On "Military Professionalism & Private Military Contractors"

Christopher Mayer

This commentary is in response to Scott Efflandt's article "Military Professionalism & Private Military Contractors" published in the Summer 2014 issue of Parameters (vol. 44, no. 2).

The social contract between the military and the society it protects will evolve, as it always has and always will. These changes drive contemporary challenges to traditional notions of professionalism. In "Military Professionalism and Private Contractors," Colonel Scott Efflandt argues the primary source of contemporary challenges comes from "private contracting companies," and particularly private security companies. He proposes these companies "are actively and passively contesting the US military's professional jurisdiction over its core task – the authority to employ lethal force as the agent of the state." In support of this proposition he cites secondary sources claiming recent legislation and regulations undermine the commander's authority to control these contractors on the battlefield. These assertions are based on a misunderstanding of the role of private security companies and US legislation regarding these actors.

Private security companies are not agents of the state for the employment of lethal force. First, private security companies do not exclusively work for governments. Most contracts for armed private security services are with private entities, such as the petroleum industry, mining concerns, and even non-governmental organizations. They cannot, therefore, be considered agents of state authority in the same way as military forces. Second, they are not used for the employment of lethal force in any way which resembles that function in the armed forces of a state. The use of force by private security companies is limited to self-defense and the defense of others from unlawful attack. This is not combat or direct participation in hostilities. It is the inherent right of individual self-defense. The International Committee of the Red Cross, in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* specifically excludes individual self-defense and defense of others against unlawful violence as meeting the threshold for direct participation in hostilities. This is true even when the attackers are members of the armed forces of a belligerent party.

Mr. Christopher Mayer is the Director, Contingency Contractor Standards and Compliance in the Office of the Deputy Assistant Secretary of Defense (Program Support). He is responsible for Defense Department policy and programs regarding private security contractors. Mr. Mayer is a 2008 graduate of the U.S. Army War College.

Combat, on the other hand, defined as "operations to actively seek out, close with, and destroy a hostile force or other military objective by means of, among other things, the employment of firepower and other destructive and disruptive capabilities," is inherently governmental and reserved for military performance (DODI 1100-22). This reservation is specified in law, policy, and Defense Instructions (e.g., OMB Cir A-76, OMP PL 11-01, DODI 1100-22). This division is reflected in international agreements such as *The Montreux Document on Pertinent Legal*

Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict. This document clarified the status of private security companies personnel as civilians, enjoying similar protections as other civilians and subject to applicable national criminal law. It also describes use of force and firearms by private security companies only when necessary in self-defense and the defense of third persons.

Instead of blurring the line between private contractors and military forces, legislation and regulations enacted over the past ten years clarified this distinction and enhanced the authority of the military commander. COL Efflandt points out that the *National Defense Authorization Act for Fiscal Year 2007* placed contractors in contingency operations under the *Uniform Code of Military Justice*. This supplemented, and did not replace, previous applicability of the *Military Extraterritorial Jurisdiction Act* to Department of Defense civilians and contractors. The UCMJ is used in cases where no other law is suitable or applicable. The change was tested in 2008, when a dual national Canadian-Iraqi citizen working on a US contract was found guilty by court-martial for assault and attempted murder.

The *National Defense Authorization Act for Fiscal Year 2008* did not, as COL Efflandt maintains, remove contractors employed by other government agencies from military oversight and investigation. Section 862 of that Act requires all private security providers under contract for any federal agency operating in an area of combat operations or other significant military operations to comply with orders, directives, and instructions issued by the applicable commander of a combatant command, including rules for the use of force, and to cooperate with any investigation conducted by the Department of Defense.

Section 833 of the *National Defense Authorization Act for Fiscal Year 2011* provided further controls over private security companies supporting contingency operations. This legislation directed the Defense Department to develop business and operational standards for private security companies. These standards do not nullify the authority of the combatant commander. Instead, they provide a reference for the combatant commander to specify minimum requirements for private security companies technical competence, a means to evaluate performance, and a method to hold the companies accountable under contract law. Certification with this standard is not mandatory, as COL Efflandt states. Rather, the law gives the Department the option to consider certification to the standard as one of several evaluation criteria in a contract award. Commanders may – and do – supplement the requirements of this standard through military orders and directives. Through the development of these standards and other initiatives, the Department of Defense has actually increased the reach of the principles upon which American military professionalism has been based by extending their logic in a way that could be used by other clients of private security services.

By law and custom, the armed forces of a state remain the only profession privileged to engage in combat. Only members of the armed forces are allowed to use lethal force on behalf of the state, and enjoy immunity from the charge of murder or other homicide; but such use must be consistent with the laws and customs of war. Private security

companies do not share this privilege in theory or practice. Despite a decade of maturation in defining the roles, limitations, and controls over armed commercial security services in complex contingencies, COL Efflandt's article demonstrates how much more work is needed to educate military and civilian leaders about private security companies. The *US Army War College Quarterly* should be commended for publishing COL Efflandt's work and the two accompanying articles in the Summer 2014 edition. The challenge now is to incorporate a proper understanding of the role of operational contract support into our military education system and other professional development and outreach.

The Author Replies

Scott L. Efflandt

My compliments and thanks to Mr. Christopher Mayer on a thoughtful and well written contribution on the effect of private security companies on the military profession. I agree with his two conclusions; a) much work is needed to educate military and civilian leaders about private security companies, b) the challenge is to incorporate a proper understanding of the role of operational contract support into our military education and professional development. However, I would add a third conclusion, c) the need to understand how private security companies are continuing to change the military profession. This is the research question of my research to date. Using Abbott's model, a profession is defined by its jurisdiction as determined by the resolution of competition with other professions in three areas—legal arena, public opinion, and the work place.

As to legal competition, Mr. Mayer offers a substantive counter-argument which I think is best addressed by others in subsequent research. Legal opinions aside, one must also consider the consequences of competition in the workplace and the court of public opinion when assessing the effects of private security companies on the military profession. Today we see an unprecedented number of armed non-military personnel performing duties previously done by uniformed service members—many (but not all) of whom are sanctioned by the state.

Likewise, the public remains very predisposed to using private security companies. Since the initial publication of my article events in the Middle East have sparked a credible public dialog on the viability of forming a contract force to assist Iraq in lieu of using the US Army as "boots on the ground." The purpose of examining all three of these areas is to answer these questions: has the US military profession ceded jurisdiction? If so, how will this change effect US civil-military relations?

Mr. Mayer has provided important information on the legal battle for jurisdiction, but it is only part of the answer to these two larger questions. I look forward to the research of other scholars, who will continue to work in this important area. May they find our two contributions meaningful.