

Testimony of

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Co-Chairs and Commissioners, it is an honor and privilege to be invited to share thoughts with you here today. As Co-Chair Shays has emphasized, “There’s a vigorous debate in policy circles whether or to what extent security can or should be contracted out in combat zones...As we saw in 2007 at Nisur Square in Baghdad, when private security guards killed or wounded 34 Iraqi civilians, contractor incidents can have a direct and devastating effect on United States objectives and public support for our presence. At the same time, properly managed contractors can reduce the strain on U.S. military personnel.”

With the drawdown of American forces in Iraq just on the horizon and the continuing struggle in Afghanistan, it is an appropriate time to review our current wartime contracting practices, many of which were adopted for reasons of expediency in the heat of the moment and may not serve American interests in the long term. I wish to make two major arguments here today. First, to the question posed by this hearing’s title, armed security contractors have been performing inherently governmental functions in Iraq and Afghanistan. Second, Congress should ban the use of armed contractors for moving security in combat zones (including remotely located trigger-pullers for drone flights) and instead use direct hire employees. If the USG is going to engage actively in countries where the lives of its personnel are at risk, this means we will need to build up our in-house capacity to staff those missions appropriately.

The Commission is already familiar with the many different types of contractors deployed in Iraq and Afghanistan. Our concern here today is with a subset of that much larger force, security contractors, who are, by definition, armed. Armed security contractors can be further divided into two main categories, static security (guarding a particular location, such as an embassy or camp) and moving security (guarding personnel or convoys as they pursue work in different locations). Contractors providing static security do not venture out on missions. Those providing moving security often perform jobs indistinguishable from those of uniformed personnel and are most likely to wind up using their weapons. The use of contractors to guard US embassies is a practice that began in the 1980s and has been a longstanding source of employment for local

nationals. Contracting for moving security is largely a post-Cold War development, and our missions in Iraq and Afghanistan today are wholly dependent on it.

As I have argued elsewhere, it makes good sense for the government to harness the energy, efficiency, and bottom-up creativity of the private sector in as many ways as possible--up to the point where market imperatives begin to undermine the public interest.¹ We have reached such a tipping point in Iraq and Afghanistan. As many witnesses before me have testified, Iraq and Afghanistan are our first two contractors' wars. Even at the height of the Vietnam War, contractors comprised just 14% of the American presence on the ground in Southeast Asia. Today, contractors outnumber uniformed personnel on the ground in both Iraq and Afghanistan, and in the simplest of terms, armed security contractors enable us to wage two wars simultaneously while avoiding the necessity of a draft.

Are armed security contractors currently performing inherently governmental functions in these conflict zones? While there is a general consensus that there are activities so intrinsic to the nature of government that they should not be contracted out, there is little agreement on what those activities are. Both OMB and Congress have repeatedly focused attention on the topic of inherently governmental functions, but to date have refrained from providing specific guidelines as to what particular activities must never be outsourced. Restricting the focus to those contractors able to deploy lethal force makes it easier to render a judgment. A leading advocate of minimal government, Milton Friedman, maintained, "The basic functions of government are to defend the nation against foreign enemies, to prevent coercion of some individuals by others within the country, to provide a means of deciding on our rules, and to adjudicate disputes."² Using Friedman's minimalist definition, the use of contractors in the realms of security and justice demand the strictest scrutiny. Even under this leanest of definitions, moving security contractors are performing inherently governmental functions, since they are actively involved in defending the nation against foreign enemies.

Section 5 of the Federal Activities Inventory Reform Act, Public Law 105-70 defines inherently governmental functions in potentially broader terms as "a function that is so intimately related to the public interest as to require performance by Federal Government employees." The Office of Federal Procurement Policy is expected to issue further guidance on this definition by late summer/early fall of this year. Yet even without that additional guidance, it seems clear that taking up arms to defend the interests of the United States, whether remotely pulling triggers on drone flights or to guard government personnel as they travel in war zones would seem to constitute active involvement in defending the nation against foreign enemies, hence clearing Milton Friedman's minimalist inherently governmental threshold.

¹ Allison Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy* (New Haven, CT: Yale University Press, 2009).

² Milton Friedman, *Why Government Is the Problem* (Palo Alto, CA: Hoover Institution Press, 1993), p. 6. http://media.hoover.org/documents/978-0-8179-5442-0_1.pdf

There are additional grounds for concern about the use of armed security contractors that have yet to receive appropriate attention. From a constitutional perspective, Article I, Section 8 of the US Constitution gives Congress the power to grant letters of marque and reprisal, yet armed privateers have been deployed in both Iraq and Afghanistan without such explicit authorization. From a legal perspective, armed security contractors in conflict zones still operate in a grey area, which makes it difficult to prosecute abuses when they occur. The Military Extraterritorial Jurisdiction Act (MEJA) provides a constitutionally sound basis for trying contractors, but the scope of its jurisdiction is ambiguous. The Uniform Code of Military Justice (UCMJ) is easier to apply, but its application to civilians is constitutionally questionable. The status of armed contractors under international law is unclear, and their status under foreign law still more confusing, varying entirely from country to country.³ The murky legal status of privateers hired by the USG and deployed overseas in part helps explain why it is possible for firms whose employees have committed clear abuses and behaved in the most undiplomatic fashion to continue to have their contracts renewed in Washington.

Lest I be misunderstood, I must emphasize that the current use of armed security contractors is wholly well-intentioned, a matter of necessity rather than choice. The State Department and Department of Defense continue to utilize them, despite all the negative press, because an all-volunteer force leaves us severely understaffed for meeting US objectives in Iraq and Afghanistan simultaneously. State and DOD should therefore not be blamed for their reliance on armed contractors; with an all-volunteer force and an under-resourced civilian capability, they are doing the best job with the resources currently available of delivering what Congress and the President have explicitly and implicitly asked them to do. But understanding how we arrived at our present predicament renders our current practices neither desirable nor sustainable. Our short-sighted and growing reliance on armed contractors in Iraq and Afghanistan compromises long term US interests in at least six different ways.

First, the practice blurs the line between the legitimate and illegitimate use of force, which is just what our enemies want. Al Qaeda's operatives have no country and are private actors waging war on the United States. Terrorists may receive funding from states, but they are by definition non-state actors. If the United States can legitimately rely on non-state actors wielding weapons to protect our interests, why can't Al Qaeda or the Taliban, especially when contractor misdeeds appear to go completely unpunished?

Second, our dependence on armed contractors in war zones is wholly at odds with our stated intention to build state capacity in Iraq and Afghanistan, so that the Afghan and Iraqi governments might one day be capable of independently providing security for their own citizens. The argument that security provided by the state is preferable to that provided by a collection of warlords is difficult to maintain when the United States itself lacks the capacity to wage war without reliance on private militias. The Afghan First

³ Richard Fontaine and John Nagl, "Contracting in Conflicts: The Path to Reform," Center for a New American Security, June 2010, pp. 24-25; 28.
http://www.cnas.org/files/documents/publications/CNAS_Contracting%20in%20Conflicts_Fontaine%20Nagl.pdf

strategy aims to hire local nationals to provide private security, and it has been wildly successful; at least 90% of private security contractors in Afghanistan today are Afghans.⁴ But in empowering these local privateers, we are in turn empowering regional warlords—precisely the opposite of building up Afghanistan’s capacity to secure its own territory without massive infusions of US taxpayer money.⁵ Since guns for hire never pledge enduring allegiance to a particular country, our rented allies today may very well become our enemies tomorrow. The local militias whose creation we have encouraged will also be a destabilizing future presence for the security of the AfPak region.

Third, the extensive use of privateers overseas has had disastrous consequences for government accountability and transparency. The Commission is well acquainted with the enormous waste, fraud, and abuse that have resulted when US taxpayer money must change hands multiple times in a war zone. Further, local security contractors in Afghanistan are hired through sub-contracts, and information on sub-contracts is currently entirely unavailable to the public. The site on USAspending.gov, President Obama’s “Google for Government,” was supposed to go live over a year ago, but it remains “under construction.” Thus, we are effectively pouring taxpayer money into a black hole in Afghanistan, with no real means of knowing how well that money is likely to be spent or even who is receiving it.⁶

Fourth, the United States has no interest in seeing Afghans or Iraqis imitate our practices, let alone other foreign governments. The market for force is currently dominated by US and UK firms who often hire third party or local nationals, or sub-contract to local firms. But if it’s profitable, why shouldn’t other countries want in the game? Medieval Europe featured extensive use of local armies and mercenaries for security, but it was hardly the most desirable set of arrangements for liberty, equality, and prosperity. Medieval Europe on a global scale would not be a world order that served American interests or values.

Fifth, our dependence on armed contractors ultimately undercuts troop morale by sending mixed signals to our citizens in uniform, who often perform the same jobs for a fraction of the pay. Government’s embrace of armed contractors in war zones erodes the virtue of fighting for one’s country, undermining the important value of disinterested public service. It also doesn’t help that the burden of sacrifice is currently unfairly distributed and hence undemocratic. How many US households earning in excess of \$250,000 a year have a son or daughter in uniform? What does it say about American values, when we actively uphold a system in which a privateer can make double or triple the money selling his labor to the highest bidder?

⁴ Moshe Schwartz, “The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress,” *Congressional Research Service*, 7-5700. January 19, 2010, p. 9. <http://www.fas.org/sgp/crs/natsec/R40835.pdf>

⁵ Dexter Filkins, “With US Aid, Warlord Builds Afghan Empire,” *New York Times*, June 5, 2010. <http://www.nytimes.com/2010/06/06/world/asia/06warlords.html?pagewanted=1&ref=global-home>

⁶ Allison Stanger, “Addicted to Contractors,” *Foreign Policy*, December 1, 2009. http://www.foreignpolicy.com/articles/2009/12/01/addicted_to_contractors

Finally, and perhaps most importantly, our dependence on armed security contractors has fueled an overly ambitious international agenda. Without privateers, we would need a draft to wage war in Iraq and Afghanistan, which would transform the politics of both conflicts. Avoiding a draft might sound like a plus, but surely war should ultimately be a matter of national sacrifice and honor, not profits and consumption. We degrade ourselves and strengthen our enemies by treating lethal force as something to be casually bought and sold.

There is one thing Congress could do that would immediately disrupt this vicious circle: ban the use of moving armed security contractors in war zones, with the practice to be phased out incrementally, so that it does not leave our civilian and military forces short-handed and compromised.

Looking to the future and returning to the inherently governmental, how should we view private security contractor deployment beyond Iraq and Afghanistan? There are many different ways to estimate the relative costs of contracting for a service versus providing it in-house, and those estimates can be a matter for argument, but one fact seems indisputable; hiring moving security is vastly more expensive than relying on our own arms. A March 2010 GAO study, for example, showed that the State Department's annual costs of using contractors for moving security in the Baghdad region was \$380 million, compared to an estimated annual cost of \$240 million for using Diplomatic Security to provide the same services.⁷ I know of no other study that would disagree with this comparative assessment. From a relative cost perspective alone, therefore, there are compelling reasons to in-source moving security at the earliest opportunity. Factoring in the non-monetary costs of having contractors perform inherently governmental functions, the case grows only all the more compelling.

In a world where the principal threats to American security come from non-state actors rather than hostile states, the United States is likely to continue to have a presence in dangerous environments where additional security will be required. Exhibit A of this reality is Iraq after the drawdown of American forces, just a few months down the road. The likelihood of returning to the past, when the standard American response to any violent attack on US government personnel or property was to close down the embassy and evacuate all employees, is very small. I have argued that Congress should ban the use of moving security contractors in war zones, the change phased in gradually so as not to jeopardize our missions in Afghanistan and Iraq through precipitous action. Looking beyond Iraq and Afghanistan, they should also consider banning their use more generally. A strong case can be made that moving security personnel should always be in a direct governmental or military chain of command, not a contractual one.

Thank you for your attention and I welcome your questions.

⁷ "War Fighter Support: A Cost Comparison of Using State Department Employees versus Contractors for Security Services in Iraq," GAO-10-266R, March 4, 2010, p. 3.
<http://www.gao.gov/new.items/d10266r.pdf>