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PRIVATE MILITARY CONTRACTORS: THE ARMED FORCES ABSENT FROM THE WAR POWERS RESOLUTION

McKINNEY VOSS WHEELER*

Private military contractors (PMCs) are increasingly ubiquitous in international conflicts, providing security, transport services, and even fighting alongside commissioned troops in battle. Yet for the United States, the ambiguity surrounding PMCs' role in war presents a serious threat to the constitutional balance of war powers. The Founding Fathers deliberately divided those powers between the executive and legislative branches, aware of the dangers of concentrating them too heavily; and Congress further clarified protocol with the War Powers Resolution in 1973. But the War Powers Resolution, which requires the President to notify Congress when engaging "U.S. Armed Forces" in battle, omits any reference to PMCs—a loophole the executive could exploit to take action abroad without Congressional knowledge or approval. Congress must either revise the War Powers Resolution to include PMCs or else pass new legislation regulating their use if it hopes to prevent executive overreach and an increasing reliance on hired guns to fight America's battles.

*Law Clerk to the Honorable Stephen Alexander Vaden, United States Court of International Trade. The views expressed in this article are solely my own, and do not reflect the views of my employer or the United States Government. My warm thanks go to Professor Eric Jensen for his insights and encouragement, with respect both to this Article and to the broader world of legal academia. I am also grateful to the editors of the American University National Security Law Brief for their time and efforts in preparing this piece for publication.

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INTRODUCTION

20,000 private military troops sat in Libya on February 27, 2021.¹ Their continued presence waning on throughout 2021 has prompted calls from United Nations human rights experts for their departure as end-of-year elections approach.² Hailing from non-government groups based in Russia, Turkey, and elsewhere, these troops represent a threat to the tenuous peace talks in the state.³ And on a broader scale, they represent a shift from public to private control of defense and security forces across the globe in the three decades since the end of the Cold War. The extent to which this shift is alarming is a philosophical and policy question that will play out in legislatures, executive offices and international courts as the world adjusts. But for the United States, increased reliance on private military contractors (PMCs)⁴ sparks important questions of constitutionality, congressional oversight, and allocation of war powers.⁵ As other scholars have recognized, outsourcing military services to contractors implicates “significant problems of accountability.”⁶

The War Powers Resolution (WPR) of 1973 was a legislative attempt to reassert constitutional authority to declare war by requiring executive consultation anytime “United States

¹ Greg Miller, Missy Ryan, Sudarsan Raghavan & Soad Mekhennet, *At The Mercy of Foreign Powers*, WASH. POST (Febr. 27, 2021), <https://www.washingtonpost.com/world/interactive/2021/libya-civil-war-russia-turkey-fighter-planes/>.

² *Mercenaries and Related Private Contractors Must Leave Libya to Pave Way for Peace, Elections – UN Experts*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Jul. 30, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27351&LangID=E>.

³ *Id.* (“[M]ercenary related private contractors’ . . . continued recruitment and presence in Libya impedes progress in the peace process and constitutes an obstacle for the upcoming elections.”).

⁴ Many different terms are used to describe this group in academic literature and by government agencies. These terms include Private Military Contractors or Companies (PMCs), Private Security Contractors (PSCs), Private Military Security Contractors or Companies (PMSCs), and Private Military Forces (PMFs). All are correct, but for the sake of simplicity, this Article will refer to privately employed, non-government commissioned security forces or soldiers as Private Military Contractors (PMCs). *See infra* Section I for a more complete definition of PMCs.

⁵ Laura A. Dickinson, *Outsourcing Covert Activities*, 5 J. NAT’L SEC. L. & POL’Y 521, 522 (2012) (“The ever-expanding use of private contractors threatens core public values because the mechanisms of accountability and oversight that the United States has generally used to curb abuses by government employees generally do not translate well to contractors . . . Yet outsourcing as it is currently practiced threatens . . . the commitment to have some degree of transparency and public participation in decisions to pursue aggressive activities abroad.”).

⁶ Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 417 (2013) (“Traditional public governmental mechanisms of regulation and accountability, as well as accountability through litigation, are often inadequate or unavailable [to regulate private contractors].”).

Armed Forces”⁷ are introduced to “hostilities.”⁸ Without statutory definitions, these terms have been left to interpretation by past practices and competing proffered meanings.⁹ Accordingly, recent administrations have argued, for example, that their interventions aren’t governed by the WPR because the alleged conflict doesn’t rise to the level of hostilities.¹⁰ But in the discussion of PMCs, the definition that matters most is what exactly the WPR means by the “U.S. Armed Forces.” If, as understood by common convention and as statutorily defined elsewhere, the “U.S. Armed Forces” refers to “the Army, Navy, Air Force, Marine Corps, Space Force and Coast Guard,”¹¹ the term does not appear to encompass the use of private, independent military contractors. If so, that loophole combined with the availability of and rising reliance upon PMCs in the United States and across the world creates a ready opportunity for the executive to intervene in foreign conflicts without restraint by typical procedural formalities. Indeed, it raises the possibility that the President could commit U.S. national resources through proxy forces to hostilities without any legislative requirement to notify or consult with Congress—a dangerous precedent reminiscent of the deception rampant during the Vietnam War that prompted passage of the WPR in the first place.¹²

⁷ “United States Armed Forces” is the specific term used in the War Powers Resolution (WPR) to describe commissioned U.S. troops. This Article occasionally shortens the term to “U.S. Armed Forces” but always capitalizes it when analyzing the term specifically referenced in the WPR. This Article also uses the terms “U.S. troops” “U.S. forces” and “commissioned U.S. troops” interchangeably to refer generally to commissioned military forces of the United States; those terms should be understood to refer to the same group as “United States Armed Forces” as described in the War Powers Resolution and elsewhere in U.S. Code.

⁸ War Powers Resolution, 50 U.S.C. §§ 1541-1549, 1541 (1973).

⁹ J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U.L.J. 57, 57 (2007) (describing how executive branch policymakers and legal counsel seek to “interpret—and frequently avoid—the requirements of the War Powers Resolution”).

¹⁰ *Separation of Powers - War Powers Resolution - Obama Administration Argues That U.S. Military Action in Libya Does Not Constitute “Hostilities”*, 125 HARV. L. REV. 1546, 1549 (2012) (“[T]he ‘unusual confluence’ of variables in Libya led the Administration to conclude that it did not ‘constitute the kind of ‘hostilities’ envisioned by the [WPR]’”); *Libya and War Powers: Hearing Before the S. Comm. on Foreign Rels.*, 112th Cong. 7-40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep’t of State).

¹¹ 10 U.S.C. § 101(a)(4).

¹² Awareness of this phenomenon is slowly permeating the general public. As articulated by a 2016 article in *The Atlantic*, “contractors don’t count as ‘boots on the ground.’ Congress does not consider them to be troops, and therefore contractors do not count against troop-level caps in places like Iraq. The U.S. government does not track contractor numbers in war zones. As a result, the government can put more people on the ground than it reports to the American people, encouraging mission creep and rendering contractors virtually invisible.” Sean McFate, *America’s*

Though there is currently no evidence that a United States executive has used this loophole as an opportunity to engage U.S. resources without committing the “Armed Forces,” the potential is alarming. PMCs, with less accountability to a national government¹³ and the disciplinary processes of official military forces, have been guilty of shocking human rights violations in recent conflicts—which has the potential to seriously undermine the international reputation of the United States where the PMCs are American corporations.¹⁴ At the domestic level, the loophole also undermines the purpose of the War Powers Resolution, and creates dangerous incentives for the executive to evade congressional oversight. This Article argues that only proactive legislative efforts can address the current deficiencies in the War Powers Resolution created by this loophole. Indeed, Congress *must* act, to restore balance to the constitutional allocation of war powers and thus limit very possible future executive abuse.

This Article begins by examining the background and text of the War Powers Resolution, its track record in successfully regulating constitutional war powers, and the role of PMCs in U.S. military conflicts to date. It turns next to the question of whether PMCs are included in the statutory scheme of the War Powers Resolution, and upon determining that there is no strong basis for their inclusion, evaluates the possible real-life consequences created by that statutory ambiguity. Finally, this Article argues that congressional action is necessary to maintain a proper balance of war powers

Addiction to Mercenaries, ATLANTIC (Aug. 12, 2016), <https://www.theatlantic.com/international/archive/2016/08/iraq-afghanistan-contractor-pentagon-obama/495731/>.

¹³ See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 141 (2005) (“[P]rivatization may take constitutional norms out of the question domestically (leading to a dramatically reduced scope of accountability.”).

¹⁴ *Blackwater Sentencing—UN Experts on Mercenaries Call for International Regulation of Private Security*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Apr. 14, 2015), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15840&LangID=E> (“‘Justice is served in this case but must be assured globally,’ the United Nations Working Group on the use of mercenaries has said today, reiterating its call for global regulation of private military and security companies (PMSCs). ‘The outsourcing of security to these firms by States creates risks for human rights, hence the need to regulate their activities,’ they said.”).

in the United States and prevent possible executive overreach. Congress should either revise the WPR or pass new legislation to curtail and regulate the use of paramilitary forces.

I. THE BALANCE OF WAR POWERS AND ROLE OF PMCs

Understanding the background and purpose of the War Powers Resolution is a prerequisite to establishing the role of PMCs within the constitutional framework of war powers. Private military contractors have a unique history and increasing presence within the United States—but a somewhat less established legal status. This section argues that despite the imperfections of the WPR, it has effectively provided a measure of accountability for the executive branch; and given the United States' growing reliance upon PMCs, the PMCs merit inclusion in the framework of the War Powers Resolution.

A brief explanation of terms is necessary to set the stage. Though definitions for what constitutes PMCs vary, the most authoritative is the one adopted by international agreement in the Montreux Document in 2008, and this is the definition accepted by this Article.¹⁵ According to the Montreux Document, PMCs

are private business entities that provide military and/or security services,
irrespective of how they describe themselves. Military and security services include,
in particular, armed guarding and protection of persons and objects, such as

¹⁵ FED. DEP'T OF FOREIGN AFF. OF SWITZ. & INT'L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT, at 9-10, 31 (Sept. 17, 2008) [hereinafter THE MONTREUX DOCUMENT], https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document_EN.pdf ("The Montreux Document is the result of an initiative launched by Switzerland and the ICRC in early 2006. A first draft of the Montreux Document was prepared during four intergovernmental meetings that took place between January 2006 and September 2008. The final document was adopted by consensus of the participating states at the fourth and last meeting, which took place in Montreux from 15 to 17 September 2008."). As of April 2020, 57 states have joined the Montreux Document. *Participating States of the Montreux Document*, FED. DEP'T OF FOREIGN AFF. OF SWITZ. (July 15, 2021), <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>.

convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.¹⁶

While PMCs may conceptually resemble the traditional perceptions of mercenaries (both could be casually referred to as “hired guns”), mercenaries are specifically defined by the 1977 Additional Protocol to the 1949 Geneva Convention as individual soldiers who are primarily motivated by financial gain substantially in excess of what they might be paid by a national army.¹⁷ In this way, mercenaries differ both in intent and form from the companies or businesses that constitute PMCs. Though some of the sources referenced by this Article may less precisely conflate PMCs and mercenaries, this Article focuses on PMCs, the security companies that contract with governments or other groups to provide military assistance—not on the individual (and traditionally less reputable) hired soldiers who are mercenaries.

A. The War Powers Resolution: History, Purpose, and Structure

1. History

The War Powers Resolution, passed in 1973, is widely acknowledged to be a congressional response to ongoing rounds of executive branch deceptions used to secure legislative approval for continued U.S. involvement in Vietnam.¹⁸ In 1971, several newspapers revealed that the executive branch had withheld critical information that may have impacted Congress’s decision to pass the

¹⁶ THE MONTREUX DOCUMENT, *supra* note 15, at 9.

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 47(2)(c) (“A mercenary is any person who: . . . is motivated to take part in the hostilities essentially by the desire for private gain.”).

¹⁸ Alexander C. Linn, *International Security and the War Powers Resolution*, 8 WM. & MARY BILL RTS. J. 725, 737 (2000); *see also* Eugene V. Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 1 (1986).

Gulf of Tonkin Resolution, which further authorized the President to keep U.S. forces in the Vietnam War.¹⁹

But the revelation that deception had played a role in the ongoing justification of war wasn't the sole impetus for the WPR; indeed, it arguably merely fanned the flames of frustration that Congress had already been experiencing. Despite the growing public sentiment against American involvement in Vietnam and its mounting costs, Congress found it difficult to extricate American forces when faced with resistance from the Commander in Chief. The WPR was a response to that vexing phenomenon, "written by a Congress dissatisfied with the Executive's ability to initiate and direct war, with little or no inclination to seek congressional approval. Thus, in passing the Resolution, Congress sought to set parameters on the Executive's ability to commit military forces to combat."²⁰ It was an attempt to more explicitly articulate the balance of war powers shared between the legislative and executive branches, and, as articulated by Congress itself, "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."²¹

¹⁹ Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 80 (1984); John T. Correll, *The Pentagon Papers*, AIR FORCE MAG. (Feb. 1, 2007), <https://www.airforcemag.com/article/0207pentagon/> (discussing that the publication of the Pentagon Papers in 1971 revealed "the calculated misleading of the public, the purposeful manipulation of public opinion, the stunning discrepancies between public pronouncements and private plans" that likely impacted the trust of the legislative branch in the executive).

²⁰ Linn, *supra* note 18, at 737.

²¹ 50 U.S.C. § 1541(a).

2. Structure

The WPR changed the legal landscape of war powers by statutorily defining the roles of the executive and legislative branches where the Constitutional limitations were ambiguous or unclear. In Article I of the Constitution, Congress is endowed with the power to “declare War,” “raise and support Armies,” “provide and maintain a Navy,” and to “make rules” calling forth and regulating militias and armed forces, a broad array of war powers.²² The President, meanwhile, is the “Commander in Chief of the Army and Navy” and of the state militias when called into federal service, and she also appoints ambassadors and officers of the armed forces, and makes treaties.²³ These intertwined responsibilities obligate the two branches to work closely with one another in declaring and making war, and the WPR codifies what is expected of the executive, in particular, in engaging U.S. forces in hostilities.

In the first instance, the WPR makes explicitly clear that the President may constitutionally introduce “United States Armed Forces” into hostilities pursuant to only three circumstances: 1) a congressional declaration of war; 2) specific statutory authorization; or 3) “national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”²⁴ In effect, this clarification removed much of the ambiguity that previously existed as to whether and when the President could engage U.S. forces in conflicts.²⁵

The consultation, notification, and sixty-day withdrawal provisions of the WPR are the requirements with the greatest potential impact on the uncertain position PMCs occupy in the constitutional framework of war powers. The consultation provision mandates that in every possible instance, the President “shall consult with Congress before introducing United States Armed Forces

²² U.S. Const. art. I, § 8.

²³ U.S. Const. art. II, § 2.

²⁴ 50 U.S.C. § 1541.

²⁵ See Daniel J. Freeman, *The Canons of War*, 117 YALE L.J. 280, 283-84 (2007).

into hostilities” and regularly consult with Congress thereafter until the hostilities have ceased or the U.S. Armed Forces are no longer involved.²⁶ The notification provision can best be seen as a reporting requirement. Specifically, it requires that “in the absence of a declaration of war,” anytime U.S. Armed Forces are introduced into imminent or actual hostilities, the President must within 48 hours submit a report to Congress with details about the authority under which troops were introduced, and the estimated scope of the involvement.²⁷ Finally, the sixty-day clock, or withdrawal provision, functions in conjunction with the notification requirement to limit the time period during which the President may continue to keep U.S. Armed Forces engaged in hostilities absent explicit congressional approval. It provides that “within sixty calendar days after a report is submitted or is required to be submitted,” the President shall terminate the use of U.S. Armed Forces unless Congress has declared war or enacted specific legislative authorization for the continued use of United States Armed Forces.²⁸

What is striking about each of these provisions is the specific and repeated references to the “United States Armed Forces”—a seeming indication of Congress’s particular interest in regulating the President’s use of official, commissioned U.S. troops. Of course, given that PMCs had up until that point primarily been deployed in supplementary noncombat roles,²⁹ legislators may not have predicted that there was any real alternative equally worth regulating. Recent trends and more combative roles for PMCs, however, may merit reconsideration of the limited language in the WPR.

²⁶ 50 U.S.C. § 1542.

²⁷ 50 U.S.C. § 1543(a)(1).

²⁸ 50 U.S.C. § 1544.

²⁹ See *infra* Section I.C.

B. The Effectiveness of the War Powers Resolution

From its inception, the WPR has met with both political and scholarly resistance.³⁰ When President Nixon vetoed the act, he issued a lengthy message to Congress, expressing his disapproval and belief that it was “clearly unconstitutional” in part because it would “attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.”³¹ The sixty-day withdrawal requirement in particular attracted his censure, but that was by no means his only objection; Congress nevertheless overrode his veto, and the War Powers Resolution was enacted without the President’s signature.³²

Examples from more recent administrations demonstrate continued resistance to being bound by the WPR. The Obama administration, for instance, did not consider the use of technology, such as UAVs and cyber-warfare, to fall within the realm of the WPR, since U.S. Armed Forces were not actually being “introduced into hostilities”; it argued that the use of such technology could therefore be implemented without consulting Congress.³³ The Trump administration likewise took the position that its airstrikes in Syria in 2017 were not subject to the reporting requirements of the WPR, because they were carried out by drones and therefore did not reach the bar of actually introducing U.S. troops into hostilities.³⁴ As illustrated by these examples, it seems likely that executives will continue to try to expand their power under the Constitution and WPR to allow for

³⁰ Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 142 (1988) (arguing that the WPR “has suffered political and legal impediments that render it practically useless as a check on presidential power”).

³¹ Richard M. Nixon, *Veto of the War Powers Resolution*, 5 PUB. PAPERS 893 (1973).

³² See Robbins, *supra* note 30, at 141.

³³ THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 42-44 CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/R/R42699>; Julia L. Chen, *Restoring Constitutional Balance: Accommodating the Evolution of War*, 53 B.C.L. REV. 1767, 1798 (2012).

³⁴ Tess Bridgeman, *Trump’s War Powers Legacy and Questions for Biden*, JUST SEC. (Feb. 23, 2021), <https://www.justsecurity.org/74903/trumps-war-powers-legacy-and-questions-for-biden/>; see also NCC Staff, *Did Trump-Ordered Missile Strikes Fall Under the War Powers Resolution?*, NAT. CONST. CENTER (Apr. 7, 2017), <https://constitutioncenter.org/blog/did-trump-ordered-missile-strikes-fall-under-the-war-powers-resolution>; Joe Gould, *Why the DOJ says Trump was Justified in Syria Airstrikes*, DEFENSE NEWS (June 1, 2018), <https://www.defensenews.com/congress/2018/06/01/why-the-doj-says-trump-was-justified-in-syria-airstrikes/>.

greater flexibility in responding to national security needs. The WPR as presently constituted may not adequately address changes in technology and changes in trends (such as the rising use of PMCs), but arguably it is effective at least at encouraging some measure of accountability, and increasing communication between the executive and legislative branches on important war powers issues. Despite the arguments of recent administrations that their actions did not fall under mandatory WPR reporting, they nevertheless made the effort to justify the reasons why to Congress and the public—which certainly seems like progress compared to the pre-WPR regime.

In the years since its passage, the War Powers Resolution has also been criticized by scholars not necessarily on grounds of constitutionality, but for its functional failures to achieve its stated ends. One scholar argues that it has “produced perversions in internal executive branch decision-making” and that “its key consultation provision has been easily avoided because Congress has failed to organize itself in such a way as to make consultation unavoidable, secure, and meaningful.”³⁵ Another scholar points out that while the statutory language is strong, Congress has done little to enforce violations or require executive compliance with the text.³⁶

Despite its apparent weaknesses and debatable constitutionality, the War Powers Resolution has nevertheless had some effect; Presidents continue to file reports even while protesting the necessity of doing so. The War Powers Resolution Reporting Project by NYU’s Reiss Center on Law and Security comprehensively tracks all reports filed by Presidents in compliance with the War Powers Resolution since its passage. It shares the details of the 107 unclassified reports made to Congress, evaluating them by president and stated purpose.³⁷ The data show that each U.S. president since the WPR was passed in 1973 made at least one report to Congress during his administration

³⁵ Atwood, *supra* note 9, at 58.

³⁶ Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 19 (1995).

³⁷ TESS BRIDGEMAN, REISS CENTER ON LAW AND SEC., WAR POWERS RESOLUTION REPORTING: PRESIDENTIAL PRACTICE AND THE USE OF ARMED FORCES ABROAD, 1973-2019, at 17 (2020), <https://warpowers.lawandsecurity.org/wpr-reporting-1973-2019.pdf>.

(except for Nixon, who was impeached and left office a year later).³⁸ Even President Biden had already complied with the 48-hour reporting requirement barely two months into his first term.³⁹

Executives may continue to claim that the WPR is unconstitutional and therefore not binding; but so long as they continue to comport with the perceived legal requirements to notify and consult with Congress when introducing U.S. Armed Forces into hostilities, the WPR accomplishes its primary intended goals. It provides some measure of accountability for the executive, and it keeps Congress informed of foreign conflicts in which commissioned U.S. troops are involved at the beginning of the involvement, when it may be easier to withdraw. These are not inconsequential effects, and where PMCs may in some instances serve as proxies for U.S. troops, the WPR should require notification and consultation with regard to their use as well.

C. Private Military Contractors in the United States

1. History Pre-1973

Though the modern conception of mercenaries/unaffiliated hired soldiers is generally a pejorative one,⁴⁰ perhaps because of their perceived lack of legitimacy given their non-association with a state and focus on financial gain, state monopoly over security forces is actually a relatively recent innovation.⁴¹ As documented by P.W. Singer in his masterful book *Corporate Warriors*, independent, foreign military bands actually dominated warfare for much of western history,

³⁸ *Id.* at 16.

³⁹ See REISS CENTER ON LAW AND SECURITY, WAR POWERS RESOLUTION REPORTING PROJECT, <https://warpowers.lawandsecurity.org/reports/>.

⁴⁰ Devin R. Desai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F.L. REV. 825, 830 (2005) (“Despite the enduring history of hired military services, they have often been regarded with distrust.”).

⁴¹ “The tradition of states using private military services is an ancient practice that arguably has never gone away. For example, Ramses II, King David, Alexander the Great, Caesar, Justinian, William the Conqueror, princes of Italian City States, and the British Empire, all employed foreigners for combat military purposes.” *Id.* at 829-30.

especially prior to the consolidation of power from feudal provinces to the modern nation-state.⁴² The inflection point came near the end of the Napoleonic Wars, when technological advances and philosophical shifts made hiring foreign armies unpalatable.⁴³ Indeed, as weak nations began recasting exactly what it meant to be a state and asserting “claims regarding the impermeability of their borders,” they could no longer outsource their security needs—instead, to justify their claims to sovereignty, “they had to be able to show they could defend themselves without having to hire external help.”⁴⁴

Accordingly, by the founding of the United States, the system of entering into commercial contracts with one’s own or with another state’s citizens was “unimaginable”⁴⁵ (British employment of Hessian troops notwithstanding). Perhaps the closest equivalent ever actually used by the early United States government was the practice of privateering,⁴⁶ which originated prior to the Revolutionary War and continued through the end of the Civil War. Yet that practice is distinguishable—rather than hiring private citizens and ships, the American government merely issued “letters of marque”⁴⁷ that authorized private American vessels to attack and claim as prizes any foreign vessels they came across; in this way, private individuals did function to supplement the official U.S. Navy, but they were never directly hired to fight as soldiers in a war.

That trend seems to have continued throughout much of American history. Private employees were hired and deployed for noncombat support roles. This phenomenon was already

⁴² P.W. SINGER, CORPORATE WARRIORS 23 (2008).

⁴³ *Id.* at 29, 31 (“The French Revolution and ensuing Napoleonic Wars (1789-1815) signaled the end of hired soldiers playing a serious role in warfare, at least for the next two centuries.”).

⁴⁴ *Id.* at 31.

⁴⁵ *Id.*

⁴⁶ Dickinson, *supra* note 5, at 521 (“To be sure, U.S. history is rich with examples of contractors; the privateers of the Revolutionary period are a case in point.”).

⁴⁷ U.S. CONST. art. I §8.

growing during the Vietnam War, during which in 1969 the United States Procurement Agency of Vietnam hired 9000 civilian employees with total annual contracts of \$236 million.⁴⁸

2. A Growing Trend and Current Use

Scholars and commentators have attributed a surge in reliance on the private military industry since the end of the Cold War to three factors: “(1) large scale reduction in military forces after the Cold War, which created a surplus of trained military personnel without jobs; (2) the policy shift to privatizing government services whenever possible; and (3) an increase in regional conflicts.”⁴⁹ Though reliance upon PMCs was not uncommon prior to the Cold War, the scale of their use and the types of tasks they perform have changed fairly dramatically. While the contractor to soldier ratio in U.S. deployments was 1:24 in World War I, 1:7 in World War II, and a narrower 1:5 in Vietnam, in Afghanistan, the ratio was 1.42:1, the first inverse in U.S. history.⁵⁰ The drastic increase in pure numbers coincided with PMCs being entrusted with more and more substantive tasks of the kind previously thought of as an inherently government domain.⁵¹

The United States acknowledges its use of military contractors in every major military operation, but only, in theory, for “noncombat functions” or to “provide services judged too menial or too specialized for government personnel to accomplish themselves.”⁵² Such cited services

⁴⁸ Desai, *supra* note 40, at 831.

⁴⁹ *Id.* at 832.

⁵⁰ Kristine A. Huskey, *The American Way: Private Military Contractors and U.S. Law After 9/11, An Update: 2010*, PRIV-WAR Report 6 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184090; *see also* Dickinson, *supra* note 5, at 521 (“Over the past decade, the United States has radically shifted the way it projects its power overseas . . . while traditionally we relied on diplomats, spies and soldiers to protect and promote our interests abroad, increasingly we had turned to hired guns. Contrast the first Gulf War to later conflicts in Iraq and Afghanistan. During the Gulf War the ratio of contractors to troops was 1 to 100; now, with approximately 260,000 contractors working for the State Department, Department of Defense (DoD), and the U.S. Agency for International Development in Iraq and Afghanistan, that ratio has often exceeded 1:1.”).

⁵¹ *See* Dickinson, *supra* note 13, at 182 (“[T]he United States, other governments, and international organizations are increasingly contracting with private actors to perform a range of military functions, from logistics support on the battlefield, to tactical advising, to interrogation and detention services, to, in some cases, actual combat.”).

⁵² CONGRESSIONAL BUDGET OFFICE, *CONTRACTOR’S SUPPORT OF US OPERATIONS IN IRAQ 12* (2008), <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-12-iraqcontractors.pdf>.

include, for example, transportation, engineering and construction, maintenance, base operations, and medical services.⁵³ Yet this claim is at odds with documented use of private security contractors for tasks much more substantive than is acknowledged by the Congressional Budget Office. In the 1960s, for example, “the military hired private contractors to train South Vietnamese troops prior to U.S. entrance in the Vietnam War.”⁵⁴ In Afghanistan, private employees served in a variety of roles, deploying with U.S. forces, “serving in CIA paramilitary units,” flying on “joint surveillance and targeting aircraft,” and even operating the Air Force’s most advanced unmanned surveillance planes—Global Hawks.⁵⁵ In Iraq, the Pentagon signed a \$35.7 million contract with Blackwater USA to train 10,000 U.S. soldiers in force protection.⁵⁶ Training U.S. troops and allies, deploying on the ground alongside U.S. troops, and operating advanced military surveillance technology all appear to be much more than “menial” services reportedly reserved for non-commissioned military support employees.

One of the most well-known PMCs in recent years is Blackwater USA (which became Xe Services, then Academi, now owned by Constellis).⁵⁷ Blackwater is an American PMC, founded in 1997 by former Navy SEAL Erik Prince.⁵⁸ It is useful as a brief case study illustrating the trend of relying upon and granting greater responsibility to PMCs in the United States. A 2008 report by the Congressional Research Service described their roles as armed guards of supplies and U.S. diplomats, and the frequency with which Blackwater employees were involved in active hostilities—victims of and parties to the exchange of deadly fire on 195 occasions in less than three years, and

⁵³ *Id.*; see also Desai, *supra* note 40, at 834 (citation omitted) (“[K]itchen patrol, laundry, recruiting—in short, outsourcing ‘as many tasks as possible to enable the military . . . to focus on its core competency: fighting.’”).

⁵⁴ Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 859 (2010).

⁵⁵ CORPORATE WARRIORS, *supra* note 42, at 17.

⁵⁶ See Barry Yoeman, *Soldiers of Good Fortune*, MOTHER JONES, May/June 2003, at 43.

⁵⁷ Jason Ukman, *Ex-Blackwater Firm Gets Name Change, Again*, WASH. POST (Dec. 12, 2011), https://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO_blog.html.

⁵⁸ Jennifer K. Elsea, Moshe Schwartz & Kennon H. Nakamura, CONG. RSCH. SERV., RL32419, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues* 7-8 (2008).

the first to fire in 163 of those incidents.⁵⁹ Blackwater employees were among the thousands of private security contractors employed by the Department of State in Iraq and across the world—and that number doesn’t take into account the PMCs employed by other U.S. agencies during the same time period.⁶⁰ During the course of those employment contracts, Blackwater came under close scrutiny after the Nisour Square Massacre during which Blackwater guards of a U.S. diplomatic convoy wounded or killed seventeen Iraqi civilians after firing into a crowd.⁶¹ That incident and others over the years of Blackwater’s contracts led military officials to express concerns that the security contractors were “trigger happy,” and multiple Blackwater shootouts in 2004 prompted congressional investigation into the proper “legal and contractual framework” to control PMCs.⁶² Yet despite some of the risks their use presents, more than ten years later, there is still substantial ambiguity relating to the regulation of PMCs. Notably, as the next section explores, they appear to be conspicuously absent from the War Powers Resolution—and their direction falls almost entirely under the control of the executive branch.

II. THE ABSENCE OF PMCs FROM THE WAR POWERS RESOLUTION

A. The “Armed Forces” in U.S. Code: What’s Included, and What’s Not

Of course, if the WPR can clearly be understood to encompass executive deployment of private security forces in addition to U.S. troops, there may be no cause for troubling ambiguity. However, this does not appear to be the case. While the WPR itself lacks a section of definitions, other contemporary legislative definitions may prove to be a helpful guide in determining what

⁵⁹ *Id.* at 11-12 (citing to an October 2007 Majority Staff Hearing Memorandum prepared for the House Committee on Oversight and Government Reform hearing regarding Blackwater and its involvement in incidents in Iraq).

⁶⁰ *See id.* at 9 (referencing a Department of State table listing the number of Security Contractors in Iraq WPPS as of May 29, 2008).

⁶¹ *Id.* at 12.

⁶² *Id.* at 11-12.

Congress meant to encompass in the WPR.⁶³ At least as early as 1958 and continuously to the present day, Congress has in other legislation defined the United States “Armed forces” as “the Army, Navy, Air Force, Marine Corps, and Coast Guard.”⁶⁴ No mention is made of a more expansive understanding including private contractors upon whom those U.S. forces may rely. Moreover, given the drastic expansion of the use of PMCs in recent decades and the comparably minimal use, if any, of private contractors in combat roles before the 1970s, when the WPR was passed, it seems probable that Congress was not considering PMCs when defining the extent of executive war powers.

Additional support for the notion that “U.S. Armed Forces” in the WPR does not include PMCs is that Congress has specifically legislated regarding PMCs, and when it has done so, it refers to them differently than the Armed Forces. While Congress appears to be aware of PMCs, it has primarily governed them through the National Defense Authorization Act and its Fiscal Year appropriations bills, which have directed the Department of Defense and Department of State to prepare memoranda of understanding coordinating their use of PMCs.⁶⁵ Therefore, it appears that Congress is aware of PMCs and that they do not fall within the definition of Armed Forces, nor has Congress updated the WPR to include PMC use.

Many scholars have already expressed frustration and dissatisfaction with the current regulatory scheme for PMCs. Guidelines for what they can and cannot do—like which functions are “inherently governmental” and therefore reserved for government employees, and which are not—

⁶³ The *in pari materia* canon of interpretation supports looking to other statutes on the same subject matter to help determine the meaning of an ambiguous statute.

⁶⁴ Act of September 2, 1958, Pub. L. No. 85-861, 72 Stat. 1437, 70A Stat 596 (codified as amended at 32 U.S.C. § 591). Currently, the updated definition is: “[T]he Army, Navy, Air Force, Marine Corps, Space Force and Coast Guard,” 10 U.S.C. § 101(a)(4).

⁶⁵ Huskey, *supra* note 50, at 45 (“Congress passed the NDAA FY 2008, obligating DoD, DoS, and USAID to enter into a Memorandum of Understanding (MOU) relating to contracting in both Iraq and Afghanistan.”).

are very limited.⁶⁶ Likewise, oversight, review and accountability for civilian security employees are severely lacking.⁶⁷ This legislative inadequacy is highlighted by multiple now-notorious incidents, such as private contractor involvement in the torture of prisoners at Abu Ghraib prison in Iraq⁶⁸ and the previously mentioned controversial slaughter of Iraqi civilians in the Nisour Square massacre.⁶⁹

By contrast to the limited and vague language Congress has used to attempt to regulate PMCs, references to and regulations for the “United States Armed Forces” abound in the U.S. Code in laws that receive frequent attention and updates. There are laws regulating their pay,⁷⁰ veteran’s benefits,⁷¹ and procedures for promotions.⁷² While PMCs seem to be an afterthought of regulation, Congress appears to be regularly involved in military affairs, promulgating the Uniform Code of Military Justice and making regular updates. All of this makes sense—after all, U.S. troops are at the heart of national security and defense, critical to sustaining America’s long-term safety and growth. Nevertheless, the abundant legislation governing the U.S. Armed Forces stands in sharp contrast to the minimal and vague direction Congress has given governing PMCs—especially where increased privatization and outsourcing has entrusted PMCs with substantial responsibility relating to national security and where they are deployed to combat zones in numbers commensurate with

⁶⁶ See *id.* at 13-14 (“[N]either the OMB Circular nor accompanying interpretation provides governing principles useful in illuminating how and why certain functions obtain “inherently governmental” status.”); see also Sullivan, *supra* note 54, at 859 (“[T]his test has proven hopelessly unhelpful in clarifying how to determine whether a particular governmental function is appropriate for outsourcing.”).

⁶⁷ See Huskey, *supra* note 50, at 19 (stating that the US has yet to demonstrate its ability to hold contractors criminally liable for unlawful acts they commit while abroad).

⁶⁸ See Dickinson, *supra* note 13, at 138-39 (“[T]he Abu Ghraib prison scandal revealed that even such sensitive tasks as military interrogations have been privatized. Moreover, according to a military report, over one-third of the private interrogators at Abu Ghraib lacked formal military training as interrogators. As one of these interrogators revealed, ‘cooks and truck drivers’ were hired because the private company providing interrogation services was ‘under so much pressure to fill slots quickly.’ It is not surprising then that many reported incidents of abuse at Abu Ghraib have now been tied to these private contractors.”).

⁶⁹ See Dickinson, *supra* note 5, at 521-22 (“[I]n a notorious 2007 incident in Baghdad’s Nisour Square, security guards employed by the firm then known as Blackwater, under contract with the U.S. government, fired into a crowd and killed civilians.”).

⁷⁰ 37 U.S.C. § 204.

⁷¹ 38 U.S.C. § 109.

⁷² 10 U.S.C. § 624.

commissioned U.S. troops. And given congressional willingness to heavily legislate the affairs of the official U.S. Armed Forces, it seems even more likely that it was to that group specifically that Congress intended to refer in the WPR—and not to PMCs.

B. Implications of the Omission of PMCs

If, then, as this Article argues, PMCs are not included in the WPR, the ramifications are troubling. This section sets out some possibilities and hypotheticals relating to the three WPR provisions previously discussed, and the impact upon the allocation of war powers should each be deemed not to encompass PMCs. There is no indication that a U.S. executive has yet exclusively deployed PMCs other than in conjunction with commissioned U.S. troops; but such an action is not unprecedented elsewhere. One recent example is Russia's use of the Wagner Group, a PMC, to fight as a proxy in conflicts around the world.⁷³ Though Russia disclaims any official association with the Wagner Group and it is not an acknowledged part of the Russian military, it is generally understood to act at the behest of Russian leaders.⁷⁴ For example, the Wagner Group has been involved in various conflicts in Africa since at least 2017, engaging in hostilities in Libya, Sudan, and Mozambique—participating in combat, training local forces, and providing security for Russian businesses.⁷⁵ The use of PMCs, expressly disaffiliated with official Russian forces but serving Russian interests in hostile regions, allows Russia to accomplish its strategic objectives without the need to justify its actions or involvement with respect to international law.

⁷³ See R. Kim Cragin & Lachlan MacKenzie, *Russia's Escalating Use of Private Military Companies in Africa*, INST. FOR NAT'L STRATEGIC STUD., (Nov. 24, 2020), <https://inss.ndu.edu/Media/News/Article/2425797/russias-escalating-use-of-private-military-companies-in-africa/> ("Over the past three years, Russia has increasingly relied on Private Military Companies (PMCs) to function as its proxies in Africa. PMCs are for-profit organizations that provide combat, security, and logistical services for hire. The Wagner Group is the most infamous Russian PMC. Yevgeny Prigozhin, a Russian oligarch with close ties to Putin and the Kremlin, runs the Wagner Group.").

⁷⁴ Rodrick H. McHaty & Joe Moye, *The US Military Must Plan for Encounters with Private Military Companies*, BROOKINGS INST., (Mar. 30, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/03/30/the-us-military-must-plan-for-encounters-with-private-military-companies/>.

⁷⁵ Cragin & MacKenzie, *supra* note 73.

Were a U.S. executive to strategically use PMCs in a similar manner, it could empower her to unilaterally engage U.S. resources and perhaps private American civilian soldiers into hostilities—with uncertain implications under international law and without any mandated congressional oversight, a veritable *carte blanche* both domestically and abroad (assuming the actions couldn't be traced back to their origin). Such a circumstance would almost certainly run afoul of the balance of war powers between the branches, created by the checks and balances of the Constitution and advanced by the WPR for the last fifty years.

Nor is such an action by an American executive far-fetched. The crisis in Palma, Mozambique earlier this year presents a useful example. Located on the northeast coast of Mozambique, Palma is the closest town to gas projects worth some \$60 billion under development by major oil companies including Total, a French multinational oil and gas company with substantial shareholders in the United States.⁷⁶ On March 24, 2021, Palma was attacked by insurgent groups, killing dozens of civilians and displacing tens of thousands more in an assault that lasted more than ten days.⁷⁷ The havoc commenced on the same day that Total had announced cautiously resuming work on the oil projects after suspending them due to earlier violence in the region; Total has since decided to once again postpone work indefinitely.⁷⁸ Besides the obvious human cost of the devastation, the catastrophe implicates enormous business costs to U.S. investors and others around the world. President Biden may well be receiving pleas or pressure from American investors with

⁷⁶ *Armed Groups Attack Mozambique Town Closest to Gas Projects: Sources*, REUTERS (Mar. 24, 2021), <https://www.reuters.com/article/us-mozambique-insurgency/armed-groups-attack-mozambique-town-closest-to-gas-projects-sources-idUSKBN2BG2V1>; see also *Share Ownership Structure*, TOTALENERGIES, <https://totalenergies.com/investors/shares-and-dividends/ownership-structure> (last visited Dec. 8, 2021) (graph showing that the greatest percentage of shareholders are in North America); *Top Ten Owners of TotalEnergies SE*, CNN BUS., <https://money.cnn.com/quote/shareholders/shareholders.html?symb=TOT&subView=institutional> (last visited Dec. 8, 2021) (listing the current top ten stockholders of TotalEnergies, all of which are American companies).

⁷⁷ Max Bearak, *As Militants Overrun Mozambique Oil Town, Fears Rise of 'Humanitarian Catastrophe'*, WASH. POST (Mar. 31, 2021), <https://www.washingtonpost.com/world/2021/03/31/mozambique-palma-attack-insurgency/>; Mogomotsi Magome, *Southern African Leaders Concerned by Mozambique's Rebels*, AP NEWS (Apr. 8, 2021), <https://apnews.com/article/southern-africa-africa-filipe-nyusi-mozambique-maputo-67d58c5eac1dec319c02c53bab8ac92>.

⁷⁸ Bearak, *supra* note 77.

interests threatened by the instability in Mozambique to intervene in the region; but even if he was inclined to send forces to protect U.S. interests there, he would have no legal basis for involving U.S. troops, nor are the odds very high that Congress would authorize such involvement. Under such circumstances, covertly utilizing PMCs may present an extremely attractive alternative—as an opportunity to send security forces to safeguard substantial U.S. financial interests, with no domestic or international obligation to legally justify the action.

This Article does not intend to suggest that either President Biden or any other executive have used PMCs in the manner described; Palma merely illustrates circumstances under which sending PMCs as a proxy for commissioned U.S. forces may sound tempting to a President, if there is no requirement under the War Powers Resolution to report the action to Congress and the PMCs can accomplish strategic objectives equally well. Based loosely on the circumstances in Palma, the following sections will briefly describe the specific implications of each of the consultation, notification and withdrawal requirements of the WPR if PMCs are not included in its terms.

1. Requirement to Consult

As previously discussed in Part I, the WPR requires the President “in all possible instances” to consult with Congress before introducing U.S. Armed Forces into hostilities.⁷⁹ But if PMCs do not qualify as U.S. Armed Forces under the WPR, then the executive could arguably deploy solely PMCs seemingly indefinitely without any clear constitutional mandate to consult with Congress. Any openly sustained, long-term deployment would likely arouse concern from both Congress and the public—after all, the action would still need funding, and to secure that the executive might in some measure need to justify it before Congress. But the President could legally engage in international

⁷⁹ 50 U.S.C. §1542.

conflicts with armed fighters and advanced military technology and strategy, without an official obligation to consult with Congress.

In a situation like that in Palma, the President would be under no legal obligation to consult with Congress before sending in PMCs. After receiving reports on the situation, the President could unilaterally make the decision to deploy private security forces to guard the oil equipment and facilities from rebel insurgence. There are funding issues that the executive would need to resolve in order to take such an action; but the executive branch has previously exhibited determined creativity to subvert congressional spending directives and secure funds for favored military projects (see, e.g., the Iran-Contra Affair).⁸⁰ Though it would be both ill-advised and beyond the scope of this Article to suggest specific mechanisms by which the executive branch could do this to fund PMCs, it is by no means implausible that the President could find a way and deploy PMCs as proxies for U.S. troops. If so, Congress would have no advance warning of any planned involvement abroad, nor any right to demand it if it did not involve U.S. Armed Forces.

2. Requirement to Notify

Congress would be similarly kept in the dark after the President sent PMCs to Mozambique, because the notification requirement would be similarly impacted by a deployment of only PMCs. A President could respond to a national emergency or perceived threat by sending PMCs to deal with the concern, with no obligation to justify the circumstances of U.S. involvement, explain the legal authority for the action, or anticipated scope of involvement, all of which are currently required by the WPR.⁸¹ Congress may not learn of the executive action until long after the fact. Such a situation may in fact be a useful tool for the executive—PMCs have been praised as sometimes being quick

⁸⁰ See generally *Iran-Contra Affair*, HISTORY.COM (Jan. 17, 2020), <https://www.history.com/topics/1980s/iran-contra-affair> (explaining how the CIA used arms deals with Iran to secure funds for military support to the Sandinistas in Nicaragua).

⁸¹ 50 U.S.C. § 1543(a).

and more efficient in responding to crises than conventional troops.⁸² If intelligence indicated that a short deployment of fighters or security forces could restore stability to Palma and allow the development of oil projects to resume, the President could contract with a PMC for a quick mission, in and out, and never feel compelled to inform Congress. Nevertheless, such unilateral, unfettered military deployment would have a disturbing impact on the balance of powers between the executive and legislative branches.

3. Requirement to Withdraw

Finally, the withdrawal requirement would be uniquely impacted. In the first instance, the withdrawal requirement is conditional upon the notification requirement; the sixty-day clock is not triggered until the day the report is submitted to Congress or would have been required to be submitted to Congress. Accordingly, if no report is submitted or required to be submitted to Congress in a PMC-only deployment, the President could keep those PMCs in action with no time limit or expiring clock. But additionally, the provision only specifies, again, that “United States Armed Forces” be withdrawn from hostilities if congressional authorization has not been granted.⁸³ Though compliance with this provision has historically been limited at best, with many presidents and scholars challenging its constitutionality, a President relying upon PMCs with very few limitations on their combatant responsibilities could comply with the letter of the law and withdraw official U.S. troops, while continuing to direct PMCs in the area of conflict. In a modified Mozambique hypothetical, if the President found a legal basis for sending U.S. troops to engage in Palma and duly reported the action to Congress, but never received authorization to keep troops there after the 60 days, he could withdraw the commissioned U.S. forces while leaving PMCs behind

⁸² Although this has mostly been the case in developing countries, not major powers like the U.S.. See CORPORATE WARRIOR, *supra* note 42, at 57.

⁸³ 50 U.S.C. § 1543(a).

to maintain stability if he thought a continued security presence was necessary. Those PMC fighters, many American ex-military civilians perhaps, could engage in conflict in pursuit of their contractual objectives, but the President could continue to leave them there potentially indefinitely. Such an approach seems to directly conflict with constitutional norms and expectations for the sharing of war powers, but would not explicitly flout any provision of the WPR.

4. Legislative Purpose

As previously established, Congress's stated and implied purposes in passing the War Powers Resolution were to clarify ambiguities in the constitutional allocation of war powers and to increase transparency and oversight over executive decisions to commit U.S. forces to hostilities. If Congress did not include PMCs in the WPR, there are two broad categories of explanation: (1) it was an oversight, perhaps because PMCs were not yet such a powerful military resource in the world or for the United States; or (2) it was by design, because Congress did not think that including PMCs was necessary to achieve the purposes of the WPR. Of those possibilities, the former appears more likely; though many military jobs were privatized at the time, they were more mundane services, and U.S. forces did not rely as heavily on contractor work either in scale or significance.⁸⁴ Congress may simply not have anticipated that military work would be privatized to the extent that executive use of PMCs could be wholly adequate to accomplish strategic objectives; under such a paradigm, mentioning PMCs may have seemed entirely irrelevant in a discussion about the U.S. Armed Forces.

Yet the second option is not impossible and merits analysis. It may be worth considering that at the time of the framing of the U.S. Constitution, hiring foreign mercenary troops was already becoming unpalatable. The German Hessian forces hired by the British to assist in fighting against

⁸⁴ See *supra* section I.C.1.

Americans during the Revolutionary War were considered with distaste as mere mercenaries.⁸⁵ The 30,000 Hessian troops, however, had a not inconsequential impact on the war; even though hiring foreign soldiers was beginning to be considered unfashionable or immoral, with such a fresh reminder of the practice it seems unlikely that the Framers would have been unaware of the practice as they drafted the U.S. Constitution. In clarifying the allocation of constitutional war powers, therefore, perhaps Congress simply took a hint from the original Framers, omitting any mention of PMCs because it believed PMCs were an anomaly. Congress may have decided that PMCs didn't factor into essential questions of allocating power over a standing army and other more important war powers. Alternately, in its goal of increasing oversight and accountability of the executive, perhaps Congress really was solely concerned with the President's deployment of commissioned U.S. troops. After all, U.S. troops represent the nation to the world; they are a great source of national pride and patriotism for American citizens, and the armed forces are centuries-old, disciplined institutions. By contrast, PMCs are hired for only temporary contracts, and are very distinct—their deaths not even calculated among total casualties for recent wars, even where they are U.S. citizens.⁸⁶ There may well be important reasons for wanting to regulate the President's direction over formal U.S. troops that don't equally apply to private military contractors.

But ultimately, whether the exclusion of PMCs from the WPR was deliberate or unintentional, their current prominence and problems still call for legislative reevaluation. The

⁸⁵ David Head, *Hessians*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/hessians/#:~:text=The%20term%20%22Hessians%22%20refers%20to,also%20saw%20action%20in%20America> ("The Declaration of Independence, for example, condemned the king for 'transporting large Armies of foreign Mercenaries to compleat [sic] the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.' During the war, Hessian plundering often pushed neutral or indifferent Americans to the Patriot side.").

⁸⁶ Bernd Debusman, *In Outsourced U.S. Wars, Contractor Deaths Top 1,000*, REUTERS (Jul. 3, 2007), <https://www.reuters.com/article/us-usa-iraq-contractors/in-outsourced-u-s-wars-contractor-deaths-top-1000-idUSN0318650320070703> ("Deaths and injuries among the growing ranks of civilians working in war zones are tracked on the basis of claims under an insurance policy, the Defense Base Act, which all U.S. contracting companies and subcontractors must take out for the civilians they employ outside the United States.").

growing strength and size of PMCs, the outsourcing of what may once have been considered “inherently governmental functions” including more combative security roles, and the inflexible language of the WPR combine to create a potentially devastating loophole for an assertive executive.⁸⁷ The potential for a determined President to avoid congressional consultation, notification, or oversight by sending private security contractors to do work that once would have been completed by official U.S. Armed Forces could dangerously upset the balance of war powers. While Congress always has the option of cutting funding, the true danger is not one of a sudden coup by private military troops, but rather that a President may become more and more bold over time, creating a historical gloss⁸⁸ that makes it challenging for Congress to legally object, with no recourse to the WPR because it would not apply. To avoid such an eventual outcome, Congress should take action to either modify the WPR or enact new legislation specifically designed to regulate PMCs. These possibilities and proposals are discussed in the next section.

III. RESTORING BALANCE THROUGH LEGISLATIVE ACTION

There are undoubtedly many ways in which the PMC industry generally could be better regulated. However, this is not an article about how to legislate away all of the current problems associated with PMCs—other scholars have made thorough and insightful suggestions to that end.⁸⁹ Rather, this Article is more narrowly focused on the problem of where PMCs fit into the constitutional scheme of shared allocation of war powers. The current imbalance is that it seems that complete control of PMCs by default rests in the executive branch, and that without being included in the WPR, the legislative branch can have little to say to regulate PMCs as a proxy for U.S. troops

⁸⁷ Huskey, *supra* note 50, at 13.

⁸⁸ “Historical gloss” is the source of executive authority described by Justice Frankfurter that derives from “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.” Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 75 (2013).

⁸⁹ See Desai, *supra* note 40, at 830; see also Dickinson, *supra* note 5, at 522.

in combat situations. If privatization and outsourcing continue at current trends, this problem won't go away or solve itself anytime soon; Congress must take decisive action to reassert its diminished war power in this arena.

The way to reset the scales most naturally seems to follow two avenues: (1) Congress can modify the original War Powers Resolution; or (2) Congress can enact new legislation. Each of these options will involve various advantages and disadvantages and be evaluated in greater detail in the coming sections, but either action would be preferable to the implied third option—inaction.

A. Redefining the War Powers Resolution

A relatively simple solution to solving the PMC loophole would be to amend the original War Powers Resolution.⁹⁰ Amending the WPR could present numerous advantages, not the least of which is the opportunity to clarify other ambiguities that have frustrated the President's Office of Legal Counsel, Congressional authorities, and legal scholars alike.⁹¹ Most significantly however, it could clarify exactly the extent to which Congress expects consultation and reporting from the President about the actions of PMCs. On the one hand, Congress likely does not want to be overwhelmed with insignificant reports about the movements of PMCs—if private contractors are deployed on a peace-keeping or infrastructure mission in some foreign state, a formal report may be excessive. The best solution would be to require consultation, notification, and withdrawal in the same contexts in which the President is required to do so for introduction of U.S. Armed Forces

⁹⁰ This article is by no means the first to call for amendment. See Anthony Marcum, *It's Time to Amend the War Powers Resolution*, LEGBRANCH (Jan. 14, 2020), <https://www.legbranch.org/its-time-to-amend-the-war-powers-resolution/> (“These examples demonstrate the many weaknesses of the War Powers Resolution. Today, presidents are largely able to rely on past practice to ignore many of the Resolution's conditions and dare Congress to intervene, a difficult feat given the president's power to veto legislation and his status as commander in chief. As a result, any actual reforms should strive to be simple and overwhelmingly bipartisan. Based on past presidential practice, two reforms spring to mind: defining “hostilities” under the War Powers Resolution and specifying whom the president should consult (and how) before hostilities commence.”).

⁹¹ *Id.*

into hostilities; the threat of engaging the United States in a conflict from which it is difficult to escape is probably almost equally commensurate whether it is the U.S. Army with boots on the ground engaging in hostilities, or whether it is the ex-Army elites of Academi.

The practical change would be very straightforward: merely add a “Definitions” section to the WPR, as Congress has included with legislation before and since, and expand the definition of “United States Armed Forces.” The expanded definition could start the same way it has been defined in other legislation; “the Army, Navy, Air Force, Marine Corps, Space Force and Coast Guard,” and then add language describing PMCs and the roles in which they would be considered synonymous, drawing from the Montreux Document (of which the United States is one of the original signatories) or other international law guidance. For example, “the Army, Navy, Air Force, Marine Corps, Space Force, Coast Guard, and associated Private Military Contractors serving in strategic security, defense, and combat roles.” Such a definition would instantly update the WPR and solve the problem without rewriting each provision. It would distinguish between private contractors performing engineering, laundry, kitchen, or other lower-profile work and the higher stakes of PMCs flying surveillance planes and defending key sites at combat locations. Most importantly, it would clarify that despite the increased outsourcing of functions once considered inherently governmental, the President doesn’t get a free pass with PMCs—committing U.S. resources to an overseas conflict still requires congressional consultation and authorization, in order to provide a meaningful check on the President’s powers as Commander in Chief.

An added practical advantage of this approach is that merely adding a definitions section to existing legislation is less likely to be controversial, and more likely to successfully be incorporated into the current WPR. In an increasingly polarized world, a simple, practical update that members of both parties could support may be the only way to make a change at all.

Updating the WPR by expanding the definition of Armed Forces is not foolproof, however. One disadvantage of doing so may be the potential to confuse the definition of “Armed Forces” as it is used in Title 10 of the U.S. Code with the expanded definition included in the War Powers Resolution in Title 50. Though from a national security and constitutional accountability perspective the implications of using private military fighters and formal troops may be similar, there are many good reasons for maintaining the distinction in other respects. The independence of contractors may improve efficiency or be cheaper, for example. In that respect, inconsistency between the definitions within the U.S. Code could lead contractors to argue that they should be entitled to the same benefits as official troops, which for many reasons the government may not wish to provide. Ultimately, however, this concern is likely not weighty enough to seriously impact the effectiveness of adding PMCs to the definition of Armed Forces in the WPR. A carefully-crafted definition could specify that PMCs are included in definitions of the Armed Forces only for the limited purpose of mandating executive accountability, and could set to rest any concerns about confusion between competing definitions.

B. Starting from Scratch

Though a slightly more involved solution, passing entirely new legislation to regulate PMCs is also a possible avenue to address some of the current ambiguities in the constitutional/WPR scheme. An advantage of this approach is that it could be an opportunity to address many of the issues scholars have lamented over the past two decades. New legislation could create mechanisms for holding PMCs accountable, civilly and criminally, for human rights abuses or other legal violations during their contract terms. It could provide more accurate measures for determining fair pay, given the public debate about the sometimes exorbitant contracts awarded to these private companies. But those matters are beyond the scope of this Article. Most significantly, any such

legislation should articulate a requirement, similar to that of the WPR, that the President consult and notify Congress upon the introduction of PMCs serving in security roles into hostilities.

A disadvantage of designing new legislation is the added difficulty of crafting bipartisan language that is likely to actually be enacted. Given the decades of controversy over the withdrawal requirement of the WPR, new legislation regulating PMCs could omit that aspect—avoiding controversy while still ensuring Congressional involvement in executive's decisions to deploy PMCs. Laura Dickinson has explored the possibility of using sunshine laws (like FOIA) and whistleblower laws to promote transparency in the realm of PMCs, finding ways to apply them to contractors and provide protections beyond the realm of public employees.⁹² Other scholars have evaluated the possible effectiveness of preliminary licensing regimes for PMCs.⁹³ Though the objective value of such other proposals is beyond the scope of this Article, calls for more comprehensive regulation of PMCs could be readily combined with a notification requirement similar to that contained in the WPR, but with application specifically to PMCs. The value of comprehensive regulation of PMCs could be substantial in resolving manifest other ambiguities, making this option a very compelling one as well.

C. Legislative Inaction

Of course, in the alternative, Congress could do nothing. This has seemed to be its preferred course of action as past presidents have stretched the limits of the WPR, creating precedent that allows each ensuing administration to whittle down its requirements even further. Less than three months into Biden's presidency, the Commander in Chief had already been called out by

⁹² LAURA DICKINSON, *OUTSOURCING WAR AND PEACE* 110-11 (2011) (describing how both whistleblower and sunshine laws have allowed for more transparency in US government agencies by protecting employees who come forward and allowing citizens to require access to gathered information).

⁹³ Peter Jenkins, *How to Clear up Blackwater: Bringing Effective Regulation to the Private Military Industry*, 23 TEMP. INT'L & COMP. L.J. 177, 201 (2009).

congressional leaders for failure to comport with the requirements of the WPR in his strikes on Syria in late February of 2021.⁹⁴ The repercussions of the way that PMCs are currently excluded from the WPR may not be immediate, but without making a change, Congress will have little legal authority upon which to base its objections should an executive use PMCs to circumvent the current requirements of the WPR. Congress could find itself once again at the mercy of a president who has already dedicated significant resources to a conflict without consulting the legislature, but is exerting pressure to continue to fund U.S. involvement to justify past expenditures or save face.⁹⁵ After Vietnam, it seems that it would be in Congress's (and indeed, America's) best interest to avoid any such dangerous situation again.

D. Moving Forward

Of the possible solutions, making minor modifications to the WPR stands out as the best option. With a minimal update, it could substantially clarify many important issues and bring PMCs out of the shadows and into the spotlight to be considered alongside any other dedication of U.S. troops to a conflict. Including PMCs in the definition of "Armed Forces" of the WPR is the most simple, practical solution to the war powers imbalance. It would likely require less research and drafting than entirely new legislation regulating PMCs and is certainly superior to the alternative of

⁹⁴ Emma Newberger, *Biden Tells Congress Syria Strikes are Consistent With U.S. Right to Self-Defense*, CNBC (Feb. 27, 2021), <https://www.cnbc.com/2021/02/27/biden-tells-congress-syria-strikes-are-consistent-with-us-right-to-self-defense.html> ("[S]ome Senate Democrats have pushed back against Biden over the strikes, calling on him to provide a briefing why military action was taken without congressional approval. Under the War Powers Resolution, presidents are required to inform Congress within 48 hours after taking military action. In the letter, Biden cited his constitutional authority as commander in chief."). Biden did eventually provide a report. See *A Letter to the Speaker of the House and President pro tempore of the Senate Consistent with the War Powers Resolution*, WHITE HOUSE BRIEFING ROOM (Feb. 27, 2021), <https://assets.ctfassets.net/6hn51hpulw83/5fczyX6Tuwqq5AvC5dqMjZ/df0483dac2d9f69a61ec36d6bbe345a/20210227-Biden.pdf>.

⁹⁵ See generally Elizabeth Becker, *The Secrets and Lies of the Vietnam War, Exposed in One Epic Document*, N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/2021/06/09/us/pentagon-papers-vietnam-war.html> ("As the Pentagon Papers later showed, the Defense Department also revised its war aims: '70 percent to avoid a humiliating U.S. defeat . . . 20 percent to keep South Vietnam (and then adjacent) territory from Chinese hands, 10 percent to permit the people of South Vietnam to enjoy a better, freer way of life.'").

continued congressional inaction. Despite its critics, the War Powers Resolution has fulfilled the valuable objective of added accountability and supervision of the war powers of the executive branch. But at almost fifty years old, the War Powers Resolution seems due for an update.

CONCLUSION

For thousands of years, hired soldiers have been the decisive factor in victory or defeat for innumerable conflicts. After hundreds of years of relative unpopularity, private companies of soldiers have roared onto the scene again and taken on increasingly visible and combative roles. For the United States, a nation in which war powers are split up by design between different government branches, a lack of clarity and responsibility for a growing force like PMCs can have serious constitutional consequences.

The legislators drafting the War Powers Resolution in 1973 could not have predicted the imminent rise of PMCs following the Cold War. But the beauty of our legislative process is the ability to adapt to change, to evaluate new circumstances and update legislation to face new threats. Congress has the opportunity now to do just that. Small, simple changes to the WPR could have a big impact and rebalance the war powers between the executive and legislative branches, as intended by the Framers.

A founding principle of this nation is that power should not be concentrated too heavily, and that the distribution of power best safeguards democracy.⁹⁶ When faced with the threat of imbalanced power, Congress is called upon to act. It should do so now, by taking into account the armed forces conspicuously absent from the War Powers Resolution.

⁹⁶ U.S. Const. arts. I-III.