

Public Hearing
Commission on Wartime Contracting in Iraq and Afghanistan
Are Private Security Contractors Performing Inherently Governmental Functions?

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Commissioner Thibault, Commissioner Shays and distinguished members of the Commission for Wartime Contracting, thank you for asking me to testify this morning on the important question of whether private security contractors are performing inherently governmental services.

The question of whether private security contractors perform inherently governmental services is both important and hard to answer. Under congressional direction the Office of Federal Procurement Policy (OFPP) is currently developing a definition, criteria and guidance to serve as a government-wide standard as to what is inherently governmental. Its draft policy letter issued on March 31, 2010 adopted the definition contained in the 1998 FAIR Act. This Act deemed inherently governmental any service “so intimately related to the public interest as to require performance by a federal government employee”. The FAIR Act definition elaborates on several ways in which a service is intimately related to the public service: if it binds the US to action, if it advances US interests by military or diplomatic action, and if it significantly affects the life, liberty or property of private persons, among others. The OFPP draft document also goes on to broaden the range of services government officials should consider by including attention to functions that are “closely associated with governmental” or “critical” to governmental missions as being more appropriately served by government employees than contractors. The wide array of views represented in the 118 comments on OFPP’s draft document demonstrates that there is considerable disagreement over just where to draw the line.¹

Drawing on the OFPP letter, I will consider how the activities undertaken by private security contractors – site security, convoy security and personal security details – relate to this whole spectrum: critical, closely associates with governmental, and inherently governmental. My argument is that one cannot classify a particular job, such as site security, within this spectrum or not in a vacuum. Whether an activity is inherently governmental, critical, or neither depends on several risk factors that elevate or lower the threat the service poses to private individuals, to the US mission/policy, or to both. These risk factors include: 1) the threat environment, 2) characteristics of a particular job, and 3) the level of command and control. Let me first elaborate on how the relevant risk

¹ Robert Brodsky, “Inherently Governmental Rule Sparks Little Consensus,” Government Executive, 3 June 2010.

factors affect whether private security contractors could threaten the lives of private individuals and then US mission/ policy. I will then outline alternative strategies for addressing situations where private security contractors are deemed to impinge on inherently governmental services.

Private Security Contractors, Risk and Inherently Governmental Services

Risk to private individuals:

The most fundamental way in which private security activities may encroach on what is inherently governmental is through the exercise of deadly force - widely presumed to be a fundamental function of governments and specifically mentioned in the 1998 FAIR Act definition, among others. All armed private security personnel could affect the lives of the persons around which they work. Whether or not this effect is likely to be *significant* depends on at least three risk factors.

- First is the threat environment. A more permissive environment where private security contractors are likely to function to deter common criminals, such as when they are guarding an embassy in a settled country, is much less risky than when contractors function in an active insurgency like in Afghanistan.
- Second is the particular job. Guarding a warehouse is less risky than convoy security or personal security details. Jobs that require moving from one place to another increase both contact with others and the potential for threat.
- Third is the level of command and control over private security contractors. The reason why a government employee is preferable to a private contractor in carrying out tasks intimately related to the public interest is because federal employees, particularly members of the US military, operate under the clear control of the federal government and have well designed systems of accountability. Though control of private contractors is never as great as command and control over US forces, different regulations can yield more or less control. Also important for the level of control are the skills, training and background of the personnel who perform private security jobs.

These risk factors also interact. Even static guards may come under attack (and use force) if they are guarding important material or situated in a dangerous area. Protecting a convoy is more likely to require the use of force when it travels through a dangerous stretch of road than when it is traveling through a settled area. Poor command and control and/or guards with little training exacerbate the risk posed by the threat environment and the particular job while stronger command and control and/or better training can, to some extent, mitigate these risks.

Risk to US Mission/Policy

Private security may also encroach on inherently governmental work if *what* contractors do or *how* they do it can undermine the functioning of the military and/or the overall policy or mission of the US government.

Some jobs are simply more critical to the core function of the military (i.e., its ability to fight) than others. A convoy carrying fuel, weapons or other important supplies to a military unit in the field is more critical than protection of the contents of a particular warehouse. Reliable protection that accords access to supply in the field is critical because of its relationship to the ability of military units to fight.

In a counterinsurgency environment, though, the *way* private security contractors carry out their jobs is also critical to the success of the overall mission.² This is true for supply convoys, but particularly for personal security details that frequently operate in highly populated areas. If they deliver supplies or people safely but in a way that is disrespectful to or abusive of civilians, they may allow the US military or diplomatic team to function but at the same time undermine popular support for the US (or the host government) and thus frustrate the chances for ultimate success. There were countless complaints from both Iraqis and US military personnel about poor behavior on the part of personal security details in Iraq between 2004 and 2007. Military personnel complained specifically about how this behavior undermined the counterinsurgency effort. The Nisour Square incident in 2007 provided a dramatic example of this issue.

Finally, there is the relationship between private security companies and other violent forces in the country – including the host government but also militia forces and even insurgents. Relationships between private security companies and forces that are (or become) parallel forces, in competition with government forces, have been a common phenomenon over the course of the post-Cold War era and have often undermined efforts to build effective governance. In Iraq there was much speculation about the relationship between personnel that worked for the Facilities Protection Force and various militias connected with the insurgency in 2004. In Afghanistan, the US has relied much more on indigenous personnel and companies for its security.³ There are allegations that some of these companies are paying off the Taliban to ensure safe passage for convoys.⁴ Using private security contractors in a way that provides a platform for funneling US dollars to those working against US goals poses a significant risk to the overall US mission in Afghanistan.

² See discussion in Moshe Schwartz, “Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis,” Congressional Research Service, 14 December 2009, pp. 16-17.

³ The CENTCOM 4th Quarter Census Report in 2009 revealed that 90% of private security contractors in Afghanistan were Afghans. Moshe Schwartz, Moshe, *The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis and Options for Congress*. 19 January 2010, p. 9

⁴ Dexter Filkins, “Convoy Guards in Afghanistan Face an Inquiry: U.S. Suspects Bribes to Taliban Forces,” *New York Times*, 7 June 2010.

The three risk factors listed above: threat environment, nature of the job, and degree of command and control still affect the degree to which using private security could matter.

- Guarding a convoy carrying critical supplies to the field will always be more critical to the military's ability to function than guarding a warehouse but guarding the same convoy through a pacified area poses less risk than guarding it through a more dangerous area. For example, KBR had a good record of delivering supply in the (relatively) permissive environment in the Balkans.⁵ At the beginning of the Iraq War, however, KBR had difficulties fielding the requisite personnel and these difficulties were specifically linked to an unexpectedly high level of danger.⁶
- The potential for alienating civilians in a counterinsurgency environment is lower for static guards than for convoy security and personal security details that move around. This is by virtue of the fact that static guards are simply less likely to encounter as many civilians. By this rationale, the risk of alienating civilians is greatest for personal security details that not only move around but also tend to operate in more populated areas.
- More command and control can reduce the risk that private security will undermine policy. For instance, the reforms that followed the Nisour Square shootings in 2007 established a greater level of command and control, which reduced the incidence of private security contractor behavior that alienated civilians. It is important to note, however, that while ostensibly under the same US policy, some convoy and personal security details in Afghanistan have not shown the same level of improvement. This may be due to the different background and training of Afghan companies and personnel.

In sum, all armed personnel working for the United States abroad potentially encroach upon critical, close to governmental or inherently governmental simply by virtue of their ability to use deadly force. Those performing tasks critical to the mission of the US military or US policy also have the potential to trespass upon governmental roles. Features of particular threat environments, particular jobs, and the level of control over private security contractors can elevate or lower the degree of risk. All of these features should be considered in determining whether a job is critical, close to governmental or inherently governmental. The more of these features that are present, the more likely the job is inherently governmental. Thus, when private security contractors are armed, perform tasks critical to the US mission, work in dangerous environments where the nature of the job increases the chance of interaction with private individuals, *and* operate

⁵ Victoria Greenfield and Frank Camm, "Performance and Risk Management in the Balkans Support Contract," RAND, MG-282-A, 2005

⁶ General Charles S. Mahan Jr., then the Army's top logistics officer, was referenced complaining of troops going without adequate support due to problems deploying contractors in a draft of what became Gregory Fontenot, E. J. Degen and David Tohn, On Point: the US Army in Operation Iraqi Freedom (Office of the Chief of Staff US Army, Fort Leavenworth: Combat Institute Press, 2004). In the final version of the document the discussion of the difficulty with logistics did not mention contractors. General Mahan's complaints were also reported by Anthony Bianco and Stephanie Anderson Forest, "Outsourcing War," Business Week, 15 September, 2003; David Wood, David, "Some of Army's Civilian Contractors are No-Shows in Iraq," Newhouse News Service 31 July, 2003.

under weak command and control, they are most likely to be in violation of the principles enshrined in the inherently governmental edict.

Options to Remedy Questionable uses of Private Security Contractors

Looking at the inherently governmental issue as one determined by the level of risk private security contractors pose to private individuals or US policy offers a variety of options in dealing with situations deemed sufficiently risky to fall within the inherently governmental category. These range from a standard “in-sourcing” of risky jobs to a spectrum of steps that would reduce risk by increasing command and control in different ways. These include:

- Change US force structure to incorporate greater numbers of military or diplomatic security personnel to perform security roles. This would require an accurate anticipation of the level of future need and could shortchange security needs if forces are not large enough and/or prove expensive as forces cannot be released when they are not needed.
- Establish a reserve force of prescreened and credentialed individuals to be mobilized for private security upon need (perhaps modeled on the FEMA Disaster Reserve Workforce). This would be less expensive than increasing the size of the force but would require some expenditure to keep forces trained and in reserve.
- Establish a mechanism for commissioning private security personnel for short periods upon need. Though not in reserve and thus subject to greater uncertainties about mobilizing capacity, this could move private security personnel under military command and control (and the jurisdiction of the UCMJ) when they are called into risky areas and/or to perform tasks critical to the US mission.
- Develop standards – perhaps eventually even licenses – for private security personnel in different roles. This would offer less control than the military command structure but could establish a baseline of experience, training and knowledge that clarify expectations about appropriate behavior and certification (via license) that personnel understand these expectations and have followed them in the past.
- Improve the legal framework so as to clarify the status of private security contractors in international law and ensure that there is a workable system to hold private security contractors working abroad accountable for misconduct. Greater legal certainty along with standards would go a long way toward enhancing control short of incorporating security personnel into the military system.
- Develop standards for management and oversight among US government offices (i.e., DoD, State, USAID, Justice, etc.) so that all private security contractors working for the US work under the same structure. Control, of course, requires that someone be holding the reins. Given that private security contractors work for and with multiple offices of the US government, standardization of oversight and management among all would work to communicate a consistent message about how private security contractors should perform.
- Increase the numbers of, and clarify roles and responsibilities for, contracting officers and other management staff. Also crucial to control are adequate

- numbers of people who manage contractors. If the US is going to rely on private security contractors it should have adequate numbers of contracting officers – perhaps and/or program or project managers – to manage them.
- Increase transparency surrounding which private security contractors work for the US and where. Increased transparency would allow different parts of the US government as well as NGOs, members of the media, and others to share information about the behavior of private security contractors, offering one more incentive for personnel to act appropriately.
 - Integrate the role of private security contractors and their control into planning, policy and strategy. If the US is going to rely on these contractors, it should plan accordingly so that it can anticipate and develop strategies for changes in the level of risk and the proper mix of military, diplomatic security and private security personnel in various environments.

Conclusion

Determining whether private security contractors are performing activities that are inherently governmental, close to governmental, critical, or not governmental at all can not be determined in a vacuum. Instead, this judgment should be made by examining the risk factors (threat environment, characteristics of the job and level of command and control) that elevate or lower the threat the service poses to private individuals, to the US mission/policy, or to both in particular settings (or types of settings). To bring overly risky activities into compliance with edicts against contracting out inherently governmental services, policy makers can choose among an array of options from insourcing to taking steps that will lower the risk surrounding the use of private security contractors.