defense contract with numerous subcontractors with their own subcontractors, the possibility of holding people in this system accountable for their actions is equally poor. Who is responsible for the actions of the employee on the ground, when that person commits a crime? A case in point is the 2007 incident in Iraq involving Blackwater personnel where several civilians were murdered.⁷ The contractors in question were hired by Blackwater to fulfill a very general contract awarded to them by the DOD, which included maintaining the safety of DOD employees when they visited Iraq. When this incident took place, the Blackwater employees in question were not escorting any DOD personnel, but had come, according to their own testimony, under fire from unseen gunmen when driving across a town square. Several Iraqi civilians were killed, and there were no evidence to support the Blackwater employees' version of the incident, that they had simply responded to enemy fire. This incident highlights the extent of the blurring of accountability in an outsourced military. The Blackwater employees did actually commit a crime, but the nature of contracting and operating in warzones makes it difficult to bring anyone to justice. The Blackwater employees who committed the crime should be punished, but under what jurisdiction? Blackwater is an American company operating in Iraq on a DOD contract, paying their contractors with money they receive from Congress. But their employees are not necessarily American citizens, and they could just as well be Iraqi nationals.. Should they be punished under Iraqi law, as this happened in Iraq, or should an American court try them as the U.S. government ultimately hires them?⁸

⁷ J Glanz and A J Rubin, "Blackwater Shootings 'Murder,' Iraq Says," *The New York Times*, (The New York Times, September 8, 2007), <http://www.nytimes.com/2007/10/08/world/middleeast/08blackwater.html?pagewanted=all&module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D>.

⁸ Matt Apuzzo, "Ex-Blackwater Guards Sentenced to Long Prison Terms in 2007 Killings of Iraqi Civilians," *The New York Times*, April 14, 2015, <http://www.nytimes.com/2015/04/14/us/ex-blackwater-guards-sentenced-to-prison-in-2007-killings-of-iraqi-civilians.html?hp&action=click&pgtype=Homepage&module=first-column-region®ion=top->

1.5 A Brief History of the American Use of Private Military Companies, Mercenaries and War Profiteering

The American history of the use of mercenaries and private military companies began with the War of Independence. At this time the British had their forces spread thinly across a number of conflicts, and did not have sufficient manpower to send across the Atlantic. The British turned to the private mercenary market and hired German mercenaries, a total of 29,875. These mercenary troops came mostly from the Hesse-Kassel region, and so these troops became known as “Hessians.” The “Hessians,” however, did little good for the British during the war. They proved effective in a strictly militaristic way only, but the decision to use them, and their ruthless method of warfare, were instrumental in turning more and more colonials against the British. It seems likely that the decision to use German mercenaries against the Colonies influenced the writing of the Declaration of Independence, as the following words are found in the Declaration: “He [King George III] is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny ...”⁹

The link between private enterprise and warfare continued through American history, and it surfaced again in the American Civil War. During the Civil War, there was a great need for equipment and weapons for the troops. As there was no real public military industry in the nation at the time, the vast majority of weapons and other equipment was bought from private producers. The problem was that the private producers saw, and seized, the opportunity to make incredible profits by producing inferior equipment and selling it to the government. Contracts for the production of equipment was often handed out to the company that offered the largest bribe, and public servants and factory owners alike profited immensely as a result of the arrangement. Some producers, especially those in the clothing industry, went extra far

news&WT.nav=top-news&_r=0. The former Blackwater personnel in question were finally sentenced to long prison sentences for their crimes on April 13, 2015.

⁹ Jefferson, *The Declaration of Independence and the Constitution of the United States of America*.

in the hunt for profits and created equipment that was thrown together with scraps, even making shoe soles out of pressed sawdust. The result was that the soldiers' clothing often fell apart and became unusable after a very short time, endangering the health of the soldiers. Sometimes this even resulted in deaths as some uniforms were made with the wrong colors, resulting in soldiers firing upon and killing friendly troops.¹⁰

Many industry owners earned fortunes selling inferior equipment to the government, and as a result the number of millionaires in New York City rose from a few dozen in 1860 to hundreds just after the war.¹¹ This period is a good illustration of the detrimental consequences of outsourcing and contracting when there is little or no governmental control. Sometimes these two worlds even intertwine, as the border between the public and the private becomes blurred. In 1862, George Opdyke became the Mayor of New York City. Opdyke was a clothing manufacturer, who had made a fortune producing cheap clothes for southern slaves. When he himself became the official clothing inspector for the city, approving the shoddy products produced by his and other companies, the farce was complete. Opdyke nurtured relationships with other manufacturers and made a fortune off bribery and dubious profits during the war.¹² War profiteering during the Civil War was an atrocity that resulted in a few individuals earning huge sums of money by scamming the U.S. government and ultimately gambling with the lives of soldiers and others.

The direct use of PMC personnel in times of war by the U.S. government has a more recent history, but became very widespread once adopted. The first major conflict in modern times that saw a large-scale use of contractors to aid U.S. military operations was the Vietnam War, when as many as 80,000 contractors were brought in to support U.S. military operations. The contractors were mainly tasked with "base operations; construction projects; water port and ground transportation operations; petroleum supply; and maintenance and technical support for aviation and high technological systems."¹³ However, even during the Second World War, the U.S. military used so-called "tech reps" to assist them with what had already at that

¹⁰ Ron Soodalter, "The Union's 'Shoddy' Aristocracy," *The New York Times*, May 9, 2011, <http://opinionator.blogs.nytimes.com/2011/05/09/the-unions-shoddy-aristocracy/?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D>.

¹¹ Soodalter, "The Union's 'Shoddy' Aristocracy."

¹² Soodalter, "The Union's 'Shoddy' Aristocracy."

¹³ S K Cotton et al., "Hired Guns: Views About Armed Contractors in Operation Iraqi Freedom," 2010. Location 552

time become an ever-increasing technological complexity of their equipment. Some of these even found their way to the front lines.¹⁴ Since Vietnam, the use of contractors died down throughout the world, but this was only temporary, and as the Cold War came to an end, change was coming.

1.6 The Reemergence of PMCs in the 1990s

P. W. Singer, Simon Chesterman and Chia Lehnardt points to essentially the same factors in explaining the huge increase in PMC activity seen in the post–Cold War era. Firstly, the end of the Cold War saw large reductions in military forces all over the world. With the threat of a new world war diminishing, it was no longer necessary to have standing armies of hundreds of thousands of soldiers ready to go into battle at a moment’s notice. Almost overnight the U.S. and the Soviet Union no longer felt the need to meddle in conflicts in foreign nations simply to pursue an ideological warfare through proxy nations. But when the U.S. and the Soviet Union pulled out of or reduced their presence in many nations worldwide, this created a security vacuum that, in many cases, local military forces of those nations could not fill. In many cases PMCs were hired to control the situation, and the market for PMCs grew exponentially over a very short span of time. The situation became self-reinforcing as the superpowers drastically reduced their presence around the world. Thousands of professional soldiers lost their jobs, and many of them joined PMCs. PMCs now had the manpower to fill the vacuum.¹⁵ In addition, the withdrawal of the superpowers from third party nations allowed long-standing conflicts, suppressed by the superpowers’ presence, to rise to the surface again, further increasing the need for a PMC presence.¹⁶

The second factor Singer points to is that several incidents of cross-border fighting and warfare took place in the aftermath of the Cold War. This was often a result of some nations taking advantage of the collapse of the security balance previously maintained by the U.S.

¹⁴ Cotton et al., “Hired Guns: Views About Armed Contractors in Operation Iraqi Freedom.” Location 511

¹⁵ Simon Chesterman and Chia Lehnardt, *From Mercenaries to Market*, (Oxford University Press, 2007). Foreword and 181–182

¹⁶ P W Singer, *Corporate Warriors*, (Cornell University Press, 2011). 48–50

and the Soviet Union.¹⁷ However, in order for these nations to go to war on their own, and take full advantage of the power vacuum, they needed well-trained personnel, and they needed them quickly. This is very difficult to achieve unless you use PMCs, which after all are armies ready to go to war at a moment's notice. This global development increased the market for PMCs on the world stage substantially. The third factor Singer points to is the globalization of the world markets that took place in the aftermath of the Cold War. This has had two important effects: First, that globalization has allowed PMC companies to grow into international powerhouses, and legitimized their work. And second, that globalization has created more inequality, and consequently more conflicts that involve PMCs.¹⁸

Finally, we have to consider some additional factors when trying to understand the reemergence of PMCs in the post-Cold War era. In the years after the early 1990s, the world has seen an increase in so-called non-state actors and their participation in conflicts and warfare. Examples are the FARC guerrilla in Colombia, and international terrorist groups such as Al-Qaida. These actors tend to be well funded and have the means to hire PMC personnel, not primarily as fighters, but rather as advisors and instructors. Some PMCs supply not only instructors and military know-how to the highest bidder, they also supply weapons and military hardware. Singer points to the fact that in the aftermath of the Cold War, an enormous amount of military equipment and weapons found its way into private hands. When the former Soviet Union sold off much of its now surplus equipment to acquire much-needed capital, PMCs were willing buyers. Singer points to one example in particular: When the East and West Germany reunited in 1990, the new German republic had little use for the equipment formerly used by East Germany. Military equipment was sold off on an unprecedented scale, and everything from missile attack boats to handguns found their way into the hands of the highest bidder. Big international PMCs and groups such as FARC seized the opportunity given them by this mass downsizing, and acquired large arsenals.¹⁹

1.7 Government Post-Cold-War Use of PMCs

¹⁷ Singer, *Corporate Warriors*. 51

¹⁸ Singer, *Corporate Warriors*. 50–51

¹⁹ Singer, *Corporate Warriors*. 53–54

As mentioned above, the use of PMCs is not new to the operations in Iraq and Afghanistan, it has been a part of American government outsourcing for several years. The idea, which springs out of the more general idea of outsourcing, was to reduce the size of the U.S. military. Congress placed a cap on the number of civil servants that could be employed by the U.S. government, but failed to limit the number of individuals that could be hired by private companies, such as PMCs. This laid the foundation for an escalation of the use of contractors, as well as allowing the true number of people directly or indirectly employed by the government to be hidden. In the years between 1992 and 2002, the U.S. government spent in excess of 300 billion dollars on contracts to different PMCs.²⁰

The use of private military companies is more widespread than one might realize, and in recent years private military personnel have been used on a gigantic scale. During the conflicts in Iraq and Afghanistan, at times more than 100,000 PMC personnel took part in each conflict. In some periods the total number of PMC personnel in these conflicts even exceeded the U.S. military's. According to the DOD, in 2011 there were 90,339 PMC personnel in Afghanistan alone, costing the DOD more than \$39 billion.²¹ In Iraq at the same time, and even though operations were being stepped down, there still remained 64,253 contractors employed by the DOD. In 2011 alone the DOD spent \$15.4 billion on PMC contracts, and in the years from 2005 to 2010 the DOD spent a total of \$112.1 billion on PMC contracts in Iraq alone.²²

The UN now bans the use of mercenaries, and consequently the use of the word has come into disrepute and is now associated with lawlessness and violence, and any employment of mercenaries would be condemned by the UN.²³ The U.S. gets away with its massive use of PMCs in part because the U.S. government has refused to sign the "mercenary" resolution. The term "PMC" is in itself a somewhat broad one, and even though a person is hired by a PMC, it does not necessarily mean that he takes part directly in any combat operations. In general, PMC personnel are not fighters on the frontline, but are rather used for military

²⁰ Jody Freeman and Martha Minow, *Government by Contract*, (London: Harvard University Press, 2009). 111–112

²¹ Schwartz and Swain, "Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis."

²² Schwartz and Swain, "Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis."

²³ "UN Resolution NR054793 Mercenary Act," (New York, January 15, 2001), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/547/93/IMG/NR054793.pdf?OpenElement>.

support functions, running logistics operations, maintaining equipment etc.²⁴ Allison Stanger breaks down the PMCs into three types: military provider firms, military consulting firms and military support firms.²⁵

Military provider firms are on the front line, engaging in combat operations alongside U.S. military personnel. Examples are companies such as Blackwater and DynCorp, which provided security for DOD personnel in Iraq and Afghanistan.²⁶ Some of the most profiled cases concerning PMCs, in Iraq in particular, have involved PMCs hired to function as armed security for U.S. officials or other VIPs. Military consulting firms are not involved in combat situations directly, but they often train the troops that are directly involved. These kinds of PMCs are the “functional equivalent of business consultancies in that they improve the management and readiness of a client’s armed forces.”²⁷ In order to be able to offer valuable advice, these kinds of firms tend to have a large number of ex-military personnel on their payroll. Stanger points to one company in particular, Military Professional Resources Incorporated (MPRI), as the prime example of this part of the PMC business. “MPRI not only employs thousands of ex-military personnel but maintains a database of 340 retired generals and several thousand retired senior officers available for contracting assignments.”²⁸ The third type of PMC is the military support firm. This is by far the most common type, and can include anything from the contractors that serve food in the military bases, to the ones that build the military bases. These firms are vital to all combat operations, as they supply almost all the logistics services the U.S. military needs.

1.8 Advantages With Contractor Use

²⁴ Freeman and Minow, *Government by Contract*. 112

²⁵ Allison Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*, (New Haven : Yale University Press, 2009). Location 1281

²⁶ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 1281

²⁷ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 1288

²⁸ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 1288

In the Western world we are accustomed to the concept of a sharp distinction between government and business. As the Italian legal and political philosopher Norberto Bobbio has noted, “The public-private distinction is one of the great dichotomies in Western jurisprudence and politics.”²⁹ William J. Novak argues that one of the most common trends in the historiographical interpretation of the American system, past and present, is to only focus on business, rather than the government, when explaining the successes of the U.S.: “American history is the supremacy of the private in American life – the predominance of private property, individual rights, private interest, civil society, and market forces.”³⁰ He goes on to note that some have given the private sphere almost all the credit for the United States’ prosperity. The public sphere, on the other hand, is seen as ineffective, deeply regulated, and in essence a hindrance to further private gains.

The alternative way to view American history, the perspective supported by most liberals, is to focus on the periods when the public sector was celebrated, such as during the New Deal, Lyndon B. Johnson’s Great Society, and the Civil Rights Movement. The dominant theme of American history from this perspective is the “never-ending struggle to protect the public from powerful and resilient private interests.”³¹ The United States has a long history of public-private cooperation, going back to the colonial period. Novak points to the fact that the British had a tradition for a combination of public and private governance in the American colonies. Private organizations carried out many of the functions of the public institutions, and even courts were sometimes on private hands, with the King’s blessing.³² This system of public-private cooperation helped build bridges, canals, harbors and other infrastructure long into the nineteenth century, and has continued to do so to this day. Public-private cooperation is much more common than most people realize, as many power companies, utility services etc. are in fact a public-private cooperation.³³

As seen above, the concept of public-private cooperation originated at a time with little governmental control, and a generally weak state, in the late eighteenth and early nineteenth century. Why, then, would the U.S. government pursue the idea of outsourcing and public-private cooperation to this day? The arguable advantage of public-private cooperation is that

²⁹ Freeman and Minow, *Government by Contract*. 25

³⁰ Freeman and Minow, *Government by Contract*. 26

³¹ Freeman and Minow, *Government by Contract*. 26

³² Freeman and Minow, *Government by Contract*. 28

³³ NCPPP, “Home - NCPPP,” *NCPPP.org*, accessed August 27, 2014, <http://www.ncppp.org>.

it is a sort of “best of both worlds”-scenario. Fully functioning public-private ventures are ideally more efficient than purely public ventures, and less likely to fall victim to solely private interests. The best-case scenario is a venture that consists of public control and credibility, and private efficiency and know-how. A good public-private cooperation system could ensure this. Public-private cooperation also fits well into a system of separation of political power, and reduces the need for a big government – both seen as desirable in the American system. However, public-private cooperation and the outsourcing of previously public responsibilities rely heavily on a trust in the private market.

As noted earlier, the U.S. military has a long history of cooperation with private enterprise. A vast range of businesses, and thousands of jobs in the so-called military-industrial complex, are completely dependent on this cooperation. Allison Stanger points to four major factors in explaining why this cooperation and outsourcing began, and how it has become what we see today. Firstly, in 1922 the U.S. Navy and War Departments decided to outsource the building of ships and planes. This was the decision that in many ways launched what would become the military-industrial complex, at least when it comes to outsourcing the production of equipment. Secondly, after the war in Vietnam, the U.S. military moved away from a conscription-based military to a military based on volunteers. As a consequence, the workload of the Pentagon increased substantially, as it now had to make a career in the military seem more attractive in order to get people to volunteer. Most of these new services included expanding the use of PMCs. Thirdly, during the Cold War there was a large push to increase the quality of American military equipment, in order to counter the large quantities of equipment produced by the Soviet Union. This military build-up was completely reliant on the private sector. And finally, the military is under strict control regarding how much it is allowed to pay in salaries to military personnel, and is thus unable to compete with the private sector for the best talent, as no such limitations exist there. Outsourcing circumvents this restriction, as the military rather can spend huge amounts on contracts, and so hire the personnel they could not afford to have in-house.³⁴ The budget cuts that followed the end of the Cold War further increased this tendency. The main arguments then, used by the supporters of PMC use and the PMC industry alike, were that PMC use saves the American taxpayer money. The then Secretary of Defense, Donald Rumsfeld, stated in a speech at the School of Advanced International Studies in December 2005 that “It is clearly cost-effective

³⁴ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 1238

to have contractors for a variety of things that military people need not do and that for whatever reason other civilian government people cannot be deployed to do. . . . Any idea that we shouldn't have them I think will be unwise.”³⁵

But there are more incentives to using PMCs than just cost savings, and Stanger points to several of these. In recent years, technological advances in warfare have been immense, particularly in the unmanned aircraft or drone sector. The use of drones is now a vital tool in combat operations, and in the War on Terror. The U.S. military is completely dependent on the private sector to develop this new technology, to build the aircrafts and ultimately to fly them. The situation even has gone to the point where the CIA has outsourced the loading of missiles onto the predator drones used in the hunt for Al-Qaida.³⁶ The use of PMCs allows the U.S. to have the world's most effective and cutting-edge military technology, and also the means to use it effectively around the world.³⁷

Another advantage of PMC use is that it allows the U.S. military to be flexible, and to increase its combat capabilities in times of need. As mentioned earlier, the U.S. military shifted to an all-volunteer model after the Vietnam War. This shift meant that in the following years, the U.S. military has had an ever-increasing problem filling its ranks; contracting solves this problem. Neither the operation in Iraq nor in Afghanistan could have been achieved without PMCs. The military simply does not have the manpower for operations on that scale at any given time. Hiring PMCs allows the U.S. military to amass the numbers of personnel needed to conduct large operations abroad, something that would be impossible without a draft if no PMCs were involved. Further, the use of PMCs allows the U.S. to influence conflicts and situations around the globe without officially putting any boots on the ground. Stanger points to several examples of this, one being the conflict in the former Yugoslavia in the early 1990s. At that time the U.S. hired the PMC MPRI to train and advise the Croatian military, ultimately enabling the Croats to force the Serbs to the negotiation table due to their new capabilities. This was achieved without the U.S. officially

³⁵ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 1364

³⁶ J Risen and M Mazzetti, “CIA Said to Use Outsiders to Put Bombs on Drones,” *The New York Times*, (New York Times, August 20, 2009), http://www.nytimes.com/2009/08/21/us/21intel.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D&_r=0.

³⁷ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 1335

taking sides in the conflict, and without using any U.S. military personnel. Another example is the war on drugs in South America, which is almost exclusively fought by PMC personnel, allowing the U.S. to conduct an effective campaign without committing U.S. troops.³⁸

1.9 Disadvantages With Contractor Use

As mentioned above, in an ideal world contracting and outsourcing could save the U.S. taxpayer substantial amounts. However, the reality of the matter tells a different story. The most obvious pitfall with the use of privately owned companies to save public money is just that, the use of private enterprise. We know that the chief objective of most privately owned companies is to create profits for its owners. It seems that the common conception is that a private company will always be able to do the job cheaper than a public company, even when the public company does not have to produce a profit. The willingness to believe that public companies are woefully inefficient is no doubt strong in the U.S., but the willingness, even by the U.S. government, to believe that private companies can perform the same task for less money without this affecting the final outcome is seemingly even stronger, based on their willingness to outsource on such a large scale.

If one were to look at the basic dynamics of this system, one could take as a point of departure a certain task that needs to be done, for example the protection of DOD personnel in Iraq. This particular task was outsourced to Blackwater, presumably with the idea that they would be able to perform this task with the same level of satisfaction, or perhaps even better, than if the U.S. military had done it. This is an example of a task that used to be done “in-house” by the U.S. military. In the eyes of the U.S. government, Blackwater was able to do this job much cheaper than the military. They supposedly did this while still earning a substantial profit for its owners, and paying their employees several times more than a U.S.

³⁸ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 1335–1357

soldier. Some of these contractors can earn more than \$1000 per day, more than a four-star general in the U.S. army, and up to ten times as much as a private in the U.S. Army.³⁹

Another example is the PMC CACI, which was awarded the contract to interrogate Iraqi detainees, including the ones held in the infamous Abu Ghraib prison. They hired thousands of translators, most of them Iraqi nationals that spoke little or unsatisfactory English. This is a problem in itself, but when one considers that the lives of U.S. military personnel often depended on the information gathered by these sometimes unqualified translators, this practice becomes a huge liability.⁴⁰ The interrogators in Abu Ghraib, however, got their chief notoriety from their systematic abuse and ridicule of Iraqi detainees. The most well-known incidents took place in Abu Ghraib in 2003 to 2004, and led to the arrest and conviction of U.S. troops for their participation.⁴¹ The U.S. troops that eventually were arrested for these actions were convicted due to the existence of a clear chain of command, a transparent system and clear accountability. What the news stories often ignore, however, is what happened to the many contractors that were involved. No contractors were ever convicted for their actions, although all available evidence suggests that they took part in and committed the exact same actions as the convicted U.S. troops. This is a striking example of the lack of transparency and accountability within the contracting business. CACI was eventually sued by victims of the abuse in Abu Ghraib, but it took until 2014 before they finally settled the case in a U.S. court, agreeing to pay the victims a total of \$5 million, an insignificant sum for a company that reportedly made \$1.6 billion in profit in 2013.⁴²

Another disadvantage with the use of PMCs is the lack of follow-up of their employees after their contract is ended, and they return home from a warzone. U.S. troops that have served in wars have certain rights and benefits as veterans, including access to the “Post-9/11 GI Bill” that helps veterans get educated and re-trained for a civilian life. This program helps

³⁹ John F Burns, “The Deadly Game of Private Security,” *The New York Times*, September 23, 2007, <http://www.nytimes.com/2007/09/23/weekinreview/23burns.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A7%22%7D>.

⁴⁰ Greenwald, *Iraq for Sale - the War Profiteers*.

⁴¹ The Associated Press, “Soldier Is Found Guilty in AbuGhraib Abuse,” *The New York Times*, May 17, 2005, <http://www.nytimes.com/2005/05/17/national/17abuse.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A8%22%7D>.

⁴² John H Cushman, “Contractor Settles Case in Iraq Prison Abuse,” *The New York Times*, January 8, 2013, <http://www.nytimes.com/2013/01/09/world/middleeast/contractor-settles-case-in-iraq-prison-abuse.html?module=Search&mabReward=relbias%3As%2C%7B%221%22%3A%22RI%3A7%22%7D>.

thousands of veterans, and the eligibility to the program can be transferred to spouses etc.⁴³ Veterans that have sustained injuries or become disabled during their service are entitled to veteran benefits and disability pay for the rest of their lives, enabling them to live an as normal life as possible. Veteran benefits are in no way overly generous, but the value of the programs becomes evident when you consider those that are not eligible for anything. Employees of the PMCs are not entitled to benefits in the same way that U.S. military troops are, as they are not automatically considered veterans. They can apply for some limited veterans benefits, but certain requirements have to be met, and the application progress is complicated.⁴⁴ Contractors in Iraq and Afghanistan have the same access as military personnel to healthcare in these places, but the differences become apparent when they sustain life-altering injuries or disabilities. Whereas U.S. veterans are automatically entitled to benefits, contractors have a much more rigid and limited system of benefits from their employers. Most PMCs have very strict systems with clearly defined rules for entitlement to benefits, including a cap on the number of weeks contractors can receive benefits. One example is the maximum number of weeks a PMC employee is entitled to benefits for losing an arm, 312, as opposed to indefinitely if that person had been a part of the U.S. military.⁴⁵ It is further worth noting the large number of locally hired contractors in both Iraq and Afghanistan. These locals probably have little or no understanding of the welfare they are entitled to, if any, or knowledge of their rights. Using locally sourced contractors is how the PMCs balance their budgets, they pay them very little compared to U.S. citizens, and they have even fewer rights as they are hired under local jurisdictions, as they are hired according to local rules and to local wage levels. There is clearly a huge discrepancy here, between what people should be entitled to for working in a warzone, and what they actually get. Understanding this system is vital if one is to understand the threats outsourcing and the use of PMCs pose to democracy in the U.S.

⁴³ “Education and Training,” *US Department of Veteran Affairs*, accessed September 8, 2014, http://www.benefits.va.gov/gibill/post911_gibill.asp.

⁴⁴ “VETS -- General Frequently Asked Questions,” *United States Department of Labour*, accessed September 8, 2014, <http://www.dol.gov/vets/generalfaq.htm>.

⁴⁵ David Isenberg, “Are Private Contractors Really Cheaper?,” *Time*, July 23, 2013, <http://nation.time.com/2013/07/23/are-private-contractors-really-cheaper/>.

2 The Presidency, War and Contractors

The role of the president, as it is written in the U.S. Constitution, is found in article II, section 1: “The executive Power shall be vested in a President of the United States of America.”⁴⁶

What this section states is in essence that the president shall have the power to run the executive branch of government. Further on, section 2 stipulates that the president shall be commander-in-chief of the armed forces, and that the president should be able to make treaties on behalf of the nation.⁴⁷ With such an arguably vague wording of what was initially thought of as the role of the president, there is a far cry to the reality of the modern presidency, and all the concrete functions the president has today. The questions regarding what the constitutional title of “commander-in-chief” actually entails, especially when it comes to military intervention and the use of contractors, are especially interesting. Several scholars, including Arthur M. Schlesinger and Andrew Rudalevige, have argued that the powers of the president have expanded greatly since the Second World War, and that presidents such as Richard M. Nixon and George W. Bush have been particularly willing to expand these powers.⁴⁸ A president that is willing to expand and use the executive power is a threat to the American democratic model of a three-way divided sharing of power between the different branches of government, with mutual checks and balances in order to maintain equality. This chapter examines how the presidency has changed since the Second World War with regard to waging war and utilizing armed forces, be they U.S. military troops, PMCs or other non-governmental military actors. The Second World War has been chosen as a starting point as it was the first armed conflict where military contractors were used to any great extent.

Arguably, the intention of the framers of the Constitution was to limit the powers of the presidency, and all of the three branches of government, so that no one would have excessive power. According to Andrew Schlesinger, when the president of the United States amasses

⁴⁶ Jefferson, *The Declaration of Independence and the Constitution of the United States of America*.

⁴⁷ Jefferson, *The Declaration of Independence and the Constitution of the United States of America*.

⁴⁸ Arthur Meier Schlesinger, *The Imperial Presidency*, (Houghton Mifflin Harcourt, 2004). Arthur M. Schlesinger published the book *The Imperial Presidency* on the matter of expanding presidential power in 1973, and Andrew Rudalevige continued the legacy with the book *The New Imperial Presidency* in 2006.

too much power, and takes on roles previously held by Congress, a so-called Imperial Presidency is in effect.⁴⁹ A shift of power, so that one branch of government comes to dominate the other two, is a clear threat to the American democratic model because it goes against the principles of the model and threatens to undermine the system of checks and balances. There is a wide range of factors that ultimately could cause an imperial presidency, but the discussion in this chapter will be restricted to executive actions regarding war and the use of armed forces, either U.S. military troops or PMC personnel.

2.1 Understanding the Buildup of Executive Power from FDR to Nixon

The timeline starts with President Franklin D. Roosevelt, as he was the President during the buildup to and fighting in the Second World War. FDR personally oversaw several key changes in legislation that directly involved the use of contractors in wars. Prior to the onset of the Second World War, the U.S. had passed a set of strict neutrality laws in order to prevent American participation in another European war. FDR, however, soon saw the potential dangers of the war in Europe and wanted to aid Britain in the fight against Nazi Germany. The neutrality laws prohibited him from doing so, and Congress refused to declare war on Germany at the time, an action that would suspend the neutrality laws. On September 21, 1939, FDR tried to convince Congress to repeal these neutrality laws, claiming, “I regret that the Congress passed that Act,” and adding, “I regret that I signed that Act.”⁵⁰ FDR, however, did not wait for Congress to act, and made a deal with Britain himself, giving them 50 destroyer class warships in exchange for 8 British naval bases in the Caribbean. This was clearly the action of a strong president who felt he had the power to make such an agreement, regardless of the fact that it was in clear violation of the neutrality laws, and of a 1917 act that prevented the U.S. from exporting military equipment to a nation in conflict. FDR justified his actions by invoking the ever-disputed powers inherent in the constitutional title

⁴⁹ Schlesinger, *The Imperial Presidency*. Foreword

⁵⁰ Franklin D Roosevelt, “Franklin D. Roosevelt’s Message to Congress Urging Repeal of the Embargo Provisions of the Neutrality Law.,” accessed October 27, 2014, <http://www.presidency.ucsb.edu/ws/?pid=15813>.

“commander-in-chief.” In June 1940, when France fell to Germany, FDR declared an “unlimited national emergency” and seized the opportunity to prepare for war by spending \$15 billion on different military measures.⁵¹ In January 1941, he expanded these measures, and in a display of executive power he got the Lend-Lease Act through congress. The Lend-Lease Act allowed FDR to do almost as he pleased regarding aid to Great Britain, making him even more powerful.⁵² Even though these actions did not directly involve the U.S. in the Second World War, they came in reality very close to a declaration of war. Edward Corwin called it “a qualified declaration of war” and the most “sweeping delegation of legislative power” ever made to a President.⁵³

FDR also greatly expanded the use of private contractors during the Second World War. In 1940, the National Defense Expediting Act was passed, which made it much easier to use such contractors in the armed forces. The contractors used by FDR were primarily specialists in different areas, mainly weapon systems, but also builders that worked for the Army Corps of Engineers. Over \$7.2 billion was spent on contractors who built houses and army installations for the armed forces during the Second World War, and the need to service and repair military equipment employed a great number of people. Even though FDR used contractors to a great extent, they saw little action at the front line, very much unlike the situation today.⁵⁴

FDR has been called the father of the modern presidency, and the trend of increasing executive power that he initiated persisted in the years after the Second World War. When President Truman took office, he would imitate FDR in going against convention, by not seeking congressional approval for some of his actions. The most important decision made by Truman, which demonstrates the gradual expansion of executive power, was the start of the Korean War in 1950. This was never approved by Congress, and rather than waiting for a congressional declaration of war, Truman sent in U.S. armed forces under the pretense that it was a “police action.” By doing this he completely circumvented Congress, allowing him to personally decide to intervene in a foreign conflict. The Korean conflict also saw a great

⁵¹ Andrew Rudalevige, *The New Imperial Presidency*, (University of Michigan Press, 2005). 49

⁵² “The Lend-Lease Act of 1941,” accessed October 28, 2014, <http://history.house.gov/Historical-Highlights/1901-1950/The-Lend-Lease-Act-of-1941/>.

⁵³ Elizabeth L Hilman, “Franklin D. Roosevelt, Commander in Chief,” *Cordozo Law Review* 29, no. 3 (2008): 1037–47.

⁵⁴ Deborah C Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*, (BiblioGov, 2012). 14

expansion in the use of PMCs by the U.S. government. From June 1950 to June 1953, Truman spent more than \$1.5 billion on PMC contracts, and the total number of people employed to help support the troops in Korea surpassed 240,000. These people were mainly Korean and Japanese workers that worked in logistics, and never saw any front line action. Many were not directly employed by the U.S. government, but rather worked for the Korean government.⁵⁵

Truman's successor, President Eisenhower, originally took a more passive approach to executive power, perhaps as a response to Truman's approval rating, which fell dramatically during the Korean War. Eisenhower won the reelection in 1956, but after the Soviet Union launched the Sputnik, the first space satellite in 1957, his relatively more relaxed position on foreign policy began to haunt him. Voters were concerned about the fact that the Soviets had been allowed to build up their technology to such a point that they could threaten the U.S. with nuclear weapons. The so-called missile gap became very important in the 1960 presidential campaign, and Kennedy played this card well, blaming Vice President Nixon for allowing this to happen. This undoubtedly made an impact on Nixon's campaign, and later arguably played a part in him becoming what Schlesinger would label an Imperial President.⁵⁶

However, before Nixon took office, there were two further presidents that would leave their marks on the expansion of executive power, John F. Kennedy and Lyndon B. Johnson. Kennedy's presidency was marked by several crises in foreign policy, including most infamously the Cuban missile crisis. Kennedy had served three terms as a congressman before taking office as President, and was known for his willingness to exercise executive power, famously complaining, "We were just worms in the House – nobody paid much attention to us nationally."⁵⁷ After serving as a congressman, he served seven years in the Senate, again stating that he would much rather be President, and often talking about the virtues of presidential power. "Being president provided powers to make a difference in world affairs – the arena in which he felt most comfortable – that no senator could ever hope

⁵⁵ Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*. 15

⁵⁶ Richard Reeves, "Missile Gaps and Other Broken Promises," *The New York Times*, February 10, 2009, http://100days.blogs.nytimes.com/2009/02/10/missile-gaps-and-other-broken-promises/?_r=0.

⁵⁷ Robert Dallek, "Power and the Presidency, From Kennedy to Obama," *Smithsonian.com*, January 2011, <http://www.smithsonianmag.com/history/power-and-the-presidency-from-kennedy-to-obama-75335897/#7zMLSog6UIQKWhMp.99>.

to achieve.”⁵⁸ In April 1961, Kennedy used 1400 CIA-trained Cuban exiles to invade Cuba in an attempt to bring down Fidel Castro. The utter failure of the operation known as the Bay of Pigs incident marked a turning point in the history of the use of military forces by the president. A new crisis emerged in September 1962, when Khrushchev, the leader of the Soviet Union, decided to send nuclear missiles to Cuba, directly threatening the U.S. In response to this, Kennedy summoned his closest advisors, including his brother Robert Kennedy and his Vice President Lyndon B. Johnson. Every decision made during this crisis was made by the President and his small team alone. Kennedy controlled the situation completely, in the sense that no one outside his counsel knew much about it, or had any significant influence on the decision-making.⁵⁹ This was a brazen display of executive power, and Congress was more or less kept in the dark about the proceedings.

When Lyndon B. Johnson took over the presidency in 1963, he soon made it clear that he would not be restrictive of the use of executive power. His response to an army officer, when headed towards the wrong helicopter for his departure from a troop inspection, has gone down in history. The officer said, “Sir, that is your helicopter over there.” President Johnson simply replied, “Son, they’re *all* my helicopters.”⁶⁰ President Johnson initially sought congressional approval for his actions, especially in Vietnam, and he managed to get the Gulf of Tonkin resolution through Congress. The resolution allowed him to use conventional army troops in the conflict, not just military advisors. As the war escalated, Johnson sent more and more troops to Vietnam. Johnson continued the escalation in Vietnam despite growing public criticism in the U.S., and his popularity suffered as a result. He became so unpopular that he declined to seek reelection, and so the stage was set for the arrival of the President who came to inspire the term “the imperial presidency,” Richard M. Nixon.

The presidency of Richard M. Nixon was filled with controversy, and ultimately ended in disgrace. Right from the start, Nixon sought to expand executive power, not only for the presidency, but also for the rest of the White House staff. As a result, he also increased the workforce of the executive branch substantially. Rudalevige notes:

⁵⁸ Dallek, “Power and the Presidency, From Kennedy to Obama.”

⁵⁹ Jason Mullins, “Georgetown Security Studies Review – Embassy Moscow: a Diplomatic Perspective of the Cuban Missile Crisis,” *Georgetown Security Studies Review*, December 10, 2013, <http://georgetownsecuritystudiesreview.org/2013/12/10/embassy-moscow-a-diplomatic-perspective-of-the-cuban-missile-crisis/>.

⁶⁰ Hugh Sidey, *A Very Personal Presidency; Lyndon Johnson in the White House.*, (New York: Atheneum, 1968). 98

A small but telling note concerns lunch: in the Eisenhower administration, there was one White House mess. In the Johnson administration there was one mess, but two servings. Under Nixon, a second dining area had to be added.⁶¹

Nixon also further empowered the National Security Council (NSC), and expanded it greatly. Henry Kissinger led the NSC, and under his auspices it became the chief source of advice for the President in foreign affairs. Nixon seemed to want to build up his own close counsel, and many of the decisions he made as President had indeed their origin within this close circle of advisors. Building on the newfound power of the Gulf of Tonkin resolution, Nixon greatly expanded the military commitment in Vietnam. In its wake, the several PMCs followed.⁶²

PMCs had been operating in Vietnam since 1954, and had contracts on various support functions, including base management, transport and construction services. In the mid-1960s, 35 different companies supported the American military operations in Vietnam, including an increasing number of civilian field service technicians who worked on the front lines. Their job was mainly to provide hands-on support for military equipment and weaponry.⁶³ The use of PMCs was at the time controversial, and claims were made that the companies were fraudulent and corrupt. One company in particular, Brown and Root, was reported to have “lost accounting control of 120 million dollars.” In addition, their apparently lackluster security of their Vietnam operations had led to the theft of millions of dollars in various military equipment.⁶⁴

In the last years of the Vietnam War, Congress increasingly sought to take control of the military, and to wrestle some power away from the President. In 1973 the War Powers Act was passed, requiring the President to seek congressional approval for any deployment of U.S. troops after 60 days. This act was intended to restrict the President’s ability to use the armed forces as he saw fit, and to severely limit the powers actually vested in the title commander-in-chief. As Congress stripped the President of the power over the armed forces, more and more responsibilities were allocated to different private companies. The PMCs became the President’s tool for avoiding the War Powers Act. 1973 was also the year the

⁶¹ Rudalevige, *The New Imperial Presidency*. 60

⁶² Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*. 15–16

⁶³ Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*. 16

⁶⁴ Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*. 16–17

military draft ended, being replaced by a voluntary military. After many years of an unpopular war in Vietnam, it was increasingly hard to find motivated soldiers. PMCs had no problem finding motivated individuals, as they were, and are, able to pay handsomely those who are willing to work for them. In the face of increasing congressional control and the end of the draft, it seemed that the answer to every challenge to the power of the president to intervene in foreign countries and conflicts was to increasingly rely on the services provided by the PMCs. President Johnson's, albeit limited, and President Nixon's use of PMCs in Vietnam arguably contributed to making the use of these companies in military operations the norm, rather than the exception.

Thus, the "imperial" powers of the president did not originate with President Nixon, but they were greatly expanded during his administration. Nixon is by most remembered first and foremost for the Watergate scandal, but it was rather his willingness to use and abuse presidential power that was the central issue of his presidency, Schlesinger notes:

Watergate's importance was not simply in itself. Its importance was in the way it brought to the surface, symbolized and made politically accessible the great question posed by the Nixon administration in every sector – the question of presidential power. The unwarranted and unprecedented expansion of presidential power, because it ran through the whole Nixon system, was bound, if repressed at one point, to break out at another. This, not Watergate, was the central issue.⁶⁵

This use of presidential power manifested itself in, among other things, Nixon's use of the armed forces as well as PMCs. Even though Nixon mostly expanded existing systems, and did not create many new ones, he was the one that pushed so far as to attract the attention of scholars such as Schlesinger. The buildup of presidential power, starting with FDR during the Second World War, would come to a temporary halt with the termination of the Nixon presidency. It was the Watergate scandal that ultimately brought Nixon and his imperial presidency to its knees, and the man infamous for later noting, "When the President does it, that means that it is not illegal,"⁶⁶ had to leave the White House.

2.2 From Carter to Clinton – The Resurgence Years

⁶⁵ Schlesinger, *The Imperial Presidency*. Location 4858

⁶⁶ Rudalevige, *The New Imperial Presidency*. 100

When President Ford lost the election to Jimmy Carter, a clear shift was observed. During his campaign, Carter used Watergate to attack the Ford administration. It was clear that Watergate was still fresh in the voter's memory, and that President Ford was seen as too close to the problem to be trusted to lead the charge towards a less imperial presidency. Ford had after all shown little respect for the War Powers Resolution by sending American Special Forces to rescue American sailors captured by the Khmer Rouge. In what would be named the "Mayaguez scandal," 41 U.S. troops lost their lives in a poorly planned and poorly executed mission approved by President Ford. Thirty-nine sailors were rescued, but the incident became known as a complete scandal, and as yet another abuse of presidential power, as Ford sent in the troops without ever consulting Congress.⁶⁷ In his short time in office, Ford was not known for any extended use of PMCs, but it is likely that any use under Nixon continued under his presidency.

The presidency of Jimmy Carter was not marked by much abuse of presidential power, or many foreign policy scandals. However, it seems that no modern president can leave office without at least a modicum of unwarranted use of executive power. In Carter's case, this was evident in the Iran hostage crisis. In 1980, Carter sent in the Special Forces to attempt a rescue of 55 American citizens that were being held captive in the American embassy in Teheran. "Operation Eagle Claw," as it was known, was planned and executed in secrecy, but ended in disaster. Eight soldiers were killed, four wounded and several aircrafts and helicopters were either abandoned or destroyed. This failed rescue attempt sparked a diplomatic crisis, and even though the secrecy of the operation was justified to ensure the best chance of success, the fact that it failed was a hard blow to the Carter administration.⁶⁸ In an era where presidential power was being limited, the failure of Operation Eagle Claw was seen as a direct failure by the President, and left Carter in a very unfortunate position before his reelection campaign. This failed display of executive power, combined with the energy crisis of 1979, left him unpalatable to most voters. In 1980 he won the trust of the Democratic Party, but lost in the general election to Ronald Reagan. During the presidency of Jimmy Carter, PMC use died down somewhat, as there were no major conflicts that the U.S. was

⁶⁷ Christopher Lamb, *Belief Systems and Decision Making in the Mayaguez Crisis*, (University Press of Florida, 1989). Introduction

⁶⁸ Chua Lu Fong, "V28N2 - Operation Eagle Claw, 1980: a Case Study in Crisis Management and Military Planning," July 3, 2006.

involved in, and consequently they did not require the services of PMCs in day-to-day operations.

The Reagan administration oversaw an ever-increasing use of PMCs and a general escalation in the use of force and concomitant cooling of the Cold War. President Reagan escalated the arms race with the Soviet Union, revitalized the economy and made major changes in the U.S. military. Regarding executive power, Reagan mostly followed the procedures Congress demanded that he follow, and informed Congress of most of his actions. However, one incident broke with this pattern, and has since become forever associated with his name. The Iran-Contras affair was a complex scheme orchestrated by members of the Reagan administration to raise funds for anti-communist forces in Nicaragua, known as the Contras, through arms sales to Iran. Iran was under a strict arms trade embargo, and the decision to go through with the plan was a blatant example not only of poor judgment, but of a complete disregard for laws passed by Congress. The Iran-Contras affair was probably the biggest stain on the Reagan legacy.

President Reagan had an ambition to reform and deregulate the U.S. government, and this ambition also included the armed forces. With his blessing, the Department of Defense awarded the first so-called umbrella contract to a defense contractor. Umbrella contracts were meant to enable one contractor, or a group of contractors, to provide all the functions needed in a military intervention or a humanitarian relief operation. This system of having one or a few contractors fill every role and provide everything the U.S. government might need is called the Logistics Civil Augmentation Program (LOGCAP) and is still in use today. The first LOGCAP contract was awarded to KBR, a gigantic firm with numerous subsidiaries, including PMCs. KBR was given complete control over just about every service provided to the U.S. military or its allies, including food, water, base security, construction etc. The general idea was that KBR, under the LOGCAP umbrella, could be used instead of the U.S. military for various missions, making them more effective, more responsive and, in theory, more cost efficient.⁶⁹ LOGCAP contracts would become the method of choice when outsourcing military functions not only for the Reagan administration, but for every administration since. LOGCAP contracts were in effect during the American intervention in East Timor, Operation Desert Storm, and in Bosnia-Herzegovina. A new round of LOGCAP

⁶⁹ Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*. 18

contracts were handed out in 2001 in preparation for the forthcoming invasion of Afghanistan. The LOGCAP contract was awarded to KBR, and they became the main contractor in both Afghanistan and Iraq until 2013, when yet another LOGCAP contract was awarded to KBR, DynCorp and the Fluor Corporation.⁷⁰

George H. W. Bush in many ways continued the legacy of Reagan, and his foreign policy would come to define his presidency. His most well-known foreign policy decision was “Operation Desert Storm,” a military engagement to force Iraqi forces out of Kuwait in 1991. The operation, later known as the Gulf War, was a short affair and a tremendous success for U.S. troops. Perhaps as a result of the brevity of the engagement, few contractors were used in this war, compared to later military engagements. In total 998 employees of 76 different PMCs were employed in the war, in addition to 2900 employees of non-U.S. contracting firms.⁷¹ Even though this number is low compared to figures from post-9/11 conflicts, contractors played an indispensable role in the war. Despite their relatively low numbers, oversight was still a considerable problem, and the lack of transparency and accountability was evident. A Logistics Management Institute survey found that “Command and control was difficult, commanders had poor visibility of contractors, and few military contracting officers were available to supervise the work.”⁷² It was clear early on that even a modest use of contractors raised issues, and that the potential pitfalls associated with the use were numerous. President George H. W. Bush agreed with Congress not to continue the operation into Iraq itself. By doing so, he showed a willingness to comply with Congress, and with the wishes of the American people, who were unwilling to escalate the conflict. The presidency of George H. W. Bush, then, marked yet another step towards an increasing congressional control, and it seemed that Congress finally had regained the power it seemed to have lost in the period between the Second World War and Watergate.

In 1993, William Jefferson Clinton moved into 1600 Pennsylvania Avenue. The Clinton administration led a campaign to reinvent government, meaning, among other things, a further move towards outsourcing. During the Clinton administration, the number of

⁷⁰ Deborah D Avant and Renée de Nevers, “Military Contractors & the American Way of War,” *American Academy of Arts Sciences*, 2011, 1–12. 89–90

⁷¹ Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*. 19

⁷² Kidwell, *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*. 19

contractors grew notably, not only in government in general, but also in the DOD. In the mid-1990s, downsizing was beginning to become the norm in government, as the extra personnel hired during the Cold War were no longer needed. The Clinton administration received support from the United States Commission on Roles and Missions, whose job it was to reduce redundancy and increase the efficiency of the armed forces. In 1995, the Commission concluded that the U.S. should increase its reliance on contractors. Later that year, a Pentagon report claimed that the DOD could save \$12 billion annually if everything but the actual combat operations was outsourced.⁷³

Clinton, in general, continued the trend of congressional involvement as seen in the era since Watergate, and did consult Congress on most matters of foreign affairs. In the matter of enforcing the U.N.-sanctioned no-fly zone over Yugoslavia, he consulted congressional leaders, but when he launched operation “Desert Fox” in 1998, he did not. The latter was a semi-covert operation aimed at reducing Iraq’s ability to wage war against its neighboring countries.⁷⁴ Clinton managed the budget well, and one could argue that his push to outsource actually did pay off monetarily. During his presidency, there were no major conflicts that required substantial numbers of U.S. troops to be deployed, and consequently there was little use for large amounts of PMC personnel. When Clinton left office, there was a budget surplus, the taxes on the top 1.2% of the population had been increased, the taxes for low-income families reduced, and the economy was booming.

2.3 George W. Bush and the Return of the Imperial Presidency

When George W. Bush was on the campaign trail in 2000, his platform theme consisted of “compassionate conservatism,” tax cuts for all, an energy reform and the No Child Left Behind initiative. His campaign was in many ways a classic Republican campaign, and an obvious response to two terms of a Democrat in the White House. During his campaign, Bush often mentioned the decline of presidential authority, and his administration, he claimed,

⁷³ David Isenberg, *Private Military Contractors and U.S. Grand Strategy*, 2009. 19

⁷⁴ Dallek, “Power and the Presidency, From Kennedy to Obama.”

would “restore honor and dignity to the White House.”⁷⁵ Initially, this could have been interpreted simply as an attack on the Clinton administration, but it soon became clear that something more lay behind it. Bush soon stated: “I am not going to let Congress erode the executive branch. I have a responsibility to protect the executive branch from legislative encroachment.”⁷⁶ Some alarm bells undoubtedly went off in the minds of those that studied the concept of an imperial presidency, such as Schlesinger and Rudalevige. When he moved into the White House in January 2001, President Bush and the rest of the U.S. population knew nothing of what was about to happen that fall, and how what otherwise probably would have been a mundane presidency in a predictable world would develop into a modern imperial presidency in response to the September 11 attacks.

September 11, 2001 was a major turning point in U.S. history. It was the first large-scale attack on the U.S. since Pearl Harbor in 1941, and it would change not only the American people, but also the American presidency. 2,976 people lost their lives that day, and more than 6,000 were wounded in what was the single bloodiest day on U.S. soil since the Civil War. The American people were in shock and needed more than ever before a strong leader to guide them through this paradigm shift in history. George W. Bush rose to the occasion, and his flaming speech on Ground Zero on September 14, was perhaps just what an American people in shock needed. In the speech, President Bush proclaimed “The people who knocked these buildings down will hear all of us soon!”⁷⁷ President Bush wasted no time in mounting his response to the attacks, and later that day, September 14, 2001, Congress passed the S.J.Res.23 – Authorization for Use of Military Force bill. This very short bill simply stated

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁷⁸

This landmark bill gave the President enormous power, and allowed him to take the actions he felt was needed to protect the U.S. without having to go to Congress for support. The bill

⁷⁵ Rudalevige, *The New Imperial Presidency*. 211

⁷⁶ Rudalevige, *The New Imperial Presidency*. 211

⁷⁷ “The Rhetoric of 9/11: Bullhorn Address at Ground Zero (9-14-01),” *Americanrhetoric.com*, November 12, 2014, <http://www.americanrhetoric.com/speeches/gwbush911groundzerobullhorn.htm>.

⁷⁸ The 107th Congress, *S.J.Res.23 - Authorization for Use of Military Force, 2001*.

specifically states that it serves as congressional authorization regarding the War Powers Resolution.⁷⁹

However, the S.J.Res.23 was not the only pivotal piece of legislation that was passed in the immediate aftermath of 9/11. On October 26, 2001, the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act” (USA PATRIOT act) was passed. The president did not stand idly by, and pushed major reforms through Congress, which at the time might have been seen as a necessity to combat this new threat to the U.S. It seemed that no one at the time wanted to be the one to say no to these changes, in fear of appearing unpatriotic or unsupportive of the War on Terror. The USA PATRIOT act has since been the target of much criticism. Zbigniew Brzezinski, who served as a counselor to LBJ and as the National Security Advisor to Carter, became one of the strongest voices of criticism. Brzezinski claims that the way the Bush administration conducted its response to the 9/11 attacks instilled a constant feeling of fear, and that “Fear obscures reason, intensifies emotions and makes it easier for demagogic politicians to mobilize the public on behalf of the policies they want to pursue.”⁸⁰

There were, however, more instances of presidential imperialism to come, and more reasons to question this substantial buildup of the executive power. On September 23, 2001, President Bush, by executive order, set up the Office of Homeland Security (OHS). It was intended to serve as an additional part of the intelligence and defense community, and was to operate as an independent entity, under direct presidential control. However, the OHS was reorganized into the Department of Homeland Security (DHS), a large new department that unified 22 different agencies, and hired tens of thousands of new employees. In excess of 170,000 people now work for the DHS. The DHS was not just under President Bush’s control, it was also under order not to divulge any information it received to the public, apparently to maintain national security. In essence, this meant that even Congress was to be excluded from this information. Congress reacted and demanded to be informed. President Bush wrote the following reply:

The Executive branch does not construe this provision to impose any independent or affirmative requirement to share such information with the Congress or the Comptroller General and shall construe it in any event in a manner consistent

⁷⁹ Rudalevige, *The New Imperial Presidency*. 217

⁸⁰ Zbigniew Brzezinski, “Terrorized by ‘War on Terror’,” *The Washington Post*, March 25, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301613.html>.

with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative process of the Executive, or the performance of the Executive's constitutional duties.⁸¹

What this signifies is that Bush was willing to keep information from Congress, information available to the executive branch. He seemed to want to keep critical information under the control of the executive branch and himself personally. This was worrying in itself, but even more so if one interprets this development in the context of an imperial presidency. Bush had set the stage for a powerful presidency, with less congressional control than had been seen in decades.

During his presidency, Bush also issued a large number of so-called signing statements to laws passed by Congress. A signing statement is a presidential comment on a law that has been passed, and is included in the congressional archive. Signing statements were used very sporadically until the 1980s, and usually only as a general comment or a historical statement, but Bush changed this. Signing statements were used increasingly during the Reagan, George H. W. Bush and Clinton years, but George W. Bush brought this use to unprecedented levels. President Bush used his opportunity to issue signing statements to critique more than 700 provisions of law. He would claim that they were either in breach of the Constitution, or, more often, in opposition to his interpretation of how to execute his power as head of the executive branch, or commander-in-chief.⁸² Bush's use of signing statements came under sharp criticism, and in 2006 an American Bar Association task force, known as the "ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine," concluded that President Bush's use of signing statements was unconstitutional and in direct violation of the system of checks and balances.⁸³

President Bush was not only willing to exercise his power as head of the executive branch, he was also willing to push the limits of what it meant to be the commander-in-chief. In 2002, he made the case that the detainees at the Guantanamo military base on Cuba were not entitled to treatment as prisoners of war, as they did not represent a specific nation. Instead, they were

⁸¹ Rudalevige, *The New Imperial Presidency*. 238–239

⁸² American Bar Association, *Presidential Signing Statements and the Separation of Powers Doctrine*, (Chicago, 2006).

⁸³ American Bar Association, *Full Report by the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine*, 2006.

to be referred to as enemy combatants. He claimed that as commander-in-chief, he could make this type of decision, but the decision soon became under sharp criticism. In 2006, the matter had reached the Supreme Court in the case of *Hamdan v. Rumsfeld*. To the dismay of the Bush administration, the Supreme Court ruled that President Bush did not have the power to make this decision, and that it was in breach of the Geneva Convention.⁸⁴ Bush also wished to gain complete control over the interrogation of the prisoners at Guantanamo, something that normally would be under congressional control. A report from the Office of Legal Counsel was used as proof that the President had this power. It stated, “As commander-in-chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.”⁸⁵ The report also stated that any action that limited the president in this matter would be unconstitutional.

Regarding contractor use, President Bush is in a league of his own, with a much more elaborate use of contractors than any other president. The use of contractors in Iraq and Afghanistan reached levels far beyond any comparable use in the past, with contractors at times outnumbering soldiers in both Iraq and Afghanistan. However, President Bush’s connection to the contractor industry dates back to the time before the invasion of Afghanistan and Iraq, which became clear in his choice of running mate. Richard Bruce “Dick” Cheney had served as the Secretary of Defense during the presidency of George H. W. Bush, and was the mastermind behind Operation Desert Storm, the military operation to push Iraqi forces out of Kuwait in 1991. From 1995 to 2000, Cheney had served as the CEO of Halliburton, an American multinational corporation with a large number of subsidiaries. Halliburton is predominantly an oil service company, but they also deliver a wide range of contracting services to the DOD through its many subsidiaries. One of those subsidiaries is KBR, which became the biggest recipient of government contracts during the wars in Iraq and Afghanistan. For a long period, from 2003 until 2008, KBR had almost exclusive control over contracts in Iraq, and received contracts worth in excess of \$24 billion during this

⁸⁴ “HAMDAN v. RUMSFELD,” *Cornell University Law School*, July 2006, <http://www.law.cornell.edu/supct/html/05-184.ZO.html>.

⁸⁵ Office of Legal Counsel, *Standards of Conduct for Interrogation Under 18 USC §§ 2340-2340A*, August 1, 2002, <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>.

period.⁸⁶ The fact that Dick Cheney had such close links to KBR drew much criticism from democrats at the time, who claimed that KBR was favored by the government, and allowed to conduct its business with even less governmental oversight than usual. The criticism of Cheney's former role at Halliburton did become so bothersome that Halliburton decided to sell KBR in 2007, specifically citing the criticism of Cheney as their motivation.⁸⁷ KBR itself also suffered sharp criticism for the way it conducted business in Iraq, critics claiming that they did shoddy work, even resulting in the death of four U.S. soldiers due to electrocution by faulty wiring. A 2009 *New York Times* editorial even went so far as calling their business methods "tragic profiteering."⁸⁸

Even though we have seen that presidential power is dynamic and ever-changing, recent years have witnessed a sharp increase in presidential power, which has brought with it a remarkable escalation in the use of PMCs. It would seem that as presidents gain more power, they want to exercise that power with less and less congressional control, and PMC use allows this. The dynamic of presidential power is important to study when one is attempting to understand the American use of operational contract support, but it is also deeply intertwined with both the executive and legislative branches. American politics are divided by design, and in order to fully understand a topic completely, one has to view it from all angles. The next two chapters examine these branches of government and seek to explain their roles in the use of PMCs.

⁸⁶ James Risen, "KBR Losing Exclusive Hold on Iraq Contracts," *The New York Times*, May 26, 2008, <http://www.nytimes.com/2008/05/26/business/worldbusiness/26iht-defense.4.13211927.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C%7B%21%22%3A%22RI%3A6%22%7D>.

⁸⁷ Bloomberg News, "Sale of KBR Bolsters Profit at Halliburton - New York Times," *The New York Times*, July 24, 2007, <http://www.nytimes.com/2007/07/24/business/24halliburton.html?module=Search&mabReward=relbias%3Ar%2C%7B%21%22%3A%22RI%3A6%22%7D>.

⁸⁸ Editorial, "KBR Does It Again," *The New York Times*, May 23, 2009, <http://www.nytimes.com/2009/05/24/opinion/24sun3.html?module=Search&mabReward=relbias%3Ar%2C%7B%21%22%3A%22RI%3A6%22%7D>.

3 The Role of the Executive Branch

3.1 The “Shadow Government”

The “shadow government” is a term used by Allison Stanger to describe the nature of outsourcing and the various contractors in the U.S. Her contention is that big government has been partially replaced with a government consisting of private actors that have an increasingly large amount of power. Big government and the private sector have in a way transmuted into an opaque “shadow government.” Stanger points to a pivotal moment during the Eisenhower administration as the birth of this shadow government, namely a certain order by the Office of Management and Budget (OMB), named Circular A-76. The circular was in its original form not published until 1966, but it was directly based on the Bureau of Budget’s bulletins published in 1955, 1957 and 1960. These bulletins, and later the OMB A-76 itself, stated that certain activities, which at the time were under complete government control, were to be outsourced to public-private partnerships. OMB A-76 also functioned as a limiter on what could be outsourced by naming some functions as “inherently governmental.” These functions were not to be outsourced, doing so would arguably threaten transparency and accountability. The ground rules for whether something is inherently governmental, and in breach with the OMB circular A-76, are defined in the Office of Official Procurement Policy Letter 92-1 and the 1998 Federal Activities Inventory Reform (FAIR) Act. They define an inherently governmental as a “function that is so intimately related to the public interest as to require performance by Federal Government employees.”⁸⁹ This is evidently rather vague, and the lack of clearer guidelines has undoubtedly made it easier to gradually weaken the restrictions set by OMB A-76’s over time.

It was the Clinton administration that expanded outsourcing to fully include PMCs. As mentioned in chapter one, the administration utilized the services of PMCs in Colombia and the former Yugoslavia. It sought to expand the contracting business into fields that were

⁸⁹ Jason Peckenpaugh, “Definition of ‘Inherently Governmental’ Could Change - Contracting,” *Govex.com*, June 8, 2001, <http://www.govexec.com/contracting/2001/06/definition-of-inherently-governmental-could-change/9293/>.

previously completely under the control of the military. President Clinton stated, “Americans want to ‘get their money’s worth’ and want a government that is more businesslike and better managed. Circular A-76 is not designed to simply contract out. Rather, it is designed to ... empower federal managers to make sound and justifiable business decisions.”⁹⁰ With this statement, the message was clear that outsourcing would expand again, and also into areas one might argue should be considered “inherently governmental,” by doing as Clinton suggested, namely empowering federal managers to decide for themselves what could be considered inherently governmental.

The executive branch is the client for all contractors employed by the various governmental agencies and departments, and over the last decade or so, there has been an incredible growth in the number of people under contract. The outsourcing and contracting grown to the extent that the biggest government contractor, Lockheed Martin, is awarded more money from the U.S. government than the Department of Justice.⁹¹ Giant corporations like Lockheed Martin are responsible for a wide array of tasks previously done by the U.S. government itself: “Lockheed Martin sorts your mail, tallies up your taxes, cuts social security checks, counts people for the U.S. census, runs space flights, and monitors air traffic.”⁹² The contractors have become such an integral part of the U.S. government that despite the huge increase in the size of the U.S. government since the 1960s, the actual number of civilian federal employees of the executive branch has remained at 1963 levels, about 1.9 million people. The tremendous growth of outsourcing is apparent from a comparison of 1963 and 2006 budgets. Adjusted for inflation the federal budget for 1963 was about \$733 billion compared to the 2006 federal budget of \$2.7 trillion. There is a staggering difference here, and considering that the number of people directly employed by the executive branch has remained unchanged, a good portion of this budget gap is filled by contractors.⁹³ So what does this entail for transparency and accountability?

⁹⁰ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 288

⁹¹ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 253.

⁹² Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 255

⁹³ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. eLocation 319

In short, the executive branch, as the client, should have oversight and control over the contractors it employs. This is a necessity, but how is the federal government supposed to manage this enormous growth in contractors with basically the same number of people as they had in 1963? For one, most governmental employees' jobs have shifted to a more managerial role. As the U.S. government outsourced ever more functions, the remaining federal employees were tasked with contractor management, as their original jobs had been outsourced. Returning to the budget differences between 1963 and 2006, one can see that each federal employee managed about \$385,000 in 1963, compared to over \$1,420,000 in 2006. Governmental spending has increased dramatically, and yet the same number of people are supposed to have control over the spending and make sure the contractors fulfill their contracts.⁹⁴ It is not difficult to see the inherent complications and pitfalls in this system and the result is that the "shadow government" can increasingly do as it pleases with less and less federal control, such as Blackwater did in Iraq during its years there.

The fact is that the U.S. government has become completely dependent on outsourcing and private contractors, and if one were to remove contractors from the American system today, there is good reason to believe that there would be a total collapse. Part of the reason is that the ever-increasing spending on private contracts has undermined the ability of the U.S. government to perform a wide range of functions, as much expertise and know-how are found only in private companies. People that used to work for the government have increasingly turned to jobs in private businesses, often earning significantly more. This is especially apparent within the PMC business sector. A further reason for this push for outsourcing is that it is welcomed, and has been welcomed and even celebrated for decades. There is an inherent distrust of government, and especially of big government, in a large proportion of the American population. Outsourcing and contracting have been seen as an ideal way to keep government small and efficient, but without giving private businesses complete control over certain "inherently governmental" tasks. Outsourcing and contracting are not necessarily bad, and can work successfully if managed well. Outsourcing is an inherent part of governmental downsizing in the U.S., making the government appear smaller by employing contractors. By doing so, the number of federal employees can be held at 1960s levels, while the total number of people on the government payroll has increased dramatically. Several presidents, republicans and democrats alike, have supported this

⁹⁴ Stanger, *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*. Location 319

development in recent times. The full-scale government downsizing began under the Reagan administration and continued under the George H. W. Bush administration. Downsizing continued as a trend during the Clinton administration, under the name “reinventing government,” and was further bolstered by the George W. Bush administration.⁹⁵ The problem of outsourcing, however, becomes more apparent when the very cornerstone of what defines a state, the monopoly on power, is outsourced.

3.2 The Department of Defense

The Department of Defense (DOD) can trace its history back to 1949. However, the institution it replaced, the War Department, was established as early as 1789. The War Department remained in place from 1789 to 1947, when the National Military Establishment replaced it in an effort to unite all branches of the military under one roof, in times of peace as well as war. In 1949, the National Military Establishment was replaced with the Department of Defense, which remains in the same role today. The Secretary of Defense, who functions as the main defense policy advisor to the President, is the head of the DOD. The secretary is responsible for and has the authority over all actions made by the DOD, under direction from the President. As the head of the executive branch and the commander-in-chief, the President is ultimately responsible for the entire executive branch. The DOD is the largest employer in the U.S., with more than 1.4 million service members on active duty, another 1,100,000 who serve in the National Guard and Reserve Forces, and a civilian staff of about 718,000. The DOD is located in the Pentagon outside Washington D.C., but has additional installations in various locations throughout the U.S.⁹⁶

The DOD is the department that awards contracts to PMCs, and is thus the client for all contracts awarded to different PMCs over the years. The DOD is the top authority for the PMCs and dictates what the content of the contracts will be, and the ultimate cost of the

⁹⁵ Paul R Verkuil, “Outsourcing and the Duty to Govern,” in *Government by Contract*, (London: Harvard University Press, 2009), 310–34.

⁹⁶ “About the Department of Defense (DOD),” *U.S. Department of Defense*, accessed September 29, 2014, <http://www.defense.gov/about/>.

contracts. Their main goals for PMC use are listed on the website of the Office of the Deputy Assistant Secretary of Defense:

Contracted private security functions remain a legitimate and effective method for providing non-inherently governmental protection of personnel, property, and activities in contingencies and areas of other significant military operations where the use of military or other government security forces are unavailable, insufficient, or inappropriate.

- The use of force in such protective services is limited to self-defense and defense of others against unlawful attack.
- Service must be provided using methods and techniques that promote, and do not undermine, long-term stability and security of the region in which these services are performed.
- Misconduct on the part of any PSC affects the ability of all PSCs to operate. Therefore, contracted security functions should be performed to quality standards common to all private security providers, regardless of contracting entity.⁹⁷

Even though the DOD is the client for the PMCs, Congress is also a part of the process, as it ultimately accepts the contracts awarded by the DOD. Congress controls the federal budget, and is the branch that allocates funds for the PMCs' salary. The DOD awards contracts worth several millions and sometimes billions of dollars every single day. On Tuesday, October 30, 2014, the DOD awarded contracts worth a total of about \$884,000,000 to contractors for the Defense Logistics Agency alone. They awarded about \$827,000,000 in contracts to contractors working for the Navy, about \$30,000,000 to contractors working for the Defense Health Agency, about \$652,000,000 to contractors working for the Air Force, about \$628,000,000 to contractors working for the Army and finally about \$63,000,000 to contractors working for the U.S. Transport Command.⁹⁸ These numbers, adding up to more than \$3,000,000,000 in contracts, awarded on a single day, are truly staggering. These numbers shed some light on the immense scale of outsourcing of defense in the U.S. If one included numbers for the other parts of the executive branch, the total would be even higher. However, the 30th of October is the last day in the fiscal year, and consequently the number of contracts might have been higher on that day due to budgetary reasons, but if one checks other days throughout the year, one can see numbers that come close to these on a regular basis.

⁹⁷ "Private Security Companies (PSCs)," *Office of the Deputy Assistant Secretary of Defense*, October 13, 2014.

⁹⁸ "DOD Contracts Daily Oversight," *U.S. Department of Defense*, October 1, 2014, <http://www.defense.gov/contracts/>.

The DOD relies on the services provided by defense contractors and PMCs for varying reasons. As mentioned in the introduction, a common conception is that outsourcing and contracting save the taxpayer money: A private company is more efficient than a public one, and less taxpayer dollars are used to get a certain task done if one uses private contractors. Whether or not this is true is a matter of debate, but one thing remains certain: The current U.S. military cannot go to war, or even operate functionally, without contractors. According to retired Army general Barry McCaffrey, “We’ve [the U.S.] got an armed forces in uniform that is incapable of carrying out the current national-security strategy,” and without contractors, “our war effort collapses.”⁹⁹ Outsourcing and contracting have been going on for so long, and in such a large scale that the U.S. military is wholly dependent on it. But how does U.S. law govern this use?

3.3 The Case of Contractor Accountability

Warzones are not only dangerous; they can be very confusing, and sometimes completely out of control. When a nation is in the middle of a war, basic institutions, such as a functional legal system, often do not exist. This was the case in Iraq and Afghanistan. After the invasion of Iraq in 2003, the U.S. military overthrew the Iraqi government and seized control of the nation. The U.S. set up a temporary entity known as the Coalition Provisional Authority (CPA) to act as the new government for Iraq until the nation could be stabilized. The CPA functioned both as the voice of the U.S. in Iraqi politics, but also as the final authority in legal matters. The CPA made laws and enforced them on all foreigners in Iraq, including the employees of the different PMCs.¹⁰⁰ The CPA has played an important part in the development of how operational contract support has functioned in Iraq. At least one step taken by the CPA would have far-reaching consequences: In 2004, contractors in Iraq were

⁹⁹ M R Kestian, “Civilian Contractors: Forgotten Veterans of the War on Terror,” *U Tol L Rev*, 2007. 2

¹⁰⁰ J Dobbins, *Occupying Iraq: a History of the Coalition Provisional Authority*, (Santa Monica, CA : RAND Corp, 2009). Preface

granted immunity from the law. This immunity lasted until 2009 when a new system would take over. This new system made the contractors that operate in Iraq liable to Iraqi law.¹⁰¹

So what did this immunity mean? In theory, immunity from Iraqi law would entail that the contractors could do as they pleased in Iraq, as long as they kept within the limits of their contract from the DOD. However, as mentioned above, these contracts had a tendency to be very vaguely formulated. The result was a lawless society in Iraq, where PMC personnel could do whatever they deemed necessary to get their job done. There have been cases, in Iraq in particular, where PMC personnel have killed civilians, and where the deaths of PMC personnel have led to an escalation in ongoing conflicts between U.S. troops and insurgents in Iraq.¹⁰² The immunity given to the PMC personnel, and the general lack of oversight by the DOD and the U.S. government undoubtedly played a major part in worsening the situation in Iraq. More than one thousand military contractors have lost their lives in Iraq, along with more than 4480 U.S. service members. It is impossible to calculate how many of these that lost their lives due to poor management of PMCs and in operations either to rescue or to clean up after poor decisions made by PMC personnel.¹⁰³

It might seem illogical and counterproductive to give PMC personnel immunity from Iraqi law, but David Isenberg have suggested some reasons why this happened. Isenberg argues that in the aftermath of the American invasion of Iraq, the legal system in the country was virtually non-existent. The CPA existed, but more on paper than anything else, and the reality was that Iraq was a lawless warzone. Isenberg claims that without immunity, the PMCs would not want to send their personnel into these areas, as they risked arbitrary legal treatment by a non-functioning legal system, if one existed at all. In addition, without the immunity the different PMCs would have faced much higher insurance premiums, further increasing their costs and again making them unwilling to send personnel into Iraq. As the services of the PMCs were greatly needed by the U.S., immunity from Iraqi law was the only way forward.

¹⁰¹ R De Nevers, "The Effectiveness of Self-Regulation by the Private Military and Security Industry," *Journal of Public Policy*, 2010, doi:10.1017/S0143814X10000036. 223

¹⁰² Michael Meyer, "The 10th Anniversary of a Photo That Changed the Iraq War," March 30, 2014, http://www.cjr.org/feature/one_day_in_the_war_of_images.php?page=all.

¹⁰³ David Isenberg, *Shadow Force*, (ABC-CLIO, 2009). Location 2372

In 2007, however, an incident took place that forced the DOD to reevaluate how PMC personnel should be treated and prosecuted if they were found to be in breach of contract or violating basic human rights. On September 16, in what would be known as the Nisour Square incident, four trucks with Blackwater employees, who had been out on a mission to bring a DOD official back to the so-called green-zone area in Baghdad, pulled into a roundabout in the western part of the city. In what has later been considered an unprovoked attack, the Blackwater employees opened fire on a vehicle traveling in their general direction. The driver was instantly killed, but as the car continued to move towards them, they kept firing. The situation that followed was a complete chaos. The Blackwater employees continued to attack what seemed like everyone that moved in the area, using heavy machineguns and helicopters. The incident only ended when U.S. military troops were sent in to stop the fight, which now had transformed into a firefight between Blackwater personnel and the Iraqi police. A total of 17 Iraqis lost their lives and 27 were wounded.¹⁰⁴

After this incident, Iraqi officials wanted Blackwater out of Iraq, and the DOD saw the need to go through their routines regarding PMCs and reevaluate how they should handle incidents where PMC personnel had killed Iraqis. At the time, CPA's immunity for all PMC personnel was still in effect, and the deficiencies of this system were becoming acutely apparent. A revision of the laws governing PMCs was needed. The rules that governed PMC personnel accountability and how PMCs were to be handled by the DOD are as follows.

In the U.S., some laws have been passed that specifically govern the use of PMCs. The DOD is adamant about the fact that PMCs can be used with great effect, and that contractual oversight is possible and even easily achieved. They have their official guidelines, but these are not by themselves legally binding. However, some U.S. laws are. First and foremost, the OMB circular A-76, mentioned earlier in this chapter, lists the basic governmental functions that cannot be outsourced, and thus makes the outsourcing of these functions illegal. However, the OMB circular A-76 has been the subject of many discussions over the years, and it has been watered down substantially since its conception. The current version of the

¹⁰⁴ Michael Hurst, "After Blackwater: a Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations," *The George Washington Law Review* 76, no. 5 (August 2008): 1308–26. 1308

OMB circular A-76 is from 2003 and is quite short, only 42 pages.¹⁰⁵ The most important piece of legislation that governs PMC use, however, is the Federal Acquisition Regulation (FAR). It is perhaps the most important legislation concerning outsourcing in the U.S. The FAR is some 1889 pages and describes in detail every aspect of legislation regarding government procurement. However, the sections that apply specifically to the use of PMCs are quite limited.¹⁰⁶

In the entire FAR document, there are only about six pages that deal with the use of PMCs. Most of this legislation specifies the demands put on the PMCs regarding completing the tasks required by their client, in most cases the DOD. There are long lists of demands on the PMCs that describe everything from how they must catalog their weapons and vehicles, to what forms to fill out when said weapons are discharged. The sections in the FAR that treats PMC use is more of a guideline for the PMCs for how to do business with the government, rather than detailing how the government should manage its contractors.¹⁰⁷ The specific parts of the FAR in question are the “FAR 252.225–7039 Contractors performing private security functions” and “FAR 225.7402 Contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.” The latter is a list of what types of PMCs that are allowed to provide operational contract support for U.S. military troops.¹⁰⁸

When a U.S. military service member commits a crime, there is a clear legal system in place, namely the Uniform Code of Military Justice (UCMJ). This legal system is supposed to also govern those that accompany U.S. military personnel in times of war or during a contingency operation, but has so far proven to be ineffective. Another relevant piece of recent legislation is the Military Extraterritorial Jurisdiction Act of 2000. This law was supposed to ensure that all PMC personnel are accountable for their actions, and can be punished in the same way as U.S. military personnel.¹⁰⁹ This again is a step in the right direction, but according to Michael

¹⁰⁵ Office of Management and Budget, “Circular No. a-76 Revised,” *Whitehouse.Gov*, May 29, 2003, http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/.

¹⁰⁶ “Federal Acquisition Regulation.Pdf,” *Federal Acquisition Regulation*, March 1, 2005, 1–1889.

¹⁰⁷ *The Defense Federal Acquisition Regulation Supplement, Part 225, Subpart 7401 of the Code of Federal Regulations Requires Use of ANSI/ASIS PSC.1 Standard Through Implementing Instruction PGI 225.7401(a)*, *The Defense Federal Acquisition Regulation Supplement*, n.d.

¹⁰⁸ *The Defense Federal Acquisition Regulation Supplement Part 252, Subpart 225-7039, The Defense Federal Acquisition Regulation Supplement*, n.d.

¹⁰⁹ “18 U.S. Code § 3261 - Criminal Offenses Committed by Certain Members of the Armed Forces and by Persons Employed by or Accompanying the Armed Forces Outside the United States ,”

Hurst, author of “After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations,” it is not enough.

Hurst argues that the following can form the basis for a three-part approach to dealing with contractor accountability. These three parts would be: host-nation law (in this case Iraqi law), U.S. military law and extraterritorial jurisdiction. According to Hurst, a combination of these could establish a fair and effective legal system to ensure PMC personnel accountability.¹¹⁰ Hurst is one among many scholars that have attempted to find a solution to these problems, and the ideas of several others are presented in chapter five.

The lesson here is that when the DOD used PMC personnel in Iraq, they knew the laws governing them were weak at best. The decision by the CPA to grant PMC personnel immunity from prosecution surely played a part in creating an even more lawless situation in Iraq in the years following the invasion. The use of PMCs has undoubtedly kept many DOD employees safe in Iraq, but it has also caused countless deaths and in many cases escalated conflicts, worsening an already unstable situation. One can ask why the DOD chose to use contractors to such a large extent, when the U.S. military clearly could have done the job themselves, at least in the long run, as they did before widespread contractor use became the norm. The U.S. government has for many years claimed that contractors save the American taxpayer’s money. But what is the basis for this claim?

3.4 The Case of Veteran Benefits

The U.S. government has sought for many years to downsize the military to be more cost-effective, and one important factor motivating this push to downsize is the increasing cost of benefits for veterans. The Department of Veteran Affairs (VA) is tasked with managing everything to do with the veterans of the U.S. military. Its mission statement is, “To care for him who shall have borne the battle, and for his widow, and his orphan” by serving and

Cornell University Law School, accessed October 16, 2014, <http://www.law.cornell.edu/uscode/text/18/3261>.

¹¹⁰ Hurst, “After Blackwater: a Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations.”

honoring the men and women who are America's veterans.¹¹¹ Taking care of veterans costs money, and as a result of the U.S. veterans' entitlements, the VA is the fifth largest U.S. department in terms of budget, with \$107,500,000,000 in FY2013. The VA's budget exceeds the budgets of the Department of Transportation, the Department of Energy and the National Aeronautics and Space Administration combined. Veterans' benefits are for life, and so every veteran in the U.S. might cost the VA a considerable amount of money during his or her lifespan. Considering this, it is not difficult to imagine that any effort to reduce the amount of government spending on the VA, without stripping the existing veterans of their benefits, is welcomed.

The VA operates with a strict set of requirements for being considered a veteran and receive veterans' benefits. The current requirements state that the service member has to have had "active duty" in one of the branches of the military. Active duty means a full-time service in the military, discounting basic training. The active duty also has to have lasted a minimum of 24 months. There are some additional requirements, e.g. that the service member has to have left the armed forces without a "dishonorable discharge,"¹¹² meaning that the service member lose his or her veterans' benefits if kicked out of the military. If the service member served during a time of war, he or she might be entitled to additional benefits, but it should be noted that Congress does not consider the recent conflicts in Iraq and Afghanistan a war in this sense. The last armed conflict that Congress recognized as a war was the Persian Gulf War of 1990.¹¹³

Considering the VA's strict requirements for being defined as a veteran, it becomes apparent that people that work for PMCs cannot be considered veterans. Employees of the PMCs have in fact no right to veterans' benefits at all, as they fail to meet the requirements set by the VA. The PMC employees are not on active duty for the U.S. military when they are hired by PMCs, even though they are on contract for the DOD. Some PMC personnel have a military background, and might be entitled to veterans' benefits as a result, but working for a PMC alone does not grant you benefits from the VA. It seems paradoxical that Americans who have worked in dangerous combat operations, under contract by the DOD, perhaps even protecting American service members' lives, are not entitled to veterans' benefits. The fact is

¹¹¹ "About VA," *The Department of Veteran Affairs*, October 1, 2014. 1311

¹¹² Umar Moulta-Ali, *Who Is a Veteran?*, (Congressional Research Service, January 23, 2014). 2

¹¹³ Moulta-Ali, *Who Is a Veteran?* 5

that the PMC employees, who do the jobs the DOD has chosen to outsource, are stripped of veterans' benefits simply because there is an additional link in the chain of command. If an American service member and a PMC employee performed the exact same task, the service member would be entitled to benefits (as long as the other requirements are met), while the PMC employee would not.

However, when individuals hired by PMCs, or any federal contractor that operates in areas such as Iraq and Afghanistan, are wounded, they are not completely without benefits. Employees of the PMCs have some chances to receive benefits, primarily through the Defense Base Act and the War Hazards Compensation Act. These acts are meant to provide a safety net for civilians who work for or with the U.S. military, and provide some basic healthcare and compensation for injuries sustained while working in places such as Iraq and Afghanistan.¹¹⁴ Employees of PMCs receive the same immediate healthcare in conflict areas as service members; the difference is apparent when one looks into long-time care and benefits. Where service members have veterans' benefits, the employees of the PMCs have to battle either their own company or an insurance company in court for their benefits. Compensation for civilian employees in war zones has been discussed before, and is something that should have been solved long before the post 9/11 conflicts. M. R. Kestian notes,

Between World War II and the recent War on Terror, the Supreme Court repeatedly held that civilian contract employees are entitled to compensation when “the obligations or conditions of employment create the ‘zone of special danger’ out of which the injury or death arose” and unless their injury is “so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment.”¹¹⁵

Despite this, Kestian notes that in recent years, employees of PMCs have had increasing difficulties in obtaining the benefits they should be receiving from their companies. The problem is inherent in the complicated legal process of obtaining benefits: An employee of a PMC that is wounded on the job would have to file a workman's compensation claim with his or her employer, the PMC. The idea behind a workman's compensation is that you as an employee is automatically entitled to some benefits if you suffer a “personal injury arising out of and in the course of employment or an occupational disease.”¹¹⁶ The problem arises,

¹¹⁴ Kestian, “Civilian Contractors: Forgotten Veterans of the War on Terror.” 3

¹¹⁵ Kestian, “Civilian Contractors: Forgotten Veterans of the War on Terror.” 7

¹¹⁶ Kestian, “Civilian Contractors: Forgotten Veterans of the War on Terror.” 10

however, when one considers the fact that the PMC, or any employer for that matter, can challenge that claim legally, no matter how legitimate it might be. The PMC could then either give you the money you demand, but more likely will fight the case in court to limit its expenses. If the case goes to court, the wounded employee or the family of a deceased employee would have to battle a multi-million or even multi-billion dollar PMC in court, or that PMC's insurance firm. It would be an uphill struggle, to say the least.

Considering all this, some question should be asked: Who stands to gain financially in the long term from this? Is the system fair for the employee of the PMC? The answer to the first question is, perhaps not surprisingly, the U.S. government. By outsourcing more and more tasks previously done by the military, the U.S. government is in essence downsizing the armed forces, even though expenditures go up in the short term. Outsourcing is expensive, and the DOD spends enormous sums on it, but veterans' benefits for life are even more expensive. Considering again the budget of the VA, about \$107,000,000,000 per year, any step that has the potential to reduce this budget in the long term would be very enticing. Cutting the number of soldiers on the ground in half, replacing them with PMC personnel, could in theory cut the expenditures of the VA in half in the long run.

Is this fair for the employees of the PMCs? The short answer is no. By using contractors, the U.S. government waives its responsibilities towards thousands of people that risk their life to protect American interests. There is arguably a shocking lack of accountability here, in the way the DOD use contractors to reduce its future costs in veterans' benefits. Outsourcing and contracting allows this to happen as it reduces the transparency of the entire process. Transparency is a two-way phenomenon, so the lack of transparency also shields the DOD from its actual responsibilities for thousands of people.

4 The Role of the Legislative Branch

What responsibilities does Congress have with regard to both the expansion of presidential power and the lack of transparency and accountability in the use of PMCs? The influence and relative power of Congress fluctuates, and is often directly coupled with the power of the president and the executive branch, as seen in chapters 2 and 3. So how did we end up in a situation where PMCs are being used in huge numbers, and the president seems to make all the important decisions in matters of foreign affairs and military interventions? What happened with the Congress that rallied against the imperial presidency of Nixon in the 1970s, and asserted its control over the power play between the different branches of U.S. government?

Kennedy aide Ted Sorensen once remarked, “Congress already has enormous power, if it only had the guts to use it.”¹¹⁷ This notion still stands, as the Constitution is unchanged. Why do we see a Congress that clearly has taken a back seat in the recent developments regarding both defense contracting and PMC use? The answer is multi-faceted, but it boils down to some fundamental facts that affect everything Congress does, and how it does it. The 435 members of the House of Representatives are all elected for short terms, only two years. Thus, they need to constantly think about short-term goals that will benefit their constituency in order to be re-elected. The representatives have to constantly look for ways to create jobs, secure funding for projects, or in other ways keep their voters happy. The result is short-term thinking and a chase for short-term benefits, with little regard for long-term solutions and tough decisions. Andrew Rudalevige quotes Richard Fenno when he writes that members of Congress “run for Congress, by running against Congress. Attacking the institution as a way of bolstering their indispensability. But the result is that the institution bleeds from 435 separate cuts.”¹¹⁸ As I interpret this statement, there is something fundamentally wrong with a governmental institution whose members base their campaign to be elected to it on the idea that there is always something wrong with it, and their job is to fix it, or at least fix it for their constituency. The result is a less coherent Congress, in which the potential for collective

¹¹⁷ Rudalevige, *The New Imperial Presidency*. 262

¹¹⁸ Rudalevige, *The New Imperial Presidency*. 277

decision-making is greatly limited, and where it has become impossible to reach the full potential for congressional power.

Keeping the voters happy, however, is not the only concern for senators or members of the House. All members of Congress have to take into account not only the satisfaction of their constituency or state, but also their ties to their political party, as well as powerful lobbying groups that can have a profound effect on their politics. Lobbying groups are an important part of American politics, representing almost any point of view, or industry, under the sun. With regard to defense contracting, the biggest, most powerful lobbying group is the Professional Services Council. They represent the defense contracting industry, and lobby actively to increase the use of contractors, and by extension PMCs.¹¹⁹ Lobbying groups, or interest groups as they are also known, form one side of the so-called iron triangle of American politics. The iron triangle is a metaphor for the three-sided nature of power in American politics. With Congress and the bureaucracy constituting the other two sides, interest groups can limit presidential influence and exercise control over bills before they arrive in Congress. Powerful and influential interest groups can prove a major hurdle for any form of new legislation on PMC use, as they have an interest in keeping the industry less regulated, and the influence sufficient to back up their intentions. As a hypothetical example, a member of the House of Representatives would have a hard time supporting a bill to ban PMC use if a certain PMC or several PMCs operate out of his or her constituency or state, and threatened to cut down their employment in the district if certain regulations or limitations were passed.¹²⁰

However, the short terms for the members of the House of Representatives, and the lobbying industry, are not the only challenges facing Congress with regard to doing its job of keeping oversight over defense contracting and PMC use. Others include the decentralization of Congress, and the plethora of sub-committees. Congress itself can be seen as dynamic in the sense that it has changed over the years, despite the Constitution not having changed notably. Burdett A. Loomis points to several distinctive eras in the history of the Congress, from the “senate individualism and house fragmentation” in the 1830s–1860s, “the rise of the modern

¹¹⁹ “The PSC Mission,” accessed January 29, 2015, http://www.pscouncil.org/i/a/The_PSC_Mission/c/a/The_PSC_Mission/About_PSC.aspx?hkey=d138b175-d0a3-4f0e-9234-b6e3d11027b5.

¹²⁰ “Iron Triangles,” *University of Pittsburgh*, accessed February 18, 2015, <http://www.pitt.edu/~mitnick/MESM10/IrontrianglesrevEncyBusEthics.pdf>.

congress” in the 1860s–1920s, “the development and decline of the textbook congress” in the 1920s–1970s, the “Congress reformation” in the 1970s and finally to the “post reform congress” from the 1980s onwards.¹²¹ However, one trend started in earnest in the 1970s, and has continued to this day, namely the decentralization of Congress into committees and sub-committees.

Much of day-to-day business is done in the various committees and sub-committees, and together they cover almost the whole spectrum of Congress’s tasks and responsibilities. There are 22 House of Representatives committees, all of them with several sub-committees, as well as 20 Senate committees, again with several sub-committees.¹²² The main committee that deals with questions of defense contractors and the PMC industry is the Senate Committee on Armed Services. Senator John McCain (R, AZ) currently heads the Committee. As with other committees there are several sub-committees that deal with various aspects of the different contractor industries, but the Subcommittee on Emerging Threats and Capabilities is most relevant for the PMCs. This subcommittee has jurisdiction over DOD policies, and deals with how the DOD manages its capabilities, including PMCs. However, there are several other committees, in both the House of Representatives and the Senate, that are involved in some of the challenges noted in chapter 3. These committees include the Committee on Appropriations, the Committee on Oversight and Government Reform, and the Committee on Veterans’ Affairs.

In the face of this fragmentary manner in which Congress conducts its business, it is not hard to imagine that something might fall through the cracks when it comes to legislation. However, something as important as the gigantic buildup of PMC use in Iraq and Afghanistan should not be among the issues to go unnoticed. It might be believed that the buildup of PMC use was invisible to Congress, and that most members of Congress, and most Americans with them, did not know what a PMC was, and to what extent they were used. This is only partly true. As shown in the next subchapter, members of Congress often serve long careers. Considering that PMC use and defense contracting is not a new phenomenon,

¹²¹ Burdett A Loomis, “Congressional Decentralization in Design and Evolution ,” in *The Contemporary Congress*, 1996, 1–12.

¹²² “Congressional Committees and Subcommittees,” *Congressmerge.com*, accessed January 29, 2015, http://www.congressmerge.com/online/db/cgi-bin/committee_list.cgi?site=congressmerge.

there is a substantial number of members of Congress who have not only seen this buildup, but also taken part in discussions on the subject before.

4.1 Missed Opportunities for Increased Control of PMC Use

At the onset of the War on Terror after September 11, 2001, there was little common knowledge of what PMCs did and how they operated. However, the members of Congress who have served several terms, and had long careers, undoubtedly have come across questions and legislation regarding PMC use. Even though the terms are short, many members of Congress serve for a long time. Since the 1930s, more than 21 senators have served for more than 36 years, one even as much as 51 years, in the case of Robert Byrd of West Virginia. Senators such as Edward Kennedy (D, MA), Robert Byrd (D, WV) and Daniel Inouye (D, HI) have all served in the Senate since the 1950s and 1960s and have witnessed the buildup of the military-industrial complex, and the rise of the PMC industry. There is also a large number of members of the House of Representatives who have served long careers and have witnessed the same development, such as Don Young (R, AK), Pete Stark (D, CA), Bill Young (R, FL) and Charles Rangel (D, NY). Some of these members of Congress, and many others like them, have had ample opportunity to observe the potential problems inherent in the PMC industry, and to witness a strong imperial president using PMCs to further his causes.

As noted in chapter two, Congress chose to give the president what can only be described as a carte-blanche resolution regarding how to conduct the operations in Afghanistan and later Iraq. The S.J.Res.23 – Authorization for Use of Military Force bill, passed just days after September 11, 2001, may have been intended to make the response to the attacks as easy to conduct as possible, but the result was a substantial empowerment of the President, and a corresponding weakening of Congress.¹²³ Why Congress decided to do this, however, could be summed up in these words, by Andrew Rudalevige: “A nation cannot meet crises, or even

¹²³ The 107th Congress, *S.J.Res.23 - Authorization for Use of Military Force*.

the day-to-day needs of governing, with 535 chief executives or commanders in chiefs.”¹²⁴ Sometimes it is necessary to allow decisions to be made by fewer people, or even a single one, the President, in order to make sure that the response is adequately swift. President George W. Bush was not slow to act, he assumed the role of commander-in-chief immediately, and ultimately pushed his newfound power even further. However, in the immediate aftermath of September 11, 2001, Congress was not sitting idly by waiting for the President to assume control.

Mere days after the attacks, Congress started working on what would become the USA PATRIOT Act (“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act”). The act would empower the executive branch to go further than ever before in the hunt for information that could potentially be used to catch terrorists, in order to prevent attacks similar to the ones seen on September 11, 2001. The USA PATRIOT Act had its origin in the Anti-Terrorism Act of 2001, which was introduced in Congress on September 19, 2001. The act was later changed to the USA (“Uniting and Strengthening America”) Act, and incorporated more legislation and other acts. The final version of the act, the USA PATRIOT Act, was put before the House of Representatives on October 24, and passed with a 357–66 vote. Sixty-two Democrats and one independent voted against it, while only three Republicans did the same. The next day, after sweeping through the House of Representatives, the Act was put before the Senate. There was little doubt that it would pass, as the Act was seen as a necessity, and extremely important to the protection of the nation. Senator Leahy (D, VT) noted in a response to Senator Reid (R, NV), “I agree with the distinguished Democratic leader in his request because we do want to have discussion of this piece of legislation, but there is no question we will vote on this piece of legislation today and we will pass this legislation today.”¹²⁵ It is clear that the USA PATRIOT Act was universally considered essential at the time, and in the vote in the Senate that day, only one senator, Russ Feingold (D, WI), voted against it. The USA PATRIOT Act was passed, and later extended twice, last in 2011. As mentioned, the act allowed for a substantial increase in the powers of the executive branch, as well as the president’s. Although the full ramifications of the act might not have been understood at the time, the fact that it got extended in 2006, with a vote of 280–138 in the House of Representatives, and a vote of 89–10 in the Senate, speaks volumes. Long after the problems

¹²⁴ Rudalevige, *The New Imperial Presidency*. 263

¹²⁵ *Congressional Record - Senate*, October 25, 2001.

inherent in the act had become common knowledge, it is clear that Congress felt it was still needed.

Congress eventually began to realize the ramifications of the PATRIOT Act, but in the meantime, the War on Terror had moved to Iraq, and escalated far beyond what the members of Congress might have initially foreseen. David Isenberg writes that in the first years of the operations during the War on Terror, when PMC use was really beginning to take off, Congress paid very little attention to it. It was not until 2004 that Congress instructed the Pentagon to develop a set of rules and guidelines for defense contracting in the new warzones. The effort resulted in a bill that required the Secretary of Defense to implement a system for collecting information on the contractors in Iraq, and later issue rules on how to manage the contractors.¹²⁶ This suggests that Congress was well aware that the existing framework of rules and guidelines was inadequate at best.

Had it been passed, the bill, which would be a part of the annual military authorization bill, could have become a vital tool in providing congressional control and oversight over PMC use, and the Senate version of the bill in particular had some potentially very good tools for control. Two amendments were suggested. The first was a limitation on how the DOD could use contractors in general, a clear attempt at taking back control of PMC use from the executive branch. The amendment stated that contractors could only be used if regular military or DOD civilian personnel “cannot reasonably be made available to perform the functions.”¹²⁷ This wording, although somewhat vague, would be a huge departure from the then-current system, and would force the DOD to cut down substantially on its use of contractors. The second amendment would have prohibited the use of contractors to conduct interrogations of prisoners. By mid-2004, the misconduct of the contractors in the Abu Ghraib prison in Iraq had begun to surface, and this part of the bill was undoubtedly a response to this. The atrocities committed against prisoners in the Abu Ghraib prison, as noted in chapter 1, was one of the very first times the issues of contractor use had been reported in U.S. mainstream media. In addition to preventing the DOD from using contractors to conduct interrogations, this second amendment also included a restriction of the use of PMCs in combat missions. This was unprecedented, and would likely have

¹²⁶ David Isenberg, “A Government in Search of Cover: Private Military Companies in Iraq,” in *From Mercenaries to Market*, (Oxford University Press, 2007), 82–93.

¹²⁷ Isenberg, “A Government in Search of Cover: Private Military Companies in Iraq.” 90

substantially reduced contractor deaths, and also made the battlefield more controllable, ensuring more transparency and accountability.

However good these suggested amendments were, Congress failed to rise to the occasion, and the bill never passed. It went to a vote on June 16, 2004, just after the incidents in Abu Ghraib had become common knowledge. Despite the recent events, the Senate defeated the proposal with a vote of 54–43. Another bill that proposed stricter punishments for defense contractors that overcharge the government was also defeated, with a vote of 52–46.¹²⁸ An initiative led by members of the Democratic Party, the bill proposed sentences for up to 20 years for fraud against the U.S. government. Senator J. W. Warner (R, VA), chairman of the Armed Services Committee, is a long-time recipient of campaign funding from different defense contractors, and has received more than \$1,319,000 in funding from 2000–2008.¹²⁹ In 2004 alone he received more than \$204,000, again from defense contractors.¹³⁰ The state of Virginia, which Senator Warner represents, have a large number of government contractors, and Virginia contractors have been awarded more than \$521 billion in government contracts from 2000–2013.¹³¹ It is clear that Senator Warner is dependent on the support of the contractor industry, and this becomes evident in his opinions on the subject of PMC use. Warner feared that the harsh sentences would deter contractors from doing business with the government, and rallied support for an alternative approach. This new approach was to extend American anti-fraud laws to those defense contractors that operated in Iraq. The Democrats voiced their concerns, and Senator Patrick J. Leahy (D, VT) claimed that this new approach would not change anything.¹³² Senator Leahy has, compared to

¹²⁸ Isenberg, “A Government in Search of Cover: Private Military Companies in Iraq.” 91

¹²⁹ “Sen. John W. Warner: Campaign Finance/Money - Industries - Senator 2000,” *Opensecrets.org*, accessed February 19, 2015, <http://www.opensecrets.org/politicians/industries.php?cycle=2000&type=I&cid=N00002061&newMem=N&recs=20>.

¹³⁰ “Sen. John W. Warner: Campaign Finance/Money - Industries - Senator 2004,” *Opensecrets.org*, accessed February 19, 2015, <http://www.opensecrets.org/politicians/industries.php?cycle=2004&type=I&cid=N00002061&newMem=N&recs=20>.

¹³¹ “Virginia Defense Contractors - \$521,087,334,175 in Government Contracts by 15,214 Contractors in 134 VA Counties,” *Governmentcontractswon.com*, accessed February 23, 2015, http://www.governmentcontractswon.com/departments/defense/virginia_counties.asp.

¹³² Carl Hulse, “Senate Rejects Harder Penalties on Companies, and Ban on Private Interrogators,” *The New York Times*, June 17, 2004.

Senator Warner, not received nearly as much funding from the defense contractor sector, with a total of \$200,000 over the course of his 40 year long career.¹³³

That these bills failed to raise concerns of whether Congress was doing its job of tackling the challenges posed by this rapid expansion in PMC use, and outsourcing in general, is remarkable. David Isenberg notes that passing laws, however important, is not enough to confront the fundamental challenges posed by PMC use. Real congressional oversight is needed, by which he means increased background checks of the different PMCs and the employees they hire. This could be done by a congressional body, or as he suggests, be voluntary based on a system of either incentives or punishment organized by Congress. He also mentions that Congress should play a more active role in bringing in auditors from different governmental agencies to keep tabs on the PMCs.¹³⁴ What Isenberg calls for is basically that Congress should take the role of a governing body in the case of PMC use, and make sure the system is not abused. Isenberg clearly thinks that Congress does have a genuine responsibility in this case, and that it has failed in the task thus far.

In 2007, Congress got another chance to tighten the reins on PMC use and bring it back under control. The incident in Nisour Square in Baghdad, on September 16, 2007, where, as mentioned earlier, Blackwater personnel opened fire and killed several Iraqi civilians, was a turning point in the ongoing discussion on PMC use. The incident sparked worldwide debate, and in the fall of 2007, there was one particularly important congressional hearing on the subject. On October 2, the House Committee on Oversight and Government Reform convened a hearing to investigate the shooting, and to interrogate the CEO of the infamous PMC Blackwater, Erik Prince. In the immediate aftermath of the shootings, PMC use, and especially the oversight and control of them, had become a matter of both public and congressional interest. Perhaps finally there would be enough momentum and interest in the subject to push through real reform.¹³⁵ Important questions were raised, among them the question of whether the use of PMCs was in fact beneficial to the ongoing conflict in Iraq. Claims were made that the misconduct of Blackwater was counterproductive to the “hearts

¹³³ “Sen. Patrick Leahy: Campaign Finance/Money - Industries - Senator Career,” *Opensecrets.org*, 2015, <http://www.opensecrets.org/politicians/industries.php?cycle=Career&type=I&cid=n00009918&newMem=N&recs=20>.

¹³⁴ Isenberg, “A Government in Search of Cover: Private Military Companies in Iraq.” 91–92

¹³⁵ Ann Hagedorn, *The Invisible Soldiers*, (Simon and Schuster, 2014). 98

and minds” campaign in Iraq, a campaign to win over the population in Iraq in order to secure support for the then ongoing operations.¹³⁶ The debate went on for over five hours, and many important questions were raised as the interrogation of the Blackwater CEO continued.

However, the hearing soon descended into a discussion about the need for PMCs in general, with two clearly opposing sides. The Democrats in attendance were in general against the use of PMCs outright, and wanted it to stop, while the attending Republicans seemed to be in favor of even less regulation, and freer use of PMCs. Congressman Davis (R, VA), chairman of the House Oversight and Government Reform Committee, led the charge for the Republicans, speaking out in favor of continued PMC use. He stated among other things that “They offer invaluable surge capacity and contingent capabilities Federal agencies can’t afford to keep in-house,” “U.S. personnel believe they can’t live without them,” and that

However you define success in Iraq, from stay the course to immediate withdrawal and every scenario in between, security contractors are going to play an integral part. The inevitable redeployment of U.S. military units out of the current urban battle space will only increase the need for well trained and well managed private security forces to fill that vacuum and protect diplomatic and reconstruction efforts.¹³⁷

Rep. Davis, representing Virginia’s 11th congressional district, is, not surprisingly, a large recipient of campaign contributions from defense contractors, with \$516,000 in funding since 2002.¹³⁸ It seemed clear from the start that the Republicans would not do a thing to limit the use of PMCs or to condemn the actions of Blackwater. To further illustrate the Republican position on the subject, Congress member John Mica (R, FL) stated that the hearing was a political ploy to hurt the Bush administration and that it should be adjourned after only one hour. Rep. Mica has also received considerable campaign contributions from the defense contractor industry, a total of \$266,000 since 2000.¹³⁹ Rep. Mica represents Florida’s 7th

¹³⁶ Hagedorn, *The Invisible Soldiers*. 99

¹³⁷ Hagedorn, *The Invisible Soldiers*. 101

¹³⁸ “Rep. Tom Davis: Campaign Finance/Money - Industries - Representative 2002,” *Opensecrets.org*, accessed February 19, 2015, <https://www.opensecrets.org/politicians/industries.php?cycle=2002&type=I&cid=N00002045&newMem=N&recs=20>. Virginia’s Eleventh Congressional District is one of the richest districts in Virginia, and has a large number of lobbyists residing there. Rep. Davis held the district from 1994 to 2008.

¹³⁹ “Rep. John L. Mica: Campaign Finance/Money - Industries - Representative Career,” *Opensecrets.org*, accessed February 19, 2015, <https://www.opensecrets.org/politicians/industries.php?cycle=Career&type=I&cid=N00002793&newMem=N&recs=20>.

congressional district, a district that includes St. Johns County, a county that received more than \$2.4 billion from the total of \$147 billion in contracts defense contractors in Florida have received from 2000 to 2013.¹⁴⁰ Rep. Mica is clearly dependent on the support of the defense contractor industry in the counties that make up his constituency. Congress member Michael Turner (R, OH) stated that he disapproved of any criticism of Blackwater, claiming them to be on “our team” and that they are “our team working the trenches and in a war zone.”¹⁴¹ Rep. Turner is also represented on the list of politicians that receive money from defense contractors, with a total of \$629,000 since 2002.¹⁴² Rep. Turner represents Ohio’s 10th congressional district, a district that includes the Montgomery and Greene counties. These two counties alone received more than \$12.6 billion in defense contracts of the total of \$75 billion for Ohio from 2000 to 2013.¹⁴³ The pattern is clear: The representatives that are most in favor of PMC use are all representing districts or states that receive several billions in defense contracts from the U.S. government.

When the interrogation transformed into an outright debate over PMC use, it became evident that there was no common ground in Congress on the matter. Even in the face of several horrifying stories, on top of the Nisour Square incident, no common ground could be found to ensure better regulation and control of PMC use. The result was that the hearing collapsed into a political debate instigated by the Republicans, and although the Democrats in attendance tried their best to interrogate Prince, no conclusive answers were given and no solutions agreed on. The diametrically opposing positions on the use of PMCs that surfaced during the hearing highlighted the problems inherent in Congress, and perhaps revealed one important reason why there had not been passed sufficient legislation on this subject before.¹⁴⁴

¹⁴⁰ “Florida Defense Contractors - \$147,947,519,764 in Government Contracts by 12,996 Contractors in 67 FL Counties,” *Governmentcontractswon.com*, accessed February 23, 2015, http://www.governmentcontractswon.com/departments/defense/florida_counties.asp.

¹⁴¹ Hagedorn, *The Invisible Soldiers*. 102

¹⁴² “Rep. Michael R. Turner: Campaign Finance/Money - Industries - Representative Career,” *Opensecrets.org*, accessed February 19, 2015, <https://www.opensecrets.org/politicians/industries.php?cycle=Career&type=I&cid=N00025175&newMem=N&recs=20>.

¹⁴³ “Ohio Defense Contractors - \$75,075,628,336 in Government Contracts by 7,387 Contractors in 89 OH Counties,” *Governmentcontractswon.com*, accessed February 23, 2015, http://www.governmentcontractswon.com/departments/defense/ohio_counties.asp.

¹⁴⁴ Hagedorn, *The Invisible Soldiers*. 100–108

4.2 Existing Legislation on PMC Use

Although there might not exist any one overarching piece of legislation that can be used to fully control the PMC use, there are several laws and regulations already in place that in theory should provide an adequate level of their control. PMCs are required to adhere to an array of rules when operating on a DOD contract. David Isenberg lists the following:

Private security firms are also accountable to the War Crimes Act of 1996, Victims of Trafficking and Violence Protection Act of 2000, Anti-Torture Statute, Defense Trade Controls Act, Arms Export Control Act, Gun Control Act, Export Administration Regulations, International Traffic in Arms Regulations, Defense Base Act, Foreign Corrupt Practices Act, Federal Aviation Regulations, Defense Federal Acquisition Regulations (DFAR), and General Orders of the Central Command, Multi-National Corps-Iraq and Combined Joint Task Force (CJTF)¹⁴⁵

In theory, then, there should be ample opportunity to achieve oversight and control over PMCs when they have to follow all these laws, so why has this not been the case? As Laura Dickinson has pointed out, it is obvious that there are clear breaches of several statutory requirements in most cases of PMC use. In a study of 60 publically available contracts, she found that none of them required the PMC personnel to obey international laws on human rights.¹⁴⁶ The provision to follow basic human rights could easily be integrated into government contracts on equal basis with the laws and regulations listed in the quotation above. Doing so would offer an even more easy-to-use tool to control the PMC personnel, and make sure that they operated in the best possible way. Whether this could have prevented such tragic incidents as the Nisour Square shootings is only speculation, but it seems that if there were stricter laws in place, the PMC personnel might have acted differently.

One monumental obstacle for strengthened congressional oversight and control is the fact that there was much confusion over jurisdiction in the early years of the conflict in Iraq. Isenberg points to the fact that there was an almost non-existent legal system in Iraq in the aftermath of the American invasion, and that PMC personnel were granted immunity from Iraqi law. This is documented in chapter 3, but it is also worth noting here due to the fact that it directly influenced congressional oversight and control. In the early years of the invasion, there was great confusion over the questions of where and in what venue a case against a

¹⁴⁵ Isenberg, *Shadow Force*. Location 2365

¹⁴⁶ Isenberg, *Shadow Force*. Location 2365

PMC employee could be held.¹⁴⁷ This was all very likely due to the poor legislation on PMC use at the time of the invasion of Iraq in 2003.

Some scholars, including Laura A. Dickinson, have also pointed to the potential threat of conflict of interest problems, as more than half of the contracting firms that were awarded contracts in Iraq were run by former government personnel. She writes that a Center for Public Integrity report notes that of these companies, more than 60% of them “had employees or board members who either served in or had close ties to the executive branch for Republican and Democratic administrations, for members of congress of both parties, or at the highest levels of the military.”¹⁴⁸ This potential threat is worth noting, as the sheer number of former government employees who run these firms is so high. The combination of lackluster oversight and the fact that many companies are run by people that probably know the system very well from past experience in government is the recipe for abuse of the system, both economically and legally. Maud Beelman, in her article “Winning Contractors,” points to the findings of a Center for Public Integrity study of the contracts awarded in the period from 2001 to 2003. It was found that all the top ten contracts went to companies that employed former high-ranking government officials, or individuals who had close connections to Congress or state agencies. In addition, these companies were large political donors, giving in excess of \$11 million between 1990 and 2002 to the Republican and Democratic Party alike.¹⁴⁹ Almost all the companies that were awarded contracts in the time period the study covers donated to politics, a combined sum of more than \$49 million from 1990 to 2002. President G. W. Bush alone received more than \$500,000 in such donations.

In the U.S., it is nothing new that companies contribute economically to political candidates they support, but it is a great cause for concern that there is such a clear link between defense contractors that have former government officials on their payroll, contracts awarded to them by the U.S. government and campaign contributions. It seems that it is almost a necessity for a defense contractor to have a former government official on payroll in order to be awarded large contracts from the U.S. government, and that raises questions of how sound the process of awarding contracts actually is. In general, the defense contractor sector is a major

¹⁴⁷ Isenberg, *Shadow Force*. Location 2372

¹⁴⁸ Laura A Dickinson, “Public Values/Private Contract,” in *Government by Contract*, (London: Harvard University Press, 2009), 335–59. 337

¹⁴⁹ Maud Beelman, “Winning Contractors,” September 30, 2003, <http://www.publicintegrity.org/2003/10/30/5628/winning-contractors>. 2

contributor to politics in the U.S. It is interesting to note how the campaign contributions made by defense contractors vary according to party affiliation. Since 1990, the defense contractor industry has contributed more than \$175 million to different candidates, with about \$98 million going to Republicans and \$76 million to Democrats.¹⁵⁰ This trend is also evident from the numbers given earlier in this chapter of the contributions to certain key politicians. There is clear evidence that the Republicans who are most in favor of increased PMC use all receive major contributions from the defense contractor industry.

4.3 The Lack of Adequate Legislation and Potential Executive Hurdles

A key issue here is that there seems to be confusion over who has what responsibility for PMC oversight. Congressional control must be based on legislation, against which the actions of the PMCs must be measured. Even though there are several relevant laws, as mentioned earlier, there seems also to be a lot of confusion over what laws to use, and what to do when laws overlap. In the early years of the conflict in Iraq, the main legislation used by Congress to oversee the use of PMCs was the Arms Export Control Act (AECA). This act, originally intended for the regulation of weapons export, became the legislation of choice because the American-based PMCs that were awarded contracts at the start of the conflict fall under it, as the use of PMCs originally was categorized as arms export to Iraq.¹⁵¹ The AECA failed when it came to congressional control, however, as the rules regulating reporting to and informing Congress were inadequate at best. The result was an ill-informed Congress unable to perform its role as a watchdog in this respect. Congress did not receive enough information to be able to maintain oversight over the use of PMCs, and the result was an industry that could behave almost as it pleased in Iraq.¹⁵²

¹⁵⁰ “Defense: Money to Congress,” *Opensecrets.org*, accessed February 19, 2015, <http://www.opensecrets.org/industries/summary.php?ind=D&cycle=All&recipdetail=A&sortorder=U>.

¹⁵¹ Isenberg, *Shadow Force*. Location 2240

¹⁵² Isenberg, *Shadow Force*. Location 2240

Another obstacle for Congress's ability to do its job was an executive order passed by President Reagan in 1987. The order, known as Executive Order 12600, was intended to make it more difficult for the public to obtain information that was regarded as confidential or a significant threat to the way a corporation conducted its business, such as internal trade secrets. This order would protect business secrets and potentially confidential information from a Freedom of Information Act claim against the corporation, or against contracts the corporation had with the U.S. government. Consequently, if the public wants any information about a certain contract between a PMC and the government, the PMC has the opportunity to omit any information its management believes to be critical to its operation. The fact that the PMCs themselves have the power to choose what information is excluded, simply on the basis that it might hurt their competitiveness, is unfortunate, and a large obstacle to transparency. As the information they want to keep confidential cannot be controlled by anyone outside the company, this raises questions over what type of information this is, and to what extent information that would be interesting to congressional reviewers is deliberately withheld by the PMCs.¹⁵³ A system that allows a company to withhold information from the very people meant to keep oversight over it, is extremely counterproductive to transparency and accountability. This system allows for virtually no transparency at all, making congressional oversight extremely difficult.

As time passes, a steady stream of new legislation and updates to existing legislation on the use of PMCs have been written. Some of the most vital pieces of legislation were mentioned in section 3.3, "The Case of Contractor Accountability." But still there are significant challenges to congressional control and oversight of PMCs, e.g. when they are based in other countries, or when their personnel are hired locally. There are a substantial number of challenges facing genuine congressional oversight, but the opportunities for creating better legislation have also been numerous. One would have to conclude that Congress has taken a back seat when it comes to PMC use, apparently willing to let the executive branch and the president do almost as they please. This passive approach by Congress falls into a trend observed since September 11, 2001 and its aftermath. Congress has never taken control of the War on Terror, and has been willing to sit back and let the balance of power shift increasingly towards the executive branch. This was not always the case, and the power struggle between the branches of the U.S. government ebbs and flows over time.

¹⁵³ Isenberg, *Shadow Force*. Location 2254

4.4 The Changing State of Congressional Power

In the era following the resignation of President Richard M. Nixon, there was resurgence in congressional control and power. This was a response to Nixon's imperial presidency, as described in chapter 2. When Gerald Ford took office, on August 9, 1974, it was the end of an era. The very same afternoon, Ford remarked that "our long national nightmare" is over, "our constitution works" and "our great republic is a government of laws and not men. Here the people rule."¹⁵⁴ This was an attempt by Ford to distance himself from the Nixonian ways, making it clear that he would play by the rules set by Congress. Congress acted swiftly and decisively in the post-Nixon era, creating a shift of power back to the legislative branch. An example of this assertion of power was the 1973 War Powers Resolution, which would, on paper, severely limit the president's ability to intervene militarily or to deploy troops in any instance. The president would still have the opportunity to do so, but he would be required to inform Congress 48 hours in advance of any troop movement, and to explain how long the engagement would last and under what legislative authority it took place.¹⁵⁵ In addition, all troops had to be withdrawn within 60 days if Congress had not authorized the troop movement or engagement. What Congress wanted to achieve was to withhold the powers that come with being until the legislative had declared a war. However, in reality the War Powers Resolution did little to limit presidential power. Since Congress passed the War Powers Resolution, the actual power of the president has not changed much, and the presidency of George W. Bush is an example of this. Throughout the buildup of executive power during the George W. Bush presidency, the War Powers Resolution was in effect, and did nothing to limit the power of the president. The War Powers Resolution is simply too easy to circumvent, and when Congress are willing to pass resolutions such as the S.J.Res.23 – Authorization for Use of Military Force bill, they undermine the War Powers Resolution even further.

¹⁵⁴ Rudalevige, *The New Imperial Presidency*. 101

¹⁵⁵ Rudalevige, *The New Imperial Presidency*. 119

The passing of S.J.Res.23 – Authorization for Use of Military Force, which is described in detail in chapter 2, proved a vital turning point, and a clear shift of power back to the executive branch. One revealing piece of evidence of this trend is the influence Vice President Cheney had over Congress. Cheney was perhaps the most powerful vice president in U.S. history,¹⁵⁶ and was the spearhead of the George W. Bush administration’s push for increased executive power. Cheney, formerly the CEO of Halliburton, a huge company with several PMC subsidiaries, previously served as chief of staff for President Ford, and experienced first-hand the resurgence period in congressional power after Watergate. A decade later, as a member of the House of Representatives, he went against the majority when claiming that President Reagan did in fact have the right to arm the Contras, even though this was a direct breach of what Congress had demanded.¹⁵⁷ As Vice President, Cheney exerted an influence over the members of Congress previously unseen in U.S. history. As a historical note, Jonathan Mahler claims that in 1961, when LBJ was elevated to Vice President from his position as the Democratic Party leader, he expressed a desire to continue to preside over the Democratic caucus. The Democratic Party caucus revolted, saying that this would allow the executive to gain too much power over Congress. This stands in stark contrast to the George W. Bush presidency, when Cheney attended the weekly Republican caucus strategic meetings as regularly as clockwork, sometimes even bringing White House Deputy Chief of Staff, Karl Rove, with him.¹⁵⁸ Mahler notes that this was a clear strategy to force members of Congress to vote strictly along party lines and to ignore institutional loyalty.¹⁵⁹ This is arguably one of the primary problems with how Congress operated in the years after September 11, 2001. A Republican majority in Congress after 2003, driven to vote increasingly in a partisan fashion by the powerful Vice President Cheney, was arguably the recipe for what would become the lackluster congressional control of the use of PMCs in the War on Terror in Afghanistan and Iraq.

4.5 Conclusions

¹⁵⁶ “Richard B Cheney,” *Millercenter.org*, accessed February 4, 2015, <http://millercenter.org/president/gwbush/essays/vicepresident/1825>.

¹⁵⁷ Jonathan Mahler, “After the Imperial Presidency,” *The New York Times*, November 7, 2008, http://www.nytimes.com/2008/11/09/magazine/09power-t.html?pagewanted=all&_r=0. 3

¹⁵⁸ Mahler, “After the Imperial Presidency.” 4

¹⁵⁹ Mahler, “After the Imperial Presidency.” 5

In hindsight, Congress should have done more to take a commanding role in the immense buildup of PMC use and general defense contracting in Iraq and Afghanistan during the War on Terror. There was a lack of proper legislation, despite the fact that PMC use, and the pitfalls accompanying such a use, was well known to several long-serving members of Congress. Congress's control of the PMC industry suffered from the idea that most of the decision-making was to be given to the president in a time of crisis. The result was a president and an executive branch that received an excessive amount of power, enabling them to act as they saw fit for years to come. It was the executive branch that orchestrated the buildup of PMC use in Iraq and Afghanistan, and it was done with the blessing, or rather the near-complete lack of interest, from Congress. Congress has had many opportunities to change this situation, and to enact new legislation on the matter, but has failed to do so time and time again. These opportunities more often than not descended into debates and arguments over fundamental differences in political points of views.

Congress has a vast number of tasks and responsibilities, and the success of its work is dependent on the cooperation of the different branches of government, and most importantly the information its members receive. In the case of oversight over the various contracts with the different PMCs, its job has not been easy. This is due both to external factors, such as the opportunity for military contractors to withhold information from Freedom of Information Act requests, and internal factors, such as a lack of willingness to pass the laws required to do the job properly and a lack of cooperation between the two political parties. The result is that through its inactivity, Congress has indeed played a large role in the use of PMCs and operational contract support in general. It has allowed the use of PMCs to escalate out of control, and has allowed the DOD and the U.S. armed forces to become almost completely dependent on the services provided by defense contractors in order to achieve results in the War on Terror. The actions of Congress have resulted in a legislative landscape that is mired with challenges to transparency, and with it, a lack of accountability. Congress should have done a better job at acknowledging its responsibility, and it should have done a better job at reigning in the use of PMCs in the face of an overwhelming amount of evidence that suggests that the PMC industry needs more control and supervision.

5 Possible Solutions, Recent Developments and Concluding Thoughts

5.1 Possible Solutions to the Problems of Transparency and Accountability in the Use of Contractors and PMCs Presented by Experts in the Field

It is clear that there are several key challenges to the use of operational contract support and other forms of governmental outsourcing by the U.S. government. This subchapter will present an overview of possible reforms and ideas on how to improve the system. I will cite different experts in the field of outsourcing, who include law professors and attorneys who have specialized on outsourcing and government contracts, such as Paul R. Verkuil, Laura A. Dickinson and others, as well as two members of the contractor lobbying industry itself, Stan Soloway and Alan Chvotkin. The section is divided into three parts, with a different point of view represented in each one. These parts are based on the approach taken in the book *Government by Contract* by Jody Freeman and Martha Minow.¹⁶⁰ This book is a collection of texts by experts in the field of government contracts and outsourcing, and the experts presented in this chapter have all contributed to that book. This subchapter is meant to give examples for solutions for some of the different problems identified in the previous chapters, but also to give an insight into current scholarly work on the subject.

5.1.1 Arguments against Increased Control over Contractors and PMCs

Government outsourcing and PMC use is a highly controversial subject. As seen in previous chapters, there is sometimes a clear political bipartisan divide on the subject, with, generally

¹⁶⁰ Freeman and Minow, *Government by Contract*.

speaking, Democrats in favor of more regulation and Republicans in support of freer use of contractors. It is reasonable to assume that there is a similar division in the popular opinion about the use of PMC and contractors, and so it is important to also give attention to the side in favor of increasing the use of contractors, and decreasing regulation. Steven J. Kelman, a law professor at Harvard University, has voiced his opinions in chapter 7 of *Government by Contract*. He chooses to take the side of the contractor industry, the industry he works for, by highlighting what he deems as “mainstream policy and management issues in the world of government contracting.” One of his main goals is to remind scholars and activists who study and comment these issues that contracting has some substantial benefits, and that the role of contractors is to “help the government agencies meet their missions to serve the public.”¹⁶¹ His main arguments for increased contractor use are well-known and widely used by the supporters of the contracting industry. In essence, it boils down to cost. Kelman argues that it is nonsensical to order soldiers, who are trained to fight, to run cafeterias etc. in army bases, and that using contractor personnel to do this makes a lot more sense and saves the government money. He lists the contracts awarded to Halliburton and its subsidiaries under the LOGCAP system described in earlier chapters as examples of a resounding success.¹⁶²

Kelman argues that all governmental agencies and companies are by design doomed to underperform, and that outsourcing is the only way to ensure that fewer tax dollars are wasted. He goes into considerable length to explain why government companies cannot perform to the same standard as private companies, claiming that government companies are too restricted by rules and regulations. He even goes as far as to write that “An individual who needs to spend hours each day worrying about how s/he will avoid murdering others is unlikely to be successful at achieving substantive goals,”¹⁶³ and that “Democratic accountability of agencies is a central value in democracy. This focus is a constraint since it says nothing about results, only process.”¹⁶⁴ Kelman is clearly at the more extreme end of the spectrum when it comes to glorifying business and criticizing state-run companies and

¹⁶¹ Steven J Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective,” in *Government by Contract*, (London: Harvard University Press, 2009), 153–92.

¹⁶² Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 157

¹⁶³ Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 159

¹⁶⁴ Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 160

processes. He also argues that the Iraq War cannot be used to criticize and draw conclusions about the contracting industry as a whole, and claims that the DOD and U.S. laws are to blame for any and all the negative incidents related to PMC use in Iraq.¹⁶⁵ He even supports the disastrous decision to hire hundreds of translators to interrogate the prisoners in Abu Ghraib.¹⁶⁶ Further, he stoically protects the decision to give companies that work on contract for the U.S. government the right to deny any Freedom of Information Act requests, a practice that severely limits transparency in the contracting industry.¹⁶⁷ To conclude, Kelman argues that the main reason for the lack of contract oversight and control in the U.S. is “a desire to use procurement abuse, real or alleged, as a partisan political issue.”¹⁶⁸ In short, Kelman argues that the contracting industry would benefit from an internal restructuring, and that the public law community should be careful who they criticize, in order not to “provoke bitter opposition from most of the procurement community.”¹⁶⁹

Stan Soloway and Alan Chvotkin in general agree with Kelman’s arguments. This is no surprise, as they represent the contracting industry. Soloway and Chvotkin are both employees of the Professional Services Council, an organization that works as a lobbying group for the contracting industry.¹⁷⁰ They claim that increased outsourcing is a natural step forward, and that it is the solution to any problems the federal government might have in the

¹⁶⁵ Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 173

¹⁶⁶ Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 181

¹⁶⁷ Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 185

¹⁶⁸ Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 190

¹⁶⁹ Kelman, “Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective.” 191

¹⁷⁰ “About PSC,” *Pscouncil.org*, 2015, http://www.pscouncil.org/i/a/The_PSC_Mission/c/a/The_PSC_Mission/About_PSC.aspx?hkey=d138b175-d0a3-4f0e-9234-b6e3d11027b5. Their mission statement is as follows: “The Professional Services Council (PSC) is the voice of the government technology and professional services industry, representing the full range and diversity of the government services sector. PSC is the most respected industry leader on legislative and regulatory issues related to government acquisition, business and technology. PSC helps shape public policy, leads strategic coalitions, and works to build consensus between government and industry. PSC’s more than 370 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the trade association’s members employ hundreds of thousands of Americans in all 50 states.”

years to come.¹⁷¹ Soloway and Chvotkin start by asserting, “There is no evidence or any other reason to believe that additional layers of laws and rules [in the federal procurement regime] would do anything to improve the process or its outcomes.”¹⁷² It is clear that Soloway and Chvotkin oppose any increased regulation, and they are quick to claim that the current system and process is “widely transparent.” They brag about the fact that the government has “specially trained and licensed ‘agents’ (contracting officers) who are the sole individuals authorized to commit public dollars via contract.”¹⁷³ It is worth noting that the only people who claim that there is a proper system in place for monitoring contracts are the people who benefit the most from a lack thereof.

Soloway and Chvotkin go on to highlight the differences between outsourcing and privatization, noting that they are substantial. They argue that the government never gives up ownership of projects or tasks; they simply hire someone to do tasks for them. Thus, outsourcing is not deserving of some of the criticism they argue is more justifiably directed against privatization. Ultimately, the responsibility for oversight and management, and the guarantee that there is transparency and accountability, rests squarely with the federal government. As a result of this, the contracting industry should not be allowed to control and keep oversight over themselves, which it seems that Kelman, Soloway and Chvotkin would prefer. Soloway and Chvotkin list several of what they deem to be success stories to prove that outsourcing is working as it should. They mention the buildup of PMCs in the last 10–15 years, as well as the outsourcing of several functions of the NSA over the last decade. However, they are quite vague on how these are success stories, and they are nearly alone in claiming this. The general conclusion among scholars in the field, such as Martha Minow, Laura Dickinson, David Isenberg and Paul R. Verkuil, is that these events signify a hugely negative trend, and are not success stories at all.

Soloway and Chvotkin’s basic arguments against increased regulation are largely based on the notion that there should be more outsourcing and not less. Soloway and Chvotkin claim that the current level of outsourcing is much lower than what is accepted by the scholars mentioned in the previous paragraph. Soloway and Chvotkin claim that the total amount

¹⁷¹ Stan Soloway and Alan Chvotkin, “Federal Contracting in Context - What Drives It, How to Improve It,” in *Government by Contract*, (London: Harvard University Press, 2009), 192–238. 192

¹⁷² Soloway and Chvotkin, “Federal Contracting in Context - What Drives It, How to Improve It.” 193

¹⁷³ Soloway and Chvotkin, “Federal Contracting in Context - What Drives It, How to Improve It.” 193

spent on service contracting in 2006, \$ 240 billion, is misleading. They do not, however, give any exact numbers, and only operate with very general estimates. For instance, they claim that as much as 25–30% or more of the \$240 billion goes to overhead, and that physical purchases, such as laptops and pencils, make up about 50–80% of the rest. There might be a valid point here, but the imprecise estimates they offer do not support their argument. It is nothing new that not all of the \$240 billion goes directly to contractor salaries, and an argument might be made, moreover, that the numbers given by the government are too general. However, when Soloway and Chvotkin use these imprecise estimates to argue that the cost of two million federal employees' salaries and benefits is \$180 billion, compared to “only a portion” of \$240 billion for eight million employees, the whole argument collapses. They claim that outsourcing is significantly cheaper than using federal employees, which might be the case, but their arguments are severely exaggerated.

Their arguments follow in the same pattern for about 35 pages, but their conception still boils down to the fact that they, and the industry they represent, contend that there is no need for increased regulation. They believe that the current system is more than adequate, and that the industry should have a greater say in how they are supposed to be managed. Their arguments follow a classic capitalist approach to limit the size of government, and let the markets govern themselves.

5.1.2 Arguments Supporting the Use of the Tools Already in Place

In *Government by Contract*, there are two scholars that advocate using the existing legislation to increase the oversight and make the PMCs more accountable. In their respective chapters, Nina A. Mendelson and Alfred C. Aman Jr. support this point, and agree on the most fundamental approaches for accomplishing these goals. Mendelson and Aman are both law professors, and their chapters are based primarily on the legal aspects of outsourcing and contracting. Transparency and accountability, however, are also important topics in their work. Mendelson argues against Kelman, Soloway and Chvotkin, stating that the increasing reliance on contractors is a problem, and that the current system does not adequately ensure sufficient oversight and control of contractors and PMCs. She claims that inadequate

government contracts, lack of competition between the different PMCs and limited contract oversight are the main challenges facing proper management, transparency and accountability in contracting.¹⁷⁴

To increase contractor accountability, and to combat these kinds of problems, Mendelson proposes six different ways to improve the management of contractors. They are all based on already existing laws, and could thus be implemented easily, at least in theory. Firstly, she proposes that contractors should be required to publicly disclose documents that relate to how they have fulfilled their contracts. This would undoubtedly increase transparency, and potentially make the contractors more accountable. She suggests that every government contract should include a clause that requires the contractor to submit critical documents, such as operating procedures, to their client agency.¹⁷⁵ This seems obvious, but is not currently common practice. This would make these documents subject to a Freedom of Information Act (FOIA) request, circumventing Executive Order 12600. This order, as discussed in the previous chapter, allows the contractors to refuse to make public any information they claim can harm their competitive ability.

Next, she argues that the contractors should be more responsible to tort claims. By clarifying the laws on the subject, she shows that this would make the contractors more accountable. Tort reform¹⁷⁶ has been the study of one scholar in particular, Jenny S. Lam, one of the leading legal experts on the subject. Lam originally argued that the PMC personnel in Iraq and Afghanistan who were involved in incidents such as the Nisour Square shootings could be held accountable under the “alien tort statute,” a revolutionary idea at the time.¹⁷⁷ Mendelson also argues that the government should make several key changes that would increase contractor accountability, such as subjecting contracts to the APA guidelines, making them as accountable as government agencies.¹⁷⁸

¹⁷⁴ Nina A Mendelson, “Six Simple Steps to Increase Contractor Accountability,” in *Government by Contract*, (London: Harvard University Press, 2009), 241–60. 240–250

¹⁷⁵ Mendelson, “Six Simple Steps to Increase Contractor Accountability.” 254

¹⁷⁶ Simon Chesterman, “What Is Tort Reform?,” accessed April 22, 2015, <http://www.hg.org/article.asp?id=7041>. “Simply put, a tort is a non-criminal civil wrong that is caused either on purpose or through negligence. Or, to put it another way, torts are civil cases in which an act, intentional or otherwise, has caused injury (physical, mental or monetary). In such cases where a tort is committed, the injured party has the right to sue the wrongdoer for damages.”

¹⁷⁷ Jenny S Lam, “Accountability for Private Military Contractors Under the Alien Tort Statute,” *California Law Review* 97, no. 5 (October 1, 2009): 1459–99, doi:10.2307/20677914.

¹⁷⁸ Mendelson, “Six Simple Steps to Increase Contractor Accountability.” 254–260

Alfred C. Aman Jr. largely agrees with Mendelson on the use of existing legal framework, avoiding having to implement something completely new, which could take considerable time, and potentially be very expensive. Aman argues that the best way to increase oversight is to extend the laws and regulations that regulate federal agencies to the private contractor sector. This would make the contractors as accountable as the federal agencies and departments. He states that this would be most important for contracts that affect vulnerable people, such as the elderly and children, but it is easy to imagine the same kind of policy change being made so that it affects PMCs as well. Doing this could help monitor the industry much more closely than what is possible now, and would ensure that PMC personnel would get punished for their wrongdoings, as discussed in chapter 3. Aman also believes there should be more public involvement in how contracts are awarded, so that no contracts can be awarded without public knowledge.¹⁷⁹

5.1.3 Arguments in Favor of New Constitutional Restrictions and Increased Governmental Control

This third part examines the points of view among scholars who argue that the best solution to the inherent problems of contracting is to set up new constitutional restrictions. There are three such scholars represented in *Government by Contract*. These include one law professor, Gillian E. Metzger, one attorney and renowned scholar in the field of PMC use, Paul R. Verkuil, and finally one of the major authorities on PMC use, Laura K. Dickinson. Verkuil's and Dickinson's publications in this field have been used extensively throughout this thesis and have served as major sources of inspiration in the process of working on the topic of challenges inherent in the use of PMCs.

Gillian E. Metzger's approach is based on the notion that two different doctrines frame the discussions on outsourcing, the state action doctrine and the private delegation doctrine. The state action doctrine says that private companies, when under governmental contract, should

¹⁷⁹ Alfred C Aman Jr, "Privatization and Democracy," in *Government by Contract*, Resources in Administrative Law, (London: Harvard University Press, 2009), 261–88. 261–288

be considered government actors, and thus be subject to all laws and regulations that apply to the government. This is the approach favored by Alfred C. Aman Jr., presented in the previous section. The private delegation doctrine, on the other hand, says that private companies should retain their private status, and not be subject to the same scrutiny as public actors. Rather, the doctrine questions whether the Constitution allows for certain powers to be delegated to private actors in the first place.¹⁸⁰ One example of this is the debate over what can be considered inherently governmental under the OMB Circular A-76, which is discussed in detail in chapter 3.

Metzger asserts that she finds both these doctrines to be lacking, and that neither are sufficient to combat the challenges facing the system of widespread contracting and PMC use. Metzger claims that these approaches are, as she sees them, useless. As she summarizes her main arguments, “The net result of these developments is evident: current constitutional law has little relevance to privatization.”¹⁸¹ Metzger then, in response to the shortcomings in the current approach to the problem of outsourcing, suggests a new approach. She calls it the “reformulated private delegation” approach, and while it is new, it is based largely on the current approaches. Metzger’s approach is in a sense an evolution, rather than a revolution, and she admits that the current approaches, despite their shortcomings, have some merit. Her new approach is based on the question of “whether adequate accountability mechanisms exist by which to ensure that private exercises of government power comport with constitutional requirements.”¹⁸² The main goal of her new approach is to require the U.S. government itself to create better mechanisms for controlling contractors, so that requirements such as transparency and accountability are met. What Metzger is saying is that she would prefer more governmental control of the contractors, and that it is the government’s responsibility to see that this happens. In general terms, this approach is not new, and might even seem obvious, but Metzger goes far in listing how this can be achieved in practical politics, and is very thorough in her approach. Metzger’s arguments boil down to the notion that there is a need for reform, if we are to have transparency and accountability in outsourcing.¹⁸³

¹⁸⁰ Gillian E Metzger, “Private Delegations, Due Process, and the Duty to Supervise,” in *Government by Contract*, (London: Harvard University Press, 2009), 291–309. 297

¹⁸¹ Metzger, “Private Delegations, Due Process, and the Duty to Supervise.” 294

¹⁸² Metzger, “Private Delegations, Due Process, and the Duty to Supervise.” 297

¹⁸³ Metzger, “Private Delegations, Due Process, and the Duty to Supervise.” 297

What she wants is a system that requires the government to structure any authority given to the private sector. What this means is that if the contractors were to make any decisions, they would have to follow a governmental approach when doing so, in essence making the contracting industry private only in terms of ownership, and increasingly governmental in its function. She concludes with this statement: “Perhaps most basically, achieving adequate government supervision depends upon the political branches recognizing that such supervision is essential if privatization is to yield its promised improvements in the performance of government programs.”¹⁸⁴

Paul R. Verkuil, an attorney and scholar in the field of outsourcing and PMC use, expands on Metzger’s arguments in his chapter entitled “Outsourcing and the Duty to Govern.” He goes one step further than Metzger and argues that the transfer of governmental power – in other words, the ability for contractors to make decisions on their own accord when on a government contract – should not happen at all. Verkuil is an avid critic of the outsourcing system. He has also published the book *Outsourcing Sovereignty* on this very topic. His response to the challenges of outsourcing and PMC use is a new doctrine, the “nondelegation doctrine.” This is arguably a development of Metzger’s “reformulated private delegation doctrine” and in short it seeks to impose even stricter regulations on the contractors.¹⁸⁵

The main problem with the current system, as Verkuil sees it, is the lack of oversight and control by the U.S. government. He argues that far more government officials are needed to oversee and manage the more than 12 million contractors. Currently there are about 7,000 members of the Senior Executive Service and about 3,000 presidential appointees, considered “Officers of the United States,” who do this job.¹⁸⁶ He also mentions the situation in Iraq as an example of what happens when there is widespread outsourcing, with lackluster control due to downsizing. In general, he is strongly against the use of PMCs. He also speaks out against the decision by the Government Accountability Office (GAO) to use contractors to

¹⁸⁴ Metzger, “Private Delegations, Due Process, and the Duty to Supervise.” 309

¹⁸⁵ Paul R Verkuil, “Outsourcing and the Duty to Govern,” in *Government by Contract*, (London: Harvard University Press, 2009), 310–35. 310–311

¹⁸⁶ Verkuil, “Outsourcing and the Duty to Govern.” 311–312 and 314 “Executive control over the administrative branch is assured in different ways. The president appoints “Officers of the United States” that function as “deputies” to the president. The president can control these officers with the ability to “require the opinion, in writing, of the principal officer in each of the executive departments, and through the presidents responsibility to “take care that the laws be faithfully executed” The appointment process of these officers are controlled by Congress, and they can be subject to impeachment.”

maintain oversight over outsourcing, in effect giving the contracting industry the power to oversee themselves. He believes doing so would only exacerbate the problem of transparency and accountability rather than fixing it. He states, “If government does not have adequate personnel to oversee its outsourcing, it does not have adequate personnel to read the reports on outsourcing submitted by its private overseers.”¹⁸⁷ To sum up his views, he quotes David Walker, Comptroller General of the GAO from 1998 to 2008. “War fighting, judicial, enforcement, regulatory, and policy-making should never be privatized.”¹⁸⁸

Verkuil’s suggestions for tackling the problems of transparency and accountability can broadly be summarized as “more, and new, regulation.” He believes that contractors should never manage themselves, as this, he claims, is unconstitutional. He argues that stripping the “Officers of the United States” of the power of oversight would be undemocratic, as it would remove the possibility of the overseers to be impeached by Congress, and in other ways controlled by it. The solution would be to discontinue the outsourcing of contractor oversight, and rather keep this function “in-house.” He suggests a more active use of the Subdelegation Act, in order to maintain congressional oversight.¹⁸⁹ This act could serve as a limiter, denying the president the power to outsource any policymaking decisions. He also suggests a stricter use of the OMB circular A-76 (see earlier chapters) as a method to increase accountability.

The final position that is presented here is that of Laura A. Dickinson. Dickinson is a law professor and among the experts on PMC use and contracting. She has written, among other works, *Outsourcing War and Peace*, an influential book on the subject of PMC use.

Dickinson is a strong critic of the use of PMCs in Iraq, and her chapter uses the practice of outsourcing in the second Iraq war as its overall example. She has compiled a comprehensive list of nine provisions for increasing transparency and accountability in PMC use, which in combination, she claims, would ensure that contractors are accountable for their actions, and that the process to hire them, and the management of them, are transparent. These nine provisions are as follows:

- (1) Explicitly extend relevant norms of public international law to private contractors, (2) specify training requirements, (3) provide for enhanced monitoring both within the government and by independent third-party monitors,

¹⁸⁷ Verkuil, “Outsourcing and the Duty to Govern.” 313

¹⁸⁸ Verkuil, “Outsourcing and the Duty to Govern.” 313

¹⁸⁹ Verkuil, “Outsourcing and the Duty to Govern.” 324–325

(4) establish clear performance benchmarks, (5) require accreditation, (6) mandate self-evaluation by the contractors, (7) provide for governmental takeovers of failing contracts, (8) include opportunities for public participation in the contract negotiation process, and (9) enhance whistleblower protection and rights of third-party beneficiaries to enforce contractual terms.¹⁹⁰

She is essentially in agreement with both Metzger and Verkuil, but she also suggests that better monitoring of contracts, although very valuable, is not in itself enough, and that there has to be other reforms as well.¹⁹¹ She stresses that not all contractors necessarily are against reform and/or increased oversight, and that many companies even welcome it. She states that several companies see the benefit of increased control and stricter regulations, e.g. because it could root out less serious actors in the contracting industry.

Her first provision is broadly similar to the approach preferred by Metzger. It would make the contractors more similar to government agencies in terms of oversight and management, requiring them to follow the same laws as e.g. federal agencies. Her second provision has its origins in the Abu Ghraib interrogator scandal, which was discussed in chapters 1 and 4. Reports have shown that there was a marked lack of training among these interrogators, and that as many as 35% of them had no training in military interrogation techniques and policies.¹⁹² Proper training could prevent disastrous events such as the ones in Abu Ghraib, and could make the PMCs more accountable. Her third and fourth provisions again fall in line with suggestions by Metzger and Verkuil of enhanced monitoring of government contracts. Establishing clear performance benchmarks would be an integral part of this, to ensure proper accountability. Provision five is an attempt at creating a new and better system for evaluating the different PMCs and contractors. Her idea is to bring in third-party organizations, or even the United Nations, to come up with a new system for control of contractors. This would require the contractors to be accredited by other independent actors, ensuring a more transparent process when hiring these contractors.¹⁹³

Her sixth provision is to mandate contractor self-evaluation. She acknowledges the fact that self-regulation can be manipulated, and in some cases be completely false. Nonetheless, she claims it will be beneficial, and can in some instances prove very valuable. Provision number

¹⁹⁰ Dickinson, "Public Values/Private Contract." 336

¹⁹¹ Dickinson, "Public Values/Private Contract." 336

¹⁹² Dickinson, "Public Values/Private Contract." 341

¹⁹³ Dickinson, "Public Values/Private Contract." 348-350

seven calls for the ability of the government to terminate contracts and potentially take them over themselves. There is a system already in place that allows the government to terminate contracts, but she argues that the system could be much better, and with a lower threshold for termination. This would serve as a tool to keep the contracting firms in check, and would allow the government to take over vital contracts and make sure they are completed, regardless of the actions of the contractors. Provision eight requires more public participation in the processes surrounding how contracts are awarded. On this point, she is in agreement with Alfred C. Aman Jr. Her ninth and final provision is a notion to “strengthen enforcement mechanisms.”¹⁹⁴ This would mean, among other things, improved protection for whistleblowers as well as increased protection for third-party beneficiaries to contracts.¹⁹⁵

All these approaches, given by different scholars of varied backgrounds, have sought to provide solutions for problems inherent in the contracting industry. The approaches have varied significantly, but they all agree, with perhaps to some extent the exception of the representatives of the PMC industry, on the basic notion that something has to be done. These scholars demonstrate the broad scope of approaches to the subject matter of this thesis, and how it could be tackled.

5.2 Main Findings

This thesis asks the following question: In what way has the outsourcing of the American military affected accountability and transparency, and can this be a threat to the American democratic model? In order to examine this question, the thesis has looked at how the use of contractors, and in particular the degree of PMC use, has affected transparency and accountability. Transparency and accountability are vital for a functioning democracy, and they are basic tenets of the American democratic model. This thesis has examined the presidency, the executive branch and the legislative branch, in order to discover their roles in the massive expansion of the use of contractors and PMCs since World War II, with an emphasis on the period following September 11, 2001. All these institutions play their own

¹⁹⁴ Dickinson, “Public Values/Private Contract.” 355-356

¹⁹⁵ Dickinson, “Public Values/Private Contract.” 355

unique role, but they are also interconnected, in the sense that the problems and challenges associated with contractor and PMC use are overreaching, and not limited to any one branch of government.

Chapter 2 examines the role of the presidency. It is important to be aware of how the conduct of the presidency has evolved since World War II, especially regarding the use of military force. This development is an important backdrop to the current. We have seen that different presidents, from FDR to George W. Bush, have played major roles in the buildup of contractor and PMC use. The buildup has happened gradually, but its pace was markedly stepped up during the military operations in Afghanistan and Iraq during the War on Terror. Those conflicts demonstrated clearly the true problems associated with widespread and expansive use of contractors and PMCs, and highlighted the problems of maintaining adequate transparency and accountability. The level of contractor and PMC use seen in the War on Terror, largely initiated by the presidency, poses a very real threat to the American democratic model. A well-functioning democracy is premised on a high level of public control. For this to be possible, there must be transparency in the actions of those that govern, including the president. By exploiting the opportunity to increase executive power that arose after September 11, 2001, President George W. Bush revealed his aspirations for becoming an imperial president. In an imperial presidency, the president makes decisions that are unknown to the general public, suspending transparency. Such a president can act as a leader who is above the law, seriously threatening the accountability of his office and his actions. The unprecedented level of contractor and PMC use during the War on Terror allowed President George W. Bush to exercise immense power, with little or no congressional control. This was a huge threat to the very cornerstones of the American democratic model. Considering that the mechanisms established by President George W. Bush in the aftermath of 9/11 are still in place, the potential risk of an imperial presidency remains unchanged.

The third chapter examines the role of the executive branch of the U.S. government. The executive branch is here separated from the presidency, and the focus lies on the different departments of the executive branch, with the main emphasis on the DOD. The executive branch is responsible for hiring and managing the contractors and PMCs. In traditional wars in the past, the fighting was done by U.S. troops, and logistics were managed by U.S. military personnel. There were clear chains of command, and clear rules and regulations to ensure both transparency and accountability in regard to both the soldier on the ground, but also the

military leaders that gave the orders. During the War on Terror, the chains of command became obscured, as contractors and PMCs handled more and more of the extensive logistics of the war effort. The people ultimately accountable in the DOD were far removed from the actions of the companies they hired to do the job. As the operations in Afghanistan and Iraq gradually were taken over by contractors and PMCs, transparency and accountability suffered greatly. The result was that the general public had very little knowledge of what was going on in Afghanistan and Iraq, and the true number of contractors and PMCs used there was largely unknown to them. The use of contractors and PMCs by the executive branch is a major obstacle to transparency and accountability, and stands in the way of the American people's knowledge of what their government is doing.

Chapter 4 investigates the legislative branch and the role of Congress in recent years regarding the use of contractors and PMCs. The chapter discusses whether Congress has done its job of maintaining accountability, and what has been done to improve the situation. The elected members of Congress are the people's representatives in the American democratic model. They have a responsibility to inform the public of the actions of the U.S. government, as well as to serve as watchdogs over the presidency and the executive branch. Congress has played a large role in the expansion of the use of contractors and PMCs, both directly and indirectly. Directly as it has passed legislation such as the S.J.Res.23 – Authorization for Use of Military Force bill and the USA PATRIOT act, and indirectly as it has chosen to take a back seat when it comes to control over the contractors and PMCs. The expansion in the use of contractors and PMCs would not have been possible without congressional action (and inaction), and the lack of accountability in particular falls heavy on its shoulders. In the months and years following September 11, 2001, Congress did little to challenge the expansion of presidential power or the buildup of contractor and PMC use, and in the following years, it failed on several occasions to increase its control. Congress has seemingly turned a blind eye to the outsourcing of matters related to the conduct of the country's wars, and as representatives of the people of the U.S., the members have failed in their task of keeping the actions of the government as transparent as possible. Congress's lack of interest in addressing the obvious problems associated with the use of contractors and PMCs in war is a neglect of its responsibilities, and ultimately a threat to the American democratic model.

5.3 Recent Developments in PMC Use

5.3.1 The Fight Against IS and the Return of PMCs to Iraq

The focus for most of this thesis has been the use of PMCs in the conflicts in Iraq and Afghanistan. The invasion of Iraq in 2003 marked the beginning of the buildup of outsourcing through the employment of PMC personnel, as documented earlier. For a substantial period there were more PMCs and other contractor personnel in Iraq than there were U.S. military troops. The PMC industry has expanded rapidly, from their part-taking in small-scale security missions in conflict zones around the world, to become an integral part of the U.S. strategy in Iraq. PMCs and other defense contractors have been given large contracts and employed tens of thousands of people. As operations in Iraq wound down approaching the American withdrawal in 2011, the need for PMCs gradually subsided. This was driven both by a natural de-escalation of the conflict, as well as a desire to cut down on costs related to the war.

The level of PMC use by the U.S. government is connected to the type of operations that are currently ongoing or planned. When there are no major military operations abroad, there is no longer a need for the level of PMC personnel that was observed in Iraq and Afghanistan during the height of those conflicts. As of 2011, major combat operations in Iraq were over, and the majority of U.S. troops had been pulled out. On September 30, 2014, the United States and Afghanistan signed a bilateral security agreement that allowed for some U.S. troops to remain in the country, but also there, the majority of U.S. troops would be pulled out.¹⁹⁶ As a result of these developments, the numbers of PMCs in both nations followed suit, and only a small percentage of the previous numbers remained. In the years after 2011, it would be reasonable to believe that the era of PMC use was over, as there was nothing to indicate a new American military involvement in the near future. The rise of the Islamic State, or IS, changed that.

¹⁹⁶ “U.S. Relations with Afghanistan,” *State.Gov*, September 31, 2014, <http://www.state.gov/r/pa/ei/bgn/5380.htm>.

In the late fall of 2014 and the winter of 2014–2015, the U.S. again got involved militarily in Iraq to combat the rising threat of IS. After long wars in both Afghanistan and Iraq, there was little public acceptance of any major U.S. involvement, and very low support for American “boots on the ground” in another conflict. An obvious answer to the question of how to be able to fight IS without deploying a significant number of U.S. troops was the use of PMCs. Metin Gurcan wrote an article about the situation in September of 2014, in which he discusses the potential for a second “contractors’ war” in Iraq. He raises the same concerns that were raised during the 2003–2011 conflict, asking whether there will be better opportunities for transparency and accountability this time around.¹⁹⁷ Seth Robson, a writer for *Stars and Stripes*, a DOD newspaper that focuses on the U.S. armed forces, echoes his concerns. Robson mentions that in August of 2014, the DOD opened a new round of bidding on contracts for companies willing to go to Iraq and, among other tasks, train the Kurdish forces currently fighting IS.¹⁹⁸

As of the end of December, the number of contractors in Iraq was about 1,800, and the number of U.S. troops about 1,750.¹⁹⁹ The numbers are small compared to the numbers seen in Iraq before 2011, but there are clear signs of an escalation of the conflict and an increase of contractors. In the same month, U.S. Defense Secretary Chuck Hagel ordered the deployment of an additional 1,300 U.S. troops, and there is reason to believe that more contractors will follow.²⁰⁰ It seems that PMC use is here to stay, and that it will be a major part of any future military involvement by the U.S. What is worrying, though, is that there does not seem to be any plans to alter the way PMCs are being used. Recent developments in Iraq seem to be a reflection of the last conflict, in terms of how PMC use is being managed and controlled.

However, there have been some developments with regard to contractor accountability. On April 14, 2015, four former employees of Blackwater were convicted for their actions in the incident at Nisour Square in Baghdad in 2007. The incident remains important to this day, as

¹⁹⁷ Metin Gurcan, “Are Military Contractors Heading Back to Iraq?,” *Al-Monitor.com*, accessed March 13, 2015, doi:10.1080/17467580903532068#.VA680_1_vCI.

¹⁹⁸ Seth Robson, “In Place of ‘Boots on the Ground,’ US Seeks Contractors for Iraq,” *Stripes.com*, September 7, 2014, <http://www.stripes.com/news/in-place-of-boots-on-the-ground-us-seeks-contractors-for-iraq-1.301798>.

¹⁹⁹ Warren Strobel and Phil Stewart, “As U.S. Troops Return to Iraq, More Private Contractors Follow,” *Reuters.com*, December 24, 2014, <http://www.reuters.com/article/2014/12/24/us-usa-iraq-contractors-idUSKBN0K20AW20141224>.

²⁰⁰ Strobel and Stewart, “As U.S. Troops Return to Iraq, More Private Contractors Follow.”

it is remembered vividly in Iraq, where it is one of the Iraqis' major arguments against the use of PMCs in their country.²⁰¹ The conviction of these four former Blackwater personnel marks a major turning point in the question of contractor accountability. The Blackwater personnel received harsh sentences, one sentenced to life imprisonment, the others receiving 30 years. A fifth Blackwater employee testified against his former colleagues, and has yet to receive a sentence. Before this landmark conviction, no contractors had ever been convicted of crimes committed in Iraq or Afghanistan. Testimony from the court case has shown that Blackwater personnel were seen as untouchable in Iraq, and that they could do whatever they liked with impunity. "Blackwater had power like Saddam Hussein," said Mr. Kinani, an Iraqi national whose son was killed in the incident.²⁰² The hope among advocates for more accountability is that this conviction can pave the way for more convictions, but most importantly usher in a new era of contractor accountability. This new era could potentially see PMCs adhering to the same standards as U.S. military personnel, hopefully reducing or eliminating unnecessary civilian deaths or injuries in the future.

This thesis has highlighted the many pitfalls and dangers associated with the use of contractors. It is very unfortunate that the U.S. government now seems willing to escalate another contractors' war in the Middle East. There are worryingly few developments in terms of increased transparency and accountability since the start of the war in Iraq in 2003 regarding the use of contractors. The laws governing contractors leave much to be desired. There have been some improvements in terms of transparency and accountability, but sadly these have been modest at best. There is still a major task ahead when it comes to making sure that contractors and PMCs are being used in the best possible manner, and that they are supervised and held accountable in a satisfactory way. The use of PMCs and other contractors is here to stay, and if this use is to be continued, or even expanded upon again in the future, steps have to be taken to reduce the chance of this use becoming a threat to the American democratic model.

5.4 Conclusion

²⁰¹ Robson, "In Place of 'Boots on the Ground,' US Seeks Contractors for Iraq."

²⁰² Apuzzo, "Ex-Blackwater Guards Sentenced to Long Prison Terms in 2007 Killings of Iraqi Civilians." 3

This thesis has examined whether the lack of accountability and transparency in the outsourcing of military functions is a threat to the American democratic model. It has been shown that the outsourcing of military functions can be used as a kind of test of the American democratic model, showing how it can be challenged by an expansive and aggressive executive branch and president on one side, and a passive Congress on the other. The outsourcing of military functions breaks down the rules and regulations that are meant to maintain the division of power between these governmental branches in the American democratic model. This thesis has shown that the use of PMCs was an important part of the buildup of power in the executive branch during the presidency of George W. Bush, and the weakening of Congress in the same time period. The outsourcing of military functions can potentially be a threat to the American democratic model when there is a lack of both transparency and accountability, both on the part of the PMCs themselves, and also on the part of the employer, the U.S. government. The outsourcing of military functions proves a threat to the American democratic model when it allows the executive branch and the president to wage war with contractors, personnel that Congress, and the American people, has very little control over as a result of Congress's laissez-faire attitude towards the matter.

Bibliography

- Aman, Alfred C, Jr. "Privatization and Democracy." In *Government by Contract*, 261–88. Resources in Administrative Law, London: Harvard University Press, 2009.
- American Bar Association. *Full Report by the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine*, 2006.
- American Bar Association. *Presidential Signing Statements and the Separation of Powers Doctrine*, Chicago, 2006.
- Apuzzo, Matt. "Ex-Blackwater Guards Sentenced to Long Prison Terms in 2007 Killings of Iraqi Civilians." *The New York Times*, April 14, 2015. http://www.nytimes.com/2015/04/14/us/ex-blackwater-guards-sentenced-to-prison-in-2007-killings-of-iraqi-civilians.html?hp&action=click&pgtype=Homepage&module=first-column-region®ion=top-news&WT.nav=top-news&_r=0.
- Avant, Deborah D, and Renée de Nevers. "Military Contractors & the American Way of War." *American Academy of Arts Sciences*, 2011, 1–12.
- Beelman, Maud. "Winning Contractors," September 30, 2003. <http://www.publicintegrity.org/2003/10/30/5628/winning-contractors>.
- Bloomberg News. "Sale of KBR Bolsters Profit at Halliburton - New York Times." *The New York Times*, July 24, 2007. <http://www.nytimes.com/2007/07/24/business/24halliburton.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A6%22%7D>.
- Brzezinski, Zbigniew. "Terrorized by 'War on Terror'." *The Washington Post*, March 25, 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301613.html>.
- Burns, John F. "The Deadly Game of Private Security." *The New York Times*, September 23, 2007. <http://www.nytimes.com/2007/09/23/weekinreview/23burns.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A7%22%7D>.
- Chesterman, Simon. "What Is Tort Reform?." Accessed April 22, 2015. <http://www.hg.org/article.asp?id=7041>.
- Chesterman, Simon, and Chia Lehnardt. *From Mercenaries to Market*, Oxford University Press, 2007.
- Congressional Record - Senate*, October 25, 2001.
- Cotton, S K, U Petersohn, M Dunigan, Q Burkhart, Megan Zander-Cotungo, Edward O'Connel, and Michael Webber. "Hired Guns: Views About Armed Contractors in Operation Iraqi Freedom," 2010.
- Cushman, John H. "Contractor Settles Case in Iraq Prison Abuse." *The New York Times*, January 8, 2013. <http://www.nytimes.com/2013/01/09/world/middleeast/contractor-settles-case-in-iraq-prison-abuse.html?module=Search&mabReward=relbias%3As%2C%7B%221%22%3A%22RI%3A7%22%7D>.
- Dallek, Robert. "Power and the Presidency, From Kennedy to Obama." *Smithsonian.com*, January 2011. <http://www.smithsonianmag.com/history/power-and-the-presidency-from-kennedy-to-obama-75335897/#7zMLSog6UIQKWhMp.99>.
- De Nevers, R. "The Effectiveness of Self-Regulation by the Private Military and Security Industry." *Journal of Public Policy*, 2010. doi:10.1017/S0143814X10000036.
- Dickinson, Laura A. "Public Values/Private Contract." In *Government by Contract*, 335–59,

- London: Harvard University Press, 2009.
- Dobbins, J. *Occupying Iraq: a History of the Coalition Provisional Authority*, Santa Monica, CA : RAND Corp, 2009.
- Eckholm, Erik. "Democrats Step Up Criticism of Halliburton Billing in Iraq." *The New York Times*, June 28, 2014.
<http://www.nytimes.com/2005/06/28/politics/28haliburton.html?pagewanted=all&module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D>.
- Editorial. "KBR Does It Again." *The New York Times*, May 23, 2009.
<http://www.nytimes.com/2009/05/24/opinion/24sun3.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A6%22%7D>.
- Fong, Chua Lu. "V28N2 - Operation Eagle Claw, 1980: a Case Study in Crisis Management and Military Planning," July 3, 2006.
- Freeman, Jody, and Martha Minow. *Government by Contract*, London: Harvard University Press, 2009.
- Glanz, J, and A J Rubin. "Blackwater Shootings 'Murder,' Iraq Says." *The New York Times*, The New York Times, September 8, 2007.
<http://www.nytimes.com/2007/10/08/world/middleeast/08blackwater.html?pagewanted=all&module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D>.
- Iraq for Sale - the War Profiteers*. Edited by Robert Greenwald. Vol. 1, 2006.
- Gurcan, Metin. "Are Military Contractors Heading Back to Iraq?." *Al-Monitor.com*. Accessed March 13, 2015. doi:10.1080/17467580903532068#.VA680_1_vCI.
- Hagedorn, Ann. *The Invisible Soldiers*, Simon and Schuster, 2014.
- Hilman, Elizabeth L. "Franklin D. Roosevelt, Commander in Chief." *Cordozo Law Review* 29, no. 3 (2008): 1037–47.
- Hudson, William E. *American Democracy in Peril*. 7 ed., Los Angeles: Sage, 2013.
- Hulse, Carl. "Senate Rejects Harder Penalties on Companies, and Ban on Private Interrogators ." *The New York Times*, June 17, 2004.
- Hurst, Michael. "After Blackwater: a Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations." *The George Washington Law Review* 76, no. 5 (August 2008): 1308–26.
- Isenberg, David. "A Government in Search of Cover: Private Military Companies in Iraq." In *From Mercenaries to Market*, 82–93, Oxford University Press, 2007.
- Isenberg, David. "Are Private Contractors Really Cheaper?." *Time*, July 23, 2013.
<http://nation.time.com/2013/07/23/are-private-contractors-really-cheaper/>.
- Isenberg, David. *Private Military Contractors and U.S. Grand Strategy*, 2009.
- Isenberg, David. *Shadow Force*, ABC-CLIO, 2009.
- Jefferson, Thomas. *The Declaration of Independence and the Constitution of the United States of America*, Cato Institute, 2002.
- Kelman, Steven J. "Achieving Contracting Goals and Recognizing Public Law Concerns - a Contracting Management Perspective." In *Government by Contract*, 153–92, London: Harvard University Press, 2009.
- Kestian, M R. "Civilian Contractors: Forgotten Veterans of the War on Terror." *U Tol L Rev*, 2007.
- Kidwell, Deborah C. *Occasional Paper 12 Public War, Private Fight? the United States and Private Military Companies*, BiblioGov, 2012.
- Lam, Jenny S. "Accountability for Private Military Contractors Under the Alien Tort Statute." *California Law Review* 97, no. 5 (October 1, 2009): 1459–99.
doi:10.2307/20677914.
- Lamb, Christopher. *Belief Systems and Decision Making in the Mayaguez Crisis*, University

- Press of Florida, 1989.
- Loomis, Burdett A. "Congressional Decentralization in Design and Evolution ." In *The Contemporary Congress*, 1–12, 1996.
- Mahler, Jonathan. "After the Imperial Presidency." *The New York Times*, November 7, 2008. http://www.nytimes.com/2008/11/09/magazine/09power-t.html?pagewanted=all&_r=0.
- Mendelson, Nina A. "Six Simple Steps to Increase Contractor Accountability." In *Government by Contract*, 241–60, London: Harvard University Press, 2009.
- Metzger, Gillian E. "Private Delegations, Due Process, and the Duty to Supervise." In *Government by Contract*, 291–309, London: Harvard University Press, 2009.
- Meyer, Michael. "The 10th Anniversary of a Photo That Changed the Iraq War," March 30, 2014. http://www.cjr.org/feature/one_day_in_the_war_of_images.php?page=all.
- Moulta-Ali, Umar. *Who Is a Veteran?*, Congressional Research Service, January 23, 2014.
- Mullins, Jason. "Georgetown Security Studies Review – Embassy Moscow: a Diplomatic Perspective of the Cuban Missile Crisis." *Georgetown Security Studies Review*, December 10, 2013. <http://georgetownsecuritystudiesreview.org/2013/12/10/embassy-moscow-a-diplomatic-perspective-of-the-cuban-missile-crisis/>.
- NCPPP. "Home - NCPMP." *NCPMP.org*. Accessed August 27, 2014. <http://www.ncppp.org>.
- Office of Legal Counsel. *Standards of Conduct for Interrogation Under 18 USC §§ 2340-2340A*, August 1, 2002. <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>.
- Office of Management and Budget. "Circular No. a-76 Revised." *Whitehouse.Gov*, May 29, 2003. http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/.
- Peckenpaugh, Jason. "Definition of 'Inherently Governmental' Could Change - Contracting." *Govex.com*, June 8, 2001. <http://www.govexec.com/contracting/2001/06/definition-of-inherently-governmental-could-change/9293/>.
- Press, The Associated. "Soldier Is Found Guilty in AbuGhraib Abuse." *The New York Times*, May 17, 2005. <http://www.nytimes.com/2005/05/17/national/17abuse.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A8%22%7D>.
- Reeves, Richard. "Missile Gaps and Other Broken Promises." *The New York Times*, February 10, 2009. http://100days.blogs.nytimes.com/2009/02/10/missile-gaps-and-other-broken-promises/?_r=0.
- Risen, J, and M Mazzetti. "CIA Said to Use Outsiders to Put Bombs on Drones." *The New York Times*, New York Times, August 20, 2009. http://www.nytimes.com/2009/08/21/us/21intel.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D&_r=0.
- Risen, James. "KBR Losing Exclusive Hold on Iraq Contracts ." *The New York Times*, May 26, 2008. <http://www.nytimes.com/2008/05/26/business/worldbusiness/26iht-defense.4.13211927.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A6%22%7D>.
- Robson, Seth. "In Place of 'Boots on the Ground,' US Seeks Contractors for Iraq." *Stripes.com*, September 7, 2014. <http://www.stripes.com/news/in-place-of-boots-on-the-ground-us-seeks-contractors-for-iraq-1.301798>.
- Roosevelt, Franklin D. "Franklin D. Roosevelt's Message to Congress Urging Repeal of the Embargo Provisions of the Neutrality Law.." Accessed October 27, 2014. <http://www.presidency.ucsb.edu/ws/?pid=15813>.
- Rosenbaum, D E. "A Closer Look at Cheney and Halliburton." *The New York Times*, The New York Times, September 28, 2004. <http://www.nytimes.com/2004/09/28/national/28fact.html?module=Search&mabReward>

- =relbias%3Aw%2C%7B%22%22%3A%22RI%3A7%22%7D.
- Rudalevige, Andrew. *The New Imperial Presidency*, University of Michigan Press, 2005.
- Schlesinger, Arthur Meier. *The Imperial Presidency*, Houghton Mifflin Harcourt, 2004.
- Schwartz, Moshe, and Joyprada Swain. "Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis," March 29, 2011.
- Sidey, Hugh. *A Very Personal Presidency; Lyndon Johnson in the White House.*, New York: Atheneum, 1968.
- Singer, P W. *Corporate Warriors*, Cornell University Press, 2011.
- Soloway, Stan, and Alan Chvotkin. "Federal Contracting in Context - What Drives It, How to Improve It." In *Government by Contract*, 192–238, London: Harvard University Press, 2009.
- Soodalter, Ron. "The Union's 'Shoddy' Aristocracy." *The New York Times*, May 9, 2011. <http://opinionator.blogs.nytimes.com/2011/05/09/the-unions-shoddy-aristocracy/?module=Search&mabReward=relbias%3Aw%2C%7B%22%22%3A%22RI%3A7%22%7D>.
- Stanger, Allison. *One Nation Under Contract - the Outsourcing of American Power and the Future of Foreign Policy*, New Haven : Yale University Press, 2009.
- Strobel, Warren, and Phil Stewart. "As U.S. Troops Return to Iraq, More Private Contractors Follow." *Reuters.com*, December 24, 2014. <http://www.reuters.com/article/2014/12/24/us-usa-iraq-contractors-idUSKBN0K20AW20141224>.
- The 107th Congress. **S.J.Res.23 - Authorization for Use of Military Force**, 2001. *The Defense Federal Acquisition Regulation Supplement Part 252, Subpart 225-7039. The Defense Federal Acquisition Regulation Supplement*, n.d.
- The Defense Federal Acquisition Regulation Supplement, Part 225, Subpart 7401 of the Code of Federal Regulations Requires Use of ANSI/ASIS PSC.1 Standard Through Implementing Instruction PGI 225.7401(a). The Defense Federal Acquisition Regulation Supplement*, n.d.
- Verkuil, Paul R. "Outsourcing and the Duty to Govern." In *Government by Contract*, 310–34, London: Harvard University Press, 2009.
- Verkuil, Paul R. "Outsourcing and the Duty to Govern." In *Government by Contract*, 310–35, London: Harvard University Press, 2009.
- "18 U.S. Code § 3261 - Criminal Offenses Committed by Certain Members of the Armed Forces and by Persons Employed by or Accompanying the Armed Forces Outside the United States ." *Cornell University Law School*. Accessed October 16, 2014. <http://www.law.cornell.edu/uscode/text/18/3261>.
- "About PSC." *Pscouncil.org*, 2015. http://www.pscouncil.org/i/a/The_PSC_Mission/c/a/The_PSC_Mission/About_PSC.aspx?hkey=d138b175-d0a3-4f0e-9234-b6e3d11027b5.
- "About the Department of Defense (DOD)." *U.S. Department of Defense*. Accessed September 29, 2014. <http://www.defense.gov/about/>.
- "About VA." *The Department of Veteran Affairs*, October 1, 2014.
- "Congressional Committees and Subcommittees." *Congressmerge.com*. Accessed January 29, 2015. http://www.congressmerge.com/onlinedb/cgi-bin/committee_list.cgi?site=congressmerge.
- "Defense: Money to Congress." *Opensecrets.org*. Accessed February 19, 2015. <http://www.opensecrets.org/industries/summary.php?ind=D&cycle=All&recipdetail=A&sortorder=U>.
- "DOD Contracts Daily Oversight." *U.S. Department of Defense*, October 1, 2014. <http://www.defense.gov/contracts/>.

- “Education and Training.” *US Department of Veteran Affairs*. Accessed September 8, 2014.
http://www.benefits.va.gov/gibill/post911_gibill.asp.
- “Federal Acquisition Regulation.Pdf.” *Federal Acquisition Regulation*, March 1, 2005, 1–1889.
- “Florida Defense Contractors - \$147,947,519,764 in Government Contracts by 12,996 Contractors in 67 FL Counties.” *Governmentcontractswon.com*. Accessed February 23, 2015.
http://www.governmentcontractswon.com/department/defense/florida_counties.asp.
- “HAMDAN v. RUMSFELD .” *Cornell University Law School*, July 2006.
<http://www.law.cornell.edu/supct/html/05-184.ZO.html>.
- “Iron Triangles.” *University of Pittsburg*. Accessed February 18, 2015.
<http://www.pitt.edu/~mitnick/MESM10/IrontrianglesrevEncyBusEthics.pdf>.
- “Ohio Defense Contractors - \$75,075,628,336 in Government Contracts by 7,387 Contractors in 89 OH Counties.” *Governmentcontractswon.com*. Accessed February 23, 2015.
http://www.governmentcontractswon.com/department/defense/ohio_counties.asp.
- “Private Security Companies (PSCs).” *Office of the Deputy Assistant Secretary of Defense*, October 13, 2014.
- “Rep. John L. Mica: Campaign Finance/Money - Industries - Representative Career.” *Opensecrets.org*. Accessed February 19, 2015.
<https://www.opensecrets.org/politicians/industries.php?cycle=Career&type=I&cid=N00002793&newMem=N&recs=20>.
- “Rep. Michael R. Turner: Campaign Finance/Money - Industries - Representative Career.” *Opensecrets.org*. Accessed February 19, 2015.
<https://www.opensecrets.org/politicians/industries.php?cycle=Career&type=I&cid=N00025175&newMem=N&recs=20>.
- “Rep. Tom Davis: Campaign Finance/Money - Industries - Representative 2002.” *Opensecrets.org*. Accessed February 19, 2015.
<https://www.opensecrets.org/politicians/industries.php?cycle=2002&type=I&cid=N00002045&newMem=N&recs=20>.
- “Richard B Cheney.” *Millercenter.org*. Accessed February 4, 2015.
<http://millercenter.org/president/gwbush/essays/vicepresident/1825>.
- “Sen. John W. Warner: Campaign Finance/Money - Industries - Senator 2000.” *Opensecrets.org*. Accessed February 19, 2015.
<http://www.opensecrets.org/politicians/industries.php?cycle=2000&type=I&cid=N00002061&newMem=N&recs=20>.
- “Sen. John W. Warner: Campaign Finance/Money - Industries - Senator 2004.” *Opensecrets.org*. Accessed February 19, 2015.
<http://www.opensecrets.org/politicians/industries.php?cycle=2004&type=I&cid=N00002061&newMem=N&recs=20>.
- “Sen. Patrick Leahy: Campaign Finance/Money - Industries - Senator Career.” *Opensecrets.org*, 2015.
<http://www.opensecrets.org/politicians/industries.php?cycle=Career&type=I&cid=n00009918&newMem=N&recs=20>.
- “The Lend-Lease Act of 1941 .” Accessed October 28, 2014.
<http://history.house.gov/Historical-Highlights/1901-1950/The-Lend-Lease-Act-of-1941/>.
- “The PSC Mission.” Accessed January 29, 2015.
http://www.pscouncil.org/i/a/The_PSC_Mission/c/a/The_PSC_Mission/About_PSC.aspx?hkey=d138b175-d0a3-4f0e-9234-b6e3d11027b5.
- “The Rhetoric of 9/11: Bullhorn Address at Ground Zero (9-14-01).” *Americanrhetoric.com*, November 12, 2014.

<http://www.americanrhetoric.com/speeches/gwbush911groundzerobullhorn.htm>.
“U.S. Relations with Afghanistan.” *State.Gov*, September 31, 2014.
<http://www.state.gov/r/pa/ei/bgn/5380.htm>.
“UN Resolution NR054793 Mercenary Act,” New York, January 15, 2001. [http://daccess-
dds-
ny.un.org/doc/RESOLUTION/GEN/NR0/547/93/IMG/NR054793.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/547/93/IMG/NR054793.pdf?OpenElement).
“VETS -- General Frequently Asked Questions.” *United States Department of Labour*.
Accessed September 8, 2014. <http://www.dol.gov/vets/generalfaq.htm>.
“Virginia Defense Contractors - \$521,087,334,175 in Government Contracts by 15,214
Contractors in 134 VA Counties.” *Governmentcontractswon.com*. Accessed February 23,
2015.
http://www.governmentcontractswon.com/department/defense/virginia_counties.asp.