

Exposing Corruption Exploring Solutions
Project On Government Oversight

Testimony of Danielle Brian, Executive Director
Project On Government Oversight (POGO)
before the
Commission on Wartime Contracting in Iraq and Afghanistan
“Are Private Security Contractors Performing Inherently Governmental Functions?”

June 18, 2010

I want to thank the Commission for asking the Project On Government Oversight (POGO) to testify about the question of whether private security contractors (PSCs) are performing inherently governmental functions. We have studied inherently governmental functions for years, and have recently submitted a public comment to the proposed White House policy letter.¹

As we have examined this question, it has become clear to POGO that the answer is yes, PSCs are performing inherently governmental functions. A number of jobs that are not necessarily inherently governmental in general become so when they are conducted in a combat zone. Any operations that are critical to the success of the U.S. government’s mission in a combat zone must be controlled by government personnel. In addition, in those areas that have not been brought under the rule of law, it is an inherently governmental function to provide security so that the government’s missions can be successful.

Why does this matter? The use of private contractors for security in a combat zone poses unique risks. One is the inherent tension between the effective performance of a mission and the financial interests of the contractor. As the Center for a New American Security put it, “The very existence of private contractors inserts a profit motive onto the battlefield; their primary responsibility is not the national interest but rather fulfilling the terms of their contracts.”² In fact, making a profit and serving the national interest are sometimes in direct conflict: while cutting costs is good for the bottom line, it can undermine security.³ We saw evidence of this phenomenon in the ArmorGroup North America contract where, for example, in order to save money the company hired Gurkhas who did not meet language proficiency contract

¹ POGO, Comments to the Office of Management and Budget, Office of Federal Procurement Policy, Proposed Policy Letter, “Work Reserved for Performance by Federal Government Employees,” June 1, 2010.
<http://www.pogo.org/pogo-files/letters/contract-oversight/co-gp-20100601.html>

² Center for a New American Security, *Contracting in Conflicts: The Path to Reform*, p.6, June 2010.
http://www.cnas.org/files/documents/publications/CNAS_Contracting%20in%20Conflicts_Fontaine%20Nagl.pdf
(Downloaded June 15, 2010) (Hereinafter *Contracting in Conflicts*)

³ POGO’s Federal Contractor Misconduct Database includes an instance in which the families of four Blackwater guards who were killed and mutilated in Fallujah in 2004 filed a wrongful death lawsuit against Blackwater, claiming the company broke its contractual obligations by deploying the guards on their mission without proper equipment and personnel. <http://www.contractormisconduct.org/index.cfm/1,73,222,html?CaseID=649> This incident hampered the overall military mission because it prompted the U.S. military to stage an assault on the city, in which several soldiers died. For more examples of PSC alleged misconduct, see POGO’s Federal Contractor Misconduct Database: <http://www.contractormisconduct.org/>

requirements—and therefore could not adequately communicate with the English-speaking guards.⁴

Another problem is that the laws in place do not adequately hold accountable all contractors that violate rules and endanger security in combat zones, particularly contractors for the State Department and CIA. Private employers such as security firms cannot ensure a binding chain of command that provides adequate discipline.⁵

Last year at the U.S. Naval Academy 2009 McCain Conference, there was a seminar on “Ethics and Military Contractors: Examining the Public-Private Partnership” which looked at the question of whether security in a combat zone is an inherently governmental function. According to the Executive Summary of the conference, “contractors should not be deployed as security guards, sentries, or even prison guards within combat areas. [Armed Private Security Contractors] should be restricted to appropriate support functions and those geographic areas where the rule of law prevails. In irregular warfare...environments, where civilian cooperation is crucial, this restriction is both ethically and strategically necessary.”⁶

Even the National Association of Security Companies recently wrote to the Office of Management and Budget (OMB), “Perhaps insourcing or much greater contractor scrutiny may be needed for security provided in combat and combat support roles and in situations where combat could evolve....”⁷

The fact is the barn door has been open for many years, and in the short term, this question is academic. We currently have approximately 30,000 PSC personnel operating in Afghanistan and Iraq providing what are arguably inherently governmental functions.⁸ Although the wild-west atmosphere with PSCs in Iraq and Afghanistan appears to be getting somewhat better—I believe due to oversight by the media, the Commission on Wartime Contracting, Congress, and groups like POGO—the bigger policy questions need to be resolved.

In the short term, we need to deal with the current reality and ensure the contractors are adequately being overseen and held accountable. In the long term, we need to build the ability to

⁴ POGO Letter to Secretary of State Hillary Clinton regarding U.S. Embassy in Kabul, September 1, 2009. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-gp-20090901.html>

⁵ Congressional Research Service, *The Department of Defense's Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress* (R40835), January 19, 2010, p. 12. www.fas.org/srg/crs/natsec/R40835.pdf (Downloaded June 16, 2010)

⁶ United States Naval Academy, Stockdale Center for Ethical Leadership, “Executive Summary: Ethics and Military Contractors: Examining the Public-Private Partnership,” U.S. Naval Academy’s 9th Annual McCain Conference on Ethics and Military Leadership, April 23-24, 2009. <http://www.usna.edu/Ethics/Publications/USNAMemo-McCainConfCMC%5B1%5D.pdf> (Downloaded June 15, 2010)

⁷ National Association of Security Companies, Comments to the Office of Management and Budget, Office of Federal Procurement Policy Proposed Policy Letter, “Work Reserved for Performance by Federal Government Employees,” p. 3, June 1, 2010. <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480afa1b9> (Downloaded June 15, 2010)

⁸ Department of Defense, “Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility, Iraq, And Afghanistan,” May 2010, http://www.acq.osd.mil/log/PS/p_vault/5A_May2010.doc (Downloaded June 15, 2010)

restore control of the security operations—meaning the planning and management of security operations—to the government, and allow those functions to be only supported by contractors. Additionally, the security of government personnel, facilities, and property in a combat zone not under the rule of law should be categorized as an inherently governmental function.

Short Term: Dramatic Need for Increased Oversight and Accountability

In the short term, we need to significantly improve the government’s capacity to oversee security contracts. One of the biggest weaknesses in the government’s oversight of PSCs is its inability to scrutinize subcontractors, particularly in Afghanistan. The Special Inspector General for Afghanistan Reconstruction (SIGAR) is currently auditing the number and volume of contracts in place to provide security services in Afghanistan. As Raymond DiNunzio testified before the Commission last month, “The U.S. does not have the ability to monitor Afghan security contractors or determine the nature of their affiliation or allegiance. Similarly, the U.S. government has difficulty identifying and monitoring second and third tier subcontractors that are Afghan or third-country-owned businesses. Multi-tiered subcontracting is problematic and results in weak oversight control and accountability.”⁹

Rumors abound that there is massive corruption at those subcontractor levels. The Afghanistan Ministry of Interior encourages private security companies to partner with Afghan companies, many of which are allegedly controlled by relatives of President Karzai.¹⁰ When you are talking about corruption in security contracting in a war zone, this is not simply about dollars wasted. PSC personnel have repeatedly told POGO that the only way convoys are assured a safe passage is if the security contractors pay off the local warlords not to target their convoy. The issue here is that we don’t know who U.S. dollars are paying—are they actually paying off the very people our troops are fighting?

In terms of the oversight infrastructure set up to handle these contracts, it is either based on self-reporting, or is too under-resourced to provide credible oversight. For example, the Contractor Operations Cells (CONOC) rely on reports from PSCs regarding incidents. These self-disclosures are then sent by the contracting officer to the commander of the unit the PSC is supporting.¹¹ This does not amount to independent oversight. We understand there is some push to outsource CONOC operations; however we consider this coordination function to be an inherently governmental function.

Understaffing is also clearly a problem. For instance, the Armed Contractor Oversight Division (ACOD) in Iraq, originally staffed by six people, has been downgraded to a Branch of three

⁹ Raymond J. DiNunzio, *Statement by Raymond J. DiNunzio, Assistant Inspector General, Criminal Investigations Directorate, Special Inspector General for Afghanistan Reconstruction Before the Commission on Wartime Contracting in Iraq and Afghanistan*, p. 3, May 24, 2010. http://www.wartimecontracting.gov/docs/hearing2010-05-24_statement-SIGAR-DiNunzio.pdf (Downloaded June 15, 2010)

¹⁰ Carl Forsberg and Kimberly Kagan, Institute for the Study of War, *Backgrounder: Consolidating Private Security companies in Southern Afghanistan*, p.1, May 28, 2010. http://www.understandingwar.org/files/BackgrounderPSC_0.pdf (Downloaded June 15, 2010)

¹¹ Office of the Special Inspector General for Iraq Reconstruction, *Investigation and Remediation Records Concerning Incidents of Weapons Discharges by Private Security Contractors Can Be Improve* (SIGIR 09-023), July 28, 2009. <http://www.sigir.mil/files/audits/09-023.pdf> (Downloaded June 15, 2010) (Hereinafter SIGIR 09-023)

people.¹² Plans to grow that office to 20 people were never realized. This shop was allegedly downgraded because the security environment in Iraq is stabilizing; however the number of security contractors in Iraq has actually increased in the last year.¹³ In Afghanistan, the ACOD is primarily staffed by a contractor,¹⁴ which was incredibly, until recently, another PSC—the worst kind of contractor-overseeing-contractor conflict-of-interest.

In an effort to bolster oversight, the State Department created the Force Investigation Unit (FIU) in Iraq. This unit, like ACOD-A, was initially staffed by contractors, although after Senator Feingold objected to contractors overseeing contractors, the FIU was staffed by four federal employees.¹⁵ State Department's oversight is supported by Embassy Regional Security Officers, who may or may not have the experience necessary to evaluate the performance of security contractors.¹⁶

Real oversight requires having the resources, technical knowledge, and experience necessary to know when a contractor is not adequately performing its mission. We need more than contracting officers in this role; we need investigators who are experienced in security operations in the oversight shops. Even the ACOD in Iraq, which is arguably the best of these shops, had to rely on the activity commanders to do the investigations. As we have seen in the Securities and Exchange Commission's failure to provide the oversight necessary to prevent the Wall Street collapse, and the Department of the Interior's failure to adequately regulate the oil and gas industry, when the regulated industry is in the driver's seat, the public interest is in jeopardy. In the case of combat zones, the consequences are even more dire.

When it comes to PSCs, the Special Inspector General for Iraq Reconstruction (SIGIR) has largely focused its attention on serious incidents involving the discharge of firearms¹⁷—not the many other types of issues raised by having private security contractors in combat zones, such as those issues we raised earlier.

One important step to take to improve oversight and accountability of contractors in a combat zone is to clarify the Military Extraterritorial Jurisdiction Act so that it applies to all contractors supporting U.S. government operations.

¹² SIGIR 09-023

¹³ Department of Defense, "Contractor Support of U.S. Operations in the USCENTCOM AOR, Iraq, and Afghanistan," February 2009, http://s3.amazonaws.com/publica/assets/contractors/adusd_active_contractors_feb2009.pdf (Downloaded June 15, 2010);

Department of Defense, "Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility, Iraq, And Afghanistan," May 2010, http://www.acq.osd.mil/log/PS/p_vault/5A_May2010.doc (Downloaded June 15, 2010)

¹⁴ Commission on Wartime Contracting in Iraq and Afghanistan, *AT WHAT COST? Contingency Contracting in Iraq and Afghanistan* (Interim Report), p. 76, June 2009. http://media.washingtonpost.com/wp-srv/politics/documents/CWC_Interim_Report_06-10-09.pdf (Downloaded June 16, 2010)

¹⁵ Kirit Radia, "Govt. Uses Contractors to Probe Iraq Contractors," ABC News, October 3, 2008. <http://abcnews.go.com/Politics/story?id=5951683&page=2> (Downloaded June 16, 2008)

¹⁶ Department of State, "Special Agents." <http://www.state.gov/m/ds/career/c8853.htm> (Downloaded June 16, 2010)

¹⁷ SIGIR 09-023, p. 2-3.

Finally, I would remiss if I did not point out another fundamental oversight tool that is currently lacking—whistleblower protections for PSC employees. While DoD contractor employees do have such protections, State Department contractor employees do not.¹⁸ As a result, those PSC employees are far less likely to report misconduct. Legislation pending in both the House and Senate would extend much-needed protections to these employees, and should be passed promptly.¹⁹

Long Term: Restore Planning and Management of Security Operations to the Government

Rather than distinguishing different types of security services such as personal security details and convoy and static security, and asking which of these are inherently governmental functions, I suggest that the Commission look at the question differently.

The GAO has noted that beyond simply providing security services, private security contractors provide advice and planning related to security.²⁰ It is at this level that the government must reestablish control. Currently, the management of security operations in combat zones is largely left in the hands of the private sector. The planning and management of security functions in combat zones are inherently governmental functions; contractors should only provide support of those functions in areas that are under the rule of law.

OMB points out that the command of the military forces providing combat support or combat service support is already established as an inherently governmental function.²¹ Does it not then logically follow that contractors that command security forces providing combat support or combat service support functions are also engaged in inherently governmental functions?

In addition to planning and management of security functions, *what* is being secured and *whether the rule of law is in place* should be the other standard for determining if that function is inherently governmental; whether the security is mobile, static, or some other type shouldn't play a role. In other words, providing security to government personnel, facilities, and property in areas that are under the rule of law may be done by contractors; providing such security in areas that are not under the rule of law may not.

¹⁸ Defense Authorization Act, 10 U.S.C. § 2409(c)(2); False Claims Act, 31 U.S.C. § 3730 (h)

¹⁹ The Whistleblower Protection Enhancement Act, H.R. 1507, sponsored by Reps. Chris Van Hollen (D-MD) and Todd Platts (R-PA), passed unanimously as an amendment in the House to the American Recovery and Reinvestment Act on January 28, 2009, but was stripped in conference with the Senate bill. A hearing on H.R. 1507 was held by the House Oversight and Government Reform on May 14, 2009. The Non-Federal Employee Whistleblower Protection Act of 2009, S. 1745, was introduced in the Senate on October 1, 2009 by Sen. Claire McCaskill (D-MO). See: Whistleblower Protection Enhancement Act of 2009, H.R. 1507. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1507ih.txt.pdf (Downloaded June 15, 2010)

²⁰ Government Accountability Office, *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers* (GAO-05 737), p. 9, July 2005. <http://www.gao.gov/new.items/d05737.pdf> (Downloaded June 15, 2010)

²¹ Office of Management and Budget, Office of Federal Procurement Policy, Proposed Policy Letter, "Work Reserved for Performance by Federal Government Employees," 75 Fed. Reg. 16188, Appendix A, March 31, 2010. <http://edocket.access.gpo.gov/2010/pdf/2010-7329.pdf> (Downloaded June 15, 2010) (Hereinafter 75 Fed. Reg. 16188, Appendix A)

Legal Background

The Office of Federal Procurement Policy (OFPP) will issue a policy letter sometime this year that incorporates specific examples from the FAR (Federal Acquisition Regulation) Subpart 7.5 of inherently governmental functions and “functions closely associated with the performance of inherently governmental functions.”²²

According to OMB, the activities of private security contractors that might conceivably cross the line into inherently governmental functions include:

- The command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role.
- The conduct of foreign relations and the determination of foreign policy.
- The direction and control of Federal employees.
- The direction and control of intelligence and counter-intelligence operations.²³

The activities of private security contractors that might conceivably constitute “functions closely associated with the performance of inherently governmental functions” include:

- Assistance in contract management (particularly where a contractor might influence official evaluations of other contractors’ offers).
- Participation in any situation where it might be assumed that participants are agency employees or representatives.
- Provision of special non-law enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and nonmilitary national security details.²⁴

Circular A-76, as revised in 2003, states that using contractors to provide certain types of protective services—guard services, convoy security services, plant protection services, and the operation of detention facilities—is not prohibited, but it also stipulates that agencies should take into account whether performance of the service “will significantly and directly affect the life, liberty, or property of individual members of the public,” including the need to resort to force and “the degree to which force may have to be exercised in public or relatively uncontrolled areas.”²⁵

DoD implementation of the FAR, known as the Defense Federal Acquisition Regulation Supplement (DFARS), also does not prohibit the use of contract personnel for security functions, but it limits the extent to which contract personnel may be used to guard military installations. In 2006, DoD amended DFARS to allow private security contractors to use deadly force “only when necessary to execute their security mission to protect assets/persons, consistent with the

²² 48 C.F.R. §§7.503(c) and (d)

²³ 75 Fed. Reg. 16188, Appendix A

²⁴ 75 Fed. Reg. 16188, Appendix A

²⁵ Office of Management and Budget, *Circular NO. A-76 (Revised)*, May 29, 2003, p. A-3. www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf (Downloaded June 16, 2010)

mission statement contained in their contract.”²⁶ However, when it proposed this change, DoD emphasized that “it is the responsibility of the combatant commander to ensure that private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks, or any other types of attacks.”²⁷ Two years later, the FAR was amended with a similar deadly force provision for private security contractors employed by agencies other than DoD.²⁸

Conclusion

In conclusion, the first order of business is to bolster much-needed oversight of PSCs in combat zones. In the long run, POGO believes that the planning and management of security operations in a combat zone should be identified as inherently governmental functions. Furthermore, security for government personnel, facilities, and property in combat areas that have not been brought under the rule of law should also be considered inherently governmental. Contractors will always have some role to play, but that role needs to be better clarified and contained. All of these reforms would go a long way to ensure that in the future the U.S. military and foreign policy missions in combat zones are more secure and effective.

Thank you again for your oversight of private security contractors and for asking me to testify. I look forward to answering any questions you may have, and to working with the Commission on this issue.

²⁶ 48 C.F.R. § 252.225-7040 (b)(3)(ii)

²⁷ 71 Fed. Reg. 116, 34826-34827 (June 16, 2006)

²⁸ 48 C.F.R. § 52.225-19(b)(3)(ii)