TRANSFORMING INSTALLATION SECURITY: WHERE DO WE GO FROM HERE?

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And let there be no doubt: in the years ahead, it is likely that we will be surprised again—by new adversaries who may also strike in unexpected ways. And as they gain access to weapons of increasing power, these attacks could grow vastly more deadly than those we suffered September 11th. Our challenge in this new century is a difficult one—to prepare to defend our nation against the unknown, the uncertain, the unseen and the unexpected. That may seem, on the face of it, an impossible task. It is not. But to accomplish it, we must put aside comfortable ways of thinking and planning--take risks and try new things—so we can prepare our forces to deter and defeat adversaries that have not yet emerged to challenge us.[2]

I. Introduction

The horrific events of 11 September 2001, demonstrated the United States' tremendous vulnerability to unpredictable, asymmetric terrorist

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2. Secretary of Defense Donald H. Rumsfeld, Address at the National Defense University (Jan. 31, 2002).

threats against both civilian and military targets. In the military setting, this vulnerability was particularly evident as Army installations throughout the Continental United States (CONUS) rapidly attempted to increase their force protection conditions,[3] only to discover that their organic security forces were woefully inadequate to meet the challenge.[4] This inadequacy forced installations to turn to temporary security forces comprised of mobilized National Guard and U.S. Army Reserve units as well as active duty personnel reassigned from other duty positions.[5]

Faced with this dangerous and unpredictable operating environment, Army leaders sought to develop a new, innovative installation security strategy, designed to provide not only comprehensive force protection, but also to assist combat units to be fully manned to fight the Global War on Terrorism.[6] Unfortunately, the Army soon discovered that federal statutes significantly restricted one such innovative strategy, the "contracting out"

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3. U.S. GEN. ACCOUNTING OFFICE REPORT, COMBATING TERRORISM: ACTIONS NEEDED TO GUIDE SERVICES ANTITERRORISM EFFORTS AT INSTALLATIONS GAO-03-14 (Nov. 2002). "After the September 11, 2001 terrorist attacks, domestic military installations increased their antiterrorism measures to their highest levels." *Id*. at 1. *See also* U.S. DEP'T OF ARMY, REG. 525-13, ANTITERRORISM para. B-1 (4 Jan. 2002) [hereinafter AR 525-13]. The Army has five force protection conditions (FPCON), which "describe progressive levels of security measures to counter threats to U.S. Army personnel, information, or critical resources." These FPCON's range from FPCON "normal," in which no discernible terrorist threat exists, to FPCON "delta," in which a terrorist attack has occurred or is likely to occur against a specific target. *Id*; *see generally* U.S. DEP'T OF DEFENSE, DIR. 2000.12, DOD ANTITERRORISM/FORCE PROTECTION (AT/FP) PROGRAM para. 5.1.9 (13 Apr. 1999) [hereinafter DOD DIR. 2000.12] (requiring the development of standards and measures to reduce the vulnerability of DOD personnel and family members to terrorism); U.S. DEP'T OF DEFENSE, INSTR. 2000.16, DOD ANTITERRORISM STANDARDS paras. E3.1.1.11-13 (14 June 2001) [hereinafter DOD INSTR. 2000.16] (defining command responsibility for raising and lowering FPCONs).

4. *See Combating Terrorism: Protecting the United States, Part II*: H*earing Before the 107th Congress House Subcomm. on National Security, Veterans Affairs and International Relations, Committee on Government Reform*, 107th Cong. 4 (2002) [hereinafter *Combating Terrorism Hearing*] (testimony of Peter Verga, Special Assistant for Homeland Security, DOD). As of 21 March 2002, the DOD had mobilized over 31,000 National Guard and Reserve Security Forces to support force protection at domestic and overseas military bases. *Id*; *see also* E-mail from Colonel Calvin M. Lederer, Counsel, U.S. Army Office of the Chief Legislative Liaison (OCLL), to Colonel David Howlett, Command Counsel, Headquarters, U.S. Army Materiel Command (1 Oct. 2001) [hereinafter OCLL E-mail] (on file with author). Data gathered before the September 11th terrorist attacks showed that the Army had a 4,028-person shortfall in security personnel for access control at Army installations. Moreover, sixty percent of the Army's "line military police" were in deployable combat units. *Id*.

of installation security functions.[7] In fact, these statutes had hindered the development of cost-effective installation security solutions for decades.

Recognizing the incredible security problems created by the September 11th terrorist attacks, Congress twice attempted to enact relief.[8] Unfortunately, rather than simply repealing these restrictions, Congress created a complicated contractual authority, which permits the use of contracted security in only limited, poorly defined circumstances. As a result, Army leaders remain greatly hampered in the development of long-term

5. U.S. Army Office of the Deputy Chief of Staff for Operations and Plans, Proposed Legislative Change to Authorize Installations to Contract for Post Security-Guards (May 3, 2002) (unpublished information paper) (on file with author). As of May 2002, the Army had mobilized, deployed, or diverted from their normal duties 28,146 soldiers to perform post security services. This included 15,668 Reserve Component soldiers and 12,478 Active Component Soldiers. *Id.*; *see also U.S. Representative David Hobson (R-Ohio) Holds Hearing on FY 2003 MILCON Appropriations: Subcomm. on Military Construction, House Comm. on Appropriations*, 107th Cong. 7 (2002) (testimony of Jack Tilley, Sergeant Major of the Army) ("Many active duty troops are needed to secure their own post and facilities and are not available on a daily basis for just normal duty within their command"). As an example, Sergeant Major Tilley noted that in January 2002, the U.S. Forces Command used approximately 4,000 reassigned soldiers each day to secure eleven installations, which did not include law enforcement personnel. He noted that the number of reassigned personnel can jump to as many as 11,000 or 15,000 depending on the threat. *Id.*

6. *Combating Terrorism Hearing*, *supra* note 4, at 4 (testimony of Peter Varga) (testimony of Peter Verga) ("Since September 11, the Army has completed a security infrastructure assessment at each of its installations to determine the incremental and total cost for structural and procedural enhancements for access control packages and equipment, critical mission essential areas, and weapons of mass destruction preparedness.").

7. 10 U.S.C. § 2465 (2000). As discussed in Part II *infra*, 5 U.S.C. § 3108, known as the Anti-Pinkerton Act, also prohibits contracting for certain security functions.

8. As discussed in Part III *infra*, the first attempt at legislative relief occurred through the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter U.S.A. PATRIOT Act]. The second attempt occurred through the enactment of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002) [hereinafter NDAA for FY 2003].

force protection programs that would effectively protect CONUS installations and allow the Department to cut costs and fully man combat units.[9]

This article offers a guide to Army leaders seeking to use contracted security services to enhance installation force protection. First, it provides a detailed analysis of the statutory restrictions affecting a contracted security program by reviewing the legislative history and the status of 5 U.S.C. § 3108 and 10 U.S.C. § 2465.[10] Second, it examines the Army's new contractual authority contained in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001[11] (U.S.A. PATRIOT Act), and the Bob Stump National Defense Authorization Act for Fiscal Year 2003[12] (NDAA for FY 2003).[13] Finally, it provides guidance on the appropriate contractual method to implement this new authority, and urges the Army to develop a comprehensive contract security program at the installation and departmental or regional levels.[14] This broad-based program will support a renewed request for the repeal of these statutes and ultimately allow the Army to transform installation security throughout CONUS.

II. The Statutory Restrictions

For well-over one hundred years, Congress has been concerned with the federal government's use of contracted security forces.[15] These concerns have ranged from a fear of private mercenary armies, to an anxiety over the quality[16] of security at military installations. To address these

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9. Memorandum, Thomas E. White, Secretary of the Army, to Assistant Secretary of the Army (Acquisition, Logistics and Technology) et al., subject: Non-Core Competencies Working Group and The Third Wave (4 Oct. 2002) [hereinafter Third Wave Memo] (on file with the author) ("The Army must quickly free up resources for the global war on terrorism, and do so in a way that avoids disruptions to our core operations.").

10. *See infra* Part II.

11. U.S.A. PATRIOT Act, *supra* note 8, § 1010.

12. NDAA for FY 2003, *supra* note 8, § 332.

13. *See infra* Part III.

14. *See infra* Part IV.

15. CHARLES P. NEMETH, PRIVATE SECURITY AND THE LAW 22 (1995) (explaining that since the passage of the Anti-Pinkerton Act, private security forces have been the subject of continuous congressional concern and governmental oversight). *See, e.g.*, The Security Officer Employment Standards Act of 1991, S. 1258, 102d Cong. (this unenacted legislation provided for the creation of standards for federal security officers and required criminal background checks). *Id.*; *see also* Private Security Officer Employment Standards Act of 2002, S. 2238, 107th Cong. 2002 (This unenacted legislation permitted reviews of the criminal records of applicants for private security officer employment). *Id.*

concerns, Congress passed 5 U.S.C. § 3108 and 10 U.S.C. § 2465. Both of these statutes significantly restrict the Army's use of contracted security services to protect CONUS military installations. To properly understand and implement the Army's new contracting authority, Army leaders must understand the historical underpinnings and current interpretations of these statutes. By understanding and addressing the longstanding congressional concerns behind these restrictions, the Army can develop a comprehensive contracted security program, which will ultimately support their repeal.

A. 5 U.S.C. § 3108 (The Anti-Pinkerton Act)

Congress created the century old Anti-Pinkerton Act to prevent governmental use of private mercenary armies. Although judicial interpretation has narrowed its scope, the Act continues to restrict the Army's ability to obtain certain security services. This subpart describes the Act's historical underpinnings and its current status.

1. Historical Development

Congressional concern over the federal government's use of private security forces began with the rise of the Pinkerton National Detective Agency (Pinkerton Agency). Created in 1850 by former Chicago police officer Allan Pinkerton, the Pinkerton Agency grew to be the most prominent private security force in the United States by 1855, holding several lucrative contracts with major industries throughout the nation.[17] As the

16. Regarding quality, Congress has been specifically concerned with three issues: the control of installation security functions, the potential for labor disputes or strikes by contracted security forces, and the training level of contracted personnel. *See infra* Part II.B.1. Note, however, as discussed in Part II.B.1 *infra*, the original congressional opponents of 10 U.S.C. § 2465 asserted that the design of this statute was to appease government employee unions. Although this assertion contains some validity, the legislative history of 10 U.S.C. § 2465 demonstrates that the primary reasons for its creation related to concerns over the quality of security forces used to protect DOD installations. It is highly unlikely that any contracted security program would ever satisfy the concerns of government employee unions. Thus, the program advocated by this article focuses upon meeting congressional concerns related to the quality of contracted security forces and the government's use of private "quasi-military armed forces."

17. Pinkerton Inc., *Pinkerton History*, available at www.pinkertons.com/company-info/ history/pinkerton/index.asp (last visited Feb. 5, 2003) [hereinafter *Pinkerton History*]; *see also* NEMETH, *supra* note 15, at 7.

Civil War commenced, the Pinkerton Agency's size and reputation led the United States to seek its services for the security of federal facilities and the protection of government personnel.[18] Throughout the war, the United States continuously employed "Pinkertons" as security officers, intelligence gatherers, and counterintelligence operatives.[19]

When the Civil War ended, the Agency resumed its work for major companies throughout the nation, providing both security guard and detective services.[20] As organized labor movements developed, however, the Agency found its security contracts evolving from the protection of company personnel and property to the controversial and often deadly task of "strike-breaking."[21] Unfortunately, one such contract with Carnegie, Phipps & Company, led to a deadly labor riot in Homestead, Pennsylvania, in which striking workers ambushed and killed numerous Pinkerton guards.[22] This riot and similar incidents of strike-breaking sparked great public concern over the use of private security forces. It also led labor organizations throughout the nation to call on Congress to pass federal legislation to prohibit corporations from using such forces. [23]

In response to this significant public outcry, Congress ordered the House of Representatives' Committee on the Judiciary to conduct an inquiry into both the Pinkerton Agency and the Homestead Riot.[24] After an extensive investigation, the Committee determined that the Pinkertons were members of a private mercenary security force consistently used in strikes, riots, and other labor troubles;[25] that corporations used them to supplant local law enforcement; and that their mere presence incited members of labor organizations to extreme deeds of violence.[26]

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18. *Pinkerton History*, *supra* note 17.

19. JAMES MACKAY, ALLAN PINKERTON THE FIRST PRIVATE EYE 97-110 (1996). In fact, Pinkertons protected President Lincoln during the early months of the Civil War, until Allan Pinkerton was selected to develop and head a new security unit called the Secret Service under the command of General McClellan's Army of the Potomac. *Id.*; *see also Pinkerton History*, *supra* note 17.

20. NEMETH, *supra* note 15, at 8.

21. *Id.* at 9; *see also* GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-140 (1991) [hereinafter FEDERAL APPROPRIATIONS LAW].

22. NEMETH, *supra* note 15, at 9.

23. HOUSE COMM. ON THE JUDICIARY, EMPLOYMENT OF PINKERTON DETECTIVES, H.R. REP. NO. 52-2447, at VII (1893) [hereinafter HOUSE PINKERTON REPORT].

24. *Id.* at I.

25. *Id.* at XIII.

26. *Id.* at XV.

Nevertheless, in spite of the danger posed by these forces, the Judiciary Committee, through a very narrow reading of the Constitution, determined that Congress had no authority to prohibit the employment of Pinkertons by private corporations.[27] Therefore, it recommended that the states "pass such laws as may be necessary to regulate or prohibit the employment of Pinkerton watchmen or guards within their respective jurisdictions."[28] Congress, however, facing continuous union pressure and public concern, felt compelled to pass legislation restricting the use of these private mercenaries. Thus, as part of the 1893 Sundry Civil Appropriations Act, Congress passed what became known as the Anti-Pinkerton Act.[29]

This legislation, which banned all federal government contracts with the Pinkerton Detective Agency or similar agencies, had a significantly adverse effect on government contracting for security services.[30] For more than eighty years after its enactment, the U.S. Comptroller General strictly interpreted the Act to prevent government contracts with any detective agency, even if that agency merely furnished security guards or watchmen for the protection of government property.[31] Consequently, because major detective agencies could not compete for federal security contracts, the Act greatly hampered the government's ability to obtain high quality security services at the most competitive prices.[32] Nevertheless, Congress has refused to repeal the Act.

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27. *Id*. at XV-XVI. The Committee specifically recognized Congress's authority to regulate interstate commerce. Yet, the Committee interpreted Article IV, Section 2, Clause 1 of the Constitution, which states, "The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States," as a significant restriction on that authority. Based on this clause, the Committee found that only the states had the authority to regulate the employment of security forces by private corporations. *Id*.

28. *Id.* at XVI.

29. Sundry Civil Appropriation Act of 1893, 27 Stat. 572, 591 (1893). The full text of the Act stated, "that hereafter no employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service or by an officer of the District of Columbia." *Id.* Congress originally enacted the Anti-Pinkerton Act as a temporary prohibition in the Sundry Civil Appropriation Act of 1892, 27 Stat. 349, 368. Congress used the Act as a stopgap measure while the House Committee on the Judiciary investigated the Pinkerton Agency and the Homestead Riots. Congress later made the Act permanent in the Sundry Civil Appropriations Act of 1893. For an excellent synopsis of the history of the Anti-Pinkerton Act, *see* FEDERAL APPROPRIATIONS LAW, *supra* note 21, at 4-139 to 4-144.

30. S. REP. NO. 88-447, at 7 (1963).

2. The Anti-Pinkerton Act Today

The Anti-Pinkerton Act, currently codified at 5 U.S.C. § 3108, remains virtually unchanged since its original enactment. This statute continues specifically to prohibit the federal government from contracting for services from "[a]n individual employed by the Pinkerton Detective Agency or similar organization."[33] Although the text of the Act remains intact, the landmark case of *Weinberger v. Equifax, Inc*. has drastically changed its interpretation.[34]

In *Equifax*, the U.S. Court of Appeals for the Fifth Circuit reviewed the federal government's use of Equifax, Inc. to gather background information on prospective employees. To support his *qui tam* suit,[35] Weinberger made two allegations. First, he argued that all government contracts with Equifax violated the Anti-Pinkerton Act, because Equifax used "detective-like investigative techniques." Therefore, it was an organization similar to the Pinkerton Detective Agency.[36] Second, he argued that, because the Act barred contracting with Equifax, the corporation violated the False Claims Act[37] each time it billed the government for its "illegal" services.[38]

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31. *See* Comptroller General McCarl to the Governor of the Panama Canal, 8 Comp. Gen. 89 (1928). Nevertheless, by strictly construing the statute, the Comptroller made several rulings, which actually lessened the reach of the Act's prohibition. For example, in Comptroller General Warren to the Administrator, War Assets Administration, 26 Comp. Gen. 303 (1946), the Comptroller held that the government may employ a "protective agency" but may not employ a "detective agency" to do protective work. The Comptroller also held that the prohibition does not apply to subcontracts with detective agencies. *See* To John Munick, National Aeronautics and Space Administration, 41 Comp. Gen. 819 (1962) (holding that the Act does not extend to a wholly owned subsidiary of a detective agency, providing the subsidiary is not a detective agency itself).

32. S. REP. NO. 88-447, at 7.

33. 5 U.S.C § 3108 (2000). The section in its entirety currently states, "an individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia." *Id*.

34. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977); s*ee also* To the Heads of Federal Departments and Agencies, 57 Comp. Gen. 524 (1978).

35. For an excellent historical review of *qui tam* suits under the False Claims Act, *see generally* Vermont Agency of Natural Resources v. United States, *ex rel.*, Jonathan Stevens, 529 U.S. 765 (Vt. 2000). "*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Vt. Agency of Natural Res.*, 529 U.S. at 768

36. *Equifax*, 557 F.2d at 458.

To determine the validity of the plaintiff's allegations, the *Equifax* court conducted an extensive review of the Anti-Pinkerton Act's legislative history, as well as the Comptroller General's Opinions strictly interpreting the Act's prohibition.[39] First, the court noted that Congress created the Act out of great frustration over the employment of private mercenary forces to engage in strike-breaking and merely used the term "Pinkerton Detective Agency" as a definitional example of these forces.[40] Second, the court determined that by using this example, Congress intended to prohibit government employment of the Pinkerton Detective Agency as it was organized in 1892.[41] Thus, the court held that for a company to be similar to the 1892 Pinkerton Detective Agency, it must offer "quasi-military armed forces for hire."[42] Since Equifax had no such forces, it did not violate the Anti-Pinkerton Act or, by extension, the False Claims Act.[43] Unfortunately, the court did not define the term "quasi-military armed forces," leaving the government's authority to contract for security services uncertain.

Soon after *Equifax*, the Comptroller General issued a decision adopting the court's analysis and rescinding many of its prior restrictive interpretations of the Act.[44] In its decision, the Comptroller also failed to define "quasi-military armed forces." The Comptroller, however, clarified what the term did not include. Specifically, "a company which provides guard or protective services does not thereby become a 'quasi-military armed force,' even if they arm the individual guards, and even though the company may also engage in the business of providing general investigative or 'detective' services."[45] This opinion, which greatly expanded the ability of federal agencies to contract for high-quality secu-

37. The False Claims Act, currently codified at 31 U.S.C. § 3729 (2000) (during *Equifax*, Congress codified the Act at 31 U.S.C. § 231), specifically authorizes private citizens to "bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Originally enacted in 1863, this Act "is the most frequently used of a handful of extant laws creating a form of civil action known as *qui tam*." *Vt. Agency of Natural Res.*, 529 U.S. at 768.

38. *Equifax*, 557 F.2d at 458.

39. *Id.*

40. *Id.* at 462.

41. *Id.*

42. *Id.* at 463.

43. *Id.*

44. To the Heads of Federal Departments and Agencies, 57 Comp. Gen. 524 (1978).

45. *Id.* at 529.

rity services, continues to be the controlling guidance on the application of the Anti-Pinkerton Act today.

Under its current interpretation, the Act provides little impediment to the Army's contracting for security guard services, so long as, the contractor does not offer "quasi-military armed forces for hire."[46] Nevertheless, without a clear definition of this term, the Act may still impair the Army's ability to obtain important special security services, such as special reaction team (SRT) support.[47]

Army Regulation (AR) 190-58 requires all installation commanders to maintain a "specially trained and equipped team of military and civilian security personnel [to] serv[e] as the . . . principal response force in the event of a major disruption or threat situation on the installation."[48] This SRT must be capable of responding to crises ranging from barricaded criminals, sniper incidents, and threatened suicides, to drug raids, terrorist attacks, and even enemy combat operations.[49] Smaller installations often have difficulty meeting this requirement with their organic military police forces and would greatly benefit from the use of private sector contracted SRT support. Unfortunately, without a clear definition of "quasi military armed forces," these contracted SRT teams, which arguably have similar characteristics to the 1892 Pinkertons,[50] could be construed as violating the Act.

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46. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 37.109 (Sept. 2001) [hereinafter FAR]. This regulation implements both the *Equifax* and Comptroller General's interpretation of the Anti-Pinkerton Act. In pertinent part, this regulation provides the following:

> This prohibition applies only to contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract's character. An organization providing guard or protective services does not thereby become a "quasi-military armed force," even though the guards are armed or the organization provides general investigative or detective services.

Id.; *see also* U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 237.109 (1998) [hereinafter DFARS] (referring only to DFARS 237.102-70, which is the regulatory prohibition implementing 10 U.S.C. § 2465).

47. *See generally* U.S. DEP'T OF ARMY, REG. 190-58, PERSONAL SECURITY para. 4-1 (22 Mar. 1989) [hereinafter AR 190-58] (describing the requirement for an installation SRT).

48. *Id.*

49. *Id.* para. 4-1b.

Although the scope of the Anti-Pinkerton Act has been narrowly interpreted, Army leaders must still consider its restrictions when implementing the Army's new contractual authority. Specifically, any use of contracted security personnel to provide special security services, such as SRT support, may conflict with the Act. As the Army develops long-term installation force protection plans, leaders must be ever mindful of the longstanding congressional concern regarding the government's use of quasi-military armed forces.

B. 10 U.S.C. § 2465 (Contracting Installation Security Functions)

Unlike the Anti-Pinkerton Act, 10 U.S.C. § 2465 did not develop over concerns that the government would use skilled private mercenaries. Rather, Congress created the prohibition to address concerns related to the quality of the private security forces used to protect Department of Defense (DOD) installations.[51] Although Congress provided some temporary relief to its prohibition, 10 U.S.C. § 2465 continues to significantly restrict the Army's use of contracted security. To assist Army leaders in developing a comprehensive contract security program, this subpart

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50. *See* HOUSE PINKERTON REPORT, *supra* note 23, at XIV-XV. In describing the characteristics of the Pinkertons, the Committee stated, "They are professional detectives and guards or watchmen, and in the latter capacity may properly be characterized as a sort of private military or police force." The Committee also noted that various entities frequently employed the Pinkertons to handle special security situations, such as blockades, strikes, riots, and other labor troubles. *Id.* While some might argue that Congress aimed the Anti-Pinkerton Act at restricting only the government's use of quasi-military armed forces in labor disputes, the *Equifax* court specifically rejected that premise. Weinberger v. Equifax, Inc., 557 F.2d 456, 462 (5th Cir. 1977). Rather, the Court held that the Act must be read to encompass *any use* of these forces by the government. *Id.* Using contracted personnel for high threat, special security missions such as barricaded criminals, drug raids, or hostage situations would at least appear to be the use of a "quasi-military armed force" and may run afoul of the Act. This restriction, however, should not apply to the use of state or local police personnel for contracted SRT support under the program discussed in Part IV *infra*. Based on *Equifax* and the legislative history of the Act, the possibility that a court would find a state or municipal government to be a "similar organization" to the 1892 Pinkerton Detective Agency is quite unlikely.

51. *See infra* Part II.B.1. Note, however, congressional opponents of 10 U.S.C. § 2465 argued that the prohibition stemmed from pressure exerted by government employee unions. Although this assertion may have some validity, the possibility that any comprehensive contracted security program will ever appease government employee unions is unlikely. Therefore, the program advocated by this article does not address this political issue. *See also supra* text accompanying note 16.

describes the historic concerns giving rise to the statute and the status of its prohibition.

1. Historical Development

In 1982, executive agencies throughout the federal government felt the significant effects of the "A-76 Program."[52] This program, which specifically authorized agencies to contract out the performance of "commercial activities,"[53] drew great opposition from government leaders, civil service employees, and numerous unions. Consequently, Congress grew increasingly concerned that the Executive Branch was abusing the program.[54] The DOD naturally became the focus of congressional scrutiny as the largest executive department involved in the program. The concern was so great that the House Committee on Armed Services called for a total moratorium on all DOD contracting out activities that year.[55] This great backlash against the A-76 Program led to the enactment of the 10 U.S.C. § 2465 prohibition.

Several senators, led by Senator George Mitchell, offered an amendment to prohibit the DOD from contracting out any installation security or firefighting services[56] during the floor debate over the Department of

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52. FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983, Revised 1999) [hereinafter OMB Cir. A-76]. This circular is the current version that replaced the 29 March 1979 version, in force during the 1982 congressional debate over DOD contracting for firefighting and security functions. *Id*. para. 2. Currently, the Office of Management and Budget is completely revising this circular. *See* FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76 (REVISED DRAFT), PERFORMANCE OF COMMERCIAL ACTIVITIES (Nov. 14, 2002) [hereinafter OMB Cir. A-76 (REVISED DRAFT)].

53. "A commercial activity is one which a federal executive agency operates and which provides a product or service obtainable from a commercial source." OMB Cir. A-76, *supra* note 52, para. 6a.

54. 128 Cong. Rec. S9002 (1982) (statement of Sen. Mitchell).

55. *Id.*

56. *Id.* As passed by the Senate, the Mitchell/Dodd amendment stated:

> None of the funds appropriated under an authorization contained in this Act or any other Act enacted after the date of enactment of this Act may be obligated or expended to enter into any contract for the performance of firefighting functions or security functions at any military installation or facility.

Id.

Defense Authorization Act for Fiscal Year 1983.[57] During this hasty yet strenuous debate, proponents of the amendment argued that they intended the prohibition to protect the quality of installation firefighting and security services. The proponents argued that the installation commander should directly control these functions, that lapses in service could occur due to contractor strikes, and that poorly trained and inexperienced contract guards posed a significant danger to the installation.[58] Opponents, however, charged that the legislation was nothing more than a blatant attempt at protecting an entrenched employee union by micromanaging the DOD.[59] Opponents argued that the measure would thwart the very purpose of the A-76 Program—the DOD's development of more cost-effective and efficient operations. Although numerous DOD facilities had contracts for fire protection and security services, no evidence showed that any facility had experienced the quality issues cited in support of the amendment.[60]

In spite of these sharp disagreements, the measure narrowly passed with no Senate hearings and a party line vote. Likewise, the House of Representatives inserted a similar prohibition in its version of the Act, which also passed with minimal debate along party lines.[61] Thereafter, the restriction became law with only one limited exception—grandfather clause permitting renewal of contracts effective the day of the law's enactment.[62] Concerned with the bluntness of the restriction, Congress soon revisited the prohibition to whittle down its broad application.

The first change came just a year later in the DOD Authorization Act for FY 1984,[63] when Congress extended the prohibition for an additional two years and, at the request of the DOD, created two limited exceptions.[64] First, it authorized the DOD to contract for security guard and firefighting services to protect installations or facilities outside of the United States.[65] Second, it permitted contracts for such services to protect government

57. *Id.* at 9001-2.

58. *Id.* at 9001-5 (statements of Sen. Mitchell and Sen. Dodd).

59. *Id.* at 9003-4 (statement of Sen. Jepsen).

60. *Id.* (statement of Sen. Jepsen).

61. 128 CONG. REC. H18645 (1982) (statement of Rep. Gejdenson). House proponents of the prohibition cited similar concerns as those raised in the Senate. They argued that concerns over control, potential strikes, and poor training supported the measure. *Id.* Opponents argued that the legislation was merely a "plum for a special interest group," that no evidence supported the proponents' concerns, and that the measure imposed unnecessary constraints on the management abilities of DOD officials. 128 CONG. REC. H18646-7 (1982) (statements of Rep. Badham and Rep. Derwinski).

owned, but contractor operated facilities.[66] Thereafter, Congress extended the prohibition in one-year increments in both the DOD Authorization Act for 1986[67] and the NDAA for FY 1987.[68]

The second major change to the prohibition occurred in the NDAA for FY 1994.[69] Recognizing the manpower and security problems caused by the implementation of the Base Realignment and Closure program (BRAC), Congress created another limited exception to the prohibition by

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62. DOD Authorization Act 1983, Pub. L. No. 97-252, § 1111, 96 Stat. 718, 747 (1982). The original prohibition was a temporary restriction only valid for Fiscal Year 1983. It stated,

> None of the funds appropriated under an authorization contained in this Act may be obligated or expended to enter into any contract for the performance of firefighting functions or security guard functions at any military installation or facility, except when such funds are for the express purpose of providing for the renewal of contracts in effect on the date of the enactment of this Act.

Id.

63. DOD Authorization Act, 1984, Pub. L. No. 98-94, § 1221, 97 Stat. 614, 691 (1983).

64. 129 CONG. REC. 18987 (statement of Sen. Levin). The DOD General Counsel expressed great concern regarding the scope of its restrictions after analyzing the temporary prohibition contained in the 1983 DOD Authorization Act. He requested Congress clarify the statute, which led to the enactment of the exceptions for OCONUS activities and government owned or contractor operated facilities.

65. DOD Authorization Act, § 1221.

66. *Id*.

67. DOD Authorization Act, 1986, Pub. L. No. 99-145, § 1232, 99 Stat. 583, 733 (1985). In extending the prohibition, Congress continued to express concern over the quality of contracted personnel. By requiring the DOD to prepare a report regarding the special security and firefighting needs of DOD and how those needs were being met using both government and contract personnel.

68. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1222, 100 Stat. 3816, 3976-77 (1986). Although this Act merely extended the prohibition against contracted security services for another year, it did signal congressional desire for a more permanent restriction. Specifically, the Act it formally codified the prohibition against contracted firefighting services as 10 U.S.C. § 2693. *Id*. One year later, Congress amended § 2693 to also codify the prohibition against contracting for security guard functions. National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 1112, 101 Stat. 1019, 1147 (1987). Congress ultimately recodified 10 U.S.C. § 2693 as 10 U.S.C. § 2465. Codification of Defense Related Provisions, Pub. L. No. 100-370, § 2(b), 102 Stat. 840, 854. (1988).

69. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2907, 107 Stat. 1547, 1921 (1993); *see also* 10 U.S.C. § 2687 (2000) (containing the text of the BRAC exception in the note).

permitting the DOD to contract with local governments for police and fire-fighting services at any military installation slated for closure within 180 days.[70] Although the DOD continued to push for repeal of the statute, [71] Congress made no other substantive changes to the prohibition and continued to voice its great concerns over the use of contracted security forces used on military installations.[72]

2. 10 U.S.C. § 2465 Today

In spite of repeated requests for its repeal, 10 U.S.C. § 2465 still prohibits the DOD from contracting for security guard services at installations or facilities, unless the contract is performed outside the continental United States, at a government owned but contractor operated facility, or is for the performance of a function that was already under contract on 24 September 1983.[73] The BRAC installations have a separate exception, which continues to permit them to contract with local governments for security services as long as the facility will close within 180 days.[74] However, as discussed in Part III *infra*, Congress has recently created some relief from the restrictions of 10 U.S.C. § 2465. Unfortunately, this relief is only tem-

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70. *Id.*

71. H.R. REP. NO. 105-132, pt. 2, at 13 (1997) (requesting repeal of 10 U.S.C. § 2465 by the DOD as an "impediment to providing efficient and cost-effective fire fighting and security support at defense installations"). *Id.*

72. *Id.* The House Committee on National Security expressed great concern that repeal of the statute was premature and "could negatively impact national security." *Id.*

73. 10 U.S.C. § 2465 (2000). The statute provides the following:

> (a) Except as provided in subsection (b), funds appropriated to the DOD may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting or security guard functions at any military installation or facility.
> (b) The prohibition in subsection (a) does not apply—
> (1) to a contract to be carried out at a location outside the United States (including its commonwealths, territories, and possessions) at which members of the armed forces would have to be used for the performance of a function described in subsection (a) at the expense of unit readiness;
> (2) to a contract to be carried out on a Government-owned but privately operated installation; or
> (3) to a contract (or the renewal of a contract) for the performance of a function under contract on September 24, 1983.

Id.

porary in nature and very limited in scope. Consequently, the statute remains a significant impediment to the development of a comprehensive, contract security program to meet the long-term needs of the Army.

III. Congressional Attempts at Relief

In the wake of the September 11th terrorist attacks, Congress examined numerous aspects of the national defense structure in an attempt to enhance homeland security significantly. During the course of this review, Congress revisited and temporarily modified the prohibition contained in 10 U.S.C. § 2465 through both the U.S.A. PATRIOT Act and the NDAA for FY 2003. Unfortunately, these modifications not only failed to provide a mechanism to resolve the Army's long-term security needs, but they also created a vague, complicated, and difficult to implement authority. This part describes these shortsighted attempts at legislative relief, provides a detailed analysis of their flawed provisions, and recommends that the Army issue specific policy guidance regarding the use of these authorities.

A. U.S.A. PATRIOT Act

The U.S.A. PATRIOT Act is a hastily drafted legislative hodgepodge designed to "deter and punish terrorist acts and to enhance law enforcement investigatory tools."[75] It contains legislation on a myriad of topics ranging from intelligence gathering and money laundering to increased

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74. *See* 10 U.S.C § 2687. The note accompanying § 2687 contains the uncodified BRAC exception, which in pertinent part states the following:

> The Secretary may enter into agreements (including contracts, cooperative agreements, or other arrangements for reimbursement) with local governments for the provision of police or security services . . . by such governments at military installations to be closed under this part, or at facilities not yet transferred or otherwise disposed of in the case of installations closed under this part, if the Secretary determines that the provision of such services under such agreements is in the best interests of the Department of Defense. * * * The Secretary may not exercise th[is] authority . . . earlier than 180 days before . . . the installation is to be closed.

Id.

75. U.S.A. PATRIOT Act, *supra* note 8, pmbl.

border protection and enhanced information sharing. A minor provision of the Act, § 1010, was Congress' first attempt at easing the restrictions of 10 U.S.C. § 2645.[76] Unfortunately, as discussed below, it utterly failed to provide the authority needed to meet the current or long-term security needs of CONUS military installations and facilities.[77]

1. Background and Elements of the Act

In late September 2001, the DOD submitted a legislative change proposal to Congress, which would amend 10 U.S.C. § 2465, permitting the DOD to contract for installation security from both the public and private sectors.[78] Before this proposal, senior DOD and Army officials conducted extensive meetings with Senate staffers to explain, not only the unprecedented security needs caused by September 11th, but also the long-term requirements faced by military installations throughout CONUS. Once again, quality concerns over the training and control of contractor personnel ruled the day.[79] Members of the Senate Armed Services Committee rejected the proposal and developed a compromise solution, which ultimately became law.[80] Although § 1010 of the Act does permit con-

76. *Id.* § 1010. This authority has been implemented through DFARS 237.102-70(c). DFARS, *supra* note 46, at 237.102-70. However, the DFARS provision merely reiterates the vague requirements of the statute. The Army has issued no additional clarification or implementing instructions as a guide to the use of this authority. *See* Jerry Williams, *Police Mutual Aid Agreements under the Patriot's Act*, OFFICE OF COMMAND COUNSEL NEWSLETTER (U.S. Army Materiel Command Washington, D.C.) Dec. 2002, at 31 (noting that the Army has issued no implementing instructions for the proper use of § 1010 authority).

77. Letter from William J. Haynes II, General Counsel, U.S. DOD, to the Honorable Richard B. Cheney, President, United States Senate (Apr. 19, 2002) (on file with author) [hereinafter DOD General Counsel Letter]. This letter contains two enclosures: a draft bill, which details DOD's legislative proposal for the NDAA FY 2003 and an analysis of the proposal explaining DOD's rationale for the requested legislation. Part of this proposal was a request seeking additional relief from 10 U.S.C. § 2465. In support of this request, the DOD General Counsel criticized the authority provided by the U.S.A. PATRIOT Act. Specifically, he stated, "Although Section 1010 of the PATRIOT Act allows for entering into contracts or other agreements with local or State governments for security, it does not offer flexibility for meeting the long-term security needs of small DOD installations during peace or increased threats." *Id.*

78. OCLL E-mail, *supra* note 4, at 1.

79. *Id.* at 2.

80. *Id.*

tracting for installation security in CONUS, it mandates that all such contracts be with a local or state government, and only for a limited time.[81]

For the Army to use § 1010 authority, it must meet the following specific elements of the Act. First, the contract or other agreement must be for "security functions" at a military installation or facility within the United States.[82] Second, the contract must be with a proximately located local government, state government, or a combination of the two.[83] Third, the contract must contain training and qualification standards, as established by the Secretary of the Army, for all local law enforcement personnel engaged in installation security.[84] Finally, the contract or agreement must not exceed the time that U.S. Armed Forces are engaged in Operation Enduring Freedom (OEF) and up to 180 days thereafter.[85] As demon-

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81. U.S.A. PATRIOT Act, *supra* note 8, § 1010.

82. *Id.* In pertinent part, subsection (a) of the statute states the following:

> Notwithstanding section 2465 of title 10, United States Code, during the period of time that United States Armed Forces are engaged in Operation Enduring Freedom, and for the period of 180 days thereafter, funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into contracts or other agreements for the performance of security functions at any military installation or facility in the United States with a proximately located local or state government, or combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation.

Id.

83. *Id.*

84. *Id.* Section 1010(b) contains this training requirement and specifically states, "Any contract or agreement entered into under this section shall prescribe standards for the training and other qualifications of local government law enforcement personnel who perform security functions under this section in accordance with criteria established by the Secretary of the service concerned." *Id.*

85. *Id.*; *see supra* text accompanying note 82. Note, § 1010(c) also required that the DOD report on the use of this authority and other means used to improve security at CONUS installations. Specifically §1010(c) requires,

> (c) One year after the date of enactment of this section, the Secretary of Defense shall submit a report to the Committees on Armed Services of the Senate and the House of Representatives describing the use of the authority granted under this section and the use by the Department of Defense of other means to improve the performance of security functions on military installations and facilities located within the United States.

Id. The DOD has submitted no report as of the date of this article.

strated below, several of these elements make this compromise an ineffective solution for the security problems faced by CONUS Army installations.

2. An Ineffective Solution

The U.S.A. PATRIOT Act's contracting authority contains four flaws. First, it drastically limits the resources available to the Army by requiring all contracts to be with local or state governments. Second, it fails to define the scope of "security functions" or to address the authority of contracted personnel. Third, it permits individual Services to determine the appropriate training standards for local law enforcement personnel engaged in contracted security. Finally, the authority is only temporary in nature and its duration is undeterminable.

a. Limited State and Local Resources

First, Congress failed to recognize that many state and local governments simply do not have sufficient resources to provide the security needed by installations facing threats related to the Global War on Terrorism.[86] Although immediately after September 11th many state and local law enforcement agencies did temporarily assist installations with maintaining a heightened security posture, most of these agencies were unable to provide contract security assistance due to their own limited personnel and increased security needs.[87] Thus, § 1010's authority was of no assistance to most Army installations, which were simply unable to find a state or local government vendor.[88] Consequently, since the Act offered no authority to use alternative sources,[89] this flaw became a major factor in the DOD's renewed request for additional relief from 10 U.S.C. § 2465.[90]

86. Telephone Interview with Colonel David Howlett, Command Counsel, Headquarters, U.S. Army Materiel Command (Aug. 20, 2002) [hereinafter Howlett Telephone Interview, Aug. 20, 2002].

87. Telephone Interview with Colonel David Howlett, Command Counsel, Headquarters, U.S. Army Materiel Command (Jan. 22, 2003).

88. Howlett Telephone Interview, *supra* note 86.

89. *Id.* The Act does not specifically prohibit the Army from entering into a prime contract with a local or state government allowing that government to subcontract with a private security firm. However, the Army rejected this "end run" approach as being a clear violation of congressional intent. *Id.*

90. *See supra* text accompanying note 77.

b. Definitions and Authority

Second, § 1010 fails to define "security functions" or to clarify what, if any, law enforcement authority a local or state police officer would retain in his or her contractor status. The term "security functions" lends itself to a wide variety of meanings. For example, these functions could range from controlling access points or patrolling the outer perimeter, to conducting driving under the influence checkpoints or traffic stops, or responding to domestic disturbances. All of these functions directly relate to the security of the installation and could easily fall within the term "security functions."

Similarly, the statute fails to address the authority a local police officer would have on the installation during the period he is performing security functions as a "contractor." This dual role of policeman or contractor is especially confusing considering that many Army installations are composed of a patchwork of "federal legislative jurisdictions." These differing jurisdictions, which developed due to the piecemeal creation of many Army posts, govern the authority of the federal or state government over each portion of the installation.[91] Often, a single installation has exclusive,[92] concurrent,[93] and proprietary jurisdictions.[94] By not addressing the question of authority, the statute leaves this confusing issue open.

For example, does a police officer, currently performing contracted security functions, have the authority to arrest someone in a proprietary or concurrent jurisdiction for a state crime that occurred off the installation? In other words, does he retain that state law enforcement power when he

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91. U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 1 (1 Aug. 1973) [hereinafter AR 405-20]. This regulation sets forth the Army's policy on acquiring legislative jurisdiction and defines the governmental authority within each type of jurisdiction. Note, the Army's policy is to acquire only a proprietarily interest in land, unless unusual circumstances dictate otherwise. *Id*. para. 5.

92. *Id.* para 3. With exclusive legislative jurisdiction, the federal government possesses all of the authority of the state. The state exercises no concurrent authority; however, the state may reserve the right to serve civil or criminal process regarding matters occurring outside the exclusive jurisdictional area. *Id.*

93. *Id*. With concurrent legislative jurisdiction, the federal government possesses the same legislative authority as it would with exclusive jurisdiction. However, the state has reserved the right to exercise this same level of authority *concurrently* with the United States. *Id*.

94. *Id.* With a proprietary interest, the federal government has certain rights or title to a specific area within a state. However, the federal government has none of the state's legislative authority. *Id*.

assumes the mantle of a federal security contractor? Acting in his normal capacity as a police officer, he clearly has the authority to arrest the individual.[95] However, according to *AR 190-56*, acting as a federal security contractor, he may only apprehend individuals on the installation for offenses committed on post.[96] If he were to make an arrest as a federal contractor, he may arguably be providing unlawful support to civilian law enforcement in violation of the Posse Comitatus Act.[97]

Congress could have easily provided a solution to these concerns, and has done so for the DOD installations in the National Capital Region. By enacting 10 U.S.C. § 2674, which allows contracted security personnel to perform both law enforcement and security functions, the act provides them with the "same powers . . . as sheriffs and constables."[98] Unfortunately, without such a legislative solution in the U.S.A. PATRIOT Act, the Army must resolve these issues by defining the "security functions" which are subject to contract, and by issuing specific guidance regarding the authority of local law enforcement personnel who perform these functions.[99]

c. Training and Qualification Requirements

As noted above, § 1010 requires all contracts or agreements with local or state law enforcement to contain certain training standards and personnel qualifications.[100] Congress failed, however, to specify the standard

95. Note also that some states allow police officers to exercise their law-enforcement authority even when engaged in off duty employment. *See, e.g.*, VA. CODE ANN. § 15.2-1712 (2003) (allowing Virginia localities to permit law-enforcement officers to engage in off-duty employment requiring the use of their police powers).

96. U.S. DEP'T OF ARMY, REG. 190-56, THE ARMY CIVILIAN POLICE AND SECURITY GUARD PROGRAM para. 5-2 (21 June 1995) [hereinafter AR 190-56].

97. 18 U.S.C. § 1385 (2000). *See also* AR 190-56, *supra* note 95, para. 5-2. "Civilian police and security guard personnel, while on duty at an installation, are considered part of the Army, and are therefore subject to the restrictions on aid to civilian law enforcement imposed by section 1385, title 18, United States Code, commonly known as the Posse Comitatus Act." Whether this regulatory interpretation of the Posse Comitatus Act (PCA) would be controlling in the situation described above is unclear. However, to ensure the proper use of contracted security personnel, the issue of authority and the application of the PCA, if any, must be addressed in all contracts or agreements with state or local governments. *See generally* Message 212313Z Feb 03, Headquarters Department of the Army, subject: Contract Security-Guard Implementation [hereinafter Implementation Message § 332] (although not applicable to actions under § 1010, the Army's implementation of § 332 of the NDAA for FY 2003 requires contracts to define the authority of contracted personnel specifically).

for this training or to define the qualifications required. Rather, it authorized individual Secretaries to determine these standards for their respective services. Unfortunately, this authority could produce disparate standards across DOD installations in CONUS, and thereby create significant differences in the quality of the security services provided.

At a minimum, the Army should adopt the training and qualification standards set by the Office of Personnel Management for federal civilian uniformed police.[101] The Army should then coordinate with the other services to adopt common training and qualification standards for all contracts or agreements made under § 1010. This coordination would ensure

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98. 10 U.S.C. § 2674(b). In pertinent part the statute states the following:

> The Secretary may appoint military or civilian personnel or contract personnel to perform law enforcement and security functions for property occupied by, or under the jurisdiction, custody, and control of the Department of Defense, and located in the National Capital Region. Such individuals—
>
> (a) may be armed with appropriate firearms required for personal safety and for the proper execution of their duties, whether on Department of Defense property or in travel status; and
>
> (b) shall have the same powers (other than the service of civil process) as sheriffs and constables upon the property referred to in the first sentence to enforce the laws enacted for the protection of persons and property, to prevent breaches of the peace and suppress affrays or unlawful assemblies, and to enforce any rules or regulations with respect to such property prescribed by duly authorized officials.

Id.

99. As discussed in detail in Part III.B.2.a. *infra*, the Army should issue policy guidance, which defines "security functions" broadly to include specifically special security functions such as SRT services.

100. U.S.A. PATRIOT Act, *supra* note 8, § 1010(b). *See supra* text accompanying note 84.

101. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, OPERATING MANUAL FOR QUALIFICATION STANDARDS FOR GENERAL SCHEDULE POSITIONS, at IV-B-18 (1998) [hereinafter OPM GS STANDARDS MANUAL]. This manual contains standards for all General Service positions throughout the government. Qualification standards GS-083 and GS-085 define the individual occupational requirements for federal police and security guards, respectively. *Id*. The Army should adopt these basic personnel standards and then incorporate additional requirements for local law enforcement personnel performing special infrequent security functions, such as SRT support. *See infra* discussion at Part IV.A.

a standardized level of security across all DOD installations using this authority.

d. Temporary in Nature

Finally, the U.S.A. PATRIOT Act's contracting authority is not only temporary in nature; its duration is undeterminable. Thus, Army installations are unable to rely on this authority to make any long-term security arrangements. As noted above, the authority terminates no later than 180 days after the end of OEF.[102] Unfortunately, the Army will continue to face significant security threats, coupled with the challenge of fully manning combat units, regardless of when OEF ends. Thus, even if installations could find local or state police able to provide continuous general security services, the duration of § 1010's authority is so indefinite that commanders are simply unable to rely on these services as part of long-term force protection programs. To ensure standardization and symmetry across installation security plans, the Army must provide regulatory guidance regarding the appropriate term for any contract or agreement with a local or state law enforcement agency made under § 1010.[103]

B. NDAA for FY 2003

Similar to the U.S.A. PATRIOT Act, the NDAA for FY 2003 contains numerous provisions covering a myriad of topics related to the DOD and national security.[104] The Act authorizes DOD appropriations, sets personnel strengths for the military departments, and contains numerous provisions directly affecting the management of the DOD.[105] In § 332, a minor

102. U.S.A. PATRIOT Act, *supra* note 8, § 1010(a). It is unclear when Operation Enduring Freedom may end. *See generally The Reconstruction of Afghanistan, Hearing Before the 108th Congress Senate Foreign Relations Committee*, 108th Cong. 4 (2003) [hereinafter Reconstruction of Afghanistan Hearing] (statement of David T. Johnson, U.S. Department of State Coordinator for Afghanistan Assistance). *Id*.

103. To garner the greatest benefit from § 1010 as well as to promote greater standardization across the Service, the Army should require installations to enter into one year contracts or agreements with a maximum of two option years. This potential three-year arrangement will match the period that the Army's private sector contracting authority is available under the NDAA for FY 2003. *See infra* text accompanying note 120.

104. NDAA for FY 2003, *supra* note 8.

105. *Id*.; *see generally* DEPARTMENT OF COMMAND, LEADERSHIP, AND MANAGEMENT, UNITED STATES ARMY WAR COLLEGE, HOW THE ARMY RUNS 10-3 (2002) (National Defense Authorization Acts are yearly enactments which accompany defense appropriations).

provision of the Act, Congress again attempted to provide legislative relief from the restrictions of 10 U.S.C. § 2465.[106] Unfortunately, as explained below, Congress limited the provision so much, that it again failed to provide the Army with the contractual authority needed for an effective long-term contracted security program.

1. Background and Elements of the Act

Recognizing the significant limitations of the U.S.A. PATRIOT Act, the DOD again requested Congress to review and modify 10 U.S.C. § 2465 as part of the NDAA for FY 2003.[107] Although not aimed at repealing the prohibition, the DOD proposal would have provided the flexibility needed to develop a comprehensive contract security program. The proposal would have allowed the DOD to contract for "security guard functions," so long as, "the provision of such services by government personnel [was] not cost effective or practical."[108] Rather than providing the DOD with this much needed flexibility, Congress again sought a compromise solution in the NDAA for FY 2003. Although § 332 of the Act did provide the DOD with the authority to contract with private security firms,[109] Congress again made this authority temporary in nature, limited in scope, and diffi-

106. NDAA for FY 2003, *supra* note 8, § 332. DFARS 237.102-70(d) implemented this authority. DFARS, *supra* note 46, at 237.102-70. Unfortunately, the DFARS provision merely restates the vague requirements of the statute. Although the Army has recently issued implementing instructions for § 332, it failed to adequately clarify or embrace the authority provided by § 332. *See* Implementation Message § 332, *supra* note 96. *See also infra* text accompanying notes 126, and 140.

107. DOD General Counsel Letter, *supra* note 77, encl. 2.

108. *Id.* encl. 1. In pertinent part, DOD's proposal sought to amend 10 U.S.C. § 2465 by adding the following subsection:

> (c) Funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into a contract for the performance of security guard functions provided that the Secretary of Defense determines that such contract is necessary because the provision of such services by government personnel is not cost effective or practical.

Id. In describing the effect of this proposed amendment on DOD Force Protection, the General Counsel stated, "The proposed revision will permit the hiring of security personnel to augment or replace existing federal employee security guards by utilizing contracts to meet and sustain to a level of applicable Force Protection Condition requirements expeditiously, commensurate with compliance with the Directives." *Id.*

109. NDAA for FY 2003, *supra* note 8, § 332.

cult in application. The specific elements of the authority are described and discussed below.

To exercise § 332 authority, the Secretary of the Army must make the following determinations. First, the contract must be for the increased performance of "security guard functions" stemming from the September 11th terrorist attacks. [110] Second, without the contract, members of the Armed Forces would be required to perform the increased security.[111] Third, the contractor's recruiting and training standards are comparable to those of government personnel performing DOD security guard functions.[112] Fourth, the contractor's personnel will be effectively supervised, reviewed, and evaluated.[113] Finally, the contractor's performance will not result in a reduction in security at the installation or facility.[114]

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110. *Id*. In pertinent part, subsection (a) of the statute states the following:

> The Secretary of Defense or the Secretary of a military department may enter into a contract for any increased performance of security guard functions at a military installation or facility under the jurisdiction of the Secretary undertaken in response to the terrorist attacks on the United States on September 11, 2001, and may waive the prohibition under section 2465(a) of title 10, United States Code, with respect to such contract, if—
>
> (1) without the contract, members of the Armed Forces are or would be used to perform the increased security guard functions; and
>
> (2) the Secretary concerned determines that—
>
> (A) the recruiting and training standards for the personnel who are to perform the security guard functions at the installation or facility under the contract are comparable to the recruiting and training standards for the personnel of the Department of Defense who perform security guard functions at military installations and facilities under the jurisdiction of the Secretary;
>
> (B) the contractor personnel performing such functions under the contract will be effectively supervised, reviewed, and evaluated; and
>
> (C) the performance of such functions by the contractor personnel will not result in a reduction in the security of the installation or facility.

Id.

111. *Id*. § 332(a)(1).

To assist the Secretary in making these determinations, Congress also defined "increased performance" by providing two definitional examples.[115] First, if the installation had no security guard functions on 10 September 2001, then all security guard functions at the installation are considered increased performance.[116] Second, if the installation did have security guard functions on 10 September 2001, then only the functions over and above those performed as of that date are considered increased performance.[117] As demonstrated below, Congress created yet another ineffective solution, which fails to meet the security needs of the Army.

2. Another Ineffective Solution

Similar to § 1010 of the U.S.A. PATRIOT Act, § 332 of the NDAA for FY 2003 uses vague terms and unclear requirements to create a difficult and limited contractual authority.

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112. *Id*. § 332(a)(2)(A). Specifically, § 332 requires that all contracts contain recruiting and training standards comparable with those of "personnel of the Department of Defense who perform security guard functions." *Id*. Although this broad language could require a comparison to the standards governing military police, the Army should reject this interpretation. Rather, the Army should interpret § 332 merely to require the standards currently detailed in *AR 190-56*. AR 190-56, *supra* note 95. *AR 190-56*, which governs the Army's civilian police and security guard program, specifically requires contract guard personnel standards comparable to Army civilian police standards. *Id*. para. 3-14.

113. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(B).

114. *Id.* § 332(a)(2)(C).

115. *Id*. § 332(b)

116. *Id*. Subsection (b)(1) states that "in the case of an installation or facility where no security guard functions were performed as of September 10, 2001, the entire scope or extent of the performance of security guard functions at the installation or facility after such date" becomes increased performance. *Id*.

117. *Id*. Subsection (b)(2) of the statute states,

> in the case of an installation or facility where security guard functions were performed within a lesser scope of requirements or to a lesser extent as of September 10, 2001, than after such date, the increment of the performance of security guard functions at the installation or facility that exceeds such lesser scope of requirements or extent of performance is considered increased performance.

Id.

a. "Security Functions" v. "Security-Guard Functions"

First, rather than repealing or modifying § 1010 of the U.S.A. PATRIOT Act, Congress provided § 332 as additional authority. In doing so, Congress unfortunately failed to reconcile two key terms: "security functions" and "security guard functions." Under § 1010, an installation may contract with local or state governments for any "security functions" regardless of the nature of the security function or when the need arose.[118] Under § 332, however, an installation may only contract with the private sector for "security guard functions" caused by increased performance requirements stemming from the September 11th terrorist attacks.[119]Since Congress failed to define the nature of these "functions" or to provide any significant legislative history on either provision, Army leaders and contracting officials are left to interpret what distinction, if any, Congress intended by using these different terms.[120]

As such, before using either authority, the Army must provide guidance regarding the scope of these functions.[121] With no definition provided by Congress, the Army may interpret these terms expansively to garner the greatest benefit from each of the Acts. The Army should base

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118. U.S.A. PATRIOT Act, *supra* note 8, § 1010. *See supra* discussion at Part III A.2b. and the text accompanying note 82.

119. NDAA for FY 2003, *supra* note 8, § 332(a). *See supra* text accompanying note 109.

120. Although the terms "security functions" and "security guard functions" are similar, the Army should not interpret them as referring to the same activities. *See* Clay v. United States, 123 S. Ct. 1072, 1077 (2003) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)) ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). Here, both § 1010 of the U.S.A. PATRIOT Act and § 332 of the NDAA for FY 2003 modify the prohibition contained in 10 U.S.C. § 2465. As such, the Army may presume that by using different terms to modify the same Act, Congress intended each term to have an individual meaning. Since the term "security functions" is the more general of the two, its meaning should be given a broader interpretation. Consequently, the Army should interpret "security functions" to include not only security guard activities, but also a broader level of security activities, such as SRT services.

121. Note that the duration of each authority differs. Under § 1010, installations may contract with local or state governments for up to 180 days after the end of OEF. As noted in Part III *supra*, since the Operation has no definite end date, this authority is available for an undeterminable period. Under § 332, however, installations may contract with the private sector for three years from the enactment of the NDAA for FY 2003. As discussed in the text accompanying note 102 *supra*, the Army should reconcile these differences by developing policy guidance, which standardizes (as much as possible) the term for which both authorities are available.

this expansive interpretation upon the realistic ability of state and local governments to provide installation security functions[122] and upon extensive market research to determine the security guard services that are available in the private sector.[123]

b. Increased Performance

Second, the definition of "increased performance" is quite problematic. As the security of the United States began to stabilize in 2002, Army installations lowered their defensive postures from Force Protection Conditions (FPCON) Delta to Alpha.[124] Consequently, the Army reassigned many mobilized, detailed, or deployed military personnel for the massive security requirements of FPCON Delta. As a result, the number of military personnel that are or would be used to perform security has decreased substantially.[125] The definition, however, is silent on whether increased performance refers to the maximum number of personnel required after September 11th to support FPCON Delta or whether the term refers only to that increment currently involved in security operations at FPCON Alpha. With the dangerous operating environment that Army installations

122. As discussed in Part IV *infra*, realistic services available from local governments should include infrequent SRT support and temporary general security guard services in emergency situations.

123. For example, Wackenhut Services Inc., the largest supplier of contract security to the federal government, provides a wide-range of government services including: security management; armed security officers; pass, identification, and badge issuing services; access control operations; random security patrols; escort duties; alarm monitoring; building security checks; vehicle inspections; security inspection and oversight services; traffic control, investigations, and enforcement; and emergency center operations. Wackenhut Services Incorporated, Government Services, *at* www.wackenhut.com/services/wsi/contracts.htm (last visited 5 Feb. 2003). By defining "security functions" and "security guard functions" to meet the standards generally available in the government or industry, the DOD will provide installation commanders with the maximum flexibility to integrate contracted security into their force protection plans.

124. *See Military Training Capabilities/Shortfalls Hearing Before the 107th Congress House Armed Services*, 107th Cong. 5 (2002) (testimony of Brigadier General Jason K. Kamiya, Commanding General of the Joint Readiness Training Center and Fort Polk, Louisiana) (discussing the effects of lowering FPCONs at Fort Polk).

125. *See Nominations, Hearing Before the 107th Congress Senate Armed Services Committee*, 107 Cong. 22 (2002) (testimony of Charles S. Abell Nominee for Deputy Under Secretary Of Defense for Personnel and Readiness). As the Global War on Terrorism began, DOD called up over 100,000 Reservists for a one-year tour. The DOD engaged many of them in force protection. As of 27 September 2002, the Army released most of these Reservists with approximately 14,000 remaining for a second year. *Id*.

continue to face, commanders must have the flexibility to increase installation security to combat terrorist threats. Yet, the vague definition of increased performance leaves uncertain the extent to which contractors can fill this need.[126]

The Army should interpret this term expansively to meet installation security needs at the highest threat levels. With the strong possibility of new terrorist attacks in CONUS, installations must be able to use contracted security to maximize force protection measures rapidly. Interpreting the scope of increased performance to mean those at FPCON Delta will ensure that commanders have the flexibility to contract for sufficient security personnel to augment their organic forces.[127]

c. Supervision and Security

Finally, two other requirements in § 332 are vague and redundant. First, the Secretary must determine that contractor personnel are "effectively supervised, reviewed and evaluated."[128] This statutory provision is a strange, statutory provision considering that by regulation all procurements require such determinations. Whether it is the responsibility determination of the procuring contracting officer[129] or the oversight duties of the contract administration office,[130] all government acquisitions must ensure that contractor activities are supervised, reviewed, and

126. Implementation Message § 332, *supra* note 96, also ignores the need to replace military personnel that were performing security duties *before* September 11th. As the Army continues to restructure its forces to man combat units fully, the use of contracted security could free significant numbers of military personnel for reassignment. Unfortunately, § 332 focuses solely on contracting for increased performance after 11 September 2001, thereby removing a valuable tool to assist the Army in restructuring its forces to fight the Global War on Terrorism.

127. The Army has greatly hampered the flexibility of its installation commanders by interpreting increased functions to be those at the FPCON Bravo level. Implementation Message § 332, *supra* note 96, para. 3.H.(1). This interpretation fails to garner the maximum benefits offered by § 332, and inhibits the development of a comprehensive contracted security program. Therefore, the DOD should reconsider this overly restrictive interpretation.

128. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(B).

129. FAR, *supra* note 46, at 9.103.

130. *Id*. at 42.302.

evaluated.[131] Thus, the purpose of this statutory requirement is unclear from a substantive standpoint.

Second, the Secretary must determine that contractor performance will not reduce security at the installation or facility.[132] This requirement is also a strange requirement in that the whole purpose of § 332 is to allow installations to contract for *increased* security. It would be unusual indeed for an installation to procure security guards if it would ultimately decrease security at that facility. Again, it is unclear what Congress is seeking to regulate by this vague requirement.

Consequently, with no legislative history to shed light on these provisions, the Army should interpret this as Congress, once again, expressing its historic concerns over the quality of contracted security personnel.[133] Therefore, as discussed extensively in Part IV *infra*, the Army should address these quality concerns by establishing a comprehensive, standardized contractual framework, which will ensure that installations throughout CONUS can easily contract for the highest quality security guard services available to meet their needs.[134]

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131. *See also* AR 190-56, *supra* note 95, para. 3-1. This regulation establishes the Army's Individual Reliability Program (IRP) for security personnel. The IRP requires a systematic and periodic review of all Army security personnel to ensure their fitness for duty. The IRP specifically covers contracted security personnel. *Id.*

132. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(C).

133. Note, § 332 also requires a comparison of the contractor's training and recruiting standards to those of DOD personnel performing similar functions. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(A). The Army should interpret this requirement to be another expression of congressional concern over the quality of contract security personnel. However, this requirement is easily definable as the Army provides such standards in *AR 190-56* (incorporating the OPM standards mentioned in the text accompanying note 100 *supra*).

134. Nevertheless, to meet the letter of the statute, the Army should also require the source selection authority to make these factual determinations specifically in writing before the award.

IV. Program Implementation

Based on the foregoing analysis, this Part recommends a comprehensive, contracted security program under the authority provided by both the U.S.A. PATRIOT Act and the NDAA for FY 2003. As described below, this program will utilize limited contracts or cooperative agreements[135] at the installation level; and a multiple award, omnibus contract at the departmental or regional level. This bifurcated approach will effectively implement the Army's new contractual authority, will address Congress' historic concerns over quality and the use of quasi-military armed forces, and will thereby support a renewed request for the ultimate repeal of the statutory restrictions.

A. Installation Level

At the installation level, the Army should require all facilities to pursue individual contracts or cooperative agreements with state and local agencies[136] for the provision of special, infrequent security services, such as special weapons and tactics (SWAT) support for installation SRT operations.[137]

As discussed in Part III *supra*, most state and local agencies simply do not have sufficient resources to provide the general security services required by CONUS installations. However, these governments should be able to provide assistance with special, infrequent security threats such as snipers or hostage situations.[138] To entice state and local governments to enter such contracts or agreements, installations may provide funding

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135. *See generally* 31 U.S.C. § 6305 (2000) (defining the authority of federal agencies to use cooperative agreements).

136. For decades, certain federal agencies have had the authority to use contracts and cooperative agreements with state and local law enforcement organizations to handle security operations at remote federal facilities. *See, e.g.*, 16 U.S.C. § 460ww-1 (Dep't of the Interior); 42 U.S.C. § 1962d-5d) (U.S. Army Corps of Engineers); 8 U.S.C.S. § 1103 (Dep't of Justice Immigration and Naturalization Service). Often these agreements merely involve coordinating with local authorities to enforce state criminal laws in federal proprietary jurisdictions. *See, e.g.*, 36 C.F.R. 330.4 (authorizing law enforcement contracts to service U.S. Army Corps of Engineers' water resource development projects).

137. Note, if SWAT support is not available from the state or local government, or if the installation has sufficient SRT resources available, the contract or agreement could be for short-term, general security guard assistance. For example, while organic installation security personnel are conducting SRT operations, state or local personnel could provide the facility with temporary access control, security patrols, or traffic control.

for the training of civilian SWAT teams and other civilian law enforcement personnel.[139]

Such an installation level program will have two key benefits. First, by requiring installations to pursue these contracts or agreements, the Army will not only enhance installation security, but will also strengthen relations with local communities, thereby enhancing homeland security in general.[140] Second, by using only state and local governments to provide these special security functions, the Army will demonstrate to Congress that any remaining concerns over the government's use of private "quasi-military armed forces" are unfounded.

B. Departmental or Regional Level

At the departmental or regional level, the Army should use the authority of § 332 to enter multiple award, performance-based, omnibus contracts to procure general security guard services that are common to all CONUS installations.[141] This method has three main benefits. First, it supports the Army's new installation management and contracting systems by centralizing and standardizing the procurement of all installation general security guard functions. Second, it supports the DOD's goal of promoting innovation, competition, and quality through performance-based service contracts. Finally, it will further demonstrate to Congress that the

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138. As discussed in Part III *supra*, the Army may interpret "security functions" broadly. By doing so, the Army may go beyond typical "security guard functions" and contract with local law enforcement personnel to support these emergency security missions.

139. Recall that § 1010 requires training and qualification standards for all local law enforcement personnel engaged in installation security functions and authorizes the Army to expend appropriated funds in support of such contract or agreements. *See also supra* text accompanying notes 82, 84, 100. Each contract or agreement may contain a provision for the Army to provide training for local SWAT or other law enforcement personnel. This provision could be for civilian law enforcement training funded as part of the contract or agreement or could be for SRT training provided by the U.S. Army Military Police School. *See generally* Memorandum, John P. White, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: DOD Training Support to U.S. Civilian Law Enforcement Agencies (29 June 1996) [hereinafter DOD CLEA Training Memo] (on file with author).

140. The DOD is encouraging installations to interact with local communities to enhance emergency preparedness planning and to develop joint military civilian response procedures. *See Combating Terrorism Hearing supra*, note 4, at 4 (statement of Peter Verga Special Assistant for Homeland Security, DOD).

Department can responsibly use contract personnel without jeopardizing installation security.

1. Supporting the Transformation of Installation Management and Army Contracting

On 1 October 2002, the Army completely restructured its installation management and contracting programs in an effort to streamline, standardize, and enhance base functions; [142] to consolidate common use contracts; and to leverage economies of scale.[143] Specifically, these programs centralized installation management and contracting functions at the Departmental level under the newly created Army Installation Management Agency (IMA) [144] and Army Contracting Agency (ACA),[145] respectively.

As discussed below, an omnibus departmental or regional security guard contract will support every major goal of these programs. First, it

141. The Army recently promulgated general implementing instructions for the use of § 332's contracting authority. *See* Implementation Message § 332, *supra* note 96. Although these instructions establish "project officers" at the Army G-3 and the new Installation Management Agency, they fall far short of effectively creating a comprehensive contract security program. *Id*. paras. 3.B.(3), 3E.(3). Unfortunately, rather than providing a standardized procurement scheme for all general security guard services, the implementation instructions require garrison commanders at the installation level to ensure that the qualifications, training, recruitment, and authority of contract security guards meet the requirements of § 332. *Id*. para. 3.H. This requirement does little to further the long-term security needs of CONUS installations. As advocated throughout this Part, the Army should create a more centralized comprehensive program at the Departmental or Regional level. By doing so, the Army will standardize installation contract security, further their overall transformation efforts, and provide support for the ultimate repeal of the statutory restrictions.

142. Headquarters, Dep't of Army, Gen. Orders No. 4 (22 Aug. 2002) (creating the new Army Installation Management Agency). The Transformation of Installation Management (TIM) program is a "top-down regional alignment [that] creates a corporate structure with the sole focus on efficient, effective management of all [Army] installations." *FY 2003 Defense Authorization Request Before the 107th Congress Subcommittee on Military Installations and Facilities House Armed Services*, 107th Cong., 27 (2002) (testimony of Mario Fiori, Assistant Secretary of the Army, for Installations and Environment).

143. Headquarters, Dep't of Army, Gen. Orders No. 6 (23 Sept. 2002) (creating the Army Contracting Agency).

144. Gen. Orders No. 4, *supra* note 141, para. 2. The IMA, which falls directly under the Assistant Chief of Staff for Installation Management (ASCIM), supports the management of all installations and installation support services throughout the Army. *Id*. The IMA oversees seven directorates, which in turn manage Army installation functions within specified geographic regions throughout the world. *Id*.

will streamline the procurement of general security guard services. Second, it will provide greater stability and standardization of these services. Third, it will increase competition and ultimately enhance the quality of security services. Finally, it will allow the department or region to leverage great economies of scale, ultimately reducing the cost of security guard services.

One of the key goals of both the Department and the ACA is efficiency. By using multiple award omnibus contracts, installations will save time and money, through a streamlined, consolidated procurement process.[146] First, with an omnibus contract, installations need only issue task orders against the existing procurement. Unlike a stand-alone procurement, task orders do not require a synopsis and need not be open for thirty days.[147] Second, the Army generally does not permit protests on task orders, which will save time and expense at the installation level.[148] This ability to acquire security guard services quickly will also prove invaluable when the installation rapidly increases the base FPCON for an extended time.[149]

Another key objective of the IMA is the stabilization and standardization of installation functions across the Army.[150] Omnibus contracts will allow the Army to maintain strict visibility on the quality of security guard services provided to all CONUS installations. Specifically, once the instal-

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145. Gen. Orders No. 6, *supra* note 142, para. 2. The ACA, which falls directly under the Assistant Secretary of the Army (Acquisition, Logistics & Technology), provides "command and control of the regional and installation contracting offices; the U.S. Army Information Technology, E-Commerce, and Commercial Contracting Center (ITEC4); and the contingency contracting function." *Id*. para. 1. The ACA oversees three directorates, which in turn manage contracting based upon requirements (i.e., ITEC) or geographic regions (e.g., complementing IMA geographic regions). *Id*. para. 4.

146. *See generally* OFFICE OF FEDERAL PROCUREMENT POLICY, BEST PRACTICES FOR MULTIPLE AWARD TASK AND DELIVERY ORDER CONTRACTING (1997) [hereinafter OFPP MULTIPLE AWARD BEST PRACTICES GUIDE]. To enhance efficiency, the ACA is also in the process of consolidating all "common use" contracts over $500,000. At a minimum, the regional level will handle such contracts. *See* Perry Hicks, Address at the U.S. Army Assistant Chief of Staff for Installation Management A-76 Conference (Aug. 15, 2002).

147. FAR, *supra* note 46, at 5.202(a)(6).

148. *Id*. at 16.505(a)(8).

149. Any omnibus contract must specifically provide for the rapid movement of security guard forces to installations faced with heightened FPCONs and emergencies. Although the use of contracts or agreements with state and local law enforcement agencies under § 1010 will assist in temporary emergency situations, when installation FPCONs are raised for an extended period of time, the omnibus contract must provide for the significant increase of long-term general security guard services.

lation establishes the contract, this process will provide a set of pre-qualified contractors from which to choose. Although the contractors may be different at each installation, the quality, standards, and functions performed will generally be the same.

Third, the IMA also seeks to create effective management of all installation functions. In this regard, an omnibus contract at the departmental or regional level will enhance competition and improve the quality of the security services provided. Using multiple awards creates two layers of competition. First, the initial procurement will be competitive in nature and will be large enough to attract experienced contractors, who may greatly assist the Army in enhancing its contracted security program.[151] Second, each order issued against the contract must be the product of competition among the "pre-qualified" vendors.[152] With these multiple levels of competition, using the performance-based contracting methods discussed in Part IV.B.2. *infra*, installations will be able to obtain rapidly the best quality services available to meet their security needs.

Finally, omnibus contracts will generate significant economies of scale—a major goal of the ACA. The large number of security guard requirements throughout CONUS, coupled with the multiple levels of competition discussed above, will provide the department or region significant leverage in any procurement. The Army can use these economies of scale to obtain the highest quality security guard services at the best prices.

2. Performance-based Security Contracting

The effective acquisition of services from the private sector is playing an ever-increasing role in the successful achievement of DOD objectives.[153] As a result, the DOD has recognized the importance of molding its services acquisition policy around the business practices used in the commercial sector.[154] One such practice, the use of performance-

150. Press Release, U.S. Army Public Affairs, Secretary of the Army Announces Regions for Transformation of Installation Management (March 19, 2002) (on file with the author).

151. *See also infra* Part IV.B.2.b. (discussing the unique benefits of using statements of objectives (SOO) at the departmental or regional level to maximize industry participation in the procurement).

152. FAR, *supra* note 46, at 16.505. *See also* DFARS, *supra* note 46, at 216.505-70 (requiring DOD organizations to comply with competition requirements for any task order exceeding $100,000 against a multiple award contract).

based service contracting, has become a major thrust of the DOD acquisition reform. In fact, the Department announced in April 2000 that at least "50 percent of service acquisitions, measured both in dollars and actions, are to be performance-based by the year 2005."[155] Moreover, Congress,[156] the Office of Management and Budget, [157] and the President[158] support this strong emphasis on the use of performance-based service contracting. Consequently, Army leaders and contracting personnel should strongly consider using this method for the acquisition of general security guard services under § 332. As demonstrated below, this acqui-

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153. *See Technology and Procurement Policy, Hearing before the 107th Congress Subcommittee on Technology and Procurement Policy Committee on Government Reform*, 107th Cong., 2 (2002) [hereinafter *DOD Procurement Policy Hearing*] (testimony of Deidre A. Lee Director, Defense Procurement, Office of the Under Secretary of Defense for Acquisition, Technology & Logistics).

> Our business environment within the Department of Defense has become very complex, particularly in the acquisition of services. The amount of money the Department spends on services has increased significantly over the past decade, to the point where we now spend approximately an equal amount of money for the acquisition of services as we do for equipment.

Id.; *see also* Memorandum, Principle Deputy Under Secretary of Defense for Acquisition and Technology, to Secretaries of the Military Departments et al., subject: Acquisition of Services (5 Jan. 2001) [hereinafter DOD Acquisition of Services Memo] (on file with author); Memorandum, Acting Assistant Secretary of the Army Acquisition, Logistics & Technology, to Program Executive Officers et al., subject: Performance-Based Service Acquisition (PBSA) Implementation (6 Sept. 2001) [hereinafter Army PBSA Implementation Memo] (on file with author) (stating, "Services represent approximately 30 percent of our acquisition dollars and 40 percent of our actions. This is by far the Army's largest single acquisition category and has been increasing at a rate of one to two percent per year."). *Id*.

154. *See* U.S. DEP'T OF DEFENSE, GUIDEBOOK FOR PERFORMANCE-BASED SERVICES ACQUISITION (PBSA) IN THE DEPARTMENT OF DEFENSE iii (2000) [hereinafter DOD PBSA GUIDEBOOK] (on file with author) ("Performance Based Services Acquisition (PBSA) strategies strive to adopt the best commercial practices and provide the means to reach world class commercial suppliers.").

155. Memorandum, Under Secretary of Defense for Acquisition and Technology, to Secretaries of the Military Departments et al., subject: Performance-Based Services Acquisition (PBSA) (5 Apr. 2000) [hereinafter DOD PBSA Goals Memo] (on file with author); *see also* Army PBSA Implementation Memo, *supra* note 152, at 1 (discussing the Army's plan to meet DOD's 50 percent PBSA goal, and tasking senior acquisition leaders to implement PBSA strategies to the maximum extent practicable).

156. NDAA for FY 2003, *supra* note 8, § 805 (stating that "it shall be an objective of the Department of Defense to achieve efficiencies in procurements of services under multiple award contracts through the use of . . . performance-based services contracting.").

sition method not only offers several practical advantages, such as increased innovation and competition, but it would also support DOD policy and further demonstrate to Congress the Army's ability to effectively implement a comprehensive contract security program.

a. Performance-based Contracting Methods

Performance-based service contracting is a method of obtaining services, which dictates the result desired by the requiring activity rather than the manner of performance by the contractor.[159] Its goal is to encourage creativity and innovation in the private sector by allowing contractors to develop their own means of meeting the government's needs. To achieve this goal, performance-based contracts have four general characteristics. First, they describe work in terms of results rather than methods of performance.[160] Second, they have specific standards designed to measure performance as well as quality assurance surveillance plans to ensure that the standards are met.[161] Third, they have penalty provisions, which reduce the fee or price when the vendor fails to meet certain performance

157. Memorandum, Deputy Director, Office of Management and Budget, to Heads and Acting Heads of Departments and Agencies, subject: Performance Goals and Management Initiatives for the FY 2002 Budget (Mar. 9, 2001) [hereinafter OMB Performance Goals Memo] (on file with author). As one of its primary goals for Fiscal Year 2002, OMB instructed all federal executive agencies to make greater use of performance-based contracts. "For FY 2002, the Performance-Based Service Contracting (PBSC) goal [was] to award contracts over $25,000 using PBSC techniques for not less than 20 percent of the total eligible service contracting dollars." *Id.*

158. PROCUREMENT EXECUTIVES COUNCIL, FISCAL YEAR 2001-2005 PROCUREMENT EXECUTIVES COUNCIL STRATEGIC PLAN (2001) (on file with author) ("Over the next five years, a majority of the service contracts offered throughout the Federal Government will be performance-based . . . the Government must set the standards, set the results and give the contractor the freedom to achieve it in the best way.") (quoting Presidential Candidate Governor George W. Bush, Making the Government More Efficient, Address at Philadelphia, Pennsylvania (June 9, 2000)).

159. FAR, *supra* note 46, at 37.601.

160. *Id*. at 37.601(a). The key document for any performance-based acquisition is an individually tailored statement of work (SOW) that describes the requirements, rather than how to accomplish the work. *Id.* at 37.602-1(a). Under the comprehensive contracted security program proposed in this Part, the key task for installation security planners will be to develop an individual SOW to support task orders placed against the omnibus contract.

standards.[162] Finally, they may include incentive provisions to reward work that exceeds certain performance standards.[163]

Although the *Federal Acquisition Regulation* provides authority for performance-based service contracting, it does not provide a system to implement the method. Rather, individual agencies are left to develop their own means of employing these concepts.[164] Consequently, a group of federal agencies recently formed an interagency or industry team to create the *Seven Steps to Performance-Based Services Acquisitions Program (Seven Steps PBSA Program)*.[165] As described below, this detailed guide provides a useful framework for Army leaders and contracting officials to create an effective contract security program.

b. Seven Steps to Contracting for General Security-Guard Services

The Seven Steps PBSA Program covers the entire contractual process from acquisition planning to contract administration. The interagency team designed this program to "shift the paradigm from traditional 'acquisition think' into one of collaborative performance-oriented teamwork."[166] The Seven Steps are the following: establish a team, describe the problem, examine private sector and public sector solutions, develop the performance work statement or statement of objectives, deter-

161. *Id*. at 37.601(b). Properly prepared, these plans can encourage a strong collaboration with the contractor to meet the government's needs. In performance-based acquisitions, not only does the Quality Assurance Surveillance Plan (QASP) have government inspection and acceptance criteria, but it also can incorporate the contractor's normal, commercial quality control obligations. The QASP also ties all surveillance criteria to measurable contractor output rather than the method of performance. *Id*. at 37.602-2. The plan, if developed and administered properly, can further encourage innovation and collaborating by the contractor.

162. *Id*. at 37.601(c). The ability to motivate the contractor to work at or above performance standards is a key advantage of performance-based acquisitions. Various factors may motivate contractors, from the type of contract chosen to the negative or positive performance incentives in the contract. *Id*. at 37.602-4; 37.602-1. Consequently, the generally preferred contract type in performance-based acquisitions is the fixed price contract. *Id*. at 37.602-4.

163. *Id*. at 37.601(d).

164. *See, e.g.*, DOD PBSA GUIDEBOOK, *supra* note 153.

165. U.S. Dep't of Commerce, *Seven Steps to Performance-Based Services Acquisitions*, *at* http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/home.html [hereinafter SEVEN STEPS PBSA GUIDE] (last visited 5 Feb. 2003).

166. *Id*.

mine how to measure and manage performance, select the right contractor, and then manage the performance.[167] Each of these steps relates to contracting for general security guard services.[168]

The first step is for the Department or regions to establish a multi-discipline, contract security acquisition team. This team should include not only contracting personnel and Army force protection experts, but also security managers from each major Army installation as well as private sector security consultants. By establishing this broad based team, the department or region can effectively use this program to rethink installation security from all levels and perspectives.

Second, the team must effectively define the problem. To do so, the Department must first develop comprehensive policy guidance, which addresses the flaws of § 332 as identified in Part III.B.2. Next, with this guidance, the team should develop and issue an Army or region-wide security survey, which requires each installation to identify all security guard functions currently available for contracting under § 332.[169] This information will permit the team to determine which functions are common to all CONUS facilities, and thereby, define the scope of the problem that the acquisition will address.

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167. *Id*.

168. Naturally, a Departmental or regional omnibus contract using performance-based methods will require some lead-time to implement. Unfortunately, with the Global War on Terrorism (GWOT) operations ongoing, CONUS installations must be able to contract for general security guard services immediately. The Department should consider authorizing temporary procurement of such services through contractors on the GSA Schedule 539 or 084 at a regional level. The GSA criteria for contract guard training and recruitment meet current OPM guard standards and should be sufficient to satisfy the general requirements of § 332. For a description of these standards, *see supra* text accompanying note 100. By temporarily using GSA schedules, the Army will be able to provide installations with immediate support, while developing a comprehensive Army-specific contract security program. Note that DFARS 208.404-70 requires competition for any order from a GSA schedule if it is in excess of $100,000. DFARS, *supra* note 46, at 208.404-70.

169. *See also* Implementation Message §332, *supra* note 96, para. 3.F.(1). Under the Army's current implementation plan, Major Army Commands determine their command-wide security guard needs. *Id*. While this blunt method may yield some of the required data, a standardized Departmental or regional survey (coupled with detailed policy guidance) would provide a better analysis of installation needs. With such standardized data, the Army will be in a much stronger position to support its request for the ultimate repeal of the statutory restrictions.

Third, the team must conduct extensive market research to determine the private sector's ability to provide a solution to common installation security guard needs.[170] This research will be the most important part of the acquisition. In fact, "the right kind of market research can dramatically shape an acquisition and draw powerful, solution-oriented ideas from the private sector."[171] Here, the team should not only take advantage of the traditional methods of market research,[172] but should also tap into the vast experience of industry leaders in private sector security firms. Although the FAR permits several methods of market research, which directly involve the participation of contractors,[173] commentators have argued that "one-on-one" sessions with industry leaders provide the best method of developing performance-based solutions.[174] By using this direct approach early in the process, the team will be able to craft its requirements to take advantage of the latest security solutions. Moreover, the team may obtain key information regarding the performance measures used by the security industry to evaluate the effectiveness of these solutions. This information will directly influence the team's development of the statement of work (SOW) or the statement of objectives (SOO).

Fourth, based on its survey and market research, the team must develop a broad based SOW or SOO for the omnibus contract as well as guidance for installations to develop individual performance-based task orders.[175] For the base contract, the Army should use a SOO. A SOO is a performance-based acquisition technique, where the government merely identifies the desired objectives and allows contractors to offer solutions in

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170. Although the Seven Steps Program emphasizes examining both private and public sector solutions, the public sector aspect of installation security is addressed through the use of contracts or agreements using §1010 of the U.S.A. PATRIOT Act. *See* discussion *supra* Part IV.A.

171. Bob Welch, *Commercial Keys to Performance-Based Acquisition: Emulating the Commercial Sector's Streamlined Acquisition Approaches and Target Marketing Efforts Could Help the Government Generate More Creative Solutions at a Lower Price*, CONTRACT MGMT. 20 (2002) (Welch goes on to note that effective market research "can support a fundamental rethinking about the nature of the requirement, and deliver better results to the program office through performance-based partnership with high-performing contractors.)

172. FAR, *supra* note 46, at 10.002(b)(2) (describing general methods available for market research).

173. *See id*. at 15.201 (describing early exchanges of information with contractors such as industry or small business conferences, public hearings, presolicitation notices and draft requests for proposals (RFP)).

174. Welch, *supra* note 170, at 2. *See also* FAR, *supra* note 46, at 15.201 (permitting use of one-on-one meetings with potential offerors).

the form of detailed statements of work. These contractor SOWs must include specific performance measures based upon existing commercial practices.[176] For this acquisition, the SOO's objectives should focus upon the contractor's ability to fulfill common installation security guard functions and its ability to provide increased security guard support rapidly in the event of an emergency or heightened FPCON. Using this approach, the team will encourage innovation and competition, while also obtaining the most current performance standards used in the commercial marketplace. With this information, the team can then develop detailed guidance to assist installations with producing performance-based SOWs to support individual task orders.[177]

Fifth, while the installation will base each task order upon its particular needs, the team can provide examples of common performance-based standards and measures to assist in SOW development. For instance, the team may issue sample standards and measures for such common services as installation access control, security patrolling, dispatch operations, and emergency response actions.[178] Although the installation will modify such samples based upon individual security guard needs, all installations will have a common starting point for SOW development.

Sixth, the departmental or regional Source Selection Authority must choose the right contractors for the omnibus contract. This authority should base its selection upon the best value "trade-off" approach,[179] rather than the "lowest cost technically acceptable" standard,[180] to ensure that

175. FAR, *supra* note 46, at 37.602-1. Since this task-order will involve an omnibus multiple award acquisition, the team needs to first define the overall scope of the basic contract. The statement of work for each task order will then be performance-based in accordance with the guidance of the Department or Region.

176. Welch, *supra* note 170, at 2.

177. Issuing this guidance to assist all installations with the development of SOWs will further promote the IMA goal of standardization of installation services.

178. Recently, the U.S. Department of Commerce began using performance-based methods to acquire security guard services. Telephone Interview with E. Darlene Bullock, Contracting Officer, Commerce Acquisition Solutions, Business Solutions Office, U.S. Department of Commerce (Jan. 31, 2003). For an example of performance standards and measures used with a security guard services contract *see*, U.S. DEPARTMENT OF COMMERCE, *Request for Quotation for U.S. Department of Commerce Security Guard Services*, RFQ NO. SA1301-03-RQ-0009 (Jan. 23, 2003) (on file with the author U.S. Department of Commerce Business Solutions Office and the author) (providing performance-based standards and measures for such requirements as roving patrols, entrance control, and emergence response activities).

179. FAR, *supra* note 46, at 15.101-1.

180. *Id*. at 15.101-2.

appropriate tradeoffs can be made in determining the acceptable contractor pool.[181] Once this authority determines the pool, installations should be able to use the "lowest cost technically acceptable"[182] standard to issue performance-based task orders.

Finally, all installations must effectively manage the performance of each task order. This management not only entails a strong quality assurance and surveillance plan (QASP), but also a strong partnership with the contractor. First, as part of the QASP, installations must define appropriate inspection or acceptance criteria, linked directly to the performance objectives in the statement of work. Contractors must understand this linkage and be aware of the penalties for poor performance. Second, installations should appoint multiple contracting officer representatives or inspectors to monitor contractor performance.[183] Third, the contracting officer and their representatives should meet monthly with the contractor to review performance levels and discrepancies. Finally, the department or region should require detailed quarterly reports on the performance of each task order. This will ensure the effective monitoring of all security guard functions throughout CONUS. These reports will provide useful guidance for obtaining even higher quality security guard services in future acquisitions.

In summary, using a multiple award omnibus contract, coupled with performance-based contracting methods, will support DOD and Army

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181. Note also that DFARS 212.102 now authorizes contracting officers to use FAR Part 12 procedures for any performance-based service contract or task order valued at $5 million or less, so long as, certain specified criteria are met. DFARS, *supra* note 46, at 212.102. Although this authority may make contracting for such services easier, this authorization is only temporary in nature (ending on 30 October 2003). Unless extended, this authority will provide little assistance in the development of a comprehensive contract security program.

182. Although installations will be able to use the "best value approach" in issuing task orders, this approach seems unnecessary. Once the Department or region determines the group of contractors, which are able to meet the agency's screening criteria, installations should be able to choose the contractor simply, which offers the lowest cost technically acceptable services for their task orders.

183. *See* AR 190-56, *supra* note 95, para. 1-4(i)(3)(b) (requiring the contracting officer's representative (COR) to be the Provost Marshal of the installation concerned). *See also* Implementation Message § 332, *supra* note 96, para. 3.H.(6) (reiterating the COR requirement of AR 190-56).

management goals as well as maximize quality through increased competition and contractor innovation.

3. Satisfying Congress

As discussed throughout Parts II and III, Congress has historically shown concern with two main aspects of contracting for private security: the quality of the security used to protect DOD installations[184] and the government's use of quasi-military armed forces. As demonstrated throughout this Part, this program addresses each of these concerns.

First, regarding quality, Congress has shown concern with the control of installation security functions, the potential for labor disputes, and the training level of contracted security personnel. Fortunately, by using omnibus contracts at the departmental or regional level, the Army can control the quality of the services procured, and therefore can provide significant stability, standardization, and control across the service. Moreover, if the employees of one contractor should strike, the contract will have sufficient vendors available to obtain substitute services quickly. Regarding training, § 332 requires all vendors to have training and recruitment standards that are comparable to the DOD security personnel. The Army need only define these standards and make them mandatory requirements in the omnibus contract. By controlling general security guard contracting at the departmental or regional level, the Army will ensure all CONUS installations have high quality security services.

Second, by restricting private sector contracts to the provision of general security guard services, the Army will in no way use private quasi-military armed forces as described in Part II.A.2.[185]

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184. As discussed in Part II.B.1 *supra*, the original congressional opponents of 10 U.S.C. § 2465 (2000) asserted that Congress enacted this statute to appease government employee unions. The possibility that any contracted security program would ever satisfy the concerns of government employee unions is highly unlikely. *See supra* text accompanying note 16. As such, the program advocated by this article focuses upon meeting congressional concerns related to the quality of contracted security forces as well as concerns related to governmental use of quasi-military armed forces.

185. *See supra* text accompanying note 50.

Consequently, this program will fully address each of the historic congressional concerns which led to the development of both 5 U.S.C § 3108 and 10 U.S.C. § 2465. As such, this program will not only effectively implement the Army's new temporary contractual authority, but will also provide strong support for a renewed request for a complete repeal of the statutory restrictions. The repeal of these restrictions will play a key role in the Army's transformation efforts. Specifically, this program will permit the Army to use the A-76 process to study the feasibility of contracting out security positions currently held by federal government personnel. This process should allow the Department to shift essential resources to the performance of "core competencies;"[186] to use competition to obtain higher quality security services; and most importantly, to establish cost-effective, long-term installation force protection programs throughout CONUS.

V. Conclusion

As demonstrated throughout this article, the Army continues to face significant statutory restrictions in the development of a comprehensive contract security program to meet the long-term needs of CONUS installations. Although Congress has provided some temporary relief, it continues to express significant concerns regarding the quality and use of private security forces in the DOD, as evidenced by the vague, complicated, and limited contractual authority created by both the U.S.A. PATRIOT Act and the NDAA for FY 2003. By understanding and addressing these historic concerns, the Army can use this limited contractual authority to develop a broad-based security program, which will support a renewed request for the repeal of these antiquated restrictions.

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186. *See* Third Wave Memo, *supra* note 9 (stating, "The Army must focus its energies and talents on our core competencies–functions we perform better than anyone else–and seek to obtain other needed products or services from the private sector where it makes sense."). *Id.*