

## Book Review

### Outsourcing Is Not Our Only Problem

OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF  
GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND  
WHAT WE CAN DO ABOUT IT by *Paul R. Verkuil*.  
Cambridge Univ. Press 2007. Pp. 248. \$80.00.

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Paul Verkuil's new book, *Outsourcing Sovereignty*, is an important contribution to the debate about the appropriate roles of public agencies and private contractors in governing the nation. Verkuil begins by tracing the modern history of the trend toward privatization of governmental functions from Iran Contra to private prisons, Katrina, and Iraq.<sup>1</sup> He then paints an ugly picture of excess that includes too many private contracts, contracting out of functions that should be retained in-house, too many no-bid contracts, and too few government employees to draft and negotiate the contracts and monitor the performance of the growing army of contractors. The book focuses pri-

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<sup>1</sup> PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 156 (2007).

marily on outsourcing of military and other national security functions.

### *I. Problems Created by Outsourcing*

After Verkuil discusses the modern history of privatization, he documents and explains the problems caused by excessive and poorly implemented privatization. He begins by describing the scope and recent growth of the outsourcing phenomenon: “[D]uring the period [Fiscal Year (“FY”)] 2000 to FY 2005, the value of federal contracts increased by 86% (from \$203 billion to \$377 billion) and the value of noncompetitive contracts increased by 115% (from \$67 billion to \$145 billion).”<sup>2</sup> He then explains why outsourcing of government functions, unless implemented with great care, can cause a variety of major problems. The results of outsourcing can include conflicts of interest, poor performance of important governmental functions, and the sacrifice of important public values.<sup>3</sup>

Verkuil describes the safeguards that are essential to obtain acceptable results in contracting out governmental functions.<sup>4</sup> These safeguards include discriminating carefully between functions that are well-suited to outsourcing and functions that are not, minimizing the number of no-bid contracts, carefully drafting and negotiating contracts, and vigilant monitoring of the performance of contractors.<sup>5</sup> Verkuil documents major shortfalls in each area: contracting out of inherently sovereign functions, such as the interrogation of prisoners; profligate use of no-bid contracts; poorly drafted incomplete contracts; and contractor monitoring that is both quantitatively and qualitatively inadequate.<sup>6</sup> The number of Department of Defense (“DOD”) contracting officers has declined by thirty-eight percent over the same five-year period in which the value of DOD contracts has nearly doubled. The Government Accountability Office (“GAO”) found that fifty-two percent of DOD contracts suffered from the adverse effects of inadequate monitoring, and the level of government staffing proposed by the Bush Administration for the future would create a ratio of one government employee for every twelve to fifteen employees of private contractors.<sup>7</sup>

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<sup>2</sup> *Id.* at 140.

<sup>3</sup> *Id.* at 140–52.

<sup>4</sup> *Id.* at 57–152.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 140–52.

<sup>7</sup> *Id.* at 148, 161.

Moreover, drafting government contracts, negotiating with prospective contractors, and monitoring the performance of contractors requires a skill set that is increasingly scarce in the federal workforce.<sup>8</sup> The federal government cannot satisfactorily increase its reliance on outside contractors unless it increases significantly the number of federal employees with the education and experience necessary for effective drafting, negotiating, and monitoring. Yet, the number of federal employees with the combination of skills required to perform these critical functions effectively is declining rapidly from an already inadequate base.<sup>9</sup> As a result, Verkuil identifies situations in which the government has hired a contractor to monitor the performance of another contractor who is, in turn, responsible for monitoring the performance of other contractors.<sup>10</sup>

Verkuil does an excellent job of documenting a serious problem. At times, however, he goes too far in attributing bad things to the increasing tendency to contract out important government functions. For instance, he repeatedly references outsourcing as a significant cause of the mistreatment of prisoners at Abu Ghraib and elsewhere, of the United States's rendition of prisoners to countries that are known to (and expected to) torture prisoners, and of the secret prisons the United States is believed to be operating in eastern Europe.<sup>11</sup> I share Verkuil's revulsion at these insults to the values of the United States, but they have virtually nothing to do with outsourcing. Verkuil links the practices to contractors by referring to Seymour Hersh's revelation that employees of private contractors were involved in the interrogation process at Abu Ghraib.<sup>12</sup> I would love to believe that torture, other forms of prisoner abuse, extraordinary rendition, and secret prisons are attributable primarily to poorly supervised rogue contractors. They are not. The private contractors have been operating under the direction and close supervision of government employees. As this story continues to unfold, it is becoming clear that each of these contemptible forms of behavior had its roots in government employees, including elected officials, political appointees, career senior civil servants, and military officers.<sup>13</sup> Indeed, that is the main point

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<sup>8</sup> *Id.* at 149–50, 159–62, 173–74.

<sup>9</sup> *Id.* at 149–50, 159–62, 172–74.

<sup>10</sup> *Id.* at 6, 149.

<sup>11</sup> *Id.* at 27–28, 30, 41–42, 129–30, 147, 190.

<sup>12</sup> *Id.* at 27.

<sup>13</sup> *See, e.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 165–72 (2007) (discussing that the infamous torture memos issued by the Office of Legal Counsel were written at the urging of the Vice President in an effort to

Hersch makes in his reporting on this subject.<sup>14</sup> Indiscriminate and poorly implemented outsourcing of government functions is causing many serious problems, but it is far from the only source of problems in our governance structure.

## II. *Proposed Legal Remedies*

As Verkuil recognizes, it is not easy to identify good remedies for the problems he documents. Verkuil repeatedly emphasizes both that privatization can have socially beneficial effects and that he favors its use in many contexts.<sup>15</sup> He devotes an entire chapter to a well-reasoned argument that it was a mistake to remove the airport security function from private contractors and place it in-house in the wake of 9/11.<sup>16</sup> He argues persuasively that the European approach to airport security—reliance on carefully supervised private contractors—is better than our new approach of exclusive reliance on government employees.

Verkuil characterizes the root of the problems he documents as a function of a lack of “balance” in our efforts to create an appropriate mix of public and private employees to perform government functions.<sup>17</sup> Thus, the problem is one of degree—we have too many contractors performing too many functions with too little supervision. Problems of degree are difficult to solve through use of legal remedies.

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

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protect government employees from potential criminal and civil liability for engaging in conduct that most people believe to be a clear violation of domestic and international law). The Central Intelligence Agency (“CIA”) Director has repeatedly defended the Agency’s use of “enhanced interrogation” techniques. He claims that they do not qualify as torture, but he refuses to describe them. See, e.g., Ben Feller, *Spy Chief McConnell Defends Tactics*, WASHINGTONPOST.COM, July 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/22/AR2007072200597.html>. Many of the tactics, including exposure to extreme cold, simulated drowning, and head-slapping, were authorized in secret Justice Department memoranda. Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogation*, N.Y. TIMES, Oct. 4, 2007, at A1.

<sup>14</sup> See Seymour M. Hersch, *The General’s Report*, NEW YORKER, June 17, 2007, at 58; Seymour M. Hersch, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42.

<sup>15</sup> VERKUIL, *supra* note 1, at 6, 68.

<sup>16</sup> *Id.* at 57–77.

<sup>17</sup> *Id.* at 8–9.

illustrate each category by describing two proposals that fall within each.

A. *Unsupportable Legal Remedies*

Verkuil argues that some functions are inherently governmental and cannot be assigned to private contractors.<sup>18</sup> He argues that courts should apply separation of powers principles to prohibit the President from delegating inherently governmental functions to private entities.<sup>19</sup> He focuses primarily on military functions. Thus, he calls “the phrase ‘private military’ an oxymoron offensive to our Constitution.”<sup>20</sup> He characterizes the “private military” as “a post-Vietnam phenomenon” that was “largely unknown a decade ago.”<sup>21</sup> That characterization, however, is inaccurate. For the first century of the existence of the United States, we relied primarily on private contractors to perform military functions.<sup>22</sup> Thus, we have not embarked on a radical new venture; we have returned to our historical practice.<sup>23</sup> There is no chance that the Supreme Court will hold unconstitutional a practice that was the norm from 1789 until the 1890s.

Verkuil also argues that the Appointments Clause<sup>24</sup> precludes the government from delegating any “significant authority” to a private entity, with significant authority defined broadly to include many of the functions that the government is now outsourcing.<sup>25</sup> He recognizes, however, that his expansive definition of “significant authority” is inconsistent with the power conferred on qui tam relators in the False Claims Act. Thus, this proposed remedy is not available unless the Supreme Court is prepared to hold that the False Claims Act violates the Appointments Clause.

On this point, Verkuil is engaged in a quixotic fight against both history and precedent. The False Claims Act is almost as old as the Constitution, while the Supreme Court unanimously upheld the False Claims Act over a challenge based on the Case or Controversy

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<sup>18</sup> *Id.* at 103–05.

<sup>19</sup> *See id.*

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

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

<sup>22</sup> Nicholas Parrillo, *The De-Privatization of American Warfare*, 19 *YALE J.L. & HUMAN.* 1, 3–4 (2007).

<sup>23</sup> *See id.*

<sup>24</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>25</sup> VERKUIL, *supra* note 1, at 106–12.

Clause.<sup>26</sup> In addition, every circuit court that has addressed the question has upheld it over a challenge based on the Appointments Clause.<sup>27</sup>

### B. *Inapplicable Legal Remedies*

Some of the legal remedies Verkuil proposes are well-supported but are not applicable to any of the outsourcing Verkuil discusses. For instance, Verkuil argues that due process precludes the government from delegating regulatory functions to private parties that have conflicts of interest.<sup>28</sup> He provides good support for that argument, in the form of the Supreme Court's opinion in *Carter v. Carter Coal Co.*<sup>29</sup> I am not aware of anything the government is doing at present that runs afoul of that important prohibition, however, and Verkuil does not attempt to apply the prohibition to any of the government actions that he criticizes.

Verkuil also makes a well-supported argument that “the Secretary of Defense cannot delegate the power to conduct the war in Iraq to the Rand Corporation.”<sup>30</sup> He acknowledges, however, that this is a “far-fetched scenario” that bears no resemblance to the manner in which the government is using contractors in Iraq or anywhere else.<sup>31</sup>

### C. *Ineffective Legal Remedies*

Verkuil also urges the use of remedies that are well-supported and clearly apply but are ineffective at present. He discusses in some detail both the process of applying Circular A-76<sup>32</sup>—the official criteria that govern the scope of the functions that can be contracted out—and the Federal Acquisition Regulations (“FAR”)<sup>33</sup>—the rules that govern both the process of contracting out and the oversight of government contractors. He concludes that neither process is effective at present but that both offer the promise of becoming more effective in

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<sup>26</sup> *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773, 777 (2000).

<sup>27</sup> *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc).

<sup>28</sup> VERKUIL, *supra* note 1, at 105–06.

<sup>29</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>30</sup> VERKUIL, *supra* note 1, at 121–22.

<sup>31</sup> *Id.* at 122.

<sup>32</sup> *Id.* at 124–32.

<sup>33</sup> *Id.* at 146–52.

the future with some combination of changes in institutional structure and staffing.<sup>34</sup>

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

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

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

Verkuil documents an enormous increase in the number of political appointees in the federal government—a ten-fold increase over the past forty years and a four-fold increase over the last decade.<sup>35</sup> He refers to a recent study that finds that career government employees outperform political appointees as managers, and he urges a reversal of the trend toward increased reliance on political appointees as a means of improving both the performance of agencies and the morale of senior bureaucrats.<sup>36</sup> Verkuil supports this proposal well and links it in important ways to the problems created by over-reliance on contractors. It will be hard to convince Presidents and their politically appointed agency heads to reduce the number of political appointees in government, but it may not be impossible. I have had conversations recently with two agency heads who converted senior positions from political appointee status to career government employee status because of their beliefs that they could recruit and retain better managers with such a change.

However, it is important to recognize the values of political appointees and to balance those values against the disadvantages of undue reliance on political appointees in implementing this promising reform. At one point, Verkuil criticizes the Bush Administration for placing “political appointees in positions of power over career officials.”<sup>37</sup> That criticism is misplaced.<sup>38</sup> In a democracy, all career offi-

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<sup>34</sup> *Id.* at 149–50.

<sup>35</sup> *Id.* at 164.

<sup>36</sup> *Id.* at 165–69.

<sup>37</sup> VERKUIL, *supra* note 1, at 168.

<sup>38</sup> Verkuil refers to Executive Order 13,422 to illustrate the problem he characterizes as placement of political appointees above career officials. *Id.* at 168. Executive Order 13,422

cials *must* be subject to supervision by political appointees; the Appointments Clause explicitly requires such a hierarchical structure in our form of democracy.<sup>39</sup>

Political appointees have other values as well. Verkuil repeatedly and critically refers to politically appointed ambassadors to illustrate his point.<sup>40</sup> However, any head of state would prefer to have a politically appointed U.S. Ambassador, rather than a career Foreign Service Officer (“FSO”) Ambassador, and for good reason. Ambassadors who are career FSOs are more competent on average than politically appointed ambassadors, but they usually have little ability to influence U.S. decisionmaking. A career FSO Ambassador can communicate with the White House only through the elaborate chain of command established by the Secretary of State. Most politically appointed ambassadors have personal relationships with the President that allow them to engage in far more effective direct communication with the White House.

Political appointees in domestic agencies have similar advantages over career government employees. A political appointee can usually do battle with the Office of Management and Budget over both policy decisions and important issues involving the agency’s budget and staffing in a more effective manner than can a career government employee. I agree with Verkuil’s proposal to reduce our present excessive reliance on political appointees, but we must do so in a manner that recognizes and balances the advantages and disadvantages of both types of government employees.

### B. *Government Reorganization*

Verkuil shares Paul Volker’s beliefs that government reorganization is essential to the success of any effort to reduce our excessive reliance on private contractors and to obtain better control over the contractors we need to use to perform important functions. He de-

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requires each agency to designate a Regulatory Policy Officer (“RPO”) without whose approval an agency cannot take major policy actions. Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007). As Peter Strauss has explained, the problem created by this change in structure is attributable to the fact that the RPO is not accountable to the agency head, even though Congress has designated the agency head as the individual with the power to make the policy decisions at issue. Peter Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 701–02 (2007). Both agency heads and RPOs are political appointees, so the Executive Order reallocates power among political appointees, not between career officials and political appointees.

<sup>39</sup> See Richard Pierce, Morrison v. Olson, *Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1.

<sup>40</sup> VERKUIL, *supra* note 1, at 191.



scribes and supports numerous reorganization proposals made by Volker.<sup>41</sup> However, Verkuil also illustrates both the difficulty of identifying and implementing beneficial reorganizations as well as the high risk that a superficially appealing reorganization will have unintended and severe adverse effects.

Verkuil notes that Volker initially praised the creation of the Department of Homeland Security (“DHS”) as a model of the type of reorganization that is likely to produce the kinds of beneficial results that Verkuil and Volker seek.<sup>42</sup> But Verkuil seems to share my strong belief that the creation of the DHS has been a disaster—literally as well as figuratively, given its role in destroying the Federal Emergency Management Agency’s ability to respond effectively to a natural disaster such as Hurricane Katrina. I doubt that reorganization has much potential to improve the situation on the margins that Verkuil (and I) care about, and I am certain that it has the potential to create severe unintended, adverse effects.

I share Verkuil’s respect for Volker, but I marvel at Volker’s naïve belief that creation of DHS would have beneficial effects. Creation of DHS placed under several additional levels of bureaucracy twenty-two agencies, most of which were performing quite well and each of which had a unique and complicated culture and mix of missions. That was a prescription for disaster, and we are paying a high price for that serious misstep. The most beneficial government reorganization we could implement today is to eliminate DHS.

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

Verkuil repeatedly refers to the growing scarcity of highly skilled government employees as a major source of the serious problems that he documents.<sup>43</sup> This increasing shortage contributes to the problem in two ways. First, the inadequate number of government employees with the education and experience needed to perform many critical governmental functions creates an increasing need to turn to private contractors to obtain access to those critical skills. Second, as we increase our reliance on private contractors, we create a growing need for highly skilled people who can effectively draft and negotiate government contracts and monitor the performance of contractors. It follows that the government needs to recruit and retain more of these highly skilled people.

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<sup>41</sup> *Id.* at 161–78.

<sup>42</sup> *Id.* at 163–64.

<sup>43</sup> *Id.* at 149–50, 159–62, 173–74.

Verkuil is not explicit on this point, but he seems to recognize implicitly that large increases in the high end of the range of government salaries are essential to further this laudable goal.<sup>44</sup> Any such proposal, however, is unlikely to overcome the formidable political obstacles to its adoption. In a democracy in which most people make far less money than the top end of the government-employee salary scale, it may simply be impossible for the government to pay salaries that are competitive with the private sector. Every year, the Chief Justice of the United States submits an Annual Report on the State of the Judiciary.<sup>45</sup> Every year, this report documents the massive and growing disparity between judicial salaries and the salaries of individuals with comparable education and experience in the private sector.

In his 2006 Annual Report, Chief Justice Roberts characterized the situation as a constitutional crisis.<sup>46</sup> Law clerks to Supreme Court Justices—individuals in their twenties with little legal experience—get starting salaries in the private sector that match the salaries of the Justices, while partners in major law firms make over five times the salary of a Supreme Court Justice. Every year, Congress refuses to take the actions needed to close the yawning gap between judicial salaries and private sector salaries.<sup>47</sup>

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

I am much more concerned about the government's ability to recruit and retain the thousands of highly skilled people needed to perform other critical government functions. The labor pool available for these jobs does not include large numbers of people who have already accumulated wealth in private-sector jobs. In addition, taking a position as a government scientist or expert on finance does not boost an individual's status to the extent that a judicial appointment does. Thus, the government can recruit and retain the highly skilled people

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<sup>44</sup> *See id.*

<sup>45</sup> *See, e.g.*, CHIEF JUSTICE JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2007).

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.* at 2–3.

it needs to perform many critical functions only by significantly increasing the high end of the government salary scale, and I am not optimistic that Congress can be persuaded to enact into law a new salary structure with a high end that allows the government to compete effectively with the private sector to hire and retain the kind of workforce presently needed to perform most government functions in-house.

*D. Increases in Military Personnel*

The problems that Verkuil identifies arise in extreme forms in the context of the military. He is particularly concerned about the military's growing reliance on contractors, and he proposes to remedy the problem by bringing back the draft.<sup>48</sup> In fact, he proposes to expand the scope of the draft beyond the military to create "a twenty-first-century Civilian Conservation Corps . . . ."<sup>49</sup> I am not sure how seriously to take this proposal. At one point, he characterizes it as "a serious option that must be evaluated as the volunteer ranks are further strained."<sup>50</sup> Yet in another place he calls it "a political nonstarter."<sup>51</sup> He also refers to the possibility of other more modest steps in the same general direction, e.g., expanding the Reserve Officer Training Corps ("ROTC") program and creating a civilian counterpart to the military academies to train career government employees.<sup>52</sup>

I agree with Verkuil's assertion that the draft, in either its purely military form or Verkuil's expanded national service form, is "a political nonstarter." I am not saddened to say that. For reasons described in the last section of this review, I would not welcome a return of the draft.<sup>53</sup> Verkuil's more modest suggestions, however, may have some beneficial effect. I am pleased to see some elite universities welcoming ROTC programs back to their campuses after their expulsion during the Vietnam War.<sup>54</sup> An expanded ROTC program has some potential to increase the population of career military officers.

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<sup>48</sup> VERKUIL, *supra* note 1, at 175.

<sup>49</sup> *Id.* at 174–76.

<sup>50</sup> *Id.* at 175.

<sup>51</sup> *Id.* at 176.

<sup>52</sup> *Id.* at 176–78.

<sup>53</sup> *See infra* Part IV.

<sup>54</sup> *See, e.g.,* Richard D. Challener, *Reserve Officer's Training Corps (R.O.T.C.)*, in *A PRINCETON COMPANION* (Alexander Leitch ed., 1978). *But see* Lee C. Bollinger, Letter to the Editor, *Columbia, ROTC, and Sexual Orientation*, *WALL ST. J.*, May 17, 2005, at A13 (discussing President Bollinger's decision to refuse to allow ROTC to return on the Columbia University campus).

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

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

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

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

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

pointees, expansion of ROTC, and increased recruitment and training of contracting officers. I have little doubt that a less ideological President with better judgment can and will implement some combination of remedies that will at least reduce the scope and severity of the problems Verkuil documents.

Third, the worst of the excesses Verkuil describes can be avoided simply by refusing to insulate government contractors and their employees from potential civil and criminal liability. As Verkuil notes, “[c]ontractors, after all, cannot be ordered to perform nor disciplined for refusing to do so.”<sup>55</sup> Verkuil relies on that important difference between government employees and contractors as one of the bases for his critique of our use of contractors to perform military and other national security functions. Yet, that difference between government employees and contractors has advantages that may outweigh its disadvantages.

A rogue President can do far more damage than can a rogue contractor. As all contractors know, a President cannot unilaterally confer on a contractor or its employees immunity from civil or criminal liability for violations of law.<sup>56</sup> That is why telecommunications firms refused to comply with exhortations from President Bush to engage in arguably illegal wiretapping that was not authorized by Congress.<sup>57</sup> Thus, the inability to force contractors to do what government employees can be ordered to do is an *advantage* of relying on private contractors to perform many military and other national security functions. It provides one of the few practical means through which Congress can maintain some degree of control over a rogue President. Congress need only do two things to maintain this control: (1) subject private contractors and their employees, including those operating overseas, to the normal sources of potential criminal and civil liability that apply to members of the armed forces and to contractors and their employees operating in the United States; and (2) refuse to con-

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<sup>55</sup> VERKUIL, *supra* note 1, at 50.

<sup>56</sup> See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 227–28 (1940) (finding that official executive branch encouragement to engage in conduct that violates the Sherman Act is no defense in a criminal antitrust proceeding). In the case of illegal conduct undertaken by contractors in countries that are occupied by the United States but are putatively independent, even a conferral of immunity by the U.S. Congress may not be sufficient to protect the contractor and its employees from civil and criminal liability. If the legislature of the occupied country refuses to confer immunity on the contractor, it confronts a powerful deterrent to illegal conduct in the form of potential civil and criminal liability. See, e.g., James Glanz & Sabrina Tavernise, *Security Company Faces Iraqi Criminal Charges*, N.Y. TIMES, Sept. 23, 2007, at A1.

<sup>57</sup> James Risen, *Warrantless Wiretaps Not Used, Official Says*, N.Y. TIMES, Sept. 19, 2007, at A14.

fer immunity on contractors and their employees for engaging in illegal conduct. The credible threat of civil or criminal liability for contractors and their employees simultaneously serves as a check on potential excesses engaged in by contractors and on potential excesses engaged in by the executive branch through the use of contractors.

Finally, there is another major advantage of our heavy reliance on contractors to perform military functions. To explain this advantage, I will begin by summarizing the history of the performance of U.S. military functions from 1789 until the 1890s.<sup>58</sup> For the first century of its existence, the United States relied primarily on private contractors to perform military functions. This practice produced the same types of criticisms as those Verkuil voices with respect to our present heavy reliance on contractors to perform military functions. Yet, the political leaders of the United States during this period resisted the call to create a substantial public military establishment because of their fear that such an action would threaten democracy—basically the opposite of the causal relationship that now concerns Verkuil.

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

I will return to the lessons of the nineteenth century after I recount a conversation with Graham Fuller, one of the smartest people I know. Fuller had a long and distinguished career at the Central Intelligence Agency (“CIA”), including Chief of Station in several major countries and Vice Chair of the National Intelligence Council in the

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<sup>58</sup> This summary is based on Parrillo, *supra* note 22.

Reagan Administration. After retiring from the CIA, he continued to provide strategic advice to the government in his new capacity as a Senior Political Scientist at the Rand Corporation. He also took advantage of his new-found freedom to write a series of books that are required reading in international relations courses at numerous universities.<sup>59</sup> His languages include Russian, Chinese, Arabic, Turkish, Farsi, and several European languages. Fuller now lives as an expatriate in Canada, where I visited him a few months ago.

Fuller believes that the United States has developed an inherently imperialistic culture.<sup>60</sup> After much thought about his opinion, I have come away from that exercise with a perspective that differs only slightly from Fuller's. I believe that the United States has an underlying tendency toward imperialism that manifests itself episodically. There is solid support for the belief that the United States had imperialistic tendencies in the nineteenth century and that it has those tendencies in the twenty-first century, but there is little evidence to support that belief in the twentieth century. I believe that the awful results of World War I provided a source of caution that suppressed the U.S. tendency toward imperialism during the 1920s and 1930s, and that the stalemate in Korea, the defeat in Vietnam, and fear of nuclear war with the Soviet Union suppressed that tendency during most of the balance of the century. Toward the end of the twentieth century, however, the United States' "victory" over the Soviet Union in the Cold War, and its emergence as the only global superpower, gave Washington a taste for broader domination of the world scene—an ambition seen by many as imperialistic and embraced by Democrats as well as Republicans.

When I combine the history of the U.S. military in the nineteenth century with both Fuller's concern and recent U.S. military adventures, I conclude that the United States is better off with its present heavy reliance on private contractors to perform military functions than if the United States had the much more robust military capability it would have with a draft-supported public military. We have invaded and occupied two countries in the last five years. We have botched both efforts<sup>61</sup> even though we have made extensive use of private con-

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<sup>59</sup> *E.g.*, GRAHAM E. FULLER, *THE FUTURE OF POLITICAL ISLAM* (2004).

<sup>60</sup> Interview with Graham Fuller in Squamish, B.C. (Aug. 7, 2007).

<sup>61</sup> *See generally* THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006) (detailing the U.S. failure to provide adequate security in Iraq); John Sifton, *We're Losing the War in Afghanistan, Too*, SALON, Aug. 21, 2003, <http://dir.salon.com/story/news/feature/2003/08/21/afghanwar> (detailing the U.S. failure to provide adequate security in Afghanistan).

tractors to perform essential military functions.<sup>62</sup> The U.S. military failures in Iraq and Afghanistan are attributable to a considerable extent to inadequate forces available to perform the missions. Thus, as Verkuil accurately describes, U.S. failure in Iraq and Afghanistan is largely due to the combination of downsizing the military and outsourcing military functions to private contractors.

However, the obvious inadequacy of our military resources to occupy a foreign country effectively also has a major advantage. If we believed that we had the military resources sufficient to effectively occupy multiple countries, I believe that we would have done so. I suspect that we would have invaded and occupied somewhere between three and six countries over the past five years if we believed that we had the military resources to do so effectively.<sup>63</sup> Because I believe that those actions would have been extremely bad for both the country and the rest of the world, I am delighted that we lack the resources to indulge our cultural tendency to invade and to occupy countries that displease us.

I do not want the United States to take actions, such as bringing back the draft, that would increase our ability to indulge our tendency toward imperialism. By downsizing and privatizing our military, we have deprived ourselves of the ability to take actions that we should not take but that we would be tempted to take if we had the ability to do so. This deprivation is, in my opinion, a perfect example of the socially beneficial version of the law of unintended consequences. As much as I share Verkuil's displeasure with the manner in which private contractors are performing many military and other national security functions, I believe that problem to be both more tolerable and more manageable than the problems this country would have if the public believed that the U.S. military had the ability to effectively invade and occupy multiple countries whose policies and beliefs displease us.

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<sup>62</sup> See John F. Burns, *The Deadly Game of Private Security*, N.Y. TIMES, Sept. 23 2007, at WK1 (characterizing the work of private security firms in Iraq as "indispensable").

<sup>63</sup> The most likely candidates for additional invasions and occupations were Iran, North Korea, Syria, and Pakistan.