

LEGITIMIZING A DE FACTO U.S. FOREIGN LEGION IN AFGHANISTAN: TRANSFER OF MISSION CRITICAL SECURITY OPERATIONS FROM PRIVATE CONTRACTORS TO U.S. MILITARY PERSONNEL

*Blake F. Nichols*¹

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1. Blake F. Nichols is a third year law student at Michigan State University College of Law and is the Executive Editor of the International Law Review. Blake wishes to thank Reema Nandy, his friends, family, professors, and peers for their tireless support throughout his academic career.

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INTRODUCTION

This note will start where many other papers analyzing private military contractors (PMCs) start, with a description of the general problems associated with the use of contractors. The use of PMC personnel in such mission critical situations as security operations is no doubt a complex issue. However, the consensus seems to be that there is too little accountability stemming from a lack of oversight and that some fairly substantial changes will be required to correct the situation. This note proposes the adoption of a U.S. Foreign Legion as one possible solution to the overreliance on PMC personnel in Afghanistan.

The solution proposed in this paper is in no way intended to be an immediate resolution to all issues associated with the use of PMCs. Those who have analyzed the overreliance on PMCs seem resigned to the fact that no one, short-term solution is available.² The proposed solution in this note is offered only as one part of a solution to the complex issue that overreliance on private security contractors presents. This note specifically examines the implementation of a formalized, structured, U.S. Foreign Legion, which would build on current U.S. laws, borrow from other formalized foreign military institutions, and would reduce some of the problems currently associated with reliance on PMC personnel by incorporating these same individuals into the existing U.S. military command structure.

2. COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG. INTERIM REPORT NO. 2, AT WHAT RISK?: CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 9 (2011) [hereinafter CWC, AT WHAT RISK?] (“Reducing this over-reliance will take resolve, zealous attention, resource investments, and time.”).

I. PROBLEMS WITH CURRENT U.S. RELIANCE ON PRIVATE MILITARY CONTRACTORS

A. Overreliance on Private Contractors Generally

“Though some organic capability still exists, agencies cannot successfully self-perform for the length of time and with the breadth of responsibility required in Iraq and Afghanistan.”³ What was initially a quick fix use of contractors for an immediate need in mission critical situations where tight deadlines necessitated immediate action has now become a more or less permanently “default option.”⁴ The bottom line is that if the military needs a job done and cannot handle it with its own personnel, the job gets contracted out.⁵

PMCs are supposed to help “[r]educe the need to hire and train new federal civilian employees[, and] [p]rovide flexibility in expanding and reducing support personnel quickly and as needed.”⁶ Essentially, PMC personnel are at-will employees who can be hired on or laid off as the situation dictates. Assuming that this flexibility actually leads to cost savings—something that will be analyzed later—this system comes with some substantial drawbacks for mission-critical functions. Namely, PMC personnel are also free to walk away from a mission any time they want.⁷ As Peter Singer succinctly puts it, a contractor can simply say to himself: I’m not being “paid enough for this #%&.”⁸ These private entities may abandon a specific mission or task and there is no way that the U.S. military can force them to stay.⁹ Contract employees simply do not face the same sanctions for defecting from service that regular soldiers do.¹⁰

“The wars in Iraq and Afghanistan have seen unprecedented reliance on contractors to support American operations and objectives.”¹¹ Truly, “relying on contractors has become the ‘default option’ for many functions, including security for convoys and persons, even if it may not be a legitimate or preferable option.”¹² Despite the fact that it may not even be a legitimate option, U.S. dependence on and use of PMCs persists and the

3. *Id.* at 13.

4. *Id.* at 14.

5. *Id.*

6. *Id.* at 8.

7. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 160-61 (2008).

8. *Id.* at 162.

9. *Id.* at 160-61 (citing Stephen Zamparelli, *Contractors on the Battlefield: What Have We Signed Up For?*, AIR FORCE J. LOGISTICS, 19 (1999)).

10. *Id.* at 160.

11. CWC, AT WHAT RISK?, *supra* note 2, at 6.

12. *Id.* at 10.

conflicts in Iraq and Afghanistan are now “the most contractor-dependent armed conflict in U.S. history.”¹³

How did the United States get to this point? Some have suggested that the “combination of reduced government staffing and increased government responsibility” may have essentially “opened a breach into which contractors have stepped,”¹⁴ by the hundreds of thousands it would seem.

The increased government responsibility comes from the obvious strain of fighting two simultaneous wars lasting nearly a decade each. The lack of government staffing can potentially be explained, over the long term at least, by the fact that the United States currently relies on an all-volunteer army and has since Richard Nixon’s 1973 announcement of a shift away from conscription in response to opposition to the draft during Vietnam.¹⁵ This paper in no way advocates for conscription. Even if that were the most logical solution to filling the thousands of spots that would be left by contractors, it would likely be political suicide for any politician to suggest it, let alone act on it.

However, there is something unsettling about the fact that “[c]ontractor employees—U.S. citizens and foreign nationals—at their peak represented nearly half of the total force deployed to Iraq and Afghanistan.”¹⁶ In 2010, this meant that nearly 200,000 contractors, 199,783¹⁷ to be more precise than the data may actually allow, “were supporting U.S. and allied operations in Iraq and Afghanistan.”¹⁸ Department of Defense (DoD) reports place the estimate of the number of U.S. military personnel in Iraq and Afghanistan at the same time to be 202,100.¹⁹

As the numbers above suggest, there is some uncertainty in calculating exactly how many contractor personnel are currently at work in theater, but a round number of 200,000 is useful for understanding the scope of contractor reliance. This 200,000 figure is also useful for getting a sense of the level of reliance on non-citizen foreign contractor personnel when one considers that over 150,000 of these contractors are either Iraqi nationals, Afghan nationals, or third-country nationals, with another 1,209 individuals of unknown or apparently undeterminable nationality.²⁰ Simple math tells us that, conservatively, this means that over 75% of our military force now consists of non-citizen foreign nationals.

This note in no way suggests that the United States should immediately abandon reliance on all 200,000 contract personnel, or even that it abandon

13. Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERV. CONTRACTOR, Sept. 2010, at 16, 18.

14. CWC, AT WHAT RISK?, *supra* note 2, at 13.

15. CYNTHIA A. WATSON, U.S. MILITARY SERVICE 125 (2007).

16. CWC, AT WHAT RISK?, *supra* note 2, at 24.

17. *Id.* at 7 (citations omitted).

18. *Id.*

19. *Id.* at 8.

20. *Id.* at 7 (citations omitted).

the use of the 150,000 or so non-citizen personnel; it simply couldn't be done. To do so would mean that the United States would somehow need to mass, train, equip, and transport an additional 150,000 to 200,000 personnel to fill all the combat and non-combat positions that would be left by a purge of contractors of this magnitude.

The United States currently uses PMC personnel to “guard bases and diplomatic facilities, escort convoys and personnel, wash clothes and serve meals, maintain equipment and translate local languages, erect buildings and dig wells”²¹ To get to a more manageable number, this note will set aside those PMC personnel who work in logistics, food service, etc. and focus on those actively engaged in armed security functions. CENTCOM's Armed Contractor Oversight Division estimates that as of May 2010 this subset of PMC personnel operating on contracts/subcontracts in Afghanistan numbered approximately 26,000, the vast majority of which are Afghan nationals.²²

Ideally PMC personnel can be used to “[f]ree up military personnel for combat or other critical missions.”²³ However, at least one PMC executive has suggested that the more politicized rationale behind reliance on PMCs could be to take focus off of the U.S. body count by drawing down troops and replacing where needed with PMC personnel.²⁴ Regardless of the reasons, some PMCs now have “skills and experience that government agencies lack or possess only to a limited extent,”²⁵ often because PMCs have been the default and have had opportunities to develop knowledge and skills that others have not.²⁶

B. Cost Concerns

With such heavy reliance on contractors, it is no wonder that “[f]or federal fiscal years 2002–2010 the reported value of funds obligated for contingency contracts for equipment, supplies, and support services is at least \$154 billion for the DoD, \$11 billion for the Department of State, and

21. *Id.*

22. *Sen. Carl Levin (D-MI) Press Conference on Private Security Contractors in Afghanistan* (C-SPAN television broadcast Oct. 7, 2010) [hereinafter *Levin Press Conference*], available at <http://www.c-span.org/Events/Sen-Carl-Levin-D-MI-Press-Conference-on-Private-Security-Contractors-in-Afghanistan/19234-1/>.

23. CWC, *AT WHAT RISK?*, *supra* note 2, at 8.

24. *Frontline: Private Warriors* (PBS television broadcast June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/view/> (interview by Martin Smith with Andy Melville, Project Director, Erinys Iraq, in Red Zone of Baghdad in which Mr. Melville suggests that Erinys may have been used extensively by the Army Corp of Engineers as part of an overall troop drawdown by replacing U.S. troops with PMC personnel).

25. CWC, *AT WHAT RISK?*, *supra* note 2, at 8.

26. *Id.* at 14.

\$7 billion for the U.S. Agency for International Development (USAID).²⁷ When one adds the “\$5 billion in grants and cooperative agreements awarded by State and USAID” the total value becomes \$177 billion.²⁸ To put these figures in more comprehensible, concrete terms, the average cost per U.S. household for contractor support of contingency operations in Iraq and Afghanistan in fiscal years 2002-2010 was \$1,505.²⁹

Truly, there seems to be less consideration for costs and more importance placed on simply trying to get the task accomplished;³⁰ however, with the reliance on contractors, the U.S. has essentially introduced another step where money can get lost or shuffled into the wrong hands. While there is no “single, definitive accounting of the extent of contingency-contract waste, fraud, and abuse,”³¹ the Commission on Wartime Contracting in Iraq and Afghanistan recently estimated the number to be, conservatively, tens of billions of dollars.³² The Commission determined that estimates of fraud alone account for \$12 billion,³³ while recognizing that waste, while not as easily quantified, may account for substantially more U.S. taxpayer funds that have not reached their intended use.³⁴

The reduced government staffing and increased responsibility mentioned above have aggravated what the Commission on Wartime Contracting calls the “toxic interplay [between] huge sums of money” and the “unprecedented reliance on contractors” in relatively small states.³⁵ To put it bluntly, this interplay is made toxic because of “a decimated federal acquisition workforce; a military downsized in the 1990s, but now facing expanded and extended missions; limited deployability of federal civilians; and inadequate operational planning for using and monitoring contractors.”³⁶ This toxic interplay has resulted in the convictions and guilty pleas of some contractor personnel for “bribe[s] solicitation[s], kickbacks, false invoicing, theft of government property, and money laundering in connection with contracting.”³⁷

27. *Id.* at 6 (citing Commission calculation from Federal Procurement Data System-Next Generation data for Defense, State, and USAID contracts performed in Iraq, Afghanistan, Kuwait, Bahrain, and Qatar).

28. *Id.* (citing Commission calculation from the www.USAspending.gov database (based on data from the Federal Assistance Award Data System, for grants and cooperative agreements performed in Iraq and Afghanistan)).

29. *Id.* at 10 fig.2.

30. *Id.* at 14.

31. CWC, *At What Risk?*, *supra* note 2, at 6.

32. *Id.* at 7.

33. *Id.* (applying an estimated 7% loss-of-revenue-to-fraud metric, established by the Association of Certified Fraud Examiners in its 2008 Report to the Nation on Occupational Fraud and Abuse, to the \$177 billion in contingency contracts and grants at issue in Iraq and Afghanistan).

34. *Id.*

35. *Id.* at 9.

36. *Id.*

37. CWC, *AT WHAT RISK?*, *supra* note 2, at 8.

According to Senator Levin's remarks at an October 2010 press conference, General Petraeus specifically warned a bipartisan commission that spending contracting funds too quickly, without sufficient oversight, would likely cause funds to be lost through corruption and criminal patronage and that some of these funds could even unintentionally end up in the hands of insurgents, thereby undermining U.S. objectives in Afghanistan.³⁸

Kickbacks and bribes are bad enough, but having U.S. taxpayer dollars diverted to those who would kill U.S. troops is quite another matter. Yet, according to a recent bipartisan report, this has happened repeatedly in Afghanistan, and two task forces are currently investigating the matter.³⁹

In his October 2010 press conference on the matter, Senator Levin provided some insight into these examples of U.S. taxpayer funds going to the Taliban and al Qaeda through Afghan warlords.⁴⁰ One instance involved a U.S. Air Force contract with ArmorGroup (a subsidiary of G4S) in which funds went directly from contractor to subcontractor to Afghan warlords who then supplied personnel for a contracted security guard force.⁴¹ In that particular case, one warlord killed another (murder and bribery), and one warlord was killed in a U.S. military raid on a Taliban meeting that happened to be held at his house (U.S. funds flowing to those who would undercut U.S. objectives).⁴² A second instance involved a contract with EOD Technology in which one Afghan warlord was reportedly "playing both sides" in appearing to be supportive of both the Taliban and the U.S. military.

Preventing U.S. funds from going to Afghan warlords or insurgents through patronage or poorly monitored contracts is essential, but there are concerns that removing such patronage payments to Afghan warlords/strongmen might make the situation on the ground in Afghanistan more dangerous for civilians and International Security Assistance Force (ISAF) troops.⁴³ Senator Levin acknowledges that there may very well be times when military officials will have to utilize an individual or group that is not ideal but may be the "best that we can do" in a given situation.⁴⁴ However, Levin insists that such a decision should not be left to those lower down in the military chain of command; if the U.S. military is to utilize strongmen, it must be a conscious decision from the very top.⁴⁵ Senator Levin indicated that General Petraeus shared the concern that these types of

38. *Levin Press Conference, supra* note 22.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Levin Press Conference, supra* note 22.

45. *Id.*

decisions should not be left to lower level military officials,⁴⁶ which is the case under the current system.

C. Perceived Illegitimacy of Use of Force by PMCs

Assuming that PMCs are the most “cost-effective for performing certain support functions,”⁴⁷ which is certainly open for debate,⁴⁸ and assuming that the military could properly oversee the formation and execution of contracts while still tending to their other, core objectives, there still remains the policy concern of whether or not the U.S. wants to continue to rely on PMCs.

U.S. policy has historically evinced a preference for the citizen-soldier who, rather than being a professional soldier for hire, would be called upon when needed to resolve a conflict on behalf of his or her country and then return to civilian life after completing military service⁴⁹ and take back up a life in business, agriculture, etc.⁵⁰ In this way, the citizen-soldier represented the most effective compromise between an effective fighting force and a military that is least likely to interfere in the internal affairs of the nation.⁵¹ While this note does not suggest that the United States is in any immediate danger of PMCs staging a *coup d'état*, there is concern within the U.S. military that traditional military principles are being eroded by the increasing use of PMCs, even those comprised largely of former U.S. soldiers; the argument put forward by some of our own military officers has essentially been that associating the U.S. armed forces with commercial enterprises could compromise their professionalism.⁵² U.S. Army Colonel Bruce Grant is quoted as saying, “When former officers sell their skills on the international market for profit, the entire profession loses its moral high ground with the American people.”⁵³ Legitimizing the security functions these contractor personnel perform by incorporating their tasks into the current military command structure, as this note suggests below, would arguably help to alleviate some of these concerns.

46. *Id.*

47. CWC, AT WHAT RISK?, *supra* note 2, at 8 (emphasis added).

48. *Frontline: Private Warriors*, *supra* note 24 (e.g., meals at \$20 per plate that get prepared and thrown away, the presence of multiple kinds of ice cream, or the presence of all manner of fast food options).

49. WATSON, *supra* note 15, at 12.

50. *Id.* at 28 (citation omitted).

51. *Id.* at 298.

52. SINGER, *supra* note 7, at 204 (citations omitted).

53. *Id.* (quoting BRUCE GRANT, ARMY WAR COLLEGE, U.S. MILITARY EXPERTISE FOR SALE: PRIVATE MILITARY CONSULTANTS AS A TOOL OF FOREIGN POLICY (1998), available at <http://handle.dtic.mil/100.2/ADA344357>).

D. Lack of Public Consciousness of Contractor Sacrifices

Scholars have discussed the fact that the American public does not have a true sense of the scale of the operations in Iraq and Afghanistan because contractor injuries and fatalities are not well reported or properly considered in the debate over the true cost of the war.⁵⁴ For example, “[b]etween September 2001 and December 2010, over 2,200 contractor employees of all nationalities have died and over 49,800 were injured in Iraq and Afghanistan.”⁵⁵ Even by early 2010, while U.S. contractor fatalities had reached only 2,008, it was estimated that adding these fatalities brought the total U.S. fatalities in Iraq and Afghanistan to over 7,500.⁵⁶ This figure is believed to be even higher, since the best estimate of contractor fatalities comes from the Labor Department’s Division of Longshore and Harbor Worker Compensation, which only tallies contractor deaths where families or employers file for insurance benefits.⁵⁷ According to Steven Schooner, a professor at The George Washington University School of Law who has authored numerous works on the subject, these contractor fatalities should be considered more seriously.⁵⁸

E. Coordination & Communication Issues with PMCs

The decisions of PMC personnel can directly impact U.S. military operations, and yet PMC personnel are able to make and execute plans wholly outside of the existing military command structure. Take, for example, the widely reported killing of four American Blackwater contractors and the horrific mutilating of their bodies in Fallujah.⁵⁹ The decision to send these contractors through Fallujah was made without regard to U.S. military strategy in the area and ultimately led the U.S. Marine Corps to enter the city on terms other than those they had

54. See, e.g., Schooner & Swan, *supra* note 13.

55. CWC, AT WHAT RISK?, *supra* note 2, at 8 (“Actual casualties are undoubtedly higher, because federal statistics are based on filed insurance claims, which may not apply to many foreign contractors’ employees.”) (citing OFFICE OF WORKERS’ COMPENSATION PROGRAMS, DEP’T OF LABOR, DEFENSE BASE ACT CUMULATIVE REPORT BY NATION (09/01/2001—12/31/2010), available at www.dol.gov/owcp/dlhwc/dbaallnation.htm).

56. Schooner & Swan, *supra* note 13, at 16.

57. *Id.* at 17.

58. See generally Steven L. Schooner, *Why Contractor Fatalities Matter*, PARAMETERS, Autumn 2008, at 78; Steven L. Schooner, Op-Ed., *Remember Them Too: Don’t Contractors Count When We Calculate the Costs of War?*, WASH. POST, May 25, 2009, at A21; Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public’s Casualty Sensitivity*, J. NAT’L SEC. L. & POL’Y (forthcoming 2012).

59. *Frontline: Private Warriors*, *supra* note 24.

determined were best for the overall mission.⁶⁰ As Marine Col. John Toolan puts it:

[The U.S. Marine Corps has] a tendency to want to be a little bit more sure about operating in an environment. We're going to do the risk analysis, and we will, in most cases, opt to reduce the amount of violence. Whereas I think some of the contractors are motivated by the financial remuneration and the fact that they probably want to get someplace from point A to point B quickly, their tendency [is] to have a little more risk. So yes, we're at odds [with contractors], but we can work it out. But it requires....having a joint coordination center where everybody is aware of the rules. And somebody has to be the big dog, and that needs to be us.⁶¹

Further muddying the waters in the above situation was the difficulty in tracking down who was ultimately responsible for the Blackwater contractors being in Fallujah when they were killed. Doing so would involve figuring out who was working for whom and it appears that Blackwater was contracted to provide security for ESS, the dining service subcontractor who was in turn hired by KBR through a Kuwaiti company named Regency.⁶² ESS claims that it was not working for KBR on March 31st during the Fallujah attack and that the Kuwaiti company, Regency, has been reluctant to release any documentation.⁶³ So ultimately it has been difficult to establish why those American contractors were even in Fallujah that night.

To deal with the coordination and communication issues involving PMCs in Iraq, the U.S. brought in Aegis, itself a British PMC, to try to unify the other private security contractors.⁶⁴ Even assuming that another private contractor could properly oversee the multitudes of other private contractors, cooperation between these private entities is still voluntary and is still *outside* the military chain of command. Additionally, this outsourcing to solve the problem of outsourcing seems counterintuitive⁶⁵ and exemplifies how ingrained the reliance on private contractors has become.

60. *Id.* (Marine Col. John Toolan, reveals his frustration at having to change his plans to enter Fallujah: "The only reason why [going into Fallujah] bothered me is because we had developed a pretty detailed plan on how we were going to address the problem [of insurgency within the city]. And by those contractors being killed, that really forced us to put that aside and to opt for the more direct approach.").

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* SIMMS TABACK, *THERE WAS AN OLD LADY WHO SWALLOWED A FLY* (1997) (providing a simple, poignant, yet absurd example of how solving one problem with more of the same merely perpetuates an undesirable cycle).

F. Chain of Command & Accountability Issues with PMCs

Retired USMC Colonel Thomas X. Hammes, a former base commander in Iraq, has expressed concern that private security contractors operating in Iraq create unsafe conditions; he believes that to the Iraqi population, these contractors represent the United States and that Iraqi civilians know that when these individuals kill civilians in the process of accomplishing a specific task they will not be held accountable.⁶⁶ It stands to reason that Afghan civilians would have similar reactions.

Andy Melville, Project Director for Erinys, Iraq, when asked who his company was accountable to, said that Erinys is accountable to coalition forces and insisted that Erinys is a “very professional and disciplined company.”⁶⁷ However, Lawrence Peter, formerly in charge of regulating private security in Iraq for the U.S. government, and now a Private Security Association Representative (note the irony), admits that typically, any reprimand of private contractor personnel that *does* make its way back to the military would be handled between the contracts officer who hired that private security company and the private security company itself and not necessarily between the individual PMC employee and the military.⁶⁸ Again, difficulties arise here in that the military must rely on cooperation from the PMC in order to even begin to determine which PMC employees may be responsible; the system simply does not provide the same checks and balances for PMC actions as it does for more traditional, public military forces.⁶⁹

Congress has made several attempts to bring contractors into the fold of more traditional military accountability. For example, the 2007 Defense Bill sought to apply the Uniform Code of Military Justice (UCMJ) to private contractors accompanying the military in the field.⁷⁰ Section 552, of 3510 total sections in that bill, amends 10 U.S.C. § 802(a)(10) (article 2(a) of the UCMJ) by replacing the word “war” with the phrase “declared war *or a contingency operation*.”⁷¹ Additionally, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA), which could have applied civilian law to contractor crimes in war zones; however, MEJA simply has not been used to that end because of the difficulties that civilian prosecutors here in the U.S. have in determining what is illegal activity in a conflict zone 9,000

66. *Frontline: Private Warriors*, *supra* note 24.

67. *Id.*

68. *Id.*

69. *E.g.*, SINGER, *supra* note 7, at 220-21.

70. Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors*, BROOKINGS INST. (Jan. 12, 2007), http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx.

71. Peter W. Singer, *The Law Catches Up to Private Militaries Embeds*, BROOKINGS INST. (Jan. 04, 2007), http://www.brookings.edu/articles/2007/0104defenseindustry_singer.aspx (emphasis added).

miles away and because of the funding and logistical problems associated with trying such a remote case.⁷² The reality is that from the inception of the war in Iraq until early 2007, “[n]ot one contractor of the entire military industry in Iraq [had] been charged with any crime . . . let alone prosecuted or punished.”⁷³ Similarly ineffective from a civil liability standpoint, the Federal Tort Claims Act (FTCA) has found little use in holding private security contractors accountable in the United States because of the “government contractor defense.”⁷⁴

G. Security Concerns

Proper record keeping and vetting of security personnel is essential as evidenced by recent attacks by Taliban from *within* the Afghan security forces.⁷⁵ Even some security companies, like U.K. based ArmorGroup, have admitted that the industry as a whole needs to take greater care in properly vetting potential employees.⁷⁶ Yet, a recent DoD audit by the Inspector General (IG) examining the life cycle of contractor Common Access Cards (CACs) found weaknesses in the system that could “result in unauthorized access to DoD resources, installations, and sensitive information worldwide.”⁷⁷ As a specific example:

DoDIG auditors found that better Army oversight is required for a KBR Realtime Automated Personnel Identification System site that issued 25,428 CACs to contractors deploying to Southwest Asia. According to the audit, a KBR subcontractor did background checks with no Army oversight; a contractor facilitated a CAC approval process that bypassed Contractor Verification System; and nearly half of revoked CACs were not recovered. Furthermore, contractors were misclassified as government employees on their CACs. Specifically, 40,055 contractor CACs indicated the holders had General Schedule pay grades, and 211,851 had e-mail

72. *Id.*

73. *Id.*

74. DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ 129 (2009) (describing the failed attempts by Iranian citizens to hold U.S. government contractors civilly liable under the Federal Tort Claims Act for civilian deaths resulting from the U.S. Navy’s 1988 downing of an Iranian passenger with a contractor built ship and weapons system).

75. *The Situation Room: Man Opens Fire on Americans in Kabul* (CNN television broadcast Apr. 28, 2011), available at <http://www.cnn.com/2011/WORLD/asiapcf/04/27/afghanistan.violence/index.html?hpt=T2> (describing attacks by insurgents in official Afghan police uniforms, the large numbers of uniforms that had been confiscated on raids in and around Kabul, the Taliban’s stated priority of infiltrating security forces, and the woefully inaccurate records—181,000 Afghan police in the national database as compared to only 125,000 actual personnel).

76. ISENBERG, *supra* note 74, at 105 (citing Thomas Catan, *Call to Vet Security Companies Working Overseas*, FINANCIAL TIMES (London), Sep. 29, 2004).

77. INSPECTOR GEN. GORDON S. HEDDELL, U.S. DEP’T OF DEF., SEMI-ANNUAL REPORT TO THE CONGRESS 29 (2011) (discussing control of Common Access Cards).

addresses that improperly identified the holders as U.S. government employees.⁷⁸

In some cases, the improper background checks of foreign nationals working on U.S. military bases or for the U.S. military in the region are a result of the lack of accurate records in the individuals' home countries, where such records of the kind typically used simply do not exist.⁷⁹

Given the security card issue above, would it be so far-fetched to imagine that an individual or group determined to harm U.S. interests or personnel in the region would potentially be able to get a hold of one of these cards or evade a proper background check and drive a car loaded with explosives through the gate at some forward operating base? If the author of this work has thought of it, it seems plausible that someone with much more sinister motives may have thought of it as well.

II. PROPOSED SOLUTION

A. Overview

While President Obama's administration and Afghani President Karzai share a stated goal of a 2014 transfer of security operations to the Afghan government, Secretary of Defense Gates has indicated that this does not necessarily mean a complete withdrawal of all U.S. troops by 2014.⁸⁰ Even as the U.S. prepares for initial troop drawdowns beginning in July 2011, it is likely that there will be a continued need for U.S. presence to train and support Afghan National Security Forces (ANSF) for years to come.⁸¹ In fact, the Commission on Wartime Contracting, in its recently released fifth special report, recommends immediate actions be taken to secure the gains in security, infrastructure, and programs that have been made to date in Afghanistan or else risk wasting years of hard work and sacrifices and billions of dollars as U.S. troops withdraw before the Afghan government has the capacity to maintain those gains on its own.⁸²

78. *Id.*

79. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-351, CONTINGENCY CONTRACT MANAGEMENT: DOD NEEDS TO DEVELOP AND FINALIZE BACKGROUND SCREENING AND OTHER STANDARDS FOR PRIVATE SECURITY CONTRACTORS 1 (2009), available at <http://www.gao.gov/new.items/d09351.pdf>

80. Viola Gienger, *Afghan 'War-Weariness' in U.S. Won't Damp Intention to Succeed*, *Gates Says*, BLOOMBERG (June 4, 2011, 6:35 AM), <http://www.bloomberg.com/news/2011-06-04/afghan-war-weariness-in-u-s-won-t-damp-intention-to-succeed-gates-says.html>.

81. *See id.*; COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., SPECIAL REPORT NO. 5, SUSTAINABILITY: HIDDEN COSTS RISK NEW WASTE 1 (2011) [hereinafter CWC, SUSTAINABILITY], available at http://www.wartimecontracting.gov/docs/CWC_SpecialReport5.pdf.

82. *See* CWC, SUSTAINABILITY, *supra* note 81.

It is in light of the projected need for continued U.S. presence in Afghanistan through at least 2014 and the Commission on Wartime Contracting's "extensive deliberation[s]" calling for "sweeping reforms" to the current PMC structure that this note suggests a U.S. Foreign Legion as one possible method to bring about fundamental change that the Commission on Wartime contracting suggests "must be made."⁸³ The Commission specifically suggested increasing "responsibility and accountability for contracting outcomes" as a way to correct for the negative results of U.S. overreliance on private contractor personnel.⁸⁴ The Commission then goes through and proposes over thirty changes, most of them alterations within the current contractor-reliant scheme.⁸⁵

This note focuses narrowly, and builds on two of the most fundamental suggested changes; first, the growth of "organic capacity"⁸⁶ on the part of government agencies which currently rely on contractors and secondly, a specific corollary to this increase in organic capacity, "restricting [the] reliance on contractors for security."⁸⁷

Former General McChrystal, in statements to Senate Armed Services Chairman Levin, made it clear that he did not believe PMCs were appropriate for a country like Afghanistan that is trying to grow law and order.⁸⁸ Secretary of State Clinton has pointed out that "[s]ometimes contracting makes sense and does make us more efficient and flexible. But there are core governmental functions that should always be performed by public servants, not private companies."⁸⁹ This note takes the position that security operations are one of these core governmental functions that should not be handled by private contractors. As such, this note suggests expanding the responsibility and accountability of what is now being handled by contractors by removing security functions entirely from the sphere of contracting and placing them squarely within the existing U.S. military command structure where such core governmental functions belong. Certainly this would constitute a "sweeping reform[],"⁹⁰ that the Commission on Wartime Contracting suggests is needed. Although, it is admittedly a more fundamental change than simply retooling an existing contractor centered approach.

83. CWC, *AT WHAT RISK?*, *supra* note 2, at Foreword.

84. *Id.*

85. *See generally id.*

86. *Id.* at 2 (recommending increased organic capacity as the very first of over thirty proposed solutions to over-reliance on contractors).

87. *Id.* (recommending restrictions on use of contractors for security as the third of over thirty proposed solutions to over-reliance on contractors).

88. *Levin Press Conference*, *supra* note 22.

89. CWC, *AT WHAT RISK?*, *supra* note 2, at 12 (quoting Sec'y of State Hillary Clinton, Briefing on Quadrennial Diplomacy and Development Review (Dec.15, 2010)).

90. *Id.* at Foreword (quoting the Commission in its determination that only "sweeping reforms" will be enough to make necessary changes to reduce overreliance on contractors).

Any suggestion that the U.S. incorporate security functions back into its own military must address the reality that many of these positions are now held by PMC employees who are non-citizen foreign nationals.⁹¹ Recognizing that one of the underlying causes for reliance on PMCs for security is a lack of organic capacity,⁹² and further recognizing that it may not be possible to grow this capacity rapidly enough to fill the void that would be left by abandoning the use of PMCs, this note proposes that if the U.S. is to remain in Afghanistan and a continued reliance on non-citizen private security contractor personnel is required, that the U.S. bring these individuals within the purview of the existing U.S. military command structure via the proposed “U.S. Foreign Legion.” Doing so would serve to legitimize the roles that these individuals currently fulfill, would more accurately reflect the sacrifices being made by these individuals, more appropriately reward them for their service, and is in keeping with current trends in domestic U.S. laws.

B. How Proposed Solution Addresses Problems Within Current PMC System

1. *Legitimizing use of force*

International perception of private security contractors must be balanced against U.S. security concerns. Late in 2010, President Obama welcomed criticism from President Karzai regarding the perception of “heavy-handedness” on the part of private security contractors in Afghanistan. However, while President Obama recognized President Karzai’s concerns as “perfectly appropriate,” he stated that he “can’t send U.S. aid workers or civilians into areas where [he] can’t guarantee their safety.”⁹³ President Obama stressed that he had to “think practically” about operations in Afghanistan.⁹⁴

Thinking practically, the need for continued security will likely persist. Until Afghanistan is capable of handling security internally, utilizing a formal U.S. military force would meet the practical needs of securing a nation while avoiding some of the harshest criticisms about the accountability of PMC personnel. A U.S. Foreign Legion would hold Legionnaires to the same high standards as other U.S. military personnel

91. *See id.* at 7 (citations omitted).

92. *Id.* at 13-15, 17.

93. Barack Obama, President of the United States of America, Remarks at the NATO Summit Presidential Press Conference (Nov. 22, 2010) [hereinafter *NATO Press Conference*], available at <http://www.whitehouse.gov/photos-and-video/video/2010/11/20/nato-summit-presidential-press-conference> (President Obama responding to a question from Karen DeYoung regarding President Karzai’s concerns over private security contractors in Afghanistan (beginning at 15:07)).

94. *Id.*

and would likely avoid some of the criticisms of “heavy-handedness.” Where problems arose, they could be dealt with under the Uniform Code of Military Justice in the same way disciplinary actions are handled for U.S. military personnel.

2. *Increased Accountability Through Chain of Command*

Some scholars have expressed concerns that “certain tasks, such as prisoner interrogation, are too sensitive to be outsourced to the private sector without proper government oversight.”⁹⁵ Pratap Chatterjee, a Visiting Fellow at the Center for American Progress, testified on May 2, 2011 at a public forum before the Commission on Wartime Contracting in Iraq and Afghanistan and strongly suggested that the U.S. needs better methods of tracking personnel, funding, and supplies.⁹⁶ Mr. Chatterjee has spent a considerable amount of time studying the issue and is specifically concerned with “the lack of inventory tracking of weapons and ammunition that were supplied by contractors, and the theft and misuse of the weapons by security forces” as well as “the unqualified translators [the U.S.] hired through L-3/Titan, the inexperienced police officers through DynCorp, and the payments that Third Country Nationals have to make to labor brokers to get jobs on bases.”⁹⁷

When asked about U.S. actions in Fallujah, Iraq following the death of four Blackwater PMC personnel, Marine Col. John Toolan suggested that the military’s original plans for working with local leaders in Fallujah to minimize violence were thrown to the wayside when those contractors drove through the city without communicating their intent or location to the military. This was a highly publicized example of what can go wrong in the interplay between PMC and military actions through a lack of communication.

The U.S. military works to minimize these issues through a regional command structure, which brings multiple military branches together to work under a single, unified regional commander.⁹⁸ In Afghanistan, this duty falls to Central Command, which has responsibility for gathering and

95. ISENBERG, *supra* note 74, at 136 (describing the lesson learned from the Abu Ghraib prison scandal as being that the potential for human rights violations require prisons to be staffed by military, rather than PMC, personnel while lamenting the continued reliance on PMC staff resulting from shortages of qualified military personnel).

96. Pratap Chatterjee, Visiting Fellow, Center for American Progress, Statement before the Commission on Wartime Contracting in Iraq and Afghanistan (May 2, 2011), available at http://www.wartimecontracting.gov/docs/forum2011-05-02_statement-Chatterjee.pdf (“We need accurate data on everything from the workers we use to the goods and services we purchase.”).

97. *Id.*

98. WATSON, *supra* note 15, at 7.

disseminating data and coordinating efforts in that region.⁹⁹ While there have been attempts to contract out a similar function for PMCs that would both coordinate the actions of the multitudes of PMCs amongst themselves and between PMC actions and those of the military, such efforts have not been widely successful.¹⁰⁰ This note suggests placing PMC personnel directly under U.S. Central Command thereby potentially avoiding the action-reaction scenario seen in Fallujah; the military would be able to plan its moves without having to react directly to the actions of PMC personnel or indirectly to the repercussions of PMC personnel actions.

3. Improved Coordination Toward Accomplishing Mission Objectives

The proposed U.S. Foreign Legion is a unique solution to the concerns of military command and those who study these issues because, instead of trying to supplant the large numbers of PMC personnel, it would overlay a proper chain of command and increased accountability atop of an existing force. The U.S. Foreign Legion would be structured and incorporated into the existing U.S. military and in this way would have the type of top-down decision making that Senator Levin and General Petraeus suggest is necessary to avoid compromising overall mission strategy at the lower levels of military command.¹⁰¹

Additionally, since some of the current contractor personnel have more experience in theater than U.S. military personnel,¹⁰² the proposed solution here is to essentially co-opt that expertise and bring it into the folds (or back into the folds where PMC personnel are former military personnel) of the existing military command structure. Regardless of whether or not the initial contracting was a sound decision, this solution takes the best of what has come from it and moves forward.

Instead of spreading these experienced personnel across dozens of different organizations with different objectives and no real central command,¹⁰³ the proposed U.S. Foreign Legion would provide a means by which the U.S. could channel the efforts of these individuals toward major objectives. Placing these individuals under one command structure would put the overall mission command back in the hands of senior military officials whose job it is to guide the overall mission towards success rather than leaving the bulk of the decision making to private entities and lower

99. Gen. James N. Mattis, Statement Before the Senate Armed Services Committee About the Posture of U.S. Central Command (Mar. 1, 2011), *available at* <http://www.centcom.mil/en/about-centcom/posture-statement/>.

100. *Frontline: Private Warriors*, *supra* note 24.

101. *Levin Press Conference*, *supra* note 22.

102. CWC, *AT WHAT RISK?*, *supra* note 2, at 15.

103. *Frontline: Private Warriors*, *supra* note 24 (describing the contracting out of attempts to organize contractors).

level military officials with disparate interests and goals.¹⁰⁴ An added benefit from this system might well be further cost savings as fewer funds may be lost to waste, fraud, etc. and where efforts can be streamlined and duplicated efforts could be avoided.

4. *Reductions in Overall Cost, Waste, and Fraud*

As described above, the Commission on Wartime Contracting (CWC) estimates that U.S. taxpayers have lost \$12 billion to fraud by using PMCs to support contingency operations in Afghanistan and Iraq.¹⁰⁵ The CWC suggests that waste, while not necessarily quantifiable, may well cause even more U.S. taxpayer funds to be diverted from their intended uses.¹⁰⁶

This note suggests essentially removing the middleman from the equation. Instead of having prices set by a corporation looking to profit from conflict, the proposed U.S. Foreign Legion would pay its members directly for their services and in this way reduce the chance that funds would be squandered in the process. Additionally, the opportunity to “pad accounts” would likely be reduced if the money was kept “in-house.”

Of course, the tighter controls on funds would likely also help avoid blatant abuses akin to instances where Blackwater personnel cashed in on fraudulent receipts for fuel or expensed prostitution.¹⁰⁷ While some individual U.S. Foreign Legionnaires might inevitably spend their pay on illicit activities,¹⁰⁸ an individual’s choices would reflect less negatively on an institution than when the vice is expensed and billed directly to Uncle Sam.

Costs for proposed U.S. Foreign Legion could be *roughly* approximated by multiplying pay for individual U.S. Foreign Legionnaires by number of Legionnaires needed. For purposes of this note, a very crude approximation could be made by taking the number of PMC personnel currently devoted to security functions and assuming a similar number of U.S. Foreign Legionnaires would be needed to replace the PMCs. To approximate this cost, the U.S. could look to its own internal pay scales,¹⁰⁹ to pay scales of

104. See *Levin Press Conference*, *supra* note 22.

105. CWC, *AT WHAT RISK?*, *supra* note 2, at 7 (applying an estimated 7% loss-of-revenue-to-fraud metric, established by the Association of Certified Fraud Examiners in its 2008 Report to the Nation on Occupational Fraud and Abuse, to the \$177 billion in contingency contracts and grants at issue in Iraq and Afghanistan).

106. *Id.*

107. *Suit: Prostitute, Strippers Part of Blackwater Fraud*, CNN JUSTICE (Feb. 12, 2010), <http://www.cnn.com/2010/CRIME/02/12/blackwater.suit/index.html?iref=allsearch>.

108. See, e.g., ADRIAN D. GILBERT, *VOICES OF THE FOREIGN LEGION: THE HISTORY OF THE WORLD’S MOST FAMOUS FIGHTING CORPS* 85–88 (2010) (describing rampant prostitution accompanying the French Foreign Legion on campaign).

109. *Basic Pay: Active Duty Soldiers*, U.S. ARMY, <http://www.goarmy.com/benefits/money/basic-pay-active-duty-soldiers.html> (last visited Jan. 30, 2012) (listing baseline Army pay); *2011 Pay Table*, DEF. FIN. & ACCOUNTING SERV.,

similar foreign military forces,¹¹⁰ and to current pay for PMC personnel¹¹¹ in order to estimate the pay for U.S. Foreign Legionnaires.

As a baseline, current pay for enlisted non-officer U.S. military personnel in the Army and Navy ranges from \$17,611 (\$1,467 per month) for an E1 with less than 2 years' experience up to \$34,088 (\$2,840 per month) for an E6 with 6 years of experience.¹¹² Using these figures, a low-end annual estimate for the salaries of a 150,000 strong¹¹³ U.S. Foreign Legion would be anywhere from about \$2.6 billion to \$5.1 billion.

The French Foreign Legion currently pays its Legionnaires a similar range based upon years of service, rank, and division within the Legion.¹¹⁴ The pay for French Foreign Legionnaires starts at €1,043 (approximately \$1,345) per month and goes up to €1,205 to €3,567 (approximately \$1,554 to \$4,601) per month for Legionnaires with between 10 months and 3 years of service.¹¹⁵ Comparing these numbers to those for members of the U.S. military makes it clear that the French Foreign Legionnaires are generally compensated at a level the U.S. is comfortable with.

Many other factors would impact the ultimate cost of this proposed solution, but these figures provide a baseline estimate and the potential for a more definite and quantifiable cost structure. Additionally, the proposed U.S. Foreign Legion would solve some of the disparity in pay for individuals in positions now occupied by PMC personnel where Nepalese Gurkhas make around \$50 per day while other PMC personnel make \$500 or more.¹¹⁶

5. Improved Recognition for PMC Personnel and Their Sacrifices

Historically, pay for French Foreign Legionnaires was abysmal and brought out all manner of infighting and divisive behavior that would not serve to improve unit cohesion or morale.¹¹⁷ A more equitable pay scale in the proposed U.S. Foreign Legion would more adequately recognize the

<http://www.dfas.mil/dms/dfas/militarymembers/pdf/MilPayTable2011.pdf> (listing baseline Navy pay).

110. See, e.g., *Pay*, FRENCH FOREIGN LEGION, <http://www.legion-recrute.com/en/salaires.php> (last visited Jan. 30, 2012) (detailing the basic pay range for French Foreign Legionnaires).

111. *Frontline: Private Warriors*, *supra* note 24.

112. *Basic Pay: Active Duty Soldiers*, *supra* note 109.

113. CWC, AT WHAT RISK?, *supra* note 2, at 7 (citations omitted).

114. *Pay*, FRENCH FOREIGN LEGION, *supra* note 110.

115. *Id.*; *World Currencies*, CNN MONEY, <http://money.cnn.com/data/currencies/> (last visited Jan. 21, 2012) (showing last trade conversion rate at 1 euro to 1.29 U.S. dollars).

116. See, e.g., *The Baghdad Boom*, ECONOMIST (Mar. 25, 2004), <http://www.economist.com/node/2539816>; *Frontline: Private Warriors*, *supra* note 24.

117. GILBERT, *supra* note 108, at 74.

efforts and sacrifices of some members while trying to build a more cohesive environment among the Legionnaires as a whole.

Some in this country even have concerns that the U.S. military *generally* operates as a vehicle for the less educated and less wealthy to protect the interests of the wealthy, with a disproportionate number of minorities enlisting.¹¹⁸ The proposed U.S. Foreign Legion would likely have many individuals from less well developed nations and from economically depressed backgrounds. However, without minimizing this concern, the proposed U.S. Foreign Legion is not creating this problem. These individuals already serve in large numbers as PMC personnel and would receive more adequate recognition and compensation for their actions through the proposed U.S. Foreign Legion. Not to mention that many foreign nationals currently serve on active duty within the existing branches of the U.S. military.¹¹⁹

Improved compensation for foreign nationals who serve the U.S. would help properly recognize their efforts. Providing citizenship options to those who take up arms for the U.S. would potentially represent an even greater recognition of their sacrifices. Extending improved citizenship options to those U.S. Foreign Legionnaires who were interested would also be more in keeping with the theoretical ideal of the *citizen-soldier*. While this concept is not universally accepted, general historical concepts of citizenship in the United States have involved the notion that one “cannot be a fully functional citizen without being willing to put down the plow and take up the rifle to defend one’s home, standard of living, and life.”¹²⁰ This note suggests offering the *option* of citizenship to those who already put down their proverbial plows and pick up rifles to defend our way of life without such recognition.

The suggestions in this paper are intended to be narrowly tailored and pragmatic, not xenophobic. If one believes that the underlying system is fundamentally flawed, which is in no way the thrust of this note, the suggestions contained in this paper still represent a marked improvement by compensating private contractor personnel in a manner that does not span a 10 plus fold disparity based on national origin,¹²¹ ensures that all personnel have access to basic equipment,¹²² and that more commensurately recognizes the sacrifices that these individuals are increasingly making on

118. See WATSON, *supra* note 15, at 17-19.

119. See discussion *infra* Part III.D.i.

120. WATSON, *supra* note 15, at 13.

121. *Frontline: Private Warriors*, *supra* note 24 (describing pay for former Gurkha private security personnel at \$50 per day versus U.S. & U.K. pay contractor personnel earning up to \$500 to \$1000 per day).

122. SHADOW COMPANY (Purpose Films 2006) (highlighting disparity in equipment between PMC personnel and official U.S. military personnel).

behalf of the United States.¹²³ This is especially important in Afghanistan where contractor fatalities increased from 36 percent of 2009 fatalities to 56 percent of 2010 fatalities.¹²⁴ Furthermore, formally recognizing the actions of these individuals and supporting these non-citizen soldiers and their families would not leave them to rely on private aid organizations for support when they retire from service or are killed or wounded in action.¹²⁵

6. *Improved Security via Proper Vetting of Personnel*

The U.S. military conducts numerous physical, medical, and criminal background checks on recruits before even allowing them to enlist.¹²⁶ The goal is to ensure that the U.S. military is comprised of strong, healthy troops with good moral character who are dedicated to the defense of the nation.¹²⁷ PMC personnel on the other hand take no oaths, often do not need to pass the same physical tests, and certainly are not always held to the same stringent standards for background checks that U.S. military personnel are held to.¹²⁸

These individuals already serve in many of the same areas, and indeed inside many of the same secured facilities, as U.S. personnel. It is only logical to require that they be vetted in the same manner as their military counterparts. While there is no guarantee that proper screening of security personnel would prevent any and all sabotage,¹²⁹ a lack of proper screening unnecessarily subjects U.S. personnel, and the greater U.S. mission, to

123. Schooner & Swan, *supra* note 13, at 17 (discussing the increasing percentage of fatalities that contract personnel represent in Iraq and Afghanistan in recent years; from 4% in 2003 to 53% in the first half of 2010).

124. *Id.* at 18 (based on the first half of 2010).

125. See, e.g., GURKHA WELFARE TRUST, <http://www.gwt.org.uk/> (last visited Jan. 21, 2012) (an organization created to support former Gurkhas who fought bravely for the U.K. without any formal support thereafter).

126. See “*A Day at the Meps*,” U.S. MILITARY ENTRANCE PROCESSING COMMAND, <http://www.mepcom.army.mil/dayatmeps/transcript.asp> (last visited Jan. 21, 2012).

127. See, e.g., U.S. DEP’T OF THE ARMY, FM 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE viii (2006); “*A Day at the Meps*,” *supra* note 126.

128. See, e.g., SINGER, *supra* note 7, at 160, 162; CWC, AT WHAT RISK?, *supra* note 2, at 8; *Levin Press Conference*, *supra* note 22 (discussing U.S. taxpayer funds being funneled to the Taliban and al Qaeda through Afghani warlords); *Frontline: Private Warriors*, *supra* note 24 (interviewing USMC Col. John Toolan, who contrasts USMC operations with those of private contractors within his area of command; retired USMC Col. Thomas X. Hammes, who expresses concerns that Iraqi civilians see PMC personnel as unaccountable for civilian casualties; and Lawrence Peter, a Private Security Association Representative, who admits that accountability for PMC personnel misconduct would be handled between a contracts officer and the PMC firm rather than between the PMC employee and the U.S. military).

129. See, e.g., Steve Inskeep & Quil Lawrence, *Karzai’s Half-Brother Assassinated in Kandahar* (NPR radio broadcast July 12, 2011), available at <http://www.npr.org/2011/07/12/137784161/karzais-half-brother-assassinated-in-kandahar> (describing the assassination of President Hamid Karzai’s brother by a trusted security official inside a secure compound).

threats that could be reduced if those security personnel were cleared in the same way their current U.S. counterparts are.

Subjecting all would-be U.S. Foreign Legionnaires to more stringent screening processes than those faced by current PMC personnel may pose some difficulties where recruits hail from parts of the world with less thorough record-keeping, but a good faith effort must be made even if it means losing some otherwise qualified personnel in exchange for improved security. Worth noting is that the French Foreign Legion already subjects all of its potential recruits to roughly three weeks of assessment which includes physical, intellectual, and psychological testing, as well as a rigorous security screening process.¹³⁰

C. Examples of State Military Units Comprised of Foreign Nationals

In implementing a U.S. Foreign Legion, the U.S. should review historical examples of military forces comprised of non-citizen foreign nationals. The two most prominent examples are the French Foreign Legion and the British and Indian Gurkhas. These military units both have long, storied histories and are still seeing active duty today.¹³¹ Studying the success and failures of these organizations would help the U.S. in structuring its forces by borrowing from them what works and avoiding what has proven problematic.

1. French Foreign Legion

When individuals think of a national military unit comprised of non-citizen soldiers, the first thought is probably of the romanticized French Foreign Legion. Historically, the French Foreign Legion has been made up of individuals seeking a fresh start,¹³² individuals looking for a unique challenge,¹³³ or those for whom the Legion offered a reprieve from absolute poverty;¹³⁴ even today, the French Foreign Legion still provides the opportunity for some to escape and make a fresh start.¹³⁵

130. GILBERT, *supra* note 108, at 20-22 (quoting a former French Foreign Legionnaire who described the security screening as a series of Gestapo-like interrogations where “if any aspect of your story didn’t gel, you were out”).

131. *See generally id.* (history of the French Foreign Legion); DAVID JORDAN, *THE HISTORY OF THE FRENCH FOREIGN LEGION FROM 1831 TO THE PRESENT DAY* 92—109 (2005) (history of the French Foreign Legion); JOHN PARKER, *THE GURKHAS: THE INSIDE STORY OF THE WORLD’S MOST FEARED SOLDIERS* (1999); TONY GOULD, *IMPERIAL WARRIORS: BRITAIN AND THE GURKHAS* (1999); E.D. SMITH, *JOHNNY GURKHA: ‘FRIENDS IN THE HILLS’* (1985); SANDRO TUCCI, *GURKHAS* (1985).

132. GILBERT, *supra* note 108, at 16.

133. *Id.* at 13-16.

134. *Id.* at 16-17.

135. Neil Tweedie, *The French Foreign Legion—the last option for those desperate to escape the UK*, TELEGRAPH (London), Dec. 3, 2008,

While French Foreign Legionnaires were historically not allowed to operate in regular French army artillery or cavalry units because of fears that they would abandon these critical posts,¹³⁶ the modern Legion has proven itself a loyal and capable force in modern hostilities.¹³⁷

To the extent that the French Foreign Legion was created by royal ordinance,¹³⁸ it may not provide the best *legal* framework for a similar fighting force under the U.S. legal system. However, as a force with such a lengthy history that still sees active combat operations around the world,¹³⁹ it provides a unique case study and this note borrows from the French experience often in discussing the potential for a U.S. Foreign Legion.

2. *British and Indian Gurkhas*

“If a man says he is not afraid of dying, he is either lying or he is a Gurkha.”¹⁴⁰

Historically, Gurkha troops have fought bravely for the British in Afghanistan.¹⁴¹ Active duty Gurkha troops have continued to serve in Afghanistan with the British military¹⁴² and many former Gurkhas work with PMC contractors.¹⁴³ However, despite their renown for valor and courage, even former Gurkha soldiers have been known to abandon a mission when working as private contractors.¹⁴⁴ Compare, for example, the withdrawal of ex-Gurkha private contractors from hostilities in Sierra Leone following the mutilation of their commander¹⁴⁵ with the resolve of colonial British Gurkha troops to continue fighting in a historic battle in Afghanistan

<http://www.telegraph.co.uk/news/worldnews/europe/france/3546207/The-French-Foreign-Legion-the-last-option-for-those-desperate-to-escape-the-UK.html>.

136. SINGER, *supra* note 7, at 302 n.47.

137. JORDAN, *supra* note 131 (giving a brief overview of French Foreign Legionnaire involvement in widely varied and highly specialized missions across the globe).

138. *Id.* at 8, 19 (describing the initial creation of the French Foreign Legion by royal ordinance in 1831 and the subsequent founding of the ‘modern’ French Foreign Legion by royal ordinance in 1835).

139. See generally GILBERT, *supra* note 108; JORDAN, *supra* note 131.

140. *Who Are Gurkhas*, GURKHA WELFARE TRUST, <http://www.gwt.org.uk/about-gurkhas/what-are-gurkhas/> (last visited Jan. 21, 2012) (quoting former Chief of Staff of the Indian Army, Field Marshal Sam Manekshaw).

141. See, e.g., TONY GOULD, *IMPERIAL WARRIORS: BRITAIN AND THE GURKHAS* 126 (1999); PARKER, *supra* note 131 64, 116-17.

142. See, e.g., *Prince Harry Made Honorary Gurkha by Fearsome Warriors He Served with in Afghanistan*, MAIL ONLINE, <http://www.dailymail.co.uk/news/worldnews/article-1082172/Prince-Harry-honorary-Gurkha-fearsome-warriors-served-Afghanistan.html> (last updated Oct. 31, 2008).

143. See, e.g., *The Baghdad Boom*, *supra* note 116.

144. SINGER, *supra* note 7, at 112-13 (describing a PMF comprised of primarily ex-Gurkha fighters breaking a contract and abandoning the contracted mission after they suffered heavy casualties and had their commander killed and mutilated in combat against the rebel Revolutionary United Front (RUF) in Sierra Leone in 1995).

145. *Id.*

despite similar mutilation of their commander.¹⁴⁶ This comparison highlights the disparity in dedication to mission accomplishment between private security contractors and officially sanctioned military operations. With the Gurkhas as a prominent example, it seems that troops are more dedicated to a mission if more than money is at stake.

While both the French Foreign Legionnaires and the British and Indian Gurkha Regiments are formal military forces comprised of foreign nationals, there are significant differences. Where French Foreign Legionnaires are soldiers from around the world, the Gurkha regiments of the British and Indian Armies are exclusively composed of Nepalese nationals¹⁴⁷ with some British or Indian officers.¹⁴⁸

Additionally, whereas the French Foreign Legion was created by a royal ordinance,¹⁴⁹ the terms and conditions under which the Gurkhas served were initially left entirely up to the Indian authorities and were not codified under British law¹⁵⁰ until the “Tripartite Agreement of 1947 between the UK, India and Nepal” more formally laid down these terms and conditions.¹⁵¹ While the Tripartite Agreement of 1947 (TPA) does not address every detail of Gurkhas’ service, it is a “series of documents comprising a Memorandum, a number of Annexes and several trilateral and bilateral exchanges between the three Governments” that addresses major aspects of service, including “pay, pensions and allowances, leave, children’s education and provisions to meet religious, national and cultural observances.”¹⁵²

Under the TPA, British Gurkha basic pay rates are linked directly to the Indian Army Pay Code (IPC); formal reports every 10 years are used to update that pay scale while any interim changes to the Pay Code are made as India notifies the U.K.¹⁵³ Cost of living allowances for Gurkhas serving outside of Nepal, known as Universal Addition (UA), are also given in

146. PARKER, *supra* note 131, at 116-17 (recounting the take-no-prisoners response that came from a platoon of Gurkha soldiers who found the castrated and mutilated body of their British officer following a battle in the Khyber Pass region in the summer of 1935).

147. See CLAIR TAYLOR, INT’L AFFAIRS & DEFENCE SECTION OF HOUSE OF COMMONS, GURKHAS: TERMS AND CONDITIONS OF SERVICE, 2009, H.C. 4671, at 4 (U.K.) [hereinafter GURKHAS: TERMS AND CONDITIONS], available at www.parliament.uk/briefing-papers/SN04671.pdf.

148. E.D. SMITH, JOHNNY GURKHA: ‘FRIENDS IN THE HILLS’ 166-69 (1985); see also PARKER, *supra* note 131, at 39-42, 105-07; TONY GOULD, IMPERIAL WARRIORS: BRITAIN AND THE GURKHAS 236 (1999) (describing historical WWI command structure in Gurkha battalions as having only British officers).

149. JORDAN, *supra* note 131, at 8, 19.

150. GURKHAS: TERMS AND CONDITIONS, *supra* note 147, at 4.

151. *Id.* at 1, 4.

152. *Id.* at 4.

153. *Id.* at 5.

order to try and ensure that net take-home pay is the same for Gurkhas independent of where they serve.¹⁵⁴

Pensions are handled in much the same way, with periodic adjustments tied to the Indian Army Pension Code with annual increases for cost of living.¹⁵⁵ Additionally, the British and Indian militaries have established systems for doling out pensions to retired Gurkha servicemembers in ways that try to accommodate their location. Those who live close to the major Nepalese cities of Kathmandu, Pokhara, and Itahari either receive pensions through direct deposit or collect regular checks from one of three regional Pension Paying Offices.¹⁵⁶ Those in more remote communities are able to collect their pensions quarterly from one of 24 Area Welfare Centres dotted throughout Nepal near ex-Gurkha population centers.¹⁵⁷

Under the original TPA, Gurkhas remained Nepalese citizens and were required to resettle in Nepal at the conclusion of their service in the Brigades.¹⁵⁸ There was virtually no real citizenship option for retiring Gurkhas to settle in the U.K.¹⁵⁹ In 2009, after several years of legal wrangling, the U.K. provided all Gurkhas with the right to apply to settle in the U.K. at the end of their service, presuming they have served for at least four years.¹⁶⁰

Despite the routine adjustment of pensions and cost of living allowances, there are still criticisms of the pension structure; the British Gurkha Welfare Society contends that an estimated 24,000 Nepalese Gurkhas who served the British before 1997 currently receive only one third of the typical British military pension.¹⁶¹

While the existing Gurkha pension system provides an interesting case study, the implementation of a pension system for the proposed U.S. Foreign Legion presents a very real cost concern and would require in-depth analysis. Any system would need to be carefully structured to be sustainable while appropriately recognizing those who have served.

154. *Id.*

155. *Id.*

156. GURKHAS: TERMS AND CONDITIONS, *supra* note 147, at 6.

157. *Id.*

158. ARABELLA THORP & JOHN WOODHOUSE, HOME AFFAIRS SECTION OF HOUSE OF COMMONS, IMMIGRATION: SETTLEMENT AND BRITISH CITIZENSHIP FOR DISCHARGED GURKHAS AND COMMONWEALTH MEMBERS OF THE ARMED FORCES, 2009, H.C. 4399, at 1 (U.K.) [hereinafter HOUSE OF COMMONS, IMMIGRATION], available at www.parliament.uk/briefing-papers/SN04399.pdf.

159. *Id.* at 1, 7.

160. *See id.*

161. *UK Hails Ruling on Gurkha Pensions*, EKANTIPUR.COM (Jan. 11, 2010), <http://202.166.193.40/2010/01/11/capital/uk-hails-ruling-on-gurkha-pensions/306206.html>.

D. Current Domestic Support for U.S. Foreign Legion

1. *Building on the Status Quo*

This proposal is not a new concept; “non-citizens have fought in the U.S. Armed Forces since the Revolutionary War.”¹⁶² Nor is this a concept relegated to historical accounts. Currently, Defense Manpower Data Center (DMDC) places the estimated number of non-citizens serving on active duty with the U.S. military at 35,000, with 12,000 more serving in either the National Guard or the and Reserve.¹⁶³ Broken down by military branch, approximately 15,800 non-citizen personnel serve as Sailors with the U.S. Navy, 6,440 Marines are non-citizens, the Army is home to 5,596 non-citizen Soldiers, and the Air Force has a contingent of 3,056 non-citizen Airmen,¹⁶⁴ all of this with an estimated 8,000 additional non-citizens with green cards enlisting every year.¹⁶⁵

The reality is that the suggestion in this paper does not represent as radical a departure from the status quo as it may seem. This note suggests a U.S. Foreign Legion that draws on the experiences of all branches of the U.S. military with non-citizen servicemembers. The Army has already engaged in a limited initiative to recruit 1,000 individuals nationwide in order to test the feasibility of a subsequent increase in the number of such recruits and an expansion to all other branches of the military with the end goal being upwards of 14,000 non-citizen recruits—the equivalent of one in six recruits—per year.¹⁶⁶ The truth is that as the U.S. has fought two wars on two fronts, “recruiters [have] struggled to meet their goals for the all-volunteer military” while at the same time recruiting officers have been turning away “thousands of legal immigrants with temporary visas who tried to enlist” simply because they did not have the required “permanent green cards.”¹⁶⁷

The proposed U.S. Foreign Legion builds on suggestions from the Commission on Wartime Contracting¹⁶⁸ and is generally in keeping with statements made by Senate Armed Services Committee Chairman Carl Levin that the U.S. transition away from heavy reliance on contractors and use them as needed, and only where properly vetted, in the meantime.¹⁶⁹

162. ANITA U. HATTIANGADI ET AL., CTR. FOR NAVAL ANALYSIS, NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 6 (2005).

163. *Id.* at 6-7; see also Julia Preston, *U.S. Military Will Offer Path to Citizenship*, N.Y. TIMES, Feb. 14, 2009, at A1, <http://www.nytimes.com/2009/02/15/us/15immig.html> (approximating the number of foreign-born non-citizen military personnel at 29,000).

164. HATTIANGADI ET AL., *supra* note 162, at 7.

165. *Id.* at 6; see also Preston, *supra* note 163.

166. Preston, *supra* note 163.

167. *Id.*

168. See discussion *supra* Part II (analyzing overreliance on PMC personnel).

169. Levin Press Conference, *supra* note 22.

Senator Levin suggests that the U.S. move some of the current PMC personnel into the Afghan army/security force with proper vetting.¹⁷⁰ This note does not oppose handing off as much responsibility to the Afghan security force as is feasible. However, this note does recognize that a complete transition is not likely going to be immediate and suggests the U.S. Foreign Legion be implemented to address the continued need for U.S. presence.

2. *Support in Existing Domestic Laws*

U.S. law already provides options for non-citizens who wish to serve. However, under previous immigration laws, an individual typically had to obtain permanent residency before being able to serve in the U.S. armed forces.¹⁷¹ Now, that requirement has been reduced such that temporary immigrants who have lived here for 2 years or more can enlist.¹⁷² Moreover, “[u]nder a statute invoked in 2002 by the Bush administration, immigrants who serve in the military can [start the application process] to become citizens on the first day of active service, and they can take the oath in as little as six months.”¹⁷³ As this quote from the New York Times indicates, Executive Order 13269¹⁷⁴ made it substantially easier for non-citizens to serve in the U.S. military and rewarded those who served with expedited citizenship. Generally, the benefits that are described in Executive Order 13269 were reserved for those individuals who had served honorably or are enlisted to serve in the U.S. military for at least 12 years.¹⁷⁵ Executive Order 13269 of July 3, 2002¹⁷⁶ significantly expedited citizenship options codified in section 329 of the Immigration and Nationality Act (INA).¹⁷⁷

Executive Order 13269 of 2002 was not the end of these types of changes. The 2004 National Defense Authorization Act

[r]educed the peacetime waiting period for U.S. citizenship application[s,]
[a]llowed applicants to be granted emergency leave and priority
government transportation to complete citizenship processing[,]
[e]liminated all application fees for non-citizen servicemembers[,]

170. *Id.*

171. 10 U.S.C. § 504(b) (2006) (describing who may legally enlist in the U.S. armed forces); see also HATTENGADIET AL., *supra* note 162, at 10 tbl.1, 27.

172. Preston, *supra* note 163.

173. *Id.*

174. Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 8, 2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=02-17273-filed.pdf.

175. 8 C.F.R § 245.8(a) (“Benefits under this section are limited to aliens who have served honorably (or are enlisted to serve) in the Armed Forces of the United States for at least 12 years . . .”).

176. Executive Order 13,269, 67 Fed. Reg. 45,287.

177. Immigration and Nationality Act § 329, 8 U.S.C. § 1440 (2006).

[a]llowed for the finalization of military citizenship applications to take place at U.S. consulates, embassies, and overseas U.S. military installations[, and] [g]ave special immigration preference to the immediate family of non-citizens awarded posthumous citizenship.¹⁷⁸

Thus, the 2004 National Defense Authorization Act seems to suggest a willingness to move in the direction that is proposed in this note.

The 2004 National Defense Authorization Act specifically addressed the immigration benefits for military personnel and their families described above by amending portions of the INA.¹⁷⁹ Specifically, section 1701 of the 2004 National Defense Authorization Act addressed naturalization requirements for non-citizen servicemembers and reduced the period of service that was required before an individual could apply for citizenship under section 328(a) of the INA¹⁸⁰ from 3 years to 1 year,¹⁸¹ essentially codifying what President Bush had done via Executive Order 13269 in 2002.¹⁸² Section 1701 further amended the INA to provide that “no fee shall be charged or collected from the applicant for filing the application, or for the issuance of a certificate of naturalization upon being granted citizenship . . .”¹⁸³ Section 1702 provided naturalization benefits for members of the Selected Reserve of the Ready Reserve.¹⁸⁴ Section 1703 also extended posthumous benefits to surviving spouses, children, and parents of non-citizen service-members while section 1704 expedited the process for granting citizenship posthumously to those non-citizen servicemembers who gave the ultimate sacrifice in service to the United States.¹⁸⁵ The enabling legislation for the U.S. Foreign Legion should build on this existing legal framework.

As discussed above in Part II.F, Congress has already attempted to impose more traditional military accountability on contractor personnel with little success.¹⁸⁶ By bringing PMC personnel serving in such operations more directly under existing military authority, the proposed U.S. Foreign

178. HATTIANGADI ET AL., *supra* note 162, at 1- 2.

179. National Defense Authorization Act of 2004, Pub. L. 108-136, 117 Stat. 1392 (2003).

180. National Defense Authorization Act of 2004 § 1701, 8 U.S.C. 1439(a) (2006) (amended 2008).

181. HATTIANGADI ET AL., *supra* note 162, at 1-2. (providing an overview of the changes to section 328 of the INA that were made by the National Defense Authorization Act of 2004).

182. National Defense Authorization Act of 2004 § 1701; *see also* *Bush Speeds Citizenship for Military*, CNN (July 3, 2002), <http://edition.cnn.com/2002/US/07/03/bush.military.citizenship/index.html?related>.

183. Immigration and Nationality Act § 328(b)(4), 8 U.S.C. § 1439 (2006).

184. National Defense Authorization Act of 2004 § 1702.

185. *Id.* §§ 1703-1704.

186. *See* discussion *supra* Part II.F.

Legion would be in keeping with the intent behind the 2007 UCMJ amendments.¹⁸⁷

E. Implementing the U.S. Foreign Legion

As described above, one major hurdle to implementation of the proposed U.S. Foreign Legion would be the enactment of legislation required to create the Legion. Additional issues related to implementation would include how to organize the Legion, what type of functions the Legion would be responsible for, and the type of training that would be required.

1. Organizing

In terms of logistics, the first issue might be whether to create a wholly separate military branch or to place the U.S. Foreign Legion under one of the existing U.S. military branches. Based on a successful pilot program in the U.S. Army for non-citizen soldiers,¹⁸⁸ as well as the fact that the U.S. Navy has the greatest number of non-citizen active duty members of any branch,¹⁸⁹ this note suggests initially placing the proposed U.S. Foreign Legion under one of these two branches.

One of the next major logistical concerns would be how many troops divided into how many divisions. One anonymous U.S. Army Captain posted his suggestion to a forum on a military community website in 2004, suggesting that a U.S. Foreign Legion should consist of three 8,000 member infantry divisions for a total of 24,000 active duty members.¹⁹⁰

2. Recruiting

This note suggests incorporating current PMC personnel into the new U.S. Foreign Legion to the extent possible. Based on the current numbers of PMC personnel,¹⁹¹ a force of 24,000 seems relatively conservative. Assuming an eventual drawdown in U.S. presence in Afghanistan, a force numbering somewhere between the anonymously suggested 24,000 and the more than 150,000 non-citizen PMC personnel currently serving in Iraq and Afghanistan¹⁹² provides a very crude range for the number of U.S. Foreign

187. Singer, *supra* note 70.

188. Preston, *supra* note 163.

189. HATTIANGADI ET AL., *supra* note 162, at 7.

190. Wayne Hommer, Guest Column, *An American Foreign Legion*, MILITARY.COM (Jan. 21, 2004), http://www.military.com/NewContent/0,13190,Defensewatch_012104_Foreign,00.html (reposting an article from DefenseWatch, a publication put out by Soldiers for the Truth).

191. See discussion *supra* Part II.A (estimating the number of PMC personnel serving in theater at around 200,000 with around 150,000 being foreign nationals).

192. CWC, *AT WHAT RISK?*, *supra* note 2, at 7 (citations omitted).

Legionnaires that may be needed. Since approximately 26,000 PMC personnel are currently devoted to security operations in Afghanistan,¹⁹³ a force near this size may likely be suitable for a more narrowly tailored solution.

Given the large numbers of PMC personnel already in theater who could potentially be absorbed into an American Foreign and the fact that around 8,000 new non-citizen recruits already join existing U.S. military branches each year,¹⁹⁴ it is likely that the U.S. would be able to sustain a sufficiently large troop force without much difficulty. Additionally, there are nearly 1.5 million Legal Permanent Residents of recruitable age (18 to 24) living right here in the U.S.¹⁹⁵ who may be interested in the benefits that military service in such a unit would offer.

However, if active recruiting is required, the U.S. could look to the French Foreign Legion or the Gurkha Brigades for guidance in recruiting foreign citizens or absorbing those already in theater. After all, these fighting forces have certainly managed to create sufficient draw to keep their forces fully staffed, with the French Foreign Legion accepting only 1 in 8 applicants¹⁹⁶ and the Brigade of Gurkhas accepting only 230 of roughly 28,000 applicants annually.¹⁹⁷

3. Training

This note suggests that the proposed U.S. Foreign Legion be designed to address the current security functions now being handled by PMC personnel. This note does not suggest that the U.S. create a new military force comprised entirely of foreign nationals who are trained for purely combat missions. Instead, U.S. Foreign Legion troops should be trained for the modern security functions that our military has been forced to outsource. Even the French Foreign Legion has had to retool for the twenty-first century to focus on peacekeeping operations.¹⁹⁸ This is not to suggest that U.S. Foreign Legionnaires would not need to be well trained but that such training should focus on the needs at hand—the needs currently filled by PMC personnel. Training for U.S. Foreign Legionnaires should thereby focus on providing security for military installations (bases, airfields, etc.), diplomats and politicians, and reconstruction projects.

Effective communication on the battlefield would be essential to the success of a U.S. Foreign Legion. Just as the French Foreign Legion

193. *Levin Press Conference*, *supra* note 22.

194. HATTIANGADI ET AL., *supra* note 162; *see also* Preston, *supra* note 163, at 1.

195. HATTIANGADI ET AL., *supra* note 162, at 6, 11.

196. GILBERT, *supra* note 108, at 21- 22 (quoting a Major in the French Foreign Legion who explains that the large number of would-be legionnaires means that the Legion has the ability to be selective in who it accepts).

197. GURKHAS: TERMS AND CONDITIONS, *supra* note 147, at 7.

198. GILBERT, *supra* note 108, at 254 (2010).

requires all recruits be functionally proficient in French, all U.S. Foreign Legionnaires would need to have a common language. Currently, the U.S. military requires that all new recruits have a basic level of English proficiency,¹⁹⁹ and the proposed U.S. Foreign Legion would be no exception. A recent Army test program to recruit certain non-citizens with temporary visas did not change this requirement. “[Recruits] will have to pass an English test.”²⁰⁰

The same anonymous U.S. Army Captain who posted on Military.com regarding troop divisions suggested an intensive six-week English language course to ensure effective communication skills in the field.²⁰¹ All other aspects of training should be used to help recruits learn via immersion, as it is in large part with the French Foreign Legion.²⁰² Formalized classroom training may also be needed. One unique method, embraced by the French Foreign Legion, is to assign each new recruit a native French speaker to assist the recruit in language acquisition.²⁰³ Here, each new recruit could be assigned a native English speaker.

Such language instruction should focus on enabling effective communication while still embracing the multilingual abilities that would come with a military force comprised of members from around the globe. As Lt. Gen. Benjamin C. Freakley suggested when speaking about the U.S. Army test program, the inclusion of foreign nationals would offer an increase in human capital.²⁰⁴

The French Foreign Legion actually points to the multilingual capabilities of its members as an inherent advantage of having such a diverse military force.²⁰⁵ Apparently, the French Foreign Legion has even been called in for translation efforts in recent peacekeeping efforts in Rwanda.²⁰⁶ In the far-reaching war on terror, “linguistic and cultural diversity non-citizens bring to the services are especially valuable.”²⁰⁷

In addition to the language training, U.S. Foreign Legionnaires would still face the same strict training conditions that meet U.S. recruits at bases all over the U.S.

199. HATTIANGADI ET AL., *supra* note 162, at 93-94 (discussing Army and Navy basic English language requirements).

200. Preston, *supra* note 163.

201. Hommer, *supra* note 190.

202. GILBERT, *supra* note 108, at 41.

203. *Id.*

204. Preston, *supra* note 163.

205. GILBERT, *supra* note 108, at 254.

206. *Id.*

207. HATTIANGADI ET AL., *supra* note 162, at 7.

4. *Equipping*

In terms of equipment, U.S. Foreign Legionnaires should be armed based upon the task they are assigned and should be given the best equipment to accomplish their tasks. This means that instead of scavenging for substandard weapons and ammunition in the black markets of a host nation like some PMC personnel have had to do,²⁰⁸ or riding around in improperly armored vehicles,²⁰⁹ the U.S. Foreign Legion would have the same standard issue firearms and armor as U.S. troops.

F. Possible Criticism

1. *Resistance to Change from Within Military*

Some in the military may object to an influx of non-citizen soldiers. The logical response to that would be “look around you.” With more than half of the U.S. presence in Afghanistan consisting of non-citizen—and, in fact, non-military—personnel, and with 8,000 non-citizens joining existing U.S. military branches annually,²¹⁰ this objection seems ignorant of the realities of the situation.

2. *Xenophobia*

The purpose of this paper is not to suggest that the U.S. wholly shove responsibility for fighting and dying off on non-citizen foreign nationals; the conflict in Afghanistan is our own. This note simply proposes legitimizing the current *de facto* situation.

In looking to historical examples of non-citizen military units, this note does not ignore the fact that economic pressures have been major motivating factors.²¹¹ Some who have studied the potential inclusion of non-citizens in the U.S. military have noted that the age and economic status of large portions of the world’s population mean a large potential pool of recruits.

About a third of the world’s population is under age 15, and the overwhelming majority lives in developing countries. Because this large bulge of future workers will have difficulty finding work in their native countries, many may emigrate—either alone or with young families. Of the

208. See SHADOW COMPANY, *supra* note 122 (describing the black market as a workaround for PMC personnel where the permitting process and cost to import needed weaponry is prohibitive).

209. See, e.g., *id.*

210. HATTIANGADI ET AL., *supra* note 162, at 1; see also Preston, *supra* note 163.

211. GILBERT, *supra* note 108, at 16.

16 million foreign-born people who entered the United States between 1990 and 2002, almost a quarter were under age 21.²¹²

However, there are other reasons why individuals have joined units like the French Foreign Legion and might therefore be interested in joining the proposed U.S. Foreign Legion.²¹³ Indeed, if the French Foreign Legion is any example, more equitable benefits for Legionnaires and the promise of citizenship would make service to the U.S. Foreign Legion even more appealing to a wider range of individuals.²¹⁴

3. Duplication or Segregation of Current Forces

This note suggests the creation of a new military force that would bring into the folds of the American military those positions currently handled by non-citizen foreign nationals. This note does not suggest placing all non-citizens in only the proposed U.S. Foreign Legion; it does not suggest taking those servicemembers who are currently serving in the Marine Corps, Army, Navy, or Air Force and segregating them into the proposed U.S. Foreign Legion.²¹⁵ This new military force would represent another option for non-citizens interested in serving on behalf of the U.S.

4. Afghan Nationals May Not Wish to Become U.S. Citizens

Many of the non-citizen PMC personnel working for U.S. interests in Afghanistan are Afghan nationals.²¹⁶ These individuals may not wish to take advantage of the potential to become U.S. citizens through service in the U.S. Foreign Legion. However, the U.S. Foreign Legion would not be trying to capitalize on all 200,000 PMC personnel and so, assuming many Afghan nationals currently working for PMC's opt out of becoming U.S. Foreign Legionnaires, this would mean only a reduced pool of applicants. Additionally, extending the offer of U.S. citizenship would give those who were interested a chance to gain U.S. citizenship for their service should they choose to pursue it. Lastly, the more equitable pay scale, better organizational structure, and increased accountability may be preferred even among those PMC personnel who are not interested in the citizenship aspect of the U.S. Foreign Legion.

212. HATTIANGADI ET AL., *supra* note 162, at 5.

213. GILBERT, *supra* note 108, at 17 -18 (describing those who may desire to enter a military force like the French Foreign Legion for purely professional reasons—to be a professional soldier—and those who seek refuge from any number of political pressures in their native countries).

214. *See id.* at 18.

215. *See* discussion *supra* Part III.D.i.

216. CWC, AT WHAT RISK?, *supra* note 2, at 7 (citations omitted).

5. End of Hostilities in Afghanistan

Assuming an eventual conclusion of U.S. involvement in hostilities in Afghanistan and given the fact that many of the PMC personnel are highly trained, it would be logical to retain some portion of this force for security in other areas. An end to hostilities in Afghanistan would not necessarily mean a dismantling of the U.S. Foreign Legion. Looking to the French Foreign Legion as an example, one of the major adjustments following the independence of Algeria included the reduction of the Legion from 20,000 troops to 8,000 troops.²¹⁷ Currently, the United Kingdom is slated to reduce its elite Gurkha regiment by 700 servicemembers to a troop size of 2,900 soldiers by 2015.²¹⁸ Yet, despite troop reductions or changes in mission objectives, both of these military units endure and a U.S. Foreign Legion could likewise adapt to changing demands.

Additionally, this criticism presupposes an end to hostilities that would require an augmented U.S. fighting force like the proposed U.S. Foreign Legion. Recent events in Syria²¹⁹ and rhetoric among some in Congress²²⁰ may foreshadow the need for such a force in future conflicts.

CONCLUSION

While undoubtedly producing new challenges, the creation of a formal U.S. Foreign Legion would address many of the issues caused by the current overreliance on PMC personnel for mission-critical functions described above. Such a military unit would place the use of military-style force squarely back within the proper control of the sovereign U.S. government²²¹ and would appropriately recognize the efforts of those

217. JORDAN, *supra* note 131, at 92-93.

218. *UK to Reduce Gurkha Brigade Size*, EKANTIPUR.COM (Apr. 4, 2011), <http://www.ekantipur.com/2011/04/04/top-story/uk-to-reduce-gurkha-brigade-size/331977.html>.

219. *See, e.g.,* Anne Barnard, *Syria Opposition Group Is Routed and Divided*, N.Y. TIMES, Mar. 15, 2012, at A6, *available at* <http://www.nytimes.com/2012/03/15/world/middle-east/syria-torture-report-military-maintains-assaults.html?ref=global-home>; Michel Martin, *Is There A Moral Duty To Intervene In Syria?* (NPR radio broadcast Mar. 15, 2012), *available at* <http://www.npr.org/2012/03/15/148678004/is-there-a-moral-duty-to-intervene-in-syria> (discussing possible intervention in Syria with professor Shaun Casey, who teaches “Just War” theory, and Abderrahim Foukara of Al Jazeera International).

220. *See, e.g.,* Sen. John McCain, *Syrians Need the U.S. to Act Now*, USA TODAY, (Mar. 15, 2012), <http://www.usatoday.com/news/opinion/editorials/story/2012-03-14/Syria-John-McCain-Assad/53536942/1>.

221. Discussions of military intervention center on the rights and responsibilities of sovereign states, not those of private, for-profit companies. *See, e.g.,* U.N. Charter art. 2, para. 4, *available at* <http://www.un.org/en/documents/charter/chapter1.shtml> (addressing limits of *states* with respect to the use of force); U.N. Charter art. 51, *available at* <http://www.un.org/en/documents/charter/chapter7.shtml> (addressing the right of member *states* to defend themselves); Letter dated Oct. 7, 2001 from John D. Negroponte, Permanent

individuals who are currently serving U.S. interests without commensurate benefits. Lastly, such a force would enhance U.S. security interests abroad—through increases in oversight and control of PMC personnel—and would help reign in fraud and waste at a time when the U.S. government can afford neither.

Representative of the United States of America, to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (justifying U.S. intervention in Afghanistan by referencing the right of national self-defense articulated in Article 51 of the U.N. Charter); S.C. Res. 1368, U.N. Doc. S/Res/1368 (Sept. 12, 2001) (reaffirming the right of collective self-defense and calling on states to act); S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001) (reaffirming the right of collective self-defense and calling on states to act); THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 338 (4th ed. 2007) (describing the international reaction to U.S. *state* intervention on self-defense grounds in Afghanistan as largely supportive).

