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## **Contracting in Conflicts** *The Path to Reform*

By Richard Fontaine and John Nagl  
Foreword by Allison Stanger



Center for a  
New American  
Security

## Acknowledgments and Methodology

*Contracting in Conflicts* benefited from many consultations and working group meetings with key stakeholders in the field. We would like to thank those individuals for their candid assessments and deep knowledge, which together informed our conclusion that serious reform of the contracting process is necessary.

The report relies on scores of consultations with officials from the Department of Defense, the Department of State and the U.S. Agency for International Development; employees from private contracting firms; active-duty and retired military officers; congressional staff; trade association officials; independent journalists; officials from the International Committee of the Red Cross; academics; staff from the Congressional Research Service and the Government Accountability Office; personnel from the Geneva Centre for the Democratic Control of Armed Forces; officials from the offices of the Special Inspectors General for Iraq and Afghanistan Reconstruction; staff serving on the Commission on Wartime Contracting; and think tank experts. A full list of working group participants is located in Appendix B. The participation of government officials does not imply that the final report reflects U.S. policy.

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The authors of this report are solely responsible for the analysis and recommendations contained herein.

### 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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# Contracting in Conflicts

## *The Path to Reform*

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## *About the Authors*

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## I. FOREWORD



By Allison Stanger

This report could not be timelier. Contractors and contracting have become serious policy issues in both Iraq and Afghanistan, and they will continue to be so wherever American power is projected abroad. In clear prose, the report's authors identify a host of important policy challenges generated by America's current contracting practices that demand our immediate attention and offer many creative recommendations for confronting those challenges head on.

The explosion of what the authors call Expeditionary, Stabilization and Reconstruction (ES&R) contracting – contracting in conflict environments – is a piece of a much larger puzzle that amounts to a stealthy whole-scale paradigm shift in the core business of American foreign policy. As I have chronicled elsewhere, contractors quietly have become prominent across the so-called three Ds of defense, diplomacy, and development, as well as in homeland security. In all of these realms, the majority of what used to be the exclusive work of government has been outsourced to private actors, both for-profit and not-for-profit. Contractors today outnumber American men and women in Iraq and Afghanistan. In the development realm, contracts and grants have become the principal vehicle for American efforts to help others help themselves. These changes are not the result of partisan politics; Democrats and Republicans alike embraced the privatization imperative. Thus, while no one consciously planned it, much of the envisioning and execution of American objectives is today in private hands.

The reinvention of government business has not been confined to U.S. foreign policy institutions. To cite just one telling statistic, the federal government had the same number of full-time employees in 2008 as it had in 1963. Yet the federal budget, in real terms, more than tripled in that same period. That gap reflects the increased prominence of contractors. The longstanding debate over the size of government thus takes on different dimensions;

government can be big in terms of the amount of money it spends but small in terms of the number of people it directly employs to manage that spending. In such a world, to quote President Obama's inaugural address, "the question... is not whether our government is too big or too small, but whether it works." The employment of large numbers of contractors carries benefits. For instance, by circumventing the downsides of bureaucracy, contracting can facilitate innovation, efficiency, and flexibility in government operations.

But all of the potential problems that can accompany privatization are exacerbated when the work must be done beyond America's borders. Fraud, waste and abuse are more difficult to contain in a war zone. Legal and regulatory challenges loom large. Despite these risks, the new normal for policy will continue to involve a multi-sector workforce of public and private actors. The challenge is to ensure that this blended workforce serves the interests of the American people rather than the self-interest of special interests.

While the need to expand government capacity in the right places is a recurrent theme in the pages that follow, it bears mention that simply in-sourcing whatever is easiest to in-source will not address the serious problems identified in this report. Just as it matters what tasks government chooses to out-source, it matters what tasks government chooses to bring back in-house. We do not need in-sourcing; we need smart-sourcing that can restore proper government oversight while harnessing the energy and initiative of the private sector for the public good.

"Contractors in Conflicts" ably presents a smart-sourcing approach for contractors in conflicts and maps the reforms we need to get ES&R contracting right. Those reforms all require striking a balance between the innovation, energy, and efficiency that private sector involvement can bring and the requisite oversight to ensure that market energy is properly harnessed to American interests. Smart-

sourcing means building government capacity for effective management of the multi-sector workforce. Smart-sourcing also means identifying tasks that should never have been outsourced and bringing those back in-house through what the authors call a "core competencies approach."

A key ingredient in improving performance across the board will be unprecedented transparency. OMB efforts to improve contracts and grants data quality, as well as the further development of USAspending.gov to include subcontracts and subgrants are steps in the right direction, as is the administration's Open Government Initiative. Transparency and accountability are critical values in a smart-sourcing orientation, and U.S. anti-corruption efforts abroad will have enhanced credibility when the United States is perceived to be upholding the same values at home. When so much of government is outsourced, whole of government approaches grow only all the more imperative, and the information-sharing that increased transparency delivers encourages unity of effort.

In the past, contracting has been perceived and treated as a peripheral issue, yet as the authors make eminently clear, this perception and practice must not continue. No less than the very effectiveness of American foreign policy and our military operations are at stake in getting ES&R contracting right. I applaud CNAS for tackling this weighty issue in such an insightful way and hope that this report generates the serious debate it deserves.

*Allison Stanger is the Russell Leng '60 Professor of International Politics and Economics at Middlebury College and the author of One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy (Yale, 2009).*

## II. INTRODUCTION

By Richard Fontaine and John Nagl

When our nation goes to war, contractors go with it. In both Iraq and Afghanistan today, there are more private contractors than U.S. troops on the ground.<sup>1</sup> This state of affairs is likely to endure. Now, and for the foreseeable future, the United States will be unable to engage in conflicts or reconstruction and stabilization operations of any significant size without private contractors. Changes in business practices, the provision of government services and the character of modern conflict, together with limits on the size of the American military, diplomatic and development corps, are driving the size and scope of expeditionary contracting to unprecedented proportions. Absent a significant reduction in America's international commitments and perceived global interests, the employment of private contractors in future American conflicts is here to stay.

The system within which this contracting takes place has not caught up with the new reality. Tens of billions of taxpayer dollars committed to contracts in Iraq and Afghanistan have been implemented with little oversight. Contracting companies themselves crave clearer guidelines. The roles of contractors remain incompletely integrated into the conduct of American operations. The legal framework within which contractors work remains cloudy. And there have been serious allegations of harm to both local civilians and U.S. personnel as a result of contractor malfeasance.

To adapt, the U.S. government must embark on a path of ambitious reform that will require new laws and regulations; an expansion of the government's contracting workforce; a coordination mechanism within the executive branch; greater scrutiny, more transparency and clearer standards; a strategic view of the roles of contractors in American operations; and a change in culture within the government.

As an initial step, the U.S. government must understand and then rethink how contractors are

employed in contingency environments. The vast majority of contractors work for the Department of Defense (DOD), the State Department and the U.S. Agency for International Development (USAID), and they perform a host of key tasks critical to U.S. efforts overseas. These tasks vary widely and include such areas as logistics, transport, linguistic support, security, weapons systems maintenance, construction, intelligence analysis, local security force training and agricultural technical assistance.

Thus far, efforts to understand the contracting phenomenon have been limited in two crucial ways. First, most media, congressional and public attention focuses on the activities of private security contractor (PSC) firms such as Blackwater (now known as Xe Services) that employ armed personnel to protect private property, assets and individuals.<sup>2</sup> Yet while the activities of such PSCs have sometimes led to flashpoints in American conflicts – as when the killing of four contractors in Fallujah, Iraq, 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 and others like them tell just a small part of the bigger story of contracting on the battlefield.<sup>3</sup> Private security contractors comprise roughly 11 percent of all contractors in hostile environments.<sup>4</sup> In Iraq and Afghanistan today, for example, DOD employs 100,000 and 107,000 contractors, respectively, of whom only 23,148 are armed security contractors.<sup>5</sup> Similarly, the State Department and USAID employ thousands of contractors, only a fraction of whom handle security duties.

This report looks beyond the security providers to address the great majority of service contractors that handle duties other than security. While less controversial, service contracts yield their own set of problems – including insufficient oversight and management, inadequate integration into operational planning and ambiguous legal status. Thus, in order for the United States to succeed in current and

future engagements, it must establish new policies and rules of the road – not only for armed security contractors but also for the 85 to 90 percent of contractors that carry out a wide array of other tasks.

The second limitation is the almost exclusive focus of Congress, government watchdog groups and other observers on fraud, waste and abuse in Iraq and Afghanistan, and on the government’s failure to properly manage contracts. The focus is absolutely necessary; ensuring the proper stewardship of American taxpayer dollars represents a critical aspect of such investigations. But it is insufficient. Other facets of the rise of contracting also require action. 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 missions in theater. In addition, there are broader strategic foreign policy considerations at play, many of which have received only scant consideration thus far. 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.<sup>6</sup> In light of this, the United States has a keen interest in properly marshalling the activities of contractors in America’s combat, stabilization and reconstruction operations.

This report outlines a fuller range of issues raised by expeditionary contracting and offers recommendations for how the United States – both the government and the community of private contracting firms – can strike a balance among the greater efficiency and effectiveness necessary to support American missions overseas; the versatility and flexibility required in a rapidly evolving strategic environment; and the proper oversight, accountability and transparency expected by American taxpayers. To put the phenomenon of contracting in context, this report offers a brief history of such contracting and examines the emergence of its unprecedented scope and scale today. It discusses fraud, waste and abuse in

## Expeditionary Stabilization and Reconstruction (ES&R)

Given the vast array of functions carried out by the private sector during and after conflicts, contractors have often been grouped into three broad categories:

- Military provider firms that provide armed security assistance.
- Military consulting firms that provide training, assessment and analysis.
- Military support firms that conduct logistics, intelligence and maintenance services.<sup>7</sup>

To describe companies in these three categories, observers have offered various terms, including “expeditionary contractors,” “private military companies” and “contingency contractors.” 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 report, we therefore propose a new term: Expeditionary Stabilization and Reconstruction (ES&R) contractors.<sup>8</sup> This term captures the universe of companies and industries working in support of expeditionary operations (both during and after combat operations) by providing logistical and many other kinds of support. Stability operations contracting represents the transitional work that contracting industries carry out in order to establish and maintain stability in all or part of a nation-state, usually in support of military operations. Reconstruction contracting represents the work of private firms in building and rebuilding physical infrastructure as well as political, social and economic infrastructure – in some cases for years after the end of hostilities. The three chief U.S. government agencies that employ ES&R contractors are the Departments of Defense and State and the U.S. Agency for International Development.

ES&R contracting involves a vast number of diverse activities in theaters around the globe. In Iraq and Afghanistan, for instance, private contractors construct buildings, serve food, drive convoys, deliver mail, advise government ministries, train police and provide translators. And these two theaters do not represent the total of ES&R contracting taking place today. The United States continues to employ private contractors in Colombia, the Balkans and other locations to provide support similar to those tasks required in Iraq and Afghanistan. In employing these unprecedented numbers of ES&R contractors, the United States is also spending an unprecedented amount of money to procure their services. And while much, if not most, of the work these contractors have carried out has been vital to the success of American missions, it has also provoked high visibility problems, ranging from misspent funds to individual criminal behavior.

contracting and the costs associated with employing contractors, as well as military, foreign policy and legal implications. It concludes by offering a series of specific recommendations for reform.

The recommendations in this report will, if implemented, go a long way toward reforming America’s

use of private contractors in hostile environments. The United States government now relies on contractors in its overseas engagements but its regulation, management and oversight of these contractors has not kept pace. Since America’s dependence on contractors is likely to continue, the need for reform is pressing. The time to act is now.

### III. A BRIEF HISTORY OF ES&R CONTRACTING

While the current use of private contractors in hostile environments may be unprecedented in magnitude, the provision of ES&R-type functions by contractors on the battlefield is not a modern phenomenon. During the Revolutionary War, the Continental Congress sought support from various individuals and commercial enterprises for engineering, food, transportation, medical and carpentry services. General George Washington's army, for example, employed contractors to assist with the Delaware River defense in 1777 and to help dig siege fortifications in Savannah, Ga., two years later.<sup>9</sup> Similarly, the Quartermaster General contracted teamsters to transport supplies and private citizens ferried soldiers across the Chesapeake Bay in preparation for the Yorktown Campaign.<sup>10</sup> Due to the limited number of soldiers employed to fight the British, Congress encouraged the use of contractors for tasks deemed too menial for soldiers (e.g., transporting supplies) or overly specialized (such as surgeons and other specialized medical personnel).<sup>11</sup>

Following the war, Congress adopted rules that awarded low-bid contracts to provide supplies and equipment to distant military posts.<sup>12</sup> Contractor neglect often led to operational failures during the Indian Wars and the War of 1812; as a result, military commanders advanced the idea of subjecting private contractors on the battlefield to military law.<sup>13</sup> Secretary of War John Calhoun attempted to replace service contractors with commissary officers to provide logistical support, but the ratio of contractors to soldiers remained approximately 1:6 in both the Seminole and Mexican Wars.<sup>14</sup>

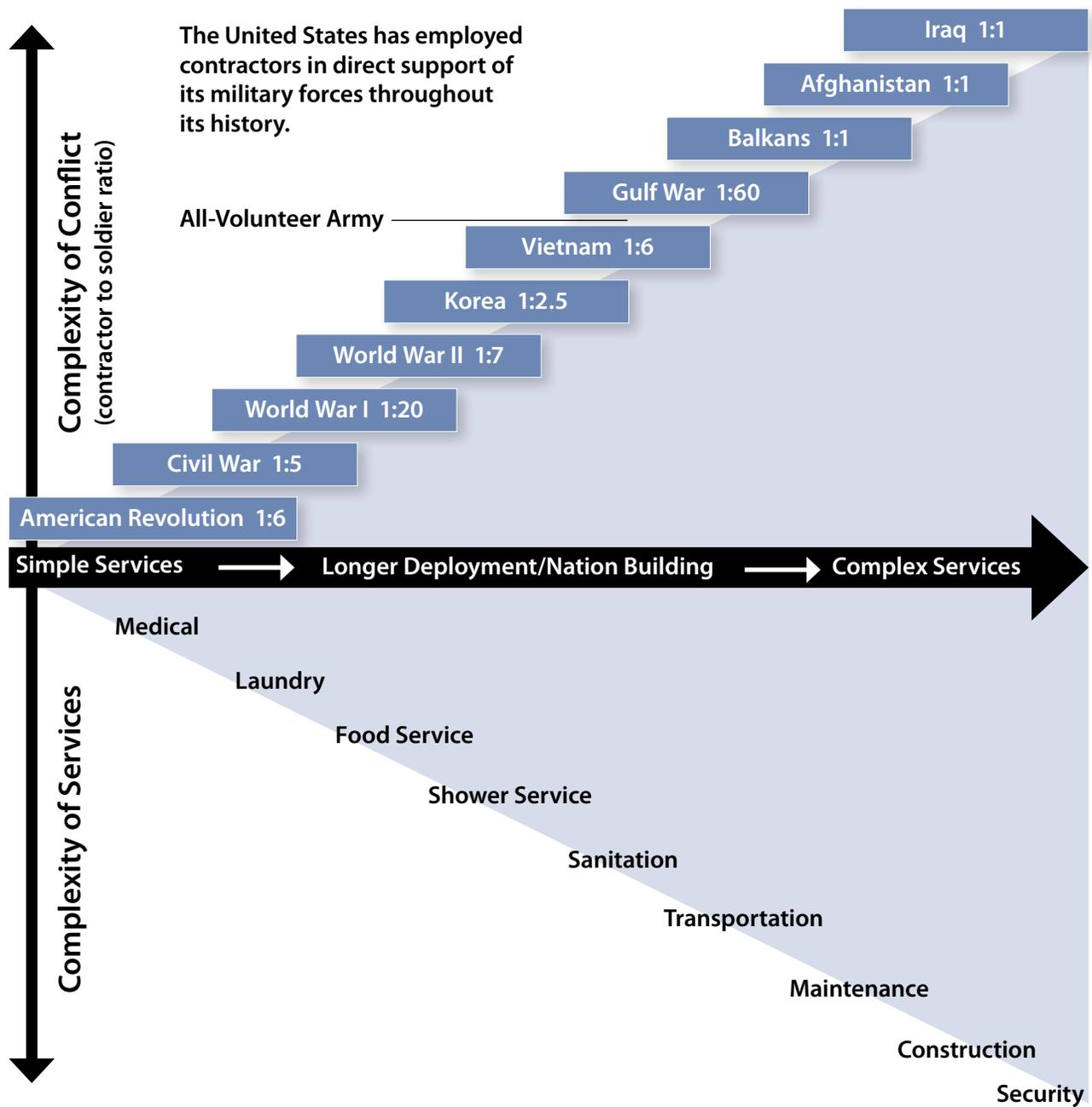
During the Civil War the logistics capacity of both Union and Confederate forces proved inadequate for sustaining troops in the field. As a result, private contractors served alongside soldiers as cooks, medical officers, teamsters, blacksmiths and

in other support roles. To improve the intelligence collection capabilities of the Army of the Potomac, General George McClellan hired the Allan Pinkerton detective agency, while U.S. Military Telegraphs employed thousands of operators and linesmen to help sustain the Union war effort.<sup>15</sup> The first aviation element, the U.S. Army Balloon Corps, was completely contracted.

The Spanish-American War gave birth to a new era of expeditionary conflict. To coincide with America's ascendancy as a global power, the military underwent a series of structural changes intended to professionalize the force. To this end, the military began to transform previously outsourced logistical functions into core competencies performed by government personnel. The expansion of the Quartermaster Corps signaled a growing trend of internalizing logistical training and oversight.

The outbreak of World War I saw a tremendous expansion in the use of private contractors for military support. Despite a massive mobilization of private industry, the task of transporting and supplying the American Expeditionary Forces (AEF) across Europe proved overwhelming for military support services. American and foreign contractors filled the void by crewing ships, constructing railroads, administering post offices and providing other general logistical support. In total, the AEF employed over 85,000 contractors during the war.<sup>16</sup>

The mid- to late-20th century witnessed a significant transition toward modern contracted functional support in American operations. By the time the United States entered the Second World War, a technological revolution in military hardware had altered the role of contractors on the battlefield and the U.S. military found itself without the requisite human capital to maintain newly designed military aircraft and technologically advanced weapons systems. In addition, the demand for labor outstripped the uniformed



Source: Center for Military History (CMH), The Commission on Wartime Contracting in Iraq and Afghanistan, Interim Report, June 2009.

supply; during the war, U.S. corporations manned ammunition depots and expanded ports in North Africa and the Middle East and built airfields and forward operating bases in the Pacific. Through the course of the war, some 730,000 civilians, all but 25,000 of whom were foreigners, supported the roughly 5.4 million American soldiers deployed overseas.<sup>17</sup>

**From this point forward, operational success was inextricably linked to contractor performance and competence.** The reconstruction of Japan and postwar Europe under the Marshall Plan necessitated America's largest reconstruction efforts until 2003 in Iraq. Yet it was in Korea and Vietnam that ES&R contracting was truly born.

During the Korean War, 156,000 Korean, Japanese and American contractors, mostly in construction and engineering roles, supported 393,000 U.S. military personnel on the battlefield.<sup>18</sup> The extensive use of contractor support, both in dollar amounts (12 billion in current dollars) and personnel (with a 2.5:1 military-to-contractor ratio), was due in large part to the mass demobilization of the U.S. military after World War II.<sup>19</sup> Similarly, President Lyndon Johnson's decision not to mobilize reserve units during the Vietnam War led to the increased use of contractors in theater.<sup>20</sup> U.S. military operations in Vietnam, branded the "War by Contract" by *Business Week* in 1966, created a vast demand for physical infrastructure construction, and the Army awarded support contracts to a number of large American firms.<sup>21</sup> From 1965-1972 the United States disbursed over 2 billion dollars in fees to contractors and involved them in building everything from roads and bridges to power plants, fuel storage depots and jet airfields.<sup>22</sup> In addition, the military's demand for skilled technicians grew with the first extensive use of helicopters in combat. Throughout the conflict, an estimated 130,000-150,000 contractors worked in support of U.S. military operations in Vietnam.<sup>23</sup>

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 the establishment of the Army's Logistics Civil Augmentation Program (LOGCAP) in 1985 and its activation in 1992. This program, created to "preplan for the use of civilian contractors to perform selected services in wartime to augment Army forces," is now also used for logistics support in post-war stabilization and reconstruction phases.<sup>24</sup> The first LOGCAP award, valued at an estimated 815 million dollars, allowed the Army to employ one company in support of all of its field operations in places such as the Balkans, Haiti, Italy, Rwanda, Saudi Arabia and Somalia.<sup>25</sup> This initial agreement set an important precedent, as the military would now depend on contractor support for a wide range of services and products in-theater in future conflicts. To date, four LOGCAP contracts have been awarded – the most recent of which, LOGCAP IV, allows the Army to award a total annual maximum value of 15 billion dollars to three competing contractors for a lifetime maximum value of 150 billion dollars.<sup>26</sup>

U.S. operations in the Balkans in the 1990s spurred another evolution in the emergence of modern ES&R contracting. The Balkans Support 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 Balkans experience foreshadowed the enormous use of contractors in current wars: For the first time, the ratio of contractors to military personnel was approximately 1:1.<sup>27</sup>

During the first Gulf War, the Army employed just 9,200 contractors in support of U.S. combat units.<sup>28</sup> In the 1990s, following the collapse of the Soviet Union and the end of the Cold War, the U.S.

slashed the size and budget of the armed forces. By the end of FY 2000, the U.S. military's active component had been reduced by one-third and the budget of the Department of Defense was 22 percent smaller than it had been at the end of the Cold War.<sup>29</sup> As America's international engagements increased in the following years, employing private contractors became an unavoidable reality of any sizable expeditionary operation.

**The 2001 invasion of Afghanistan, together with the March 2003 invasion of Iraq, saw an increase in the size and scope of contracted support on the battlefield that was, as the Congressional Budget Office (CBO) stated, “unprecedented in U.S. history.”<sup>30</sup>** By 2007, CBO estimated that at least 190,000 contractors were working in the Iraqi theater on U.S.-funded contracts, pushing the ratio of contractors to members of the U.S. military to greater than 1:1.<sup>31</sup> It also noted that U.S. agencies awarded some 85 billion dollars in contracts for services between 2003 and 2007, predominantly for contracts in Iraq.<sup>32</sup> DOD spent upward of 30 billion dollars in FY 2007 and the first half of FY 2008 on contractors in Iraq and Afghanistan, in addition to significant sums spent on contractors by the Department of State (1.9 billion dollars) and USAID (1.7 billion dollars).<sup>33</sup> These contractors engaged in activities as diverse as transportation, security, engineering and construction, maintenance, weapons maintenance, base operations and police and army training. For those contractors operating in the field, this spike in activity was accompanied by an equally high level of uncertainty and danger.

#### IV. ES&R CONTRACTING TODAY

The rise of large-scale ES&R contracting reflects a more basic shift in the way the U.S. government – and particularly the military – conducts its business. As anyone who has followed the debates over “outsourcing” will recognize, the use of contractors has increased across the spectrum of government activities and within the business community. The transition to a more service-oriented economy and increased outsourcing has spurred change even in the functioning of DOD, long thought to be among the most hardware-intensive of all government agencies. Approximately 60 percent of DOD contractors in Iraq and Afghanistan currently perform logistical functions such as maintenance, dining and laundry services; 11 percent protect personnel and property; and the remainder carry out other forms of support (see Figure 1).<sup>34</sup> State Department contractors fulfill a number of roles, including a major police training effort in Iraq, and USAID contractors engage in reconstruction and development projects in both theaters. In addition, contractors provide support for other contractors, including food services, base security and transportation.

The U.S. contracting cadre is truly multinational. It has become common, for example, to see in battlefield dining facilities cooks from one country working with servers from another to dispense food to citizens of a third – perhaps in a facility partially constructed by locals and guarded by foreigners. 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).

#### Privatization Grows

This large-scale U.S. reliance on contractors in expeditionary operations is likely to remain an

Figure 1: Iraq DOD Contractor Personnel by Type of Service Provided (as of December 31, 2009)

CURRENT CONTRACTOR PERSONNEL IN IRAQ	
TYPE OF SERVICE	NUMBER OF CONTRACTORS
Base support	61,725
Security	11,095
Translator/Interpreter	8,414
Logistics/Maintenance	6,085
Construction	3,385
Other	3,384
Communications support	2,429
Transportation	2,060
Training	1,458
<b>TOTAL</b>	<b>100,035</b>

Source: DOD; USCENTCOM 1st Quarter Contractor Census Report, FY 2010.

enduring feature of future contingencies. Many factors contributed to this circumstance. The global rise in outsourcing, changes in the nature of warfare, the shift to an all-volunteer force, the statutory limit on the overall size of U.S. military forces, the decline in USAID personnel numbers, a desire to reduce government costs during peacetime and the probable character of future U.S. engagements are trends unlikely to change significantly in the foreseeable future. Meanwhile, 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 exclusively American, French or Japanese, and businesses have increasingly turned

Figure 2: DOD Contractor Personnel In the USCENTCOM Area of Responsibility

DOD CONTRACTOR PERSONNEL				
	TOTAL CONTRACTORS	U.S. CITIZENS	THIRD COUNTRY NATIONALS	LOCAL/HOST COUNTRY NATIONALS
<b>Iraq only</b>	100,035	27,843	51,990	20,202
<b>Afghanistan only</b>	107,292	10,016	16,551	80,725
<b>Other USCENTCOM locations</b>	32,124	6,681	19,690	5,753
<b>USCENTCOM Area of Responsibility</b>	239,451	44,540	88,231	106,680

Source: DOD; USCENTCOM 1st Quarter Contractor Census Report, FY 2010

to outside contractors to carry out all but their core functions for reasons of speed, cost, expertise and efficiency.

The U.S. government under several presidential administrations actively encouraged the shift to contracting. In 1983, the Reagan administration stated that "... it has been and continues to be the general policy of the government to rely on commercial sources to supply the products and services government needs."<sup>35</sup> Similarly, Vice President Al Gore's famous pledge to "reinvent government" led to new regulations encouraging an expansion of outsourcing. The government explicitly expanded the contracting-out of functions that had previously been performed by government workers by revising the A-76 process of the Office of Management and Budget (OMB) and passing the Federal Activities Inventory Reform (FAIR) Act of 1998.<sup>36</sup> This privatization was aimed mostly at domestic activities; as the roles of contractors

expanded and they began to operate in expeditionary environments, changes in the legal and policy framework governing them lagged significantly behind. Nevertheless, the trends accelerated following the end of the Clinton administration; between 2001 and 2008, federal spending on contracted services more than doubled.<sup>37</sup>

The trajectory of USAID, the agency to which Americans might naturally look to carry out many reconstruction activities, is emblematic of these changes. Created to separate development aid from foreign military and other security-type assistance, the history of USAID highlights the shift toward privatization. In 1968, at the acme of U.S. involvement in Vietnam, USAID had 17,500 direct hire employees, many of whom were active on the battlefield. By 1980, the number was 6,000; it fell to roughly 3,300 by 1990 and to less than 2,000 a decade later.<sup>38</sup> Today, when America's significant stabilization and reconstruction responsibilities

would suggest the need for a substantially larger USAID, the total stands at approximately 2,700.<sup>39</sup> Professor Allison Stanger, in an incisive book 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.”<sup>40</sup>

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*As the volume and complexity of contracts has increased, a commensurate deficit of government skill in overseeing those contracts has emerged.*

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### **As Contracting Rose, Oversight Declined**

Yet, 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 other government agencies, individual contracting officers (COs) have overseen a steadily increasing volume of contracts while the number of contracting officers and contracting officer representatives (individuals appointed by the contracting officer to monitor the day-to-day administration of a contract, abbreviated as CORs) has held constant or even declined.

In addition, as the volume and complexity of contracts has increased, a commensurate deficit of government skill in overseeing those contracts has emerged. In the Army, for example, while the overall number of individuals working in contracting held

steady from 1996 to 2005 at approximately 5,500, the same time span saw a 331 percent increase in the dollar value of contracts and a 654 percent increase in actions.<sup>41</sup> Between 1990 and 2006, the Defense Contract Management Agency’s civilian workforce fell 60 percent, from roughly 24,000 personnel to just shy of 10,000.<sup>42</sup> DOD has taken steps to address its personnel deficits over the past year by boosting the numbers of COs and CORs – in Iraq and Afghanistan, in particular – but serious gaps in contracting personnel remain.<sup>43</sup> USAID saw similar trends; the number of employees overseeing contracts dropped significantly from 1997-2007. By the end of 2007 the agency had just 109 employees managing more than 8.9 billion dollars in contracts – 81 million dollars per employee.<sup>44</sup> Those contracting officers and program managers who remain with the government have often lacked a familiarity with the specialized characteristics of ES&R contracting and tend to be located in the United States, thousands of miles away from the sites at which contracts are executed. The result, in Iraq and elsewhere, was that the government has actually had to hire contractors to coordinate the activities of other contractors.

### **The Changing Nature of Conflict**

Changes in the character of warfare are accelerating the growing reliance on contractors on the battlefield. Contractors often help to 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 premium on extending quick requests for bids from outside contractors.

To the extent that future conflicts 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. Even in more conventional conflicts and postwar reconstruction activities, contractors are likely to be numerous. To extinguish support for insurgencies, build the security forces of host nation 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, including local hires.

Indeed, many experts believe that American military conflicts in the future will resemble U.S. operations in the Balkans, Colombia (via “Plan Colombia”), Iraq and Afghanistan more than conventional conflicts like Operation Desert Storm. Military force has tended toward complex and protracted affairs, seeking not rapid battlefield results such as the ejection of the Iraqi army from Kuwait but rather establishing the conditions under which political and economic development can take hold. Sir Rupert Smith, a retired British general renowned for his analysis of modern warfare, wrote, “We intervene in . . . a conflict in order to establish a condition in which the political objective can be achieved by other means and in other ways. We seek to create a conceptual space for diplomacy, economic incentives, political pressure and other measures to create a desired political outcome of stability, and if possible democracy.”<sup>45</sup> Following hostilities, the United States may play a reconstruction role for years (in creating or recreating physical, economic, social and political infrastructure); indeed, the Balkans Support Contract is still in force today.

## Numbers

**Simple math illuminates a major reason for the rise of contractors: The U.S. military simply is not large enough to handle all of the missions assigned to it.** By employing contractors, the United States has been able to maintain a much smaller standing Army than would otherwise be required, quickly draw on pools of expertise and manpower in the face of unexpected events and attempt to reduce the cost to government

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*The statutory limit on the armed forces constrains the size and surge capacity of the U.S. military, leading DOD to focus increasingly on building a force that generates combat power.*

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between times of war, since the government does not need to retain contractors on its payroll after a conflict ends. The statutory limit on the armed forces constrains the size and surge capacity of the U.S. military, leading DOD to focus increasingly on building a force that generates combat power. This emphasis on combat forces has come at the expense of those who support the effort: “KP” (“Kitchen Patrol,” logistical support provided by soldiers temporarily reassigned from combat units as recently as Operation Desert Storm), for example, is largely a thing of the past. To cite a contemporary example, before the surge of American troops to Afghanistan was announced in December 2009, defense officials developed plans to replace military support units with contractors. By employing private contractors to fulfill duties previously carried out by military personnel, defense planners hoped to add as many as 14,000 combat troops in Afghanistan while leaving the overall number of U.S. forces in the country unchanged.<sup>46</sup> Similarly, the State Department and USAID do not possess the human infrastructure required to carry out the tasks for which they are responsible.

President Barack Obama entered office intent on reforming the way that government conducts business. “It starts,” he said, “with reforming our broken system of government contracting.”<sup>47</sup> To achieve

this goal, the president set out to reduce the number of contractors working for the federal government, including ES&R contractors operating in hostile environments. “In Iraq,” he said, “too much money has been paid out for services that were never performed, buildings that were never completed, [and] companies that skimmed off the top . . . We will stop outsourcing services that should be performed by the government.”<sup>48</sup> While the most recent Quadrennial Defense Review (QDR) echoes the president’s position and talks of finding a more appropriate balance between contractors and federal employees in carrying out necessary tasks, it fails to outline how DOD would establish such a balance among military, federal civilian and contractor personnel, or what exactly that balance would look like.<sup>49</sup> Even if efforts to in-source some functions are successful, they are unlikely to significantly reduce U.S. dependence on contractors. It has become a new reality both of overseas engagements and of American foreign policy.

### Political Costs and Commitments

**The use of private contractors has reduced the political costs associated with U.S. deployments and global commitments.** American politicians and policymakers routinely make reference to the number of troops deployed in Iraq and Afghanistan but almost never to the over 200,000 contractors currently on the U.S. government payroll. American troops, diplomats and other government workers killed in combat zones are listed in casualty totals and featured in “faces of the fallen” tributes; American contractors killed in the same zones barely register – to say nothing of local or third-country nationals. (Through 2009, an estimated 1,757 contractors have died in Iraq and Afghanistan, and nearly 40,000 wounded.)<sup>50</sup> Had U.S. presidents been required to deploy only American troops and federal employees to carry out all duties in recent conflicts, it seems likely that these operations would have garnered less public support.

There is another way in which the United States could reduce its employment of private contractors

in combat and in stabilization and reconstruction operations: limit the number, scope and duration of such operations. While there is a growing body of opinion suggesting that the United States will not carry out major, multiyear operations on the scale of Iraq and Afghanistan again in the near to middle term, it is exceedingly unlikely that the number of even much more limited operations will drop to zero. Post-Cold War U.S. presidents, both Republican and Democratic, have engaged in dozens of overseas contingency operations; the current U.S. president, like his predecessors, continues to define American security interests as global in scope.

### Challenges

**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 it is likely that American commitments overseas will remain great or even increase, U.S. reliance on private ES&R contractors is here to stay. But accepting this reality makes reform imperative. As *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.”<sup>51</sup>

The U.S. government’s increased dependence on contractors has provoked a number of concerns, investigations and calls for reform. Five issues merit particular attention:

- Fraud, waste and abuse
- Cost
- Military implications
- Foreign policy implications
- Legal and regulatory implications

## V. FRAUD, WASTE AND ABUSE

One area of particular concern among public officials and concerned citizens has been the degree of fraud, waste and abuse linked to reconstruction operations and contractor-provided services in Iraq and Afghanistan. The post-invasion reconstruction environments in both countries represent the largest-ever markets for private firms providing ES&R services; through March 2010 Congress had appropriated 53 billion dollars for reconstruction in Iraq and 51 billion dollars for reconstruction in Afghanistan (President Obama has since requested an additional 20 billion dollars to fund reconstruction in Afghanistan).<sup>52</sup> The great amounts of money disbursed, the speed with which the government demanded the reconstruction projects move forward and the lack of oversight – particularly in the early stages of reconstruction efforts in each country – invited a significant degree of waste and corruption.

To increase oversight of reconstruction efforts, Congress mandated the creation of the Special Inspector General for Iraq Reconstruction (SIGIR) in 2004. Originally known as the Inspector General for the Coalition Provisional Authority, it was tasked with examining how billions of dollars were spent on contracts in theater – a significant amount of which was believed to have been lost to fraud, waste or abuse.<sup>53</sup> While it is impossible to accurately gauge the level of this loss, SIGIR Inspector General Stuart Bowen has suggested that poor contract management in Iraq has left billions of taxpayer dollars vulnerable to waste and fraud.<sup>54</sup>

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 – after nearly seven years and 38 billion dollars had been committed to rebuilding the war-torn nation.<sup>55</sup> Among their many functions, these offices have conducted audits and investigations into maximizing efficiency in contract oversight and resource management.

Figure 3: Status of Investigative Activities of U.S. Agencies other than SIGIR, as of March 31, 2010

FRAUD INVESTIGATIONS IN IRAQ*	
AGENCY CASES**	OPEN/ONGOING
<b>Defense Criminal Investigative Service</b>	223
<b>U.S. Army Criminal Investigation Command, Major Procurement Fraud Unit</b>	105
<b>Federal Bureau of Investigation</b>	92
<b>Department of State, Office of the Inspector General</b>	17
<b>USAID</b>	11
<b>U.S. Air Force Office of Special Investigations</b>	7
<b>Naval Criminal Investigative Service</b>	3
<b>TOTAL</b>	<b>458</b>

\* Does not include cases under investigation by the Special Inspector General for Iraq Reconstruction (SIGIR).

\*\*Numbers include pending cases worked with other agencies within the Joint Operations Center.

Source: SIGIR, “Quarterly Report to the United States Congress,” April 30, 2010.

To date, SIGIR investigations have led to 39 indictments for fraud and 30 convictions, not counting investigations and indictments by other government agencies.<sup>56</sup> When these are included, the total number of convictions for fraud stands at more than 60 (as of March 2010). In addition, the government has opened an additional 52 cases, at least

45 of which derived from information gathered by the Treasury Department's Financial Crimes Enforcement Network, an office that tracks suspicious financial transactions.<sup>57</sup> Similarly, SIGAR is expanding its operations to provide better oversight of reconstruction efforts and to increase its efforts to deter corruption. SIGAR is currently engaged in 12 ongoing audits of U.S. reconstruction efforts, including four which involve contracts related to building the Afghan National Security Forces.<sup>58</sup>

Regulations aimed at preventing fraud, waste and abuse while ensuring proper contracting practices are enshrined in the Federal Acquisition Regulation (FAR). The FAR, however, is not written for contracting in contingency environments, contains an enormous number of regulations and involves laborious requirements before a contract can be cancelled. In addition, relatively few acquisition personnel are familiar with its use in hostile theaters. As retired Air Force Major General Darryl Scott, former head of Joint Contracting Command Iraq/Afghanistan, 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."<sup>59</sup> Other officials and observers go further, saying that the FAR represents regulations designed for peacetime acquisition and that only very selected waivers to FAR rules have thus far been permitted, even for contracting in contingency areas. This system, they argue, results in a rigid and time-consuming route to fulfilling contracts, one that limits the military's authority and flexibility on the battlefield. "The real issue," one DOD official stated, "is whether we can have an abbreviated Contingency FAR authorized so we can plan, train and execute off an acquisition rule book that is responsive to the needs of the operation, not peacetime processes, and for which we can be held reasonably accountable."<sup>60</sup>

## VI. COST

One of the fiercest debates over the role of private contractors in contingency operations concerns the issue of cost. Are contractors less or more expensive than using federal employees? The answer is much more complicated than it would appear at first glance and remains highly disputed.

**Most experts agree that contracting out logistics and construction activities tends to result in significant cost savings to the government, while more skilled labor – and private security functions in particular – tends toward parity with the cost of using federal employees.** Hiring unskilled locals or third-country nationals can save the taxpayer substantial costs. It is generally much less expensive to hire citizens from low-wage environments to carry out a variety of ES&R tasks (e.g., serving food, constructing barracks, etc.) than it would be to have uniformed personnel, federal civilian employees or American civilian contractors perform the same functions. As the required skills increase, however, the picture changes. Per-day salary for an American contractor, for instance, can easily exceed the per-day salary for a member of the military carrying out the same duty. Many factors influence the cost of hiring contractors for a particular function, including the type of skilled labor required, the background of the contractor (e.g., whether or not a given individual served in the U.S. military and collects benefits; the previous U.S. training provided), the task itself, the length of deployment and the benefits incurred by the contractor or by the U.S. government (e.g., housing, medical care in theater, armed protection).

One set of costs that is not always apparent in comparative calculations is the "brain drain" aspect to contracting when military personnel who have been trained by the United States, and who may receive a pension and lifetime health care, depart military service or other federal employment in order to take higher-paying jobs working for private contractors.

Among military personnel, as a 2005 CBO report points out, pay is just one element of total compensation. The other elements – which constitute a significant portion of the compensation package – include retirement pay, services at military installations (e.g., housing and food) and health care, which may continue for life. While CBO attempted to convert the elements of military compensation into present-value terms, this calculation proved nearly impossible for other federal employees or contractors. In addition, there are substantial differences in cost to the government depending on whether the calculation involves both wartime and peacetime costs, or wartime costs alone. CBO has estimated that, in calculating wartime costs alone, the Army could fulfill LOGCAP functions for roughly the same cost as private contractors. At the same time, it estimated that, over a 20-year period (in both wartime and peacetime), obtaining logistics support from a private contractor would cost approximately 41 billion dollars, while obtaining the same services from Army units would cost around 78 billion dollars, nearly double the cost of the contracted services.<sup>61</sup>

This and other reports demonstrate, however, the extraordinary difficulties the government has had in making comprehensive cost comparisons between government workers and private contractors carrying out the same functions. For example, the U.S. Comptroller General recently initiated a review of costs to DOD and the State Department of using private security contractors versus using federal employees for the same functions. As the March 2010 report of the Government Accountability Office (GAO) indicates, the Pentagon was unable to provide the information necessary for GAO to make such a comparison; it lacked information about the number of military personnel that would be needed to meet contract requirements or the cost of training personnel to carry out security functions. This occurred nearly five years after GAO issued a report calling

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*The clearest benefits of using contractors center more on readiness issues such as flexibility and speed of deployment and less on cost savings.*

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on DOD to improve its transparency and data collection of active duty compensation.<sup>62</sup> The GAO instead focused its 2010 report on State Department security contractors.<sup>63</sup>

**The clearest benefits of using contractors center more on readiness issues such as flexibility and speed of deployment and less on cost savings.** As CBO points out, “Because contractors need not make long-term commitments to their employees, they are in a better position to ‘surge’ to meet a short-term demand for workers and then rapidly downsize later.”<sup>64</sup> To cite one example, the U.S. government in Iraq shed over 40,000 contractors in a matter of months as part of the redeployment of American forces there.<sup>65</sup> In addition, CBO has said, contractors may “be able to deploy to the wartime theater more rapidly than could support units from the Army Guard and Reserve . . . which contain two-thirds of the Army’s logistics personnel.”<sup>66</sup> At the same time, the report notes, “A disadvantage of using contractors is that the contracts themselves may be inflexible, requiring military commanders to issue change orders to support contracts for even minor shifts in tasks.”<sup>67</sup>

## VII. 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. In a recent address, General Stanley McChrystal, the top U.S. and NATO commander in Afghanistan, expressed concern about the military's dependence on private contractors. "I think we've gone too far," McChrystal said. "I think that the use of contractors was done with good intentions so that we could limit the number of military. I think in some cases we thought it would save money... We have created in ourselves a dependency on contractors that I think is greater than it ought to be."<sup>68</sup>

McChrystal's comments reflect the military's ongoing effort to grapple with the new issues raised by America's unprecedented dependence on private contractors. Despite efforts to align the conduct of contractors with that of military personnel, these relationships remain poorly defined. For example, operational plans have only recently taken the role of contractors into account. Beginning in 2006, DOD has required operational planners to include in their operations orders an annex – Annex W – that details the numbers of contractors required for a military operation and the tasks they will perform. The Department has moved ahead in developing Annex W content in operational plans, but the quality of those plans often comes up short.<sup>69</sup> Beyond Annex W, DOD guidance encourages operational planners to include contract requirements in other sections of their plans. Yet detailed information about these requirements or the role contractors will play is often minimal or even nonexistent in other parts and annexes.<sup>70</sup>

GAO has reported that most operational plan annexes drafted thus far simply restate broad language from existing guidance on contractors, rather than precise details about the kinds and numbers of contractors necessary to carry out an operation.<sup>71</sup> By providing less detail than expected

by Department leadership, GAO reports that current plans are "limiting the utility of the Annex W as a planning tool to assess and address contract support requirements."<sup>72</sup> GAO indicates that this lack of detail "can hinder the ability of combatant commanders to understand the extent to which their plans are reliant on contractors" and that "senior decision makers may incorrectly assume that operations plans have adequately addressed contractor requirements."<sup>73</sup>

**In addition, training courses for U.S. soldiers preparing to deploy to Afghanistan or Iraq rarely address the role of contractors, even though half of all those employed by the United States in theater are contractors.** In light of this fact, Congress in 2008 directed DOD to develop a joint policy document on contingency program management to ensure the Department provides training to relevant non-acquisition workforce personnel (including operational field commanders and their key staff) in contracting issues. Congress mandated that this training be "sufficient to ensure that the military personnel . . . understand the scope and scale of contractor support they will experience in contingency operations and are prepared for their roles and responsibilities."<sup>74</sup> As of April 2010, DOD had not issued the joint policy document.<sup>75</sup> The same deficit appears with respect to pre-deployment war games. In 2008, Congress mandated that DOD provide for the incorporation of both contractors and contract operations in mission readiness exercises.<sup>76</sup> Yet war games and role-playing exercises (which, somewhat ironically, are themselves often staffed by contractors) rarely incorporate the role of contractors. In such exercises, contractors often play every role *except* contractors.

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. Contractors are not in the chain of command; they are now, however, subject to the Uniform Code of Military Justice

## Contracting the Iraq Drawdown

Recent experience in Iraq demonstrates DOD's continued difficulty in integrating the role of contracting into military planning. While U.S. Forces-Iraq has identified the LOGCAP support that will be necessary for the coming drawdown of American troops, it has failed to identify other contractor support needed to meet the stated U.S. objective of a 50,000-troop ceiling by August 2010.<sup>80</sup>

DOD doctrine requires operational personnel, rather than contracting officials, to determine the numbers of contractors that will be necessary to carry out a mission and the functions they must carry out. According to GAO, however, the Iraq drawdown plan delegated this responsibility to contracting agencies such as the Joint Contracting Command (JCC).<sup>81</sup>

JCC stated that it could not determine the appropriate level of in-theater contract support required without relying on commanders to provide the necessary information, information it did not receive. Remarkably, instead of employing operationally driven requirements to determine contracted services, the Iraq drawdown plan is based on historical ratios of contractors to military personnel in Iraq.<sup>82</sup>

(UCMJ), albeit only under certain circumstances and not to the entire Code. All DOD contracts now require contractors to follow relevant rules and regulations, including fragmentary orders issued by commanding officers in contingency areas.<sup>77</sup> At the same time, failure to follow orders can result in criminal prosecution for military personnel, but this is not true of civilian contractors. The contractors, rather than commanders in the field, are responsible for ensuring that their employees comply with laws and orders, and commanders on the ground have in the past expressed repeated

frustration with their own lack of knowledge regarding contractor activities – or even presence – in the battlespace.<sup>78</sup> Although DOD has designated certain civilian employees as “emergency-essential” personnel who may be sent overseas during a crisis, even involuntarily, and State Department and USAID Foreign Service Officers must agree to worldwide availability and can be subject to directed (i.e., involuntary) assignments in some cases, this is not the case with private contractors. Federal employees who refuse may face administrative penalties, including termination of employment.<sup>79</sup>

Today and in the future, properly marshalling the collective activities of private contractors will be critical to a commander's ability to accomplish his or her 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.

Despite the enormous role now played by contractors on the battlefield, defense planners still pay them inadequate attention. It is striking, for instance, that the QDR failed to discuss the role of contractors on the battlefield and in stabilization operations, how military commanders can better integrate contractors into planning, training and operations, or a vision for the relationship between contractors and government personnel (other than that there will be fewer of the former and more of the latter). Given the QDR's assurance that an increasingly complex security environment will demand U.S. military involvement in a broad range of contingencies in the future, the QDR represents a missed opportunity to outline a framework within which contractors and military personnel can partner. Apart from stating that DOD intends to hire or convert 20,000 new acquisition positions

by 2015, the 2010 QDR, while acknowledging that the future force includes contractors, failed to lay the groundwork for significant institutional and cultural change within the Department.<sup>83</sup> Although Secretary of Defense Robert Gates ordered his department to grow the Army contracting civilian workforce by 1,600 new positions by FY 2015, the 2010 QDR devotes just a few short paragraphs to the issue, noting simply, “Over the next five years, the Department will reduce the number of support service contractors to their pre-2001 level of 26 percent of the workforce (from the current level of 39 percent) and replace them, if needed, with full-time government employees.”<sup>84</sup> This drive to in-source not only appears to be based on an arbitrary target percentage, but it also fails to distinguish between types of contractors – some of whose functions may cost less than employing government employees and others whose tasks the government may want to in-source as a core competency. For an institution that relies on private contractors to an unprecedented degree for its operational success, DOD should give their role much more strategic thought.

## VIII. FOREIGN POLICY IMPLICATIONS

How America deals with ES&R contractors carries broad foreign policy implications. This is true most obviously in the wars in which the United States is engaged. The testimony of military personnel and contractors alike suggests that local populations draw little or no distinction between American troops and the contractors they employ; an act committed by one can have the same effect on local or national opinion as an act carried out by the other. (Insurgents have also viewed contractors as potential targets; in Afghanistan, Taliban fighters have begun regularly targeting USAID contractors working with local Afghan officials on civil infrastructure projects.)<sup>85</sup> 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.

Though most American private contractors appear to make a positive contribution, and to be honest, patriotic and dedicated to the mission at hand, 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 number of contractors provided interrogation services at Abu Ghraib prison.<sup>86</sup>

ES&R contractors have played a significant role in the counterinsurgency-intensive operations in Iraq and Afghanistan. Such missions often require providing employment for local populations. 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. Major General Darryl Scott 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.<sup>87</sup> Hiring significant amounts of local labor to carry out contracted tasks can be central to the success of counterinsurgency operations. At the same time, contracting - even locally - can pose difficulties. Employing local labor can draw talent away from the host government and toward higher paying private sector jobs. And there may be greater concerns about security and reliability when employing local contractors rather than Americans to carry out the same tasks.

**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. As the surge of 30,000 U.S. troops to Afghanistan gathers pace, the Congressional Research Service projects that 130,000-160,000 contractors will support the nearly 100,000 U.S. troops in Afghanistan by August 2010.<sup>88</sup> As the number of contract personnel increases, so too does the reliance on host-nation and third-country nationals. In one example, the U.S. government has requested that a contracting firm deploy into Afghanistan some 5,000 support contractors as soon as possible. The vast majority of these will be Indian nationals - irrespective of Pakistan's acute sensitivity to the perception of Indian encroachment in Afghanistan. There appears to be insufficient deliberation within the State Department about the foreign policy implications of contracting decisions made at the corporate level, both on State/USAID funded contracts and on DOD contracts.

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

and protect since 1945. Through legal precedents and norms of behavior established in the course of current wars, U.S. employment of contractors could 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 it should expect that many others will follow America's lead. In this regard, efforts such as the Montreux Document (discussed below) and international legal interpretations will have important precedent-setting implications for the future conduct of American and foreign behavior.

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## IX. 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. (civilian) federal court for crimes committed overseas.<sup>89</sup> In 2004, Congress expanded MEJA jurisdiction to apply to contractors working for agencies other than Defense as long as their “employment relates to supporting the mission of the Department of Defense overseas.” This phrase, however, 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.<sup>90</sup> It remains unclear whether State Department or USAID contractors fall under MEJA, even in a patently military environment. In addition, MEJA was originally written to provide jurisdiction over criminal acts committed in non-operational environments. There are practical and logistical challenges associated with trying contractors in federal court for crimes committed in hostile environments abroad, including the requirements to procure witnesses, ensure custody of evidence and so on. Perhaps as a result of these factors, relatively few contractors have been tried under MEJA since its passage in 2000 or even after its expansion. (Between March 2005 and March 2010, 17 U.S. national contractors have been prosecuted or charged under MEJA, with an additional 15 cases pending.<sup>91</sup>)

The murky legal status of contractors on the battlefield has led numerous observers, including some in the Pentagon, to call on Congress to pass legislation applying MEJA unambiguously to all contractors in a contingency environment. In 2008, then-Sen. Barack Obama introduced an amendment with that

objective, but the effort failed. By adopting 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 UCMJ. The FY 2007 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.<sup>92</sup> The first case brought under the UCMJ dealt with an Iraqi-Canadian who worked as a contract interpreter for the U.S. Army and was charged with stabbing a colleague.<sup>93</sup> 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 is the federal court system. Yet serious constitutional questions surround the concept of trying civilian contractors by court-martial, questions that may eventually require answers from the U.S. Supreme Court.<sup>94</sup>

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.

Further complicating the legal picture, ES&R contractors may also be subject to foreign law. The legal status of contractors varies by country, 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 80,000 American and third-country national contractors present in Iraq are subject to Iraqi law.<sup>95</sup> 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 of the contractors.<sup>96</sup> 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 has a strong interest in clarifying with host-nation 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 developed 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, as well as in ensuring that a perception of contractor impunity does not damage American public diplomacy and counter-insurgency efforts.

The status of contractors under international law is also somewhat ambiguous. 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.<sup>97</sup> The status of contractors does not fall neatly into either of the two main categories of individuals under the law of armed conflict – combatants and civilians. As a result, 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.<sup>98</sup>

Under the Geneva Conventions and the law of armed conflict, it appears that most contractors would be considered civilians and thus do not constitute legitimate military targets. They would retain this status so long as they take no active part in hostilities, and enemy forces could not legitimately target them for attack. Contractors deploying with the military and who possess identification cards could qualify as prisoners of war if captured, entitling them to a broader set of rights and protections than those that apply to unlawful combatants.

**The legal status is less clear, however, for contractors carrying out functions more closely related to military activities, such as intelligence collection and support, logistics support to forward deployed troops, operating drones, maintaining or repairing weapons systems, or (possibly) using a weapon, even if fired in self-defense.** (This concern goes beyond private security contractors, as some ES&R contractors carry weapons for personal protection.) If they are deemed to take an active part in hostilities but do not meet the definition of combatants (because, for example, they are not fully integrated into the armed forces, do not wear distinctive insignia, follow a chain of command, carry a weapon openly, etc.), they would

## The “Inherently Governmental” Conundrum

Critics of the greater use of ES&R contracting object to outsourcing functions intimately related to the public interest – that is, those deemed “inherently governmental.” 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 German sociologist Max Weber famously noted, defines the state itself.<sup>102</sup> At the same time, Article 1, Section 8 of the U.S. Constitution confers power on Congress to “grant letters of marque and reprisal” which, while no longer used, at one time played a key role in the contracting out of violence.

Today, 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.

Until recently, while U.S. law and policy bar anyone other than a government official or entity from performing “inherently governmental” activities, statutes and regulations offered overlapping, conflicting and ambiguous guidance for determining which functions fell into this category.

As one 2007 report tallied, the U.S. Code uses the term 15 times; DOD requires over 120 pages to describe inherently governmental activities; and Federal Acquisition Regulations list 17 examples.<sup>103</sup> Missing from this picture has been clear and standardized guidance across the U.S. government that could 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.

As a result, the FY 2009 National Defense Authorization Act required the Office of Management and Budget to promulgate just such a government-wide definition of “inherently governmental.” OMB released a draft policy letter on March 31, 2010 that aims to clarify “when work performed for the Federal government must be carried out, in whole, or in part, by Federal employees,” and to have the U.S. government speak with one voice on the issue. The letter adopts the definition contained in the 1998 FAIR Act: an inherently governmental function is one that is “so intimately related to the public interest as to require performance by federal government employees.”<sup>104</sup> While this definition appears to shed little light on the issue, the letter does include some basic

guidance for judging whether a function is inherently governmental and lists examples of such functions, including the command of military forces, the direction and control of intelligence operations, and the award, administration and termination of contracts.

The government’s draft guidance does not, however, comment directly on some of the most contentious functions that have been contracted out, including the provision of security services, interrogation of enemy combatants and coordination of federal contractors.<sup>105</sup>

OMB’s publication of the finalized letter is unlikely to resolve the debate simply because there remains little consensus about which functions should be included under the “inherently governmental” rubric. This is perhaps most vividly demonstrated by Congress’ inability to enumerate a substantial list of activities that fall into this category and by its decision to pass the responsibility for defining the term to the executive branch.

It is important to note the implications of deeming a particular activity within or outside those bounds. Should a given function be deemed inherently governmental, it then becomes illegal for the government to ever contract it out – even *in extremis*. On

the other hand, simply deeming a task not inherently governmental, and one that agencies could therefore contract out, in no way suggests that it is automatically good policy to do so.

For this reason, a better alternative is to focus on a “core competencies” approach. While Congress should deem inherently governmental any acts it can agree should never be outsourced under any circumstances, a core competencies approach would apply to all of those activities that do not fall under that rubric. It would focus on those functions the government should develop, maintain and enforce, rather than trying to enumerate a list of specific activities for which it is impermissible, under law and in any circumstance, to ever contract out.<sup>106</sup>

Thus, for example, the government could decide that interrogating enemy prisoners is a core competency that it wishes to maintain. As it ramps up its federal interrogation capacity, it would aim to avoid contracting out this function, but – and only *in extremis* – it would be permitted under law to hire private contractors to interrogate prisoners should the government workforce prove insufficient to carry out this vital task.

By eschewing contracting in specific areas as a matter of policy, the federal government would leave the option legally open to afford itself the flexibility to employ contractors in times of crisis or other extreme circumstances.

Moreover, the core competencies approach would give commanders and others in the field the access to surge capacity and swiftness often necessary in an unpredictable contingency environment, while moving the U.S. government away from dependence on certain forms of contractors as a more general principle. It would also hold the promise of cutting through continued debates about what does or does not constitute an “inherently governmental” activity and instead concentrate on what the government should be doing and how it will ensure its competency to do so.

be classified as civilians under the law of armed conflict. This, at least arguably, would open them to criminal prosecution for any actions they had taken during hostilities (as opposed to combatants, who enjoy immunity from prosecution for committing hostile acts on the battlefield). These contractors would still be entitled to the baseline humane treatment protections included in Common Article 3 of the Geneva Conventions but not to the broader set of protections they would enjoy if classified as POWs or noncombatants.<sup>99</sup>

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Despite useful efforts by the International Committee of the Red Cross (ICRC), the precise status of contractors, including their rights and obligations, remains ambiguous under international law. In 2008, the ICRC and a number of interested states issued the Montreux Document, a nonbinding set of guidelines for states regulating the application of law to such contractors. The United States, which participated in drafting the document, is one of 34 signatories.<sup>100</sup> The fact 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. The International Peace Operations Association (IPOA), a trade association representing contingency contracting firms, has adopted a code of conduct for its members and a complaints process for tracking alleged violations. IPOA’s code of conduct is, however, limited in two respects. First, the association’s member firms are largely American, and thus offer only a partial solution to the need for robust international norms. Second, there is little coercive enforcement mechanism for violators. After the 2007 Nisour Square shootings, for example, IPOA initiated an independent review to determine whether Blackwater had violated the IPOA code of conduct. Several days later, Blackwater simply withdrew its membership from the association. In addition to IPOA’s moves, efforts are proceeding on the international level. Following a mandate of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) is working with the Geneva Academy of International Humanitarian Law and Human Rights to develop a global code of conduct that will govern industry norms.<sup>101</sup>

### **Efforts at Reform**

Responding to the many challenges and complexities raised by the expansion of ES&R contracting, Congress is advocating a number of reforms. It first sparked a significant change in DOD’s approach by including a requirement in the FY 2007 National Defense Authorization Act (NDAA) that the Department put into place

a new process for preparing for and executing contingency contracting and that it place these functions under the authority of a senior officer.<sup>107</sup> It has directed that contract support requirements be included in pre-deployment training and war games, and the FY 2009 NDAA authorized the addition of ten general officer billets for acquisition.<sup>108</sup> In addition, as described above, Congress established the Special Inspector General for Iraq Reconstruction and the Special Inspector General for Afghanistan Reconstruction.

Efforts to enhance oversight of contracting in hostile environments appear to be accelerating. The Senate and House Armed Services Committees have held hearings on the issues surrounding contracting; Senator Carl Levin, chairman of the Senate committee, has initiated a lengthy investigation into specific allegations of wrongdoing. Senator Claire McCaskill, chair of the Ad Hoc Subcommittee on Contracting Oversight, has held numerous hearings into these issues, including transparency of the contracting system, accountability of foreign contractors and contracts for police training in Afghanistan. Congress also established a Commission on Wartime Contracting with a broad mandate. Senator Jim Webb, who co-sponsored the legislation authorizing the commission, describes its role as “retroactive in terms of accountability and proactive in terms of providing recommendations on wartime contracting.”<sup>109</sup> The required interim report, released in July 2009, focused on contractor management and accountability, security services, logistical support and reconstruction efforts. With its authorization extended into 2011, the commission illustrates the increasing attention given to the role private contractors now play in major American conflicts.

As with these efforts of reform, a series of reports has called for changes in the way the government contracts for services on the battlefield and oversees

the process. The 2007 Gansler Commission report, for instance, stated that there was “urgent reform required” in the Army’s expeditionary contracting system and laid out a series of recommended changes in the contracting process.<sup>110</sup> DOD has acted on many of these recommendations, as well as those contained in similar reviews, but State and USAID have made far fewer changes.<sup>111</sup>

**Significant additional reforms are needed in the Defense Department, the State Department, USAID and the U.S. government as a whole. 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.**

## X. THE PATH TO REFORM

If the United States is facing an era of persistent engagement, it is also facing an era of persistent contractors. It is time for a new, strategic approach to the role played by ES&R contractors in conflicts, one that seeks to build upon past disparate attempts to reform unique elements of the contracting process. It is past time to rationalize, modernize and improve the system of contingency contracting. This report proposes a new system based on core principles that lead to a new approach. This approach features an interlocking set of recommendations for the way ahead.

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. There is no consensus on the way ahead. 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, with some advocating the establishment of a new agency altogether. As all these debates take place, tens of thousands of U.S. contractors carry out their duties every day in conflict environments, often at great physical risk.

There does appear to be a consensus that the current contracting system does not work the way it should and that without change it will not function properly in the future. Future conflicts and reconstruction efforts will not only involve federal employees pursuing national interests but will also depend on the expertise and willingness of for-profit corporations and private citizens to augment federal capacity overseas. This fact reflects the new reality of 21st-century economics, government and warfare. 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

### A Roadmap to Reform

The many changes required fall into 12 critical reforms. Taken together, they would significantly improve the contracting process for American operations today and far into the future.

- Improve U.S. government management of ES&R contracting.
- Rebuild, expand and improve the ranks of contracting personnel.
- Establish a contingency contracting reserve corps.
- Increase transparency and accountability.
- Increase scrutiny of ES&R contractors.
- Improve the legal and regulatory framework.
- Raise standards among contractors.
- Clarify the proper roles of contractors in conflicts.
- Integrate the role of contractors into policy and strategy.
- Integrate contractors into command and control.
- Change the U.S. government's culture of contracting.
- Harvest and apply lessons learned.

rather than later. Should it not, the negative consequences – for the conduct of America's overseas engagements and for broader U.S. foreign policy interests – could well be profound.

**Contracting is no longer simply “someone else's business,” but rather the business of American policymakers across the board. It will require time and attention commensurate with its importance.** Senior policymakers can no longer simply rely on specialists to handle the myriad factors that affect the United States' ability to carry out its missions.

A change in culture and mentality begins, as it does so often inside the U.S. government, with leadership at the top. Department heads and White House officials must begin to place priority on rationalizing and modifying the ES&R contracting process and understand its critical importance to our foreign policy and national security efforts.

The recommendations enumerated below would, if implemented, go a long way toward solving the many current problems facing the U.S. approach to contingency contracting. The recommendations alone – even if all are fulfilled – will not be sufficient to adequately improve the American way of contingency contracting. On the contrary, their implementation must be accompanied by a shift in mentality and culture in the relevant agencies. The Department of Defense, the Department of State, the U.S. Agency for International Development and their bureaus and offices must continue to seek reform in all phases of the contracting process: policy, planning, formation and management.

### **Recommendation: Improve U.S. Government Management of ES&R Contracting**

**Coordination is key to everything the United States seeks to achieve via ES&R contracting. Despite the years – and tens of billions of dollars – spent on ES&R contracting since 2001, the approach to contingency contracting remains fragmented and *ad hoc*.** Insufficient interagency coordination before and during operations has been combined with an unprecedented degree of dependence by the agencies on contracted support. The result too often has been inefficiency, lack of transparency and insufficient unity of effort. Yet the problem goes beyond this: Even expert contract managers (and, ultimately, contractors themselves) will be unable to adequately contribute to the overall mission if they receive incomplete, vague or contradictory instructions from policymakers and program officers. Policy must drive contracting, not the other way around.

The Department of Defense has taken steps to remedy poor coordination within DOD<sup>112</sup> but the State Department and USAID appear to have made fewer improvements in their own internal systems. In addition, interagency coordination has tended to be informal and incomplete; disjunctions between policymakers and contract managers have emerged. (The one exception is a Memorandum of Understanding agreed upon by the three agencies to manage private security contractors.) As a result, it is imperative to improve coordination among policymakers, program officers and federal contracting personnel, and also among the agencies. The best course is to increase the contracting capacity at DOD, State and USAID and establish a formal (but relatively simple) interagency coordination mechanism.

This effort should include expanding the current DOD Office of Program Support, which is located in the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics. This expanded office, which would be renamed the Office of Contingency Contracting (OCC), should be led by a Senate-confirmed Assistant Secretary of Defense for Contingency Contracting. It should be the unambiguous Department locus for planning, funding, staffing and managing DOD's ES&R and private security contracting.

Similarly, the State Department should expand its Office of Logistics Management into a new Bureau of Contingency Contracting located under the Undersecretary for Management. The bureau should be led by a Senate-confirmed Assistant Secretary (the current office is directed by a Deputy Assistant Secretary). USAID should either direct that its Bureau of Democracy, Conflict and Humanitarian Assistance develop a specific expertise in ES&R contracting (including adding contract specialist personnel to the bureau) and provide guidance to USAID regional bureaus as they manage their own contracts or it should establish a separate contracting bureau headed by an Assistant Administrator-level official.

The objectives in making these changes are to expand the capacity within the agencies to handle ES&R contracting, to ensure that the offices are directed by officials whose rank is commensurate with the great importance of such contracting and to equalize within the agencies the ranks of responsible officials in order to harmonize the coordination mechanism described below.

As part of this effort, and to establish quickly a cadre of well-trained contract professionals, the three offices should recruit not only government civilians, active duty military and other direct hires, but should also seek to modify the laws governing civil service retirements in order to induce former federal contracting professionals to return to service without losing their pensions. This would permit the government to quickly hire retired federal contract managers on a temporary basis when needed. In addition, such a step would allow retirees to enlist in the contingency contracting reserve corps (described below) and deploy for temporary duty – thus providing to the government a potentially substantial pool of skilled personnel. The directors of the offices described above should encourage their employees to accept temporary detailing to the corresponding offices in the other two agencies and to contracting positions in theaters abroad in order to broaden their experience and expertise.

**This report proposes a mechanism by which the three officials named above would take responsibility for coordinating contingency contracting in future operations.** They should meet on a regular basis to develop general guidance for contract managers (including translating policy and mission objectives into specific guidance for contracting personnel), propose any needed changes to the Federal Acquisition Regulation (or to other statutes, regulations and procedures), ensure understanding across agencies, coordinate contracting processes and plans and identify problems that can be resolved or referred to policymakers. This basic structure should include a

representative from the Office of Management and Budget (from either its national security budget section or its Office of Federal Procurement Policy) and should be chaired by a new National Security Council Senior Director for Reconstruction and Stabilization Operations (for whom handling contracting issues would comprise just one of several responsibilities). In addition, to preserve institutional knowledge and enhance the stability of the three expanded offices, the agencies should consider nominating career officers to head them or, at a minimum, direct that each political appointee filling one of the three positions have support from a professional Deputy Assistant Secretary (or Deputy Assistant Administrator).

Replacing an *ad hoc* process with this more formal mechanism would help ensure that the government possesses the ability to articulate and carry out synchronized, efficient and effective strategies to support contingency operations. Before the government initiates a contingency operation, the officials named above and their staffs should coordinate with combatant commands, chiefs of mission, contracting firms and others as appropriate in order to inform operational plans and develop contracting-specific plans. They should also support policymakers in coordinating efforts with foreign governments, non-governmental organizations and international organizations.

### **Recommendation: Rebuild, Expand and Improve the Ranks of Contracting Personnel**

Given the explosion in the number of contracts in recent years, and the degree to which American operations have become dependent on outside contractors, growing the government contract workforce has become the necessary but not sufficient condition for fixing the problems that continue to plague the ES&R contracting process. If the government takes this step, it can implement the many other recommendations offered here to reform the contracting process. If it does not, it is highly likely that most, if not all, of these other reforms will simply flounder.

The recommendations below emphasize the great need to hire more contract professionals in each agency and across the spectrum of contracting responsibilities. It may appear that this report is arguing mainly for a significant increase in government personnel able to oversee contracts. It is. Through working group meetings and in many consultations with government officials, private contractors and others, one theme stood out above all others: The U.S. government is sorely lacking in trained and qualified contract personnel. Over the past three decades, the number of U.S. government personnel managing and overseeing ES&R contracts has fallen significantly, precisely at a time in which the volume and complexity of these contracts has increased tremendously. As a result of these changes, today the government suffers from a serious lack of trained professionals able to manage contracts both from the United States and in theater. Expanding the quantity and quality of the government's contracting workforce must be a top priority.

The need for increased numbers of able government personnel familiar with contracting issues goes well beyond simply increasing the number of contracting officers based in Washington and overseas. There is a dire need for increased numbers of other government personnel involved in the contracting process, including contracting officer representatives, auditors and investigators.

Numbers alone are insufficient; the departments must actively work to improve the skills and elevate the rank of personnel involved in contract management and oversight. To cite one example, the military often assigns contracting officer representative duties to low-ranking personnel in the field who are often not acquisition professionals; their COR duties are viewed by the chain of command as secondary responsibilities.

Reforming the ES&R contracting process also requires that government personnel not directly tasked with overseeing contracts – including

commanders, other military personnel, diplomats and policymakers – are educated in basic contracting issues and procedures. As contractors continue to play an increasing role in the conduct of U.S. foreign policy and national security, U.S. policymakers and other officials must broaden their knowledge of the contracting process and the potential benefits and limitations of outsourcing activities previously carried out by the government.

#### **THE SECRETARY OF DEFENSE SHOULD:**

- Continue to significantly increase the number of qualified contract personnel responsible for ES&R contracting.<sup>113</sup> The boost in personnel should include filling the remaining flag officer billets for acquisition authorized in the FY 2009 NDAA and increasing the number of CORs and other government personnel responsible for quality assurance and contract oversight.
- Continue to provide incentives for enlisted personnel, officers and civilians to pursue a career track in contract management or auditing.
- Issue a directive that prioritizes the education, training and assigning of ES&R contracting personnel, as well as other relevant personnel outside the acquisition staff. This directive should:
  - » Direct that CORs should not have other duties that conflict with their contract responsibilities.
  - » Add basic contracting issues to professional military education and flag officer training and education. The aim should be to ensure that officers are qualified to assess compliance with contracting regulations and are familiar with the role of contractors in hostile environments.

#### **THE SECRETARY OF STATE AND THE USAID ADMINISTRATOR SHOULD:**

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.

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*A standard complaint voiced by Congress, inspectors general, the press and the Commission on Wartime Contracting revolves around the lack of transparency and accountability in the ES&R contracting process.*

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- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.

### **Recommendation: Establish a Contingency Contracting Reserve Corps**

The FY 2009 National Defense Authorization Act created a government-wide Contingency Contracting Corps – a pool of individuals currently working in the federal acquisition workforce who agree to make themselves available for deployment in response to an emergency, major disaster or contingency operation. The Corps is authorized to deploy either within or outside the United States, and voluntary membership is open to all military and federal employees working in federal acquisition.

While the creation of this corps is a welcome development and provides an attractive model for dealing with the problems associated with the lack of qualified contract managers in

theater, it is somewhat peculiarly housed at the General Services Administration (GSA). The GSA Administrator has responsibility for standing up the corps and the OMB Director has the authority (with the concurrence of other agency heads) to deploy members of the corps. In addition, the new corps replicates in large measure the deployable contracting capacity housed at the Federal Emergency Management Agency (FEMA); indeed, many federal contracting personnel who have agreed to join the FEMA-based contracting corps for domestic deployment have also sought to join the GSA-led contingency corps.

A better model would move the GSA-based contingency contracting reserve corps to an expanded DOD Office of Contingency Contracting, with deployment authority resting with the Secretary of Defense. In addition, deploying such a corps to manage ES&R contracts in a contingency environment should serve as the beginning, rather than the end, of the government's efforts to deal with a future mismatch between the requirements for skilled contract managers and the pool of such managers available for deployment. The contingency contracting reserve corps should serve as a surge capacity when needed, but the government should aim to transition to non-reserve corps federal contract managers within a relatively fixed period of time (e.g., one year). This time could be used to hire and deploy skilled contract specialists as temporary federal employees, ensuring both that the U.S. government has the necessary capacity and that the necessary personnel are federal employees (i.e., not themselves contractors).

### **Recommendation: Increase Transparency and Accountability**

A standard complaint voiced by Congress, inspectors general, the press and the Commission on Wartime Contracting revolves around the lack of transparency and accountability in the ES&R contracting process. This opacity has led to poor management and glaring inefficiencies: as of December 2009, federal auditors

had identified nearly a billion dollars in wasteful spending in Afghanistan contracts.<sup>114</sup> Congress has held numerous hearings on issues related to mis-spent contracting funds, revealing that the executive branch for a time failed to keep sufficient records on companies operating under government contracts or subcontracts in Iraq – or was unwilling to provide them.<sup>115</sup> Various factors exacerbate the difficulties of monitoring contract performance, including the multitude of contracts awarded, the relatively small staff that monitors them and the fact that contracting officers are often located far away from the area in which services are actually provided.

A number of measures have been taken in recent years to address this problem. DOD now provides Congress with periodic reports on the contractors and subcontractors it employs. The Army trains and deploys CORs to sites where contractors are providing services in order to ensure on-the-ground monitoring.<sup>116</sup> The U.S. government has also attempted to centralize responsibility for contractor oversight at the country level. In Afghanistan, for example, the Coordinating Director for Development and Economic Assistance in Kabul is tasked with reviewing each contract and ensuring its compliance with U.S. standards and strategy.<sup>117</sup>

Another major step forward was the establishment of the Synchronized Predeployment and Operational Tracker (SPOT) system in January 2007. SPOT was designed to serve as a unified database for contingency contractor and contract services information. Although SPOT plays a useful role in aggregating information for better contractor management and oversight, there are still areas in which it falls short. GAO continues to report that many information fields in SPOT are left unfilled because agencies differ in their interpretations regarding which contractor and subcontractor personnel must be entered into the system, leading to important knowledge gaps.<sup>118</sup> In addition, wide discrepancies have emerged

between the counts offered by SPOT and by the CENTCOM Quarterly Census. DOD, which conducts a manual count to track contractor personnel, regards the census as more accurate than SPOT, while GAO has found shortcomings in both systems. In one recent example, an April 19, 2010 SPOT report identified 32,000 contractors working for DOD in Afghanistan; meanwhile, the Quarterly Census found 107,000.<sup>119</sup> Agencies continue to use a variety of other systems – many of which are *ad hoc* – to obtain information on contractor personnel and contracts, undermining the utility of SPOT as a centralized database. This patchwork of practices must be integrated in order to establish SPOT as a fully effective contractor monitoring tool.

In addition to aggregating data, there is a keen need to ensure full access to contracts for government auditors. This at times requires auditors to link with customers as closely as possible. To cite one example, the Defense Contract Audit Agency (DCAA) has co-located auditors at the facilities of some major services contractors, creating what is essentially a continuous audit. State, on the other hand, has not been able to station auditors on site and has had to rely on DCAA to audit some of its books.

#### **THE SECRETARY OF DEFENSE, IN COORDINATION WITH THE SECRETARY OF STATE AND THE USAID ADMINISTRATOR, SHOULD:**

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.

- Improve accountability and monitoring of sub-contractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
- Establish enhanced mechanisms for planning, executing and monitoring Commander's Emergency Response Program projects.
- Establish a future baseline ratio of government contracting personnel (e.g., investigators, COs and CORs) to contractors to help ensure adequate oversight in future contingencies.
- Include clauses in ES&R contracts that require contracting firms to enforce rules governing behavior that impacts the overall U.S. mission, beyond the narrowly construed completion of their contracted activities.

#### THE SECRETARY OF STATE AND THE USAID ADMINISTRATOR SHOULD:

- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

#### THE ADMINISTRATION, TOGETHER WITH CONGRESS, SHOULD:

- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

#### Recommendation: Increase Scrutiny of ES&R Contractors

Congress, the press, government watchdog groups and others have focused to a large degree on the actions of private security contractors. Though they

comprise the vast majority of U.S. contractors in hostile environments, and receive the bulk of taxpayer dollars expended on contingency contracting, ES&R contractors have received much less scrutiny. This phenomenon adds to the perceived lack of transparency in dealing with contractors on the battlefield and should be altered in order to enhance transparency and accountability; illuminate contractor wrongdoing; uncover further instances of fraud, waste and abuse; and highlight those firms and contractors that perform at a high level.

#### CONGRESS, THE MEDIA, GOVERNMENT WATCHDOG GROUPS AND THE COMMISSION ON WARTIME CONTRACTING SHOULD:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America's overseas engagements. In so doing, these groups might draw on the effective example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistle-blower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

#### Recommendation: Improve the Legal and Regulatory Framework

Nine years after the commencement of hostilities in Afghanistan, and seven years after the war in Iraq began, the legal framework governing the use of ES&R contractors in hostile environments remains patchy and even ambiguous in some areas. One reason for this is the generally improvised approach Congress and two administrations have taken to codify law in this area, coupled with a belief in some quarters that the role of contractors in future contingencies will be – or can be forced to be – seriously diminished. Because, as explained above, this is unlikely, it is vitally important to establish a clear

statutory and regulatory framework in which contractors operate and are subject to stronger oversight. Such a framework should resolve jurisdictional issues for all contractors working for the U.S. government, including American citizens, host-nation citizens and third country contractors. In addition, it is essential to educate contractors and government workers about their legal rights and obligations and to provide the government personnel necessary both to ensure compliance and handle violations.

#### **THE DEPARTMENT OF DEFENSE GENERAL COUNSEL, TOGETHER WITH THE DEPARTMENT OF JUSTICE, SHOULD:**

- Clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, the Special Maritime and Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors.
    - » This should include clarifying the laws and jurisdiction relevant to third-country nationals employed by both contracting firms and subcontractors.
    - » It should also include engaging with America’s partners, and with NATO allies in particular, to ensure a common coalition view of the ways in which host-nation law and international law apply to private contractors.
- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD’s ability to investigate wrongdoing by contractor personnel.
  - Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
  - Establish a new, streamlined contingency Federal Acquisition Regulation that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waiver process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
    - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
    - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

#### **THE WHITE HOUSE, THE SECRETARY OF DEFENSE AND THE ATTORNEY GENERAL, TOGETHER WITH CONGRESS, SHOULD:**

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the “mission of the Department of Defense” overseas.

#### **ES&R CONTRACTING FIRMS SHOULD:**

- Ensure that senior managers and in-theater supervisors are familiar with relevant U.S. and local law, Status of Forces Agreements, the law of armed conflict and the applicable rules of engagement.
- Precisely define the way in which legal obligations and rules of engagement apply to their contract employees, including local nationals.

**THE U.S. GOVERNMENT SHOULD:**

- Press for wider international adoption of the Montreux Document and initiate other efforts to clarify the status of private contractors under the law of armed conflict.

**Recommendation: Raise Standards Among Contractors**

Just as the government must reform the way it handles ES&R contracts, so too should contracting firms and individual contractors bear responsibility for effecting change. Contractors working in the service of the U.S. government must be pressed to eliminate fraud, waste and abuse; hold their employees to the highest ethical and professional standards; and ensure that their employees are adequately trained and prepared for the unique demands of ES&R contracting in hostile environments. Where contracting firms are reluctant to carry out these responsibilities individually or in concert, the government should demand reasonable efforts to fulfill them as a condition of U.S.-issued contracts.

**ES&R CONTRACTING FIRMS SHOULD:**

- Enforce existing rules that require key employees (such as those who will carry weapons or are likely to see hostile fire) to have basic training in the law of armed conflict (e.g., the Geneva Conventions) and the rules of engagement for a particular theater of operations.
- Institute enhanced vetting procedures for third-country and local contractors to ensure that those with criminal pasts, a history of human rights violations or connections to enemy forces are prevented from obtaining employment.
- Establish a trade association that includes, as members, firms specifically engaged in ES&R contracting (as opposed to private security contracting). Such an association should:
  - » Establish an accreditation program and licensing standards for firms.

- » Serve as an interlocutor with the government on ES&R contracting issues.
- » Establish a database of contractors working for licensed firms and put into place a process for receiving and investigating complaints.
- » Promulgate education and training guidance for contractors working for member firms.
- » Encourage the development of, and participate in the design of, an international code of conduct to which firms, both American and foreign, may voluntarily commit and which spells out specific repercussions for severe violations.

- Work with Congress, the Secretary of Defense, the Secretary of State and the USAID Administrator to establish and mandate compensation mechanisms for victims of contractor abuse.

**Recommendation: Clarify the Proper Roles of Contractors in Conflicts**

One of the most passionate debates in the area of contingency contracting revolves around what activities are, or are not, “inherently governmental.” The term seeks to draw a stark line between tasks and behaviors that can be legitimately contracted out and those that cannot. In reality, such a clear delineation is often difficult to establish. There currently exist various instances of contractors carrying out precisely the sorts of tasks that many would deem to be “inherently governmental,” including providing security, conducting interrogations of enemy prisoners, maintaining weapons and coordinating the efforts of other contractors. An alternative approach would have the government determine, in advance, those areas it seeks to avoid contracting out as a matter of policy but also leave open the possibility of legally employing contractors in the same positions during times of crisis. This report proposes a hybrid to resolve the “inherently governmental” conundrum: The

government should define as “inherently governmental” those areas in which there is some consensus and move toward a “core competencies” approach in areas where there is not.

#### **CONGRESS SHOULD:**

- State in law any specific activities that it deems “inherently governmental.” It has already designated offensive combat operations and direct contractual oversight as such, and should expand the list to the degree that Congress can agree on enumerated activities.<sup>120</sup>

#### **THE OFFICE OF MANAGEMENT AND BUDGET SHOULD WORK WITH CONGRESS TO:**

- Move toward a “core capabilities” approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

#### **CONGRESS SHOULD:**

- Require the executive branch to carry out comprehensive cost analyses that compare the costs of contracted services with the costs of the same services provided by government personnel.

#### **Recommendation: Integrate the Role of Contractors into Policy and Strategy**

Until now, discussions on the role of contractors in conflict have emerged in a largely *ad hoc* fashion, often in reaction to news stories highlighting their

mistakes. While numerous statements and reports have noted the indispensable nature of contractors in future U.S. engagements, this has not directly translated into a policy discussion of the optimal features of a contracting force working alongside the military, diplomatic corps or USAID officials. As described above, the increasing use of private contractors has deep and widespread implications for American foreign and defense policy. The U.S. government must adopt a strategic view of the role of contractors and actively integrate them into planning mechanisms to ensure their systematic, effective and lawful deployment in future conflicts.

#### **THE SECRETARIES OF DEFENSE AND STATE, TOGETHER WITH THE USAID ADMINISTRATOR, SHOULD:**

- Establish an interagency process to determine the possible foreign policy implications of contracting with particular third-country nationals (e.g., employing contractors whose nationality and presence in a combat zone would provoke political sensitivities).
- Increase contracting coordination among International Security Assistance Force partners in Afghanistan and ensure that the role of contractors is considered in NATO policy decision making.
- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:
  - » Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
  - » Ensuring that all aspects of ES&R contracting are considered in the development of the Quadrennial Diplomacy and Development Review (QDDR).

### Recommendation: Integrate Contractors into Command and Control

Various hurdles have prevented the fully effective integration of contractors into existing command and control structures. Commanders and officers have reported not knowing even basic facts about the contractors operating in their areas of responsibility, such as their numbers and their missions. Knowledge of the rules governing these contractors can be equally scarce. Private security contractors generally operate outside the chain of command and the relationship between commander and contractor is sometimes unclear. Communication failures between commanders and contractors sharing an area of responsibility compound the problem. In Fallujah in 2004, for example, the Marine unit based just outside the city did not find out about the attack that killed four Blackwater contractors until it was reported by journalists.<sup>121</sup>

In addition, both pre-deployment training and the development of operational and contingency plans generally take place without adequate appreciation for the role of contractors on the battlefield. Training often includes individuals playing every role *but* contractors, and operational plans – while they now take into account the role of contractors – still tend to be developed without adequate consultation with contractors or with fully developed plans for their use on the battlefield.

#### THE SECRETARY OF DEFENSE SHOULD:

- Ensure that operational and contingency plans take into account every aspect of contractor support by:
  - » Expanding Annex W, which contains information on the numbers of contractors required for a military operation and the tasks they will perform, and ensuring that it contains relevant and adequate detail.
  - » Requiring that other functional annexes identify contracted support requirements.
  - » Identifying probable transition points at

which government employees will cede functions to private contractors or vice versa.

- Consult with contractors during the military's mission planning process, to the extent that the mission will rely on contractor support. This process should include ensuring that commanders know – before they deploy – the number of contractors they will encounter in an area of operations and the services these contractors will provide.
- Require military staffs to establish contracting planning cells to:
  - » Determine the precise roles contractors will play in a given operation.
  - » Develop contingency plans for the possibility that a contractor either fails or is not permitted to perform a service as specified in a contract.
- Integrate contractor roles into pre-deployment training and war games. This should include issuing the joint policy document mandated by Congress in 2008 and ensuring that it includes guidance for the inclusion of contractor roles in all facets of training.

### Recommendation: Change the U.S. Government's Culture of Contracting

A change in the culture of DOD, State and USAID with respect to contracting is long overdue. As one report noted, the Department of Defense has demonstrated an “inability to institutionalize operational contract support by accepting contractors as an integral part of the total force.”<sup>122</sup> Yet DOD may be the agency that has become the most comfortable with contracting out functions that until recently were performed largely by government personnel. In the State Department in particular, familiarity with contractors is sparse and there are few incentives for skilled personnel to move into contracting roles. Only a continued cultural shift in the way the three agencies view ES&R contracting – a shift that leads to changes in training, education, doctrine and planning – can lead to necessary change.

**THE SECRETARIES OF DEFENSE AND STATE,  
TOGETHER WITH THE USAID ADMINISTRATOR,  
SHOULD:**

- Provide clear incentives, including financial bonuses and promotions, to skilled employees who take on key contracting duties.
- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.

**Recommendation: Harvest and Apply  
Lessons Learned**

The lessons learned in Iraq and Afghanistan constitute one of the most expensive educations in American history. Only over a number of years has the United States begun to get a handle on the broad implications of its reliance on great numbers of contractors to carry out missions in hostile environments. As this report attests, that work is hardly done. The United States should not compound its problems and mistakes by forgetting the lessons learned in their wake.

**THE SECRETARIES OF DEFENSE AND STATE,  
TOGETHER WITH THE USAID ADMINISTRATOR,  
SHOULD:**

- Establish a contingency contracting lessons-learned center to collect, process and disseminate a history of past contracting experiences and the lessons that can be drawn from them. This center should attempt to capture lessons learned that apply not only to the employment of contractors by the Department of Defense but also by the Department of State and USAID.

## XI. CONCLUSION

The U.S. government and its contract employees have been thrust together as partners in a shared endeavor, the scale, cost and duration of which have taken nearly all observers by surprise.

Private contractors now represent an enduring feature of American conflicts, stabilization operations and reconstruction efforts. In light of changes in business practices, the provision of government service and the character of modern warfare, this surprising circumstance is unlikely to change. The reality is that America's reliance on private contractors is not likely to fade, and it is time for the United States to adapt to this new way of war.

Nine years after America's initial engagement in Afghanistan, and seven years after the U.S. invasion of Iraq – and with continuing American commitments and interests across the globe – action is long overdue. America's national security policy demands new ways of organizing, managing and overseeing the use of private contractors in overseas engagements. It requires new standards and new levels of oversight at home. It means thinking hard about what tasks should be outsourced and which should not. And it entails a greater understanding by policymakers and the American public of the role that the private sector has come to play in current and future engagements.

This report aims to draw together the most salient issues surrounding the use of contractors in American conflicts and chart a path forward. Taken together, the recommendations outlined above would reform, rationalize and improve the process of employing private contractors in ES&R roles. The government, the military, the contracting community and ultimately the American people will benefit from sweeping reform of the ES&R contracting system that ensures the private sector's role in American engagements aligns firmly with our nation's interests and values.

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*The reality is that America's reliance on private contractors is not likely to fade, and it is time for the United States to adapt to this new way of war.*

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## ENDNOTES

1. This figure is based on three sources: Department of Defense, *Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan*, USCENTCOM Quarterly Census 1st Quarter FY2010, [http://www.acq.osd.mil/log/PS/hot\\_topics.html](http://www.acq.osd.mil/log/PS/hot_topics.html); General Ray Odierno interview with Fox News Sunday (18 April 2010) stating that there are currently 95,000 U.S. troops in Iraq; and John J. Kruzal, "Afghanistan Troop Level to Eclipse Iraq by Midyear," identifying 83,000 U.S. military personnel in Afghanistan (24 March 2010), <http://www.defense.gov/news/newsarticle.aspx?id=58461>.
2. The National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181 Sec. 864) defines private security functions as the guarding of personnel, facilities or properties, and any other activity for which contractors are required to be armed.
3. PBS Frontline, "The High-Risk Contracting Business" (21 June 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors/highrisk.html>; Department of Justice, "Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq" (8 December 2008), <http://www.justice.gov/opa/pr/2008/December/08-nsd-1068.html>.
4. USCENTCOM Quarterly Census 1st Quarter FY2010.
5. Ibid.
6. In this vein, Colonel Thomas X. Hammes said about private actors in Iraq, "The contractor was hired to protect the principal. He had no stake in pacifying the country. Therefore, they often ran Iraqis off the roads, reconned by fire, and generally treated locals as expendable." See Thomas Ricks, *Fiasco: The American Military Adventure in Iraq* (New York: Penguin Books, 2006): 371.
7. Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003): 88.
8. This term was suggested by Herb Fenster, to whose encyclopedic knowledge of this subject we are in debt.
9. Paul K. Walker, *Engineers of Independence: A Documentary History of Army Engineers in the American Revolution, 1775-1783* (Washington: US Government Printing Office, 1981): 151, 265.
10. James A. Huston, *The Sinews of War: Army Logistics, 1775-1953* (Washington: Office of the Chief of Military History, 1966): 63, 81. See also Major William W. Epley, *Contracting in War: Civilian Combat Support of Fielded Armies* (Washington: US Army Center of Military History, 1989): 5-6.
11. James A. Huston: 35. See also Major William W. Epley: 5-6.
12. Erna Risch, *Quartermaster Support of the Army: A History of the Corps, 1775-1939* (Washington: Office of the Chief of Military History, 1962): 78-79.
13. Erna Risch: 142-43. See also James A. Huston: 105.
14. Major William W. Epley: 10-14.
15. Ibid: 19.
16. Ibid: 25.
17. Ibid: 28-29. These figures do not include Merchant Marines.
18. Ibid: 37-38.
19. Deborah C. Kidwell, "Public War, Private Fight? The United States and Private Military Companies," *Global War on Terrorism Occasional Paper 12* (Fort Leavenworth, KS: Combat Studies Institute Press, 2006): 15.
20. Ibid: 16.
21. "Vietnam: How Business Fights the 'War By Contract,'" *Business Week* (5 March 1965).
22. Deborah C. Kidwell: 16.
23. Lieutenant General Joseph M. Heiser, *Civilian Combat Support in Vietnam: Some Lessons Learned* (McLean, VA: Logistics Management Institute, December 1990): 1. Civilian support during the Vietnam War came from four primary sources: federal employees (approximately 1 percent of the total civilian support), American contractors (3 percent), third-country nationals (12 percent) and Vietnamese nationals (83 percent).
24. U.S. Department of the Army, Regulation 700-137, *Logistics Civil Augmentation Program* (16 December 1985).
25. Congressional Budget Office, *Logistics Support for Deployed Military Forces* (October 2005): 3 (Table 1.1).
26. United States Army, "LOGCAP IV Logistics Contract Awarded through Full and Open Competition" (17 April 2008), <http://www.army.mil/newsreleases/2008/04/17/8573-logcap-iv-logistics-contract-awarded-through-full-and-open-competition/>.
27. Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq* (August 2008): 13.
28. Government Accountability Office (formerly the General Accounting Office), *DOD Force Mix Issues: Greater Reliance on Civilians in Support Roles Could Provide Significant Benefits*, GAO/NSIAD-95-5 (Washington: October 1994): 5. Nearly 5,000 DOD civilian employees also deployed to the Persian Gulf to support the war effort.
29. The military's active component fell in personnel from 2,046,144 to 1,384,338 between 1990 and 2000; the DOD budget (in FY 2008 dollars) fell from 491 billion dollars to 385 billion dollars over the same period. See Department of Defense, *Active Duty Military Personnel Strengths by Regional Area, and by Country* (309A) (30 September 1990), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/Hst0990.pdf> and Department of Defense, *Active Duty Military Personnel Strengths by Regional Area, and by Country* (309A) (30 September 2000), <http://siadapp.dmdc.osd.mil/personnel/M05/hst0900.pdf>. For U.S. military budgetary statistics, see Steven M. Kosiak, *Historical and Projected Funding for Defense: Presentation of the FY 2008 Request in Tables and Charts*, Center for Strategic and Budgetary Assessments (7 June 2007), [www.cbaonline.org](http://www.cbaonline.org). Personnel and budget statistics cover FY 1990 through FY 2000.
30. Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*: 12.
31. Ibid: 1.
32. Ibid. From 2003-2007, the Department of Defense awarded contracts totaling 76 billion dollars, whereas the U.S. Agency for International

Development and the Department of State obligated 5 billion dollars and 4 billion dollars, respectively. During this period, 75 percent of DOD contracts were obligated through the Army.

33. Government Accountability Office, *Contingency Contracting: DOD, State, and USAID Contracts and Contractor Personnel in Iraq and Afghanistan* (Washington: October 2008): 20, 29, 34.
34. Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, Congressional Research Service R0764 (14 December 2009): 8.
35. Office of Management and Budget, *Circular Number A-76: Performance of Commercial Activities*, <http://www.whitehouse.gov/omb/circulars/ao76/ao76.html>.
36. Allison Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy* (New Haven, CT: Yale University Press, 2009): 15-16.
37. Office of Management and Budget Fact Sheet, *Work Reserved for Performance by Federal Government Employees* (30 March 2010).
38. Allison Stanger: 119; Ben Barber, "Andrew Natsios: Getting USAID on its Feet," *Foreign Service Journal* (September 2002): 23.
39. Congressional Budget Justification, *Foreign Operations FY 2010 Budget Request* (22 May 2009): 89.
40. Allison Stanger: 110, 119.
41. Gansler Commission on Army Acquisition and Program Management in Expeditionary Operations, *Urgent Reform Required: Army Expeditionary Contracting* (31 October 2007): 30.
42. Gansler Commission Report: 42.
43. Shay Assad and Jeffrey Parsons, Written Statement before the House Appropriations Committee Subcommittee on Defense, Department of Defense Contingency Contracting Initiatives (11 March 2010).
44. Allison Stanger: 125.
45. Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (New York: Knopf, 2007): 272.
46. Julian E. Barnes, "U.S. to Boost Combat Force in Afghanistan," *Los Angeles Times* (2 September 2009), <http://articles.latimes.com/2009/sep/02/world/fg-afghan-troops2>.
47. The White House, "Remarks by the President on Procurement" (4 March 2009), [http://www.whitehouse.gov/the\\_press\\_office/remarks-by-the-president-on-procurement-3/4/09](http://www.whitehouse.gov/the_press_office/remarks-by-the-president-on-procurement-3/4/09).
48. *Ibid.*
49. Department of Defense, *Quadrennial Defense Review Report* (February 2010): xiii.
50. ProPublica, "Disposable Army: Civilian Contractors in Iraq and Afghanistan," <http://www.propublica.org/series/disposable-army>.
51. Thomas L. Friedman, "The Best Allies Money Can Buy," *New York Times* (4 November 2009), <http://www.nytimes.com/2009/11/04/opinion/04friedman.html>.
52. James Glanz, "New Fraud Cases Point to Lapses in Iraq Projects," *New York Times* (13 March 2010), <http://www.nytimes.com/2010/03/14/world/middleeast/14reconstruct.html>; Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (30 April 2010).
53. Of note, SIGIR's focus is on the management of contracts, rather than the contractors themselves.
54. See, for example, numerous testimonies of Stuart W. Bowen Jr., including "Oversight: Hard Lessons Learned in Iraq and Benchmarks for Future Reconstruction Efforts," Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, United States House of Representatives (24 February 2010); Special Inspector General for Iraq Reconstruction, *Quarterly Report and the Semi-Annual Report to the United States Congress* (30 January 2010).
55. Special Inspector General for Iraq Reconstruction, *Applying Iraq's Hard Lessons to the Reform of Stabilization and Reconstruction Operations* (February 2010): 19.
56. Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (30 April 2010): 18.
57. James Glanz.
58. Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (30 April 2010).
59. "Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) Supports Commanders and Their Troops," *Army AL&T* (July-September 2006): 31.
60. Nagl/Fontaine email communication with DOD official (8 January 2010).
61. Congressional Budget Office, *Logistics Support for Deployed Military Forces* (October 2005): xiii, 38.
62. Government Accountability Office, *Military Personnel: DOD Needs to Improve the Transparency and Reassess the Reasonableness, Appropriateness, Affordability, and Sustainability of Its Military Compensation System*, GAO-05-798 (Washington: July 2005).
63. The office concluded that, in comparing State Department costs versus contractor costs in four different task orders, the cost of using State Department employees was higher in three (e.g., providing static security) while contractors were more expensive for carrying out one of the task orders, providing personal security. The office emphasized, however, the dynamic nature of such calculations, which turn on the need to recruit, hire, and train additional employees; administrative costs required for the government to reduce personnel if no longer needed; administrative costs associated with awarding and overseeing contracts, etc. GAO reported that the Department of Defense was unable to estimate these costs.

64. Congressional Budget Office, *Logistics Support for Deployed Military Forces*: xi-xii.
65. Fontaine email communication with DOD official (7 April 2010).
66. Congressional Budget Office, *Logistics Support for Deployed Military Forces*: xi-xii. The CBO report notes that during Operation Iraqi Freedom the average lag between activation of reserve-component units and their arrival in-theater was 158 days for full battalions and around 60 days for smaller detachments. By contrast, some aspects of the Army's logistics contract require that performance begin as early as 15 days after the Army notifies a contractor to proceed with a task order. While the contractor has not always met that goal, the report continues, "it has generally responded faster than Army reserve-component units."
67. Ibid.
68. General Stanley McChrystal, Remarks at the French National Defense Academy, L'Institut des Hautes études de Défense Nationale, IHEDN (16 April 2010).
69. Government Accountability Office, *Warfighter Support: DOD Needs to Improve its Planning for using Contractors to Support Future Military Operations* GAO-10-472 (Washington: March 2010). The GAO reported that as of February 2010, the Secretary of Defense had approved just four operational plans with Annex Ws and that DOD must continue to work to ensure that operational contract support requirements are included in future operational plans.
70. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T (Washington: 17 March 2010): 26.
71. Ibid: 26.
72. Ibid: 26.
73. Ibid: 26-7.
74. National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181 (2008), section 849.
75. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T: 25.
76. National Defense Authorization Act for Fiscal Year 2008, section 849.
77. Private contractors in contingency areas have been dismissed for consuming alcohol in theater, which in Iraq and Afghanistan constitute a violation of General Order No. 1. See, for example, Andrew Quinn, "U.S. to Drop Contractor in Kabul Embassy Scandal," *Reuters* (8 December 2009), <http://www.reuters.com/article/idUSTRESB75F420091208>.
78. Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*: 20-21. As an example of this opacity, the Marine unit based just outside Fallujah in 2004 did not find out about the attack that killed four Blackwater contractors until it was reported by journalists. See Peter Singer, *Can't Win with 'Em*, *Can't Win Without 'Em: Private Military Contractors and Counterinsurgency*, (Washington: The Brookings Institution, September 2007): 13-14.
79. Congressional Budget Office, *Logistics Support for Deployed Military Forces*: xii.
80. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T (Washington: 17 March 2010): 20.
81. Ibid.
82. Ibid: 21.
83. Department of Defense, *Quadrennial Defense Review Report* (February 2010): 93.
84. Shay Assad and Jeffrey Parsons, Written Statement (11 March 2010): 24; Department of Defense, *Quadrennial Defense Review Report* (February 2010): 55-56.
85. Joshua Partlow, "Taliban Targets U.S. Contractors Working on Projects in Afghanistan," *Washington Post* (17 April 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604521.html>.
86. MG George R. Fay, "AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade," Department of the Army (23 August 2004): 9, 19, 33, 40, 48, 74, *inter alia*; LTG Anthony R. Jones, "AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade," Department of the Army (23 August 2004): 6, 11, 18; MG Antonio M. Taguba, "AR 15-6 Investigation of the 800th Military Police Brigade," Department of the Army (May 2004): Executive Summary, 36, 48.
87. "Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) Supports Commanders and Their Troops," *Army AL&T* (July-September 2006): 32.
88. Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*: 12-13.
89. Alexandra Zavis, "Army Interpreter Sentenced At Court-Martial," *Los Angeles Times* (28 June 2008), <http://articles.latimes.com/2008/jun/24/world/fg-interpreter24>.
90. Del Quentin Wilber and Karen DeYoung, "Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting," *Washington Post* (17 August 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081601967.html>.
91. Fontaine email communication with DOD official (20 April 2010).
92. Peter Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors* (Washington: The Brookings Institution, 12 January 2007).
93. Alexandra Zavis.
94. A conversation one of the authors had with a U.S. senator suggests that, at least among supporters of the provision in Congress, there exists confidence that its constitutionality will be upheld.

95. USCENTCOM Quarterly Census 1st Quarter FY2010.
96. Waleed Ibrahim, "Iraqi Forces Arrest Five U.S. Security Contractors," *Reuters* (7 June 2009), <http://www.reuters.com/article/idUSL724660>.
97. Daphne Richemond-Barak, "Private Military Contractors and Combatancy Status under International Humanitarian Law," paper presented for "Complementing IHL" conference (1-3 June 2008): 6.
98. Fontaine email communication with International Committee of the Red Cross official (29 April 2010); Fontaine email communication with the Geneva Centre for the Democratic Control of Armed Forces official (29 April 2010).
99. This paragraph draws heavily on the excellent discussion of the legal status of military personnel, government citizens and contractors contained in Congressional Budget Office, *Logistics Support for Deployed Military Forces*: 9-13.
100. The Montreux Document is open to all states and international organizations. See "Participating States of the Montreux Document," <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>.
101. Geneva Centre for the Democratic Control of Armed Forces website, [http://www.dcaf.ch/news/\\_diarydetailskms.cfm?lng=en&id=108835&nav1=2](http://www.dcaf.ch/news/_diarydetailskms.cfm?lng=en&id=108835&nav1=2).
102. See, for example, Michael Walzer, "Mercenary Impulse," *The New Republic* (12 March 2008).
103. Roger D. Carstens, Michael A. Cohen, and Maria Figueroa Kupcu, *Changing the Culture of Pentagon Contracting* (Washington: The New American Foundation, October 2008): 13.
104. Office of Management and Budget, "Work Reserved for Performance by Federal Government Employees," *Federal Register* (31 March 2010).
105. Ibid: 16196-16197.
106. Several observers have offered two potentially useful principles that might underlie any determination of what activities should be considered core competencies. Under these principles, core competencies are those activities which, if removed, would clearly lead to mission failure, and those which if performed by contractors would pose significant legal complications. An additional consideration is the desire to avoid lost skill sets; if the U.S. government outsources a function, it may risk losing the capacity to carry out the activity at any point without contractors.
107. H.R. 5122, the John Warner National Defense Authorization Act for Fiscal Year 2007, Section 854.
108. Edward M. Harrington and Jeffrey P. Parsons, Statement before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009). The FY 2009 NDAA authorized an increase of five general officer billets specifically for the Army (see, P.L. 110-417 sec. 503(a)), all five of which were reserved for those who serve in an acquisition position (see, P.L. 110-417 sec. 503(e)(1)). It also authorized an increase of 53 general officer and flag officer positions that are joint duty assignments, which may be designated for exclusion from the statutory limitations on the numbers of general officers and flag officers on active duty (see, P.L. 110-417 sec. 503(c)). Of these 53 new positions, five are reserved for general officers or flag officers who serve in an acquisition position, with one assignment specifically placed within DCMA (see, P.L. 110-417 sec. 503(e)(2)). It appears that any service (including Army) may be considered for these other five billets.
109. Office of Senator Jim Webb, "Freshman Senators Call for Commission to Investigate Wartime Contracting" (18 July 2007), <http://mccaskill.senate.gov/newsroom/record.cfm?id=279465>.
110. Gansler Commission Report.
111. Fontaine email communication with official from Special Inspector General's office (13 April 2010).
112. Among other steps, DOD has issued doctrine in the 31 March 2010 "Operational Contract Support Concept of Operations" establishing an Army Contracting Command and establishing a Joint Theater Support Contracting Command for contingency-specific contracts in Iraq and Afghanistan.
113. Secretary of Defense Robert Gates stated that DOD intends to hire an additional 9,000 defense procurement professionals by 2015, including 2,500 auditors at the DCAA. This cadre will have responsibility, however, for procurement across the spectrum, not only for ES&R contracting. See DOD News Briefing by Secretary of Defense Robert Gates (6 April 2009).
114. Opening statement by Senator Claire McCaskill before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).
115. Jennifer K. Elsea, Kennon H. Nakamura, and Moshe Schwartz, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, Congressional Research Service RL 32419 (25 August 2008).
116. Edward M. Harrington and Jeffrey P. Parsons, Statement before the Subcommittee on Contracting Oversight (17 December 2009).
117. Dan Feldman, Remarks before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).
118. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T: 17.
119. Department of Defense, *Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan*, USCENTCOM Quarterly Census 1st Quarter FY2010 and Synchronized Predeployment and Operational Tracker (SPOT), "Weekly SPOT numbers for DOD, DOS, USAID, and Other" (19 April 2010).
120. Carstens et al.: 13
121. Peter Singer, *Can't Win with 'Em, Can't Win Without 'Em: Private Military Contractors and Counterinsurgency* (Washington: The Brookings Institution, September 2007): 13-14
122. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T (Washington: 17 March 2010): 26-7.

# Appendices

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By Richard Fontaine and John Nagl

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## APPENDIX A: RECOMMENDATIONS BY AGENCY OR ACTOR

### THE WHITE HOUSE (TOGETHER WITH THE DEPARTMENTS OF DEFENSE AND JUSTICE AND CONGRESS) SHOULD:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the “mission of the Department of Defense” overseas.
- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD’s ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation (FAR) that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waivers process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
  - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
  - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

### THE ADMINISTRATION (TOGETHER WITH CONGRESS) SHOULD:

- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

### THE ADMINISTRATION SHOULD:

- Press for wider international adoption of the Montreux Document and initiate other efforts to clarify the status of private contractors under the law of armed conflict.

## THE DEPARTMENT OF DEFENSE SHOULD:

- Continue to significantly increase the number of qualified contract personnel responsible for ES&R contracting. The boost in personnel should include filling the remaining flag officer billets for acquisition authorized in the FY 2009 NDAA and increasing the number of CORs and other government personnel responsible for quality assurance and contract oversight.
- Continue to provide incentives for enlisted personnel, officers and civilians to pursue a career track in contract management or auditing.
- Issue a directive that prioritizes the education, training and assigning of ES&R contracting personnel, as well as other relevant personnel outside the acquisition staff. This directive should:
  - » Direct that CORs should not have other duties that conflict with their contract responsibilities.
  - » Add basic contracting issues to professional military education and flag officer training and education. The aim should be to ensure that officers are qualified to assess compliance with contracting regulations and are familiar with the role of contractors in hostile environments.
- Ensure that operational and contingency plans take into account every aspect of contractor support by:
  - » Expanding Annex W, which contains information on the numbers of contractors required for a military operation and the tasks they will perform, and ensuring that it contains relevant and adequate detail.
  - » Requiring that other functional annexes identify contracted support requirements.
  - » Identifying probable transition points at which government employees will cede functions to private contractors or vice versa.
- Consult with contractors during the military's mission planning process, to the extent that the mission will rely on contractor support. This process should include ensuring that commanders know – before they deploy – the number of contractors they will encounter in an area of operations and the services these contractors will provide.
- Require military staffs to establish contracting planning cells to:
  - » Determine the precise roles contractors will play in a given operation.
  - » Develop contingency plans for the possibility that a contractor either fails or is not permitted to perform a service as specified in a contract.
- Integrate contractor roles into pre-deployment training and war games. This should include issuing the joint policy document mandated by Congress in 2008 and ensuring that it includes guidance for the inclusion of contractor roles in all facets of training.

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## THE DEPARTMENT OF DEFENSE (IN COORDINATION WITH THE WHITE HOUSE, THE DEPARTMENT OF JUSTICE, AND CONGRESS) SHOULD:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the “mission of the Department of Defense” overseas.
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  - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
  - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

## THE DEPARTMENT OF DEFENSE (IN COORDINATION WITH THE STATE DEPARTMENT AND USAID) SHOULD:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms’ reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.
- Improve accountability and monitoring of subcontractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
- Establish enhanced mechanisms for planning, executing and monitoring Commander’s Emergency Response Program projects.
- Establish a future baseline ratio of government contracting personnel (e.g., investigators, COs and

CORs) to contractors to help ensure adequate oversight in future contingencies.

- Include clauses in ES&R contracts that require contracting firms to enforce rules governing behavior that impacts the overall U.S. mission, beyond the narrowly construed completion of their contracted activities.
- Establish an interagency process to determine the possible foreign policy implications of contracting with particular third-country nationals (e.g., employing contractors whose nationality and presence in a combat zone would provoke political sensitivities).
- Increase contracting coordination among International Security Assistance Force partners in Afghanistan and ensure that the role of contractors is considered in NATO policy decision making.
- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:
  - » Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
  - » Ensuring that all aspects of ES&R contracting are considered in the development of the Quadrennial Diplomacy and Development Review (QDDR).
- Provide clear incentives, including financial bonuses and promotions, to skilled employees who take on key contracting duties.
- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.
- Establish a contingency contracting lessons-learned center to collect, process and disseminate a history of past contracting experiences and the lessons that can be drawn from them. This center should attempt to capture lessons learned that apply not only to the employment of contractors by the Department of Defense but also by the Department of State and USAID.

#### THE DEPARTMENT OF DEFENSE (TOGETHER WITH THE DEPARTMENT OF JUSTICE) SHOULD:

- Clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, the Special Maritime and Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors.
  - » This should include clarifying the laws and jurisdiction relevant to third-country nationals employed by both contracting firms and subcontractors.
  - » It should also include engaging with America's partners, and with NATO allies in particular, to ensure a common coalition view of the ways in which host-nation law and international law apply to private contractors.

**THE STATE DEPARTMENT SHOULD:**

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.
- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.
- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

**THE STATE DEPARTMENT (IN COORDINATION WITH THE DEPARTMENT OF DEFENSE AND USAID) SHOULD:**

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the Synchronized Predeployment and Operational Tracker (SPOT) system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.
- Improve accountability and monitoring of subcontractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
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- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:

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- » Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
- » Ensuring that all aspects of ES&R contracting are considered in the development of the Quadrennial Diplomacy and Development Review (QDDR).
- Provide clear incentives, including financial bonuses and promotions, to skilled employees who take on key contracting duties.
- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.
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#### USAID SHOULD:

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.
- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.
- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

#### USAID (IN COORDINATION WITH THE DEPARTMENTS OF STATE AND DEFENSE) SHOULD:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.

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## THE COMMISSION ON WARTIME CONTRACTING (IN COORDINATION WITH THE MEDIA, GOVERNMENT WATCHDOG GROUPS, AND CONGRESS) SHOULD:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America's overseas engagements. In so doing, these groups might draw on the effective example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistle-blower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

## ES&R CONTRACTING FIRMS SHOULD:

- Ensure that senior managers and in-theater supervisors are familiar with relevant U.S. and local law, Status of Forces Agreements, the law of armed conflict and the applicable rules of engagement.
- Precisely define the way in which legal obligations and rules of engagement apply to their contract employees, including local nationals.
- Enforce existing rules that require key employees (such as those who will carry weapons or are likely to see hostile fire) to have basic training in the law of armed conflict (e.g., the Geneva Conventions) and the rules of engagement for a particular theater of operations.
- Institute enhanced vetting procedures for third-country and local contractors to ensure that those with criminal pasts, a history of human rights violations or connections to enemy forces are prevented from obtaining employment.
- Establish a trade association that includes as members firms specifically engaged in ES&R contracting (as opposed to private security contracting). Such an association should:
  - » Establish an accreditation program and licensing standards for firms.
  - » Serve as an interlocutor with the government on ES&R contracting issues.
  - » Establish a database of contractors working for licensed firms and put into place a process for receiving and investigating complaints.
  - » Promulgate education and training guidance for contractors working for member firms.
  - » Encourage the development of, and participate in the design of, an international code of conduct to which firms, both American and foreign, may voluntarily commit and which spells out specific repercussions for severe violations.
- Work with Congress, the Secretary of Defense, the Secretary of State and the USAID Administrator to establish and mandate compensation mechanisms for victims of contractor abuse.

**CONGRESS SHOULD:**

- State in law any specific activities that it deems “inherently governmental.” It has already designated offensive combat operations and direct contractual oversight as such, and should expand the list to the degree that Congress can agree on enumerated activities.
- Require the executive branch to carry out comprehensive cost analyses that compare the costs of contracted services with the costs of the same services provided by government personnel.

**CONGRESS (IN COORDINATION WITH THE WHITE HOUSE AND THE DEPARTMENTS OF DEFENSE AND JUSTICE) SHOULD:**

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the “mission of the Department of Defense” overseas.
- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD’s ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waivers process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
  - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
  - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

**CONGRESS (TOGETHER WITH THE ADMINISTRATION) SHOULD:**

- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

### CONGRESS (IN COORDINATION WITH THE MEDIA, GOVERNMENT WATCHDOG GROUPS, AND THE COMMISSION ON WARTIME CONTRACTING) SHOULD:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America’s overseas engagements. In so doing, these groups might draw on the effective example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistle-blower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

### CONGRESS (TOGETHER WITH THE OFFICE OF MANAGEMENT AND BUDGET) SHOULD:

- Move toward a “core capabilities” approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

### THE OFFICE OF MANAGEMENT AND BUDGET (TOGETHER WITH CONGRESS) SHOULD:

- Move toward a “core capabilities” approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

**THE DEPARTMENT OF JUSTICE (TOGETHER WITH THE DEPARTMENT OF DEFENSE) SHOULD:**

- Clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, the Special Maritime and Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors.
  - » This should include clarifying the laws and jurisdiction relevant to third-country nationals employed by both contracting firms and subcontractors.
  - » It should also include engaging with America’s partners, and with NATO allies in particular, to ensure a common coalition view of the ways in which host-nation law and international law apply to private contractors.

**THE DEPARTMENT OF JUSTICE (TOGETHER WITH THE WHITE HOUSE, CONGRESS, AND THE DEPARTMENT OF DEFENSE) SHOULD:**

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## APPENDIX B: WORKING GROUP PARTICIPANTS

The following individuals participated in working group sessions designed to help inform this project. However, all opinions expressed within the report – unless otherwise noted – are those solely of the authors and not necessarily conclusive of the working group sessions.

**Deborah Avant**  
University of California, Irvine

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The Louis Berger Group

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**John Brummet**  
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**Major General Julian  
Burns, USA (Ret.)**  
BAE Systems

**Tom Callahan**  
Lockheed Martin

**Pablo Carrillo**  
Senate Armed Services  
Committee

**Phil Carter**  
McKenna Long & Aldridge,  
LLP

**Kristi Clemens Rogers**  
AEGIS

**Carole Coffey**  
U.S. Government  
Accountability Office

**Jock Covey**  
Bechtel

**Ginger Cruz**  
Special Inspector General for  
Iraq Reconstruction

**Colonel Jack Cunnane,  
USA**  
U.S. Army Contracting  
Command

**Margaret Daum**  
Senate Homeland Security  
and Governmental Affairs  
Committee Subcommittee on  
Contracting Oversight

**Bob Dickson**  
Commission on Wartime  
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**Dominick Donald**  
AEGIS

**Major General Charles  
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**Andrew Erdmann**

**Colonel Jay Farrar, USMC  
(Ret.)**  
Bechtel

**Herb Fenster**  
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**Richard Fontaine**  
Center for a New American  
Security

**John Gastright**  
DynCorp International

**The Honorable Pete  
Geren**  
Twentieth Secretary of the  
U.S. Army

**Kristen Gilley**  
Special Inspector General for  
Afghanistan Reconstruction

**Bill Greenwalt**  
Lockheed Martin

**General Ron Griffith, USA  
(Ret.)**  
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**Ambassador John Herbst**  
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**Major General Pat  
Hickerson, USA (Ret.)**  
CH2M HILL

**David Isenberg**  
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**Rob Jenkins**  
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**Ed Laughlin**  
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**Linda McKnight**  
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Operations Association

**Gary Motsek**  
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of Defense (Logistics and  
Material Readiness)

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Lockheed Martin

**John Nagl**  
Center for a New American  
Security

**Rebekah Nottingham**  
BAE Systems

**Kevin O'Brien**  
Innovative Analytics &  
Training LLC

**Dr. Ken Oscar**  
Fluor

**Brigadier General Craig  
Peterson, USA (Ret.)**  
Former Chief of Staff, Multi-  
National Division North,  
Operation Joint Guard, Bosnia

**Richard Ressler**  
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**Moshe Schwartz**  
Congressional Research  
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**Mark Silverman**  
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the Red Cross

**Allison Stanger**  
Middlebury College

**Chris Taylor**  
Mission Essential Personnel

**Bill Walter**  
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**Jamie Williamson**  
International Committee of  
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## *Production Notes*

**Paper recycling** is reprocessing waste paper fibers back into a usable paper product.

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