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## Book Review: Outsourcing Sovereignty: Why Privatization Threatens Democracy

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# **Book Review**

## **OUTSOURCING SOVEREIGNTY**

### **by Paul R. Verkuil<sup>1</sup>**

Richard J. Pierce, Jr.<sup>2</sup>

Paul Verkuil's new book, *Outsourcing Sovereignty*, is an important contribution to the debate about the appropriate roles of public agencies and private contractors in governing the nation. Verkuil begins by tracing the modern history of the trend toward privatization of governmental functions from Iran Contra to private prisons, to Katrina and Iraq.<sup>3</sup> He then paints an ugly picture of excess that includes too many private contracts, contracting out of functions that should be retained in house, too many no-bid contracts, and too few government employees to draft and negotiate the contracts and to monitor the performance of the growing army of contractors. The book focuses primarily on outsourcing of military and other national security functions.

#### **I. Problems Created by Outsourcing**

After he discusses the modern history of privatization, Verkuil describes, explains, and documents the problems that excessive and poorly-implemented privatization is causing. He begins by describing the scope and recent growth of the outsourcing phenomenon: "During the period FY 2000 to FY 2005, the value of federal contracts increased by 86% (from \$203 billion to \$377 billion) and the value of

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<sup>1</sup> Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It*, Cambridge University Press (2007).

<sup>2</sup> Lyle T. Alverson Professor of Law, George Washington University. I am grateful to Graham Fuller and Polly Nayak for providing helpful comments on an earlier version of this review.

<sup>3</sup> Verkuil, *supra*. note 1, at 1-56.

noncompetitive contracts increased by 115% (from \$67 billion to \$145 billion).”<sup>4</sup> He then explains why outsourcing of government functions can cause a variety of major problems unless it is implemented with great care. The results can include conflicts of interest, poor performance of important governmental functions, and sacrifice of important public values.<sup>5</sup>

Verkuil describes the safeguards that are essential to obtain acceptable results in contracting out governmental functions.<sup>6</sup> They include discriminating carefully between functions that are well-suited to outsourcing and functions that are not, minimizing the number of no-bid contracts, careful drafting and negotiation of contracts; and vigilant monitoring of the performance of contractors. Verkuil documents major shortfalls in each area – contracting out of inherently sovereign functions like interrogation of prisoners; profligate use of no-bid contracts; poorly-drafted incomplete contracts; and, contractor monitoring that is inadequate both quantitatively and qualitatively.<sup>7</sup> The number of DOD contracting officers has declined by 38% over the same five-year period in which the value of contracts entered into by DOD has nearly doubled; GAO found that 52% of DOD contracts suffered from the adverse effects of inadequate monitoring; and the level of government staffing proposed by the Bush Administration for the future would create a ratio of 1 government employee for every 12 to 15 employees of private contractors.<sup>8</sup>

Moreover, drafting government contracts, negotiating with prospective contractors, and monitoring the performance of contractors requires a skill set that is

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<sup>4</sup> Id. at 140.

<sup>5</sup> Id. at 140-152.

<sup>6</sup> Id. at 57-152.

<sup>7</sup> Id. at 140-152.

<sup>8</sup> Id. at 148, 161.

increasingly scarce in the federal workforce.<sup>9</sup> The federal government cannot increase its reliance on outside contractors with satisfactory results unless it increases significantly the number of federal employees with the education and experience required for effective drafting, negotiating, and monitoring. Yet, the number of federal employees with the combination of skills required to perform those critical functions effectively is declining rapidly from a base that was already inadequate.<sup>10</sup> As a result, Verkuil identifies situations in which the government has hired a contractor to monitor the performance of another contractor that is, in turn, responsible for monitoring the performance of other contractors.<sup>11</sup>

Verkuil does an excellent job of documenting a serious problem. At times, however, he goes too far in attributing bad things to the increasing tendency to contract out important government functions. Thus, for instance, he refers repeatedly to the mistreatment of prisoners at Abu Ghraib and elsewhere, to U.S. rendition of prisoners to countries that are known to (and expected to) torture prisoners, and to the secret prisons the U.S. is believed to be operating in eastern Europe.<sup>12</sup> I share Verkuil's revulsion at these insults to the values of the United States, but they have virtually nothing to do with outsourcing. Verkuil links the practices to contractors by referring to Seymour Hersh's revelation that employees of private contractors were involved in the interrogation process at Abu Ghraib.<sup>13</sup> I would love to believe that torture, other forms of prisoner abuse, extraordinary rendition, and secret prisons are attributable primarily to poorly-supervised rogue contractors. They are not. The private contractors have been operating

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<sup>9</sup> Id. at 149-150, 159-162, 173-174.

<sup>10</sup> Id. at 149-150, 159-162, 172-174.

<sup>11</sup> Id. at 6, 149.

<sup>12</sup> Id. at 27-28, 30, 41-42, 129-130, 147, 190.

<sup>13</sup> Id. at 27.

under the direction and close supervision of government employees. As this story continues to unfold, it is becoming clear that each of these contemptible forms of behavior had its roots in government employees, including elected officials, political appointees, and career senior civil servants and military officers.<sup>14</sup> Indeed, that is the main point Hersch makes in his reporting on this subject.<sup>15</sup> Indiscriminate and poorly-implemented outsourcing of government functions is causing many serious problems, but it is far from the only source of problems in our governance structure.

## **II. Proposed Legal Remedies**

As Verkuil recognizes, it is not easy to identify good remedies for the problems he documents. Verkuil emphasizes repeatedly that privatization can have socially-beneficial effects, and that he favors its use in many contexts.<sup>16</sup> He devotes an entire chapter to a well-reasoned argument that we made a mistake when we removed the airport security function from private contractors and took it in house in the wake of 9/11.<sup>17</sup> He argues persuasively that the European approach to airport security – reliance on carefully supervised private contractors – is better than our new approach of exclusive reliance on government employees.

Verkuil characterizes the root of the problems he documents as a function of lack of “balance” in our efforts to create an appropriate mix of public and private employees

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<sup>14</sup> See, e.g., Jack Goldsmith, *The Terror Presidency* (2007) (the infamous torture memos issued by the Office of Legal Counsel were written at the urging of the Vice President in an effort to protect government employees from potential criminal and civil liability for engaging in conduct that most people believe to be a clear violation of domestic and international law.) The CIA Director has repeatedly defended the agency’s use of “enhanced interrogation” techniques. He claims that they do not qualify as torture, but he refuses to describe them. See, e.g., Associated Press, *McConnell Defends Interrogation Tactics* (July 24, 2007), posted on Military.com, last visited September 25, 2007.

<sup>15</sup> E.g., Seymour Hersh, *The General’s Report*, *New Yorker*, June 17, 2007); Seymour Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis, How Far Up Does the Responsibility Go?* *New Yorker*, May 10, 2004.

<sup>16</sup> Verkuil, *supra*. note 1, at 6, 68.

<sup>17</sup> *Id.* at 57-77.

to perform government functions.<sup>18</sup> Thus, the problem is one of degree – we have too many contractors performing too many functions with too little supervision. Problems of degree are difficult to solve through use of legal remedies.

Verkuil recognizes that no single remedy is likely to be effective alone. He urges consideration of a rich mixture of remedies of different types. He includes in the mix at least a dozen legal remedies. Unfortunately, each of the legal remedies Verkuil proposes falls in one of three categories – unsupportable, inapplicable, or ineffective. I will illustrate each category by describing two proposals that fall within each.

### **A. Unsupportable Legal Remedies**

Verkuil argues that some functions are inherently governmental and cannot be assigned to private contractors.<sup>19</sup> He argues that courts should apply separation of powers principles to prohibit the President from delegating inherently governmental functions to private entities. He focuses primarily on military functions. Thus, he calls “the phrase ‘private military’ an oxymoron offensive to our Constitution.”<sup>20</sup> He characterizes the “private military” as “a post-Vietnam phenomenon” that was “largely unknown a decade ago.”<sup>21</sup> That characterization is inaccurate. For the first century of the existence of the United States we relied primarily on private contractors to perform military functions.<sup>22</sup> Thus, we have not embarked on a radical new venture; we have returned to our historical practice. There is no chance that the Supreme Court will hold unconstitutional a practice that was the norm from 1789 until the 1890s.

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<sup>18</sup> Id. at 8-9.

<sup>19</sup> Id. at 103-105.

<sup>20</sup> Id. at 104.

<sup>21</sup> Id. at 24, 26.

<sup>22</sup> Nicholas Parrillo, *The De-Privatization of American Warfare*, 19 *Yale J. L. & H.* \_\_\_\_ (2007).

Verkuil also argues that the Appointments Clause precludes the government from delegating any “significant authority” to a private entity, with significant authority defined broadly to include many of the functions that the government is now outsourcing.<sup>23</sup> He recognizes, however, that his expansive definition of “significant authority” is inconsistent with the power conferred on qui tam relators in the False Claims Act. Thus, this proposed remedy is not available unless the Supreme Court is prepared to hold that the False Claims Act violates the Appointments Clause. On this point, Verkuil is engaged in a quixotic fight against both history – the False Claims Act is almost as old as the Constitution – and precedent – the Supreme Court unanimously upheld the False Claims Act over a challenge based on the Case or Controversy Clause,<sup>24</sup> and every circuit court that has addressed the question has upheld it over a challenge based on the Appointments Clause.<sup>25</sup>

## **B. Inapplicable Legal Remedies**

Some of the legal remedies Verkuil proposes are well-supported but are not applicable to any of the outsourcing Verkuil discusses. Verkuil argues that due process precludes the government from delegating regulatory functions to private parties that have conflicts of interest.<sup>26</sup> He provides good support for that argument, in the form of the Supreme Court’s opinion in *Carter v. Carter Coal*.<sup>27</sup> I am not aware of anything the government is doing at present that falls afoul of that important prohibition, however, and

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<sup>23</sup> Verkuil, *supra*. note 1, at 106-112.

<sup>24</sup> *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000).

<sup>25</sup> *United States ex rel Stone v. Rockwell International Corp.*, 282 F.3d 787 (10<sup>th</sup> Cir. 2002); *Riley v. St. Luke’s Episcopal Hospital*, 252 F.3d 749 (5<sup>th</sup> Cir. en banc 2001).

<sup>26</sup> Verkuil, *supra*. note 1, at 105-106.

<sup>27</sup> 298 U.S. 238 (1936).

Verkuil does not attempt to apply the prohibition to any of the government actions that he criticizes.

Verkuil also makes a well-supported argument that “the Secretary of Defense cannot delegate the power to conduct the war in Iraq to the Rand Corporation.”<sup>28</sup> He acknowledges, however, that this is a “far-fetched scenario” that bears no resemblance to the manner in which the government is using contractors in Iraq or anywhere else.<sup>29</sup>

### **C. Ineffective Legal Remedies**

Verkuil also urges use of remedies that are well-supported and that clearly apply, but that are ineffective at present. He discusses in some detail both the process of applying Circular A-76<sup>30</sup> – the official criteria that govern the scope of the functions that can be contracted out – and the Federal Acquisition Regulations (FAR)<sup>31</sup> – the rules that govern the process of contracting out and oversight of government contractors. He concludes that neither process is effective at present, but that both offer the promise of becoming more effective in the future with some combination of changes in institutional structure and staffing.

### **III. Proposed Structural and Staffing Remedies**

More broadly, Verkuil recognizes throughout the book that no legal regime can be effective in reducing the serious problems he identifies unless it is accompanied by changes in the structure and staffing of the government. He urges adoption of four such changes as remedies for the problem – reduced use of political appointees, government

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<sup>28</sup> Verkuil, *supra*. note 1, at 121-122.

<sup>29</sup> *Id.* at 122.

<sup>30</sup> *Id.* at 124-132.

<sup>31</sup> *Id.* at 146-152.



reorganization, increases in the number of highly talented government employees, and increases in military personnel.

#### **A. Reduced Use of Political Appointees**

Verkuil documents an enormous increase in the number of political appointees in the federal government – a ten-fold increase over the past forty years and a four-fold increase over the last decade.<sup>32</sup> He refers to a recent study that finds that career government employees outperform political appointees as managers, and he urges a reversal of the trend toward increased reliance on political appointees as a means of improving both the performance of agencies and the morale of senior bureaucrats.<sup>33</sup> Verkuil supports this proposal well and links it in important ways to the problems created by over-reliance on contractors. It will be hard to convince Presidents and their political appointee agency heads to reduce the number of political appointees in government, but it may not be impossible. I have had conversations recently with two agency heads who converted senior positions from political appointee status to career government employee status because of their beliefs that they could recruit and retain better managers with such a change.

It is important to recognize the values of political appointees and to balance those values against the disadvantages of undue reliance on political appointees in implementing this promising reform, however. At one point, Verkuil criticizes the Bush Administration for placing “political appointees in positions of power over career officials.”<sup>34</sup> That criticism is misplaced.<sup>35</sup> In a Democracy, all career officials *must* be

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<sup>32</sup> Id. at 164.

<sup>33</sup> Id. at 165-169.

<sup>34</sup> Verkuil, *supra*. note 1, at 168.

subject to supervision by political appointees; the Appointments Clause explicitly requires such a hierarchical structure in our form of Democracy.<sup>36</sup>

Political appointees have other values as well. Verkuil refers repeatedly and critically to politically-appointed Ambassadors to illustrate his point.<sup>37</sup> Any head of state, however, would prefer to have a politically-appointed U.S. Ambassador, rather than a career FSO Ambassador, for good reason. Ambassadors who are career FSOs are more competent on average than politically-appointed Ambassadors, but they usually have little ability to influence U.S. decisionmaking. A career FSO Ambassador can communicate with the White House only through the elaborate chain of command established by the Secretary of State. Most politically-appointed Ambassadors have personal relationships with the President that allow them to engage in far more effective direct communication with the White House.

Political appointees in domestic agencies have similar advantages over career government employees. A political appointee usually can do battle with OMB over both policy decisions and important issues involving the agency's budget and staffing more effectively than can a career government employee. I agree with Verkuil's proposal to reduce our present excessive reliance on political appointees, but we must do so in a

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<sup>35</sup> Verkuil refers to Executive Order 13422 to illustrate the problem he characterizes as placement of political appointees above career officials. *Id.* at 168. That Executive Order requires each agency to designate a Regulatory Policy Officer (RPO) without whose approval an agency cannot take major policy actions. As Peter Strauss has explained, the problem created by this change in structure is attributable to the fact that the RPO is not accountable to the agency head, even though Congress has designated the agency head as the individual with the power to make the policy decisions at issue. Peter Strauss, *Overseer or Decider: The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696 (2007). Both agency heads and RPOs are political appointees, so the Executive Order reallocates power among political appointees, not between career officials and political appointees.

<sup>36</sup> See Richard Pierce, *Morrison v. Olson*, Separation of Powers, and the Structure of Government, 1988 *Sup Ct. Rev.* 1 (1988).

<sup>37</sup> E.g., *id.* at 191.

manner that recognizes and balances the advantages and disadvantages of both types of government employees.

## **B. Government Reorganization**

Verkuil shares Paul Volker's belief that government reorganization is essential to the success of any effort to reduce our excessive reliance on private contractors and to obtain better control over the contractors we need to use to perform important functions. He describes and supports numerous reorganization proposals made by Volker.<sup>38</sup> However, Verkuil also illustrates why it is devilishly difficult to identify and to implement beneficial reorganizations and the high risk that a superficially-appealing reorganization will have unintended severe adverse effects.

Verkuil notes that Volker initially praised the creation of the Department of Homeland Security (DHS) as a model of the type of reorganization that is likely to produce the kinds of beneficial results that Verkuil and Volker seek.<sup>39</sup> But Verkuil seems to share my strong belief that the creation of DHS has been a disaster – literally as well as figuratively, given its role in destroying FEMA's ability to respond effectively to a natural disaster like Katrina. I doubt that reorganization has much potential to improve the situation on the margins that Verkuil (and I) care about, and I am certain that it has the potential to create severe unintended adverse effects.

I share Verkuil's respect for Volker, but I marvel at Volker's naive belief that creation of DHS would have beneficial effects. Creation of DHS placed under several additional levels of bureaucracy 22 agencies, most of which were performing quite well and each of which had a unique and complicated culture and mix of missions. That was a

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<sup>38</sup> Id. at 161-178.

<sup>39</sup> Id. at 163-164.

prescription for disaster, and we are paying a high price for that serious misstep. The most beneficial government reorganization we could implement today is to eliminate DHS.

### **C. Increases in Highly Skilled Government Employees**

Verkuil repeatedly refers to the growing scarcity of highly skilled government employees as a major source of the serious problems that he documents.<sup>40</sup> That increasing shortage contributes to the problem in two ways. First, the inadequate number of government employees who have the education and experience needed to perform many critical governmental functions creates an increasing need to turn to private contractors to obtain access to those critical skills. Second, as we increase our reliance on private contractors, we create a growing need for the highly skilled people who can effectively, draft and negotiate government contracts and monitor the performance of contractors. It follows that the government needs to recruit and retain more such highly skilled people.

Verkuil is not explicit on this point, but he seems to recognize implicitly that large increases in the high end of the range of government salaries are essential to further this laudable goal. Any such proposal is unlikely to overcome the formidable political obstacles to its adoption, however. In a Democracy in which most people make far less money than the top end of the government employee salary scale, it may simply be impossible for the government to pay salaries that are competitive with the private sector. Every year, the Chief Justice of the United States submits an Annual Report on the State of the Judiciary. Every year, that Report documents the massive and growing disparity between judicial salaries and the salaries of individuals with comparable education and experience in the private sector.

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<sup>40</sup> Id. at 149-150, 159-162, 173-174.

In his 2006 Annual Report, Chief Justice Roberts characterized the situation as a constitutional crisis.<sup>41</sup> Law clerks to Supreme Court Justices – individuals in their 20s with no experience – get starting salaries in the private sector that match the salaries of the Justices, and partners in major law firms make over five times the salary of a Supreme Court Justice. Every year Congress refuses to take the actions needed to close the yawning gap between judicial salaries and private sector salaries.

Similar disparities exist with respect to many of the other highly skilled people required to perform critical government functions. I am not convinced that the gap between judges' salaries and private sector salaries has created a crisis. It may be that the prestige of becoming a federal judge or Justice, typically after accumulating considerable wealth in the private sector, is enough to offset the below-market salary and to allow the government to continue to recruit and to retain enough highly skilled lawyers to perform the judicial function.

I am much more concerned about the government's ability to recruit and to retain the thousands of highly skilled people needed to perform other critical government functions. The labor pool available for those jobs does not include large numbers of people who have already accumulated wealth in private sector jobs, and taking a position as a government scientist or expert on finance does not boost an individual's status to the extent that a judicial appointment does. Thus, the government can recruit and retain the highly skilled people it needs to perform many critical functions only by increasing significantly the high end of the government salary scale, and I am not optimistic that Congress can be persuaded to enact into law a new salary structure with a high end that allows government to compete effectively with the private sector to hire and to retain the

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<sup>41</sup> Chief Justice John Roberts, 2006 Year End Report on the Federal Judiciary (Jan. 1, 2007).

kind of workforce the government needs today to perform most government functions in house.

#### **D. Increases in Military Personnel**

The problems that Verkuil identifies arise in extreme forms in the context of the military. He is particularly concerned about the growing reliance on contractors in that context. He proposes to remedy the problem by bringing back the draft. In fact, he proposes to expand the scope of the draft beyond the military to create “a twenty-first-century Civilian Conservation Corps. . . .”<sup>42</sup> I am not sure how seriously to take this proposal. At one point, he characterizes it as “a serious option that must be evaluated as the volunteer ranks are further strained.”<sup>43</sup> Yet in another place he calls it “a political nonstarter.”<sup>44</sup> He also refers to the possibility of other more modest steps in the same general direction, e.g., expanding the ROTC program and creating a civilian counterpart to the military academies to train career government employees.<sup>45</sup>

I agree with Verkuil’s assertion that the draft, in either its purely military form or expanded to create a general national service requirement, is “a political nonstarter.” I am not saddened to say that. For reasons that I will describe in the last section of this review, I would not welcome a return of the draft. Verkuil’s more modest suggestions may have some beneficial effect. I am pleased to see some elite universities welcome ROTC back to their campuses after they expelled it during the Vietnam War.<sup>46</sup> An expanded ROTC program has some potential to increase the population of career military officers.

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<sup>42</sup> Verkuil, *supra.* at 174-176.

<sup>43</sup> *Id.* at 175.

<sup>44</sup> *Id.* at 176.

<sup>45</sup> *Id.* at 176-178.

<sup>46</sup> See, e.g., the discussion of the expulsion and return of ROTC on the Princeton University website, last visited on Sep. 25, 2007. But see the discussion of President Bollinger’s decision refusing to allow ROTC to return on the Columbia University website, last visited on Sep. 25, 2007.

Verkuil's proposed public service academy also has some potential to expand the population of talented career civilian government employees, though I fear that most of its graduates will replicate the pattern of behavior of most graduates of the military academies – take the excellent free education and leave government for higher paying jobs in the private sector as soon as legally possible.

#### **IV. Viewing the Problem Through a Different Prism**

I have acknowledged the validity of Verkuil's description of the serious problems we are now experiencing as a result of excessive reliance on private contractors to perform governmental functions and expressed skepticism about the viability and/or efficacy of many of his proposed solutions. Yet, I do not have a sense of despair about the future of the Republic. I have a relatively sanguine perspective on the future for four reasons.

First, I believe that we must accept the reality that the U.S. must rely more heavily on private contractors today and in the foreseeable future than we have historically. The number of government functions that can only be performed effectively by highly skilled people is increasing steadily. The market for such highly skilled people has changed to the point at which the salaries they can command in the private market vastly exceed the maximum salary the government can pay. Yet, I see no possibility that Congress will respond to those changes in labor market conditions by increasing the upper end of the government salary scale to the point at which the government can hire enough people to perform all government functions with government employees. I suspect that each of these trends will continue, with inevitable results – a continuing

increase in the proportion of the federal workforce that consists of contractors' employees.

Second, I believe that future Presidents can, and will, take a more balanced approach to privatization than has President George W. Bush. To some extent, our current excessive reliance on poorly-supervised private contractors is a result of discretionary decisions taken by the Chief Executive and his Administration. Eventually, President Bush will be replaced by a President who is less ideological and who has better judgment. I hope the new President (or more realistically, some of his key advisors) read Verkuil's excellent book and use it as a valuable tool to diagnose a serious problem. He (or she) may then make good use of some of Verkuil's proposed remedies, such as more effective applications of FAR and Circular A-76, decreased use of political appointees, expansion of ROTC, and increased recruitment and training of contracting officers. I have little doubt that a less ideological President with better judgment can and will implement some combination of remedies that will at least reduce the scope and severity of the problems Verkuil documents.

Third, the worst of the excesses Verkuil describes can be avoided simply by refusing to insulate government contractors and their employees from potential civil and criminal liability. As Verkuil notes, "Contractors, after all, cannot be ordered to perform nor disciplined for refusing to do so."<sup>47</sup> Verkuil relies on that important difference between government employees and contractors as one of the bases for his critique of our use of contractors to perform military and other national security functions. Yet, that difference between government employees and contractors has advantages that may outweigh its disadvantages.

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<sup>47</sup> Id. at 50.



A rogue President can do far more damage than can a rogue contractor. As all contractors know, a President cannot unilaterally confer on a contractor or its employees immunity from civil and criminal liability for violations of law.<sup>48</sup> That is why telecommunications firms refused to comply with exhortations from President Bush to engage in arguably illegal wiretapping that was not authorized by Congress.<sup>49</sup> Thus, the inability to force contractors to do what government employees can be ordered to do is an *advantage* of relying on private contractors to perform many military and other national security functions. It provides one of the few practical means through which Congress can maintain some degree of control over a rogue President. Congress need only refuse to confer immunity on contractors and their employees for engaging in illegal conduct to exercise this important check on potential excesses engaged in by the Executive Branch.

Finally, there is another major advantage of our heavy reliance on contractors to perform military functions. To explain this advantage, I will begin by summarizing the history of the U.S. performance of military functions from 1789 until the 1890s.<sup>50</sup> For the first century of its existence, the U.S. relied primarily on private contractors to perform military functions. This practice produced the same types of criticisms as those Verkuil voices with respect to our present heavy reliance on contractors to perform military functions. Yet, the political leaders of the U.S. during this period resisted the call to create a substantial public military establishment because of their fear that such an action

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<sup>48</sup> See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (official Executive Branch encouragement to engage in conduct that violates the Sherman Act is no defense in a criminal antitrust proceeding.) In the case of illegal conduct undertaken by contractors in countries that are occupied by the U.S. but that are putatively independent, even a conferral of immunity by the U.S. Congress may not be sufficient to protect the contractor and its employees from civil and criminal liability. If the legislature of the occupied country refuses to confer immunity on the contractor, it confronts a powerful deterrent to illegal conduct in the form of potential civil and criminal liability. See, e.g., James Glanz & Sabrina Tavernise, *Security Company Faces Iraqi Criminal Charges*, *New York Times* A1 (Sep. 23, 2007).

<sup>49</sup> James Risen, *Warrantless Wiretaps Not Used, Official Says*, *New York Times* A14 (Sep. 19, 2007).

<sup>50</sup> This summary is based on Parrillo, note 22 *supra*.

would threaten Democracy – basically the opposite of the causal relationship that now concerns Verkuil.

The U.S. finally abandoned its primary reliance on private contractors to perform military functions and created a substantial public military in the 1890s. The U.S. embarked on that then-radical path at the urging of the Hearst Publishing Company. The case for creation of a public military establishment was simple and straightforward – by the 1890s, the U.S. had finally realized its “manifest destiny” of taking most of North America from Indian Tribes, Mexico, and Great Britain. Yet, according to the extraordinarily influential Hearst newspapers, the U.S. needed to continue to expand, and it could not extend its range of influence beyond North America without a substantial public military. The public found the Hearst argument persuasive, and the government created for the first time a substantial public military. Within the next few years, the U.S. used its new-found military capability to invade Cuba, Puerto Rico, Guam, the Caroline Islands, and the Philippines.

I will return to the lessons of the nineteenth century after I recount a conversation with one of the smartest people I know -- Graham Fuller. Fuller had a long and distinguished career at the CIA, including Chief of Station in several major countries and Vice Chair of the National Intelligence Council in the Reagan Administration. After he retired from CIA, he continued to provide strategic advice to the government in his new capacity as a Senior Political Scientist at Rand Corporation. He also took advantage of his new-found freedom to write a series of books that are required reading in international relations courses at numerous universities.<sup>51</sup> His languages include Russian, Chinese,

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<sup>51</sup> E.g., Graham Fuller, *The Future of Political Islam* (2004).

Arabic, Turkish, Farsi, and several European languages. Fuller now lives as an expatriate in Canada, where I visited him a few months ago.

Fuller believes that the U.S. has developed an inherently imperialistic culture.<sup>52</sup> I have given a lot of thought to Fuller's concern. I have come away from that exercise with a perspective that differs only slightly from Fuller's. I believe that the U.S. has an underlying tendency toward imperialism that manifests itself episodically. There is solid support for the belief that the U.S. had imperialistic tendencies in the nineteenth century and that it has those tendencies in the twenty-first century, but there is little evidence to support that belief in the twentieth century. I believe that the awful results of World War I provided a source of caution that suppressed the U.S. tendency toward imperialism during the 1920s and 1930s, and that the stalemate in Korea, the defeat in Vietnam, and fear of nuclear war with the Soviet Union suppressed that tendency during most of the balance of the century. Toward the end of the twentieth century, however, the U.S. "victory" over the Soviet Union in the cold war, and its emergence as the only global superpower gave Washington a taste for broader domination of the world scene – an ambition seen by many as imperialistic and embraced by democrats as well as republicans.

When I combine the history of the U.S. military in the nineteenth century, with Fuller's concern, and with recent U.S. military adventures, I conclude that the U.S. is better off with its present heavy reliance on private contractors to perform military functions than if the U.S. had the much more robust military capability it would have with a draft-supported public military. We have invaded and occupied two countries in

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<sup>52</sup> Conversation with Graham Fuller in Squamish, British Columbia (Aug. 7, 2007).

the last five years. We have botched both efforts<sup>53</sup> even though we have made extensive use of private contractors to perform essential military functions.<sup>54</sup> The U.S. military failures in Iraq and Afghanistan are attributable to a considerable extent to inadequate forces available to perform the missions. Thus, as Verkuil accurately describes, U.S. failure in Iraq and Afghanistan is largely due to the combination of downsizing the military and outsourcing military functions to private contractors.

The obvious inadequacy of our military resources to occupy a foreign country effectively also has a major advantage, however. If we believed that we had military resources sufficient to occupy effectively multiple countries, I believe that we would have done so. I suspect that we would have invaded and occupied somewhere between three and six countries over the past five years if we believed that we had the military resources to do so effectively.<sup>55</sup> Since I believe that those actions would have been extremely bad for both the country and the rest of the world, I am delighted that we lack the resources to indulge our cultural tendency to invade and to occupy countries that displease us.

I do not want the U.S. to take actions like bringing back the draft that would increase our ability to indulge our tendency toward imperialism. We are dealing here with the socially-beneficial version of the law of unintended consequences. By downsizing and privatizing our military, we have deprived ourselves of the ability to take actions that we should not take but that we would be tempted to take if we had the ability to do so. As

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<sup>53</sup> See, e.g., Tom Ricks, *Fiasco* (2006) (detailing the U.S. failure to provide adequate security in Iraq); John Sifton, *We're Losing the War in Afghanistan Too*, Salon (Aug. 21, 2003) (detailing the U.S. failure to provide adequate security in Afghanistan).

<sup>54</sup> John Burns, *The Deadly Game of Private Security*, New York Times Outlook Section page 1 (Sep. 23 2007) (characterizing the work of private security firms in Iraq as “indispensable”).

<sup>55</sup> The most likely candidates for additional invasions and occupations were Iran, North Korea, Syria, and Pakistan.

much as I share Verkuil's displeasure at the manner in which private contractors are performing many military and other national security functions, I believe that problem to be both more tolerable and more manageable than the problems the U.S. would have if the public believed that the U.S. military has the ability to invade and to occupy effectively multiple countries whose policies and beliefs displease us.