



**PRIVATEERS!  
THEIR HISTORY AND FUTURE**

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28 January 2015

## 1 Introduction

Government employment of private military firms is not a new phenomenon. During the Age of Sail, naval powers issued privateering licenses to shipowners, allowing and encouraging them to raid enemy commerce and attack foreign navies during times of war – a system that bears several similarities to modern military contracting. But private enterprise did not go to war in a legal vacuum. Privateering licenses were tightly regulated and their holders overseen by courts, which coexisted with other institutions that channeled private resources into war efforts at low cost to the state. Drawing on the American experience, we discuss the legal and economic structures of privateering, evaluate its effectiveness, explain its fall into disuse, and then discuss the recent return of private military forces and the prospects for reviving institutions similar to those that regulated privateering.<sup>1</sup>

## 2 Historical and Legal Foundations

Privateering was governed by a substantial system of legislation enforced through admiralty courts, prize courts, and bonds. In the United States, this system is founded on Article 1, Section 8 of the U.S. Constitution which gives Congress the power to “grant letters of marque and reprisal,” a power closely related to Congress’ preceding power: “to declare war.” Letters of marque and reprisal, granted since the twelfth century, were designed to transform the anarchy of retaliation into lawful methods of seeking restitution. Sovereigns issued letters of marque and reprisal to raid enemy ships during wartime or periods of heightened international tensions. These special mechanisms allowed private means to be dedicated to public wars.

Privateering played a critical role in the American Revolution, with around 700 licensed privateers active, compared to only about 100 ships in the official U.S. Navy.<sup>2</sup> The apogee of American privateering, however, was the War of 1812. On June 18, 1812, Congress declared war on Great Britain and began to issue letters of marque and reprisal.<sup>3</sup> On June 26, 1812, Congress followed its declaration of war with greater detail on how privateers would be regulated.<sup>4</sup> In this, Congress and the president who subsequently added to the regulations drew upon hundreds of years of legal traditions, practices, and regulations.<sup>5</sup>

The private market’s response was swift. For example, the privateer *Comet*, owned by a group of wealthy Baltimore investors who anticipated the war, was commissioned on June 29, just 11 days after the declaration of war. On July 12, the *Comet* cleared Baltimore’s harbor along with several other privateers, capturing its first prize on July 26, the 400-ton *Henry*.<sup>6</sup> In less than 30 days a fleet of cruisers was launched from the coast of America ready

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<sup>1</sup>We draw upon Alexander Tabarrok, “The Rise, Fall, and Rise Again of Privateers,” *The Independent Review*, Vol. 11, No. 4 (Spring 2007), 565–577.

<sup>2</sup>Reuben E. Stivers, *Privateers and Volunteers: The Men and Women of Our Reserve Naval Forces, 1766 to 1866* (Annapolis: Naval Institute Press, 1975); U.S. Maritime Service Veterans, “Privateers and Mariners in the Revolutionary War,” website, May 29, 2012, available from <http://www.usmm.org/revolution.html> last accessed January 23, 2015.

<sup>3</sup>‘An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof, and the United States of America and Their Territories’, *Annals of Congress*, 12th Congress, 1st Session, 2323-2324, available from <http://memory.loc.gov/ammem/amlaw/lwac.html>.

<sup>4</sup>‘An Act Concerning Letters-of-Marque, Prizes and Prize Goods’, *Annals of Congress*, 12th Congress, 1st Session, 2327-2328.

<sup>5</sup>See Hugo Grotius, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, 2012). Available from Project MUSE, <http://muse.jhu.edu> last accessed October 20 2014.

<sup>6</sup>Jerome R. Garitee, *The Republic’s Private Navy* (Middletown: Wesleyan University Press, 1977), 150.

to harass and imperil the British commercial fleet throughout the world.<sup>7</sup> The privateers' entrepreneurial foresight and readiness stands in sharp contrast to that of the U.S. Navy, which had only eight seaworthy ships when the war began.<sup>8</sup>

## 2.1 Legal Institutions and Performance Bonds

In the era of the Comet, acquiring a privateer's license, called a commission, was the first step required by law in outfitting a privateer. Without a commission and oversight by a court, the privateer could not sell its prizes. A privateer's license was recognized as valid by courts throughout the world. Unlike pirates, who were punished as criminals outside the rule of law, privateers lawfully interfered with enemy shipping and were treated as opposing military forces under the law of nations. If a British warship captured an American privateer, for example, its captain and crew would be accorded the same rights as captured officers and crew of the U.S. Navy.

When a privateer captured a valuable prize, it was manned with a prize master and crew and instructed to set sail for the nearest friendly port. From the moment a prize arrived, its new owners were subject to rules regulating how they profited from the ship and its holdings. The cargo and ship could not be legally disturbed (no "breaking bulk") until the privateer had proven in a court of law that the vessel was owned by the enemy. To thus "condemn" a vessel, the privateer relied on the captured ship's papers, and the court would question the prize's captured officers, crew, and passengers. If the prize was found to be lawful, it was sold in a court-ordered auction. Congress stipulated, however, that if a court found a capture to have been made without just cause or otherwise unreasonably, it could order the owners of the privateer to pay restitution to those harmed by the unlawful capture.<sup>9</sup>

The courts were judicious toward enemy vessels and their owners. A court declared the first two American prizes in the War of 1812 to be invalid because their skippers had not yet had the chance to learn of the state of war.<sup>10</sup> American courts, operating under U.S. law, were even established in foreign countries to adjudicate prize cases brought by privateers who took their prizes to foreign ports. Benjamin Franklin sat as a judge in one such court in Paris during the American Revolution.<sup>11</sup>

Congress also required that privateers respect the persons, property, and ships of neutral nations and legislated to incentivize the proper treatment of neutrals.<sup>12</sup> Privateers with crews of fewer than 150 men were required to pay a performance bond—a financial instrument whereby the purchaser forfeits the value if he violates the rules of the agreement—of USD 5,000. Ships with a larger crew paid USD 10,000. Each bond had to have at least two

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<sup>7</sup>Garitee notes that "The instructions given Captain Henry Dashiell of the privateer Saranac in January of 1815 reflected experiences gained in two and half years of war. . . .they instructed Dashiell to cruise for ten days east of Bermuda and then to head for Barbados for a twenty-day cruise. If he still had sufficient officers and men to man prizes, he was then to steer for Madeira. After Madeira, off the African coast, the captain was to use his discretion, but he was encouraged to cruise in and off the English and Irish channels." See Garitee, *The Republic's Private Navy*, 144.

<sup>8</sup>Donald B. Chidsey, *The American Privateers* (New York: Dodd, Mead & Company, 1962), 89.

<sup>9</sup>'An Act Concerning Letters-of-Marque, Prizes and Prize Goods', *Annals of Congress*, 12th Congress, 1st Session, 2327-2328.

<sup>10</sup>Chidsey, *The American Privateers*, 88. For other examples of the courts invalidating prizes and enforcing payment of damages, see Garitee, *The Republic's Private Navy*, 156, and Donald A. Petrie, *The Prize Game* (Annapolis: Naval Academy Press, 1999), 160.

<sup>11</sup>Petrie, *The Prize Game*, 155.

<sup>12</sup>Garitee, *The Republic's Private Navy*, 97-98, "An Act Concerning Letters-of-Marque, Prizes, and Prize goods," 2327-2328.

responsible sureties who did not have a financial stake in the privateer.<sup>13</sup> The performance bond ensured that privateers would follow the rules laid down by Congress and the law of nations or face a large financial penalty – the value of the bond. In addition, the privateering ship itself was a form of collateral that could be sold by the courts to pay an adverse judgment. A typical privateer outfitted for around USD 25,000, not including wage advances to the crew, and the potential loss of that investment was a real deterrent against unlawful behavior.<sup>14</sup>

## 2.2 Ransoms

Capture followed by auction was not the only option available to the privateer. If the crew was short and the prize was far from a friendly port, the privateer could ransom the captured ship back to its captain, who would agree on behalf of the prize's owners to pay the ransom at a later date. The privateer would then release the prize and crew with papers that guaranteed the prize's safety if intercepted by another American privateer. Captain Boyle of the *Comet*, for example, chose this option at least four times during the War of 1812, agreeing to a USD 5,000 ransom in each case.<sup>15</sup>

The ransom took the form of a bond – a promise from the owners of the ship to the privateer, with the captain of the merchant ship as the surety.<sup>16</sup> By themselves, promises seldom create expectations solid enough to support a well-established business practice such as ransom. There existed three legal constructs that helped a privateer recover a ransom in the event that the owners refused to pay.

First, ransoms were contracts enforceable in courts. While under British common law a promise made under duress was not enforceable, the threat under which ransom bonds were agreed was not personal but against the cargo and ship which the privateer had the legal right to sink.<sup>17</sup> The privateer did not have standing to sue a British owner of a merchant vessel in Britain's courts. However, the captain of the captured vessel, who was the surety for the ransom, could be sued and could in turn sue the owner in British courts. If the surety's suit was successful, he would then use the judgment to compensate the American owners of the ransom bond.

Second, the merchant's assets outside of the enemy nation could be legally seized through a process called repossession. When a merchant's vessels entered American or foreign ports, agents of the privateer could initiate legal action to seize them. After the British parliament made ransom promises unenforceable in 1782, thereby nullifying their status under common law, British merchants continued to pay ransoms because such promises were enforceable in the courts of other nations. During the War of 1812, the British government largely turned a blind eye toward these payments.

Third, the privateer often took a hostage, usually the captain of the ship or another officer, who would be released only after the ransom was paid. The hostage, in some instances, also served as the surety for the ransom bond and could be released to initiate legal action against the merchant ship's owners. Because the hostage was the surety, he owed the privateer for the value of the ransom if the owners did not pay, thus aligning the incentives of the privateer

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<sup>13</sup>'An Act Concerning Letters-of-Marque, Prizes, and Prize goods', 2327-328.

<sup>14</sup>The cost of a privateer is from Garitee, *The Republic's Private Navy*, 111, 125. USD 25,000 in today's dollars using the CPI is USD 452,000 or USD 4,840,000 using the wages of unskilled labor as a comparison. See Tabarrok, 'The Rise, Fall, and Rise Again of Privateers'.

<sup>15</sup>Garitee, *The Republic's Private Navy*, 272.

<sup>16</sup>Henry Wheaton, *A Digest of the Law of Maritime Captures and Prizes* (New York: Forbes & Co, 1815), 236.

<sup>17</sup>Petrie, *The Prize Game*, 20.

and hostage to seek redress in the courts. Privateers and merchantmen negotiated the terms under which such hostages were kept, extending even to how they would be cared for.<sup>18</sup>

For privateers, the reliability of ransom as a business option reduced the relative attractions of violence, mitigating the loss of life and the destruction of property. Those same benefits also accrued to enemy merchants, who easily preferred ransom costs to the destruction of property. This logic is straightforward: it is better to be taxed than to lose all of one's property. Ransom also benefited the government commissioning the privateers, as the option allowed its mobile and adaptive fleet to stay at sea for longer periods and harass ships closer to enemy shores. From the perspective of the state there were disadvantages to the practice of ransom, however, the most significant being that enemy ships and personnel were not removed from the war effort, but merely taxed.

### 2.3 Parole

This downside was equally evident in the legally defined practice of parole, which was also available to privateers. When a privateer captured a vessel of too low a commercial value to be worth sending back to port as a prize, the privateer could let the crew of the captured ship go free along with prisoners from previous prizes. Such freedom, granted with restrictions on the behavior of the released prisoners, was called a parole. It was expensive for a privateer to feed and guard large numbers of prisoners, which was required by the law regulating privateers.<sup>19</sup> The privateer's ability to take future prizes and the duration of its cruise were reduced by the presence of prisoners.

The advantages of parole were many. For privateers, granting a parole could increase the length and range of cruises. For enemy merchants, parole decreased the costs of being captured but still imposed a significant burden. States, however, had to balance the greater freedom afforded its privateers versus the fact that parole did not decrease the supply of sailors available to the enemy.

### 2.4 Privateering Firms: Incentives and Organizations

A privateering firm earned revenues from ransoms and the sale of prizes. Merchant ships converted to privateers typically paid their crewmen fixed wages, as typical merchant sailors were paid, but they also earned shares of any prizes they captured. Crewmen on private men-of-war were paid exclusively in shares and therefore only earned their keep if they successfully captured prizes. Sailors in the Royal Navy and the U.S. Navy were not as well incentivized.

Typically the owners of the privateering venture would keep half the shares, and the captain and crew would receive the other half (excluding shares devoted to repairs and maintenance and reserved for the captain to award crewmembers for especially meritorious conduct). The Articles of Agreement for the privateer *Comet* were typical. When in 1812 the *Comet* captured a British prize, the *Hopewell*, for example, Captain Boyle and his crew owned 256.75 shares in total (plus 13.25 shares at the Captain's disposal for rewards.) Boyle himself owned sixteen shares, the 1st lieutenant nine, the Captain of Marines six, each able-bodied seaman two and so forth down to the greenhands who owned one share each.<sup>20</sup> The captain kept

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<sup>18</sup>Peter T. Leeson and Alex Nowrasteh, "Was Privateering Plunder Efficient?," *Journal of Economic Behavior and Organization*, Vol. 79, No. 3 (August 2011), 312-313.

<sup>19</sup>Garitee, *The Republic's Private Navy*, 97-98.

<sup>20</sup>Garitee, *The Republic's Private Navy*, 192.

shares in reserve to be awarded as bonuses; the first sailor to spot a prize and the first to board a fighting prize, for example, received bonus shares. Injured crewmen would also receive insurance payments, and in the event of death, a crewman's shares were bequeathable to his heirs.<sup>21</sup> Each crew member's compensation was tied to the privateer's financial success.

Taxes, duties, and payments to auctioneers typically absorbed half the value of a prize, but the crew of a privateer lucky enough to bring in prizes could still profit handsomely. The Hopewell's capture paid an able-bodied crewman USD 210.78, or about seven months' worth of salary in alternative employment, while Captain Boyle's sixteen shares were worth USD 1,686.24, or about USD 327,000 today.<sup>22</sup> Of course, not all voyages were successful. While privateering was a high-risk, high-reward profession for crew members, a privateering venture's financial backers could obtain consistent returns. The owners of the Comet received an estimated USD 220,000, or at least USD 42,600,000 in today's dollars, from the prizes, ransoms, and cargoes she captured during the War of 1812.<sup>23</sup>

### 3 Evaluation and Decline

Privateers were a cost-effective and successful method of waging economic warfare through the War of 1812. Despite these successes, privateering declined after the war and was banned almost everywhere with the Declaration of Paris in 1856. Why did such a successful and low-cost way of fighting a naval war decline?

The state's embrace of privateering was a response to its own fiscal limitations. Public navies were expensive, especially as they had to be maintained in times of peace as well as in times of war, and until the late nineteenth century tax systems tended to be ineffectual and inefficient. The funding base of the pre-Napoleonic Royal Navy, the era's preeminent naval force, is illustrative.

The first source of funding for Britain's navy was a variety of taxes earmarked for certain agencies and collected directly by them. Since 1347, the tonnage and poundage—a customs duty levied on merchant vessels docking in British ports—had been collected by the Royal Navy directly to compensate it for convoy protection duties.<sup>24</sup> If merchants could not trade in British ports, the Royal Navy would be stripped of this important source of revenue; this gave the Royal Navy an incentive to protect convoys and keep British ports open to trade.

The second and largest source of funds for the Royal Navy was debt. It issued bills of credit called Navy Bills when cash from other sources was unavailable. Navy Bills were a recognized short-term investment that bore interest after six months.<sup>25</sup> Customs duties collected by the Royal Navy serviced these debt obligations. Bondholders followed Navy actions with attentiveness to verify that the force efficiently administered and properly prioritized convoy protection to guarantee the continual flow of customs duties.<sup>26</sup> Although it was technically illegal for the Royal Navy to issue bonds, Parliament tacitly approved of the system because it did not want to fund the entire Navy budget. The Treasurer of the Navy was the only

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<sup>21</sup>See, for example, the Articles of Agreement of the privateer Yankee in Chidsey, *The American Privateers*, 104.

<sup>22</sup>Garitee, *The Republic's Private Navy*, 191. We use the "labor value of the commodity" from <http://www.measuringworth.com/uscompare/relativevalue.php>

<sup>23</sup>Garitee, *The Republic's Private Navy*, 272.

<sup>24</sup>Nicholas A. Rodger, *The Command of the Ocean: A Naval History of Britain, 1649-1815* (New York: W.W. Norton & Company, 2004), 160.

<sup>25</sup>Rodger, *The Command of the Ocean*, 293.

<sup>26</sup>Rodger, *The Command of the Ocean*, 293.

public accountant who did not have to produce vouchers or open his books to Parliament.<sup>27</sup> As maintaining its credit rating was vital for the Navy to sell bonds in the future, the fleet's size tended to expand during war as the Navy stretched itself to protect trade and customs duties.

A third source of funding was tax revenue appropriated by Parliament. While Parliament frequently granted monies, paid off Navy Bills, or assumed debts, large portions of Navy expenditures were in practice self-financed. As a consequence, Parliament never completely controlled naval spending.

In the face of fiscal inefficiencies similar to those that plagued Britain, governments everywhere relied on and welcomed the low-cost transformation of merchant vessels into raiders. The privateering system meant that there was always a ready stock of war-fighting ships available that did not require maintenance by the state.

In the United States, opposition to standing armies and navies also motivated the use of privateers. The founders feared standing armies as a threat to liberty. At the constitutional convention, for example, James Madison argued that "A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence against foreign danger have been always the instruments of tyranny at home."<sup>28</sup> For the founders, the defense of the country was best left to citizens who would take up arms in times of national peril, form militias, overcome the peril, and then to return to their lives.<sup>29</sup> Explaining why the United States would not sign the 1856 Treaty of Paris, William Marcy, Secretary of State, said:

*The United States consider powerful navies and large standing armies as permanent establishments to be detrimental to national prosperity and dangerous to civil liberty. The expense of keeping them up is burdensome to the people; they are in some degree a menace to peace among nations. A large force ever ready to be devoted to the purposes of war is a temptation to rush into it. The policy of the United States has ever been, and never more than now, adverse to such establishments, and they can never be brought to acquiesce in any change in International Law which may render it necessary for them to maintain a powerful navy or large standing army in time of peace.*<sup>30</sup>

The growing power of the state to collect tax revenue and afford a permanent, large navy in Europe and the United States meant that the cost-saving advantages of privateering became relatively less attractive. Improvements in technology also made privateering less effective. A few extra cannon and men could convert a merchant vessel into a commissioned vessel capable of capturing small prizes, should any cross her trading route. But as military technology developed, substitution between private and military use became more difficult. It was one thing to transform an eighteenth century merchant vessel into a privateer and quite another to build an attack submarine with private capital. The ideological commitment in the United States against standing armies and militarism also faded away.

<sup>27</sup>Rodger, *The Command of the Ocean*, 370.

<sup>28</sup>Quoted in Max Farrand's *Records of the Federal Convention of 1787*, Vol. I [1] (1911), 465, available from <http://memory.loc.gov/ammem/amlaw/lwfr.html> last accessed January 23, 2015.

<sup>29</sup>John P. Reid, *In Defiance of the Law: The Standing-Army Controversy, The Two Constitutions, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 1981); Leon Friedman, 'Conscription and the Constitution: The Original Understanding', *Michigan Law Review*, Vol. 67, No. 8 (June 1969), 1493-1552; Arthur Ekirch, Jr., *The Civilian and the Military: A History of the American Anti-Militarist Tradition* (Oakland: Independent Institute, 2010 2nd Ed.).

<sup>30</sup>Quoted in Henry Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge, 1887* (London: John Murray, 1915 2nd Ed.). Available online at Avalon Project: [http://avalon.law.yale.edu/subject\\_menus/intmenu.asp](http://avalon.law.yale.edu/subject_menus/intmenu.asp) last accessed January 23, 2015.

Additionally, privateering had always been an imperfect system from the state's point of view. The misalignment of state and privateer incentives created tensions which threatened the potential for privateering to advance national interests. Ransoming and parole benefited privateers and their captures, but it was not always in the interests of their respective governments. A ransomed ship could carry cargo another day and paroled prisoners and prisoner exchanges could release manpower to the enemy. When governments could maintain their own navies, they decided to remove the legal bases for those activities.

The first steps toward outlawing privateering came in the form of assaults on the legal underpinnings of the practice of ransoming and parole. The British government outlawed ransoming as early as 1782, for example, and was followed by the Americans in 1813.<sup>31</sup> The British also began to deny the legitimacy of parole by the end of the War of 1812. The U.S. Congress made parole a comparatively less attractive option by raising the bounty on captured enemy prisoners from USD 20 in 1812 to USD 25 in 1813 and USD 100 in 1814.<sup>32</sup> In March 1813, Congress also offered a substitute for ransom: the U.S. government would pay to any privateer who would "burn, sink or destroy" any armed British vessel half the value of that vessel.<sup>33</sup> In this way, privateers became more and more like government contractors and were redirected toward the goal of committing maximum destruction against the enemy. Eventually, states decided to move away from managing complicated incentives and toward direct command of their own naval power.

The state's increasing ability to directly fund and staff navies also created conflicts with privateering ventures as the two competed to hire experienced sailors.<sup>34</sup> British privateers offered higher wages and better working conditions than the Royal Navy, and drew many of the best trained and most experienced seamen toward privateering. In some instances, armed fights broke out between Royal Navy personnel and privateers competing for sailors.<sup>35</sup> This competition produced large and endemic personnel shortages for the Royal Navy. As a result of this shortage, the Royal Navy relied on impressments, or the kidnapping of experienced sailors and sometimes landsmen, to man its ships. However, because the law exempted privateering crews from impressment, this tactic exacerbated the Navy's manpower shortage by incentivizing experienced sailors to join privateering crews for a lower wage.<sup>36</sup> Once implemented, the outlawing of privateering relieved the manpower shortage.

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<sup>31</sup>Garitee, *The Republic's Private Navy*, 168.

<sup>32</sup>Garitee, *The Republic's Private Navy*, 168.

<sup>33</sup>Chidsey says the armed qualification was not so important since most ships were armed. Petrie argues that this only applied to official Navy war ships; see Petrie, *The Prize Game*, 45-46.

<sup>34</sup>The Royal Navy and privateers also competed for all forms of ships, naval stores, and armaments. Often the Royal Navy ended up with inferior goods because it refused to pay higher prices. Sir Wager remarked to Admiral Vernon at the start of the War of the Austrian Succession, "We must do as well as we can, but we find great Difficulty in getting Seamen enough for our ships, which has been our Case in all our considerable Sea Armaments"; see Edward Vernon, *Original Letters to an honest Sailor* (London: 1746), 4. Privateers consumed substantial quantities of war material. One hundred and twenty privateers docked in Liverpool in 1779 had an aggregate tonnage of 31,385 and carried 1,986 guns; see Gomer Williams, *History of the Liverpool Privateers and Letters of Marque with An Account of the Liverpool Slave Trade, 1744-1812* (Montreal: McGill-Queen's University Press, 2004), 20. Privateers demanded speedy ships that were also in demand by the Royal Navy. Brigs, schooners, slavers, and sloops were all used in various capacities in the Royal Navy. During the Napoleonic Wars, never less than a quarter of Royal Navy ships were prizes that it had captured; see Nicholas Rogers, *The Press Gang: Naval Impressment and Its Opponents in Georgian Britain* (London: Continuum Books, 2007) 483.

<sup>35</sup>Rogers, *The Press Gang*, 82, 85.

<sup>36</sup>Geoffrey J. Marcus, *A Naval History of England: The Formative Centuries* (Boston: Atlantic Monthly Press, 1961), 374.



## 4 Present Status

The practice of contracting out government functions, such as the manufacturing of uniforms and military equipment, to private firms never disappeared completely and has grown in recent years. For most of the fiscal quarters between 2007 and 2013 in Afghanistan and most quarters from 2008 to 2011 in Iraq, for example, the number of private contractors exceeded the Department of Defense (DOD) workforce.<sup>37</sup> Many contractors are locals who offer non-combat services, including logistical support for U.S. troops. However, significant numbers have also been involved in security operations. In March 2013, for example, there were 108,000 DOD contractors in Afghanistan, of which 18,000 were private security contractors, which compares with 65,700 U.S. troops in the country that month.<sup>38</sup>

The modern U.S. government has used contractors for many of the same reasons privateers were advantageous in the Revolutionary era. Contractors do not need to be hired on permanently and can quickly be called up to meet a crisis or drawn down after the crisis dissipates. Contractors often have specific expertise—language skills or country knowledge today—which are more expensive for the government to maintain on a permanent basis. Additionally, contractors are also more incentive-driven than government bureaucracies, making them relatively nimble and willing to innovate.<sup>39</sup>

To be sure, the use of private contractors has created many of the same tensions as the use of privateers in earlier wars.<sup>40</sup> Private military contractors (PMCs) and the military, for example, compete for soldiers, especially elite soldiers.<sup>41</sup> In 2005, the Pentagon began offering reenlistment bonuses of up to USD 150,000 for special forces personnel.<sup>42</sup> However, the competition for elite personnel is not always zero-sum. Doug Brooks, president of the International Peace Operations Association, observes that the temporary nature of security contracting appeals mainly to special forces soldiers who were otherwise intending to retire—meaning that private contracting could actually increase the supply of soldiers available on the battlefield.

There are other reasons why manpower competition is less of an issue for the U.S. DOD than it was for the Royal Navy. As foreigners are rarely allowed to serve in the U.S. military (the only noncitizens who can enlist, with few exceptions, are lawful permanent residents), but can be hired by private firms, contracting may expand the size of the potential manpower pool. While foreign governments could also hire former U.S. soldiers, thereby offsetting the manpower benefit, in practice the U.S. government remains the largest purchaser of specialized military personnel. Another potentially supply-increasing effect is that more soldiers may decide to join elite military forces because they will be eligible for lucrative

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<sup>37</sup>Moshe Schwartz and Jennifer Church, “Department of Defense’s Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress,” CRS Report for Congress R43074, May 17, 2013, Congressional Research Service, Washington, D.C., 24-25.

<sup>38</sup>Schwartz and Church, “Department of Defense’s Use of Contractors to Support Military Operations,” 2.

<sup>39</sup>Congressional Budget Office, “Logistics Support for Deployed Military Forces,” CBO Study, October 2005, Congressional Budget Office, Washington, D.C. Blackwater founder Erik Prince’s history of Blackwater is useful in recounting how the firm grew quickly by filling a demand for training, intelligence and security services that the police and the military could not supply in response to a series of crises—beginning with the Columbine High School shootings in 1999 and continuing with the attacks on 9/11. See Erik Prince, *Civilian Warriors: The Inside Story of Blackwater and the Unsung Heroes of the War on Terror* (New York: Portfolio Trade, 2014).

<sup>40</sup>Peter W. Singer, ‘Outsourcing War’, *Foreign Affairs*, Vol. 84, No. 2 (March/April 2005), 119-133.

<sup>41</sup>David Isenberg, *Shadow Force: Private Security Contractors in Iraq* (Westport: Praeger, 2009).

<sup>42</sup>Extracts of interview with Doug Brooks at PBS, “Frontline: Private Warriors – Frequently Asked Questions,” website, June 21, 2005, available from <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/> last accessed January 23, 2015.

employment as a contractor after they are discharged.<sup>43</sup> More generally, one of the main justifications for hiring contractors to support the troops is that it frees up military personnel for combat units.<sup>44</sup>

While the contracting of private firms has benefited the U.S. DOD, some problems have emerged due to their profit-driven structure. The difficulty of writing and monitoring complex contracts means that contractor and government incentives are never perfectly aligned. Privateers in 1813 wanted to capture ships, not sink them (until the U.S. government paid them directly for sinking). Similarly, contractors in Afghanistan were paid to protect convoys of U.S. materiel but may have done so in a way that compromised larger goals.

On the positive side, a U.S. House of Representatives oversight committee reported that the private system worked well in delivering goods:

*[T]he Host National Trucking [HNT] providers supply almost all U.S. forward operating bases and combat outposts across a difficult and hostile terrain while only rarely needing the assistance of U.S. troops. Nearly all of the risk on the supply chain is borne by contractors, their local Afghan truck drivers, and the private security companies that defend them. During the Soviet Union's occupation of Afghanistan (1979-1989), by contrast, its army devoted a substantial portion of its total force structure to defending its supply chain. The HNT contract allows the United States to dedicate a greater proportion of its troops to other counterinsurgency priorities instead of logistics.*<sup>45</sup>

However, delivering supplies was a means to an end and not an end itself. Many of the contractors, local Afghans employed by the firm, were paying insurgents not to attack the convoys. The payments were effective in accomplishing the contractor's goal—getting the goods delivered—but to the extent that the payments ultimately supported the insurgency they were at cross-purposes with the U.S. mission.<sup>46</sup>

A more general problem is that writing and managing contracts is difficult. Profit-driven systems incentivize private firms to act quickly, lower costs, and innovate, but also to game the system and exploit the buyer. Contracting problems are especially acute when quality is important but difficult to measure. It is relatively easy to judge the quality of goods, for example, but much harder to judge the quality of services like security.

Although contractors are now an indispensable part of any U.S. military operation,<sup>47</sup> the job of writing and managing contracts is not valued within the military as a key aspect of warfighting. Thus the Commission on Wartime Contracting argues that contingency contracting should be raised to the level of other Joint Staff functions like intelligence, plans, and operations.<sup>48</sup> In addition, to avoid problems of waste, fraud and, abuse, there must be greater training in the theory and practice of incentive design.<sup>49</sup>

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<sup>43</sup>Suzanne Kelly, 'Confessions of a private security contractor', CNN Security Blog post, December 27, 2011, available from [security.blogs.cnn.com/2011/12/27/confessions-of-a-private-security-contractor](http://security.blogs.cnn.com/2011/12/27/confessions-of-a-private-security-contractor) last accessed January 23, 2015.

<sup>44</sup>Schwartz and Church, 'Department of Defense's Use of Contractors to Support Military Operations', 3.

<sup>45</sup>U.S. House Committee on Oversight and Government Reform, "Warlord, Inc.: extortion and corruption along the U.S. supply chain in Afghanistan," report by the majority staff of the Subcommittee on National Security and Foreign Affairs, June 2010, U.S. House of Representatives, Washington, DC.

<sup>46</sup>U.S. House Committee, "Warlord, Inc."

<sup>47</sup>Singer, "Outsourcing War."

<sup>48</sup>Commission on Wartime Contracting, "Transforming Wartime Contracting: Controlling Costs, Reducing Risks," Final Report to Congress, August 2011, U.S. Congress, Washington, D.C.

<sup>49</sup>Tyler Cowen and Alexander Tabarrok, "Managing Incentives," in Tyler Cowen and Alexander Tabarrok, *Modern Principles of Economics* (New York: Worth Publishers, forthcoming 2016), Chapter 22.

Adopting novel contract forms and provisions could better align PMC and government interests. U.S. privateers, for example, were required to purchase performance bonds which could be forfeited in light of bad behavior. Currently, the U.S. military does not require PMCs to purchase bonds, but their use should be evaluated as a way to structure incentives correctly. The French government considered requiring military suppliers to sign performance bonds but the measure was not adopted.<sup>50</sup>

In addition to designing better contracts, the government also needs to monitor PMCs more closely. As the dollar value of contracts skyrocketed in Iraq and Afghanistan, the DOD staff responsible for monitoring PMCs shrank by 25 percent.<sup>51</sup> In 2010, each government auditor was responsible for over USD 2 billion of private military contracts.<sup>52</sup>

Finally, and more radically, bounties, another vestige of the privateering system, could also be increased and made available more frequently. The U.S. Department of State's Rewards for Justice program has since 1984 provided USD 125 million to informers around the world who have helped to bring terrorists like Ramzi Yousef, the plotter behind the 1993 World Trade Center attack, Abu Solaiman, Hamsiraji Marusi Sali, and others to justice.<sup>53</sup> The program was expanded in 2013 to allow payments leading to the arrest of individuals wanted by the International Criminal Court.

Within the U.S. criminal justice system, bounties are routinely used not only to incentivize informants, but also to encourage the capture and apprehension of bail jumpers. The incentive approach works: bounty hunters are much more likely to recapture felony defendants who jump bail than police are to re-arrest similar defendants who fail to appear.<sup>54</sup> If rewards on terrorists such as Ayman al-Zawahiri, currently the United States' most wanted, were raised from USD 25 million to USD 250 or USD 500 million, the government would incentivize not only information provision but also active pursuit—a return of true privateering. In conjunction, an international bounty hunter license for war criminals or human rights abusers could be authorized by the United Nations Security Council under its powers to combat threats to international peace and security.<sup>55</sup> Such an authorization could create obligations for states to erect a legal framework to support or tolerate the bounty-hunters' activities.<sup>56</sup> The private pursuit of justice would no doubt be controversial and problematic, but so too have been the wars in Afghanistan and Iraq undertaken to combat terrorism.

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<sup>50</sup>White Paper Commission, *The French White Paper on Defence and National Security* (New York: Odile Jacob, 2008), 267.

<sup>51</sup>Peter W. Singer, "The Regulation of New Warfare," *The Politic*, February 27, 2010, available from <http://thepolitic.org/the-regulation-of-new-warfare-2/> last accessed January 23, 2015.

<sup>52</sup>Singer, "The Regulation of New Warfare."

<sup>53</sup>U.S. Department of State Bureau of Diplomatic Security, "Rewards for Justice – Success Story", website, December 3, 2014, available from [http://www.rewardsforjustice.net/english/hamsiraji\\_sal.html](http://www.rewardsforjustice.net/english/hamsiraji_sal.html) last accessed December 4, 2014.

<sup>54</sup>Eric Helland and Alexander Tabarrok, "The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping," *Journal of Law and Economics*, Vol. 47, No. 1 (April 2004), 93-122; Alexander Tabarrok, "The Bounty Hunter's Pursuit of Justice," *The Wilson Quarterly*, Vol. 35, No. 1 (Winter 2011), 56-61.

<sup>55</sup>Christopher M. Supernor, "International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice," *Air Force Law Review*, Vol. 50, (2001), 215-252.

<sup>56</sup>Drawing on the precedent of UN Security Council resolutions 1373 (2001), 1540 (2004), and 2178 (2014), which obligated states to create or improve legal regimes for combatting terrorism, proliferation of weapons of mass destruction, and the movement of foreign fighters.

## 5 Conclusion

For hundreds of years, governments drew on privateers for their initiative and industry. The incentives of privateers and the governments that commissioned them were always imperfectly aligned, but when governments were unwilling or unable to maintain permanent navies the benefits outweighed the costs. As governments became more powerful, the privateering system declined, but rather than being eliminated, it evolved into the contracting out of services. The acceleration of this process today reflects current budgetary pressures and the need for greater flexibility in the use and deployment of military assets to face asymmetric threats.

The problem of aligning the incentives of private firms with national policy was a concern during the era of privateers and remains one today. Government regulation, oversight, and development of well-designed contracts that incentivize private military firms and contractors to act in the interests of national policy are all essential. The institutions that regulated privateers were surprisingly well-honed for the task, and helped to mitigate governments' resource constraints during the Age of Sail. Careful contract design based on the lessons learned from privateering regulations can re-harness private initiative to serve today's national interests.

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