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Testimony before the Commission on Wartime Contracting

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Chairmen Thibault and Shays, Mr. Dickson, and Members of the Commission: I thank you for the opportunity to appear before you today to discuss whether private security companies are performing “inherently governmental” functions in support of U.S. military operations overseas. Clarifying the roles of armed security personnel in contingency operations is advantageous to our national security interests and thus demands careful appraisal from the U.S. government.

The “Inherently Governmental” Conundrum¹

When our nation goes to war, contractors go with it. In both Iraq and Afghanistan today, there are more private contractors than U.S. troops on the ground.² This state of affairs is likely to endure. Now, and for the foreseeable future, the United States will be unable to engage in conflicts or reconstruction and stabilization operations of any significant size without private contractors. Changes in business practices, the provision of government services and the character of modern conflict, together with limits on the size of the American military, diplomatic and development corps, are driving the size and scope of expeditionary contracting to unprecedented proportions. Absent a significant reduction in America’s international commitments and perceived global interests, the employment of private contractors in future American conflicts is here to stay.

The system within which this contracting takes place, however, has not caught up with the new reality. Billions of taxpayer dollars committed to contracts in Iraq and Afghanistan have been implemented with little oversight. Contracting companies themselves crave clearer guidelines. The roles of contractors remain incompletely integrated into the conduct of American operations. And the legal framework within which contractors work remains cloudy.

To adapt, the U.S. government must embark on a path of ambitious reform that will require new laws and regulations; an expansion of the government’s contracting workforce; a coordination mechanism within the executive branch; greater scrutiny, more transparency and clearer standards; a strategic view of the roles of contractors in American operations; and a change in culture within the government. My CNAS colleague Richard Fontaine and I have written a report that discusses possible solutions to many of these problems – a report that is available

¹ This testimony draws upon John A. Nagl and Richard Fontaine, “Contractors in Conflict: A Path to Reform,” published by the Center for a New American Security in June 2010.

² This figure is based on three sources: Department of Defense, *Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan*, USCENTCOM Quarterly Census 1st Quarter FY2010, http://www.acq.osd.mil/log/PS/hot_topics.html; General Ray Odierno interview with Fox News Sunday (18 April 2010) stating that there are currently 95,000 U.S. troops in Iraq; and John J. Kruzell, “Afghanistan Troop Level to Eclipse Iraq by Midyear,” identifying 83,000 U.S. military personnel in Afghanistan (24 March 2010), <http://www.defense.gov/news/newsarticle.aspx?id=58461>.



for download on the CNAS website. Today I would like to focus exclusively on of the issue of whether private security contractors are performing inherently governmental functions.

Critics of wartime contracting often object to outsourcing functions intimately related to the public interest – that is, those deemed “inherently governmental.” U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than federal employees from performing such tasks. Arguably, nothing is more “inherently governmental” than the legitimate use of violence which, as German sociologist Max Weber famously noted, defines the state itself.³ At the same time, Article 1, Section 8 of the U.S. Constitution confers power on Congress to “grant letters of marque and reprisal” which, while no longer used, at one time played a key role in the contracting out of violence.

Today, while there appears to be a rough consensus that there are some functions so intrinsic to the nature of American government that they should never be outsourced, there is little or no consensus about precisely what those functions are. Until recently, while U.S. law and policy bar anyone other than a government official or entity from performing “inherently governmental” activities, statutes and regulations offered overlapping, conflicting and ambiguous guidance for determining which functions fell into this category. As one 2007 report tallied, the U.S. Code uses the term 15 times; DOD requires over 120 pages to describe inherently governmental activities; and Federal Acquisition Regulations list 17 examples.⁴ Missing from this picture has been clear and standardized guidance across the U.S. government that could speed the process of contracting out certain activities, permit the development of a competitive civilian sector with these capabilities, and reduce the risk of protracted litigation.

As a result, the FY 2009 National Defense Authorization Act required the Office of Management and Budget to promulgate just such a government-wide definition of “inherently governmental.” OMB released a draft policy letter on 31 March 2010 that aims to clarify “when work performed for the Federal government must be carried out, in whole, or in part, by Federal employees,” and to have the U.S. government speak with one voice on the issue. The letter adopts the definition contained in the 1998 FAIR Act: an inherently governmental function is one that is “so intimately related to the public interest as to require performance by federal government employees.”⁵ While this definition appears to shed little light on the issue, the letter does include some basic guidance for judging whether a function is inherently governmental and lists examples of such functions, including the command of military forces, the direction and control of intelligence operations, and the award, administration and termination of contracts. The government’s draft guidance does not comment directly on some of the most contentious

³ See, for example, Michael Walzer, “Mercenary Impulse,” *The New Republic* (12 March 2008).

⁴ Roger D. Carstens, Michael A. Cohen, and Maria Figueroa Kupcu, *Changing the Culture of Pentagon Contracting* (Washington: The New American Foundation, October 2008): 13.

⁵ Office of Management and Budget, “Work Reserved for Performance by Federal Government Employees,” *Federal Register* (31 March 2010).



functions that have been contracted out, including the provision of security services, interrogation of enemy combatants and coordination of federal contractors.⁶

OMB’s publication of the finalized letter is unlikely to resolve the debate simply because there remains little consensus about which functions should be included under the “inherently governmental” rubric. This is perhaps most vividly demonstrated by Congress’ inability to deem a substantial list of activities that fall into this category and by its decision to pass the responsibility for defining the term to the executive branch. It is important to note the implications of deeming a particular activity within or outside those bounds. Should a given function be deemed inherently governmental, it then becomes illegal for the government to ever contract it out – even *in extremis*. On the other hand, simply deeming a task to be not inherently governmental, and one that agencies could therefore contract out, in no way suggests that it is automatically good policy to do so.

For this reason, a better alternative is to focus on a “core competencies” approach. While Congress should deem inherently governmental any acts it can agree should never be outsourced under any circumstances, a core competencies approach would apply to all of those activities that do not fall under that rubric. It would focus on those functions the government should develop, maintain and enforce, rather than trying to enumerate a list of specific activities for which it is impermissible, under law and in any circumstance, to ever contract out. Thus, for example, the government could decide that interrogating enemy prisoners is a core competency that it wishes to maintain. As it ramps up its federal interrogation capacity, it would aim to avoid contracting out this function, but – and only *in extremis* – it would be permitted under law to hire private contractors to interrogate prisoners should the government workforce prove insufficient to carry out this vital task. By eschewing contracting in specific areas as a matter of policy, the federal government would leave the option legally open to afford itself the flexibility to employ contractors in times of crisis or other extreme circumstances. Moreover, the core competencies approach would give commanders and others in the field the access to surge capacity and swiftness often necessary in an unpredictable contingency environment, while moving the U.S. government away from dependence on certain forms of contractors as a more general principle. It would also hold the promise of cutting through continued debates about what does or does not constitute an “inherently governmental” activity and instead concentrate on what the government should be doing and how it will ensure its competency to do it.

In our report, we have offered several specific recommendations that flow from the core competencies framework.

⁶ Office of Management and Budget, “Work Reserved for Performance by Federal Government Employees,” *Federal Register* (31 March 2010): 16196-16197; L. Elaine Halchin, Kate M. Manuel, Shawn Reese, and Moshe Schwartz, *Inherently Governmental Functions and Other Work Reserved for Performance by Federal Government Employees: The Obama Administration’s Proposed Policy Letter* CRS R41209 (26 April 2010).



Congress should:

- State in law any specific activities that it deems “inherently governmental.” It has already designated offensive combat operations and direct contractual oversight as such, and should expand the list to the degree that Congress can agree on enumerated activities.⁷

The Office of Management and Budget should work with Congress to:

- Move toward a “core capabilities” approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

The “inherently governmental” term seeks to draw a stark line between tasks and behaviors that can be legitimately contracted out and those that cannot. In reality, such a clear delineation is often difficult to establish. There currently exist various instances of contractors carrying out precisely the sorts of tasks that many would deem to be “inherently governmental,” including providing security, conducting interrogations of enemy prisoners, maintaining weapons and coordinating the efforts of other contractors. By moving toward a hybrid to resolve the “inherently governmental” conundrum with the government defining as “inherently governmental” those areas in which there is some consensus and moving toward a “core competencies” approach in areas where there is not, we may have a chance to move significantly beyond this nearly irresolvable issue and toward a system that will work better for all concerned.

⁷ Carstens et al.: 13

Biography

John A. Nagl

President of the Center for a New American Security



John A. Nagl is the President of the Center for a New American Security. He is also a member of the Defense Policy Board, a Visiting Professor in the War Studies Department at Kings College of London, a life member of the Council on Foreign Relations and the Veterans of Foreign Wars, and a member of the International Institute of Strategic Studies. Dr. Nagl is a member of the *Joint Force Quarterly* Advisory Committee and of the Advisory Board of the *Journal of the Royal United Services Institute*, a former Young Leader of the French-American Foundation and the American Council on Germany, and a member of the American Association of Rhodes Scholars.

Dr. Nagl was a Distinguished Graduate of the United States Military Academy Class of 1988 and served as an armor officer in the U.S. Army for 20 years, retiring with the rank of Lieutenant Colonel. His last military assignment was as commander of the 1st Battalion, 34th Armor at Fort Riley, Kansas, training Transition Teams that embed with Iraqi and Afghan units. He led a tank platoon in Operation Desert Storm and served as the operations officer of a tank battalion task force in Operation Iraqi Freedom. He earned his doctorate from Oxford University as a Rhodes Scholar. Nagl taught national security studies at West Point's Department of Social Sciences and in Georgetown University's Security Studies Program. He served as a Military Assistant to two Deputy Secretaries of Defense and later worked as a Senior Fellow at the Center for a New American Security. Nagl also earned a Master of the Military Arts and Sciences Degree from the Command and General Staff College, where he received the George C. Marshall Award as the top graduate. He was awarded the Combat Action Badge by General James Mattis of the United States Marine Corps, under whose leadership he fought in Al Anbar in 2004.

Dr. Nagl is the author of *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* and was on the writing team that produced the U.S. Army/Marine Corps *Counterinsurgency Field Manual*. His writings have also been published in *The New York Times*, *Washington Post*, *The Wall Street Journal*, *Foreign Policy*, *Parameters*, *Military Review*, *Joint Force Quarterly*, *Armed Forces Journal*, *The Washington Quarterly*, and *Democracy*, among others. He was also profiled in the *Wall Street Journal* and *The New York Times Magazine*. Dr. Nagl has appeared on *The Jim Lehrer News Hour*, *National Public Radio*, *60 Minutes*, *Washington Journal*, and *The Daily Show with Jon Stewart*. He has lectured domestically and internationally at military war colleges, the Pentagon's Joint Staff and Defense Policy Board, the Office of the Secretary of Defense, major universities, intelligence agencies, and business forums.