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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\*\*

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

*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.<sup>2</sup>*

### I. 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.<sup>3</sup> Once the nation commits to an operation, decisions

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1. Christopher Gelpi & John Mueller, *The Cost of War: How Many Casualties Will Americans Tolerate?*, FOREIGN AFFAIRS, Jan./Feb. 2006, at 139.

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](http://www.wartimecontracting.gov/docs/hearing2011-03-28_transcript.pdf). The authors discussed an earlier version of this paper at a forum of the Commission on Wartime Contracting. *See Public Forum*, COMM'N ON WARTIME CONTRACTING (May 2, 2011), <http://www.wartimecontracting.gov/index.php/hearings/publicforum>. On August 31, 2011, the Commission released their Final Report to Congress. *See* COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 30 (2011), *available at* [http://www.wartimecontracting.gov/docs/CWC\\_FinalReport-lowres.pdf](http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf) [hereinafter COMM'N ON WARTIME CONTRACTING, FINAL REPORT].

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

regarding how long to remain are hotly debated. Public support for sustained military engagements, especially those involving long-term deployment of ground forces, is scrupulously observed and dissected.<sup>4</sup> Within this complicated calculus,<sup>5</sup> several significant factors determine whether the public will support these operations. The most graphic is the number of soldiers who have died on the nation's behalf. 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 most quantifiable and readily accessible metric of public interest. Most recent studies suggest that "[m]ajorities 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."<sup>6</sup> Specifically, an inverse relationship exists between the number of military deaths and public support.<sup>7</sup> Economists have dubbed this the "casualty sensitivity" effect.<sup>8</sup>

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SYSTEM OF CHECKS AND BALANCES (2005), *available at* [http://www.constitutionproject.org/pdf/War\\_Powers\\_Deciding\\_To\\_Use\\_Force\\_Abroad.pdf](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 iii (1996), *available at* [http://www.rand.org/pubs/monograph\\_reports/MR726.html](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.

6. LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at xv. 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](http://www.usatoday.com/news/washington/2011-03-31-gates-mullen-libya_N.htm).

7. LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 9 (noting that "the rate of decline [in support] as a function of casualties varies dramatically from operation to operation."). 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

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. As their role in governance and defense expands, contractors increasingly experience risks to their health and well-being. The post-millennial U.S. military, like the modern U.S. government, is more heterogeneous than ever before. In every conceivable aspect of missions abroad, the U.S. military is populated by a “blended workforce” that integrates soldiers with private-sector contractors – comprised of both U.S. citizens and foreign nationals. 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 “substitution” has taken place beyond the cognizance of the public and, potentially, Congress.<sup>9</sup> This article examines this phenomenon, identifies some of the challenges and complexities associated with quantifying and qualifying casualty rates in this modern outsourced military, and encourages greater transparency<sup>10</sup> so that the public can more meaningfully participate<sup>11</sup> in democratic debate, “the great American experiment.”<sup>12</sup>

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greater resolve) to achieve victory. *Id.* at 53.

8. See Christopher Gelpi et al., *Success Matters: Casualty Sensitivity and the War in Iraq*, 30 INT’L SEC., no. 3, 2006, at 7, available at <http://www.mitpress-journals.org/doi/pdf/10.1162/isec.2005.30.3.7> (indicating that “[s]ince 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.”).

9. See Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 753-757 (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 754-755 (quoting Marego Athans, *To Make A Living, Driver Risked It All*, BALTIMORE SUN 1A (Feb. 8, 2004)).

10. Since early in his Administration, President Barack Obama has emphasized the linkage between transparency and the government’s accountability to the public. See Memorandum on the Freedom of Information Act, 1 PUB. PAPERS 4 (Jan. 21, 2009) (“A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, ‘sunlight is said to be the best of disinfectants.’”).

11. LAURA A. DICKINSON, *OUTSOURCING WAR & PEACE* 104-105 (2011). Dickinson introduces her chapter on “Public Participation/Private Contract” by explaining, among other things, that:

## II. A MODERN, UNANTICIPATED ROLE FOR CONTRACTORS

*In past decades, enlisted personnel cut grass, peeled potatoes, and carried out most defense services. Today, with a smaller all-volunteer force, many of these services are now contracted out.*<sup>13</sup>

The extraordinary growth in the government's reliance on service contractors in the last two decades is well documented,<sup>14</sup> and the outsourcing phenomenon has generated scholarly debate about the

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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 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 105-106 (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 out to the government the 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. *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

13. OFFICE OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON IMPROVEMENTS TO SERVICES CONTRACTING 31 (2011), available at <http://www.acq.osd.mil/dsb/reports/2011-05-Services.pdf> [hereinafter IMPROVEMENTS TO SERVICE CONTRACTING].

14. Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. OF CONT. MGMT. 10 (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); Collin D. Swan, Note, *Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Service Contractors*, 80 GEO. WASH. L. REV. (forthcoming 2012) (noting that service contractors are increasingly performing functions that are indistinguishable from those performed by their federal counterparts). Symposia have grappled with a host of related issues. *See, e.g., Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1319 (2001); *New Forms of Governance: Ceding Power to Private Actors*, 49 UCLA L. REV. 1687 (2002); *Privatization and Outsourcing*, 30 PUB. CONT. L.J. 551 (2001); *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

implications for governments and governance.<sup>15</sup> According to the recent report by the Center for Strategic & International Studies (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.<sup>16</sup> The Department of Defense (DoD) remains the largest federal government consumer of professional services, having spent over

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15. Scholars also have exposed more of the thorny issues implicated when governments, at the federal, state, and local levels, rely on the private sector. *See, e.g.*, 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.”) 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, *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) (noting that 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 among the last in line. The policy goals are simply too complex and, in a democratic society, conflicted.”). 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) (see author’s biographical footnote for sources relating to privatization in New Zealand); 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). The newly-reformed Administrative Conference of the United States (ACUS) issued a Final Recommendation on June 17, 2011, calling for the Federal Acquisition Regulatory (FAR) Council to promulgate language that addresses the increasing risk of personal conflicts of interest among service contractors. *See* ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-3, COMPLIANCE STANDARDS FOR GOVERNMENT CONTRACTOR EMPLOYEES – PERSONAL CONFLICTS OF INTEREST AND USE OF CERTAIN NON-PUBLIC INFORMATION 12-13 (June 17, 2011), available at <http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics/>.

16. 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](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.

\$162 billion on service contracts in 2009.<sup>17</sup> One major consequence of this expansion is that federal government contractors are now heavily involved in our nation's operations abroad.<sup>18</sup> There may be no more significant indicator of the scope of this involvement than the frequency with which contractor personnel are now being asked to make the ultimate sacrifice in what, until recently, would have been described as "the battle area."<sup>19</sup>

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17. *Id.* at 8. According to the Defense Science Board Task Force:

Contracts for services are essential to all aspects of military operations. Contracted services to support Department of Defense (DOD) missions range from routine base operating support to highly skilled analysis to direct support to battlefield operations. Contracts for services supporting major DOD programs and their associated administrative, technological, and logistics services are a strategic component of the expanding expeditionary military, stability, and reconstruction operations. The reduction in the number of uniformed personnel in the 1990s, and today's demanding combat missions have resulted in the expansion of services contracting to more than \$200 billion – over 50 percent of the DOD acquisition budget. *Today, almost every defense task that is not an inherently governmental function is carried out in some part through contracted services.*

IMPROVEMENTS TO SERVICE CONTRACTING, *supra* note 13, at vii (emphasis added).

18. 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](http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf) [hereinafter COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?] (quoting the Commission on Wartime Contracting in its description of 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."). See also COMM'N ON WARTIME CONTRACTING, FINAL REPORT, *supra* note 2, at 18-19. 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, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* (Cong. Research Serv. R40764), May 13, 2011, at 13-15, 24-25, available at <http://www.fas.org/sgp/crs/natsec/R40764.pdf>.

19. 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., 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."). Sophia Brill, *The National Security Court We Already Have*, 28 YALE L. & POL'Y REV. 525, 536 (2010);<sup>19</sup> 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, as they lack of a formal declaration of war by Congress. See U.S. Const. art. I §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

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On the modern battlefield, the ratio of troops to contractors has never been lower. While the number of contractors employed by the military has varied from conflict to conflict, historically, the ratio of contractors to troops averaged around one-to-six.<sup>20</sup> The last decade witnessed the U.S. government's first sustained operations where contractors consistently outnumbered troops in the battle space (with the exception of the engagement in Bosnia in the mid-1990s).<sup>21</sup> What separates the current conflicts in Iraq and Afghanistan from previous wars is the sheer pervasiveness of contractors.<sup>22</sup> 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.<sup>23</sup> Correspondingly, evidence indicates that contractor fatalities on the battlefield have never been higher.

As the military assigns more contractors to perform dangerous-yet-vital tasks, contractors are inevitably bearing a larger portion of the casualty rate. Cumulatively, contractor deaths account for nearly thirty percent of total losses since the United States entered Iraq and Afghanistan.<sup>24</sup> 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 effect<sup>25</sup> to its

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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)).

20. 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](http://www.wartimecontracting.gov/docs/CWC_Interim_Report_At_What_Cost_06-10-09.pdf) [hereinafter COMM’N ON WARTIME CONTRACTING, AT WHAT COST?].

21. See *id.*

22. 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 in the U.S. military.

23. See *id.*; SCHWARTZ & SWAIN, *supra* note 18, 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 (2010), available at [http://www.acq.osd.mil/log/PS/hot\\_topics.html](http://www.acq.osd.mil/log/PS/hot_topics.html).

24. See *infra* text accompanying notes 77-79.

25. 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 goods. In essence, price changes induce the buyer to purchase lower-priced



advantage. Nothing suggests that senior military 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.<sup>26</sup> 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.<sup>27</sup> 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, Blackwater – after the high-profile Nissour Square incident prompted the company's expulsion from Iraq.<sup>28</sup> As the State Department prepared to take over the U.S. reconstruction effort in Iraq, James F. Jeffery, the U.S. ambassador to Iraq, testified in early 2011 that he

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goods as a “substitute” for higher-priced goods. *See* RICHARD A. IPPOLITO, *ECONOMICS FOR LAWYERS* 23 (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.

26. Karen Parrish, *DOD Directs Army, Marine Drawdowns for 2015, 2016*, *American Forces Press Service* (Jan. 6, 2011), <http://www.defense.gov//News/NewsArticle.aspx?ID=62355>.

27. 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.

28. *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](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 Mazzetti, *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. The D.C. Circuit, in a unanimous decision issued in April 2011, reinstated criminal suits against four Blackwater employees involved in the September 2007 Nissour Square shootings. *See* *United States v. Slough*, 641 F.3d 544, 547 (D.C. Cir. 2011). The District Court judge, Ricardo M. Urbina, had previously dismissed the indictments on the grounds that the defendants' statements to Diplomatic Security were compelled in violation of the Fifth Amendment. *See* *United States v. Slough*, 677 F. Supp. 2d 112, 133 (D.D.C. 2009).

expected 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.<sup>29</sup>

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.

### III. 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.<sup>30</sup> 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.”<sup>31</sup>

For 40 years, policy makers and scholars have widely accepted the theory that public support for any given military conflict is inversely related to the number of U.S. military casualties suffered in that conflict. Economists may not perceive this as rational behavior,<sup>32</sup> but the public does

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29. 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](http://foreign.senate.gov/imo/media/doc/Jeffrey-Austin_Testimony.pdf).

30. But see LARSON, CASUALTIES AND CONSENSUS, *supra* note 5, at 2 (acknowledging that “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.”). See also DICKINSON, *supra* note 11, at 104-105. 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.

31. Deborah Avant & Lee Sigelman, *Private Security and Democracy: Lessons from the U.S. in Iraq*, 19 SECURITY STUDIES 230, 236-237 (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 239-240.

32. “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

not always behave in entirely rational ways.<sup>33</sup> John E. Mueller persuasively demonstrated this theory in his 1973 book, *War, Presidents and Public Opinion*, by analyzing opinion polls for the Vietnam and Korean Wars in connection with their respective casualty rates.<sup>34</sup> 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.”<sup>35</sup> Research suggests that, without a clearly defined national imperative for a military operation or 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.<sup>36</sup>

The RAND Corporation’s Eric V. Larson, who chronicles public opinion polls of military operations, explained that “all else being equal, prospective and observed support for a U.S. military intervention [declines] as expected or actual casualties increase.”<sup>37</sup> But the calculus is more complex, and, the most hyperbolic positions may 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”

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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).

33. The common assumption held by most economists is 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).

34. See JOHN E. MUELLER, WAR PRESIDENTS AND PUBLIC OPINION (1973). Like most significant research, Mueller’s work is frequently summarized and over-simplified. See Gelpi, *supra* note 8, at 11 (“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.”).

35. Avant & Sigelman, *supra* note 31, at 255 (citing MUELLER, *supra* note 34).

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

37. *Id.* at 7. One of our colleagues, an Army Judge Advocate, 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.

for escalation to a “decisive victory.” . . . [N]either of these extreme views is accurate.<sup>38</sup>

Nor, Larson implies, are military casualties 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.”<sup>39</sup> Taking these factors together, 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.<sup>40</sup>

This theory has proved accurate over time and, more recently, when applied to the conflicts in Iraq and Afghanistan.<sup>41</sup> Mueller has argued that public support for the war in Iraq has generally followed the same steady decline as witnessed in Korea and Vietnam.<sup>42</sup> 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 their likely success 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.”<sup>43</sup> Larson and Begdan Savych caution that “if most

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38. *Id.* (footnotes omitted).

39. *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-authors 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.

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

41. “[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.

42. John Mueller, *The Iraq Syndrome*, FOREIGN AFFAIRS, Nov./Dec. 2005, at 44. For a critique of this article by Christopher Gelpi, a political science professor at Duke University, followed by a reply from Mueller, see Gelpi & Mueller, *supra* note 1.

43. LARSON & SAVYCH, MOGADISHU TO BAGHDAD, *supra* note 4, at xxiv. See also

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.*<sup>44</sup>

#### IV. LAYERS OF COMPLEXITY: DILUTING A SIMPLE NUMBER

Unfortunately, the raw number of military casualties no longer tells the whole story of human sacrifice associated with military actions. As the battlefield becomes more complex, it becomes increasingly more difficult to discern and provide an accurate tally of the human cost of war; that is, the number of troop fatalities can no longer capture the true human cost of these operations.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> This development has created a whole new set of analytical challenges that government programs<sup>48</sup> and non-profits, like the Wounded Warrior Project,<sup>49</sup> have been

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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.”).

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

45. 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), available at [http://www.brookings.edu/articles/2009/11\\_robotic\\_revolution\\_singer.aspx](http://www.brookings.edu/articles/2009/11_robotic_revolution_singer.aspx). Nevertheless, the modern battlefield is still a very dangerous place.

46. 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>.

47. 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.

48. 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\\_VA\\_Healthcare\\_Summary.pdf](http://www.cbo.gov/ftpdocs/118xx/doc11811/2010_10_7_VA_Healthcare_Summary.pdf).

49. *See About Us*, WOUNDED WARRIOR PROJECT, <http://www.woundedwarriorproject.org/content/view/1135/>.

## 2011] CONTRACTOR DEATHS AND CASUALTY SENSITIVITY 13

working to resolve. 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.<sup>50</sup>

By analogy, consider similar research in the homicide context, which suggests that the steady decrease in homicide rates over the last few decades may be due more to advances in emergency medical technology than to an actual reduction in violent crime.<sup>51</sup> 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.”<sup>52</sup>

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. 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. Even as President Obama took steps to officially end combat operations and withdraw troops in Iraq, he made no representation that there would be a proportionate decrease in contractor staffing; in fact, Ambassador Jeffries's testimony regarding the State Department's preparations to continue the reconstruction efforts in Iraq clearly indicated that additional contractors will be required to fill the void.<sup>53</sup>

This implicates the broader outsourcing trend, which we do not attempt to chronicle here.<sup>54</sup> Suffice it to say that government contractors are

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50. 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>. Of course, we commend the New York Times prominently discussing issues relating to the risks facing contractors in Afghanistan. See Rod Nordland, *War's Risks Shift to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A1; *infra* text accompanying notes **Error! Bookmark not defined.**-163.

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

52. *Id.* at 156.

53. See Pincus, *supra* note 29.

54. As Paul Light explained in his book *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). The most recent iteration of constant reform in this arena is intended “to assist agency officers and employees in ensuring that only Federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector.” Publication of the Officer of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56236 (Sept. 12, 2011).

gaining a greater presence on the battlefield because the government increasingly depends on the private sector to sustain our war, intelligence, and homeland security efforts.<sup>55</sup> Contractors are employed more than ever in critical support positions, such as gathering intelligence, maintaining weapons, providing static and mobile security, training troops, and handling interrogations.<sup>56</sup> Using contractors generally,<sup>57</sup> as well as in more specific contingency operations, can have significant benefits.<sup>58</sup> But today's

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55. 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 Memorandum on Government Contracting, 1 PUB. PAPERS 180 (Mar. 4, 2009). If the Administration makes good on these promises – granted, an unlikely scenario – this will reverse an aggressive outsourcing trend that spanned the 16 years of the predecessor Clinton and Bush administrations. As indicated, *passim*, any momentum such an initiative may have had appears to have dissipated. Indeed, the current pervasiveness of contractors in Iraq and Afghanistan will have significant strategic implications for future conflicts. See T.X. Hammes, *Private Contractors in Conflict Zones: The Good, the Bad, and the Strategic Impact*, JOINT FORCE Q., Jan. 2011, at 26, 34 ("The size and type of force that we build for the future depend on a clear concept of how the United States plans to use contractors, both armed and unarmed, in present and future conflicts.").

56. See COMM'N ON WARTIME CONTRACTING, AT WHAT COST?, *supra* note 20, 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). On August 11, 2011, DoD issued a final rule establishing policy and procedures "for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract." Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations or Other Significant Military Operations, 76 Fed. Reg. 49650, 49655 (Aug. 11, 2011). This rule also establishes policy on incident reporting and rules for the appropriate use of force. *Id.* 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).

57. See IMPROVEMENTS TO SERVICE CONTRACTING, *supra* note 13, at 11 (noting that using contractors provides the government with "the ability to tailor efforts more easily to available budgets[,] "provides access to expertise developed outside of government contracting[,] and allows for "performance improvements [to be] well-documented when work is completed[.]").

58. 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.

military cannot effectively fight or sustain itself without an enormous, highly integrated contractor presence.<sup>59</sup> Ashton B. Carter, the current Deputy Secretary of Defense and former Under Secretary of Defense for Acquisition, Technology & Logistics, 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, though by now this should be recognized as a phenomenon that’s here to stay and should not be unaccustomed.”<sup>60</sup>

The outsourcing of military responsibilities is not limited to DoD. It 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.<sup>61</sup> Both the State Department and USAID employ a burgeoning 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 the State Department’s global security services contract.<sup>62</sup> 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.<sup>63</sup> But these deaths are by no means limited to

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COMM’N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra* note 18.

59. 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](http://www.wartimecontracting.gov/docs/hearing2011-03-28_testimony-Carter.pdf).

60. Testimony of Ashton B. Carter, *supra* note 2, at 3.

61. See Schooner & Greenspahn, *supra* note 14, at 10; Schooner, *Contractor Atrocities*, *supra* note 56, at 3-6; COMM’N ON WARTIME CONTRACTING, FINAL REPORT, *supra* note 2, at 20 (stating that “[t]he number of contractors and grantee employees supporting State and USAID in Iraq and Afghanistan greatly exceeds the agencies’ employees—18 to 1 for State, and 100 to 1 for USAID.”)

62. See JENNIFER K. ELSEA ET AL., CONG. RES. 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>.

63. Moshe Schwartz, *The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress* (Cong. Res. Service R40835), Feb. 21, 2011, at 12. There are many reasons for this disparity. There are likely to be differences in the levels of professional training and



arms-bearing contractors. Data from 2008 “show that the chances of humanitarian aid workers dying by violence were almost six times those of U.S. police officers,”<sup>64</sup> and anecdotal evidence indicates that truck driving remains the most dangerous job in these regions.<sup>65</sup>

Against this backdrop, we sense that high contractor casualties produce a substitution effect that artificially reduces the public’s perception of the 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.<sup>66</sup> In addition to outsourcing jobs that were previously performed by 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.<sup>67</sup> While military

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available equipment between public military soldiers and private contractors. *See, e.g., infra* note 141.

64. M.A. Thomas, *It’s Dangerous Out There*, AM. INT., Nov.–Dec. 2010, at 56, 57, available at <http://www.the-american-interest.com/article.cfm?piece=888> (“Unlike police officers, however, few aid workers have any training or equipment for self-protection; indeed, many are deeply conflicted about whether and how to protect themselves.”). As this article aptly states: “[T]his is not your parents’ aid work. What today’s idealistic young people are not told is that . . . foreign aid work has become a high-risk occupation. . . . While data on aid worker mortality is poor, the data . . . suggests that if aid were a domestic U.S. industry, aid work would follow deep-sea fishing and logging as the third or fourth most dangerous occupation.” *Id.* at 56.

65. In a single, high-profile example, an attack on a convoy left six men dead, eleven seriously wounded, and one missing and presumed dead. *See Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006).

66. Indeed, in today’s foreign policy environment, NGOs have been recast “as a ‘soft power’ tool of U.S. foreign policy, a ‘force multiplier’ for U.S. combat forces and a valuable source of military intelligence.” *Id.* at 58. This “poses a particular problem for NGOs that see themselves as humanitarians adhering to the principles articulated by the International Committee of the Red Cross (ICRC). *Id.* Perhaps most importantly:

While some NGOs are fighting to maintain distinctions between combatants and aid workers, . . . these boundaries are collapsing and are likely beyond resurrection in a new era of warfare. With so many actors engaged in similar tasks – soldiers, military contractors, civilian government aid workers, civilian aid workers embedded in military units, development contractors, development contractors owned by military contractors, development NGOs, humanitarian NGOs, multi-mandated NGOs . . . , NGOs who are also government contractors – it would be difficult for even conscientious combatants to tell who would be entitled to protected status without the help of . . . lawyers and accountants. The targeted attacks on aid workers suggest that insurgents are not even interested in attempting to draw this difficult distinction, nor are terrorists . . .

*Id.* at 60.

67. Avant & Sigelman, *supra* note 31, 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

“[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.”<sup>68</sup> 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.<sup>69</sup>

This conversation – involving policy-makers and the public and facilitated by the media – is critical to informed decision-making.<sup>70</sup> An accurate tally of contractor casualties is important to 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.

#### V. OUTSOURCING 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

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companies].”).

68. *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.*

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

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

(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.<sup>71</sup> 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.<sup>72</sup> To the extent that more data has recently become publicly available, the data still includes significant gaps and reflects wild fluctuations.<sup>73</sup> Again, our endeavor here

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71. One Army Judge Advocate suggested:

[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 the 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).

72. 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 18; COMM'N ON WARTIME CONTRACTING, FINAL REPORT, *supra* note 2; *but see* SCHWARTZ, *supra* note 63, 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.

73. The CENTCOM census began breaking out logistics/maintenance and training in the first quarter of 2010. See SCHWARTZ & SWAIN, *supra* note 18, 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

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is limited to surrogacy. While we realize that our data, and hence the comparisons we draw from that data, are imperfect,<sup>74</sup> we have attempted to be fully transparent as to the limited 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).<sup>75</sup> 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.<sup>76</sup>

According to this data, more than 2,600 contractors have been killed in Iraq and Afghanistan (in addition to another sixty-two contractors killed in Kuwait) between 2001 and the end of 2011.<sup>77</sup> Another 58,000 contractors have been injured, more than 22,000 at least somewhat seriously (see Figure 2).<sup>78</sup> While these numbers were slow to accumulate, Figure 1 reflects the startling fact that *contractor deaths now represent nearly thirty*

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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.

74. The Defense Science Board recently attempted to articulate the scope of this problem, ultimately recommending the need for a new taxonomy for services:

Given the concerns over data quality, [the] eight "portfolio groups" used by the DOD to track services are particularly troubling. While these groupings may make semantic sense, they are not appropriate to determine guidance and policy. The "knowledge-based services" portfolio group, as an example, inappropriately combines routine education and training contracts with expeditionary logistics management contracts. This portfolio group is overly vague and cannot provide meaningful analysis of performance insights.

IMPROVEMENTS TO SERVICE CONTRACTING, *supra* note 13, at 6.

75. 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).

76. 33 U.S.C. §930(a) (2006).

77. 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), available at <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.

78. 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), available at <http://civiliancontractors.wordpress.com/2011/01/11/contractor-casualties-on-the-rise-according-to-the-dols-latest-dba-figures/>.

percent of U.S. fatalities since the beginning of these wars.<sup>79</sup>

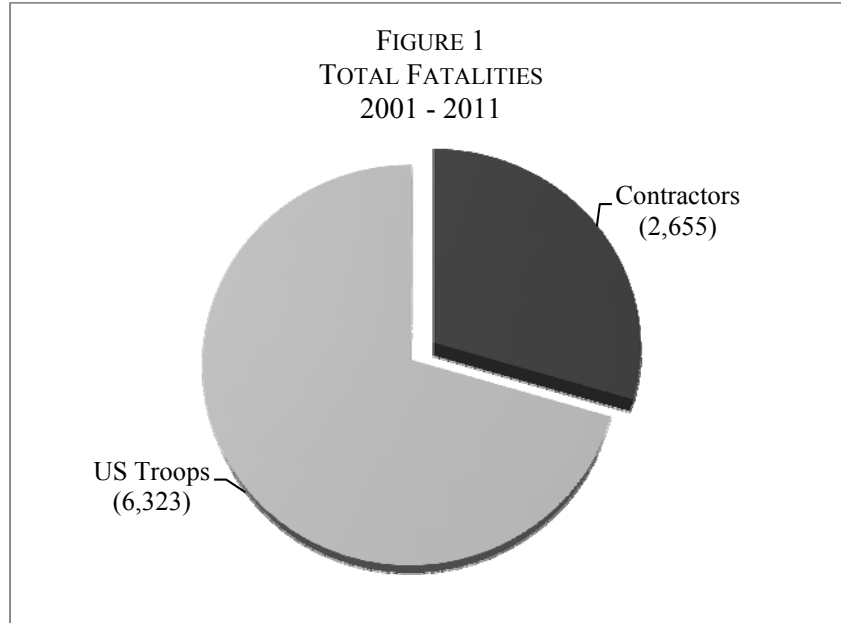


FIGURE 2  
CONTRACTOR INJURIES  
2001 - 2011<sup>80</sup>

	Serious Injuries	Total Injuries
<b>Iraq</b>	16,290	44,606
<b>Afghanistan</b>	6,202	13,467
<b>Total</b>	22,492	58,073

Certain firms have been particularly hard hit. Eighty-two contracting firms have lost at least seven employees since 2001.<sup>81</sup> Other companies

79. See *Defense Base Act Case Summary by Nation*, *supra* note 77; *Military Casualty Information*, DEFENSE MANPOWER DATA CENTER (Dec. 31, 2010), available at <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/castop.htm>.

80. *Defense Base Act Case Summary by Nation*, *supra* note 77.

81. 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), available at <http://www.dol.gov/owcp/dlhw/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,

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have suffered far more severely; thirty-two companies have lost more than twenty employees, eleven companies have lost more than fifty employees, and six companies have experienced more than eighty deaths.<sup>82</sup> As Figure 3 demonstrates, L-3 Communications suffered the most of any company, having lost 373 employees since 2001.<sup>83</sup> 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.<sup>84</sup>

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DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION, *available at* <http://www.dol.gov/owcp/dlhwc/laboutdbareports.htm>.

82. *See Defense Base Act Case Summary by Employer, supra* note 81.

83. *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). *Id.*

84. 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 77. 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), *available at* <http://www.dol.gov/owcp/dlhwc/dbaallcarrier.htm>.

FIGURE 3  
CONTRACTOR FATALITIES BY EMPLOYER  
2001 – 2011<sup>85</sup>

<b>Employer</b>	<b>Fatalities</b>
L-3 Communications (including subsidiaries MPRI; Titan Corp.; TLOTS1)	373
The Supreme Group (including subsidiary Supreme Food Service)	241
Compass Security	163
Service Employees International	127
DynCorp International (including subsidiary DynCorp Technical Services)	101
AEGIS (including subsidiaries Aegis Defense Service; Mission Essential Personnel)	89

Additional complexities are created by the difficulties in distinguishing prime contractors and subcontractors – distinctions 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.<sup>86</sup> While the exact relationship between prime contractors and subcontractors is obviously quite opaque, it is worth noting that the DBA applies to subcontractors.<sup>87</sup> As a result, subcontractor fatalities are included in the DBA's overall count.

Predictably, the overall carnage has been greater in Iraq, where more than 1,560 contractors, about a quarter of the overall U.S. death toll in that country, have died since 2003 (see Figure 4). By comparison, in Afghanistan, the 1,095 dead contractors represent nearly forty percent of U.S. deaths in that country.

85. See *Defense Base Act Case Summary by Employer*, *supra* note 81.

86. 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))).

87. See 42 U.S.C. §1651(a) (2006).

FIGURE 4  
TOTAL FATALITIES  
2001 – 2011

	<b>US Troops<sup>88</sup></b>	<b>Contractors<sup>89</sup></b>
<b>Iraq</b>	4,474	1,560
<b>Afghanistan</b>	1,849	1,095
<b>Total</b>	6,323	2,655

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 and 2011, contractor fatality claims represented nearly half (forty-seven and forty-eight percent, respectively) 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 surpassed military deaths in 2009 and 2010*, although the carnage in 2010 was less than half of what it was in 2009 (see Figure 7). Over the past three 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.

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88. *Military Casualty Information*, *supra* note 79.

89. *Defense Base Act Case Summary by Nation*, *supra* note 77.



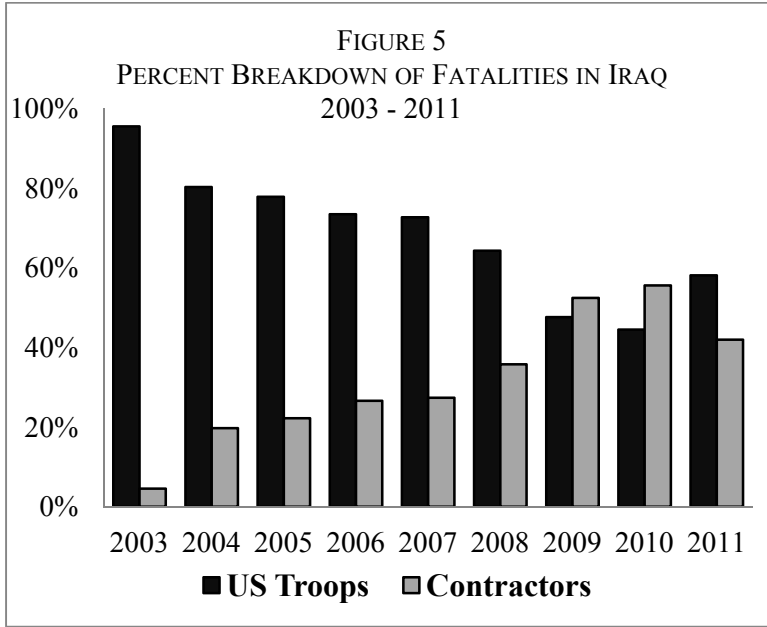
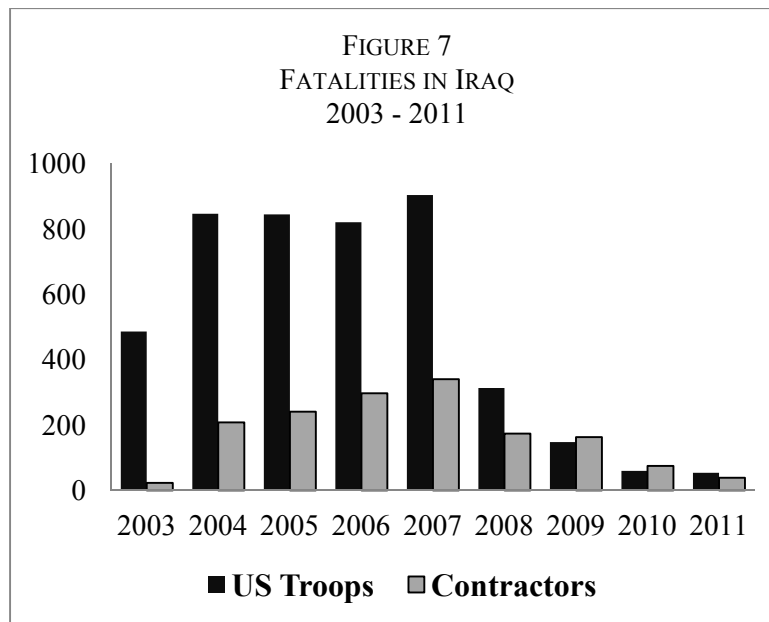
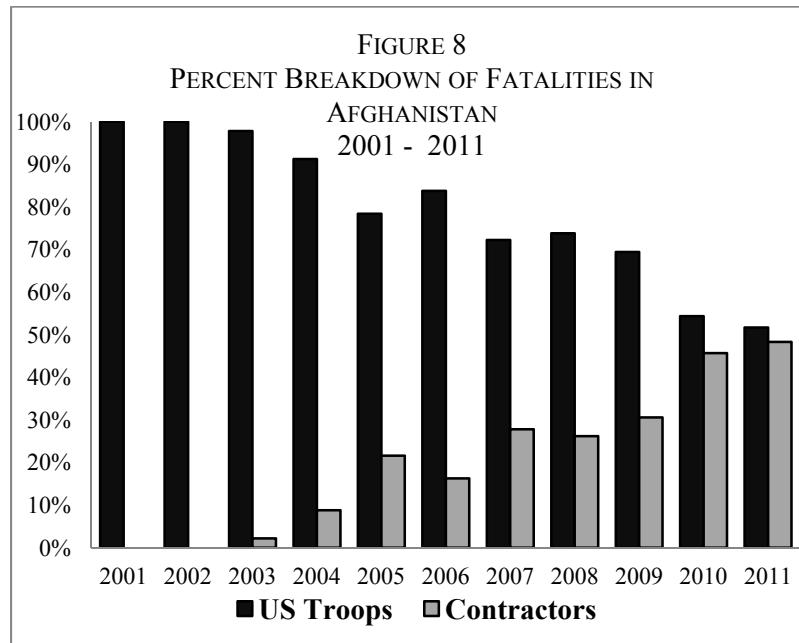


FIGURE 6  
IRAQ FATALITIES  
2009 – 2011<sup>90</sup>

<b>Contractors</b>	277
<b>US Troops</b>	262



90. *Military Casualty Information*, *supra* note 79; *Defense Base Act Case Summary by Nation*, *supra* note 77.



In Afghanistan, the trend accelerated late in the decade. 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, forty-six percent of U.S. fatalities in 2010, and forty-eight percent of U.S. fatalities in 2011 (see Figure 8).<sup>91</sup> More than eighty-six percent of all contractor fatalities in Afghanistan occurred between 2009 and 2011. From the beginning of the Afghanistan war to the end of 2009, a total of 289 contractors and 936 military troops were killed. Since 2010, more than 806 contractors and 913 military troops were killed (see Figure 9). This makes 2010 and 2011 the most dangerous period on record in Afghanistan for both contractors and U.S. troops (see Figure 10). Indeed, the future of the Afghanistan war remains far from clear. Ambassadors Lakhdar Brahimi and Thomas Pickering have questioned the success of the U.S. counterinsurgency and its ability to eradicate the Taliban through military force.<sup>92</sup>

91. 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 77; *Military Casualty Information*, *supra* note 79. See also Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERVICE CONTRACTOR 16, 17 (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 77; *Military Casualty Information*, *supra* note 79.

92. Lakhdar Brahimi & Thomas R. Pickering, *Settling the Afghan War*, N.Y. TIMES,

FIGURE 9  
AFGHANISTAN FATALITIES  
2010 – 2011<sup>93</sup>

<b>Contractors</b>	806
<b>US Troops</b>	913



Mar. 23, 2011, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CEE DD1231F930A15750C0A9679D8B63&ref=afghanistan>. Ambassadors Brahim 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 Brahim 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.”).

93. *Military Casualty Information*, *supra* note 79; *Defense Base Act Case Summary by Nation*, *supra* note 77.

## VI. AN IMPERFECT PICTURE: UNDER-REPRESENTATIVE DATA

The lack of publicly available data on contractors in Iraq and Afghanistan creates 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.<sup>94</sup> 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.<sup>95</sup>

Unfortunately, the Government Accountability Office (GAO) recently confirmed that there are numerous problems associated with this data, which likely under-represents the total number of contractor deaths and injuries.<sup>96</sup> The Labor Department's database was not designed for this task;<sup>97</sup> rather, Labor only designed its database to compile the number and type of insurance claims filed under the DBA and not to track the actual deaths and injuries of contractor personnel.<sup>98</sup> 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.<sup>99</sup> The DBA database only reflects a contractor's death when the family or employer *files a claim* for insurance compensation, which does not always occur immediately after the incident giving rise to the claim, assuming a claim is filed at all.<sup>100</sup> 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

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

95. This website may be found at <http://www.dol.gov/owcp/dlhwc/dbaallnation.htm>. See *Defense Base Act Case Summary by Nation*, *supra* note 77. See also Schooner & Swan, *supra* note 91, at 17.

96. 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).

97. 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 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).

98. *Id.* at 24.

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

100. *Id.* at 35 n.33.

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subject to the DBA.<sup>101</sup>

The Inspector General of the Department of Labor expressed further concern about the efficiency and accuracy of the DBA claims process.<sup>102</sup> Specifically, the Inspector General estimated that around sixty-eight percent of employers fail to report employee injuries in a timely manner.<sup>103</sup> Additionally, administrative problems exist due to the antiquity of the DBA, which “was enacted during World War II [and] has not been modified or adequately staffed to take into 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.”<sup>104</sup>

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.<sup>105</sup> Accordingly, the actual number of contractor fatalities is probably higher than currently known, particularly with respect to local hires and third country contractors.<sup>106</sup> 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.<sup>107</sup>

Contemplating the data from the standpoint of specific agencies, most, including the defense agencies, initially made little or no effort to keep

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101. *Id.*

102. 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>.

103. *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.”).

104. *Id.*

105. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-280R, DEFENSE BASE ACT INSURANCE: REVIEW NEEDED OF COST AND IMPLEMENTATION ISSUES 5 (2005); see also COMM’N ON WARTIME CONTRACTING, FINAL REPORT, *supra* note 2, at 31 (“[C]ontractor deaths are undoubtedly higher than the reported total because federal statistics are based on filed insurance claims, and many foreign contractors’ employees may be unaware of their insurance rights and therefore unlikely to file for compensation.”).

106. 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)).

107. 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).

track of how many contractors they employed in Iraq and Afghanistan, much less the number of contractors killed or wounded.<sup>108</sup> Only recently has Congress mandated that the Pentagon, the State Department, and the U.S. Agency for International Development (USAID) 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 Pre-deployment and Operational Tracker (SPOT) to track information on contingency contractor operations, including contractor casualties.<sup>109</sup> DoD concedes, however, and GAO confirms, that SPOT remains an inadequate source of data on this critical information.<sup>110</sup>

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108. 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)).

109. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §861, 122 Stat. 3, 253-254 (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](http://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>.

110. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-1, *supra* note 98, at 7. A recent GAO report concluded that, "while SPOT has the ability to reflect the number of personnel killed or wounded, contractors are not routinely using this function and therefore the data are

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Basically, DoD, by far the largest contracting agency in Iraq and Afghanistan, has not even seriously begun to track contractor deaths and injuries.<sup>111</sup> 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, the government's contracting officer is required to use a standard, remedy-granting clause.<sup>112</sup> The required clause contains exhaustive warnings and requirements.<sup>113</sup> The DoD's regulatory guidance<sup>114</sup> and the DoD version of

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unreliable." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-886, IRAQ AND AFGHANISTAN: DOD, STATE, AND USAID CANNOT FULLY ACCOUNT FOR CONTRACTS, ASSISTANCE INSTRUMENTS, AND ASSOCIATED PERSONNEL 9 (2011). The report also stated that "SPOT still cannot be used to reliably track statutorily required contract, assistance instrument, and personnel data as agreed to in the agencies' [Memorandum of Understanding] because of a number of longstanding practical and technical limitations." *Id.* at 22.

111. *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 97, at 8-15).

112. 48 C.F.R. §52.225-19. 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).

113. 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 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-



the clause<sup>115</sup> both specifically require use of the SPOT database.

Only the State Department and USAID have initiated meaningful efforts to track the deaths and injuries of their contractors.<sup>116</sup> During FY 2009, and the first half of FY 2010, the State Department reported that nine of its contractors died and sixty-eight were wounded, while USAID reported 116 of its contractors were killed and 121 were wounded.<sup>117</sup> 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.”<sup>118</sup>

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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).

114. 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).

115. 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).

116. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-1, *supra* note 98, 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](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, 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](http://www.acq.osd.mil/log/PS/p_vault/MOU_Signed_July2008.pdf).

117. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-1, *supra* note 98, at 23.

118. *Id.*

## VII. 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.<sup>119</sup> 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 thirty percent of non-hostile deaths resulted from health conditions or illness. Again, 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 unverifiable data, which make it difficult to apply these conclusions to a wider field of contractors.<sup>120</sup>

Moreover, members of the military also die from heart attacks and vehicle accidents, and DoD and the media count those deaths as military fatalities.<sup>121</sup> Through the end of 2011, the *Washington Post's* "Faces of the Fallen" has chronicled a total of 4,474 military deaths in Iraq and 1,849 in Afghanistan.<sup>122</sup> 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 957 accidental deaths in Iraq and 373 accidental deaths in Afghanistan.<sup>123</sup> Figure 11 provides a clearer view of this breakdown.

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119. *Id.* at 26.

120. *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.

121. 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.

122. WASH. POST, *Faces of the Fallen*, (Jan. 9, 2011), available at <http://projects.washingtonpost.com/fallen/>.

123. *Military Casualty Information*, *supra* note 79.

FIGURE 11  
MILITARY DEATHS BY TYPE  
2001 – 2010<sup>124</sup>

	<b>Iraq</b>	<b>Afghanistan</b>
<b>Killed in Action</b>	3,517	1,476
<b>Accidental</b>	957	373
<b>Total</b>	4,474	1,849

We concede that it 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.

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124. *Military Casualty Information*, *supra* note 79.

VIII. FOREIGN AND LOCAL LABOR:  
UNINTENDED EXTERNALITY, UNEXPECTED BENEFIT?

The source of labor also merits further examination. As a result of the increased level of outsourcing in contingency operations, the government has discovered 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.<sup>125</sup> 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. This increased layering of complexity<sup>126</sup> 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.<sup>127</sup>

Unfortunately, the Labor Department's contractor death and injury statistics do not distinguish by trade or nationality. Inferences, however,

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125. SCHWARTZ, *supra* note 63, at 3. This is not to say that cost is the only justification for contracting with foreign nationals. Indeed, such contracting "can provide economic inputs to local economics by hiring locals to provide services. Creating jobs and stimulating the economy are key aspects of population-centric counterinsurgency." Hammes, *supra* note 23, at 29.

126. Consider a continuum, with either citizen conscripts (or draftees) or an all-volunteer army or militia at one extreme. See Avant & Sigelman, *supra* note 31, at 241 ("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."). 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.

127. 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 5, 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.* (emphasis added).

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,<sup>128</sup> 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 2011, approximately 77 percent of U.S. defense contractors in Afghanistan were foreign nationals, and 68 percent of those were local Afghans.<sup>129</sup> 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."<sup>130</sup> In Iraq, 72 percent of DoD's contracting force was foreign nationals, 20 percent of which were local Iraqis.<sup>131</sup>

The U.S. Commission on Wartime Contracting, in its February 2011 Interim 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.<sup>132</sup>

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128. 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.").

129. 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](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](http://www.acq.osd.mil/log/PS/hot_topics.html). The Government Accountability Office, however, recently reported in September 2011 that "the numbers for local nationals working under contracts in Afghanistan were generally overreported . . . [due to] a methodological error [that] resulted in double counting of local nationals in Afghanistan for the first three fiscal year 2010 quarters." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-886, *supra* note 11, at 12.

130. DOD CONTRACTOR SUPPORT, Jan. 2011, *supra* note 129.

131. *Id.*

132. See COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra* note 18, at 7. The Commission provided updated figures in its Final Report to Congress, which was issued during the final editing stages of this article on August 31, 2011. See COMM'N ON WARTIME CONTRACTING, FINAL REPORT, *supra* note 2, at 20.

FIGURE 12  
DEFENSE, STATE, AND USAID CONTRACTORS  
IN IRAQ & AFGHANISTAN FISCAL YEAR 2010<sup>133</sup>

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%

On the whole, it appears that no more than twenty-four percent of U.S. contractor employees in Iraq and Afghanistan are actually U.S. citizens.<sup>134</sup> That figure, though, appears to have risen over the last couple of years, suggesting that it might not be prudent to extrapolate too much from this limited, volatile dataset.<sup>135</sup>

As an aside, third-country nationals, particularly in developing countries and areas near battle zones, seem especially susceptible to forced labor and human trafficking. Anecdotal reports identified problems involving contractors operating on U.S. bases in Iraq and Afghanistan.<sup>136</sup>

133. COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra* note 58, at 7.

134. *Id.*

135. 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 18, 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.

136. 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), available at <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202476608072&slreturn=1>.

The exact scope of this reprehensible activity occurring in Iraq and Afghanistan is, regrettably, still unknown.<sup>137</sup>

Foreign nationals are “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 allow certain contractor personnel to enter the United States after their service.<sup>138</sup> For a host of reasons, however, such programs have not proven a panacea against the dangers.<sup>139</sup>

Furthermore, if the fatality rate among contractors has little effect on public support, either because the public does not know or care about

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137. 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](http://www.dodig.mil/SPO/Reports/SPO-2011-002_508.pdf).

138. 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 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).

139. *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.”

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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.<sup>140</sup> Thus, it is not surprising that the military chose to prioritize the issuing of then-scarce scarce body armor to soldiers before making it available to civilians.<sup>141</sup> Yet even when the supply of body armor met demand, the military was slow to issue body armor to contractors or mandate its use.<sup>142</sup> By hiring non-

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140. 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 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 this provision, KBR appears to have indirectly hired private security through its subcontractors. *See id.* at 112. This discovery evolved and 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.

141. 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 . . .”).

142. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-911T, 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



military personnel to perform high-risk tasks that were once considered inherently governmental (and thus performed solely by military personnel),<sup>143</sup> 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.”<sup>144</sup> 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.”<sup>145</sup>

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], who 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.<sup>146</sup>

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

143. As *The 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 56, at 5 (quoting Paul Krugman, *Battlefield of Dreams*, N.Y. TIMES, May 4, 2004, at A29).

144. Avant & Sigelman, *supra* note 31, at 259.

145. *Id.* But see *infra* note 168 and accompanying text.

146. *Id.* at 256-257.

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 may 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.”<sup>147</sup>

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.

#### IX. 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 force that could be easily misused, resulting in a loss of well-being, motivation, and effectiveness for draftees and draft-induced volunteers.<sup>148</sup> Oi also showed that instituting an all-volunteer military force, while more expensive per soldier, could actually be more effective and result in fewer 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.<sup>149</sup>

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 weakened. All things being equal, public consent for actions abroad that use hired forces should be easier to obtain.<sup>150</sup>

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

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

149. See *id.*

150. Avant & Sigelman, *supra* note 31, at 242.

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.<sup>151</sup> We envision an economic model in which, if perfect information regarding the historical (and projected) risks of service in the battle area were available, this information could hinder contractor recruitment and, potentially, dramatically drive up contractor salaries.<sup>152</sup>

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.<sup>153</sup> Despite repetitive outcry, little data supports this proposition, particularly when costs associated with education, training, healthcare, and retirement are factored in.<sup>154</sup> 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 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

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151. As an analogy, consider the fact that “[m]ost individual aid workers remain uninformed about the new levels of risk and the weakness of their legal protections. . . . Denial, ignorance, negligence and machismo are all costly.” Thomas, *supra* note 64, at 59.

152. See LEVITT & DUBNER, *supra* note 33.

153. See, e.g., Ron Nixon, *Government Pays More in Contracts, Study Finds*, N.Y. TIMES (Sept. 12, 2011); *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, PROJECT ON GOV'T OVERSIGHT (Sept. 13, 2011), <http://www.pogo.org/pogo-files/reports/contract-oversight/bad-business/co-gp-20110913.html>.

154. See CONG. BUDGET OFFICE, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ (2008), available at <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](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.

attention has focused on evidence that the cost of supporting military troops in Iraq and Afghanistan is as high as one million dollars per soldier, which demonstrates that cost may not readily correlate with salary.<sup>155</sup> Also, as previously stated, most, if not all, foreign nationals employed as U.S. contractors are paid considerably less than our military soldiers.<sup>156</sup> 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.<sup>157</sup>

#### X. WHY TRANSPARENCY MATTERS

Over the course of the last decade, the public has become – ever-so-slowly – increasingly aware of the extent of government’s dependence upon contractors. Part of this derives from an Obama administration commitment to greater transparency in government operations.<sup>158</sup> In its February 2011 Interim Report to Congress, the U.S. Commission on Wartime Contracting 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’

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155. See Lawrence Korb & Laura Conley, *The \$1 Million Soldier: What’s Wrong With How We Budget War*, CNNMONEY.COM (Apr. 4, 2011), available at [http://money.cnn.com/2011/04/04/news/economy/war\\_costs\\_lawrence\\_korb/index.htm?source=cnn\\_bin&hpt=Sbin](http://money.cnn.com/2011/04/04/news/economy/war_costs_lawrence_korb/index.htm?source=cnn_bin&hpt=Sbin).

156. See SCHWARTZ, *supra* note 63, at 3.

157. 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 147, at 90.

158. 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), <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>.

deaths and injuries should not be ignored, but should be a part of the public debate on the cost of war.<sup>159</sup>

To our knowledge, this was the first official comment by Congress or a government commission that contractor fatalities should be discussed in policy circles. We thus applaud the Commission for further drawing attention to this issue in its Final Report:

The extensive use of contractors obscures the full human cost of war. The full cost includes all casualties, and to neglect contractor deaths hides the political risks of conducting overseas contingency operations. In particular, significant contractor deaths and injuries have largely remained uncounted and unpublicized by the U.S. government and the media. . . . Moreover, contractor deaths are undoubtedly higher than the reported total because federal statistics are based on filed insurance claims, and many foreign contractors' employees may be unaware of their insurance rights and therefore unlikely to file for compensation.<sup>160</sup>

Early in 2012, we saw further glimpses of progress.<sup>161</sup> Frank Kendall, Acting Under Secretary of Defense for Acquisition, Technology and Logistics, raised the issue at a large conference in New York.<sup>162</sup> On

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159. COMM'N ON WARTIME CONTRACTING, AT WHAT RISK?, *supra* note 18, at 8.

160. COMM'N ON WARTIME CONTRACTING, FINAL REPORT, *supra* note 2, at 30-31.

161. Previously, Allison Stanger briefly mentioned, in her book, *One Nation Under Contract*, a *New York Times* report from 2007 on contractor fatalities. STANGER, *supra* note 147, at 99. See also, JACQUES S. GANSLER, *DEMOCRACY'S ARSENAL: CREATING A TWENTY-FIRST CENTURY DEFENSE INDUSTRY*, 115-116 (2011).

162. See Transcript of Frank Kendall, Acting Under Secretary of Defense for Acquisition, Technology and Logistics, at the Cowen Group's 33rd Annual Aerospace/Defense Conference (New York, Feb. 8, 2012). Secretary Kendall closed his speech with this meaningful anecdote:

Terence Hildner . . . was a brigadier general in the army [who died in Kabul]. He came back to Dover . . . on a C17. I went to Dover for the transfer of the remains. . . . There's a dignified transfer which is a very solemn and kind of heart wrenching for the families but moving ceremony. . . .

There was one other person on that C-17 and it was a contract employee of a Canadian firm. After we had done the transfer for General Hildner, General Austin, myself, General Mason and the Colonel did the Dignified Transfer for that Canadian citizen who was a contractor serving with us in Afghanistan.

I find that very symbolic of the service that industry is providing to us and that you really are part of all this with us. I think that the respect and the dignity with which we did that and the fact that we all stayed to do it, sends sort of a message about how we feel . . . . It is . . . a way to say, "Thank you" for that.

*Id.* at 9-10. Mr. Kendall's specificity, and his eloquence on this topic, distinguish him from his predecessors and his colleagues.

February 12, 2012, *The New York Times* became the first major news outlet to publish a front-page article on the risks facing contractors in the battlespace.<sup>163</sup>

Sadly, other media outlets have lost interest in the story, and the public remains largely ignorant of the extent of sacrifice in the contractor community. The news media rarely investigates or reports on these disturbing trends.<sup>164</sup> Regardless of whether the public is more or less sensitive to contractor deaths than military deaths, the fact remains that the public “is much less likely to know about” the contractor deaths.<sup>165</sup> 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.<sup>166</sup> Nevertheless, as the military and the government struggle to determine the appropriate role for, and limits to, outsourcing,<sup>167</sup> it is disconcerting that the public does not know and cannot acknowledge the extent to which contractors have made the ultimate sacrifice.

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 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.<sup>168</sup> 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.<sup>169</sup>

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163. Nordland, *supra* note 50, at A1 (“This is a war where traditional military jobs, from mess hall cooks to base guards and convoy drivers, have increasingly been shifted to the private sector. Many American generals and diplomats have private contractors for their personal bodyguards. And along with the risks have come the consequences: More civilian contractors working for American companies than American soldiers died in Afghanistan last year for the first time during the war.”).

164. Indeed, before 2008, “[f]ew newspapers, and none of the major newspapers, have covered the story.” Schooner, *Why Contractor Fatalities Matter*, *supra* note 86, at 78 n.3. The *Houston Chronicle* was a notable, but rare, exception. See David Ivanovich, *Contractor Deaths up 17 Percent Across Iraq in 2007*, THE HOUSTON CHRONICLE, Feb. 10, 2008, at A1.

165. Avant & Sigelman, *supra* note 31, at 232.

166. *Id.* at 245.

167. See, e.g., Publication of the Officer of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56236 (Sept. 12, 2011).

168. STANGER, *supra* note 147, at 10 (noting that “[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.”).

169. *Id.* at 258 (“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

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 in reaction to prior publications discussing contractor fatalities (e.g., in *The Washington Post* and *ProPublica*).<sup>170</sup>

Some people certainly view contractors as expendable profiteers or adventure seekers who are not entitled to the same respect as military personnel.<sup>171</sup> 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:

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political costs because people care less about contractor deaths.”).

170. See, e.g., Steven Schooner, *Remember Them, Too: Don't Contractors Count When We Calculate the Costs of War?* (May 25, 2009), available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/05/24/AR2009052401994\\_Comments.html](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.”

See also T. Christian Miller, *This Year, Contractor Deaths Exceed Military Ones in Iraq and Afghanistan*, PROPUBLICA (Sept. 23, 2010), available at <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 31, at 256-261.

171. *Id.* Popular culture reinforces these perceptions. In the movie *Clerks* (View Askew Prods. 1994), Dante Hicks (played by Brian O'Halloran) and Randal Graves (played by Jeff Anderson) discuss the implications of independent contractors that were killed with the destruction of the second *Star Wars* Death Star. Randal claimed that “any independent contractors who were working on the uncompleted Death Star were innocent victims when it was destroyed by the Rebels.” CLERKS (View Askew Prods. 1994). A roofer butts into the conversation, retorting that “any contractor working on that Death Star knew the risk involved. If they got killed, it's their own fault.” *Id.*

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.<sup>172</sup>

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. This 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.<sup>173</sup>

The public cannot be expected to make a fully informed decision without full access to complete information. Encouraging transparency to increase 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.<sup>174</sup>

#### 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.

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

173. Avant & Sigelman, *supra* note 31, at 260.

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



Although research conducted by CRS and GAO has increased insight into this complicated analysis, 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 to fund both empirical and survey research inside and outside of the government.

We think it perhaps most important to encourage the media to report responsibly on the true human costs of the government's contemporary military actions.<sup>175</sup> This tally, particularly to the extent that it proves inconsistent with conventional wisdom, is important for the public – and Congress – to grasp, in order to understand 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.<sup>176</sup> In weighing that balance, all lives must be counted.

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175. 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 the exposure ceased during much of the last decade, until President Obama lifted the ban on such images 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 DoD 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. The ban, however, 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. *See, e.g., Return of the Fallen*, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK No. 152 (April 28, 2005), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm> (quoting Begleiter as he lamented that “[h]iding 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.”).

176. 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.