STATEMENT OF

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"PRIVATE SECURITY CONTRACTORS IN IRAQ: WHERE ARE WE GOING?"

TESTIMONY

Chairman Thibault, Chairman Shays, and members of the Commission, thank you for this opportunity to appear before you today to discuss the role of private security contractors in supporting the U.S. Government. As Chief Executive Officer of Triple Canopy, I hope that I can assist the Commission in understanding the role my company plays in helping advance the mission of the U.S. Government in Iraq, and how oversight of our industry may be improved.

Background

Prior to joining Triple Canopy, I spent over 20 years in the U.S. Army, with a majority of those years spent as a member of the U.S. Special Forces, and as a member of the U.S. Army's 1st Special Forces Operational Detachment Delta. This experience allowed me to spend significant time working overseas in hostile environments. It allowed me to see firsthand the growing need for adequate security as part of an effective stability and development strategy. Without proper protection and security, time and money spent on building infrastructure, developing government, and training local nationals can very easily be wasted.

With this understanding, Triple Canopy was formed in 2003 by former members of the U.S. Special Forces community, with an eye towards creating a type of company that did things the right way. This desire is evidenced in the core principle of the company – conducting our operations in a legal, moral and ethical manner. Triple Canopy emphasizes selecting the right type of personnel, giving them the right training and equipment, and putting them under the right kind of leadership. We believe that by focusing on these items at the start, we help prevent problems from occurring in the field.

As the first core principle of our company dictates, we emphasize providing our services within the proper legal context. It is our job to protect, secure, and defend our customers in accordance with all applicable laws. In this way, we are no different from any other security firm operating inside the United States. We do not participate in military operations, and we do not seek to engage or pursue any hostile actors. Our job is simply to make sure that our customers or their assets remain safe from harm, whether they are part of the U.S. Government, an allied government, or a private company.

With that introduction, I would like to cover four key areas in my comments to the Commission, and then I welcome the opportunity to answer any questions you may have.

The Benefits of Private Security Contractors

First, I would like to start by explaining to the Commission why I believe that Triple Canopy and other private security contractors are needed, and the benefits that I believe we offer to the U.S. Government.

Private security contractors offer an effective and cost-efficient method to supplement the U.S. Government's internal security capacity so that it may better achieve its mission in places such as Iraq. For the Department of Defense, the use of private security contractors allows soldiers to be taken off routine security duties and placed in the field to perform and accomplish their actual mission. It also gives the military greater flexibility in meeting deployment timelines so that soldiers may return home to see their families. For example, on just three sites where we provide security services for the Department of Defense in Iraq, 850 soldiers have been freed to perform more critical duties or to return home. As a former member of the military, I believe that this assistance in achieving Department of Defense objectives and the contribution to increasing the morale of our soldiers should not be discounted.

For the Department of State, the use of private security contractors supplements existing capacity so that U.S. Embassy staff may safely conduct a greater scope of activities in furtherance of their diplomatic objectives in Iraq. For this reason, I believe the use of contractor-provided security remains essential for the Department of State to continue its diplomatic and development mission in Iraq.

Despite the important role private security contractors play in supporting the missions of both the Department of Defense and Department of State, for many years we have seen sweeping, unsupported arguments made against the use of private security contractors. And we have seen each of these arguments, in turn, found to be either false or exaggerated. For example, there were arguments that private security contractors were "stealing" personnel from the U.S. military and thereby depleting our armed forces. When the GAO examined this claim in 2005, however, it concluded that personnel were not leaving military service at any greater rate due to private security contractor hiring.[1]

There were arguments that it would take fewer military personnel to accomplish tasks performed by private security contractors. However, in testimony before Congress, the Department of Defense has noted that, in fact, it would take three military personnel to occupy

[1] Government Accountability Office, *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, GAO-05-737, July 2005.

one deployed position due to training and military leave requirements,[2] to say nothing of the military "tooth-to-tail" costs and requirements needed to support deployed individuals.[3]

There were arguments that contractors were paid exorbitant sums that greatly outweighed their military counterparts. However, these comparisons typically were not apples-to-apples comparisons and failed to account for the non-cash compensation and benefits enjoyed by members of the military.[4] In truth, a 2008 Department of Defense compensation review established that military personnel actually do as well as, or better than, their contractor counterparts.[5]

Finally, there were arguments that private security contractors cost more than it would cost to utilize government personnel. A 2008 Congressional Budget Office analysis[6] and a comprehensive 2010 GAO report[7] both discredited this argument, and in fact established that private security contractors can and do save the U.S. Government money, in some cases hundreds of millions of dollars on a single contract. For example, our work for the Department of State protecting the U.S. Embassy in Baghdad was estimated by the GAO to save over $785 million every year, a savings of nearly $4 billion over the life of that contract.[8]

With the common misperceptions regarding our industry eliminated, the question rightfully becomes, what do private security contractors offer? We are often less expensive. We can meet shorter mobilization timelines. We can respond to rapidly developing needs by providing expanded or additional security services, or by reducing our scope of work without legacy costs for the U.S. government. And we can offer staffing options, such as the use of local nationals or third country nationals, which are largely unavailable to the U.S. Government. In short, we give the U.S. government the flexibility it needs to better meet its military and diplomatic goals.

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[2] *Testimony of Secretary of the Army Francis Harvey to the House Committee on Appropriations, Subcommittee on Defense*, Feb. 9, 2007.

[3] Defense Business Board Report to the Secretary of Defense, *Task Group Report on Tooth-to-Tail Analysis*, Report FY08-2, April 2008 (citing a 42% "tail" cost for Department of Defense infrastructure and support).

[4] Congressional Budget Office Economic and Budget Issue Brief: *Military Compensation: Balancing Cash and Noncash Benefits*, January 16, 2004 (examining the level of noncash benefits enjoyed by members of the military).

[5] U.S. Department of Defense, *Tenth Quadrennial Review of Military Compensation, Vol. 1, Cash Compensation*, Feb. 2008.

[6] Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*, Pub. No. 3053, Aug. 2008.

[7] Government Accountability Office*, Warfighter Support: A Cost Comparison of Using State Department Employees versus Contractors for Security in Iraq*, GAO-10-266R, March 4, 2010.

[8] GAO-10-266R, March 4, 2010, *supra*, page 6.

What we cannot do, and should not do, is replace the function of an armed military. And this leads me to my second area of comment.

Private Security Contractors and Inherently Governmental Function

I would like to address one of the items the Commission has been specifically tasked by Congress to examine – namely, whether providing security in an area of combat operations is inherently governmental. The operating theory behind such a question appears to be that any use of force, even in defense of persons or property, that occurs in an area of combat operations presents a risk of being indistinguishable from offensive operations conducted by the U.S. military.

As a former member of the military and as someone responsible for all operations of a private security contractor, I respectfully disagree with that theory. When you look at the work performed by private security contractors, it is not of the type that should be classified as inherently governmental. In fact, there is a long history of allowing such work to be performed by private entities, even when the work is being performed for the U.S. Government. For example, the Department of State has for many decades used private firms to provide security at various embassies around the world, regardless of where the embassy is located and whether the host nation is friend or foe. For many years, the Office of Management and Budget listed "guard and protective services" as an example of commercial activities that may be performed by private entities under contract to the U.S. Government.[9] As recently as 2006, the GAO found that private security services, even when performed in Iraq, do not violate Department of Defense requirements relating to use of force, and they are not in violation of Federal laws regarding the use of mercenaries or quasi-military forces for hire. The GAO instead stated that the services are of a type "often performed in the private sector, such as bank guards or armed escorts for valuable cargo, as opposed to combat operations reserved solely for the performance of the armed forces."[10] Therefore, the debate has, for many years, been decidedly in favor of such services not being inherently governmental.

Moreover, even if you take the most restrictive view – namely, that sovereign nations have an absolute monopoly on the use of force within their borders – nearly all nations have established legal frameworks by which private persons or entities may be authorized to use limited force within the context of national laws. For example, a company in the United States

[9] Office of Management and Budget Circular A-76, *Performance of Commercial Activities*, Attachment A (Examples of Commercial Activities) ("Revised 1999" version).

[10] Government Accountability Office, *Matter of: Brian X. Scott*, B-298370; B-298490 (Aug. 18, 2006).

providing security services must be licensed to provide those services consistent with applicable state and federal law. This same licensing requirement exists in the vast majority of nations around the world, including Iraq and Afghanistan. Any use of force by a licensed security provider will be judged according to local laws, such as the law of self-defense and defense of others. The use of force by licensed security providers is no more justified for a government client than for a private client. Stated differently, the ability to provide security services is already approved by the relevant host government and the ability to use force is already dictated by applicable host nation law. This creates accountability.

In addition, regardless of whether we believe security work should be classified as inherently governmental, the fact is that other nations may not want or will not permit armed U.S. government or military personnel to be present within their borders, or they will limit the number of personnel that may be present or the activities they may perform. The presence of military personnel within a foreign nation typically is governed by a Status of Forces Agreement (SOFA) or similar treaty or agreement. Those agreements often put limits on the number of personnel and their activities. This is currently the case in Iraq, where the U.S. military is drawing down according to a mutually-agreed-upon schedule. A shift of security from private entities to the U.S. military in all likelihood would not be possible under the U.S.-Iraq Security Agreement. Even if it was, it likely would shift the U.S. military mission away from more critical needs. Oftentimes, there are also limits placed on the number of diplomatic staff that may be present in a foreign country, which could make it difficult to utilize non-military government employees to provide security in a foreign nation. Thus, the use of private security firms in some cases is a necessity in order to comply with the agreements the U.S. government has in place with foreign governments relating to the presence of military or government personnel within their borders.

So, in answering the question regarding whether private security services are inherently governmental, I would ask the Commission to consider these points: 1) we have a long history of treating such services as commercial in nature; 2) there are existing legal structures for licensing and controlling such services in accordance with host country laws; and 3) foreign nations themselves limit the ability of the United States to dictate how its security needs will be met within those nation's borders. A rigid determination that security is an inherently governmental function would run counter to each of these considerations, and would likely limit the ability of the U.S. Government to carry out its diplomatic and military objectives. I believe that a more effective approach is to identify the best methods for contracting for security services, and the best tools for maintaining adequate oversight, control, and accountability.

Oversight and Accountability of Private Security Contractors

This leads me to my third area of comment, which is oversight and accountability of private security contractors. This has been an area of significant debate and comment, and not without good reason. If anything, the ongoing efforts in Iraq and Afghanistan have exposed challenges in effectively managing the use of and relationship with contractors. There are a litany of current or proposed laws and regulations designed to create better oversight and accountability. Overall, I believe there have been improvements in oversight within Iraq. However, in my view, we remain at risk of creating a culture of "after-the-fact" oversight. Enormous effort is being dedicated to identifying and examining what already has occurred and what should be done to remedy it, but not enough is being done to manage for the future and to establish a framework for success. What should be equally, if not more, important is creating a better way to work with contractors moving forward. And this is where I feel the Commission can continue to make valuable contributions towards a better contracting process.

What is at risk of being forgotten is that, at its core, the relationship between the U.S. Government and a contractor is a business relationship that shares a common objective. It must be a partnership, with appropriate openness and communication by both sides in pursuit of a shared goal. The politicizing of oversight is detrimental to this relationship. We have seen our working relationships with our government customers shift to one where communications and actions are taken with an eye towards what an agency inspector general will think, rather than what is in the best interests of the government and the agency's mission.

I am sure the Commission understands that there are no easy solutions to these problems. But I would offer several suggestions within the context of private security contractors.

The first suggestion is to emphasize the need for following the federal acquisition regulations and to provide better guidance on how private security procurements should be conducted and how contracts should be administered. We have seen contracting personnel make decisions that are not consistent with established rules. We have seen contracts awarded to companies that do not possess an Iraqi security license, and when we voice those concerns we see no action. We have protested awards to companies that do not possess the proper security clearances, and rather than address the problem, we have seen the government rely on legal procedural arguments to dismiss our objections and justify an abrogation of the rules. We have seen procurements constructed in a manner to limit the effect of past performance on similar work, so that companies with poor performance records continue to be eligible for

contracts. We have seen foreign firms blatantly violate the training requirements under their contract, but been the only ones to witness it because the government does not inspect the training. These are but a few examples.

The second suggestion is to recognize that a heightened level of self-regulation by the private security industry should play a role in improving the quality of the companies and their services. Legislation and federal regulation can only accomplish so much, and ultimately such efforts often are not agile enough to react to all needs or circumstances. Private security contractors should look to develop and enhance their own standards, and then hold themselves accountable for meeting them. These standards can then work in conjunction with federal regulation and proper government oversight

I firmly believe that our industry should raise the bar of accountability and set high standards for critical items such as personnel training To support these high standards, Triple Canopy has long advocated for a system of private security contractor certification by third parties. For that reason, I welcome the recent inclusion of a third-party certification requirement in the House of Representatives version of the 2011 National Defense Authorization Act.[11] Third-party certification as a complement to government oversight has been discussed in academia for several years. The concept of specified standards of operation and a code of conduct also has been championed on the international level by the Swiss government as an outgrowth of the 2008 Montreaux Document. I believe there is sufficient momentum at this stage that we may see within the next one to two years a set of global standards of conduct for private security contractors that the U.S. Government will be able to use to help identify compliant providers and to supplement its own oversight. This development, however, will require the continued participation and effort of both the private security contractor industry and the U.S. Government.

Finally, my third suggestion for improving oversight is to consider the following fact: the U.S. Government has more authority and ability to exercise oversight over U.S.-based and U.S.-owned firms. I have seen a trend by the U.S. Government to use foreign firms to meet its sensitive security needs. This includes both local national firms as well as third party foreign firms. However, U.S. firms are subject to a host of laws designed to help enforce U.S. legal and policy considerations, and those laws ultimately support U.S. objectives. For example, a foreign firm may not be subject to the Foreign Corrupt Practices Act, and therefore arguably would be able to engage in acts of corruption or bribery and not be accountable under U.S. law. A foreign

[11] H.R. 5136, National Defense Authorization Act for Fiscal Year 2011, Section 324 (passed May 28, 2010).

firm may not be subject to the International Traffic in Arms Regulations, and therefore would be able to engage in the import and export of weapons and other sensitive items without the knowledge or approval of the U.S. Government. A foreign contractor would not be subject to the Trafficking Victims Protection Act of 2000, and therefore could be engaging in illegal human trafficking without any means of U.S. criminal prosecution.

Beyond the application of specific federal laws, permitting foreign firms to perform this work allows them generally to avoid paying U.S. taxes, avoid U.S. criminal investigation and jurisdiction, and avoid having to appear before Congress. Congress may demand my presence for the actions of my company at any time it wishes. The same is not true of a foreign firm. The only immediate recourse against a foreign firm is via the contract with the U.S. Government. For this reason, Triple Canopy supports legislative efforts such as the Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act,[12] a bill that would require companies that contract with the U.S. government to submit to the jurisdiction of the U.S. judicial system for certain offenses.

In summation, if private security contractors operating in areas of combat perform work that is considered to be in need of a high degree of regulation and oversight, I would argue that it makes sense to ensure that the full range of U.S. laws and regulations are available to ensure complete oversight and accountability. And to do so, the firms providing these services would need to be U.S.-based or U.S.-owned. This significantly reduces the risk of inadequate U.S. oversight and accountability.

Use of Best Value Contracting for Private Security Contracts

My fourth and final area of comment is closely related to oversight and accountability; however, it merits its own separate discussion. It is also an area on which the Commission has previously commented: the use of best value contracting.

The Commission has examined this issue in the past, but low price awards continue to be a challenge in Iraq. The “race to the bottom” continues, at the possible expense of U.S. security and safety. The prevailing practice continues to be making lowest price the most heavily weighted factor. Therefore, to continue to be competitive in this environment, companies must find more ways to reduce their salaries, their staff, their costs, their overhead, and all other aspects of their operation. This causes degradation in the quality of services that

[12] S.2782, Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act (introduced Nov. 17, 2009).

are being provided to the U.S. government and will eventually drive the quality performers out of the market.

As noted by the Commission in a past report, the better practice is to make awards according to a "best value tradeoff" where bids are scored and an award may be made to a higher-priced bid if the additional cost benefits the government and is justified. This does not mean that an award will not be made to the lowest-price bidder, in fact, that oftentimes still is the result. However, it permits bidders to match their price to a technical solution, rather than try to identify the absolute bare minimum needed to keep their cost low. It also can encourage innovation that benefits the government. For example, a contractor may offer additional tools for the contracting officer that offer an easier and more complete method of exercising oversight. Triple Canopy offered this very thing when we submitted a bid for security work in Iraq a number of years ago. We offered the government an online portal where they could validate the required records of our personnel at their convenience, versus having to request, receive and then review hard copy records. The government found extra value in that offer, and we were awarded the contract. Since that time, online access to records has evolved into a critical requirement.

Critics of the best value tradeoff process state that all the government needs to do is specify their exact requirements, and then raise them if necessary. There are several flaws with this argument. First, it does not eliminate the compelling need to keep a bare minimum price or the risk of underbidding and then having to "make it up" after award. Second, the technical specifications oftentimes are written by personnel without the requisite subject matter expertise, or the specifications are sometime cut and pasted again and again from the same document. This creates a stagnant set of standards that never evolve, and this has been the case at times in Iraq. And finally, the argument ignores the plain text of the federal regulations. Section 15.101 of the Federal Acquisition Regulations states that low price awards are best when "the requirement is clearly definable and the risk of unsuccessful contract performance is minimal" while best value tradeoff awards are more appropriate based on less definitive requirements or greater performance risk. Security requirements in places such as Iraq are not uniformly definable, and there are risks to performance, and the consequences of those risks are high. Low price awards may be feasible for certain kinds of services that may be re-performed if they are faulty. For security, however, I believe that a best value tradeoff remains the best option for ensuring quality service because it avoids the "lowest common dominator" requirements and permits the government to grade and select contractors rather than employ a "pass/fail, who's cheapest?" methodology.

Finally, I believe that the Commission's work in this area has resulted in positive steps towards resolving this issue. A provision in the 2010 Omnibus Appropriations Act gave the Department of State permission to make awards for embassy security in Iraq, Afghanistan, and Pakistan using the best value tradeoff method.[13] Permanent authority for best value tradeoff awards also has been included in the pending Foreign Relations Authorization Act.[14] In addition, the House of Representatives version of the 2011 National Defense Authorization Act includes language creating a best value award pilot program for private security contracts in Iraq and Afghanistan, with results to be reported back to Congress.[15] I would like to thank the Commission for its work in support of better contracting via use of the best value tradeoff award process.

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This concludes my testimony to the Commission. Thank you again for this invitation to appear today. I welcome your questions.

[13] Consolidated Appropriations Act, 2010, Public Law No. 111-117, Section 7006.
[14] S.2971, Foreign Relations Authorization Act, Fiscal Years 2010 and 2011, Section 107 (introduced Jan. 29, 2010).
[15] H.R. 5136, National Defense Authorization Act for Fiscal Year 2011, Section 323 (passed May 28, 2010).