

Statement of

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Before the
**Commission on Wartime Contracting
In Iraq and Afghanistan**

On the Subject:
**Are Private Security Contractors Performing
Inherently Governmental Functions?**

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Chairmen Thibault and Shays:

Thank you very much for the opportunity to testify before you and the other members of the Commission on the topic of inherently governmental functions. I am the President of Jefferson Solutions, the government division of Jefferson Consulting Group. Our firm provides acquisition and management consulting services to a host of Federal agencies. As a former Procurement Administrator for the United States Government, I have been heavily involved in addressing the issue of what should constitute an inherently governmental function. The Office of Federal Procurement Policy (OFPP) Policy Letter 92-1 that I signed on September 23, 1992, though no longer in effect, continues to form the foundation for how that subject is treated today. Basic provisions of the policy letter can be found both in the Federal Activities Inventory Reform (FAIR) Act of 1998 and in Part 7.5 of the Federal Acquisition Regulation (FAR).

My testimony will address the following topics:

- An overview of the basic tenets of the policy included in both the FAIR Act and the FAR,

- Elements of the March 31, 2010 Office of Federal Procurement Policy draft document entitled, “Work Reserved for Performance by Federal Employees” that would modify these policies, and,
- My views on the specific question of whether private security contractors are performing inherently governmental functions.

The FAIR Act and the FAR

The goal of the policy letter promulgated in 1992 was to help Executive Branch officers and employees “in avoiding an unacceptable transfer of official responsibility to government contractors.” Many of the concerns expressed in memoranda coming out of the White House and the Office of Management and Budget today are similar to those raised at that time. The basic concern was whether the government had come to rely on contractors to such an extent that public policy was in fact being created by private sector individuals. There was no single government-wide policy that provided guidance to federal agencies on how to address this problem. The basic policy as formulated in 1992 was derived from review of conflict of interest and other policies unique to selected agencies as well as from numerous discussions with a broad group of stakeholders. These included, among others, fellows of the National Academy of Public Administration, Congressional staff, representatives of various industry associations and staff of the Government Accountability Office. The following are the basic relevant provisions in the FAIR Act and the Federal Acquisition Regulation today.

The FAIR Act states that “an inherently governmental function” is “so intimately related to the public interest as to require performance by government employees.” It also states that these types of functions involve exercising discretion in the use of Government authority or making value judgments in Government decision-making. The specific definition is as follows:

An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as --

- (i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;*
- (ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management or otherwise;*
- (iii) to significantly affect the life, liberty or property of private persons;*
- (iv) to commission, appoint, direct, or control officers or employees of the United States; or*
- (v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States including the collection, control or disbursement of appropriated and other Federal funds.*

The FAIR Act also lists functions that would be excluded from coverage. It states as follows:

The term does not normally include –

- (i) gathering information for or providing advice, opinions, recommendations or ideas to Federal Government Officials; or*
- (ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operation and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.)*

The Federal Acquisition Regulation offers examples of the kinds of activities that would fall under these proscriptions as well as activities that would approach being inherently governmental functions and therefore would require greater government scrutiny. These examples were included in the 1992 Policy Letter at the request of a number of agency staff seeking more concrete guidance on what should or should not be contracted out. Some examples of inherently governmental activities from the FAR include the “direction and control of Federal employees, the determination of Federal program priorities and budget requests, and determining what supplies or services are to be acquired by the government.” Examples of activities that closely approach inherently governmental functions include services that involve or relate to the development of regulations, preparing budgets or support of acquisition planning.

The main difference between activities that are considered inherently governmental and those that approach being inherently governmental is who has the responsibility for decision-making. Inherently governmental activities require a government employee to make decisions about how to proceed. For inherently governmental functions, there cannot be any question as to whether an ulterior motive beyond the public interest could exist that influences decisions. Activities that are sensitive and closely approach being inherently governmental require government oversight, but can be performed by contractors. The government can benefit from the ability to take advantage of the expertise offered by the private sector in a host of these areas, as long as the government can provide adequate oversight. The policy supports the notion that the private sector can offer advice and recommendations while the government acts as the ultimate decision-maker, thereby allowing accountability to rest squarely with the public servant.

A concern, however, is whether the government is adequately staffed and resourced to be able to make effective, independent decisions on the advice it receives, rather than simply accepting the recommendations without thorough review. In many respects, this issue of capacity becomes a central issue in today's debate. This point leads to a discussion of the basic provisions of the policy document on "Work Reserved for Performance by Federal Government Employees" recently released by the Office of Federal Procurement Policy (OFPP).

Proposed Policy Letter on Work Reserved for Performance by Federal Government Employees (March 31, 2010)

In March, a proposed policy letter was issued by OFPP to reassess the definition of inherently government functions and to address the issue of whether the government has the capacity to effectively implement the policy and control its own operations.

The Federal Register notice issuing the policy letter cites both the Presidential Memorandum on Government Contracting, issued on March 4, 2009, and section 321 of the FY 2009 National Defense Authorization Act as the reasons for issuing the draft policy document. The Presidential Memorandum directs the Office of Management and Budget (OMB) to clarify "when governmental outsourcing of services is, and is not, appropriate, consistent with section 321." Section 321 requires OMB to create a single consistent definition for the term inherently governmental function, establish criteria to identify critical functions that should only be performed by federal employees, and improve internal government management of these types of functions.

For the single definition of inherently governmental functions, the document relies on the FAIR Act definition. However, the proposed policy broadens the discussion of inherently government functions to include a

new category of “critical functions”, which in some cases would also be required to be performed only by government officials. Agencies would have some discretion in identifying critical functions and who should carry them out. The document states that a “critical function” means *a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.*

It goes on to state: *It is the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials. Adherence to this policy will ensure that the act of governance is performed, and decisions of significant public interest are made, by officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress.*

The draft policy also points out that agencies must take special care in overseeing contracted work and ensure that government employees have the technical skills and expertise needed to maintain control of agency operations.

The portion of the policy letter addressing critical functions in many ways reflects a real change in the nature of the debate. The issue is less one of deciding by law or policy which activities should not be outsourced to one of promoting a robust and capable federal workforce that can control agency missions and operations and effectively oversee and make effective use of contractor support.

Taken in this light, the new approach would allow agencies the flexibility to determine for themselves what activities and competencies are critical to effective mission performance and seeing that those activities have a strong

federal staff foundation. Even if the activity should be commercial in nature, if it is central to what the agency does, there will be federal staff performing the function. In addition, depending on their mission, agencies may make different decisions about whether the same function is critical. For example, NOAA and FAA may require meteorologists to be government employees, while other agencies may decide that meteorology is not a critical function and may be filled by contractors. This shift in emphasis leads to the question of private security guards and whether or not they are performing inherently governmental functions.

Private Security Guards

As I noted in a recent issue of *The Public Manager*, the 1992 OFPP policy letter directly addresses the question of whether the use of contractors as private security guards should be considered an inherently governmental function. It cites the following as a factor to consider in deciding whether or not the award of a contract might be considered an inappropriate transfer of official responsibility from the government to a private contractor:

The contractor's ability to take action that will significantly and directly affect the life, liberty or property of individual members of the public, including the likelihood of the contractor's need to resort to force in support of a police or judicial function; whether force, especially deadly force is more likely to be initiated by the contractor or by some other person; and the degree to which force may have to be exercised in public or relatively uncontrolled areas. (Note that contracting for guard, convoy security, and plant protection services, armed or unarmed, is not proscribed by these policies.)

Many federal agencies use private security services to protect the highest value government facilities and installations. I have visited over the years numerous Department of Energy sites that rely on such support. The challenge of the original

policy and of this new document as well is that there is no “bright line test” that in every occasion will automatically identify every function as inherently governmental or critical. The 1992 policy document argued that decisions need to be made on the “totality of the circumstances” to determine whether or not an activity should be contracted to the private sector. In some cases this is an easy decision, but in others, as in the case of private security guards in a wartime setting, it is not. While the function of security guards may not always be considered “inherently governmental”, given the totality of the circumstances in a wartime setting, an agency may decide that this is a “critical function” that should only be performed by government personnel. The agency would then be making a policy decision to ensure it had the capability to control and be fully accountable for its mission and operations. The challenge of course is then ensuring that the federal resources are in fact available to assume this role. If they are not, then the agency will need to do everything it can to provide effective and thorough oversight of contractor operations.

Messrs. Chairmen, this concludes my prepared remarks. Again I appreciate the opportunity to testify before the Commission. I would be pleased to answer any questions you or the other Commissioners might have.