

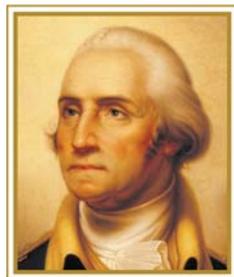
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**DEAD CONTRACTORS:
THE UN-EXAMINED EFFECT OF SURROGATES
ON THE PUBLIC'S CASUALTY SENSITIVITY**

**STEVEN L. SCHOONER
&
COLLIN D. SWAN**

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DEAD CONTRACTORS: THE UN-EXAMINED EFFECT OF SURROGATES ON THE PUBLIC'S CASUALTY SENSITIVITY

STEVEN L. SCHOONER* AND COLLIN D. SWAN**

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comments welcome at SSCHOONER@LAW.GWU.EDU

*Casualty sensitivity may be thought of as
price sensitivity to the human cost of war.¹*

*We're simply not going to go to war without
contractors; we have to build that into what we call
readiness, what we call training, what we call
leadership and what we call war planning.²*

* Steven L. Schooner is the Nash & Cibinic Professor of Government Contract Law and Co-Director of the Government Procurement Law Program, the George Washington University Law School. Professor Schooner previously served as the Associate Administrator for Procurement Law and Legislation in the Office of Federal Procurement Policy, as a trial attorney at the Department of Justice, and as an Army Judge Advocate. He is a director of the Procurement Round Table. The authors thank Michael Benjamin, Jessica Clark, Eugene Gholz, Jon D. Michaels, Tom Morrison, Lisa Schenck, and the *Journal's* anonymous reviewers for their helpful comments. Professor Schooner also gratefully acknowledges Seymour Herman for his continued support of government procurement law research at the George Washington University Law School.

** Collin D. Swan is a second-year law student at the George Washington University Law School and a member of THE GEORGE WASHINGTON UNIVERSITY LAW REVIEW.

¹ Christopher Gelpi & John Mueller, *The Cost of War*, FOREIGN AFFAIRS (Jan./Feb. 2006), <http://www.foreignaffairs.com/articles/61222/christopher-gelpi-and-john-mueller/the-cost-of-war>.

² Statement of Ashton B. Carter, Under Sec'y of Def. for Acquisition, Tech. & Logistics, before the Comm'n on Wartime Contracting: Better Buying Power in Defense Spending 39 (Mar. 28, 2011) (oral testimony), available at http://www.wartimecontracting.gov/docs/hearing2011-03-28_transcript.pdf.

The Price of War

In a representative democracy, few decisions are more significant or heavily scrutinized than the decision to engage in heavy, sustained military action abroad.³ Once the nation commits to the operation, decisions regarding how long to remain are hotly debated. Political support for sustained military engagements, especially those involving long-term deployment of ground forces, is scrupulously observed and dissected.⁴ Within this complicated calculus,⁵ several factors stand out as impacting the public's support for these operations; the most graphic being the number of military soldiers who have made the ultimate sacrifice on the nation's behalf.

³ There has been much debate over the years concerning the proper role that Congress and the Executive should play in the decision to engage in military operations. *See, e.g.*, THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES (2005), *available at* http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf. For the war-related powers of Congress and the President, see U.S. Const., art. I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War, [and] grant Letters of Marque and Reprisal”); U.S. Const., art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and the Militia of the several States, when called into the actual Service of the United States”).

⁴ *See, e.g.*, ERIC V. LARSON & BOGDAN SAVYCH, RAND CORPORATION, MG-231-A, AMERICAN PUBLIC SUPPORT FOR MILITARY OPERATIONS FROM MOGADISHU TO BAGHDAD 1 (2005), *available at* <http://www.rand.org/pubs/monographs/MG231.html> [hereinafter LARSON & SAVYCH, MOGADISHU TO BAGHDAD]:

While anecdotal evidence suggests that public opinion is not a dominant factor in decisions on whether or not to undertake military operations, there is ample evidence that the public opinion environment shapes the way military operations are justified and even, in some cases, the way they are designed and conducted.

⁵ *See* ERIC V. LARSON, RAND CORPORATION, MR-726-RC, CASUALTIES AND CONSENSUS: THE HISTORICAL ROLE OF CASUALTIES IN DOMESTIC SUPPORT FOR U.S. MILITARY OPERATIONS at iii (1996), *available at* http://www.rand.org/pubs/monograph_reports/MR726.html [hereinafter LARSON, CASUALTIES AND CONSENSUS]:

The relationship between U.S. casualties and public opinion on military operations remains an important yet greatly misunderstood issue. It is now an article of faith in political and media circles that the American public will no longer accept casualties in U.S. military operations and that casualties inexorably lead to irresistible calls for the immediate withdrawal of U.S. forces.

Indeed, in the absence of a strong national imperative or a widely-held belief in the operation's success, the total number of American fatalities becomes the public's most quantifiable and readily accessible metric of interest. In the modern era, most studies suggest that "majorities of the public have historically considered the potential and actual casualties in U.S. wars and military operations to be an important factor in their support."⁶ Specifically, an inverse relationship exists between the number of military deaths and public support.⁷ Economists have dubbed this the "casualty sensitivity" effect.⁸

This article asserts that this stark and monolithic metric requires re-examination in light of a little-known phenomenon: on the modern battlefield, contractor personnel are dying at rates similar to—and at times in excess of—soldiers. The increased risk to contractors' health and well-being logically follows the expanded role of contractors in modern governance and defense. The post-millennial U.S. military—like the modern U.S. government—is more heterogeneous than ever before. The military is populated by a "blended workforce" that integrates soldiers with private-sector contractor employees—comprised of both U.S. citizens and, to a large extent, foreign nationals—in every conceivable aspect of the mission abroad. Not surprisingly, one result of this integration is that contractors are dying alongside—or in the place of—soldiers at unprecedented and (arguably) alarming rates. For the most part, this

⁶ LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at iii. It is not uncommon for government officials to justify military engagements to the public through statements that "no ground troops" will be used. In fact, the lack of committed ground forces may explain why the public remains largely unconcerned about brief, surgical insertions, such as the nation's current military involvement in Libya. Indeed, Secretary of Defense Robert Gates has affirmatively pledged that there will not be any U.S. ground forces sent to Libya. *See Gates: No U.S. Ground Troops in Libya On His Watch*, USA TODAY (Mar. 31, 2011), http://www.usatoday.com/news/washington/2011-03-31-gates-mullen-libya_N.htm.

⁷ Of course, "the rate of decline [in support] as a function of casualties varies dramatically from operation to operation." LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 9. As discussed below, there is also the perception of a counter-conventional reaction—a form of inflammation—in which fatalities lead to a demand for escalation (or greater resolve) to achieve victory. *Id.* at 53.

⁸ "Since the Vietnam War, policymakers have worried that the U.S. public will support military operations only if the human costs of the war, as measured in combat casualties, are minimal." Christopher Gelpi et al., *Success Matters: Casualty Sensitivity and the War in Iraq*, 30 INT'L SEC., no. 3, 2006 at 7, 7, available at <http://www.mitpressjournals.org/doi/pdf/10.1162/isec.2005.30.3.7>.

“substitution” has taken place outside of the cognizance of the public and, potentially, Congress.⁹ This article explains the phenomenon, identifies some of the challenges and complexities associated with quantifying and qualifying the real price of combat in a modern outsourced military, and encourages greater transparency¹⁰ so that the public can more meaningfully participate¹¹ in “the great American experiment.”¹²

⁹ See Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 753-57 (2010). Professor Michaels addresses the political benefits of relying on a large contractor presence:

Private contractors are politically valuable insofar as they neither enter into official head or body counts—nor, it appears, into our hearts. That is to say, the nation identifies with its troops to a far greater extent than its contractors: “Americans are accustomed to hearing the military death toll. But largely absent from the public consciousness are the thousands of civilians putting their lives on the line as contractors in Iraq.” Combining US military personnel and contractors in combat zones thus allows for contractors to lighten the troops’ share of long tours, injuries, and other physical and emotional hardships. But even more importantly, the aggregate loss of life (and quality of life) is discounted by the fact that we neither hear as much about nor, evidently, care as much about homesick or fallen contractors.

Id. at 754-55.

¹⁰ Since early in his administration, President Barack Obama has emphasized the linkage between transparency and the government’s accountability to the public: “A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, ‘sunlight is said to be the best of disinfectants.’” Presidential Memorandum, Freedom of Information Act, (Jan. 21, 2009), <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

¹¹ LAURA A. DICKINSON, *OUTSOURCING WAR & PEACE* 104-05 (2011). Dickinson introduces her chapter on “Public Participation/Private Contract” by explaining, among other things, that:

Public participation has long been a central preoccupation of administrative law.... [M]uch of domestic administrative law is concerned with increasing public awareness, participation, and oversight through ... the Freedom of Information Act..., the Federal Advisory Committee Act, inspector-general oversight, whistleblower protection statutes, ... notice and comment rule making, judicial review..., and even the First Amendment. Significantly,... public participation is not simply about making sure a voting polity ratifies all government decisions. Rather, ***[public participation] is concerned with ensuring that there is some sort of dialogue, even if informal, between the***

A Modern, Unanticipated Role for Contractors

The extraordinary growth in the government's reliance on service contractors in the last two decades is now well documented,¹³ and the broader outsourcing phenomenon has generated significant debate over how this trend impacts the nature of governments and governance.¹⁴

government and the governed to act as a check on power.... In this scheme, transparency is ... an end in itself and ... [it] helps to maintain a feedback loop between government actors and those affected by government policy....

Id. at 105-06 (emphasis added, footnotes omitted). *See also*, Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 927 (2009) (“Not only will transparency and public participation inevitably help to achieve democratic goals, but they also can help produce better, more informed policy decisions.”); Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 335 (2004) (pointing to the Government in Sunshine Act’s declaration that “the policy of the United States [is] that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government” (quoting Pub. L. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2000)))).

¹² This commonly used term derives from Alexis de Tocqueville’s seminal work following his visit to the United States in the 1830s. *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

¹³ Steven L. Schooner and Daniel Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. OF CONT. MGMT. 10 (Summer 2008); *see also* PHILLIP J. COOPER, *GOVERNING BY CONTRACT: CHALLENGES AND OPPORTUNITIES FOR PUBLIC MANAGERS* (2003); *MARKET BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE* (John D. Donahue & Joseph S. Nye, Jr. eds., 2002); *THE PROCUREMENT REVOLUTION* (Mark A. Abramson & Roland S. Harris III eds., 2003) (particularly chapters 1, 3, and 5-7). Symposia have grappled with a host of related issues. *See, e.g.*, Symposium, *Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1319 (2001); Symposium, *New Forms of Governance: Ceding Power to Private Actors*, 49 UCLA L. REV. 1687 (2002); Single Subject Issue, *Privatization and Outsourcing*, 30 PUB. CONT. L.J. 551 (2001); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

¹⁴ Scholars also have exposed more of the thorny issues implicated when governments, at the federal, state, and local level, rely on the private sector. *See, e.g.*, Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000) (discussing accountability mechanisms in contracts and the conflict between public law norms and private law principles); Gillian E. Metzger,

According to the recent report by the CSIS Defense-Industrial Initiatives Group, the professional services contracting industry that serves the federal government has expanded at a rate of five percent annually over the last fifteen years, from \$137 billion in 1994, to \$280 billion in 2009.¹⁵ DOD remains the largest federal government consumer of professional services, having spent over \$162 billion on service contracts in 2009.¹⁶ One major consequence of this expansion is that federal government contractors are now integrated into every conceivable aspect of our

Privatization as Delegation, 103 COLUM. L. REV. 1367, 1371 (2003) (“[C]onstitutional law’s current approach to privatization is fundamentally inadequate in an era of increasingly privatized government.”); Sydney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003) (governments employ a transaction cost or make-or-buy analysis in determining whether to outsource governmental regulation); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 130 (2003) (“[I]n the debate about which government services are best-suited for private enterprise, . . . welfare services should be . . . last in line. The policy goals are simply too complex and, in a democratic society, conflicted.”); Roger Fairfax, *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 266 (“[T]he prosecutorial function . . . is being outsourced to private lawyers in smaller jurisdictions . . . and [t]his phenomenon is poised to expand as larger jurisdictions are forced to slash already tight law enforcement budgets.”). A wealth of contemporary comparative scholarship also examines lessons learned from experiences outside the United States. See, e.g., Lauren Page Ambinder et al., *The Mirage Becomes Reality: Privatization and Project Finance Developments in the Middle East Power Market*, 24 FORDHAM INT’L L.J. 1029 (2001); Alessandro Ancarani, *The Impact of Public Firms Commercialisation on Purchasing Management*, 3 J. PUB. PROCUREMENT 357 (2003); Bernard Black et al., *Russian Privatization & Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000); Ellen Dannin, *To Market, To Market: Legislating on Privatization and Subcontracting*, 60 MD. L. REV. 249, 249 n.1 (2001) (containing a wealth of sources relating to privatization in New Zealand in the author’s biographical footnote); Hester Lessard, *The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring*, 39 OSGOOD HALL L.J. 717 (2001); Ewell E. Murphy, Jr., *The Prospect for Further Energy Privatization in Mexico*, 36 TEX. INT’L L.J. 75 (2001); Tony Prosser, *Public Service Law: Privatization’s Unexpected Offspring*, 63 LAW & CONTEMP. PROBS. 63 (2000); Yua Wei, *Corporatization and Privatization: A Chinese Perspective*, 22 NW. J. INT’L L. & BUS. 219 (2002).

¹⁵ GREGORY SANDERS ET AL., CENTER FOR STRATEGIC & INT’L STUDIES, STRUCTURE AND DYNAMICS OF THE U.S. FEDERAL PROFESSIONAL SERVICES INDUSTRIAL BASE 1995-2009 at ix (2010), available at http://csis.org/files/publication/101112_fps_report_2010.pdf. All dollar values in this report were converted to FY 2009 dollars. See *id.* at 3.

¹⁶ *Id.* at 8.

nation's operations abroad.¹⁷ Indeed, there may be no more significant indicia of the scope of that change than the frequency with which contractor personnel are now being asked—explicitly or implicitly—to make the ultimate sacrifice in what, until recently, would have been described as “the battle area.”¹⁸

¹⁷ The Commission on Wartime Contracting described the “wide range of services” that contractors perform: “They guard bases and diplomatic facilities, escort convoys and personnel, wash clothes and serve meals, maintain equipment and translate local languages, erect buildings and dig wells, and support many other important activities.” COMM’N ON WARTIME CONTRACTING IN IRAQ & AFG., AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 7 (2011), *available at* http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf [hereinafter COMM’N ON WARTIME CONTRACTING, AT WHAT RISK?]. The CENTCOM census has grouped the contractor community into the following categories: base support, security, communication, construction, translator/interpreter, logistics/maintenance, transportation, training, and “other.” See MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS 13-15, 24-25 (2011) (citing the CENTCOM CENSUS), *available at* <http://www.fas.org/sgp/crs/natsec/R40764.pdf>.

¹⁸ Modern engagements and the use of non-traditional military forces in the past decade have blurred the geographical limits of the “battlefield.” As a result, fatalities are no longer conveniently confined to specific geographical areas. In fact, the diffuse nature of the modern battlefield is a major focus in recent scholarship on the United States’ War on Terror. See, e.g., Sophia Brill, *The National Security Court We Already Have*, 28 YALE L. & POL’Y REV. 525, 53-536 (2010); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2117 (2005) (“Two controversial issues about the detention power as it applies to terrorists concern the geographic scope of the authorized conflict and the allowable length of detention for captured enemy combatants.”). Furthermore, we make no attempt in this piece to distinguish between “war” and military conflicts on the “battlefield.” The current conflicts in Iraq and Afghanistan are not “wars” in the legal sense to the extent that they lack of a formal declaration of war by Congress. See U.S. Const. art. 1 § 8(11). Thus, the Uniform Code of Military Justice (UCMJ), which applied, “[in] time of war, [to] persons serving with or accompanying an armed force in the field,” 10 U.S.C. § 802(a)(10) (2000), originally could not be applied to military contractors in Iraq and Afghanistan in the absence of a Congressional war declaration. See Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 239 (2000). In an attempt to overcome this jurisdictional problem, Congress amended the UCMJ in 2006 by replacing “war” with “declared war or a contingency operation.” John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified as amended at 10 U.S.C. § 802(a)(10) (2006)).

On the modern battlefield, the ratio of troops to contractors has never been lower. While the number of contractors employed by the military varied from conflict to conflict, historically, the ratio of contractors to troops averaged around one-to-six.¹⁹ Other than Bosnia, the last decade witnessed the U.S. government's first sustained operations where contractors consistently outnumbered troops in the battle space.²⁰ What separates the current conflicts from previous wars is the sheer pervasiveness of contractors in Iraq and Afghanistan.²¹ While hard data remains elusive, most experts concede that, in recent years, up to 200,000 contractor personnel have supported the U.S. in Iraq and Afghanistan at any given time, a number that frequently exceeded military personnel.²² Correspondingly, data and anecdotal evidence indicate that contractor fatalities on the battlefield have never been higher.

As the military increases its use of contractors to perform dangerous-yet-vital tasks, contractors are inevitably bearing a larger portion of the casualty rate. Cumulatively, contractor deaths account for over twenty-five percent of total losses since the U.S. entered Iraq and Afghanistan.²³ But even that dramatic figure understates the extent to which—in the last two-to-three years—contractors have increasingly absorbed the most significant cost of our military actions. By continuing to outsource high-risk jobs that were previously performed by soldiers, the military, in effect, is privatizing the ultimate sacrifice.

Of course, we do not mean to assert, nor do we assume, that the government is intentionally exploiting this substitution effect²⁴ to its advantage. Nothing suggests that senior military

¹⁹ See COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFG., AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN 20-22 (2009), available at http://www.wartimecontracting.gov/docs/CWC_Interim_Report_At_What_Cost_06-10-09.pdf [hereinafter COMM'N ON WARTIME CONTRACTING, AT WHAT COST?].

²⁰ See *id.*

²¹ See *id.* Of course, a number of other variables undoubtedly influence the pervasiveness of contractors in Iraq and Afghanistan, including the prolonged length and simultaneity of the conflicts, weak international support, and declining enlistment numbers of the U.S. military.

²² See *id.*; SCHWARTZ & SWAIN, *supra* note 17, at 5-6; U.S. DEP'T OF DEFENSE, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE U.S. CENTCOM AREA OF RESPONSIBILITY, IRAQ, AND AFGHANISTAN (May 2010), available at http://www.acq.osd.mil/log/PS/hot_topics.html.

²³ See *infra* note 59.

²⁴ According to economic theory, the “substitution effect” is the relationship between a drop in price of a good and a buyer's decision to buy more of that good relative to other higher-priced

planners conspired to use contractors on the battlefield as a means of reducing the troop casualty rate. At the same time, this will not prove a fleeting experience. Nothing indicates that DOD will be able to reduce its reliance on contractors in the near future. On the contrary, Secretary of Defense Robert M. Gates recently announced plans to reduce the number of Army and Marine ground forces by as many as 27,000 troops within the next three years.²⁵ On February 1, 2011, Army Secretary John M. McHugh suspended the Army's current effort to in-source work from contractors and subjected all future insourcing proposals to rigorous review.²⁶ Neither will the Department of State reduce its reliance on contractors. In the summer of 2010, the State Department came under fire for awarding a \$120 million contract to Xe Services—formerly known as Blackwater—after the company was chased out of Iraq following the high-profile Nissour Square incident.²⁷ As the State Department prepares to take over the U.S.

goods. In essence, price changes induce the buyer to purchase lower-priced goods as a “substitute” for higher-priced goods. See RICHARD A. IPPOLITO, *ECONOMICS FOR LAWYERS* at 23 (Princeton University Press, 2005). For the purposes of this article, we suggest that the increase in contractor (or surrogate) deaths—which, for a host of reasons, fall outside of the public's cognizance—decreases the “price” of war-fighting, in terms of military deaths, thus distorting (or “increasing”) public support for contingency operations.

²⁵ Karen Parrish, *DOD Directs Army, Marine Drawdowns for 2015, 2016*, U.S. DEP'T OF DEFENSE (Jan. 6, 2011), <http://www.defense.gov/News/NewsArticle.aspx?ID=62355>.

²⁶ Memorandum from John M. McHugh, Sec'y of the Army, on Reservation of In-Sourcing Approval Authority (Feb. 1, 2011), *available at* <http://www.govexec.com/pdfs/020311rb2.pdf> (“[E]ffective the date of this directive, I reserve to myself the authority to approve any in-sourcing proposal, wherever generated across the Army. Any in-sourcing proposal presented for my consideration must be fully documented and justified. Any proposal will include, at minimum, a manpower requirements determination, an analysis of all potential alternatives to the establishment of permanent civilian authorizations to perform the contracted work, certification of fund availability and a comprehensive legal review.”).

²⁷ See Jeff Stein, *Blackwater Deal Puts Officials on Hot Seat*, WASH. POST (June 21, 2010: 6:40PM), http://voices.washingtonpost.com/spy-talk/2010/06/blackwater_deal_puts_officials.html. During that same summer, the Central Intelligence Agency also awarded up to \$600 million in contracts to Blackwater subsidiaries. See James Risen & Mark Mazzeti, *30 False Fronts Won Contracts for Blackwater*, N.Y. TIMES (Sept. 3, 2010), <http://www.nytimes.com/2010/09/04/world/middleeast/04blackwater.html>. That the government is still awarding contracts to a company with a severely damaged public reputation indicates that the government is either incredibly tone-deaf to public perception or highly dependent on contractors. [AUTHOR'S NOTE: _____ mention *U.S. v. Slough, et al.* (No. 1:08-cr-00360)(D.C. Cir. April 22, 2011) reinstating the prosecution of the Blackwater shooters, dismissed in *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009).]

reconstruction effort in Iraq, James F. Jeffery, the U.S. ambassador to Iraq, testified in early 2011 that he expects his staff to more than double in size within the coming year, from 8,000 to 17,000 people; most of that personnel growth will be contractors.²⁸

This solidifies the assumption that the government's reliance on contractor support—both logistical personnel and private security contractors—in contingency settings will continue to increase over the long-term. In other words, contractor personnel will continue to die supporting the government's missions abroad and, more specifically, performing tasks that, a generation ago, were performed by members of the military. This article, therefore, seeks to examine how this continued dependence on contractors affects the public's sensitivity to wartime casualties.

Casualty Sensitivity and Public Choice

All of this matters because of the idea, inherent in our democratic notions of governance, that public support (or public consent) is critical to any successful military action abroad.²⁹ Democratic institutions, such as “public opinion, public debate, rallies, and protests” force our democratically-elected “leaders [to] either convince the public of the necessity of using force or abide by public worries about its costs: in lives, financial resources, or opportunities.”³⁰

²⁸ See Walter Pincus, *Top Diplomat Defends Size, Cost of State Dept. Presence in Iraq*, WASH. POST (Feb. 2, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/01/AR2011020106176.html>; *Iraq: The Challenging Transition to a Civilian Mission: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of James F. Jeffrey, U.S. Ambassador to Iraq), *available at* http://foreign.senate.gov/imo/media/doc/Jeffrey-Austin_Testimony.pdf.

²⁹ Of course, “there ... are profound differences in beliefs about how representative democracy works, specifically the extent to which American political leaders influence, or follow, the will of the public.” LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 2. See also DICKINSON, *supra* note 11, at 104-05. Moreover, we agree with the proposition that “importing public participation norms into a world of private contracts is an underexplored avenue for imposing accountability and constraint.” *Id.* at 143.

³⁰ Deborah Avant & Lee Sigelman, *Private Security and Democracy: Lessons from the U.S. in Iraq*, 19 SECURITY STUDIES 230, 236-37 (2010) (citing ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971); IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795)). Indeed, Avant and Sigelman note that Kant distinguished himself from Machiavelli by suggesting that, “[b]y involving citizens in decisions about war, republics based on freedom, law, and equality could exercise greater caution and sometimes avoid the calamities of war.” *Id.* at 239-40.

For 40 years, policy makers and scholars have widely accepted the theory that the public's support for any given military conflict is inversely correlated with the number of U.S. military casualties suffered in that conflict. Economists may not perceive this as rational behavior,³¹ but the public does not always behave in entirely rational ways.³² John E. Mueller persuasively demonstrated this theory in his 1973 book, *War, Presidents and Public Opinion*, by analyzing public opinion polls for the Vietnam and Korean Wars in connection with their respective casualty rates.³³ More broadly, "in democracies[,] the standards for using force are said to be higher than elsewhere: war must be of great importance to warrant spilling the blood of citizens fighting for their country and to subject democratic leaders to political consequences when casualties mount."³⁴ Research suggests that, absent a clearly defined national imperative for a military operation and a general belief in the likelihood of that operation's success, military casualties can greatly influence the public's support for, or opposition to, that operation.³⁵

Eric V. Larson, who chronicles public opinion polls of military operations at the RAND Corporation, explained that "all else being equal, prospective and observed support for a U.S.

³¹ "The concern about casualties among political leaders and the public, although humane, is not entirely rational—U.S. battle deaths are actually somewhat rare, typically very few, and are dwarfed by the number of deaths to U.S. service personnel from other causes." LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 6 (footnotes omitted).

³² This is based on the common assumption held by most economists that individuals behave rationally, at least to some degree. See, e.g., JOHN P. BURKETT, MICROECONOMICS: OPTIMIZATION, EXPERIMENTS, AND BEHAVIOR 3 (2006). A recent strain of popular economic literature is examining some any number of theoretical economic assumptions in common, everyday scenarios, often with entertaining, if not enlightening results. See, e.g., STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS (2005); STEVEN D. LEVITT & STEPHEN J. DUBNER, SUPERFREAKONOMICS (2009). See also DAN ARIELY, PREDICTABLY IRRATIONAL (2008).

³³ See JOHN E. MUELLER, WAR PRESIDENTS AND PUBLIC OPINION (1973). Like most significant research, Mueller's work is frequently summarized and over-simplified. "Mueller's finding does not support the casualty-phobia thesis. However, Mueller was arguing that public support dropped reflexively, and more to the point, inexorably. His oft-quoted study thus fixed in the public mind the idea that support for Vietnam buckled as the body bag toll mounted, and this gradually hardened into the conventional wisdom that the public is reflexively casualty phobic." Gelpi, *supra* note 8 at 11.

³⁴ Avant & Sigelman, *supra* note 30, at 255 (citing MUELLER, *supra* note 33).

³⁵ See LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 10-12.

military intervention [declines] as expected or actual casualties increase.”³⁶ But the calculus is more complex, and, not surprisingly, the most hyperbolic positions lack empirical support. Larson identifies “[t]wo bits of conflicting conventional wisdom[:.]”

The first, ... more commonly expressed ... in the national security community, has it that, as casualties mount, the public will “demand” immediate withdrawal, i.e., U.S. casualties result in an inexorable demand to withdraw precipitously from ... military commitment. The counter-conventional wisdom has it that U.S. casualties ... inflame the American public, resulting in a “demand” for escalation to a “decisive victory.” ... [N]either of these extreme views is accurate.³⁷

Nor does any of this imply that military casualties are the only variable affecting public support for military operations. Extrapolating from available public opinion data from the last several decades, Larson outlined several additional predictors that significantly affect public support, including: (1) the importance of the stakes; (2) prospects of success; and (3) partisan leadership and “followership.”³⁸ Larson ultimately concluded that, as the public’s belief in the importance of the operation and its prospects for success increased, the more tolerant the public became of casualties and other costs.³⁹

³⁶ *Id.* at 7. One of our colleagues reminded us that, of course, things are never really equal. Accordingly, this effect is not static, and “[s]upport for a U.S. military intervention rarely remains at its initial levels and tends to fall over time (and as casualties increase).” *Id.* at xix.

³⁷ *Id.* (footnotes omitted).

³⁸ *Id.* For an alternative rubric, see Gelpi, *supra* note 8, at 14-16. Gelpi examines a number of conditions – many of which can co-exist – under which the number of casualties will cause public support to decline more rapidly: (1) Gelpi cites Bruce Jentleson for the proposition that the “pretty prudent” public bases its casualty tolerance on the articulated “principal policy objective (PPO)” and asserts greater public acceptance of “foreign policy restraint” (FPR) goals. *Id.* at 14. (2) Gelpi discusses Eric Larson’s research in the context of an “elite casualty tolerance.” *Id.* at 15. Here, he summarizes that: “when domestic elites are divided, even a small number of casualties will quickly diminish public support.” *Id.* (3) Gelpi references Steven Kull for the proposition that the engagement of other states matters; implying that multilateral support either suggests that a rationale underlies the engagement or that the burdens of the military action are being evenly (or even fairly) distributed. *Id.* Finally, Gelpi and his co-author point to the public’s expectations for success. “When the public thinks victory is unlikely, even small costs will cause support to plummet.” *Id.* at 15-16.

³⁹ *See* LARSON, CASUALTIES AND CONSENSUS, *supra* note 5.

This has proved accurate over time and, more recently, when applied to the conflicts in Iraq and Afghanistan.⁴⁰ Mueller argued a couple years ago that public support for the war in Iraq has generally followed the same steady decline as witnessed in Korea and Vietnam.⁴¹ As the administration shifted its focus away from Iraq, savage violence and a mounting death toll in Afghanistan are souring public support. While the events of September 11, 2001 helped to establish a strong national imperative for these operations, the public's belief in the likely success of these conflicts has slowly, but steadily, dwindled. "[T]he characteristics of the sort of war we are waging in the [Global War on Terror]—mostly in the shadows, with only occasional evidence of success—make it a significant challenge to sustain public optimism about the outcome."⁴² Larson cautioned that "if most Americans were to come to believe that the stakes in Iraq were no more important than those in the peace operations of the 1990s, for example, or that the situation closely resembled the quagmires of Vietnam, Lebanon, and Somalia, *remaining support and the willingness to accept casualties could quickly erode.*"⁴³

Layers of Complexity: Diluting A Simple Number

Unfortunately, the number of military casualties no longer tells the whole story of human sacrifice associated with military actions. As the battlefield becomes more complex, it has become increasingly more difficult to discern and provide an accurate tally of the human cost of

⁴⁰ "[T]here has been a great deal of continuity and consistency in the public's response to casualties in wars—including World War II and the Korean, Vietnam, and Gulf Wars—and in smaller operations—including Panama and Somalia." *Id.* at iv.

⁴¹ John Mueller, *The Iraq Syndrome*, FOREIGN AFFAIRS (Nov./Dec. 2005), <http://www.foreignaffairs.com/articles/61196/john-mueller/the-iraq-syndrome>. For a critique of this article by Christopher Gelpi, a political science professor at Duke University, followed by a reply from Mueller, see Christopher Gelpi & John Mueller, *The Cost of War*, FOREIGN AFFAIRS (Jan./Feb. 2006), <http://www.foreignaffairs.com/articles/61222/christopher-gelpi-and-john-mueller/the-cost-of-war>.

⁴² LARSON & SAVYCH, MOGADISHU TO BAGHDAD, *supra* note 4, at xxiv. See also Gelpi, *supra* note 8, at 25 ("We argue that survey respondents' tolerance for casualties in the war in Iraq is a function of two central explanatory variables: (1) the extent to which they believe that President Bush did the right thing in attacking Iraq, and (2) the extent to which they believe that the United States will emerge victorious.").

⁴³ LARSON & SAVYCH, MOGADISHU TO BAGHDAD, *supra* note 4, at xxiv-xxv (emphasis added).

war; in other words, the number of troop fatalities no longer entirely captures the true human cost of these operations.⁴⁴

For example, in 2004 the *New England Journal of Medicine* reported that advances in Kevlar, body armor, and medevac operations have reduced military deaths in Iraq and Afghanistan to about ten percent of total injuries.⁴⁵ While that is remarkable, the resulting increase in veterans surviving with (multiple) amputations, brain trauma, devastating burns, and other severe injuries has achieved less public attention.⁴⁶ This has created a whole new set of problems that government programs⁴⁷ and non-profits like the Wounded Warrior Project⁴⁸ have been working to solve. Unfortunately, neither the government nor the media have afforded the same level of attention to the deaths and injuries of contractors who have suffered in support of the nation's war efforts.⁴⁹

⁴⁴ While the modern battlefield has certainly become safer for some, it is still incredibly dangerous for others. *See infra* notes 67 & 68. Technological advances have also enabled the U.S. military to better protect certain warfighters from harm,. *See, e.g.*, Peter W. Singer, *A Revolution Once More: Unmanned Systems and the Middle East*, THE BROOKINGS INSTITUTION (Nov. 2009), http://www.brookings.edu/articles/2009/11_robotic_revolution_singer.aspx. Nevertheless, the modern battlefield is still a very dangerous place.

⁴⁵ Atul Gawande, *Casualties of War – Military Care for the Wounded from Iraq and Afghanistan*, 351 *NEW ENGL. J. MED.* 2471 (2004), *available at* <http://www.nejm.org/doi/full/10.1056/NEJMp048317>.

⁴⁶ For a particularly sobering account, see DAVID FINKEL, *THE GOOD SOLDIERS* (2009). The author, a Washington Post writer, chronicles the deployment of an infantry battalion during “the Surge” in Baghdad during 2007 and 2008, offering, among other things, a window into the medical experiences, rehabilitation, and the future prospects for some of the injured survivors.

⁴⁷ For example, the U.S. Department of Veterans Affairs received from Congress a budget of \$48 billion in 2010 to provide medical services to veterans. *See* CONGRESSIONAL BUDGET OFFICE, *POTENTIAL COST OF VETERANS' HEALTH CARE 2* (October 2010), *available at* http://www.cbo.gov/ftpdocs/118xx/doc11811/2010_10_7_VAHealthcare_Summary.pdf.

⁴⁸ *See About Us*, WOUNDED WARRIOR PROJECT, <http://www.woundedwarriorproject.org/content/view/1135/> (last visited Apr. 3, 2011).

⁴⁹ For a sobering series of articles on the numerous issues facing wounded contractors, see T. Christian Miller, *Disposable Army: Civilian Contractors in Iraq & Afghanistan*, PROPUBLICA.COM, <http://www.propublica.org/series/disposable-army> (last visited Apr. 3, 2011).

By analogy, consider similar research in the homicide context, which has suggested that the long-term decrease in homicide rates over the last few decades may be due to advances in emergency medical technology more than an actual reduction in violent crime.⁵⁰ Accordingly, “[t]he relative rarity of homicides, and the fact that they are made even more rare by medical intervention, may make homicide data alone a less reliable vehicle for studying etiology and prevention than the combination of homicides and assaults.”⁵¹

This conclusion directly applies in the wartime context, as military fatalities alone have become a less reliable vehicle for examining the total human cost of war. In fact, a massive contractor presence permits the administration to suggest, and the public to believe, that our military presence on the ground is smaller—by as much as half—than what is actually required to accomplish the mission. As President Obama took steps to officially end combat operations and withdraw troops in Iraq, no representation was made that there would be a proportionate decrease in contractor staffing; in fact, Ambassador Jeffries’s testimony on the State Department’s preparations to continue the reconstruction efforts in Iraq clearly indicated that additional contractors will be required to fill the void.⁵²

This implicates the broader outsourcing trend, which we do not attempt to chronicle here.⁵³ Suffice it to say that government contractors are gaining a greater presence on the battlefield due to the government’s increasing dependence on the private sector to sustain our war, intelligence, and homeland security efforts.⁵⁴ Contractors are employed more than ever in critical support

⁵⁰ See Anthony R. Harris et al., *Murder and Medicine: The Lethality of Criminal Assault 1960-1999*, 6 HOMICIDE STUD. 128, 130 (2002).

⁵¹ *Id.* at 156.

⁵² See Pincus, *supra* note 28.

⁵³ As Paul Light explained in his book titled *The True Size of Government*, despite a generation of bipartisan efforts to portray a “small government” to the public, government mandates continue to increase, leaving agencies no choice but to increasingly rely upon contractors to provide mission-critical services. See PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999).

⁵⁴ Indeed, Congressional and Executive leadership wonder whether we have become too dependent upon contractors. The Obama Administration has embarked upon an aggressive effort to redefine those functions that are inherently governmental and, in effect, “insource” resources with an eye towards restoring government capacity to perform these important functions. See Presidential Memorandum, *Government Contracting*, (Mar. 4, 2009), <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-subject-government-contracting>. If the administration makes good on these promises—granted, an unlikely scenario—this will reverse an aggressive outsourcing trend that spanned the

positions, such as gathering intelligence, maintaining weapons, providing static and mobile security, training troops, and handling interrogations.⁵⁵ To be sure, using contractors in contingency operations can have significant benefits.⁵⁶ But today's military is so heavily outsourced that it cannot effectively fight or sustain itself without an enormous, highly integrated contractor presence.⁵⁷ Ashton B. Carter, the Under Secretary of Defense for Acquisition,

16 years of the predecessor Clinton and Bush administrations. As indicated, *passim*, any momentum such an initiative may have had appears to have dissipated.

⁵⁵ See COMM'N ON WARTIME CONTRACTING, AT WHAT COST?, *supra* note 21, at 20-22 (2009); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005). For a discussion of the modern deputizing trend in homeland security and intelligence, see Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435 (2010); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901 (2008).

⁵⁶ According to the Commission on Wartime Contracting, deploying contractors in a contingency operation can yield numerous benefits. The Commission suggests that, among other things, contractors can:

- Offer skills and experience that government agencies lack or possess only to a limited extent;
- Free up military personnel for combat or other critical missions;
- Reduce the need to hire and train new federal civilian employees;
- Provide flexibility in expanding and reducing support personnel quickly and as needed;
- Be more cost-effective for performing certain support functions; and
- Provide jobs and training opportunities to local nationals in keeping with economic development or counter-insurgency policies.

COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 8 (2011), *available at* http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf [hereinafter COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?].

⁵⁷ According to Secretary of Defense Ashton B. Carter, "Contract management continues to be one of the Department's top priorities, both at home and in a contingency environment Another key is having the right quantity and quality of people under them. Resourcing has been—and continues to be—a challenge for the Department." Test. of Ashton B. Carter, Under Sec'y of Def. for Acquisition, Tech. & Logistics, before the Comm'n on Wartime Contracting: Better Buying Power in Defense Spending 4-5 (Mar. 28, 2011), *available at* http://www.wartimecontracting.gov/docs/hearing2011-03-28_testimony-Carter.pdf.

Technology & Logistics, recently testified before the Commission on Wartime Contracting that the exigencies of war and the difficulties of doing business locally in Afghanistan may have contributed to “the unaccustomed need to have so many contractors support our contingency operations, [although[,] by now this should be recognized as a phenomenon that’s here to stay and should not be unaccustomed.”⁵⁸

The outsourcing of military responsibilities is not limited to DOD but extends well into other agencies, such as the Department of State, the U.S. Agency for International Development (USAID), and the Department of Homeland Security.⁵⁹ The State Department and USAID both employ a cadre of contractors in Iraq and Afghanistan that often work beside DOD contractors and personnel. For example, Blackwater Worldwide began its private security operations in Iraq in 2004 under a State Department contract.⁶⁰ Therefore, it is important to keep in mind that contractor fatalities are not limited to DOD contractors.

The ubiquity of government contractors in Iraq and Afghanistan correlates with the disturbing increase in contractor fatalities. The Congressional Research Service (CRS) recently reported that private security contractors are *four times more likely to be killed* in Afghanistan than uniformed personnel.⁶¹ This, however, is just a small slice of the dangers facing contractors. For example, anecdotal evidence indicates that truck driving remains the most dangerous job in these regions.

Against this backdrop, we sense that high contractor casualties produce a substitution effect that artificially reduces the public’s perceived human cost of our efforts in Iraq and Afghanistan—quantified by some exclusively as soldier casualties. As the U.S. government increases its use of contractors in contingency operations, it simultaneously reduces the number of tasks completed by military personnel. In addition to outsourcing jobs that were previously performed by

⁵⁸ Statement of Ashton B. Carter, *supra* note 2, at 39.

⁵⁹ See Schooner & Greenspahn, *supra* note 13, at 10; Schooner, *Contractor Atrocities*, *supra* note 55, at 3-6.

⁶⁰ See JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 7 (2008), *available at* <http://www.fas.org/sgp/crs/natsec/RL32419.pdf>.

⁶¹ MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40835, THE DEPARTMENT OF DEFENSE’S USE OF PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 12 (2010). There are many reasons for this disparity. There is likely to be differences in the levels of professional training and available equipment between public military soldiers and private contractors. See, e.g., *supra* note 128.

soldiers, the government is outsourcing the physical risks of injury and death associated with those jobs, resulting in fewer military casualties.

Sadly, the media rarely mention contractor fatalities, and it is uncertain how aware the public is of these disturbing trends.⁶² While military “[c]asualty figures are routinely collected and released” to the public, “[t]here is no such coordinated or automatic diffusion of information about contractors, nor are there triggers to alert the media.”⁶³ The media, therefore, fails to fulfill a critical role in this context; it neither informs the public nor fosters debate amongst policy-makers.

The media report debates among leaders and experts to members of the public, who consider and discuss them. The media subsequently poll these same members of the public, informing leaders of the success of their persuasive arguments. While something of a simplification, this captures some of the most important features of how the democratic conversation works.⁶⁴

This conversation—involving policy-makers and the public and facilitated by the media—is critical to informed decision-making.⁶⁵ An accurate tally of contractor casualties is important to

⁶² Avant & Sigelman, *supra* note 30, at 260 (“Unprompted, nine of the ten interviewees asked something to the effect of ‘is this true?’ They then went on to say they had no idea contractors were being used this way in Iraq and expressed great surprise that non-U.S. citizens were serving under contracts with [private military and security companies].”).

⁶³ *Id.* at 245 (“The ratio of coverage of [private military security contractors] to the military was ... very low.”). Avant & Sigelman ultimately found a 1/27 ratio in the amount of contractor coverage over the amount of military coverage in the *St. Louis Times Dispatch* and a 1/47 ratio in the *New York Times*. *See id.*

⁶⁴ LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 96-97.

⁶⁵ *Id.* at xxiii (emphasis added):

The historical record suggests that *the public’s tolerance for casualties* and its support for U.S. wars and military operations *will continue to be* based upon a sensible assessment of normative and pragmatic considerations, more fully *informed by leaders*. When such an assessment leads to broad recognition that important interests are engaged, important principles are being promoted, and the prospects for success are high, the majority of the American public is likely to accept costs that are commensurably high with the perceived stakes. ... [I]n the end, most Americans do not want lives to be sacrificed for any but the most

fully assess the military's reliance on outsourcing and how that might affect military casualties in Iraq and Afghanistan, and with it, the public's overall casualty sensitivity.

Outsourcing Contractor Casualties: Quantifying the Substitution

Before we begin parsing the carnage, some clarification and caveats may be in order. Our data compares the volume of military deaths – the deaths of members of the armed services – to contractor deaths. For the purposes of this discussion, we attempt to track and depict only what appears to be a mounting substitution of contractor fatalities for military losses. Our quantification makes no attempt to represent the universe of suffering as a result of the U.S. military actions in Iraq and Afghanistan. Specifically, we do not attempt to quantify enemy combatants or civilian (Iraqi or Afghani) deaths. Nor does the data include the deaths of coalition forces, those members of the militaries of states allied in support of the U.S. military missions.⁶⁶ Similarly, we neither track nor include fatalities amongst contractors working for other states or governments. We also do not include non-military/non-contractor U.S. civilian deaths, such as fatalities amongst non-uniform employees of the U.S. Department of State, the Agency for International Development, or the various Defense Department agencies. Finally, we make no effort to distinguish contractors based upon which U.S. agency or department they serve or, more broadly, the task that they perform or the skill sets they bring to bear.⁶⁷ To the extent

compelling and promising causes, and *they look to their leaders to illuminate* just how compelling and promising the causes are.

⁶⁶ One Army Judge Advocate suggested that our “sliding scale fails to address another layer of complexity – foreign soldiers themselves. A key component to [our] mission in Afghanistan is to turn over security to the Afghans. Missions are conducted jointly; Afghan units are graded on their ability to perform independent of /along with /under close supervision of our troops. ...[T]he US is paying for not only Afghan equipment but also most of the ANSF salaries. ... [To th extent that] we are training, equipping and, basically paying the salary of, an Afghan soldier, where does he ... fall?” Email (Apr. 10, 2011) (on file with author).

⁶⁷ As others have articulated, contractors perform a wide range of services in Iraq, Afghanistan, and other hotspots. Among other things, the never ending list of tasks and specialties includes: accounting and audit services; construction; cultural anthropology; custodial services in offices and housing units; electrical, plumbing, and HVAC (heating, ventilation, and air conditioning); food service; flying planes and helicopters; information technology; intelligence gathering and analysis; health care; interpretation and translation; laundry; management and supervision; mobile security (e.g., protecting high-value targets, such as Members of Congress, and escorting convoys); oil pipeline repair, maintenance, and management; static security (guarding enclosed bases, diplomatic facilities, depots, etc.); training; truck driving; and weapon systems maintenance. See COMM’N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra*, note 17; *but*

that more data has recently become publicly available, the data still includes significant gaps and reflects wild fluctuations.⁶⁸ Again, our endeavor here is limited to surrogacy. While we realize that our data, and hence the comparisons we draw from that data, are imperfect, we have attempted to be fully transparent as to the data upon which we rely.

The best available data on contractor fatalities comes from the Department of Labor's Division of Longshore and Harbor Worker Compensation, which tracks contractor injuries and deaths based upon insurance claims submitted under the Defense Base Act (DBA).⁶⁹ Under the DBA, employers are required to report to the Labor Department compensable employee injuries and deaths within ten days of becoming aware of the incident.⁷⁰

see SCHWARTZ, *supra* note 61, at 12 (describing a higher fatality rate for arms-bearing contractors). According to a March 2011 Congressional Research Service (CRS) report, base support represents, by far, the largest category. Construction accounted for the second largest group until the dramatic decline in construction during 2009. Security now accounts for the second largest group. We do not believe, however, that this data necessarily reflects the contractor population over the course of the last 8-10 years.

⁶⁸ The CENTCOM census began breaking out logistics/maintenance and training in the first quarter of 2010. *See* SCHWARTZ & SWAIN, *supra* note 17, at 13-15, 24-25. We discourage researchers from drawing conclusions from the static and short-term data depicted in the CRS report. For example, (1) the short-term snapshots reflect wild fluctuations within service sectors (e.g., construction personnel, dropping from 29,937 to 2,171 in a two-year period); and (2) the "other" category, for the quarter ending March 2008, included more than 20,000 contractor personnel. Moreover, Iraq and Afghanistan present different scenarios. "DOD does not report the breakdown of services that contractors provide in Afghanistan, with the exception of data on private security contractors. Nevertheless, the types of services provided by contractors in Afghanistan are similar to those conducted in Iraq, including logistics, construction, linguistic services, and transportation; the percentage of contractors providing each service is likely different. DOD officials have stated in the past that they will start providing data on the breakdown of services in Afghanistan. However, to date, they have not done so." *Id.* at 10. The CRS report also explains that "[t]he percentage of private security contractors operating in Iraq is different that of those operating in Afghanistan." *Id.* at 10 n.35.

⁶⁹ The DBA applies the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (2006), "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States. . . ." 42 U.S.C. § 1651(a) (2006). The DBA provisions also apply to foreign nationals employed by U.S. contractors and "shall be [compensated] in the same amount as provided for [U.S.] residents." 42 U.S.C. § 1652(b) (2006).

⁷⁰ 33 U.S.C. § 930(a) (2006).

According to this data, more than 2,300 contractors have been killed in Iraq and Afghanistan (in addition to another 58 contractors killed in Kuwait) between 2001 and the first quarter of 2011.⁷¹ Another 51,000 contractors have been injured; more than 19,000 at least somewhat seriously (see Figure 2).⁷² While these numbers were slow to accumulate, Figure 1 reflects the startling fact that *contractor deaths now represent over 27 percent of U.S. fatalities since the beginning of these wars*.⁷³

Certain firms have been particularly hard hit. Sixty-four contracting firms have lost at least seven employees since 2001.⁷⁴ Other companies have suffered far more severely; twenty-five companies have lost more than twenty employees, eleven companies have lost more than fifty

⁷¹ See *Defense Base Act Case Summary by Nation*, U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION (DLHWC) (Dec. 31, 2010), <http://www.dol.gov/owcp/dlhwc/dbaallnation.htm>. Year-by-year data on contractor casualties from before 2009 was obtained by a Freedom of Information Act request and is on file with the authors.

⁷² Globally, a total of 2,620 DBA claims for civilian contractor deaths, and 68,869 DBA claims for civilian contractor injuries, have been filed since Sept. 2001. See *id.* It goes without saying that the majority of these claims came from contractors who worked in Iraq and Afghanistan. See also *Contractor Casualties on the Rise According to the DOL's Latest DBA Figures*, OVERSEAS CIVILIAN CONTRACTORS (Jan. 11, 2011), <http://civiliancontractors.wordpress.com/2011/01/11/contractor-casualties-on-the-rise-according-to-the-dols-latest-dba-figures/>.

⁷³ See *Defense Base Act Case Summary by Nation*, *supra* note 71; *Military Casualty Information*, DEFENSE MANPOWER DATA CENTER (Dec. 31, 2010), <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/castop.htm>.

⁷⁴ See *Defense Base Act Case Summary by Employer*, U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION (Mar. 31, 2011), <http://www.dol.gov/owcp/dlhwc/dbaallemmployer.htm>. The total number of companies suffering contractor deaths is unknown, as the DOL applies the Rule of 7: "If an employer has fewer than seven cases in any Case Type category, the actual number of cases is not shown. However, the numbers are counted toward the total at the bottom of the report." *About the Defense Base Act Case Summary Reports*, U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION, <http://www.dol.gov/owcp/dlhwc/laboutdbareports.htm> (last visited Apr. 6, 2011).

employees, and six companies have experienced more than eighty deaths.⁷⁵ As Figure 3 demonstrates, L-3 Communications suffered the most of any company, having lost 366 employees since 2001.⁷⁶ It is important to understand that not all of the data can be fully reconciled, particularly at the margins. For example, the information on losses within individual firms is not expressly limited to contractor deaths occurring in the Middle East. Nonetheless, we believe it accurately reflects the trends, to the extent that over ninety percent of the total number of deaths reported to DOL occurred in Iraq, Afghanistan, or Kuwait.⁷⁷ Additional complexities are created by the difficulties in distinguishing prime contractors and subcontractors—distinctions that are not made in the DBA data—and we make no effort here to do so. For example, Kellogg, Brown, and Root (KBR) stated in 2008 that it had lost at least 122 employees, but it included subcontractor deaths in this count.⁷⁸ While the exact relationship between prime contractors and subcontractors is obviously quite opaque, it is worth noting that the DBA applies to subcontractors.⁷⁹ As a result, subcontractor fatalities are included in the DBA’s overall count.

Not surprisingly, the overall carnage has been greater in Iraq, where more than 1,537 contractors, about a quarter of the overall U.S. death toll in that country, have died since 2003 (see Figure 4).

⁷⁵ See *Defense Base Act Case Summary by Employer*, *supra* note 74.

⁷⁶ See *id.* This number includes L-3 Communications’ subsidiaries, MPRI (which lost 10 employees), Titan Corporation (which lost 324 employees), and TLOTS1 (which lost 32 employees). See *id.*

⁷⁷ As of March 31, 2011, a total of 2,620 deaths have been filed through the DBA. See *Defense Base Act Case Summary by Nation*, *supra* note 71. Of those, 2,350 occurred in Iraq, Afghanistan, or Kuwait, and 75 were labeled as “Nation Pending.” See *id.* Four insurance carriers have covered the majority of these claims: Insurance Company of the State of Pennsylvania; Continental Casualty Company; ACE American Insurance Company; and Zurich American Insurance Company, and 111 claims were filed through an uninsured employer. See *Defense Base Act Case Summary by Carrier*, U.S. DEP’T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, DIVISION OF LONGSHORE AND HARBOR WORKERS’ COMPENSATION (Mar. 31, 2011), <http://www.dol.gov/owcp/dlhwc/dbaallcarrier.htm>.

⁷⁸ Steven L. Schooner, *Why Contractor Fatalities Matter*, 38 *PARAMETERS* 78, 87 (2008) (“KBR reports that, through July 2008, in addition to 87 ‘hostile fatalities,’ its employees suffered 22 vehicular fatalities, 13 workplace fatalities, and approximately 850 ‘hostile injuries’ in the Middle East.” (citing KBR Middle East Region – Casualty Summary: January 2003 – July 2008 (on file with author))).

⁷⁹ See 42 U.S.C. § 1651(a) (2006).

By comparison, in Afghanistan, the 763 dead contractors represent approximately one third of U.S. deaths in that country.

While the enormity of contractor sacrifice gives pause, what is even more striking is that—in both Iraq and Afghanistan—contractors are bearing an increasing proportion – annually and cumulatively – of the death toll. DBA fatality claims by contractors in 2003 represented only four percent of all fatalities in Iraq and Afghanistan. From 2004 to 2007, that number rose to twenty-seven percent. From 2008 to the end of 2010, DBA fatality claims accounted for an eye-popping forty percent of the combined annual death toll. In 2010, contractor fatality claims represented nearly half (forty-seven percent) of all fatalities. In the first quarter of 2011, contractors represented forty-five percent of all fatalities.

The situation in Iraq mirrors this proportional trend. While the number of military deaths stayed relatively constant between 2004 and 2007, the number of contractor deaths steadily increased. Contractor fatalities represented only five percent of the annual death toll in 2003, but quickly exceeded twenty percent in 2004, and reached thirty-six percent in 2008. Figures 5 and 6 demonstrate that *contractor deaths actually began surpassing military deaths in 2009*, although the carnage in 2010 was less than half of what it was in 2009 (see Figure 7). For the past two years, more U.S. contractors have been killed in Iraq than U.S. military soldiers. This is not surprising, given the withdrawal of U.S. combat forces and the official completion of Operation Iraqi Freedom. As the U.S. military's focus shifted from Iraq to Afghanistan, a plethora of contractors remain in Iraq to continue the reconstruction effort.

In Afghanistan, the trend is quickly worsening. From 2005 to 2008, contractor fatalities represented only twenty to thirty percent of the death toll. That percentage, however, rose in recent years; contractor deaths represented thirty-six percent of all U.S. fatalities in 2009 and forty-six percent of all U.S. fatalities in 2010 (see Figure 8).⁸⁰ More than half of all contractor fatalities in Afghanistan occurred within the last two years. In 2010, 420 contractors and 499 military troops were killed (see Figure 9). Compared with 2009's tally of only 137 contractor deaths and 311 military deaths, 2010 appears to be the most dangerous year on record in Afghanistan for both contractors and U.S. troops (see Figure 10). Indeed, the future of the

⁸⁰ Contractor deaths reportedly outpaced U.S. military fatalities in the first half of 2010. From January to June, 232 contractor deaths and 195 troop fatalities were reported. *See Defense Base Act Case Summary by Nation, supra note 71; Military Casualty Information, supra note 73. See also* Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERVICE CONTRACTOR 16, 17 (Sept. 2010) (addressing the rise in contractor fatalities in Iraq and Afghanistan through June 2010). In the second half of 2010, however, over 304 U.S. troops were killed, compared with only 188 contractor deaths. *See Defense Base Act Case Summary by Nation, supra note 71; Military Casualty Information, supra note 73.*

Afghanistan war remains far from clear. Ambassadors Lakhdar Brahimi and Thomas Pickering recently questioned the success of the United States counterinsurgency and its ability to eradicate the Taliban through military force.⁸¹

An Imperfect Picture: Under-Representative Data

The lack of publicly available data on contractors in Iraq and Afghanistan create additional complexities. Traditionally, the data derived from DBA insurance claims was not publicly available and could only be obtained through Freedom of Information Act requests.⁸² Only recently has the Labor Department begun publishing much of this information on its website, a positive step in increasing the public's awareness of contractor casualties.⁸³

Unfortunately, the Government Accountability Office (GAO) recently indicated that there are numerous problems associated with this data, which likely under-represents the total number of contractor deaths and injuries.⁸⁴ The Labor Department's database was not designed for this task;⁸⁵ rather, Labor only designed its database to compile the number and type of insurance

⁸¹ Lakhdar Brahimi & Thomas R. Pickering, *Settling the Afghan War*, N.Y. TIMES (Mar. 23, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9C0CEEDD1231F930A15750C0A9679D8B63&ref=afghanistan>. Ambassadors Brahimi and Pickering state that “[e]fforts by the Afghan government, the United States and their allies to win over insurgents and co-opt Taliban leaders into joining the Kabul regime are unlikely to end the conflict.” *Id.* If the United States is to succeed in its Afghanistan mission, according to Brahimi and Pickering, it needs to start considering the possibility of negotiated settlement. *See id.* (“The United States has been holding back from direct negotiations, hoping the ground war will shift decisively in its favor. But we believe the best moment to start the process toward reconciliation is now, while force levels are near their peak.”).

⁸² Schooner, *Why Contractor Fatalities Matter*, *supra* note 78, at 86.

⁸³ This website may be found at <http://www.dol.gov/owcp/dlhwc/dbaallnation.htm>. *See Defense Base Act Case Summary by Nation*, *supra* note 71. *See also* Schooner & Swan, *supra* note 80, at 17.

⁸⁴ *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-1, IRAQ AND AFGHANISTAN: DOD, STATE, AND USAID FACE CONTINUED CHALLENGES IN TRACKING CONTRACTS, ASSISTANCE INSTRUMENTS, AND ASSOCIATED PERSONNEL 24-25 (2010).

⁸⁵ According to a GAO report:

Labor's DBA case data do not provide an appropriate basis for determining the number of contractor personnel killed or wounded in Iraq and Afghanistan while

claims filed under the DBA and not to track the actual deaths and injuries of contractor personnel.⁸⁶ As such, “Labor officials . . . explained that not all deaths and injuries reported under DBA would be regarded as contractors killed or wounded within the context of the” statutory mandate.⁸⁷ The DBA database only reflects a contractor’s death when the family or employer *files a claim* for insurance compensation (assuming a claim is filed at all), which does not always occur immediately after the incident giving rise to the claim.⁸⁸ The DBA data also fails to track the deaths and injuries of personnel working under non-contract assistance instruments (i.e. grants) because these instruments are not subject to the DBA.⁸⁹

The Inspector General of the Department of Labor also expressed concern about the efficiency and accuracy of the DBA claims process.⁹⁰ Specifically, the Inspector General estimated that around sixty-eight percent of employers fail to report employee injuries in a timely manner.⁹¹ Additional administrative problems were identified based on the antiquity of the DBA, which “was enacted during World War II [and] has not been modified or adequately staffed to take into

working on DOD, State, or USAID contracts . . . Labor—unlike DOD, State, and USAID—has no responsibilities for tracking killed or wounded contractor personnel, and as such, its data were not designed to do so. . . .

Additionally, because Labor does not track cases by agency or contract, DBA data cannot be analyzed to determine how many cases involved contractor personnel working specifically on DOD, State, or USAID contracts. . . .

U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1, CONTINGENCY CONTRACTING: DOD, STATE, AND USAID CONTINUE TO FACE CHALLENGES IN TRACKING CONTRACTOR PERSONNEL AND CONTRACTS IN IRAQ AND AFGHANISTAN 17-18 (2009).

⁸⁶ *Id.* at 24.

⁸⁷ *Id.* at 25 (referencing the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008).

⁸⁸ *Id.* at 35 n.33.

⁸⁹ *Id.*

⁹⁰ OFFICE OF INSPECTOR GEN., U.S. DEP’T OF LABOR, 02-11-001-04-430, OWCP NEEDS TO IMPROVE ITS MONITORING AND MANAGING OF DEFENSE BASE ACT CLAIMS 2-4 (2011), *available at* <http://www.oig.dol.gov/public/reports/oa/2011/03-11-001-04-430.pdf>.

⁹¹ *Id.* at 6-7 (Labor officials “recognized that delays in reporting injuries—especially for foreign workers arising from remote war zones—are endemic, and DBA employers have great difficulty in meeting the 10-day requirement to submit injury reports to OWCP.”).

consideration the current use of contractors and foreign nationals in the wars in Iraq and Afghanistan, and the rapid increase in DBA cases that have resulted from these wars.”⁹²

Language and literacy barriers also present a serious challenge to ensuring that foreign contractors and their employees fully understand their rights and responsibilities under the DBA.⁹³ Accordingly, the actual number of contractor fatalities is probably higher than currently known, particularly with respect to local hires and third country contractors.⁹⁴ It is also possible that the recent upward trends are more indicative of efforts by Labor officials to improve the DBA claims process and ensure compliance by contractors in Iraq and Afghanistan. For example, efforts have recently been made to clarify when DBA insurance requirements apply, educate contractors on their rights under the DBA, and translate insurance information into Arabic.⁹⁵

Contemplating the data from the standpoint of specific agencies, most, including the defense agencies, initially made little or no effort to keep track of how many contractors they employed in Iraq and Afghanistan, much less the number of contractors killed or wounded.⁹⁶ Only recently

⁹² *Id.*

⁹³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-280R, DEFENSE BASE ACT INSURANCE: REVIEW NEEDED OF COST AND IMPLEMENTATION ISSUES 5 (2005).

⁹⁴ For example, the War Hazards Compensation Act specifically excludes coverage “in the case of any person (1) whom residence is at or in the vicinity of the place of his employment, and (2) who is not living there solely by virtue of the exigencies of his employment, unless his injury or death resulting from injury occurs or his detention begins while in the course of his employment....” War Hazards Compensation Act § 101(d), ch. 668, 56 Stat. 1028, 1030 (1942) (codified as amended at 42 U.S.C. § 1701(d) (2006)).

⁹⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-772T, DEFENSE CONTRACTING: PROGRESS MADE IN IMPLEMENTING DEFENSE BASE ACT REQUIREMENTS, BUT COMPLETE INFORMATION ON COSTS IS LACKING 5 (2008).

⁹⁶ Coordination between the various agencies in theater merely exacerbates the problem. “[D]uring the first several years of the [Iraq] conflict, the DOD did not even have the ability to count and keep track of contractors from the Department of State, and as recently as February of 2008 had still not fully entered the State Department contractors into the DOD tracking database.” DICKINSON, *supra* note 11, at 59 (citing *An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations: Hearing Before the S. Comm. on Homeland Sec. and Gov’tal Affairs* 6 (2008) (statement of Jack Bell, Deputy Under Sec’y of Def. for Logistics and Materiel Readiness)).

has Congress mandated the Pentagon, the State Department, and the U.S. Agency for International Development (USAID) to track how many contractors are working in Iraq and Afghanistan and how many have been killed and wounded. In response to a 2008 Congressional mandate, DOD created the Synchronized Predeployment and Operational Tracker (SPOT) to track information on contingency contractor operations, including contractor casualties.⁹⁷ Alas, GAO confirms, and DOD concedes, that SPOT remains an inadequate source of data on this

⁹⁷ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 861, 122 Stat. 3, 253-54 (to be codified at 10 U.S.C. § 2302 Note). For additional information on SPOT, see Synchronized Predeployment and Operational Tracker Enterprise Suite (SPOT ES), www.acq.osd.mil/dpap/pacc/cc/docs/SPOT_ES_Overview_Oct_2010_SPOT_101_Releasable.pptx. This DOD presentation introduces SPOT as: “A single, joint enterprise system on a Service Oriented Architecture (SOA) employed for: the management, tracking and visibility of contractors accompanying U.S. forces overseas and contingency operations[;] capturing movement and location information about operating forces, government civil servants, and government contractors in specified operational theaters[;] and providing dynamic, ad hoc reporting by putting the power of data reporting and analysis in the hands of the analyst.” *Id.* The NGO community has raised concerns with regard to SPOT. Specifically:

SPOT ... threatens to undermine NGO effectiveness, humanitarian worker safety, and NGO’s ability to work in partnership with ... civilian branch agencies ... in areas of the world that are of vital national interest and where NGOs have a comparative advantage on the ground in terms of relating to local populations....

SPOT ... requires a far more detailed level of personal information on program staff than mandated by the legislation. ... [T]he categories of information required under SPOT were not developed with host country nationals in mind and may be impossible to obtain and update regularly. ...

[A]s the system is owned ... by DoD with its contents subject to interagency information-sharing and intelligence gathering..., the decision to use SPOT failed to consider some significant implications for, and special challenges to, U.S. NGOs who are dedicated to working as neutral actors.... SPOT ... blurs the distinction between civilian led humanitarian and development activities and U.S. military operations and creates a perception that NGOs are closely associated with the military and U.S. intelligence forces.

InterAction, Synchronized Pre-Deployment and Operational Tracker (SPOT) Fact Sheet, June 1, 2010, *available at* <http://www.charityandsecurity.org/system/files/Synchronized%20Pre.pdf>.

critical information.⁹⁸ Basically, DOD, by far the largest contracting agency in Iraq and Afghanistan, has not even seriously begun to track contractor deaths and injuries.⁹⁹ It is difficult to understand this failure, given the existing statutory, regulatory, and contractual mandates regarding compliance. For most relevant contracts to be performed outside the United States,¹⁰⁰ the government’s contracting officer is required to use a standard, remedy-granting clause.¹⁰¹ The required clause contains exhaustive warnings and requirements.¹⁰² The Defense

⁹⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-1, *supra* note 84, at 7.

⁹⁹ *Id.* Thus the problem is not merely keeping track of dead contractors; the government continues to struggle to keep track of live, working contractors:

Since the beginning of the Iraqi conflict, none of the agencies that have hired ... contractors could give Congress an accurate account of the total number of contractors hired or deployed. . . . [T]he 2008 Defense Authorization Act mandated that . . . DOD . . . take charge of counting contractors, but as recently as 2009, many years into the Iraqi operation, the government still had no accurate system even to track how many of its own private contractors are in the country. In addition, when a firm working . . . with DOD hires a [sub]contractor . . . , the agency does not consistently include those subcontractors in its tally.

DICKINSON, *supra* note 11, at 108 (citing GAO-10-1, *supra* note 85, at 8-15).

¹⁰⁰ The clause is required for contracts to be performed: “In a designated operational area during—(1) Contingency operations; (2) Humanitarian or peacekeeping operations; or (3) Other military operations or military exercises, when designated by the combatant commander; or When supporting [certain] diplomatic or consular mission[s.]” *See, e.g.*, 48 C.F.R. § 25.301-4(a) to (b).

¹⁰¹ 48 C.F.R. § 52.225-19.

¹⁰² In addition to providing guidance on pre-deployment training, visas, wearing of uniforms, the right to carry weapons and other things, the clause – Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States (Mar 2008), 48 C.F.R. § 52.225-19 (emphasis added) – makes clear that:

- *Contract performance may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.* 48 C.F.R. § 52.225-19(b)(2).
- “Unless personnel data requirements are otherwise specified in the contract, the Contractor shall establish and maintain with the designated Government official a *current list of all Contractor personnel* in the areas of performance. The

Department's regulatory guidance¹⁰³ and the DoD version of that clause¹⁰⁴ specifically requires use of the SPOT database.

Only the State Department and USAID have initiated meaningful efforts to track the deaths and injuries of their contractors.¹⁰⁵ During FY 2009, and the first half of FY 2010, the State

Contracting Officer will inform the Contractor of the Government official designated to receive this data and the appropriate system to use for this effort. [Also, t]he Contractor shall ensure that all *employees on this list have a current record of emergency data, for notification of next of kin*, on file with both the Contractor and the designated Government official.” 48 C.F.R. § 52.225-19(g)(1) to (2).

- “In the case of isolated, missing, detained, captured or abducted Contractor personnel, the Government will assist in personnel recovery actions.... Personnel recovery may occur through military action, action by non-governmental organizations, other Government-approved action, diplomatic initiatives, or through any combination of these options.” 48 C.F.R. § 52.225-19(m)(1) to (2).
- The Contractor shall be responsible for notification of the employee-designated next of kin, and notification ... to the U.S. Consul ... if the employee—(i) Dies; (ii) Requires evacuation due to an injury; or (iii) Is isolated, missing, detained, captured, or abducted. 48 C.F.R. § 52.225-19(n)(1) to (2).

¹⁰³ The DoD FAR supplement also requires that, “[w]hen using the clause at FAR 52.225-19, the contracting officer shall inform the contractor that the Synchronized Predeployment and Operational Tracker (SPOT) is the appropriate automated system to use for the list of contractor personnel required by paragraph (g) of the clause.” 48 C.F.R. § 225.301-4(2).

¹⁰⁴ The DoD acquisition regulations supplement this clause and specifically provide: “The Contractor shall enter before deployment and maintain data for all Contractor personnel that are authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause. The Contractor shall use the Synchronized Predeployment and Operational Tracker (SPOT) web-based system, at <http://www.dod.mil/bta/products/spot.html>, to enter and maintain the data....The Contractor shall ensure that all employees in the database have a current DD Form 93, Record of Emergency Data Card, on file with both the Contractor and the designated Government official....” 48 C.F.R. § 252.225-7040(g)(1) to (2).

¹⁰⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-1, *supra* note 84, at 23. *See also* OFFICE OF ACQUISITION & ASSISTANCE, AAPD 10-04, ACQUISITION & ASSISTANCE POLICY DIRECTIVE (2010), *available at* http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd10_04.pdf. In the background section, the AAPD indicates: “The [current version of the] MOU [between DoD,

Department reported that nine of its contractors died and 68 were wounded, while USAID reported 116 of its contractors were killed and 121 were wounded.¹⁰⁶ These numbers, however, were self-reported by contractors, and GAO cautioned that “[w]ithout alternative sources of data, [it] could not verify whether State’s and USAID’s data were complete [Additionally,] a recent report from the USAID Inspector General suggested that not all security contractors in Afghanistan are reporting . . . personnel being injured or killed.”¹⁰⁷

Nuances: The Devil in the Details

Another unanswered question regarding the inadequacy of publicly available data concerns the contractors’ cause of death. The GAO recently examined a sample of DBA death claims that occurred between FY 2009 and the first half of FY 2010, and found that approximately half (forty-nine percent) of these deaths were caused by non-hostile incidents.¹⁰⁸ Broken down by country, the GAO found that 62.4 percent of DBA death claims in Iraq were caused by hostile incidents, compared with only 26.3 percent of claims in Afghanistan. The GAO also found that over 30 percent of non-hostile deaths resulted from health conditions or illness. The GAO’s analysis must be read in the context of the small sample size (less than ten percent of the total number of DBA cases) and use of unverifiable data, which make it difficult to apply these conclusions to a wider field of contractors.¹⁰⁹

State, and AID] . . . specifies that SPOT will include information on contracts in Afghanistan with performance periods of more than 30 days or valued at more than \$100,000.” *Id.* We conclude from this that contractors killed in Afghanistan while working on short-term (less than 30 days) or small (under \$100,000) contracts would not necessarily be included in SPOT. *See, e.g.,* MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE U.S. DEP’T OF STATE (DOS) AND THE U.S. DEP’T OF DEFENSE (DOD) AND THE U.S. AGENCY FOR INT’L DEV. (USAID) RELATING TO CONTRACTING IN IRAQ AND AFGHANISTAN (2008), *available at* http://www.acq.osd.mil/log/PS/p_vault/MOU_Signed_July2008.pdf.

¹⁰⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-1, *supra* note 84, at 23

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 26.

¹⁰⁹ *Id.* at 25 n.33. The GAO examined only a sample of 213 DBA cases; those cases were provided by Labor specifically for this purpose, and they are not publicly available.

Moreover, members of the military also die from heart attacks and vehicle accidents, and DOD and the media count those deaths as military fatalities.¹¹⁰ Through the end of 2010, the WASHINGTON POST's *Faces of the Fallen* has chronicled a total of 4,419 military deaths in Iraq and 1,435 in Afghanistan.¹¹¹ Cross-referencing this total with data from the Defense Manpower Data Center's Personnel and Procurement Statistics confirms that the WASHINGTON POST's numbers include 933 accidental deaths in Iraq and 319 accidental deaths in Afghanistan.¹¹² Figure 11 provides a clearer view of this breakdown.

It certainly would be worthwhile to conduct a more in-depth analysis of contractor fatalities by, for example, cause of death. We would not be surprised if, as the GAO's data indicates, health-related issues for contractors are higher than among military troops due to general demographic differences (e.g., we assume the data would show a higher median age for contractor personnel), the military's more rigorous entrance screening procedures, and ongoing military physical fitness requirements. Consider, for example, that many U.S. military retirees have returned to Iraq and Afghanistan as civilian contractors. Unfortunately, public access to the required data remains limited.

Foreign & Local Labor: Unintended Externality, Unexpected Benefit?

We also sense that the source of labor merits further examination. As a result of the increased level of outsourcing in contingency operations, the government has found a source of uniquely inexpensive labor in foreign nationals. The CRS points out the well-accepted fact that foreign nationals work for lower salaries than U.S. citizen contractors.¹¹³ Local Iraqis and Afghans are the cheapest to hire because of the dismal state of their war-torn economies and the fact that their local status avoids transportation and housing costs. Given the acknowledged pervasiveness of foreign nationals in the U.S. contracting force, it is safe to assume that many of the U.S. government contracting victims in Iraq and Afghanistan are locals and other foreign nationals.

¹¹⁰ We believe this is consistent with the historical approach to measuring battlefield deaths. It is also one of the reasons we prefer the term "fatalities" as opposed to "casualties." For example, in the most exhaustive study on the topic, the author explained: "Categories of casualties include battle deaths, non-battle deaths, wounded in action, and prisoners of war (POWs). Unless otherwise elaborated, the word *casualties* refers to deaths due to hostile action (or battle deaths) for the remainder of this report." LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 7 n.2.

¹¹¹ The Washington Post, *Faces of the Fallen*, (Jan. 9, 2011), <http://projects.washingtonpost.com/fallen/>.

¹¹² *Military Casualty Information*, *supra* note 73.

¹¹³ SCHWARTZ, *supra* note 61, at 3.

This increased layering of complexity¹¹⁴ presents a particularly problematic issue from a casualty sensitivity standpoint, as public support for U.S. military operations may be (and, we intuit, probably is) less influenced by non-U.S. casualties.¹¹⁵

Unfortunately, the Labor Department's contractor death and injury statistics do not distinguish by trade or nationality. Inferences, however, can be drawn from DOD's census reports on its defense contracting personnel, which DOD began releasing in the second half of 2007. While the GAO has raised significant questions about the reliability and accuracy of this data,¹¹⁶ the DOD quarterly census reports remain the only readily-available source for any national breakdown of contractor personnel employed in the CENTCOM region. According to this data, in January

¹¹⁴ Consider a continuum, with either citizen conscripts (or draftees) or an all-volunteer army or militia at one extreme. "The fact that citizens are required to give up their time, if not their lives, in service to the country's goals should increase the stake of citizens in those goals, enhancing participation. It should ensure that citizens show an active interest in ... the rules by which they are conscripted." Avant & Sigelman, *supra* note 30, at 241. We sense, and the research suggests, that public perception of the military changes as the combatants (or those killed in the battle area) progress across the continuum spanning, for example, American military veteran/arms-bearing contractors, American law enforcement veteran/arms-bearing contractors, American support contractors, foreign arms-bearing contractors, foreign support contractors, etc.

¹¹⁵ Inferences to this effect can be drawn from research on the public's sensitivity to civilian casualties in U.S. military operations. See ERIC V. LARSON & BOGDAN SAVYCH, RAND CORPORATION, MG-441-AF, MISFORTUNES OF WAR: PRESS AND PUBLIC REACTIONS TO CIVILIAN DEATHS IN WARTIME 3 (2006), available at <http://www.rand.org/pubs/monographs/MG441.html> ("Although it is sometimes argued that large numbers of civilian casualties *could* reverse public support for U.S. military operations, this monograph will show that Americans generally have not responded to high-profile incidents of civilian casualties during U.S. military operations by withdrawing their support for the operation." (emphasis added)). Indeed, much of the survey research in this area has not contemplated this scenario. See, e.g., LARSON, CASUALTIES AND CONSENSUS, *supra* note 4, at 7-8 and Table 2.1 (citing Americans Talk Security No. 9). In response to the question: "if you had to make a decision about using the American military, how important would each of the following factors be to you?", 86 percent said that the "[n]umber of *American* lives that might be lost" was "very important[.]" *Id.*

¹¹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-19, CONTINGENCY CONTRACTING: DOD, STATE, AND USAID CONTRACTS AND CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN 25 (2008) ("The [CENTCOM] census relies on contractor firms to self-report their personnel data. According to DOD officials, when they receive the data they review it to ensure that there are no obvious errors, but they do not routinely evaluate the accuracy or completeness of the reported data.").

2011, approximately 77 percent of U.S. defense contractors in Afghanistan were foreign nationals, and 68 percent of those were local Afghans.¹¹⁷ Local Afghans also comprised nearly 95 percent of DOD's private security contracting force in Afghanistan, although DOD cautioned that "validation of [these] numbers is uncertain due to a rapidly changing environment surrounding President Karzai's Decree 62."¹¹⁸ In Iraq, 72 percent of DOD's contracting force was foreign nationals, 20 percent of which were local Iraqis.¹¹⁹

Furthermore, the Commission on Wartime Contracting, in its February 2011 report to Congress, provided a national breakdown of contractors for Fiscal Year 2010 that expanded beyond DOD and included State Department and USAID contractors, which is reproduced in Figure 12.¹²⁰ On the whole, it appears that no more than 24 percent of U.S. contractor employees in Iraq and Afghanistan are actually U.S. citizens,¹²¹ although that figure appears to be rising over the last couple of years, which suggests that it might not be prudent to extrapolate too much from this limited, volatile dataset.¹²²

¹¹⁷ U.S. DEP'T OF DEFENSE, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE U.S. CENTCOM AREA OF RESPONSIBILITY, IRAQ, AND AFGHANISTAN (Jan. 2011), *available at* http://www.acq.osd.mil/log/PS/hot_topics.html [hereinafter DOD CONTRACTOR SUPPORT, Jan. 2011]. It is worth noting that the numbers for Afghanistan were even higher not more than six months prior to this report. In May 2010, 85 percent of U.S. defense contractors in Afghanistan were foreign nationals, 81 percent of which were local Afghans. Apparently, DOD's quarterly reports indicate that DOD eliminated over 70,000 contractor positions between May and December of 2010. *See* U.S. DEP'T OF DEFENSE, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE U.S. CENTCOM AREA OF RESPONSIBILITY, IRAQ, AND AFGHANISTAN (May 2010), *available at* http://www.acq.osd.mil/log/PS/hot_topics.html.

¹¹⁸ DOD CONTRACTOR SUPPORT, Jan. 2011, *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ *See* COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra* note 56, at 7.

¹²¹ *Id.*

¹²² Indeed, In Iraq, between the Fall of 2007 through the end of 2010, the relative populations of DOD contractors have shifted (in decreasing order of magnitude) from: (1) local nationals, (2) third-country nationals, and (3) U.S. citizens to (1) third-country nationals, (2) U.S. citizens, and (3) local nationals. SCHWARTZ & SWAIN, *supra* note 17, at 17. Similarly, in Afghanistan, the proportion of DOD contractors that are U.S. citizens and third-country nationals has gradually increased, while the percentage of contractors represented by local nationals has decreased from eighty percent in 2008 to around fifty percent at the end of 2010. *Id.* at 11.

As an aside, third-country nationals, particularly in developing countries and areas near battle zones, appear particularly susceptible to forced labor and human trafficking. Anecdotal reports identified problems involving contractors operating on U.S. bases in Iraq and Afghanistan.¹²³ Unfortunately, the exact scope of this reprehensible activity that is occurring in Iraq and Afghanistan is still unknown.¹²⁴

But foreign nationals are also “cheaper” in a more pernicious sense. Hiring non-Americans for dangerous jobs in Iraq and Afghanistan reduces the innumerable risks constantly facing U.S. military personnel and helps to reduce the number of U.S. military fatalities. Of course, the government is well aware of the risks facing locals who serve as contractors supporting the U.S. mission. Indeed, the State Department created a number of special visa programs that allows certain contractor personnel to enter the United States after their service.¹²⁵ For a host of reasons, however, these programs have not proven a panacea against these dangers.¹²⁶

¹²³ In one recent example of human trafficking, twelve Nepalese men signed labor contracts with Daoud & Partners Ltd., a Jordanian subcontractor in Iraq and Afghanistan working under KBR, a major U.S. contractor. These men were under the assumption that they were headed to Jordan to serve as hotel staff. Instead, their passports were seized and they were shipped off to Iraq before being captured and executed by Iraqi insurgents. Jeff Jeffrey, *Justice for Contract Workers in America’s Wars*, NATIONAL LAW JOURNAL (Jan. 3, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476608072&src=EMC-Email&et=editorial&bu=National+Law+Journal&pt=NLJ.com+-Legal+Times+Afternoon+Update&cn=20110103lt&kw=Pro+Bono+Awards%3A+Justice+for+Contract+Workers+in+America%27&slreturn=1&hbxlogin=1>.

¹²⁴ For more information on the subject of human trafficking in Iraq and Afghanistan, see INSPECTOR GENERAL, U.S. DEP’T OF DEFENSE, EVALUATION OF DOD CONTRACTS REGARDING COMBATING TRAFFICKING IN PERSONS: U.S. CENTRAL COMMAND (2011), *available at* http://www.dodig.mil/SPO/Reports/SPO-2011-002_508.pdf.

¹²⁵ The National Defense Authorization Act for FY 2006 authorized up to 50 Special Immigrant Visas (SIV) annually for Iraqi and Afghani translators and interpreters working for the U.S. military. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1059, 119 Stat. 3136, 3443-44 (to be codified at 8 U.S.C. § 1101 note). In 2007, Congress expanded the number of authorized SIVs to 500 per year for FY 2007 and FY 2008. *See* Act of June 15, 2007, Pub. L. No. 110-36, § 1, 121 Stat. 227, 227 (to be codified at 8 U.S.C. § 1101 note). Congress later made Iraqi and Afghan aliens holding SIVs “eligible for resettlement assistance, entitlement programs, and other benefits available to refugees.” Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, div. G, tit. V, § 525, 121 Stat. 1844, 2212. Additionally, the National Defense Authorization Act for FY 2008 authorized up to 5,000 SIVs

Furthermore, if the fatality rate among contractors has little effect on public support, either because the public does not know or care about contractors, the government and the military have little incentive to minimize contractor fatalities. This is particularly true to the extent that, as a general rule, the military, the State Department, and USAID do not take responsibility for providing security to their contractors.¹²⁷ Thus, it is not surprising that the military chose to

per year to Iraqi nationals who were employed by the United States for at least one year, “provided faithful and valuable services to the United States Government . . . [and have] experienced or [are] experiencing an ongoing serious threat as a consequence of the alien’s employment by the United States Government.” National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1244, 122 Stat. 3, 397 (to be codified at 8 U.S.C. § 1157 note). In 2009, Congress authorized the same program for Afghanistan, setting aside up to 1,500 SIVs per year for Afghani nationals. *See* Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, div. F, tit. VI, § 602, 123 Stat. 524, 807 (to be codified at 8 U.S.C. § 1101 note).

¹²⁶ *See* Jeff Stein, *Iraqi Interpreters Seek Punishment of Contractor They Say Sexually Harassed Them*, WASH. POST, Apr. 23, 2011, at A1. This article describes the ordeal of several Iraqi women who worked as translators and sought to obtain SIVs to enter the United States:

The Iraqi women . . . had college educations and spoke English well enough to work as interpreters with U.S. combat units, jobs that came with a high mortality rate even off the battlefield: Insurgents targeted them for assassination as collaborators. . . . Because of the lingering dangers for Iraqis who allied themselves with the Americans, the State Department created a special visa to allow interpreters and other workers into the United States. . . . After a brazen kidnapping attempt by armed men in a Baghdad shopping arcade, [one of the interpreters] fled to Europe. . . . “I had to leave Iraq because I faced death threat many times . . . ,” she said by telephone. “They said because I worked with the Americans, I betrayed my country . . . and I should be dead for that.”

¹²⁷ For contracts performed outside of the United States, “contractors are responsible for providing their own . . . security support, including . . . security support for their employees.” 48 C.F.R. § 25.301-2(a); 48 C.F.R. § 52.225-19(c). The enormous (and critically important) Logistics Civil Augmentation Program (LOGCAP) contract was the primary exception to this policy in Iraq. According to testimony by Tina Ballard, the United States Army’s Assistant Undersecretary for Procurement & Policy, before the House Committee on Oversight and Government Reform: “Contracts contain different provisions. In the case of the LOGCAP contract, there was a specific provision that prohibited the use of private security contractors.” *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 185 (2007) (statement of Tina Ballard, Assistant Undersec’y for Procurement & Policy, U.S. Dep’t of the Army). Despite

prioritize the issuing of scarce body armor to soldiers before making it available to civilians.¹²⁸ Yet, even when the supply of body armor met demand, the military was slow to issue body armor to contractors or mandate its use.¹²⁹ By hiring non-military personnel to perform high-risk

this provision, KBR appears to have indirectly hired private security through its subcontractors. *See id.* at 112. This discovery evolved turned into a dramatic scandal regarding the reimbursement of the costs of that security, fueled in part by the fact that Blackwater was one of the private security firms hired by a KBR subcontractor, ESS Worldwide Services. *see id.* It is interesting how little discussion there has been of what we view as the more pressing issue—that the Army ultimately failed to perform its security commitment to protect KBR personnel to such an extent that KBR felt the need to privately hire its own security. Nor have the episodic media reports of contractor deaths resulted in a public outcry regarding the government’s failure to ensure the safety of the people supporting the government’s missions.

¹²⁸ DOD did not make body armor available to contractors until months after all military personnel in the region had already received access to body armor. Even when supply was sufficient, DOD’s policy did not even prioritize, much less mandate, that body armor be supplied to contractor personnel. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-275, DEFENSE LOGISTICS: ACTIONS NEEDED TO IMPROVE THE AVAILABILITY OF CRITICAL ITEMS DURING CURRENT AND FUTURE OPERATIONS 75-81 (April 8, 2005) (“Interceptor body armor was not available in sufficient quantities to U.S. military forces in Iraq sometime between October 2002 and September 2004 Because of the shortages, many individuals bought body armor with personal funds The new body armor was initially intended for limited numbers of personnel, such as dismounted infantry, however, this [later] changed In May 2003, the Army changed the basis of issue to include every soldier in Iraq. Then in October 2003, CENTCOM further expanded issuance of the body armor to include all U.S. military and DOD civilian personnel ...[in] Iraq, Kuwait, and Afghanistan...”)

¹²⁹ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-911, DEFENSE LOGISTICS: ARMY AND MARINE CORPS’ BODY ARMOR REQUIREMENTS, CONTROLS, AND OTHER ISSUES 8 (2007). The GAO explained that:

DOD Instruction 3020.41 *allows* DOD to provide body armor to contractors *where permitted* by applicable DOD instructions and military department regulations *and where specified under the terms of the contract*. It is CENTCOM’s position that body armor will be provided to contractors *if* it is part of the terms and conditions of the contract However, the officials said that commanders, at their discretion, *can* provide body armor to any personnel within their area of operation.

Id. (emphasis added). In other words, if the government-drafted contract—or the subcontract—fails to specify that CENTCOM will provide body armor, CENTCOM’s policy is *not* to provide

tasks that were once considered inherently governmental (and thus performed solely by military personnel),¹³⁰ the government is essentially substituting contractor deaths that have little or no impact on the public's casualty sensitivity.

We concede that further research is required to assess differences in public reactions to military deaths, American contractor deaths, and foreign contractor deaths. One study suggested that—with regard to private military deaths—there was “little support for the contention that public consent is affected by whether a soldier is serving or contracting, and [interviews] did not even suggest that the nationality of the soldier mattered.”¹³¹ As noted below, this conclusion is contrary to expectation and anecdotal evidence. Moreover, the authors concede that: (1) at least one interviewee (out of ten) felt better about the contractor fatalities, and (2) others initially expressed similar sentiments but “changed their mind as they continued to speak.”¹³²

While it might be premature to conclude that substituting contractor sacrifice for military losses directly affects public support for military action, raising the question seems both rational and important.

[T]he general public may care more about the deaths of soldiers, who are serving out of a sense of patriotic duty, than of [contractors] what are motivated by profit. This possibility is widely recognized in policy analyses of the private military and security industry and is reflected in the expectations of policy-makers. . . . The deaths of soldiers may communicate a message to the public about the importance and legitimacy of a mission—invoking symbols of sacrifice, patriotism, and national interest—and about the importance of sticking it out to honor and validate the commitment of those who have fallen. The deaths of [contractors] . . . may elicit different feelings altogether.¹³³

contractors with body armor *unless* the individual commander exercises his or her discretion to do so.

¹³⁰ As New York Times columnist Paul Krugman suggested: “It’s one thing to have civilians drive trucks and serve food; it’s quite different to employ them as personal bodyguards to U.S. officials, as guards for U.S. government installations, and . . . as interrogators in Iraqi prisons.” Schooner, *Contractor Atrocities*, *supra* note 55, at 5 (quoting Paul Krugman, *Battlefield of Dreams*, N.Y. TIMES, May 4, 2004, at A29).

¹³¹ Avant & Sigelman, *supra* note 30, at 259.

¹³² *Id.*

¹³³ *Id.* at 256-57.

Furthermore, it is worth noting that, while the American public may see a distinction between U.S. contractors and the U.S. military, foreign nations and enemy combatants do not. Indeed, “[t]he hanging of four Blackwater contractors on a bridge in Fallujah in April 2004 demonstrated the extent to which our enemies see no real difference between the U.S. military and its contract employees.”¹³⁴

To be sure, there is considerable merit to employing contractors in contingency operations, and it is absurd to assume that foreign nationals are intentionally being employed solely as “shrapnel catchers.” Nevertheless, the public needs to be aware that the use of foreign nationals as contractors has the potential to greatly reduce the number of uniformed (and U.S. citizen) casualties, as the level of troop fatalities would certainly not remain constant were the U.S. military less dependent on contractors.

Potential Effects of Imperfect Information

We see an analogy between the government’s extensive use of foreign contractors and the economic arguments that contributed to eliminating the draft in the early 1970s. The economist Walter Oi demonstrated how the draft turned soldiers into an inexpensive labor input that could be easily misused, resulting in a loss of well-being, motivation, and effectiveness of draftees and draft-induced volunteers.¹³⁵ Dr. Oi also showed that instituting an all-volunteer military force, while more expensive per soldier, could actually be more effective and result in less casualties because of the increased wages and training the government provided. Because of the larger investment made in each soldier under an all-volunteer force, the government was less inclined to misuse this labor and more likely to care about reducing casualty rates.¹³⁶

As some scholars have suggested, in the absence of conscription, a market-based regime should reduce the public’s concerns regarding the deployment of military resources.

If military “service” is really just a job, if forces can quit at any time, and if combatants need not be citizens at all, then the public demand for information relevant to forces and the legislative interest in their safety should be further

¹³⁴ ALLISON STANGER, *ONE NATION UNDER CONTRACT* 100 (2009).

¹³⁵ See Walter Y. Oi, *Should We Bring Back the Draft?*, *REGULATION* (Fall 2007), available at <http://www.cato.org/pubs/regulation/regv30n3/v30n3-2.pdf>.

¹³⁶ See *id.*

weakened. All things being equal, public consent for actions abroad that use hired forces should be easier to obtain.¹³⁷

Minimal support exists for this perception today. From a similar economic viewpoint, we wonder if the lack of data on contractor fatalities in Iraq and Afghanistan directly or indirectly affects contractor recruitment and salary. If contractor fatality rates, as indicated above, are significantly higher than what the labor pool currently understands, prospective contractor employees are not able to fully assess and factor in the full risk of fatality in their salary (and insurance) negotiations. We envision an economic model in which, if perfect information were available on the historical (and projected) risks of service in the battle area, this information could hinder contractor recruitment and, potentially, dramatically drive up contractor salaries.¹³⁸

We see this latter phenomenon potentially exacerbating anti-contractor sentiment. Unfortunately, there already is a broadly-voiced concern within the public and the media that contractors receive higher pay than their military counterparts. Despite repetition and outcry, little data supports this proposition, particularly when costs associated with education, training, healthcare, and retirement are factored in.¹³⁹ Of course, we do not assume that enlisted men and women necessarily receive market-based salaries; a broad range of benefits—ranging from educational opportunities (e.g., the GI Bill, service academy degree programs, ROTC scholarships), skills

¹³⁷ Avant & Sigelman, *supra* note 30, at 242.

¹³⁸ See LEVITT & DUBNER, *supra* note 32.

¹³⁹ See CONG. BUDGET OFFICE, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ (August 2008), <http://www.cbo.gov/ftpdocs/96xx/doc9688/MainText.3.1.shtml> (“The costs of a private security contract are comparable with those of a U.S. military unit performing similar functions. During peacetime, however, the private security contract would not have to be renewed, whereas the military unit would remain in the force structure.”). See also *Is DHS Too Dependent on Contractors?: Hearing Before the S. Comm. on Homeland Sec.*, 110th Cong. at 2 n.5 (2007) (statement of Professor Steven L. Schooner, Co-Director of the Government Procurement Law Program), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=022f8766-0aca-4638-9e35-c2e42fc76159:

Slavish focus upon the relative cost of contractor support is misguided. Specifically, it is not productive to criticize agencies for paying contractors “too much” without: (1) permitting an agency to hire additional personnel; (2) confirming that sufficient personnel are available in the marketplace and willing to work for the government; (3) comparing “apples to apples,” such as taking into account all of the costs of civil servants or members of the armed services; and (4) considering critical issues such as flexibility and surge capacity.

training and experience, opportunities to work and live abroad, retirement and health benefits, to fulfillment of a sense of duty or patriotism—permit the government to pay soldiers below-market wages. Indeed, recent media attention has focused on evidence that the cost of supporting military troop in Iraq and Afghanistan is as high as \$1 million per soldier, which demonstrates that cost may not readily correlate with salary.¹⁴⁰ Also, as previously stated, most, if not all, foreign nationals employed as U.S. contractors are paid considerably less than our military soldiers.¹⁴¹ Nevertheless, we fear that should the fatality data become more accurate and accessible, the corresponding increases in contractor salaries would only increase public antipathy (if not animosity) towards the general loss of contractor life.¹⁴²

Why Transparency Matters

Over the course of the last decade, the public has become—ever-so-slowly—increasingly aware of the extent of the government’s dependence upon contractors. Part of this derives from an Obama administration commitment to greater transparency in government operations.¹⁴³ The

¹⁴⁰ See Lawrence Korb & Laura Conley, *The \$1 Million Soldier: What’s Wrong With How We Budget War*, CNNMONEY.COM (Apr. 4, 2011: 5:35AM), http://money.cnn.com/2011/04/04/news/economy/war_costs_lawrence_korb/index.htm?source=cn_bin&hpt=Sbin.

¹⁴¹ See SCHWARTZ, *supra* note 61, at 3.

¹⁴² Scholars have also expressed concerns about the “financial” motivation of contractors:

On the battlefield itself, contractors operate in a murky legal zone outside the regular chain of command. Employees of private military firms answer neither to the U.S. military nor to the indigenous population they are involved in defending. They answer to the company that employs them. One can easily imagine scenarios where a contract employee, unlike his uniformed counterpart, has the right to walk away. He or she cannot be ordered to fulfill a dangerous mission, yet attainment of shared objectives depends on the contractor’s support. When American life and liberty are on the line, financial incentives alone cannot inspire selfless and courageous action. Contractors thus introduce into any military operation a degree of uncertainty that is not present when soldiers perform the same task.

STANGER, *supra* note 134, at 90.

¹⁴³ At the start of his presidency, President Obama publicly committed himself and his administration “to creating an unprecedented level of openness in Government.” Presidential Memorandum, Transparency and Open Government, (Jan. 9, 2009),

Commission on Wartime Contracting, in its February 2011 Report to Congress, brought attention to the disturbing number of contractor fatalities:

While doing their jobs, contractors risk being killed, wounded, or captured. Between September 2001 and December 2010, over 2,200 contractor employees of all nationalities have died and over 49,800 were injured in Iraq and Afghanistan. These contractors' deaths and injuries should not be ignored, but should be a part of the public debate on the cost of war.¹⁴⁴

To our knowledge, this is the first official comment by a government commission that contractor fatalities should be discussed in policy circles. We thus applaud the Commission for addressing this issue and are optimistic that they will continue to emphasize its importance.

Allison Stanger should also be applauded for briefly mentioning in her book, *ONE NATION UNDER CONTRACT*, a *New York Times* report from 2007 on contractor fatalities.¹⁴⁵ Sadly, the *New York Times* and other media outlets have lost interest in the story, and the public remains largely ignorant of the extent of the contractor community's sacrifice. Sadly, the news media rarely investigates or reports on these disturbing trends. Regardless of whether the public is more or less sensitive to the deaths of contractors than it is to military deaths, the fact remains that the public "is much less likely to know about" the contractor deaths.¹⁴⁶ Granted, the nature of contingency contracting, which includes numerous functions and spans numerous agencies, is much more diffuse than our well-structured and hierarchical military and often complicates the collection and aggregation of relevant data.¹⁴⁷ Nevertheless, as the military and the government struggle to determine the appropriate role for, and limits to, outsourcing, it is disconcerting that the public does not know and cannot acknowledge the extent to which contractors have made the ultimate sacrifice.

To be sure, much of the research on casualty sensitivity did not anticipate the contemporary use of surrogates for military jobs. It is uncertain, therefore, exactly how an increased awareness of contractor fatalities would affect public opinion. We assert that most moral or philosophical

<http://www.whitehouse.gov/the-press-office/transparency-and-open-government>. See also Presidential Memorandum, *supra* note **Error! Bookmark not defined.**

¹⁴⁴ COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra* note 56, at 8.

¹⁴⁵ STANGER, *supra* note 134, at 99.

¹⁴⁶ Avant & Sigelman, *supra* note 30, at 232.

¹⁴⁷ *Id.* at 245.

distinctions between military and contractor deaths, upon examination, quickly break down. A contractor killed today supporting the military mission is a proxy for a prior generation's soldier.¹⁴⁸ At least one survey suggests that respondents expressed somewhat similar responses—in terms of anger and sadness—upon reading about deaths among contractors and soldiers.¹⁴⁹ Anecdotal evidence from online media sources, however, suggests a *dramatically* different result. Indeed, we have been not only disappointed but taken aback by the volume and intensity (or, maybe more accurately, venom) of anti-contractor sentiment expressed in online comment (e.g., in the Washington Post and ProPublica) in reaction to prior publications discussing contractor fatalities.¹⁵⁰

¹⁴⁸ According to Allison Stanger, “[w]ithout contractors, who supply the vast majority of the support services in Iraq in order to free up military personnel for combat roles, the Bush administration would have had to institute a draft to wage its war there.” STANGER, *supra* note 134, at 10.

¹⁴⁹ “The facts that these assessments were no more positive among soldiers should occasion surprise among those who would expect the use of contractors to decrease political costs because people care less about contractor deaths.” *Id.* at 258.

¹⁵⁰ See, e.g., Steven Schooner, *Remember Them, Too: Don't Contractors Count When We Calculate the Costs of War?* (May 25, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/05/24/AR2009052401994_Comments.html. A representative sample follows:

“[I] do not feel they have a place of honor next to our military. Not even close.”; “[C]ontractors are mercenaries [stet] and I'm sorry but they just don't count the same as the man or woman in uniform putting their life on the line because they wear the uniform and fight for Our Country[.]”; “Why memorialize contractors? . . . They. Don't. Matter.”; “I have little compassion for all those contractors, ... They do what they do for the money. The fact that that job might get them killed is something [they] need to factor into their considerations of whether the salary is worth it. ... Mercenaries are mercenaries, and if they want their own memorial day, let them have it. In secret, as befits mercenaries.”; “[T]o compare the sacrifice of the men and women of our armed forces to the human cost of for-profit civilian contractors is nonsense.”; “A mercenary is never the same as a patriot. Money does matter. It is the difference between a wife and a prostitute.”; “Sorry - no matter what nice new job title you dream up, these ‘contractors’ are mercenaries. They ... have never, ever been accorded any honor. They should not expect it now.”; “Why should mercenaries be counted among the honored dead? ... They are truly the most despicable people on the planet. ... This is the most ridiculous suggestion I've ever heard and is an insult to everyone who's ever worn the uniform.”; “I bet they're all burning in hell.”]

Some people certainly view contractors as expendable profiteers or adventure seekers that are not entitled to the same respect as military personnel.¹⁵¹ Similar arguments, however, were made in the late 1960s by opponents to an all-volunteer military force. As discussed in Sol Tax's, *The Draft: A Handbook of Facts and Alternatives*, economist Milton Friedman fiercely responded at a conference in December 1966 at the University of Chicago:

My army is “volunteer,” your army is “professional,” and the enemy’s army is “mercenary.” All these three words mean exactly the same thing. I am a volunteer professor, I am a mercenary professor, and I am a professional professor. And all you people around here are mercenary professional people. ... It’s ... a puzzle ... why people should think that ... “mercenary” somehow has a negative connotation. I remind you ... that ... Adam Smith ... said, “You do not owe your daily bread to the benevolence of the baker, but to his proper regard for his own interest.” ... In fact, I think mercenary motives are among the least unattractive that we have.¹⁵²

Regardless of whether the public values the loss of a military or contractor life differently, there can be no question that, currently, the public receives far more accessible, current, accurate, and compelling *information* on military deaths than it receives on contractor fatalities. All of which means the public is not receiving a full accounting. Accordingly:

The central effect of relying on [contractors] is to reduce the public’s knowledge about a portion of the war’s casualties.... An individual death evokes sympathy—and a sense that the government is responsible for it—regardless of whether the person who died is a soldier or a contractor. These findings suggest the need to reconsider the relationship between citizenship, public consent, and the human cost of war.¹⁵³

See also T. Christian Miller, *This Year, Contractor Deaths Exceed Military Ones in Iraq and Afghanistan*, PROPUBLICA (Sept. 23, 2010), <http://www.propublica.org/article/this-year-contractor-deaths-exceed-military-ones-in-iraq-and-afgh-100923#comments>. Of course, we do not suggest that online commenting accurately represents, well, anything. But these comments differ dramatically from Avant & Sigelman’s interpretation of their survey data. See Avant & Sigelman, *supra* note 30, at 256-61.

¹⁵¹ *Id.*

¹⁵² THE DRAFT: A HANDBOOK OF FACTS AND ALTERNATIVES 366 (Sol Tax ed., University of Chicago Press 1976).

¹⁵³ Avant & Sigelman, *supra* note 30, at 260.

The public cannot be expected to make a fully informed decision without full access to complete information. Encouraging transparency and increasing public awareness of the role that contractors currently play on the battlefield is a task that desperately needs to be undertaken by our political leaders.¹⁵⁴

Conclusion

An honest, accurate tally of the human toll of military conflicts plays a critical role in a representative democracy. Yet the public, the media, and American policy-makers currently lack relevant, accurate data. The pervasive deployment of contractors on the modern battlefield requires the injection of contractor deaths into the casualty sensitivity equation. Although research conducted by CRS and GAO has increased insight into this complicated problem, much work remains. Congress must affirmatively take cognizance of the issue. We also encourage DOD to foster discussion and thinking about these issues at its senior service schools and fund both empirical and survey research inside and outside of the government.

Perhaps most importantly, we encourage the media to report responsibly on the true human costs of the government's contemporary military actions.¹⁵⁵ This tally, particularly to the extent that it proves inconsistent with conventional wisdom, is important for the public—and Congress—to

¹⁵⁴ “The public cannot be said to have consented to something that it does not know about.” *Id.* at 261.

¹⁵⁵ The media's failure to force contractor deaths more clearly into the public consciousness appears similar (and equally inexplicable) to its failure to aggressively seek and publish military casket photos. Generations of Americans were exposed to the harsh realities of armed combat by stark images—in newspapers and on television screens—of flag-draped coffins. But not during much of the last decade, until President Obama lifted the ban in 2009. Although the policy banning media access to Dover Air Force Base dated back to 1991, its ramifications were not as significant until the “global war on terror” commenced. Professor Ralph Begleiter successfully sued the Defense Department in 2004 under the FOIA to gain access to government photographs of the Honor Guard and subsequently posted them on the web through the National Security Archive at George Washington University. But the ban effectively continued, because, as Thomas Blanton, Director of the National Security Archive, and Begleiter suggest, the litigation prompted the Pentagon to stop photographing the ceremonies. Begleiter lamented: “Hiding these images from the public—or, worse, failing even to record these respectful moments—deprives all Americans of the opportunity to recognize their contribution to our democracy, and hinders policymakers and historians in the future from making informed judgments about public opinion and war.” See, generally, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm>.

grasp and internalize both the level of the military’s reliance on contractors and the extent of contractor sacrifice. Increasingly, contractors make the ultimate sacrifice, and that sacrifice merits respect and gratitude. Ultimately, the public weighs the intangible benefits of achieving foreign policy objectives against the most tangible costs imaginable—the lives of those sacrificed to achieve those objectives.¹⁵⁶ In weighing that balance, all lives must be counted.

¹⁵⁶ Contrast this with Larson’s conclusion: “When asked to support a military operation, the American public ultimately must weigh the intangible benefits of achieving foreign policy objectives against *the most tangible costs imaginable—the lives of U.S. service personnel.*” LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 99 (emphasis added). Such a conclusion no longer reflects the realities of the modern battlefield.

Figures, Charts, and Graphs

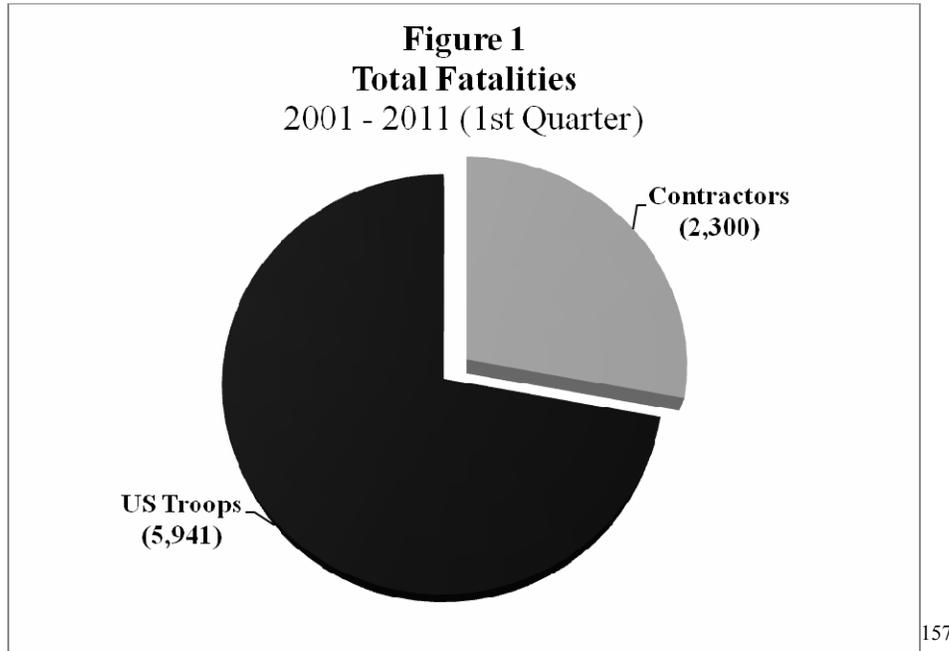


Figure 2
Contractor Injuries
Jan. 2001 – Mar. 2011¹⁵⁸

	Serious Injuries	Total Injuries
Iraq	14,672	40,688
Afghanistan	4,729	10,343
Total	19,401	51,031

¹⁵⁷ *Military Casualty Information, supra note 73; Defense Base Act Case Summary by Nation, supra note 71.*

¹⁵⁸ *Defense Base Act Case Summary by Nation, supra note 71.*

Figure 3
Contractor Fatalities by Employer
 Sept. 1, 2001 – Mar. 31, 2011¹⁵⁹

Employer	Fatalities
L-3 Communications (including subsidiaries MPRI; Titan Corp.; TLOTS1)	366
The Supreme Group (including subsidiary Supreme Food Service)	222
Service Employees International	125
AEGIS (including subsidiaries Aegis Defense Service; Mission Essential Personnel)	86
DynCorp International (including subsidiary DynCorp Technical Services)	85

Figure 4
Total Fatalities
 Jan. 2001 – Mar. 2011

	US Troops¹⁶⁰	Contractors¹⁶¹
Iraq	4,431	1,537
Afghanistan	1,510	763
Total	5,941	2,300

¹⁵⁹ See *Defense Base Act Case Summary by Employer*, supra note 74.

¹⁶⁰ *Military Casualty Information*, supra note 73.

¹⁶¹ *Defense Base Act Case Summary by Nation*, supra note 71.

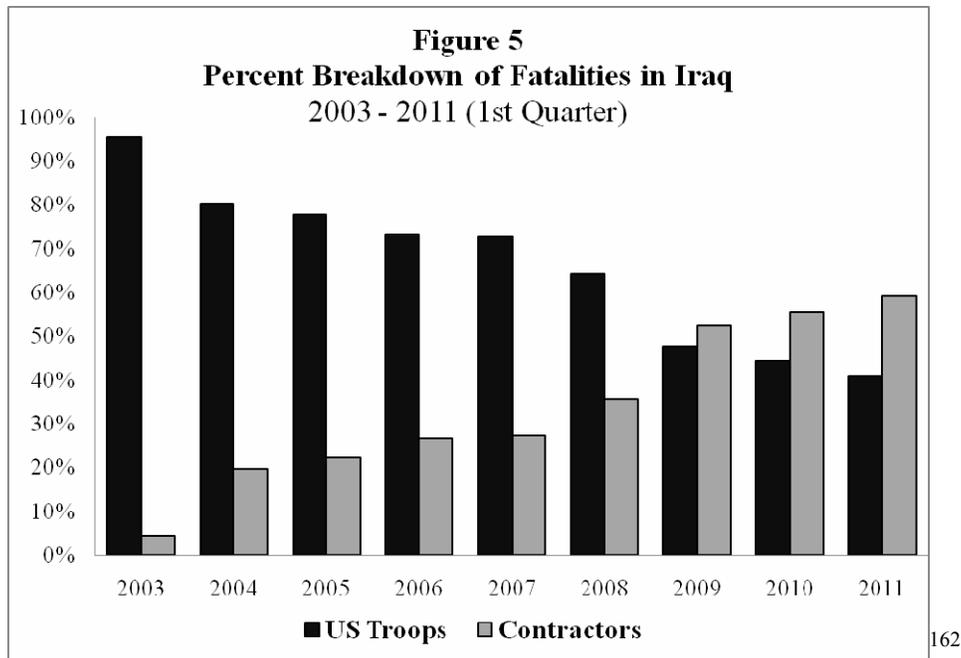
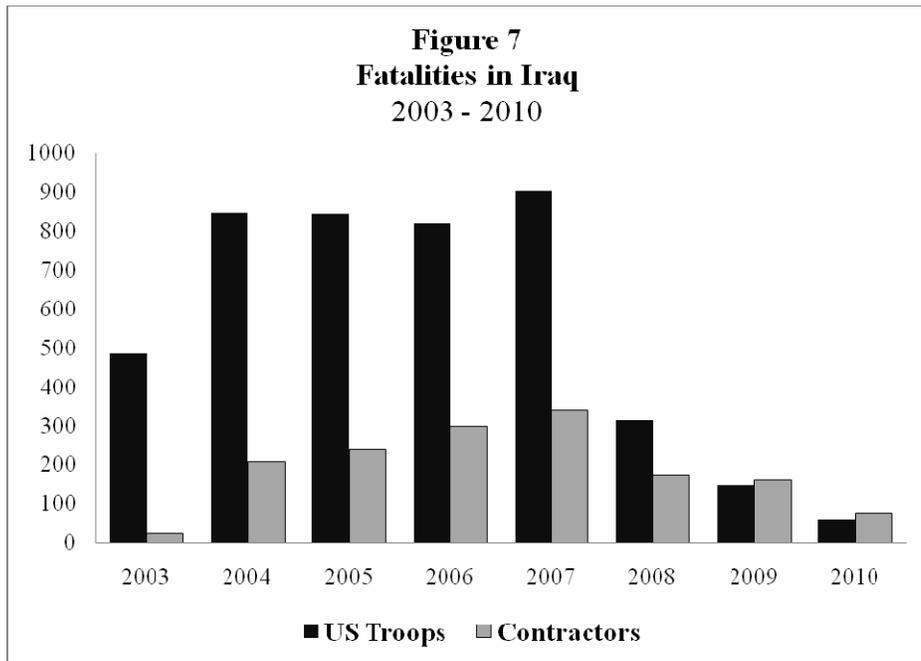


Figure 6
Iraq Fatalities
Jan. 2009 – Mar. 2011¹⁶³

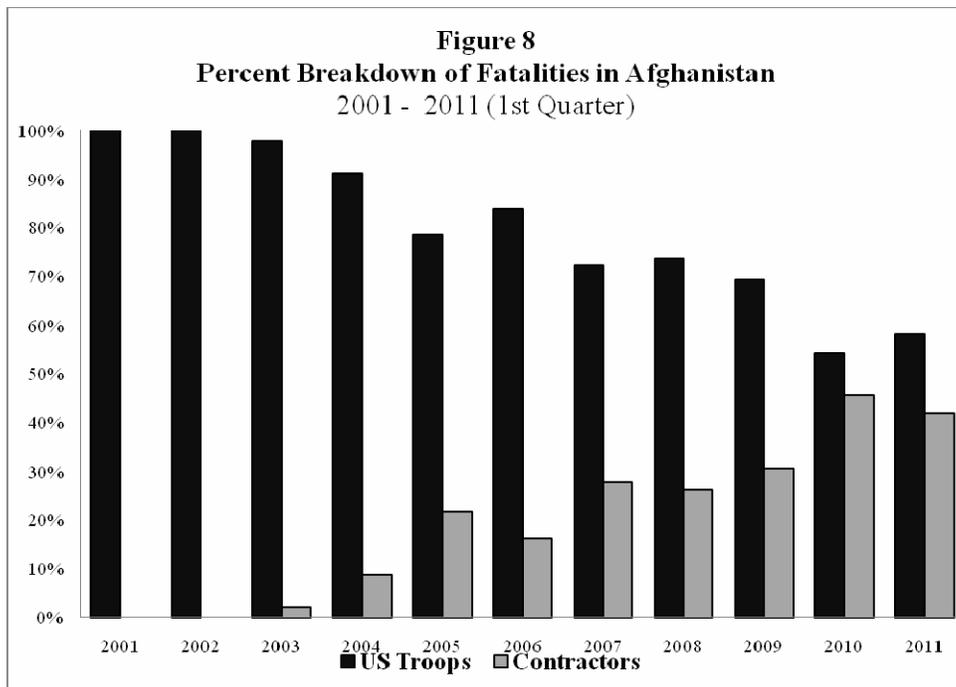
Contractors	254
US Troops	219

¹⁶² *Military Casualty Information, supra note 73; Defense Base Act Case Summary by Nation, supra note 71.*

¹⁶³ *Military Casualty Information, supra note 73; Defense Base Act Case Summary by Nation, supra note 71.*



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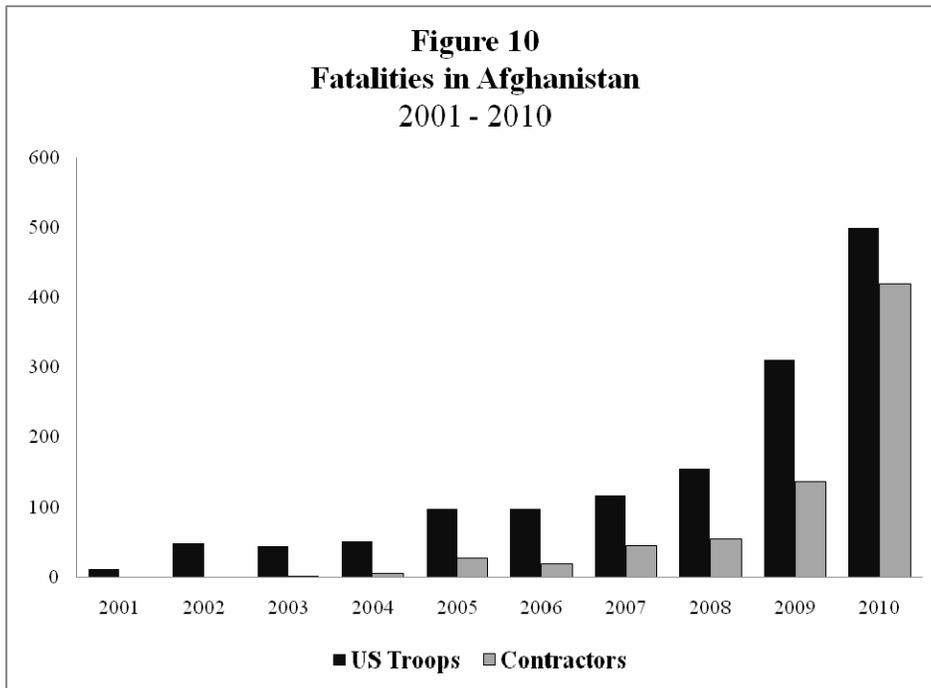


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¹⁶⁴ *Military Casualty Information, supra note 73; Defense Base Act Case Summary by Nation, supra note 71.*

Figure 9
Afghanistan Fatalities
 Jan. 2010 – Mar. 2011¹⁶⁶

Contractors	474
US Troops	574



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¹⁶⁵ *Military Casualty Information, supra note 73; Defense Base Act Case Summary by Nation, supra note 71.*

¹⁶⁶ *Military Casualty Information, supra note 73; Defense Base Act Case Summary by Nation, supra note 71.*

¹⁶⁷ *Military Casualty Information, supra note 73; Defense Base Act Case Summary by Nation, supra note 71.*

Figure 11
Military Deaths by Type
 2001 – 2010¹⁶⁸

	Iraq	Afghanistan
Killed in Action	3,486	1,116
Accidental	933	319
Total	4,419	1,435

Figure 12
Defense, State, and USAID Contractors
in Iraq & Afghanistan
 Fiscal Year 2010¹⁶⁹

Nationality	Dep't of Defense		Dep't of State		USAID		Total	
	Contractor Personnel	Percent Total	Contractor Personnel	Percent Total	Contractor Personnel	Percent Total	Contractor Personnel	Percent Total
U.S. Nationals	41,855	28.9%	4,322	22.4%	805	2.3%	46,982	23.5%
Iraqi/Afghan Nationals	44,890	31.0%	10,194	53.8%	32,621	91.2%	87,705	43.9%
Third-Country Nationals	57,960	40.0%	4,734	24.5%	1,193	3.3%	64,887	32.0%
Unknown	-----	-----	60	0.3%	1,149	3.2%	1,209	0.6%
Total	144,705	100%	19,310	100%	35,768	100%	199,783	100%

¹⁶⁸ *Military Casualty Information*, *supra* note 73.

¹⁶⁹ COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra* note 56, at 7.