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WORKING PAPER

Contractors in American Conflicts: Adapting to a New Reality

By Richard Fontaine and John Nagl



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Cover Image

Mike Dees (left), lot supervisor, Marine Corps Logistics Command (Forward) Retrograde Lot, tells a Marine where he should park his tactical vehicle during a transfer of equipment at the MCLC (Fwd) Retrograde Lot in Camp Al Taqaddum, Iraq, March 2009.

GUNNERY SGT. KATESHA WASHINGTON /U.S. Marine Corps

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I N T R O D U C T I O N

When our nation goes to war, contractors go with it.

Contractors have become an enduring feature of modern American conflicts, and the United States cannot now engage in hostilities or in reconstruction and stabilization operations without them. At their peak, there were more contractors on the ground in Iraq than American troops in uniform¹ and there are more contractors today in Afghanistan than there are U.S. troops on the ground.² Because of changes in business practices, the provision of government service, and the character of modern warfare, contractors in American conflicts are here to stay.

Thus far, an examination of the contracting phenomenon has been limited in two crucial ways. First, the vast majority of media, congressional, and public attention has focused on the activities of private security contractors (PSCs) – those firms, such as Blackwater (now known as Xe Services) which employ armed personnel for protection purposes. Yet while the activities of such PSCs have sometimes led to dramatic turning points in American conflicts (as when the killing of four contractors in Fallujah in 2004 sparked a U.S. offensive into the city, and in 2007 when contract workers allegedly shot Iraqi civilians in Baghdad’s

Nisour Square), these episodes tell just a small part of the bigger story of contracting on the battlefield. PSCs comprise roughly 5 percent of all contractors in hostile environments.³ This working paper addresses the other 95 percent. That 95 percent represents the vast majority of all the tasks carried out by U.S. contractors in theater, and it has been plagued by its own set of problems – including insufficient oversight, inadequate integration into operational planning, and ambiguous legal status. In order for the United States to adapt to the key role that contractors will play in future hostilities, it must establish new policies and rules of the road – not only for “trigger pulling” contractors, but also for the 95 percent that carry out a wide array of other tasks.

The second limitation in the analyses of expeditionary contracting is the narrow focus by Congress, the ongoing Commission on Wartime Contracting, and government watchdog groups on contractors’ waste, fraud, and abuse in Iraq and Afghanistan. While ensuring stewardship of American taxpayer dollars represents a critical aspect of such investigations, other facets of the contracting phenomenon also require careful thought. The extensive use of contracting has deep implications not just for federal expenditures but also for the ways in which the United States accomplishes its mission and its military goals in theater. There are broader strategic foreign policy considerations to bear in mind when considering this issue.

This working paper explores the most salient of these considerations. It does not propose to resolve them. The Center for a New American Security (CNAS) is conducting an ongoing study of the nature of America’s reliance on contractors in conflicts and intends to release a major report – with a series of recommendations for changes in policy, organization, and law – in June 2010.

EXPEDITIONARY, STABILIZATION AND RECONSTRUCTION CONTRACTORS

Given the vast array of functions carried out by the private sector in conflicts, contractors have often been grouped into three broad categories: private security firms employing individuals (often armed) who provide direct military assistance; military consulting firms that provide training, assessment, and analysis; and military support firms that provide logistics, intelligence, and maintenance services.⁴ Observers have offered various terms – including “expeditionary contractors,” “private military companies,” and “contingency contractors” – to describe those involved in this realm. Yet such terms are often either arbitrarily limiting or insufficient to convey the tremendous scope of activities in which contractors are now engaged, including their stabilization and reconstruction roles. For the purposes of this study, we propose a new term: Expeditionary Stabilization and Reconstruction (or ES&R) contractors. This term intends to capture the universe of companies and industries working in support of military expeditionary engagements by providing logistical and many other kinds of support. Stability operations contracting represents the transitional work that contracting industries carry out in order to maintain the stability of a nation-state – usually in support of military engagements. Reconstruction contracting represents the work of private firms in building and rebuilding infrastructure, including physical infrastructure as well as political, social, and economic infrastructure.⁵

ES&R Contracting Over Time

The provision of ES&R-type functions by contractors on the battlefield is not a modern phenomenon; in fact, it predates the adoption of our nation’s constitution. The Continental Army relied on support from various private individuals and firms, including logistical support to George Washington’s troops in the field. During the Civil War, the Union hired the Pinkerton Detective Agency to carry out intelligence functions for the Army of the Potomac,

while the Confederates had supply vendors follow them on the battlefield.

While the use of such contractors in American conflicts goes back over two centuries, the mid- to late 20th century witnessed a significant transition toward modern contracted functional support. Japan and postwar Europe under the Marshall Plan saw some of America’s first and largest reconstruction efforts, the size of which was not reached again until 2003 in Iraq. It was in Vietnam between roughly 1962 and 1975, however, that ES&R contracting was truly born. The U.S. military created a vast demand for physical infrastructure construction during the Vietnam War, and the Army awarded construction contracts to firms such as Raymond International, Morrison-Knudsen, Brown & Root, and J.A. Jones Construction. This billion dollar joint venture was the first of its kind, and involved contractors building everything from roads and bridges to power plants and jet airfields for U.S. military use.⁶ An estimated 80,000 contractors worked in support of American operations in Vietnam.⁷

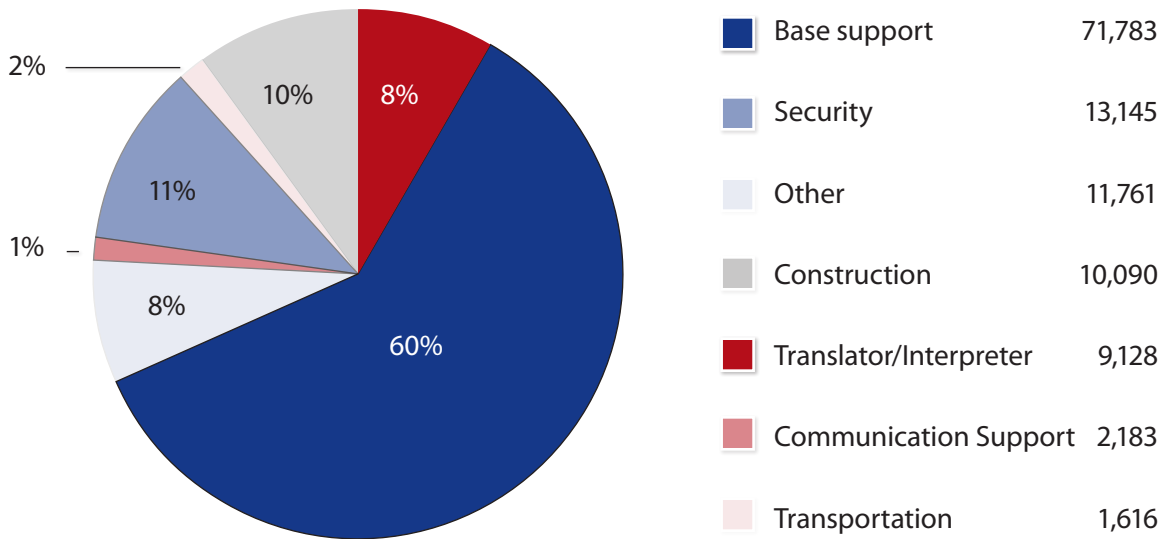
The end of the Vietnam War marked a hiatus in this type of work abroad, due primarily to a lack of extended U.S. contingency operations. Drawing upon lessons learned in Vietnam, however, the Pentagon attempted to streamline the process of expeditionary contracting. The chief result was establishment and implementation of the Army’s Logistics Civil Augmentation Program (LOGCAP) in 1985, a program created to “preplan for the use of civilian contractors to perform selected services in wartime to augment Army forces.”⁸ The first LOGCAP award, valued at an estimated 2 billion dollars, allowed the Army to employ one contractor in support of all of its field operations.

U.S. operations in the Balkans in the 1990s spurred another evolution in the emergence of modern ES&R contracting. The Balkans Support Contract was awarded via an open and competitive process, based on the quality of “[a] management and execution plan, experience, past performance, and cost.”⁹ The contract called for the provision of a huge array of logistics and other services to U.S. forces in the Balkans and remains in force today under a different name. The Balkan experience foreshadowed the enormous use of contractors in future wars – for the first time, the ratio of contractors to military personnel was approximately 1 to 1.¹⁰

The aftermath of the March 2003 invasion of Iraq saw an explosion in the number of contractors employed by the United States on the battlefield, a further increase in the great scope of contracted activities, and a spike in the level of uncertainty and danger facing those contractors operating in the field. The scale of deployment of these contractors, who engaged in activities as diverse as transportation, engineering and construction, maintenance, and base operations, was, as the Congressional Budget Office (CBO) has stated, “unprecedented in U.S. history.”¹¹ By 2007, CBO estimated that at least 190,000 contractors worked in the Iraqi theater on U.S.-funded contracts, pushing the ratio of contractors to members of the U.S. military to approximately 1 to 1.¹² The Department of Defense (DOD) spent upward of 30 billion dollars in FY07 and the first half of FY08 alone on contractors, a figure which excludes additional sums spent on contractors by the Department of State and the U.S. Agency for International Development (USAID).¹³ Today, the scope of functions they provide continues to be well beyond that previously performed in theater, ranging from dining and laundry services to security, logistics, and transportation.¹⁴ As of June 2009, private contractors outnumbered military personnel in Afghanistan and nearly equaled the number of military personnel present in Iraq.¹⁵

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FIGURE 1. IRAQ DOD CONTRACTOR PERSONNEL BY TYPE OF SERVICE PROVIDED (AS OF JUNE 2009)



Source: DOD; US CENTCOM 3rd Quarter Contractor Census Report , June, 2009.

ES&R Contracting at Present – A Snapshot

The rise of large-scale ES&R contracting reflects a more basic shift in the way the U.S. government – and particularly the military – does business. As described in further detail below, the use of contractors has increased across the spectrum of government activities and within the business community – as anyone who has followed the debates over “outsourcing” is aware. The transition to a more service-oriented economy and government has spurred change even in DOD, long thought to be the most hardware-intensive of all government agencies. In FY08, for instance, DOD spent approximately 316 billion dollars on contracted services, or roughly as much as the total amount it spent on weapons systems and equipment.¹⁶ Approximately 60 percent of DOD contractors in Iraq and Afghanistan currently perform logistical functions such as maintenance, dining, and laundry services; 11 percent perform direct tactical assistance; and the remainder carry out other forms of support (see Figure 1).¹⁷

FIGURE 2. DOD CONTRACTOR PERSONNEL IN THE USCENTCOM AREA OF OPERATION

| | Total Contractors | U.S. Citizens | Third Country Nationals | Local/Host Country Nationals |
|-----------------------------|-------------------|---------------|-------------------------|------------------------------|
| Iraq only | 119,706 | 31,541 | 56,125 | 32,040 |
| Afghanistan only | 73,968 | 10,036 | 11,806 | 51,126 |
| Other USCENTCOM locations | 50,061 | 9,381 | 35,053 | 5,627 |
| USCENTCOM area of operation | 243,735 | 50,958 | 102,984 | 89,793 |

Source: DOD; US CENTCOM 3rd Quarter Contractor Census Report, June, 2009.

In addition, and in parallel with the foreign outsourcing phenomenon that has characterized service delivery in parts of the private sector, the U.S. contracting cadre is very much multinational in character. American soldiers, diplomats, and aid workers have become accustomed to being greeted in battlefield dining facilities by Indian servers, dispensing food prepared by Filipinos, on a base guarded by Ugandans and partially constructed by Iraqis. In this sense, then, the United States has achieved with its contractors precisely the kind of multinational coalition effort that has at times eluded it when it comes to actual combat operations. In Iraq today, third country nationals comprise the largest share of U.S. contractor personnel (see Figure 2).

WHY CONTRACTING HAS GROWN – AND WHY IT'S HERE TO STAY

A number of factors have combined to produce this large-scale U.S. reliance on contractors in hostile environments and ensure that they are very likely to remain an enduring feature on the battlefield. The global rise in outsourcing, changes in the nature of warfare, the statutory limit on the overall size of the U.S. Army and Marine Corps, and the probable character of future U.S. engagements all suggest that the rise in contracting is quite likely irreversible in the foreseeable future.

The globalization of business – and the attendant ease with which information, individuals, and investment travel the world – has transformed nearly every aspect of the world's economy. Today, few enterprises are only “American,” “French,” or “Japanese,” and businesses have increasingly turned to outside contractors to carry out all but their core responsibilities for reasons of speed, cost, expertise, and efficiency. Performing all, or even most, functions in-house is widely seen as a vestige of yesteryear.

In no way has government been immune to this process. Vice President Al Gore's famous pledge to “reinvent government” led to new regulations permitting an expansion of outsourcing. The government explicitly expanded the contracting out of previously governmental functions by revising the Office of Management and Budget A-76 process and passing the Federal Activities Inventory Reform Act of 1998.¹⁸ These trends accelerated following the end of the Clinton administration. The trajectory of the United States Agency for International Development (USAID), the agency to which Americans might naturally look to carry out many reconstruction and stabilization activities in a wartime setting, is emblematic of these changes. In 1968, at the acme of U.S. involvement in Vietnam, USAID had 17,500 employees – many of whom were active on the battlefield. By 1980, the number was 6,000; it fell to a bit over 3,000 by 1990 and to less than 2,000 a decade later. Today, when America's significant stabilization and

reconstruction responsibilities would suggest the need for a substantially larger USAID, the total stands at approximately 1,465.¹⁹ Professor Allison Stanger, in a pungent chapter entitled “The Slow Death of USAID,” remarks that the agency “at the end of the Bush era was little more than a contract clearinghouse,” a “fund-dispensing agency that provided only a marginal management role and relied almost exclusively on contractors and grantees to do the work.”²⁰

Paradoxically, however, while the government downsized itself and increased its reliance on contractors, it also reduced the size of the government workforce dedicated to overseeing those contracts. At DOD, USAID, and in other government agencies, individual contracting officers have overseen a steadily increasing volume of contracts. In the Army, for example, while the overall number of individuals working in contracting has held steady in recent years at approximately 5,500, the same time span has seen a 331 percent increase in the dollar value of contracts and a 654 percent increase in actions. The number of contracting officers, contracting officer representatives (individuals appointed by the contracting officer to monitor the day-to-day administration of a contract), and government auditors has declined.²¹

As the volume and complexity of contracts has increased, a commensurate deficit of government skill in overseeing those contracts has emerged. The Army – the branch that handles most ES&R contracts – does not have a career path for contracting officers unlike the Air Force, which accounts for 37 percent of the military's contracting workforce and maintains two general officer positions in contracting. Over time, the Army has eliminated its general officer positions for acquisition, thereby eliminating a key incentive for officers wishing to pursue a career in contracting oversight.²² And those contracting officers and program managers who have remained with the government, in the Army or elsewhere, often lack a familiarity with the

specialized characteristics of ES&R contracting. The result, in Iraq, has been that the government has actually had to hire contractors to coordinate the activities of other contractors.

In addition to the economic forces pushing the U.S. government in the direction of increased reliance on contractors, changes in the character of warfare are accelerating the trend on the battlefield. Contractors are often required to help maintain technically sophisticated weaponry and to construct and sustain large, enduring base camps or logistical nodes from which to operate. Long-term nation-building efforts like those in Iraq and Afghanistan require an array of functions – from advising and training foreign security forces to constructing and maintaining power plants and waterworks – that the U.S. government is not manned to carry out on its own. And the speed with which commanders require support in the field, particularly in Iraq and Afghanistan, places a priority on extending quick requests for bids from outside contractors.

Future conflicts are likely to be more like American engagements in the Balkans, Colombia (via “Plan Colombia”), Iraq, and Afghanistan, and less like Operation Desert Storm. To the extent that future wars involve messy insurgencies and attempts to boost host government legitimacy, rather than conventional battles between massed armies, contractors will continue to play a large and prominent role. To extinguish support for insurgencies, build the security forces of host governments, expand the capacity to provide services to local populations, create jobs, train civil services, and construct (or reconstruct) infrastructure, the U.S. government will rely to an enormous extent on the use of private contractors.

Perhaps most fundamentally, the U.S. military simply is not large enough to handle all of the functions contractors carry out on the battlefield. By employing contractors, America has been able

to maintain a much smaller standing Army than would otherwise be required, reduce the political costs associated with U.S. deployments (American soldiers, sailors, airmen and marines killed in combat are listed in casualty totals and featured in “faces of the fallen” tributes; American contractors killed in the line of duty barely factor), quickly draw on pools of expertise and manpower in the face of unexpected events, and attempt to reduce the cost to government in between times of war. In Afghanistan today, commander General Stanley McChrystal reportedly favors the employment of additional private contractors in order to shift military personnel out of non-combat roles and into “trigger-puller” activities.

The large-scale employment of contracted support on the battlefield is now all but irreversible. Indeed, as one recent report put it, “reliance on private contractors is not going away any time soon. It is the new reality, not only of foreign policy in the 21st century, but also of war fighting.”²³ The U.S. military can fight nothing but the most limited engagements without the extensive use of contractors, and the State Department and USAID will continue to rely on contractors to carry out a great deal of reconstruction work. Since it is unlikely that the (statutorily limited) U.S. force structure will increase dramatically in the years ahead, and likely that American commitments overseas will remain great or even increase, U.S. reliance on private ES&R contractors is here to stay. As *the New York Times* journalist Thomas Friedman put it in a recent column, “We’re also building a contractor-industrial-complex in Washington that has an economic interest in foreign expeditions. Doesn’t make it wrong; does make you want to be watchful.”²⁴

C O N C E R N S A B O U T T H E U S E O F C O N T R A C T O R S

The rise of a “contractor-industrial-complex” has provoked a number of concerns, investigations, and calls for reform. The post-invasion reconstruction environments in Iraq and Afghanistan serve as the largest-ever market for private firms providing ES&R services and, while much of the attention from Congress and the media focuses on the actions of private military contractors such as Blackwater, the level of scrutiny directed at other forms of wartime contracting is increasing. Congressional committees have held numerous hearings, committee staffs are engaged in investigations into contractor performance, public watchdog groups have initiated their own investigations, and members in both houses of Congress have introduced legislation designed to bring about greater accountability in the contracting process.

Congress mandated the creation of the Special Inspector General for Iraq Reconstruction (SIGIR) in 2004 and tasked it with examining how billions of dollars were spent on contracts in theater – much of which was believed to have been lost to fraud, waste, or abuse. In light of SIGIR’s aggressive investigations into contracting in Iraq, and the large and rising amounts spent on contracting in Afghanistan, Congress mandated a counterpart inspector general for Afghanistan (SIGAR) in 2008. Among their many functions, these offices have conducted audits and investigations into maximizing efficiency in contract oversight and resource management.

In addition to these efforts, Congress established a Commission on Wartime Contracting with a broad mandate. Senator Jim Webb, who co-sponsored the legislation authorizing the Commission, describes the Commission’s role as “retroactive in terms of accountability and proactive in terms of providing recommendations on wartime contracting.”²⁵ The required interim report, released in July 2009, focused on contractor management and accountability, security services, logistical support, and reconstruction efforts. With its authorization

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extended into 2011, the Commission illustrates the increasing attention given to the role private contractors increasingly play in major American conflicts.

A series of reports have called for reform in the way the government contracts for services on the battlefield and for expanded oversight of the process. The 2007 Gansler Commission report, for instance, stated that there was “urgent reform required” in the Army’s expeditionary contracting and laid out a series of recommended changes in the contracting process.²⁶ DOD (and, to a lesser degree, other government agencies such as the State Department) has acted on many of these recommendations, as well as those contained in similar reviews. But significant additional reforms are needed. As summarized by one government participant in a CNAS working group, the U.S. government is trying to make up for nearly two decades of neglecting contractor management and oversight – and it is doing so in the midst of two ongoing wars that involve unprecedented contractor participation.

One reaction to the rise of private contracting is an often made objection to outsourcing “inherently governmental” functions. U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than federal employees from performing such tasks. Arguably nothing is more “inherently governmental” than the legitimate use of violence, which, as Max Weber famously noted, defines the state itself.²⁷

Yet while there appears to be a rough consensus that there are some functions so intrinsic to the nature of American government that they should never be outsourced, there is little or no consensus about precisely what those functions are. In addition, while U.S. law and policy bar anyone other than a government official or entity from performing “inherently governmental” activities, present statutes and regulations offer very limited guidance

for determining precisely which functions fall into this category. As one report tallied, the U.S. Code uses the term 15 different times; DOD requires over 120 pages to describe inherently governmental activities; and Federal Acquisition Regulations list 17 different examples.²⁸ Clear guidance that is standard across the U.S. government would speed the process of contracting out certain activities, permit the development of a competitive civilian sector with these capabilities, and reduce the risk of protracted litigation.

Given the confusion about what functions are “inherently governmental” and thus off limits to contractors, some analysts propose scrapping the entire framework. Rather than asking whether any given activity – the interrogation of captured enemies or the direct supervision of contractors, for example – is “inherently governmental,” some suggest a prohibition against contracting out “core functions,” “mission essential functions,” or “critical government functions.”²⁹ Yet these distinctions do little to advance policy makers’ understanding of precisely which activities must be carried out by the government and can never be outsourced to private firms or individuals. Finally, another school of thought holds that there should be no tests of this sort at all; though Congress might designate specific types of activities which cannot be outsourced, government agencies should have the discretion to determine on their own where and how contractors should be used.³⁰

Military Implications

The unprecedented numbers of private contractors on the battlefield, and the vast scope of their activities, pose new challenges for the U.S. military. Despite efforts to align the conduct of contractors with that of military personnel, these relationships remain poorly defined. To cite one example, operational plans have only very recently taken the role of contractors into account. Training courses for U.S. soldiers preparing to deploy into Afghanistan or Iraq rarely address the role of contractors, even

though half of all those employed by the United States in theater are contractors. Although many recent military plans lack a coherent framework for employing contracting entities and functions, DOD is more effective in this regard than other federal agencies. Elsewhere, planning processes for stabilization and reconstruction activities demonstrate little anticipation of the contractor role.

The extensive use of ES&R contractors, and their presence on the battlefield along with American troops, poses special dilemmas in command, coordination, and discipline. The very existence of private contractors inserts a profit motive onto the battlefield; their primary responsibility is not the national interest but rather fulfilling the terms of their contracts.³¹ Contractors are not in the chain of command; they can be expected to fulfill their contracts but not ordered to do so in the same fashion as military personnel. Contractors are not subject to the same discipline and order procedures that govern U.S. troops. Failure to follow orders can result in criminal prosecution for military personnel, but this is not true of civilians. The contractors, rather than commanders in the field, are responsible for ensuring that their employees comply with laws and orders³² and commanders on the ground repeatedly express frustration with their own lack of knowledge regarding contractor activities – or even presence – in the battlespace.

However, as current and former DOD officials point out, not a single mission in Iraq or Afghanistan has failed because of contractor non-performance. Today and in the future, properly marshalling the collective activities of private contractors will be critical to a commander's ability to accomplish his mission. This will require knowing the basics: how many contractors are in a particular battlespace, who and where they are, and what they are doing; how their responsibilities mesh with the authorities and responsibilities of American government personnel; and how operational plans incorporate contractors into the array of forces in play.



PHOTO BY RICHARD FONTAINE/CNAS

Security personnel at Baghdad International Airport in August 2009.

Legal Implications

The legal framework governing ES&R contractors in wartime is complicated, features overlapping jurisdictions, and is somewhat ambiguous. Contractors working for the United States can be held accountable for crimes committed overseas under at least two domestic American laws. The Military Extra-Territorial Jurisdiction Act (MEJA) allows contractors hired by DOD to be tried in U.S. federal court for crimes committed overseas.³³ In 2004, Congress expanded MEJA jurisdiction to contractors working for agencies other than Defense, as long as their “employment relates to supporting the mission of the Department of Defense overseas.” Yet this phrase remains ambiguous and turns on how the “DOD mission” is precisely construed. For instance, in the immediate aftermath of the Blackwater shooting in Nisour Square in Baghdad, the State Department argued for a time that the law did not apply to those guarding its personnel.³⁴ It remains unclear whether State Department or USAID contractors fall under MEJA, even in a patently military environment. In addition, there are an array of practical and logistical challenges associated with trying contractors in federal court for crimes committed abroad, including the requirements to procure witnesses, ensure custody of evidence, and so on. Perhaps as a result of these factors, very few contractors have been tried under MEJA since its passage in 2000 or even after its expansion. (At least two contractors in Iraq and one in Afghanistan have been prosecuted under the law.³⁵) Numerous observers, including some in the Pentagon, have called on Congress to enact provisions applying MEJA unambiguously to all contractors in a contingency environment. In 2008, then-Senator Barack Obama introduced an amendment with that objective, but the effort failed. Through legislation of this variety, Congress could significantly increase legal accountability for ES&R contractors.

Given the challenges associated with holding contractors accountable under MEJA, Congress has pursued an alternative path by expanding the jurisdiction of the Uniform Code of Military Justice (UCMJ). The FY07 National Defense Authorization Act extended military jurisdiction and trial by court martial to contractors “serving with or accompanying an armed force” in a contingency operation. The new provision, which expands UCMJ jurisdiction to a potentially broader pool of contractors than that covered by MEJA, was greeted as a major step toward bringing greater legal accountability to the actions of contractors.³⁶ The first case brought under the UCMJ dealt with an Iraqi-Canadian who worked as a contract interpreter to the U.S. Army and was charged after stabbing a colleague.³⁷ The military, given its presence on the battlefield – including its investigators, prosecutors, defense lawyers, and judges – and its experience in court-martialing its own personnel for violations of the Uniform Code, is arguably in a better position to hold contractors legally accountable than the federal court system. Yet serious constitutional questions surround the concept of trying civilian contractors by courts-martial, questions that may eventually require answers from the U.S. Supreme Court.

In short, MEJA presents a constitutionally solid basis for trying contractors, but the scope of its jurisdiction is ambiguous and the practical difficulties associated with its application are significant. The UCMJ represents a much more jurisdictionally unambiguous way to proceed and is easier to implement as a practical matter, but its application to civilians is constitutionally questionable.

In addition to domestic U.S. law, ES&R contractors may also be subject to foreign law, depending on the jurisdiction and any agreements in place between the United States and the host government. In Iraq, for instance, the Coalition Provisional Authority issued an order just prior to the transfer of sovereignty that granted contractors

immunity from Iraqi law for acts related to their contracts. This situation changed radically following the negotiation of a bilateral Status of Forces Agreement between the United States and Iraq, and today the nearly 120,000 contractors present in Iraq are subject to Iraqi law. In June 2009, Iraqi security forces detained five U.S. contractors and held them in custody under local law; the FBI actively assisted Iraqi police in their investigation.³⁸ There exists no immunity clause that protects contractors from local law in Afghanistan, but given the poorly functioning police and court system in that country, the application of Afghan law to U.S. contractors has not yet emerged as a potent issue.

In general, however, the application of local law presents novel challenges for those engaged in ES&R contracting. The United States appears to have a strong interest in clarifying with host governments how local and U.S. law will apply to the activities of contractors, particularly given the significant differences in legal systems and the undeveloped rule of law in theaters like Iraq and Afghanistan. The kind of cooperation that has taken place between the FBI and Iraqi officials after the June 2009 arrest would ideally take place in the context of a shared understanding of jurisdiction and the various laws at play. In addition, the United States has an interest in avoiding any politically motivated arrests of its contractors in countries where legal traditions are not as robust as its own.

Contractors have a somewhat ambiguous status under international law as well. It is, in a way, easier to state what categories such contractors do *not* fall into. They are not mercenaries. This is an important point, as the “mercenary” label has been used routinely – often in a pejorative sense – to describe private military contractors (and particularly private security contractors). Yet the definition of “mercenary” under international law is exceedingly narrow and the vast majority of contractors do not fall under its terms.³⁹ The status of contractors does not fall neatly into either of the two main categories

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of individuals under international humanitarian law – combatants and non-combatants – and thus their rights (including, for example, whether they could be subject to direct attack, are immune from prosecution, and would be held with prisoner of war status if captured by an enemy) remain unclear.⁴⁰ The International Committee of the Red Cross (ICRC) has attempted to clarify contractors’ rights and obligations under international law. In 2008, the ICRC and a number of interested states issued the Montreux Document, a nonbinding set of guidelines for states applying law to such contractors. The United States, which participated in drafting the document, is one of 17 signatories. In addition, the Geneva Centre for the Democratic Control of Armed Forces (DCAF), an organization established by the Swiss government, has proposed the adoption of a global code of conduct to govern industry norms, particularly among firms engaged in security contracting.⁴¹

That the United States, the world’s foremost employer of ES&R contractors, was a direct participant in the Montreux process represents an important step toward establishing enduring international norms for handling contractors in conflicts. U.S. actions, particularly in the legal arena, will establish precedents that will likely be cited by other countries as they employ their own contractors in similar situations. Perhaps for this

reason, senior Pentagon officials, among others, have called for the establishment of a widely accepted set of international standards governing the employment and conduct of contractors and an international body that would license individual contractors before their deployment.

Foreign Policy Implications

The precedent-setting nature of America's current way of dealing with contractors constitutes just one aspect of the broader foreign policy implications of outsourcing ES&R duties. The most obvious, perhaps, relates to the wars the United States is engaged in today. The testimony of military personnel and contractors alike suggests that local populations draw little or no distinction between American troops and the contractors employed by them; an act committed by one can have the same effect on local or national opinion as an act carried out by the other. In the midst of two counterinsurgency campaigns, contractor conduct directly affects U.S. authority and legitimacy on the ground in Afghanistan and Iraq. In an effort premised on a strategy of "clear, hold, and build," and in which much of the "build" mission will be executed by contractors, each of their actions impacts the effectiveness of American policies and information operations on the ground.

Media accounts typically focus on the negative aspects of contracting and the ways in which contractors' actions set back the American war effort. The Blackwater shootings in Baghdad's Nisour Square, for example, are well known; less known is that a significant number of interrogators at Abu Ghraib prison were contractors. Yet most private contractors appear to make a positive contribution, and to be honest, patriotic, and dedicated to the mission at hand.

Contractors can play a key role in the execution of counterinsurgency operations. Such missions often require providing employment for local populations, and by "hiring local," the United

States attempts to boost the local economy, reduce unemployment, and drain away the pool of young men willing to fight – for pay or from despair. Major General Darryl Scott, former head of Joint Contracting Command Iraq/Afghanistan, described the desired end state as one in which 75 percent or more of available funds are awarded to host nation contractors and policies encourage the use of local subcontractors for awards not made directly to host nation firms.⁴² The degree to which this target is reached has direct implications for the success of the overall mission in each theater.

The great reliance on contractors in wartime raises foreign policy questions that go well beyond the domain of DOD. To cite one example, the United States has brought to Iraq and Afghanistan tens of thousands of workers from developing countries in which labor costs are low. Given Pakistan's acute sensitivity to the perception of Indian encroachment in Afghanistan (the Pakistani government, for example, has routinely objected to the presence of Indian diplomats in consulates there), what are the foreign policy implications of hiring Indian nationals in Afghanistan? To address these sorts of questions, it will be necessary to bring the State Department increasingly into the decision making process.

Finally, and at perhaps the most overarching level, the role of private contractors may imply changes in the rules-based international society that the United States has endeavored mightily to construct since 1945. Through legal precedents established in the course of current wars, U.S. employment of contractors will shape the way that current and rising powers conduct future wars. Washington has long been in the norm-setting and norm-enforcing business, and as a result we should expect that many others will follow the direction in which America leads. As a result, the United States should consider carefully the broad and enduring implications of its own precedent.

“SMART CONTRACTING”

It is time for a strategic look at the role played by ES&R contractors in conflicts. The aim should be a new approach that neither rejects the role played by contractors in wartime nor merely reflects the status quo. This new approach, which we call “smart contracting,” will require revised doctrine and regulations, new structures and organizations, and enhanced plans and training. It will involve changes to the culture and awareness of contracting at DOD, State, and USAID, and will entail the buy-in of Congress and perhaps new legislation. And it will mean calling on senior foreign and defense policy makers – individuals for whom contracting issues are too often someone else’s business – to consider in depth how the increased reliance on contractors can best be leveraged to further American national interests abroad.

The unprecedented scope and number of contractors has pushed the U.S. government into uncharted territory. As Major General Scott put it in 2006, “Our contracting officers are mostly trained in the use of the Federal Acquisition Regulation (FAR) and experienced in its application in non-contingency environments. We need to increase training for contingency operations, where many traditional FAR rules do not apply.”⁴³ One of the newest and most innovative of the non-combat counterinsurgency tools is the Commander’s Emergency Response Program (CERP), which enables commanders on the ground to contract out locally; and the program explicitly excludes most of the FAR rules. CERP may serve as a model for regulating the use of contractors in conflict.

Across the U.S. government, there has been insufficient discussion about the way in which the rise in contracting has changed the nature of our foreign policy and expeditionary operations, and there is no consensus on the way ahead. Today, numerous investigations analyze the billions of taxpayer dollars committed to contracts in Iraq and Afghanistan that have been implemented with little oversight. Bills currently pending in both houses of Congress

would change the way in which contracting is conducted, including its legal framework. Experts disagree about which department(s) should administer ES&R contracting in the future; as one expert has remarked, the capacity to do so now rests “in the middle of the Potomac” (i.e., somewhere between the Pentagon and the State Department and USAID). As all these debates take place, tens of thousands of U.S. contractors carry out their duties every day in battlefield environments, often at great physical risk.

Future wars will involve not only national interests, but shareholder interests as well; this fact reflects the new reality of 21st century economics, government, and warfare. The foregoing discussion outlines the most salient and pressing issues associated with the future of contracting in conflicts. In 2010, CNAS will release a more extended examination of private contractors on the battlefield and spell out a framework for “smart contracting.” In light of America’s ongoing wars and shifts in the nature of conflicts, the U.S. government’s approach to contracting in conflicts must change sooner rather than later. Should it not, the negative consequences – for the conduct of American wars and for broader U.S. foreign policy interests – could well be profound.

E N D N O T E S

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- ⁵ This term was suggested by Herb Fenster, to whose encyclopedic knowledge of this subject we are in debt.
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