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The Future of Competitive Sourcing

*BATTLEFIELD CONTRACTORS: FACING THE TOUGH ISSUES

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I. INTRODUCTION

The battlefield of the twenty-first century bears little resemblance to the battlefields of our forefathers. While freedom and democracy still survive because of the brave and selfless sacrifices made by our military forces, private
civilian contractors now also make essential contributions to our battlefields. Civilian contractors now fuel and maintain our aircraft, support our weapon systems, and feed our troops. [FN1] The military relies on the contributions of these civilian contractors and they have become an integral spoke in the defense wheel.

Defense Secretary William Cohen's infamous statement “[w]e can keep the tooth, but cut the tail” [FN2] prefaced modern military's unprecedented reliance on civilian contractors. Secretary Cohen sought to streamline the military infrastructure by keeping the “shooters” and reducing the “supporters.” [FN3] That effort continues today, as civilian companies perform an ever-growing portion of tasks originally performed by uniformed personnel. As a practical matter, as the technological complexity increases, the need for nonshooting technical support also increases.

The military has contracted with civilian companies for hundreds of years. [FN4] Originally, contractors provided primarily supplies and transportation. During the last two decades, however, the United States military has come to rely on civilian contractors for various types of logistical and operational support. Civilian contractors increasingly perform tasks such as laundry, food, billeting, transportation and trash removal in deployed locations.

The military also relies heavily on civilian contractors to develop, maintain, and operate new technology. [FN5] This technology includes complex weapons, communications, and intelligence systems. As many of these systems rely*372 heavily on contractor support, the contractor support must accompany the system when it deploys.

In response to the increased contractor presence on the battlefield, the Department of Defense (DoD) is currently drafting comprehensive guidance. As a result of the recent military activity in Iraq, the need for such guidance has become increasingly apparent. A June 2003 General Accounting Office (GAO) report on battlefield contractors highlighted several areas requiring significant improvement. [FN6] The GAO noted DoD's increased reliance on contractors for essential services and the need for DoD to address the legal and operational issues associated with battlefield contractors. The GAO cited lack of planning and inconsistent policy as major areas of concern.

II. OVERVIEW

This Article explores some major legal and operational issues raised by the integration of contractors into the battlefield. [FN7] Commanders in all the services must be prepared for the various operational issues that may arise in the field. The best approach is through the issuance of DoD guidance that addresses the tough issues and provides the military departments with uniform guidance. By restructuring its acquisition planning, updating its regulations, and increasing contractor accountability, DoD will be well prepared to face the battlefields of the future.

DoD policy also should be updated to thoroughly address the international law implications of contractor support. DoD policy currently holds that contractors are neither combatants nor noncombatants and are entitled to prisoner-of-war treatment. Commanders and contractors would benefit tremendously from clarification of these concepts, as well as criteria to assist in implementation. Clear guidance would avoid the potential of contractors taking a direct part in hostilities and acting more like combatants than civilians.

This Article will not address all the legal and operational issues raised by battlefield contractors. A variety of issues, beyond the scope of this Article, also must be resolved. Examples include the status of contractors under host nation law, contractors' potential negligence liability under foreign law, and the adequacy of health and death benefits available to deployed contractor employees.

This Article begins by briefly describing the history of civilian contractors on the battlefield. This history illustrates how current contractor use differs from historical uses. This change in usage generates complex legal and operational*373 issues. Next, the Article examines the factors behind DoD's increased reliance on civilian contractors. These factors illustrate how contractors have become essential to the military's success in battle.

The Article then describes the contractor's role in military operations worldwide. After describing several current operations, this Article discusses the types of contractors currently utilized in military operations. It is important to
understand the differences between the types of contractors, as each type carries its own set of legal and operational concerns.

The next section addresses two major operational issues raised by the increased reliance on civilian contractors. First, the Article explores the command-and-control issues raised by the field commander's lack of direct control over contractors and their employees. The Article then proposes methods for protecting command and control. Second, the Article addresses the challenge of ensuring the continuation of essential services during hostilities. As the military cannot force contractors to remain in a hostile environment, increased reliance on contractors could raise operational issues. The section concludes with recommendations for ensuring the continuation of essential services.

Finally, this Article examines contractor status under international law. Status dictates whether an individual is a legitimate target for attack and what rights will be afforded upon capture. This Article explains and explores the law of armed conflict under the Geneva Conventions and other applicable treaties. Under international law, contractors may be legitimate targets for attack depending on the nature of their tasks and their proximity to military targets. Likewise, some contract tasks may place contractor employees at risk of being declared unlawful combatants. As unlawful combatants, contractor employees are ineligible for prisoner-of-war status and may face war crime prosecution. Commanders and Contracting Officers who authorize contractors to participate directly in hostilities against enemy forces also may face international consequences. This section concludes by recommending that comprehensive guidance be issued to clarify the proper use of battlefield contractors and their limitations. This may require coordination with the international community and a fresh look at the types of tasks appropriate for contractors.

A. Historical Perspective

Since the earliest documented wars, civilians have provided support to troops in battle. The United States was no exception. As early as the Revolutionary War, contract teamsters provided support to General George Washington’s army, [FN8] feeding the cavalry horses, [FN9] and hauling supplies. [FN10].

*374 Civilian contractors heavily supported the military during World War II and Vietnam. Roughly 1,200 contractor employees were performing construction services on Wake Island when the Japanese attacked. [FN11] During the Vietnam War, the North Vietnam government used civilians to transport supplies and repair lines of communication. [FN12] The United States also utilized contractors in Vietnam, with almost 9,000 civilian contractors located in the country. [FN13] These contractors, among other things, operated electrical plants, performed aircraft maintenance, and supported complex equipment. [FN14].

In the Gulf War, roughly 5,200 contractors supported 500,000 troops, a ratio of 1 to 100. [FN15] Contractor support increased significantly in the Balkans, where contractor employees outnumbered military personnel. Twelve thousand contractor employees supported 9,000 troops. [FN16] Civilian contractors absorbed 10 percent of the $13.8 billion spent in the Balkans from 1995 to 2000. [FN17] Increased reliance over the years is attributed to several important factors.

B. Factors Contributing to Increased Reliance

Several pervasive trends led to the military's increased reliance on civilian contractors. First, military downsizing in the 1990s reduced the active duty force by 30 percent. [FN18] At the same time, military involvement in peacekeeping and humanitarian missions steadily increased. Second, the Federal Government sought to make itself “smaller” by outsourcing inherently nongovernmental functions to private industry. [FN19] The Secretary of Defense encouraged the military departments to use contractors to free up military personnel for combat duties. Third, DoD encouraged the procurement of complex defense systems under contracts requiring ongoing contractor support throughout the systems’ lifecycles.

1. Military Downsizing

In the early 1990s, DoD significantly downsized the military departments by reducing their infrastructures, overall budgets, and military and civilian *375 workforces. [FN20] By 1995, the active duty and reserve components were reduced by 25 percent, cutting a total of 861,000 personnel. [FN21] Currently, the active duty
While the military downsized, the number of missions increased. During the past decade, the United States military participated in humanitarian, peacekeeping, and military operations in the Balkans, Colombia, Panama, Afghanistan, and Iraq. Likewise, continuing threats in Iraq, Afghanistan, and North Korea increase the need for U.S. military support.

In the wake of the events of September 11, 2001, the Air Force sought to add 7,000 troops to its force. Secretary Donald Rumsfeld instructed the Air Force to find the needed bodies within its existing force. Secretary Rumsfeld further suggested the Air Force remove military personnel from tasks that could be outsourced to contractors. In July 2003, Secretary Rumsfeld stated that there are “something in the neighborhood of 300,000 men and women in uniform doing jobs that aren't for men and women in uniform.” The military departments recognized that, by using contractors whenever possible, they could devote military personnel to severely undermanned career fields.

Military departments also utilize contractors in foreign venues operating under so-called force caps. Either Congress or the host nation may limit the number of American forces allowed in the region. The military must then streamline its forces by outsourcing noncombat functions to civilian contractors, who may not count against the cap. One such example is the State Department's counter-drug program in Colombia, where Congress limited *376 troops to 500. Under a State Department-funded contract, DynCorp supports the Colombia program with 355 personnel.

2. Outsourcing

Beginning in the mid-1950s, federal government policy required its agencies to procure all commercial goods and services from the private sector, except when “not in the public interest.” The policy was codified in OMB Circular A-76, which required agencies to procure all “noninherently-governmental” goods and services from the private sector.

In 1998, the enactment of the Federal Activities Inventory Reform (FAIR) Act forced agencies to comply with OMB Circular A-76. The FAIR Act required agencies to identify government positions that were not “inherently governmental.” If utilizing the private sector proved more economical and efficient, outsourcing was required.

Positions held by military personnel were not immune. The FAIR Act applied to the military departments and required inventories to include all military personnel performing commercial activities. With few exceptions, commercial activities on the FAIR Act Inventory such as supply, logistics, and engineering were subject to outsourcing.

Current DoD policy requires the military departments to utilize commercial support whenever appropriate. Throughout DoD, contractors perform tasks such as aircraft maintenance, base operations, and base supply. As military operations move predominantly overseas, contractors move as well.

Although inherently governmental functions are not subject to outsourcing, that concept may be slowly eroding. Inherently governmental functions are “so intimately related to the public interest as to mandate performance by government personnel.” Under previous versions of OMB Circular A-76, those functions were described as “requir[ing] either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government.”

The 2003 Circular revision replaced that language with “requir[ing] the exercise of substantial discretion in applying government authority and/or in making decisions for the government.” Some argue that the addition of the word “substantial” and the removal of the reference to “value judgments” narrowed the definition of inherently governmental.
3. Increase in Cradle to Grave Contracting

The heightened use of commercial technology also contributed to the increased contractor presence on the battlefield. [FN42] DoD policy encourages the military departments to secure long-term support for major defense systems. [FN43] The more technologically advanced the defense system, the more likely a contractor is responsible for long-term support. The number of defense systems using “smart-weapons” capabilities increased dramatically after the Gulf War. Smart-weapons capabilities exist on 70 to 80 percent of today's weapons, up from 30 percent during the Gulf War. [FN44]

While the military always depended on the commercial sector for technology development, it only recently came to rely on it for long-term support. Historically, the private sector would research and develop technology and then relinquish it to the military. The contractor was still responsible for warranty repairs, but its obligations under the contract were essentially relieved.

In contrast, most current weapons system contracts extend far beyond technology development. Contractors increasingly are responsible for maintenance,*378 operation, and modernization. They are now involved from development to disposal. Contractors may be required to be present during the weapon system's operation, either on a military installation or a battlefield. Many experts believe the military could not function without these contractors. [FN45]

The military continues to increase its reliance on technology. For the 2003 fiscal year, DoD received $127 billion for the research, development, and procurement of weapon systems. [FN46] Funding will increase dramatically over the next six years, with $182 billion projected for 2009. [FN47] With such increases, reliance on contractor support on the battlefield will continue to expand.

C. The Current Role of Contractors in Military Operations

1. Current Applications

Contractors currently support military operations throughout the world. Contractors provide support to the peacekeeping efforts in the Balkans, the counter-drug operations in Colombia, and the operations in Iraq. Contractors also guard and protect Afghan President Hamid Karazi. [FN48]

The recent war in Iraq has highlighted the increased presence of battlefield contractors. During the war build-up, the media publicized the strong presence of contractors in the Middle East. [FN49] Contractors sent thousands of technical experts to “operate communications systems, repair helicopters, fix weapons systems and link the computers with the troops to command centers.” [FN50] Some experts estimated there would be one contractor for every ten troops. [FN51]

In May 2003, there were 8,700 contractor employees deployed to the Middle*379 East in support of Operation Iraqi Freedom. [FN52] DynCorp had 1,000 workers providing aircraft maintenance in Kuwait and security in Qatar. [FN53] Under a ten-year, $550 million contract with Kuwait, Combat Support Systems maintained weapons and vehicles, charted exercises, and managed firing ranges at Camp Doha. [FN54] In addition, Anteon Corporation operated camps in Afghanistan and Kuwait to train troops for military operations on urban terrain. [FN55] The tasks performed by contractors are diverse, and several different types of contractors are utilized in the field.

2. Types of Contractor Support

DoD utilizes three types of battlefield contractors: theater support contractors, external theater support contractors, and system support contractors. [FN56] All three contractor types carry out at least part of their responsibilities in the theater of operation. The nature of the tasks performed leads to various legal and operational issues.

a) Theater Support Contractors

Theater support contractors generally provide the goods, services, and minor construction needed to meet the
immediate needs of arriving troops. [FN57] Generally, this requires contracting with local vendors. These tasks, while often taking place in the battlefield, do not contribute directly to war fighting. Consequently, the legal issues facing these contractors are limited to issues of protection, support, command and control, and criminal jurisdiction.

b) External Theater Support Contractors

External theater support contractors provide both combat support and combat service support. Support is often provided pursuant to contracts established by a contracting headquarters located outside of the theater of operation. [FN58] As needs arise in a deployed location, these preestablished contracts*380 are tapped to provide a wide variety of support functions such as construction, transportation, mortuary, and food services. [FN59]

(1) Army's Logistics Civil Augmentation Program

The most visible external support contract is the Army's Logistics Civil Augmentation Program (LOGCAP). [FN60] LOGCAP is used to preplan for civilian augmentation of military operations. LOGCAP is an indefinite-delivery-indefinite-quantity (IDIQ) contract under which the Army can issue orders for supplies and services. [FN61] LOGCAP was the first IDIQ contract for global logistics support. [FN62]

This umbrella contract allows the Army to immediately contract for support and services for contingencies around the world. [FN63] The contractor must be prepared to provide “facilities, supplies, services, maintenance, and transportation.” [FN64] In December 2001, Brown & Root Services, now Halliburton KBR, received the latest LOGCAP contract, providing worldwide combat support for the next ten years. [FN65]

LOGCAP is a cost-plus-award-fee contract. As a cost-reimbursement contract, LOGCAP pays the contractor for all allowable incurred costs. [FN66] Cost-reimbursement contracts allow for the flexibility needed during uncertain times. Contingency contracting is often the most demanding and complex *381 type of contracting because it normally involves mission-essential supplies and services under exigent circumstances. As the costs of contingencies can rarely be accurately estimated, the cost-reimbursement contract reduces the contractor's risk and ensures continued performance under adverse conditions. [FN67]

LOGCAP is also an incentive-type contract. The contractor receives additional profit if certain performance targets are achieved. [FN68] Under a cost-plus-award-fee (CPAF) contract, the contractor's fee is tied directly to performance and cost control. [FN69] Thus, the LOGCAP contract is structured to motivate the contractor to perform well and control costs.

(2) Air Force Civil Augmentation Program

The Air Force Civil Augmentation Program (AFCAP) is similar to LOGCAP. [FN70] The Air Force places orders on this contract for support during military contingencies. [FN71] Like LOGCAP, it is a cost-plus-award-fee contract. During the last six years, tasks conducted under the AFCAP contract include building refugee camps in Kosovo, designing electrical engineering at Ali Al Saleem Air Base in Kuwait, and upgrading airfields in Ecuador to support counter-drug operations. [FN72]

c) System Support Contractors

System support contractors provide the most direct, and perhaps the most controversial, logistical support on the battlefield. These contractors maintain and oftentimes operate defense systems throughout their lifecycle. [FN73] Defense systems include vehicles, weapons systems, command-and-control infrastructures, communications, and aircraft. [FN74] In some instances, the contractor is involved only during the initial fielding of the system. This type of support is known as interim contracted support (ICS). [FN75] Contractor logistic support *382 (CLS), on the other hand, involves long-term support. [FN76] CLS requires the contractor to work directly on the battlefield, often alongside troops in battle. System support contractors face the most legal issues, as their tasks may be closely associated with hostilities.

In terms of international law, each type of contractor raises its own unique issues. In terms of operational considerations, however, all battlefield contractors raise similar potential concerns.
III. OPERATIONAL CONSIDERATIONS

One concern is that battlefield contractors may adversely affect military operations. Although battlefield contractors were successful in past military operations, many operational issues remain unresolved. Two of these issues will be discussed at length below. First, a field commander's operational control is hindered by his lack of direct authority over the contractor and its employees. [FN77] Second, military operations may be jeopardized if contractors are unable or unwilling to provide essential services in hostile situations. [FN78]

A. Command and Control

Command and control is fundamental to military operations. Command and control is the ability to dictate the movements and actions of personnel and equipment. In a pure military environment, control is attained through the chain of command and the control of military supplies and equipment. Command and control may potentially suffer when the equipment and personnel belong to a contractor.

1. Control over the Contract

a) Limited Control

Field commanders exert no direct control over contractors. Battlefield contractors are present because of a contractual relationship. The contract's terms and conditions govern the responsibilities and relationships of the parties. As such, contract authority rests with the Contracting Officer, not the commander.

The Contracting Officer is the only designated authority for awarding and administering the contract. [FN79] Although the Contracting Officer can delegate *383 some authority, he generally retains the authority to modify the contract's terms and conditions. [FN80] Under current procurement regulations, field commanders are not authorized to direct the actions of the contractor and must work all issues through the Contracting Officer. [FN81]

Commanders are unaccustomed to this lack of control. Commanders rely on their ability to control all personnel and equipment in the theater of operation. This control allows them the flexibility to adapt to changing conditions. Although military operations can be planned, well-prepared plans are still subject to rapid and tremendous change. Unfortunately, commanders may lose flexibility when tied to the strict terms of a contract.

The area of logistics provides a powerful example of the dilemma created by the field commander's lack of control. Logistics involves the strategic planning, moving, and maintenance of military forces and, as stated in joint military doctrine, “is the foundation of combat power.” [FN82] Current Army policy states that a combatant commander has directive authority over the logistics within his command. [FN83] Logistical planning is most successful when the commander is able to “direct logistic actions and resources necessary to meet mission and operational taskings assigned to the command.” [FN84] Direct control is essential.

In the past, commanders had unfettered control over military forces performing logistics. As contingencies arose, commanders could change the nature and manner of the tasks performed. If military forces normally utilized for food service were needed for force protection, the commander could make that change with a simple order. With contractor personnel and equipment, the commander no longer exercises direct control over the logistics of the military operation.

The commander must coordinate all logistical changes through the Contracting Officer. Unfortunately, the Contracting Officer is generally not located at the deployed location. [FN85] It is common for Contracting Officers to be located at a headquarters office in the United States, yet be responsible for administering several different contracts worldwide. Contracting Officers often appoint a representative to oversee daily operations in the field. [FN86] The representative's utility, however, is limited in that he does not possess the same *384 level of authority as the Contracting Officer. The representative's authority rarely includes the right to change the contract's terms and conditions.

Some Army guidance specifically prohibits Contracting Officer representatives from “making any commitments
or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract.” [FN87] This prohibition prevents the representative from resolving all contract issues in the field. Instead, the Contracting Officer's representative may only act as a liaison between the commander and the Contracting Officer. [FN88]

As such, commanders must work battle plan changes through the contracting process. The Army's handbook on obtaining and using contractors states that the Contracting Officer's primary focus should be on “requesting and/or receiving the support services dictated by the needs of the combatant commander's plan.” [FN89] Unfortunately, the actual process involved in implementing a commander's battle plan is much more complex.

Several steps must occur before a contract's terms and conditions are changed. First, the Contracting Officer's representative must forward the issue to the Contracting Officer, a person far removed from the hostile environment and detached from the exigency of the circumstances. [FN90] The Contracting Officer's representative must then convince the Contracting Officer of the change's necessity. [FN91] The Contracting Officer is responsible for the funding implications of the new commitment and may hesitate to agree. [FN92] In a true armed conflict setting, the Contracting Officer is unlikely to second-guess the commander. In a less hostile environment, however, the Contracting Officer may disagree with the commander, thereby substituting his concerns about fiscal and legal constraints with the commander's concerns about accomplishing the mission. [FN93]

b) Commanders Suffer from Limited Knowledge

Commanders are often unaware of the complexity of the process until situations arise in the field. The commander may assume he has authority to direct changes and consequently do so without the Contracting Officer's knowledge. The commander will be concerned with the mission, not the fiscal law constraints. Contractors will then likely comply with any changes ordered by the commander. If the change is within the general scope of the contract, the contractor can request an equitable adjustment for the additional costs. [FN94] The Contracting Officer must then decide whether to ratify the commander's actions and assume the additional cost.

Contractors face incredible financial risk when they act based on a commander's direction. Commanders have no authority to bind the Government, regardless of the circumstances. In City of El Centro v. United States, [FN95] the U.S. Court of Appeals for the Federal Circuit reiterated the firm rule that the Government is not bound by the actions of unauthorized agents. [FN96] In El Centro, the El Centro Community Hospital sued the Government for costs associated with treating illegal aliens brought to the hospital by border patrol agents. When a hospital worker asked one of the agents who would pay for the treatment, the agent stated, “me and you” [sic]. [FN97] The hospital argued an implied-in-fact-contract existed between the hospital and the Government.

The court denied the hospital's claim finding the agent lacked authority to bind the Government. [FN98] The court noted that the Government could not be held liable for every action taken by its three million civilian employees. [FN99] Instead, the Government is bound only by the actions of specifically authorized agents.

Unwary contractors face this harsh result. They may assume that because the direction comes from a commander in the battlefield, it transcends traditional rules of authority. The Federal Circuit, however, made clear that contractors bear the risk when they fail to ascertain the bounds of an agent's authority. [FN100] Consequently, battlefield contractors acting on command direction also assume the risk that they may not receive payment for actions outside the contract's terms.

Another concern arises when commanders underestimate the government's control over a given contract. In a 2000 report on the Balkans, the GAO found most government officials did not understand their role in the Balkans Support Contract. [FN101] The Balkans Support Contract was a performance-based, cost-reimbursable contract wherein the results were defined, but the contractor decided how to complete the task. [FN102]

The GAO found that both Army and DoD officials in the field believed they had little control over the contractor's actions because of the contract's performance-based nature. [FN103] In reality, the contract allowed the Government to dictate the details in situations where they felt it was necessary. The GAO cited lack of understanding as a major factor in the Government's inability to adequately control contract costs. [FN104]

These situations illustrate the need for comprehensive training, especially of commanders in the field. While commanders may be familiar with fixed-price contracts, few have experience with cost-reimbursement types. The
commander may wrongly assume the contract is fixed-price, or may know it is cost-reimbursable but not understand how it operates. In the Balkans, one commander was shocked to learn the Army was responsible for the additional costs generated by changing the location of newly constructed buildings. The commander mistakenly believed the contract was fixed-price and assumed the contractor would bear the cost of changes. Contracting Officers in those situations must then scramble to find additional funds, often at the expense of other projects.

\[\text{FN105}\]

Contracting Officers

\(\text{c) Proposed Solutions}\)

(1) Education and Training

Commanders would benefit tremendously from training that is focused on the basics of government contracting. Detailed training is not required, but commanders must be familiar with contracts operating in their theater of operation. Training should include a working knowledge of the rules of administration, as well as familiarity with contract types.

Unfortunately, current training schemes have not been enough. In 1997, the GAO found commanders in Bosnia were not adequately trained to use the relevant support contract. Three years later, the GAO found lack of training remained a continuing problem. In June 2003, the GAO again suggested DoD develop training courses for commanders deploying to locations with contractor support.

The military departments would benefit tremendously from training its deploying commanders in government contracting. This training should not be integrated into general courses covering a variety of topics. Instead, the training should be stand-alone, so as to emphasize its importance. Instructors knowledgeable in the intricacies of contingency contracting should provide the training. The most effective instructors are those with deployment experience.

The training should provide a general overview of contract administration. The roles and limitations of the Contracting Officer and his representatives should be explained. Commanders must learn their role in the contracting process and the limits on their authority. Commanders also should learn about contracts operating in the deployed location. The training should familiarize commanders with the contract type, the contractor’s basic obligations, and the process used to make changes.

Military departments also should consider providing commanders with quick-reference contract guides. Although legal support is available in the field, many commanders seek it out only after problems arise. Costly mistakes may be avoided by arming commanders with immediate access to basic concepts.

(2) Statement of Agency Needs

In addition to training, commanders should play a role in acquisition planning and contract development. Fewer changes in the field are required if the contract is constructed with operational considerations in mind.

DoD policy currently does not require the combatant element to participate in defining contract requirements. DoD guidance only requires the acquisition planners and operational personnel to “maintain continuous and effective communication.” Part Eleven of the Federal Acquisition Regulation (FAR), which establishes procedures for defining contract requirements, does not require the inclusion of the combatant element. Likewise, the Defense Supplement to the Federal Acquisition Regulation (DFARS) contains no requirement.

The Air Force Supplement to the Federal Acquisition Regulation (AFFARS) is the only agency guidance requiring the combatant element to actively participate in the process. The teams responsible for establishing performance requirements must “include the warrior.” Commanders provide the team with a representative familiar with the operational environment and the mission plan. DoD should adopt and mandate this approach, as it has proven successful for the Air Force.

DoD also should mandate that all system contracts be written with deployment in mind. Too often, contract planning does not anticipate that the system will deploy to the battlefield. Upon deployment, both the
contractor *388 and the Government must struggle to sort out the issues. [FN114] With the current level of deployments, it is safe to assume that all systems will eventually deploy. Contractors and the military will be well-served to write all performance requirements with deployment in mind.

(3) Integration

Finally, commanders need immediate access to contracting personnel authorized to make changes. Authority should not vest in a person far removed from the area of operation. While the incorporation of the Contracting Officer's representative into daily operations is a first step, it may not be enough.

One option is to deploy a Contracting Officer to the area of operation. The Contracting Officer is then involved in the mission and appreciates the necessity of requested changes. Unfortunately, continuous cuts to the contracting workforce make such a situation impossible. [FN115] From 1991 to 2001, the federal acquisition workforce decreased by 22 percent. [FN116] DoD's acquisition workforce experienced the greatest overall decline. [FN117] Consequently, there are currently not enough Contracting Officers available to deploy to every location. In addition, Contracting Officers often administer several contracts operating in different locations.

Another option is to provide Contracting Officers with operational training. A Contracting Officer who understands operational considerations may respond quicker to a commander's needs. Contracting Officers would benefit from participation in military exercises. A Contracting Officer who has experienced operational situations first-hand will be more apt to meet commanders' operational needs in the field. [FN118]

2. Control over Contractor Employees

a) Limits of Command Control

Command control also is limited by the combatant commander's lack of direct control over contractor employees. While federal government civilians *389 are required to follow military orders, contractor employees are accountable only to their employer. [FN119] Army guidance “expects” contract employees to comply with commander-issued guidance and obey all general orders. Contractor employees, however, are not parties to the contract and have no privity with the military. Thus, the military lacks any authority over their actions.

Commanders are surprised by their lack of control over contractor employees. An After-Action Report from peacekeeping efforts in the Balkans stated, “the relationship of [contractor employees] to the disciplinary and administrative apparatus of the force often left commanders scratching their heads.” [FN120] Commanders wanted to control the behavior and movement of these civilians, but were unable to do so.

Commanders cannot assume contractors will control their employees. Contractors only exercise financial, not disciplinary, control over their employees. In the Balkans, Brown & Root employees refused to work during the holiday season. Even after Brown & Root offered pay incentives, the employees were unwilling to work. [FN121] Brown & Root could not force the contractor employees to work, thereby illustrating the limitations of disciplinary control rooted in contractual obligations.

Commanders also lack the ability to identify and track contractor employees. Despite Army requirements that contractor employees be administratively assigned to specific units, commanders rarely can state how many contractors are in the theater of operation. The U.S. Central Command, which was in charge of the operation in Iraq, could not state how many contractors or their employees were in the Persian Gulf Region. [FN122]

In its 2002 review, the Defense Acquisition Excellence Council (DAEC) noted that improvement was needed to “gain[] visibility as to the number of noncombatants in an area of operation.” [FN123] DAEC noted that while the military and government civilian employees were tracked by name, the contractor was generally responsible for accounting for its personnel. [FN124]

*390 Commanders are operationally disadvantaged when they lack knowledge about the number and locations of contractor employees. Force protection and evacuation plans are designed according to the number of personnel
affected. Without specific knowledge of the contract employees, commanders may underestimate the military importance of these tasks.

Army guidance suggests that commanders use their “indirect” control over the employees. [FN125] Indirect control is attained by attaching the employees to specific military units and incorporating the commander's orders into employer/employee agreements. [FN126] Air Force guidance suggests that commanders use available administrative actions. [FN127]

Indirect control and administrative actions, however, may not be enough. In Haiti, the commander extended General Order 1 to include contractor employees. [FN128] The order prohibited gambling, possessing privately owned firearms, consuming alcohol, eating in local Haitian restaurants, and engaging in sexual relations with members of the Haitian populace. Contractor employees who violated the order could only be punished by denying them access to the post exchange, barring them from the installation, denying them medical care, or having them removed from the area of operations. [FN129]

Administrative actions have limited utility. In a hostile environment, a commander would not risk contractor employees' safety by forcing them off the installation. Likewise, a commander would be reluctant to deny medical care. As contractor employees generally do not receive routine medical care at military treatment facilities, the punishment would only affect emergency situations. [FN130] It is unlikely a United States citizen, voluntarily located in a dangerous environment, would be denied emergency medical care.

Army and Air Force guidance suggest that commanders punish contractor employees by limiting the offender's access to facilities and revoking “any special status [he] has as an individual accompanying the force.” [FN131] This status, however, is crucial to the international treatment of contractor employees and will unlikely be revoked. [FN132] The Contracting Officer also may direct the contractor to remove and replace the employee, but only if specifically provided for in the contract. [FN133]

Commanders also have limited control over criminal actions. Contractor employees are subject to criminal action only for major offenses. With the recent passage of the Military Extraterritorial Jurisdiction Act, contractors can be prosecuted in the United States for offenses occurring while deployed. [FN134] Persons accompanying the armed forces can be charged, but only if the offense would be a felony in the United States. [FN135] Unfortunately, this law does little to help commanders enforce orders and directions, as such failures would not constitute felonies under U.S. law.

c) Proposed Solutions

(1) Increase Contractor Accountability

Contractors are in the best position to control their employees. As such, they should be accountable for their employees' actions. If contractors suffer financial losses when employees violate command orders, they are more apt to ensure compliance.

First, contractors must be liable for increased costs resulting from an employee's failure to follow command orders. The military must notify the contractor that deductive changes will be taken for additional costs created by employee misconduct. In addition, contractors must be liable for costs associated with replacing belligerent employees. This would include transportation costs, as well as all additional costs resulting from the temporary loss of that employee.

Second, employee control should be considered when evaluating a contractor's contract performance. Award fee plans should include employee control as an evaluation factor. [FN136] At the end of an evaluation period, the Government would judge the contractor based on incidents involving its employees. Significant employee issues could cost the contractor a substantial financial loss.

Employee control also could be an evaluation factor for past performance *392 evaluations. With few exceptions, all source selections for negotiated competitive acquisitions over $100,000 must consider an offeror's
past performance. [FN137] As a result, an offeror with a poor history of employee control would not be competitive.

Tying employee control to profit would prompt contractors to be proactive in ensuring employee control. Contractors would be more selective in choosing which employees to deploy. In addition, employer/employee contracts would likely be more comprehensive, with financial penalties for disobedience.

(2) Update DFARS Clauses

DoD should revise the DFARS by including clauses covering contractor employee issues. By addressing the issues within the terms of the contract, liability will be contractually placed with the contractor. While commanders will still lack direct control, the likelihood decreases that situations will arise in the first place.

First, the DFARS should require comprehensive employee/employer contracts. Employees must face financial loss when they fail to follow command orders. The mere loss of employment may not be enough incentive. As such, comprehensive employee/employer contracts can offer lucrative bonuses and damaging penalties.

Second, the DFARS should place contractors on notice of their financial liability for employees' actions. The Army currently uses the following clause, which would make an effective model:

The contractor shall ensure that all contractor employees will comply with all guidance, instructions, and general orders applicable to U.S. Armed Forces and DoD civilians .... The Contractor shall comply, and shall ensure that all deployed employees and agents comply, with pertinent Department of Army and Department of Defense directives, policies, and procedures, as well as federal statutes, judicial interpretations and international agreements .... [FN138] The clause should be modified to include references to employer/employee contracts. References to award fee plans and past performance evaluations also should be mentioned where appropriate.

Third, the DFARS should encourage Contracting Officers to consider employee control as an evaluation factor in award fee plans. It also should suggest that agencies seek this type of information when conducting past performance evaluations. Agencies seeking contract support for a deployment requirement would be keenly interested in the contractor's ability to control its employees.

Finally, the DFARS should require accurate reporting of contractor employees in the theater of operation. Commanders must know the exact number of contractor employees in order to adequately provide force protection. *393 These numbers are also crucial in preparing for certain contingencies, including evacuation. A new DFARS clause could require monthly reporting, which would force the parties to create an efficient, accurate system for providing the information to the commander.

B. Continuation of Essential Services

DoD views civilian contractors as essential force-multipliers. [FN139] Contractors augment military support, bridge gaps in support that occur prior to the arrival of military personnel, and replace some functions outright. [FN140] Under the current “tooth to tail” philosophy, all tasks not requiring military expertise may be outsourced to contractors.

As a result, contractors currently provide essential services to military operations. While contractors are capable of providing the essential services, their use raises important concerns. First, the military may lose the in-house ability to maintain and operate its defense systems. Second, the military departments cannot ensure continuation of essential services should the contractor be unwilling or unable to complete the contract.

1. Limitations on the Use of Contractors

Contractors may provide any service that is not inherently governmental. [FN141] Federal law also prohibits the military departments from outsourcing “core logistics capabilities.” [FN142] Core logistics capabilities are defined as “those capabilities that are necessary to maintain and repair the weapon systems and other military equipment.” [FN143]
To remain effective on the battlefield, the military must maintain this core capability. Concerns arise, however, as contractors continue to take over the maintenance and support of sophisticated defense systems. In addition, fewer military members are trained on their use. Because of the need to assure continuation of essential services, commanders and acquisition planners should formulate alternative plans and take proactive steps to ensure contractors remain on the battlefield.

2. Current Reliance on Contractors

As stated earlier, increased reliance on contractors raises important concerns about military readiness. Army policy is that “contractors do not permanently replace force structure and the Army retains the military capabilities necessary to perform critical battlefield support functions.” Similarly, Air Force policy is to “integrate commercial participation in the Total Force while preserving our core Air Force competencies.”

Experts worry, however, that the military has become too reliant. The Apache helicopter and Paladin artillery are almost completely reliant on contractors for operational and maintenance support. In addition, the Patriot Missile, M1A1 tank, Hunter unmanned aerial vehicle, JSTARS targeting system, and the Spitfire radio rely heavily on contractor support. These defense systems may be rendered nonoperational if support were interrupted or ceased. Contractors even acknowledge the vital role they play. One CEO stated, “because we're so involved, it's difficult to extricate us from the process.”

During the Persian Gulf War, a small number of contractors fearful of chemical weapon attacks fled from an air base in Saudi Arabia. While the contractor's departure did not disrupt the operation, it highlighted potential weaknesses. The contractor decided that financial gain was simply not worth the risk. This highlights the major difference between military personnel and contractors: one is present to serve his country, the other to make a profit.

Contractors refute that such a scenario is possible. Pointing to the voluntary nature of the assignments and the strong presence of retired military employees, contractors deny that such an exodus would occur. One contractor contends that its employees “have as much pride in their country as someone on active duty.”

Recent incidents in Iraq, however, seem to indicate otherwise. Logistical support suffered when contractors refused to deploy to dangerous areas of Iraq. According to Lieutenant General Charles S. Mahan Jr., the Army's senior logistics officer, “we thought we could depend on industry to perform these kinds of functions ... [but it got] harder and harder to get [them] to go in harm's way.” In the dangerous areas of Iraq it was not uncommon for the soldiers to go without showers, toilets, and fresh food for months.

Senior officials have increasingly begun to take note of potential problems. In a June 2002 Memorandum, Claude M. Bolton Jr., the Assistant Secretary of the Army, stated that program managers should “strive to develop systems that do not require the routine assignment of contractor support personnel in the ground maneuver area forward of the Division Rear.” Assistant Secretary Bolton recognized that using contractors in the field increased operational costs and caused complicated legal issues.

The Army now requires programs using contractors in these areas to undergo more rigorous reviews and procedures. Additionally, the systems must require less on-site maintenance by using remote diagnostics, modular “plug and play” components, and software designed to “automatically compensate for detrimental, environmental and operational conditions.” The Army hopes these steps will reduce heavy reliance on contractor support.

DoD must be fully prepared for the loss of essential contractor services and should take steps to ensure that military personnel retain core logistics skills. DoD also should ensure that the military departments implement the DoD requirements on the continuation of essential services.

3. The Loss of Military Proficiency

In a 2002 report, the GAO noted several problems with current weapon system support. The GAO
noted DoD's substantial reliance on contractor support for new systems and upgrades of old ones. [FN162] The GAO found that officials in Army and Navy major commands were concerned about their ability to “develop and maintain critical technical skills and knowledge.” [FN163] Commanders also expressed concern that expanded use of contractors could “create a shortage of adequately trained soldiers and sailors needed to maintain weapons systems during a conflict.” [FN164] The GAO concluded that DoD needed to further address these concerns.

The increased contractor support of weapon systems reduces the knowledge and skill levels of military personnel expected to utilize the weapons in combat. Commanders commonly replace military logistics personnel with contractor employees because the military personnel are desperately needed to complete other tasks. [FN165] As a result, military personnel do not always receive the on-the-job training necessary to maintain logistics skills. [FN166]

Military members trained to use the equipment are often difficult to keep. Contractors and military members often work together and build strong relationships. Contractors then discover the best and brightest military members and lure them away with better pay and incentives. [FN167] Unfortunately, the loss of skilled military members only increases the military's reliance on contract support.

4. Threat to the Continuation of Essential Services

DoD policy requires the military departments to develop plans and procedures for the continuation of essential services. [FN168] These plans prevent interruption of essential services during crisis situations. Each military department must create a plan with the contractor providing “reasonable assurance” that essential services will continue. Commanders must prepare contingency plans if they have “reasonable doubt[s]” that the contractor would continue to provide essential services in a crisis situation. [FN169]

If doubt exists, the commander has three options. First, the commander can transfer the services to military, DoD civilian, or host-nation personnel. [FN170] Second, the commander can prepare a contingency plan to obtain the services from an alternative source. [FN171] Third, the commander can accept the risk caused by the loss or disruption of essential services. [FN172]

In 1988, the DoD Inspector General (DoD IG) recommended that military departments identify tasks and services requiring performance by military personnel. [FN173] The DoD IG termed these services “war-stopper services.” [FN174] These were services that absolutely must continue during hostilities. The DoD IG recognized the importance of the continuation of services during hostilities and that the stoppage of such services could cause irreparable harm to the war effort.

In a follow-up audit conducted several years later, the DoD IG found the military departments had failed to identify these essential services. [FN175] It again recommended military departments identify “war-stopper services that should be performed exclusively by military personnel.” [FN176]

In that same report, the DoD IG concluded that the military departments “could not ensure that emergency-essential services performed by contractors would continue during a crisis or hostile situation.” [FN177] Loss of critical contractor support of complex weapons systems and military equipment “would have a degrading effect on the Armed Forces' capabilities in a protracted war effort.” [FN178] The report cited the lack of contingency planning and the failure to protect contractor employees conducting essential tasks. [FN179]

In 2001, the Air Force issued policy regarding the DoD IG's concerns. The policy required that “uniformed capability to provide essential services ... be maintained in the event the operational environment precludes the use of contractors.” [FN180] In designating services as “essential,” commanders were encouraged to limit those designations to “those truly indispensable to the accomplishment of the unit's operational mission.” [FN181] The Air Force also required that “uniformed military augmentation” be available whenever contractors are unable to provide essential services. [FN182]

In a 2003 report, the GAO found this policy was not being implemented. The report found that, DoD, in general,
had not identified the essential services or developed alternate plans. [FN183] Commanders simply assumed that things would work themselves out in a crisis situation. The failure to identify essential services heightens the possibility that military members will remain untrained and adequate backup plans will remain unwritten. The GAO concluded that none of the military departments were conducting the annual review to identify essential services provided by contractors. [FN184] The report also found only one written backup plan for the continuation of mission-essential maintenance. [FN185] It involved the maintenance of the Air Force's C21J executive aircraft. Under the plan, the Air Force proposed using Air Force personnel to perform the maintenance in the contractor's absence. The Air Force, however, had no military personnel trained to perform the maintenance. [FN186].

5. Options to Ensure Continuation

As noted by the GAO, the first step is to identify essential services. Once the services are identified, military departments can create adequate backup plans. Contracts must identify all essential services and Contracting Officers must notify commanders which services are essential.

Next, military departments should train military personnel to provide the essential services. Each contract should require the contractor to train military personnel on the operation and support of complex defense systems. While costly, this requirement is necessary to ensure essential services continue without interruption. This training would guarantee that military departments maintain core logistics skills, as required by federal statute. [FN187]

The Government also should take steps to bolster contractor reliability. Some suggest contractors will be more reliable when there is a unity of purpose. By integrating contractors into peacetime operations and military exercises, contractor employees and military personnel will build a sense of trust and shared objective. [FN188] The proponents of this theory suggest such integration could result in greater predictability in contractor performance in crisis situations. [FN189] It does not, however, solve the legal issues on the question of profit motive versus contract certainty.

Contract documents must place contractors and their employees on notice of the risks. Contracts should contain clauses requiring the contractor to acknowledge inherent risks. [FN190] The Army theorizes that if contractors are adequately informed of the risk, are prepared for the risk, and are adequately compensated for taking the risk, they will “more likely than not” remain on the job. [FN191] Army guidance offers the option of, in high-risk situations, contractually requiring contractors to hire personnel with military obligations, such as reservists and retirees. [FN192] The Army would bring the employees onto active duty to ensure continuation of services.

Finally, continued performance must tie directly to financial gain. Consequently, DoD should require liquidation clauses where appropriate. Although liquidation clauses cannot serve as punishment, they are effective motivators. Award fee plans and past-performance evaluations also can consider the contractors' ability to continue services under hostile situations. [FN193] Army contract guidance suggests that Contracting Officers “encourage” contractors to structure their pay incentives so that a higher bonus is paid upon completion of a hazardous tour of duty. [FN194] During competition, the Government should notify contractors of the dangers involved with contract performance. Contractors must then decide whether they want to assume the risk of potential hostilities. In most instances, contractors will be highly compensated for remaining during hostilities.

In conclusion, DoD must address the significant operational issues raised by battlefield contractors. Otherwise, the loss of military readiness may jeopardize military operations and place human lives at risk. The issues are complex and require substantial input from all military departments.

V. CONCLUSION

Battlefield contractors play a critical role in today's military operations. They can be essential force-multipliers and can free up military personnel for combat-duties. The role of the contractor in today's military will not diminish.
in the near future. In fact, its role will likely expand. Thus, we must face the tough issues.

The operational and international issues generated by battlefield contractors must be proactively addressed. The military departments should operate under uniform guidance that is consistent with international law. Steps must be taken to preserve command and control, as well as ensure the continuation of essential services and military proficiency. Procedures and policies must also be created to ensure that contract tasks do not place civilian contractors in positions where they violate international law.

As discussed throughout this article, many avenues exist whereby these goals can be attained. The United States must act quickly and these must be discussed within DoD, the military departments, and the international community. Only through complete resolution of these tough issues can the task of integrating contractor civilians into the battlefield be a true success.

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[FN1]. See discussion infra Part II.C.2.

[FN2]. Arnold L. Punaro, Options for the New Administration “Keep the Tooth--Cut the Tail,” Presentation to the National Defense University “QDR Symposium” (Nov. 8, 2000), available at http://www.ndu.edu/inss/symposia/jointops00/punaro1_files/frame.htm#slide0009.htm. Secretary Cohen first stated the philosophy in 1997:

We can sustain the shooters and reduce the supporters--we can keep the tooth, but cut the tail. Right now there is too much fat in the tail. Our infrastructure is still too large for our force structure today. We still do too many things in-house that we can do better and cheaper through outsourcing. Across the board, we've got to streamline, downsize and buy more off the shelf. We need to cut the fat from defense not just to save money but also to make the Department every bit as flexible and responsive as the troops we support.

Id. Throughout military history “the teeth” described the front line, while “the tail” described the support behind it. Laurie Goering, Support Convoys Face Perilous Trek to Front, CHI. TRIB., Mar. 25, 2003, at 1.

[FN3]. Punaro, supra note 2. The current administration supports the tooth-to-tail philosophy. In 2001, Defense Secretary Donald Rumsfeld challenged the military to “wage an all-out campaign to shift the Pentagon's resources from bureaucracy to battlefield, from tail to tooth.” In the White House and Around Town, WHITE HOUSE BULL., Sept. 10, 2001.

[FN4]. The history of civilian contractors is discussed infra Part II.A.

[FN5]. See discussion infra Part II.C.2.c.

[FN6]. See GENERAL ACCOUNTING OFFICE, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DoD PLANS, REP. NO. GAO-03-695 (2003) [hereinafter GAO-03-695]. The details of this report will be discussed throughout this Article.

[FN7]. This Article will focus primarily on the Department of the Army and the Department of the Air Force, as these two services utilize contractors on or around the battlefield with much greater frequency than the other services.


[FN14]. Id.

[FN15]. Cahlink I, *supra* note 9, at 43.

[FN16]. Id.

[FN17]. Id. at 44.


[FN19]. From fiscal year 2000 to fiscal year 2002, the Department of Defense concluded 570 public-private competitions covering 56,000 jobs, with private contractors winning more than 50 percent of the competitions. Seventy-six more competitions were scheduled to conclude in 2003, with over 15,000 jobs affected. *Public-Private Competitions Have Saved DoD $5 Billion Since FY 2000, Official Says*, DEF. DAILY, Mar. 27, 2003, at 2. According to studies by the General Accounting Office and the Center for Naval Analysis, the competitions result in an average 30 percent savings, regardless of who wins the competition. Id.


[FN23]. George A. Cahlink, *Send in the Contractors*, A.F. MAG. 68, 69 (Jan. 2003), available at http://www.afm.org/magazine/Jan2003/0103contract.html [hereinafter Cahlink II]. After September 11, 2001, all of the military departments made similar requests for increased strength, which were all denied. Id.

[FN24]. Id.


[FN26]. One could argue that this philosophy is inconsistent with the theory that contractors be used only on an “as-needed basis” to augment the troops. As commanders become desperate for bodies, they may outsource jobs that are truly essential. See discussion *infra* Part III.B.3.

[FN27]. DoD and Army policy encourage contractor use to supplement forces operating under force limits. “When
military force caps are imposed on an operation, contractor support can give the commander the flexibility of increasing his combat power by substituting combat units for military support units.” ARMY FIELD MANUAL NO. 100-21, CONTRACTORS ON THE BATTLEFIELD 1-1 (2000) [hereinafter FM 100-21]. “Using civilian contractors is particularly effective when a military ceiling is placed on the size of a deployed force.” DEPARTMENT OF DEFENSE, JOINT PUBLICATION 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS, at vi (Apr. 6, 2000) [hereinafter JP 4-0].


[FN29]. Id.

[FN30]. William A. Roberts III et al., A-76 Cost Comparisons: Overcoming the "Undue Built-In Bias Favoring In-House Performance of Services" 30 PUB. CONT. L.J. 585, 588 (2001). This article contains an excellent discussion of the cost comparison process under the pre-May 2003 rules.

[FN31]. Id. The Bureau of the Budget, an arm of the executive branch, was responsible for issuing the Circular. In 1970, the Office of Management and Budget (OMB) overtook the Bureau's responsibilities. Id. The Circular was first issued in 1966 and was revised several times, most recently in 2003. See OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter OMB A-76], available at http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf.


[FN33]. Agencies were required to identify all federal employee positions, except those considered “inherently governmental.” Agency heads were responsible for determining which positions were “inherently governmental.” FAIR Act, 64 Fed. Reg. 33,927, 33,927 (June 24, 1999). For a detailed discussion of the FAIR Act's impact on the military departments, see Davidson, supra note 11, at 256-58.

[FN34]. 64 Fed. Reg. at 33,934.

[FN35]. The FAIR Act exempts the following military positions: those essential to maintaining required military skills, those positions for which an overseas rotation might be required, and those functions involving skills necessary for career progression. 64 Fed. Reg. at 33,931.


[FN41]. Whether the “inherently governmental” definition has been narrowed or merely clarified is currently the subject of litigation. The National Treasury Employees Union is challenging the validity of the new definition, alleging it violates the statutory definition in the FAIR Act. Jason Peckenpaugh, Union Sues Bush Administration over New Job Competition Rules, GOV'T EXEC., June 19, 2003.

[FN42]. Kenneth Bredemeier, Thousands of Private Contractors Support U.S. Forces in Persian Gulf, WASH.


[FN45]. See Bredemeier, supra note 42, at E10. Peter Singer believes the military is too reliant on private contractors for support. He cites the military's substantial reliance on contractors for logistics support and the maintenance of critical weapons, such as the B-2 stealth bomber, attack helicopters, and drone reconnaissance aircraft. Id.


[FN47]. Id. The total investment in weapon systems from now through 2009 will exceed $1 trillion. Some projected programs include the Missile Defense Agency's land, sea, air, and space defense systems; the Army's Future Combat System; and the Air Force and Navy's Joint Strike Fighter. Id.


[FN50]. Bredemeier, supra note 42. Lockheed Martin also provided support to weapons and computer systems in the region. Id.

[FN51]. Cahlink II, supra note 23, at 69.


[FN53]. Bredemeier, supra note 42.

[FN54]. Tamayo, supra note 28. The contractor has roughly 550 employees positioned at Camp Doha. Id.

[FN55]. Wait, supra note 44.

[FN56]. JP 4-0, supra note 27, at V-1.

[FN57]. Id. at V-2. In the Army, this type of support is provided either through prearranged contracts or through contracts awarded from the mission area and is most often associated with “contingency contracting.” FM 100-21,
supra note 27, at 1-3.

[FN58]. JP 4-0, supra note 27, at V-1. For additional support, the Army also utilizes contracts by the U.S. Transportation Command (TRANSCOM) for commercial sealift support and the U.S. Army Corps of Engineers for the lease and procurement of real property. FM 100-21, supra note 27, at 1-3.

[FN59]. The services also include building roads, airfields, dredging, billeting, prison facilities, utilities, and decontamination. See JP 4-0, supra note 27, at V-2.

[FN60]. See generally DEPT OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (1985). The LOGCAP program was established in 1985 and was first used in Southwest Asia in 1988. Peter J. Higgins, Civilian Augmentation of Joint Operations, ARMY LOGISTICIAN 14 (Jan./Feb. 2003). Under the original LOGCAP contract, the Army could task Brown & Root with “receiving, housing and sustaining 20,000 troops in five base camps for 180 days.” At each base camp, Brown & Root was responsible for “billeting, mess halls, food preparation, potable water, sanitation, showers, laundry, transportation, utilities and other logistical support.” CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 135 n.448 (1995) [hereinafter HAITI REPORT], available at https://www.jagnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/59e4fca88b999c6785256a1c006f1f03/$FILE/Haiti%20LL.PDF.

[FN61]. IDIQ contracts are governed by FAR 16.5. Under an IDIQ contract, the Government places orders for individual requirements. The Government must buy the stated minimum quantity, but has no obligation to buy all its requirements from the contract. See FAR 16.504. For a discussion of IDIQ contracts, see Karen DaPonte Thornton, Fine Tuning Acquisition Reform’s Favorite Procurement Vehicle, the Indefinite Delivery Contract, 31 PUB. CONT. L.J. 383 (2002).

[FN62]. Cahlink I, supra note 9, at 44. Brown & Root earned $62 million in Somalia for the building and maintenance of Army facilities. In Haiti in 1994, Brown & Root earned $133 million for providing support to 18,000 troops. Id. During its support of the peacekeeping efforts in the former Yugoslavia, Brown & Root employed as many as 20,000 contractors. Id.

[FN63]. Higgins, supra note 60, at 14.

[FN64]. Id.

[FN65]. Id. Recently, the LOGCAP contract was used as a “bridge” contract in Iraq until competition could be held. Brown & Root received five task orders, totaling $76.8 million, to address issues surrounding the Iraqi oil infrastructure. FACT SHEET, DoD MISSION FOR REPAIR AND CONTINUITY OF OPERATIONS OF THE IRAQI OIL INFRASTRUCTURE (May 6, 2003), available at http://www.acq.osd.mil/dpap/docs/fact%20sheet%20CCC20as%20CCC20of%20CCC2006%20may%2003.doc.

[FN66]. Cost reimbursement contracts contain an estimated total cost and a cost ceiling that cannot be exceed without the Contracting Officer's approval. FAR 16.301-1.

[FN67]. Under the FAR, cost reimbursement contracts can only be utilized when costs cannot be estimated with sufficient accuracy. FAR 16.301-2.

[FN68]. The FAR allows incentive contracts when firm-fixed-price contracts are not appropriate, and performance can be improved by relating the amount of fee to the quality of performance. See FAR 16.401.
[FN69] CPAF contracts provide for a base fee and then an additional award based on performance. FAR 16.305. The government evaluates performance based on set criteria, and then makes a unilateral decision as to the award amount. FAR 16.405-2.

[FN70] The Air Force awarded the first AFCAP contract to RMS in 1997. The five-year contract generated $170 million in goods and services. Cahlink II, supra note 23, at 70. A new eight-year contract was awarded to RMS in 2001 with an estimated value of $450 million. Id. The Navy also utilizes contractor support through the use of its Construction Civil Augmentation Program (CONCAP). See JP 4-0, supra note 27, at V-2.

[FN71] Higgins, supra note 60, at 15.


[FN73] See JP 4-0, supra note 27, at V-1.

[FN74] Fortner, supra note 8, at 12, 14. In the Army, these systems include the command-and-control infrastructure, Army Battle Command Systems (ABCS), as well as the standard Army management information systems (STAMIS) and communications systems. FM 100-21, supra note 27, at 1-3.

[FN75] FM 100-21, supra note 27, at 1-3.

[FN76] Id.

[FN77] See discussion infra Part III.A.

[FN78] See discussion infra Part III.B.


[FN80] Contracting Officer's representatives lack authority to sign contracts or modifications. JOHN CIBINIC JR. & RALPH C. NASH JR., FORMATION OF GOVERNMENT CONTRACTS 90 (3d ed. 1998) (citing Essen Mall Properties v. United States, 21 Cl. Ct. 430 (1990)).


[FN82] JP 4-0, supra note 27, at ix. A nation's ability to be successful in battle is tied directly to that nation's "capacity to plan for, gain access to, and deliver forces and materiel to the required points of application across the range of military operations." Id. at I-1.

[FN83] Id. at vi.

[FN84] Id. at II-5.

[FN85] Id. at V-2.

[FN86] Contracting Officer's representatives are often unit personnel who already possess "functional area oversight responsibilities." FM 100-21, supra note 27, at 1-8. This preexisting knowledge of the function and the unit provides a solid foundation upon which to act as a liaison between the unit in the field and the Contracting Officer.
[FN87]. ARMY MATERIEL COMMAND, PAMPHLET NO. 715-18, AMC CONTRACTOR DEPLOYMENT GUIDE FOR CONTRACTING OFFICERS 42-3 (2000) [hereinafter AMC PAMPHLET].

[FN88]. Army policy requires that the COR have “direct communications to the contracting officer.” DEPT OF THE ARMY, REGULATION NO. 715-9, CONTRACTORS ACCOMPANYING THE FORCE 10 (1999) [hereinafter AR 715-9].

[FN89]. Id. at 14.

[FN90]. See discussion supra Part II.C.2.b.

[FN91]. The Contracting Officer also must determine whether the change is within the “general scope of the contract.” See FAR 52.243-2.

[FN92]. This is especially true in light of the GAO’s recent criticism of overspending in the Balkans. See generally GENERAL ACCOUNTING OFFICE, REP. NO. GAO/NSIAD-00-225, ARMY SHOULD DO MORE TO CONTROL CONTRACT COSTS IN THE BALKANS 21 (2000) [hereinafter GAO/NSIAD-00-225].


[FN94]. See FAR 52.243-2.

[FN95]. 922 F.2d 816 (Fed. Cir. 1990).

[FN96]. Id. at 820.

[FN97]. Id. at 818.

[FN98]. Id. at 820.

[FN99]. Id.

[FN100]. Id. (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947)).

[FN101]. GAO/NSIAD-00-225, supra note 92, at 21.

[FN102]. Performance-based contracting is defined as “structuring all aspects of an acquisition around the purpose of the work to be performed with the contract requirements set forth, in clear, specific, and objective terms with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.” FAR 2.102.
[FN103]. GAO/NSIAD-00-225, supra note 92, at 22.

[FN104]. Id. at 21.

[FN105]. Interview with Col. (Ret.) Harry L. Dorsey, National Defense University, Ft. McNair, in Washington, D.C. (June 3, 2003). Colonel Dorsey served as one of the primary legal advisors for the Army during Operation Joint Endeavor in Hungary.

[FN106]. GAO/NSIAD-00-225, supra note 92, at 24.

[FN107]. Id.

[FN108]. GAO-03-695, supra note 6, at 38. The GAO suggested DoD create a Web-based training course that would include information on the role of the Contracting Officer and also on the commander's role in the contracting process. While DoD agreed training was necessary, it preferred to evaluate alternative training methods, rather than exclusively relying on Web-based training. Id. at 49.

[FN109]. See discussion supra Part III.A.1.a.


[FN111]. See “Describing Agency Needs,” FAR pt. 11. These requirements are generally contained in a Statement of Work (SOW).

[FN112]. AFFARS 5311.02.

[FN113]. The GAO found many system support contracts lacked deployment language, either because the parties did not anticipate deployment or because the product was still in the development stage. See GAO-03-695, supra note 6, at 26.

[FN114]. When the recent war in Iraq began, attorneys at Lockheed Martin looked to the contract terms for answers to deployment issues. The contracts all had different provisions and various levels of specificity. As no continuity existed among the various contracts, the attorneys struggled to find the applicable rules. Telephone Interview with Richard Bruning, Roxane MacGillivray, Dennis Colby & Mike Gillett, Lockheed Martin General Counsel Staff (July 8, 2003) [hereinafter Lockheed Martin Interview].


[FN117]. Id. at 21.

[FN118]. Based on their experiences in Iraq, Lockheed Martin attorneys suggest appointing the line officer in charge to be the Contracting Officer's representative. Lockheed Martin Interview, supra note 114.

[FN119]. Federal government employees are not accountable directly to the chain of command, but are subject to the “chain of supervision.” In the Air Force, federal government employees are subject to disciplinary actions up to and including separation from federal services. See generally DEPT OF THE AIR FORCE, INSTRUCTION 36-
HAITI REPORT, supra note 60, at 143. The Army committed more than $96 million to Brown & Root during its support in Haiti. During that time, Brown & Root was “electrifying 23 buildings, installing perimeter lighting and security fencing, constructing base camps, and providing base camp operations, laundry operations, food service operations, maintenance operations, transportation services, and main supply route maintenance.” Id. at 136 n.453.

CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998; LESSONS LEARNED FOR JUDGE ADVOCATES 150 (1998) [hereinafter BALKANS REPORT], available at http://www.derechomilitar.info/monog/lecciones%20aprendidas%CC%81de%20bosnia.pdf. The problem did dissipate over time, but illustrates nonetheless that contract employees cannot be forced to work.

Bredemeier, supra note 42.


AMC PAMPHLET, supra note 87, at 4-1. An exception exists when contractor employees are working “forward,” such as weapon system maintainers. The Army directly tracks these individuals because of the obvious effect on military operations. Id. at 4-2. The AMC pamphlet suggests including clauses that allow the Contracting Officer to require the contractor to report the name and location of employees leaving and entering the area of operation. Id.

Id. at 3-2.

Id.


HAITI REPORT, supra note 60, at 143.

Id. While B&R responded quickly to situations by removing employees and replacing them, some of the subcontractors declined to take such action. Id. at 144.

AMC PAMPHLET, supra note 87, at 17-3. Army personnel may only provide medical care to deployed contract personnel as a “last resort” when nonmilitary care is not available. Id. at 17-4.

Id. at 3-2; AIR FORCE GUIDE, supra note 127, at 431.

See discussion infra Part V.

AMC PAMPHLET, supra note 87, at 3-2. The Contracting Officer can direct the removal of any employee “whose conduct endangers persons or property or whose continued employment is inconsistent with the interest of military security or adversely affects relations with the host nation.” Id.


18 U.S.C. § 3261(a) (2000). For a detailed discussion of the Military Extraterritorial Jurisdiction Act, see

[FN136]. See FAR 16.405-2. The FAR suggests areas to be evaluated under award fee plans, but this list is not exclusive. Agencies retain control to fashion award fee plans to effectively motivate the contractor.

[FN137]. FAR 15.304(c)(3). Past performance need not be evaluated if the Contracting Officer determines that it is not an appropriate evaluation factor for that contract.

[FN138]. AMC PAMPHLET, supra note 87, at 3-4.

[FN139]. DoD policy requires the military departments to consider the use of contract resources when assessing mission requirements. The military departments are instructed to use the “most effective mix of the Total Force,” which includes “Active, Reserve, civilian, host-nation, and contract resources ...” DoD, INSTRUCTION 3020.37, CONTINUATION OF ESSENTIAL DoD CONTRACTOR SERVICES DURING CRISES ¶ 4.1 (Nov. 6, 1990, with changes to Jan. 26, 1996) [hereinafter DODI 3020.37].

[FN140]. FM 100-21, supra note 27, at 1-1. The Army views the contractor presence as essential because it “permits the combatant commander to have sufficient support in the theater, while strengthening the joint force’s fighting capability.”

[FN141]. See discussion supra Part III.


[FN144]. 10 U.S.C. § 2464(a)(1) states:

It is essential for the national defense that the Department of Defense maintain a core logistics capability that is Government-owned and Government-operated ... to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements.

[FN145]. See discussion infra Part III.B.3.

[FN146]. See discussion infra Part III.B.4. See also GAO-03-695, supra note 6.

[FN147]. FM 100-21, supra note 27, at 1-8. This policy implements the DoD requirement to develop and implement plans to ensure that essential services will continue even if the contractor is unable or unwilling to perform. Id. See DODI 3020.37, supra note 139, ¶ 4.4.


[FN150]. Id.

[FN151]. Schwartz, supra note 49, at 102. The CEO, from DynCorp, believes that although the military could probably fight without them, it would be extremely difficult. DynCorp, a major defense contractor, saw an 18
percent rise in its revenues in 2002 to $2.3 billion. *Id.*

[FN152]. Bredemeier, *supra* note 42. This occurrence was the only documented instance of contractor refusal to perform during the Gulf War.


[FN155]. *Id.* (quoting the Executive Vice President of Man Tech International).

[FN156]. *Outsourcing War*, BUS. WK., Sept. 15, 2003. Mahan also stated that $8 million in contracts for troop housing in Iraq sat idle while the contractors refused to perform. Mahan stated, “Our ability to move (away) from living in the mud is based on an expectation that we would have been able to go to more contractor logistical support early on.” David Wood, *Some of Army’s Civilian Contractors Are No-Shows in Iraq*, NEWHOUSE NEWS SERVICE, July 31, 2003.

[FN157]. *Id.* The soldiers also suffered from poor mail service and other logistical areas supported by contractors.

[FN158]. Memorandum from Claude M. Bolton Jr., the Assistant Secretary of the Army, to SAAL-PS, Contractor Support Restrictions (June 11, 2002) (on file with author) [hereinafter Bolton Memo].

[FN159]. *Id.* “Units that depend on contractor personnel for system support and maintenance must allocate precious resources to ensure their security and subsistence, in accordance with Field Manual 3-100.21, Contractors on Battlefield.” *Id.*

[FN160]. *Id.*


[FN162]. *Id.* at 13.

[FN163]. *Id.*

[FN164]. *Id.* The GAO warned that by failing to address this issue, DoD “risk[s] having insufficient numbers of trained personnel when and where they are needed.” *Id.*

[FN165]. *Id.*

[FN166]. One could argue that this result is contrary to the requirement that military personnel retain those positions needed to maintain proficiency. See note 37 and accompanying text. The reliance on contractor support increases the chance that a contractor must operate the equipment during hostilities. As discussed in Part IV of this Article, contractors who operate weapons systems are arguably engaging in hostilities under international law.

[FN167]. GAO-02-306, *supra* note 161, at 13. According to officials at Military Professionals Resources Inc. (MPRI), its employees receive two to three times more pay than military salaries. In addition, they receive benefits such as stock options and 401(k) plans. Wayne, *supra* note 49. When these former military members deploy as civilians, they also may receive a bonus from their employer of up to 50 percent of their salary, Earle Ethridge, *Civilians Put Expertise on the Front Line*, USA TODAY, Dec. 5, 2001, at 8B.
[FN168]. DODI 3020.37, supra note 139, ¶ 4.1. The Instruction applies to all branches of the military and is designed to assign responsibility and prescribe procedures to be used when planning for essential services. Id. An “essential contractor service” is defined as a “service provided by a firm or an individual under contract to the Department of Defense to support vital systems ...” The services are considered essential because “DoD Components may not have military or DoD civilian employees to perform these services immediately ... [or] ... [t]he effectiveness of defense systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately.” Id. ¶ E2.1.3. A “crisis situation” is defined as “any emergency so declared by the National Command Authority (NCA) or the overseas Combatant Commander, whether or not U.S. Armed Forces are involved, minimally encompassing civil unrest or insurrection, civil war, civil disorder, terrorism, hostilities buildup, wartime conditions, disasters, or international conflict presenting a serious threat to DoD interests.” Id. ¶ E2.1.1.

[FN169]. Id. ¶ 4.1. The Services also are required to conduct annual assessments of the effect an unexpected loss of contractor support would have on the mission. These results are then to be used to prepare future contingency plans. Id. ¶ 5.2.3.

[FN170]. Id. ¶ 6.4.1. This course of action would require termination of the existing contract. Most likely, the termination would be viewed as one for the convenience of the Government. Such a termination would prove costly for the Government, as it would be liable for all costs of performance up to the point of termination, as well as a reasonable profit. The Government also may be liable for termination settlement costs.

[FN171]. Id. ¶ 6.4.2. This plan must identify alternate sources, such as other military services, DoD civilians, and other contractors. The Chairman of the Joint Chiefs of Staff is required to establish procedures for combatant commanders to use when reviewing and preparing contingency plans. Id. ¶ 5.3.1.

[FN172]. Id. ¶ 6.4.3. The Instruction requires that someone (it is not clear who bears the responsibility, but we can assume it is the CO) determine, prior to award or modification, whether “an interruption of service would result in an unacceptable risk.” Id. ¶ 6.5. If the risk is determined to be unacceptable, a contingency plan must be devised and the risk cannot be simply assumed by the combatant commander. Id.


[FN174]. Id. at 9. The IG noted that several different commands within the Services had established internal lists of “wartime essential” services. These lists were not consistent in their criteria, and the IG urged more uniform rules and procedures, preferably at the DoD level. Id. at 18.

[FN175]. See generally id.

[FN176]. Id.

[FN177]. Id. at i. The audit was conducted from October 1989 through November 1990 in response to a request from the Army Inspector General. Id.

[FN178]. Id. at 5.

[FN179]. Id. The audit found that of the sixty-seven contracts considered emergency-essential, commanders had contingency plans in place for only seven. Id. at 6.

[FN181]. Id. at 2. The policy relies on the fact that “essential” services will be identified in the contract documents, and these support requirements will then be taken into consideration when formulating the operational plan. Id.

[FN182]. Id. at 2. The policy states, “[a]ny determination regarding commercial support must consider the essential services that must be maintained and the risks associated due to possible contractor nonperformance. In the event contractors are not able to perform their assigned tasks, uniformed military augmentation must be available and integrated into planning.” Id.

[FN183]. GAO-03-695, supra note 6, at 11.

[FN184]. Id. at 15.

[FN185]. Id. at 16.

[FN188]. Ferris & Keithly, supra note 153, at 72. The authors maintain that this integration will “bolster the mutual trust that is needed between the military and its contractors to withstand political or military crises.” Id. Arguing for the need for long-term relationships, the authors point to academic literature supporting the contention that long-term partnerships can “reduce costs and more effectively improve performance than short-term contracts geared to

[FN189]. Id. at 72. “Developing mutual trust in realistic peacetime simulations permits the military and its

[FN191]. AMC PAMPHLET, supra note 87, at 7-2. The level of risk involved drives the action taken by the Army. For low-risk situations, the Army notifies contractors to expect hardships and be prepared for hostile action, often requiring them to acknowledge such disclosures in writing. Id. at 7-2 to 7-3. For moderate to high-risk situations, commanders are encouraged to relocate contractors to lower-risk areas where than can still successfully complete their tasks without degrading mission effectiveness. Id. The commander has the ultimate authority to determine what constitutes a threat and contractor input is only a factor to consider. Id. at 7-3 to 7-4. As such, contractors can face contractual breaches if they pull back without command direction.

[FN192]. Id. at 7-4. The Pamphlet does recognize the dangers associated with such a requirement, such as the loss of their employees to unrelated mobilizations. Id. Proper coordination within mission planning should alleviate some of these concerns, assuming the Army maintains adequate lists of deployed contractors.

[FN193]. See discussion supra Part III.A.2.c.1.

[FN194]. AMC PAMPHLET, supra note 87, at 29-1. The Pamphlet suggests the following contract clause: “To ensure continuation of essential services, the contractor shall structure pay of deployed employees such that half the
compensation is in the form of a bonus for successfully completing the assigned tour. However, the bonus will not be denied because death or because of Government or opposing force action, including government ordered evacuation or captivity by opposing forces.” Id. “In the event the contractor must pay additional compensation above that contemplated under the contract, to retain or obtain personnel to perform in a theater of operations during a declared contingency, the contractor shall be entitled to an equitable adjustment under this contract ....” Id.


[FN198]. Id. Chivalry ended once warfare began to include other classes and types of fighters who did not feel bound by the traditional rules. Id.

[FN199]. Hugo Grotius, one of the fathers of international law, forwarded the notion that “violence, injury that is not necessary for the conduct of war is prohibited; unnecessary suffering, superfluous injury, wanton killing and destruction are forbidden.” Röling, supra note 197, at 141.


[FN201]. RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 21-23 (Precedent Publishing 1995). The Lieber Code's principles were so similar to the military practices of the time that many countries, including Russia, Spain, Great Britain, and France, soon issued similar codes. GREEN, supra note 200, at 20.

[FN202]. The 1864 Convention was comprised of only ten articles; however, these articles served as the foundation for all subsequent treaties and agreements. JEAN S. PICTET, COMMENTARY, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITIONS OF THE WOUNDED AND SICK IN THE ARMED FORCES, INTRO, 14 (1952) [hereinafter “COMMENTARY, GENEVA I”].


[FN204]. COMMENTARY, GENEVA I, supra note 202, at 11.

[FN205]. KALSHOVEN, supra note 203, at 13.


[FN207]. KALSHOVEN, supra note 203, at 15.


[FN215]. Geneva Convention I, supra note 208, art. 2; Geneva Convention II, supra note 209, art. 2; Geneva Convention III, supra note 210, art. 2.

[FN216]. Id.

[FN217]. Id.

[FN218]. Id. art. 3.

[FN219]. Air Force Interim Policy, supra note 148, at 3.

[FN220]. Id. The memo notes that “contractors are seldom included” in status of forces agreements.

[FN221]. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 5810.01A, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM ¶ 5a. (Aug. 27, 1999). DoD ensures compliance with the laws of armed conflict by requiring each military service to implement a program to educate and prevent violations. See DODD 5100.77, supra note 195, ¶ 4.2.


[FN223]. HARTIGAN, supra note 201, at 20.

[FN224]. Clarke, supra note 222, at 107.

[FN225]. In Protocol I “armed forces” is defined to include “organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.” Protocol I, supra note 213, art. 43(2).


[FN227]. Geneva Convention I, supra note 208, art. 13; Geneva Convention II, supra note 209, art. 13; Geneva Convention III, supra note 210, art. 4. These criteria were taken from Article 1 of the Hague Convention on Land Warfare, which states that the “laws, rights, and duties of war apply not only to armies, but also to militia and
volunteer corps fulfilling [these criteria].” Hague Convention, supra note 206, art. 1.

[FN228]. Protocol I, supra note 213, art. 43(2).


[FN232]. See discussion infra Part IV.C.2.

[FN233]. Geneva Convention III, supra note 210, art. 3.


[FN235]. DEPT OF THE ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD ¶ 80 (1999) [hereinafter FM 100-10-2]. The Army's Field Manual states: “ Persons ... who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents ... are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.” Id.

[FN236]. “ Persons in the foregoing categories who have attempted, committed, or conspired to commit hostile or belligerent acts are subject to the extreme penalty of death because of the danger inherent in their conduct.” Id. ¶ 82.


[FN239]. See DETTER, supra note 226, at 146.


[FN241]. JP 4-0, supra note 27, at V-6.

[FN242]. Id. at V-1. See also Geneva Convention III, supra note 210, art. 4.


[FN244]. JP 4-0, supra note 27, at V-1.

[FN245]. Id. The Department of Defense publication governing the issue of ID cards characterizes civilians who accompany the force as “ civilian noncombatant personnel.” DoD, INST. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS ¶ 5.2.1 (1974, changed as of June 5, 1991).

[FN246]. See discussion infra Part IV.C.1.b.
DODI 3020.37, supra note 139, ¶ 5.2.4. Under the Instruction, the Heads of the Components are responsible for “specifically authorizing” appropriate uniforms. Id.

Id. at 28-1. “To ensure proper treatment, contractor employees will be provided with an identity card, most notably the Geneva Conventions Identity Card (DD Form 489).” Id. A DoD/IG report in 1991 criticized DoD for failing to ensure contractors received the necessary ID cards. GAO-02-306, supra note 173, at 8. Subsequently DoD updated DODI 3020.37, which instituted procedures to ensure that the military issued identity cards. See DODI 3020.37, supra note 139. Under Army guidance, contractors are to be issued a Uniform Services Identification Card, which allows access to government facilities and use of facilities, as well as a Geneva Conventions Identity Card for civilians who accompany the armed forces. AMC PAMPHLET, supra note 87, at 16-1. The Uniform Services Identification Card is DD Form 1173. The Geneva Conventions Card is DD Form 489, which “identifies one's status as an authorized contractor employee accompanying the U.S. Armed Forces.” Id.

Memorandum from the Assistant Secretaries of the Army, Policy Memorandum--Contractors on the Battlefield (Dec. 12, 1997); FM 100-21, supra note 27, at 1-6.

MEETING MINUTES, supra note 123.

AMC PAMPHLET, supra note 87, at 18-1.

Id.

Id. at 19-1. The AMC pamphlet states that the issuance of a self-defense weapon “does not change the status of ... contractor personnel under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War

Id. at 4.

Id. As examples, the Air Force cites “protection from bandits or dangerous animals,” but even this use is limited to only those situations where military forces are unable to provide such protection. Id.

Id. The wear of distinctive insignia is an effort in futility, as the contractor employee is likely to be a legitimate target for attack. See discussion infra Part V.C.1.b.

See discussion supra Part II.C.2.c.

Hague Convention, supra note 206, art. 13.


[FN265]. *Id.* at 1-6 (emphasis added).

[FN266]. See discussion *supra* Part II.C.2.


[FN268]. See discussion *infra* Part IV.C.1.b.

[FN269]. See discussion *supra* Part II.C.2.c.

[FN270]. JEAN S. PICTET, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 64 (1960). The Commentary states: “The list given is only by way of indication, however, and the text could therefore cover other categories of persons or services who might be called upon, in similar conditions, to follow the armed forces during any future conflict.” *Id.*


[FN272]. See discussion *infra* Part IV.C.1.b.

[FN273]. See discussion *infra* Part IV.C.1.b.1.

[FN274]. See discussion *infra* Part IV.C.1.b.2.


[FN276]. *Id.*


[FN282]. *Id.*

[FN283]. Area bombing in Germany during the Second World War resulted in the deaths of 593,000 German civilians. DETTER, *supra* note 226, at 282-83. Due to the high cost on civilian lives, area bombing was banned under Protocol I in 1977. *Id.*

[FN284]. Hague Convention, *supra* note 206, art. 27.
[FN285]. Id.

[FN286]. JEAN S. PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, PREAMBLE, 10 (1958).


[FN289]. Id. art. 51(5).

[FN290]. Id. art. 52.

[FN291]. DETTER, supra note 226, at 282-83.


[FN293]. Protocol I, supra note 213, art. 51(3).

[FN294]. Geneva Convention IV, supra note 211, art. 4 (emphasis added).

[FN295]. Protocol I, supra note 213 (emphasis added). While Protocol I specifically addresses the status of journalists in Article 79, it fails to address contractors, or any other civilians accompanying the forces. In the Introductory Note, it states, “Articles 43 and 44 give a new definition of armed forces and combatants.” Id.

[FN296]. Memorandum of Law from the Army Office of the Judge Advocate General (May 6, 1999) (on file with author) [hereinafter Army Memo].


[FN301]. Parks, supra note 12, at 132.

[FN302]. Id.

[FN303]. Id.
[FN304]. Id.

[FN305]. Davidson, supra note 11, at 245.

[FN306]. Guillard, supra note 231, at 134.


[FN308]. Protocol I, supra note 213, art. 51(3).


[FN310]. Id. A spokesman for Vinnel stated she was “not aware that that happened, and our company policy is that they not be directly involved. They're hired as advisors only ... and that's the capacity in which we expect them to act.” Id.


[FN312]. Id. In 1988, former Army Chief of Staff Carl Vuono and seven other retired generals founded MPRI. Since that time, MPRI has provided military training to dozens of countries, including Croatia, Bosnia, Macedonia, and Colombia. While this training often is provided under contracts through the Department of Defense, it also is provided through contracts directly with foreign countries. Id. The Defense Department, however, reserves the right to prevent contracts with unsavory countries by denying the necessary licenses. Id. For example, in 1998 DoD denied MPRI a license to train the Angolan army. Id.

[FN313]. Dart, supra note 300.

[FN314]. FM 100-21, supra note 27, at 1-10. These relationships are often seen by the Army as “necessary and appropriate,” especially in situations where the contractor must be deployed with the unit in order to continue to support a weapon system. Id.

[FN315]. Clarke, supra note 222.


[FN317]. Id. art. 98(2).


[FN319]. Nicholas Kralev, U.S. Halts Military Aid to 35 Countries, WASH. TIMESS, July 2, 2003, at Al. The suspensions included more than $47 million in military aid. Id.


[FN321]. Id. The president stated that, despite this determination, the detainees would receive most of the privileges of the Geneva Convention “as a matter of policy.” Some of the privileges denied to the detainees include “a monthly advance of pay, the ability to have and consult personal financial accounts, [and] the ability to receive

[FN322]. *Id.*

[FN323]. *Id.*

[FN324]. See discussion *supra* Part IV.B.2.a.

[FN325]. See *id.*

[FN326]. Protocol I, *supra* note 213, art. 45(1). Article 45 states, “[a] person who takes part in hostilities and falls into the power of an adviser Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention.” *Id.*

[FN327]. *Id.*

[FN328]. *Id.* art. 45(1). As Article 45 does not elaborate on the meaning of “any doubt,” it must be assumed that either party can raise the concern, and the concern need not be mutual.

[FN329]. Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs, 96 AM. J. INT’L L.* 475, 479 (2002). A spokesperson for the International Committee of the Red Cross, displeased with the U.S. position, stated, “people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise.” *Id.* Richard Goldstone, the former United Nations prosecutor for the UN Tribunals for the former Yugoslavia and Rwanda, stated, “It is a great misfortune that the most powerful nation in the world and the country that likes to be seen by many as the leader of the free world, turns its back on international law and the protection of civil liberties.” *International Judge Praises UN Resolution on Iraq, Warns US, AGENCE FRANCE PRESSE*, Nov. 13, 2002.


[FN332]. *International Judge Praises UN Resolution, supra* note 329.


[FN335]. Gavin Cordon, *Army to Use Private ‘Troops’ as Drivers, THE INDEP.*, Jan. 25, 2001, at 8. The employees received full military training and then were integrated into the Army units. *Id.*

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