

Joint Statement of  
Christopher Shays and Michael Thibault, Co-Chairs  
The Commission on Wartime Contracting in Iraq and Afghanistan

Hearing:

**Are Private Security Contractors Performing  
Inherently Governmental Functions?**

Room 106, Dirksen Senate Office Building, Washington, DC  
9:30 a.m., Friday, June 18, 2010

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Good morning. I am Christopher Shays, co-chairman of the Commission on Wartime Contracting in Iraq and Afghanistan. Thank you for attending this hearing, which focuses on the important question, “Are Private Security Contractors Performing Inherently Governmental Functions?”

The Commission will hold a related hearing in this location on Monday. We will hear testimony from government and industry witnesses, and question them on the adequacy of planning and managing private security contracting in Iraq, especially as they relate to the troop drawdown and the hand-off of security functions from the Department of Defense to the Department of State.

This opening statement is made on behalf of Co-Chairman Michael Thibault, our fellow Commissioners, and myself. The other Commissioners at the dais today are Clark Kent Ervin, Grant Green, Robert Henke, Katherine Schinasi, Charles Tiefer, and Dov Zakheim.

Our hearing topic combines two important issues: the role of private security contractors, or PSCs, in support of American operations overseas, and the limitations on use of PSCs that are required under the concept of “inherently governmental functions.”

Private security contracting is a big business, involving a lot of people. During the first quarter of 2010, the Department of Defense had roughly 14,000 PSC personnel working under contract in Iraq. That number is nearly equal to the personnel strength of a World War II American infantry division.

The historical reference is appropriate, because private security contractors are not new in U.S. history. Agents from the Pinkerton National Detective Agency foiled a plot against Abraham Lincoln’s life in 1861. They were, unfortunately, not providing security at Ford’s Theater in April 1865.

Private security guards are a fixture of modern, everyday life. We see them, whether armed or unarmed, at shopping malls, office buildings, banks, gated communities, warehouses, industrial plants, and government facilities. They do important work, protecting life and property—and occasionally playing a role in the national system of justice. It was a private security guard, not a police officer, who discovered the break-in at the Watergate complex in 1972 that led to criminal convictions of White House staffers and the resignation of a President of the United States.

Today in Southwest Asia, PSC employees are also doing important work under contracts with the Departments of Defense and State, with the U.S. Agency for International Development, and other agencies. They guard military bases, escort convoys and traveling VIPs, protect diplomats and diplomatic facilities, safeguard reconstruction projects, and more. During my 21 trips to Iraq as a Member of Congress, my life was in the hands of private security guards. I felt very secure, because their high level of training, professionalism, and courage was obvious.

Today's hearing and the related hearing on Monday, however, are not intended either to attack or champion private security companies. This Commission has explored cases of excessive costs, personal and corporate misconduct, inadequate training or documentation, and unacceptable performance by some PSC contractors. We have paid close attention, for example, to the impacts of Iraqi civilian deaths inflicted by PSC employees in 2007, and to the outrageous conduct and mistreatment of Afghan civilians by PSC employees guarding the U.S. Embassy in Kabul in 2008.

We also recognize, however, that many PSCs are performing vital work at a high standard. And we recognize that statutory limits on U.S. military strength, the extreme operational demands in Iraq and Afghanistan, and the need to safeguard thousands of reconstruction and development projects and workers create an enormous demand for security personnel.

The question we tackle today does not depend on whether PSC performance deserves praise or blame, on what they cost, or on how well their contracts are managed. The question here is whether they are performing inherently governmental functions that should not be contracted out in whole or in part, no matter what the demand or workload.

The answer to that question involves a mixture of law, policy, and prudence. The Federal Activities Inventory Reform Act of 1998 (the “FAIR Act”) defines an inherently governmental function as one “so intimately related to the public interest as to require performance by a federal government employee.” The language in the FAIR Act closely parallels the Office of Management and Budget’s Circular A-76, issued in 1966. The OMB definition uses “mandate” rather than “require,” and “personnel” rather than “employee.”

The principle laid down in the law and the OMB policy is nonetheless vague and open to subjective judgment. The 110th Congress addressed this problem by requiring OMB to develop a “single consistent definition” of inherently governmental function. The Bureau’s Office of Federal Procurement Policy (OFPP) has taken comments on a policy letter to make that definition, and is expected to publish a final version by October this year.

The Office of Federal Procurement Policy draft released in March takes the FAIR Act definition as a starting point. It also proposes asking whether a function involves direct exercise of

sovereign power, or whether contractor discretion could commit the government to a course of action. The OFPP also discusses functions that are “closely associated” with or “critical” for the success of governmental functions. The results of this filtering would determine whether a function must be performed by federal personnel, may be performed by contractors only under close government control, or may be routinely performed by contractors.

The Commission’s interest in this policy evolution stems from its authorizing legislation. Congress instructed us to include in our final report recommendations for improving “the process for determining which functions are inherently governmental and which functions are appropriate for performance by contractors in a contingency operation (including during combat operations), especially whether providing security in an area of combat operations is inherently governmental.”

This is a challenging, three-layer mandate. We are not simply looking at the general process for determining inherently governmental functions, but also at that process as applied to “contingency operations” that may include combat, and then at PSC use in areas of combat operations.

Our assignment takes us into fine distinctions. Hiring private guards for a U.S. supply depot may be entirely routine and uncontroversial in a stable, allied country. Is it still prudent during a contingency response to an insurgency, natural disaster, or terrorist

attack, when command, control, and assured response are high-value attributes? Is it still prudent if the contingency makes it likely that the guards will be exposed to attack, and may be likely to use force, with all the diplomatic and public-opinion consequences that follow?

These questions are not abstract or academic. They involve real people who spill real blood. Whether they should be placed in life-or-death decision roles in foreign combat zones, and under what circumstances, is a serious question. The Commissioners have thought about and discussed the question. The Commission staff has researched it and written briefs. Now we are reaching out to gather other views from well-informed and thoughtful sources.

Today's hearing brings together six distinguished witnesses with deep insight into the issues of security contracting and inherently governmental functions. They are:

- Allan Burman, Ph.D., president of the Jefferson Solutions consulting firm, former administrator of the Office of Federal Procurement Policy in the government's Office of Management and Budget;
- Allison Stanger, Ph.D., professor of international politics and economics at Middlebury College, Vermont, and author of "One Nation Under Contract";

- Stan Soloway, president and CEO of the Professional Services Council trade association, former U.S. Deputy Under Secretary of Defense for acquisition reform;
- Danielle Brian, executive director of the Project on Government Oversight, commonly referred to as POGO;
- Deborah Avant, Ph.D., professor of political science at the University of California at Irvine, and author of *Private Security: The Market for Force*; and
- John Nagl, Ph.D., president of the Center for a New American Security, co-author of its newly released report, *Contracting in Conflicts: The Path to Reform*.

Our witnesses are notable not only for their deep involvement with issues before us today, but also for the different conclusions to which their research and thinking has led them. We welcome this diversity of informed judgment, and we encourage our witnesses to engage with one another's arguments during the question period. Vigorous debate will be a service to the Commission, and to the American public.

We have asked our witnesses to summarize their testimony in 5 to 7 minutes in order to ensure adequate time for questions, answers, and debate. We also ask that witnesses submit within 15 business days responses to any questions for the record and any additional information they may offer to provide. The full texts of their written

statements will be entered into the hearing record and posted on the Commission's website.

On behalf of the Commission, we thank all of today's witnesses for participating in a very important hearing. Now, if our witnesses will rise and raise their right hand, I will swear them in:

Do you solemnly swear or affirm that the testimony you will give in this hearing is the truth, the whole truth, and nothing but the truth?

Thank you. Let the record show that all the witnesses answered in the affirmative.

Doctor Burman, please begin.

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