

CWC FORUM

MONDAY, MAY 2, 2011

Commission on Wartime Contracting

Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in Room 2203 of the Rayburn House Office Building Hon. Christopher Shays Co-Chairman of the Commission, presiding.

Present: Commissioners Ervin, Tiefer, Henke, Zakheim.

SHAYS:

It's a little early, but I think what we'll do is start. This is a meeting of the commissioner's forum. We invited institutes and we invited companies impacted by government contracting in Iraq and Afghanistan to have an opportunity to give us their final view before we do our final report.

And so, we're not swearing our witnesses. I believe we're recording them, right? So we're recording this. It will be part of the record.

And our first witness is Mr. Schooner. And, Mr. Schooner, we're allocating 15 minutes. Sometimes it may take 10, sometimes it may take a little more. But I'm going to ask our participants just to give a 30-second introduction of who you are and why you're interested in this issue. And then we'll hear what you have to say.

So you have the floor.

SCHOONER:

First, thank you so much for giving me this opportunity. I have the opportunity to speak to many of you, I believe, quite early in the process when I was invited over to speak to the Commission early during the fact-finding days.

For anyone who doesn't recall, I'm professor Steve Schooner. I'm the Nash and Cibinic professor of Government Contract Law at the George Washington University. I'm the co-director of the Government Procurement Law program.

We believe it is the premiere academic program in government contract law and policy in the United States, arguably around the world.

SHAYS:

The only other person I know like you is to my right.

SCHOONER:

And we've known each other for some time.

Before I came to the George Washington University, I was the associate administrator for acquisition, for procurement law and legislation at the Office of Federal Procurement Policy. I previously served as a trial and appellate attorney at the Department of Justice.

I'm also a former Army judge advocate general and for the duration of my reserve career, I taught in the Contract Law and Fiscal Law Department at the Judge Advocate General School of United States Army in Charlottesville, Virginia.

Today, I actually want to talk about an extremely discrete topic. I have opinions if we want to get into this in Q&A and just about everything in the report. But I was ecstatic that you took the opportunity in the report to mention a specific issue.

And so, what I wanted to do more than anything else is thank you and encourage you, if at all possible, to do more on this.

I believe in your report, I believe it's at page eight, you make the statement—this is in the February 2011 report to Congress. What you said is, "While doing their jobs, contractors risk being killed, wounded, or captured. Between September 2001 and December 2010, over 2,200 contractor employees of all nationalities have died and almost 50,000 have been injured in Iraq and Afghanistan."

So first, thank you for reporting that. Let me first say it's a responsible thing to do, and most government instrumentalities have chosen not to draw attention to this. But more specifically, what I really want to commend you for is the next sentence.

What you said is, "These contractors' deaths and injuries should not be ignored, but should be part of the public debate on the cost of war." That is one of the most responsible and transparent statements that anyone in the United States federal government has made in the last decade on this topic.

More than anything else, the reason I want to encourage you to do more about this is the president of the United States, the United States Congress, individually and collectively, and almost all senior officials in our related agencies have refused to address this issue publicly, and I think it's tremendously important.

Now, I begin from the simple premise that the public ought to have some idea who's dying in Iraq and Afghanistan pursuing United States' national interests. Now let me start from a relatively simple premise. There's a fair amount of research and thinking over the last few decades on what the economists refer to as casualty sensitivity.

The basic premise is, one of the most significant metrics that the public uses in trying to figure out whether they support military action abroad or oppose it, once we're engaged in that action, is how many people are dying in the pursuit of government interests.

In the United States today, and frankly around the world, anyone can go on to the *Washington Post* website, they can go on to the CNN webpage, and you can find out unbelievably explicit, accurate information as to which members of the military have died supporting our missions in Iraq and Afghanistan.

You can get the numbers, you can get the names, you can get the photographs, the hometowns, what they were doing, and how they died.

The interesting part of the story is that as of now, what we understand is since we've been in Iraq and Afghanistan, more than 25 percent of the people who have died pursuing our missions have instead not been members of the military, but contractor personnel.

Frankly, there is no public information readily accessible through which the public can gain this information. It's a little bit of long story. I'll try to do it quickly and we can talk about whatever you'd like.

I believe what I was told is you were given a copy of the article that I've had accepted in the *Journal of National Security, Law and Policy*. It won't be out for a number of months.

I just want to mention, over to my right hand shoulder, this is one of the best students I've ever had, Collin Swan, sitting right behind me. And he did a lot of the really good detail work on here. But I'm ecstatic he's here with me.

This is actually the fourth article that I've written on this topic over the course of a number of years and the evolution has been quite interesting. The first couple of times I testified in front of Congress about contracting in Iraq and Afghanistan, the only information that was available in the public domain suggested that fewer than 10 percent of the fatalities in Iraq and Afghanistan were contractors and we couldn't get good information.

And frankly, working with Doug Brooks, who's actually right here, we found some people who are interested in this. And what we started finding out is more people were dying than we thought, but you couldn't get any information at all.

In the mid-1990s, I started submitting FOIA requests to attempt to get more information. And the only agency that had any information on this at all, interestingly enough, was the Department of Labor. Because of the Defense Base Act insurance program, the Department of Labor collects information on contractors who have been injured or killed supporting the government.

And they collect the data mostly so that they can report lost working hours, basically an FTE equivalent. So they keep track of how many days the employees miss and then how many days the contractors miss. But that's based on Defense Base Act insurance claims.

So I collected a bunch of information to the Freedom of Information Act, and lo and behold, the numbers were staggering. Since the early 2000s to then, I believe the article came out in 2008, the numbers climbed to the point where, literally, contractors were representing one out of every four deaths.

So one out of every four people who came home from Iraq and Afghanistan in a bag or a box was a contractor, but nobody would talk about it. The newspapers wouldn't report on it. No newspaper larger than the *Houston Chronicle* would publish anything on it.

The president wouldn't talk about it. The members of Congress wouldn't talk about it. And DoD wouldn't even acknowledge that they were responsible for keeping track of the contractors that were dying in their battle space.

So the first article was published in the Army War College journal, *Parameters*, in 2008. The *Washington Post* about a year later permitted me to publish an op-ed on Memorial Day. And around that time, thankfully, finally, the Department of Labor started making this information publicly available on their webpage.

Now, remember, at this time, the only publicly available data on contractors that die in Iraq and Afghanistan was on the Department of Labor webpage pursuant to insurance claims.

Now around this time also Congress finally stepped up to the plate, and not just on this issue, but they concluded that maybe the Defense Department ought to know how many contractors we have in Iraq and Afghanistan and how many of them are dying. And that's what led to the requirement for SPOT (Synchronized Pre-Deployment and Operational Tracker).

And I'm sure you're all familiar with SPOT at this point. But the disappointing thing since then, every examination of SPOT, every GAO report, DoD testimony confirms, SPOT is not sufficiently accurate.

It's reprehensible that the Defense Department doesn't believe it's a significant priority to keep track of how many people are dying in Iraq and Afghanistan. Every examination today indicates that the Labor Department data is better than what's in SPOT and the Labor Department data, at best, is inaccurate, probably underreporting, almost exclusively late, and subject to all kinds of vagaries.

And much of this is discussed in the article.

OK. So let me just take a few minutes, if you don't mind. I don't know if you have the article in front of you. You do? Wonderful.

Let's just flip to the back, all the charts and graphs from the back. I just want to draw your attention to a few things and then we can talk about anything specifically you'd like during the Q&A.

The first graph is, for many people, an eye catcher. What you see in the pie chart is total fatalities since they started counting them in 2001. What you see is at a macro level.

If we use the term "surrogacy"—who's dying to support the United States' mission—contractors now are dying in the place of a member of the military more than 25 percent of the time.

Now, the much larger issue here is that over the course of the last generation, the United States government relies on contractors for everything. So we know the government is more outsourced.

But the point here and the reason I used the term "surrogates" is, these contractors are performing tasks that a generation ago would've been performed by somebody in uniform. Most people agree that the most dangerous job in Iraq and Afghanistan is being behind the wheel of a truck, delivering anything.

It's being behind that windshield and catching the shrapnel when the IED goes off. But it wasn't so long ago that people in uniform were driving those trucks. Anyhow, so that's your macro level information.

Very briefly, if you turn to the next page, look at figure three. And I think this is really one of the significant ones that people haven't necessarily really come to grips with.

There are five firms who have lost more than 85 employees over there. But I think the more startling statistic is that, I believe, it is 64, is that right? I believe 64 firms have lost seven or more employees since they've been working in Iraq and Afghanistan.

Why the magic number is seven? Because the Department of Labor's list is so long they don't report any firm that's lost fewer than seven people. But there are 64 firms on the list who have lost seven or more employees in Iraq.

All right, turn with me briefly to page 48. I think that this is the one that really drives home the point, but, again, we take the data part in a number of different ways. What I want you to focus on is that since 2009, I can't make this any more simple—more contractors have died in Iraq than members of the military.

2009, 2010, first quarter of 2011, more contractors have died in Iraq than members of the military. All right, the scary thing, if you jump over to figures 9 and 10, over on page 50, we're seeing the same trend line basically happening in Afghanistan as well.

We haven't actually tipped over as much, but what you see is, as these conflicts evolve, we're reducing members of the military and we're exposing contractors much more aggressively to the fatalities.

Now, we can talk about this at a number of different levels. The outsourcing phenomenon, you all are fully cognizant of this.

SHAYS:

Let me just say that we have about three and a half minutes. So, why don't you focus quickly and if a member here has a question, we'll ask you something.

SCHOONER:

So two brief things that I want to say before I wrap up: The first, one of the things that's interesting when you talk to the economists about this is, one of the things that the public is very concerned about is that we're paying contractors more than members of the military in the battle space.

First of all, most of the reports haven't been able to confirm that that's actually true because by the time you add in recruiting, training, retirement, and health care, it's not necessarily true.

But every economist that I've spoken to tells me that if this data were in the public domain, you'd have to pay contractors even more, because most contractors don't appreciate the actual risk that they're taking when they go there.

I guess the thing that I'd like to conclude with; we still have a few weeks left until Memorial Day. I think we will evolve as a nation when the president of the United States on Memorial Day thanks not only the men and women in uniform for making the ultimate sacrifice, but the contractors who, in fact, have done the same.

In an era where the president, the Congress, and the public objectively disdains contractors and thinks of contracts as some kind of evil element that is disrupting the fabric of the nation, at some point, maybe we ought to be a little bit more honest about the criticality of the task that contractors serve, particularly with regard to making the ultimate sacrifice.

I'd love to take your questions on anything. But I can't thank you enough for bringing the public's attention to this important issue.

SHAYS:

Steve, we appreciate you being here as well. And you focused on a fairly concise issue and you did such a good job, I'm not sure there are going to be many questions.

SCHOONER:

Which is fine with me.

SHAYS:

Yeah.

UNKNOWN:

Thank you, professor, for being here. Thank you very much for being here and for your testimony.

I had two or three related questions. They're related to each other. One is, and I wrote down how you put it, you praised us for focusing on this issue to some degree in our report. And you said that most government entities chose not to call attention to this issue.

And then you went on to say that government officials from the president on down have refused to discuss this publicly. Both of those two statements and other things you said suggested that there's been kind of deliberate bipartisan decision to play down this issue.

Is that what you're suggesting? And if so, why would the president, members of Congress, Republicans and Democrats alike not want to call attention to this issue, not just a matter of fact they haven't.

It's another thing to suggest as I think you're doing. But this issue has not been focused on deliberately.

SCHOONER:

Frankly, I find it to be fascinating and I wish I fully understood. Now, one thing that I try to do in the paper is not to say that the surrogacy itself is deliberate, OK?

So I'm taking a half-step back from the original question.

UNKNOWN:

That the surrogacy . . .

SCHOONER:

The surrogacy itself is not so . . .

UNKNOWN:

What do you mean by that?

SCHOONER:

I'm not accusing the Defense Department of affirmatively putting contractors in harm's way as surrogates for the military, OK? But frankly, the data might suggest that that is in fact what's happening.

I'm not accusing anyone individually. But let's take this at different layers. The military has a pretty good idea of what the dangerous jobs are.

One interesting decision early on, for example—we talked about this in the paper—is when body armor was first becoming a huge issue in the Congress. Body armor was mandated for members of the military. But frankly, the military was a little slow to mandate the same body armor for the contractors.

UNKNOWN:

Interesting.

SCHOONER:

I think that's a tactical decision. It's interesting to see the differences between the way that the Army and the Marines have actually required or not required the use of body armor by contractors.

So, again, I don't want to affirmably accuse, but by the same token, I think it is disingenuous to suggest at this point that a tactical decision is not being made to recognize the sacrifice of the contractors.

My experience talking with political officials, members of Congress, and I have spoken to many about this, I've testified on related issues a number of times on both the House and the Senate side, this is a political hot potato.

It is far more attractive politically, whether you're a Democrat or whether you're a Republican to basically point out the failures of the contractors rather than recognize the achievements that they've made.

UNKNOWN:

So just to be clear, it sounds like the answer is yes, that in your judgment, there really has been a deliberate decision on the part of government officials to downplay this issue.

SCHOONER:

I do believe that.

(UNKNOWN:)

OK.

SHAYS:

Anyone else have a question? Yes. Yes, Bob here.

HENKE:

Just . . .

SHAYS:

One second. Yeah, go on.

HENKE:

Professor Schooner, thank you very much for being here today. Just a brief question.

The chart that lays out the pie chart with 5,900 troops killed over time and 2,300 contractors. What are the implications of that? It's good to have the data, but what are the implications of it?

And let me draw out a specific question. I assume that the 5,900 troops are by the Law of Armed Conflict lawful combatants. And I assume that the large measure of the contractors are noncombatants.

SCHOONER:

I'm not sure I want to agree on that.

HENKE:

OK. Just tell us what you're thinking of that.

SCHOONER:

OK. At this point, there's a rich literature basically unpacking this, and we could look, for example, at how the UCMJ (Universal Code of Military Justice) and MEJA, the Military Extraterritorial Jurisdiction Act, have evolved over time.

Frankly, I think it's very, very difficult to suggest that the line between whether you're wearing a uniform makes you a combatant or non-combatant anymore. So, given the numbers, I think it's very, very difficult.

HENKE:

But to your knowledge, have any contractors ever been determined to have been considered lawful combatants in a Geneva Convention category?

SCHOONER:

The short answer is I'm not going to engage. I don't have that information.

But I guess in my discussions, in particular, with people like Gary Motsek and people who have tried to look at this at the broadest level, I think that the arbitrary distinctions that we've drawn between offensive and defensive arms bearing contractors, frankly, aren't going to hold up over time.

HENKE:

By the way, not knowing an answer is not a crime, so if you don't know the answer . . .

SCHOONER:

Right. No. And if I dissembled at the beginning, the short answer is I don't know. But I also don't think that the fact that there's been an international ruling yet suggests that we are on the right side of this issue as a nation.

I mean, realistically, we have employed contractors in almost every conceivable task available. Now, in terms . . .

HENKE:

Since 2000 moving forward.

SCHOONER:

Right. And in terms of the pie chart, frankly, the number of people in the pie chart, particularly the people who perished, the number who are, for example, private security, relatively small.

Having said that, there's some interesting data in here, for example, the Moshe Schwartz Congressional Research Service data seems to show that private security that we're using in Iraq and Afghanistan are three times more likely to die than a member of the military.

That's pretty serious stuff.

HENKE:

Right.

SCHOONER:

OK.

HENKE

Thank you very much.

SHAYS:

Thank you.

Mr. Dickson?

DICKSON:

Just a brief question: Do you see this is as a constant throughout the entire evolution of Iraq and Afghanistan? Have there been any kind of, you know, improvements or recognition along the way? Or has it pretty well been a constant throughout?

SCHOONER:

When you say constant, you're talking about the public affairs aspect of . . .

DICKSON:

. . . Failure to recognize the sacrifice of contractors.

SCHOONER:

OK. So, first, let's give Congress credit for passing the National Defense Authorization Act that required SPOT, OK? So that's a step in the right direction, to mandate and that someone ought to account and keep track.

So I have to acknowledge at least some credit there. I also want to give credit to the Department of Labor for making much more data available on the Web on the Defense Base Act webpage. I think that the Congressional Research Service and GAO have made some significant progress.

What troubles me most deeply, however, is I do not believe that we have evolved as a nation in terms of the anti-contractor rhetoric, particularly given the level of dependence today that our government has.

The military can't move, shoot, sustain, or basically do anything without contractors. We ought to recognize their contribution.

DICKSON:

Thank you.

SHAYS:

Thank you.

I'm just going to point out that in your charts you don't, I don't think, point out when you're describing contractors who are U.S. citizens and who aren't. And the reason I say that is you could also make the same argument that foreign troops are discounted as well and their lives are precious.

SCHOONER:

This is a terrific point. And in the section of the paper where we talk about taking apart the data, one of the hardest things to figure out over the last few years has been, who the contractors are and what they're doing, OK?

There has been a dramatic increase in just the last couple of years on data that's been made available through CENTCOM data, through the CENTCOM census. We now have more information just over the last couple of years as to what the nationality of the contractors are and what tasks they're performing.

That's in the graph. But we didn't have that a few years ago.

SHAYS:

All right. Well, you hit 21 minutes. So we'll see . . .

SCHOONER:

Sorry about that.

SHAYS:

No, not your fault. It was a very interesting presentation. And, Steve, I really appreciate you being here and I appreciate the work of your student. What is your name again, sir?

SWAN:

Collin Swan.

SHAYS:

And thank you for your work. OK.

So I may have this next name not pronounced well, but Pratap Chatterjee? Do I have it pronounced correct or not?

CHATTERJEE:

It's Pratap Chatterjee.

SHAYS:

I'm going to have you say it one more time.

CHATTERJEE:

It's pronounced Pratap.

SHAYS:

Pratap.

CHATTERJEE:

Chatterjee, that's right.

SHAYS:

Chatterjee. Mr. Chatterjee, please tell us a little about yourself, and thank you for being here.

CHATTERJEE:

Sure. Chairman Shays, distinguished members of the Commission of Wartime Contracting, thank you for this opportunity to speak to you. My name is Pratap Chatterjee and I'm a visiting fellow at the Center for American Progress where I focus on federal procurement reform.

I work on the Doing What Works project where we believe an efficient allocation of scarce resources in government will achieve greater results for all. And in particular I want to note—but first by way of background.

I've travelled to the Middle East and Central Asia over a dozen . . .

SHAYS:

Excuse me one second. We have an incompetent clock person.

We're new at this. This is very informal. And the incompetent, we won't tell the name of the person for the record.

OK, we're good. OK. Thank you.

CHATTERJEE:

So, by way of background, I've travelled to the Middle East and to Central Asia over a dozen times since September 11, 2001, spending more than 16 months on the ground in the region, have visited Afghanistan and Iraq four times each starting in January 2002.

And I've written two books on the subject, *Halliburton's Army*, as well as *Iraq Inc.*, and a number of reports and articles, and in the course of my work met with hundreds of contractors on the ground, both American non-American.

And just to sum up my sort of opinions on this issue. I believe the contracting process, whether in the war zone or here in the United States, will benefit if you have a much more robust data system to evaluate the contractors we plan to hire, and I mean from the individuals to the companies and their previous records, and our ability to track their work.

Let me start actually with the issue of security. The United States has supplied tens of thousands of weapons and millions of rounds of ammunition to both Afghanistan and Iraq for the use of the local security forces. On two trips in 2009, I visited police training centers and stations in Afghanistan and looked into the training system for this ammunition and weapons.

In one meeting my translator overheard the Afghan police officials discussing in Dari how to answer my question because they did not have proper systems to track the guns, let alone the ammunition. And I'm referring in fact partly to the fact the GAO produced a report saying that many of these weapons and ammunition were not tracked.

They didn't have the tracking numbers for these. And post that, this was still true. The biggest problem they faced was the fact that most police officers are illiterate and unable to fill out forms to track the weapons.

The second problem was that some of the companies shortchanged the Afghans, such as AEY, and their CEO, Efraim Diveroli, was sentenced to jail in March for supplying 50-year-old ammunition. I was given anecdotal information when I was there about some of the weapons being sold off by unscrupulous police officers.

I was even offered the opportunity to purchase a police gun. Recently news emerged that Paravant, a subsidiary of Blackwater, whose employees were hired to train security forces. You are undoubtedly aware the incidents in which Paravant's employees allegedly raided Bunker 22, the Afghan police armory, and took a number of AK-47s for their personal use.

Justin Cannon and Christopher Drotleff, two Paravant employees, left their military base in May 2009 without authorization and opened fire on the back of a civilian car after a traffic accident. The driver of the car and a civilian bystander were killed.

Drotleff and Cannon were both convicted of manslaughter by a jury in Virginia this March. The two Paravant employees were both found to have records of misconduct and violent behavior as well as terminations for alcohol and drug use.

At least one Paravant employee, a Paravant assistant-team leader, had even been blacklisted from being hired by the company itself for his prior work in Iraq. Yet, he was given a job in Afghanistan.

Another example, in 2006, I commissioned and worked on a report that revealed that a company called USPI was hiring local thugs to protect U.S. construction contractors working for USAID, thereby supplying money and weapons to some of the worst elements of society. And you are, of course, familiar with the HNT report also.

Since then, the owners of that company have pled guilty, that is USPI, to defrauding the government and billing nonexistent expenses from fictitious companies, and inflating the number of Afghan guards on their payroll.

I don't want to suggest in any way that this means that all the contractors—I view most contractors as brave men, as people who have their best in Iraq and Afghanistan. But relating to that, I want to address a different issue of how these contract workers are hired in the war zone.

I'm of South Asian decent and I have a working knowledge of a couple of languages of the region. So I'm often able to converse with the third-country nationals on the bases.

By my own unscientific reckoning, the average unskilled labor pays \$2,000 per person to a labor broker to get the job. The tens of thousands of truck drivers, janitors, and cooks we have hired via companies like Agility and KBR have paid out what I estimate at \$100 million in labor-broker fees in the course of the Global War on Terror alone.

What this tells me that we, as taxpayers, have almost no role in determining who we get. The actual decision is made by a third party, a labor broker who collects the fees, who almost certainly does not show on any government contract. I mean, here I'm not necessarily even speaking of subcontractors, but people below that of the third or fourth level.

Here's a second example of how little we know about the people we hire. I spent several nights in a tent in a base in Iraq some years ago with a group of Arabic translators working for L-3/Titan. One night we heard the usual loudspeaker announcing an attack with the words "incoming mortar."

I asked one of the translators, who was an American, how to say "incoming mortar" in Arabic. The American who had just finished undergraduate Arabic in Southern California had no idea so he asked a nearby Yemeni translator. Unfortunately, since the Yemeni translator spoke almost no English, he had no way of understanding the American.

Eventually a third translator, who was Lebanese, helped interpret between the first two translators, all of whom are watching for L-3/Titan. Another example, and I have quite a few of these, I won't go through all of them.

I met a DynCorp police trainer in Kabul—again, good men who were perfectly qualified back in America. Yet one of these men told me that the first time he saw a mortar attack, he thought it was a fireworks display.

What connects these disparate incidents, the security guards in Kabul, the janitors in Kuwait, the American police officers, and the Arabic translators who cannot translate is the fact that we do not often know who we are hiring.

We don't know if they are qualified. We don't know if they paid bribes to get their jobs. We don't know what they do with their weapons. And we have no way to find out.

So, in conclusion, this is what the Center for American Progress would like to recommend to Commission on Wartime Contracting. First, we need a better system of evaluating the companies we award contracts to.

Notably, we will need to screen the individuals for criminal records and police new startups, and here I'm referring to companies like USPI and AEY, to make sure that their billing systems are adequate.

And second, we would need experienced government contracting officers and oversight officers to check up on the contracting performance. Finally, when we do discover that individuals have broken the law, we need to prosecute them and send a message to make sure that it does not occur again. In your report "At what risk," the final section, recommendation number 27 in particular calls for Congress to, quote, "clarify U.S. criminal jurisdiction over civilian-agency contractors operating overseas." In that regard, I strongly support the Civilian Extraterritorial Jurisdiction Act of 2010, which will provide for criminal jurisdiction over U.S. contractors working overseas for other federal agencies, such as the Department of State. And I noticed in fact the testimony of Taxpayers Against Fraud, which we're about to hear. And I want to say I endorse a lot of their recommendations, particularly concerns of the False Claims Act. Thank you again for your invitation to speak at this forum and for your leadership in this matter. I welcome your questions.

SHAYS:

Thank you, Pratap.

Who would like to—any question? Yes.

Mr. Tiefer, Charles?

TIEFER:

Pratap, you told more than one account of the police training and the results of police training in Afghanistan. Last month I was in Afghanistan and saw they're still fighting.

They're still disputing between DynCorp and CSTC-A (Combined Security Transition Command-Afghanistan) over one of the points you've mentioned, which is DynCorp has drawn its trainers from police departments of the United States who as you say, they don't know what a mortar attack is.

They're perfectly good police people, but they're not ready for training-working conditions at Afghanistan. And I wonder if you could give us—since that's a crucial role, in some ways it's one of the most crucial roles of contractors in Afghanistan is training the police force. If you have more to say about that . . .

CHATTERJEE:

I do. And thank you for the question, Commissioner Tiefer.

When you assess the police training in Afghanistan, you really have to break up the issue into several parts. One is, did the company fulfill the contract? Whether contract has qualified an

issue I've addressed somewhat? And finally, have they been actually able to provide trained police officers in Iraq and Afghanistan?

Now, the Office of Inspector General and various other authorities have assessed the company having met the language of the contract, but in my mind, that's really not sufficient. It supplied the bodies. It supplied people who qualified police officers in the United States.

But as I pointed out in the one example I gave, and I can give others, the man in charge of police training in Iraq, for example, I think in 2007 had run a small university police force in southern Illinois. He wasn't even aware of some of the police training that took place after spending nine months on the ground when I met him in late 2007.

I met people who are qualified fire-arms trainers, but park rangers from the West Coast. They were really not the people to be doing the training.

Robert Perito, from the U.S. Institute of Peace, actually speaks about how we really need a qualified federal force to do this work. You cannot expect that a police officer from Idaho or Arkansas would be able to train people; they would be able to train people in handcuffing.

But when you're dealing with a police force that is illiterate, you have a real problem, because you have a cultural issue that you cannot surmount.

The police training has evolved and seven years ago in Iraq, for example, the police officers from America were doing training in Jordan for Iraqis and spent half their time going through translators who weren't probably qualified enough.

Now, at least Afghans do the training. The last time I went and watched the training, there were Afghans doing the training and the Americans back in the back and listened. But at the end of the day, given that, we have to redesign the contract itself.

It's not simply about getting so many bodies. Whether you're talking about translators or police officers, you actually need to in that contract say you're going to deliver police -- police officers in Afghanistan will -- that will do a get job. Otherwise, it's not good enough.

SHAYS:

Thank you.

Clark?

ERVIN:

Thank you, Mr. Pratap Chatterjee, for being here. Just a quick question to you:

And I wanted to link your testimony and Mr. Schooner's, Professor Schooner's. Given what he said that contractors are fighting and dying, to some degree anonymously in the name of the United States, and then your testimony that we, the United States government, are not doing a

good job of hiring them or overseeing and managing them and holding them accountable when there's poor performance.

I just want you to reflect on the larger implications of all this. Should we be relying on contractors to the extent that we are at least for those critical ultrasensitive functions that might put contractors in the United States government interest at risk?

CHATTERJEE:

I think in ultrasensitive areas or issues that inherently are government, we absolutely should not be relying on contractors. And I do want to say that there are aspects when you have janitors and you have cooks, these are not necessarily ultrasensitive matters.

And I think the issue that I would address more is how they're hired and their rights and that sort of thing. But when it comes to mobile security, when it comes to police training, when it comes to intelligence collection, I think it'd be a very bad idea to hire contractors who simply focus on meeting the letter of their contract.

Because if their letter of the contract is delivering, translation, for example, we are taught this—translators are perhaps the most important people on the battlefield, because they hold the life on their hands of the soldier and the local national that they are translating in between in their hands.

And I have come across occasions where, because you had a translator from a different ethnic group, they actually played a critical role perhaps on the best job and perhaps inviting attacks.

So these are roles in which you want to be very careful about whether or not you're having a contractor. Should you have somebody simply because they meet, you know, interagency-language-roundtable qualification, of speaking the language? Or do you need an interpreter?

And there's a big difference between a translator and an interpreter. This is a very critical role and I think one that has not been looked at adequately. It goes way beyond the issue of the police officers, because they often are to make split second decisions of life and death.

SHAYS:

Thank you.

Dov?

ZAKHEIM:

Yeah.

SHAYS:

Mike, Dov.

ZAKHEIM:

Sorry. Mr. Chatterjee, your testimony really is very, very interesting. I had a few questions.

I certainly sympathize with your concern about translators. I've seen it myself with the languages that I speak and that I speak four of them. But part of that what troubles me is how you actually get your arms around the problem.

For example, you say that contractors stick to the letter of the contract. Well, so does the bureaucracy, so does the military, so does everybody. So I'm not sure how you would distinguish between a contractor or an NGO or a bureaucrat. They all stick to the letters of whatever they signed up to.

In fact, it's arguable that many people would argue bureaucrats are even more sticklers about the details of what they're told to do than anybody else in the world. So that's question number one: how do you really go beyond what you said to actually implement something.

Secondly, again on the matter of implementation: You said the police should do their job well. How do you define well? How would you measure it? How would you evaluate it? Perhaps you can answer that.

CHATTERJEE:

Well, I'll start with the first issue, which is the contract itself. First of all, it means you have to write a better contract. And so if the contract is written better by the bureaucrats, the company is more likely to be able to do a better job.

But I will also draw actually here the role of the Defense Contract Audit Agency, which I think has sometimes failed to manage the contracts adequately. And in particular, I want to speak of the issue of the translators, since you raised that.

L-3/Titan was given a set of standards which they had to meet. Basically, the contractors they hired had to meet what's called the interagency language-roundtable-standards qualifications.

Now, in fact, because there wasn't a proper system of evaluating those qualifications we got we're not qualified and INSCOM, the Intelligence and Security Command, doesn't have among its staff or any of its contracting contract office representatives, as you've heard in this Commission itself, people who are speaking, they're Arabic or Dari or Pashto.

So they're not able to evaluate the contracts because the contractors themselves are not meeting the letter of the contract. So you do have the police to contract itself. You have to write a better contract.

It is very difficult . . .

ZAKHEIM:

If you write a better contract and you can't speak the language, what's the better contract?

CHATTERJEE:

Well, if you have penalties, let's say, in the contract which go beyond just providing X number of bodies on the ground to people who actually, let's say, meet a testing standard and have to re-meet that testing standard is a way you would be able to police whether or not the translators are qualified.

In the first instance that I mentioned where DCA was auditing a group of translators from L-3/Titan, the paperwork wasn't even in showing that the translator is qualified. More recently, because that matter has come to attention, DCA and INSCOM have been insisting that the paperwork be completed and the qualification of the translators.

ZAKHEIM:

Let me come back at you, because you speak multiple languages as well. You know very well that a testing standard doesn't necessarily mean very much. You don't know any . . .

CHATTERJEE:

Especially when it's not met.

ZAKHEIM:

Well, but you don't know that you're not meeting. That is the point. You can have a testing standard and the bureaucrats, they'll actually measure it. They'll have to hire contractors to do the testing.

So you're back to your contractors, anyway, number one. Number two is, if you're speaking to somebody in Dari or Pashto or French or British or English, or any language, I mean, talk to a Brit and you'll see the difference between our language and theirs.

So, to me, I still don't see how you get your arms around the problem, because you're still not going to be able to work with idiom, you're still not going to be able to work with dialect. And so, you may be setting a bar that's just impossible to get over.

CHATTERJEE:

I would return actually to Commissioner Ervin's comment, which is there's certain jobs that I think perhaps should not be contracted out. Whether it's police training or translation, you need a system of training.

Robert Perito, the U.S. Institute for Peace, has talked about, in the case of police training, a federal workforce or at least a system of training where people are prequalified in the United States before they go there. And I think you could do the same with translation.

You need to have people who you have already vetted before you send them overseas, that you know that they're adequately translators. I use translators all the time, just to give you an example.

I've travelled in almost every part of Iraq and Afghanistan. And in every part of Iraq and Afghanistan, I use a different translator. So when I'm in (inaudible) then I use the Hazara translator. When I'm in Basra, I use the Shia translator. When I'm in Sulaimaniya, I use Kurdish translator.

And I make sure that somebody that is local that I have vetted before. So I do this myself. Can you do that with 10,000 translators? Much more difficult. But that's why you need a federal system for a task that is important as this.

We're talking about life and death. When we're talking about janitors, we're not talking about life and death. These people, even the people who are carrying guns, hold the lives of men and women in the United States and local people in their hands.

And that's why they're so important to this particular issue to be addressed.

UNKNOWN:

Mr. Chatterjee, a question on what are your recommendations is to an Act, CEJA, for greater accountability. In your statement, there are two Paravant gentlemen who were convicted in March of this year for the shootings in May of '09.

Mr. Drotleff and Cannon convicted of manslaughter by a jury in Virginia in March. Under what statute were they convicted? You know, if they were convicted why do we need to enact CEJA?

CHATTERJEE:

I'm not a lawyer. So I'd have to take that for the record. I could find out. Actually, I would recommend to you that Human Rights First has done a lot of work on this and they have lawyers who can address this issue.

What they're pointing to is the fact that, A, also that there are certain things and I could be wrong on this. So, fortunately, I haven't been sworn in—is that because they were working on a base, if I understand correct, they were able to be prosecuted, but I could be wrong on this.

On the other hand, if they were not operating in a military base, they could not be prosecuted. So a civilian working for the State Department outside the base would not be able to be prosecuted.

But, again, this is something—I'm not being a lawyer.

SHAYS:

(Inaudible) has taken in. And (inaudible), if you could turn your mike on just to explain.

(UNKNOWN)

Yeah. I think it was . . .

SHAYS:

Well, let me just say, I should call your names out. This is being transcribed remotely. So I need to make sure that I am clear here.

UNKNOWN:

Yeah. OK. I think it was because they're operating on a Department of Defense contract.

UNKNOWN:

Exactly.

UNKNOWN:

And that's covered. The issue is whether you're dealing with non-Department of Defense contracts, then it gets muddier.

SHAYS:

Do you have a question?

UNKNOWN:

Yeah.

BROSNAN:

Correct. OK.

SHAYS:

He's our legal counsel.

CHATTERJEE:

All right, that is the counsel.

SHAYS:

He's our legal counsel and that's why he's responding.

UNKNOWN:

My second question is: I take your point very much about vetting and screening the individuals we hire. And the Paravant example, obviously, it wasn't done satisfactorily.

Some of the individuals had, I believe, bad conduct, discharges from the military, drug use, et cetera. So a question is, let's take a case where you perfectly vet and screen a handful of contractors and you perfectly vet and screen a handful of U.S. troops.

You still have the problem of bad apples, bad actors, right? And we've had examples of troops doing bad and inappropriate things. What's the difference?

CHATTERJEE:

I think the difference is enforcement and I think in the case of the military, if you quote, unquote, "bad apple," you know that you can and will be prosecuted. I think the signal that has been sent in the last 10 years, or 9 years something, is that you can get away with a lot of things.

There certainly have been contractors who've been flown out of the country, prosecutions that have failed. And I think the case of Drotleff and Cannon sends a good signal, which is that if somebody has been found guilty, they will be tried in the United States before a jury.

And so I think, again, that sort of . . .

UNKNOWN:

Thank you very much. I think you're right. I think that's the issue, is that ability to enforce and hold accountable.

SHAYS:

Yeah. I think we're all set then.

Again, we had a second witness that's been very helpful and we appreciate your participation. Thank you very much.

CHATTERJEE:

Thank you.

SHAYS:

When I say witness, since we're not swearing you, and I will call you participants. Susan Strawn is our next participant.

Now, is this your counsel that's joining you or...

Would you -- would you identify yourself so that...

UNKNOWN:

I thought it was your translator.

STRAWN:

I may need that.

SHAYS:

We may need that.

MORGAN:

Congressman Shays, my name is Frederick Morgan. I go by Rick. I'm a lawyer in Cincinnati and a member of Taxpayers Against Fraud Education Fund.

Ms. Strawn is relatively new to the organization and has had to spend more of her time focusing on matters like office-space lease than...

SHAYS:

OK. But will you be making a statement?

STRAWN:

No. Mr. Morgan is going to make the statement on our behalf. I just wanted to introduce Taxpayers Against Fraud Education Fund.

SHAYS:

Yes. We're happy to have you do that.

STRAWN:

. . . which is a national nonprofit, which combats fraud through the use of promoting whistleblower statutes including the Federal False Claims Act. And so, I've invited Mr. Morgan here to present on behalf of Taxpayers Against Fraud.

He's a member of our president's counsel and he's represented a number of whistleblowers who have been involved during the cases alleging, and sometimes proving, fraud in Iraq and Afghanistan.

SHAYS:

So it's Rick Morgan?

STRAWN:

Morgan.

SHAYS:

Mr. Morgan?

MORGAN:

Thank you, Chairman Shays.

SHAYS:

In my time, OK.

MORGAN:

I am frankly over the moon for your report. I think it's a beautiful document. And that you have been able to come together from the diversity of background that you bring to it, I think, speaks very highly of the effort that you've been through. It also speaks to the magnitude of the problem, regarding, which I think there's no room to doubt or deny.

And so we have a couple of proposals.

SHAYS:

I just say that's a great introduction to get us to pay attention to what you're saying. I think this is the best witness we've had so far.

(LAUGHTER)

SHAYS:

Just joking. But that's on the record.

MORGAN:

I watch a lot of C-SPAN.

So, you know, when I go to your organic statute, what I see is that one of your charges is to identify and evaluate the extent of waste, fraud, and abuse under these contracts, and the extent to which those responsible have been held financially or legally accountable.

And my experience, going back 17 years now, I have prosecutorial experience, but for the last 17 years, I've represented whistleblowers under the False Claims Act.

More than many of my colleagues, I have done so in the Defense Department arena, including major weapon systems and, more recently now, including a number of cases involving matters arising on cap or standalone contracts in Afghanistan and Iraq.

I represent some of the truck drivers that have had their windshields blown out and come home in emotional tatters. I also represent some of the business types who have seen abuses that they've been unable to correct while in country and have brought to our attention when they've returned.

Some of those matters remained under seal. I assume that a margin of familiarity with the False Claims Act our cases are filed under seal remain there sometimes for many years before they come out. And so I can't talk about particulars.

But Mr. Chatterjee talked about 50-year-old ammunition being sold. It reminds me of the roots of this law, which is with President Lincoln. And with bad ammunition, with soap boxes full of saw dust, and my favorite term, (inaudible), in the Civil War.

We have a number of proposals that we've made in the paper. What I want to talk to you about are two of those—one of which is simply return to standard practice, and another is adoption of a practice, which Congress recently made applicable to the health care sector.

The first of these is to require a more precise statement of conformance or compliance when contractors submit claims for payment. In a way, I think this is counter to my parochial interest, because I think that when somebody has to sign a statement that says we have done everything

we were required to do and here's my name on the line saying that, I think that carries some weight.

But I also think that when somebody does that without knowing that that's the case, does it without the verification that underlies that, then they're turning square corners with United States, as Justice Holmes long ago said, it's required of anyone who does business with the sovereign.

So frankly, I urge you to include acknowledgement of the role of whistleblowers, of qui tam relaters. For a long time, it was a bad word, but I don't think it is anymore, because what we have seen that the False Claims Act has brought more than 20, I think it's \$25 billion now, has brought close to \$25 billion back into the Treasury in the last probably 25 years since President Reagan reinvigorated it in 1986.

And the vast majority of that has come through the efforts of qui tam relaters, of whistleblowers. So I think that when somebody in country working for a contractor finds out that none of the translators can really translate, you know, maybe that's a matter of training. But maybe it's not.

Maybe it's a matter of bad hiring. Maybe it's a matter of a failure to train once they're onboard. And nobody's going to know that. Nobody's going to be able to help you fulfill your motion, your statutory charge better than somebody inside who knows that.

And what the False Claims Act does is allow people to bring that forward. And we return now to the certificate- of-conformance idea.

When I started doing this work, it was routine that any claim for payment, most claimants for payment by contractors included a simple statement of conformance, certificate of conformance, whatever it was called.

There's nothing hard about that or novel about the suggestion that they'd be included now. But what's happened, I think, and I don't want to delve into the sort of laxity of regulation that you discussed at length in your report. That is certainly the case in our experience.

What's happened frankly, personal opinion for a moment, is that the contractors have been able to overrun the reduced forces who are supervising and helping draft the contracts. And so a lot of what used to be standard language is no longer there. And the contractors are not going to negotiate language that's counter to their own interest.

So I urge you to take a look at a simple recommendation that every certificates of conformance or a performance, whatever you want to call them, included with every claim for payment. Anytime somebody comes to the United States and says send me \$100,000 or \$1 billion, there is no reason that somebody associated with that organization should not ensure that the government is getting what it paid for.

I'm often gratified to find out how few lawyers, much less people who have the privilege of being non-lawyers, don't know about the False Claims Act.

And we saw in 2005, Senator Grassley included in the Deficit Reduction Act language which required Medicaid contractors to include, and this is important language, quote, "as a condition of

receiving payment," close quote, written policies which notified employees, educated employees, including management employees about the False Claims Act, about the corporate obligation about the requirements of the contract, and included written policies in their personnel manuals that carry that forward.

There were anguished howls from the Medicaid community at that time and yet the nation has managed to limp along with that requirement in place. Again, my goal is obsolescence.

And I think that that provision, simply knowing it's out there, gives people the opportunity to think about what they're doing before they do it, to take compliance concerns more seriously and cut a lot of these off at the pass.

I have very few clients over the last 17 or 18 years who did not make attempts to correct fraud or waste or abuse internally before they resorted to looking for a lawyer.

These are not easy cases to bring. They're not easy cases to participate in. I don't think anybody does it lightly.

So what this provision does is make management think before they send somebody out without knowing what they're doing or before they say, oh, you know, don't worry about it, it's good enough, or government work, or whatever.

So I think about something like Sergeant Maseth being electrocuted in the shower in Afghanistan—Iraq—wherever that poor fellow Maseth's death.

SHAYS:

Was it Iraq?

UNKNOWN:

Iraq.

SHAYS:

Iraq.

MORGAN:

. . . and the other 16 or 17 soldiers who died as a result of bad electrical work there, I mean, how bizarrely horrifying is that that we send people, you know, you know all that.

So to have that organization from top to bottom charged with knowledge of what happens if fraud is reported and is litigated, I think, is a very important potential deterrent that can you ever evaluate how much money it saves? You probably can't.

But can you hope that one time out of five or three times out of 10, or whatever, it makes a difference. It makes somebody think and it militates change on the ground or in the organization rather than it coming back here.

SHAYS:

Do you want to take questions? Or do you have anything else?

MORGAN:

I'm done, sir.

SHAYS:

Questions, we'll start with . . .

ERVIN:

Thank you both, Ms. Strawn and Mr. Morgan, for coming in for your testimony. Just a quick factual question, Mr. Morgan:

I'm intrigued by your suggestion that there'd be a certificate of conformance or something like that that would be signed by somebody in the company attesting to, you know, faithful performance of the terms of the contract. And then presumably you would use that document to go against that person, that company for any malfeasances.

That is the notion I get. My question is, at what level of the company would you suggest that that statement be signed. This is not my area of expertise, but I think one of the provisions of the Dodd-Frank provision was requiring CEOs to certify financial statements, kind of the same theory?

MORGAN:

I certainly don't think it's a function to know what's happening month-to-month, or quarter-to-quarter, or sometimes twice a week. I mean, you know, I know that claim-submission frequency varies substantially.

But I do think that somebody—a lot of the defense companies over time when I've been involved in cases within, they roll it up so that there might be a sub-certification from each unit that then results in a certification by a financial person.

But it's got to be more than I'm certifying that we want this amount of money. So I think it's up to the organization to identify the person to do that and have that person then account for the organization.

I'm not looking for something that puts an individual on the spot. What I'm looking for is a system resulting in that signature, which allows the organization to ensure that what is rolled into the final invoice is true and correct.

ERVIN:

Follow up question, do you have any concerns that if that certification is pushed relatively far down in the corporate chain that, ultimately, any failure to monitor, failure to have good performance can be, you know, lobbed off onto, you know, relatively junior people in the organization?

MORGAN:

Well, you know, having the CEO sign would be great, I mean, from a lawyer's perspective. But what my focus, Commissioner Ervin, really is on having the people who know do the signing.

So whether it's somebody who part of their mission requirement is to go out and ensure that they know before they sign, I want some gravitas to the claiming for money. Now, does that get used? Because I view this as primarily a deterrence function.

We talk in our submission about the problem of contractors having loosey-goosey language so there's no way to say, well, you promise this, you didn't do it. You knew you didn't do it, therefore, you're liable.

And we get into fracasés about that, but really, I see both of these suggestions as primarily were entered toward ensuring that when you are billed, you and we, the taxpayers are billed for something that was actually delivered.

SHAYS:

Dov Zakheim?

ZAKHEIM:

Yeah. I have a lot of sympathy with your suggestions about adding something to corporate policies and procedures. It's very easy to do.

I have a question, though, just for clarification about how you envisage training regarding the False Claims Act. I know, for instance, corporations that deal with anybody overseas have annual certifications regarding the FCPA.

Is your notion that this be an annual kind of computerized test? Is that something for new employees as well, both, you know, and/or—I mean, could you just elaborate on how you would go about doing this?

I don't think it's very hard, but I'm just curious for the record, if you could sort of spell it out.

MORGAN:

. . . computerized training, but at the same time, I know that it's necessary and, you know, the bigger an organization gets, the more it's done. And I also know that that's the way to ensure accountability, to ensure that there is a record that it was done.

My experience has been that people, a fair number of people know what's in their employee handbooks. And I think if there's a paragraph in there—and I'm taking unabashedly the Deficit Reduction Act model because it's in a statute that exists.

So whether it's part of a computerized module or a module and computerized, you know, recertification training, what we don't like is the existing law which says, when it's appropriate to give some fraud training, go ahead and do it.

And I think that to have something far more precise would be beneficial and, frankly, benefit the organizations as much as . . .

ZAKHEIM:

But you wouldn't specify the nature of the training. You'd leave that to the companies?

MORGAN:

Well, I would think that it needs to be what the rights are, that the laws that, you know, whether it's just the False Claims Act, whether it's other laws that address fraud exist, but actually Deficit Reduction Act is pretty specific about that.

It says train employees about the False Claims Act. And the magic words are, as a condition of receiving payment. So, once that's in there, I think an organization is going to do it more often than not.

Certainly, the ones who are trying to do the right thing, trying to do a good job, are going to do that. So, by putting that word in there, I think that it encourages, and I'm working right now as a compliance officer from a large company who left because of issues relating to what he was being asked to certify.

So I think that itself, if you put the right carrot in there, or maybe that's the stick, I'm not sure, it takes care of itself.

ZAKHEIM:

Thank you.

SHAYS:

Mr. Tiefer?

TIEFER:

I have a comment and then questions. One: just a comment for you Ms. Strawn. You come from an organization with a very distinguished record in this town of preventing amendments that would've weakened the False Claims Act and the qui tam provision over the years.

And then, more recently, there was a brief period of time I had to teach my students at the University of Baltimore Law School the new Supreme Court Allison Engine case, which threatened to introduce more requirements that would've made all qui tam cases that much harder.

But that (inaudible) False Claims Act cases from the Department of Justice and it got reversed. The last Congress overruled the Supreme Court decision. And so, I'm glad you're coming forward with fresh ideas to deal with, as your testimony points out, the fact that many suits have been brought from wartime.

Many qui tam cases have been brought for wartime actions and they had run into one (inaudible) or another. I wish you success.

STRAWN:

Thank you.

MORGAN:

Thank you, Commissioner.

TIEFER:

And now a question or two: I'm pleased to see that your testimony supports our recommendation 26, which was to require that foreign contractors and subcontractors agree to U.S. civil jurisdiction.

But I see that you added that in order to make this truly effective for subcontractors, we'd also have to recommend something to the effective flowing-down requirements to subcontractors.

I think we are still in pursuit of things we can do with respect to subcontractors. We keep running whenever we're going to the theater, with the need to have more visibility over them or control over them. Tell me what you have in mind here.

MORGAN:

Again, I bring, primarily, our weapon-system quality management. Most of my DoD cases have involved weapon systems and many of them have involved quality-management issues.

It's commonplace under the federal acquisition regulations for all requirements to be flowed down to a subcontractor. So the subcontractor is responsible to deliver to the contractor a conforming product.

Now, how that ties into jurisdiction, I am not ready to address. But to me it's the simplest matter to include in the FAR, or to call out the FAR clauses that require whatever flow-down that's necessary to ensure that the prime doesn't end up in the position of certifying something that he or she has no idea about.

So I think that flow-down is so common in the government contracting arena that, frankly, I have not devoted a lot of thought to exactly what that would be like.

TIEFER:

I follow you with the quality issue. My other question is, the things you proposed, although they could apply across the border, all contracting, wartime contracting and non-wartime contracting, very much the flavor of your testimony is to focus on what we care about—which is wartime contracting.

I note that you cite for certain many cases that are clearly wartime contracting. And I don't see you wandering for the certificate of conformance, which Commissioner Ervin asked about. Can you give a justification for why particularly for wartime contracting this would be an improvement?

MORGAN:

Well, I think it's first typically on the whole Medicare and Medicaid side of our business such exists already. There is something along those lines in the claim form for a Medicaid-Medicare reimbursement, for example.

So, in that sense, it's only squaring it up. But again, for many years, my experience was that these were commonplace. I have a case right now where, for four years, the contracting officer thought A, and then it turned out that a different contracting officer had cognizance over that part of the contract.

And the answer in that contracting officer's opinion was B. And there's nothing anywhere where the contractor said we assert that we are entitled to everything here.

Now, I think 10 or 15 years ago, that would've been commonplace provision and I think that I alluded to the weakening of the negotiation process, maybe the tilting of the playing field a little bit, and I think that we've gotten away from what was once a pretty-well standard procedure.

ZAKHEIM:

Thank you.

SHAYS:

I just have a comment that I'm not looking for a long answer. But you could have a long answer on it.

I make an assumption that the owners of companies, the people who manage the company, they get the best performance from their employees. When you do that sometimes, you end up with unhappy employees and sometimes you fire employees.

It seems to me that they then have almost an incentive to try to protect themselves by using the False Claims and saying, you know, the company has done this, the company has done that. And that's one thing I wrestle with you.

The other thing I wrestle with is, I have a basic bias based on 21 years of following the Justice Department that it acts sometimes like it thinks it's part of the judicial branch and not part of the executive branch, and that they are very unresponsive to Congress. They're very unresponsive to our commission, frankly, I think.

And you then get into this issue of, well, if it's a False Claims Act, it's sealed. And so you can seal something for five or 10 years and then when the issue is gone, they then find there's no validity to the False Claims.

So I gave a long question and I want a short answer, which I apologize.

MORGAN:

That middle part there about the Justice Department, you're not looking for an answer to that, correct?

SHAYS:

No. Well, you gave me an opportunity to express my bias on the record.

MORGAN:

I'm pleased I could help. The answer to the first part is easy, because there is substantial supervision by the government over these cases during the seal period.

That is, if a case is truly brought by a disgruntled employee, first of all, it's unlikely that those cases. My view is . . .

SHAYS:

So your view is that the Justice Department is able to see through that.

MORGAN:

My view is the Justice Department has a statutory obligation to investigate that DoD-IG and then ...

SHAYS:

And then it does that. OK, take the last question about the sealing.

MORGAN:

Well, it's a devil-we-know problem, I think. That is, there was a recent decision out of the 4th Circuit rejecting a constitutional challenge to the seal at all.

There's been a lot more third-branch scrutiny in the last couple of years over the duration of the seal. The seal is arguably subject to some whim. I have never in my years of doing believed that it was being done for political reasons at all.

SHAYS:

It's just quick answer. It's sealed then go away. And this Commission has had a number of it since we'd like to get some information and we can't.

So, anyway, it's a two-edged sword that way.

MORGAN:

Yes, sir.

SHAYS:

Again, your panelists have been terrific. Ms. Strawn, do you want to make any closing comment?

STRAWN:

Just to thank you all very, very much for your interest in this. And in my former life, I spent over two years in Kosovo as a Department of Justice person doing capacity building.

So I can very much reciprocate with Mr. Chatterjee's comments about police training and things of that nature. But I really do appreciate you hearing us out. And I wish you all the luck with your recommendations.

SHAYS:

Well, thank you. We all feel you've been given a great opportunity and we want to make sure we use it well.

Thank you both very much.

We now have Ms. Betsy Marcotte, DAI. Am I pronouncing the last name correct?

MARCOTTE:

Yes.

SHAYS:

Come on up. So, tell us a little about yourself and then tell us what you want us to know.

MARCOTTE:

Thanks a lot for this opportunity. It's very nice to be here today.

I am the senior vice president for technical programs at DAI. I've been in this job for five years. I joined DAI with no idea that I would spend so much of my life in Afghanistan. And it has become a major part of my life, and the company's life over the last several years.

SHAYS:

Thirty seconds about the company.

MARCOTTE:

DAI is a development company. We have projects in 59 countries, 104 development projects. We've been in business. We just celebrated our 40th anniversary.

We pride ourselves on doing development work, you know, everywhere. We do not train police. We don't provide translators and we don't provide janitors.

But we do a lot of economic development. We help governments, strengthen governments, strengthen the private sector. You'll hear more about that in my testimony.

SHAYS:

Great. Great. Thank you.

MARCOTTE:

On April 11th, you heard from several of the nonprofit development organizations, I am here before you as a member of the private sector, for-profit development community, and I have to say I'm very proud to be a member of that community.

DAI delivers highly skilled technical assistance that builds local capacity to solve the complex problems that developing countries. We were recently named one of the world's Top 40 Development Innovators, one of the very few consulting firms to receive this distinction.

And what we do is we extend the reach of USAID and other development providers to provide intellectual capital, operational experience, and staff to help implement these agencies' very challenging agendas.

As a private-sector firm, we compete primarily for contracts rather than for grants or cooperative agreements. Each of these funding mechanisms has a place in the development arena, depending on the client's objectives and the desired degree of oversight and control.

Grants are designed to provide government funding for a partner's activities where those activities coincide with the government's interests. Contracts, on the other hand, are used to purchase goods or services to execute an activity specified for the government on behalf of the government, and we've heard some of that today.

When DAI implements a USAID contract, we do so in the government's name and at the government's direction. We have no hesitation about branding our work under the government banner as "aid from the American people".

There are important roles for both grants and contracts in Afghanistan and for both NGOs and private-sector development firms. But we respectfully contend that efforts to limit the kinds of service providers available to the U.S. government are misguided and ultimately detrimental to American's foreign policy and development agenda.

Fundamentally, we believe that all development organizations, NGOs and private sector firms should be judged not on their for-profit or nonprofit status, but on their ability to deliver results on a cost-effective basis.

I wanted to address four misconceptions that we felt came out of the prior hearing or participation before this committee.

SHAYS:

No. That was actually a hearing.

MARCOTTE:

OK. Right.

SHAYS:

And we appreciate you being here because this is why we've had . . .

MARCOTTE:

This is the counterpoint.

SHAYS:

Yes. So this is your opportunity.

MARCOTTE:

Right, OK.

SHAYS:

And this has much meaning to us as the hearing does.

MARCOTTE:

OK, thank you.

So the four attributes that I wanted to hit on today are results, sustainability, cost effectiveness, and security. Let's begin with what is from my company the bottom line—which is results.

There is absolutely no evidence that NGOs are more successful at delivering development results than private-sector firms. There are good development firms and there are bad ones, just as there are good NGOs and bad NGOs.

The key is to impose a rigorous system of competition that weeds out the good from the bad with a razor sharp focus on development results. DAI's results, I believe, have been exemplary. I have a few examples in my testimony.

I'm going to just give you one right now. One of our projects in the eastern part of Afghanistan, and one that I have spent a lot of time on personally, has improved the lives of millions of Afghans. This is an alternative development program, designed to provide for farmers to grow things other than poppy, which we could talk about for days.

But this has reached 2,600 communities and it's brought 24,000 hectares of land into non-poppy production, and it generated 17,000 full-time, permanent jobs, and trained, got farmers, government officials, and small business owners and it's helped more than a quarter-million subsistence farmers raise their incomes significantly, sometimes over a hundred percent.

So that's our results. On sustainability, we focus on building sustainable local capacity by developing and nurturing institutions in the private sector, civil society, and government. We're conscious that assistance programs too often create dependency where they hope to spur development. This is a real challenge.

And our goal is to "work ourselves out of a job" by building sustainable change agents and in-country development capacity. Our small business program, another example, has supported the establishment of more than a thousand small firms. We've assisted 10,000 more. And that project alone has created 100,000 new jobs as well. So that's the road to a healthy future in Afghanistan.

So, in Afghanistan, building local capacity in our minds is about nurturing and training local talent, people who contribute to our programs, learn from them, and go on to lead their own country's development.

We currently employ about 1,500 Afghans and that comprises 90 percent of our workforce in Afghanistan. And we partner with hundreds of Afghan organizations.

On another one of our projects, our largest project, 95 percent of our subcontracts on that \$350-million project are with Afghan firms and 93 percent of the grants that we have administered on that project go to Afghan NGOs.

Third point was cost-effectiveness. There is little difference in cost in our experience between NGOs and private-sector development firms. There isn't any evidence that NGOs enjoy any cost advantage over their private-sector counterparts.

In testimony before this committee, Save the Children charged private-sector firms with "following the money." This statement masks the truth.

DAI and other firms compete intensely for projects. Competition yields lower costs, better value, superior technical innovation, and more-diverse technical choices. We welcome competition from nonprofits and for-profits, and we think the Commission should view with skepticism any effort to bar the for-profit sector from the marketplace.

And with respect to salaries, Save the Children stated that NGO salaries are lower than those of the private sector. The truth is that USAID does not permit most development contractors like DAI to receive higher salaries than government employees and all salaries on our projects have to be approved by USAID.

This restriction doesn't apply to NGOs. In Afghanistan and other locations, we've lost a lot of our local staff because we couldn't match the higher salaries that NGOs offer.

Once a competitively bid project has been awarded, rigorous oversight is essential. Contracts provide the greatest level of accountability and transparency because they're carefully controlled and routinely audited. USAID contracts involve client approval of costs and actions every step of the way.

And by law, contractors are subject to close public scrutiny of every taxpayer dollar spent through independent government audits. The same strict USAID management oversight and standards of accountability and transparency don't apply to grants and cooperative agreements.

Recognizing the importance of oversight, we were one of the first DAI implementers to establish our very own Fraud Prevention and Investigation Unit in Afghanistan. And it's been a busy unit. Glad we have it.

Finally, the fourth area was security. Despite earlier testimony to the contrary, the need for security in Afghanistan has more to do with the nature of the work that's being done rather than the type of organization doing it. And there is no clear distinction between nonprofit NGOs and for-profit firms on this score.

Some NGOs that perform purely humanitarian assistance view security as compromising their neutrality, and we respect that perspective just as deeply as we respect the people who are doing this work. But other nonprofit NGOs use armed private security contractors just as we do in the work that we do.

DAI's work in Afghanistan spans the gamut, from stabilization work in counterinsurgency contexts to institutional support in the agricultural finance sector—very broad set of things that we do. And the need for security varies according to the work we're doing.

But almost all of our work involves close coordination with Afghan and U.S. authorities both civilian and military and it centers on building Afghan government capacity to counter the insurgency. Such work requires armed security because it threatens the base of support for anti-government elements and, therefore, it invites attack.

We've been implementing projects in Afghanistan since 1976. Building on our legacy of delivering tangible results and measurable value to USAID, we are now implementing eight projects in Afghanistan.

And I won't go into further detail on those programs. I think I've talked enough. But I want to thank you again for the opportunity. I'd be happy to answer any questions.

SHAYS:

Thank you. It's very nice to have you.

I'm just going to put something on the record and then I'll recognize the members. Basically, my understanding is there are grants or cooperative agreements and then there are contracts. A grant and a cooperative agreement do not allow an organization to have, quote, unquote, "a profit." So a profit organization is basically earmarked for the contracts.

Now, some have done cooperative agreements.

MARCOTTE:

We do manage cooperative agreements.

SHAYS:

In that case, then you are paying your salaries. But you're covering cost, but no profit.

MARCOTTE:

That's correct.

SHAYS:

And my understanding is that in theory a nonprofit could go after a contract.

MARCOTTE:

That's correct.

SHAYS:

So your concern is basically that you're pretty much focused on the grant-contract side and you don't want it to get pushed out and have grants and cooperative agreements become the development and the contracts less. That's one of the takeaways that I have. Is that correct?

MARCOTTE:

That's correct.

SHAYS:

OK.

MARCOTTE:

We all have a rule. And I think I don't want to be left . . .

SHAYS:

And the last statement is your point is not to go after nonprofits. They serve their role. You just want to make sure you're not shut out.

MARCOTTE:

That's absolutely correct.

SHAYS:

OK.

MARCOTTE:

And encourage competition also.

SHAYS:

So let me start on this side first.

Dov, you want to?

ZAKHEIM:

Thank you. Thanks very much.

Listening to you, I wonder why we're having any trouble in Afghanistan. It just doesn't square with the reality that I've seen.

So let me ask you a couple of things. First, on your page three of your testimony, you list a lot of the things you've done. You actually provide numbers which is good. It's the first time I've actually heard numbers and I give you a credit for that.

MARCOTTE:

There's more at the back, but I didn't give those to you.

ZAKHEIM:

But how many of these projects have remained intact? You know, say, in instance, you've built kilometers of irrigation, kilometers of road, have they all remained intact since you finished the projects?

MARCOTTE:

I can't answer that question exactly. I don't know. But I . . .

ZAKHEIM:

I think we know the answer is probably not.

MARCOTTE:

No, I guess where I'm coming from, I would say yes.

ZAKHEIM:

But you . . .

MARCOTTE:

I would say that the canals that are cleaned are probably serving, you know, they're probably irrigating fields right now.

ZAKHEIM:

OK, well, we have evidence to the effect that when things do not get blown up again it's because there'd been payoffs to the Taliban. Can you talk a little bit about that?

MARCOTTE:

You know, I've certainly heard that, but I would have to say . . .

ZAKHEIM:

No evidence, no experience, no knowledge, nothing.

MARCOTTE:

We have been investigated every way of a Sunday. And I spend how much of my life in Afghanistan? And I would be very confident in saying that we don't do that and that is absolutely not the way we operate.

ZAKHEIM:

And you're not aware of any subcontracts doing that?

MARCOTTE:

And I'm not aware of my—in fact, there was an IG report on, I guess, security contractors in Afghanistan and paying off the Taliban and (inaudible) International, that is our security subcontractor, was given a clean bill of health in that report.

ZAKHEIM:

OK.

MARCOTTE:

And I think this is the unit that we set up, the time, and the money, and the effort that we spend making sure that we're not doing that is almost as much as the time we spend developing the development results that we're there to do.

So I think that one of the things that I've learned over my time working in Afghanistan is how careful we have to be and, in terms of how we hire people, how we watch what we're doing, how we report.

And so I feel that I have a lot of confidence that we are doing absolutely everything we can to make sure that doesn't happen.

ZAKHEIM:

So you use translators, right?

MARCOTTE:

I was thinking about that. We don't really use translators. Our local staff are actually the people that do our—we have staff that do this work.

ZAKHEIM:

And, finally, just a quick question: You got this award you said of being the top 40. Who granted that to you? The United States government?

MARCOTTE:

No, it wasn't the United States government.

ZAKHEIM:

Who was it?

MARCOTTE:

It was a group that represents our industry, the development industry.

ZAKHEIM:

And so it was your own people that granted that?

MARCOTTE:

It was, it was . . .

ZAKHEIM:

OK. Thank you.

MARCOTTE:

. . . made up of private-sector and NGO community, but it's a very broad group of people.

ZAKHEIM:

Thank you.

SHAYS:

Let me just go to (inaudible) and then I'll come to you. OK, Bob?

HENKE:

All right.

SHAYS:

Yes.

Clark?

ERVIN:

Thank you.

Thank you very much Ms. Marcotte for being here for your testimony. We want to provide an opportunity for all relevant points of view to be heard. So glad that you're here making the case for private development work.

We don't agree with every particular point of view, but we want to make sure that every relevant point of view is represented, so, again, I'm glad you're here.

Just a couple of questions, one, I was struck by one of the things you said in your statement, your oral statement that your goal is to ultimately work yourself out of the job. To me that's a rather unusual, odd thing for a for-profit company to say.

And I want to ask you really what you meant by that. Are you saying that, you know, at some point, in the ideal world, through your efforts and the efforts of others for-profit and not-for-profit, through competition, Afghanistan would be at a such a state that we really wouldn't need for the development and then you just move on to the next country there, whatever they are, 200 countries in the world so you can go on to the other 199 and make a profit. But what did you mean by that?

MARCOTTE:

What I meant by that is that our goal is to develop the capacity of the groups that we work with so that we really don't have to stay there forever. A lot of groups, you know, tend to go in. They set up shop. They set up a permanent location in the country . . .

ERVIN:

Right.

MARCOTTE:

. . . and continue to provide grants which I find to be an unsustainable way of providing (inaudible) . . .

ERVIN:

But isn't the business model of your company and all for-profit companies in this field, the development dependent on their continuing to be the need for development work in any given country?

MARCOTTE:

I would be real happy if there was a need for development work, frankly. I mean, that would be a nice place to imagine that we could have. And just as you could imagine that there wouldn't be wars or you could imagine that (inaudible) some sort of a rhetorical question.

ERVIN:

All right, all right, fair enough. You seem to suggest, otherwise, that's why I asked you about it.

MARCOTTE:

Well, in every given project, I don't want to be working on a project for 20 years. I think our goal is to get in, make a difference, develop that capacity, and move on.

ERVIN:

To the next project?

MARCOTTE:

That's right. Another project, another country, another place.

ERVIN:

All right. Secondly, you said that you didn't have any hesitancy, and perhaps you were speaking to just for DAI, but also for the industry so you can distinguish or not, but you said you had no hesitancy in identifying the aid that you provide the development work that you do with the United States government, right? And by implication, you're suggesting that that's a distinction between for-profit development work and not-for-profit work, right?

MARCOTTE:

Sometimes. I mean, I think that some of the groups that we work with over there really don't want to be involved in dealing with some of the counterinsurgency issues, working with the military, some of the things that we've been asked to do.

And so there is a distinction. And I think we all should have the right. And certainly there, the non-profit status, the way they do their work, they are not obligated.

ERVIN:

Right.

And that leads to the next and final question that I had for you. And that is perception on the part, not of your local implementing partners, but perception on the part of the recipients, the Afghan recipients. Do they feel differently?

Do they feel more positive about receiving development efforts from an entity that's closely associated with the United States government given your long experience in Afghanistan or not?

MARCOTTE:

I don't think that they would have any preference or not. I think that, you know, that you are working with individuals and I don't think they have any idea whether they are working with a for-profit firm or I don't think that's important.

ERVIN:

And you don't find any evidence that the Taliban have managed to denigrate the efforts of development that's provided with United States government (inaudible)? You have seen nothing or read nothing to suggest that in Afghanistan?

MARCOTTE:

Well, I've certainly seen a lot of things. I mean, I think that a lot of things that we do there are denigrated across the board. So I'm not quite sure. Again, that's another rhetorical question.

ERVIN:

Thank you.

UNKNOWN:

I'm sorry. Yes .

UNKNOWN:

I thank you for your testimony. I just want to make a comment. Our previous hearing about NGOs grew out of a very valuable and impressive trip that Chairman Shays and Commissioner Zakheim took to Afghanistan in which they explored the whole (inaudible) which is a part of it. They went to PRTs. They went all over.

And I think their effort has—I know that the NGO hearing gave kind of a sense, I don't know what kind of sense it gave, but they have been in a forefront as Commissioner Ervin has been in making us remember.

I can't remember, I can't count the number of times they've said we can't just think about DoD. We have to also think about State and AID. And they translate for us the very different contracting world of AID as you have today.

So thank you.

MARCOTTE:

Great.

SHAYS:

Thank you.

Do you have any question?

Bob?

DICKSON:

Good morning.

MARCOTTE;

Good morning.

DICKSON:

It seems to me in one sense that there's always been a dialogue about the role of for-profit and not-for-profit, non-governmental organization. Is there some kind of a . . .

SHAYS:

Bob, I need to tell you you need to identify four our transcriber that this is Bob Dickson.

DICKSON:

Right.

SHAYS:

I apologize. So it's not Bob Henke.

DICKSON:

Not Bob Henke.

Is there some kind of a trend now or a greater concern now about the balance between for-profit and non-governmental organizations that prompted your presentation and your thoughts on this?

MARCOTTE:

I think that, you know, some of the testimony that was given on April 11th, which really I think is very anti the contractor community, I feel is unwarranted. And I think our community really wanted to go on the record today as saying that we have a very important and legitimate role as well.

And, you know, in our opinion, competition, the private sector, sort of the principles that this country is built on I think we can apply the development work as well.

DICKSON:

So then it would be fair to say primarily that as a result of the hearing, you're reacting to that, that you don't see a broader trend of other developments where work is now being shifted to the non-governmental sector at the expense of the for-profit companies?

MARCOTTE:

I have to say there's been a lot of rhetoric. Perhaps there's always been that rhetoric, but it seems that it's been a little bit more intense recently against the for-profit contracting community. And I think that it really is important.

And I feel very strongly as somebody who's been doing contracting for most of my career that it's very important to take a stand and to say that we have a very important role to play.

DICKSON:

At the end of all of this, it's really the United States government that has to decide how appropriately to balance for-profit and non-governmental organizations to produce optimal results.

MARCOTTE:

That's exactly right.

DICKSON:

And when we discussed this with the non-governmental organizations, it seemed clear that there's no single place for coordination. Our February report, our interim report talked, about interagency planning, greater cooperation, visibility among the agencies and that kind of thing. And yet USAID isn't the only organization that's necessarily out there, but has a prime role.

And the question is what else can be done to assure that the United States government strikes the right balance in terms of asking for-profit companies to do certain things and non-governmental organizations to do the other?

I mean, frankly, in the hearing that we had, it was kind of deferred to the government to sort that out and yet in the end we need, this commission certainly needs to make recommendations to the government about how to do it better.

Do you have any ideas or suggestions for how the government can do more in this area to assure the right balance?

MARCOTTE:

Well, one thing that comes to mind is that in the contracting front, and there's been a lot of discussion recently about rebuilding USAID, for example, because it really was an agency that I think lost a lot of important staff over the last 10, 20 years.

And in the contracting arena, in that group of people that really are the ones that decide what vehicles should be used, contract sometimes take longer to procure the competitive process. Making sure that you're picking the right group takes longer. It takes more resources.

But you end up in my opinion with a better outcome, but that takes resources on the government side. I think that they've been stretched very thin the last few years. And there has been some rebuilding. And I welcome that.

One thing that occurred to me when I was talking is that the thing from a contractor's standpoint that works the best and I have seen this in my career is when I have a strong partner on the government side. And if there's a very good person on that side and there's a very good person on that side, very good things happen.

But when that balance is off, it just doesn't work as well. And we don't get the oversight, we don't get the feedback, we don't have that perspective. And I think it's that perspective plus, you know, our extension of that that really makes things happen. So that would be my recommendation.

SHAYS:

Thank you. I'm going to just close up here and say a few things for the record. One, I have been a huge fan of NGOs. And I don't take anything you say as being that they're not doing a great job.

What I'm happy to know is that you do some more work and that you use in some cases the same models. In other words, the fact that you've been there since 1976 is huge. You're not just a company that's come in and tried to make a buck and leave.

MARCOTTE:

Even work myself out of a job though.

SHAYS:

No, but I know exactly how you mean it. And I think Clark just wanted to make sure that it was emphasized. And that is if you're doing the job that you're paid to do under the contract, you're supposed to be putting yourself out of work. That's the whole concept.

I like the idea that you hire 90 percent indigenous, but they're not like you're getting them off the street. These are people that you have vetted and these are folks—the question I have is do you sustain a model though of saying, OK, we've got, or is this a difference between a grant and a contract?

An NGO will say there are eight ways that we can help your village and we've got this sum of money and we're going to have you tell us where your priorities are. You don't do that, right, because you're more of a contract rather than a grant—or do you do that?

MARCOTTE:

No, we actually do that.

SHAYS:

OK.

MARCOTTE:

We actually . . .

SHAYS:

So you're looking for community buy-in . . .

MARCOTTE:

Absolutely.

SHAYS:

When you do a project?

MARCOTTE:

Absolutely. You can't get any results if you don't have the communities' buy-in and you don't work closely with them and develop a relationship.

SHAYS:

And the area that I think—you know, maybe it's because I've been in Congress and I've been criticized for everything under the sun, so I've become immune to criticism somewhat. But I'm struck that your organization is a little too sensitive.

My reading of the NGOs were, you know, "We're doing a great job and don't overlook what we're doing when you're spending these big dollars." So I think you are being slightly, in your organization, a little too sensitive here.

But it is interesting to me that while you really don't go after grants, NGOs don't go after contracts. And in theory, if an NGO cost less, they should be able to make out with a profit, I mean under a contract. So I have to sort out why NGOs aren't going for contracts. And I'm not going to ask you that, I'm going to ask NGOs to give us something under the record.

A grant doesn't have the same supervision, doesn't have the same requirement. It's simply not as rigorous. It allows for more flexibility. Explain to me, though, before we end, if a cooperative agreement between a grant and a contract, but you can't get a profit, why would you do a cooperative agreement?

What was the reason why you all did that?

MARCOTTE:

We're implementing a cooperative agreement now in Eastern Afghanistan and it's a follow-on to a contract that we had. And it was building on work that we had done and I think we had relationships with groups and people we've worked with for . . .

SHAYS:

So this was a commitment that you wanted to fulfill?

MARCOTTE:

We wanted to, yeah.

SHAYS:

OK.

MARCOTTE:

We didn't feel like we should just walk away on that one.

SHAYS:

Well, good for you. It's been a very excellent testimony. Well, we've just learned a lot from all the testimony. We'll go through our next participant.

MARCOTTE:

Thank you.

SHAYS:

Thank you. Thank you very much.

Mr. Gary Lazor, Nathan Associates.

LAZOR:

I'd like to thank you, chairman and commissioners, for the wonderful report. I've read with great interest your recommendations and commend you for the work that you've done.

SHAYS:

So you learned your lesson from the previous testifier that you're a quick study.

LAZOR:

I couldn't have said it better myself. Well, thank you again.

SHAYS:

So tell us about yourself and your organization quickly.

LAZOR:

Sure. I'm a principal associate with Nathan Associates, Inc. We are a private-sector economic consulting company.

SHAYS:

Like DAI?

LAZOR:

Like DAI.

SHAYS:

Yes.

LAZOR:

However, we do have a domestic component which provides economic consulting to U.S.-based customers primarily in the field of litigation. But two-thirds of our work is international in scope.

And as I mentioned, we're founded by Robert Nathan in 1946, so we've been doing consulting for quite a long time and certainly share the sentiments of putting oneself out of business. That's a very strange private-sector business model, but it's one that we definitely believe in and support as well.

My comments are a little quite different than the previous one. And I apologize from getting too far down in the weeds here, but just to add some context why I'm making the comments, talking about the barriers that contracting officers report and limitation to using the federal past-performance system.

My comments are quite specific and I . . .

SHAYS:

So, let me ask you, are you basically responding to our recommendations that we've passed on past performance and so on?

LAZOR:

Correct, correct.

SHAYS:

That would be helpful. Thank you.

LAZOR:

Recommendations 20, 21, and 22 and I find that they're very sound recommendations. However, in looking at the findings, and you can see this on page 46, the primary problems deal with Internet bandwidth constraints in remote overseas environments, talking about the contracting officers, delegating responsibility to their representatives, and the representatives have a high turnover.

And then, finally, there's the long back and forth iterative process for the past-performance reference itself. And I know that recommendation 22 talks about verification certification as a way to sort of capture and resolve these issues, but I think the devil is in the details.

The operationalization as I see it is quite difficult and does not really resolve the issue of the bandwidth constraints, nor the turnover. And so my suggestions are at least for the commission to review are three.

I was wondering if there was a way to kind of work-around for these report summaries to actually be made in a timely manner, either be it telephone, satellite phone, some way to get this information into the hands of the appropriate person where there is more bandwidth and ability to make these reports.

Also, as part of the training for these representatives who are often delegated work, is there any way to integrate them more closely into the market space and to introduce them to those firms that are implementing projects in Afghanistan and Iraq to sort of familiarize them either through an extern program or some sort of cross-training I think would be very helpful.

And another part of that I think in resolving the high turnover is what level of reporting in addition to the past-performance reports is actually kept on contractors. I don't know, I didn't read that here, but I just wondered what level of reporting, what types of activities are noted and put into an official dossier or file on an implementing partner?

So I think that would important to capture that as well and to have that record pass down from one contracting officer to another or to the representatives. I think that it would be useful to maintain some sort of active database.

In my company, we have that as well for consultant performance where we log and track the performance of consultants who work on projects for us. That enables us definitely to provide good-quality consultants when we use them, and we can document their performance and maintain that internally.

And, finally, talking about this policy of iterative process, I know it is a very long process and can take a lot of time. There's a lot of back and forth. But I do find it very important. In Nathan's experience, in some instances we haven't received past-performance reports from donor agencies and it's quite difficult to compete for business when you don't have that reference handy.

And a lot of times, it is, as you point out, either laziness or passing the buck. And I think that's a problem when performance is not documented. So I do think that needs to continue in some way and not just limited as, you know, that you've said in recommendation 20 to take out the appeal.

I think there needs to be some back and forth and that iteration is important, but maybe we can focus more on problem areas first rather than an overall report. And I think that was also one of my recommendations, is to focus on areas that needed to be fixed so that that can be then fed into the other recommendations for future procurements. And I think you capture that in aligning the past-performance assessments with contractor proposals. So I commend that.

I have nothing on with recommendation 21. So those are my statements. Quite targeted, but I know . . .

SHAYS:

No, it's wonderful that you would do that.

Does anybody want to start?

Yes, Bob? Mr. Henke?

HENKE:

Mr. Lazor, I appreciate you being here today. It's laudable, but our research indicates that the past performance really isn't supposed to be a long process. It's really supposed to be a fairly short, to get it done 30 days after the performance period ends, and get on with life and have that information available both good and bad. But the problem we're seeing is the problem that you've expressed that it's not being done and documented well enough.

People will say that they're using past-performance information even though it's not in the database. So I give them that point, there's more information out there than is in the database. But it -- it really doesn't have to be a long drawn-out thing if the contracting officer and the COR is really doing their job during performance.

If during performance you're getting notified, say, you have a two-year contract and every month or every two months, you sit down with your contracting officer and your COR and they tell you, "You're getting a C. You're getting a C. You're getting a C." At the end, and they document all of that, it should be no surprise that you're getting a C.

The trouble is when you don't communicate the government side. The government is equally at fault here. When the government doesn't communicate during the process and doesn't manage the contractor well and, all of a sudden at the end, here's a D or you get an F or you didn't perform satisfactory in these criteria.

And then what we've seen time and time and time again is when that surprise comes, the contractor is rightfully a little bit upset about it. So they then go ahead and rebut the statements, which then kicks off a lengthy downstream, six, nine, 18 months.

We've seen and we've pulled up in the database instances where the past performance is documented 18, 24, 30 months after the contract ends. And that's longer than the contract itself. So why do you have a contract for a year of performance that you document two years after it ends?

Yeah, there's no point in doing that because the point isn't just documenting how Mr. Lazor did in his contract. The point is making that information available to the next guy, the next contracting officer who wants to work with you to know what kind of entity you are.

And my last comment is, if I understand it right, we evaluate performance on a contract basis, contract-by-contract, task-by-task as we go along. What we don't do now is we don't say, "Your company is a silver-level competitor. Your company is, you know, three out of four stars."

I could go online at hotels.com and pretty quickly tell you how any one entity in Sheraton or Radisson does. But what we don't do is we don't say, "Based on the track record of performance, this company is a level four or a level five company." We tend to identify the individual contracts and tasks.

And maybe there's some idea there to evaluating the fitness of the company to work with. Any general responses to that?

LAZOR:

Yes, thank you for that comment.

I would say on the first comment about getting the Cs and getting the Cs and getting the Cs, if I was implementing a contract, I would not want to be getting Cs. Maybe a project started off on the wrong foot. Some extraneous circumstances caused a delay in start up, let's say, I've witnessed in some post-conflict countries, all the time.

But it isn't (inaudible) process of just because of performance management or organizational change management, of constant feedback, you know, feedback, a little bit of buy-in, and being able to know your performance at any given time.

As an implementing partner, for instance, with the USAID, we have that relationship. Our chiefs (inaudible), our component leaders in the field are supposed to develop that relationship with our contracting officer. So the feedback, there's no surprises at the end that they get a D.

So perhaps having that process more formalized would be important. And then the training part, I wouldn't like to have our performance evaluated non-formally. There's a lot of information out there.

HENKE:

Yes.

LAZOR:

But I would really like to have an official record that is standard apples to apples, oranges to oranges, comparisons of performance and task required because then the organization knows how well we're doing in the field.

HENKE:

Exactly right.

LAZOR:

That's . . .

HENKE:

Right. I'm reacting to that because I think you're exactly spot on. What we've seen time and time again is people say, "Well, I don't put it in the database, but we do it. Trust me. We do it."

And what that means is it's, to your words, exactly, it's informal. This CEO calls up. I know that they did a contract in (inaudible). They did contracts here and there. And they call up and they get the informal ad hoc which is, "Oh, they were great to deal with," or, "They were, you know they're difficult to deal with."

And there's nothing you can do about that, so there's no rebutting that, which is toxic I think to the process. So we want it all to be documented, fair, transparent. And at the end of the day, I don't want you getting a D. I don't want the contract should have to give you a D.

I want you to provide success and value for the money we spend and get an A. That's the point (inaudible) so I agree. Thank you for being here.

SHAYS:

Mr. Tiefer.

TIEFER:

Thanks, (inaudible). Mr. Lazor, I very much appreciate your testimony. I am always glad when the witness likes one of our recommendations. And I heard that you liked our recommendation 21 which is about aligning past performance assessments with contractor proposals and I am interested in how you've seen that in practice.

Let me just say the purpose of that—I mean, you're probably well-familiar with it but just so we're on the same page—currently under best-value procurement, there can be 30 percent of the points for past performance. But that doesn't mean past performance as we've been talking about up until now. It's not past performance as recorded in the past performance write-ups. And I am half saying this and half inviting you to tell me if I'm in touch with the experience. The contractor comes in and says, "Here's my resume. I did this. I did this. I did this. I did this," and would say that even if there were no write-ups at all. I'll stop there. Did you experience somewhat like what I am talking about?

LAZOR:

Yes. Unfortunately, a lot of that information is relayed at the competition stage. So if you have a poorly written request for proposals for a contract, then, it is very difficult as an implementing partner, potential implementing partner to prepare a well-written proposal because there may be vagaries within the language, indefinites that you can't really account for in your strategy; simple things like \$20-million contracts are being bid off a 15-page proposal. It's difficult to put what

you can do in your past performance and to successfully demonstrate to the donor agency that you can actually do what you say you can do in the circumstances and in the time period and for the money that is being allocated.

So, I think that better proposals often yield better, actually, better requests for proposals and scopes of work yield better proposals. And it makes it easier for the procurement agencies to make their procurement decisions. And the past performance is evaluated fairly across the competition in the partners that are going for that.

So, I think it's important to have, definitely, competition. But to be able to have a level of playing field for that competition to take place, and past performance is vital. And so, a standard report or standard accounting, as what was mentioned here about actually tracking, not just the past delivery, but the overall ranking of the firm and their delivery of results over time, how well that's documented, formally.

TIEFER:

Yes. Thank you very much for coming here, all of the people who have testified and spent time working on the testimony, or I guess it's not testimony but on your appearances.

You triggered a question in my mind. I think you're absolutely right. I agree with you. Lousy RFPs make for lousy performance, but there is competition.

And so, if there is competition and the RFP is poorly worded, a company that loses has the opportunity to protest. And very often, when the RFP is poorly worded, the protest is upheld by GAO.

So, could you talk a little bit about why companies, maybe yours, don't protest more often? Because we know particularly with respect to Afghanistan and Iraq, the RFPs have been poorly written.

LAZOR:

That's a good question. And I think the comments that I would respond with, me or my experience for 10 years with Nathan and working across the globe on a number of programs. You don't protest primarily because you're always competing for new opportunities.

And so, at least, in the case of USAID mission personnel, whether it's an economic growth area that I work in, moving around every year, every two years. And especially with the rotations in and out of Afghanistan or Iraq, they're moving around quite quickly and you don't want to put yourself in a position to bid for work in a country that you'd really like to work in. You have great contacts, great ability to implement change and reform and then have, "There is that economic growth officer whom I made their life miserable because I protested." It's just common sense. And I think that this . . .

TIEFER:

So what you're really saying is that the system discourages protest because you're scared you'll lose business somewhere else.

LAZOR:

That's one point. The second point is that it will definitely impact and delay how long the process will take. We mentioned quick turnaround on these evaluations. Well, with the proposal cycle, you want the work to be done quickly especially on agricultural projects. If you don't get on the ground quickly enough, you can impact or miss an entire planting season. And so, you're not going to have as much impact on the ground if it takes a long time. If you protest, that extends this time. The less time the beneficiaries are working with the assistance that are supposed to be provided and the mission is accountable, because they're supposed to be implementing programs.

So, that's another reason that protests are pretty difficult to engage in if you really want to continue the good work that you're under (inaudible).

TIEFER:

So, the bottom line is if you really want to have competition in contracting, it's not the back end and the protest end that really matters but the front end and the RFP end, correct?

LAZOR:

I definitely support that.

TIEFER:

Thank you.

SHAYS:

Mr. Dickson.

DICKSON:

Just to pick up on that last line of thinking particularly with regards to the professional acquisition workforce. You indicated in the opening of your remarks that basically these may be detailed or, you know, almost in the weeds kind of observation. But what they really are manifestations of root cause problems that exist with regard to clearly delineated roles and responsibilities; adequate database systems that are lined up to meet mission requirements and sufficient number of well-trained acquisition professionals to do what they're supposed to do. I want to take Dr. Zakheim's comments and then that last comment about the professional acquisition workforce and ask the same question in terms of adequate numbers, timely responses. Are people available to answer your questions when you need the information you need in order

to bid, deliver, perform in theater? And how does that impact you and your ability to do your job?

LAZOR:

Good questions and good points. Thank you. It's very difficult without the quality personnel. I mean, in the consulting industry, the number one resource is personnel. At Nathan Associates, we use consultants as we need them because we cannot have all of the expertise we would like to have in-house. But we do use a lot of in-house experts as well. So, we're fortunate in that respect.

But the consulting pool is relatively small. And the expertise levels of some individuals have to be validated, verified and we go through a process in all of our recruitment, of salary verification, validating higher education degrees, all of that in order to be accurate in what we are representing to the government, for audit purposes. And that process takes time. It's part of the due diligence that we do in our back offices here in Arlington. And it's important for us to get quality people. But it's a very small pool.

And in some specific areas, if you're not procuring, if you're procuring just general labor, if you're looking at someone who is an aquaculture specialist with experience in fisheries in Sri Lanka, there might be three people you can call in the world that might have that expertise, and then, hope that one of them is liked by the client. And then, they'll get approved. And then, you got to fly in there and negotiate their salary and all of that.

So, in Afghanistan and Iraq, it's much more difficult. The environment is much more difficult to find the quality people that you need. So, any sort of validation exercise and requirements that are standard that can be validated and somehow known.

And I know we talked before about how do you measure performance of successful legal work as a policeman, let's say, or a policewoman. You have to have the standards in place. You have to utilize the best possible way you can to validate those certifications and our requirements. And, sometimes, you can't measure them. It's very difficult. But you have to try. I think you do have to quantify that, in some respect.

DICKSON:

Just as a brief follow-up. In terms of adequate numbers of government people to talk to, to basically ask questions of, to get out on site, to validate payment, those kinds of things. I hear you said that the lack of those professionals in theater inhibit your ability to deliver on time.

LAZOR:

In some ways, it does. I think, in the reporting area that I talked about earlier. You know, we have requirements for reporting as well. We have to report. We have to submit those reports. We have good solid technical people that say to me as a project director back in headquarters, "Would want me to do the work or would you want me to write about it?" And so, I say, "Well,

you got to be both. You know, I want you to do the work in the field but you have to satisfy these requirements." I would expect that on the part of the founder agency as well.

DICKSON:

Thank you.

SHAYS:

Thank you, Mr. Lazor. We appreciate your testimony as well. I know that Stan Soloway has left. Is there anyone who is going to be testifying for PSC? OK. You know, I'd love it if you asked Larry Halloran to join you. Larry used to write my statements when I was on the government oversight committee. And once in a while, he'd put in some really hard words that he knew I couldn't pronounce and I'd love to find a way to get back at him. Larry, do you want to join him? Come on up here.

So, you're representing—if you'd both state your names.

CHVOTKIN:

I am Alan Chvotkin. I am the Executive Vice President and Counsel for the Professional Services Council.

SHAYS:

OK.

HALLORAN:

Lawrence Halloran, also with PSC.

SHAYS:

OK.

CHVOTKIN:

And, Mr. Shays, members of the commission, thank you very much for the invitation, the opportunity to be with you today. I am Alan Chvotkin, Executive Vice President and Counsel for the Professional Services Council. PSC is a national trade association. We represent over 330 companies, all of whom sell professional and technical services to the federal government. We appreciate the opportunity to be here today to share our views on some of the significant accomplishments of the forefront of development firms working under competitively worded contracts.

SHAYS:

So, your focus today isn't on all your membership issues but it's mostly on the development contracts?

CHVOTKIN:

That's correct.

SHAYS:

OK.

CHVOTKIN:

We'll address that from their work as well as touch on the recommendations of the commission that address those issues.

SHAYS:

Correct.

CHVOTKIN:

For starters, I want to address the role of the development firms working for DoD, State and U.S.AID.

As we said in the letter to the commission after the April 11th hearing, our member companies routinely partner with the federal agencies and non-profit organizations to implement effective sustainable U.S. funded aid projects. Both the for-profit as well as the non-profit development organizations are active in all major facets of international assistance.

Federal-agency selection of the most appropriate funding vehicle is spelled out clearly in law and policy. Federal-agency selection of the most appropriate implementing partner to achieve U.S. development goals largely must be driven by considerations such as experience, technical expertise and an understanding of the local environment rather than any a priori determination of the one business model better suited than another to successful completion of certain types of development projects.

Development companies, you've heard about the work they've done. Two of our member companies just testified about their specific activities and that's very emblematic of the work of our companies have been doing. In short, the basic attributes of successful principle development described at the April 11th hearing are not unique to NGO practice but are built into project design and execution by the for-profit implementers as well.

The development firms understand and undertake locally driven sustainable, accountable, and impartial interventions every day in some of the most dangerous places on Earth.

And so, relevant to the commission's mission about accountability and transparency, we recognize the importance of both of those. And, as you began to point out, recognize some of the differences between contracts, grants, and other forms of financial transactions that govern many of these activities and it's important that those be highlighted because they do provide a different foundation for work as well as different results at the end.

At a broad context, the real issue facing the contractors is not the role of or the myths about over-reliance on contractors; rather this developing sufficient organic capacity to oversee and manage its contingency operations by the federal government. Thus, on some levels, the very title of your report may be a bit misleading.

It seems highly unlikely that the government could or even should develop an organic workforce to do the bulk of the tasks currently performed by contractors, that we can ask the question of what are the alternatives available there as well.

Doing so, as evidenced by numerous analyses from the Congressional Budget Office, GAO and others, indicate that it would be prohibitively expensive for the vast. . .

SHAYS:

Let me just make sure that really now what you're addressing is not the development issue. You're addressing the organic issue of whether we should have contractors versus in-house government folks. Correct?

CHVOTKIN:

That's correct. But it is in the context of development, because . . .

SHAYS:

You can be here of any reason. I just want to make sure.

CHVOTKIN:

Yes, sir. You are correct.

SHAYS:

OK.

CHVOTKIN:

So as I was saying though, the vast majority of the work performed by contractors in a contingent or post-conflict environment is work that fluctuates constantly in both scope and pace—and that is precisely the kind of work that obviously leads itself to temporary, not permanent capabilities.

Let me address briefly some of the security issues that have come up in the discussion around the role of contractors. Regarding security companies, that often at great risk when implementing U.S. policy initiatives abroad and some as Professor Schooner has pointed out that . . .

SHAYS:

Let me have you slow down just a little bit I don't want you to kind of rush through this. You've got time.

CHVOTKIN:

Professor Schooner said many companies have suffered the tragic loss of (inaudible) employees including U.S. citizens, host-country residents and third-country nationals. Development projects and much of the development works in such areas must take place outside the wire of secured compounds.

Given these hard realities, we do not agree with the commission's assertions that federal agencies and their implementing partners rely excessively on private security companies.

In fact, legislation enacted in the last couple of years, coupled with DoD, State, and U.S.AID policies and contract clauses relating to the roles and responsibilities of contractors have imposed significant controls on the use of private security directly supporting U.S. government activities and that's used by contractors.

Let me turn briefly to some of the key recommendations in the commission's interim report, the February report, we concur with the general premise of the interim report, that contingency contracting should be considered a critical function for DoD. We intentionally avoid using the term "core" to avoid any implications that these functions are to be performed by military or exclusively by federal employees.

As such to the extent of the interim report highlights the importance of the Defense Department maintaining a well-trained forward deployed workforce focused on contingencies contracting, we support it.

Further, we share your view that contingency missions must also specifically include planning for and with the contractors who will be supporting the military, diplomatic, or development requirements.

As the Special Inspector General for Iraq Reconstruction, among others detailed, in several lessons-learned reports and in his testimony before this commission, the combination of enhanced resources and workforce training with dramatically improved planning and coordination are key to improving performance.

Three of the commission's recommendations address the use of past-performance information. There was already extensive discussion about those recommendations this morning. PSC has long supported the government appropriately using relevant past-performance information in future source-selection decisions and strongly supports ensuring that this information be shared only within government offices with need to access the information.

However, we oppose the commission's recommendation number 20 that would preclude a contractor from appealing an adverse agency-performance assessment. These contractor scorecards must be accurate and not merely reflect the contracting officers' perspective.

While we believe there are very limited number of appeals of adverse agency-performance assessments, protecting this element of fundamental due process is essential to ensuring that both the government and the contractor have confidence that fair treatment is provided throughout the acquisition process.

With respect to the enforcement, overall, we are concerned that the report reflects the assumption that additional punitive authorities and processes are necessary. We strongly disagree.

With regard to the recommendation on suspension and debarment, we are concerned about the underlying implication that suspension and debarment procedures are inadequate and that suspension and debarment should be virtually automatic in a broad array of circumstances.

As we pointed out in our letter to the commission two months ago, suspension and debarment are as much if not more about how a company or grantee responds to problems as it is to whether a problem, even a significant one, has actually occurred particularly in volatile contingency environments, deviations from normal processes are almost inevitable.

Also, with regard to enforcement mechanisms, we have supported appropriately targeted legislation to expand the scope of coverage of the military extraterritorial jurisdiction act that covers civilian-agency contractors operating overseas in contingency operations.

However, we don't share the commission's premise that the U.S. government's limited jurisdiction over criminal behavior and limited access to records have contributed to an environment where contractors misbehave with limited accountability. In fact, while there may be shortcomings in the realm of criminal jurisdiction, there are a large range of administrative remedies that can and often are implemented.

And finally, recommendation 31 addresses strengthening the role for civilian agencies to withhold contract payments for inadequate business systems. We do not believe there is a gap in authority for civilian agencies to withhold contract payments as evidenced in numerous cases in Iraq and Afghanistan.

Nevertheless, PSC has worked extensively with the Defense Department including the Defense Contract Audit Agency and Defense Contract Management Agency on the development of appropriately structured business-systems rule that spells out the key attributes and that addresses appropriate administrative actions and remedies. We expect that this new rule may be finalized in the next couple of weeks.

Again, thank you for the opportunity and the previous opportunities PSC and our member companies have had to engage in substantive discussions with the commission and your staff. We look forward to future opportunities to continue that dialogue as the commission completes its work. I look forward to answering any questions you might have.

SHAYS:

Thank you. Let me just ask, do we have anyone from the National Association of Government Contractors? I think they submitted a written statement? But is there a place here? I see. OK.

Then, I just want to ask, Mr. Brooks. Where are you, Mr. Brooks? I'm inclined to have you give your statement as well and then to have all three of you respond to our questions.

So if you just, yeah, add another chair, if you don't mind. And if I could just have you tell me—I make an assumption that PSC and ISOA are pretty much in the same lane, not necessary that you agree, but is that accurate?

BROOKS:

Roughly, yes.

SHAYS:

OK. What we're going to do is we're just going to have you make your statement, if you don't mind and then, this way, we can have, I think, a very interesting conversation with three brilliant, intelligent people about the report and have a nice dialogue. In that way and we won't duplicate it, OK?

So why don't you make your statement, Mr. Brooks.

BROOKS:

Great idea. Let me just say, following Chvotkin in testimony is like following Babe Ruth in baseball.

Chairman Shays, members of the commission, thank you for the opportunity to testify here on behalf of the International Stability Operations Association, ISOA. We are an association of over 50 companies that work in conflict, post-conflict environments.

I think the primary difference is we really focus on companies that work in stability operations and we are an international association so many of our members are not U.S. members, but other companies that work in these operations. Also, our companies do not necessarily work for the U.S. government although most of them do at some level.

Just a few topics that we wanted to touch based on in the more general sense and in conceptual sense. In terms of contingency contracting, I think, one thing that we've always emphasized is

the contingency contracting, by its very nature, requires greater flexibility and an understanding of the infinitely higher number of variables involved compared to domestic contracting.

Things change rapidly in the field. Experienced companies in this industry have recognized that there are many, many potential pitfalls not in the scope of work, from custom delays to transportation breakdowns to rapid changes in risk levels, and many others. And any sort of recommendation from the commission, I think, needs to take into account that this is a very, very different sort of situation.

The importance of contract officers is critical. They are the primary partners that our companies, excuse me, work with in the field. In Afghanistan and Iraq, I think, these particular instances which it is all based on are quite frankly out there simply because of the size of the U.S. involvement. There's never been anything quite like this.

The government representatives most responsible for ensuring the success of contract in these missions are the contract officers. But even the best among them, we're overwhelmed by the scale of missions and work requirements, since Steve Schooner has covered, I think, quite extensively the shortcomings we had in terms of numbers of contract officers and contract-oversight capabilities at the beginning of the Iraq conflict. And that strain also trickled down to the companies trying to carry out the contracts as well.

Much of the corrective action highlighted in the reports by the GAO, the inspector generals and so on, and this commission, especially, have—we've already seen some results in the field in terms of how the contractors are able to work with the U.S. government and modify these contracts as necessary and appropriately for these environments.

As I say, contract officers in this field are critical to success far more than in benign environments. On issue of waste, fraud, and abuse, when addressing the issues of waste, fraud, and abuse, it should be noted that the largest problem by far in contingency operations continues to be the waste issue.

And waste includes poor coordination between governments supporting the operation, between the government departments and between governments and the many non-governmental organizations that are fiercely independent, but also work in the same environment.

Inadequate planning is often the result of well-intentioned government officers being overwhelmed by the scale of the task they face when rebuilding or developing work on societies or the urgent time constraints that preclude proper project preparation. You'll never get rid of waste but obviously, this is something that when we have proper planning ahead of time, with proper design of the mission, we can significantly minimize.

Government local politics can also impact on missions in unexpected ways including through unhelpful political decisions that undermine long-term projects or, as we've seen more recently, exorbitant and arbitrary tax policies on the firms that carry out the U.S. government policies.

It's not to minimize the problems of fraud and abuse which are always the issues that grab the headlines. It's simply to point out that the recommendations commission has been making in terms of improving the procurement and contract-management systems will have the largest impact by far in terms of saving taxpayer dollars and improving the chances of mission success.

On planning and coordination by their very nature, let's say, although there have been numerous problems with coordination and stability operations, contractors have limited control over how such coordination is managed. This again highlights the need for a close partnership between private firms and contract officers who are able to modify contracts that are found to be unnecessary or need to be modified to fit into the larger picture.

It also highlights the value of a more interactive partnership with the private sector that allows information from the field related to efficiency and good project management to filter up to the mission leadership. My own experience in Sierra Leone where we had contractors supporting a UN operation there, we had an excellent partnership between the contract officers in the U.S. government and the companies in the field. The result that, I think, had been very successful support for that mission on a much smaller case of course.

The commission's second special report, lowest-priced security not good enough for war zone embassies, published in October 2009 gave critical support to government procurement professionals who are keen to make wise decisions in the best interest for the mission goals and taxpayer, but are prevented from doing so by law or the threat of congressional or departmental review.

We believe that findings of that report should be expanded to include not just the private security companies but most of the contracts in conflict and post-conflict operations. One of the issues you constantly raise appropriately is the vetting issue. Vetting is required in most contracts, but the companies that do additional bedding or extra vetting incur additional cost. And when they're in the competing for contracts, they're inevitably going to be at a disadvantage because of the extra quality they put into that contract. I think with contingency contracting, we need to look beyond that.

Contracting local firms make sense from a developmental perspective and programs such as Iraqi First and Afghan First are in place to encourage the use of local contractors and subcontractors. At the same time, we've also found such local companies often face capacity challenges in terms of financial transparency and adequate oversight, something near and dear to the hearts of inspector generals, Congress, and the commission itself.

However, there's a value for allowing such contract generally being mentored by western prime contractors especially in places like Afghanistan which could level a balance between capacity building, and effective reporting, and transparency.

ISOA wants to be clear that it's incumbent upon the industry to police ourselves as much as possible. All measures the industry does however, should be seen as supplemental of the government oversight and accountability mechanisms. There's a limit to what we can do. But I still think we should be doing what we can.

Internationally, ISOA both in terms of the accountability, one thing I did want to highlight was the International Code of Conduct for Private Security Providers specifically focused on the security companies that's been in the process of U.S. governments being involved with, the British government, the Swiss government, and of course the industry. We have more than 70 private security companies that are signed on to this process to create a code of conduct—international code of conduct with some better accountability. And in fact, the accountability

process is being hammered out now as a partnership between governments, between NGOs, and also with the industry.

The appropriate use of private security, although there's been much discussion of the definition of inherently governmental and the role of the private sector in contingency operations, there's something to be said for building flexibility into that definition.

Contingency operations by their very nature, involving in the needs of the international community for stability operations and humanitarian rescue, will continue to evolve as well. Too often, we look to a remarkable, capable military to do tasks that was never intended to do and often for duties that may not be appropriate for uniformed and armed personnel.

The contingency operations, the military itself, is excellent at establishing security by going after the sources of trouble but perhaps, improperly used when doing many developmental tasks that could be better handled by civilians, by the non-governmental organizations, or private companies.

Much has made of the ratio between soldiers and contractors, but the statistic is meaningless unless the numbers are understood in the context of the mission. In reconstruction and development situations such as Bosnia, Afghanistan, and Iraq, it makes perfect sense that may be even desirable to contractors, significantly locals, should outnumber the soldiers since the contractors are the key players in developing the new state institutions and infrastructure vital for a long-term solution.

It is private security that tends to be the touchstone on the issue of inherently governmental. Security is clearly not inherently governmental as in most developed countries there are more private security guards and police. In some cases, such as the United States, several times, several times as many private security as police.

Protecting a reconstruction effort is important but should U.S. troops be protecting reconstructed sewage treatment plants, should they be protecting UN warehouses, should they be protecting hospitals, universities, and the thousands of other sites that are considered fair targets by a ruthless enemy. And should we ask ourselves whether using U.S. troops to protect convoys carrying supplies to private factories or extractive sites is the best use of our highly trained, all-voluntary military, in other words there needs to be a gray area.

Even diplomatic security must be understood in the context of diplomacy as inherently civilian. And as perceptions are important, that make sense that security should be civilian as well. Private security companies have long been the primary security in embassies around the world and their overall performance in cost effectiveness has been exemplary enough to ensure that that role is unlikely to change.

As a security situation improves in a given location, the contractor proportion can be reduced or gradually ended as we have local militaries trained up and local police. Nevertheless, while the role of private security is not likely to be settled any time soon, much can be done in the meantime to ensure the work is done professionally and ethically. And it'll be helpful that the commissioner would highlight certain points that (inaudible) in my testimony.

Finally, I just want to wish, express ISOA's gratitude for the work of the commission since its inception. We have been impressed with the overall evenhandedness and genuine enthusiasm which the commission has set out to robustly address the key issues facing wartime contracting.

While the ISOA membership may not universally agree with every recommendation of the commission, it's been a privilege to work with you on this important issue. As I said, the first time I testified, the humanitarian value of contingency contracting is enormous and the better we do these tasks, the better we harness the vast capabilities of the private sector, the better for the militaries, the taxpayers, and most importantly, the civilians caught in the areas of conflict.

Although we tend to forget the historical legacy of contingency contracting, we need to do better in the future or we'll suffer many of the same frustrating problems that we are suffering today. Thank you.

SHAYS:

You know, I like your last statement so well that I just think we shouldn't have any questions.

Let's do this. You all have jumped in—not a criticism. And you all you have jumped around to talk about a lot of different recommendations. Do you all have a report if you? If you don't have a report, I'd like to do what Jesus did in the feeding of the masses. Someone could give up their book to Larry so he has a book.

And I'd like you to turn to page two and three. What I thought we could do is we could take each section. We have five sections. And I'd like us as commissioners, if we could focus on each section if that's all right so you will be coming back and forth.

So the first section is new and expanded, often time-critical missions combined with civilian, and military personnel have led senior officials and commanders to rely on contractors as a default option and agencies organic capacity develop a deployable contingency acquisition restrict reliance on contractors for security.

So is there any question any of our folks have of these gentlemen on the first section.

UNKNOWN:

Yeah.

SHAYS:

Can someone else give up the book here. We do you want to jump in right now? Yeah.

TIEFER:

Sure. Mr. Brooks . . .

SHAYS:

This is Mr. Tiefer.

TIEFER:

Thank you. On security, there's something we are considering further now. I don't speak for the commission, just my proposal for consideration and there was a nuance of your testimony that suggested you may be there with us.

And it has to do with probably the current, largest controversy in private security concerns in Afghanistan, convoy security for government supply convoys where in the Warlord Inc.'s report and in many, many other sources it said that some of the money, a substantial part of the money that's paid to the security subcontractors for our trucking companies, our trucking contractors is diverted to the insurgency.

And I was looking and I was struck that your testimony doesn't fight against proposals for dealing with that particular problem. I'm going to go back. Let me just note what I thought carefully, you don't fight on that point. And you read this aloud.

You talk about the need to protect sewage plants, that's static. You talk about the need to protect warehouses, that's static. You talk about the need to protect hospitals, universities, and other sites, that's static. That's not where the problem is. There's no allegation that there's a lot of diversion from static contractors, static-security subcontractors.

And then you said protect convoys carrying supplies to private factories or extractive sites. Again, that's not the U.S. subcontractors that are at the heart in this controversy. So it sounded to me like you could see that we have a problem in this area which is so extraordinary. It's not merely the problem of waste. This is not a dollar that's goes to the Taliban is not just the dollar wasted. It's the dollar that goes to arm the enemy—that goes to spending on the shopping list for the RPGs and other weapons against our troops.

Are you more supportive than of the categories you listed? Are you more supportive of efforts to deal with this problem, convoy security?

BROOKS:

It's a great question and one that's obviously had been raised. I would push back a little bit. Essentially, the definition of private security is protecting a noun, a person, place, or thing and that could be mobile or it could be static. I think that's less of an issue.

I think what it gets to, the whole problem we've had in terms of the kinds of companies doing security for the convoys, gets back to your issue of quality. If the government is constantly looking for the cheapest contractors to do that kind of security, you're going to have problems whether it's static or mobile. You're still going to have problems.

I think in that particular case, we've had lots of problems where the lowest bidders have not done what we wanted, have not done it in the way we've wanted it to be done. I would also say—in fact, I had a discussion with a counsel from the ICRC on exactly this issue of protecting, say, humanitarian convoys.

In fact, there's nothing inherently governmental or nothing in term of laws of war wrong with protecting a humanitarian convoy, because it is not a legitimate target. So if you're being attacked, it's either you're being attacked either by bandits or by somebody who's violating the rules of well, war.

So it seems perfectly acceptable. And I think, again, if we take this beyond the context of Afghanistan and Iraq and we start looking at Somalia or, who knows, Libya in the future, we may need to protect humanitarian convoys. And it may make sense that you do it with private security. And I think they can do that perfectly well.

I think we put down some guidelines in there as to what you want to look for in terms of the companies that will do that kind of work. But I would absolutely say that protecting convoys is legitimate. And I think we just really have to be careful who we hire to do it. And, again, I have some guidelines in there exactly how to do that.

But, yeah, I mean, it's a touchy question. I will also say one other thing, too. I think some of those payments that have been paid from what we've seen—and again, these are Afghan companies that are doing that mostly—are actually to the warlords who may have worked for the Taliban at one time, but now, they're working for the government because that's who's in charge in that sort the nature of working in Afghanistan which, again, sort of goes back to that issue, if we need to have a gray area, some flexibility when you draw a really hard line.

TIEFER:

I'm going to open responses to the question I asked to the others at the table.

UNKNOWN:

Thank you, Mr. Tiefer.

When we built on that, we didn't focus in our statement on that. But with respect to this area of convoy security, I think rather than focusing on the what, whether you are watching people, or places, static, or convoy, it's more appropriate to focus on the mission needs to be protected and the resources available to do that. And those are government decisions.

And so, if the government decides that it needs to protect convoy security providing fuel, then they ought to make that decision to apply the resources that it has available. That may be uniformed military to that protection. Well, that doesn't mean that every convoy needs to be done by the uniform military.

And the concern we have is that the presumption by prior testimony before this commission, even in the commission statement itself, is that carving out this whole class of work to say

always here, never here. And we just think that that misses the mark. It ought to be a focus on mission and then looking at the resources available. And those are government decisions. They're not contractor decisions.

SHAYS:

No. And this is just on that issue. So let's just deal with the security if we can. We'll go back and forth.

HENKE:

Mr. Brooks, your statement—first of all, we just received that this morning. So it's unfortunate that was not available for our review prior to 9:30. But was that an accident or was that intentional?

BROOKS:

That was very much of an accident. I'm at fault there. I blame the vagaries of computer meltdowns and . . .

HENKE:

You made a statement here in your written testimony, quote, "Lowest-price competitions are fertile breeding grounds for the very kinds of companies that we should not want assisting with our foreign policy goals," unquote.

And then, further, you say, "As it has been highlighted earlier, quality matters. Security is far too important to be awarded simply to the lowest bidder," unquote.

OK. We highlighted in our report that there's a part of the law that says State must hire low-priced, low-bid security for its embassies, all 250 places. Has Congress changed that?

BROOKS:

I believe there are some modifications.

UNKNOWN:

They have not. To my knowledge, they have not modified that statutory change. And we have endorsed that recommendation the commissioner made to change that.

HENKE:

Yeah. Yeah. They didn't change the part of code that requires it. They gave State special authority in the Appropriations Act 9 or 10. I forget which, to do good things with it. And state went off and did good things with it.

In Iraq and in Afghanistan, they, kind of, contract for static security that allows them to consider price in the mix. So they're not bound by the dumb idea that just price matters when you're hiring security.

I want to ask you: OK, so your basic assertion is that cost shouldn't be a factor. It shouldn't be the dominant factor, certainly. But it shouldn't be a major factor, right?

BROOKS:

It can be a major factor. You know, to have competitive. I think we just need to give the government the right to basically say this is, you know, going to be a better contract.

HENKE:

Right. So, your statement then though is internally inconsistent, I believe, in that it says further, "For foreign militaries to provide security is highly expensive and resource intensive. One estimate in Afghanistan being \$1 million per soldier per year protecting . . ." OK, dah, dah, dah, dah, dah: "should U.S. troops be protecting sewage treatment plants."

OK. So, which one is it, Mr. Brooks? Well, you're saying that low-price security shouldn't be a major factor, then you're saying the high cost of government forces, so . . .

BROOKS:

You don't need James Bond to guard the gate. You need somebody who's professional, and disciplined and following the rules.

HENKE:

Right, right.

BROOKS:

So essentially, if you're putting the other contract to guard a sewage plant, all right, probably you're going to use local guards. You need to make sure that they're trained and professional and they (inaudible) onto the guidelines and so on. But, you know, I mean, cost is always going to be an issue. I'm not saying that we should absolutely go with the Special Forces to do everything.

I think most of what can be done can be done by professional guards. But, you know, a report that you brought out that basically said just simply going for the cheapest guards is not the way to go. It's absolutely correct.

HENKE:

Right. So my observation is, here, in this building, once again, on the Capital grounds, there's U.S. Capitol police. By my reckoning, they're all government employees just like me and just like a number of people in the room, OK?

If the Capitol could hire a lot-cheaper security and save a hundred million bucks of taxpayer money, why don't they do it?

BROOKS:

You know, it's a governmental decision. And if you go to a military base, it will be guarded by private companies. I mean, it really . . .

HENKE:

Well, actually, not according to Congress.

BROOKS:

OK.

HENKE:

There's a part of code that says that military bases must be secured by military guys.

BROOKS:

Well, if you go (inaudible), I think . . .

HENKE:

There's a part of (inaudible) U.S. code that says the bases must be guarded by government people, whether military government people or civilian government people.

BROOKS:

I think to some degree, it's said, for who's running the contract and who's managing it. I mean, if the military says, "OK. We have these guys." In most cases, the former military people that can do the job just as well and cost us a fraction of that amount, and the military is able to put its resources where it needs them better.

So I think maybe . . .

HENKE:

All right. I take your point that at the average place, at the average government facility, it's OK to have private security contractors. It's perfectly fine in 95 percent of the cases perhaps.

But in some places, they're so important, that you want absolute government control and government performance. And I would take the issue with your statement—or maybe I'll just grant you the fact that security, you say this, security is clearly not inherently governmental. I don't know if I agree with that or not, but let me just grant you the point for the sake of this discussion here.

I would contend that in 250 other places in the world, guarding the embassy is OK with local guard forces. In fact, you want locals guarding the local embassy whether you're in Poland, or Tunisia, or wherever you want a local guard force. And it's cheaper. That's a good thing. That's an upside. That's a benefit.

But I would say, perhaps we should think about in a combat zone, in a war, guarding the piece of U.S. real estate that's called the embassy, that's not an appropriate place. In fact, I would say that's not security. I would call that military action or diplomatic action.

BROOKS:

I think it's a great point. And I would say, it kind of gets to that issue that I say building that gray zone because in which point there's a security situation become a war. So for example, Colombia, you know, you have an embassy that may get attacked by rebels. You know, is that a war or is that not a war and that's got to be a governmental decision.

HENKE:

The fact that it's a gray zone, it shouldn't mean that we should not call it something when we think of . . .

BROOKS:

I think you have to look at that. And I think you have to give the policymakers the flexibility to say, at this point, we really need to have—you know, I'm not saying you have . . .

HENKE:

On that very point, that's our default issue. And I'll end with this observation and I hope we come back to a second round.

SHAYS:

You know, we can keep going back.

HENKE:

That's our point though, that managers, executives in the executive branch should have flexibility, OK? But too often, they're driven by the resources, the forces that they have. Whoever made the decision in the State Department after the military decided to stop guarding the embassy in Kabul, and that was a discrete decision, at some point, by the Department of Defense.

After that point, State Department had to decide, well, is it inherently governmental or not. And the person making that decision knew that they didn't have 400 D.S. agents lying around unused, right? So they had no choice. They didn't have the people to do it. They didn't plan to be operating in a war zone for eight, or nine, or 10 years. They had no choice.

So if they made a call that it wasn't inherently governmental, boy, they were in a box, weren't they? Right, they had no forces to do it. So therefore, what I'm saying is they often back into their decision on something being bounded by reality and bounded by resources, which is the condition that applies to all of us.

So they call some things not inherently governmental, but really, in a perfect world, should not be done by contract. And that explains the whole concept with default.

SHAYS:

Mr. Ervin?

ERVIN:

I don't want to beat a dead horse, Mr. Brooks, did you want to . . .

BROOKS:

If I may . . .

SHAYS:

I'm sorry.

BROOKS:

No, that's all right. Thank you, Mr. Chairman. Just let me add, this is the difficulty when you're trying to establish policy by using a taxonomy or code words like "inherently governmental," because there's nothing wrong with the government making a decision that, for this embassy, I want U.S. government people only; I want the Marines only.

You don't have to label it. You don't have to call it "inherently governmental" or try to force a decision around a definition. You make the decision. Similarly, when you paint . . .

UNKNOWN:

Let me just ask quickly: so you're really saying what should drive it is risk?

BROOKS:

A risk assessment is clearly part of it, as are the available resources. I mean, you could have a risk and you may not have the resources to execute, so, in which case, you do a couple of things. It doesn't mean that you default, if I may, permanently.

You may have to default temporarily while you reallocate, reassign resources. But those are decisions of government and you don't have to force it into a code phrase like "inherently governmental" and try to define that.

Secondly, don't paint so broadly, because the discussion earlier by Mr. Lazor and Ms. Marcotte about the private security functions that they employed for their own people doing developmental systems under U.S. government contracts.

So there is private security in support of government activity. There's private security necessary in support of private-sector support. It may come up with a different action.

ERVIN:

Let me follow up on this. And I think you, as you were suggesting, Mr. Zakheim, you, Mr. Chvotkin, made a very important addition to this argument. I think you clarified things. But really the issue ought to be the criticality of the mission, the riskiness of it, and the resources available.

Now, with that as a predicate, I don't want to beat a dead horse, but I want to come back to your statement, Mr. Brooks, because, like Mr. Henke, I found it internally consistent. On page, well, I guess it's not paginated, but the page we're talking about, you began in the second paragraph by saying too often, we look to a remarkably capable military to do tasks it was never intended to do, and often for duties that may not be appropriate for uniformed and armed personnel.

In contingency operations, and this commission is focused on contingency operations, the military is excellent at establishing security by going after sources of trouble, and I'll add, responding to sources of trouble, but perhaps inappropriately used with regard to development. I think we'd agree with that.

And then a couple of paragraphs later, a couple of things. One, you say security is clearly not inherently governmental because we're using private security contractors in a number of cases that relate to guarding government installations, as if the very fact of using them ipso facto made it not inherently governmental, point one.

And then secondly, you said, in most developed countries we use these private security guards. We're talking about contingencies, as your preceding paragraph mentioned. And then as you know, there's considerable pressure to in-source some of these private security contractors for government installations here in the United States, as Mr. Henke pointed out.

You know, I'm the former inspector general of the Department of Homeland Security. The Federal Protective Service, which largely relies on contractors to protect most government buildings other than the Capitol here. There's considerable pressure now on FPS to in-source a lot of that for precisely this reason.

But the main thing is, I was struck by the various examples you placed here. Not one of these examples—I mean, I would agree with what you say here. Who would want, given the limited resources as you point out we have, and the criticality of the mission, who would want our limited military resources protecting sewage-treatment plants?

But you said private factories or extractive sites. What about the criticality of having United States government forces protecting our troops at bases overseas, as well as convoys that supply—I don't know what you meant by humanitarian convoys, but what about convoys that supply United States troops?

Aren't those a couple of circumstances, at least in contingencies, that even by the terms of your own testimony ought to be performed by government?

BROOKS:

Well, again, I think it goes back to the gray area a bit. You asked a couple of questions, one on the in-sourcing issue, and I think Jacques Gansler has actually done some interesting research on whether in-sourcing actually saves money. And in general, it doesn't. It probably ends up costing money. Now, for . . .

ERVIN:

But we're not talking about saving money here; we're talking about the criticality of the mission. Right?

BROOKS:

Fair enough. The other point is, for contingency contracting, the whole point is expanding to take care of this operation. In other words, if you build up all your resources to handle an Afghanistan or Iraq, and then you don't have another one for another 10 or 20 years, you'll have a lot of excess resources, which is expensive for the government to maintain.

This is why it makes sense to go out and contract that sort of critical kind of services for exactly the time you need it and then you get rid of it at the end of that.

In terms of protecting bases, I think it's usually a layered kind of protection, so the outer protection you generally use local nationals, which makes sense. They speak the language, if

you're, like, talking to people coming in cars, the locals are often better at understanding who's a risk, who's not a risk, or whatever.

Then you often have a second layer, which may be the third- country nationals, which are trustworthy, because you know they're not going to be part of the insurgency.

And then you have your final layer, which is your actual military people, or the quick-reaction force or something.

So I think it just makes sense, it allows the military commander a lot more flexibility, it means that the locals are able to approach the base without being assumed to be hostile all the time, because there are locals that are protecting the base. So I don't see that's such a big deal.

SHAYS:

Thank you. Dr. Zakheim?

ZAKHEIM:

Yes, thanks very much for being here. I'm still a little hung up on the cost-effectiveness issue that I raised a little earlier. Perhaps you folks can give me a better sense of what measures of effectiveness you really use.

Because we know very well, for example, that the kinds of raw numbers that we hear about, roads built, whatever, is exactly what CPA did in 2003, 2004. They were constantly churning out with all kinds of numbers showing that Iraq was on the way to nirvana. It didn't work out that way. And so I'm a little curious as to how you guys measure effectiveness.

But in addition, I now have some questions in my mind about cost. Because you've pretty much said that you get what you pay for. And therefore, if you want better quality, pay for it.

So now, the costs are going up; the effectiveness is question mark. And yet you assert that our recommendation that we should grow the agency's organic capability is somehow off-base. It seems to me, if you can't prove either side of the cost effectiveness issue, how do you know that growing the agency's organic capability is off-base?

Another part of that question, the third part, if you will, is the assertion that, well, you know, contractors will come and then they'll leave. Well, in fact, it's pretty obvious that we are going to be in contingencies for a very long time. And therefore, nobody's going anywhere. The longer you're in a contingency, the more likely it is, perhaps not the military side, but the civilian side proves to be cost-effective.

Have you done any analyses, or are you aware of any, not on the military side—we know about that—but on the civilian side, that contractors are actually more cost-effective than civilians?

BROOKS:

So the key issue of metrics, obviously I think, in terms of, for example, a better company versus a not so good company, if you're hiring local nationals, for example, they're \$400 a month or whatever it is in salary. But there's also a cost for procuring them and finding them and making sure they're properly vetted. There's an expense there.

It's still going to be infinitely cheaper than using an American, a Westerner to do the work, whether it's an engineering job or a security job; it's still far, far cheaper to use locals. What you want to do is make sure you're using the right locals. And, actually, Mr. Chatterjee talked about the whole issue of getting third-country nationals and locals properly vetted and how you do that sort of thing. I absolutely agree with him on that.

ZAKHEIM:

So who does the vetting?

BROOKS:

You would normally want the companies to do the vetting, but it's absolutely appropriate that the government checks on that and makes sure that . . .

ZAKHEIM:

So we'll have to hire government people to do the vetting and then we'll have to hire government people to vet the companies that are doing the vetting, and then you've got to hire people in the companies who are Americans to do the vetting. And you're layering on, not to mention the fee at each level.

BROOKS:

I was going to agree with you violently, but now I'm going to agree with you partially.

(LAUGHTER)

On the organic capability, what sort of capability do you need? Do you need people actually in the field that will go and do the job, and SCRS has actually kind of worked on that sort of model, or do you need people who are going to oversee the people actually doing the job and contracting?

That, I think, is entirely appropriate. We supported the design or the goals of SCRS (Office of the Coordinator) when that was set up for, to support State Department and coordinate all U.S. government contracting. It didn't end up happening that way, but I thought that was great. And I think it was about time. As you say, we've been doing these things in the past; we're going to be doing them in the future; we certainly should have a much bigger organic capacity in a different sort of meaning than we do right now.

Do we need to have people that just go in the field and do these sorts of jobs that turn the wrenches and things like that? No, I don't think so. That's something that you hire. But having that basic capacity to support those sorts of missions, because we are going to be there the next 10 years absolutely makes sense. So yes, I support a bigger organic capacity in that sense, and if that's what you mean, then we are in violent agreement.

ZAKHEIM:

Other two gentlemen, Mr. Chvotkin?

CHVOTKIN:

When we looked at this set of recommendations, we didn't see this first tranche as being limited exclusively just to private security.

And so we wholly concur that the government lacks the adequate number of contracting officers and the contract officer technical representatives, and others, and we've supported that; we've been long supporters of that. And so our focus has been on the last, on recommendation number three, which is to restrict reliance on contractors for security along the lines we've talked about.

There is not a good cost methodology for balancing, for measuring the relative cost, and Congressional Research Service and Government Accountability Office and others have tried to do that. The data is hard. And then the measurement of effectiveness is all the more challenging because we're looking at really negative outcomes, outcomes that don't have, but how many people were not harmed, how many explosions didn't take place—very, very challenging.

I'll come back again to, rather than looking at these, trying to find these perfect models, simply come back to the government decision-making, taking into account the risk, as you suggested, the resources available, and the time available to execute. Those are factors that go into smart government judgments, and unfortunately, I think that's all we have available to us.

SHAYS:

Thank you, I'd like to end this first section by telling you what we're wrestling with. First off, recommendation three is really a warning that we're dealing with this issue in our next report, security, and we're going to try to come to some kind of helpful conclusion on it.

The recommendations one and two, we think probably could have been written a little more clearly, but they are basically you want the in-house capability to oversee contractors. So we want a real strong contracting acquisition group within military-state-DoD, and we also want, basically, I call it a deployable cadre—a contingency operation for dealing with ArmorGroup North America, for instance, when we found their work unsatisfactory in securing the embassy.

But they had us by the short hairs, frankly, and we had to keep them because we couldn't bring any government organization in there to replace them. So they stayed on far longer than we

thought they should have. So we want the capability to not have contractors feel like you don't like us, but you're stuck with us. And in that case, that's the example we'd use.

With regard to the whole issue of inherently governmental, it is illegal for the government to hire people in an inherently governmental job, but it's not criminal. And so it's happening. Right now, as we speak, we are hiring people for inherently governmental jobs.

Now, what the commission is wrestling with—and I'd like all three of you to comment, and we'll start with you, Mr. Halloran, the concept of criticality of the mission, the concept of risk involved, and, obviously, the concept of resource is a factor in deciding.

The question that I am asking you is how would you react if we suggested that, rather than having State Department now, in the takeover in Afghanistan, say, well, none of their people they're hiring are . . .

(LAUGHTER)

. . . are inherently governmental, in spite of the fact they're replacing the military?

Wouldn't it better for them to say, in this case, it's not inherently governmental; in this case it is? In other words, in this case it's more appropriate for us to use the government; in this case we don't think it is, but we still have to use this contractor because we don't have the capability right now to do what some think is inherently governmental?

Do you understand the question?

HALLORAN:

I think so.

That decision-maker should describe, when you look at your mission, the risk, the resources applied against it and what the consideration is, what the mission is, what part of that is inherently governmental.

You can't draw that box too big, I don't think. How many government people do you need to maintain the government's essential interest in that function, make sure it's performed properly? They don't need to do everything, but there has to be sufficient government command-and-control in security realms.

And other sectors, other elements have to be under the government's purview and control, but the rest can be done by contractors or NGOs.

SHAYS:

OK. And let me take the second part of the question. The second part of the question is, would it be a positive where instead of having in effect government people have to—I'm not going to use the word "lie," but I don't know another word to use—misrepresent that this is not inherently

governmental because they have to hire somebody that's not a government, so they're stuck with it?

Other than that, then they have to admit they're breaking the law. So would it be better to say, OK, we're not adhering to the law, but we recognize that we have to work toward hiring the government rather than—that's the second issue.

And if you don't have the authority to respond to that . . .

BROOKS:

Well, no, I don't. I have an opinion, but it's, I mean, nobody's going to lie and say that we're going to do it anyway.

SHAYS:

Well but it's happening right now.

BROOKS:

Right, it happens, but . . .

SHAYS:

So, no, let me just . . .

I mean, I withdraw the "lie."

BROOKS:

Right.

(LAUGHTER)

SHAYS:

I think it's disingenuous for the State Department to say that all the people they're hiring to replace the military are not inherently governmental. I will go on record. That's my opinion. I think it's an outrageous statement and laughable. And I think we force the government to do it because they don't have any choice.

So that's my question.

BROOKS:

Right. I agree. I see the problem. The missions are there and there are inherently governmental aspects to them. But as Commissioner Henke pointed out, the government often backs into the solutions because there are no alternatives.

SHAYS:

Right.

HENKE:

And so—and that is, as your former writer, I would caution against the use of the word "default" in this section because a default assumes two choices and you favor one. But in this case, you don't have more than one. So you, you know, the finding might be to rely on security contractors inappropriately given the risk, mission, and resources.

But it's not a default that is, kind of, wrongfully or lazily chosen because you don't have another option.

SHAYS:

OK.

Mr.—we'll go right down the line.

If you don't have anything to add, just say you don't have anything to add.

CHVOTKIN:

I'll -- I'll pass on this one. I think Mr. Halloran got it right.

SHAYS:

OK. And Mr. Brooks? OK.

So that's section one. Now, you know, we're going to be a little bit, but the cafeteria stays open, and I think this is a pretty interesting stuff. The section -- and it may be we go through some fairly quickly.

The next section is existing agency cultures are all too often regulated contracting to an afterthought, thereby, inhibiting sound planning, resourcing and management of contractors. And we had 10 recommendations here. They're in front of you. I don't need to read them.

Do you care, any of you? Does anyone on this—and the commission want to ask questions as it relates to this area? I'm happy to have you respond to it.

BROOKS:

I want to comment on that relative to a questions Mr. (inaudible) asked earlier about the interagency culture and how this works. It is a problem. Each agency, you know, lives in what they describe as their own silo of excellence, often prescribed by statute.

And so you need to think about how to, kind of, cross some of those lines because, for example, DoD builds a road; they decide in terms of choosing the appropriate mechanism to let a contract for the road. USAID decides to build a road and they do it by cooperative agreement, different sets—we're looking at apples and oranges here in how we build roads.

And for that reason, the USAID just put up its foreign assistance dashboard where they make all spending on it transparent, but they cannot populate it with other agency data because they're talking apples and everybody else is talking oranges and pears. The data doesn't match up side by side so you can know what we spend on roads, what we spend on education, what we spend on democracy across agencies.

And that kind of translating and that kind of bridging has to happen.

SHAYS:

OK. Let me just tell you, this is a better way to do it, and we may go through them more quickly. We will give you the opportunity to comment on any of the recommendations in section two and then if the commission wants to respond to your reaction. In that way I think we'll . . . inaudible

Mr. Brooks, do you have any comments, or do either of you have any comments on recommendations four through 10?

BROOKS:

I think they're excellent comments, four through 10. And some I've less to say about, but in general I find them very positive.

SHAYS:

OK.

CHVOTKIN:

We, generally, as an association, don't take positions on how the government can best organize itself, but we've endorsed the focus of attention that these recommendations draw.

SHAYS:

And so, basically, you're pretty favorable towards this section here?

CHVOTKIN:

Yes, sir.

SHAYS:

OK. Under the next one, current interagency mechanisms and intra-agency resource allocations do not support the changing missions of agencies and contingency operations, the outcome of which is greater reliance in contracts and less folks and contractor—contract outcome.

And here we have recommendations 11 through 14, just four recommendations. Any comments here? And if this is not your lane, then we can just . . .

BROOKS:

As Mr. Chvotkin said, we generally don't comment on (inaudible), that's the government's decision except to say that, as we said in the testimony statement, that the recommendations to add further coordinating offices and add things to an already very confusing matrix of decision-making doesn't generally tend to fix the interagency, in my experience anyway, that doing what you do now better is usually as effective a solution than adding someone else.

SHAYS:

Yes, the question I think what motivated us with these recommendations is that, if we could do it better, we would do it better. One of the interesting things about bureaucracy is individual bureaucrats are talented people. Put them together in a bureaucracy and something weird happens.

And so what we're trying to do here is create a framework for the people to do their job better. And it's clear that right now they don't. And that's the command, whoever said say a command.

Anybody have any comments?

BROOKS:

I have one quick comment on the permanent office inspector general for contingency operation. I think it's a great idea, but the one thing I would bring up is that it's not layered on top of the IGs. SIGIRs, I mean, when I talk to my companies about the whole auditing issue, they're auditing all the time for multiple agencies and that, OK, fine, that's easy to do even up to five or six times, but it just gets time consuming.

And so if this is replacing some of the other idea, I think it's lovely.

SHAYS:

OK. We just have two more sections. Without affecting—and these are the finding and the recommendations—without affecting the competition and accurate assessment of contract performance doing contingency operations, money is wasted in the likelihood of fraud and abuse increases.

And we have recommendations 15 through 22. Now, you have spoken to some of these. Is there any one in particular that you want to bring up or do you want this testimony to stand?

And then in this comments were made. Do any commissioners want to respond to comments already made?

Charles, you want to do that?

I'll start with . . .

TIEFER:

Yes, I certainly do. The statement, the bottom of—let's see, did you number your pages here, Mr. Brooks? I guess you didn't, but it's your third page, the bottom paragraph there where you talk about the challenges of transparency and oversight, near and dear to the hearts of the inspector generals, congressmen, and CWC itself.

And you've said, in effect, look, there's going to be waste. You actually have that phrase, "Why is this inevitable?" And, therefore, you know, what can we do? It's kind of like throwing your hands up in the air.

My concern is this. If you don't spend the additional money to oversee and get the better people, which is something I talked about earlier, it's not just the matter that the performance will be worse. It's that you will, as Commissioner (inaudible) said, we'd be paying the Taliban.

And so what you have you here—and then it becomes (inaudible). You pay the Taliban. They're more effective. They cause more problems. You pay the Taliban more and it keeps going on.

That's a great business for the Taliban. I mean, I think they want us to go on forever. And, oh, by the way, the mention that somehow there's a difference between warlords and the Taliban.

When Co-chairman Shays and I were in Afghanistan, I was handed a copy of the bill. And it wasn't from a warlord. It was from the Taliban. It was called the Islamic Republic of East Afghanistan. And I guess they kind of think that's what they've got.

So it seems to me that we're being a little bit facile about waste there, that in fact more money is spent along the lines of the recommendations that we made earlier.

It's not just a matter that you'd compare it to the cost-effectiveness of contractors. It's a matter that you will have less of a likelihood that you are funding the wrong people. And that is a lot of waste, not to mention lives.

I don't know whether you . . .

HALLORAN:

I basically agree. I mean, my point is like, OK, in the United States in a benign environment, we have waste all the time. It's even more difficult to avoid that in a contingency operation because, quite frankly, you just don't have the capacities you do here. You don't have the oversight. You never will.

And what you have to do is work with that model, understanding that there's going to be those problems and heading them off. And what you're talking about, again, going back to your accounting capabilities, it sounds like exactly the right solution.

SHAYS:

Mr. Tiefer?

TIEFER:

Thank you.

Mr. Chvotkin, as I've said, I really like it when we get the support for any our recommendations. And I had to take my way through your statement to pick up the trail, but I did.

CHVOTKIN:

Larry probably wrote the statement.

(LAUGHTER)

TIEFER:

Well, I hope you'll explain it how to do it even more favorably in the future.

(LAUGHTER)

Although there's an aspect of this one that you didn't agree with, I see, I'm quoting from your testimony about Recommendation 16. We support the portion of Recommendation 16 that calls on agency competition advocates or others to determine the feasibility of—and then this is the specific—breaking out major subcontract requirements from omnibus-support contracts.

And that's the title of that recommendation for people who—this sounds sort of vague, too. It's the classic why if you cost, if the LOGCAP prime contractor, KBR, has a subcontractor, a big subcontractor which is providing the dining facilities, why not break out that subcontract and compete it as its own prime?

And it's not hypothetical. I was on a base in Iraq and I asked about it. And the same dining hall, the same company, the same Kuwaiti company that's a dining hall (inaudible) subcontractor in other facilities had been made a prime contractor that had competed that requirement out for that base because it's a fairly easy thing.

It doesn't require a whole lot of integration. It doesn't require a big, sophisticated contract. You don't need it. That's why they were doing (inaudible).

Anyway, am I right that if we put aside the issue of how the contract should be structured, whether it should be fixed price or not, that you, it sounds, am I right that you said that you were in favor, you support the portion that calls for breaking out major subcontract requirements from omnibus support contract? You're in favor of that?

CHVOTKIN:

Yes, sir. There's a timing question, but the fundamental premise of looking at the performance work and deciding that after a day, a week, a month, or six months, that the nature of the work is stable. We understand its requirements. There's no reason to simply aggregate work under a large omnibus contract.

We support that. We do that in the regular contracting. We encourage the agencies as part of their acquisition strategies and competition advocates to look at work and find is there a better acquisition strategy for requiring that. So we support that element of that recommendation here as well.

TIEFER:

I should quit when I'm ahead. These are always the words that people say, yes, do it.

(UNKNOWN)

Quit when you're ahead.

SHAYS:

OK, shall we move on? OK.

(LAUGHTER)

Responding to your better instincts. Do you have a yes, Mr. Henke?

HENKE:

Mr. Chvotkin, I do want to ask you and any of our panelists this issue about recommendation number 20 when we say we use the words "allow contractors to respond to, but not appeal

agency performance-assessment." Here's an example. I like to simplify things. I think it makes things a little bit clearer.

If the contracting officer puts in the database, you get a an F or you get a D and you disagree with that and you as a contractor can put in a B or A or whatever you think the world is, those are both out there, but it's done quicker, faster, more useful information, what's wrong with that idea?

CHVOTKIN:

I don't see anything wrong with that idea.

HENKE:

That's our recommendation.

CHVOTKIN:

Well, it goes . . .

HENKE:

That's actually exactly what our recommendation would achieve because we want our contractors to respond—we don't want two things. We don't want them to draw out a lengthy appeal process that takes longer than the contract itself.

And we don't want to discourage frank opinions because a contracting officer who's overloaded, overworked, overbusy is, frankly, dissuaded from an objective, accurate evaluation.

Let's say take the example of where the performance actually is a D. And I get that that it should not be that common. We all want good performance.

If a performance is actually a D, if the contracting officer know that putting a D down is going to require—like you know, like my kid when he goes to school, that's going to require parent-teacher conference, that's going to require remedial action and extra tutoring. And there's a disincentive there I think for the contracting officer to even when the gun is loaded to accurately evaluate performance.

So what's wrong with putting down—C.O. says D, contractor, "You're way off base; I get an A," put that into the database and walk on, move on. What's wrong with that idea?

CHVOTKIN:

Well, two reasons for it. First of all, as to the behaviors, this is the flipside, if you will, to the discussion that Mr. Zakheim had with Mr. Lazor about contract—the individual's protesting (inaudible) the system creating adverse decisions.

Our basis for concern is not the timing of it. We encourage the agencies to do more near-time, real-time evaluations, but the due process, because these past performance evaluations have consequences. They have consequences for future work.

We've now institutionalized the work, the focus on past performance as a source-selection decision point in future cost-type work. So it's not merely a . . .

HENKE:

It's not a tidy-up. I got it.

CHVOTKIN:

Right.

HENKE:

It's meaningful going forward.

ZAKHEIM:

And are you, are contractors more willing to challenge past-performance ratings than they are to protest contract awards? I mean because I would have thought the same logic applies, you're going to tick off a contracting officer.

And so if in fact you're relatively reluctant to appeal those as well, and in my experience in the contracting world it's about 15 to 20 years, there is that reluctance. Then what Mr. Henke is saying seems to make an awful lot of sense.

CHVOTKIN:

I don't have any statistics to back me up by the same token I don't have any concerns that have been raised by the private bar, by our member companies, by government officials that the number of appeals of adverse past-performance ratings is significant.

So if they're happening out there, I'm not aware of them. I don't think they're significant. I'd welcome any information (inaudible) about that.

ZAKHEIM:

But then you're proving my point though. If there aren't a significant number of appeals, then, by definition, why have a process that builds into it an extra time factor?

CHVOTKIN:

Because I think that represents, because of the consequences of the past performance, I think providing that element of due process against the arrogant, against the rogue contracting officer who is out to get a contractor, that needs to be protected.

HENKE:

Mr. Halloran?

HALLORAN:

I was just going to add one more factor, that in the better, hopefully, future world of more highly trained, skilled, technically expert contract officers, their recommendation might lie. But in the current environment where they're underworked, underpaid, undervalued, the likelihood of subjective, wrong evaluation, given a blind spot (inaudible) is more likely and needs some avenue to address.

HENKE:

This might be rhetorical question. If so, just treat this as such. Do you want an appeal right when you get an A?

CHVOTKIN:

Well, I'd welcome the right. Whether I exercised that right is my choice.

SHAYS:

That was a tricky answer.

(LAUGHTER)

Let me just tell you though that what we wrestle with is, in the private sector a company hires another firm. The only obligation they have is in the contract. But we have given contractors immense rights when they deal with the government.

And the government, when it bids out, has to follow all these rules and regulations. The private-sector company which you're representing doesn't have. And I only bring that up because I realize the reason—I was in the government oversight committee for a number of years—and I recognize that because we are such a big purchaser and because the contractors are, you know, a part of these United States. They have these rights.

But the question is what right should they have in a contingency environment when our men and women are getting killed and our mission is failing and we're dragging out a contract because in the appeal that's what we wrestle with.

So I think that's the challenge that we wrestle with. And what we think in this recommendation is it gives both sides the opportunity to be out there. So I guess your concern would be which would you give a better way to.

So I'd love to move on to five, but if, Mr. Brooks, you want to . . .

BROOKS:

I just have a quick comment. I guess the question would be when you have these contracts with your multiple contracting officers over a period of time in one company, which one gets actually makes the grade? And so I think there is something to be said there for due process.

But, again, I have not heard that this gets challenged a whole lot. But you know, the possibilities in contingency contracting are unique because this is running through all these contract officers. That may change with your recommendations, but if not, we may run into that problem.

BROOKS:

Just so that there's no ambiguity, there is nothing in our view that ought to stand in the way of mission execution. Even as Mr. Henke pointed out earlier, many of these evaluations come well after contract performance. And they have an impact not on the instant performance, but on future source selections.

So there are a number of things the government can do to accelerate that—the timing of awards of future business, including more contemporaneous . . .

SHAYS:

I get your point. Let me just ask one other question. If we were to make a recommendation somehow of penalizing companies with privilege appeals, what would your answer be to that?

BROOKS:

We opposed legislation that's tried to preclude the right of companies, to protest the (inaudible) placed on frivolous appeals. Again, this is another one of those terms that means different things to different people.

The term "frivolous" to the contracting officer means anybody who challenges them. For the contractor, it means every time I've lost.

There are other mechanisms . . .

SHAYS:

No, that's a fair description. You described both sides. Well, that's what we wrestle with. And that's fair.

Let's get on to five. This the finance agency's failing to effectively use contract suspension and debarment tools and U.S. government's limited jurisdiction over criminal behavior and limited access to records have contributed to an environment where contractors misbehave with limited accountability.

I mean this is a pretty strong statement. We have 10 recommendations. You've responded to some of them. If you want to put anything on the record again—or should I just go to any commissioner who wanted to take issue with something that was said before? Do you have any comment?

OK, is there any commissioner who wants to say. . . .

I guess we're getting hungry.

HENKE

I do want to ask Mr. Chvotkin and Mr. Halloran, your statement says, it takes issue with here.

CHVOTKIN:

If they're difficult words, Larry Halloran wrote it.

(LAUGHTER)

HALLORAN:

That's right.

UNKNOWN:

The pages are numbered.

(LAUGHTER)

HALLORAN:

Much to your credit, let me assure you.

CHVOTKIN:

I made him number the pages.

(LAUGHTER)

HALLORAN:

That's right.

(LAUGHTER)

CHVOTKIN:

And you had it in advance.

(LAUGHTER)

HENKE:

Like I told you, it's is the third or fourth reading of a profound document that brings me the most pleasure. In a broader context, the real issue facing the government is not the role or myths about over-reliance on contractors. Rather, it is developing sufficient organic capacity to oversee and manage its contingency operations.

OK. We mean over-reliance in the sense in—and the report calls out a couple of different—whether judged from the standpoint of preserving (inaudible) government's core capabilities, whatever you're going to call it, IG, core, fundamental, whatever—and protecting mission-critical functions.

That gets closer to our discussion about risk where it may not be an inherent governmental thing, but so important you might as well do it yourself anyway. And, number three, or balancing mission requires against the ability to manage and oversee contracts.

What we're getting at there is that, and we agree with you that the acquisition workforce is overworked, under-resourced, undervalued, OK? What we're saying then is that if I have the capacity to oversee and manage and pick a number, 20,000 contractors, (inaudible) agency X, and I can oversee and manage 20,000.

That's based on some rational analysis on my workforce size and my ability to manage contracts and transactions and have real oversight. But I go ahead and I hit the gas and I go (inaudible) 50,000 contractors. Therefore, I am over-reliant.

That's what aspect of over-reliance. I've gone beyond my headlights. I have more than I can reflectively realistically manage. So I think we're in definite agreement with you that the workforce, numbers and knowledge, is the single most important element in your report, Mr. Chvotkin, and you say that.

We agree with you that the workforce is important, but this idea of over-reliance also means I just have more than I can handle. I'm not making a value judgment about whether they're doing inherent governmental things. Can you just react to that?

CHVOTKIN:

Well, when . . .

SHAYS:

I'm curious about Mr. Halloran. Do you mind if he goes first?

HALLORAN:

Again, not to get in too semantic an argument, but I think over-reliance is an inapt term. Again, the presumption is you have something else you could use, but you rely on this instead.

In the circumstances you described, you don't have an alternative.

HENKE:

Yes.

HALLORAN:

And so there is something wrong with the term. I can't quite express it.

HENKE:

See, that's what we tried to capture based on the word by using the word (inaudible).

HALLORAN:

Yeah, and I don't (inaudible), either, but I think that it . . .

HALLORAN:

It's looking at the wrong end of the telescope, over-reliance. I mean, you have to have. You know, managing it properly, you use it, you know, when you don't have organic capacity, but to say over-reliant implied that there's something else you can use instead.

ZAKHEIM:

Well, there is. I mean, the point is right now we're stuck. And, there, we're over-reliant. What we're trying to do is remedy the situation. So, for example, in Vietnam we had a lot more people in AID, OK?

We could in theory have more AID people. In fact, there are various shops in AID. And you've probably followed the testimony with Administrator Shah, where, like OTI. where you really could have some more people.

So it's not merely a matter of administrative oversight, although that's major, major relevant. It is the fact that right now we're stuck. You're absolutely correct. We're stuck right now. But that's because we're over-reliant.

And we could remedy the situation. I think that's what we're driving at here, that there is an objective sense that if we could have our (inaudible), we would probably have somewhat fewer contracts, somewhat fewer contractors managed by more effective managers and somewhat more government people doing some of the jobs that contractors do today.

That's what we're driving at.

HALLORAN:

I agree. But over-reliant, it's more, in my view, under-managed. Back to your point, if there is a matrix to say or an algorithm that says we're capable of handling 40,000 contractors, there's several layers in that to say we're capable of handling 50,000 if we decided the mission is best suited by like you see in large (inaudible) contract with subs so that we're one layer removed.

Or maybe not. Maybe we need six primes for that. If you your mix (inaudible) mechanism is such that it doesn't overtax your management capabilities, you can probably expand that number.

ZAKHEIM:

No, but the point is this is something we've discussed at great length internally. It is not just a matter of management and oversight. There are some things that we believe the government, the civilian side, I think we're all in agreement that the military is doing stuff it shouldn't be doing.

But if nobody else is doing it, I mean, the contractor is doing things that others, that government civilians can do. So it really comes down to the government civilians. But were there more government civilians, we believe that there may be some things that contractors would not be doing.

Right now, there's no issue because there are no government civilians.

SHAYS:

If I could just jump in, do you mind?

HALLORAN:

No, please.

SHAYS:

One of the interesting things about this commission is I have trouble remembering who's Republican and Democrat. We really feel very privileged to have this opportunity to kind of debate this internally and so on.

But whether it's the default, the question I have is is it the easy way out? In other words—and being in Congress, and it relates to what (inaudible) said in the beginning, when I lost an American soldier, I had to go to the family. I spend the next week and I'm still interacting with the family of the soldiers we lost.

It's devastating. And then I have a whole number of constituents who say we need to get out of here. We just lost a soldier. But they never say that when it's a contractor. I've never had anyone say that to me.

And not that I lost anyone in my district, but in we have in our state. And so there is a concern that some of us have is that the easy way is just to hire a contractor. They don't cost any money because they're in the supplemental and the supplemental doesn't cost us anything because you don't vote it out as a regular budget item.

So there's not a cost factor. You know, our future generation is going to have to pay for it, but, you know, that's crazy, but that's, you know, so it's a cost issue. You don't pay. So it's almost like, you know, you can get all these people in theater under the radar screen.

And that's the easy way out. So that's, kind of, what we're wrestling with. And that would imply to us that because of that we're using more contractors than we should.

I know Mr. Tiefer has a question that he wanted to do. And do you have—OK.

And then Mr. Dickson, one point and then we're going to end up here. And I would like you to say something critical of us at the end just so that people don't think you like us. That's very important to me.

(LAUGHTER)

CHVOTKIN:

I find no difficulty in that regard.

(LAUGHTER)

CHVOTKIN:

I'm able to detect it for myself.

UNKNOWN:

You folks want to be alone?

(LAUGHTER)

TIEFER:

Since we opened, the last batch of recommendations included a couple about suspension and debarment. And I want to put aside the specifics and the details, which can always be controversial and I want to ask particularly you, Mr. Chvotkin, whether we started from the premise that suspension and debarment in wartime over there in Iraq and over there in Afghanistan, is not the same as it is in the United States in peacetime that there might be different procedures there in wartime than here.

And I wasn't sure whether you would even allow that because you said, "We're concerned about the underlying implication that suspension," this is in your statement, "that suspension and debarment procedures are inadequate."

You're concerned about the implication that suspension and debarment procedures are inadequate, which suggests that on your side you think that there could not be any improvement whatsoever made as to suspension and debarment to deal with the special circumstances of wartime contracting. It can, kind of, put us out of business in this area.

Let me mention some of those things that we've run across just to show the diversity of them. Suspension and debarment: I never in all my years of teaching or running my case that I came up with an example where suspension and debarment in the United States was based on intelligence information. And it probably is somewhat obscure there in the area of black contracting, but, you know, it's obviously not a factor.

There is currently a very major suspension and debarment challenge case by Watan, the Watan Group and, in particular, by Watan Security. I see Mr. Halloran is familiar with it.

And it took months before it could even be brought as a case, before it was sent, the packet, as they call it, was sent from Afghanistan up to the top of the agency because the packet had to not have intelligence information in it in order to be considered workable for a court. Particularly, this may very well be one that comes through a hearing, meaning you'd have a cross examination.

And lawyers are familiar with the enormous complexities of prosecutions in an environment of intelligence. Well, so this is not a rarity in theater. This is how you gather information in theater. That's one difference in wartime contracting.

Another is that the incredibly overburdened nature of the contracting personnel makes it for them difficult if not impossible to contemplate an extended trial procedure as can occur in a challenge

,not only because it has to be ready for that. They have to get the packet together, as they call it, which has to face, has to be ready, has to be capable of facing an extended trial procedure.

But, furthermore, a whole lot of what has to be done with respect to suspension and debarment isn't done by them out there. It's done back in the States, even waivers for necessary contracting. And, often, that's how the problem when Boeing was convicted, not in theater, but for giving secrets to the Chinese about launches. This was about a decade ago. It's an old example.

How did we do without Boeing's launch services for the period of the suspension and debarment?

We didn't. High-level waivers were given each time we needed them.

Can you imagine what it would be like if they had to send back from Afghanistan, oh, you know, we suspended so and so for three months, but we do need them for one contract, can we get a waiver from the secretary of defense or something?

I'll mention the third—I could go on—the third is in theater they have an extremely tempting alternative which we don't want them to take instead of doing a suspension debarment. And that's just relying on vetting, where the vetting is always going to come back with the information that so and so is a bad contractor, is an undesirable contractor, was once detected to having links to bad guys or something.

Vetting is a fancy term for suspension and debarment without procedure if the record for that contractor is a negative one. We don't want them to do that. We would rather (inaudible) contractor involved. We'd rather any form of suspension and debarment procedure even when that's easy in some way or other than just leave it to vetting.

I could go on. Are you going to tell me, I don't think you are, that there could never be an improvement in suspension and debarment procedures for wartime contracting?

BROOKS:

I would never suggest that there could not be improvements, whether in a contingent environment or even in the domestic environment. But the fact that it is difficult, the fact that there are barriers and we have cases where their intel analysis or intel information (inaudible) applies here as well.

But that doesn't mean that if you suspend, that you just circumvent the right. If you're talking about the suspension and debarment process, we agree with that. If you're talking about the conclusion that companies should be excluded from future work because of a piece of intel analysis that is unchallenged, undocumented, un-reviewed, that's where we have a concern.

And that's why due process exists. We don't suspend the law. We don't obviate lots of rights and obligations on both the government and the contractor simply because we're in a contingency environment.

And so we read your recommendations as going to the activity of excluding companies rather than utilizing the process of review through suspension and debarment for a decision by a government official of whether to exclude a company.

SHAYS:

OK, we're going to end up here.

Mr. Dickson is going to make a comment here.

DICKSON:

Thank you, Mr. Chairman.

I'd like to, kind of, go back to the beginning. I certainly thank all of the witnesses today for your comments and input. I go back to the issue that Professor Schooner raised and then apply it to this group and ask for your thoughts.

It has to do with the climate for the use of contractors. It has to do with balance in terms of what the role of contractors is in contingency operations. Certainly, there are those who think that profit is ample motivation for contractors to basically compete and perform in various settings.

And yet there are others who see contractors as instruments of national policy, see them as part of the force. And so we have this balance to be struck about working in an environment that requires compliance and accountability and at the same time has risks associated with it.

Along the way we've met companies that for various reasons chose not to bid and participate in some of these competitions in some of these places. And there are casualties, as Professor Schooner indicated.

The question is then how best to use contractors, how basically to use contractors in contingencies to optimize performance so that companies will bid, will perform, that will get the better results the competition brings and that we do so with optimizing cost.

So it has to do with kind of creating a climate for the use of contractors and striking a balance. And I would, since you represent many companies, appreciate your thoughts on whether or not that balance is near properly struck?

SHAYS:

I'd like a short answer on this one, OK, a real short answer.

DICKSON:

And just basically whether or not you feel that there are areas that require a specific focus.

HALLORAN:

I think the balance is a bit askew, relative to your question earlier to Ms. Marcotte, that I think that the selection of what tool to use in theater is often skewed by mythology, by ideology, almost religious fervor that skews the default settings for a grant or a corporate agreement or some other methodology.

I think that gets in the way of best decision-making.

BROOKS:

And I think I would agree with Mr. Halloran. And I would add that the answer to the climate for the use of contractors (inaudible) by the work to be accomplished so the extensive discussion even today around development firms there are very different motivations than the issue around private security supporting the development firms versus private security supporting, protecting military installations.

And I think segmenting the marketplace as we try to do in the services world, segmenting between information technology and engineering services and development were very important to achieving that goal. And I think there are multiple climates, not a single one.

If you can dissect that in some way, I think you'd go a long way to lowering some of the concerns that we have about the recommendations.

SHAYS:

Let me just say that all of you have been tremendous advocates for your position. I do not stay awake at night fearing that contractors will not seek out government contracts. I think it's a very rich environment.

And I think we need to find the proper balance between our military, our civil servants, contractors, and the indigenous folks that we hire overseas. And I think we also need to just make sure that we're transparent and that we are not finding ourselves using one of those four because we didn't properly plan.

And I think one of the themes that you will see is that we went into Iraq and Afghanistan both without the proper planning and that it's been costly, expensive, wasteful, and led to corruption as well. But we know that contractors are an integral part of our effort and we need to be working with them, and we all need to be working together.

And I close by saying that something significant happened last night. I don't know the difference it's going to make in the world in the days and weeks and months and years to come, but I'm happy that we've at least resolved that issue.

But you all have done a great job. All of the witnesses that have, all of the participants that have come before us have done a terrific job. Thank you very much.

