DEPARTMENT
OF POLITICAL AND
SOCIAL SCIENCES

Reform Success and Failure in the Wake of Scandals

Three Tales of Regulatory Conflict in the Private Military and Security Arena

Kyriaki Kourra

Thesis submitted for assessment with a view to
obtaining the degree of Doctor of Political and Social Sciences
of the European University Institute

Florence, 06 May 2024

European University Institute

Department of Political and Social Sciences

Reform Success and Failure in the Wake of Scandals

Three Tales of Regulatory Conflict in the Private Military and Security Arena

Kyriaki Kourra

Thesis submitted for assessment with a view to
obtaining the degree of Doctor of Political and Social Sciences
of the European University Institute

Examining Board

Professor Anton Hemerijck, EUI (Supervisor)
Professor Dorothee Bohle, University of Vienna (External Supervisor)
Professor Mark Thatcher, LSE/LUISS
Professor Hin-Yan Liu, University of Copenhagen

Researcher declaration to accompany the submission of written work

Department of Political and Social Sciences - Doctoral Programme

I Kyriaki Kourra certify that I am the author of the work "Reform Success and Failure in the Wake of Scandals: Three Tales of Regulatory Conflict in the Private Military and Security Arena" I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the Code of Ethics in Academic Research issued by the European University Institute (IUE 332/2/10 (CA 297).

I declare that this work consists of 75550 words.

Statement of language correction:

This thesis has been corrected for linguistic and stylistic errors. I certify that I have checked and approved all language corrections, and that these have not affected the content of this work.

Signature and date:

26/05/2024

Acknowledgements

This thesis is dedicated to the memory of my dad, Chari Kourra.

"Εγώ έλεα σου ότι εν να τα καταφέρεις, αλλά μουρμουράς", he would have said glowing with pride.

First and foremost, I am deeply grateful to my supervisors, Professor Anton Hemerijck and Professor Dorothee Bohle, for their support and extremely valuable advice, during all the stages of the PhD process. Their expertise and experience have inspired me to become a better researcher.

This endeavor would not have been possible without the continuous support and encouragement of Dr. Fatma Sayed Mohamed.

Mum, thank you for your unconditional love, care, and support. I know I can always rely on you.

Constantine, thank you for your love, for all the late nights and early mornings, and for helping me stay grounded over the past few months.

Christo Hadjiarapi, you are my chosen family, my best friend, thank you for never losing faith in my ability to finish this PhD journey.

Artemis Antoniou, your kindness and endless support have been an everlasting inspiration to follow my dreams with audacity and courage!

Abstract

It is well-known that scandals and policy fiascos are often politicized. Sometimes, they open "windows of opportunity" for regulatory reform, inspiring political authorities to convene hearings to assess what went wrong. Atrocities incurred by US-contracted private military and security companies in the Iraq war are cases in point. However, effective and legitimate change depends significantly on *who* is invited to the table. It also depends on the *kind* of arguments they can bring to bear on the scandal, employing a conceptually-derived framework comprised of six dimensions of policy advocacy. Empirically, to identify the conditions that facilitate or impede regulatory change, this thesis reconstructs three hearing processes of US congressional committees instigated by three broadly similar 'scandals' (or regulatory failures), involving industry transgressions that produced substantively different regulatory reform outcomes. Three key contributions follow. First, this dissertation contends that the potential for regulatory change is strongly associated with the (non-) participation of key actors in democratic processes. Policy change is more likely when actor constellations are wider and the argumentative space is more diverse (including actors excluded from previous 'quiet' deliberations). In "narrower" cases, the authorities of privileged actors tend to prevail. Second, argumentation is key to the ultimate regulatory choices. This thesis finds that "public consent" arguments, introduced by the victims or victims' families, and subsequently used by members of the committee to challenge insider actors seeking to preserve the status quo, are particularly influential in a hearing context. Third, the research very strongly shows that arguments become even more powerful when laden with Aristotelian *pathos*. The emotional engagement of 'real' actors proved decisive in one of the three cases under review. This latter finding has significant implications that future research on regulatory policy change should tackle.

TABLE OF CONTENTS

1 INTRODUCTION

2004, Fallujah, Iraq: Four Americans working as private security personnel for Blackwater, under a Department of Defense contract, were ambushed and killed in Fallujah while on a security protection mission. Their death became a turning point in public perception of the war and military experts believed that it fueled the escalation of the insurgency. The mission was described by Blackwater employees as "flat out a sloppy f**king operation". The families of the victims filed a suit against Blackwater for wrongful death, arguing that Blackwater sent their loved ones on a mission without the necessary equipment and accusing the Department of Defense of a lack of oversight over Blackwater's actions.

2005, Camp Hope, Iraq: Jamie Leigh Jones testified that she was drugged, beaten, and gang-raped by multiple Halliburton/KBR employees in her barracks bedroom. At the time, the US Department of Justice refused to investigate Jones' claims. Therefore, she was forced to pursue a civil action against her former employer i.e., Halliburton/KBR while working in Baghdad under a Department of Defense contract. The problem was, however, that Jones' contract stipulated that any allegations against Halliburton/KBR would be resolved through arbitration. The case provoked national debate in the US focusing on the use of mandatory arbitration provisions in the employment contracts of private military and security personnel. As this was tolerated by the Department of Defense, mandatory arbitration prevented PMSC personnel from going to court after being sexually abused by co-workers.

2007, Nisour Square, Iraq: Blackwater security contractors, employed by the State Department, were running an armed convoy where, without being provoked, 17 civilians were killed and 24 were wounded. In a public statement for this high-profile case, the US Attorney's Office said that "the sheer amount of unnecessary human loss and suffering" attributable to the defendants' criminal conduct was staggering. It also expressed hope that the defendants' sentencing would provide some comfort to those who had survived the shootings and the families of those who were killed or harmed. The Blackwater contractors, however, maintained that the prosecution was a 'vindictive' act of government as top public officials in the US and Iraq had closely watched this case for years, and its outcome carried international political ramifications. In 2020, President Donald Trump pardoned

the four US citizens who were found guilty of killing Iraqi civilians, a decision, that according to a UN representative “violate[s] US obligations under international law and more broadly undermine[s] humanitarian law and human rights at a global level.” (Reuters, 2020)

These are just a few of the “scandals” involving Private Military and Security Companies (PMSCs), offering military and security services, hired by US Departments to work in Iraq, alongside the US military. Interestingly, such services were previously offered by the infamous mercenaries whose existence gradually faded away with the Peace of Westphalia which established the state's exclusive right to use force. In their modern-day reincarnation as private entities, PMSCs worked hard to shed the negative connotations that accompanied the term “mercenary” and gain legitimacy. This was facilitated by the fact that, following the post-Cold War demilitarization period, the global market for PMSCs expanded dramatically, which meant that there were voids in the military and logistical resources that needed to be filled and money to be made. Notwithstanding, it remains true that any PMSC that can fulfil support and training contracts is just as capable of executing combat contracts and engaging in what is considered as traditional “mercenarism”. This is evidenced by the fact that modern PMSCs handle “everything and anything, from combat missions to delivering humanitarian aid, to equipping and operating drones” (Sutherland, 2021).

Of course, the US is not the only state that has been implicated in scandals since these actors were re-introduced to governments and their electorates as legal (and thus legitimate) companies. For instance, the “Sandline Affair” in 1998 was the first incident that brought unwanted attention to the British PMSC industry and created a major scandal that involved officials of the Foreign and Commonwealth Office. The “Sandline Affair” involved the provision of weapons, by UK-contracted PMSC Sandline International to Sierra Leone in contravention of a UN arms embargo, which was implemented by the UK through Orders in Council and criminalized the export of weapons to Sierra Leone, carrying a maximum sentence of 7 years imprisonment (Foreign Affairs Committee, 1998, HC 116, para.4). After a public call for the submission of oral and written evidence in the Foreign Affairs Committee, the UK government did not follow up on its promise to adopt legislation. It is interesting to note that when the “Sandline Affair” took place, PMSCs were still considered to be a “comparatively minor phenomenon” (Foreign and Commonwealth Office, 2002, HC 577, para.62). Yet, within a short period of time, the PMSC industry was thriving and UK-contracted PMSCs were implicated in numerous human rights violations. Another incident that caught the attention of the

media took place in 2006, when footage of contractors, working for the then PMSC Aegis Defense Services Ltd, firing at Iraqi civilian vehicles near Baghdad appeared on the Internet. One video shows security guards shooting at a car which subsequently crashed into a civilian taxi. In another video, security guards are seen discharging automatic rifles at a different vehicle, with bullets clearly hitting the car until it stops moving while the security convoy just drives on. Criminal charges against the company or the contractors involved were never brought by the Ministry of Justice, while the Aegis employee who recorded the shooting incident and publicly shared the video was immediately terminated by Aegis for violating a confidentiality clause in his employment contract (War on Want, 2008). In addition to backlash by the media and NGOs, an Early Day Motion supported by 82 members of the UK Parliament, expressed their worry and apprehension regarding the "the substantial rise of reported incidents of civilian killings and human rights abuses by PMSCs in Iraq who remain unregulated and unaccountable" (Early Day Motion 785, 2008).

1.1 Puzzle & Research Question

Many of the scandals portray PMSC employees as "trigger-happy cowboys" and designate the industry as primarily responsible for such crimes. However, these incidents can be considered, to a significant degree, as an inevitable consequence of the permissive regulatory framework, established by states, governing the conduct of PMSCs in combat zones. In fact, scandals are nothing more than highly mediatized "situations in which things have gone wrong" inevitably exposing governmental failure. Events such as 'scandals' have the dynamic potential to temporarily open "windows of opportunity" (Kingdon, 2003) for change-oriented government critics to advance their ideas and interests (see also the study of post-crisis change by Boin, McConnell and Hart, 2008). Evidently, scandals can produce sweeping changes. They may lead to minor adjustments of current regulations. However, frequently, they do not bring about any changes at all.

The fact that the politicization of scandals can open the potential for change is well-illustrated by two notorious cases which exposed the 'failures' of the administration. Despite the widespread criticism that followed both cases, change was achieved in only one of them.

After the murder of George Floyd, there were several attempts for reform. On May 25, 2020, Minneapolis police officer, Derek Chauvin, pinned Floyd to the ground with his knee on his neck for over nine minutes, disregarding Floyd's pleas of "I can't breathe." Although the incident sparked widespread demonstrations against police brutality, Congress failed to pass any meaningful reforms in response to Floyd's death.[1] Change was however eventually accomplished when the Department of Justice's (DOJ) policy was revised to provide that the use of force is allowed only when "no reasonably effective, safe, and feasible alternative appears to exist." Additionally, de-escalation provisions were added to the use-of-force policies of all federal law enforcement agencies and the obligation to intervene, prevent the excessive use of force, and provide medical aid was explicitly stated. Finally, the policy provides that all officers shall receive training designed to "reinforce the appropriate exercise of discretion and judgement in using less-than-lethal and deadly force." (The White House, 2022)

This contrasts with the second case, namely the Larry Nassar scandal. In this case, there have only been failed attempts (so far) to change the practices of the Federal Bureau of investigation (FBI) – operating under the jurisdiction of the DOJ. This follows the revelation of "fundamental" mistakes in its investigation into sexual abuse accusations against former USA Gymnastics national team doctor Larry Nassar (Office of the Inspector General, 2021). The latter was sentenced *in 2018 to up to 175 years in prison for the sexual abuse of hundreds of women and girls. Despite the FBI being aware of the* allegations in 2015, they failed to take any action. This allowed Nassar to continue his abuse for over a year. While the FBI criticized its own employees for their inaction in the case, no significant reforms were made.

Therefore, the main puzzle that the thesis seeks to solve revolves around the empirical observation that some scandals trigger significant regulatory changes, whereas others reinforce the pre-scandal status quo. Unsurprisingly, state actors who have long held political, legal, and social power through institutional structures and path dependencies resist pro-reform attempts in policies, laws, or regulations. However, with such high salience (Culpepper, 2011) attached to a 'failure' exposed by a

[1] On May 25, 2020, Democrats introduced the "George Floyd Justice in Policing Act of 2020" to improve police oversight and training. The bill passed the House twice but died in the Senate because of disagreement over multiple provisions, including whether to end qualified immunity.

scandal, it seems difficult for a government to deny to (at least) 'process' the suggested policy reforms without incurring any political cost. Focusing on how scandals are being 'processed' in the democratic arena, this thesis poses the following research question:

What conditions can facilitate or impede regulatory change in the wake of scandals implicating the PMSC industry?

By exploring how three broadly similar scandals (or regulatory 'failure' cases) were 'processed' to produce substantively different reform outcomes, I aim to identify the conditions under which scandals implicating the PMSC industry may provide 'windows of opportunity' for regulations to be changed. Significantly, in reflecting upon my research question, I aim to move beyond the response of vote-seeking political parties (driven by their desire to propose policies that resonate with voters, and whose inclination toward these changes is influenced by factors beyond just policy considerations). Instead, I focus on how a democracy responsibly 'processes' policy/regulatory 'failure' in the aftermath of scandals.

1.2 Literature Review

The PMSC industry has been widely researched, with Singer's (2003) book being a noteworthy contribution that explores the origins and differences between these companies and traditional mercenaries. Singer's work helped to stimulate academic interest in the rapid growth of the PMSC industry. Even though scholarly attention mainly focused on understanding why states *use* PMSCs (Zamparelli, 1999; Shearer 1999; Singer, 2005; Kinsey, 2006; Krahmann, 2008; Avant, 2005; Petersohn 2010; Kruck, 2013),[2] in the aftermath of controversial incidents involving PMSC personnel

[2] For a functional perspective with an emphasis on the consequences that the blurred distinction between "soldier and contractor" could generate see Zamparelli, 1999; For an evaluation of the potential advantages and disadvantages of five different types of PMSCs see Shearer 1999; A lack of a better understanding of PMSCs i.e. what is this industry and where did it come from could have destructive consequences for policy and democracy see Singer, 2005; Similarly, seeking to capture the nature of this phenomenon with an emphasis on the secrecy that surrounds the industry see Kinsey, 2006; On the theoretical and practical consequences of the shift from states to markets

academic interest also shifted to state attempts to *regulate* the industry. Early regulation research thus covers the period when accountability concerns first arose. This was prompted, in part, by the UK and US' substantial use of PMSCs in Iraq and Afghanistan, exposing the scandalous behavior of contractors (Schooner, 2005; Scahill, 2008; Hedahl, 2012; Liu, 2017). Some of the most important regulatory issues studied included PMSC status in international law (Kinsey, 2006; Percy, 2007a, 2007b, 2009; Petersohn, 2014; Liu, 2017) and the effectiveness of state efforts to control the industry (Whyte, 2003; de Nevers, 2009a, 2010; Chesterman and Lehnardt, 2009; Francioni and Ronzitti, 2011; Bruneau, 2011; Bakker and Sossai, 2012; Percy, 2013).

The question of *regulatory change* was approached from the perspective of identifying problems and attempting to offer solutions. Due to the nature of the activities of PMSCs, which in many cases assume functions traditionally carried out by states, sometimes involving the use of force, and often undertaken in unstable situations or conflict areas, literature has depicted PMSCs as posing a real threat to state institutions (de Nevers, 2010; 2016) and individual human rights (Bakker, 2011; Bakker and Greijer, 2011 Francioni, 2011; Hoppe, 2011; Vrdoljak, 2011).[3] At the international level, PMSCs appeared to be operating in a grey area as there was no comprehensive international legal framework governing their activities, with many scholars calling for the development of a new international legal framework specifically for PMSCs. Besides the list of ineffective international regulations, at the domestic level, Western powers such as the United States, were not ready for the rapid and sudden expansion of the PMSC industry which exposed gaps in governments' policies, laws, and practices. Not only did this unpreparedness result in inadequate and reactive policymaking to regulate the industry,[4] but also the initial rush to hire contractors at the beginning of the war

---

in the provision of security now seen as a commodity rather than a collective good, see Krahmann, 2008; From a political- instrumentalist perspective the author offers a detailed analysis regarding the impact that the security market has on the control of force, see Avant, 2005; for an ideational approach on the question why states use PMSCs to varying degrees, see Petersohn 2010; For a synthetic perspective on the theocratization of the causes and conditions of privatization, see Kruck, 2013

[3] On the role of host state, see Bakker, 2011; On children's rights, see Bakker and Greijer, 2011; On the role of home state, see Francioni, 2011; On the role of the hiring state, see Hoppe, 2011; On the need of gender-sensitive measures, see Vrdoljak, 2011.

[4] The United States is an example of a state that has made an effort to establish regulations that hold PMSCs accountable for actions taken abroad. The Military Extraterritorial Jurisdiction Act (MEJA), introduced in 2000, represented one of such efforts. MEJA widened the scope of American jurisdiction to include civilians who support or accompany foreign armed troops. It applied to crimes that, if committed in the US, would carry a sentence of longer than a year. The law was initially restricted to contractors working for the Department of Defense (DoD). The MEJA was further expanded in 2004 to include contractors from any agency whose work supported the DoD objective. However, it did not apply to contractors working for other organizations engaged in their own business.

resulted in the relaxation of vetting procedures which allowed less qualified personnel to be recruited (Schooner, 2005; Bruneau, 2011). Clearly, the decision of governments to deploy unqualified and poorly trained personnel in combat zones, such as Iraq, carries significant risk and could potentially compromise mission objectives, which as the thesis shows, were only exposed in the aftermath of scandals.

This meant, most scholars agreed, that it was imperative to establish an effective regulatory framework to address these challenges. Legally, problems with the existing framework included the lack of extraterritorial application of domestic laws, the difficulties in conducting thorough investigations into abuses that take place in combat environments, as well as the practical problems associated with gathering evidence and bringing witnesses to trial since these companies usually operate in conflict zones (Dickinson, 2015). For instance, the fact that "multiple entities with conflicting purposes often collect information, and individual investigators may not be well-trained, [..] can combine to taint evidence" (Dickinson, 2015, p.9). Additionally, another problem involves the fact that in the rare instance that a prosecution is finally made, it can only apply to individual contractors since in many countries there is no statutory basis to hold the corporate body criminally liable (Shah, 2014, p. 2562; Liu, 2017, p.246). Finally, host states not only have weak judicial systems, but often they are "required" to sign exemption agreements with the hiring states which grant PMSC contractors immunity from local jurisdiction (e.g. Coalition Provisional Authority Order 17 with Iraq). Politically, scholars highlighted the fact that to maintain democratic transparency, it is essential that government contracts are subject to legislative critique rather than regularly (and unjustifiably) being labelled as classified by the US government (Avant & Sigelman, 2010). Furthermore, even those that are open to public scrutiny are usually vague enough not to provide full disclosure of the purpose or intent of the contract. This could constitute one of the largest impediments for effective regulation of the industry. Interestingly, Leander (2011) even argues that effective accountability is hampered by technical understandings of accountability (which prevent the politicization of the market) advanced by security experts but also by policymakers, lawyers, journalists, academics, and NGO activists who tend to use legal terminology when seeking to resolve accountability/regulation issues (p.2263).

To address these problems, scholars proposed solutions ranging from discussions on banning PMSCs from combat zones (Pingeot, 2012) to the effectiveness of self- regulation (Hoppe and Quirico, 2009;

de Nevers, 2009b; Liu, 2017). Somewhere in the middle, other scholars proposed that the state should devise instruments to regulate the industry, domestically. For instance, Elke Krahmann (2016) examined whether higher industry standards would be facilitated through procurement policies, and particularly, through three sets of mechanisms. These included, firstly, the specification of an eligibility criteria for companies seeking a contract, secondly, establishing specific contractual requirements, and finally, offering rewards or penalties to the industry when it enforces proper standards such as incentive fees, contract termination, and exclusion from future awards. Laura A. Dickinson discusses a range of mechanisms of accountability and constraint to protect the core values of the liberal democratic state, such as incorporating public law standards into contractual terms. This could be achieved, for instance, by explicitly extending public international law principles to contractors and establishing more precise terms (Dickinson, 2011; see also Dickinson, 2007). Interestingly, she recognizes that the solutions she proposes may be considered "inherently unrealistic because one of the main reasons governments privatize is precisely to avoid the kinds of constraints". However, she explains that "there are undoubtedly many people within bureaucracies, such as contract monitors, who honestly wish to do their jobs and would therefore welcome (and lobby for) mechanisms that increase accountability." (Dickinson, 2011, p.20) Despite the fact that she seems to acknowledge the need for a more actor-centered approach, it is doubtful whether the mechanisms she proposes were designed with such considerations in mind. Therefore, Dickinson's work is surely valuable but limited to the extent that – ultimately- she does not explain under which conditions change can materialize when 'real' actors interact in the context of decision-making processes.

Such work, which identifies the "gaps" in existing laws and regulations and offers solutions to revise them, advances a "problem- oriented" policy perspective (Scharpf, 1997, pp. 10- 12). This is surely valuable because it seeks to analyze "the nature and causes of (societal) problems that (public) policy is expected to resolve and the (empirical or potential) effectiveness of policy responses to these problems." (Scharpf, 2000, pp.762-763) It remains limited, however, to the extent that it fails to explain why decisionmakers are reluctant "to put the best policy recommendations in practice" (Scharpf, 1997, p. 11) to control the activities of PMSCs. In fact, as evidenced by four decades of implementation research, policymakers' ambitions and activities are only partially achieved as expected and planned (Pressman and Wildavsky, 1984). To compensate for this shortcoming, it is thus important to focus on "the interactions between policy makers and of the conditions that favor or impede their ability to adopt and implement those policy responses that problem-oriented

analyses have identified as being potentially effective" (Scharpf, 2000, p.763). In other words, scholars should also conduct "interaction-oriented" research (Scharpf, 1997). Therefore, the first way that this thesis seeks to contribute to the current state of knowledge is by offering insights to the regulatory process from a broader perspective and exploring the "real" interactions among *all* stakeholders. These include actors involved in policy formation as well as those entrusted with policy implementation. By exploring actors' input to the regulatory process, this thesis aims to unlock the black box of policymaking and identify the core political disagreements and alliances, limitations and opportunities within bureaucracies and organizations, legal obstacles, and other factors. This will help to move beyond actors' empty promises of reform and symbolic gestures and seek "real" solutions to complex implementation problems.

Inevitably, this thesis challenges the underlying assumption informing such work, which portrays the executive branches of government to be monoliths, with unitary interests and perceptions, and change to be only taking place at the "top" level of decision-making. While many scholars successfully identify the technical difficulties that legislators face in their efforts to draft effective instruments and effectively illustrate the struggle of politicians to secure their political survival, they underestimate the role of actors entrusted with policy delivery – especially top tier bureaucrats. These individuals, actively involved in drafting the contracts with PMSCs and making decisions on which information will remain 'secret', are afforded with great discretion both at home and abroad. In fact, this thesis shows that their role can become particularly decisive in terms of determining the final policy output when implementation choices are applied in conflict or post-conflict environments. "[This] textbook conception of the policy process" (Nakamura, 1987, p. 142) assumes a linear relationship between policy objectives and their implementation. The latter is reduced to the mechanical execution of predetermined actions that are necessary to achieve such objectives. Instead, this thesis anticipates reform to take place not only in the policy formation stage of the process, but also during the policy implementation stage (thus paying particular attention to how broadly actors decide to interpret the rules that they are mandated to apply). Finally, to the question: Does successful implementation depend solely on the adoption of a new legislative framework (and legislative design in general)? This thesis responds: Not necessarily. In fact, the opposite may be true since actors need time to understand how to apply a new law in practice. As Hin-Yan Liu notes "the solution is not necessarily more law, but […] an examination of how those

laws are interpreted and applied" (2017, p.341).[5] By posing these questions, I do not seek to perpetuate the artificial separation between politics and administration. I simply wish to capture the complexities of bureaucratic implementation as the result of interactions, that are essentially political, unfolding through processes of deliberation and authoritative decision-making, in the aftermath of scandals. This will determine the conditions that have the potential to stimulate or impede regulatory change.

The second way that I aspire to contribute to the current state of knowledge is by critically engaging with work that assumes the increasing power of PMSCs will thwart most attempts at legal and regulatory change that go against the wishes of the industry. The source of the considerable business power of PMSCs, Leander (2007a; 2010; 2011)[6] argues, stems from their perceived status as security experts. She explains that these professionals encourage the expansion of an apolitical technical understanding of risk, and its associated markets, which has a depoliticizing effect, thus lowering eagerness to seek accountability. Such depoliticization, she argues, constitutes "a serious obstacle to the innovative thinking that is the *sine qua non* of effective accountability." (p. 2253) Abandoning hopes of "taming" the industry, other scholars encourage states to outsource tasks with caution and only to the extent that they have the capacity to monitor and enforce regulation, particularly regarding activities performed outside of the companies' home states, given that "the industry's reach expanded more rapidly than the regulatory framework" (de Nevers, 2016, p.175). More

[5] However, at the same time, Liu seems to advance a problem-oriented approach emphasizing that "By detailing the source of the problem, the hope is both that better solutions can be crafted to this hitherto intractable problem and that there will be fewer opportunities for situations of impunity to remain in the future." (p.341) Overall, Liu presents a critique of what he refers to as the conventional approach, which assumes that legal mechanisms can combat the impunity of private military contractors by broadening the scope and application of the law. In fact, he argues that "the law is the source of, rather than the solution to, PMC impunity" (p. 337) supporting his argument by demonstrating that legal processes often absolve PMCs of responsibility for their actions and shield them from accountability.

[6] Leander (2010) refers to this particular form of authority as their 'symbolic' capital/power (which perpetuates their paradoxical impunity) which is based in powerful (discursive/practical) assemblages – "those related, respectively, to risk/security, neoliberal market governance and to the state's monopoly on violence" (p. 485). As a result, the biases that exist in the discourses and practices are systematically reproduced, affecting the understanding of legal accountability leading to exceptionalism, ad hocism, and inconsequentialism, which in turn lead to the establishment of ineffective legal processes that constitute the root cause of PMSCs relative impunity. In previous work, focusing on the issue of regulating "civil-PMC relations", Leander (2007a) also noted that the way PMCs shape security concerns and political priorities on a broader level has hindered this issue from becoming part of the agenda. This is not because it is "unimportant or irrelevant", but rather because the present context is one which allows PMSCs to be "increasingly present as a new cast of efficient, competent, and apolitical security experts. In this context, the concern with regulating the way PMCs (as specialists on violence) shape politics is readily swept aside and forgotten." (p.64)

specifically, literature has repeatedly warned states against the outsourcing of functions, that traditionally fall within the purview of the state, to PMSCs (del Prado, 2008). Some of the most controversial functions involve direct warfighting, the protection of individuals, locations and convoys in conflict environments, and International Security Sector Reform. These include the training of foreign armies, interrogation of detainees, intelligence gathering, [7] target identification and risk and security assessments, cyber security, and the operation of complex military systems, such as unmanned aerial systems (Chesterman, 2008; Bean, 2016; Berndtsson and Stern, 2016; Cavelty, 2016; McFate, 2016).

This thesis seeks to contribute to this discussion by demonstrating that there can be "windows of opportunity" in the regulatory process where *change* is possible despite the – admittedly - overwhelming power of the PMSC industry and its attempts to silence any calls for reform. While powerful actors are in an advantageous position in the political game during "normal" times, they are far from "in control" under the intense scrutiny that takes place in the "processing" fora in the wake of scandals. This thesis argues that such scrutiny has the potential to challenge established policies, the functioning of public institutions, and scrutinize the performance of political and bureaucratic actors, thus (temporarily) opening "windows of opportunity" for reform.

Clearly, the aforementioned concerns and warnings against the outsourcing of core functions are grounded in the conviction that states should maintain a monopoly over the use of violence.[8]

[7] For instance, Chesterman observes that the privatization of intelligence has expanded so dramatically that a senior executive from the US Office of the Director of National Intelligence during a presentation convened by the Defense Intelligence Agency revealed that "we can't spy...if we can't buy!' (Chesterman, 2008, p.1055-1056).

[8] Max Weber's conceptualization of the state exemplifies the legitimate monopoly of the use of force as a central characteristic of the state. Max Weber states that "a compulsory political organization with continuous operation (politischer Anstaltsbetrieb) will be called a 'state' insofar as its administrative staff successfully upholds the claim to the monopoly of the *legitimate* use of physical force in the enforcement of its order" (1978, p.54, original emphasis). In theory, the force exercised by private actors that is not condoned by the state can be perceived as a *de facto* and *de jure* challenge to the authority of the state. Janice Thomson famously wrote in 1994 that 'real' states do not use private force. She argues that the reason that the use of mercenaries in the 1960s wars of decolonization in Africa appear as anomalies is precisely because they are only 'marginally legitimate' (1994, p.97). The emergence and enforcement of the idea of sovereignty as a new geo-spatial conception of politics led states, willingly or unwillingly, to address the 'problem' of private force, and in the end eliminate it. In her account, the state rose on the ashes of private violence. Yet, this claim was challenged by scholars arguing that the fact that states increasingly became the only units able to legitimately wage wars does not mean that private force disappeared. In

Interestingly enough, Krahmann (2013) argues that the norm of the state monopoly on violence has transformed. Nowadays, she explains, the norm is understood as expecting states to only have a monopoly over offensive force (rather than both defensive and offensive). This was achieved by the US acting as a norm entrepreneur and supporting legal instruments that promulgate this new understanding of the norm. This means that US decisionmakers internalized the transformed norm and were reluctant to establish a framework that would regulate the industry's undeniable power. In fact, the in-depth study of international norms has been one of two ways that constructivist IR literature has attempted to approach and explain the (re)emergence of PMSCs in an international environment where the state monopoly of force is considered to have a widespread consensus. However, one must wonder: if Elke Krahmann is right and the outsourcing of military and security functions is already hardwired into the structures of the modern democratic state, then why do policymakers acknowledge the regulatory failures associated with particular scandals and continue to argue about the best way to put the industry under control during processes of sense- and decision-making (e.g., over the course of Congressional Hearings)? To answer this question, this thesis zooms in on the domestic arena and looks closer into whether contracting out has indeed become more acceptable. It does so by focusing on state decision-making processes especially because, as noted by Berger, political decisions "have to be legitimised, both internally within the group and externally in the rest of society. Such legitimations often involve a reinterpretation of past events, current conditions, and future goals" (Berger, 1996, p.327).

The other way that constructivist IR literature approached the industry was by highlighting the country-specific differences which produced variations regarding the compliance and interpretations of the aforementioned international norms. For instance, Anna Leander mentioned the significance of "historical practices" (2013, p.8), Andreas Kruck emphasized the importance of states' "prior ideational contexts" (2013, p.134), and finally, Van Meegdenburg emphasizes that decisions regarding state outsourcing are significantly "shaped by nationally shared values, understandings and dispositions" (2019, p.26). Van Meegdenburg's acknowledges that to better understand military outsourcing, it would be "interesting to revisit 'old cases' and critically assess the arguments and assumptions that have so far been dominant in the field" during (domestic) processes of sense- and decision-making over outsourcing decisions (Van Meegdenburg, 2019, p.39). However, despite this,

---

fact, de Carvalho explains that "the sovereign state did not emerge as private force was eliminated. Rather, it emerged as the role of private force changed, and as it was re-intertwined with public force in different ways" (2016, p.18).

such an in-depth analysis has not been made so far. This thesis thus takes a different approach, taking domestic processes and actors' input seriously, allowing for the examination of claims that support the notion that security is no longer perceived to be a public good provided by state officials who are answerable to a democratic system of checks and balances and the rule of law. Most importantly, such literature also remains limited to the extent that it only seeks to account for states' decisions to *use* PMSCs (either in a limited or a more expansive manner) but does not explain how this is associated with the way governments choose to *regulate* the industry.

This thesis thus aims to extend the PMSC literature by examining the arguments and counterarguments that actors exchange during their interactions with the intent of "processing" regulatory failures associated with particular scandals, in specified (domestic) institutionally-prescribed fora (i.e., Congressional Hearings). This also sheds light on the micro-level aspects that an IR approach cannot fully capture. I argue that it is only when you closely examine the specifics on the way in which a process unfolded and the exact input of actors' that *change* dynamics can become discernible.

Finally, and most importantly, it should be made clear to the reader, that this thesis is interested in studying the processes and actors involved when regulatory 'fiascos' are exposed in the aftermath of scandals, using the three 'scandals' involving the PMSC industry as examples. In other words, it uses the three failures of the US government to put the industry under control and, prevent heinous acts from taking place by US- contracted PMSCs, to demonstrate the multi-dimensional aspects of decision-making processes, especially when applied in an area with particularly sensitive dynamics during actors' interactions, such as the security domain.

1.3 Overview of the Argument

Scandals tend to become politicized rather quickly. Often associated with government "failures"[9], they typically evoke public outcry and a popular demand mandating governments to do better. As a result, scandals can potentially become a critical juncture in decision-making processes in the sense that they provide an opportunity to challenge past policies and the regulatory choices of government, who are often accused of failing to establish adequate measures that would have prevented the crises in question.

A government may "fail" in three different realms that represent "three types of doing, i.e., seeking to (1) steer processes to produce policies, (2) enact programmes/decisions which they seek to put into practice, and (3) impact on politics" (McConnell, 2008). Interestingly, Mark Bovens and Paul 't Hart (2016) argue that failure is not an inherent attribute of policy, but rather a (not necessarily evidence-based) evaluation of policy subject to contentious debate in the political discourse. In other words, failure is thus nothing more than a label, applied by stakeholders, that is constructed and argued over in decision-making processes. The fate of public policy is thus decided in ongoing framing contests between its advocates, on the one hand, and its critics and victims, on the other. Therefore, such events have the dynamic potential to prompt change (either through intelligent reflection upon past mistakes or out of sheer political necessity). Note that the scandals investigated in this thesis are associated with failure in the second realm, namely, a government's failure to implement – as intended - policies that it had produced. This means that these events, having exposed administrative failure, have the potential to instigate regulatory change.

Of course, not all scandals have (noteworthy) effects on the policy process in terms of purposive regulatory change. To identify the circumstances that may impede or facilitate regulatory change in the aftermath of three broadly similar regulatory failure cases or scandals, this thesis analyses the discourse that takes place in congressional committee hearings, relying heavily on Scharpf's (1997)

[9] Given that there is little consensus in the literature on the exact definition of these concepts, authors tend to use terms such as 'fiasco', 'failure' or 'mistakes' as synonyms. This thesis will thus be using them interchangeably – see Opperman and Spencer, 2017.

actor-centered institutionalist perspective together with Majone's (1989) "analysis-as-argument" as driving policy development.

Reconstructing three different hearing processes, I argue that, in the aftermath of scandals involving PMSC transgressions, windows of opportunity open for policy and regulatory change in two intimately related directions. In the first place, public scandals can politically instigate hearings with the intent of finding out what went wrong and to learn and improve policy and regulation. Second, and intimately related to hearings, I show that public scandals potentially engage a wider actor-constellation than in times of normal policy development and regulation. As a result, the regulatory status quo is scrutinized by an "extended" actor constellation, in a hearing context, which is no longer limited to the powerful actors (e.g., administration, industry) but starts to also include the public (e.g., victims, and families of the victims).

Such intensive scrutiny may in turn have two repercussions. Firstly, actors whose voices were not heard in the insider-biased "quieter" phase of policy development (Culpepper, 2011) become empowered. In fact, when change-oriented actors play their cards well, scandals may allow them to effectively challenge powerful actors and existing political coalitions, temporarily opening windows for reform. Secondly, powerful actors seem to be more constrained. In fact, the considerable power of administrative agencies to "regulate" the information that can be made available to the public (by classifying them as secret), as well as their influence in the decision-making process, seems to be considerably reduced. Similarly, despite the rising power of PMSCs, the industry appears to lose many high-profile political battles, in the aftermath of scandals, when "high saliency" issues are at stake (Culpepper, 2011). Increased scrutiny can thus complicate the ability of powerful actors to defend the regulatory status quo. Therefore, to understand how scandals are processed, it is necessary to study shifts in the "actor constellation" in relation to issue (scandal) salience (and by implication reform potential), associated with the (non-) participation of key actors in institutionally prescribed interactive fora, such as Congressional Committee hearings.

Then, by conjecturing that the process of argumentation itself is key to understanding actors' policy choices, this thesis seeks to determine the kind of arguments that have been most influential in discursive interactions (in the sense that they facilitate the particular regulatory change) over time. It

does so by proposing a conceptually derived framework comprised of six dimensions of policy advocacy (as elaborated in Chapter 2). To really explore the process according to which individuals form a specific understanding of an issue or change their perspective on it based on information presented to them, I consider it important to examine the individual arguments and counterarguments that actors employ in their effort to defend and strengthen existing policies and regulations or get rid of them and lay the ground groundwork for new ones. The proposed heuristic allows us to shed light on the "hidden" dynamics that influence attempts at regulatory reform by categorizing the arguments actors used to justify their regulatory choices, both in terms of defending the status quo and/or advocating policy reform, in the six theory-derived dimensions. Particular attention is given to actors' use of emotional appeal, expecting that, when employed, it can make certain types of arguments more influential in terms of their ability to effectively challenge the authority of powerful actors that favor the status quo, thus contributing to path-deviating change.

It is important to underline that this thesis does not claim that power does not matter. Rather, it seeks to trace and study those times when powerful actors appear to be more constrained. This means when they are confronted with atrocities that have taken place under their responsibility, which may precisely facilitate regulatory change and policy overhaul. Even during those "moments of weakness", leaders and top officials may still try to recover control by employing tools to shape the debate (that are available to them as they are already in a position of power), such as avoiding a public inquiry, refusing to present evidence or declining to reveal certain information. As the case studies of this thesis demonstrate (as elaborated in Chapter 3, Chapter 4 and Chapter 5), the success of such actors seeking to preserve the status quo, and of the critics advocating for regulatory change, ultimately depends on how the particular issue is being "processed" (i.e., the width of the scope of actor constellation, the type of arguments being used, and whether emotional appeal was employed).

Therefore, to make sense of the circumstances that may contribute to regulatory change, I argue that it is important to analyze two specific characteristics of deliberative processes, namely, (a) the scope of the actor constellation over the different phases of the hearing process and (b) the substantive lines of argumentation that actors voice (interactively) in the extended political hearing space, opened by the scandal, on three levels i.e., quantity, content, and intensity in a structured and systematic manner.

1.4 RESEARCH DESIGN

1.4.1 Regulatory Change

Regulations are rules, made by executive departments and agencies, to implement and enforce the laws (statutes) enacted by Congress. One of the primary reasons that Congress grants agencies the power to make rules is their extensive expertise which enables them to “fill in” technical details of programs established by Congress through legislation. However, agencies must not take action that goes beyond their legislative mandate i.e., in a way that Congress views as inconsistent with congressional intent (especially given that, unlike Members of Congress, agency personnel are not directly accountable to the electorate) (CRS, 2021).

Regulations have commonalities as well as differences with laws. A key difference between laws and regulations lies to the fact that the former governs everyone equally, while the latter only applies to those who deal directly with the agency enforcing them. In other words, this means that a law can govern the action of both the State Department and the Department of Defense, but regulations issued by the State Department are not binding to the Department of Defense. Of course, there are also commonalities. Firstly, both forms of rules express what an authorizing body considers to be appropriate behaviour. Additionally, both laws and regulations are tools which can be enforced to the full authority of the law as they are binding upon a broad or specified audience. This means that violations of those rules can be penalized with fines and/or imprisonment.

Regulations are created and revised through a process known as "rulemaking".[10] Departments revise their regulatory framework and practice to comply with legislative amendments enacted by Congress. However, departments can also *change* regulations without seeking additional action from

[10] The Administrative Procedure Act (APA) and internal agency policies determine the procedures for agencies to establish new rules. Yet, not all proposed rules undergo the same treatment. In the absence of specific statutory requirements, most proposed rules follow an informal rulemaking process, which involves the public known as “notice and comment” before the agency can adopt the rule. Alternatively, the APA allows for a different set of procedures called formal rulemaking when mandated by the governing statute for certain types of rules. In such cases, instead of the notice and comment period, the agency must conduct adjudicatory-type hearings as part of the rulemaking process. However, due to its lengthy nature, rulemaking is rarely mandated by Congress.

Congress. In other words, they have the sole discretion to decide if (and when) they wish to revisit the existing regulatory framework and/or practice. Recommendations received from the President, other agencies, but most significantly for our purposes, congressional committees can constitute events that have the potential to initiate this process.

Inspired from Boin, McConnell and t' Hart (2008), regulatory change can be defined as the fundamental revision of regulations and practices, which are not easy to amend under normal circumstances (this is the outcome studied in Chapter 3). To describe a "lesser" degree of change, the concept of fine tuning is deemed more appropriate as it describes the instrumental adaptation of regulations and practices, without any challenge to basic political values and standards (this is the outcome encountered in Chapter 5). Finally, scandals may have *no effect* on existing regulations and practices (this is the outcome observed in Chapter 4). Of course, to assign any reform to a specific category involves an element of subjectivity in the sense that a value judgement is required to determine the significance of any change. To ensure transparency for the reader, each empirical chapter has a separate section providing a detailed account of the outcome (i.e., any concrete or attempted changes to existing regulations).

1.4.2 Hearings of US Standing Congressional Committees

In the first subsection, I explain how committee hearings can initiate the rule-making process (and thus the possibility for regulatory change). In the remaining two subsections, I focus on two specific characteristics of US standing Congressional committees that make hearings conducted in these fora important to analyze. These include, for example, their power to convene hearings of an oversight character and their permanent role in the decision-making process.

Committee hearings can trigger regulatory reform

Due to the confidential nature of the activities outsourced to PMSCs, public information on deliberations regarding the regulation of PMSCs is almost non-existent. Decisions are taken, behind closed doors, by executives at the highest level "in a manner that's kept secret from the American

public." (Open Society Foundations, 2015, p.2) This is unsurprising since national security is often invoked as an excuse for the lack of transparency in areas cloaked in secrecy. Interestingly, Horton (2015) explains that such "claims of secrecy" are how bureaucracies accumulate and use power. Not only is the number of secrets being generated each year significantly larger, he argues, but those secrets encompass trivial matters that do not warrant such confidentiality. This is because it offers such agencies the power "to cover up mistakes to cover up ineptitude, to secure an advantage over bureaucratic rivals for access to greater funds, the ability to hire more people, to expand their competence, for more access to power within the state." (Open Society Foundations, 2015, p.5)

In normal times, departments (who maintain a secretive stance seeking to preserve the status quo) have little incentive to revisit existing regulations and practice. As a result, it is difficult to accomplish change in this area because regulatory failure is well hidden (by both Congress and the public). In the aftermath of scandal, however, Congressional committees can play a decisive role by using their power to convene public hearings in which they (publicly) scrutinize the practice and regulatory framework of implementing actors associated with the regulatory failure under examination. This intense scrutiny over the executive branch's implementation of the law, in the context of oversight hearings, has the potential to trigger the process of regulatory reform. Of course, whether *change* will eventually take place depends on how the issue will be processed.

Finally, it should be noted that, compared to the process followed for legislative change, the role of Committees in the regulatory process differs significantly. In the context of legislative reform, committees consider the bill in a session, offer amendments to the bill, and then the committee members vote to accept or reject these changes. In contrast, the role of Committees in the regulatory reform process is less straightforward. When regulatory failure is observed, Committees convene oversight hearings, invite and hear relevant actors (including representatives of the relevant department) and formulate recommendations for change. Yet, the authorizing board of the agency responsible for making the regulation has discretion on whether to follow such recommendations (thus changing the existing regulations and practice) or not.

Committees have the power to convene oversight hearings

It is well-known that congressional committees are an essential part of the decision-making process. They have the following main functions as outlined by the CRS (2017): gather information; identify problems and propose solutions to them; propose measures to the full chambers to review (legislative role); oversee the performance of the executive branch in executing its duties (oversight role); and investigating allegations of wrongdoing (investigative role).[11] Each committee has the authority to examine matters within its jurisdiction in the course of public hearings that may be convened for legislative, oversight, or investigative purposes.[12]

To reflect on regulatory failure, committees exercise their oversight role. Committee oversight is a mechanism utilized by Congress to verify that those responsible for implementation adhere to the policy objectives set by legislators, as well as to evaluate the effectiveness of programs in response to evolving circumstances. In the Federalist, No. 51, James Madison emphasized the importance of congressional inquiry and the need for a government to "enable the government to control the governed; and in the next place oblige it to control itself." Committee oversight, therefore, empowers members of the House and Senate to act as representatives for the American public, thus ensuring transparency and accountability within the government.

---

[11] Together the mix of negative and positive powers have kept committees at the center of the decision-making process. "An oft- quoted aphorism of Washington is that on Capitol Hill it is much easier to stop something than to start something" (Marshall and Wolpe, 2018, p. 1). This quote emphasizes the idea of negative power, that is, the ability to protect a status quo policy from being overturned by a competing policy. As already explained, committees enjoy such an ability through their gatekeeping power in deciding whether to report legislation to the floor for consideration (Deering and Smith, 1997). Committees are also advantaged in policymaking through their positive power. Positive power reflects the committee's ability to persuade a floor majority to adopt the committee's policy over some status quo or rival policy that would have otherwise been preferred. The source of positive power lies in the policy information and expertise that they derive from the hearings which they can then selectively use to persuade and build internal and external coalitions thus more easily overcoming opposition to committee legislation (Marshall and Wolpe, 2018).

[12] Legislative hearings involve examinations of proposed measures or policy issues within the Committee's jurisdiction. Oversight hearings, on the other hand, concentrate on the execution and management of programs established by law. Finally, investigative hearings are primarily concerned with addressing allegations of misconduct by public officials or investigating significant crises. Both oversight and investigative hearings may result in the introduction of legislative proposals. Following, the hearing process, committees engage in "marking up" one or more relevant bills often preparing a consolidated version of a "clean bill". These Committees possess substantial power as they play a crucial role in determining the fate of measures and influencing the agenda of the chamber they belong to. (CRS, 2009; 2017)

About one-quarter of all committee hearings relate to oversight of executive agency operations (CRS, 2009). When regulatory failure is observed, committees invite the actors responsible for implementing a particular law with the purpose of evaluating whether a particular piece of legislation has been properly enforced. Committee members question those officials, and tend to confront them when they are being evasive. Ultimately, if the answers they receive are not satisfactory, they usually make recommendations for change.

Notably, committees have the power to summon individuals, as well as written materials, under a legal process (subpoena). Yet, they rarely need to resort to such formal measures because the executive branch tends to cooperate with Congress. This cooperative tradition between the executive branch and the legislative committees can be traced back to the Congress' "power of the purse", where the Committees responsible for overseeing spending matters have the authority to authorize and allocate funds for executive branch operations.

It is crucial for the purposes of this thesis that the records of such oversight hearings are public, thus allowing us (a) to map the shifts with respect to the “actor constellation” and (b) to analyze the arguments that actors use to justify their regulatory positions. Such information compensates in part for the lack of publicly available information on the interactions between the government and the industry during the early “quiet phase” (Culpepper, 2011) that takes place behind closed doors.

Committee hearings have a permanent (rather than ad hoc) character

In their volume, Boin, McConnell and t’ Hart (2008) study the characteristics of crisis-induced processes in “crisis commissions”. These commissions are ad hoc bodies, formed in the aftermath of specific crises, with the sole purpose of investigating what happened and formulating recommendations for improvement. The ad hoc bodies, examined in the different case study chapters of their volume, can be differentiated into two categories. The first type of inquiry is crisis investigations led by blue-ribbon commissions, which are often established to prevent the inquiry from developing into a politically motivated witch-hunt. These commissions rely on experts who are expected to refrain from making overly critical statements regarding the government’s involvement

in the crisis. Examples of such arenas examined in the volume edited by Boin, McConnell and t' Hart (2008) are: expert commissions led initially by a politician and then by a judge (Sweden), expert commissions led by a former secretary of state (USA), expert commissions led by a former admiral (USA), independent blue-ribbon commissions (USA), expert inquiries led by a judge (Canada and Israel). And secondly, Sofia Staelraeve and Paul 't Hart (2008) examine the inquiry process of the Belgian parliamentary crisis investigations. Such bodies are ad hoc and can only be established once a parliamentary majority is secured. More specifically, such special inquiry committees are convened pursuant to article 56 of the Belgian Constitution which stipulates that "each Chamber has the right of inquiry". Even though the powers and responsibilities of these special committees of inquiries are like those of standing parliamentary committees (as studied in this thesis),[13] the fact that a parliamentary majority is necessary to start an inquiry on an ad hoc basis can be problematic. In fact, Staelraeve and 't Hart argue that even though such bodies are expected to be independent, the political reality is different.

For the purposes of this thesis, I chose to analyze the hearings of *standing* congressional committees who have a mandate, like ad hoc crisis commissions, to focus on finding out what went wrong in the wake of a scandal. Yet, their existence does not depend on "majorities". As a result, their permanent and established role in the decision-making process allows them to be relatively independent as they delve into matters falling under the purview of the committees. They are also recognized as such by their legislative peers, the media, and the general public. Committee members thus acquire expertise but are not completely detached from the political arena.

Another limitation that ad hoc bodies face is that they tend to formulate sweeping recommendations often without taking organisational realities into account. In fact, "the more politically inspired reforms become reified as the one and only path towards a safer future, the harder it will be for organisations to honor them in practice without compromising long- standing routines and structures that had nothing to do with the crisis." (Boin, McConnell and t' Hart, 2008, p.311) If, and how, such recommendations will ultimately be incorporated into the organization's rules and practices depends on the disparity between the prescribed blueprint and the home-grown lessons. Rather than seeking

[13] For instance, both bodies can summon and hear witnesses and seize documents. It can also organize hearings with representatives of civil society, experts, etc. Both fora are generally open to the public unless the committee decides otherwise.

to completely resolve the crisis by proposing a definitive set of reforms, according to Boin, McConnell and t' Hart, the purpose of such fora should be to initiate a political and societal discussion on the need for change, thus setting the groundwork for further debate (2008, p.312). In contrast, standing congressional committees (as studied in this thesis) invite implementing actors to be part of the hearing's "constellation" on a regular basis. As representatives of the legislature, they formulate recommendations after interacting discursively with actors that come from the "bottom" (those that implement the legislation) level of the decision-making process, in a forum that takes policy analysis seriously.

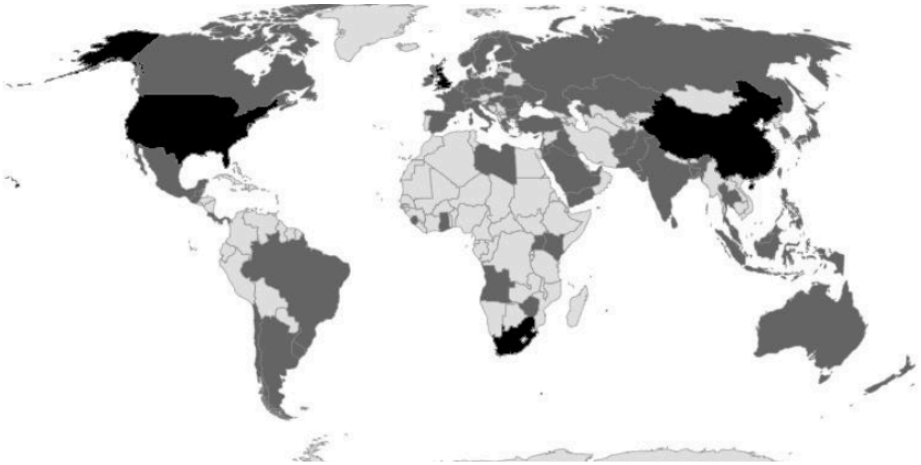
1.4.3 Cases and Case Selection

Reflecting on a dataset from Texas Tech University's Peace, War, and Social Conflict Laboratory (PWSCL-TTU), Ori and Burland note that "the 2000s boom of PMSCs was concentrated mostly in the US and the UK, which together account for over 55% of PMSCs across the sample". (2020, p. 4) Furthermore, McFate (2018) argues that the US alone revitalized this ancient mercenary trade when contracting out its wars in Iraq and Afghanistan. This is evidenced by the fact that in both Iraq and Afghanistan the number of contractors equaled or exceeded the number of army soldiers, creating a ratio of 1:1, or greater (Commission on Wartime Contracting, 2011, p.2). During the peak of these conflicts, PMSCs accounted for more than 50 percent of the overall presence of the Department of Defense (DOD) in Iraq and 70 percent in Afghanistan. In contrast, the outsourcing of military force during World War II amounted to only 10 percent (GAO, 2008; Congressional Research Service, 2016). Even more remarkably, these figures only cover contractors employed by the Department of Defense, and omit contractors used by other government departments.

Consequently, such a heavy reliance on contractors by the US normalized the use of PMSCs worldwide. Figure 1 (below) uses gray and black to identify countries that host at least one main PMSC headquarters within their territory and utilize its services, representing about 41% of all states in the global system today. The PMSC industry is dominated by four countries, marked in black in Figure 1: the United States, the United Kingdom, China, and South Africa. These four countries collectively account for approximately 70% of the entire industry (Ori and Burland, 2020).

Developing states are particularly likely to choose contracting, as they equate the use of PMSCs with maintaining control of their territories (Sutherland, 2021). For example, the Nigerian government turned to the PMSC industry in 2015 due to their issues with Boko Haram, and in a matter of weeks the PMSCs accomplished what the Nigerian government could not accomplish in six years (Sutherland, 2021). Notably, NGOs also regularly use both PMSCs and private corporations (McFate, 2018), primarily for protection in conflict zones. While currently such use is quite benign, some believe that the further use of PMSCs by private actors could become much more expansive, and problematic (McFate, 2018).

Figure 1: Global Spread of PMSCs Headquarters



(Source: Ori and Burland (2020))

This thesis focuses on studying the US for two reasons. First, amongst major global powers, the United States remains the principal consumer of PMSC services (McFate, 2018; Sutherland, 2021). In fact, the US awarded the highest number of contracts for its endeavors in unstable environments, as was particularly evident during the wars in Iraq and Afghanistan (Avant, 2005; Isenberg, 2009). "Contracting has become a new American way of war, and trendlines indicate the United States may outsource 80 to 90 percent of its future wars" (McFate, 2018, p.18). According to the Congressional Research Service (CRS), the US currently relies heavily, possibly for the first time in combat or stability operations, on private companies to provide a broad range of security services (CRS, 2011, p.1). Between 2007 and 2012, the US spent more than $160 billion USD on contractors, a sum that is four times greater than the entirety of the UK's defense budget (McFate, 2018).

Significantly, the Department of Defense utilizes PMSCs as a means to bypass presidentially imposed limits on troop numbers, as contractors do not count as "boots on the ground". For example, even though President Barack Obama set a limit of 4,647 troops in Afghanistan in 2016, the number exceeded that limit and reached 9,800 the following year. Additionally, there were more than 26,000 contractors providing support — nearly a 3:1 ratio between contractors and troops (McFate, 2018, p. 25). Similarly, during the Iraq mission, the Bush Administration deployed approximately 150,000 to 170,000 private forces to provide support, effectively doubling the US presence in Iraq, with little congressional or public knowledge (Avant and de Nevers, 2011). Furthermore, in addition to the Department of Defense, the State Department and the United States Agency for International Development also use contractors in war zones (USAID).

Second, the US appears to be normalizing the use of *armed* force by PMSCs by establishing legal and regulatory frameworks that authorize contractors to use deadly force for purposes other than self-defense (Krahmann, 2013). In the past decade, the US has also started using armed contractors openly, rather than in exceptional cases or clandestine operations only. A notable development occurred in 2001 when the US introduced the Defense of Freedom medal, specifically designed to honor civilians working for the Department of Defense who were injured or killed in the line of duty. This medal, akin to the military's Purple Heart Medal, strengthens the perception that US contractors are legitimate participants in conflicts, elevating their status to be on par with national soldiers.

Therefore, focusing on the US, this thesis thus studies the different outcomes of three similar cases of regulatory failures. Holding the regulatory environment constant, it is possible to compare how the three cases were processed (focusing on the actor constellation and actors' argumentation) to identify the circumstances that facilitate or hinder regulatory change. Chapter 3 studies how regulatory change was facilitated, in the aftermath of the Fallujah ambush scandal. The first important change involved the addition of an explicit requirement for a risk assessment of "circumstances" to be performed before a particular activity could be outsourced. The second change addressed the fact that existing regulations placed the responsibility for oversight of the PMSC activities abroad, not with the US military, but with the companies themselves (including the evaluation of the training of PMSC employees). Chapter 4 explores why effective regulatory change in the framework established by the State Department was hindered. The suggested changes involve a revision of the State Department's practice regarding (a) investigations and (b) referrals to the

Department of Justice (DOJ) to facilitate prosecutions when crimes by contractors hired by the State Department are committed abroad. Finally, this thesis investigates the circumstances that - partially - frustrated a decisive change to the regulatory framework of the Department of Defense in the aftermath of Jamie Leigh Jones' abuse scandal. This is because the language that the administration finally chose to argue for was far narrower than the one intended by the Act.

Having different reform outcomes becomes particularly "puzzling" when dealing with broadly similar scandals. More specifically, the case studies that this thesis explores have similarities in four important aspects. Firstly, all three cases received media attention and moral condemnation by reputable human rights Non-Government Organizations (NGOs) exposing the heinous nature of the crimes that were perpetrated in connection with the scandals (Amnesty International, 2008; Human Rights First, 2008, 2010, 2011; Human Rights Watch, 2011, 2013; Saferworld, 2007; War on Want, 2006, 2008, 2016).[14]

Secondly, regulatory failure was identified as a causal factor for the occurrence of the three scandals. As a result, the administration was invited to account for its inability or reluctance to build a regulatory framework that would either prevent the crime linked to the scandal (e.g., by establishing proper oversight over PMSC actions) or hold the industry accountable for its crimes (e.g., by establishing proper investigation procedures).

Thirdly, in the aftermath of all scandals, congressional committee hearings were convened as part of due process. Congressional oversight provides a useful and independent check on any claim of unjustified bureaucratic secrecy that followed the scandal (e.g., by using its investigatory powers to establish facts and, if they deemed it appropriate, publishing them). This is important because, in all cases, the administration was initially very reluctant to accept responsibility for the failures. This

[14] The thesis does not focus on companies that offer logistical support services as the most common issues of misconduct related to such services are typically overcharging and delivery delays for government-procured services. Instead, the focus is primarily on companies providing protection services and transportation for government officials operating in hostile environments. Examples of such companies include former Blackwater (now Academi), former Aegis (now acquired by Canadian Garda World), and former Armour Group (now part of British G4S). These corporate security actors often carry weapons and use force in the execution of their duties, despite their status as civilian contractors.

reluctance perhaps stemmed from the fear that, by acknowledging any evidence showing that the policies they had made or implemented did not work or had unforeseen negative consequences, their power and influence would be reduced.

Finally, it might have been expected that change in regulations – whether a stricter or more lenient approach towards PMSCs – could have been explained by shifts in political power. In fact, many representatives of the Democratic party expressed their concern over the uncontrolled proliferation of PMSCs and committed to establishing effective, pro-human rights regulation. In fact, the then Senator Obama even introduced a proposal for the adoption of a draft Security Contractor Accountability Act strongly criticizing the lack of transparency and accountability initiatives of the Bush Administration. There no notable shifts in political power, during the periods in question, that could account for the three different outcomes. Furthermore, many scholars note that even though "forty years ago, the idea of using armed contractors was anathema to policymakers. Now it is routine. This is not a Democratic versus Republican issue, but an American one. Since the 1990s, Presidents of both parties have used military contractors" (McFate, 2018). Therefore, the expansive use of PMSCs seems to be "one of the few issues in Washington that enjoys true bipartisan support, as Republican and Democratic White Houses rely on military contractors more and more" (McFate, 2018, p.23; see also Open Society Foundations, 2015, p.15). As shifts in political power cannot account for the different regulatory outcomes, it is imperative to search for different answers that do not focus on how a democracy "responds" to a crisis.

1.4.4 Methodological Tools

This section offers a synopsis of the methodological tools that were used (a) to trace the transformation of the actor constellation over the different phases of the hearing process and (b) to analyze the substantive lines of argumentation that actors voice in the extended political hearing space, opened by the scandal. To accomplish this, this thesis reconstructs the hearing processes, by analyzing the transcripts of Congressional Committees, convened to scrutinize the regulatory practice of the US Departments on specified periods following three scandals. Then, using qualitative content analysis, I analyze the arguments that actors used to justify their regulatory choices both in

terms of defending the status quo and/or advocating for policy reform on three levels i.e., quantity, content and intensity.

Reconstructing the Process

This thesis explores three regulatory failure cases or scandals with quite different regulatory outcomes. For each individual case, this thesis reconstructs hearing processes that followed the scandals in three separate empirical chapters. These hearings were convened to examine the regulatory failure associated with the scandal. By reconstructing the sequence of events comprising our process of interest, a *pattern* is revealed that involves specific changes in the actor constellation in the aftermath of a scandal. Drawing from Culpepper (2011), powerful actors are expected to prevail in political battles that take place in "quiet" phases (when the issue has not (yet) attracted the attention of the media and the public). In comparison, it is anticipated that high-profile political battles will be lost when "high saliency" issues are at stake since those are of high immediate interest to most voters ("noisy politics" phase). Therefore, keeping in mind that the hearings always follow the scandals in question, this thesis provides an explicit chronology of events, dividing our process of interest in three phases (pre-hearing phase, hearing phase, post-hearing phase).

To reconstruct the hearing process, this thesis used committee hearing transcripts that were systematically collected from Congress.gov. The hearings transcripts constitute the primary source of empirical data used in this thesis providing information that was otherwise unavailable. For an appraisal of the broader context, other sources were used such as articles, books, NGO reports, think tank and non-profit advocacy groups reports and investigative media reports, or official documents, such as bill proposals, legislation, and reports of oversight bodies (Government Accountability Office (GAO), Special Inspector General for Iraq Reconstruction (SIGIR), Special Inspector General for Afghanistan Reconstruction (SIGAR), Commission of Warfare Contracting (CWC)).

Pre-hearing phase: For each case, all actors involved in the deliberations were identified and their regulatory position (found in official public documents and statements) was documented. Three important observations were made: firstly, during this stage, only powerful actors had the

opportunity to participate in these early deliberations and voice their arguments, secondly, in the pre-hearing period, the existing regulations reflected the position of powerful actors, actively advocating for and seeking to preserve a regulatory status quo that was favorable to them. Finally, less powerful actors attempting to challenge the existing framework (e.g., NGOs) were not given an opportunity to voice their arguments in a formal (state) forum, and thus to advocate for regulatory reform.

Hearing phase: As already argued, in the aftermath of scandals, windows of opportunity open for policy and regulatory change as congressional committees convene public oversight hearings to discuss what caused the regulatory failure. Yet not all scandals lead to regulatory change. Change depends on how they are processed in the hearing context. Public transcripts were used to reconstruct each hearing process and trace the transformation of the actor constellation. Additionally, the regulatory position of all actors over the course of the hearings was again documented and, for those actors that were participating in the pre-hearing phase, compared with their earlier positions. Important issues that were considered include: Were (less powerful) actors, not previously engaged in deliberations, invited to participate in the hearings? Were they given an opportunity to voice their arguments? Did powerful actors agree to participate in the public hearings and what arguments did they use to defend the regulatory status quo?

Post- hearing phase: After each cycle of relevant hearings was concluded, this thesis evaluated whether (and to what extent) the relevant government departments were persuaded to revise their regulatory practice. More specifically, the dissertation examines whether the regulatory proposals that were brought forward by actors advocating for reform during the "noisy" hearing phase were being taken into consideration by the government departments. This thesis further used the "doctrinal" legal method (Hutchinson et al, 2012) to evaluate each outcome (i.e., applicable regulations at specific points in time) and eventually identify changes over the period of interest by comparing regulations before and after the hearing took place. By analyzing the content of the changes (if any) and comparing them to the arguments that pro-reform actors made, it was possible to draw conclusions regarding the success (or not) of their attempts, as well as detect the circumstances that triggered policy reconsideration or may have hindered regulatory change. It is noteworthy that these conclusions were drawn not only through an exploration of the three case studies but also an inevitable comparison of the three hearing processes.

Qualitative Content Analysis

The analysis of the process is complemented with an analysis of the legitimation strategies employed by actors of the hearing constellation, using qualitative content analysis. More specifically, the analysis focuses on how actors frame their arguments to justify/ defend the regulatory status quo or criticize/ advocate for regulatory change, in the hearing context.

I use the method as outlined by Schreier (2012) to identify the relevant data (i.e., actors' core arguments) from the public transcripts of relevant congressional committee hearings, to build a coding frame and subsequently to classify the arguments that actors used to justify their regulatory choices in a systematic way. Once a segment of the material was identified as a core argument, it was successively assigned under one of the six theory-derived categories representing six core dimensions of public policy. Each core argument represents one instance of an individual category of the coding frame.

The analysis of actors' substantive lines of argumentation was facilitated by the software programme MAXQDA (see Appendix 6). Specifically, using the software, the arguments of each category were quantified to find out which type of arguments were used the most during a particular hearing process. Arguments were also analyzed in terms of content and intensity (use of emotional appeal) to investigate how actors were framing arguments to substantiate their regulatory positions or attack the choices of others.

Relevant questions that were considered included: Which type of legitimating arguments do actors of the "constellation" use to justify their regulatory position (the most) in each hearing process? Do actors, upon confrontation by their opponents, stick to their guns at the risk of losing credibility, or do they change their tune? Is there an "elective affinity" between particular actors and the type of arguments they tend to use?

1.5 Overview of the Thesis

This section aims to provide an overview of this thesis' remaining chapters. Chapter 2 lays out the theoretical framework of the thesis which relies heavily on Scharpf's (1997) actor-centered institutionalist perspective together with Majone's (1989) 'analysis-as-argument' as driving policy development. During normal times the Departments have the sole discretion to decide if (and when) regulations can be reviewed. However, this thesis shows that, in the aftermath of scandals, hearings can trigger reform of the regulatory framework if implementing actors are (publicly) confronted with 'gaps' in their practice associated with a "fiasco". To identify the circumstances that may facilitate regulatory change, the analysis, firstly, studies the shifts in the 'actor constellation' in relation to issue (scandal) salience in institutionally prescribed fora i.e., Congressional Committee hearings. Then, to determine the kind of arguments that were the most influential in discursive interactions (in the sense that they facilitate regulatory change) over time, this thesis analyses the actors' argumentation on three levels i.e., quantity, content, and intensity. It uses a conceptually derived framework comprised of six dimensions of policy advocacy, namely, policy efficacy, political feasibility, state capacity, state competence, constitutional validity, and public consent.

For the institutionally dense democracy of the United States, the dissertation reconstructs hearing processes by analyzing the transcripts of Congressional Committees convened to scrutinize the regulatory practice of the US Departments on specified periods following the scandals. The three empirical chapters of this thesis explore the "processes" which lead to the three different regulatory outcomes. In Chapter 3, this thesis investigates the circumstances that facilitated change in the regulatory practice of the Department of Defense in the aftermath of the Fallujah ambush scandal. The author concludes that this outcome was facilitated by a wide actor constellation (which included the victims' families and members of the administration). This thesis further shows that the most influential type of argumentation belongs in the "public consent" dimension. Such argumentation is not only found to be the most extensively used, but the intensity (use of emotional appeal) and content of those arguments (which focused on exposing the failure of the government to establish oversight over the industry or impose penalties on those that inflicted harm to their loved ones) made them particularly important in the context of the hearing, effectively circumventing the impact of argumentation posed by powerful actors. Chapter 4 examines the circumstances that, in hindsight, effectively hindered change to the regulatory framework of the State Department, in the aftermath

of Nisour Square scandal. The actor constellation in the hearings was narrow as the families of the victims were not invited to the hearings. This thesis shows that the normative "public consent" dimension of argumentation did not muster enough reform leverage. Instead, it shows that most arguments were categorized as falling in the "state competence" dimension. This thesis argues that, during this hearing, the powerful actors were least constrained. Even though the members of the Committee challenged the validity of the State Department's arguments, they were not able to persuade the administration to publicly commit to the regulatory problems observed and change existing regulations. Chapter 5 examines the circumstances that - partially - frustrated a decisive change to the regulatory framework of the Department of Defense in the aftermath of Jamie Leigh Jones' abuse scandal. In this case, even though the victims (including Jamie Leigh Jones) were present at the hearings, the representatives of the administration failed to attend two out of three hearings. Focusing on actors' argumentations, it shows that even though the percentage of public consent arguments was high, the percentage of "state competence" arguments was much lower than in other Chapters where the administration was present. Clearly, powerful actors were constrained - but only to an extent - as their absence was frowned upon by the members of the Committee.

Finally, Chapter 6 concludes the thesis by summarizing the findings and reflecting upon the literature and theory. The thesis also reflects on an important – and unanticipated- finding which involves the importance of actors' emotional engagement to the decision-making process while also making proposals for further research.

2 THEORY

2.1 INTRODUCTION

Four Blackwater guards, prosecuted with murder and manslaughter charges against innocent Iraqi civilians in Nisour Square, argued that the case should be dismissed on the grounds of "nonjusticiable political questions". This doctrine refers to the idea that courts, typically viewed as an apolitical branch of government, should not hear a case that is so politically charged. This is because it would be impossible for the Court to assess the contractors' reported misconduct without doubting the government's policy judgements and second-guessing "a myriad of State Department decisions about how best [to provide security] services in a war zone" (Re: Blackwater Alien Tort Claims Act Litigation, [2009]).

The above example shows an attempt to exclude the court from recommending reform to the policies, regulations, and practices of the executive branch of the US government. It provides a clear illustration of the tensions that can arise in different "stages" (see Section 2) and "phases" (see Section 4) of the decision-making process, involving different "actor constellations" (see Section 3) and different kinds of argumentative claims exchanged during discursive interactions (see Section 5). The underlying considerations behind such disputes touch upon basic principles of the nature of a democratic state, such as the application of the principle of the independence of the judiciary and claims regarding the politicization of courts and the judicialization of politics.

Therefore, it is important to propose a theoretical framework that would allow us to analyze actors' discourse and trace the multidimensional dynamics that shape regulatory efforts. The proposed theoretical account articulates six dimensions of public policy. It aims to bring some order to public policy analysis and, most importantly, to give institutional approaches of gradual but transformative change more theoretical bite. The overarching ambition is to develop a theoretical perspective that does a better job of explaining the politics of policy reform in: (a) an integrative fashion (the way highly specialized policy analysis does not) and (b) to offer more concrete tools to empirically study reform efforts, successes, and failures (beyond post-hoc labelling mechanisms) as multidimensional dynamic processes, from an actor-centered institutional perspective. More specifically, the proposed

heuristic expects reformers to operate within the political space of six core dimensions of public policy, namely, policy efficacy, political feasibility, state capacity, state competence, constitutional validity, and public consent. The six core dimensions are conceptually derived, by pairing Fritz W. Scharpf's (1999) categorization of 'input' and 'output' legitimacy, extended by an expansive approach to Vivien Schmidt's (2012a, 2020) elaboration of the 'throughput' legitimacy, to James March and Johan Olsen's (2010 [1989]) differentiation between the action logics of 'consequence' and 'appropriateness'.

The proposed framework builds on novel theoretical insights on mechanisms of incremental policy change, introduced and developed by Wolfgang Streeck and Kathleen Thelen (2005). Their account of institutional processes of policy 'conversion', 'layering', 'drift', 'displacement' and 'exhaustion' improves our empirical understanding of the muted character of reform dynamics. Yet, looking at existing accounts of institutional change, we discern certain limitations. Streeck and Thelen's (2005) perception of incremental yet transformative institutional change provides a list of potential modes of change and corresponding mechanisms. However, it is not possible to understand how (when, where, why, by whom) change itself is expected to arise. Even though exhaustion, displacement, layering, drift, and conversion constitute important theoretical innovations for describing how institutional change takes effect, together these mechanisms do not really help to theorize change itself. Also, in Streeck and Thelen's account, the role of actors remains theoretically underdeveloped., They are described as seriously constrained by institutions and at the same time, driven by their motivations, in a position to take advantage of them to advance their personal interests. Their capabilities and orientations are neither explained nor associated with different stages of the decision-making process (and corresponding institutional settings). Particularly, Streeck and Thelen seem to overlook the possibility of the purposeful motivations of actors that advocate for change. Particularly, the action of redeploying old institutions to new purposes (conversion), presupposes an active purposeful reinterpretation of existing instruments. Yet, Streeck and Thelen decline to explore how actors exploit the inherently ambiguous nature of institutions and reactivate and channel latent rules and routines to new purposes.

Following the introduction, this chapter is built up over six sections. First, section 2, focuses on the way *change* occurs during the often-neglected implementation 'stage'. Section 3 examines the theoretical tools provided by Scharpf's (1997) actor- centered conceptualization of the decision-

making process. Section 4 surveys the 'phases' of the decision-making process and how they are linked to an 'extended' actor constellation. Section 5 presents the proposed theoretical framework of six core dimensions of public policy in three parts. The first part discusses Majone's (1989) conceptualization of argument as driving policy development. The second part explains how the six core dimensions of public policy – policy efficacy, political feasibility, state capacity, state competence, constitutional validity, and public consent – are conceptually derived. The coherent characteristics that each dimension presents are investigated in the third part. Section 6 concludes with a brief discussion of the "elective affinity" between the transformation of the actor constellation and the type of argumentation used in institutionally prescribed fora.

2.2 'Stages' of the Decision-Making Process

Both Fritz W. Scharpf's (1997) and Stefano Bartolini (2018) underscore the political foundation of policy. Scharpf (1997) argues that one of the most important things in politics "is the function of selecting and legitimating public policies that use the powers of the collectivity for the achievement of goals and the resolution of problems that are beyond the reach of individuals acting on their own or through market exchanges" (Scharpf, 1997, p.1). In other words, Scharpf believes that policies will have staying power when state officials who have been granted a democratic mandate "by the people" deliver effective policies "for the people." Bartolini (2018) is not so sure that all it takes for compliance to be achieved is an optimally designed policy instrument. Describing political behavior as being "motivated by a wish to achieve the compliance of other humans with the attainment of one's own goals (including the goal of the satisfaction of commanding)" (Bartolini, 2018, p.84), he draws attention to the fact that rules and policies are constitutionally open to articulate contestation, making compliance more difficult to be reached and allowing reform to be more easily challenged.

Despite such contributions, public policy analysis often presents the decision-making process as being linear and devoid of politics, including three main consecutive stages (each with its own function and logic – see Majone, 1989, p. 1-2). These stages are (A) Setting Policy (B) Drafting Legislation and (C) Designing Implementation Mechanisms. In summary, it is expected that once a policy is properly examined and debated according to relevant procedures laid out by the

constitution, a statement of intent and a policy plan is issued. If the Executive determines that a new law is required to accomplish its goals, then this serves as the foundation for introducing legislation. If such a determination is made, a draft Bill is drawn up and then reviewed by the legislative Committees. If enacted, the implementation phase follows whereby the relevant government department issues regulations. Clearly, such a conceptualization of the decision-making process cannot be accurate. This thesis argues that the policy process can instead be described as a messy endeavor in which relevant stakeholders reach and revise decisions relative to the political 'saliency' of the policy issues at a given time (Culpepper, 2011). This means that certain salient proposals might never become legislation, while concrete pieces of legislation may never be properly implemented.

For our purposes, however, such literature, is particularly useful for two reasons. First, it makes change that takes place during the – often neglected by the literature – implementation "stage" of the decision-making process more easily discernible. This is important as actors involved in policy delivery act on the basis of a written text in the form of a law that is inherently vague[15] and continuously subject to interpretation (Holland and Webb, 2013). Even the commonly known legal principles of interpretation (the literal rule, the golden rule, the purposive rule, and the mischief rule) have been characterized as "rather crude labels for describing a complex mechanism, i.e., making sense of what someone else has written." (Holland and Webb, 2013, p. 258) Similarly, Lord Templeman said that the interpretation of any document is more of an art than a science (*Re M* (*A Minor*) (*Care Order: Threshold Conditions*) [1994]).[16] Further, Streeck and Thelen note that "the

[15] "When you look at any document the meaning attached to words is often influenced both by the fact that you wish your interpretation to be accepted and also by your general approach to life. What we mean by this last point is that some people are by nature apt to take words at their literal meaning—'it says X so it should mean X' (or, the Monopoly rules say 'take the card' so you must take the card)—while others naturally find themselves looking for the purpose behind the words—'what are these words trying to do?' (or what is the point in having cards marked 'Chance' if they leave you no choice whether to take them or not; surely there is a difference between 'Chance' and 'Community Chest'?)". (Webb and Holland, 2013, p. 258)

[16] For instance, in the notorious Nisour case there were two possible interpretations of Military Extraterritorial Jurisdiction Act (MEJA). Choosing a particular interpretation of the "to the extent" language and the "while employed" language, would determine whether there was a nexus with the DOD mission and thus determine whether the offense could be prosecutable by the DOJ. A narrow interpretation of MEJA, by considering the words as more than a temporal limitation, would imply that the Act applied only when Blackwater guards actively and directly supported the DOD mission "only in the limited capacities or at those limited times". This would mean that their employment was not the determining factor, but rather the specific actions, such as securing Nisour Square, would determine if they supported the DOD mission. On the other hand, a broad interpretation would interpret these provisions as establishing that the timing of the defendants' actions is the benchmark for assessing their employment's relation to a DOD mission. Ultimately, the Court concluded that the State

enactment of a social rule is never perfect and that there always is a gap between the ideal pattern of a rule and the real pattern of life under it." (Streeck and Thelen, 2005, p. 14) Therefore, even clearly defined rules can be challenged. Actors may use rule ambiguity for improved policy delivery by allowing for downstream professional discretion. However, such actions may also be purposefully employed to undermine a policy's established objectives. As explained: "questioning the true meaning of institutionalized rules happens not only in good will. Rule takers do not just implement the rules made for them, but also try to revise them in the process of implementation, making use of their inherent openness and under-definition" (Streeck and Thelen, 2005, p.15).

Secondly, the tools offered by this literature help us map the relevant actors and their interactions as they take place in different "stages" of the decision-making process. In this regard, the relationship between the "top" and "bottom" level of the decision-making process is particularly important and will be discussed next.

Top-down theories of implementation studies assume that decisionmakers can produce undisputable policies and laws that leave little or no discretion to the implementing actors who are mandated to execute them. These approaches can be described as prescriptive, as they perceive the policy objectives established by central government as the input and the subsequent implementation as the output. Specifically, Pressman and Wildavsky (1973) highlighted the linear connection between policy objectives and their enforcement, reducing the latter to the mechanical execution of predetermined actions deemed necessary to accomplish those objectives. Another assumption made by this strand of research is that policymakers can have perfect hierarchical control over the entire decision-making process provided that they pay attention to policy design and the 'scenario writing' process. This puts them in the position to thoughtfully structure the 'implementation games' (Bardach, 1977).

Department's broader interpretation of the Act was correct. The narrow interpretation, advocated by Blackwater guars, would have violated both the text and the purpose of MEJA, as the Act aimed to close a dangerous loophole in criminal law that would have allowed civilian contractors who commit crimes to evade punishment (United States of America v. Nicholas Abram Slatten, [2017]).

On the other hand, bottom-up theoretical models show that policy objectives often do not correspond with the observed implemented outcome, thus rejecting the assumption of top-down researchers that policies take their final form at the 'top'. In such studies, implementation is envisioned as a negotiation process between networks of implementing actors (Hjern, 1982). Starting with empirical problems, scholars of this theoretical camp aim to identify the causes that determine actions on the ground as well as offer precise empirical accounts of the strategies and interactions among the actors engaged in policy implementation focusing on 'street-level bureaucrats' (Lipsky, 1980). For instance, Elmore (1980) proposed the concept of 'backward mapping' as a way to investigate the efforts made by local agencies to resolve a specific empirical problem.

Clearly, many complications may arise during policy implementation. For example, it is possible that administrative agencies lack necessary resources (e.g., funds, technology, expertise) to implement policies, a consideration that might be unknown to decision-makers. Similarly, departmental competition with respect to the allocation of resources can intensify bureaucratic conflict and lead to resource misallocation. This thesis argues that it is mistaken to assume that the analysis and proposal of solutions to policy problems is the responsibility of a unitary policymaker who has the means and the will to effectively implement the proposed solutions in practice (Scharpf, 1997, p. 11). Instead, this thesis proposes a "hybrid" understanding of the decision-making process and advances a heuristic (discussed later in the chapter) that allows the tracing of tensions that arise during actors' discursive interactions. This reconciles the concept of political guidance by central governments with the arguments of bottom-up scholars that translating policy objectives into action relies on the interplay between several actors with distinct interests and strategies.

2.3 Scharpf's Actor-Centered Approach to the Decision-Making Process

Scharpf (1997) offers an analysis of the decision-making process that is both actor-centered and highly interactive in nature. The actor-centered institutionalist framework provides strong tools that can help to overcome many of the limitations of the existing problem-solving oriented PMSC literature, as discussed in the introduction of this thesis. Instead of identifying "the causes of a problem" and proposing "technically effective and cost-efficient solution(s)", Scharpf proposes an

interaction-oriented approach that facilitates an understanding of the reasons behind governments' unwillingness "to put the best policy recommendations in practice" (1997, p. 11).

Actor-centered institutionalism does not ignore the debate regarding the dominance of actors versus structure, or vice versa. Instead, it attempts to integrate both perspectives. Scharpf explains the importance of institutional effects on actors since they contribute to the formation of "actor constellations" (1997, p. 69) while also creating "systems of rules that structure the courses of action that a set of actors may choose" (1997, p. 38). However, the final policy output is still assumed to be determined by the interaction of 'pragmatically-selected' actors. According to Scharpf, actor interactions are more proximate explanatory factors to policy outcomes than institutions. This thesis employs the concept of 'actor constellations' to trace the participation of key actors in institutionally prescribed fora. Even though Scharpf expects actor constellations to be relatively stable during the decision-making process, the empirical chapters of this thesis offer evidence showing that the constellation changes during different 'phases' of the process.

Both individual and composite actors may become part of an actor constellation. Composite actors can be sub-categorized as 'collective' and 'corporate' actors (Scharpf, 1997, p. 54-55). Choices made by collective actors are not autonomous. They are "dependent on and guided by the preferences of their members" (Scharpf, 1997, p. 54). For instance, Congress could be categorized as such an actor. On the contrary, corporate actors, such as PMSCs, have "a high degree of autonomy from the ultimate beneficiaries of their action and whose activities are carried out by staff members whose own private preferences are supposed to be neutralized by employment contracts" (Scharpf, 1997, p. 54). Therefore, the preferences of employees are expected to be completely decoupled from the industry's course of action. Of course, the actor's specific professional ranking in the corporation produces variation in individual action resources. Significantly, the course of action of a corporate actor is not influenced by the population that they impact.

Actors are portrayed as having specific capabilities and action orientations. Action orientations include specific perceptions and specific preferences. (Scharpf, 1997, p. 43-44) Capabilities is a term meant to describe "all action resources that allow an actor to influence an outcome in certain respects and to a certain degree" (Scharpf, 1997, p. 43). They include personal properties (e.g.

persuasion), physical resources (e.g. privileged access to information) and action resources determined by institutional rules (Scharpf, 1997, p. 43).

An actor's orientations involve, firstly, cognitive orientations, secondly, preferences (which are further subcategorized as basic self-interest, normative role orientations and identity), and thirdly, interactive orientations (Scharpf, 1997, p. 60 - 66). Each of these elements will be briefly discussed. Firstly, cognitive orientations are not evaluated on an individual basis. Rather, both knowledge and ignorance are considered to be shared among actors in an interactive process unless there is a specific reason to consider otherwise. Secondly, preferences are subdivided into three categories: interests, norms, and identities. Therefore, actors can either serve their own subjectively defined self-interest or follow their own normative convictions as to what is 'good' or 'appropriate' in a given situation. Normative orientations do not necessarily need to transform to legal rules and sanctions do not have to be taken seriously by other actors. Instead, they can simply take the form of shared understandings among participants where violations of normative practice will receive criticism and contempt. Actors might choose to emphasize the former or the latter, according to a given context, thus forming a particular identity. Thirdly, interactive orientations in an actor constellation can, according to Scharpf, include five different types, namely, individualism, altruism, solidarity, hostility, and competition.

Scharpf aims to link modes of interaction (based on actors' orientations) to specific outcomes. The limitation here is that the analysis appears to lose sight of the process itself. In other words, by putting too much focus on combining particular 'modes of interactions' with particular 'actor constellations' to explain outcomes, Scharpf underestimates the way in which the interactive process itself could have an effect on outcomes. To compensate for this, this thesis will (also) pay attention to the process itself by analyzing actors' discourse and argumentation.

2.4 'Phases' of the Decision-Making Process

Culpepper traces the source of powerful corporations back to their managers' expertise and their ability to influence both the government as well as certain members of the legislature (Culpepper,

2011, p. 9). Defining political salience as the significance of an issue to the average voter in comparison to other political issues (Culpepper, 2011, p. 4), he expects that business interests will win political battles when dealing with 'low saliency' issues. This is because such battles tend to escape the attention of the media since they are of little interest to the public. This enables politicians to disregard popular opinion to ensure reelection (defined as the 'quiet politics' phase).

However, powerful corporations may lose many high-profile political battles when 'high saliency' issues are at stake as they are of high immediate interest to most voters (described as the 'noisy politics' phase). Such issues attract the attention of the media who develop independent sources of expertise, thus reducing any information asymmetry between the media and the public, on the one hand, and industry, on the other. This brings increased attention to the politicians' policy choices. Fearing that they may lose votes, politicians become less susceptible to the industry's influence.

State regulation of PMSCs generally constitutes an issue of 'low saliency' that the average voter is unlikely to be knowledgeable about. This is firstly due to the remote consequences of PMSC activities on the public of the hiring/home state, and secondly, because such meetings are conducted between industry experts and state officials behind 'closed doors'. PMSCs offer states the possibility to have a military presence abroad, without the need for accountability to the legislature or the electorate, as would have been the case if they had decided to send the military. This makes their services very attractive to states. As a result, during this 'quiet' phase, industry has significant influence on state regulatory practices.

However, empirical findings of this thesis show that, in the aftermath of scandals, the media and public start paying attention to the 'failures' that led to the crisis in question. The issue temporarily obtains a 'high saliency' status with two implications. Firstly, the scandal may instigate political hearings aiming to find out what went wrong. Secondly, the regulatory status quo may be scrutinized by a more 'extended' actor constellation than in times of normal policy development and regulation. During the 'quiet' phase, the constellation is comprised of industry and the executive. However, in the wake of scandals, the actor constellation expands to include less privileged actors such as members of the public. During the 'noisy' phase, actors who were unable to voice their arguments in the previous 'quiet' phase, can bring their proposals forward and challenge the regulatory status quo.

To investigate how such scandals are processed, this thesis analyzes the deliberations of actors interacting in democratic fora and the arguments employed to defend their regulatory position.

2.5 Argumentative Claims

2.5.1 Argumentation in the Decisionmaking Process

In his book 'Argument, Evidence and Persuasion in the Policy Process', Giandomenico Majone discusses democracy as "a system of government by discussion" (Majone, 1989, p. 1) emphasizing the practice of discourse and argumentation in specified institutional settings. In such settings, actors are obliged to put arguments forward to clarify their policy positions and persuade others to align with their position, conjuring up "a method of mutual learning through discourse" (Majone, 1989, p. 8). Arguments are "central in all stages of the policy process" (Majone, 1989, p.1). In this context, actors formulate problems and listen to the proposals and assumptions of others, engaging in a process of discursive argumentation over previous policy experience.

Majone seeks to discover the main implications of adopting a dialectical approach to policy analysis which has "less to do with formal techniques of problem solving than with the process of argument" (Majone, 1989, p.8). His conceptualization of persuasive argumentation in the policy process is inspired by Aristotle's 'dialectic method of argumentation' (Majone, 1989, p. 6).[17] A persuasive argument is described as one that can enhance the acceptability of a selective policy choice as well as provoke other actors to search for even more conclusive evidence to base policy choices upon. At the same time, insufficient empirical evidence offers a unique opportunity for actors seeking to change the status quo to anchor their arguments on such premises and advocate for reform. However, it

[17] Majone's conceptualization of the argumentation process is inspired by Aristotle's 'dialectic method of argumentation' (1989, p. 6), namely, the method of *sullogismos* (Greek: συλλογισμός). It is necessary to clarify that Majone is supposed to have drawn inspiration from Aristotle's 'Art of Dialectic'. This is a two-fold process which requires, firstly, the execution of the method i.e., the discovery of whether an argument is a *sullogismos*, which hinges on whether its conclusions necessarily result from its premises. Subsequently, there is an evaluation of the likelihood that such premises will be convincing to a given interlocutor (Smith, 2019). This second aspect of the process explains Majone's continuous emphasis on the need to build a 'persuasive argument' that would be accepted by a given audience.

should be noted that the practice of argumentation is rarely 'dialectic'. Not all actors have equal opportunities to voice their arguments during all phases of the decision-making process. This is due to the prevailing balance of political power and institutional arrangements, which can significantly limit their engagement.

Despite Majone's failure to fully capture the intrinsic dynamic of the argumentation process as gradually producing change, his 'analysis-as-argument' approach to policy correctly emphasizes the pivotal role of the process of argumentation itself in understanding actors' policy choices. In other words, he draws attention to the importance of the 'process' itself rather than the 'outcome', which for the purposes of this thesis, offers us the theoretical tools to study interactive argumentation in democratic fora.

2.5.2 Democratic Legitimacy and Action Logics

Policy analysis not only requires knowledge of policy consequences in terms of their effective performance, but also the investigation of standards and values that underpin political problems. These two dimensions of policy correspond to Fritz W. Scharpf's (1999) analytical distinction between the input-oriented ("by the people") and output-oriented ("for the people") criteria of democratic legitimacy. While input legitimacy focuses on the 'who', and output legitimacy is focusing on the 'what', we are also interested in the 'how' of decision-making, explained by throughput legitimacy.

This triple foundation (input-, throughput- and output-oriented dimensions) of advanced democratic legitimacy is cross-paired with Johan Olsen and James March's behaviorally oriented logics of 'consequence' and 'appropriateness' (see table 1). March and Olsen's ground-breaking work 'Rediscovering Institutions' (2010 [1989]) paved the way for the creation of a nuanced perspective on action in policy studies, which championed both voluntaryism and contextual limitations (the weight of institutions) in the practice of policy and politics. While the logic of consequence focuses on desired goals and rules, the logic of appropriateness is concerned with the political-social environment in which these goals and rules are established. Each logic will be discussed in turn.

According to the logic of consequence, rational action is understood as a deliberate act aimed at attaining specific objectives using the best possible means and methods. It is assumed that the policy problems handled by decisionmakers are unambiguous. The actors are regarded as capable unitary actors with clear, stable preferences allowing them to achieve their goals (Coleman, 1990). A goal-realizing decisionmaker is supposed to choose based on complete knowledge of the available alternatives, as well as the anticipated consequences of alternative options. Knowledge of alternatives and their relative costs allows policymakers to (hierarchically) rank the policy options. They then ultimately choose the alternative with the highest net benefit by using a rational analysis of costs and benefits (Quade, 1975). The main question to be answered by the decisionmaker is which alternative produces optimal results in terms of efficiency and effectiveness. The synoptic-rational model presupposes (a) an omniscient actor, an actor who is not guided by institutions but rather restricted by them, (b) consensus on the hierarchy of ends and means (stable preferences) and (c) a sharp separation between values and facts. The inherent risks of making choices can be calculated in advance using probability theory and game theory, without distorting the rational-synoptic procedures of decision-making and policy development.

In contrast, following the contextually pre-structured and situational logic of appropriateness, March and Olsen assume an entirely different kind of behavior according to which actors are guided by what is culturally acceptable in a particular situation. 'Appropriate' behavior expects institutions to lead actors to behave in role- and rule-bound ways in light of the goals and purposes of the institutional structure. They interact in institutional contexts and their social behavior is "driven by rules of appropriate or exemplary behavior, organized into institutions" (March and Olsen 2010, p. 479). The actors feel those rules to be "natural, rightful, expected, and legitimate" (March and Olsen 2010, p. 479). Political actors are perceived as goal-seeking rather than goal-realizing. This means that they do not make policy choices based on supposedly stable preferences, but on what they perceive to be 'appropriate' in a given situation. Motivation and action are determined by the identities of decisionmakers. The way actors see their own role and the way in which they evaluate a situation determines, to a large extent, what they perceive to be 'appropriate' behavior. An actor's (individual or collective) identity and preferences may change depending on the institutional environment. Institutions are integral because they shape how policymakers view their role in the policy process. Social roles in policy and politics are largely shaped, mediated, and channeled through historically influenced institutional arrangements.

Overall, when actors argue in favor or against a particular policy choice, their argument can be framed in terms of an 'optimal' choice compared to the available alternatives (drawing from a logic of consequentiality), but also by alluding to the 'appropriate' choice informed by inter-subjective standards and norms. Where there is "purpose" there is meaning (appropriateness) and generally ideas on how to put purpose into practice (consequence).

Undeniably, it is difficult to explain human behavior by focusing narrowly on one logic of action. "Specific logics [...] can be good approximations under specific conditions" (March and Olsen 2010, p. 492). Any conceptualization that aims to categorize actors according to one single logic underlying their behavior could lead to the wrong conclusions. Based on this categorization, Abbot and Snidal distinguish between "value actors" and "interest actors". According to their analysis, interest actors can be described as rational and strategic participants of the "logic of consequence" driven by a motivation to maximize their preferences through their actions (2012, p.10). On the other hand, value actors are individuals who operate within the "logic of appropriateness", guided by principled beliefs and sociological norms in their actions (2012, p.10). For instance, they identify corporations as 'interest actors' and activists/NGOs as "value actors". Even though they acknowledge that some actors may have mixed motive, what should be expected from them is unclear. Our theory compensates for such false dichotomies. Categorizing the arguments rather than the actors themselves allows the multi-faceted nature of human beings and their interactions during decision-making processes to be captured.

2.5.3 Six Core Dimensions of Public Policy [18]

By cross-pairing Scharpf and Schmidt's triad of input, output, and throughput legitimacy with March and Olsen's behavioral action logics of 'consequence' and 'appropriateness', we are able to conjure up six core dimensions of public policy. Each of the six dimensions appeals to different 'truth claims' in argumentative political engagement. By analyzing the actors' argumentative claims, we can trace the tensions that occur across the six dimensions, resulting from the actors' interaction, in terms of

[18] The discussed framework is also elaborated in the draft paper by Anton Hemerijck, Kyriaki Kourra, and Maciej Sobocinski titled 'Six Core Questions of Public Policy: The Nested Politics of Structural Reform' presented in 2020 in the Workshop The Nested Politics of Structural Reform: Policy-Making in Times of Uncertainty (Autumn 2020).

the stakes at play, the actors involved from the early phase of politicization to the (temporary) closure of the reform.

More specifically, the proposed heuristic, shown in table 1, allows light to be shed on the 'hidden' dynamics that influence attempts at regulatory reform by categorizing the arguments used by actors to justify their regulatory choice, both in terms of defending the status quo and/or advocating for policy reform. Essentially, the matrix below constitutes a conceptual map which assists in navigating (in an orderly manner) the different aspects, or argumentative truth-claims, over policy reform processes. Each of these six dimensions exhibit coherent characteristics along the independent dimensions of legitimacy perspective and action orientation, which can be ideally distinguished from each other. This enables their categorization and analysis. Of course, some dimensions will be more important than others in different democracies and for different attempts to reform.

Table 1: Six Core Dimensions of Public Policy

	OUTPUT LEGITIMACY	***THROUGHPUT LEGITIMACY***	***INPUT LEGITIMACY***
LOGIC OF CONSEQUENCE	*Policy Efficacy*	*State Capacity*	*Constitutional Validity*
LOGIC OF APPROPRIATENESS	*Political Feasibility*	*State Competence*	*Public Consent*

POLICY EFFICACY

This dimension assumes a logic of consequence with a direct focus on output-performance. Policy efficacy is fundamentally dependent on critical changes in the policy environment that require problem-oriented interventions and reforms. A 'problem-oriented' approach to policy process research is necessary to investigate the causes of policy problems and propose solutions in the context of the wider policy environment in which they operate (Scharpf 1997, p. 11). Therefore, it is necessary to focus on the way actors with "bounded rationality" perceive the policy environment, a policy's stated objectives, and how they assess the policy options available to them. For instance, a "policy efficacy" argument made in the context of this thesis was voiced when State Department officials defended their choice to renew Blackwater's contract with the US Embassy in Iraq in terms of their effectiveness in keeping employees safe in a cost-effective way.

Actors' cognitive orientations are central to such research. Hugh Heclo (1974) emphasized that the dynamics of social learning, in the policy process, were driven by dynamics of expert input and political competition (Heclo, 1974, p. 320). Uncertainty is central to Heclo's understanding of the concept of policy learning emphasizing that "[p]olitics finds its sources not only in power but also in uncertainty—men collectively wondering what to do" (p. 305). This implies that policy actors are "reflexive". In other words, essentially, they can engage in problem-solving and propose potential policy solutions and alternatives in response to emerging problems (Mantzavinos, 2001). The process of information feedback thus involves active learning, which includes understanding and interpreting actors' changing cognitions, beliefs, and desires, rather than merely relying on past policy experiences (Hemerijck, 2013, p. 96). Actors are expected to engage in a continuous process of trial and error until they find 'satisficing' solutions (Simon, 1985). This process begins when existing practices appear unsatisfactory (Cyert and March, 2005), allowing actors "to detect and correct errors" to search for alternative solutions that will "improve the functioning of systems" (Olsen and Peters, 1996, p.4). Misconceptions, which are often the result of unstated assumptions, can bring unintended consequences. However, such errors are not necessarily fatal if information feedback remains possible.

Two criteria are particularly important to actors when it comes to policy selection. Policies must be effective in terms of their problem-solving or goal achievement, as well as efficient in terms of their relative cost. The goal of problem-oriented policy research is to evaluate the effectiveness and efficiency of potential solutions by using both *ex-post* and *ex-ante* policy analysis (Hemerijck, 2013, p. 146). In ex post policy analysis, the effectiveness of a policy is evaluated retrospectively provided that adequate indicators are available to assess the degree of goal achievement. This offers important practical insights on a policy's relative performance. Such knowledge explains why applying a previously successful policy no longer works. Ex- ante analysis however cannot be limited to a critical evaluation of a past policy's perforce since selecting policy is inherently a future-oriented activity. The groundwork for policy reorientation is typically more prevalent in think tanks and expert committees than political parties or organized interests. This is because the former is less influenced by the needs of ideological roots and interest-based constituencies that political entities often have to accommodate (Hemerijck, 2013, p. 102). However, once we move to the political preference among policy alternatives, then normative selection and political interests take priority. Competitive advantage can only be carried by problem-oriented policy if it is able to gather political support.

POLITICAL FEASIBILITY

This dimension follows a more contextual logic of appropriateness while focusing on output performance. This is the premise of 'interaction-oriented' research. Scharpf explains that "[p]ublic policy … is likely to result from the strategic interaction among several or many policy actors, each with its own understanding of the nature of the problem and feasibility of particular solutions, each with its own individual and institutional self-interest and its own normative preferences, and each with its own capabilities or action resources that may be employed to affect the outcome" (Scharpf 1997, p. 11). Actor interactions with the potential to create political coalitions in support of concrete policy proposals and reforms are those determining the relative success or failure of a policy reform.

Of course, the political feasibility of any reform is fundamentally situational. It is often conditioned by existing political institutions - such as electoral systems - which strongly affect political interaction (Hemerijck, 2013, p. 104). Policy choice is fundamentally informed by regular, free, and fair electoral

competition between different parties. In affluent democracies, as Bryan Jones puts it "[e]lections are the mechanisms that enforce that responsiveness" (Jones, 2001, p.170).

Electoral competition enables proponents of conflicting policies driven by self- interest to challenge current or proposed policies, particularly when these policies fall short of meeting public expectations. Therefore, "voter dissatisfaction can be a critical driver of reform" (Hemerijck, 2013, p. 100). Ambitious actors may use the feedback to revise and improve existing policies. However, this does not occur when reforms are seen as unrewarding. In the absence of a risk of losing power and authority, there is no inherent political motivation for these actors to learn (Hemerijck, 2013, p. 100). Heclo also recognized the possibility of "non-learning", acknowledging that policymakers may be unwilling or incapable of adjusting their actions to new insights, experience, and information (Heclo, 1974, p. 312). While it is accurate that policy decisions can be influenced by problem-oriented "puzzling", the determination of which ideas are the most impactful is the result of an interactive "contest of power" (Heclo, 1974, p. 306).

It should be kept in mind that processes of reform coalition formation are often disjointed because of multiple goals, conflicting aims, and power asymmetries. Actors not only contemplate substantive policy matters but also consider the causal connection between policy solutions and their position of power, pre-existing ideological beliefs, and normative orientations. These are significant because they decisively shape actors' interpretation of empirical information against or in support of proposed policy alternatives. Specific circumstances may facilitate or even encourage the formation of temporary alliances. For instance, on the aftermath of the Fallujah scandal, actors from both the Democratic and the Republican party formed an "alliance" to request information that the Department of Defense was reluctant to disclose, labelling them as "secret".

The process of politically translating policy proposals into actual and concrete reforms requires explicit and systematic investigation. Any reform entails the strategic framing of policy issues by political actors whose final outcome is determined by prolonged negotiations between political parties, governments, and social partners (Hemerijck, 2013, p. 111). Processes of reform are typically fragmented and opportunistic following paths with the least resistance. Unsurprisingly, reforms that change the distribution of power and challenge established interests are more challenging to achieve

(Hemerijck, 2013). However, these changes become more attainable when new normative frameworks and discourses are introduced. It is essential for actors advocating for reform to be prepared to challenge opponents by highlighting the problematic nature of their (distributive) resistance in terms of (problem-oriented) effectiveness and their (normative) fairness within the political sphere. To be successful, ultimately, pro-reform actors need to build political consensus (institutional) to gain support for the proposed reforms (Stiller, 2010).

STATE CAPACITY

This dimension concentrates on the throughput dimension of policy delivery following the logic of consequence. The state is expected to render procedurally effective solutions while ensuring that core state actors and institutions are not needlessly disrupted. State capacity is generally concerned with the ability of the state to ensure that its core activities, such as collection of taxes and provision of public goods, are effectively delivered. For instance, actors who do not favor the increased outsourcing of military functions to PMSCs argue that it will render a pre-existing institution useless, i.e., the army. The interventionist state is thus expected to effectively manage the tensions between existing policy commitments and the drive for new policy solutions to mounting adaptive pressures. The fact that the political authority over many public goods, in terms of delivery, is shared with private firms and civil society organizations is another challenge that the state needs to effectively handle.

The policy world is not a *tabula rasa* or a blank slate. Public policy provision is made up of various administrative layers, organizations, and public-private mixes which are the product of previously made choices. The essence of an institution is that to a certain extent it can create the conditions for its own survival. Therefore, any new policy must 'fit' (make sense) within the institutional environment in which it is expected to operate in the best way possible. Therefore, policy innovation should not cause unnecessary disruption to pre-existing institutional arrangements (especially if they cannot be easily altered or ignored at will). This surely implies that policymakers – when designing a law – need to settle for second best alternatives to find a way to pursue policy change at low transactional costs in relation to aspired to societal benefits.

Precisely because the political executive is fundamentally transient in liberal democracy, the state administration is a formidable structure of expertise, authority, and power. In fact, "the bureaucratic organization is technically the most highly developed means of power in the hands of the man who controls it" (Gerth and Mills, 2009, p.647). The relationship and modes of interaction between party government (cabinet) and its bureaucratic entourage is critical for the longer-term success of a policy reform. Furthermore, as is well-known, bureaucracies often pursue their own agendas in public administration, precisely because political government is transient. As such, administrative agency is a formidable modifier in reform efforts. It therefore cannot be discounted in the study of the 'nested' politics of policy change. As repeatedly emphasized in this thesis, no matter how effective a law is designed to be, implementing actors still enjoy some discretion in its delivery. This discretion can however be significantly curtailed by the pre-existing commitments of the state as observed by administrative officers to achieve effective policy delivery.

STATE COMPETENCE

This dimension is anchored in the normative expectation that, corresponding with the logic of appropriateness, policy implementation is pursued in ways that agrees with procedural standards safeguarding professional and normative integrity in policy delivery, while adhering to elementary accountability and transparency (Schmitt, 2012, p. 6-7). Such standards are fundamental to countering corruption in government, including the bribery of public officials, improper influence of private interests at the expense of the public, or the misappropriation of public funds or other resources for their private political and administrative gain.

In contrast with the state capacity dimension, actors' discretion is not confined by pre-existing institutional commitments but rather by standards of "appropriateness". Assuring the public of bureaucracy's adherence to fundamental standards and procedures lends moral authority to an administrative actor's determinations and reconciles people to adverse decisions. This is very important because, as will be repeatedly demonstrated in the empirical chapters of this thesis, bureaucrats discovered that attaching a "secret" label to their claims protected them from thorough examination. Further restricting access to this classified information by compartmentalizing the secret proves even more effective. This power together with the pyramidal hierarchical structure of

the bureaucratic organization, in which the sharing of secrets is restricted progressively from the top to the bottom, could lead to abuse of power. This is because when administrative agencies of the government classify something as secret, they are in effect regulating that information and using secrets to advance their own power and influence in the decision-making process. Such behavior can thus be attributed to professional ambition and/or departmental competition. Interestingly, Horton argues that "[b]ureaucrats are not driven by an antidemocratic ideology per se—though their use of secrecy may indeed be profoundly antidemocratic—but they invariably develop a desire to grow in size, wealth, and influence." (Horton, 2015, p.151) Secrecy thus becomes "an almost reflexive response by any battle-scarred bureaucrat" (Horton, 2015, p.152). In other words, it becomes the path with the least resistance for ordinary bureaucrats.

Congressional oversight and the use of formal procedures of accountability are essential to protect citizens from arbitrariness, negligence, and other forms of maladministration. The openness of government offices also plays an important role. Bureaucratic decisions can be more easily accepted by the public when the state shares information held by government agencies (including specific requests for the outcome of their application at a reasonable cost and without needing to pay a bribe). Additionally, measures that allow information to be shared with the public in plain language (and ensuring its availability in multiple languages) empower people and may increase popular trust in the government. This is because any suspicion of discriminatory conduct, inappropriate government influence, or even unreasonable delay, can be more easily alleviated.

Generally, public administration is expected to comply with legal rules in all its activities to prevent any arbitrary use of its monopoly on social intervention. Yet, even the most detailed law cannot predict all the circumstances that implementing actors will need to deal with in practice. Administrative officers are expected to take decisions daily without engaging in a fact-finding process (unlike courts) which legitimizes them to decide on the merits of individual cases. As a result, they might reach conflicting interpretations of the same text, and consequently proceed to implement the law inconsistently. Administrative discretion is primarily justified by *ambiguity* which is "a fundamental property of discourse, rules, texts, and institutions which are necessarily open to multiple (re)interpretations" (Crespy and Vanheuverzwijn, 2011). Textual ambiguity and vagueness, whether adopted intentionally or unintentionally by policymakers, affords implementing actors with broad discretion for interpretation and subsequent action on a case-by-case basis. Ambiguity has

been described as 'constructive' in the sense that it may open the way to incremental change (Mahoney and Thelen, 2010), but it can also turn into a weapon "in dubious cases, [where] power interests tip the balance" (Gerth and Mills, 2009, p.618). This is because the instinct of the bureaucracy to maintain its power may jeopardize democratic ideals and processes.

Implementing actors often work under the radar and therefore enjoy significant discretion. They also have great powers which allow them to 'creatively bend' certain rules and procedures at their own volition. For instance, the difficulty of regulating companies according to the services they offer was discussed by Peter W. Singer (2003).[19] These companies offer a wide range of services, from consultancy to armed security, thus making them very difficult to define and categorize. As a result, procurement officers are offered considerable discretion in deciding which companies to hire and which services to 'buy' (which makes them vulnerable to bribe and corruption).

However, administrative officers are not trained for such complex implementation exercises. As a result, they might attempt to go back to the conceptual level to clarify what were the policy objectives behind a particular law before deciding on how to act. However, such a task is particularly challenging due to the complexity of the decision-making process itself. This can make the initial objectives appear confusing and contradictory. In this case, officials may perceive challenges as a puzzle requiring the identification of a plausible and coherent solution. This does not, however, imply that the actor must completely dismiss all efforts to clarify the objectives. Rather, it suggests that the pursuit of coherence and clarity should be expanded to include practical ways to redesign current practice. Still, the fact that this process is not scrutinized on a continuous basis, due to work overload or insufficient budget, could undermine the fundamental principle of equality before the law. Therefore, given that these actors are afforded largely unfettered discretion, some 'safety valves' need to be put in place.

[19] For example, Peter W. Singer (2003) suggests a "tip-of-the-spear typology" which divides PMSCs into three groups: (i) private military provider firms; (ii) military consultant firms; and (iii) military support firms.

CONSTITUTIONAL VALIDITY

In contrast with “state competence”, the dimensions of “constitutional validity” appeal to a policy’s compatibility with constitutional provisions and formal rules. As such, claims to constitutional validity suggest consequential enforcement, sanctions and judicial appeal and review. Any ‘creative’ interpretation of the constitution is constrained by the strict procedures in place that request actors to justify their decisions. On the contrary, administrative procedures and interpretations (as discussed in the previous subheading) are not equally well-documented or scrutinized (unless a citizen brings a case to the court). Consequently, the actor’s margin of discretion expands considerably in agreement with an ‘appropriate’ administrative *esprit de corps*. This means that in a democratic state governed by the rule of law, judges are bound by law to offer an elaborate account of all implicit or explicit considerations they considered in their interpretation of the constitution. On the contrary, administrative officials, who exercise their discretion daily, are not similarly expected to explain their reasoning when ‘interpreting’ the law.

However, who determines the content of law? If the law is not to be infected by the moral debates leading to its creation in the first place, it should be possible to determine its content in a relatively uncontroversial manner, for example, by referring to specific sources, like statutes (Simmonds, 1986 [2008], p. 237, also see Dworkin, 1986 [1998]). For Hart (1961 [1997]) this is achieved by referring to the fundamental rule of recognition, which is established by observing the actual behavior of officials. By doing so, the content of the law can be determined through a purely empirical investigation without raising any controversial moral questions. Additionally, it assumes that a judge, when tasked with applying the rule of recognition, will adhere to the rule accepted by their fellow judges. This stands in stark contrast to the stance of the Dworkinian judge (Hercules) who does not aim to apply the theory of law accepted by other judges. Instead, it seeks to apply the soundest theory of law, irrespective of whether that theory is accepted by other judges. As a result, the way in which these sources are utilized will vary based on the judge’s overall interpretation. This, in turn, is influenced by their moral perspective, regardless of whether it aligns with those of other judges. The

judge is thus tasked with addressing a controversial question of political theory rather than a factual inquiry concerning the conduct of fellow judges (Simmonds, 1986 [2008], p. 200-216).[20]

Constitutional validity essentially demarcates the legal boundaries of an actors' margin of discretion under the rule of law. Therefore, an argument made by any actor in the context of the 'constitutional validity' dimension argues that a particular policy is either compatible or in violation with the constitution and other formal rules. The constitution represents a *higher law* which cannot be amended following standard procedures such as an ordinary legislative act (which usually requires a two thirds majority or a referendum). Most modern constitutions describe the basic principles upon which a state is based, it defines the structures and processes of government (how laws are made and by whom), and safeguards its citizens fundamental rights. An important function of this set of legal-political principles contained in a constitution is to shield the public from abuse of government authority i.e., it creates lines that no ruler can cross. To that end, the constitution constrains government power by establishing procedures for independent auditing and review. It also enables independent media, civil society organizations, political parties, and individuals to openly express their opinion on government policies without facing any reprisals or consequences.

The rule of law is quintessential to any democracy. This is because it protects political rights and ensures equal treatment under the law, as well as in the political sphere, and a politically impartial and independent judiciary. The guiding principle of the classical rule of law is the guarantee against arbitrariness in the exercise of state power. In the classical rule of law, public power is limited by the requirement for a legal basis (the principle of legitimacy), the division of the functions of legislation, administration, and jurisprudence among three different bodies (the principle of separation of powers), and the principle that the composition of the legislative body is determined by free elections (the principle of democracy). Legislation occasionally aims to embody and advance specific values. Discrimination law serves as a good example of this, as ever since the enactment of the Race Relations Act in 1965, its objective has been to declare certain activities unlawful, and more

[20] Regarding the status of principles, for Hart, they are described as extra-legal moral considerations which are applied by the courts, in the exercise of their discretion, when the legal rules fail to give a clear and determinate answer. For Dworkin, on the other hand, the criterion that distinguishes legal from non-legal principles is a different one - a principle is a legal principle if it forms a part of the soundest theory of law that could be offered as a justification for the established legal rules and institutions (Simmonds, 1986 [2008], p. 200-216).

significantly, to advocate for the principle of equality among individuals regardless of their race, ethnic background and other factors.

PUBLIC CONSENT

The notion that the authority of the government is derived 'by the people' is at the core of the 'public consent' dimension. As a matter of principle, the legitimacy of government policy is derived from the electorate's mandate. However, 'public consent' has a wider bearing with respect to normative orientations in society than the mere popularity of any concrete policy or piece of legislation. It refers to the extent to which any reform effort agrees with normative standards of acceptability prevailing in a society. It entails an element of inter-subjective evaluation of policy and the 'public good' as perceived by citizens. Significantly, policy choices tend to be perceived as 'appropriate' under given circumstances when they cohere with broadly accepted values of social fairness and the norm of democratic procedure. In fact, even those who would oppose concrete reforms tend to abide by them when they have a sense that they were established observing 'appropriate' democratic procedures, consistent with the rule of law. In other words, it is the democratic process itself that gives citizens the idea that they are being taken seriously, promoting the legitimacy of government action and, more generally, confidence in politics.

Over the past decades, however, public trust in government institutions and democratic processes has been disrupted. Klingemann and Fuchs (1995) note that the relationship between citizens and government has fundamentally transformed over the past decades. Citizens are much more critical of government performance. This can be explained as citizens have become much more critical of governments, particularly when scandalous stories involving public officials are revealed. In this regard, the way the media chooses to cover a news story is crucial. For good or bad, the media does not always stick to the factual events of a covered topic. It is the "drama" behind each story that makes the headlines. It is critical to observe that there is a difference between giving an account of a

scandal and employing "scandalization"[21] in the sense that the journalist is "not primarily concerned with informing the public, but rather with persuading the public that a severe, and indeed scandalous, transgression has occurred" (Graβl et al, 2021). This practice may eventually reduce people's trust in government. It is thus indispensable for any government, not only to abide by democratic procedures, but to allow citizens to witness it for themselves by participating in democratic fora. It must allow them to voice their arguments in the context of government processes. Such an action reassures citizens that the principle of 'government by the people' has been respected.

At the same time, though, secrecy in national security affairs can be particularly corrosive to democracy. Democratic deliberation is based on the principle that ideas, once presented to the public, are subject to scrutiny. Subsequently, debate will succeed or fail based on their own merit. In fact, "American society had been the historical fortress of publicity—championing the right of Americans to know in wholesome measure the inner workings of their government". (Horton, 2015, p. 193) The practice of bureaucratic 'secrecy' can produce a public that is poorly informed, and a government that is prone to corruption. In a democracy, the ultimate power to fix policy and law lies with elected officials and the voting public. However, when bureaucratic agencies classify information, they remove it from the information base available to the public, and from lawmakers and sometimes even the executive. This has a highly corrosive effect on democratic institutions and processes. This is because when information is labelled "secret", it cannot undergo examination and questioning within the context of democratic discussion (Horton, 2015). Weber further observes that the concept of the "official secret" is a specific invention of bureaucracy. For Weber, the logical check on unjustified bureaucratic secrecy is congressional oversight, providing a useful and independent check on any claim of secrecy (Horton, 2015). Yet, in facing Congressional Committees, "the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups." (Gerth and Mills, 2009, p.652) It is thus particularly important for Congress to keep congressional hearings open to the public. Horton argues that "bureaucrats who misuse secrets can be hauled before an open congressional hearing and hit with probing questions. In this fashion, even without disclosing the secrets, parliamentarians can

[21] "In this gray area of incidents that may or may not constitute severe transgressions, scandalization – that is, the reporting of events in order to *create* a scandal – plays a potentially important role. […] [S]candalization has been conceptualized as a communication process in which alleged transgressions are denounced with the aim of eliciting public outrage." (Graβl et al, 2021).

signal to the public that something is amiss and that they may have been misled." (Horton, 2015, p.198)

2.6 Conclusion

The proposed theoretically derived, multidimensional framework of the six core public policy dimensions seeks to reveal the 'hidden' dynamics behind contested reform processes. It will also eventually explain the circumstances facilitating regulatory change in an institutionally dense democracy, such as the United States. This empirically grounded heuristic identifies the most influential arguments in institutionally prescribed fora through an analysis of the argumentative claims expressed during actors' interactions. These may be cognitive claims of policy efficacy, claims of political feasibility regarding coalitional dynamics, they may involve an institutional assessment in terms of the state's capacity or competence to deliver, or claims of constitutional validity and public consent in terms of overall societal acceptance.

Overall, this Chapter's theoretical expectations revolve around two specific characteristics of deliberative processes which are considered to be significant in the study of regulatory change in a structured and systematic manner. The first is the scope of the 'actor constellation' which appears to transform over the different phases of the hearing process and is associated with issue (scandal) salience. The second is the specific characteristics of the substantive lines of argumentation that actors voice in the 'extended' political space of a hearing, opened by the scandal. Significantly, an "elective affinity"[22] (Howe, 1978) is anticipated between the type of argumentation that actors use and the scope of the actor constellation. In other words, the wider the actor constellation (with "unusual suspects" at the table negotiating reform), the wider the argumentative space (with a great(er) diversity of arguments becoming part of the hearings' discourse), the more likely it is that reform will take place.

[22] Max Weber used the term "elective affinity" to describe the relationship between Protestantism and capitalism (in The Protestant Ethic and the Spirit of Capitalism, 1905).

3 REGULATING AFTER FALLUJAH

3.1 INTRODUCTION

The Chapter analyzes two key hearings (see Committee on Government Reform, Serial No. 109–214, 2006; Committee on Government Reform, Serial No. 110–11, 2007) that took place in the aftermath of the Fallujah ambush scandal exposing the "failures" of the Department of Defense (DOD).[23] Over the course of the hearings, members of the Committees scrutinized and confronted DOD officials regarding their failure to establish a regulatory framework with explicit criteria regarding the way decisions over (sensitive) activities could be outsourced to the private sector, emphasizing the need for consideration of the "circumstances" or the environment these companies operate in. They also highlighted the need for government officials to assume responsibility over PMSC oversight (with implications for issues, such as the lack of scrutiny of qualifications and training of these contractors as well as visibility over (sub)contractors working alongside the US military).

This thesis argues that, in this case, *change*[24] was facilitated by (a) an "extended" actor constellation which included the families of victims who were invited to participate in the hearing and (b) the argumentation that such actors used to advocate for reform and challenge powerful actors that were seeking to preserve the regulatory status quo. Argumentation is analyzed in terms of quantity (which arguments were the most extensively used), content (whether influential arguments were reflected in the changes made by the Department of Defense) and intensity (the use of emotional appeal).

Following this introduction, this chapter consists of five sections. Section 2 presents the facts of the Fallujah scandal which exposed the "failures" of the DOD. Section 3 seeks to mark the changes that were made to existing DOD regulatory guidelines and practice. Section 4 traces the transformation of

[23] It should be kept in mind that each US Department issues its own set of regulatory requirements that apply to PMSC contractors acting overseas that can be amended, without seeking additional action from Congress, at their own discretion (see The Administrative Procedure Act 5 U.S.C. 552).

[24] *Regulatory change* is defined as the revision of regulations and practices, which are difficult to change under normal circumstances (Boin, McConnell and t' Hart, 2008).

the actor constellation and analyses actors' discourse during their interactions in the hearing context. It highlights arguments and counterarguments that appeared to be more influential in facilitating change. Subsections are drafted thematically to discuss specific arguments that later materialized in changes to regulations. These include issues of assessing circumstances before outsourcing, monitoring PMSC qualifications, control over (sub)contractors and coordination with the US military and the overall responsibility for PMSC oversight. Finally, section 5 concludes the chapter by summarizing the most important findings and further critically reflecting on whether shifts in political power could have better explained the observed changes.

3.2 The Fallujah Scandal

On March 31, 2004, a group of four American private security personnel, employed by Blackwater, a company contracted by the Defense Department to provide security services in Iraq, were ambushed and lost their lives while on a protective mission in Fallujah. The failure of the DOD to regulate the actions of Blackwater was criticized during the hearings, when the family members of the four victims testified that Blackwater not only failed to provide adequate protective safety equipment and guidance to their loved ones before sending them on the mission that cost their lives, but were even more disappointed that the US government and the DOD failed to prevent this from happening by exerting control over the actions of Blackwater. Andrew G. Howell, the General Counsel of Blackwater USA, attempted to prevent these testimonies and tragic events from being heard in such a public forum. He insisted that these facts were already the subject of ongoing litigation referencing the lawsuit against Blackwater for the wrongful death of four contractors brought by the victims' families (Committee on Government Reform, Serial No. 110–11, 2007). Despite his effort to silence the matter, the members of the Committee still heard the testimonies in the open hearing forum.

In fact, Congresswoman Schakowsky noted that it is about time to shed light on the matter because, over the past years, there have been several scandals implicating the PMSC industry exposing the challenges the government faces regulating PMSCs. For instance, even though the role of the military regarding the abuse of detainees at Abu Ghraib prison had been well-known, the involvement of private contractors from TITAN and CACI as interpreters and interrogators during the abuses was not widely known and acknowledged. Interestingly, the contractors involved in the scandal were not

subject to prosecution or imprisonment like their military counterparts. Instead, a few of them faced consequences such as having their security clearances revoked. (Committee on Government Reform, Serial No. 109–214, 2006, p. 6) Such incidents, she argues brought attention to the difficulties that arise when nonstate actors are hired to operate in active war zones without adequate regulation, or when the enforcement of existing laws is weak (Committee on Government Reform, Serial No. 109–214, 2006, p. 13) In fact, Congressman Van Hollen argues that the US seems to have turned over its governmental responsibilities to PMSCs (Committee on Government Reform, Serial No. 109–214, 2006, p. 12).

Congressman Shays brought up another incident where private military contractors were reported to engage in gunfire towards civilian vehicles travelling on the highway. He emphasized that it was unacceptable for the DOD representative who was present to the hearing to claim not to have any information on this case which was both recent and ongoing. The administration should have anticipated the question, he added (Committee on Government Reform, Serial No. 109–214, 2006, p. 64). Similarly, Congressman Kucinich showed his discontent with the fact that no representative of the administration was willing to answer his questions illustrated in the dialogue below:

> "Mr. KUCINICH. Anybody here qualified to answer that? And if they're not, why are you here? [..] I'd like to submit for the record the story from the Washington Post, contractors cleared in videotape attacks. It says the Army's criminal investigation division cleared these individuals. The investigation's not being released or publicly discussed. It said lack of probable cause or belief that a crime was committed in what was an attack that was allegedly videotaped. […] Back to the Department of Defense. Would the Department of Defense be prepared to see prosecution against any private contractor who was demonstrated to have unlawfully killed a civilian?
>
> Mr. ASSAD. Sir, I can't answer that question. I would have to take it back, and we will answer it for the record.
>
> Mr. KUCINICH. Wow. Think about what that means. If private contractors can get away with murder, and in some cases, they may have. It's not an adequate response really."
> (Committee on Government Reform, Serial No. 109–214, 2006, p. 65)

3.3 Regulatory Status Quo and Changes

Circular A-76, as adopted by George W. Bush, on 29 May 2003, afforded the administration with "substantial" discretion in determining activities as "inherently governmental" based on four broad criteria (Circular A-76, 2003, Attachment A, Subsection B (1) (a)).[25] The word "substantial" was interpreted by many as affording executive agencies with unfettered discretion in contracting state functions to private corporations (e.g., Laubacher, 2017, p.808). This is most remarkable when it comes to outsourcing *armed* security services. This is because the Circular specifies that these policies do not forbid the contracting of services for guarding, convoy security, pass and identification, plant protection, or the management of prison or detention facilities, regardless of whether *the providers are armed or unarmed* (Circular A-76, 2003, Attachment A, Subsection B (1) (c) (4), emphasis added).

In line with the logic of Circular A-76 (2003), the Department of Defense issued a number of regulations to control PMSC activities abroad. The most important was Department of Defense Instruction 3020.41 (DODI 3020.41), which was released on 3 October 2005. It sought to offer a comprehensive guide outlining the policies and procedures applicable to contractor personnel authorized to accompany the US Army forces by ensuring that "contracts clearly and accurately specify the terms and conditions under which the contractor is to perform" and by describing "the specific support relationship between the contractor and the Department of Defense" (DODI 3020.41, section 4.1). Even though it states that inherently governmental functions (IG) cannot be outsourced to private entities, it fails to explain how the *contracting officer* is supposed to make decisions before outsourcing specific activities (e.g., provision of security), particularly when they are closely associated to IG (DODI 3020.41, section 6.1.5). Department of Defense Directive 1100.4 (DoDD 1100.4) also states again that IG activities must not be contracted without further guidance on how discretionary decisions shall be made by the DOD. Notably, DODI 3020.41 states that the

[25] The criteria are, "(1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (3) Significantly affecting the life, liberty, or property of private persons; or (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds."

provision of *security services* is "permissible", even though contractors – more often than not – need to use armed force to perform assigned security duties (subsection 6.3.5). Such determinations are made again – a priori – by the *contracting officer.* This means a DOD employee working from an office in the US, not a military commander working in the field alongside these contractors who is aware of the *environment* that the security provider is actually operating in.

Further, DODI 3020.41 (2005) stated that it is the defense contractor – rather than military commanders or the DOD contracting officer- that are ultimately responsible for ensuring that PMSC contractors fulfill their expected obligations under the terms of the contract, adhere to theater orders, and comply with relevant directives, laws, and regulations. Furthermore, they are responsible for maintaining employee discipline (Section 6.3.3. DOD Instruction 3020.41, 2005).

This has many repercussions. Firstly, it means that the DOD would mainly receive information on incidents involving PMSC employees (including their conduct and performance) from reports that the companies themselves were providing them. This is problematic as these are for profit companies, who wish to keep their contracts with the DOD. They therefore may be tempted to provide false information regarding the situation on the ground which can result in waste, fraud or even death (as evidenced by what happened in Fallujah). Secondly, the contracted activities designated in specified categories between PMSCs and the DOD might run for years, while the environment that the former operates in changes constantly. For this reason, "circumstances" may render services IG. As it is the company's responsibility to convey information to the DOD in a timely manner, as evidenced by the Fallujah scandal, such information was buried. Thirdly, it was the defense contractor's responsibility to provide documentation on the employee's training and qualifications in the form of a written acknowledgement stating that they are sufficiently trained and qualified (again potential conflict of interest).[26] Finally, the military commanders had very little visibility (let alone control) over the multiple layers of subcontractors thus making coordination with the US military on the ground particularly challenging.

[26] Mr. Assad, the DoD representative, confirms that he is unable to provide information regarding the specific training programs offered by individual companies. Such details, he adds, would need to be obtained directly from the respective company in question and that it surely depends upon "the nature of the security provided and upon the individual contract statement of work." (Committee on Government Reform, Serial No. 109–214, 2006, p. 36)

REGULATORY CHANGE (I): A few months after the first hearing took place on June 13, 2006, specific guidance on the way DOD officials were expected to determine whether an activity is IG or commercial was – finally – released under Department of Defense Instruction 1100.22 (DODI 1100.22 2006). This Instruction, released on September 7, 2006, included language that specifically separated such activities into three broad categories services including "inherently governmental" (and thus could not be outsourced), "commercial but exempt from private sector performance" (and thus could not be outsourced) and "commercial and subject to private sector performance" (and thus could always be outsourced) – see section 6.2, DODI 1100.22 (2006).

Significantly, shortly after this Instruction was released and only 3 months after the second key hearing (which took place on February 7, 2007), the DOD revised section 6.2 again (on April 6, 2007), to include another category, namely, "activities associated with inherently governmental functions" which could only be outsourced under very specific circumstances (DODI 1100.22, 2007). Specifically, DODI 1100.22 (2007) dictates that "particular attention should be paid to activities that are associated with IG functions [...] Although these functions are generally not considered to be IG, they may become IG because of the way they are performed or the *circumstances* under which they are performed." (Subsection 6.2.2, DODI 1100.22, 2007, emphasis added) This is important because it explicitly acknowledges the need for a determination of the circumstances in which an activity is executed *before* it is outsourced to the private company.

Additionally, regarding the particularly sensitive – as it often involves the use of force - case of the provision of security in *"in Hostile Areas*" (DODI 1100.22, 2006; DODI 1100.22, 2007, para. E2.1.4, emphasis added), the Instruction notes that such activities are IG if performed in "unpredictable international or uncontrolled, high threat situations". Echoing the concerns raised during the hearings, paragraph E2.1.4.1.4 explains that: "Security operations that involve more than a response to hostile attacks typically entail substantial discretion and are IG. For example, security operations that are performed in highly hazardous public areas where the risks are uncertain, could require deadly force that is more likely to be initiated by U.S. forces than occur in self-defense". This emphasizes that such high-risk operations should thus solely be executed by the military. (DODI 1100.22, 2006; DODI 1100.22, 2007)

REGULATORY CHANGE (II): According to the Instructions (DODI 1100.22, 2006; DODI 1100.22, 2007), which were issued after the hearings, specific examples were given where government officials have "the discretionary authority to final approval or regular oversight" (paragraph E2.1.4.1.5.) regarding the conduct of defense contractors authorized to provide security services. For instance, where security operations – otherwise considered to be IG because they require "on-the-spot judgments on the appropriate level of force" (paragraph E2.1.4.1.4.) – do not require "substantial discretion" (paragraph E2.1.4.1.5.) and are thus outsourced to defense contractors, it is government officials that are responsible for overseeing their conduct. Placing responsibility for the oversight of PMSCs with government officials appears to have also incentivized the DOD to perform its own background checks, to verify that contractors have adequate training and qualifications (and to avoid been held liable for PMSC performance failures). It also started to take efforts to effectively oversee, on an integrated basis, alongside US military forces as well as to keep track of the conduct of subcontractors.

The following section analyses two public hearings instigated by the Fallujah scandal which aimed to understand what policy or regulatory mistakes were made leading to the particular scandal. This analysis allows us to identify the circumstances facilitating the regulatory changes discussed in the previous section (a) by tracing the (new) actors entering the "extended" hearing space (including families of the victims and experts) and (b) by following the argumentation voiced by actors to demand change and to challenge actors defending the status quo (including industry and administration). To determine which arguments were the most influential (in the sense that they were reiterated by the members of the Committee), it is important to study how extensively they were used, what they were advocating for in terms of content, and their intensity.

3.4 The Hearings

Two hearings were convened to scrutinize the regulatory framework, established by the DOD, whose "gaps" were exposed by the Fallujah scandal. The first hearing, titled "Private Security Firms Standards, Cooperation and Coordination on the Battlefield", took place on June 13, 2006, by the Committee on Oversight and Government Reform House of Representatives (Serial No. 109–214). The second hearing, titled "Iraqi Reconstruction: Reliance on Private Military Contractors and

Status", took place on February 7, 2007, by the Committee on Oversight and Government Reform House of Representatives (Serial No. 110–11). In these hearings, the actor constellation was "extended" to include not only actors who previously participated in the "quiet" deliberations between industry and the administration, but actors who were not given access or the opportunity to voice their arguments in decision making fora, such as independent experts (GAO) and the families of the victims. Additionally, actors with institutional powers, namely, members of Congressional Committees (who were not previously involved in the early phase of contracting) were now leading the discussion in the hearing context by offering input which exposed administrative failure and facilitated change.

Interestingly, in the early hearing phase, it was clear that most members of the Committee were positively predisposed towards the industry (and Blackwater in particular) based on their own personal experience (Blackwater employees guarded members of Congress during their trips abroad, often, in dangerous environments). As Andrew G. Howell (the General Counsel of Blackwater USA) testified, Blackwater's patriotic mission was to defend the lives of Americans in highly hazardous locations. "Chances are" he argued "if and when you, as Members of Congress, and your staff travel into Iraq, your lives will be protected for at least part of the trip by Blackwater." (Committee on Government Reform, Serial No. 110–11, 2007, p. 121)

Another factor that kept some members of the Congress in the dark, prior to the hearings, was the reluctance of the administration to disclose information related to DOD operations in Iraq involving "scandalous" cases. For instance, Congressman Waxman and Congresswoman Schakowsky admitted that they had requested information from the Defense Department which they never received including information on the quantity and overall expenditure of active security contracts held by PMSCs, the total count of contractors in Iraq and Afghanistan, and a compilation of disciplinary measures implemented against contractors involved in acts of abuse (Committee on Government Reform, Serial No. 109–214, 2006, p. 10 - 13). The administration refused to provide this information as it was labelled "confidential". Interestingly, during the hearings, members of the Committee were determined to gain access to this information and eventually formed a Republican-Democrat "coalition". More specifically, Democrat Congressman Waxman asked the Republican Congressman Shays if he would support him in an official request for information involving PMSC activities and DOD involvement. The latter immediately agreed and further warned members of the administration

present during the hearing that if the requested information was not provided promptly, they would be left with no alternative but to utilize the committee's authority to subpoena the information. This is "a matter of legislative responsibility" he adds "and we do need to work together on that." (Committee on Government Reform, Serial No. 109–214, 2006, p. 11). It should be noted that, in this case, the Departments – eventually – did comply. As Congressman Waxman noted, it was remarkable that even though the DOD would not even respond to his inquiry for two years, they finally replied at the end of the 2006 hearing (Committee on Government Reform, Serial No. 109–214, 2006).

The fact that political rivalries were (temporarily) set aside is particularly important because the members of the Committee felt that this "is a whole area where the Congress has been completely separated from oversight over thousands [..] We just need to open that up and shed light" (Committee on Government Reform, Serial No. 109–214, 2006, p. 7). This is crucial, Democrat Congressman Waxman noted, because of the unprecedented role that the war in Iraq and Afghanistan has given PMSCs (at the time close to $4 billion of taxpayer's money was allocated for private security services in reconstruction alone). Notably, even Conservative Congressman Duncan criticized the fact that "some conservatives seem to think at this point that we can't criticize [the government] and that we have to give the Defense Department every single thing that they ask for and we shouldn't ever question any of the expenditures that they do". Instead, he argued, it is important for everyone to question whether involvement in Iraq is primarily driven by the financial interests of defense contractors, rather than real security concerns." (Committee on Government Reform, Serial No. 109–214, 2006, p. 9 – 10)

In addition to labelling information as secret, the DOD also used another strategy to avoid answering "difficult" questions. For instance, Mr. Shay Assad (one of the representatives of DOD to the hearings) tried to downplay the role that security contractors played in Iraq by arguing that the activities of PMSCs offered in Iraq were just "protective" (thus defensive). They were deemed to only "support reconstruction and relief operations in a complex contingency" (Committee on Government Reform, Serial No. 109–214, 2006, p. 35 - 36). Yet, the very term "contingency" that Mr. Assad (DOD) chose to use, by definition, encompasses any undertaking where armed forces personnel may engage in military actions against an enemy of the US or a hostile military force (Federal Acquisition Regulations (FAR), subsection 2.101(A)). This means that these contractors were operating in an

environment which allowed (if not encouraged) the discretionary use of *offensive* force (a fact that was also repeatedly made over the course of the hearings).

The DOD was not the only actor who tried to "regulate" the information that was offered to the Committee. Even worse, Blackwater representatives were caught in a lie when Blackwater's vice president, Mr. Taylor, offered testimony to the 2006 Committee hearing (Committee on Government Reform, Serial No. 109–214, 2006, p. 172-173)[27] which was later contradicted by subpoenaed information (Committee on Government Reform, Serial No. 110–11, 2007, p. 178).[28] Even though Blackwater insisted that this was only "a grave misunderstanding", Congressman Kucinich maintained that there seemed to be evidence suggesting that Blackwater attempted to deceive or withhold pertinent information from Congress. Given that dubious testimony was given under oath, he further insisted that the committee should continue to investigate the matter to find out the

---

[27] "Mr. SHAYS. Let me just tell you this part though, because you are on record saying that basically constitutes the full cost. So, you do need to document that. This $800 is the full cost of all the things that involve the training, the housing and so on. It's not—and so we just want documentation that shows that to be correct.
Mr. TAYLOR. Again, Congressman Shays, I will certainly go back to legal counsel.
Mr. SHAYS. I'm trying to say it differently. I know you are going to go back. I need to make sure that you provide us that information. Now, whether it's you that provides it or someone else, I just want to say this, it is not an issue of, you know, you have the option to not provide that information. Please tell your superiors that you have testified—and I believe you, so you don't have a problem with me—that you testified that this constitutes the full cost. If it, in fact, doesn't, you need to set the record straight that it doesn't with documentation, and if it does, you need to just provide us the documentation that shows it's true. It's a common request, and one to which I know you would—you can't commit what your company does, I understand it. You're not the man in charge, but you're close to it. So that's all.
Mr. TAYLOR. I understand the request. Yes, sir" (Committee on Government Reform, Serial No. 109–214, 2006, p. 172-173)

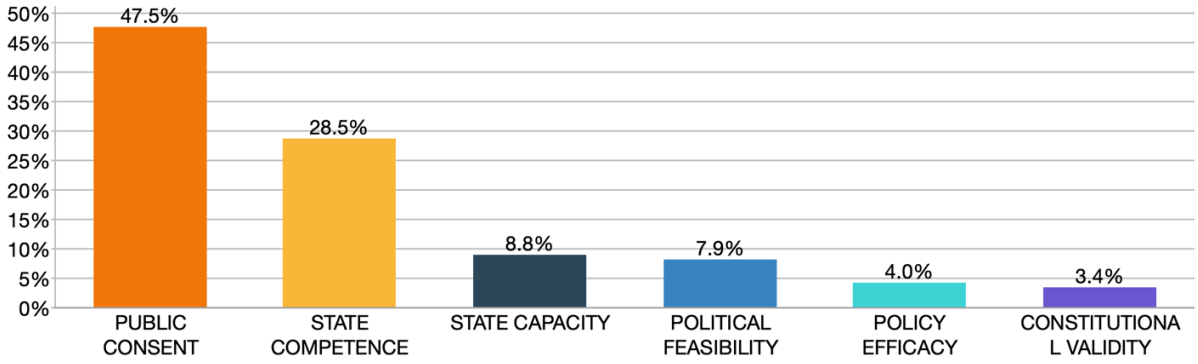
[28] "Mr. KUCINICH. I would like to raise an issue regarding Blackwater's prior testimony in front of Congress. Blackwater testified before a National Security Subcommittee of this committee, Blackwater testified on June 13, 2006, and I had asked questions about their contracts. The Blackwater's vice president testified that Blackwater charges $815 per day for the services of independent security contractor working in Iraq, and he testified that the $815 charge was fully burdened. Specifically, he provided the following response to me. I asked, ''In those contracts is it true you were paying your men $600 a day but billing Regency $815 a day?'' He said, ''Per the presentation, Mr. Kucinich, $815 a day is the right figure, but it is a fully burdened figure that includes travel, training, gear, housing, food, the works, fully burdened number.'' But the documents obtained by this committee, Mr. Chairman, refute the claim that these were fully burdened. We received the contract between Regency and Blackwater which clearly provide information contrary to Mr. Taylor's claims: one, that housing costs were the responsibility of ESS, not Blackwater; two, that food, subsistence for the contractors, was the responsibility of ESS, not Blackwater; and, three, insurance was to be paid by ESS, not Blackwater. I think that, since I have information here that Mr. Taylor presented misleading testimony under oath to our committee, and I am going to ask that this committee look further into that to try to reconcile what he said and what the facts are, as this committee has been able to determine them. I think it would be good to get it clarified, because the exchange that we had really didn't leave a positive impression. It seems to me there may have been an effort by Blackwater to mislead or conceal relevant information from the Congress." (Committee on Government Reform, Serial No. 110–11, 2007, p. 178).

truth, particularly because Blackwater continued to provide information which was proven to be "erroneous and misleading" (Committee on Government Reform, Serial No. 110–11, 2007, p. 180).

The congressional hearings thus operated as a forum where the regulatory choices of the Department of Defense could be scrutinized by the Congress, and their shortcomings could be publicly exposed. Evidently, up to that point, the members of Congress had not fully realized the extent to which these companies were operating autonomously due the lack of an effective regulatory framework. The "tables" only really turned when the hearing space opened to include voices that had not been heard before. The poor performance of PMSCs, which cost the lives of many, was discovered and proven to be associated with the way in which respective departments were regulating PMSC operations in Iraq. The voices of the families of the four victims were particularly powerful in calling upon the members of the Committee to confront the Department of Defense with their failures, by asking them to defend their regulatory choices and, if they were unable to do so, to start making some changes.

The next sections aim to analyze actors' argumentation to help identify which arguments were the most influential in facilitating change and challenging the status quo. It should be noted that the analysis, using MAXQDA, aimed to identify which type of arguments were most heavily used. It showed that "public consent" arguments brought forward by the families (and then reiterated by the members of Committee), proved to be particularly influential in every aspect. Such arguments not only had the highest percentage (see figure 2), but their content also mirrored the changes eventually made by the DOD, thus making them particularly powerful. Most significantly, the intensity of such arguments is noteworthy as they tend to carry high emotional appeal as they are perceived to be derived from "the people". The members of the Committee used such argumentation (as introduced by the families) to challenge the "competence" of the administration. This persuaded them to make the necessary changes – especially when the arguments used by the DOD to defend their regulatory choices proved to be elusive.

Figure 2: Argumentation after Fallujah



The next section allows the examination of the actors' discourse, arguments, and counterarguments in more depth. The section is divided in four parts. Part A examines the arguments that actors used regarding the need to conduct a risk assessment of the surrounding circumstances ('environment') before sensitive activities are outsourced to PMSCs. The other three parts deal with oversight issues and in particular, Section B, addresses the need for adequate vetting and hiring procedures to monitor the qualifications of contractors and subcontractors working alongside the US military. Section C highlights the lack of control over the multiple layers of (sub)contractors meaning that the DOD cannot monitor the quality of services that PMSCs provide or coordinate with the US military. This exposes both the military as well as PMSC employees to a greater risk of harm. Part D investigates the issue of PMSC direction and oversight – should responsibility be placed on the defense contractor or the US Department hiring them?

3.4.1 Assessing the Circumstances

According to the regulatory status quo, the provision of *armed* security services was considered "permissible" (DODI 3020.41, 2005) under particular circumstances determined by contracting officers stationed in DOD offices in the US. The specific criteria used to decide whether to outsource an activity, and whether they considered an important factor i.e., the surrounding circumstances and the environment that these companies would be operating in, was not explicitly stated prior to the hearings. In fact, many participants to the hearings – including the family members of the victims – argued that, in practice, the activities that the contractors were performing in Iraq were in no way

distinguishable from the activities that the active military performs (Committee on Government Reform, Serial No. 110–11, 2007).

To highlight the need for change in this practice, Mr. Solis (GAO expert) explained that soldiers and contractors in Iraq are dealing with a "unique" environment because it marks the first time in which the US relied to such a significant extent on contractors to furnish security within an extremely hostile environment (Committee on Government Reform, Serial No. 109–214, 2006, p. 15). Even the industry association representative, Mr. Chvotkin, argued that Iraq presented a particularly hazardous environment for individuals and entities, especially those affiliated with the US government, to reside and operate in (Committee on Government Reform, Serial No. 109–214, 2006, p. 156) Therefore, before outsourcing sensitive activities to PMSCs, several factors needed to be evaluated. These included the high number of projects contracted by the US government, the concurrent nature of these projects, the number of (sub) contractors, and the facilities necessitating private security assistance, along with the evolving and frequently deteriorating security conditions in locations where work needed to be performed.

Members of the Committee further noted that outsourcing, without consideration of the circumstances, of an essentially military function has increased risks and may pose a threat to US national interest if not properly managed. For instance, Congressman Kucinich explained that outsourcing military operations to PMSCs within a war zone is particularly troubling because Iraq constitutes a particularly hazardous environment where PMSCs are exposed to risks that often result in the use of offensive force. He added that contractors perform services which extend beyond the provision of meals and laundry so that the troops could focus on fighting. Rather, contractors are being hired to be "what they call the tip of the spear" (Committee on Government Reform, Serial No. 110–11, 2007, p. 96).

Most members of the Committee concluded that it is important for the DOD to amend its regulations to distinguish between the services that can be outsourced based on the circumstances and environment in which contracted PMSCs operate. This is particularly critical concerning sensitive activities, such as the provision of *security* services, which often require the use of force. This is clearly reflected in the revised DOD regulations which made a distinct categorization between

activities that can always be outsourced (commercial activities), functions that can never be outsourced (inherently governmental) and activities that require an assessment of the circumstances before being contracted out (closely associated with inherently governmental functions).

3.4.2 Scrutinizing the Qualifications of PMSC Employees

In terms of the screening of contractors working abroad, the common practice was for the DOD to rely on companies' self-assessments of their employees' suitability, which often proved unreliable as (unsurprisingly) all companies claimed to adhere to very high standards. This should have been expected since PMSCs are profit driven companies competing with each other to win contracts with the US government. For instance, an industry representative (DynCorp) testified that their recruiting and vetting procedures were very thorough, adhering to high quality standards, as evidenced by the fact that most of their employees had previously dedicated their careers to public service roles, such as the military, law enforcement and other government positions. Therefore, he argues, they share a common commitment to the ideals that guided them in their previous endeavors (Committee on Government Reform, Serial No. 109–214, 2006, p. 83).[29] Likewise, Mr. Balderas, speaking on behalf of Triple Canopy, asserted that the company, established in 2003, was founded by US Army Special Forces veterans with the aim of offering comprehensive security solutions to both the US government and private corporations (Committee on Government Reform, Serial No. 109–214, 2006, p. 135). One representative even claimed that they exceed their contractual obligations by offering additional training to all their security professionals (Committee on Government Reform, Serial No. 109–214, 2006, p. 83-84). Ironically, the representative making this claim represented one of the

[29] According to DynCorp International representative General Rosenkranz, their company "adheres to strict performance standards and imposes established professional standards of conduct which govern employees in all assignments. As a result of DynCorp International's and other security related services since 1994, we have a mature vetting procedure for evaluating and selecting candidates for the provision of these security services. Our process includes extensive investigations, medical screening, psychological assessments, and a variety of other screenings described in detail in our formal submission. As with our vetting procedures, we have the benefit of 12 years of active experience developing and refining our training procedures for security assignments. Programs of instruction and course curricula are designed and developed to apply to the specific field assignment, taking into consideration the prevailing security environment." According to Triple Canopy representative, Mr. Balderas they "firmly believe that hiring only highly experienced and professional personnel, providing them with thorough and relevant training prior to deployment, and holding them accountable to high standards once deployed is critical not only to operational success but also to employee satisfaction and retention. Triple Canopy's recruiting and screening standards are among the industry's most stringent[..] Our training produces highly capable operators who are prepared to perform demanding tasks in challenging high- risk environments." (Committee on Government Reform, Serial No. 109–214, 2006)

most notorious PMSCs implicated in almost every big scandal (and the one investigated in this Chapter), namely, Blackwater USA.[30]

The need for adequate vetting and hiring procedures to monitor the qualifications of contractors and subcontractors working alongside the US military (especially when contracted to perform sensitive functions, including the use of force in a dangerous environment) was heavily criticized. Expert, Mr. Solis (GAO), revealed that in a report issued in 2005, they found that the administration had no established standards for monitoring the qualifications of private security providers. Findings showed that the biggest challenge was faced by reconstruction contractors, who, although they had primary contracts with the DOD, encountered significant difficulties in finding suitable security providers. In five of the eight construction contracts reviewed by the GAO, primary contractors had to replace their security providers, attributing this turnover to several factors, including their limited understanding of the security market and available security service providers, and most importantly, the lack of useful guidance provided by the US Departments involved (Committee on Government Reform, Serial No. 109–214, 2006, p. 14-15). Despite the recommendations already made by the GAO in 2005, the expert testified to the Committee that they refused to even explore those recommendations at the time (Committee on Government Reform, Serial No. 109–214, 2006, p. 15; see report GAO, 2005).[31]

Congresswoman Schakowsky was very critical of the behavior exhibited by the Departments, according to the GAO expert, noting that a simple request to establish a baseline criteria for qualifications, training prerequisites, and other key performance characteristics of private security personnel "is not too much to ask" (Committee on Government Reform, Serial No. 109–214, 2006, p. 74). Therefore, she added, it is "completely unsatisfactory" for the DOD to deny establishing

[30] Even in the 2007 hearing, Blackwater continues to have the same attitude. Congressman Sarbanes asked "Did you, yourselves, ever reflect on whether you were in a space where you didn't belong? Did you ever say to yourselves, ''We shouldn't be doing this? This is something that the armed forces should be engaged in.'' Unsurprisingly, the response coming from the Blackwater's representative was that "[w]e have a role to play. We have a contribution to make". (Committee on Government Reform, Serial No. 110–11, 2007)

[31] The GAO recommended that Departments should move to either establish their own qualified vendor lists so that contractors would be able to obtain such services quickly and efficiently by choosing one of the contractors already approved by the DoD. Another broader recommendation was to identify and establish "minimum standards for private security personnel qualifications" and "training requirements in the key performance characteristics that these personnel should possess" (GAO, 2005).

standards for individuals involved in sensitive missions just because the government may be held liable in case of performance failures (Committee on Government Reform, Serial No. 109–214, 2006, p. 75). It is imperative, she argued, that with the substantial amount of taxpayer funds allocated towards PMSCs, the US should be able to hold the Departments accountable that choose to contract "with people who aren't doing what they should be doing, aren't trained appropriately, etc.?" (Committee on Government Reform, Serial No. 109–214, 2006, p. 73).

In particular, Congressman Shays asked for a specific evaluation of DOD standards as they proved to be inadequate in the aftermath of Fallujah. When the expert responded that the DOD appears to have unclear standards in terms of qualifications, Congressman Shays turned to the DOD representative (Mr. Assad) and stated that "what I would hope you would gain from this is that, if DOD has a little catching up to do, you are going to be paying some keen attention to this" (Committee on Government Reform, Serial No. 109–214, 2006, p. 75). Mr. Assad ended up reassuring the Committee that that even though it may not have been the case in the past, the DOD was determined to rectify the situation (Committee on Government Reform, Serial No. 109–214, 2006, p. 75- 76). The fact that, after the hearings, the DOD issued Instructions accepting responsibility for "final approval or regular oversight" regarding PMSC conduct was particularly significant in avoiding being held liable for performance failures.

3.4.3 Control over (Sub)Contractors & Coordination with the Military

During, the hearings, Congressman Cummings, Congressman McHenry, and Congressman Davis of Virginia, all attempted to find out the number of (sub)contractors working abroad and for the DOD (Committee on Government Reform, Serial No. 109–214, 2006; Committee on Government Reform, Serial No. 110–11, 2007). However, the DOD representative, Ms. Ballard claimed not to know the exact number, something which surprised Congressman Waxman who argued "it just strikes as amazing that this kind of information wouldn't be readily available." (Committee on Government Reform, Serial No. 110–11, 2007, p. 157) The reluctance to provide such information was however consistent with the Defense Department's previous "secretive" behavior. Prior to the hearings, such information was also requested by Congresswoman Schakowsky and Congressman Duncan, but the

Department again avoided providing them (Committee on Government Reform, Serial No. 109–214, 2006).

Therefore, despite all their efforts, committee members could not figure out how many contracts and how many (sub)contractor personnel were present in Iraq. Criticizing this situation, Congressman Towns argued that, with so many layers of subcontractors, it becomes challenging for the Government to effectively monitor the work carried out by PMSCs and hold individuals accountable for potential misconduct (Committee on Government Reform, Serial No. 110–11, 2007). Congressman Shays was particularly frustrated when Ms. Ballard (DOD) testified that the DOD does not actually monitor the sub-contractors, highlighting that this lack of monitoring led to poor quality control (Committee on Government Reform, Serial No. 110–11, 2007, p. 183).[32] He noted:

> "Mr. SHAYS. Ms. Ballard, I am surprised that you can't give us an idea of the number of contracts and number of contractors in theater. Is that because you just hire out from the first and then from then on you don't feel you have an interest in or responsibility to know who was subcontracted? In other words, once you put out that contract, whoever is subcontracted is not your interest or responsibility? […]
>
> Ms. BALLARD. The prime has responsibility for the subcontract. We do not have privy of contracts with the subs. […]
>
> Mr. SHAYS. And you don't know how many of those subcontractors had subcontractors?
>
> Ms. BALLARD. Correct.
>
> Mr. SHAYS. I mean, tell me why I shouldn't be concerned by that."
>
> (Committee on Government Reform, Serial No. 110–11, 2007, p. 182)

[32] "Mr. SHAYS. But I was always left with the feeling that our government would know who the contractors were, who were the subcontractors, who got a sub-contract from a subcontractor. I just thought it would be intuitive that we would know how many people, and so on. And the fact that once the major contractor subcontracts, they don't care who is sub-contracting that is of concern to me, and it tells me that we are not going to have good quality control and that we are going to have pretty serious mistakes." (Committee on Government Reform, Serial No. 110–11, 2007, p. 183)

In fact, in the Fallujah case, the situation was considerably complex due to multiple layers of subcontracting. Blackwater rendered security services through a contract with Regency (a Kuwaiti company). Regency, in turn, acted as a subcontractor for ESS Support Services Worldwide, which provided dining services to other contractors like KBR and Fluor Corp. Remarkably, even after three years of investigations, the precise identity of the primary contractor employing the four individuals was still somewhat unclear. This failure to keep track of PMSCs became much more obvious when Ms. Ballard (DOD) testified that the DOD-contracted KBR had never sub-contracted work to a PMSC in support of the execution of a statement of work under a LOGCAP-III task order. Her testimony was later found to conflict with the testimonies of Blackwater and ESS. When she was confronted with this issue, she said that the DOD will be investigating the matter and if KBR was found to have violated the terms of the LOGCAP-III contract, whether knowingly or unknowingly, the US Army would take necessary contractually agreed actions to recover any funds disbursed for such services. Furthermore, she assured the Committee of her personal commitment to fully disclose the outcomes of the DOD's investigations (Committee on Government Reform, Serial No. 110–11, 2007). Clearly, Congressman Waxman highlighted that the DOD has no "idea of what is going on lower down on the contracting chain, and it may be acceptable not to have any oversight over subcontractors who provide paper clips, but it is not acceptable when the subcontractors are putting armed forces in the field" (Committee on Government Reform, Serial No. 110–11, 2007, p. 185).

Further, the lack of control over multiple layers of (sub)contractors also made coordination with the US military particularly difficult. Even though the GAO recommended specific steps that the DOD should take to improve the coordination between PMSCs and the military on the battlefield, the expert, Mr. Solis (GAO), testified that the DOD did not issue any guidance or conduct any training to comply. In fact, he added that the fact that PMSCs appear to still engage in the battlefield without coordinating with the US military exposes both the military and security contractors to a heightened risk of injury. Mr. Chvotkin, the trade association representative, agreed with Mr. Solis and underlined that the DOD was reluctant to take necessary actions to address the problems of coordination, proving that the incorporation of contractor force protection requirements into the military planning process was still lacking or was incomplete (Committee on Government Reform, Serial No. 109–214, 2006, p. 159).

When Mr. Shays, the DOD representative, was confronted with these "failures", he publicly acknowledged that there was clearly room for improvement. Congressman Shays made clear, however, that this is not a partisan issue so "whether you end up with a Republican Congress or a Democratic Congress next year, we are going to have this same kind of oversight." Mr. Assad reassured the Congressman that the DOD will focus on ensuring that actions will be taken "to get the coordination that is necessary, get the insight that is necessary and be able to be more responsive to [the Committee]" (Committee on Government Reform, Serial No. 109–214, 2006, p. 81). This commitment is reflected in the revisions that the DOD made to ensure (better) oversight over PMSC activities. Furthermore, the Department (contractually) forced PMSC employees to register with the Reconstruction Operation Center and SPOT database on the day of their arrival.

3.4.4 Taking Responsibility

Defending the regulatory status quo became almost impossible after the families of the victims testified. The joint testimony of the families was delivered by Ms. Helvenston-Wettengel (Committee on Government Reform, Serial No. 110–11, 2007, p.71 – 75) and was particularly emotional. It appealed to those participating in the hearing, and most importantly, to the members of the Committee. The families' arguments accused Blackwater of failing to provide protective equipment before sending their loved ones into Fallujah. They were described as unprepared and without armored vehicles and heavy automatic weapons to defend against attacks. It also criticized the Department of Defense for failing to control Blackwater and oversee their actions which could have prevented the tragedy. For instance, Congressman Waxman promised that even though it is difficult to get to the bottom of what happened, the committee has "an inviolate obligation to the men and women in harm's way and to their families to make certain that their safety doesn't take a back seat to corporate profits or wasteful spending." (Committee on Government Reform, Serial No. 110–11, 2007, p. 3)

The families' testimonies were particularly powerful in the hearing context. Significantly, Ms. Helvenston-Wettengel testified:

> "Although everyone remembers those images of the bodies being burned, beaten, dragged through the streets, and ultimately hung up from a bridge, we continue to relive that horror

> day after day, as those men were our fathers, sons, and husbands. Following that horrific incident on March 31, 2004, we turned to Blackwater for answers. What we received was appalling. We were told that the information surrounding the circumstances in which our loved ones were killed was confidential. When we insisted on seeing the report concerning the incident, Blackwater told us that we would have to sue them to get it. Having just lost the most important people in our lives, a lawsuit was the last thing on our minds. Instead, our focus was concentrated on finding out just what happened. However, the people in the best position to tell us what happened refused to do so. It was not as if Blackwater was claiming that it did not know what happened; but instead, Blackwater concealed the information from us that we needed so desperately to understand why our loved ones were dead."
> (Committee on Government Reform, Serial No. 110–11, 2007, p. 71)

The families thus claimed that, in an effort to cut back expenses, Blackwater did not provide the victims with the equipment necessary for the mission, such as armored vehicles, a rear gunner and heavy machine weapons. Further, Blackwater failed to support the victims with a team of six people and did not conduct a risk assessment of the mission or provide the four contractors with an opportunity to familiarize themselves with their designated routes prior to embarking on the mission. On top of that, the families argued that Blackwater did not dispute its obligation to afford protective equipment to their loved ones, they just said that they could not be sued for its conduct. Congressman Waxman emphasized that the questions posed[33] by the families should be taken seriously to examine the conduct of Blackwater, and most importantly, the responsibility of the DOD to regulate the actions of PMSC companies and hold them accountable in cases of abuse. The existing regulatory framework, he added, allows the DOD to escape liability for Blackwater's action and should thus be revised to place ultimate oversight and responsibility with the US army. (Committee on Government Reform, Serial No. 110–11, 2007, p. 71 - 75)

[33] "We are seeking answers from Blackwater as to how and why our loved ones are dead. Why were they not in armored vehicles? Why were they not in a team of six? Why were there not three operators in each vehicle? Why were there not provided heavy weapons? Why were they not permitted to learn the routes in Iraq before going on their mission? Why were they not allowed to gather intelligence from the outgoing security company? Why was a risk assessment not performed prior to that mission? Why were they not given 24-hour notice before their mission? Why were they lost in the middle of Iraq? Why did they drive through the center of Fallujah at a time when even U.S. military would not go through? Why were they lied to about the weapons and protections they would have?" (Committee on Government Reform, Serial No. 110–11, 2007, 71 - 75)

After the families described their tragic loss due to the failures of the US government, the members of the Committee expressed their sympathy and compassion with the "brave and patriotic men", namely, Scott Helvenston, Wesley Batalona, Jerry Zovko, and Michael Teague. Some details of their personal stories were shared including the fact that Katy Helvenston-Wettengel is the mother of Scott Helvenston, a former Navy Seal, highly accomplished athlete, and a father of two young children. Donna Zovko is the mother of Jerry Zovko, a former Army Ranger possessing proficiency in four languages and only 32 years old when he passed away. Rhonda Teague is the widow of Michael Teague, a member of the Army's elite Nightstalkers helicopter unit, who had served in Afghanistan, Panama, and Grenada. He was awarded the Bronze Star and left behind a son. Kristal Batalona is the daughter of Wesley Batalona, who participated in the 1989 invasion of Panama, the first Gulf war in 1991, and the 1993 humanitarian mission in Somalia. Ms. Batalona heard the news of her father's death on her 22nd birthday. (Committee on Government Reform, Serial No. 110–11, 2007, p. 34).

At the same time, the members of the Committee were annoyed by the company's vengeful behavior towards the victims' families, as well as the administration's indifference in the aftermath of the scandal. Congressman Tierney asked the family members if they were – at least - able to find answers to their questions on the death of their relatives after bringing the lawsuit against the company. Ms. Helvenston-Wettengel's (mother of one of the four victims) explained that Blackwater was outraged that the families had the audacity to file lawsuits against them. They argued that they were immune from legal action as they were contractors for the DOD (Committee on Government Reform, Serial No. 110–11, 2007, p. 90). On top of that, Blackwater took legal action against the families with a $10 million countersuit.[34] Congressman Shays expressed his dissatisfaction with the treatment of those families, contending that contractors who lost their lives in Iraq were just as heroic as any other individual who risked their lives in the region. As a result, he asserted that they should have been extended the same level of respect and consideration as military families. Instead, "they were treated in a very shabby way" (Committee on Government Reform, Serial No. 110–11, 2007, p. 191).

[34] "Mr. TIERNEY. And did they take any action against you?
Ms. HELVENSTON-WETTENGEL. Personally, $10 million is something kind of personal.
Mr. TIERNEY. The countersuit?
Ms. HELVENSTON-WETTENGEL. Yes. That is pretty personal."
(Committee on Government Reform, Serial No. 110–11, 2007, p. 90)

Furthermore, these interactions were particularly important as some regulatory choices proved to be particularly difficult to defend in the wider actor constellation. For instance, it was argued that Blackwater could be trusted with taking such decisions because clearly all four individuals were skilled and seasoned professionals who possessed extensive knowledge of both military and enforcement tactics. This was basically proof that Blackwater was hiring highly qualified employees (Committee on Government Reform, Serial No. 110–11, 2007, p. 88-90). This argument was immediately challenged by Ms. Teague (the widow of one of the dead contractors) who noted that even though the four men were indeed highly skilled and familiar with combat, none of them had been with Blackwater for long. In fact, in the case of her husband, he arrived in Kuwait on March 29th and tragically lost his life on March 31st. The other three men sent on the mission with her husband, she added, were equally new to Blackwater - something that would never have happened had the four men been employed by the active military (Committee on Government Reform, Serial No. 110–11, 2007, p. 88-89). Even though his motives are questionable (he tries to shift the blame for the scandal from Blackwater to the Government), Mr. Chvotkin also supported that the military should be taking such decisions. He argued that, as a trade association, they welcomed the robust oversight function of US Departments (Committee on Government Reform, Serial No. 110–11, 2007).

The families' testimonies opened the way for a broader discussion on the way oversight over armed contractors should be exercised when they provided evidence to the Committee proving that the night before the four soldiers were killed, one of the victims alerted their local manager, who in turn notified the Blackwater headquarters via email, of the lack of safety equipment and that the team was unprepared to begin its mission (see full email - Committee on Government Reform, Serial No. 110–11, 2007, p. 11-13). The email was ignored by Blackwater and the employee who reported the matter was fired. This brings us back to the question of oversight: Why did the Defense Department fail to establish regulations and protocols that would have mandated Blackwater to inform them about such incidents? Are those the kind of decisions that the Defense Department should have been outsourcing to private contractors?

Blackwater was a sub-contractor hired to provide armed security services for Regency/RHHC and they were supposed to send reports to the prime contractors. Focusing on an email that was sent from Tom Powell - the operations manager for Blackwater in Baghdad to Regency/RHHC – dated March 30, 2004 (that is, one day before the attack in Fallujah), Congressman Waxman explained that

the e-mail revealed that the reports that were sent out (supposedly providing real time security information) were "very misleading and bogus on the surface". This is a deeply concerning e-mail, he added, because if it was accurate, it indicated that Blackwater potentially distributed situation reports that were ''smoke and mirrors show'' and ''not reality-based information.'' Powell writes in the email: "My only hope is that Justin sees through the smoke and mirrors show and believes me when I am telling him that all is not what it seems. Please, Justin, send your sitreps to the client with reality-based information.'' (Committee on Government Reform, Serial No. 110–11, 2007, pp. 11-13) In hindsight, this is "a pretty chilling communication", Congressman Waxman admits. Additionally, it proves that Blackwater had full knowledge that the four victims were in the field with borrowed equipment, and facing imminent danger (Committee on Government Reform, Serial No. 110–11, 2007, p. 147 – 148). These conversations prove that Blackwater exercised poor judgement on a matter which should have been decided by a US military commander. Therefore, Congressman Towns contended that the delegation of work which should be performed by government employees should not be performed by PMSCs because the "absence of accountability has real, real human cost" (Committee on Government Reform, Serial No. 110–11, 2007, p. 25).

In the following dialogue with the victims' family members, Congressman Hodes underlines the fact that DOD should be ultimately responsible:

> "Mr. HODES. Do you know if the Defense Department, which ultimately was at the top of this pyramid, as you have called it, was monitoring what Blackwater was doing with its employees?
>
> Ms. HELVENSTON-WETTENGEL. The only Defense paper I saw when Chris brought Scotty home and he gave me his personal things*, there was something in there with the Defense Department heading, and it basically just said that they had no liability to Blackwater.*
>
> Mr. HODES. Do you think that someone should do more to watch over what is going on with the private security contractors, including Blackwater?
>
> Ms. HELVENSTON-WETTENGEL. Yes. Most definitely.
>
> Mr. HODES. And do you have any feelings as to whether or not it ought to be the Department of Defense which ought to be doing more to monitor what is going on with the contractors who are serving our country so bravely?

> Ms. HELVENSTON-WETTENGEL. [..]Yes, I think the Defense Department should establish some rules."
>
> (Committee on Government Reform, Serial No. 110–11, 2007, p. 102, emphasis added)

The refusal of the Blackwater representative (Mr. Howell) to disclose important information annoyed the members of the committee.[35] He even claimed that it would have been a criminal act to turn over the reports since they constituted classified information. Congressman Waxman confronted him stating that this statement is not accurate as this Committee is entitled to receive classified information (Committee on Government Reform, Serial No. 110–11, 2007). Similarly, the members of the Committee were not happy with the fact that Mr. Howell denied any knowledge of particular facts that took place in Fallujah, while offering a rather misleading account on others. For instance, Mr. Howell had previously testified that *two* operators per vehicle was sufficient (thus assuring the Committee that Blackwater had provided the victims with adequate equipment). Congressman Tierney challenged his argument drawing everyone's attention to an Appendix of the security services agreement which clearly stated that to deliver tactically sound and fully mission-capable protective security details, a team size of no fewer than six operators and a minimum of two armed vehicles is required to facilitate ESS movement. Failing to obtain answers from Blackwater, members of the Committee turned to the representative of the Defense Department for answers. They were however disappointed when Ms. Ballard (DOD) claimed to have no knowledge on several crucial questions posed by Congressman Cummings, Congressman Waxman, Congressman McHenry, Congressman Shays and Congressman Davis of Virginia. The members of the committee frown upon the DOD's lack of preparation and reminded Ms. Ballard that the DOD is obligated to provide all necessary information to the members of the Committee. The fact that the administration deflected these pressing questions shows the power of argumentation in public fora, when such powerful actors can no longer defend the regulatory status quo, thus giving pro-reform actors the opportunity to act.

---

[35] "Mr. KUCINICH. Mr. Howell, we have heard from the families on the first panel that they had to sue Blackwater to get information about what happened to their relatives. Then we heard something else that I have to say astounded me in its callousness, and that is that Blackwater filed a countersuit against the families for $10 million. Now, Mr. Howell, you are the general counsel for Blackwater. Why did the company sue the families that lost two sons, a husband, and a father?
Mr. HOWELL. First, let me say that, once again, extend our deepest condolences to the family--
Mr. KUCINICH. Is the lawsuit part of those condolences?" (Committee on Government Reform, Serial No. 110–11, 2007, p. 177).

Noting that this Committee has an oversight role over the activities of executive agencies, the members of the Committee made it perfectly clear that the DOD's response to Blackwater's actions was inadequate (and their defense of the regulatory status quo elusive). Clearly, the Defense Department failed to establish a framework that would put Blackwater under control, tragically leading to the death of innocent people. Congressman Shays underlined in his concluding statement, that the deliberative process that took place in the Committee hearings helped him to realize the existing regulatory gaps, and the need for changes regarding the provision of armed security services. He thus urged the DOD to revise the existing framework to regain control over their contractors and subcontractors. Most members of the Committee agreed that this could only happen if they take oversight out of the hands of contractors and put it in the hands of the military and the Defense Department. Notably, Democrat Congressman Waxman thanked Conservative Congressman Shays for these remarks: "You, more than any other Member of Congress in the last Congress, actually actively got into many of these issues, and we look forward to working with you and Mr. Davis on a bipartisan basis. These are not partisan issues." (Committee on Government Reform, Serial No. 110–11, 2007, p. 191)

3.5 Conclusion

This Chapter examines the circumstances facilitating regulatory change in the regulatory framework of the Department of Defense, in the aftermath of the Fallujah scandal. The increased (and very public) scrutiny of existing regulations, in the wake of Fallujah, exposed administrative failure. It made it very difficult for the administration to defend the regulatory status quo and they were eventually "forced" to make changes. In summary, the first important change involved the additional requirement of explicit criteria on the way decisions over which (sensitive) activities can be outsourced to the private sector, emphasizing the need for consideration of the "circumstances" or the environment in which these companies operate. The second change to the regulatory status quo involved the need to transfer responsibility for the direction and oversight of (sub)contractors to the Department of Defense.

To identify the circumstances that may have facilitated change, this Chapter studied the transformation of the actor constellation and analyzed the argumentation of actors to defend their

regulatory positions or challenge the arguments of other (more powerful) actors. This thesis anticipates, theoretically, that in the aftermath of scandals, a wider actor constellation will be engaged in the context of hearings, powerful actors will be (more) constrained and less privileged actors will be given the opportunity to voice their arguments, thus facilitating path-deviating change.

Indeed, the revision of established practice and regulations took place after the "competence" of the administration was challenged by emotional arguments derived from "the people" in an extended hearing setting, including the legislature (committee members), the executive (administration representatives), experts and the public (family members of victims). Specifically, pro-reform "public consent" arguments (introduced by the families of victims) underlined that existing regulations allow companies' misconduct to go unpunished and that the DOD appeared to tolerate this. It is important for such actors (excluded from previous "quiet" phases) to have a seat at the decision-making "table" to voice their arguments, offer evidence to substantiate their content, and challenge the arguments of more privileged actors who seek to preserve the status quo. The more open the actor constellation, the more difficult it becomes for the administration to substantively ignore *normative* "public consent" arguments and remain intact when "attacked" with particularly influential argumentation.

The results of the MAXQDA analysis showed that "public consent" arguments were the most extensively used. Interestingly, there seems to be an "elective affinity" between the families of the victims and the use of normative "public consent" type of arguments (seeking to find justice for their loved ones due to governmental failure). The second highest percentage of arguments that actors used during the two hearings belonged to the "state competence" category. Similarly, there seemed to be an affinity between "state competence" arguments and the presence of the administration during the hearings (seeking to justify the way they used their discretion to make certain regulatory choices). The fact that such powerful actors had access to the hearings and made their arguments heard loudly is unsurprising. Yet, the importance of their presence during the hearings should not be underestimated. It allowed other pro-reform actors to publicly scrutinize their conduct and challenge their arguments, thus making the regulatory status quo difficult to defend.

Notably, “public consent” arguments seem to be particularly influential in the “extended” hearing setting, persuading actors with institutional powers (i.e., members of the committee) to pressure the administration to change its regulatory practice. This is because the families of the victims who introduced such arguments to the hearings epitomize the democratic character of the hearing process and, most importantly, have a personal connection with the issue being discussed due to the tragedies suffered from losing their loved ones as a result of administrative “failure”. Such arguments thus emotionally appealed to the members of the Committee who felt that the victims could be their own children, siblings, parents, or spouses, thus intensifying their quality. This chapter further shows that the content of the aforementioned revisions reflects the content of the most influential arguments that became part of the two hearings’ discourse.

Argumentation matters in terms of facilitating change (how extensively some arguments were used, what they are advocating for, and their intensity). It is however important to examine whether power shifts could offer an alternative explanation for the discussed changes. To this end, the question becomes whether there were any shifts in political power during the period that could have facilitated the changes. Considering that the Fallujah scandal took place in 2004 and that Instructions were released after the two hearings (i.e., in 2006 and in 2007) by a Republican Administration, this thesis concludes that power (does matter but in this case) cannot account for the observed regulatory revisions. However, argumentation can account for such changes.

4 REGULATING AFTER NISOUR

4.1 INTRODUCTION

This Chapter studies the reluctance of the State Department (DOS) to make revisions that would resolve "failures" exposed in the wake of the Nisour Square scandal. To this end, it analyzes two hearings aimed at "processing" what went wrong and to learn and improve policy and regulation. In the context of the hearings, it was apparent that the State Department was reluctant to establish an adequate regulatory framework regarding (a) investigations and (b) referrals to the Department of Justice (DOJ) to facilitate prosecutions when crimes by contractors hired by the State Department are committed abroad, and thus prevent such incidents involving PMSC transgressions from taking place in the future.

This thesis argues that, in this case, *change* was hindered (i.e., there was no significant effect on existing regulations and practices) because (a) the actor constellation was narrow – the families of the victims were not invited to the hearings and (b) as a result, arguments advocating for reform and challenging powerful actors who were seeking to preserve the regulatory status quo were not heard (this refers in particular to the reduced percentage of "public consent" arguments and the increased percentage of "state competence" arguments - see figure 3), not to mention that the element of emotional appeal was non-existent.

Following this introduction, this chapter is made up of six sections. First, section 2 discusses the Nisour Square scandal. Next, section 3 examines The Military Extraterritorial Jurisdiction Act, which is the legal basis enabling the US government to prosecute offenders for crimes committed abroad (part A). In Part B, I examine the additional legislation adopted by Congress which mandated the adoption of the Memoranda of Understanding to facilitate coordination with other Departments. Section 4 examines the reluctance of the Department of State to draft comprehensive regulations to address "gaps" in procedures regarding investigations and referrals to the DOJ. Section 5 traces the transformation of the actor constellation and analyses actors' discourse during their interactions in this "narrow" hearing context. It highlights the arguments and counterarguments that appeared to be more influential, and those eventually hindering meaningful reform. Section 6 concludes with a

brief discussion of the "elective affinity" between the transformation of the actor constellation and the type of argumentation used in institutionally prescribed fora.

4.2 The Nisour Square Scandal

The Nisour Square shooting was one of the most high-profile incidents resulting in Iraqi civilian casualties involving the infamous PMSC Blackwater. On September 16, 2007, Blackwater security guards were accompanying an American representative when a car explosion occurred close to the residence of a US diplomat in Baghdad, Iraq. Four individuals, namely Slatten, Slough, Liberty, and Heard, were part of Team Raven 23, which was sent to offer additional assistance in the evacuation of the diplomat (United States of America v. Nicholas Abram Slatten, [2017], p. 777). Shortly after the arrival of Raven 23, which resulted in the restriction of traffic, what is now known as the Nisour Square Massacre unfolded. Within two or three minutes, witnesses reported hearing gunshots. The vehicle that was struck, a white Kia Sedan, was flagged days before by a Blackwater intelligence analyst as a type that could potentially be utilized as a car bomb. Even though government and court reports indicate that the driver of the Kia was already dead or injured ("The driver's side of the Kia windshield had a hole in it and was splattered with blood"), indiscriminate shooting from the convoy continued past the Kia. When the convoy eventually left the Square, it had already caused the death or injury of at least 31 Iraqi civilians (United States of America v. Nicholas Abram Slatten, [2017], p. 777-778). The four Blackwater contractors were – eventually – prosecuted on murder and manslaughter charges under the Military Extraterritorial Jurisdiction Act (MEJA).

During the trial, the government presented testimonies from a total of 71 witnesses (30 of those witnesses flew from Iraq which represented the largest group of foreign witnesses to travel to the US for a criminal trial). The US Attorney's Office issued a statement underlining that this prosecution reflected the American justice system's dedication to upholding the rule of law. It expressed hope that the conviction of the four individuals which caused mayhem and such "unnecessary human loss and suffering" would bring solace to the survivors of the shootings and the families of those who lost their lives or were injured (Department of Justice, 2015). On the other hand, the four former Blackwater security contractors argued that the prosecution was "vindictive" (Business and Human Rights, 2016), because top government officials in the US and Iraq had closely watched this case for

years, and its outcome carried international political ramifications (United States of America v. Nicholas Abram Slatten, [2016]).

While the guilty verdict represented a milestone in a lengthy and complex eight-year-long legal saga, the controversy surrounding the State Department's use of PMSCs persisted. Historically, the responsibility for protecting personnel and assets abroad was handled internally by the Bureau of Diplomatic Security. However, following the invasion of Iraq, the demand for security personnel carrying out diplomatic protection increased drastically. This resulted from the State Department– unquestionably – leading the way in the trend of privatizing security operations (Cusumano, 2017). Both Erik Prince, CEO of Blackwater International, and State Department diplomats regularly defended the preferred use of private security contractors over military personnel arguing that US soldiers did not have the appropriate training to provide personal security. Hence, they argued that firms, like Blackwater, filled a specialty gap. Ambassador Satterfield (DOS) also noted the vital role of contractors since "[w]ithout protective security details, we would not be able to have the interaction with Iraqi government officials, institutions and other Iraqi citizens critical to our mission there" (Committee on Government Reform, Serial No. 110-89, 2007, p. 123). In reality, the use of contractors was the only way the State Department could enforce its zero-casualty policy. This policy generated significant controversy with academic and military experts who argued that it fostered a reckless "cowboy" and in a way incentivized the contractors involved in security operations to use excessive force. The reason was the huge difficulties the Department had in devising financial and promotion incentives that could motivate a sufficient number of its own personnel to accept deployment to Iraq. Even after the Nisour Square scandal, the State Department argued that the use of PMSCs was indispensable and that there was no alternative except contracts. Unsurprisingly, seven months after the events in Nisour Square, the US State Department extended Blackwater's contract.

The Nisour Square incident triggered a military investigation by the US and subsequent Congressional hearings that shed light on Blackwater's conduct and revealed the regulatory failures and 'gaps' in conduct evidenced by incidents that had already occurred before late 2007. The Congressional Committee on Oversight and Government Reform found that around 437 internal incident reports proved that Blackwater was consistently employing excessive and unnecessary force which resulted in unnecessary deaths and property damage (Case: 1:07-cv-01831, para.27). Furthermore,

Blackwater reports revealed that the company's personnel frequently discharged shots from moving vehicles without stopping to verify if anyone was injured or killed (Case: 1:07-cv-01831, para.33). They also they failed to report wrongful use of force on a regular basis and consistently provided false information on such incidents (Case: 1:07-cv-01831, para.34). A pattern can be discerned, as in every incident the State Department facilitated the transportation of the implicated Blackwater employee out of Iraq while offering to pay sizeable amounts of money to families of the victims (Committee on Government Reform, Serial No. 110-89, 2007, p. 117)

Although Blackwater's "trigger-happy cowboys" appeared to be primarily responsible for such incidents in the eyes of the American public and media, these incidents are really an inevitable consequence of the permissive Rules of the Use of Force, referred to as the 'use of force continuum', set by the State Department's DS Regional Security Office. The rules allowed contractors to resort to force preemptively. In fact, Blackwater contractors who were prosecuted in the Nisour square case for their excess in the use of force never really violated DOS contractual provisions. When asked whether it constituted a breach of the contractual rules of engagement to initiate gunfire at a vehicle approaching a chief of mission motorcade, Ambassador Griffin replied "[a]bsolutely not." He further added that there is no requirement for a contractor to wait until their colleague sustains physical harm before intervening to prevent it (Committee on Government Reform, Serial No. 110-89, 2007, p. 144).

The Nisour Square massacre scandal also showed that within different departments, there was confusion surrounding certain concepts informing their employees and contractors prescribed course of action (e.g., regarding the use of violence following the State Department's rules of engagement versus the DOD's rules of the use of force). Laura Dickinson noted that agency discretion in the implementation of legislation appeared to have resulted in the two Departments adopting conflicting regulatory practices (Committee on Governmental Affairs, Serial No. 41–453, 2008, p. 17). Notably, the State Department appears particularly reluctant to cooperate with other Departments and change its practices. In an attempt to settle the confusion, Congress instructed the DOD and the State Department to sign a Memorandum of Agreement on December 5 2007. However, it soon became clear that the joint work on the memorandum between the DOD and the State Department regarding the use of PMSCs was forced cooperation, primarily focusing on the Iraq operation which

the State Department had no intentions to develop further (Committee on the Judiciary, Serial No. 110 – 130, 2007).[36]

4.3 LEGAL BASIS

In part A of this section, this thesis examines MEJA, which is the legal basis enabling the US government to prosecute offenders for crimes committed abroad. In part B, I analyze additional legislation mandating a revision of the Department's regulatory practice in the context of MEJA by adopting a memoranda of understanding pursuant to NDAA FY2008 and NDAA FY2009.

4.3.1 The Military Extraterritorial Jurisdiction Act (MEJA)

Typically, the reach of US law is primarily limited to the territorial boundaries of the US (Sale v. Haitian Ctrs. Council, Inc., [1993]). To establish jurisdiction beyond territorial boundaries, it must be explicitly stated in the law (EEOC v. Arabian Am. Oil Co., [1991]) or be inferable. This is because limiting the application of the statute to the US territory would significantly reduce its scope and usefulness (United States v. Villanueva, [2005]).

MEJA passed in 2000 to close the jurisdictional gap that was created in *Gatlin*, in which case the court ruled that MEJA could not be applied extraterritorially and thus the conviction of James Gatlin (a civilian who was living on property leased by the US military in Germany) did not stand even though he pled guilty to raping his 13-year-old stepdaughter (United States v. Gatlin, [2000]). Yet, there were still holes in the jurisdictional net (Bateman, 2012). The "gaps" in the Act's reach became particularly noticeable in the aftermath of the Abu Ghraib detainee abuse scandal when MEJA was – again –

[36] More specifically, the MOA (2007) directs the two Departments to "(a) improve the effectiveness of incident management, response, and follow-up for investigations; (b) assure transparent, timely reporting and investigation of incidents between DOS and DOD, with timely reporting of same to the government of Iraq; and (c) synchronize PMSC operations between the battle space commander and Regional Security Officer in order to establish real-time oversight, visibility, and coordination of PMSC convoy movements outside secure bases."

deemed inapplicable because the contractors in question were not employed by the DOD, but by the Central Intelligence Agency (CIA) and the Department of Interior.

To address the situation, President George W. Bush signed the bill into law on October 28 2004, amending MEJA into its current form under the Ronald W. Reagan National Defense Authorization Act for the Fiscal Year 2005. This amendment expanded the definition of "employed by the Armed Forces outside the United States" to include individuals who are contracted by any Federal agency (not only the DOD) as long as their employment related to supporting the overseas mission of the DOD. Despite the 2004 amendment to MEJA, jurisdictional 'gaps' persisted (CRS, 2010). The independent expert, Ms. Tara Lee, explained that its plain text does not apply to contractors working for the State Department or other Government agencies, *except and unless* it can be established that they are supporting the mission of the Defense Department – meaning that jurisdiction will be decided on a case-by-case basis (Committee on Judiciary, Serial No. J–112–24, 2011, p. 5). Therefore, depending on how broadly MEJA is construed, non-DOD contractors who commit the same crimes as DOD contractors might not be covered by MEJA. This means that the fact-finding task is of utmost importance to a successful prosecution by establishing the necessary nexus of the non-DOD employee with the DOD's mission (GAO, 2008). For this task to be fulfilled, it is necessary for the Departments to put in place a comprehensive regulation to allow agents called to the scene to (a) properly investigate and (b) successfully refer a crime to the DOJ.

It should be clarified that even though the DOJ is primarily responsible for prosecuting crimes under MEJA, certain criminal investigations and arrests may be conducted by other federal agencies. For example, the State Department has the authority, as specified in 22 U.S.C. § 2709 and 22 U.S.C. § 4802, to undertake specific investigations and make arrests of persons suspected of having committed a felony. Specifically, the Bureau of Diplomatic Security's Office of Special Investigations, within the State Department, holds the main responsibility for conducting and coordinating investigations into reported cases of administrative and criminal misconduct. These investigations include State Department employees, their dependents, contractors, and other personnel affiliated with the US government and fall under the authority of the chief of mission while overseas (Department of State, 2020). Therefore, it is important for the State Department to have in place effective regulations, otherwise its employees may fail to properly investigate a case of PMSC abuse – and eventually – fail to successfully refer a case to the DOJ.

In fact, The United States of America v. Nicholas Abram Slatten (Nisour Square case) allows us to see how arguments in favor or against MEJA's applicability can unfold, where the responsible Department fails to properly investigate a case of PMSC abuse. The rationale behind advocating for the application of MEJA begins with the fact that Iraq was a war zone. Therefore, the majority of State Department contracts can be presumed to contribute to the broader mission of the DOD - this is because for every contractor working in Iraq, a US soldier becomes free to participate in offensive missions aimed at combating insurgents (Stinnett-Kassoff, 2019).[37] On the other hand, arguments against the applicability of MEJA attempt to prove that the contractors' employment was not supporting the DOD mission.[38]

[37] In *Slatten*, the US Court of Appeals dismissed the defendants' arguments and found that the nexus between the defendants' employment with the DOD mission was established because, by 2007, the DOD had a broader mission overseas —specifically, in Iraq— that extended beyond military operations against the insurgency. The DOD's objective related to the reconstruction of the war-torn country, including the establishment of economic and political stability. In this rebuilding endeavor, the State Department played a significant role, with its diplomats actively contributing to restoration efforts in Iraq. As the defendants' provided security for these diplomats, whose work directly supported the DOD mission, their employment can be seen as "relate[d] to"—that is, had a "connection with or reference to"—the DOD mission. (United States of America v. Nicholas Abram Slatten, [2017]).

[38] To support their claim, the defense in Slatten cited three reasons: Firstly, the defense maintained that to determine the scope of an individual's employment as a government contractor, courts need to look to the governing contracts. Here, they argue, the relevant contracts provided no support for the government's theory that the Defendants' employment related to supporting the Defense Department's mission. Additionally, the defendants were employed under the State Department's Worldwide Personal Protective Services II contract which involved the hiring of PMSCs to assist in providing armed diplomatic security globally. According to the terms of the contracts, the State Department engaged Blackwater to provide protection for three categories, firstly, US Embassy non-government and government personnel supporting official US government business, secondly, individuals or groups directly engaged in supporting development or reconstruction efforts in conjunction with the US Agency for International Development (USAID), and thirdly, personnel operating under the authority of the Chief of Mission authority, upon RSO request. The defense argued that the contracts unambiguously outlined the scope of work. They contended that the defendants' responsibilities solely centered around supporting the State Department's statutory mission of providing diplomatic mission, while the DOD's mission is not mentioned at all. (United States of America v. Nicholas Abram Slatten, [2016]). Secondly, the defense contended that even if the court were to consider factors beyond the contracts to establish a connection, the government did not successfully demonstrate that the alleged conduct related to supporting the DOD's mission because in Nisour Square the defendants were engaged in a fundamental State Department function, namely securing a safe route for an attacked US diplomat while acting under Embassy, not military, supervision (United States of America v. Nicholas Abram Slatten, [2016]). Lastly, the defense argued that the government's arguments regarding MEJA conflicted with the language of the statute. The prosecution argued the State and Defense Departments worked "seamlessly" as "one team" with "one mission," to rebuild Iraq. This broad interpretation disregarded MEJA'S explicit limitations on the application of the statute to non-DOD contractors. In other words, by equating the "mission of the Department of Defense" in Iraq to the "overarching mission of the United States", the prosecution essentially argues that every federal employee and contractor in Iraq was "employed by the Armed Forces" (United States of America v. Nicholas Abram Slatten, [2016]).

4.3.2 Memoranda of Understanding

It should be clear that the DOJ's involvement in a MEJA case only begins when a DOD or State Department agent refers a case to the DOJ for possible prosecution. The referral process is difficult to follow so, again, it is important for Departments to cooperate and issue regulations that will assist their agents when they are implementing MEJA in practice.

Section 3266(a) of MEJA mandated the Department of Defense (in consultation with the Department of State and the Attorney General) to issue regulations "governing the apprehension, detention, delivery, and removal of persons […] and the facilitation of proceedings under section 3265." However, no explicit reference was made to the State Department. To "persuade" the State Department, the Congress decided to include a provision in the National Defense Authorization Act for FY2008 explicitly asking the Department of State to enter a memorandum of understanding (MOU) with the Department of Defense concerning issues pertaining to contracts in Iraq or Afghanistan. This MOU aimed to address various aspects, including the delineation of responsibilities for investigating and referring potential violations of MEJA (section 861 of the 2008 NDAA). An MOU between the Department of Defense and the Department of State was thus concluded on the 12th of May 2007 (MOU, 2007). According to the MOU, the DOS and the DOD agreed that they would jointly develop and implement core standards including the "[r]ecognition of investigative jurisdictions and coordination for joint investigations" for PMSC personnel. (MOU, 2007) Specifically, section VII of the MOU notes that the "U.S. Embassy Baghdad will have the lead responsibility for investigating a serious incident involving a U.S. Embassy Baghdad PSC, and MNF-I [DOD] will have the lead responsibility for investigating a serious incident involving an MDF-I [DOD] PSC. The entity conducting the investigation can request investigative assistance or relevant information from the other entity, which will be provided or shared to the greatest extent possible." (MOU, 2007) In other words, this agreement makes clear that the investigation of crimes will be conducted by the agency that contracted the PMSC involved in a particular incident.

Additionally, the Congress broadened the scope of the MOU requirements to encompass additional reporting obligations for contractors concerning allegations of offenses that contravene MEJA, whether committed by or against contractor personnel. These provisions also focused on ensuring that contractor personnel are fully informed about their duty to report such crimes and are aware of

the appropriate channels to seek assistance (section 854 of the FY2009 NDAA, P.L. 110-417). Another memorandum was therefore drafted which clarified that each Department has a separate responsibility for collecting evidence and referring cases to the DOJ including any information relating to offenses under MEJA for the contracted PMSCs. (MOU, 2008) This means that the State Department has an obligation to conduct the preliminary investigation of a serious incident involving a company it has contracted and to refer information related to possible offenses under MEJA or any other applicable US criminal law to the DOJ, as appropriate, unless other arrangements have been agreed upon (MOU, 2008).

Since the State Department contracted Blackwater, it would be expected that after the Nisour Square scandal, the DOS would have revised its regulatory framework to address the problems (particularly regarding gathering evidence) identified during the hearings that followed. Yet, we observe that the State Department made no significant changes to its regulatory framework. This is unsurprising considering that there was a perception that the State Department may have compromised the case itself to protect Blackwater, with reports suggesting that State Department agents tampered with the scene by cleaning up and picking up shot shells (Apuzzo, 2014). As Liu notes, this allegation in combination "with the State Department according to limited immunity in exchange for statements about the shooting, the picture suggests official attempts at extending both de jure and de facto impunity for Blackwater over this incident." (Liu, 2017, p.79) The next section elaborates on the DOS' regulatory status quo and its reluctance to make changes post-Nisour to (a) investigations and (b) referrals to the DOJ. Before proceeding to the DOS, we will examine the regulations established by the DOD on the same matters as a point of reference that will enable better understanding of the 'gaps' in the State Department's regulatory framework.

4.4 Regulatory Framework

The Nisour Square scandal exposed the failure of the State Department to regulate the actions of PMSCs by putting an adequate regulatory framework in place that would provide State Department officials with guidelines and instructions on how to properly handle such an incident. As discussed, the issues involve a failure to properly investigate and gather evidence in the aftermath of the event which would then have facilitated the contractors' prosecution by the DOJ. First the section will

provide an overview of the regulations of the DOD guiding their agents on how to handle such incidents. This can be used as a point of reference to compare the failure of the State Department to establish any guidelines to direct its agents when such incidents take place.

Defense Department's regulatory framework: The DOD issued Instruction 5525.11 (DODI 5525.11, 2005) to implement policies and procedures pursuant to MEJA. Section 2.5. of the Instruction stipulates that MEJA and the DOD Instruction 5525.11 aim to fill the jurisdictional gap in US law concerning the application of criminal sanctions to, amongst others, civilians employed or accompanying the Armed Forces outside the US. Among other things, the Instruction provides clear and comprehensive guidance to DOD employees on how (a) to conduct a proper investigation and (b) process a request for prosecution of PSMCs in court (referrals). Bateman (2012) highlights that MEJA is not a "DOJ thing". While the DOJ is responsible for prosecuting individuals under MEJA, it is the agents from the DOD and the State Department who play a key role in facilitating the progress and development of the case (Ayer, 2019).

DODI 5525.11. (2005) regulates the conduct of DOD agents since they must exercise discretion to decide whether an individual should be referred for prosecution and how to conduct an investigation so that evidence supporting the referral claim is provided. DOD agents are thus responsible for "implementing investigative policies" to effectively enforce and execute MEJA (DOD Instruction 5525.11, section 5).[39] The comprehensive Instruction, spanning 33 pages, establishes the obligation to report, as well as responsibilities pertaining to the collection of essential information for the purpose of prosecuting cases under MEJA. If they fail, Bateman (2012) warns the case may never make it to the DOJ. Additionally, DOD agents have the responsibility to inform the Attorney General

[39] "5.3: The Heads of the Military Law Enforcement Organizations and the Defense Criminal Investigative Organizations, or their Designees, shall:

5.3.1. Advise the applicable Commander of the Combatant Command and Staff Judge Advocate (or Legal Advisor), or designees, of an investigation of an alleged violation of the Act that may lead to arrest or criminal prosecution under the Act. Such notice shall be provided as soon as practicable. In turn, the [General Counsel (GC)], DoD, or designee, shall be advised to ensure notification of and consultation with the DOJ and the DoS regarding information about the potential case, including the host nation's position regarding the case. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Department of Defense, the DOJ, and the DoS." (DOD Instruction 5525.11., 2005)

(i.e., refer the case) whenever they have reasonable suspicion that a crime has been committed (DOD Instruction 5525.11, section 5).[40] Bateman (2012) notes that the crucial element for DOD agents to comprehend is the referral process. Since the DOJ has the discretion to decide whether to accept a case referred from the Department agents or not, there are certain actions that DOD officials and investigators can take to increase the chances of a case being accepted for prosecution by the DOJ. He thus suggested that, firstly, MEJA referrals must be made formally. Hence, it is crucial for the DOD agent to promptly inform the designated General Counsel for MEJA cases as well as the attorneys at the DOJ Human Rights and Special Prosecutions Section (HRSP). The HRSP serves as the primary point of contact for DOD personnel regarding investigations that may result in criminal prosecutions and related pretrial matters. Additionally, to prosecute an individual under MEJA, it is necessary for the government to demonstrate that this person is acting in support of the DOD mission. Therefore, one of the key responsibilities of DOD officials is to conduct an investigation that not only proves the underlying criminal act but also gathers evidence establishing this vital jurisdictional element.[41]

This task becomes far more daunting when the individual is employed by some "other Federal agency", because MEJA's applicability to non-DOD contractors can be contested by the defense in prosecutions. Cases that would otherwise be straightforward may become complex investigations that move beyond examining the underlying criminal conduct to scrutinizing the scope of the defendant's employment, specific job responsibilities, and other jurisdiction related factors.

---

[40] "5.2. The Inspector General of the Department of Defense shall:

5.2.1. Pursuant to Section 4(d) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3) (reference (d)), "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." This statutory responsibility is generally satisfied once an official and/or special agent of the Office of the Inspector General of the Department of Defense notifies either the cognizant DOJ representative or the Assistant Attorney General (Criminal Division) of the "reasonable grounds."

5.2.2. Pursuant to Section 8(c)(5) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3) (reference (d)) and 10 U.S.C. 141(b) (reference (e)), ensure the responsibilities described in DoD Directive 5525.7 (reference (f)) to "implement the investigative policies, monitor compliance by DoD criminal investigative organizations, and provide specific guidance regarding investigative matters, as appropriate" are satisfied relative to violations of the Military Extraterritorial Jurisdiction Act of 2000 (reference (a))." (DOD Instruction 5525.11., 2005)

[41] Bateman (2012) highlights the importance of including information about the crime in the initial report but advises against conducting an in-depth analysis of the jurisdiction element. Such analysis could be counterproductive and potentially impact the prosecution process. According to Bateman, this correspondence could be considered *Brady* material and would need to be disclosed to the defendant's attorneys, which could be used by the defense to challenge jurisdiction.

Determining the scope of a defendant's employment can be challenging but also resource-intensive, particularly in war zones where operational conditions can be demanding (Committee on Judiciary, Serial No. J–112–24, 2011). In a hearing, Mr. Lanny Breuer, then Assistant Attorney General, clarifies that determining whether an individual falls under the purview of MEJA is contingent upon meticulous assessment of the precise facts and circumstances pertaining to their employment (Committee on Judiciary, Serial No. J–112–24, 2011, p. 22). When the employment contract involves an agency other than the DOD, it becomes necessary to gather additional information to demonstrate that the individual's "employment relates to supporting the mission of the Department of Defense overseas". To establish this jurisdictional element beyond reasonable doubt requires investigators to go beyond the mere examination of employment records. They need to collect evidence such as memoranda of understanding or contracts between the individual's employer and the DOD commander they worked with. Further, witness statements confirming the subject's involvement in missions supporting the DOD, as well as statements detailing the specific tasks performed by the contractor on these missions, are also important pieces of evidence.

Such documentation needs to be gathered by the Department making the referral. In the Nisour case, for instance, this was the primary responsibility of the State Department. Mr. Breuer explained that in the Nisour case establishing the nexus between the contractors and their mission with the Department of Defense presented challenges (Committee on Judiciary, Serial No. J–112–24, 2011, p.22-23). An important factor was the fact that the State Department, the agency that had contracted Blackwater and was supposed to be leading the investigation, failed to do so. The fact that the State Department did not have a compressive framework in place, such as the DOD's one which instructed its employees on how to conduct a proper investigation and successfully refer a case to the DOJ, made prosecution more difficult.

State Department's Regulatory Status Quo: In contrast, the State Department had no comprehensive regulatory framework in place, only disconnected orders, procedures, and protocols established by the Regional Security Office (RSO).

Regarding referrals, the RSO in post is expected to provide general oversight and manage the operations of PMSCs by developing and maintaining Standard Operating Procedures (SOPs). The

SOPs of the high threat protection office encompass a broad range of policies, including reporting protocols and pre-mission briefings. All PMSC contractors are obligated to promptly notify the RSO of any operational incidents involving weapon discharges, attacks, serious injury, or death. The RSO then conducts a thorough investigation to ensure that the specific use of force aligns with Department policies. Depending on the nature of the incident, the Department may impose remedial training, request reassignment of personnel to non-firearm duties, or altogether withdraw the personnel from the project. If an incident suggests potential criminal acts, the case must be referred to the DOJ. However, there appears to be no comprehensive guidelines on how a State Department officer is supposed to do most of the above (CRS, 2010).

Regarding investigations, the RSO is among many actors that could be involved in the investigation of a criminal activity overseas. Often, it is Embassy officials who are the first to be informed and address criminal activities involving or targeting US nationals abroad. In fact, in cases where it is deemed suitable, DS agents may take the lead on any US investigation. Such investigative materials, including witness and perpetrators' interviews, are supposed to be presented by the referring agency to the DOJ's Criminal Division to determine if the evidence is sufficient to establish that jurisdiction exists under MEJA. While investigations by the DOD are made pursuant to procedures set forth in the DODI 5525.11 (discussed above), no similar comprehensive guidelines seem to exist for investigations that are supposed to be made by State Department agents (CRS, 2010). The lack of proper guidance was made obvious after the Blackwater shootings in Nisour when "Department of State investigators interviewed witnesses on the scene and purported to give them immunity, which interfered with the ability of prosecutors to build their case" (Dickinson, 2015, p.10).

No Change in State Department's Regulations: The State Department was expected to revise its regulatory practice in response to the Nisour massacre scandal. However, even after additional legislation was drafted (section 861 of the 2008 NDAA for FY2008 and section 854 of the 2009 NDAA for FY2009), the slight modifications that took place lacked a broader policy strategy to effectively address the State Department's relationship with PMSC contractors. Instead, the changes focused on resolving immediate problems without considering the need for a comprehensive regulatory approach or the development of policies to prevent future problems from arising. Notably, in the wake of Nisour, Secretary of State, Condoleezza Rice, assembled a panel of external experts to examine the State Department's security practices in Iraq. The Panel's mandate was to be "serious,

probing and comprehensive" (Panel on Personal Protective Services in Iraq, 2007, p. 3) in its review. To this end, they spent two weeks in Baghdad interviewing State personnel, the Chief of Mission, the Deputy Chief of Mission, and the Regional Security Officer. The Panel also interviewed US DOD military officers and civilians. According to the Panel on Personal Protective Services in Iraq (2007), the State Department's security operations were successful in ensuring the safety of mission personnel. However, the Panel also identified deficiencies in oversight and accountability. Therefore, the members of the Panel recommended that the State Department urgently collaborate with other administrative agencies to establish a comprehensive regulatory framework. The Panel also found 'gaps' in the investigation practices of the DOS because "when incidents involving the discharge of weapons occur, the scope of investigation has not been broad enough to ensure that on-the-scene information is gathered quickly and thoroughly and incorporated into the overall investigation" (Panel on Personal Protective Services in Iraq, 2007, p. 8 - 12). Instead, the State Department responded with measures constituting an "immediate fix", rather than comprehensive regulations. For instance, the Department established a procedure in which each convoy is required to have a camera and a State Department officer accompanying it. However, such isolated actions were criticized not only because they were not part of a comprehensive regulatory instrument, but also because agents on the ground found this approach to be unreasonable since the officer tends to sit at the front, while issues typically arise at the back of the convoy.

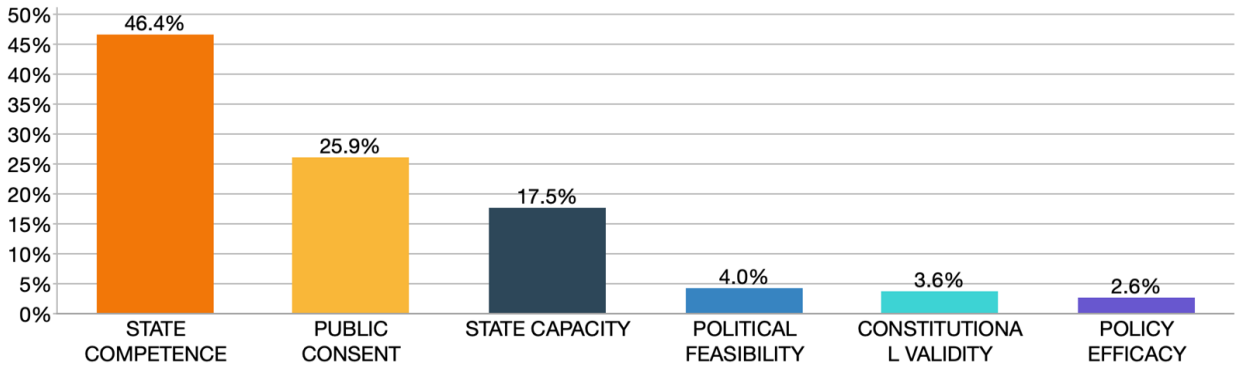
Clearly, the State Department appeared reluctant to acknowledge that there were 'gaps' in its regulatory practice, even after Nisour. As a result, they only took measures as an exception to common practice, rather than the new modus operandi. Such quick solutions cannot bring the same kind of closure discussed in the previous chapter.

4.5 The Hearings

Two hearings were convened to scrutinize the regulatory framework, established by the State Department, whose "failure" was exposed by the Nisour scandal (Committee on Government Reform, Serial No. 110-89, 2007; Committee on Governmental Affairs, Serial No. 41–453, 2008). The actor constellation was "narrow" as the victims' families were not present to the hearings. The actor

constellation thus only included the members of Congress, the administration (DOS officials)[42] and the founder and owner of Blackwater, Eric Prince. Further, in contrast to Chapter 3, the number of "public consent" arguments expressed during these hearings was considerably reduced (figure 3). Instead, the dimension with the highest percentage is the "state competence" category. As will be shown in this section, the fact that the actor constellation was restricted to powerful actors and the argumentative space was limited appears to have hindered effective *change* in the State Department's framework. Crucially, it becomes evident that the State Department's unwillingness to admit its shortcomings is pronounced. Despite the Committee members questioning its "competence" to a certain degree, there was no meaningful closure leading to reform.

Figure 3: Argumentation after Nisour



The first hearing took place only a few days after the Nisour square scandal, on 2 October 2007. It scrutinized the actions of the State Department in the aftermath of the incident, and more broadly whether the Department had a comprehensive regulatory framework in place for when a crime is committed overseas. Chairman Waxman emphasized that the Nisour square massacre raises significant questions about Blackwater and, most importantly, the State Department's oversight of the company. The Committee was seeking to answer a basic question: Is the Government doing enough to hold Blackwater accountable for alleged misconduct? (Committee on Government Reform, Serial No. 110-89, 2007, p. 3)

[42] Those officials were: Ambassador David Satterfield (Senior Advisor to the Secretary and Coordinator for Iraq, US Department of State); Ambassador Richard Griffin (Assistant Secretary of State, Bureau of Diplomatic Security, US Department of State); William Moser (Deputy Assistant Secretary for Logistics Management, US Department of State)

Even though members of the Committee were not allowed to ask explicit questions about the events of the Nisour square scandal due to the ongoing investigation, they were able to bring up the way the State Department handled prior (analogous) incidents of Blackwater's misconduct. Congressman Davis of Virginia argued that the State Department appears to handle incidents of erratic and hazardous conduct exhibited by PMSCs "with little or no regard to Iraqi law. Usually, the bad actor is simply whisked out of the country, whether the offense is a civilian casualty, negligent discharge of a weapon, alcohol or drug abuse, or destruction of property" (Committee on Government Reform, Serial No. 110-89, 2007, p. 14). As a result, no proper investigation of the incident could be conducted. He concluded that it is understandable for Iraqis to feel resentment towards the US "preaching about the rule of law" while US contractors seemed to be exempt from legal consequences. This, he further explained, is why the events of September 16th caused such a strong reaction from the Iraqi government and people who perceive unprosecuted attacks on civilians as a challenge to their national sovereignty (Committee on Government Reform, Serial No. 110-89, 2007, p. 14).

One incident showing the State Department's lenience towards Blackwater's misconduct, Chairman Waxman notes, took place on December 24, 2006. On that particular day, a drunk contractor employed by Blackwater shot the guard of the Iraqi Vice President. Importantly, the incident occurred within the secured Green Zone rather than during a diplomatic protection mission. The Chairman highlights that if such an incident had taken place within the US, the contractor would have been arrested and subjected to criminal investigation. Similarly, if the perpetrator had been a US solder instead of a contractor, the soldier would have faced a court martial. However, in the case of the Blackwater contractor, the only consequence was that he lost his job. The State Department's response to this incident caused much controversy. The Department recommended that Blackwater resolve the issue by providing compensation to the victim's family "to make the problem go away". It then encouraged the contractor to depart from Iraq a mere 36 hours after the shooting (Committee on Government Reform, Serial No. 110-89, 2007, p. 3-4). Chairman Waxman highlights that the matter should have been investigated and referred to the DOJ. To add insult to injury, previously "confidential" emails exchanged between Blackwater and the State Department revealed a disturbing debate regarding the amount of compensation to be paid. The initial recommendation by the charge d'affaires was a payment of $250,000 but this was later reduced to $15,000 based on concerns raised by the Diplomatic Security Service. The reasoning behind this reduction was that Iraqis might intentionally put themselves in harm's way to obtain such a substantial payout. By

reading these emails, Chairman Waxman argues, “it is hard not to conclude that the State Department is acting as Blackwater’s enabler.” (Committee on Government Reform, Serial No. 110-89, 2007, p. 3-4). Congresswoman Maloney adds that, given that the particular incident took place within the Green Zone, the fact that an investigation was not initiated was completely unjustified. This was because the situation in this Zone was controllable and an investigation would have been easier to conduct. Yet, the State Department preferred to just “pack him and have him leave the country within 2 days” (Committee on Government Reform, Serial No. 110-89, 2007, p. 59). She adds that such incidents have grave consequences since they essentially undermined the US mission in Iraq and significantly damaged the relationship and trust between the Iraqi people and the American military.

Eric Prince (Blackwater) essentially blamed the State Department, asserting that Blackwater strictly adhered to their instructions without deviation. He added that in cases of “performance difficulties”, such as the one that took place on Christmas Eve 2006, the Department had encouraged Blackwater to hold themselves internally accountable and then just send the incident report to the RSO. This is justified, according to him, because when an incident occurs “[i]t generally comes to our attention first. We as a company, we fire them. We send the termination notice to the State Department as to why we fired someone.” (Committee on Government Reform, Serial No. 110-89, 2007, p. 56- 57). To make things worse, Mr. Prince added that “[i]f there is someone [an employee] that doesn’t agree or is not operating within the standards of the Department of State, they have two decisions, window or aisle” (Committee on Government Reform, Serial No. 110-89, 2007, p. 56). When Congressman Sarbanes asked him to explain what he means by that, Mr. Prince proudly responded that Blackwater’s policy is to immediately fire the employee involved in the incident. To this statement Congressman Sarbanes responded that being fired and fined does not have the same kind of deterrent effect that would exist if perpetrators believed that they could face prosecution for their actions. However, it was generally accepted by most members of the Committee that it is the State Department that was at most at fault, as they gave Blackwater the orders to transport the offender back to the US. Again, on the determination of the amount paid to the victims’ families, Mr. Prince was very clear that the amount is agreed in consultation with the State Department (Committee on Government Reform, Serial No. 110-89, 2007, p. 93).

Finally, Congressman Davis of Illinois noted another shooting incident which involved the murder of an innocent man standing by the side of the street by Blackwater's guards. In this case, after the event, the contractors neglected to report the shooting incident and tried to cover it up. Even though the State Department was informed about this incident and the attempted cover up by Blackwater employees, the Department still failed to refer the case. In fact, their report described the incident as ''the random death of an innocent Iraqi" (Committee on Government Reform, Serial No. 110-89, 2007, p. 71 -72). On the matter of the amount that Blackwater paid to the family, Mr. Prince testified that the payment – which was (again) processed by the State Department. It was not an attempt to "hush it up or cover it up", but rather common practice and no different to what the DOD does, that is, when "there is an accidental death from whether it is an aerial bomb, a tank backs over somebody's car or injures someone. There is compensation paid to try to make amends" (Committee on Government Reform, Serial No. 110-89, 2007, p. 72). Therefore, the payments made by the State Department are "part of the regular course of action" (Committee on Government Reform, Serial No. 110-89, 2007, p. 72). When Mr. Prince was asked how many times the State Department provided compensation to innocent Iraqi civilians or their families who had suffered death or injuries due to the actions of Blackwater employees. Eric Prince claimed not to remember the exact number.[43] This is alarming, the Congressman concluded, because there is clearly a "lack of accountability. If one of our soldiers shoots an innocent Iraqi, he or she can face a military court martial. But when a Blackwater guard does this, the State Department helps arrange a payout to make the problem go away. This seems to be a double standard, and it is causing all kinds of problems in Iraq" (Committee on Government Reform, Serial No. 110-89, 2007, p. 72).

The testimonies of the State Department officials followed. Early in the hearing, it became clear that the State Department did not have an effective regulatory framework in place that would guide its

[43] "Mr. DAVIS OF ILLINOIS. Can you tell me how it was determined that this man's life was worth $5,000?
Mr. PRINCE. We don't determine that value, sir. That is kind of an Iraqi-wide policy. We don't make that one.
Mr. DAVIS OF ILLINOIS. Do you know how many payments Blackwater has made to compensate innocent Iraqis or their families for deaths or injuries caused by Blackwater personnel?
Mr. PRINCE. I do not know that, sir.
Mr. DAVIS OF ILLINOIS. Do you know what the total value of those payments might be?
Mr. PRINCE. No, sir.
Mr. DAVIS OF ILLINOIS. Could you supply the committee with that information?
Mr. PRINCE. Yes, sir. I will make sure we get it back to you." (Committee on Government Reform, Serial No. 110-89, 2007, p. 72)

agents through the complex investigation and referral procedures. Ambassador Satterfield responded that in those rare situations when security contractors must employ force, embassy management officials diligently examined each incident to verify that proper procedures and protocols were indeed adhered to. In particular, he reassured the Committee that State Department officials of the Bureau of Diplomatic Security work closely with the DOJ in cases where there appeared to be a basis for the assertion of US criminal jurisdiction overseas. He emphasized that the September 16th incident was no exception. Following the Secretary's instructions, the embassy conducted a comprehensive investigation into the facts of the incident (Committee on Government Reform, Serial No. 110-89, 2007, p. 124 - 125). However, as discussed, such an investigation was found to be deficient, as the agents had no real guidance on how to proceed. They used their own discretion on how to apply the law, thus making grave mistakes along the way.

Congressman Lynch challenged the Ambassador's claim presenting some emails which raised questions about the State Department's conduct in the aftermath of a crime. He maintained that in situations where Iraqi lives were lost, it seemed that the State Department's initial response was to ask Blackwater to make monetary payments rather than prioritize accountability or launching investigations into the potential criminal responsibility of Blackwater personnel. He highlighted that, despite the assertion of Secretary of State, John Negroponte, that every incident of Blackwater personnel discharging their weapons was thoroughly reviewed by management officials to ensure compliance with procedures. The documents and emails discovered for the purposes of the Committee hearing seemed to contradict this claim (Committee on Government Reform, Serial No. 110-89, 2007, p. 110 - 111). Specifically, one email dated July 1 2005, from RSO Al-Hillah, referring to an incident where Blackwater personnel fired and killed another Iraqi civilian, stated ''This morning, I met with the brothers of an adult Iraqi male who was killed by a gunshot to the chest at the time and location where the PSD, in this case, Blackwater team, fired shots in Al- Hillah on Saturday, June 25th of 2005.'' And then it says, ''Gentlemen, allow me to second the comments on the need for Blackwater to provide funds ASAP. For all the reasons enunciated in the past, we are better off getting this case and any similar cases behind us quickly. Again, the Department of State needs to promptly approve and fund an expedited means of handing these situations. Thanks.'' (Committee on Government Reform, Serial No. 110-89, 2007, p. 117) Clearly such emails rendered the State Department's defense elusive.

Additionally, Chairman Waxman expressed concern over the facilitation of Blackwater contractor's departure, who was suspected of killing one of the Iraqi Vice President's security guards. He argued that, based on the documents subpoenaed by the committee, it was evident that Blackwater arranged for the shooter to leave Iraq within 36 hours of the incident, with the approval of the RSO at the Baghdad Embassy. Ambassador Griffin explained that following the incident and after conducting several interviews, the Department determined that there was no compelling reason for the contractor to remain in Baghdad. Chairman Waxman challenged his claim by reading an excerpt from a policy briefing which noted that "the subjects of investigation should be kept in-country, because the investigators may need access to them". Then he added, "In fact, when you think about this, this is an obvious point. Why didn't you follow the policy recommended by Ambassador Kennedy?" Ambassador Griffin's response was that evaluation must be made on a case-by-case basis (Committee on Government Reform, Serial No. 110-89, 2007, p. 137 -138). Chairman Waxman was not persuaded and insisted that "this is not an ordinary case. This is a pretty extreme one. You have a private military contractor within the Green Zone, which is an internationally protected area, shoot and kill an Iraqi security guard. What we saw was that within 36 hours, he was ushered out of the country and the State Department helped that happen. In fact, the documents show that the primary response of the State Department was to ask Blackwater to make a payment to the family in the hope that this would make the problem go away." (Committee on Government Reform, Serial No. 110-89, 2007, p. 137 -138). In fact, upon examining the State Department's reaction to the Christmas Eve shooting, it became evident that there was lack of meticulous oversight and scrutiny, which contradicts the claims made by the Ambassador. Instead, he added, there seems to be an attempt "to sweep the whole incident under the rug" (Committee on Government Reform, Serial No. 110-89, 2007, p. 137 -138).

Then, the Ambassador changes tactics and follows a different line of defense arguing that the problem is that the applicable legislative framework is particularly "murky". As a result, the Department was not sure which actions to take. Clearly annoyed by his attempt to avoid any responsibility on the regulatory fiasco at hand, the following heated discussion took place:

> "Chairman WAXMAN. So, you weren't sure at the State Department whether this was a possible criminal violation, when a person hired by a contractor of the United States shoots and kills an Iraqi in the Green Zone? There is a question of whether this is criminal? Is that

why the State Department helped get him out of the country and gave Blackwater a suggestion of how much to pay to get rid of the whole incident?

Ambassador GRIFFIN. That is your judgment that is what happened. I was not there. I think that is why the Department of Justice is examining this case. And they are examining the potential ways that it might be prosecuted.

Chairman WAXMAN. Well, it just seems to me common sense to say that if there is an examination going on, and the man is not there any longer, you can't pursue some of those issues. And the ones that pursue the investigation are the ones right there on the ground. You don't get the guy out of the country as fast as possible and then say we did what we thought was a responsible thing to do."

(Committee on Government Reform, Serial No. 110-89, 2007, p. 138 - 139).

On the specific matter of establishing proper investigation procedures, most members of the Committee agreed that the fragmented orders and procedures that the Department had in place did not appear to be working because they gave too much room to the contractors to withhold crucial information for a timely investigation. This therefore impeded a proper investigation and referral to the DOJ. Furthermore, given that the role of State Department agents on the scene is crucial, especially after a weapon is fired or an incident occurs, comprehensive regulations had to be put in place for a thorough investigation to take place. The Ambassador still insisted that such incidents are only the exception, and that the Department has a detailed procedure in place. This procedure stipulates that when a weapon is fired during a mission, the team involved is immediately brought to the tactical operations center where they are individually interviewed by State Department agents to provide an account of the events. Within a 24-hour period, they are required to provide a written statement under oath detailing what happened (Committee on Government Reform, Serial No. 110-89, 2007, p. 137 -142).

Again, his claims were challenged by Congressman Cooper who referenced a specific incident that had occurred on November 28 2005, in which a Blackwater convoy purposefully collided with 18 different vehicles (Committee on Government Reform, Serial No. 110-89, 2007, p. 149). Blackwater's own internal memo on the incident (provided upon the Committee's request) said that during that mission, the tactical commander of Blackwater explicitly instructed the primary driver to engage in

acts of random negligence for no apparent reason. The Congressman added that it appeared that the State Department had knowledge of the incident but chose not to refer it to the DOJ. When asked prior to the hearing to provide the investigation report on the incident, the State Department failed to provide it. The Ambassador claimed that the only reason for not providing the report was that the Committee requested a number of reports, and the Department did not have to time to gather them. This claim was again challenged by the Congressman who explained that the request was made six months before the hearing was scheduled to take place. (Committee on Government Reform, Serial No. 110-89, 2007, p. 149). The Ambassador also failed to provide a response on whether they had investigated an incident involving the killing of an innocent Iraqi bystander in Al-Hillah, but the Ambassador again failed to give an answer.[44] Inevitably, the reluctance to provide information to the Committee led to "doubt on the sufficiency of any State Department investigations into these incidents. We have had a better response from Blackwater than we have from the State Department on getting information. Does that bother you as much as it bothers me? I can't understand why we don't get responses from the State Department", Congressman Waxman concluded (Committee on Government Reform, Serial No. 110-89, 2007, p.153).

Finally, Congressman Lynch warned that the close relationship between State Department personnel and Blackwater could potentially impede the agents from carrying out their duties impartially and objectively. As "The State Department works hand in hand with Blackwater […] in a fairly coordinated team approach in protecting State Department personnel […] Friendships develop. Reliance develops" (Committee on Government Reform, Serial No. 110-89, 2007, p. 153). This may result in

---

[44] "Mr. LYNCH. Could you tell me, was an investigation ever conducted?

Ambassador SATTERFIELD. Congressman, if you will, we will get back to you with full details of that incident and the investigatory followup.

Mr. LYNCH. You are kidding. This is a June 25, 2005 case.

Ambassador SATTERFIELD. Congressman, we will respond in detail on the questions you have posed.

Mr. LYNCH. But sir, you were the Deputy Chief of Mission at the time. You don't recall this?

Chairman WAXMAN. Congressman, I do not recall in the fashion necessary to respond to your question in the detail it deserves.

Mr. LYNCH. I am just asking if there was an investigation. That is not, OK, you have the shooting, you were there, do you remember if there was an investigation? That is not heavy on detail?

Ambassador SATTERFIELD. And Congressman, I would prefer to respond to you in writing on this.

Mr. LYNCH. Are you refusing to answer?

Ambassador SATTERFIELD. No, Congressman, I want to give you a full answer. I am not able to do that at this time.

Mr. LYNCH. I am just looking for a yes or no. Was there an investigation, yes, if there wasn't an investigation, no?

Ambassador SATTERFIELD. I am not able to confirm the details of what happened following that incident at the time."

(Committee on Government Reform, Serial No. 110-89, 2007, p. 152).

agents turning a blind eye on contractor behavior and inhibit their ability to hold them accountable. They might even feel indebted to Blackwater because Iraq is a very dangerous place and Blackwater does a great job on keeping the agents safe. There seems to be a conflict of interest because the company protects their physical wellbeing. The Congressman added "I am sure there is a heavy debt of gratitude on the part of the State Department for your [Blackwater's] service. And yet they [State Department agents] are the very same people who are in our system responsible for holding you accountable in every respect with your contract and the conduct of your employees." (Committee on Government Reform, Serial No. 110-89, 2007, p. 111) As a result, "there may have been some complicity or some involvement, or let's call it negligence even on the part of that individual [RSO]" (Committee on Government Reform, Serial No. 110-89, 2007, p. 154). In fact, the deputy director of the trade association representing private security contractors expressed his concerns in an interview with the Washington Post, ''Blackwater has a client who will support them no matter what they do" (Committee on Government Reform, Serial No. 110-89, 2007, p. 138). Therefore, Congressman Waxman argued that the company operates as if they are untouchable.

The hearings concluded with an important statement from most of the Committee members. They made clear that this is not a partisan issue - Democrats and Republicans will work together to make sure that the Department is responsive to them – the same way Blackwater is obligated to be responsive to the Department – because "we [the Committee] have the have the oversight jurisdiction [over the Department] and you [the Department] have the oversight jurisdiction over Blackwater. And "We [the Committee] want to know if you are exercising that oversight responsibility" (Committee on Government Reform, Serial No. 110-89, 2007, p. 138 – 139). He continued to express his disappointment that even after all this time spent in hearings, there is still a lack of clarity regarding whether the State Department is effectively investigating such incidents, particularly because the State Department failed to fully cooperate with the Committee (Committee on Government Reform, Serial No. 110-89, 2007, p. 161). The State Department's reluctance to disclose information, answer the questions posed with sincerity, or assume any responsibility for the regulatory failures exposed in the wake of Nisour became discernible over the course of the hearings. This is also fully consistent with the fact that the Department did not go to the trouble of making any comprehensive changes to its policies and regulations.

This is also in line with our empirical findings, analyzing actors' argumentation using MAXQDA. This analysis revealed that, in contrast to Chapter 3 (see figure 2), the percentage of "public consent" arguments – which were seen as particularly influential, especially when intensified with the use of emotional appeal which became very difficult to undermine – dropped significantly (see figure 3). Instead, it can be observed that, in this Chapter, most arguments fall in the "state competence" dimension. The content analysis of such arguments shows that they were mostly employed by the administration to justify its regulatory choices in the context of the discretion afforded by the law. Therefore, it appears that even though the State Department's arguments defending the regulatory status quo were challenged by the members of the Committee and were proven to be elusive multiple times, the Department never really acknowledged the gaps in its framework.

4.6 CONCLUSION

This Chapter investigates the circumstances hindering regulatory change in the regulatory framework of the State Department, in the wake of Nisour. Specifically, the members of the Committee confronted the Department regarding the need for reform addressing (a) a lack of proper procedures when conducting investigations and (b) guidance for referrals to the DOJ. Despite the increased scrutiny of the regulations, post Nisour, which exposed major administrative failure, the State Department was reluctant to acknowledge the "gaps" in its policies and regulations, let alone make comprehensive reforms to prevent future abuses from taking place.

To identify the circumstances that may have hindered change, this Chapter studied the transformation of the actor constellation and analyzed the argumentation used by actors to support their regulatory positions. This thesis anticipates, theoretically, that in the aftermath of scandals, the "narrower" actor constellation – where the victims' families were absent from the hearings, while both the State Department and the founder of Blackwater, Eric Prince, were present during the hearings - and thus the less pro-reform voices and arguments heard in the hearing context, will not be able to constrain powerful actors, and effectively challenge the "competence" of the Department to achieve path-deviating reform.

This contrasts with Chapter 3, when the "wider" actor constellation made the arguments of the victims' families heard as part of a dialectically open process which offered evidence to support their claims and challenge powerful actors. Further, in Chapter 3, the MAXQDA analysis showed that "public consent" arguments were the most extensively used. Interestingly, it showed that there appeared to be an "elective affinity" between the families of the victims and the use of normative "public consent" arguments (expressing their sorrow for losing their loved ones due to governmental failure and demanding reform). In this Chapter, the highest percentage of arguments belonged to the "state competence" category (see figure 3). I argue that there is an affinity between "state competence" arguments and the presence of the administration during hearings (who are seeking to defend the regulatory status quo by arguing that change is not necessary because such incidents are the exception and not the norm). The fact that "public consent" arguments were reduced significantly seems to be related to the fact that the victims' families did not attend the hearings. This conclusion was reached because (1) in the previous Chapter, we saw that such arguments appear to be introduced to the hearing by the families of the victims and (2) such argumentation, perceived as being derived from 'the people', were shown to exert significant emotional appeal to the members of the Committee who were "legitimized" to challenge the "competence" of the administration more passionately. Less powerful actors were excluded from the "quiet" phases of contracting sensitive functions to PMSCs. They also continued to be deprived of their right to have their arguments heard in a democratic forum and a seat at the "table". This eventually enabled powerful actors (Departments, Industry) to prevail and succeed in preserving the regulatory status quo. "State competence" arguments thus became the prevalent narrative in the hearing context as they were not challenged by *normative* "public consent" arguments voiced by those harmed the most by the Department's failures, that is, the victims' families. It thus seems that when the actor constellation is narrow and the argumentative space is more limited, it becomes considerably more difficult to challenge the argumentation posed by powerful actors seeking to defend the regulatory status quo.

Argumentation matters in terms of facilitating but also, as shown in this Chapter, hindering change. However, it is important to examine whether power shifts could offer an alternative explanation for the discussed changes. To this end, the question becomes whether there were any shifts in political power during the period that may have hindered the proposed (and much needed) changes from taking place. One month after Nisour, the then Senator Obama strongly criticized the Bush Administration's lack of transparency and accountability initiatives. Additionally, in a prepared statement to the Senate Committee on Foreign Relations in 2008, he promised that he will "ensure

that contractors are held accountable for their actions" (Committee on Foreign Relations, Serial No. 110 – 744, 2008, p.61). His election as the 44th President of the United States, on 20 January 2009, was expected to be the final push for the adoption of a framework that would safeguard the public against contractor abuse, especially during 111th Congress, as democrats controlled both houses of Congress. However, it appears that the political shift that occurred with Obama's Election did not influence neither the stance of the State Department or the observed regulatory outcome. Power does matter, however in this case, it does not seem to have influenced the outcome.

Finally, this Chapter offered an excellent opportunity to study what happens when the same law is implemented by two different Departments. This is related to the assumption that as long as legislation is properly designed, then effective implementation will follow. Yet, as has been noted, the mere enactment of laws does not guarantee their implementation in practice. Instead, their application depends on the efforts of individual executive departments. Put differently, the question becomes: Is it possible to have the same legal basis, but different – one successful and another unsuccessful - regulatory outcomes? This Chapter shows that this is indeed possible. MEJA constitutes a single legal basis which was implemented by both the State Department and the DOD (as discussed in detail in section 4 of this Chapter). Even though the Defense Department managed to establish a relatively successful regulatory framework, the State Department failed to implement MEJA in an effective manner. The same law can thus be implemented in a qualitatively different manner by two different Departments. In turn, this proves that the relative success of a piece of legislation does not only depend on the 'design' of a particular law but also on the way it is implemented.

5 REGULATING AFTER JONES

5.1 INTRODUCTION

This Chapter studies the – partially successful – implementation of legislation by the Department of Defense (DOD) to resolve "failures" exposed, in the wake of the Jamie Leigh Jones scandal. This scandal involved the contracting of PMSCs who used mandatory arbitration clauses in their employment contracts which prevented Jones and many other women who came forward with their stories from getting their day in court after being sexually abused. The outcome of this case is characterized as partially successful because even though the Department of Defense eventually issued regulations implementing the "Franken Amendment" (Section 8116 of the Defense Appropriations Act for Fiscal Year 2010), it opposed the adoption of such legislation from the offset and even after the adoption of the Amendment (and there was a clear legislative mandate), it effectively narrowed the scope of the law using vague language in its regulatory measures.

To this end, the Chapter analyzes three hearings that were convened with the intent of "processing" what went wrong when the Jones' story began to receive increased media attention three years after the abuse took place. This thesis argues that, in this case, a "lesser" degree of change[45] is observed because (a) the actor constellation was narrow – the Defense Department failed to attend two out of the three hearings and (b) as a result, even though Jones and other survivors of sexual abuse were able to voice their personal stories, explain the "gaps" in the existing regulatory framework, and advocate for reform, they were not given the opportunity to *publicly* challenge the arguments of powerful actors seeking to preserve the regulatory status. The element of emotional appeal was existent, and I argue that it was conducive to *change* (despite being limited). However, the fact that the actor constellation was narrow – and the DOD was absent – seems to have prevented a more comprehensive change from taking place.

[45] Boin, McConnell and t' Hart (2008) describe such reform using the concept of fine tuning which describes the instrumental adaptation of regulations and practices, without any challenge to core political values.

Following this introduction, this chapter is made up of five sections. Section 2 discusses the Jamie Leigh Jones scandal. Section 3 deals with the – only partially successful – change regarding the regulatory practice of the Defense Department, even after it was given a clear legislative mandate to incorporate provisions prohibiting the use of mandatory arbitration clauses in their employment contracts with PMSCs. Section 4 traces the transformation of the actor constellation and analyses actors' discourse during their interactions in this "narrow" hearing context. It highlights the arguments and counterarguments that appeared to be more influential, in a case where powerful actors failed to attend two out of three hearings. There are two parts. The first part deals with the testimony of Jamie Leigh Jones and other women whose contract stipulated that they had no right to a jury trial, after having suffered sexual abuse by their co-workers. The second part discusses the observed official indifference and inaction of the Department of Defense in resolving problems arising from contracts with PMSCs including mandatory arbitration clauses. Section 5 concludes with a brief discussion of the "elective affinity" between the transformation of the actor constellation and the type of argumentation used in institutionally prescribed fora.

5.2 The Jamie Leigh Jones Scandal

Although the army made efforts to decrease the episodes of sexual assault against female military personnel, a study showed that 90% of female veterans have been sexually harassed (Murdoch and Nichol, 1995). Studies explaining the persistent issue of sexual assault against female soldiers by their male colleagues discovered that misogynism (Benedict, 2008) and other prevalent norms in military culture, such as the glorification of hyper-masculinity, promiscuity, and the representation of women as sexual targets, seem to be factors that strongly correlate with the occurrence of sexual abuse against women (Morris, 1996). A particularly important study revealed a strong correlation between the conduct of high-ranking officers and incidences of rape within the military. In particular, the study showed that when superior officers were condoning or engaging in sexually degrading remarks or gestures towards female soldiers, the likelihood of rape increased three to four times. Other findings suggest that the particularly lenient treatment of perpetrators of sexual assault by superior officers further reinforced the perception that female soldiers are an inferior class of soldier compared to their male counterparts and thus can be considered fair game for sexual abuse (Moffeit and Herdy, 2005).

This misogynistic legacy is now at risk of frightful expansion by employees of PMSCs, contracted by government departments. This is unsurprising given that private companies offering military and security services consist of individuals who have previously served in the military and are allured to the private sector by significantly higher compensation compared to the amount received by US soldiers. In fact, individuals who have learnt to perceive women as the "other", and as individuals to be conquered and subdued, have an even higher chance of being involved in acts of sexual violence against their female colleagues than US soldiers. This is due to the belief that their actions will probably go unpunished because of legal hurdles regarding the investigation and referral of crimes committed abroad. Most importantly, this understanding is reinforced by the tolerance of the US government (in this case the Department of Defense) which chooses to contract with PMSCs using mandatory arbitration clauses in their employment contracts. This prevents their employees, among others, from getting their day in court in abhorrent situations, such as the one investigated in this Chapter i.e., after having suffered sexual abuse. Jamie Leigh Jones' testimony in a series of Congressional Committee hearings received increased media attention and provoked a national debate in America. She was viewed not only as a victim of a brutal gang rape but also as someone who fell victim to a culture of arbitration within the US legal system that deprived her of both justice and the opportunity to have her day in court. In this section I provide some important background information on the case.

Ms. Jones – who was 19 years old at the time – entered an employment contract with the Overseas Administrative Services, wholly owned by Halliburton/Kellogg, Brown & Root (Halliburton/KBR) on July 21 2005. This contract included a provision stipulating that she must resolve any employment-related claims through arbitration rather than through the pursuance of a trial. She testified before a Senate committee, "I had no idea that the clause was part of the contract, what the clause actually meant, or that I would eventually end up in this horrible situation" and that this clause would prevent her from bringing her case to court (Committee of the Judiciary, 2009, p.6).

Jones argued that she was promised "a private billeting area to be shared only with women." (Jones v. Halliburton Co. 583 F.3d 228, 5th Cir. 2009) Instead, she was assigned to barracks predominantly occupied by male employees. After only two nights in Baghdad, Jones requested Halliburton/KBR managers relocate her to a safer housing facility due to the pervasive "sexually hostile" environment in her current housing situation. Halliburton/KBR denied. (Jones v. Halliburton Co. 583 F.3d 228, 5th

Cir. 2009). The following day, she was drugged, physically assaulted, and gang-raped by multiple employees of Halliburton/KBR in her barracks bedroom. The morning after the abuse, she reported the rape to Halliburton/KBR medical personnel, and she underwent medical examination and evidence collection with a kit administered at a hospital operated by the US Army. Yet, what followed, was a series of despicable events (Adams, 2011). Firstly, Halliburton/KBR retained possession of the rape kit for a period of two years. Unfortunately, when it was eventually recovered, it had sustained damage. Secondly, Halliburton/KBR kept Jones under constant armed guard, confined her within a shipping container, and denied her repeated requests to leave. During her "imprisonment" she endured hours of questioning by company management and human resources personnel. During such a period of interrogation, she was informed that if she decided to return to the US, there would be no assurance of a job upon her return. Her request to contact her family was also refused. It was only when she persuaded a guard to allow her to call her dad, who contacted US Congressman Ted Poe, that the State Department dispatched agents from the US Embassy in Baghdad to ensure Jones' secure repatriation to the US. Interestingly enough, the DOJ chose not to pursue an investigation into Jones' allegations. Consequently, she was left with the only option of pursuing civil action against her former employer. Jones filed a lawsuit in 2007 against KBR and its former parent company, Halliburton. The challenge for Jones, however, was that her contract stipulated that any disputes with Halliburton/KBR must be resolved through arbitration rather than litigation in the court system.

In Jones v. Halliburton Co., 625 F. Supp. 2d 339 (S.D. Tex. 2008) the central question revolved around whether claims arising from the incident of rape that occurred in employment housing were subject to arbitration. In a comprehensive and well-reasoned opinion, the District Court for the Southern District of Texas determined that the mandatory arbitration provision was "very broad." Due to the broadness of the clause, the court ruled that Jones's allegation regarding assault and battery, intentional infliction of emotional distress arising out of the alleged assault, negligent hiring, retention, the supervision of employees involved in the alleged assault, and false imprisonment fell "beyond the outer limits of even a broad arbitration provision" and were "not related to Ms. Jones's employment." Specifically, the court ruled that even though Jones' housing was provided by Halliburton/KBR, her bedroom should not be regarded as part of the official "workplace". In other words, the court concluded that Jones' claims fell out of the scope of the arbitration provision and could thus be litigated in court.

The court's analysis in *Jones* is important, not only because "there is a strong federal policy in favor of arbitration" (Jones v. Halliburton Co. 583 F.3d 228, 5th Cir. 2009), but also because the district court discussed and disagreed with the decision in another case with similar facts. Specifically, in Barker v. Halliburton Co., 541 F.Supp.2d 879 (S.D.Tex.2008), the court examined the same arbitration language as in Jones. In that case, however, the Court determined that the plaintiff's claims of negligence, negligent undertaking, sexual harassment and hostile work environment, retaliation, fraud, and intentional infliction of emotional distress, stemming from a sexual assault that took place in the plaintiff's living quarters in Iraq fell within the scope of the arbitration provision (and so they could not be litigated in court). In holding this, the district court in *Barker* based its decision on the distinctiveness of the plaintiff's work environment, recognizing that for employees stationed overseas, there is no clear demarcation between work and leisure time. The district court in *Jones* disagreed with the decision in *Barker* stating: "Just because an assailant's actions happen to be in violation of his employer's policies, and those policies also govern plaintiff's behavior, does not necessarily render the assault related to plaintiff's employment for purposes of arbitration" (Jones v. Halliburton Co., 625 F. Supp. 2d 339 S.D. Tex. 2008).

Halliburton/KBR, partially, contested the denial of their motion to enforce arbitration for Jones' claims regarding her alleged rape by Halliburton/KBR employees during her assignment at a company facility in Baghdad, Iraq. The Court in Jones v. Halliburton Co., 583 F.3d 228 5th Cir. 2009 affirmed the District Court's ruling, agreeing that the claims discussed were not covered by the arbitration clause because "in most circumstances, a sexual assault is independent of an employment relationship" (Jones v. Halliburton Co., 583 F.3d 228 5th Cir. 2009). The Court held that there were compelling factors indicating that this incident fell into such a category. These factors included the fact that Jones' sexual assault in her bedroom took place during off-duty hours, it happened following a social gathering in which several co-workers had been drinking (which, notably, at the time was only allowed in non-workspaces), and the abuse took place in a location at a considerable distance from where she worked. Finally, the court noted that, if individuals who were not affiliated with Halliburton/KBR had assaulted Jones, then they would undoubtedly be subject to prosecution as that would clearly constitute an actionable claim. The fact that in *Jones*, the victim happened to be a co-worker of the perpetrators does not change the assessment of the situation.

5.3 A – Partially – Successful Outcome

In the US, mandatory arbitration clauses are authorized by the Federal Arbitration Act of 1925. A mandatory arbitration clause – such as the one included in Jones' contract – has been called by the Supreme Court —in effect, a specialized kind of forum-selection clause which goes beyond determining the location for dispute resolution, but also specifies the procedure and mode by which that resolution will take place (see Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)). In arbitration, an impartial individual—the arbitrator—resolves a dispute by carefully considering the evidence and arguments presented by the parties involved. Arbitration awards are generally binding, meaning that they cannot by appealed in most cases (Sussman, 2009). When a disagreement is settled through arbitration, it excludes alternative forms of dispute resolution like litigation in a court of law. Mandatory arbitration for employees typically occurs through two primary mechanisms: (1) agreements entered into upon hiring, and (2) company-wide employment policies (Colvin, 2017). In recent years, there has been a growing trend of utilizing such clauses to limit class action lawsuits and restrict the procedural remedies accessible to specific groups of individuals involved in litigation.

There is debate over the use of mandatory arbitration clauses. In short, advocates of mandatory arbitration agreements favor their use for a number of reasons. Other than arbitration's relative speed, finality, and effect on courts, they argue that it offers several advantages, including the assurance of having a specialized decisionmaker with expertise in the specific subject matter of the dispute. Additionally, unlike a trial or judicial process, arbitration proceedings and outcomes are kept private and confidential (Wasserman, 2018). Critics, on the other hand, argue that arbitration cannot act as a perfect substitute for courts for several reasons. Firstly, arbitration generally imposes restrictions on the extent of discovery and eliminates the involvement of a jury in the resolution of the dispute (McAllister and Bloom, 2003). It is highly likely that it may suppress meritorious claims, and it also imposes limitations on the availability of information to the public through nondisclosure agreements, which are frequently included in arbitration settlements. Secondly, arbitration presents significant drawbacks, particularly in situations of unequal bargaining power. Usually, the more sophisticated contracting party can select the arbitrator, and this introduces the significant risk of a "repeat player" advantage (in fact, some employment contracts specifically stipulate that the arbitrator must be chosen by the employer). The repeat player advantage arises from the fact that employers, familiar with the arbitration system, may encounter the same arbitrator multiple times,

potentially leading to unconscious bias in their favor. Finally, by mandating arbitration on the individual level, mandatory arbitration clauses can also prevent employees from pursuing their claims as a class. This provides substantial protection to large companies from what might otherwise be considerably adverse judgments that could arise by bringing together a great number of workers who have suffered harm as a class (McWhorter, 2018; Sternlight, 2000).

McCullough (2019) argues that while arbitration may have advantages in commercial settings, the challenges and drawbacks of using arbitration to resolve sexual harassment claims are obvious. She argues that victims of sexual harassment – such as Jamie Leigh Jones - should have the freedom to opt for litigation if they wish to do so. In fact, the hearings following the scandal discussed the problematic nature of such clauses in sexual abuse cases. They demonstrated the regularity with which companies still utilize such clauses. As will be discussed in the next section, after the testimony of Jamie Leigh Jones, other PMSC employees came forward to share their stories of abuse, showing that Jones' case was not unique and such claims were not the exception but the norm (see Risen, 2008). Jones's attorney, Todd Kerry, added that: "I've received upwards of [forty] calls to my office [about assault cases] in the last two years. A good number of them had been disposed of under arbitration." (McGreal, 2009) Additionally, Kerry further contended that had there been public oversight and the opportunity for these cases to be tried in court, the recurrence of sexual assaults could have been prevented. Consequently, Kerry emphasized the importance of safeguarding future employees from any potentially unjust consequences arising from such mandatory arbitration clauses just because the perpetrators feel like they will face no consequences for their actions. In fact, "one of the men who raped Jamie was so confident that nothing would happen that he was lying in the bed next to her the morning after." (McGreal, 2009) Next, I will discuss the regulatory status quo and the – partially successful – attempts to achieve reform in the regulatory practice of the DOD.

Remarkably, Congress introduced an amendment to the 2010 Defense Appropriations Bill (Section 8116) which needs to be renewed annually as part of the DOD appropriation process. This legislation bars the Department of Defense from working with any private defense contractor that requires their employees to settle all discrimination claims, including those of sexual assault, through mandatory arbitration (as the amendment was authored by Senator Franken, it became known as the "Franken Amendment."). This represented a significant change in federal policy (Congress limited

or prohibited the use of mandatory arbitration provisions in a few relatively narrow contexts – see Platt, 2010). It was also significant because the Court in *Jones* had already made a ruling in Jones' favor by permitting many of her claims to proceed to litigation despite the contractual provision calling for their resolution through arbitration.

In practice, this meant that the DOD was mandated to implement the legislation and revise its regulatory practice by incorporating a new contract clause restricting the use of mandatory arbitration agreements into specific Department of Defense contracts. The original Amendment, as approved in the Senate, consisted of a concise and stringent prohibition for the Department of Defense stating: "None of the funds appropriated or otherwise made available by this Act may be used for any existing or new Federal contract if the contractor or a subcontractor at any tier requires that an employee or independent contractor, as a condition of employment, sign a contract that mandates that the employee or independent contractor performing work under the contract or subcontract resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention" (See H.R. 3326, 111th Cong. § 8118, 2009).

Interestingly, the DOD did not support the strong language of the Amendment. The Department opposed the amendment and wrote a letter to numerous senators stating that the Pentagon and its contractors "may not be in a position to know" whether there were mandatory arbitration clauses in the employment contracts of PMSCs with whom they subcontract (Grim, 2017). Further, in a message to Congress on October 6 the DOD, echoing concerns of the industry, noted that "[e]nforcement would be problematic". It referred specifically to the difficulty of ensuring subcontractor compliance especially in relation to subcontracts that are several tiers removed from the prime contractor. (Grim, 2017). Additionally, the DOD highlighted the impracticality of enforcing the Franken Amendment, as it would require someone within the DOD to meticulously review the employment contracts of each and every contractor and subcontractor, at all tiers, to ensure their compliance with the Amendment (Adams, 2011).

In response to these concerns, members of the House and Senate narrowed the final language of the Franken Amendment during a negotiation between the defense appropriations committees of the House and Senate in two ways: (1) the scope of the Amendment was restricted to include only companies that held federal government contracts valued at one million dollars or above. This meant that those requiring less than that amount were left unaffected (Chaudry, 2019); and (2) The Act granted the Secretary of Defense the right to waive in situations where it determined that a waiver is necessary to prevent harm to national security interests. In such cases, the Secretary is obligated to transmit to Congress and publicly disclose any such determination at least 15 business days prior to awarding the relevant contract or subcontract (Dlouhy, 2009; GAO, 2011).

As a result, the pertinent part of the final version of the Amendment reads: "(a) None of the funds appropriated […] by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 […] unless the contractor agrees not to: (1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising […] out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or (2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." (Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454–55, 2009)

The reluctance of the DOD to implement the legislation was evident as instead of changing its regulatory practices in a clear and comprehensive manner, it only included in both the interim and final regulation what appeared to be – intentionally – vague language, thus leaving room for the discretionary interpretation of important terms (e.g., 'covered' (sub)contracts) by DOD agents. By adopting such language, the DOD inevitably intended to reduce the scope of the Act regarding the way it would be applied in practice. Next, I will discuss the series of measures that the DOD used to implement the Amendment.

Once the provision took effect, the DOD was mandated to implement it through a number of measures (GAO, 2011). The first of these was a class deviation issued February 17, 2010, which was followed by an interim rule on May 19, 2010 (Federal Register, Vol. 75, No. 235, DFARS Case 2010–D004), and a final rule on December 8, 2010 (Federal Register, Vol. 75, No. 96, DFARS 252.222-7006). With these measures, the DOD was expected to direct its contracting officers to incorporate a specific clause in applicable contracts, utilizing funds provided by the Act, to limit contractors' utilization of mandatory arbitration. However, according to a report from the GAO, the DOD's compliance rate in incorporating the clause restricting mandatory arbitration in relevant DOD contracts was found to be low. Specifically, among the DOD contracting entities that responded to a request for information in November 2010 by the DPAP, the clause had been implemented in only 14 percent of applicable contracts as of March 2011 (GAO, 2011).[46] Remarkably, according to the GAO (2011) report, two years after the Amendment was enacted, the DOD had still not issued clear guidance to its agents on the specific manner in which the clause should be included in all relevant contracts. Contracting representatives from the Army and Air Force informed the GAO that their automated contract writing systems did not emphasize the particular provision restricting arbitration as a *required* clause. As a result, the clause was only included in a contract if the contracting officer recognized the need for its inclusion and manually selected the clause.

The DOD's unwillingness to put a comprehensive regulatory framework implementing the Amendment in place was also reflected in the vague language it used in both its interim and final published rules. Despite the feedback it received in response to the interim rule asking for clarification of 'covered' contractors and subcontractors, the final rule remained largely unchanged from the interim rule promulgated in May 2010 and the DOD class deviation issued in February 2010 (Howard and Lee, 2010). The three issues that were raised in response to the vague language used in the Interim regulation involved three separate proposed revisions which will be discussed next.

[46] The data request for contracts, task orders, delivery orders, and modifications adding new work covered the period February 27, 2010 to September 30 2010. However, the DOD clarifies that the total number of contracts and the implementation rate cannot be generalized to all DOD contracting entities, as the information was only obtained from 20 DOD entities and not all recipients of the data request provided a response.

The first involved the ambiguity of the DOD Rules as to whether the Amendment applied only to contractors that are party to the covered contract. Specifically, the preface to the interim rule in the Federal Register, as issued by the DOD, defines the term *covered contractors* narrowly in a way that is to be "applied only to the entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected." (Federal Register, Vol. 75, No. 235, DFARS Case 2010–D004) This would seem to limit the reach of the arbitration agreement prohibition to only apply to the corporate entity that is a party to the contract, leaving unaffected any corporate parents or subsidiaries that are not parties to the contract (Tanenbaum and Kolek, 2010). However, this discrepancy appears to contradict both the language and "intent" of the statute, which does not include such a restrictive definition. Moreover, it contradicts Senator Franken's own interpretation of his Amendment, which he conveyed to the DOD's Director of Defense Procurement and Acquisition Policy during the consultation period regarding the interim rule. Senator Franken further expressed his discontent with the ambiguity of the DOD regulation's language in a report published by the GAO in 2011 (and by sending a formal letter to the DOD). He invited public comments on the interim rule, emphasizing that the Rule should have a broader definition of the term to encompass not just the entity directly holding the contract with the DOD, but also the parent company and any subsidiaries associated with it. Similar calls for clarification were expressed by the Equal Employment Advisory Council which noted that the regulation should clarify which employees are covered under the provision. The American Bar Association Section of Public Contract Law also requested that the term "covered contract" be explained (GAO, 2011).

The second issue involved the ambiguity of the regulations regarding who are the *covered subcontractors*. Section 8116 also prohibits the use of fiscal year 2010 funds on any contract awarded after June 17, 2010, unless the primary contractor provided a certification stating that it obligated every "covered subcontractor" to similarly refrain from entering into or enforcing mandatory arbitration provisions in their employment contracts (GAO, 2011). Yet, the DOD Rules did not clarify whether this certification requirement extended to covered subcontracts at all tiers, not just first-tier subcontractors (Esaw and Taylormoore, 2010).

Despite the comments that the DOD received, the final Rule reiterated that the Amendment only applies to contractors (and subcontractors) that are party to the covered contract. It therefore intentionally chose to keep the ambiguity in the Rule's language (Howard and Lee, 2010). The only

actual change that the DOD agreed to make was to provide additional guidance on the waiver of the Amendment's requirements (third issue). Specifically, the Equal Employment Advisory Council and Senator Franken requested that the Rules clarify that when granting a waiver, the Secretary of Defense is required to provide Congress and the public with a detailed explanation of the grounds for the waiver, the alternatives considered, and the reasons why such alternatives would not effectively mitigate harm to national security. The DOD did not address all these issues. However, the final Rule does indeed provide more specific guidance on the waiver of these requirements by the Secretary of Defense (Howard and Lee, 2010).

5.4 The Hearings

This section focuses on three hearings[47] that were convened for the purpose of investigating the regulations governing the contracting practices of the DOD after Jamie Leigh Jones' abuse received increased scrutiny and media attention, revealing policy "failures" and the reluctance of the Department to change the status quo. This section is divided into two Parts. The first Part discusses the testimonies of Jamie Leigh Jones and other women who were sexual abused by their co-workers but the mandatory arbitration clause in their contract prevented them from having their day in court. The second Part focuses on the arguments of actors who were arguing either in favor or against the use of mandatory arbitration clauses in employment contracts.

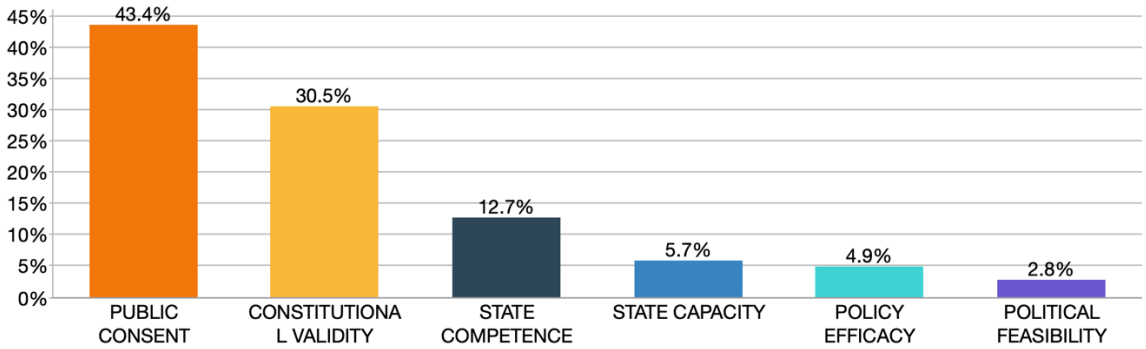
This analysis allows identification of the circumstances enabling the DOD to change its regulations in order to adhere to the legislative mandate, while at the same time choosing to use language that reduced the effect of the law. I seek to explain this – partially – successful outcome (a) by studying a "narrow" actor constellation – since even though the Department was invited to participate in the hearings, it failed to attend two out of three times and (b) by following the argumentation that actors

[47] The first hearing, titled "Enforcement of Federal Criminal Law to Protect Americans Working for US Contractors in Iraq", was convened on the 19th of December 2007 by the (House) Committee on the Judiciary. The second hearing was titled "Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment". It was convened on the 9th of April 2008 by the (Senate) Committee on Foreign Relations. The third hearing was titled "Workplace Fairness: Has the Supreme Court Been Misinterpreted Laws Designed to Protect American Workers from Discrimination?". It was convened on the 7th of October 2009.

(and more specifically the victims of abuse) voiced to demand change, who at the same time did not have the opportunity to challenge the argumentation of powerful actors who were defending the status quo in a public forum.

To determine which of those arguments were the most influential (in the sense that they were reiterated by the members of the Committee) it is important to study how extensively particular arguments were used, what they were advocating for in terms of content, and their intensity. The findings of the MAXQDA analysis show that even though the percentage of public consent arguments is particularly high (which has an "elective affinity" with the presence of the victims to the hearings), the percentage of "state competence" arguments is much lower than in other chapters where the administration is present. Interestingly, we see a rise in the use of "constitutional validity" arguments, perhaps due to developments regarding the adoption of the Franken Amendment (see figure 4). The changes that were made reflect the actors' argumentation expressed over the course of the hearings. I argue that change was partially successful because the arguments voice by the victims of abuse – which mostly belonged in the "public consent" category – were intensified and emotionally appealed to the Members of the Committee. The fact that the administration failed to attend two out of three hearings, however, protected them from having their mistakes publicly exposed and challenged, and ultimately hindered comprehensive change in their regulatory practice.

Figure 4: Argumentation after Jamie Leigh Jones



5.4.1 Survivors' Testimonies

In the hearing titled "Enforcement of Federal Criminal Law to Protect Americans Working for US Contractors in Iraq" which took place on the 19th of December 2007, Jamie Leigh Jones gave a shocking testimony explaining the events leading up to her abuse by her co-workers. In particular, after being drugged and raped, she testifies that:

> "The next morning, I was extremely sore between my legs and in my chest. I was groggy and confused. I went to the restroom and realized I had bruises between my legs and on my wrists and was bleeding between my legs. When I returned to my room, a man was laying in the bottom bunk of my bed. It wasn't the same man who gave me the drink. I asked him if he had had sex with me, and he said that he did. I asked if it had been protected, and he said no. I was still feeling the effects of the drug from the drink and was now very upset at the confirmation of my rape. My heart sank that day." (Committee of the Judiciary, 2007, p.33)

She then explained how the day following the abuse the army doctor who examined her confirmed that she had been raped. Horrifyingly, she explained that she was then imprisoned by KBR in a trailer for a day, until one of the guards finally let her call her father who then informed Conservative Congressman Poe what had happened to ensure her return to the US.[48] (Committee of the Judiciary, 2007)

[48] "I was later interviewed by Halliburton-KBR supervisors, and it was made clear to me that I had essentially two choices—one, stay and get over it, or, two, go home with no guarantee of a job either in Iraq or in Houston. Because of the severity of my injuries, I elected to go home, despite the obvious threat of being fired. Once I returned home, I sought medical attention, both psychiatric and physical. I was originally sent to a psychiatrist of Halliburton's choosing. The first question asked was, ''Are you going to sue Halliburton?'' So my mother and I walked out. Some time around May 2007, a State Department agent called and said that she was not aware of a rape kit or any pictures of my injuries. I insisted that the rape kit existed and forwarded a copy of KBR's own EEOC response to prove that the Army doctor handed it over to a KBR employee at the hospital the night of the rape. It was a few days later that I received a call from the agent stating she had found the rape kit but the pictures were missing and so were the doctor's notes attached to the top of the rape kit. I have had reconstructive surgery on my breasts and pectoral muscles due to the disfigurement caused by the brutal attack. I am still waiting for a follow-up surgery because I am still not back to normal. I have to sleep with a sports bra because of the pain. I still continue to go to counseling three times per week." (Committee on the Judiciary, 2007)

Significantly, she brought to the members of the Committee's attention the fact that, after going public with her story, she discovered that other women had also suffered at the hands of Halliburton and KBR and were compelled to go through arbitration. She added that these corporations have been consistently exploiting and mistreating women, using arbitration as a means to erase all records of disputes that have arisen and silencing the victims (Committee on the Judiciary, 2009, p.16). She underscored that arbitration should only be used in cases where it is voluntary and negotiated between parties who have equal bargaining power. She thus argued that the US "government has to provide people with their day in court […] Otherwise, we are not only deprived of our justice in the criminal courts but in the civil courts as well. The laws have left us nowhere to turn." (Committee of the Judiciary, 2007, p.34) She argued that the arbitration laws are so oppressive that they will not effectively prevent further abuse. What measures are in place preventing these companies from victimizing more women in the future, she wondered.

The members of the Committee became emotionally engaged with the testimonies, including not only the one given by Jones but also the others that followed. These will be discussed later in this section. They felt that these women could be their daughters, sisters, or wives. In fact, being overwhelmed by the testimony, Congressman Lungren highlighted that this is a particularly difficult hearing because "If one of my four sisters or my two daughters that are younger than you, Ms. Jones, had undergone this, I am not sure I could control my rage." (Committee of the Judiciary, 2007, p.59) Both Congressman Scott and Congressman Conyers congratulated Jones for her "courage to go forward", particularly because her courageous account inspired other women to share their own tragic stories. Congressman Conyers noted that: "You know [..] this could break up, you know, a normal person. You are tough. You are patriotic." Such outrageous situations, he added, truly shocks our conscience (Committee of the Judiciary, 2007, p.59). Similarly, Congresswoman Jackson Lee thanked Ms. Jones for testifying, noting that she is a 'patriot' and a 'hero' promising to find a solution for her and all the people who serve the country[49] (Committee of the Judiciary, 2007, p.25).

[49] Congresswoman Baldwin also expressed her sympathy stating that she "can only imagine what a difficult experience this has been for you, and I want you to know how much we appreciate your efforts to shed light on such an appalling and, frankly, intolerable issue". (House Committee of the Judiciary, 2007) Congressman Weiner again complimented Ms. Jones for her "remarkable amount of courage to go through what you did and not simply return to your home and try to heal yourself. You chose not to do that. You brought this forward here." Along the same lines, Congressman Davis noted that he admires Jones' courage to come forward because a person that he was very close to him, experienced the same thing. He explains that "I still remember her telling me in some detail about it. She was unwilling to

Interestingly, the support shown by the members of the Committee seems to have solid foundations on a bipartisan basis. For instance, Democrat Congressman Conyers and Republican Congressman Lungren promised to cooperate so that they could find a solution. Congressman Gohmert welcomed "a bipartisan letter where it doesn't matter which Administration, whether it is Clinton or Bush or whoever in the future—we ought to lay out some ground rules that we can agree with" (Committee of the Judiciary, 2007, p.70).

Congressman Poe emphasized that "Jamie's case is not unique" (Committee of the Judiciary, 2007, p.31). Among the PMSC employees who came forward to testify the abuse they suffered, and the injustice that followed due to the mandatory arbitration clause in their contract, was Tracy Barker. During her testimony, she revealed that, during her deployment, she had to constantly endure physical threats, verbal abuse, and sexually explicit conversations. She added that, even though she and her collogues had lodged numerous complaints through the Halliburton Dispute Resolution Program (HDRP) no actions were taken to address the sexually hostile work environment or, at least, investigate the complaints raised. Furthermore, despite the promise of confidentiality under the HDRP, her complaints were forwarded to her supervisors. In response to the filing of formal complaints with human resources, they retaliated by escalating the abusive behavior. After being confined for three days, she returned to work under the direct supervision of the same people and stayed there until she was transferred to another military base (Basra) where she was also subjected to abuse by her colleague. Although she complained of the sexually hostile conditions to her direct supervisor and camp manager, nothing was done to remedy the situation. She concluded by noting that it was astonishing that her case was declined for prosecution by the Eastern District of Virginia US Attorney office, but she found it equally astonishing that the mandatory arbitration clause in her contract had not allowed her to have her day in court. (Committee of the Judiciary, 2007)

---

report her crime because she felt that people wouldn't believe her version of what happened. And all too many women realize that is what happens in so many of these cases. You walk in, you tell what someone did to you, and you are the person who falls under the critical microscope. You are the person who is doubted at every turn." (House Committee of the Judiciary, 2007) Congressman Johnson, expressing his discontent that Jones cannot take her case to court because of this mandatory binding arbitration clause, also noted that "if something like this would have happened to my daughter, I, like all of the others sitting on this podium, would—it is impossible to say how one would react until one is faced with some dilemma like this, and it could actually tear apart the family. And I am so happy that you are here with your family today, your father, your mother, and your husband, who has stuck with you throughout this trial and tribulation. And so, my hat goes off to that family support that you have." (House Committee of the Judiciary, 2007)

Another survivor, Mary Beth Kineston, explained "the culture of hostility" towards women in her place of work in the following manner:

> "After I was raped, the sexual harassment in my department of 45 men and two women just intensified, to the point where me and this other woman, we were, like—we didn't know where to turn […] we had supervisors pulling down their pants and urinating in front of us, I had pornography put in my truck all the time, and just different things like that, that we had to deal with on a daily basis." (Committee on Foreign Relations, 2008, p.9)

Kineston also described similar treatment by her employer when she tried to seek help. She testified that her complaints were met with either indifference or punitive measures taken as a form of retaliation. Furthermore, no action was ever taken to hold the perpetrators to account for the sexual assaults. She also expressed her disappointment as she had initially hoped that her employer would take such complaints seriously and would conduct a thorough investigation in good faith. Not only did KBR refuse to do that, but they also failed, in the meantime, to keep her safe and away from her abuser. On the contrary, she explained that such abusive behavior was tolerated by KBR as "there was nothing ever, ever done about that. […] They didn't even bring—they didn't even question the man, when I told them about the—being molested." (Committee on Foreign Relations, 2008, p.10). She was then forced into arbitration and concluding by pointing out that even though she ultimately succeeded in her arbitration claim with the help of her legal counsel, she never became "whole for [her] suffering and pain." She added that "I did not sign on for this kind of treatment when I joined KBR. I did not waive my civil rights or surrender my dignity because I wanted a job." (Committee on Foreign Relations, 2008, p.4)

Finally, in the same hearing, another survivor of sexual abuse, Dawn Leamon, explained that being the mother of four children, "it is extremely difficult to come forward and identify myself to you and the American public" (Committee on Foreign Relations, 2008, p.11) because of the impact it could have on her family's life. And this is the reason that Ms. Leamon concealed her identity in previous hearings using the pseudonym ''Lisa Smith''. She testified that "I will not go into the details here, but it was brutal and horrific." (Committee on Foreign Relations, 2008, p.12) Due to the monitoring of all communications in the camp where she was stationed, she had no opportunity to have private communication with the outside world. "I felt completely alone, and I was scared", she testified

(Committee on Foreign Relations, 2008, p.12).[50] In line with the previous testimonies, KBR's first response upon learning that she had been sexually assaulted was to keep it quiet or try to make her feel as if she had brought it on herself. And, like all other cases, the mandatory arbitration clause in her contract prevented her from holding the perpetrators to account which, as she described, shattered her faith and trust in the US government (Committee on Foreign Relations, 2008).

5.4.2 Mandatory Arbitration Clauses and "Official Indifference"

Focusing on the problematic aspects of mandatory arbitration clauses, Congressman Johnson abhorred their use by Halliburton who actively used them to conceal "egregious violations of the criminal law" (Committee of the Judiciary, 2007, p.23). Such clauses, he added, were not intended to deprive citizens of their fundamental rights to a jury trial. Rather, they were intended to be agreements between parties of equal bargaining power. Particularly, "for Ms. Jones, Ms. Barker and the countless other employees who have tried to exercise their rights under these agreements, they turn out to be anything but equal. Companies have taken advantage of employees by forcing them to sign away their rights to a public justice system in favor of a private, for-profit justice system where the chips are stacked against them and where the arbitrator, playing judge and jury, typically sides with the big business that signs his or her paycheck." (Committee of the Judiciary, 2007, p.24)

[50] "The next morning, I was given an eight-page statement that had been prepared for me to sign. Even though I did not have the opportunity to read the entire statement, I read enough of it to see that there were parts I did not agree with. When I brought them to KBR's attention, they said that as soon as I signed the statement, I could leave Adder and go back to Cedar. So, I signed it. Although KBR promised me they would give me a copy of my statement, they refused. Upon my return to Cedar, I again contacted my attorney, Daniel Ross, and told him what had happened. His office sent me an e-mail with a copy of the letter they intended to send to KBR on my behalf. About 10 minutes later, KBR security confiscated the computer I was using. Within minutes, I received a phone call from KBR security telling me I had to be on the next hard car to Adder. When I got to Adder, I was taken to CID, where I was interrogated from 2 p.m. until midnight by two special agents. I advised them that I had an attorney, and they convinced me to sign a waiver of my rights. The agents were very intimidating, and their questions and demeanor suggested strongly that they thought I was lying about the rape. I had no way of communicating with anyone while I was at Adder. My movements were restricted, and I was accompanied everywhere. I later learned that was because the men who had attacked me were also at Adder and their movements at the camp were unrestricted. I was told that my safety was in jeopardy if I was alone. The next day I was questioned by CID again and given a 14-page statement and another waiver to sign. I signed them. Once again, I was sent back to Cedar. […] Once again, while I was at Adder, I was accompanied everywhere by personnel from KBR and CID security. My attackers were still at Adder and still had unrestricted movement." (Committee on Foreign Relations, 2008)

Congresswoman Sanchez underlined that the original purpose of the Federal Arbitration Act was to enable two sophisticated legal entities to use binding mandatory arbitration contracts for settling disputes without resorting to the legal system. With that in mind, she asked Mr. Foreman about his perspective on whether employers and employees constitute equally sophisticated parties when negotiating employment contracts. He responded "Absolutely not." (Committee on Education and Labor, 2007, p.61) In Jones' case, the two parties were clearly not on equal footing as Jones was 19 years old, had no lawyers present, and was unable to understand the "18 pages long" contract, Congressman Sanchez added. (Committee of the Judiciary, 2007, p.64)

Mr. Foreman, testifying on behalf of the Leadership Conference on Civil Rights, emphasized the fact that arbitration should be voluntary. Using Jones case as an example, he highlighted that this is "one of the ugliest employment situations that you can imagine" and that "ugliness is revisited by the fact that she cannot have the right that this Congress has provided to her exercised in a court of law or before a jury" essentially changing individuals' substantive rights (Committee on Education and Labor, 2007, p.18). In another hearing, Senator Leahy explained that "There is no rule of law in arbitration. There are no juries or independent judges in the arbitrations industry. There is no appellate review. There is no transparency. And [for] Jamie Leigh Jones there is no justice." (Committee on the Judiciary, 2009, p.2) Congressman Davis also argued that arbitration should be "optional and it certainly shouldn't apply to criminal activity." (Committee of the Judiciary, 2007, p.62). Along the same lines, both Congressman Gohmert and Congresswoman Jackson Lee, noted that there should be "criteria that says if it is a criminal matter, then—that the provision that maybe an employee signs is waived, and that might be one element that we might consider as, you know, having arbitration but waiving it if it happens to be a criminal matter." (Committee of the Judiciary, 2007, p.71)

Over the course of the hearings, those who argued in favor of mandatory arbitration clauses placed themselves in an unenviable position, particularly after the women's testimonies. Mr. de Bernardo, for instance, was a senior partner and chair of the ADR practice group, who testified that it is widely acknowledged that employment litigation has the potential to damage the employment relationship, whereas arbitration is seen as a means of preserving such a relationship. This is because, he argued, there is improved communication and constrictive input from employees, which ultimately contributes to the creation of "better workplaces." Crucially, Senator Franken asked Mr. de Bernardo

if he considered “better workplaces” as a housing situation, such as the one in Jones case, where she was housed with 400 men, and even after she had told KBR that she had been drugged and raped, KBR’s solution was to lock her in a shipping container with an armed guard. Jamie Leigh Jones, Senator Franken added, “has not had her day in court, she has litigated for four years to have her day in court. She was drugged, she was raped, and she had to have reconstructive surgery. If that’s a better workplace, what was the workplace like before?” (Committee on the Judiciary, 2009, p.20). Congressman Leahy also asked de Bernardo whether he considers that arbitration would be helpful for someone like Ms. Jones when her employer Halliburton, in effect, said that rape and sexual assault must just be considered part of the job. The latter insisted that arbitration has “a very positive role to play” and that the fact “one incident and one individual incident, as terrible as they may be, don’t necessarily reflect […] we should embrace or withdraw from the concept of arbitration in employment.” (Committee on the Judiciary, 2009, p.10)

Congressman Baldwin argued that the biggest problem, however, is the observed “official indifference” (Committee of the Judiciary, 2007, p.26). The “boys-will-be-boys” environment encouraged not only by PMSCs, but that has also “permeated our government agencies” is extremely problematic (Committee of the Judiciary, 2007, p.26) particularly as the administration seemed to be saying that “it ain’t our problem”, according to Congressman Weiner. He is making an important argument, in line with the findings of this thesis, that “without the face and the voice of someone who has actually been through it, none of these things get changed.” (Committee of the Judiciary, 2007, p.27) Senator Nelson also emphasized that it is important for the victims to be heard “to paint the full picture of the number of sexual assaults perpetrated against these American contractors.” Otherwise, “American women working in Iraq and Afghanistan will continue to be sexually assaulted while their assailants will go free.” (Committee on Foreign Relations, 2008, p.2). Hence, he argued that the Committee has a responsibility to support Jones as she had endured victimization, not only in the heinous crime itself, but also through the deliberate obstruction of justice aimed at eradicating any potential evidence that could have substantiated her claims. And finally, she was victimized again by the administration (Committee of the Judiciary, 2007, p. 27). The administration seemed to be saying “Look, war is hell. Things happen. There is the fog of war that sometimes takes place”. Yet, he continued to note that this now seems to be an organized effort by the Department to avoid responsibility by employing PMSCs to do “the dirty work of war” (Committee of the Judiciary, 2007, p.27). In fact, Congressman Lungren argued Ms. Jones is owed an apology by the government– the “bad guys” should not be allowed “to hide behind bureaucratic inaction or, worse, such fear of

bureaucratic inaction being revealed that somehow you don't act, and you cover things up" (Committee of the Judiciary, 2007, p.59). Congressman Johnson concluded by stating that the system clearly failed her as a result of "some unholy alliance between the law enforcement at that facility and your private employer, and that operated to deprive you of your right to justice under the criminal law up to this point." (Committee of the Judiciary, 2007, p.61)

The hearing titled "Closing Legal Loopholes: Prosecuting Sexual Assaults and other Violent Crimes Committed Overseas by American Civilians in a Combat Environment" was the only hearing out of the three in which a representative of the Defense Department attended. Of course, the representative of DOD, Mr. Reed, stressed from the beginning that he would not be able to answer most questions because he was simply a procurement officer. Emphasizing that the US government has a duty to assist individuals who serve their country to defend their constitutional right to have their employment disputes examined in a court room, Senator Feingold asked whether the Defense Department intended to "give serious consideration to requiring contractors to remove these mandatory arbitration provisions from their contracts with employees?" (Committee on Foreign Relations, 2008, p.46). This was before the Franken Amendment was adopted. In other words, he encouraged the DOD to use its discretion to make sure that such provisions were incorporated in their contracts (even in the absence of a clear legislative mandate). Ironically, Mr. Reed answered that they are now in the process of developing such regulations to "deter this kind of misbehavior as employees under contracts to the Department of Defense. So, that is a Federal acquisition regulation-type of procedure required in order to place the requirement on that." (Committee on Foreign Relations, 2008, p.50)

Yet, only months later, Senator Sessions said:

> "The Department of Defense let me know to oppose this amendment. There are a number of reasons: because it goes far beyond the issue raised by my colleague from Minnesota [Senator Franken]. It eliminates arbitration for any claim under title VII of the Civil Rights Act, any claim resulting from negligent hiring, negligent supervision, or retention of an employee—virtually any employment dispute that is now resolvable under arbitration, which the U.S. Supreme Court has said is good. Statistics show that employees get final judgment and actually win more cases under arbitration than they do going to the expense of a Federal court trial." (Congressional Record, 2009)

He continues: “I think we should listen to the Department of Defense and vote no on this amendment.” Yet, Senator Franken counterargued that “Sometimes you have to push bureaucracies to get change,” he said. (Congressional Record, 2009) Even though the Franken Amendment was – eventually – adopted by Congress, the Department of Defense’s disapproval of the legislation was clear in its subsequent actions. Despite issuing regulations implementing the Franken Amendment, the language that it used was narrower than the Act intended (this becomes particularly clear when assessing the Congressional debates that took place on the 1st and 6th of October 2009, with legislation being adopted on the 19 December 2009).

5.5 Conclusion

This Chapter investigated the circumstances which – partially – facilitated regulatory reform by the Defense Department in the aftermath of the Jamie Leigh Jones scandal. Reform is not considered comprehensive because the DOD not only opposed legislation preventing the Department from contracting with PMSCs using mandatory arbitration clauses in their employment contracts from the beginning. Furthermore, even after legislation was adopted with a clear mandate, the DOD issued regulations with vague language essentially narrowing the scope of the law.

To identify the circumstances contributing to this outcome, this Chapter studied the transformation of the actor constellation and analyzed the argumentation used by actors to challenge the regulatory status quo and advocate for reform. This thesis anticipates, theoretically, that in the aftermath of scandals, the “narrower” the actor constellation, the less likely it is for change to occur. Even though the victims gave heartbreaking testimonies describing their abuse, the DOD failed to attend two out of the three hearings. As a result, pro-reform voices and “public consent” arguments, intensified by the use of emotional appeal, did not cross swords to publicly challenge the “competence” of the Department and achieve comprehensive change.

This contrasts with Chapter 3, when the “wider” actor constellation allowed the victims’ families to voice their arguments and offer compelling evidence to support their claims. This enabled them to effectively challenge the argumentation of powerful actors (the DOD and industry) seeking to

preserve the status quo. In Chapter 4, this thesis dealt with a "narrow" constellation where the victims' families were not invited to the hearings. Moreover, they were not given the chance to challenge the reluctance of the State Department to put an effective regulatory framework in place which would have prevented the mayhem in Nisour. In this Chapter, the constellation remained "narrow" as the DOD failed to attend two out of three hearings, but the outcome is relatively different. I consider the outcome to be – partially – successful because the Defense Department issued regulatory measures to implement the legislative mandate. However, it used vague language which effectively narrowed down the scope of the Act.

Significantly, the findings of the three empirical chapters suggest that there is an affinity between the presence of some actors during the hearings, and the type of arguments they tend to use. For instance, in Chapters 3 and 5 where the public is present, there is a very high number of "public consent" arguments (with victims' of sexual abuse expressing their frustration for not having the opportunity to have their day in court, and families of victims sharing their pain in having lost their loved ones due to governmental failure or indifference and advocating for reform). On the contrary, in Chapter 4, where the public is absent, the number of "public consent" arguments decreases significantly. In a similar manner, the presence of the administration seems to be linked to the use of a "state competence" type of argumentation. It can thus be observed that in Chapter 3 and Chapter 4, where the administration is present during the hearings, there is a high number of "state competence" arguments (with representatives of government departments seeking to preserve the existing regulatory framework arguing that there is no need for reform because such incidents are the exception and not the norm). In comparison, in Chapter 5, when the administration fails to attend two out of three hearings, the number of such arguments drops significantly.

We can thus conclude that path-deviating regulatory change may be facilitated by a "wider" actor constellation allowing less powerful actors – who were excluded during "quiet" phases – to have a seat at the "table". They can have their arguments heard, publicly, in a democratic forum and offer evidence to substantiate their positions. In addition, the presence of powerful actors (Departments, and Industry) is significant. They can express their arguments in favor of the status quo giving the opportunity to actors with institutional powers (e.g. Committee members) to use those arguments to legitimize their criticism against the administration. Additionally, the element of emotional appeal appears to be conducive to re-regulation, as it intensified the quality of "public consent" arguments.

Further, this Chapter offers an interesting example illustrating the discretion enjoyed by implementing actors even when they have received a clear legislative mandate. In this example, an implementing actor (the DOD) may use the discretion afforded to it to narrow the language of legislation, reducing down its scope (against the wishes of the legislators). This challenges the "textbook" conceptualization of the policy process (Nakamura, 1987, p. 142) which expects change to occur during the policy formation "stage" of the process. This further demonstrates that it cannot be clearly separated from the policy implementation "stage" which has only been described by such literature as the mechanical execution of policies and laws.

In conclusion, it is imperative to examine whether power shifts could offer an alternative explanation for the discussed changes. It is thus important to examine whether there were any shifts in political power during the period that may provide a better explanation for the discussed outcome. The Jamie Leigh Jones scandal received media attention in 2007, while the final regulatory measures were issued in 2010. Specifically, the DOD adopted a class deviation on February 17 2010, which was followed by an interim rule on May 19 2010, and a final rule on December 8 2010. During this period, no power shift was observed which could explain the negative stance of the Defense Department towards the proposed reform. Overall, it is important to note that power shifts do not seem to influence the observed regulatory outcome in any of the three case studies. Instead, it is argumentation that seems to have been conducive to the occurrence of path-deviating change.

6 CONCLUSION

6.1 OVERVIEW OF THE ARGUMENT

When the PMSC industry asserts itself in political conflict, most expect that it will prevail over the efforts of state officials. The scholarly literature examining this dynamic, however, often fails to note that it is highly prone to reversal in 'noisy' phases of political engagement (Culpepper, 2011). Such 'noisy' times of government failure and scandals, often politicized, trigger congressional hearings, and create windows of opportunity for regulatory reform.

Scandals, by their nature, bring to light underlying processes and power dynamics that are usually obscure. The three case studies in this thesis were chosen as they represent key moments where the usual quiet politics give way to public scrutiny (in the sense that they prompt hearings). This provides a unique opportunity to study shifts in policy and regulation. The focus on Congressional hearings, especially in the aftermath of scandals triggered by government failures, is a deliberate choice. This approach aims to uncover the dynamics of policy-making and regulatory change. Hearings, especially in countries with strong constitutional frameworks and adherence to the rule of law, serve as a critical platform where the influence of arguments is particularly evident. Significantly, they provide a setting allowing for a detailed examination of the constellations of actors and their argumentative strategies, thus serving as a microcosm of broader policy processes. Additionally, these hearings are a rich source of documented debates and discussions, making them invaluable for empirical research. They offer particular insights into interactions and discourses that occur behind 'closed doors', especially in security-related matters, which are otherwise difficult to capture. To this end, this thesis reconstructs the hearing processes of US congressional committees, instigated by three highly mediatized events, with the intent of studying how pragmatically selected participants discursively interact under the public eye.

Aiming to identify conditions likely to facilitate or impede regulatory change, three broadly similar instances of regulatory failure are investigated. Each instance involves transgressions of the private military and security industry which produced substantively different regulatory reform outcomes. More specifically, chapter 3 deals with a case where regulatory change took place in the aftermath of

the Fallujah ambush scandal, whereas chapter 4 explores a case where reform was hindered in the wake of the Nisour Square massacre. Finally, chapter 5 investigates the circumstances, in the case of Jamie Leigh Jones' abuse scandal, that - partially - frustrated decisive change in the sense that the language that the administration finally chose was far narrower than intended by the Act.

My research is thus mainly concerned with understanding the evolution of actor constellations and argumentation over time. This open approach seeks to capture how diverse arguments influence decisions or non-decisions, moving beyond simplistic explanations centered on a single factor. By studying change from an interaction–oriented perspective (and paying attention to actors involved in policy formation and those entrusted with policy implementation), I seek to move beyond the identification of problems (that is, that PMSCs can become a threat to the smooth functioning of state institutions and individual human rights) and the proposal of solutions (in the form of technical revisions aspiring to put the industry under control) to seek "real" solutions to complex implementation problems.

My research challenges the tendency within political science to attribute outcomes predominantly to power dynamics. Drawing inspiration from the works of Majone (1989) and Albert Hirschman (1970), my research emphasizes the need to take arguments more seriously in the policy-making process. Hirschman's idea of 'voice' is particularly relevant, underscoring the importance of giving due consideration to the arguments presented by different stakeholders. Throughout this thesis, I have endeavored to underline this perspective, presenting arguments as not just rhetorical tools, but key elements that can influence, alter, or reinforce policy decisions. As discussed in more detail below, this perspective opens new avenues for research and discussion within the field, suggesting that greater attention should be given to the analysis of arguments and their role in shaping policy, especially in times of crisis.

By focusing on the role of arguments, especially in crisis-driven policy changes, it brings to light a different, yet crucial, aspect of policymaking. My thesis stands firm on the premise that under specific conditions, such as crises, there is heightened scrutiny of facts and the influence of argument becomes more prominent in shaping policy outcomes. This is because the usual dynamics of power attribution are overshadowed by the need for reasoned and articulate arguments. To understand the

regulatory choices of actors, I analyze the argumentation process as it unfolds in hearings. This analysis employs a conceptually derived framework with six dimensions of public policy. This framework helps determine why some arguments are more influential than others in specific settings. Through this approach, I aimed to make sense of the divergent pathways observed in our three case studies. Specifically, this thesis found that arguments from the 'public consent' dimension are particularly influential during congressional hearings. Arguments from this dimension were found to be commonly initiated by victims or their families and subsequently utilized by committee members to challenge those seeking to uphold the status quo. Further, this thesis finds that such arguments become even more powerful when laden with emotional appeal, a finding with significant implications for future research. It should be clear from the outset that the theoretical framework of my research is fundamentally probabilistic. For instance, if the wives of victims enter the actor constellation, the likelihood of emotional appeals is significantly high. At the same time, it is improbable for them to engage in legalistic arguments due to their lack of training. Whether these emotional appeals gain traction, and to what extent, primarily depends the receptivity of other actors in the constellation (in this case, committee members). This thesis finds that, once these appeals enter the public discourse, in this particular context, they can significantly impact perceptions of state officials' 'competency'.

In summary, this thesis' main argument is that the potential for reform is associated with the (non-) participation of key actors, including victims and families of victims, in democratic processes. Change is more likely to occur when the actor constellation is wider —including actors excluded from previous 'secret' deliberations— and the argumentative space is more diverse. In contrast, narrower actor constellations allow powerful actors to steer the conversation and determine whose voices are heard, thus silencing calls for reform.

6.2 Summary of Empirical Findings

This thesis examines how three broadly similar scandals—or cases of regulatory 'failure'—involving the PMSC industry were 'processed' within the democratic arena, leading to significantly different reform outcomes. Through an analysis of the hearings prompted by these scandals, I identify two key elements of the deliberative processes which seem to facilitate regulatory change. The first element

is the expanded scope of the 'actor constellation' following the scandals. This now includes not only powerful entities, such as the industry and administration, but also individual members of the public. The second element pertains to the substantive lines of argumentation by actors within interactive forums. Specifically, this thesis argues that a detailed analysis of arguments and counterarguments—considering their quantity, content, and intensity—reveals which arguments are most effective at challenging the authority of powerful actors and enabling significant change.

The findings of each chapter will be summarized in turn. Chapter 3 investigates the circumstances facilitating change (i.e., two separate revisions of DOD Instruction 3020.41) in the regulatory practice of the Department of Defense in the aftermath of the Fallujah ambush scandal. Reconstructing two committee hearings (Committee on Government Reform, Serial No. 109–214, 2006; Committee on Government Reform, Serial No. 110–11, 2007), I argue that this outcome was facilitated by a wide actor constellation (which included the victims' families and members of the administration) whereby all actors became part of a dialectically open process. Further, I show that the most influential type of argumentation used in this Chapter belonged to "public consent" for three reasons. Firstly, such arguments were the most extensively used (48% of total arguments). Significantly, 'public consent' arguments were introduced in the hearing by the victims' families and then were adopted by actors with institutional powers (i.e., members of committee) to challenge the 'competence' of the Department and pressure them to change their regulatory practice. Secondly, the content of such arguments was reflected in the regulatory changes that were subsequently made by the Department of Defense. For instance, after the Committee's recommendation that a risk assessment of the 'circumstances' be performed before a particular activity could be outsourced to PMSCs, the Department of Defense revised its existing regulations to include a distinct categorization between activities that can always be outsourced (commercial activities), functions that can never be outsourced (inherently governmental) and activities that require an assessment of the circumstances before being contracted out (closely associated with inherently governmental functions). Additionally, after being accused of failing to protect the four victims due to a lack of oversight over Blackwater's actions (who failed to provide adequate equipment to the four young men before sending them to a dangerous missing), the Department of Defense acknowledged the 'gaps' in its practice and revised its regulations. It also assumed responsibility for the oversight of PMSC activities (including the evaluation of the training of individual contractors and coordination with the US military). Finally, I show that the intensity of the arguments that were used (focusing on the use of

emotional appeal), made them particularly important in the context of the hearings, effectively circumventing the impact of argumentation posed by powerful actors defending the status quo.

Chapter 4 examines the circumstances that, in hindsight, effectively hindered change to the regulatory framework of the State Department, in the aftermath of Nisour Square scandal. Even though the Congressional Committee mandated a revision of the Department's regulatory practice on investigations and referrals to the Department of Justice to facilitate prosecutions when crimes by contractors are committed abroad (NDAA FY2008 and NDAA FY2009), the State Department made no substantial changes. This chapter provides an opportunity to study a case where the ultimate actor constellation in the hearing was rather narrow, as the families of the victims were not invited to the two relevant hearings (Committee on Government Reform, Serial No. 110-89, 2007; Committee on Governmental Affairs, Serial No. 41–453, 2008). This thesis continues to show that the normative "public consent" dimension of argumentation did not muster enough reform leverage in this case. Instead, it is shown that most arguments were categorized as falling into the "state competence" dimension. The content analysis of actors' argumentation further revealed that such arguments were predominantly employed by the administration to justify their choices based on the discretion they enjoy in implementing legislation, while the element of 'emotional appeal' seemed to be missing. More specifically, the members of the Committee criticized the fact that the State Department had no comprehensive regulatory framework to properly investigate incidents of abuse. In addition, if the facts of an incident indicated potential criminal acts, there was no framework to refer them to the Department of Justice. Significantly, over the course of the hearings, it was revealed that the State Department appeared to be tolerating PMSC transgressions. This was evidenced by the fact that the State Department failed to open an investigation when Blackwater employees attempted to 'cover up' the shooting of an innocent bystander. They also authorized the perpetrators to be transported out of Iraq, only recommending a sizeable payment to the victims' families "to make the problem go away" (Committee on Government Reform, Serial No. 110-89, 2007, p. 3-4). Reading email exchanges between Blackwater and State Department employees, some members of the Committee argued that it would have been hard not to conclude that that the State Department was essentially acting as Blackwater's enabler. Yet, despite the efforts of the members of the Committee, the State Department maintained that the use of PMSCs was indispensable, arguing that there was no alternative except through contracts. Additionally, the State Department insisted that such incidents are the 'exception' and not the 'norm', thus persistently defending the status quo. Clearly, during this 'narrow' hearing, the powerful actors were least constrained.

Finally, Chapter 5 examines the circumstances that -partially - frustrated a decisive change to the regulatory framework of the Department of Defense in the aftermath of Jamie Leigh Jones' abuse scandal. The changes were partial as the language that the administration finally chose to argue for was far narrower than the language intended by the Act (i.e., Section 8116 of the Defense Appropriations Act for Fiscal Year 2010, also known as the "Franken Amendment"). In other words, the Department of Defense issued regulations to implement the Franken Amendment, but it chose language narrowing the effect of the law (e.g., in its definition of who would qualify as a covered contractor). The discussed changes involved the revision of the regulatory framework which would prohibit the use of mandatory arbitration clauses in the employment contracts of PMSC employees which prevented them from getting their day in court after being sexually abused.

Analyzing the content and intensity of the arguments used during the hearings, the emotional response of the members of the Committee to the victims' testimonies was apparent, characterizing the four women as "courageous", a "patriot" and "hero" (House Committee of the Judiciary, 2007). Specifically, Jamie Leigh Jones testified that the Department of Defense had refused to take action to discipline her assailants for their actions. In addition, the mandatory arbitration clause in her employment contracts did not allow her to have her day in court. Her testimony was reinforced by three other women who came forward and testified that the Department of Defense acted in the same way. In this case, even though the victims (including Jamie Leigh Jones) were present during the hearings, the representatives of the administration failed to attend two out of three hearings. This thesis shows that even though the percentage of public consent arguments was relatively high, the percentage of "state competence" arguments was much lower than in other Chapters where the administration was present. The members of the Committee criticized the "official indifference" observed in this case in light of the Department's actions after the abuses took place and because they failed to appear in the hearings convened by the Committee on the matter. The absence of the administration indicates that powerful actors were less constrained in this case as they could afford not to show up to the hearing (interestingly, in the only hearing that the administration attended, the representative from the Defense Department refused to respond on whether the Department would endorse such a prohibition, claiming that these issues were outside the scope of his employment). To an extent, however, their power was reduced as their absence was frowned upon by the members of the Committee who noted that they would employ their institutional powers, if necessary, to subpoena the witnesses and evidence that they considered relevant, even if this means

scrutinizing the actions of the government. They emphasized that “the bad guys” should not be allowed to hide behind bureaucratic inaction.

It should be clarified upfront that utilizing a probabilistic theoretical framework allows for an analysis which appreciates the conditional probabilities of different argument-actor-presentation combinations. This approach recognizes that while certain conditions, such as the involvement of family members of victims making public consent arguments in an emotional manner, may enhance the likelihood of regulatory change, these are not deterministic. Each element—type of argument, the actor, and presentation mode—contributes to the overall influence in a specific policy context, particularly in the wake of scandals that trigger public and legislative scrutiny. The empirical findings underscore the significance of understanding how these conditions co-vary and interact within the policymaking process. This thesis does not argue that one element is inherently more influential than the others. Instead, it posits that the effectiveness of an argument is significantly shaped by the synergy between the nature of the argument, the credibility and emotional appeal of the actor making the argument, and the strategic presentation of the argument. This synergy is context-dependent, varying according to the specific circumstances of each case under investigation.

6.3 Reflection on the Literature

Many scholars accurately identify problems regarding the technical difficulties faced by legislators in their efforts to regulate the PMSC industry. They also note the lack of transparency because of politicians’ desire to secure their political survival, thus surrendering core state functions for profit-driven interests. However, the scholarly community has largely failed to explain why decisionmakers refuse to put some of their best policy recommendations/solutions to practice. They significantly downplay the role of actors entrusted with policy delivery, even though their discretion when applying laws can evidently be critical with respect to policy output, particularly in conflict- or post-conflict environments. Moving beyond a “problem-oriented” perspective, this thesis studies change in the context of interactions between all stakeholders involved in the decision-making process (both actors involved in policy formation and those entrusted with policy implementation) aiming to explain why states are reluctant to put good policy recommendations in practice (“interaction-oriented” perspective, see Scharpf, 1997).

This thesis seeks to enhance the existing body of research by opening the 'black box' of policymaking, revealing the intricate processes behind policy formation, and emphasizing the roles of actors, their interactions, arguments, and emotional dynamics. I critically examine the notion that the rising power of PMSCs invariably impedes any legal or regulatory reforms outside of the industry's interests, due to their substantial clout and the subdued nature of military and security discussions. This thesis specifically shows that despite the considerable power that the PMSC industry appears to enjoy during normal times, effectively thwarting attempts that aim to challenge the status quo, windows of opportunity can still appear in the regulatory process. These opportunities make change possible because of the intensive scrutiny that takes place in democratic decision-making forums in the wake of scandals. By demonstrating that regulatory reforms are indeed feasible, this thesis challenges the prevailing assumption that the business interests of even the most clandestine sectors invariably prevail, highlighting the potential to overcome industry resistance to reform.

Additionally, this thesis provides a more realistic and empirically grounded understanding of the various actors and multiple dimensions of policy formation, thereby moving beyond the narrower focus on political party dynamics and public opinion. This thesis highlights that the transient nature of political leadership in a liberal democracy significantly amplifies the importance of administrative professionalism and capabilities, thereby leading to considerable policy-making discretion. To examine these multilevel dynamics, this thesis delves into the forces behind regulatory shifts at the grassroots level of decision-making, highlighting the considerable discretion of those enforcing policies, laws, and regulations in ‘real’ scenarios. It illustrates that these actors can spearhead critical reforms in the policy execution phase, bypassing the need for legislative measures such as new statutes, amendments, or current laws by Congress.

Further, this thesis challenges Dickinson's contention that the constraints mechanisms she proposes can realistically be implemented because “there are undoubtedly many people within bureaucracies [..] who honestly wish to do their job and would therefore welcome (and lobby for) contractual mechanisms that increase accountability” (2011, p.20). Through detailed empirical analysis of implementing actors' arguments and perceptions during hearings, it becomes evident that bureaucratic actors attending the hearings were often hesitant to disclose information. These actors frequently argued that the 'gaps' discussed were exceptions rather than the norm, suggesting that

change was unnecessary—a stance reminiscent of the "just a few bad apples" argument. Moreover, they displayed a reluctance to accept any responsibility for the regulatory issues revealed by scandals, unless they were left with no other choice. This thesis also highlights the tendency of high-ranking bureaucrats to classify information as secret, even when it is only tangentially related to national security, as exemplified in Chapter 3.

Finally, this thesis addresses the claims in International Relations (IR) of a transformative norm regarding the state's monopoly on violence. According to IR literature, this norm has allegedly been internalized by decision-makers, leading to the normalization of the outsourcing of defensive force to private actors, hindering genuine efforts to regulate the industry (Krahmann, 2013). Opting for a policy research framework over constructivist approaches as commonly employed in IR, my study delves deeply into the micro-level dynamics of policy processes, especially during crisis scenarios. Central to this research is an exploration of the intricate discursive interactions among various actors and the role of argumentation within specific policy contexts during domestic decision-making processes. By focusing on the micro-processes, this thesis dissects actor-centered discursive interactions influencing policy development and delivery. It argues that if most decisionmakers had truly accepted the notion that the use of force is no longer the exclusive domain of the state, they would not engage in continuous debates. These debates, filled with arguments and counterarguments, aim to ‘process’ regulatory failures linked to specific scandals, within institutionally prescribed forums, such as Congressional Hearings. This thesis thus reexamines "old cases", heeding van Meegdenburg's suggestion. It critically assesses the arguments and assumptions actors make during domestic processes of understanding and decision-making by closely following three hearing processes. These hearings, convened to address regulatory failures linked to three distinct scandals, illuminate the dynamics facilitating change. Contrary to the belief that there has been a shift in the norm regarding the state's monopoly on violence which supports the outsourcing of defensive force, this thesis argues that such a norm has not gained legitimacy, neither “internally within the group” nor “externally in the rest of society” (Berger, 1996, p.327).

6.4 Theoretical and Methodological Reflection

6.4.1 Theoretical Reflection

The selection of the thesis' theoretical framework was influenced by my background in law and political science, and my dissatisfaction with certain aspects of the prevailing literature in these fields. These shortcomings did not align with my thesis' research objectives which aimed to understand reform processes, with a particular focus on multi-actor dynamics, the effects of their interactions, and the role of argumentation within democratic forums. In particular, I found the tendency in political science to establish a hierarchy of influence rather than exploring the complex interactions between various actors somewhat narrow. My interest leans more towards understanding the 'how' of the decision-making process, including how interactions unfold among different actors and the arguments they employ. The legal scholarship, on the other hand, often distances itself from what it perceives as 'dirty politics', focusing instead on due process. This is particularly evident in scenarios involving scandals, where outcomes can be unpredictable. However, this emphasis on procedural correctness sometimes overlooks broader societal or political implications.

Significantly, in tightly institutionalized democracies operating under the rule of law, events such as scandals often trigger multi-factor scenarios. In these scenarios, it is the effects of interactions among various actors that shape the outcome, rather than a singular entity possessing control. This understanding is crucial in acknowledging that, in many cases, no single actor is entirely 'in charge.' Therefore, as a result of my discontent with the common predisposition in political science to focus solely on determining 'who pulled the trigger'—and thus seeking a singular cause—and the legal literature's emphasis on procedural correctness, I was motivated to develop a new multifactor approach, in collaboration with Professor Anton Hemerijck and Maciej Sobocinski.[51]

[51] Anton Hemerijck, Kyriaki Kourra, and Maciej Sobocinski titled 'Six Core Questions of Public Policy: The Nested Politics of Structural Reform' presented in 2020 in the Workshop The Nested Politics of Structural Reform: Policy-Making in Times of Uncertainty (Autumn 2020).

In Chapter 2, theories from Scharpf (1997)[52], March and Olsen (2010 [1989])[53], Majone (1989)[54], and Culpepper (2011)[55] set the groundwork for this thesis' framework. My goal was to blend insights from these theories to create a new framework capturing the dynamic, but also 'nested' nature, of policymaking. The proposed theoretical contribution begins by conceptually combining Fritz W. Scharpf's concepts of 'input' and 'output' legitimacy (extended by Vivien Schmidt's concept of 'throughput' legitimacy) with James March and Johan Olsen's distinction between the logics of 'consequence' and 'appropriateness'. This combination enables a deep understanding of the dynamics of policymaking, focusing on six fundamental dimensions of public policy. Building on Giandomenico Majone's idea of policymaking as a form of 'public deliberation', it is theoretically proposed that, in an ideal setting, reform efforts are underpinned by six key arguments ('truth claims') relating to six dimensions of public policy. Namely, these dimensions are *policy efficacy* (involving a policy's effectiveness and efficiency, and problem-oriented research examining how policy actors make informed decisions), *political feasibility* (assessing the political support for reforms, central to interaction-oriented research and the negotiation process in structural reforms), *state capacity* (focusing on the state's ability to implement policies, highlighting the role of state actors in execution), *state competence* (encompassing the ethical standards of civil servants and service providers in policy delivery, balancing accountability with professional autonomy),

---

[52] Democratic Legitimacy: In "The Games Real Actors Play," Fritz Scharpf discusses democratic legitimacy within actor-centered institutionalism, emphasizing that legitimate public policies result from the efforts of democratically elected officials aiming to serve the public interest. He acknowledges the complexity of distinguishing factual from normative aspects in policy analysis and highlights the vulnerability of policies to contestation in liberal democracies due to their dynamic political environments. Scharpf contends that policymaking is a collective process involving strategic interactions among diverse actors, contrasting with the notion of policymaking as the domain of individual policymakers.

[53] Action Logics: Building on March and Olsen's concepts of the 'logic of consequence' and 'logic of appropriateness,' my framework incorporates these decision-making paradigms to further elucidate the decision-making and implementation processes in policymaking. These logics, which prioritize either rational goal-oriented actions or culturally and normatively appropriate behaviors, are integral to understanding the dynamic and context-dependent nature of policymaking in advanced liberal democracies.

[54] The Role of Argumentation: Giandomenico Majone's emphasis on discourse and argumentation in "Argument, Evidence and Persuasion in the Policy Process" aligns closely with my thesis' focus on the role of arguments in the policy process. By viewing democracy as governance through discussion, Majone's framework underscores the importance of persuasive argumentation across all stages of policymaking. This perspective informed my approach to exploring how various 'truth claims' shape the contours of policy debates and reform efforts.

[55] "Quiet" and "Noisy" Politics: Culpepper's 2011 framework differentiates between "quiet" and "noisy" phases of political engagement. During "quiet" phases, when issues have not yet caught the media or public's attention, powerful entities like corporations or lobbying groups often successfully push their agendas due to minimal public scrutiny. However, when issues escalate into the "noisy" phase, gaining significant media coverage and public interest, the balance of power shifts. These high-saliency issues, which command immediate voter attention, lead to a more democratic discourse, where public opinion and media scrutiny challenge the dominance of powerful actors.

constitutional validity (outlining the legal boundaries of government action under the rule of law, ensuring policy compatibility with constitutional principles), and *public consent* (concerned with societal acceptance and fairness of policies, reflecting democratic values and public trust).

From an actor-centered institutional perspective, it is suggested that state-level policy reformers operate within a 'nested' political environment, as defined by the proposed heuristic. It is argued that policy change depends as much on argument and persuasion as it does on power resources. The dynamics of policy change are seen as evolving through structured public deliberation. This evolution is driven by perceived alignments and misalignments, as well as agreements and disagreements among relevant policy actors on the six core public policy dimensions. To support comprehensive diachronic research, a multi-dimensional theoretical framework was developed, which tracks the verbalization of politically salient policy issues from their initial definition through to the resultant political reforms and their administrative implementation.

I opted for this *open* and *dynamic*, but at the same time *'nested'*, theoretical framework for its ability to explain specific aspects of my research, which other frameworks addressed less comprehensively. The thesis will continue with a reflection, specifically focusing on the way the novel integration of actor-constellation heuristic and argumentative content analysis could enhance theories of relevant literature in political science, particularly discourse analysis, as well as competing approaches in international relations (IR).

Rationale for the Selected Framework Over Constructivist Approaches in International Relations (IR)

Constructivist approaches in IR provide valuable insights into discursive interactions but generally focus on the macro level, examining broad international systems and state-level interactions. Specifically, IR constructivism tends to focus on broader societal norms, which Finnemore (1996) defines as collective ideas about appropriate behavior or desired actions within social groups. This approach seeks to understand how ideas gain momentum and spread through mechanisms such as learning, diffusion, transmission, and imitation, as discussed by Dobbin, Simmons, and Garrett (2007). While this macro perspective is useful, it does not provide the detailed analytical framework

demanded by my research which focuses on the complexities of state-level micro-processes, particularly how discursive interactions among various actors shape policy development and implementation.

Rationale for the Selected Framework Over Vivien Schmidt's Discursive Institutionalism (DI)

Why did this thesis not build on Vivien Schmidt's discursive institutionalism (DI)? Even though DI offers valuable insights into the role of ideas and discourse in institutional contexts, my research required a different approach to capture the complex interactions of multiple actors and the evolving nature of arguments in political and legal processes. After briefly summarizing Schmidt's work, a more thorough discussion on the matter will follow.

Schmidt presents a framework which examines institutional change transcending the static structural view of rational choice, historical, and sociological institutionalism through the dynamism of discourse. This perspective recognizes discourse as both influenced by and influential over interests, institutions, and culture. This is observed in how discourse transforms interests, restructures institutions, and redefines cultural norms. Schmidt articulates that ideas lie at the heart of discourse which function across policy, program, and philosophy levels, and are categorized as either cognitive or normative. In addition to the content of discourse, Schmidt posits that assessing a discourse's efficacy involves evaluating its cognitive justification and normative legitimacy, along with its communication method. This includes analyzing 'coordinative discourse' within policymaking and 'communicative discourse' in political communication. She adds that the effectiveness of discourse hinges on more than content and audience. Instead, the institutional setting is crucial. This means, she argues, that simple polities, like Britain or France, focus on public communicative discourse, with limited policy coordination, prompting public responses as key indicators of discourse impact. In contrast, compound polities, like Germany or the Netherlands, prioritize coordinative discourse among policy actors, and public communicative discourse is less detailed (Schmidt, 2006, 2008, 2012b).

Our framework extends beyond the limitations of DI in several areas. Schmidt's analysis often revolves around competition between different types of discourses, such as communicative (in countries like the UK) versus coordinated discourse (in countries like the Netherlands), and how the dominant discourse influences policy change. Our approach transcends the search for a single causative factor, embracing an open, multi-factor perspective which includes a heuristic to navigate the political landscape. This allows different actors' expressions of varying perspectives during policy discussions to be traced to consider the influence of such arguments on the reform trajectory.

Recognizing that the transformation of policy arguments, evidence, expertise, and persuasion into actual reform demands deliberate and methodical attention, we designed a framework capturing the dynamic and 'nested' characteristics of reform. Like layers within nesting dolls, reform often exhibits a range of depths, from expansive overhauls to more targeted modifications. Each layer, while unique, is interconnected, forming a multifaceted reform structure. Consequently, changes in one sector can influence or depend on changes in others, and reforms across various sectors may interact in different ways. Therefore, it is important to comprehensively study the motivations behind reformers' efforts. This is because both practical and suitable reforms are deeply connected with the variety of arguments that spark debates, contestations, and agreements.

Secondly, the two frameworks use a different approach regarding their understanding of the nature and use of arguments by actors in the policy process. Our framework, which is inherently probabilistic, does not make definitive assumptions about the types of arguments that actors will use in the policy making process. It posits that while there may be an increased likelihood of certain types of arguments being used, this is not a certainty. It thus emphasizes the diversity in the use of arguments by policy actors, suggesting a more open-ended approach to understanding actor behavior. This contrasts with the view advanced by DI which presupposes a certain predictability in the discourse used by actors depending on whether they express ideas as part of coordinative discourse, on the one hand, or communicative discourse, on the other. In this view, policy ideas in coordinative discourse, which are often grounded in cognitive justification, are translated by political actors into language and arguments that are accessible to the general public as part of communicative discourse. This translation includes adding normative legitimation to ensure alignment with the philosophical frames of the polity.

Finally, the framework empirically applied in the context of this thesis, marks a significant advancement in understanding the role of individual members of the public in the policymaking process. In DI, the emphasis has been on policy 'entrepreneurs' or 'mediators,' viewed as integral in coordinative discourse. Additionally, in the communicative discourse, a broader spectrum of influence is observed encompassing media personnel, social movements, opinion leaders, and even everyday individuals. Yet, the participation of these individuals is expected to occur within organized social movements, voting processes, citizen juries, forums, and polls, as well as through their routine practices. Despite recognizing these roles, DI has not sufficiently explored the engagement of individual members of the public in policy creation or the possibility to argue, influence other actors, and induce change. This is where the framework steps in, addressing this critical gap. The theoretical approach in this thesis allows for an in-depth investigation and analysis of specific arguments presented by individuals who have endured the consequences of governmental failures. It offers a richer understanding of how individual voices, often overlooked, can significantly contribute to bringing about regulatory changes. This thesis, by empirically applying the framework, demonstrates that it not only broadens the scope of existing theories, but also provides a practical tool for identifying and evaluating the real-world influence of individuals on policy development.

6.4.2 Methodological Reflection

In response to the shift towards a more dynamic institutional policy analysis which accentuates the significance of discourse, this thesis utilizes a mixed-method strategy combining text analysis from an 'argument in interaction' perspective. The methodological choices made for the purposes of this thesis aimed to address the innovative combination of actor-constellation heuristic and argumentative content analysis. This thesis endeavors to make a substantial contribution to the methodological discourse in political science transcending the constraints of traditional, attribution-biased approaches which are often less open to qualitative content analysis in polyarchic political settings.

Specifically, this thesis traces the process of three separate attempts at regulatory reform following scandals. It reconstructs the sequence and timing of the hearings to provide a clear narrative of what transpired within a specified period. This period is the aftermath of the government 'failure'

triggering the scandal in each of the three cases under investigation. This thesis then conducts an in-depth analysis of each hearing process. This offers insights into the circumstances facilitating or hindering regulatory change, enabling understanding on how the three observed outcomes were reached. The analysis includes mapping the key actors involved in the hearing context, noting both those who participated and those who were expected to but did not.

The discursive interactions among these actors are then scrutinized using our empirically grounded heuristic for the multidimensional tracing of reform processes, using qualitative content analysis. This approach identifies which groups of actors most frequently utilize each category of argument, or put differently, the predominant argument categories used by different actor groups. By analyzing the content of each argument, this thesis provides a detailed understanding of the actors' perspectives. It also investigates whether the changes implemented after the Congressional hearings align with the content of the arguments predominantly used during the hearings.

Hearings are replete with a multitude of words and arguments (e.g., the oral transcript of each hearing typically spans hundreds of pages), necessitating an approach that integrates both qualitative and quantitative elements. This approach not only matches the complexity of the theoretical framework but also ensures comprehensive data analysis aligned with theoretical propositions. Process tracing is specifically leveraged to trace the development and sway of arguments within hearings over time, further complemented with the use of MAXQDA software. This tool facilitates the quantification and analysis of complex argumentative structures. This renders it ideal for dissecting the multi-level interplay of argument interactions and their consequential impact on policy decisions over time. The selected methodology is thus chosen to monitor the interaction of arguments and their impact on policy decisions. It offers a contrast to traditional discursive approaches that often emphasize dominant narratives or single-actor viewpoints. Centering on the interplay of arguments within actor constellations, it moves beyond the idea of discourse competition.

To guide this analytical process, I outlined criteria and examples for each category in Appendices 1 and 2 to ensure a transparent and structured approach to classifying arguments in hearing transcripts. To summarize, in an ideal-typical fashion, these categories exhibit coherent

characteristics along the dimensions of legitimacy and action logic. First, *policy efficacy* focuses on the logic of consequence with an emphasis on output-performance, evaluating the effectiveness and efficiency of a policy. Secondly, *political feasibility* involves a contextual logic of appropriateness, assessing the political support behind policy reform choices with reference to output legitimacy. Thirdly, *state capacity* refers to throughput legitimacy, highlighting the necessary administrative resources for effective implementation. Fourthly, *state competence* concerns professional and normative integrity, following a logic of appropriateness and throughput legitimacy. Fifthly, *public consent* addresses societal acceptance and fairness, embodying tacit input-legitimate public support. Finally, *constitutional validity* delineates the legal boundaries of government action under the rule of law, employing a consequentialist logic.

Recognizing that policy positions in public discourse often intertwine with multiple types of arguments, the heuristic template is designed to help researchers systematically track the evolution of policy discussions over time. To address this complexity, the criteria for argument allocation was structured to prevent any possibility of overlap, thereby ensuring each argument was assigned to a single, distinct category. This approach guarantees consistency across the empirical analysis. By adhering to this structured classification method, supported by specific indicators, my research aims to clarify how different types of arguments are employed in policy deliberations and their impact on outcomes. The transparent and structured approach, applied to hearing transcripts, enhances the reliability of data analysis by ensuring arguments fit exclusively into one category.

Contemplating the most fitting method for analyzing 'argument in interaction' within this study, the discussion now extends to compare this approach with attribution-biased approaches which are often less open to qualitative content analysis in polyarchic political settings. For example, taking a closer look at Vivian Schmidt's Discursive Institutionalism (DI), her analysis focuses on identifying how types of dominant discourse influence policy changes and shape institutional reforms. In contrast, my research takes a different path from this concept of discourse competition. Instead of focusing solely on the prevailing discourse, this thesis explores the interplay of arguments within a structured six-dimensional public policy framework, considering the specific actor constellations involved. This approach is more receptive to qualitative content analysis because its primary interest is in understanding how different arguments, used by various actors, interact with each other and how these interactions either lead to change or maintain the status quo. Significantly, unlike approaches

that pre-determine or retrospectively identify a winning discourse, this thesis' framework adopts an open-ended approach. This enables the process through which different arguments gain or lose strength to be traced. It also analyzes how these dynamics influence subsequent decisions. Recognizing the multidimensional nature of policymaking, this thesis moves beyond simplifying these processes to questions of 'who is the boss' or 'what is the dominant discourse', acknowledging the complexity of real-world scenarios. Instead, the focus is on the relative strength of different arguments and their impact on decision-making, rather than pinpointing a singular prevailing discourse.

The six-dimensional framework for analyzing argumentative truth claims offers several advantages over existing methodologies. Grounded in rigorous data filtration based on well-defined criteria, our analysis enhances transparency. We have established a set of rules to assist researchers in systematically categorizing the plethora of arguments used by actors to derive conclusions. This methodology provides a structured framework for data analysis, governed by specific categorization rules, leading to more reliable findings. The systematic application of this classification approach in studies analyzing actors' discursive interactions is advocated to introduce more structure and coherence. Recognizing the novelty of this approach, it is acknowledged that empirical indicators could be further refined. Although there are inherent limitations in determining which arguments fit into each category, the established rules can serve as a foundation for ongoing refinement and improvement in future projects. Additionally, our framework offers a unique perspective in capturing the viewpoints of individual actors (e.g., individual members of the public, individual employees of PMSCs, and individual officials working for governmental departments, etc.) within the policy sphere, analyzing their distinctive arguments. This approach is designed to provide a more realistic understanding of policy dynamics, a feature which may not be as thoroughly accounted for in other methodologies. For instance, Swinkels (2020) identifies a significant methodological challenge in Discursive Institutionalism (DI), namely the lack of in-depth research on the cognitive processes of individuals in public policy. Our framework addresses this gap, offering tools for a deeper exploration of these micro-level cognitive dynamics, such as the reasoning of individual actors, to enhance our understanding of how arguments influence policy.

6.5 Arguments Do Matter

Every voice should matter. A well-functioning democracy is (at least theoretically) expected to encourage a plurality of voices, arguments, and counterarguments, especially when it comes to holding public officials accountable for their (in)action. We need to ask: Who can speak, with what legitimacy, and in what tone of voice? Scholars have long argued that individual members of the public do not have equal access to government processes which would allow them to voice their arguments on policy matters (e.g., those disadvantaged by low levels of income and education are less likely to participate – see Green and King, 2013). The 'table' is perceived as being reserved for individuals who have both the influence and power to make choices and bring about change. Given that decisionmakers cannot consider voices they do not hear, being granted a seat at the table signifies an opportunity to be heard and to make a difference.

To the best of my knowledge, this topic has not yet been studied from a perspective that seriously considers argumentation. In an Aristotelian light, when actors are given the opportunity to interact in democratic forums, the kind of arguments they strategically employ plays a catalytic role in shaping government action and bringing about change. My thesis firmly asserts that under specific conditions, especially in crises triggering investigations and hearings to understand the 'failures' leading to governmental fiascos, arguments play a crucial role in determining policy outcomes. Therefore, it calls on the field of political science to take arguments more seriously—not just acknowledge their existence but understand their role as catalysts for or impediments to policy change.

This oversight in political science research, which tends to overlook the power of arguments in favor of attributing changes solely to power dynamics, is particularly pronounced in crisis scenarios. In these situations, a retrospective analysis of facts and decisions becomes decisive. Hearings provide a particularly important platform for such investigations. They are not merely procedural formalities, but are instrumental in shaping policy through the exchange and scrutiny of arguments. Jürgen Habermas' concept of democracy, which functions through discussions that are free from power imbalances and where decisions are made through consensus rather than power dynamics, represents an ideal that is rarely achieved in reality. However, in scenarios like scandal investigations,

this ideal gets closer to realization, as these situations allow voices that are typically marginalized to be heard, leading to more inclusive discussions.

Indeed, this thesis has empirically demonstrated that regulatory changes occurred when the hearing space was 'extended' to include less powerful actors—those previously excluded from 'quiet' deliberations (Culpepper, 2011). These actors were then given the opportunity to voice their arguments advocating for reform. Thus, it can be concluded that change is more likely to occur when the constellation of actors is broader, leading to a more diverse argumentative space. This finding is significant because, during normal times, the power resources of privileged actors almost exclusively determine which arguments are heard. It is only in the wake of scandals, which bring increased (and very public) scrutiny to the government's failures, that the political space opens to include less privileged actors, providing windows of opportunity for voicing pro-reform arguments.

At the same time, as the empirical chapters of this thesis illustrate, increased scrutiny can constrain powerful actors and complicate their ability to defend the regulatory status quo. In a democratic arena, all arguments claim to represent the truth. Challenging arguments with weak premises, including those from powerful actors, requires listening to as many voices as possible in an 'extended' hearing space. Although diversity and dissent might render democratic decision-making 'messy', this approach is still a much better safeguard against spectacular 'fiascos' than a top-down, monolithic, linear process, dominated by a single elite within the policy arena. In fact, the biggest fiascos are not caused by opening the process to genuine contests of ideas. Instead, they occur when the policymaking process is closed off, where too much power is held by too few people, debate time and space are limited, and there is no room for alternative viewpoints.

Of course, power still matters. Ironically, the decision to investigate a scandal is often made by powerful entities who find themselves with no other choice but to initiate a hearing. This inadvertently opens a discursive space. In the special context of hearings, dynamics change. Although power remains an underlying factor, the nature of a hearing creates an environment where arguments cannot be easily silenced by power alone. This setting facilitates a more open examination and discussion of the issues at hand. Once this discursive space is established, the chances of effecting change relative to the status quo increase. This occurs because recognizing a situation as a

scandal demanding investigation creates opportunities for different interpretations and discussions, ultimately paving the way for potential regulatory changes. In democratic societies, such discussions are crucial to uncovering the manipulative tactics and flawed ideas often present in the discourse of elites. For instance, my thesis demonstrates how this space is utilized but also, at times, misused, such as through non-participation in hearings. By choosing not to attend the hearings, powerful actors effectively exercise the power not to listen, allowing them to overlook or reject alternative ideas or discourse in an attempt to uphold their status and influence.

What makes some arguments more influential than others? The theoretical framework of this thesis is characterized by its openness and probabilistic nature. It avoids prescribing predetermined outcomes, instead exploring a range of possibilities in argumentative environments. This approach allows for the consideration of various outcomes and perspectives. To understand what makes some arguments more influential than others, and thus to make sense of the divergent pathways in the three case studies, I employed a heuristic comprised of six dimensions of policy advocacy to analyze the discourse of different actors. This thesis suggests that in interactions among various actors, different types of arguments are presented, and some become more influential than others. This stance was supported by the empirical findings of this thesis, which revealed a diverse range of arguments in use, rather than the dominance of any single type.

The empirical research, approached from an open perspective, allowed the examination of the types of arguments that state officials, individual citizens, experts, and other actors focus on. Initially, I had anticipated that arguments employed by public officials would dominate due to their inherent power position compared to individual citizens. However, the empirical evidence led to a different and particularly fascinating conclusion. A key finding of my analysis was that the type of arguments most frequently used by individual members of the public (namely, 'public consent') were the most influential, in advocating for reforms and in countering arguments seeking to justify and maintain the regulatory status quo in the hearing context. Of course, the mere frequency of these arguments does not prove their influence. To confirm the influence of 'public consent' arguments, I compared the content of such argumentation with changes made by the administration to regulations after the hearings and found them to be identical.

How did this thesis arrive at this finding? I discovered an elective affinity between the victims/ victims' families and the use of 'public consent' argumentation. Specifically, Chapters 3 and 5, where individual members of the public were present, feature a very high number of 'public consent' arguments. In contrast, Chapter 4, where the public was absent, shows few arguments of this type. This does not imply that other actors did not use such arguments. Instead, it highlights that members of the public were the most frequent users. The significant use of these arguments by individual members of the public in the hearing setting seems to have made them more powerful, as the legitimacy of government policy, in principle, is derived from the electorate's mandate. Therefore, all rules (legal or regulatory) are expected to align with the basic values and norms conforming with the prevailing standards of acceptability in society. Consequently, it would entail political costs if members of Congress refused to seriously consider arguments made by citizens calling for reform.

This finding has significant implications for democracy and the rule of law. The respect for the voices of citizens calling for change becomes even more critical when considering that public trust in government institutions and democratic processes has been disrupted over the past decades, particularly in areas shrouded in secrecy, as examined in this thesis. This concern arises because the practice of bureaucratic 'secrecy' can be particularly corrosive to democracy. A hallmark of democracy, and indeed any state governed by the rule of law, is the accountability of those who, under the guise or authority of law, abuse their power, make mistakes, or commit crimes. However, it appears that bureaucrats may use 'secrecy' to obscure from public view anything that might embarrass them or reduce their political power and influence. This includes innocent mistakes, evidence of incompetence, evidence that the policies made or implemented are ineffective or have unforeseen negative consequences, corruption, or even evidence of criminal conspiracies and dealings. (Horton, 2015, p.150) According to Weber, the logical check on unjustified bureaucratic secrecy is congressional oversight. Thus, it is extremely important that, in the hearing context, the arguments of individual members of the public were reiterated by the Congressional Committee members to challenge the bureaucrats' arguments and 'competence'. This reflects a modern democratic principle where lawmakers increasingly listen to their constituents, and changes in values are more swiftly reflected in new laws. This contrasts with the past when a small elite, whose values were contrary to those of the general population, had the monopoly on law-making (Dror, 1957).

Finally, this thesis discovered that the strength of "public consent" arguments was enhanced when certain actors employed emotional appeal, one of Aristotle's three modes of persuasion. This finding, unexpected from a theoretical perspective, has significant theoretical implications which should inform future work. This will be discussed in detail in the following section.

6.6 Do Emotionally – Charged Arguments Matter (More)?

This thesis discovered that the influence of "public consent" type of arguments becomes particularly strong when laden with emotions, both in challenging the discourse of powerful actors and advocating for reforms deviating from established paths in policies, laws, and regulations. This was an unanticipated finding which suggests that the political space where policy reformers operate—and where argumentative claims clash, mix, and coalesce behind reform decisions—is not emotionally sterile.

It is important to clarify that the determination of actors' emotional engagement primarily stemmed from a qualitative analysis of Congressional hearing transcripts. This analysis entailed a meticulous examination of the language, tone, and emphasis committee members used, especially in response to emotionally charged testimonies. For the purposes of this thesis, 'emotional' describes arguments that evoke or appeal to the audience's emotions. Key indicators of an emotional response included changes in speech patterns—such as increased volume, which I observed by watching the publicly available recorded hearings on Congress's official website. It also included emphasis, such as references to personal experiences, and expressions of empathy or moral outrage. These indicators were essential for conducting the qualitative content analysis to infer the committee members' emotional engagement. I identified and described specific instances in each of the empirical chapters where committee members visibly reacted or altered their line of questioning in response to emotionally charged arguments. By tracking the reactions and statements of committee members throughout the hearings, I discerned patterns indicating that emotionally charged arguments significantly influenced their perspectives and potentially their policy positions. To bolster these claims, this thesis also briefly draws on secondary sources discussing the role of emotion in political decision-making. This literature supports the notion that emotional appeals, while not the sole factor, do play a significant role in shaping political discourse and decisions.

Aristotle refers to Pathos, or the appeal to emotions, as one of the three modes of persuasion. In 'Rhetoric,' he states: 'Of the modes of persuasion furnished by the spoken word there are three kinds … [Firstly,] persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible … Secondly, persuasion may come through the hearers, when the speech stirs their emotions. … Thirdly, persuasion is effected through the speech itself when we have proved [the point] by means of the persuasive arguments suitable to the case in question.' (Rhetoric, I.2.1356a2-21, Roberts.) The second mode of persuasion, the appeal to emotions, is of particular relevance to our study. It involves an arguer's effort to understand the causes of emotion and effectively evoke them within a specific audience. Pathos can be utilized in various ways to evoke both positive and negative emotions, as it denotes the Greek term for both 'suffering' and 'experience.' When pathos is employed to influence an audience, the goal is to elicit an emotional response motivating action. Any emotion, such as happiness, compassion, nostalgia, anger, or others, has the potential to drive individuals, even on a smaller scale. Pathos can be cultivated through straightforward and powerful language, an emotional tone of voice (whether spoken or written), well-timed pauses, and the use of emotional metaphors or narratives. It is unsurprising that audiences may be more persuaded by someone with whom they can relate or identify. Yet, emotional appeal should not be misperceived as a tool employed by elites to manipulate an easily swayed and uninformed public. Emotions have always been an aspect of our reasoning process, and thus included in our deliberative assessments and final decisions. In other words, empathizing with another is not the same as being manipulated by that person just because our emotions are involved (Dowding, 2018).

Nabi (2003) suggests that people view issues through an emotional lens, thereby turning the emotion itself into a frame which impacts subsequent opinions. Thus, the repeated association of specific emotions with certain thoughts or events gradually shapes one's interpretation and reaction to those events, ultimately affecting their worldview. Therefore, emotion can act as a frame, guiding the processing of information and influencing subsequent judgments. Of course, different emotions may trigger different behavioral responses. For instance, Lu (2015) focused on the behavioral response that can be stimulated by the emotion of sadness. Sadness can be experienced by observing someone else in trauma or tragedy. The recipient may, in turn, become determined to go beyond self-interest and facilitate the victim through emotional or financial support. The emotion of disgust, on the other hand, is associated with impurity and contamination (Horberg, Oveis, and Keltner, 2011). The prime motive for feelings of disgust is to avoid a pathogen. However, this behaviour may

also be associated with moralization. Feelings of disgust show moral condemnation of any object, event, or individual. Therefore, an individual may feel disgusted when another violates his or her individual construction of rules for morally acceptable behaviour. This can even lead to the subsequent avoidance of individuals violating these predetermined rules. Finally, the behavioral response triggered by anger may facilitate punishing behaviors and moral condemnation. This is because anger is associated with the subjective moral judgment of an individual being elicited by specific circumstances wherein an individual notices harmful or unjust behaviour or actions (Cushman, 2008).

It is important to clarify, again, that my research does not suggest that emotions override all other factors. Rather, it undertakes a probabilistic exploration of how multiple actors and factors, including emotional appeals, shape outcomes in specific contexts. While recognizing the role of emotional engagement, this thesis does not assert that emotions supersede rational policy deliberations. Instead, it suggests that under certain conditions—such as in the aftermath of scandals and government failures, and within specific forums like hearings—emotional arguments can act as a catalyst to influence committee deliberations, thereby bringing about regulatory change.

The impact of emotional appeal seemed to be intimately connected with the actors who made the arguments, namely, the families of victims or the victims themselves. The fact that in Chapter 3, normative arguments questioning the extent to which the government had protected their loved ones were made by the mothers and wives of the PMSC soldiers killed in Iraq surely hit too close to home. Similarly, the arguments put forward by the victims themselves in Chapter 5 emotionally appealed to the Committee members, who felt that the victims of sexual abuse could be their own children or family. In fact, Congressman Weiner admits, 'nowadays, without the face and the voice of someone who has actually been through it, none of these things get changed' (House Committee of the Judiciary, 2007). As a result, this specific context made such arguments particularly forceful (irrespective of the content of the argument itself), and its impact should be the subject of future study. This raises the question: Would the outcome in Chapter 4 have been different if the families of Iraqi victims had voiced their arguments in the context of the hearings?

Note that given the probabilistic framework employed in this thesis, it does not necessarily mean that emotionally charged 'public consent' arguments, used by family members of victims or the victims themselves, will prevail in every context. Instead, it suggests that in the aftermath of scandals, such actors, when invited to participate in official decision-making forums, are more likely to employ normative 'public consent' type arguments. This is instead of the technically procedural 'state competence' arguments that bureaucratic actors were found to use more frequently, often to justify the decisions and actions of their Departments and to shift the blame to individual PMSC contractors involved in scandals. Furthermore, due to the tragedies they have endured, family members or victims are also most likely to utilize emotionally charged arguments. This contrasts with Blackwater's founder and CEO, Eric Prince, and other industry actors who tended to use technical arguments that were not emotionally charged. Therefore, as already explained, the outcome when actors interact in discursive forums and their arguments clash is not predetermined. Therefore, this thesis argues that the use of the theoretical framework facilitates the exploration of a range of possibilities in argumentative environments in a structured and systematic manner.

Admittedly, the theoretical framework offers a more neutral perspective which does not fully account for the role that emotions and emotional appeal, as means of persuasion, can play in reinforcing a particular type of argument. To bridge this gap, it is crucial to develop more explicit and comprehensive indicators for systematically studying this phenomenon. Future research should aim to refine these methods and further explore the intricate role of emotion in policymaking. Doing so would enable the emotional responses of individual actors to be traced and analyzed more effectively.

6.7 Future Research Trajectories

While concluding the research cycle of this study, I recognize the importance of identifying future research trajectories. It is crucial to demonstrate how the selected adjacent areas — namely, private prisons, policing systems, and autonomous weapons technology — connect with the trajectory established in my thesis. The delegation of organized force, along with the associated oversight and regulatory challenges exacerbated in the wake of scandals, serve as the common thread linking these areas to the core focus of my thesis. Each area presents unique contexts where scandals have

occurred, triggering congressional hearings, or hold the potential to occur, thus creating opportunities for regulatory change.

Privatization of Prisons: The controversies surrounding private prisons, particularly those involving human rights violations, serve as pronounced examples of government failures like those discussed in this thesis. Scandals, akin to those involving PMSCs, have revealed regulatory oversight flaws, drawing congressional committees' attention (see e.g., the Committee on Oversight and Reform and the Subcommittee on Civil Rights and Civil Liberties Staff Report on 'The Trump Administration's Mistreatment of Detained Immigrants: Deaths and Deficient Medical Care by For-Profit Detention Contractors', September 2020) and engaging advocacy groups and affected communities in a discourse which could potentially lead to regulatory reform. CoreCivic, a private prison company, has been embroiled in repeated scandals for human rights violations and inadequate staffing, contributing to increased violence. The American Civil Liberties Union (ACLU) reported that former Montana Governor Steve Bullock extended CoreCivic's contract for two additional years in exchange for managing a $34 million fund aimed at assisting the state in eventually acquiring and operating a facility in Shelby, Montana. Moreover, the ACLU accused other politicians, beyond Bullock, of being influenced by CoreCivic. Following Donald Trump's election, Congressman Greg Gianforte significantly invested in the private prison sector, leading to a surge in demand for such facilities, particularly for detaining immigrants. The ACLU has criticized the government's failure to instigate reform, as evidenced by scandals revealing 'our highest elected officials shaking hands with an industry that warehouses their constituents in facilities lacking adequate medical care, exposing them to racial discrimination, physical abuse, religious discrimination, and unchecked sexual assault' (Rossi, 2018). These incidents involving high-level officials and governmental failures underscore the need for regulatory intervention and reform. The CoreCivic case highlights the urgent need for reform in prison privatization. It also questions the effectiveness of current oversight mechanisms, aligning well with this thesis' emphasis on regulatory opportunities arising from scandals. Applying this thesis' framework, future research can investigate how argumentative strategies used during the interactions of various actors, including civil rights organizations like the ACLU, could influence policy changes in this sector.

The 'Broken' Policing System: The widespread protests and demands for police reform following incidents of police violence, especially against people of color, exemplify the scandal-driven

opportunities for regulatory change. These incidents trigger hearings (see e.g., House Committee on the Judiciary Hearing on 'Oversight Hearing on Policing Practices and Law Enforcement Accountability', 2020), as discussed in this thesis. The Department has shown reluctance to exercise oversight over the police, even in the face of numerous requests for investigations into units suspected of widespread misconduct through 'pattern or practice' inquiries. Such interventions were perceived as 'aggressive,' contributing to the current crisis. Despite high-profile incidents involving the deaths of unarmed Black men after encounters with police, the Department has claimed its lack of intervention is due to being 'ill-equipped to serve as the go-to response for scandal-hit law enforcement departments across the country' (Lerner, 2015). Calls for expanding the office's size and powers at the eleventh hour appear hypocritical, while efforts to enact reform — such as by diversifying police forces and implementing implicit bias training — have had minimal impact on changing behaviors and reducing violence against people of color. This renders them largely symbolic. The Department of Justice's reluctance and eventual failure to effectively oversee police departments can be analyzed using the proposed theoretical framework, in the context of hearings triggered by scandals, exploring how interactions among actors and their argumentation could lead to significant policy shifts rather than symbolic or minimal changes. This area aligns with this thesis by demonstrating how scandals, like the deaths of Breonna Taylor and George Floyd, trigger congressional hearings, thus creating windows of opportunity for profound regulatory change in law enforcement.

Autonomous Weapons Technology: While this area may currently lack visible and widely publicized scandals, the ethical and operational concerns it raises could potentially lead to future controversies. Theoretical objections and the evolving debate around the autonomy of weapon systems preemptively highlight areas where regulatory frameworks may need to adapt in response to emerging technologies and their implications for the delegation of organized force. The CRS (2022) poses a crucial question: Are the weapons review processes and legal standards in the US sufficient? In January 2023, the Department of Defense issued Directive 3000.09, aiming to set guidelines and allocate responsibilities for the advancement and utilization of autonomous and semi-autonomous capabilities in weapon systems. This includes armed platforms that can be operated remotely or with personnel onboard. Remarkably, these guidelines are 'designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements' (DODD 3000.09, 2023, p.1). The Directive aims to 'allow commanders and operators to exercise appropriate levels of human judgment over the use of force' (DODD 3000.09,

2023, p.3). However, the language of the Directive is vague regarding what constitutes 'appropriate' judgment across operational contexts, leaving room for interpretation in practice. Moreover, the policy itself acknowledges the possibility of failure. As this thesis has demonstrated, such discretionary judgments over the use of force must be scrutinized closely, given the high potential for ‘fiascos’. This is especially true because, in this context, 'judgment' does not refer to manual human control of the weapon system but to discretionary decisions about how, when, where, and why the weapon will be employed. In the regrettable scenario that a major public scandal breaks out triggering hearings and investigations into failures, future research should explore the possibility for regulatory change through the lens of argumentative interactions of actors.

In conclusion, this thesis broadens its theoretical scope by expanding on how these cases might influence regulatory reform through argumentative interactions among stakeholders. Its comprehensive approach leverages the diversity of the cases studied—from high-profile policing scandals to the more conceptual debates over autonomous weapons technology. This showcases the extensive applicability of its theoretical insights across various contexts and controversies. Inspired by the theoretical groundwork of this study, future research should delve further into these issues. Utilizing the analytical tools proposed in this thesis to examine comparable cases offers a pathway to understand the crucial role that 'real' actors’ argumentative interactions play in achieving path-shifting policy change, and to further explore the impact of 'real' actors' emotional engagement in drafting effective re-regulation.

7 REFERENCES

Abbott, K. W., & Snidal, D. (2012). Law, Legalization, and Politics. *Social Science Research Network*, 33–56. https://doi.org/10.1017/cbo9781139107310.003

Adams, J., (2011). The Assault of Jamie Leigh Jones: How One Woman's Horror Story is Changing Arbitration in America. *Pepp. Disp. Resol. L*.J., *11*, p.253.

Amnesty International, (2008). *Carnage and Despair: Iraq Five Years On*. [online] Available at: http://psm.du.edu/media/documents/reports_and_stats/ngo_reports/amnesty_international_carnage_and_despair.pdf [Accessed 9 Jan. 2019].

Apuzzo, M. (2014). Trying to Salvage Remains of Blackwater Case. *The New York Times* . Retrieved from https://www.nytimes.com/2014/05/12/us/trying-to-salvage-remains-of-blackwater-case.html.

Avant, D., (2005). *The market for force*. Cambridge, UK: Cambridge University Press.

Avant, D. and De Nevers R., (2011). Military Contractors & the American Way of War. *Daedalus,* 140(3), p.88–99.

Avant, D. and Sigelman, L., (2010). Private Security and Democracy: Lessons from the US in Iraq. *Security Studies*, 19(2), pp.230-265.

Ayer, J., (2019). Military Extraterritorial Jurisdiction Act: International Implications and Prosecutorial Considerations. Indiana Int'l & Comp. Law Review 29(1)

Bakker, C. and Greijer, S., (2011). Children's Rights: The Potential Impact of Private Military and Security Companies. In: F. Francioni and R. Natalino, ed., *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, 1st ed. Oxford University Press.

Bakker, C. and Mirko S., (2012). *Multilevel Regulation of Military and Security Contractors: The Interplay Between International, European and Domestic Norms*. Oxford: Hart Publishing.

Bakker, C., (2011). Duties to Prevent, Investigate, and RedressHumanRightsViolations by Private Military and Security Companies: The Role of the Host State. In: F. Francioni and R. Natalino, ed., *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, 1st ed. Oxford University Press.

Bakker, C., & Sossai, M. (2012). *Multilevel Regulation of military and security contractors: The interplay between international, European and domestic norms*. Hart Publishing.

Bardach, E., (1977). *The Implementation Game: What Happens after a Bill Becomes a Law*. Cambridge: MIT Press.

Barker v Halliburton Co., (S.D.Tex.2008). 541 F.Supp.2d, 879

Bartolini, S., (2018). *The Political*. London: ECPR Press.

Bateman, M., (2012). A Military Practitioner's Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations. In: *The Army Lawyer*. Department of the Army.

Bean, H., (2016). Privatizing intelligence. In: R. Abrahamsen and A. Leander, ed., *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES*. ROUTLEDGE HANDBOOKS.

Benedict, H., (2008). Why Soldiers Rape: Culture of misogyny, illegal occupation, fuel sexual violence in the military. *In These Times*, *13*, pp.2008. <https://inthesetimes.com/article/why-soldiers-rape>.

Berger, T. (1996). Norms, identity and national security in Germany and Japan. In: Katzenstein, P. ed., *The Culture of National Security. Norms and Identity in World Politics*. New York: Columbia University Press, pp. 317–356.

Berndtsson, J., Stern M., (2016). PRIVATE SECURITY GUARDS Authority, control and governance?. In: Abrahamsen, R., Leander, A., ed. In ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES

Best, G., (1980). *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT*. Columbia University Press.

Boin, A., McConnell, A., & Hart, P. 't. (2008). *Governing after crisis: The Politics of Investigation, accountability and learning*. Cambridge University Press.

Bovens, M., & 't Hart, P. (2016). Revisiting the study of policy failures. *Journal of European Public Policy*, *23*(5), 653–666. https://doi.org/10.1080/13501763.2015.1127273

Bruneau, T. C. (2011). *Patriots for profit: Contractors and the military in U.S. national security*. Stanford University Press.

Business and Human Rights Centre, (2016). *Blackwater contractors appeal US court convictions over shootings in Iraq.* [online] Available at: < https://www.business-humanrights.org/de/neuste-meldungen/blackwater-contractors-appeal-us-court-convictions-over-shootings-in-iraq> [Accessed 14 September 2021].

Case: 1:07-cv-01831 [2007] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Cavelty, M., (2016). Cyber-security and private actors. In: R. Abrahamsen and A. Leander, ed., *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES*. ROUTLEDGE HANDBOOKS.

Chaudry, M.I., (2019). An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for# MeToo Victims. *Seton Hall Legis. J.*, *43*, p.215.

Chesterman, S., (2008). 'We Can't Spy … If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'. *European Journal of International Law*, 19(5).

Chesterman, S. and Chia L., (2009). *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press.

Clancy, D.S. and Stein, M.M., (2007). An uninvited guest: Class arbitration and the federal arbitration act's legislative history. *The Business Lawyer*, pp.55-79.

Coleman, J., (1990). *Foundations of Social Theory*. Belknap Press of Harvard University Press.

Colvin, A.J.S., (2017). The growing use of mandatory arbitration. *Economic Policy Institute*, 5, pp.2017. <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

Commission on Wartime Contracting in Iraq and Afghanistan, (2011). *Report Commission On Wartime Contracting In Iraq And Afghanistan Transforming Wartime Contracting: Controlling Costs, Reducing Risks*. Washington, D.C.

Committee on Education and Labor, (2007). *Protecting American employees from workplace discrimination.* Serial No. 110-77 WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on Foreign Relations United States Senate, (2008). *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment*. Serial No. 110 – 744. WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on Homeland Security and Governmental Affairs United States Senate, (2008). *An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations*. Serial No. 41- 453. WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on the Judiciary, (2009). *Workplace fairness: has the Supreme Court been misinterpreting laws designed to protect American workers from discrimination?.* Serial No. […] WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on the Judiciary, (2011). *HOLDING CRIMINALS ACCOUNTABLE: EXTENDING CRIMINAL JURISDICTION TO GOVERNMENT CONTRACTORS AND EMPLOYEES ABROAD*. Serial No. J–112–24 WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on Oversight and Government Reform House of Representatives, (2006). *Private Security Firms Standards, Cooperation and Coordination on the Battlefield*. Serial No. 109–214. WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on Oversight and Government Reform House of Representatives, (2007). *Iraqi Reconstruction: Reliance on Private Military Contractors and Status.* Serial No. 110–11. WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on Oversight and Government Reform House of Representatives, (2007). *Blackwater USA*. Serial No. 110-89. WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE.

Committee on Oversight and Reform and Subcommittee on Civil Rights and Civil Liberties U.S. House of Representatives (2020) *The Trump Administration's Mistreatment of Detained Immigrants: Deaths and Deficient Medical Care by For-Profit Detention Contractors*. [online]. Available from: https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf.

Committee on the Judiciary United States Senate, (2007). *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq*. Serial No. 110 – 130. WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE. CONGRESS.GOV [online] Available at: <http://www.congress.gov> [Accessed 13 September 2021].

Committee on the Judiciary U.S. House of Representatives (2020) *Oversight Hearing on Policing Practices and Law Enforcement Accountability*. [online]. Available from: https://democrats-judiciary.house.gov/calendar/eventsingle.aspx?EventID=2984.

Congressional Research Service, (2009). *The Committee System in the U.S. Congress*. [online] Available at: <https://crsreports.congress.gov/product/pdf/RS/RS20794/6> [Accessed 13 September 2021].

Congressional Research Service, (2010). *Private Security Contractors in Iraq and Afghanistan: Legal Issues*. [online] Available at: <https://sgp.fas.org/crs/natsec/R40991.pdf> [Accessed 14 September 2021].

Congressional Research Service, (2011). *The Department of Defense's Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress.* [online] Available at: https://www.everycrsreport.com/files/20110513_R40835_864346917e2f9beec58b21ff7e89ebdf8edfc3e9.pdf

Congressional Research Service, (2016). *Department of Defence Contractor and Troop Levels in Iraq and Afghanistan.*

Congressional Research Service, (2017). *Committee Types and Roles*. [online] Available at: <https://sgp.fas.org/crs/misc/98-241.pdf> [Accessed 13 September 2021].

Congressional Research Service, (2021). *An Overview of Federal Regulations and the Rulemaking Process*. [online] Available at: < https://sgp.fas.org/crs/misc/IF10003.pdf>

Congressional Research Service (2022) *Defense Primer: U.S. Policy on Lethal Autonomous Weapon Systems*. [online]. Available from: https://crsreports.congress.gov/product/pdf/IF/IF11150/9.

Crespy, A., & Vanheuverzwijn, P. (2017). What "Brussels" means by structural reforms: Empty signifier or constructive ambiguity? *Comparative European Politics*, *17*(1), 92–111.

Culpepper, P., (2011). *Quiet politics and business power: Corporate control in Europe and Japan. Cambridge studies in comparative politics*. Cambridge: Cambridge University Press.

Cushman, F. (2008). Crime and punishment: Distinguishing the roles of causal and intentional analyses in moral judgment. *Cognition*, *108*(2), 353–380.

Cusumano, E., (2017). Diplomatic Security for Hire: The Causes and Implications of Outsourcing Embassy Protection. *The Hague Journal of Diplomacy* 12, 1, p.27-55

Cyert, R. and March, J., (2005). A behavioral theory of the firm. In: J. Miner and M. Sharpe, ed., *Organizational Behavior 2: Essential Theories of Process and Structure*. pp.169–87.

Davis, K., (1970). Discretionary Justice. *Journal of Legal Education* 23 (1) p.56–62.

de Carvalho, B., (2016). Private force and the making of states, c. 1100–1500. In: R. Abrahamsen and A. Leander, ed., *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES*. ROUTLEDGE HANDBOOKS.

De Nevers, R., (2009). Private Security Companies and the Laws of War. *Security Dialogue,* 40(2). p.169–90.

de Nevers, R. (2009b). (Self) regulating war?: Voluntary regulation and the private security industry. *Security Studies*, *18*(3), 479–516. https://doi.org/10.1080/09636410903132854

DE NEVERS, R., (2010). The effectiveness of self-regulation by the private military and Security Industry. *Journal of Public Policy*, *30*(2), 219–240. https://doi.org/10.1017/s0143814x10000036

de Nevers, R., (2016). PRIVATE SECURITY'S ROLE IN SHAPING US FOREIGN POLICY. In: R. Abrahamsen and A. Leander, ed., *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES*. ROUTLEDGE HANDBOOKS.

Deering, C. and Smith, S., (1997). *Committees in Congress*. 3rd ed. pp.63–86.

del Prado, J. L. (2008). Private military and security companies and the UN Working Group on the use of mercenaries. *Journal of Conflict and Security Law*, *13*(3), 429–450. https://doi.org/10.1093/jcsl/krp010

Department of Defense Appropriations Act, *(2009, 2010).* (Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454–55).

Department of Defense Appropriations Act, 2010, 111th Congress (2009-2010), H.R.3326

Department of Defense Directive 1100.4, February 12, 2005. Guidance for Manpower Management.

Department of Defense Directive 3000.09, January 2023. *Autonomy in Weapon Systems*.

Department of Defense Instruction 1100.22, April 6, 2007. *Guidance for Determining Workforce Mix.*

Department of Defense Instruction 1100.22, September 7, 2006. *Guidance for Determining Workforce Mix.*

Department of Defense Instruction 3020.41, October 3, 2005. *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*.

Department of Defense Instruction 5525.11, March 3, 2005. *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*.

Department of Justice, (2015). *Four Former Blackwater Employees Sentenced to Decades in Prison for Fatal 2007 Shootings in Iraq.* [online] Available at:

<https://www.justice.gov/archive/opa/pr/2008/December/08-nsd-1068.html> [Accessed 14 September 2021].

Department of State, (2007). *Report of the Secretary of the State's Panel on Personal Protective Services in Iraq*. [online] Available at: <https://www.hsdl.org/?abstract&did=480232> [Accessed 14 September 2021].

Dickinson, L. 2007. Contract as a tool for regulating private military companies. In: Chesterman, S., Lehnardt, C., ed. In From Mercenaries to Market: The Rise and Regulation of Private Military Companies. Oxford University Press

Dickinson, L., (2011). *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs*, London and New Haven: Yale University Press.

Dickinson, L., (2013). Regulating the Privatized Security Industry: The Promise of Public/Private Governance. *Emory Law Journal,* 63(2), p.417–54.

Dickinson, L., (2015). *Panel Event December 2015: Regulation Of Private Military And Security Companies*. [online] Ohchr.org. Available at: <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/EventDec2015.aspx>.

Dlouhy, J.A., (2009). K.B.R. Rape Case to Influence Rules for Contractors. *HOUSTON CHRONICLE.* <http://www.chron.com/disp/story.mpl/nation/6773870.html>.

Dobbin, F. et al. (2007) The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning? *Annual Review of Sociology*. [Online] 33 (1), 449–472.

Dowding, K., (2018). Emotional appeals in politics and deliberation. *Critical Review of International Social and Political Philosophy*, 21(2), pp.242-260.

Dror, Y. (1957). Values and the Law. *The Antioch Review*, *17*(4), 440.

Dworkin, R., (1998). *Law's Empire*. Hart Publishing.

Early Day Motion 785, 2008. *Private Military And Security Companies*. [online] Available at: https://edm.parliament.uk/early-day-motion/34949 [Accessed 5 Jan. 2019].

EEOC v. Arabian Am. Oil Co., [1991] 499 U.S. 244, p.248.

Elmore, R.F., (1980). Backward Mapping: Implementation Research and Policy Decisions. *Political Science Quarterly*, 94, p.601–616.

Esaw, R.B., and Taylormoore, M.L., (2010). New Mandatory Arbitration Restrictions for Federal Contractors Signal Things to Come. *MARTINDALE.COM,* 8, pp.2010. <http://www.martindale.com/government-contracts-law/article_McGuireWoods-LLP_887518.htm>.

Farmer, M.B., (2012). Mandatory and Fair-A Better System of Mandatory Arbitration. *Yale LJ*, *121*, p.2346.

Federal Acquisition Regulations 48 CFR

Federal Register, Vol. 75, No. 235, DFARS Case 2010–D004

Federal Register, Vol. 75, No. 96, DFARS 252.222-7006

Finnemore, M. (1996) Norms, culture, and world politics: insights from sociology's institutionalism. International Organization. [Online] 50 (2), 325–347.

Francioni, F. (2011). The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors. In: Francioni, F., Ronzitti, N., ed., *In War by contract: Human rights, humanitarian law, and private contractors*. Oxford University Press.

Francioni, F. and Ronzitti, N., (2011). *War By Contract: Human Rights, Humanitarian Law, And Private Contractors*. New York: Oxford University Press.

Government Accountability Office, (2005). *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*. [online] Available at: <https://www.gao.gov/assets/a247253.html> [Accessed 14 September 2021].

Government Accountability Office, (2008). *Rebuilding Iraq: DOD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions Are Needed to Sustain Improvements*. [online] Available at: <https://www.gao.gov/products/gao-08-966> [Accessed 14 September 2021].

Government Accountability Office, (2011). *Legislative Restrictions on Contractor Use of Mandatory Arbitration Agreements Have Had No Reported Impacts on National Security*.

GovInfo. (n.d.). Retrieved February 25, 2023, from https://www.govinfo.gov/app/details/USCODE-2009-title22/USCODE-2009-title22-chap38-sec2709

Graβl, P., Schaap, G., Spagnuolo, F., & Van 't Riet, J. (2021). The effects of scandalization in political news messages on Political Trust and message evaluation. *Journalism*, *22*(10), 2566–2582.

GREEN, D., & KING, S. (2013). (rep.). *WHAT CAN GOVERNMENTS DO TO EMPOWER POOR PEOPLE?* OXFAM.

Grim, R. (2017). *Defense Department Opposed Franken's Anti-Rape Amendment*. *HUFFINGTON POST*. <https://www.huffpost.com/entry/defense-department-oppose_n_326569>.

Hart., H.L.A. (1961 [1997]). *The concept of law*. Oxford University Press.

Heclo, H., (1974). *Modern Social Politics in Britain and Sweden: From Relief to Income Maintenance*. Yale.

Hedahl, M. (2012). Unaccountable: The current state of private military and security companies. *Criminal Justice Ethics*, *31*(3), 175–192. https://doi.org/10.1080/0731129x.2012.740907

Hemerijck, A. (2013). *Changing welfare states*. Oxford University Press.

Hemerijck, A., Kourra, K. and Sobocinski, M., (2020). Six Core Questions of Public Policy: The Nested Politics of Structural Reform (Draft Paper).

Hirschman, A. O. (1970) *Exit, voice, and loyalty: responses to decline in firms, organizations, and states*. Cambridge, Mass: Harvard Univ. Press.

Hjern, B., (1982). Implementation Research. *Journal of Public Policy*, 2 p.301–308.

Holland, J. and Webb, J., (2013). *Learning legal rules*. 8th ed. Oxford University Press.

Hoppe, C., 2011. Positive Human Rights Obligations of the Hiring State to Connection with the Provision of “Coercive Services” by a Private Military or Security Company. In: F. Francioni and R. Natalino, ed., *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, 1st ed. Oxford University Press.

Hoppe, C., & Quirico, O. (2009). (working paper). *CODES OF CONDUCT FOR PRIVATE MILITARY AND SECURITY COMPANIES: THE STATE OF SELF-REGULATION IN THE INDUSTRY.*

Horberg, E. J., Oveis, C., & Keltner, D. (2011). Emotions as moral amplifiers: An appraisal tendency approach to the influences of distinct emotions upon moral judgment. *Emotion Review*, *3*(3), 237–244. https://doi.org/10.1177/1754073911402384

Horton, S. (2015). *Lords of secrecy the National Security Elite and America's stealth warfare*. Nation Books.

Howard, T.W., and Lee, N., (2010). DoD Issues Final Rule to Implement Franken Amendment. 12, pp.2010.

Howe, R. H. (1978). Max Weber's elective affinities: Sociology within the bounds of pure reason. *American Journal of Sociology*, *84*(2), 366–385. https://doi.org/10.1086/226788

Hudson, B., (1989). Michael Lipsky and Street Level Bureaucracy. A Neglected Perspective. In: L. Barton, ed., *Disability and Dependency*. London: Falmer Press.

Human Rights First, (2008). *Private Security Contractors at War Ending the Culture of Impunity*.

Human Rights First, (2010). *State of Affairs: Three Years After Nisoor Square*.

Human Rights First, (2011). *Fact Sheet: The Case for The Civilian Extraterritorial Jurisdiction Act (CEJA)*.

Human Rights Watch, (2011). *Just Don't Call It a Militia: Impunity, Militias, And The "Afghan Local Police"*.

Human Rights Watch, (2013). *Without Rules: A Failed Approach to Corporate Accountability*.

Hutchinson, T. and Duncan, N., (2012). Defining and Describing What We Do: Doctrinal Legal Research. *Deakin Law Review*, 17(1), p.83.

RE: BLACKWATER ALIEN TORT CLAIMS ACT LITIGATION [2009] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Isenberg, D., (2009). *Shadow Force*. 1st ed. Westport, Conn.: Praeger Security International.

Jones v Halliburton Co., (S.D.Tex.2008). 625 F.Supp.2d 339, 352

Jones v Halliburton Co., (5th Cor. 2009). 583 F.3d 228, 242

Jones, B., (2001). *Politics and the architecture of choice: Bounded rationality and governance*. University of Chicago

Kingdon, J. W. (2003). *Agendas, alternatives, and public policies* (2nd ed.). Longman.

Kinsey, C., (2005). Challenging International Law: A Dilemma of Private Security Companies. *Conflict, Security & Development,* 5(3), p.269–93.

Kinsey, C., (2006). *Corporate Soldiers And International Security*. London: Routledge.

Klingemann, H. D., and D. Fuchs, (1995). *Citizens and the State*. Oxford University Press.

Krahmann, E. (2008). Security: Collective good or commodity? *European Journal of International Relations*, *14*(3), 379–404. https://doi.org/10.1177/1354066108092304

Krahmann, E., (2013). The United States, PMSCs and the State Monopoly on Violence: Leading the Way towards Norm Change. *Security Dialogue,* 44(1), p.53–71.

Krahmann, E., (2016). Regulation Through Procurement Policies. In: R. Abrahamsen and A. Leander, ed., *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES*. ROUTLEDGE HANDBOOKS.

Kruck, A., (2013). Theorising the use of private military and security companies: a synthetic perspective. *Journal of International Relations and Development*, 17(1), pp.112-141.

Laubacher, T., (2017). SIMPLIFYING INHERENTLY GOVERNMENTAL FUNCTIONS: CREATING A PRINCIPLED APPROACH FROM ITS AD HOC BEGINNINGS. *Public Contract Law Journal*, 46(4), pp.791–832.

Leander, A., (2007a). Regulating the role of private military companies in shaping security and politics. In: S. Chesterman and C. Lehnardt, ed., *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford University Press.

Leander, A., (2007b). The Impunity of Private Authority. Working Paper No. 89. Chicago.

Leander, A., (2010). The Paradoxical Impunity of Private Military Companies: Authority and the Limits to Legal Accountability. *Security Dialogue*, 41(5), pp.467-490.

Leander, A., (2011). Risk and the Fabrication of Apolitical, Unaccountable Military Markets: The Case of the CIA 'Killing Program. *Review of International Studies,* 37(5), p.2253–68.

Leander, A. (2013). Commercialising Security in Europe. https://doi.org/10.4324/9780203375341

Lerner, A. Policing scandals threaten to overwhelm Justice Dept. (2015). *POLITICO*. https://www.politico.com/story/2015/05/policing-scandals-threaten-to-overwhelm-justice-dept-117736

Lipsky, M., (1980). *Street Level Bureaucracy*. New York: Russell Sage.

Liu, H.-Y. (2017). *Law's impunity: Responsibility and the modern private military company*. Hart Publishing.

Lu, H. (2015). The effects of emotional appeals and gain versus loss framing in communicating sea star wasting disease. *Science Communication*, *38*(2), 143–169. https://doi.org/10.1177/1075547015619173

Mahoney, J., & Thelen, K. A. (2010). *Explaining institutional change: Ambiguity, Agency, and power*. Cambridge University Press.

Majone, G., (1989). *Evidence, Argument, And Persuasion In The Policy Process*. New Haven: Yale University Press.

Mantzavinos, C., (2001). *Individuals, Markets and Institutions*. Cambridge University Press.

March, J. and Olsen, M., (2010). *Rediscovering institutions*. Simon and Schuster.

March, J. and Olsen, M., (2020). The Logic of Appropriateness. In: R. Goodin, ed., *The Oxford Handbook of Political Science*.

Marshall, B. and Wolpe, B., (2018). *The Committee: A Study of Policy, Power, Politics and Obama's Historic Legislative Agenda on Capitol Hill*. University of Michigan Press.

McAllister, B.A. and Bloom, A., (2003). Evidence in Arbitration. *J. Mar. L. & Com.*, *34*, p.35.

McConnell, A. (2016). A public policy approach to understanding the nature and causes of foreign policy failure. *Journal of European Public Policy*, *23*(5), 667–684.

McCullough, K., (2019). Mandatory Arbitration and Sexual Harassment Claims:# MeToo-and Time's Up-Inspired Action Against the Federal Arbitration Act. *Fordham L. Rev.*, *87*, p.2653.

McFate, S., (2015). *The Modern Mercenary: Private Armies and What They Mean for World Order*. Oxford: Oxford University Press.

McFate, S., (2016). PMSCs in international security sector reform. In: R. Abrahamsen and A. Leander, ed., *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES*. ROUTLEDGE HANDBOOKS.

McFate S., (2018) *Mercenaries and war: Understanding private armies today*. National Defense University Press.

McGreal, C, (2009). Rape Case to Force US Defence Firms into the Open. *THE GUARDIAN.* <https://www.theguardian.com/world/2009/oct/15/defence-contractors-rape-claim-block>.

McGrain v. Daugherty, [1972] 273 U.S. 135.

McWhorter, A., (2018). A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration. *Colum. J.L. & Soc. Probs.*, *52*, p.521.

Memorandum of Agreement between the Department of Defense and the Department of State on USG Private Security Contractors, December 2007.

Memorandum of Understanding between the US Department of State and the US Department of Defense and the US Agency for International Development relating to Contracting in Iraq and Afghanistan, July 2008.

Military Extraterritorial Jurisdiction Act of 2000, P.L. 106-523, 114 Stat. 2488 (2000), codified at 18 U.S.C. § 3261-67.

Moffeit, M, and Herdy, (2005). A. For Crime Victims, Punishment. *THE DENVER POST*. <https://www.denverpost.com/2005/05/13/for-crime-victims-punishment/>.

Morris, M., (1996). By force of arms: Rape, war, and military culture. *Duke LJ*, *45*, p.651.

Murdoch, M. and Nichol, M.D., 1995. Violence and sexual harassment while in the military. *Arch Fam Med*, *4*, pp.411-418.

Nabi, R. L. (2003). Exploring the framing effects of emotion. *Communication Research*, *30*(2), 224–247. https://doi.org/10.1177/0093650202250881

Nakamura, R.T., (1987). The Textbook Policy Process and Implementation Research. *Policy Studies Review*, 7, p.142–154.

National Defense Authorization Act for Fiscal Year 2008, Public Law 110–181, 110th Congress

National Defense Authorization Act for Fiscal Year 2009, Public Law 110–417, 110th Congress

Office of Management and Budget, May 29, 2003. *Circular No. A-76.*

OFFICE OF THE INSPECTOR GENERAL, DOJ OIG Releases Report of Investigation and Review of the FBI's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar (2021). Retrieved from https://oig.justice.gov/sites/default/files/2021-07/2021-07-14_0.pdf.

Olsen, J. and Peters, B., (1996). *Lessons from experience: experiential learning in administrative reforms in eight democracies*. Scandinavian University Press.

Open Society Foundations. *Lords of secrecy: The National Security Elite and America's stealth warfare*. Retrieved March 24, 2022, from https://www.opensocietyfoundations.org/events/lords-secrecy-national-security-elite-and-america-s-stealth-warfare

Oppermann, K., & Spencer, A. (2017). *Fiascos in public policy and foreign policy*. Routledge.

Percy, S., (2007a). Mercenaries: Strong Norm, Weak Law. *International Organization,* 61(2), p.367–97.

Percy, S. (2007b). *Mercenaries: The history of a norm in international relations*. Oxford University Press.

Percy, S. (2013). *Regulating the private security industry*. Taylor and Francis.

Percy, S., (2014). The Unimplemented Norm: Anti-Mercenary Law and the Problems of Institutionalization. In: A. Betts and P. Orchard, ed., *Implementation and World Politics: How International Norms Change Practice*. Oxford Scholarship Online.

Petersohn, U., (2010). Sovereignty and Privatizing the Military: An Institutional Explanation. *Contemporary Security Policy*, 31(3), pp.531-552.

Petersohn, U., (2014). Reframing the Anti-Mercenary Norm: Private Military and Security Companies and Mercenarism. *International Journal: Canada's Journal of Global Policy Analysis,* 69(4), p.475–93.

Pingeot, L. (2012). (rep.). *Dangerous Partnership Private Military & Security Companies and the UN*. Global Policy Forum.

Pressman, J. and Wildavsky, A., (1984). *Implementation: How Great Expectations in Washington Are Dashed in Oakland*. 3rd ed. University of California Press.

Quade, E. S., (1975). *Analysis for public decisions. Research studies*. New York: American Elsevier.

Re M (A Minor) (Care Order: Threshold Conditions), [1994] 2 FCR 871.

Reuters, (2020). Trump pardon of Blackwater Iraq contractors violates international law - UN. [online] Available at: <https://www.reuters.com/article/us-iraq-blackwater-un-idUSKBN294108> [Accessed 13 September 2021].

Rhodes, R., (1994). The Hollowing out of the State: The Changing Nature of the Public Service in Britain. *Political Quarterly*, 65, pp.138 - 151.

Risen, J., (2008). Limbo for U.S. women reporting Iraq assaults. *New York Times*. <https://www.nytimes.com/2008/02/13/world/africa/13iht-13contractors.9995624.html>.

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811 (2004).

Rossi, S. (2018). Private Prison Giant CoreCivic Manipulates Montana Into Renewing Its Contract. *American Civil Liberties Union*. https://www.aclu.org/news/smart-justice/private-prison-giant-corecivic-manipulates-montana-renewing

Saferworld, (2007). *Addressing the role of private security companies within security sector reform programmes*. [online] Available at: https://www.saferworld.org.uk/downloads/pubdocs/PSC_%20report.pdf [Accessed 16 Jan. 2019].

Sale v. Haitian Ctrs. Council, Inc., [1993] 509 U.S. 155, p.173.

Scahill, J. (2012). *Blackwater: The rise of the world's most powerful mercenary army*. MJF Books.

Scharpf, F., (1997). *Games Real Actors Play: Actor-Centered Institutionalism In Policy Research*. Westview Press.

Scharpf, F., (1999). *Governing in Europe: Effective and democratic?* Oxford University Press.

Scharpf, F. W. (2000). Institutions in comparative policy research. *Comparative Political Studies*, *33*(6-7), 762–790. https://doi.org/10.1177/001041400003300604

Scheffer, D., (2009). Closing the Impunity Gap in U.S. Law. *Nothwestern Journal of International Human Rights*, 8(1), p.30.

Scherk v Alberto-Culver Co., (1974). 417 U.S. 506, 519

Schmidt, V. A. (2006) '5 Theorizing Democracy in Europe', in *Democracy in Europe*. 1st edition Oxford University PressOxford. pp. 219–266. [online]. Available from: https://academic.oup.com/book/7030/chapter/151386243 (Accessed 23 March 2024).

Schmidt, V. A. (2008) Discursive Institutionalism: The Explanatory Power of Ideas and Discourse. *Annual Review of Political Science*. [Online] 11 (1), 303–326.

Schmidt, V. A. (2012a). Democracy and legitimacy in the European Union Revisited: Input, output *and* 'throughput.' *Political Studies*, *61*(1), 2–22.

Schmidt, V. A. (2012b) 'Discursive Institutionalism: Scope, Dynamics, and Philosophical Underpinnings', in Frank Fischer & Herbert Gottweis (eds.) *The Argumentative Turn Revisited*. [Online]. Duke University Press. pp. 85–113. [online]. Available from: http://read.dukeupress.edu/books/book/1647/chapter/178418/Discursive-InstitutionalismScope-Dynamics-and (Accessed 24 March 2024).

Schmidt, V., (2020). *Europe's crisis of legitimacy: Governing by rules and ruling by numbers in the eurozone.* Oxford: Oxford University Press.

Schooner, S. L. (2005). Contractor atrocities at Abu Ghraib: compromised accountability in streamlined, outsourced government. *Stanford Law & Policy Review*, 16(2), 549-572.

Schreier, M., (2012). *Qualitative Content Analysis In Practice*. SAGE Publications Ltd.

Shah, R., (2014). Beating Blackwater: Using Domestic Legislation to Enforce the International Code of Conduct for Private Military Companies. *The Yale Law Journal*, 123(7), p.2559.

Shearer, D. (1999). Private military force and challenges for the future. *Cambridge Review of International Affairs*, *13*(1), 80–94.

Staelraeve, S., t'Hart, P., (2008). Dutroux and dioxin: crisis investigations, elite accountability and institutional reform in Belgium. In: Boin, A., McConnell, A., & Hart, P. 't., ed., *Governing after crisis: The Politics of Investigation, accountability and learning*. Cambridge University Press.

Simmonds, N., (2008). *CENTRAL ISSUES IN JURIDSPRUDENCE*. 3rd ed. Sweet & Maxwell.

Simon, H., (1985). Human nature in politics: The dialogue of psychology with political science. *American Political Science Review*, 79(2), p.293–304.

Singer, P., (2003). *Corporate Warriors: The Rise of the Privatized Military Industry*. New York: Cornell University Press.

Singer, P. W. (2005). Outsourcing War. *Foreign Affairs*, *84*(2), 119. https://doi.org/10.2307/20034280

Smith, R., (2019). Aristotle's Logic. In: *The Stanford Encyclopedia of Philosophy*.

Snell, A., (2011). The Absence of Justice: Private Military Contractors, Sexual Assault, and the US Government's Policy of Indifference. *University of Illinois Law Review,* 3, p.1125–1164.

Sossai, M., (2016). The legal framework for the armed forces and the regulation of private security. In: R. Abrahamsen and A. Leander, ed., *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES*. ROUTLEDGE HANDBOOKS.

St Antoine, T.J., (2008). Mandatory Arbitration: Why It's Better Than It Looks. *U. Mich. J.L. Reform*, *41*, p.783.

Sternlight, J.R., (2000). As mandatory binding arbitration meets the class action, will the class action survive? *Wm. & Mary L. Rev.*, *42*, p.1.

Stiller, S., (2010). *Ideational Leadership in German Welfare State Reform: How Politicians and Policy Ideas Transform Resilient Institutions*. Amsterdam University Press.

Stinnett-Kassoff, M., (2019). Dogs of War Get a New Lease on Life: Why the Military Extraterritorial Jurisdiction Act Violates the Eighth Amendment in Light of United States v. Slatten. *25 Wash. & Lee J. Civ. Rts. & Soc. Just.* 361

Streeck, W. and Thelen, K., (2005). Beyond Continuity: Institutional Change. In: W. Streeck and K. Thelen, ed., *Advanced Political Economies*. Oxford University Press.

Sussman, E., (2009). Why arbitrate? The benefits and savings. *N.Y. S.T. BJ*, *81*, pp.20-22.

Sutherland, M. (2021). MARKET FOR FORCE: THE EMERGING ROLE OF PRIVATE MILITARY AND SECURITY COMPANIES. Retrieved from https://thesecuritydistillery.org/all-articles/market-for-force-the-emerging-role-of-private-military-and-security.

Swed, O., & Burland, D. (2020). *The global expansion of pmscs: Trends, opportunities, and risks*. Texas Tech University Scholars. Retrieved August 24, 2022.

Swinkels, M. (2020) *How ideas matter in public policy: a review of concepts, mechanisms, and methods.* International Review of Public Policy. [Online] 2 (3), 281–316.

Tanenbaum, J.M., and Kolek, D., (2010). Defense Department publishes Interim rule implementing Franken Amendment: What it means for employment arbitration agreements for defense contractors. 06, pp.2010.

The Administrative Procedure Act 5 U.S.C. 552

The Federal Arbitration Act, 9 U.S.C. §§ 1-16; 9 U.S.C. §§ 201-208; 9 U.S.C. §§ 301-307

The White House, FACT SHEET: President Biden to Sign Historic Executive Order to Advance Effective, Accountable Policing and Strengthen Public Safety (2022). Retrieved from https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/25/fact-sheet-president-biden-to-sign-historic-executive-order-to-advance-effective-accountable-policing-and-strengthen-public-safety/.

Thomson, J., (1994). *Mercenaries, Pirates, And Sovereigns*. Princeton: Princeton University Press.

U.S. Department of State. (2021). *Special investigations - united states department of state*. U.S. Department of State. Retrieved February 25, 2023, from https://www.state.gov/under-secretary-for-management/bureau-of-diplomatic-security/special-investigations-92320

U.S. Senate, Congressional Record, (2009). *Department of defense appropriations act of 2010*. (vol. 155, p. 17).

UK Foreign & Commonwealth Office, (2002). *Private Military Companies: Options for Regulation*.

UK Parliament Foreign Affairs Committee (FAC), HC 116, Second Report, 3 February 1999.

UNITED STATES OF AMERICA, APPELLEE v. NICHOLAS ABRAM SLATTEN, APPELLANT [2017] No. 15-3078 (United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT).

UNITED STATES OF AMERICA, APPELLEE v. NICHOLAS ABRAM SLATTEN, APPELLANT [2016] No. 15-3078 (United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT).

United States v. Gatlin, [2000] 216 F.3d 207, 209 (2d Cir.).

United States v. Maldonado, [2007] 215 Fed. Appx. 938 (11th Cir.).

United States v. Villanueva, [2005] 408 F.3d 193 (5th Cir.), pp.197–98.

van Meegdenburg, H. (2018). 'we don't do that': A constructivist perspective on the use and non-use of private military contractors by Denmark. *Cooperation and Conflict*, *54*(1), 25–43. https://doi.org/10.1177/0010836718765901

Vrdoljak, A., (2011). Women and Private Military and Security Companies. In: F. Francioni and R. Natalino, ed., *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, 1st ed. Oxford University Press.

War on Want, (2006). *Corporate Mercenaries: The Threat of Private Military and Security Companies*. [online] Available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/805_mercenaries_/805_mercenaries_en.pdf [Accessed 19 Nov. 2018].

War on Want, (2008). *Up Front: Private Armies*. [online] Available at: https://waronwant.org/sites/default/files/UpFront%20-%20Private%20Armies.pdf [Accessed 12 Nov. 2018].

War on Want, (2016). *Mercenaries Unleashed: The Brave New World of Private Military and Security Companies*. [online] Available at: http://psm.du.edu/media/documents/reports_and_stats/ngo_reports/waronwant_mercenaries_unleashed_2016.pdf [Accessed 19 Nov. 2018].

Wasserman, H., (2018). Unintended Consequences: How Legislative Responses to #MeToo May Harm Harassment Victims. *W.E.S.T.L.A.W. J. EMP.*, 1, p. 1-4.

Weber, M., (1978). *Economy And Society: An Outline Of Interpretive Sociology*. Berkeley: Univ. of California Press.

Weber, M. (2009). *From Max Weber: Essays in Sociology* (H.H. Gerth, & W. Mills, Trans.; 1st ed.). Routledge.

Whyte, D., (2003). Lethal Regulation: State-Corporate Crime and the United Kingdom's Government's New Mercenaries. *Journal of Law and Society* 30(4), p.575–600.

Zamparelli, J., (1999). Contractors on the Battlefield: What Have We Signed up for?. Air Force Journal of Logistics. *Journal of Logistics*, 23(3), pp.11–9.

APPENDIX 1: DESCRIPTION OF CODING PROCEDURE

Unit of Analysis

Each oral transcript of a hearing held in congressional committees constitutes a unit of analysis. I identified relevant hearings from the database www.congress.gov using specific keywords ("private security" and "private military"). I defined as relevant those hearings that were convened after the scandal. with the intent of finding out what went wrong. This means that two hearings were identified as relevant for Chapter 3, two hearings were identified as relevant for the purposes of Chapter 4 and three hearings were identified as relevant for the purposes of Chapter 5.

Unit of Coding

I define the unit of coding as a core argument. Following Schreier (2012), a core argument can include more than one grammatical sentence. Conversely, a grammatical sentence might include more than one core arguments.

Steps for Coding Committee Hearings

1. The analysis of selected hearings was executed in a systematic way scrutinizing *all* the material. Document memos were used to describe information about the context of the hearing (including the actors comprising the hearing's constellation, the hearing's structure, reference to written evidence submitted pre- or post-hearing)
2. I assigned each core argument to one of the six theory- derived categories. Each category represented one of six dimensions of public policy (also see section "*Assigning Arguments to Categories")*, using MAXQDA. I used code memos to describe the meaning of a category as clearly as possible (including inclusion criteria of application, examples, and differentiation from other categories).
3. Finally, to analyze the coded data, I used two tools. Firstly, code frequencies were used to examine how often specific codes have been applied to our data. For this, it was necessary to

activate the documents that we wanted to examine and then selected Analysis > Code Frequencies. This generated a table that showed us the number of arguments which contained each code together with the percentage breakdown. The chart view of the Code Frequencies was also used, and the chart was copied and exported as a graphic file to be used in the dissertation.

4. Then I used the overview of coded segment tool to facilitate content analysis. This allowed me to retrieve the arguments assigned to each category. This tool also helps us better visualize the results viewing the segments in tabular view, with access to any code comments, and shows all of the codes linked to each segment.

Assigning Arguments to Categories

1. Each core argument was assigned to a category provided that it fulfilled the inclusion criteria.
2. Two criteria (elaborated in the Codebook) need to be satisfied for a unit of coding (core argument) to be assigned to a particular category. First, the researcher needs to examine whether the argument deals with the performance (what), the participation (who) or the procedural (how) aspect of policy/regulatory choice. Then, the researcher needs to decide whether the actors deal with the 'appropriateness' angle of a particular policy/regulatory choice or whether the actor considers whether this policy/regulatory position is the 'optimal' choice compared with known and available alternatives. The specific criteria for each category are elaborated in the Codebook (see Appendix 2). For example, for an argument to be assigned to the 'state capacity' category, the coder should conclude that the actor is *both* following a logic of consequences (criterion 1) and arguing with respect to procedural standards (criterion 2). Examples for all categories are elaborated in the Codebook (see Appendix 2).
3. The hearing is always read in full. Therefore, context is always taken into consideration when assigning units or segments to categories.
4. The list of categories is exhaustive. It is not possible for a particular argument to fall under more than one category.
5. Following Schreier, I re-coded part of the material after 10 days to ensure reliability and validity.

APPENDIX 2: CODEBOOK

Policy Efficacy

Criterion 1: the actor follows a logic of consequence.

Criterion 2: the actor focuses on output performance.

Actors draw arguments concerning the optimal performance of a regulatory choice in terms of (a) its technical effectiveness in terms of problem-resolution or goal attainment and (b) its efficiency in terms of relative cost.

Examples: PMSC key skills; professional expertise; advanced equipment; advanced training

(1) "Outsourcing services to the private sector have been hugely successful in terms of efficiencies, quality, speed and results. It is safe to say that the U.S. military in Iraq is the best supported, best supplied military force in history." (Doug Brooks, IPOA)

(2) "Not one single Member of Congress has been injured nor killed under Blackwater protection." (Congressman McHenry)

Political Feasibility

Criterion 1: the actor follows contextual logic of appropriateness.

Criterion 2: the actor focuses on output performance.

Actors draw arguments concerning an 'appropriate' performance of a regulatory choice aiming to build political consensus. Their cognitive and prior normative orientations, ideologies and vested

interests (including individual multiple goals, power asymmetries, short-term electoral cycles and desire for re-election) pose challenges in such an attempt.

Examples: forming bipartisan alliances to request information by Departments; support for a proposed bill

(1) “I do want to point out that now is the time Congress should be asking these questions. We should have been asking them in the past, and asking questions and trying to get accountability is not gotcha. It is trying to do our job, and I think we need to work together on a bipartisan basis to do that.” (Congressman Shays)

(2) “I want to engage the chairman in a colloquy. As I understand it, you agree that we should get this information. You will join me in a request for the information.” (Congressman Waxman)

State Competence

Criterion 1: the actor follows a contextual logic of appropriateness.

Criterion 2: the actor focuses on procedural standards (throughput).

Actors draw arguments concerning a procedurally ‘appropriate’ regulatory choice. It is expected that ‘appropriate’ policy implementation is pursued in ways that agree with ‘appropriate’ standards that safeguard professional and normative integrity in policy delivery while adhering to elementary accountability and transparency. Additionally, in all its activities, public administration is expected to comply with legal rules, so as to prevent any arbitrary use of the actors’ discretion in rule interpretation and implementation.

Examples: establishing transparency and accountability mechanisms and guidelines to monitor conduct of contracted firms and employees on the field (keeping track of PMSC conduct, report and propose investigation of suspected abuses); full transparency when using their discretion to apply

legal rules on a case-by-case basis; ensure transparency of the contracting procedure (e.g. disclosure in case of conflict of interests such as private gain from a particular contract, background checks, qualifications checks); adhering to timeframes.

(1) "[I]t seems that nobody in the administration has been keeping track of who is in Iraq." (Congressman Kucinich)

(2) "Myself and, I believe, my constituents don't think it is too much to ask for the Federal Government to say, we are going to set *some criteria* for people who are carrying out sensitive missions in Iraq and that for the response to be, well, we don't want to do that because it may create some—the government could be held liable for performance failures, to me, is completely unsatisfactory." (Congresswoman Schakowsky, emphasis added)

State Capacity

Criterion 1: the actor follows a logic of consequences

Criterion 2: the actor focuses on procedural standards (throughput).

Actors draw arguments concerning a procedurally effective regulatory choice. State capacity is defined in terms of the ability of the state to ensure that its core activities are effectively delivered. Optimal policy delivery is pursued by utilizing state resources in the most technically effective and efficient way in terms of relative cost. The implementing actors are expected to manage the tensions between existing policy commitments, legacies and institutions and the drive for new policy solutions to mounting adaptive pressures (such as coordination between state actors and private firms). Therefore, any new policy must 'fit' (make sense) in relation to the institutional environment that it is expected to operate in.

Examples: monitoring effective coordination between the Army (preexisting state institution) and PMSCs on the field; optimal spending of state resources to avoid overspending at the expense of other state core activities.

(1) “Well, I know that people down my way, and I come from a very conservative, very patriotic, very pro-military district, but they don’t want to see money just wasted continuously. We are getting to the point with an $8.3 trillion national debt which is headed up very highly, we are not going to be able to pay all of our military pensions and civil service pensions and our Social Security and Medicare and so forth in not too many years from now if we don’t stop spending hundreds of billions of dollars in other countries for things like this.” (Congressman Duncan)

(2) “Security contractors have been working at U.S. diplomatic posts for more than 20 years, but their extensive use in the midst of ongoing military conflict raises important new questions about the ability of Government acquisition officials […] to […] coordinate private security firms in a complex, highly dangerous battle space.” (Congressman Davis of Virginia)

Constitutional Validity

Criterion 1: the actor follows a logic of consequences.

Criterion 2: the actor focuses on legitimacy derived ‘by the people’ (input).

Actors draw arguments, legitimized ‘by the people’, concerning an optimal choice in the sense of being in line with the constitution and other legal rules (whose breach would generate sanctions). Judges are constitutionally mandated and constraint by strict procedures to engage in fact-finding procedure and publicly justify their rulings. In that way, citizen’s equality before the law (*isonomia*) is not jeopardized. (Note that judges’ obligations are not alleviated even if we adhere to a ‘dynamic’ interpretation whereby legal principles are equally important to legal rules (Dworkin) or treat legal principles as “extra-legal” moral considerations only to be used when legal rules are in conflict (Hart)).

Examples: identify ‘gaps’ and propose revision of existing legislation; revision of existing legislation that covers crimes committed by the military so that it addresses crimes committed by PMSCs; revision of conditions under which legislation can be applied extraterritorially; update existing legislation to take into consideration state “failures”

(1) “And so is it your position that a Blackwater contractor working for the State Department can be court martialed in the military justice system? … So almost 5 years later, we are now figuring out who is subject to what laws?” (Congresswoman Schakowsky)

(2) “When our troops commit crimes or atrocities as happened in Abu Ghraib and appears to have happened at Haditha, there is a well-established body of law that governs their conduct and provides for military tribunals, but nothing like this exists when private contractors are hired as subcontractors to provide security services.” (Congressman Waxman)

Public Consent

Criterion 1: the actor follows contextual logic of appropriateness.

Criterion 2: the actor focuses on legitimacy derived ‘by the people’ (input).

Actors draw arguments, legitimized ‘by the people’, concerning an ‘appropriate’ regulatory choice in the sense of adhering to accepted values of social fairness and norm of democratic procedure. Even those who would oppose concrete reforms and have voted for incumbent parties generally abide by the reforms in question when they have a sense that ‘appropriate’ democratic procedures, consistent with the rule of law have been observed; it reassures them that the principle of ‘government by the people’ has been respected.

Examples: exposure of high-profile scandals by PMSCs against American and foreign citizens (may relate to abuse, fraud); PMSCs act against national foreign policy objectives; PMSCs acting against the public interest

(1) “So, let me begin by recalling some stories that have been found on the newspaper pages recently. One involves a Texas woman who was working as a civilian contractor in Iraq about 2 years ago. She was drugged, she was gangraped, and it was gang-rape by coworkers. She was held against her will in a storage locker. And yet, her assailant remains free. Another story involves a woman from my State of Florida. She worked in Iraq for the same American company, and she also reported that

she was sexually assaulted by a male coworker, and he wasn't charged either. More recently, just a couple of months ago, a Midwestern woman, working for the same employer, reported that she was gang-raped by a coworker and a soldier at a U.S. base in Iraq, and her bosses, she says, discouraged her from reporting the assault. And the latter, more recent case is among our witnesses who will testify today to help bring into sharper focus the problem of sexual assaults against American women working in Iraq and Afghanistan and the question about their ability to find justice." (Senator Nelson)

(2) "The testimony that came forward this morning from the courageous witnesses, Ms. Kineston and Ms. Leamon, was obviously absolutely shocking. It is unthinkable that the perpetrators of such horrible acts should go unpunished." (Senator Feingold)

(3) "The private military contractor business is the war business, and for-profit companies may not share the same mission-based goals as the US military. They are in business for profit." (Congressman Van Hollen)

(4) "The most ridiculous of all is that we hire a foreign firm, a British firm to provide security for our own military". (Congressman Duncan)

APPENDIX 3: MAXQDA RESULTS (CHAPTER THREE)

Using specific keywords ("private security", "private military"), I collected 13 hearings from the official website for U.S. federal legislative information (www.congress.gov).[56] For the purposes of this chapter, I identified as relevant and analyzed in depth- using the software programme MAXQDA - two hearings that took place within a set period of time, that is, between 31 March 2004 (Fallujah scandal) and 6 April 2007 (final regulatory outcome).

The first hearing titled "Private Security Firms Standards, Cooperation and Coordination on the Battlefield" (Serial No. 109–214) took place on 13 June 2006 before the Subcommittee on National Security, Emerging Threats and International Relations of the House of Representatives Committee on Oversight and Reform. The actor constellation was comprised by (A) Members of Congress, (B) Government Expert, (C) Administrative Officers (Department of Defense, Department of State and USAID) and (D) PMSC Corporations (Blackwater USA, DynCorp, Triple Canopy) and Industry Associations (International Peace Operations Association, Professional Services Council). The second hearing titled "Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report" (Serial No. 110–11) took place on 7 February 2007 before the Subcommittee on National Security, Emerging Threats and International Relations of the House of Representatives Committee on Oversight and Reform. The actor constellation was comprised by (A) Members of Congress, (B) Administrative Officer (Department of Defense) and (D) PMSC Corporations (Blackwater USA, ESS Support Services Worldwide, KBR and Fluor Corp.) and Industry Association (Professional Services Council) and (E) the public (families of victims).

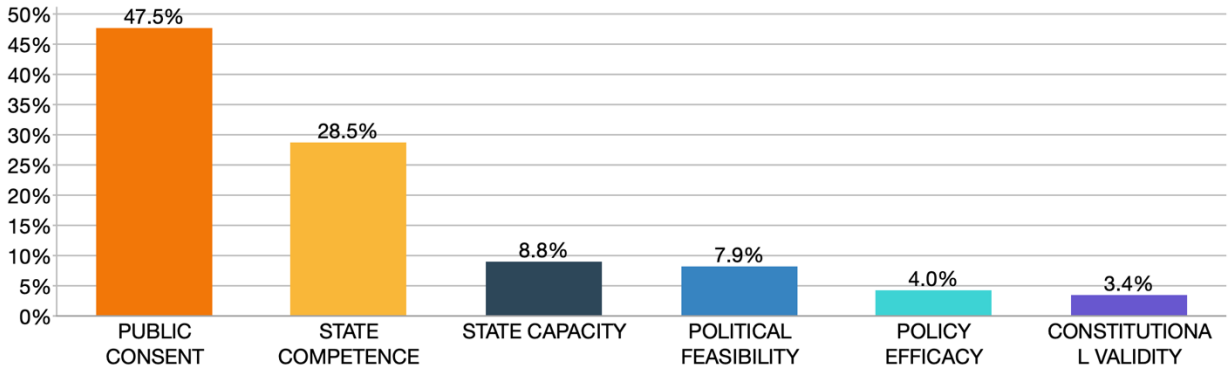
Results: Code Frequencies (MAXQDA)

For the two hearings, I coded a total of 354 core arguments. The percentage of arguments that were assigned to the 'public consent' category was 47.46 (168 arguments). The percentage of arguments

[56] There were 5 hearings of the Oversight and Reform Committee, 2 hearings of the Judiciary Committee, 2 hearings of the Homeland Security and Governmental Affairs Committee, 1 hearing from the Energy and Commerce Committee, 1 hearing of the Rules Committee, 1 hearing of the Armed Services and 1 hearing of the Foreign Relations Committee.

that were assigned to the ‘state competence’ category was 28.53 (101 arguments). The percentage of arguments that were assigned to the ‘state capacity’ category was 8.76 (31 arguments). The percentage of arguments that were assigned to the ‘political feasibility’ category was 7.91 (28 arguments). The percentage of arguments that were assigned to the ‘policy efficacy’ category was 3.95 (14 arguments. Finally, the percentage of arguments that were assigned to the ‘constitutional validity’ category was 3.39 (12 arguments).

Figure 2: Argumentation after Fallujah



APPENDIX 4: MAXQDA RESULTS (CHAPTER FOUR)

Using specific keywords ("private security", "private military"), I collected 16 hearings from the official website for U.S. federal legislative information (www.congress.gov).[57] For the purposes of this chapter, I identified as relevant and analyzed in depth- using the software programme MAXQDA - two hearings that took place within a set period of time, that is, between 16 September 2007 (Nisour scandal) and 22 October 2014 (Nisour 1st court decision).

The first hearing titled "Blackwater USA" (Serial No. 110–89) took place on 2 October 2007 before the House of Representatives Committee on Oversight and Reform. The actor constellation was comprised by (A) Members of Congress, (B) Government Expert, (C) Administrative Officers (Department of State) and (D) PMSC Corporation (Blackwater USA). The second hearing titled "An Uneasy Relationship: US Reliance on Private Security Firms" (Serial No. 110-1016) took place on 27 February 2008 before the Committee on Homeland Security and Government Affairs. The actor constellation was comprised by (A) Members of Congress, (B) Independent Expert, (C) Administrative Officers (Department of State and Department of Defense) and (D) PMSC Association (ArmorGroup North America).

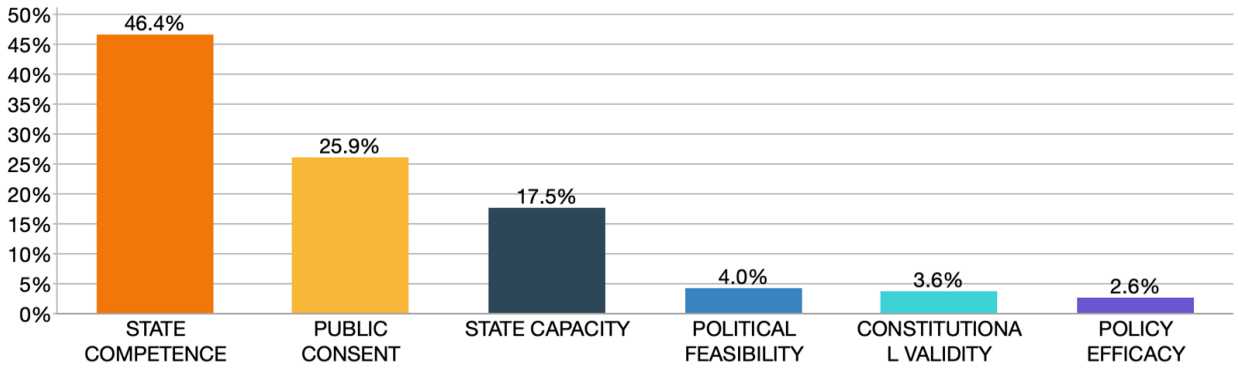
Results: Code Frequencies (MAXQDA)

For the two hearings, I coded a total of 274 core arguments. The percentage of arguments that were assigned to the 'state competence' category was 46.35 (127 arguments). The percentage of arguments that were assigned to the 'public consent' category was 25.91 (71 arguments). The percentage of arguments that were assigned to the 'state capacity' category was 17.52 (48 arguments). The percentage of arguments that were assigned to the 'political feasibility' category was 4.01 (11 arguments). The percentage of arguments that were assigned to the 'constitutional

[57] There were 4 hearings of the Oversight and Reform Committee, 3 hearings from the Rules Committee, 2 hearings from the Judiciary Committee, 3 hearings from the Homeland and Governmental Affairs Committee, 2 hearings of the Armed Services Committee and 2 hearings of the Foreign Relations Committee.

validity' category was 3.65 (10 arguments). Finally, the percentage of arguments that were assigned to the 'policy efficacy' category was 2.55 (7 arguments).

Figure 3: Argumentation after Nisour



APPENDIX 5: MAXQDA RESULTS (CHAPTER FIVE)

Using specific keywords ("private security", "private military"), I collected 11 hearings from the official website for U.S. federal legislative information (www.congress.gov). For the purposes of this chapter, I identified as relevant and analyzed in depth- using the software programme MAXQDA - three hearings that took place within a set period of time, that is, between 1 May 2007 (lawsuit against Halliburton) and 8 December 2010 (final regulation).

The first hearing titled "Enforcement of Federal Criminal Law to Protect Americans Working for US Contractors in Iraq" (Serial No. 110–130) took place on 19 December 2007 before the House of Representatives Committee on the Judiciary. The actor constellation was comprised by (A) Members of Congress, (B) Government Expert and (C) the public (victims). The second hearing titled "Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment" (Serial No. 110-744) took place on 9 April 2009 before the Committee on Foreign Relations. The actor constellation was comprised by (A) Members of Congress, (B) Government Expert, (C) Administrative Personnel (DOJ, DOD, DOS) and (D) the public (victims). The third hearing titled "Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers from Discrimination?" (Serial No. J-111-55) took place on 7 October 2009 before the Committee on the Judiciary. The actor constellation was comprised by (A) Members of Congress, (B) Government Expert and (C) the public (victims).

Results: Code Frequencies (MAXQDA)

For the three hearings, I coded a total of 472 core. The percentage of arguments that were assigned to the 'public consent' category was 43.43 (205 arguments). The percentage of arguments that were assigned to the 'constitutional validity' category was 30.51 (144 arguments). The percentage of arguments that were assigned to the 'state competence' category was 12.71 (60 arguments). The percentage of arguments that were assigned to the 'state capacity' category was 5.72 (27 arguments). The percentage of arguments that were assigned to the 'policy efficacy' category was 4.87 (23 arguments). Finally, the percentage of arguments that were assigned to the 'political feasibility' category was 2.75 (13 arguments.

Figure 4: Argumentation after Jamie Leigh Jones scandal