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## Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause

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# REGULATING THE NEW PRIVATEERS: PRIVATE MILITARY SERVICE CONTRACTING AND THE MODERN MARQUE AND REPRISAL CLAUSE

## I. INTRODUCTION

On March 24, 1994, the defense minister of the young nation of Croatia appealed to the United States military for assistance. In a letter to the Pentagon, Gojko Susak wrote that Croatia's goal was the transition of the Croatian military "to one which follows the model of the United States."<sup>1</sup> Croatia's fledgling army had received stinging defeats at the hands of Serbian forces in 1991 and Bosnian Muslim forces in 1993, and enemy troops occupied over thirty percent of Croatia's territory.<sup>2</sup> Pentagon officials were sympathetic to Mr. Susak's appeal, primarily because they had begun to see Croatia as a potential moderate ally in an unstable region.<sup>3</sup> But the hands of the United States military establishment were tied—a United Nations arms embargo barred the United States from providing any military assistance to entities of the former Yugoslavia.<sup>4</sup> Pentagon officials referred Mr. Susak to Military Professional Resources, Incorporated (MPRI), an American company that specializes in supplying military training and expertise to governments and other organizations worldwide.<sup>5</sup>

Because the arms embargo also applied to private entities, MPRI could not provide direct military planning or intelligence services or advice on strategy and tactics to Croatia or any other party in the former Yugoslavia.<sup>6</sup> MPRI could only provide instruction on such non-strategic subjects as leadership skills and the role of

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1. Roger Cohen, *U.S. Cooling Ties to Croatia After Winking at Its Buildup*, N.Y. TIMES, Oct. 28, 1995, at A1.

2. *See id.* at A5.

3. *See id.*

4. *See Res. 713*, U.N. SCOR (1991); Cohen, *supra* note 1, at A1.

5. *See Cohen, supra* note 1, at A5.

6. *See id.*

the military in an emerging democracy.<sup>7</sup> Nonetheless, the impact of the resulting MPRI-Croatia contract was dramatic. Just months after MPRI was hired to conduct leadership seminars for top Croatian military officers, the Croatian army launched the stunningly successful Operation Uluja or "Storm" against the Serb-held Krajina region of Croatia.<sup>8</sup> In a five-pronged offensive, the Croatian commanders integrated air power, artillery, and rapid infantry movements to target the Serb command and control networks, sending much of the Serb army into retreat.<sup>9</sup> Military analysts agreed that the evidence of American instruction in strategy and tactics was unmistakable.<sup>10</sup> Whether MPRI violated the terms of the United Nations arms embargo is a murky issue, but the results for the United States national security apparatus were clearly positive: without the involvement of a single American soldier or a single American dollar, the MPRI project strengthened Croatia's military and bolstered the nation's strategic position in the region.<sup>11</sup>

Recent dramatic reductions in federal budgets for national security agencies, as well as sensitive political and diplomatic considerations, have led the United States government to increasingly rely on corporate enterprises like MPRI to perform military and quasi-military functions abroad.<sup>12</sup> These private military service contractors employ thousands of retired American military officers and view military activity as a purely commercial enterprise.<sup>13</sup> Federal law requires these companies to register with the State Department and obtain a license for each project,<sup>14</sup> but the government does not directly employ them. Instead, the companies hire out their military expertise to foreign governments and other entities for profit.<sup>15</sup>

In many ways, private military service contractors are modern day privateers. During the American Revolution, the Continental Congress and individual colonial governments licensed private volunteer ship owners or privateers to attack and plunder British ships.<sup>16</sup>

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7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See* Ken Silverstein, *Privatizing War*, THE NATION, July 28, 1997, at 11, 11.

13. *See id.*

14. *See* Arms Export Control Act (AECA), 22 U.S.C.A. § 2778(b) (West Supp. 1997).

15. *See* Silverstein, *supra* note 12, at 12.

16. *See* C. Kevin Marshall, *Putting Privateers in Their Place: The Applicabil-*

The licenses the privateers received were termed letters of marque and reprisal.<sup>17</sup> In exchange for their services these commercial warriors were allowed to keep any booty they captured. In a similar way, companies like MPRI are solicited to undertake profit-making military ventures that align with the national security interests of the United States.

For policymakers, these new privateers provide many financial and political advantages over the use of regular military troops. First, in an era of tight defense budgets, the use of private contractors like MPRI is inexpensive.<sup>18</sup> Like many large corporations, the United States military cannot afford to warehouse legions of experts with very narrow specialties that are seldom needed. For the American government, soliciting retired officers to accept privately-financed military contracts that further American interests is extremely cost-effective.

Second, in international relations, the introduction of American troops into a region is often untenable. Private military contractors can behave as unofficial agents of American policy in a region where official action is prohibited or undesirable. For example, when MPRI first entered the Balkans, the American military was barred from the region, and when American troops were invited to go in, they were part of an ostensibly neutral NATO peacekeeping force.<sup>19</sup> Under the guise of a private commercial enterprise, MPRI could thus achieve what would otherwise be impermissible American military objectives.

Finally, employing privateers allows politicians to sidestep sensitive domestic political issues.<sup>20</sup> To the American public, risking the lives of American service persons is often unacceptable even where key strategic concerns are at stake. If private contractors volunteer to take those risks at no expense to the government, it is a win-win situation from a political standpoint.

These very advantages, however, also make the new privateers potentially dangerous to American national security interests. Although they are cheap for the government, private financing allows the new privateers to operate outside the ordinary military chain of command. Critics charge that this independence encourages many

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*ity of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954 (1997).

17. *See id.*

18. *See Silverstein, supra* note 12, at 14.

19. *See* Chris Hedges, *Bosnian Muslims Are Reported to Rearm Secretly*, N.Y. TIMES, Oct. 3, 1997, at A1.

20. *See Silverstein, supra* note 12, at 14.

private military service contractors to go beyond government sanctioned conduct in search of higher profits.<sup>21</sup> Such unauthorized action in hot spots such as the Balkans and the Middle East has the potential to destroy the delicate diplomatic and military stability policy-makers are trying to achieve. The privateers may also inadvertently draw the United States into direct military involvement by provoking attacks on American troops or allies who are in these countries performing other functions.<sup>22</sup>

The increasing use of private military service contractors may also undermine public accountability of the American military and other organs of national security.<sup>23</sup> The public is generally unaware of this risky aspect of American military policy and therefore unable to make informed decisions about the government's foreign policy. Should the government be able to sidestep opposition to American involvement in political hot spots by simply arranging for privateers to be put in harm's way rather than American soldiers? Is this a principled way to handle potential domestic or international opposition to American military policy?

This Comment argues that while the Marque and Reprisal Clause of the Constitution empowers Congress to regulate private military service contractors, Congress has failed to adequately exercise that power to ensure that these new privateers act in the best interests of the United States. Part II observes that private military service contracting may undermine American national security interests if it is not strictly regulated. Part III establishes that the Marque and Reprisal Clause of the United States Constitution grants Congress power to regulate private military service contracting. Part IV traces Congress's attempts to exercise this power through the Arms Export Control Act (AECA). Finally, Part V concludes that Congress should enact new legislation to better regulate these companies and ensure that they perform their activities in a manner that is consistent with the best interests of the American people.

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21. See Cohen, *supra* note 1, at A1.

22. See William D. Hartung, *Mercenaries, Inc.: How a U.S. Company Props up the House of Saud*, THE PROGRESSIVE, Apr. 1996, at 26.

23. See Silverstein, *supra* note 12, at 17.

## II. PRIVATE MILITARY SERVICE CONTRACTORS MAY UNDERMINE AMERICAN NATIONAL SECURITY INTERESTS

While private military service contractors will likely play an increasingly important role in the government's military and national security policy, they may also endanger American interests. Because these companies are privately-financed, they operate beyond the ordinary military chain of command and may be difficult to control once authorized. This independence has the potential to inadvertently draw the entire nation into war by provoking retaliation against American troops or civilians. Two companies in particular illustrate the need for strong regulation in this area.

### A. MPRI

MPRI is perhaps the primary player in private military service contracting. MPRI spokesman and former head of the Defense Intelligence Agency, Ed Soyster, calls his company "the greatest corporate assemblage of military expertise in the world"—a claim backed by 160 full-time employees and a database of over 2,000 retired generals, admirals, and other officers available for contract work.<sup>24</sup>

MPRI has been crucial to American strategic planning in the Balkans. MPRI's Croatian contract—officially termed the "Democracy Transition Assistance Program"—is one of several in the region licensed by the State Department Office of Defense Trade Controls.<sup>25</sup> Federal law requires companies who sell military goods or services abroad to register with the Office of Defense Trade Controls and obtain a license for each contract.<sup>26</sup>

In order to obtain a license for its initial Croatia contract, MPRI had to make assurances that it would not undertake "direct military planning or advice on strategy to the Croatian Army."<sup>27</sup> Such activities would violate the United Nations arms embargo. It appears, however, that MPRI's assistance to the Croatians went well beyond civics lessons and probably violated the embargo. During the initial MPRI training mission, Croatia spent an estimated \$1 billion to arm

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24. Mark Thompson, *Generals for Hire*, TIME, Jan. 15, 1996, at 34, 34.

25. See Paul Harris, *Privatizing War: Military Advising Is Growth Industry*, INSIGHT ON THE NEWS, Aug. 26, 1996, at 12, 13.

26. See Arms Export Control Act 22 U.S.C.A. § 2778(b) (West Supp. 1997); Department of State International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 124.1(a) (1997).

27. Cohen, *supra* note 1, at A5.

itself with East-European weapons,<sup>28</sup> and any claim that MPRI offered no advice regarding the procurement or implementation of these arms is not credible.

Western military analysts are convinced that the Croatians did not conceive of Operation Storm in Krajina on their own. An American officer assigned to United Nations forces in the region noted that "the evidence of American instruction was unmistakable. You don't just stumble on what the Croats have achieved."<sup>29</sup> Or, as another military observer put it, "[t]he Croatians did a good job of coordinating armor, artillery and infantry. That's not something you learn while being instructed about democratic values."<sup>30</sup> A Croatian spokesman told the press that General Varimar Cervenko, the commander of Croatian forces in the Krajina campaign, met with MPRI representative, General Carl Vuono (ret.), several weeks before the offensive and at least ten more times in the five days immediately before the offensive.<sup>31</sup> MPRI spokesman Ed Soyster described the Croatian project as "kind of frustrating. No military plans. No strategy."<sup>32</sup> But he has also laughed off the suggestion that MPRI overstepped its mandate in Croatia: "They could have got [*sic*] the battle plan just as well from Georgetown University as from MPRI."<sup>33</sup> Critics of MPRI have taken Operation Storm very seriously, alleging that MPRI violated the United Nations arms embargo and the terms of its State Department license with the tacit permission of Pentagon officials.<sup>34</sup>

Uneasiness regarding such violations goes beyond international legal niceties. Despite initial Clinton Administration support for the Croatian training program, some Pentagon and State Department officials believe that by going beyond the terms of their contract, MPRI has served its client to the detriment of American strategic interests.<sup>35</sup> MPRI has helped the Croatian army become the most powerful force in the region—the same Croatian army that burned over seventy percent of Serbian homes and executed dozens of elderly Serbs during the Krajina assault, and the same army that must learn to cooperate with a far inferior Bosnian Muslim military under the

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28. *See id.*

29. *Id.*

30. Silverstein, *supra* note 12, at 14.

31. *See id.*

32. Cohen, *supra* note 1, at A5.

33. Harris, *supra* note 25, at 13.

34. *See generally* Cohen, *supra* note 1.

35. *See id.* at A5.

terms of the Dayton Peace Accords.<sup>36</sup> A stable, strong, responsible Croatian military is in the American strategic interest; an aggressive, unstoppable, irresponsible Croatian military is not. MPRI trainers may have helped the Croatian military become the latter, thereby upsetting a delicate balance of power in the Balkans that American policymakers are working to achieve.<sup>37</sup>

By the time the Dayton Peace Accords brought a tense peace to the Balkans in November of 1995, MPRI was lining up its next contract.<sup>38</sup> The agreement signed in Ohio called for a series of negotiated arms reductions by Bosnian Serbs to achieve a balance of power between the Serbs and the Bosnian-Croat alliance forces that would control the rest of Bosnia.<sup>39</sup> From the beginning, however, the Clinton Administration considered this plan an inadequate solution, believing that military parity could only be achieved by arming and training the Bosnians.<sup>40</sup> America's European allies opposed this approach, but allowed the United Nations arms embargo to lapse in March of 1996, a few months after the peace accords were signed.<sup>41</sup>

Even before the embargo was lifted, the Pentagon had enlisted MPRI to contract with the Bosnian government to train its troops.<sup>42</sup> The Bosnian government, with the help of a coalition of Islamic nations including Saudi Arabia, Kuwait, Malaysia, and Brunei, paid MPRI's \$400 million fee.<sup>43</sup> With this contract, MPRI became a key component in a policy whereby the United States quietly supported the Bosnian army buildup on the one hand, while it remained officially neutral and participated in the NATO peacekeeping mission on the other.<sup>44</sup>

Unless it is strictly monitored, the MPRI Bosnian Army project could indirectly endanger the lives of United States military personnel stationed in the Balkans. Since 1996, the Bosnian Muslim government has been complementing MPRI's training with a massive arms buying spree.<sup>45</sup> According to some experts, the combination of

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36. *See id.*

37. *See id.*

38. *See Harris, supra note 25, at 12.*

39. *See Thompson, supra note 34, at 34.*

40. *See id.*

41. *See id.*

42. *See Harris, supra note 25, at 13.*

43. *See id.*

44. *See id.*

45. *See Hedges, supra note 19, at A1.*



new weapons and MPRI training has encouraged the Bosnian Muslim military to plan a major offensive to retake territory lost during the war. As one NATO commander observed in the fall of 1997, "[t]he question no longer is if the Muslims will attack the Bosnian Serbs, but when."<sup>46</sup> Such an attack would imperil thousands of American troops and shatter the fragile peace that the United States has worked so hard to foster.

Authorizing MPRI contracts in the Balkans provides several advantages for American policymakers. These low-profile privateers help achieve American strategic goals while the American government remains officially neutral. But the MPRI projects are fraught with dangers for the United States because thousands of American military personnel are still stationed in the region. Neutral treatment of the previously warring factions is critical to the legitimacy of the American/NATO peacekeeping mission.<sup>47</sup> If the Bosnian Serbs perceive excessive American support for the Bosnian Muslims or Croats, they may choose to undermine the peace process or take military action against the Bosnian Muslims or even their American "allies."<sup>48</sup> On the other hand, MPRI's American training and expertise may embolden the Muslims and Croats to exact revenge for past Serbian aggression. None of these scenarios would be good for American interests.

### B. Vinnell

The Vinnell Corporation began as a southern California construction firm in 1931 and built a reputation on civilian projects including portions of the Los Angeles freeway system, the Grand Coulee Dam, and Dodger Stadium.<sup>49</sup> The company's involvement with military and intelligence work began at the end of World War II when it contracted with the United States government to ship supplies to Chiang Kai-shek's Nationalist Army in China and continued with contracts to build military airfields in Pakistan, Japan, Taiwan, Thailand, and South Vietnam throughout the 1950s and 1960s.<sup>50</sup>

During this period, Vinnell also established a close relationship with operatives of the Central Intelligence Agency (CIA). Company founder Albert Vinnell offered his staff's services to the agency and

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46. *Id.*

47. *See generally* Harris, *supra* note 25.

48. *See* Hedges, *supra* note 19, at A1.

49. *See* Hartung, *supra* note 22, at 26.

50. *See id.*

several CIA agents used employment with Vinnell as cover for operations in Africa and the Middle East.<sup>51</sup> In return, the CIA helped Vinnell win construction contracts on oil fields in Libya and Iran.<sup>52</sup>

The company became most directly involved in military and intelligence operations during the American war in Southeast Asia from 1965-1975. At the height of the war, Vinnell had over 5,000 employees in Vietnam.<sup>53</sup> They were officially working on projects such as repairing American military equipment and constructing military bases and airfields, but United States military officers who oversaw Vinnell's work at the time have revealed that Vinnell also ran several secret intelligence programs.<sup>54</sup> In 1975, one Pentagon official described Vinnell as "our own little mercenary army in Vietnam. . . . [W]e used them to do things we either didn't have the manpower to do ourselves, or because of legal problems."<sup>55</sup>

Continuing American military defeats in Vietnam from 1970 to 1974 brought the company to the brink of bankruptcy in January, 1975.<sup>56</sup> The company was saved from ruin later that year when it landed a \$77 million contract to train the National Guard of Saudi Arabia.<sup>57</sup> This contract has been repeatedly renewed and expanded over the last twenty-two years and remains Vinnell's most profitable venture.<sup>58</sup> The most recent incarnation of this operation involves contracting hundreds of employees in Saudi Arabia to work for the Guard and Royal Air Force.<sup>59</sup> Although the Saudi royal family will pay the \$819 million price tag for this project, it is part of an ongoing effort by the United States government to shore up a politically-moderate regime and strategic ally in the Middle East.<sup>60</sup>

At various times, both the American press and lawmakers have criticized Vinnell's operations in Saudi Arabia as an effort to protect the country's autocratic rulers from the democratic aspirations of

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51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *Id.*

56. *See id.* at 27.

57. *See id.*

58. *See* Charles J. Hanley, *Firm to Train Saudi Guard Has Ties with Washington Insiders*, THE COMMERCIAL APPEAL (MEMPHIS), Mar. 23, 1997, at A22.

59. *See id.*

60. *See* Hartung, *supra* note 22, at 27.

their own people.<sup>61</sup> The Saudi National Guard has a chain of command independent of the Saudi Defense Ministry.<sup>62</sup> The 75,000-strong force can operate as a mobile complement to the tank-heavy divisions of the Saudi army in wartime, but its primary mission is protecting the ruling royal family from peacetime internal political unrest.<sup>63</sup> Many in Saudi Arabia view the Guard as a palace guard whose main mission is to crack down on internal dissenters.<sup>64</sup> To suit this purpose, the Guard still recruits mainly from the tribal desert interior of Saudi Arabia where strict loyalty to the monarchy is the norm.<sup>65</sup>

Over the past twenty-two years, Vinnell employees have become an integral part of the Guard. One American military officer who monitors Vinnell's Guard activities observed in a recent interview that "[i]t's a big mission. We have responsibilities and tasks in every functional area there is to run an organization . . . everything from management training to logistics to medical."<sup>66</sup> But he made it clear that Americans do not "run" the Guard.<sup>67</sup>

Some suspect, however, that Vinnell agents have at times gone beyond mere training and consulting. In 1979, for example, Saudi rebels took over the Grand Mosque at Mecca and demanded that the royal family relinquish power.<sup>68</sup> As the Guard prepared to storm the mosque, United States military personnel and Vinnell employees helped plan the attack.<sup>69</sup> Finally, when the initial attack failed, there were unconfirmed reports that Vinnell "trainers" were brought in to provide "tactical support" for the final successful assault.<sup>70</sup>

Despite such suspected actions that go well beyond training, the Defense Department sees great advantages in soliciting Vinnell to perform tasks like training the Saudi Arabian National Guard that the United States military would otherwise undertake. First and foremost, the Vinnell operation costs the American government nothing and facilitates a key strategic goal of stabilizing an important ally in the politically sensitive Middle East region. Second, it also performs the task with no direct risk to American service men and

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61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *Id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

women—a critical issue with political constituencies in an increasingly isolationist America.<sup>71</sup> Finally, Vinnell's private corporate "consultants" may be able to keep a lower profile within Saudi Arabia than American military personnel.

Recent events in Saudi Arabia exhibit the dangers inherent in the deployment of companies like Vinnell. On November 13, 1995, a bomb exploded in one of the Guard's training facilities in Riyadh, killing five Americans.<sup>72</sup> Two of the victims were American service personnel and three were civilian contractors including a retired army officer.<sup>73</sup> Many experts on Saudi politics said the attack was specifically targeted at Vinnell's Guard training contract. As one analyst put it,

I don't think it was an accident that it was that office that got bombed. If you wanted to make a political statement about the Saudi regime you'd single out the National Guard, and if you wanted to make a statement about American involvement, you'd pick the only American contractor involved in training the guard: Vinnell.<sup>74</sup>

While the American military provides direct assistance to the mainstream Saudi army, Vinnell contracts for Guard training.<sup>75</sup> Authorizing Vinnell to train the Guard may be an effort to avoid the perception that the American military is propping up the royal family's autocratic regime.<sup>76</sup>

As the bombing shows, however, dissident political groups in Saudi Arabia are not fooled. They accurately view Vinnell and other American military contractors as *de facto* American agents who are in Saudi Arabia to implement American foreign policy. That policy includes supporting the Saudi government's main organ for quelling political dissent, the National Guard. American policymakers must carefully consider whether it is wise to continue authorizing Vinnell's contracts when Vinnell is seen as a mere proxy for the United States.

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71. *See id.*

72. *See* Terry Atlas, *Terrorist Blast Points to Saudis' Vulnerability*, CHI. TRIB., Nov. 14, 1995, at 1.

73. *See id.*

74. Hartung, *supra* note 22, at 26.

75. *See id.*

76. *See id.*

### C. Other Players

The work of MPRI and Vinnell in the Balkans and Middle East is a small representative sample of a vast new privateering industry. MPRI, Vinnell, and other companies such as Betac, DynCorp, Ronco, and SAIC have undertaken what are termed "military training missions" in such far-flung regions as Sri Lanka,<sup>77</sup> Angola,<sup>78</sup> Peru,<sup>79</sup> Rwanda,<sup>80</sup> Taiwan,<sup>81</sup> and Sweden.<sup>82</sup> The officials of these companies are understandably tight-lipped, and the American press and public seem to have little interest in these regions, creating a dearth of reliable information on the operations of many new privateers.<sup>83</sup>

### III. THE MARQUE AND REPRISAL CLAUSE OF THE UNITED STATES CONSTITUTION GRANTS CONGRESS POWER TO REGULATE PRIVATE MILITARY SERVICE CONTRACTING

Article I, Section 8 of the United States Constitution provides that "Congress shall have Power To . . . grant Letters of Marque and Reprisal."<sup>84</sup> To modern readers, the language of this obscure clause is arcane and unfamiliar. For the Framers of the Constitution, however, issuing letters of marque and reprisal was a common, well-defined war-making practice.

Using two lines of analysis, this section argues that the Marque and Reprisal Clause applies to authorizing modern private military service contractors. First, the activities of modern private military service contractors are analogous to eighteenth-century privateering. Second, a structural analysis of the constitutional war powers reveals that the underlying purpose of the Marque and Reprisal Clause was

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77. See Paul Harris, *Ghosts of Vietnam Haunt the 'Resplendent Land,'* INSIGHT ON THE NEWS, Aug. 5, 1996, at 15 (MPRI has trained members of the Sri Lankan Army).

78. See Silverstein, *supra* note 12, at 15 (MPRI is negotiating to train government troops in Angola).

79. See *id.* at 16 (DynCorp of Virginia has been involved with Peruvian anti-drug operations).

80. See *id.* at 17 (Ronco trains Rwandan troops in de-mining operations).

81. See Paul Harris, *Have Guns Will Travel: Corporate Mercenaries with Links to Arms Sellers and the Pentagon Are Fulfilling U.S. Policy Aims by Proxy,* SCOTLAND ON SUNDAY, May 5, 1996, at 15, available in LEXIS, Nexis Library, SCOTSM File (MPRI has contracted to provide services to the Taiwanese armed forces).

82. See *id.* (MPRI has contracted to provide services to the Swedish armed services).

83. See Silverstein, *supra* note 12, at 12.

84. U.S. CONST. art. I, § 8, cl. 11.

to prevent the executive from avoiding congressional oversight of national military affairs by employing privately-financed military forces.

*A. Licensing Private Military Service Contractors Is Analogous to the Eighteenth-Century Practice of Issuing Letters of Marque and Reprisal*

Revolutionary War era privateering was a privately-financed, commercial enterprise controlled by government solicitation and licensing.<sup>85</sup> The privateers' focus on commercial gain rendered them useful only when profit motive was aligned with the national interest. While government efforts to maintain this alignment were largely successful, the privateers' loyalty to profits made them controversial and periodically called into question their strategic value. Modern private military service contracting exhibits these same characteristics and is the functional equivalent of eighteenth-century privateering.

1. Revolutionary War era privateering

Throughout the revolution, individual colonies—particularly the powerful mercantile colonies of New England—and the Continental Congress solicited owners of armed merchant ships to become privateers.<sup>86</sup> A letter of marque and reprisal gave the privateer the right to finance and outfit a ship, attack and capture enemy ships, and keep a large percentage of any booty captured.<sup>87</sup> The letter also imposed rules regarding the area patrolled, the type of ships attacked, the use of force, and the humane treatment of captives.<sup>88</sup> Letters of marque and reprisal required the privateer to post a bond guaranteeing compliance with the terms of the letter/license. Special prize courts determined whether booty had been captured lawfully under those terms.<sup>89</sup> If the restrictions were violated, the booty was forfeited back to the rightful owner, and the bond was used to compensate for any additional damages.<sup>90</sup>

Overall, the privateers' entrepreneurial spirit aligned nicely with colonial strategic goals. For the cash-poor colonial governments,

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85. See Marshall, *supra* note 16, at 958.

86. See *id.* at 959-60.

87. See *id.* at 973-74.

88. See *id.* at 961-62.

89. See *id.* at 974-77.

90. See *id.* at 962.

employing privateers was cheap and effective.<sup>91</sup> Severely outnumbered and outgunned, the colonists' only hope against the powerful British army was to disrupt its supply routes from England and the West Indies. As profit-driven military entrepreneurs, privateers were ideal for this purpose.<sup>92</sup> British merchant and supply ships were attractive privateering prey because they carried rare and expensive goods. With this incentive, revolutionary privateers effectively harassed British shipping throughout the North Atlantic and beyond. John Adams recognized the importance of privateers to the revolutionary war effort and called the Massachusetts privateering law "one of the most important documents of the Revolution."<sup>93</sup>

Despite its success in disrupting British trade, privateering was controversial throughout the war.<sup>94</sup> Many colonists argued that the privateers' insatiable thirst for booty made warmaking a purely commercial venture and corrupted the revolutionary movement.<sup>95</sup> Others complained that many privateers became price-gouging profiteers when it came time to sell captured goods which were rationed or in short supply.<sup>96</sup>

The privateers' independence and profit motive also periodically called their strategic value into question. Privateering was a high-risk, capital-intensive venture. Fortunes were made and lost on the high seas, and the expense of outfitting an armed merchant ship was immense.<sup>97</sup> Privateering captains were understandably cautious and rarely engaged enemy warships by choice.<sup>98</sup> "Clashing unnecessarily with a British warship was both folly and bad business, since such ships rarely carried the goods privateers sought."<sup>99</sup> Instead, privateers preyed mostly on unarmed or lightly armed British merchant ships and depended on speed and luck to avoid the powerful British navy.<sup>100</sup> While this approach made good business sense, it also rendered privateers almost completely useless for organized naval campaigns.<sup>101</sup>

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91. *See id.*

92. *See id.* at 960.

93. *Id.*

94. *See Jules Lobel, Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1085-87 (1986).

95. *See Marshall, supra* note 16, at 967-68.

96. *See id.* at 968.

97. *See id.* at 972-74.

98. *See id.* at 968-69.

99. *Id.* at 968.

100. *See id.* at 968-70.

101. *See id.* at 969.

In 1779, for example, the American navy organized over forty ships to attack a British naval base on the Penobscot River in Maine.<sup>102</sup> About fifteen of the ships were privateers that Massachusetts had insured and impressed into service for the battle.<sup>103</sup> General Solomon Lovell, leader of the ground forces, was roundly defeated largely because the promised naval support for his attack never arrived.<sup>104</sup> Although regular navy ships also performed badly at Penobscot, historians assign much of the blame for the defeat to the privateers who, more concerned with protecting their ships than military victory, urged the American naval commander to stall and then fled when the British navy arrived in force.<sup>105</sup> Incidents like Penobscot discouraged the government from ever again relying on privateers for coordinated operations because such campaigns offered little opportunity for profit and plunder.

Profit motive could also entice privateers to overstep the bounds of their licenses.<sup>106</sup> Although privateers generally obeyed the restrictions contained in their letters of marque and reprisal, rogue privateers who attacked neutral ships created diplomatic crises and threatened to draw the whole country into wider war with European powers.<sup>107</sup> Several incidents involving ships from Sweden and France—both neutral countries at the time—brought threats of military action against the colonies or naval retaliation against American shipping.<sup>108</sup>

There were, however, two important checks on privateering attacks against neutral vessels. First, a privateer captured while attacking a neutral ship or in waters outside the terms of his letter received no diplomatic assistance from the United States government and suffered his fate as an accused pirate alone.<sup>109</sup> This obviously served as strong incentive for privateers to attack only British ships and to stay within authorized shipping lanes. Second, the prize courts reviewed every capture at sea after the fact. As businessmen, privateers were

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102. *See id.* at 970.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.* at 974-75.

107. *See id.*

108. *See id.* Two British ships were also returned to their owners under British government protests that the capturing privateers had sailed from French ports when a British-French treaty prohibited such action. *See id.*

109. *See id.*; see also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 251 (1996).



generally eager to gain legal title to their prizes through the courts because enormous amounts of money were involved.<sup>110</sup> Violation of neutrality rules led to forfeiture of any prize and liability for damages plus interest.<sup>111</sup> These mechanisms helped keep the revolutionary privateers' profit motive aligned with the interests of the new American nation.

## 2. The new privateers

The defining characteristics of Revolutionary War privateering are also present in the activities of modern companies like MPRI and Vinnell—the new privateers. Modern private military service contractors are solicited by the government to achieve American military objectives and are subject to a government licensing scheme similar to the issuance of *marque* and reprisal letters. American State and Defense Department officials, for example, negotiated MPRI's contract with the Bosnian government<sup>112</sup> and have brokered Vinnell's continuing series of contracts with Saudi Arabia.<sup>113</sup> Like the privateers, private military service contractors must promise that their actions will remain within specified limits. For example, in order to obtain a license for its Croatian project, MPRI had to give specific assurances that its training activities would not violate the United Nations Arms Embargo.<sup>114</sup>

Commercial gain is the focus of the new privateers just as it was for their eighteenth-century counterparts. Vinnell records consistently growing profits, and individual employees are well compensated. Retired American service personnel report that five years of work with Vinnell enables them to save hundreds of thousands of dollars.<sup>115</sup> As one former officer put it, Saudi oil money flows so freely that employees feel "like they've died and gone to heaven, because the Saudis will never run out of money."<sup>116</sup> MPRI's motivation is also entirely economic. It is no coincidence that the company's biggest Balkan contract is with the Bosnian Muslims—a group backed by the oil-rich Islamic regimes of the Middle East.<sup>117</sup>

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110. See Marshall, *supra* note 16, at 975.

111. See *id.* at 976.

112. See Harris, *supra* note 25, at 12-13.

113. See Hartung, *supra* note 22, at 26.

114. See Cohen, *supra* note 1, at A5.

115. See Hartung, *supra* note 22, at 28.

116. *Id.*

117. See Harris, *supra* note 25, at 13.

This focus on commercial gain has made the new privateers very controversial. Some commentators argue that the private, low-profile nature of their activities renders the new privateers improperly unaccountable to the American political process.<sup>118</sup> Elected officials who should be responsible to the electorate for their policy decisions may be tempted to solicit privateers in an effort to obfuscate controversial policies.<sup>119</sup> Overuse or abuse of private military forces may make it impossible for the electorate to make informed decisions regarding American national security policy.

The new privateers' focus on commercial gain also makes it critical that they are used only when a clear profit motive aligns directly with American policy objectives. Like their eighteenth-century counterparts, modern policymakers have generally been able to maintain this alignment. In an era of shrinking defense budgets, private military service contracting has cheaply and effectively achieved American policy goals in the Balkans, the Middle East, and elsewhere.<sup>120</sup>

When the government fails to ensure the alignment of profit and policy, however, a focus on servicing the customer may create incentives for the new privateers to go beyond the terms of their licenses much like the rogue privateers of old. Some analysts have argued that "hired guns" like MPRI and Vinnell are inherently dangerous to United States interests because they have divided loyalties. Although it is solicited and licensed by the American government, a private military service contractor's ultimate loyalty is to its customer.<sup>121</sup> If asked to go beyond its authorized activities, the privateer may take a "the customer is always right" approach and subvert American policy rather than disappoint a paying customer. In Croatia, for example, American officials are now concerned that MPRI may have gone beyond the terms of its license to violate the United Nations arms embargo and upset the delicate balance of power in the region.<sup>122</sup>

Thus, modern military service contracting exhibits the defining characteristics of Revolutionary War privateering and requires similar government efforts to maintain an alignment between commercial incentives and national security policy. As the next section shows,

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118. See Silverstein, *supra* note 12, at 11.

119. See *id.*

120. See generally Hartung, *supra* note 22; Hedges, *supra* note 19; Silverstein, *supra* note 12.

121. See Thompson, *supra* note 34, at 36.

122. See Cohen, *supra* note 1, at A5.

the Constitution requires that Congress be primarily responsible for those efforts.

*B. The Underlying Purpose of the Marque and Reprisal Clause Was to Ensure Congressional Oversight of All National Military Ventures*

In drafting provisions for war and national defense, a central concern for the Framers of the Constitution was that the new, more centralized government would lead to military despotism. In response to this concern they created an integrated system of separated war and national security powers.<sup>123</sup> Most importantly, they separated power over the national sword from power over the national purse—making the president the Commander-in-Chief of the military,<sup>124</sup> but reserving to Congress *sole* power to approve spending from the national treasury.<sup>125</sup> Under this arrangement, congressional approval or acquiescence for most accepted forms of military action—deploying American troops, hiring mercenaries, or sending aid to allied military forces—was constitutionally required. There was one form of military action, however, that lay beyond the power of the purse—the solicitation of privateers. The Marque and Reprisal Clause closed this small but critical loophole in congressional power over warmaking, assigning to Congress the power to license and regulate privately-financed military ventures on behalf of the nation.<sup>126</sup>

1. The Framers viewed the congressional purse power as a critical check on presidential authority over national military policy

An analysis of the structure of the Constitution and the history leading up to the American revolution demonstrates that a theory of purse/sword separation lay at the heart of the war powers framework.

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123. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 20-21 (1995).

124. See U.S. CONST. art. II, § 2, cl. 1.

125. See *id.* art. I, § 8, cl. 7.

126. Some scholars have argued that the Marque and Reprisal Clause applies to all military activities short of full-scale, declared war, including open hostilities employing United States military forces and covert operations employing hired proxies. See, e.g., Lobel, *supra* note 94, at 1040-41. This argument, however, misapprehends the Clause's more narrow but crucial role in the war powers framework. With sufficient political will, Congress can control any use of the United States military or paid proxies through its purse power. For the Framers, the term "letters of marque and reprisal" applied only to a specific type of privately-financed, commercial military enterprise that lay beyond Congress's power of the purse.

Article I of the Constitution grants Congress a long list of powers directly related to war and national defense. Congress has the power to tax and spend for the common defense,<sup>127</sup> declare war,<sup>128</sup> grant letters of marque and reprisal,<sup>129</sup> make rules for captures on land and water,<sup>130</sup> raise and support armies,<sup>131</sup> provide and maintain a navy,<sup>132</sup> regulate the army and navy,<sup>133</sup> call the militia into service,<sup>134</sup> regulate the militia,<sup>135</sup> and determine when a state may engage in war.<sup>136</sup>

But, for the Framers, none of these provisions was more important to the constitutional war powers scheme than the dictate of Article I, Section 9, Clause 7: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>137</sup>

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127. *See id.* § 8, cl. 1.

128. *See id.* § 8, cl. 11.

129. *See id.*

130. *See id.*

131. *See id.* § 8, cl. 12.

132. *See id.* § 8, cl. 13.

133. *See id.* § 8, cl. 14.

134. *See id.* § 8, cl. 15.

135. *See id.* § 8, cl. 16.

136. *See id.* § 10, cl. 3.

137. *Id.* § 9, cl. 7; *see* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 3 (1994). Some twentieth-century scholars emphasize the Declare War Clause as Congress's most important war power. *See generally* FISHER, *supra* note 123; Lobel, *supra* note 94. They tend to view the prevalence of undeclared war as a modern development. In fact, the Framers did not think that a formal declaration of war was needed to initiate military hostilities. Alexander Hamilton specifically recognized that, by the time of the founding, formal declarations of war had largely fallen into disuse, and other Framers echoed the view that formal declarations had become "obsolete." *See* Yoo, *supra* note 109, at 248. It would have made little sense for the Framers to rely on a largely formalistic or unused power to play a practical role in assuring congressional authority over military affairs. *See id.*

Professor John C. Yoo argues that in the late eighteenth century, the power to declare war did not describe the power to initiate military action. Instead, it was precisely as the name implied, a declaratory power that announced a change in legal relationships. Under international law, declaring war just before hostilities or during hostilities already begun announced the new state of legal relations existing between the countries involved. *See id.* at 244-45.

Domestically, a declaration of war was meant to signify a change in the constitutional relationship between the government and the governed. *See id.* For example, the Fifth Amendment guarantees indictment or grand jury presentment "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. CONST. amend. V. The Third Amendment also guarantees that "[n]o soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *Id.* amend. III. Thus, the Constitution recog-

Madison called the power of the purse the "most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining redress of every grievance, and for carrying into effect every just and salutary measure."<sup>138</sup> Congress's complete control of the governmental purse strings supports each of its above listed war powers in two ways.<sup>139</sup> First, it gives Congress the *ex ante* power to specify exactly how funds will be spent before they are drawn.<sup>140</sup> And second, if these specifications are not followed, the clause gives Congress the *ex post* or after the fact power to cut off future funds and effectively end any ongoing program or operation.<sup>141</sup>

The success of purse/sword separation was manifest to the Framers via the British example. Originally, the British monarch decided when and where the kingdom should go to war, but by the late seventeenth century, Parliament was exercising effective veto power over monarchical military adventurism through control of the treasury.<sup>142</sup> The king acted in close consultation with Parliament during times of war and could not maintain a standing army without parliamentary consent during peacetime. This aspect of British history was discussed extensively during the framing and ratification debates.<sup>143</sup>

The Framers' experience with colonial government also instilled in them a strong belief in the effectiveness of the power of the purse.<sup>144</sup> Colonial governments were modeled on the British system with a governor as the executive, an appointed governor's council as the upper legislative house, and an elected lower house.<sup>145</sup> Through this model, the British unwittingly sowed the seeds of revolution. In an early effort to limit the power of the elected assemblies, the king decreed that they could not exercise any power that the House of

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nizes different boundaries for government power in times of war and peace and assigns the quasi-judicial function of determining when the country is officially at war to Congress.

138. THE FEDERALIST NO. 58, at 380 (James Madison) (Modern Library ed. 1941).

139. See BANKS & RAVEN-HANSEN, *supra* note 137, at 3.

140. See *id.*

141. See *id.*

142. See *id.* at 11-17.

143. See *id.* at 11.

144. See *id.* at 22.

145. See *id.* at 18.

Commons in England was not allowed to wield.<sup>146</sup> Almost immediately, the assemblies began to assert a right to *all* powers analogous to those exercised by the British lower house. The central power claimed was the power of the purse. Later, the English crown required the colonies to fund their own defense during the French and Indian War. By refusing to release defense funds to the governors unless certain policy conditions were met, the colonists opportunistically exploited military emergencies to undermine executive authority and assert more power for the elected representatives of the people.<sup>147</sup>

The Framers also relied on their experience with purse/sword separation under the Articles of Confederation when considering the apportionment of war powers. The Articles granted Congress the power to conduct the Revolutionary War but reserved to the states all power to tax and spend.<sup>148</sup> This federal-state separation of powers successfully gave the states a strong veto power over the conduct of war because they controlled funding for the cause. Unfortunately, this approach also made it virtually impossible for Congress to conduct the war at all.<sup>149</sup>

During the ratification debates, the antifederalists continued to oppose any taxing powers for the federal government, arguing that a government that “has all power and both purse and Sword has the absolute Gov’t of all other Bodies and they must exist at the will and pleasure of the Superior.”<sup>150</sup> James Madison pointed to the separation of purse from sword within the federal government to counter this argument:

Does it mean that the sword and purse ought not to be trusted in the hands of the same government? This cannot

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146. *See id.*

147. *See id.* at 19-21.

148. *See id.* at 22-23.

149. *See id.* Many commentators argue that the Continental Congress’s ineffective leadership during the Revolutionary War effort led the framers to vest most military power in the executive through the Commander-in-Chief Clause. *See id.* This is a misreading of the “lessons” the framers learned from the Revolutionary War. The primary problem Congress faced in conducting the war was their dependence for funding on the whim of the states. “The first lesson of the Revolutionary War was therefore that effective war-making—and national defense—required a reallocation of power between the national government and the states,”—not a centralized allocation of power in the executive branch alone. *Id.* at 25-26.

150. JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788*, at 144 (1961) (quoting Melancton Smith at the New York ratifying convention).

be the meaning; for there never was, and I can say there never will be, an efficient government, in which both are not vested. The only rational meaning is, that the sword and purse are not to be given to the same member. Apply it to the British government. . . . The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America, as far as any analogy can exist. . . . The purse is in the hands of the representatives of the people. They have appropriation of all moneys.<sup>151</sup>

Thus, by using its "compleat and effectual weapon," Congress would be able to defend its role in virtually every aspect of American military policy.

Shared power over military affairs creates constant friction and a need for cooperation between the political branches of government.<sup>152</sup> While the president is the natural initiator of foreign and military policy, the executive power is in no way greater than that of legislature. Congress, after all, has the power to raise or not raise armies;<sup>153</sup> to provide or not provide a navy;<sup>154</sup> to call or not call the militia into service;<sup>155</sup> and to appropriate or not appropriate funds for these purposes.<sup>156</sup> Even in the modern context of proxy armies and covert operations, Congress plays an effective role in military and intelligence policy when it requires detailed reports of such activities and reviews their wisdom—all under a threat that if reporting requirements are not complied with or use of such forces is not wise, Congress will cut off their funding. In a system of separated powers, Congress maintains practical control over military policy primarily because it has the power of the purse.

## 2. The Marqee and Reprisal Clause closes a loophole in congressional power over national military affairs—presidential solicitation of privately-financed military forces

There was limited debate regarding the Marqee and Reprisal Clause during the drafting and ratification of the Constitution, and the Clause is often ignored in modern war powers debate.<sup>157</sup> Both the

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151. 3 ELLIOT'S DEBATES 393 (J. Madison) (John Elliot ed. 1836).

152. See HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69 (1990).

153. See U.S. CONST. art. I, § 8, cl. 12.

154. See *id.* § 8, cl. 13.

155. See *id.* § 8, cl. 15.

156. See *id.* § 9.

157. See Lobel, *supra* note 94, at 1036.

historical record and structure of the Constitution however, prove that the Marque and Reprisal Clause represented the Framers' view that Congress should be involved in all areas of military policy. James Madison noted that giving Congress the sole power to issue marque and reprisal letters was designed to ensure "immediate responsibility to the nation in all those for whose conduct that nation itself is responsible."<sup>158</sup> If issuing a letter of marque and reprisal was an act of war, then the nation as a whole would face the consequences of that act, and the nation as a whole must approve it.<sup>159</sup>

The Marque and Reprisal Clause ensured congressional control of a common form of warmaking that was beyond the power of the purse. Without the Clause, the president or the states could license privately-financed, war-making ventures and commit the nation to acts of war without any Congressional oversight before or after the fact. The Framers drafted the Marque and Reprisal Clause to ensure congressional control over the decision to employ privateers.

This underlying purpose for the Marque and Reprisal Clause applies equally to the modern practice of soliciting private military service contractors. Like the privateers, these privately-financed commercial warriors are not beholden to the national treasury. The Constitution, however, mandates congressional control over privately-financed military enterprises to ensure that the direct representatives of the people have a voice in all military policy.

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158. THE FEDERALIST NO. 44, at 318 (James Madison) (B. Wright ed. 1961).

159. The importance of a centralized marque and reprisal power to the Framers is also exhibited in the apportionment of the marque and reprisal power between the state and federal governments. Article I, Section 10 delineates powers that the states, through the Constitution, ceded to the federal government in all circumstances: "No State shall . . . grant Letters of Marque and Reprisal." U.S. CONST. art. I, § 10, cl. 1. That section goes on to list national powers that a state could undertake with congressional approval:

No State shall, without the Consent of Congress . . . , keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. *Id.*, § 10, cl. 3.

The different wording in these two clauses shows the importance the Framers attached to the centralized deployment and regulation of privateers. With the consent of Congress, states can raise armies and engage in full-scale war, but the first clause prevents the states from *ever* issuing letters of marque and reprisal even with congressional approval.



#### IV. CONGRESS HAS ATTEMPTED TO REGULATE PRIVATE MILITARY SERVICE CONTRACTING THROUGH THE ARMS EXPORT CONTROL ACT (AECA)

The Arms Export Control Act (AECA) regulates all foreign sales of "defense goods and services" by the United States Government and private contractors.<sup>160</sup> Companies like MPRI and Vinnell provide defense services under that Act and are therefore subject to its provisions. This section outlines the basic provisions of the Act and discusses its constitutionality and effectiveness.

##### A. *The Arms Export Control Act (AECA)*

The laws and regulations Congress and the Department of State have created to deal with the private military service industry are part of a larger scheme to regulate the export of American defense technology and services. The AECA<sup>161</sup> is the key statute in this area. The statute authorizes the president "[i]n furtherance of world peace and the security and foreign policy of the United States," to control the import and export of arms and other defense articles and services.<sup>162</sup> The Act gives the president full authority to promulgate regulations for this purpose and to designate items as defense articles and defense services by placing them on the United States Munitions List.<sup>163</sup> Any person or organization that manufactures, exports, or imports the goods or services on the list must register with the United States government and receive a license for each contract.<sup>164</sup> Criminal penalties can result from a failure to register properly.<sup>165</sup> Congress has given the president broad power to determine not only registration and licensing procedures but also which goods and services fall under the regulations.

A major inter-branch limitation on this executive regulatory power is a series of reporting and certification requirements. Basically, any license to export defense goods or services to a single nation or organization totaling more than \$1 million must be reported to the Speaker of the House and the Chair of the Senate Foreign Relations Committee on a quarterly basis.<sup>166</sup> The report must include

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160. See 22 U.S.C.A. § 2778 (West Supp. 1997).

161. See *id.*

162. *Id.* § 2778(a)(1).

163. See *id.*

164. See *id.* § 2778(b).

165. See *id.* § 2778(c).

166. See *id.* § 2776(a).

necessitate the immediate issuance of the export license and a discussion of the national security interests involved."<sup>174</sup>

The final check on presidential regulatory power in this area was added in 1996. The new provision requires the president to publish the above certifications in the Federal Register upon transmittal to the Speaker of the House and Chair of the Foreign Relations Committee.<sup>175</sup> This public notification requirement only applies to major arms licenses for export deals totaling \$50 million or more.<sup>176</sup>

### *B. The Arms Export Control Act is Constitutional Under Current Supreme Court Doctrines*

Because Congress has explicitly authorized the president to regulate the new privateers through the AECA, the critical constitutional issue in this area is whether Congress has in some way unconstitutionally delegated its power to the executive branch.

Most constitutional scholars believe that, in the realm of foreign affairs, Congress has a particularly broad ability to delegate authority to the president.

Although the Constitution provides that in matters of foreign relations the President and Congress share concurrent power, the Supreme Court has held that the Constitution's separation of powers and its arrangement of checks and balances are less precise in this area than a survey of the text might suggest. Consequently, the Court has permitted Congress to make broad delegations of its foreign policy powers to the Executive Branch at times when it might not have permitted similarly expansive delegations with regard to domestic affairs.<sup>177</sup>

The main source for this permissive delegation doctrine is Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*<sup>178</sup> The case concerned a joint resolution that permitted the president to control the export of arms to a region in South America if, in his opinion, the export would prolong armed conflict there.<sup>179</sup> The

174. *Id.*

175. *See id.* § 2776(e).

176. *See id.* § 2776(b).

177. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 211 (2d ed. 1988); *see also* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 124-25 (2d ed. 1996) (arguing that in foreign affairs there is no such thing as "excessive" delegation).

178. 299 U.S. 304 (1936).

179. *See id.* at 311-12.

the items exported, the quantity of each item, the contract price, the name and address of the "ultimate user" of each item, and an estimate of the number of United States government employees in the territory to which the items will go.<sup>167</sup>

For any proposal to export defense articles or defense services worth \$50 million or more, the president must provide the above information to the Speaker of the House and the Chair of the Senate Foreign Relations Committee *before* the deal is completed or the license granted.<sup>168</sup> The statute then specifies that Congress has a fifteen-day<sup>169</sup> or thirty-day<sup>170</sup> period in which to consider the proposed export. During the specified period, Congress may request additional information from the president including an estimate of the number of United States military personnel or contract personnel needed to carry out the proposed deal; an evaluation of whether and how the proposed export would contribute to an arms race, support international terrorism, increase the risk of an escalation or outbreak of armed conflict, prejudice the negotiation of arms controls, or adversely effect the arms control policy of the United States; the reasons why the proposed export is in the foreign policy interests of the United States; an analysis of the effect of the sale on the military capabilities of the buying country or organization; and an analysis of how the proposed sale would effect the military balance of power in the given region.<sup>171</sup> During the review period, Congress may act to block the proposed export by joint resolution.<sup>172</sup> If Congress does not act within the given period, the president may issue the license at his discretion.

The president may circumvent the specified waiting period by stating in his certification that a state of emergency exists which requires immediate approval of the exports.<sup>173</sup> The emergency certification must also set forth "a detailed justification for his determination, including a description of the emergency circumstances which

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167. *See id.*

168. *See id.* § 2776(c)(1).

169. The fifteen-day period applies to exports to NATO, NATO members, Australia, Japan, or New Zealand. *See id.* § 2776(c)(2)(A).

170. The thirty-day period applies to exports to any other country or organization. *See id.* § 2776(c)(2)(B).

171. *See id.* § 2776(b)-(c).

172. *See id.* § 2776(c)(2)(A)-(B).

173. *See id.* § 2776(c)(2).

defendants had sold machine guns to some of the combatants in violation of an arms embargo declared by the president.<sup>180</sup> They argued that Congress had unconstitutionally delegated legislative power to the executive branch.<sup>181</sup> In a sweeping decision, Justice Sutherland expounded on his view that the executive is the primary organ of American foreign policy and that Congress can and should grant wide discretion to the president in this area:

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>182</sup>

Critics have pointed out that the holding in *Curtiss-Wright* was relatively narrow, characterizing much of Justice Sutherland's argument as *dicta*. The decision, however, has remained very influential and is an accurate statement of Supreme Court jurisprudence in this area to this day.<sup>183</sup>

Despite this jurisprudence, there is an argument that the Marque and Reprisal Clause grants Congress a specific, exclusive power that cannot be delegated without upsetting essential checks and balances between the legislative and executive branches. Such an argument, however, misses the point of the permissive delegation doctrine. The overlapping and interlocking executive and congressional powers in the realm of foreign relations are an inseparable blur.<sup>184</sup> Picking out any one foreign relations power and arguing that one or the other branch has exclusive, non-delegable authority over it leads to illogical results. Can it seriously be argued, for example, that the president

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180. *See id.*

181. *See id.* at 314-15.

182. *Id.* at 320.

183. *See* TRIBE, *supra* note 177, at 210-13.

184. *See id.*; *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson J., concurring). In his influential concurrence, Justice Jackson described three "zones" of presidential action. The president acts against express congressional provisions, with express congressional approval, or in the "twilight zone" of congressional silence. When the president acts with congressional approval, his constitutional power is at its zenith. *See id.* at 637.

can constitutionally send troops into battle without a formal declaration of war, but he may not license private contractors to train a foreign army even when he has explicit congressional authority to do so? The Constitution specifically grants Congress the power to regulate privateering activity, but it also allows the delegation of a portion of that authority to the executive.

The strongest limitation on any such delegation is in its impermanence.<sup>185</sup> Congress has decided for now to allow the president broad discretion in regulating private military service exports, but Congress can also decide tomorrow that it wants to limit that discretion. For this reason, any delegation of a specific congressional power only grants a portion of that power.

*C. The Arms Export Control Act Fails to Effectively Regulate the New Privateers in the Best Interests of the American People*

The AECA is ineffective for three basic reasons. First, the AECA no longer has any teeth to force presidential compliance. Second, the AECA's reporting requirements provide inadequate information for Congress to assess private military service contracts. Finally, the AECA provides only limited public information regarding unclassified contracts which may commit the nation to acts of war.

1. The AECA has no teeth

Congress enacted the 1976 Arms Export Control Act in response to a series of controversial presidential arms sales to Iran, Saudi Arabia, and Kuwait.<sup>186</sup> As originally enacted, the statute reserved in Congress the power to reject large defense service contracts with a concurrent resolution—a majority vote of both houses needing no presidential approval.<sup>187</sup> Although Congress never exercised this veto power, it imposed discipline on executive branch officials who administered AECA regulations.<sup>188</sup>

From the 1930s through the 1970s, Congress enacted over 200 statutes allowing it to revoke certain executive actions by executive

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185. *See id.* at 213.

186. *See* KOH, *supra* note 152, at 49-50.

187. *See* Pub. L. No. 94-329, 90 Stat. 729 (1976). The 1976 act allowed concurrent resolution disapproval and the current act allows joint resolution disapproval for service contracts over \$50 million. *See* 22 U.S.C.A. § 2776(c)(2)(B) (1997).

188. *See* KOH, *supra* note 152, at 50.

agencies by "legislative veto."<sup>189</sup> Depending on the statute, Congress could employ the veto through a concurrent resolution, a one-house majority vote, or a majority vote by a particular oversight committee.<sup>190</sup>

In *INS v. Chadha*,<sup>191</sup> a case involving a congressional effort to veto an INS suspension of deportation order, the Supreme Court ruled that Article I of the Constitution requires any congressional action that is legislative in character to be passed by both houses of Congress and presented to the president for signature or veto.<sup>192</sup> Because it was legislative in character and not presented to the president, the concurrent resolution legislative veto in *Chadha* was invalid.<sup>193</sup>

In 1986, in response to the *Chadha* holding, Congress amended the AECA, inserting "joint resolution" for "concurrent resolution."<sup>194</sup> This change dramatically watered down Congress's ability to reject military service contracts.<sup>195</sup> Passing a joint resolution requires majority approval in each house of Congress and presentment to the president for signature or veto.<sup>196</sup> Because the president clearly favors any service contract at issue, Congress can only reject the contract by overriding a presidential veto with a two-thirds vote. In other words, the president can solicit a private military service contract as long as he has the support of only one-third plus one in either house of Congress.

This scenario has occurred at least twice in recent years with controversial arms sales. In the mid 1980s, President Reagan approved arms sales to Saudi Arabia and Kuwait that were opposed by majorities in both houses of Congress. In each case, the president was able to complete the arms sale by vetoing a joint resolution and surviving an override attempt.<sup>197</sup> Arms sales like these show that the loss of the legislative veto provision has undermined Congress's disciplinary power under the AECA.

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189. See *TRIBE*, *supra* note 177, at 213-14.

190. See *id.*

191. 462 U.S. 919 (1983).

192. See *id.* at 946-50.

193. See *id.* at 959.

194. See Pub. L. No. 99-247, 100 Stat. 9 (1986).

195. See Senator Joseph R. Biden, Jr. & Representative Mel Levine, *Letter*, *N.Y. TIMES*, Apr. 2, 1987, at A30.

196. See *BLACK'S LAW DICTIONARY* 1311 (6th ed. 1990).

197. See *KOH*, *supra* note 152, at 51; see also Biden & Levine, *supra* note 195.

2. The AECA reporting provisions provide Congress with inadequate information to assess private military service contracts

The primary problem with the AECA's reporting provisions is that they require congressional review of military service contracts only when a contract exceeds \$50 million.<sup>198</sup> With either service contracts or arms sales, the type of military activity or the type of arms authorized is often much more important than the dollar value. In 1987, Senator Joseph Biden proposed an amendment to the AECA to discard dollar thresholds and substitute a well-defined list of types of weapons systems requiring congressional review.<sup>199</sup> In support of the amendment, Senator Biden noted that the Reagan administration had negotiated deals to sell extremely sophisticated anti-tank shells to several Middle Eastern countries. He argued that because of their advanced technology, these shells constituted a significant threat to the balance of power in the region.<sup>200</sup> Yet, the President did not need congressional approval for the deals because none of them met the dollar threshold.<sup>201</sup> Similarly, the nature of a private military service contract is much more important than its dollar value. In unstable regions where a truce or cease-fire is in place, even small-scale military operations can destroy a delicate diplomatic balance. As MPRI's project with the Croatian Army shows, a relatively small training project can yield dramatic results.

Another major problem is that the AECA was drafted primarily to regulate one-time arms sales contracts. As a result, the Act does not provide adequate mechanisms for ongoing review of a service contract that may last for months or years. For example, if MPRI did violate the terms of its license and the United Nations arms embargo in Croatia, it seems that there was little accountability for its actions once the license was granted. Assurances that the company will follow the rules are of little comfort when there is little or no oversight or enforcement after the project has begun.

Often, the activities of a privateering company are closely integrated with direct American military involvement in the same region, and informal contacts between company employees and their active duty counterparts abound.<sup>202</sup> The Vinnell project in Saudi Arabia exemplifies this type of situation. Close informal contacts between

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198. See 22 U.S.C.A. § 2776(c)(1) (West Supp. 1997).

199. See Biden & Levine, *supra* note 195.

200. See *id.*

201. See *id.*

202. Silverstein, *supra* note 12, at 11.

executive branch officials and private contractors, however, cannot substitute for strict accountability to Congress. Critics charge that congressional oversight is cursory at best:

If the D.O.D. [Department of Defense] was directly involved you'd have a whole network of Congressional offices providing oversight, even if it's not always sufficient. . . . When you turn these tasks over to a contractor, the only oversight comes from an overworked civil servant in the federal bureaucracy.<sup>203</sup>

It is disconcerting that the regulations under the AECA provide no ongoing oversight after an export license has been granted.

3. The AECA provides little public accountability for non-classified contracts that may commit the entire nation to acts of war

There is very little public information about the activities of the new privateers or the stringency with which the State Department applies its licensing regulations. As mentioned above, the publishing requirement for presidential certifications went into effect in 1996 and only applies to contracts for \$50 million or more. Currently, the information that is publicly available often depends on intensive investigative reporting by the press, but such efforts may bear little fruit. As one reporter pointed out, the State Department licensing process takes place far from public view:

The Pentagon is obliged to respond to inquiries, if not always forthrightly, when U.S. troops are deployed abroad. Retired generals and private companies have far more leeway in evading questions from the press or Congress. A former Congressional staffer who is familiar with the use of private military contractors described the system as a "nonsexy but far bigger Oliver North-style enterprise."<sup>204</sup>

This lack of public information makes it virtually impossible for the public to assess the practice of private military contracting. Such lack of public accountability would be less bothersome if the regulatory

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203. *Id.* at 17.

204. *Id.* The Marque and Reprisal Clause may also be applicable to some of the Iran-Contra activities because they involved presidential use of third-party funding to avoid congressional restrictions on appropriations for the Contras. Unlike the new privateers, however, most of the key players in Iran-Contra were federal government employees not private actors. For an in-depth analysis of the constitutional ramifications of Iran-Contra, see generally KOH, *supra* note 152.



framework guaranteed adequate executive supervision and congressional oversight. But the level of review and inquiry that either branch gives to licensing decisions under the AECA is unclear.

The scarce public information that is available suggests that the current regulatory scheme, while constitutional, does not provide the same safeguards of ongoing executive review, in-depth congressional oversight, and public accountability that are applied to ventures undertaken by the United States military. Yet many of the same dangers to American interests are involved when private contractors do the work. Public accountability is perhaps the most important and the most lacking safeguard, because without public accountability there is no way for voters to evaluate the adequacy of congressional enforcement provisions or oversight.

V. CONGRESS SHOULD ENACT NEW LEGISLATION TO  
SPECIFICALLY REGULATE PRIVATE MILITARY SERVICE  
CONTRACTORS AND ENSURE THAT THESE NEW PRIVATEERS  
ALWAYS ACT IN THE BEST INTERESTS OF THE AMERICAN PEOPLE

In light of the executive's increasing reliance on private military service contractors to perform national security functions, Congress should address the specific issues their use raises through new legislation under the Marque and Reprisal Clause of the Constitution. A comprehensively-drafted sample bill is beyond the scope of this Comment, but there are several provisions that effective legislation should include.

Congress should re-enact the original legislative veto provision of the 1976 AECA as applied to private military service contracts. Despite the *Chadha* ruling, Congress and the president have enacted literally hundreds of legislative veto provisions over the last fifteen years.<sup>205</sup> Although presidents have declared many new veto provisions to have no force or effect, the effect of a veto provision on administrative agencies is real. In essence, the *Chadha* decision has driven legislative vetoes underground. "They [administrative agencies] have to live with their [congressional] review committees year after year, and have a much greater incentive to make accommodations and stick by them."<sup>206</sup> Thus, informal agreements between congressional committees and administrative agencies are the primary

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205. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993).

206. *Id.*

method by which Congress remains directly involved in the administrative process.<sup>207</sup> Although a legislative veto over private military service contracts would probably be held unconstitutional in the courts under the *Chadha* decision,<sup>208</sup> its passage would facilitate negotiations between Congress and the executive branch to arrive at informal review procedures to give teeth to congressional oversight.

The new law should also clearly define private military service contracting and base required review on the type of activity involved not the value of the contract. Activities directly related to military operations should receive the highest level of review regardless of the size of the operation, whereas even large contracts for more tangential military projects should not. Under an effective statute, for example, contracting to provide just a few officers for active duty in a fledgling third world military would receive the highest level of congressional scrutiny, but a \$100 million contract to build barracks for a foreign military would not.

Finally, the law should also require ongoing administrative review of all contracts with quarterly reports to Congress. The reports should assess the degree to which the contractor is complying with the terms of the authorized contract. Each contractor should also be required to post a bond insuring that the work stays within those terms. Going beyond the terms should result in stiff fines commensurate with the enormous profits reaped by private military service contractors. The administrative reviews should be financed through licensing fees and fines. Congress should also publish all non-classified

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207. *See id.* at 292.

208. Some commentators have argued that *Chadha* would not apply to a congressional veto provision enacted pursuant to a special non-legislative power granted to Congress by the Constitution. *See* Louis Fisher, *War Powers: The Need for Collective Judgment*, in *DIVIDED DEMOCRACY: COOPERATION AND CONFLICT BETWEEN THE PRESIDENT AND CONGRESS* 213-25 (J. Thurber ed., 1991). For example, the concurrent resolution in the War Powers Act technically may not be a legislative veto because the Act implements the congressional declare war power which is not a legislative power. Thus, a concurrent resolution under the War Powers Act is simply a statement to the President that Congress refuses to declare war, not a legislative act. *See id.*

One could argue by extension that a concurrent resolution veto power enacted pursuant to the Marque and Reprisal Clause is constitutional. The *Chadha* Court, however, applied its ruling to any congressional action that is "essentially legislative"—meaning that it "had the purpose and effect of altering legal rights, duties and relations of persons . . . outside the Legislative Branch." *INS v. Chadha*, 462 U.S. 919, 952 (1983). Using a concurrent resolution to reject a private military service contract would alter the rights, duties, and relations of the parties to the contract making the veto invalid under *Chadha*.

information contained in its quarterly reports. Only then will the electorate be able to make an informed decision about the value of the new privateers.

The activities of MPRI and Vinnell show how private military service contractors are potentially dangerous to the national security interests of the American people. James Madison hoped that the Marque and Reprisal Clause of the Constitution would ensure "immediate responsibility to the nation in all those for whose conduct that nation is itself responsible."<sup>209</sup> The nation is responsible for the actions of the new privateers because the United States government solicits and authorizes their conduct. Currently, however, private military service contractors are responsible only to the clients who hire them and the executive branch bureaucrats who authorize their contracts. Congress has power to regulate the new privateers under the Marque and Reprisal Clause but has failed to exercise that power effectively. Congress must enact new legislation to ensure that the new privateers always act in the best interests of the American people.

*Matthew J. Gaul\**

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209. See THE FEDERALIST NO. 44, at 318 (James Madison) (B. Wright ed. 1961).

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