

ARE PRIVATE SECURITY CONTRACTORS PERFORMING INHERENTLY  
GOVERNMENTAL FUNCTIONS?

FRIDAY, JUNE 18, 2010

Commission on Wartime Contracting

Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in Room 106, Dirksen Senate Office Building, Hon. Chris Shays, Co-Chairman of the Commission, presiding.

Present: Commissioners Ervin, Green, Henke, Schinasi, Tiefer and Zakheim.

SHAYS:

Good morning. I'm Christopher Shays, Co-Chairman of the Commission on Wartime Contracting in Iraq and Afghanistan. And thank you for attending this hearing, which focuses on the important question: Are private security contractors performing inherently governmental functions?

Co-chairing this hearing with me is my colleague, Mr. Ervin.

The commission will hold a related hearing in this location on Monday. We will hear testimony from government and industry witnesses and question them on the adequacy of planning and managing private security contracting in Iraq, especially as they relate to the troop drawdown and the hand-off of security functions from the Department of Defense to the Department of State.

This opening statement is made on behalf of Co-Chairman Mike Thibault, who isn't here today, our fellow commissioners, and myself.

The other commissioners at the dais are Clark Kent Ervin, Grant Green, Robert Henke, Katherine Schinasi, Charles Tiefer, and Dov Zakheim.

Our hearing topic combines two important issues, the role of private security contractors, or PSCs, in support of American operations overseas and the limitations on use of PSCs that are required under the concept of "inherently governmental functions."

Private security contracting is a big business, involving a lot of people. During the first quarter of 2010, the Department of Defense had roughly 14,000 PSCs personnel working under contract in just Iraq. That number is nearly equivalent to the personnel strength of a World War II American infantry division.

The historical reference is appropriate because private security contractors are not new in U.S. history. Agents from the Pinkerton National Detective Agency foiled a plot against Abraham Lincoln's life in 1861. They were, unfortunately, not providing security at Ford's Theater in April 1865.

Private security guards are a fixture of modern, everyday life. We see them, whether armed or unarmed, at shopping malls, office buildings, banks, gated communities, warehouses, industrial plants and government facilities. They do important work, protecting life and property, and occasionally playing a role in the national system of justice.

It was a private security guard, not a police officer, who discovered the break-in at the Watergate complex in 1972 that led to the criminal convictions of White House staffers and the resignation of a president of the United States.

Today in Southwest Asia, PSC employees are also doing important work under contracts with the Departments of Defense and State, with the U.S. Agency for International Development, and other agencies. They guard military bases, escort convoys and traveling VIPs, protect diplomats and diplomatic facilities, safeguard reconstruction projects, and more.

During my 21 trips to Iraq as a member of Congress, my life was in the hands of private security guards. I felt very secure because their high level of training, professionalism, and courage was obvious.

Today's hearing and the related hearing on Monday, however, are not intended either to attack or champion private security companies.

This commission has explored cases of excessive costs, personal and corporate misconduct, inadequate training or documentation, and unacceptable performance by some PSC contractors. We have paid close attention, for example, to the impacts of Iraqi civilian deaths inflicted by PSC employees in 2007 and to the outrageous conduct and mistreatment of Afghan civilians by PSC employees guarding the U.S. embassy in Kabul in 2008.

We also recognize, however, that many PSCs are performing vital work at high standard. And we recognize that statutory limits on U.S. military strength, the extreme operational demands in Iraq and Afghanistan, and the need to safeguard thousands of reconstruction and development projects and workers create an enormous demand for security personnel.

The question we tackle today does not depend on whether PSC performance deserves praise or blame, on what they cost or how well their contracts are managed. The question here today is whether they are performing inherently governmental functions that should not be contracted out in whole or in part, no matter what the demand or workload.

The answer to that question involves a mixture of law, policy, and prudence.

The Federal Activities Inventory Reform Act of 1988 [1998], the "FAIR Act," defines an inherently governmental function as one, quote, "so intimately related to the public interest as to require performance by a federal government employee," end of quote.

The language of the FAIR Act closely parallels the Office of Management and Budget's Circular A-76 issued in 1966. The OMB definition uses "mandate" rather than require and "personnel" rather than "employee."

The principle laid down in the law and the OMB policy is nonetheless vague and open to subjective judgment.

The 110th Congress addressed this problem by requiring OMB to develop a single consistent definition of inherently governmental function.

The bureau's Office of Federal Procurement Policy, OFPP, has taken comments on a policy letter to make that definition and is expected to publish a final version by October this year.

The Office of Federal Procurement Policy draft released in March takes the FAIR Act definition as a starting point. It also proposes asking whether a function involves direct exercise of sovereign power or whether contractor discretion could commit the government to a course of action.

The OFPP also discusses functions that are closely associated with or critical for the success of governmental functions.

The results of this filtering would determine whether a function must be performed by federal personnel, may be performed by contractors only under close government control, or may be routinely performed by contractors.

The commission's interest in this policy evolution stems from its authorizing legislation. Congress instructed us to include in our final report recommendations for improving, quote, "the process for determining which functions are inherently governmental and which functions are appropriate for performance by contractors in a contingency operation, including during combat operations, especially whether providing security in an area of combat operations is inherently governmental."

This is a challenging, three-layer mandate. We are not simply looking at the general process for determining inherently governmental functions, but also at that process as applied to contingency operations that may include combat and then at PSC use in areas of combat operations.

Our assignment takes us into fine distinctions. Hiring private guards for a U.S. supply depot may be entirely routine and not controversial in a stable, allied country. Is it still prudent during a

contingency response to an insurgency, natural disaster, or terrorist attack, when command control and assured response are highly valued attributes?

Is it still prudent if the contingency makes it likely that the guards will be exposed to attack and may be likely to use force, with all the diplomatic and public-opinion consequences that follow?

These questions are not abstract or academic. They involve real people who spill real blood. Whether they should be placed in life-or-death decision roles in foreign combat zones and under what circumstance is a serious question.

The commissioners have thought about and discussed the question. The commission staff has researched it and written briefs. Now we are reaching out to gather other views from well-informed and thoughtful sources.

Today's hearing brings together six distinguished witnesses with deep insight into the issues of security contracting and inherently governmental functions.

They are Allan Burman, Ph.D., president of Jefferson Solutions Consulting Firm, former administrator of the Office of Federal Procurement Policy in the government's Office of Management and Budget; Allison Stanger, Ph.D., professor of international politics and economics at Middlebury College, Vermont, and author of *One Nation Under Contract*; Stan Soloway, president and CEO of the Professional Services Council Trade Association, former U.S. deputy under secretary of defense for acquisition reform; Danielle Brian, executive director of the Project on Government Oversight, commonly referred to as POGO; Deborah Avant, Ph.D., professor of political science at the University of California at Irvine and the author of *Private Security, The Market for Force*; and John Nagl, Ph.D., president of the Center for a New American Security, co-author of its newly released report, "Contracting in Conflicts, The Path to Reform."

Our witnesses are notable not only for their deep involvement with issues before us today, but also for the different conclusions to which they did their research and thinking and which has led to their views today.

We welcome this diversity of informed judgment, and we encourage our witnesses—in fact, I would like to demand our witnesses to engage with one another's argument during the question period. Vigorous debate will be a service to the commission and to the American public.

We have asked our witnesses to summarize their testimony in five to seven minutes in order to ensure adequate time for questions, answers, and debate. We also ask that witnesses submit within 15 business days responses to any questions for the record and any additional information they may offer to provide.

The full texts of their written statements will be entered into the record and posted on the commission's website.

So on behalf of the commission, we thank all our today's witnesses for participating in a very important hearing.

Now if our witnesses will rise and raise their right hand, I will swear you in.

Raising your right hand, do you solemnly swear or affirm that the testimony you will give in this hearing is the whole truth and nothing but the truth?

We'll note for the record that all our witnesses have responded in the affirmative.

Again, I want to say I am really looking forward to this hearing, and it will be a better hearing if we are really candid.

And I would also say something else: None of you work for government. You don't have any boss that restrains you. And that's another reason why we like having you here—I don't think you had to have 10 people approve your statement.

So with that spirit, we'll engage in our first witness.

And, Dr. Burman, you start and we'll just go right down the line.

BURMAN:

Thank you very much, Mr. Chairman. I appreciate the opportunity to testify before you and the commission today.

I'm the president of Jefferson Solutions and my firm provides acquisition and management-consulting services to federal government agencies, and as you mentioned I'm a former procurement administrator for the federal government and signed, back in 1992, Office of Federal Procurement Policy Letter 92-1, which really forms the foundation for what is today's inherently governmental policy.

What I'd like to do is submit my statement for the record and briefly summarize it.

What I'd like to do this morning is discuss the basic tenets of the policy that was formed back in the 1992 policy document, and is also included in the FAIR Act and the Federal Acquisition Regulation, talk about elements of the March 31, 2010, Office of Federal Procurement Policy document, "Work Reserved for Performance by Federal Employees," which is an attempt to modify those existing policies, and then go from that to the issue of whether private security contractors are performing inherently governmental functions.

Back in '92, many of the issues that we're addressing today were also prevalent. And, in fact, it was Senator David Pryor, here in the Congress, who was a prime mover in getting the administration to look at this issue and to try to come up with some broad guidance that would apply across the government.

I met with many different stakeholders at that time, members of the GAO, people from Congress, industry associations, members of the National Academy of Public Administration, to develop this policy.

Let me take just a minute to provide some definitions. As you mentioned, the FAIR Act states an inherently governmental function is something so intimately related to the public interest as to require performance by government employees. It involves exercising discretion or making value judgments in government decision making.

Then there's a whole list of activities that are identified in the FAIR Act that would represent inherently government actions. I'm not going to go through the list, but it includes things such as binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise.

What it also says is that it does not include gathering information for or providing advice, opinions, recommendations, or ideas to the federal government or federal government officials or functions that are primarily ministerial.

The kinds of examples that are included in today's Federal Acquisition Regulation include direction and control of federal employees, determination of federal program priorities and budget requests, and determining what supplies or services are to be acquired by the government.

It also includes services that closely approach inherently governmental functions, including such activities as activities relating to the development of regulations, preparing budgets, or support of acquisition planning.

Now the major concern that's being raised today is whether the government is adequately staffed to make effective independent decisions based on recommendations made from the private sector and also the whole question of whether the capacity of the government exists to, in fact, perform these inherently governmental functions.

That moves us to the policy letter that has recently been released in draft form by the Office of Federal Procurement Policy.

They've been tasked by Section 321 of the fiscal year 2009 National Defense Authorization Act to come up with a single definition, as you mentioned, Mr. Chairman, to establish criteria to identify critical functions that should only be performed by federal employees and to improve internal government management of these types of functions.

Essentially what they've done is for the purpose of defining inherently governmental, they've used the FAIR Act definition. But then they've added a new category of critical functions, which means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.

And I see this as the real change in the nature of the debate today, because now the issue is one of promoting a capable workforce that can control agency missions and operations and effectively oversee contractor support.

If it's central to what the agency is doing, if this function is determined to be critical, then it can be done by federal employees. It makes no difference whether the type of activity you're talking about is a commercial kind of activity or something that otherwise might have been identified as inherently governmental.

The example I like to use is an agency like NOAA that requires meteorologists as basic to their core function. They can say that these are government employees and should be government employees performing this work.

I think this approach helps to frame, then, an answer to the private-security-contractor question. Back in '92, our policy letter looked at the question of whether or not an unacceptable transfer of responsibility to the private sector would be taking place and used this example: The contractor's ability to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of contractor's need to resort to force in support of a police or judicial function, whether force, especially deadly force, is more likely to be initiated by the contractor or by some other person, and the degree to which force may have to be exercised in public or relatively uncontrolled areas.

It looks like exactly the issue that we're talking about today, but then it goes on to say, note, that contracting for guard convoys, security and plant protection services, armed or unarmed, is not prescribed by these policies.

Many agencies use private security services. Over the years, I've visited many Department of Energy facilities that require private-sector support in terms of supporting their activities.

There isn't really a bright line test. Essentially my conclusion is that this criticality test becomes the best approach to use today, looking at the totality of the circumstances and making a judgment using that kind of a model or an approach to make a determination whether or not private sector security guards should, in fact, be government employees or not.

Mr. Chairman that concludes my prepared remarks, I'd be pleased to answer any questions you or the other members of the commission might have.

SHAYS:

Thank you, Dr. Burman.

Dr. Stanger?

STANGER:

Thank you.

Co-Chair and commissioners, it is an honor and privilege to be invited to share thoughts with you here today. I have submitted a longer statement for the record and will use my five minutes here to summarize the key points of its two major arguments.

First, to the question posed by this hearing's title, armed security contractors have been performing inherently governmental functions in Iraq and Afghanistan since even Milton Friedman's minimalist definition of the basic functions of government renders that verdict.

Second, Congress should ban the use of armed contractors for 'moving' security in combat zones and instead use direct-hire employees. If the U.S. government is going to engage actively in countries where the lives of its personnel are at high risk, we will need to build up our in-house capacity to staff those missions appropriately.

As I have argued elsewhere, it makes good sense for the government to harness the energy, efficiency, and bottom-up creativity of the private sector in as many ways as possible, up to the point where market imperatives begin to undermine the public interest.

We have reached such a tipping point in Iraq and Afghanistan. As many witnesses before me have testified, Iraq and Afghanistan are our first two contractors' wars. At the height of our involvement in Vietnam, contractors represented 14 percent of the American presence on the ground. Today, they are the majority presence on the ground in Iraq and Afghanistan.

Why is this rising percentage of contractor involvement in war important?

It's important because our current degree of dependence on security contractors makes it far too expensive a habit and far too easy to overlook abuses.

I also find 'moving' security contractors the most problematic, since they are the most likely to use their weapons.

I want to emphasize that the State Department and the Department of Defense should not be blamed in any way for their current reliance on armed security contractors. With an all-volunteer force and an under-resourced civilian capability, they are doing the best job they can with the resources currently available.

But understanding how we arrived at our present predicament renders our current practices neither desirable nor sustainable. Our short-sighted and growing reliance on armed contractors in Iraq and Afghanistan compromises long-term U.S. interests in at least six different ways. And I go into this in greater detail in my written statement.

First, it blurs the line between the legitimate and illegitimate use of force, which is just what our enemies want.

Second, the practice is at odds with building state capacity in Iraq and Afghanistan. The Afghan First strategy has been wildly successful. Ninety percent of armed contractors in Afghanistan today are local nationals. Yet this policy, at the same time, is building up a force that could very well be a destabilizing presence in the AfPak region in the future.

Third, our current policies have had disastrous consequences for government accountability and transparency. Local security contractors in Afghanistan are hired through subcontracts, and that information, the information on subcontracts, is currently entirely unavailable to the public.

Fourth, the United States, I would argue, really has no interest in seeing others do as we are doing. Medieval Europe made extensive use of privateers and yet it was not the most desirable set of arrangements for liberty, equality, and prosperity.

Fifth, the use of armed contractors, particularly for ‘moving’ security, undercuts troop morale and the value of disinterested public service.

And finally, I would argue that our overuse of security contractors has fueled an overly ambitious international agenda.

All of these lead me to conclude that there is one thing Congress could do that would immediately disrupt this vicious circle: Ban the use of ‘moving’ armed security contractors in war zones, with the practice to be phased out incrementally and gradually so that it does not leave our civilian and military forces shorthanded and compromised.

Thank you for your attention, and I would welcome your questions.

SHAYS:

Thank you, Doctor.

Mr. Soloway?

SOLOWAY:

Thank you, Mr. Chairman, members of the commission. Thanks for the opportunity to appear before you today.

I'm Stan Soloway, the president and CEO of the Professional Services Council, the nation's largest organization of government services contractors.

Among our nearly 350 member companies there are a number of companies that provide security services and many more that, because of the work they do on behalf of the United States government, must procure such services.

As such, we have the fortunate opportunity to look at this important issue from the perspective of both customer and provider.

In addition, on a personal basis, as Chairman Shays noted, I had the privilege of serving in the Clinton administration in the Office of the Secretary of Defense and looked at these issues related to inherently governmental questions broadly and the role and use and management of contractors in contingency environments more specifically to some extent. So I have that perspective as well to offer.

So let me start by suggesting two things.

First, I think it's important we dispense with simplistic labels in the course of discussing private security. The term private security itself, as Dr. Stanger's testimony implied, encompasses an array of capabilities and functions, from facility protection to convoy security, training, personal protection, and more.

Thus we ought to be careful to not simply treat all aspects of private security as being one.

Moreover, while the public perception of private security firms has been largely and often inaccurately formed by both news media and literary and film fiction, when looked at objectively, and in light of the size of the mission and the hundreds of thousands of private security personnel who have cycled through the theater of conflict, overall their performance has been highly professional and disciplined and sometimes even heroic.

This is not to whitewash any incidents that have occurred, to minimize the importance of the issue or to suggest in any way that the firms or their employees ought not to be held accountable for their actions. It is simply to suggest that on balance their performance has been impressive, they perform a vital and needed service, and without them, there would be no reconstruction and no economic or other development.

Second, the size and scope of the private security involvement in Iraq and Afghanistan, much like the size and scope of contractor involvement in Iraq and Afghanistan, has been driven by the unprecedented nature of the concurrent missions being performed in theater—active combat,

reconstruction, and development. Historically, those missions have occurred sequentially. In this case, the decision was made to perform them concurrently.

The obvious end-strength limitations of the armed forces, the cost and availability of assets, and the fact that all of the thousands of reconstruction and development projects throughout the region need security have combined to create this unprecedented environment.

Indeed, the federal acquisition regulations make it explicitly clear that contractors performing on U.S. contracts outside of the U.S. for other than direct support of the U.S. military are responsible for their own security.

With that as a foundation, let me make five basic points.

First, let's be clear. As OMB has stated, private security itself is not an inherently governmental function. The use of private security personnel both domestically and overseas by governmental and nongovernmental entities is both common and routine.

As OMB has also suggested, work that is not inherently governmental does not have to be performed by federal employees, as long as the agency has the requisite management and other capabilities needed to ensure it can oversee and administer outside providers and maintain control of its missions.

And it is there that I believe the commission's work could provide the most value.

Second, private security, like other important human-capital and mission questions must be looked at holistically. While it's clear that for reasons of cost of available human resources and other mission-related factors the government cannot provide all the requisite security throughout the theater, that does not absolve the government of the responsibility of ensuring that the available and appropriate government security assets are assigned and allocated properly.

Consistent with OMB's guidance, in the case of private security we should be looking at the total force requirement across all government entities in the region and assigning on a priority or hierarchical basis the available resources to those activities that are deemed to be the most sensitive and thus where the strongest preference for government performance exists.

Third, consideration ought to be given to having DoD or a combination of DoD and State take control of the overall private security requirement and management. In 2003, we recommended to DoD that the department award a multiple-award contract off of which those needing security services, be they governmental or nongovernmental entities, could obtain them.

Recognizing that DoD might not want to take that step, we recommended as alternatives that DoD create the equivalent of a qualified bidders list, or at a minimum, at least issue a set of standards against which firms could be measured. None of this has happened.

I believe these two steps would also directly address another key question posed by the commission—that is the oversight and management of security contractors. As I mentioned before, by and large, and looked at through an objective lens, those firms have performed impressively and the management of them by the not-for-profit and for-profit firms that utilize their services has proven generally effective.

But to the extent the government seeks to enhance its insight and its ability to manage and oversee this vital aspect of the mission, establishing clearer standards against which firms could be held accountable and/or managing the requirement directly through competitively awarded contracts would help achieve that goal.

Fourth, we cannot avoid the issue of cost and its many ramifications. While cost alone is not enough reason to determine that any function is appropriate for contract performance, as OMB makes clear, for work that does not have to be performed by government employees, it must be considered.

With regard to private security, the military's manpower resources are already under enormous strain and as General Petraeus has said in the past, if he were to have to replace the 15,000 private security personnel supporting just DoD's activities, he would need more than twice that many soldiers, which raises substantial manpower and fiscal questions.

The State Department as well as GAO and the CBO [Congressional Budget Office] have each concluded that the cost of performing a security function in-house could be as much as an order of magnitude more expensive than utilizing private security personnel.

Moreover, the cost of security has a direct correlation to the amount of funds that are available for the execution of the core mission—reconstruction and development. It is therefore not only reasonable, but essential that overarching cost implications be considered in any sourcing decision.

Finally, some have pointed to perceived problems on individual contracts as a rationale for converting that work to government performance. However, the two aren't entirely unrelated topics. Work is either inherently governmental or not. The quality of an individual contractor's performance has nothing to do with that equation any more than the quality of the government's performance of inherently governmental functions would itself justify shifting the source of performance.

If and where contractors are not performing well, are not meeting the government's established requirements, there are any number of tools available to drive better performance, up to and including re-competing the work.

Since we became involved in this issue in the fall of . . .

SHAYS:

Mr. Soloway 30 more seconds. 30 more minutes, rather seconds.

(LAUGHTER)

SOLOWAY:

I'm wrapping up, sir.

SHAYS:

Thank you.

SOLOWAY:

I'll take the 30 minutes, but I'll do it in 30 seconds.

SHAYS:

No, you wouldn't want that.

SOLOWAY:

Since we first became involved in the full scope of issues associated with contracting and security in Iraq just prior to the advent of the conflict, things have improved, but we have not yet institutionalized enough of the lessons that have been learned.

From communications and coordination to oversight and accountability for all personnel and entities, governmental and nongovernmental, we can and must seek to continuously improve. It is in all of our interests that we work together to ensure we have the right process and management regime in place to ensure optimal performance, rather than merely assigning labels or allow misperceptions to drive action or policy.

Thank you for your time.

SHAYS:

Thank you, Mr. Soloway. If I hadn't interrupted you, you would have finished exactly in seven minutes. So you did nice.

Ms. Brian?

BRIAN:

Thank you, Chairman. Thank you, Chairman.

SHAYS:

You are an experienced testifier and you forgot to turn on your mike.

BRIAN:

Sorry. I forgot to push the button.

I want to thank the commission for asking POGO to testify today. We have studied inherently governmental functions for years and have recently submitted a public comment to the proposed White House policy letter on this subject. In fact, we're in the process of completing a multi-year study of the extent and impact of privatization later this fall.

We have concluded that private security contractors are currently sometimes performing inherently government functions when they work in a combat zone. A number of jobs that are not necessarily inherently governmental in general become so when they are conducted in a combat zone.

Why?

The use of private contractors for security in a combat zone poses unique risks. One is the inherent tensions between the effective performance of a mission and the financial interests of the contractor.

We saw evidence of this phenomenon in the ArmorGroup North America contract last year, where, for example, in order to save money, the company hired Gurkhas who did not meet language-proficiency contract requirements and therefore could not adequately communicate with the English-speaking guards, as this commission recalls.

Another problem is that private employers, such as security firms, cannot ensure a binding chain of command that provides adequate discipline. Any operations that are critical to the success of the U.S. government's mission in a combat zone must be controlled by government personnel.

In addition, in those areas that have not been brought under the rule of law, it is an inherently governmental function to provide security, so that the government's missions can be successful.

Contrary to Mr. Soloway's testimony, even the National Association of Security Companies recently wrote to OMB that perhaps in-sourcing, or at least much greater contractor scrutiny, may be needed for security provided in combat and combat support roles.

In the short term, we need to deal with the current reality—they're there—and ensure the contractors are adequately being overseen and held accountable.

In terms of the oversight infrastructure set up to handle these contractors, it is either based on self-reporting or is too under-resourced to provide credible oversight. For example, the CONOCs [Contractor Operations Centers or Contractor Operations Cells] rely on reports from private security contractors regarding incidents—and this does not amount to independent oversight.

Understaffing is also a problem. For instance, the ACOD [Armed Contractor Oversight Directorate] in Iraq, originally staffed by six people, has been downgraded to a branch of three people. One of the biggest weaknesses also in the government service side of PSCs, as Dr. Stanger mentioned, is its inability to scrutinize the subcontractors, particularly in Afghanistan. Rumors abound that there is massive corruption at those subcontractor levels.

Real oversight requires having the resources, technical knowledge, and experience necessary to know when a contractor is not adequately performing its mission. We need more than contracting officers in this role. We need investigators who are experienced in security operations in the oversight shops.

As we've seen in the SEC's failure to provide oversight necessary to prevent the Wall Street collapse and Interior's failure to adequately regulate the oil and gas industry, when the regulated industry is in the driver's seat, the public interest is in jeopardy. In the case of combat zones, the consequences are even more dire.

I would be remiss if I did not point out another fundamental oversight tool that is currently lacking—whistle-blower protections. Pending legislation would extend much-needed protections to these employees and should be passed promptly.

In the long run, rather than distinguishing different types of security services, such as personal security detail, convoy, and static security and asking which of these are inherently governmental, I suggest the commission look at the question differently.

The GAO has noted that beyond simply providing these services, private security contractors provide advice and planning related to security. POGO believes we need to restore control of the security operations, meaning the planning and management of security operations, to the governments and allow those functions to be only supported by contractors.

Secondly, what is being secured and whether the rule of law is in place should be the other standard for determining if that function is inherently governmental. The type of security function is less important to us.

In other words, the security of government personnel, facilities, and property in a combat zone not under the rule of law should be characterized as an inherently governmental function.

Private security contractors will always have some role to play, but that role needs to be better clarified and contained.

Thank you for addressing this important issue and for asking for POGO's thoughts on the issue. I look forward to answering any questions you may have and to working with the commission.

And in the spirit, since I have a few seconds left, of the dialogue, I just wanted to point out, in terms of what Mr. Burman was mentioning with the Department of Energy facilities, the subject of security of a nuclear-weapons complex, is actually under consideration for federalizing those guard forces.

SHAYS:

Thank you, in that spirit. Thank you for your statement.

Dr. Avant?

AVANT:

Yes. Chairman Shays and distinguished members of the Commission on Wartime Contracting, I want to thank you for asking me to testify this morning.

The question of whether private security contractors perform inherently governmental services is both important and hard to answer.

I draw on the work that's been mentioned several times, on the Office of Federal Procurement Policy's draft letter earlier this year and consider how the activities of private security contractors relate not just to inherently governmental services, but also to the spectrum, ranging from not governmental to closely associated with governmental to inherently governmental.

My argument is that we cannot classify a service in where it sits on that spectrum in a vacuum. Whether an activity is inherently governmental, critical, or neither depends on several risk factors that elevate or lower the threat that the service provides, either to private individuals, to U.S. policy, or to both.

These risk factors include the threat environment, the characteristics of a particular job, and the level of command and control.

Now let me just elaborate briefly on these and then outline how this way of thinking affects the potential responses.

So in terms of risks to private individuals, this is the most fundamental way in which private security activities may encroach on what is inherently governmental: through the exercise of deadly force. This is widely presumed to be a fundamental function of government and the FAIR Act and the OFPP letter specifically state that activities that issue significant risks to private individuals are inherently governmental.

Now all armed private security personnel have the potential to affect the lives of persons around whom they work. Whether or not this effect is likely to be significant depends on the three risk factors.

First, the threat environment—a more-permissive environment, where private security contractors simply deter common criminals—is much less risky than when contractors function in an active insurgency, like in Afghanistan.

Second, the particular job—guarding a warehouse is less risky than convoy security or personal security details. Jobs that require moving, as other people have mentioned, from one place to another increase both contact with others and the potential for threat.

Third, the level of command and control—the whole reason why a government employee is preferable to a private contractor in carrying out tasks that are intimately related to the public interest is because federal employees are under a clear and well-defined system of control and accountability.

Though the control of private contractors is never as great as the command and control of U.S. forces, different regulations can yield more or less control. Also important for the level of control are the skills, background, and training of the personnel that are performing the security jobs.

In terms of the risk to the U.S. mission or policy, private security may also encroach on inherently governmental work, according to the OFPP draft letter, if what contractors do or how they do it can undermine the functioning of the military or the overall policy of the U.S. government.

This can work in a few different ways. Some jobs are simply more critical to the military's ability to fight than others. A convoy carrying fuel is more important than protecting a warehouse.

In a counterinsurgency environment, though, the way private contractors function is also critical to the success of the overall mission. This is particularly true for personal security details

that frequently operate in highly populated areas. If they deliver people safely, but in a way that's abusive of civilians, they may allow the U.S. to function, but undermine popular support and frustrate the chance for ultimate success. Of course the Nisour Square incident is a dramatic example of this.

Finally, there's a relationship between private security companies and other violent forces in the country, particularly militia and insurgents.

If using private security enhances the capacity of forces in a way that they compete with government forces, this can undermine efforts to build effective governance.

In Iraq, there was a lot of speculation about the interaction between the people in the facilities-protection force and the militias that led to the insurgency.

And in Afghanistan, right now, where the U.S. has relied to a much greater extent on Afghan personnel, there is speculation that some of them are in fact paying off the Taliban in order to guarantee passage. And this is, of course, essentially funding U.S. enemies, which is posing a significant risk to the overall mission of the U.S.

The three risk factors also affect the degree to which private security could matter for U.S. policy. In terms of threat environment, guarding a convoy carrying supplies in a dangerous area is more critical than guarding a convoy carrying supplies through a pacified area.

And here I would just pose the contrast between KBR in the Balkans, a more-permissive environment, and their performance at the beginning of the Iraq war.

Second, in terms of particular jobs, you can alienate civilians more easily in an active threat environment than in a more passive one.

Then finally, in terms of threat, the level of command and control, more command and control can reduce the risk that private security will undermine policy.

And I think you saw that in the reforms that followed the Nisour Square incident in Iraq have in fact increased the level of command and control over private security and reduced the risk of them behaving in a way that alienates civilians.

So in sum, all armed personnel working for the United States abroad potentially encroach upon inherently governmental territory, simply by virtue of their ability to use deadly force. Those that perform tasks critical to the mission of the U.S. also have the potential to trespass on governmental roles.

Features of particular threat environments, particular jobs, and the level of control over private security contractors can elevate or lower the degree of risk.

In my view, all these features should be considered in determining where a job fits on this spectrum. The more features are present, the more likely the job is to be inherently governmental.

Looking at the issue this way poses a variety of options in dealing with jobs deemed to be sufficiently risky. They range from a standard in-sourcing to a variety of steps that would reduce risk by increasing command and control.

I won't elaborate on these, given the time, but outline them in my written comments and would be happy to answer questions about them.

Thank you.

SHAYS:

Thank you, Dr. Avant.

Dr. Nagl?

NAGL:

Chairman Shays, 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 very much in our national-security interest, and I'm pleased to have the opportunity to discuss it with you today.

As you know, when our nation goes to war, contractors go with it. In both Iraq and Afghanistan, there are more private contractors than U.S. troops on the ground.

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.

The system within which this contracting takes place, however, has not caught up with this new reality. To adapt, the U.S. government must embark on a path of ambitious reform.

Part of that reform constitutes clarification of rules regarding the outsourcing of functions intimately related to the public interest. That is, those deemed inherently governmental.

As you know, U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than federal employees from performing such tasks. But 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. And I think we've seen that today.

Until recently, while U.S. law and policy barred 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 fall into that category.

As a result, the F.Y. 2009 National Defense Authorization Act required OMB to promulgate just such a government-wide definition of inherently governmental.

The draft policy letter released on March 31st aims to clarify when work performed for the federal government must be carried out in whole or in part by federal employees.

But, unfortunately, the government's draft guidance does not comment directly on some of the most contentious functions that have been contracted out, including the provision of security services, the interrogation of enemy combatants, and the coordination of federal contractors.

I believe OMB's publication of the finalized letter is unlikely to resolve the debate, simply because there remains little consensus about which function should be included under the inherently governmental rubric and because, as Dr. Avant just noted, it's a sliding scale, depending on a number of factors. And I think her factors are a good place to start thinking about that sliding scale, but there are probably others as well.

So this is an enormously difficult task, and the fact that it's so difficult is vividly demonstrated by Congress's decision to pass the responsibility for defining the term onto the executive branch.

And this matters, because if a given function is deemed inherently governmental, it then becomes illegal for the government to contract it out, even in extremis.

On the other hand, simply deeming a task not to be 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, I believe the 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.

With 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 wants to maintain. As it ramps up its federal-interrogation capacity, it would

aim to avoid contracting out this function, but 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.

This solution would also promise to cut 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 itself or to oversee the performance of contractors it has decided have to perform the function.

The inherently governmental term seeks to draw a stark line between tasks and behaviors that can be legitimately contracted out and those that cannot. But as we've seen already today, such a clear delineation is often difficult to establish.

There currently exist various instances of contractors carrying out precisely the sort of tasks that many would deem to be inherently governmental, including providing security, conducting interrogations, maintaining weapons, and even coordinating the efforts of other contractors.

By moving toward a hybrid solution to resolve the inherently governmental conundrum, with the government defining as inherently governmental those areas in which there is a 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.

Thank you, and I look forward to your questions.

SHAYS:

Thank you, Dr. Nagl.

I'm going to ask the questions at the end, but what I'm hoping at the end of this hearing, is that we can box you all in, in the sense that I will want to know what each of you think about the definition, if we have agreement there. Do we have agreement that convoys are inherently governmental or not? Go down that list. And where we have, you know, just this real gray area. So that'll be my interest.

We're going to have eight-minute questioning from each of the members. We'll then do a second round of five. And then we'll even do a third round, and any member here who has to leave can leave. We will be done before 12 o'clock, to give you all a sense of how you can spend your afternoon.

So with that, I'll go to our acting co-chair, Mr. Ervin.

ERVIN:

Thank you, Mr. Chairman.

I want to add my own thanks to those of the co-chairman. I want to thank you all for being here. This is an enormously important hearing.

This whole issue of what is and what isn't inherently governmental, obviously, is very, very controversial, particularly in the area of contingency contracting and especially in the area of private security contractors. So thank you for being here.

I, in general, draw my questions from witness statements, and I will especially do that today. So I'd like to delve into each of your statements, as time permits.

I want to start with you, Dr. Burman. I think you did a very good job in your statement of laying out the government's struggle over time, its evolving efforts to try to come to grips with this issue.

But I didn't get a sense from you of what your position is on this issue. The subject of today's hearing is: are private security contractors performing inherently governmental functions. What's your personal view about this matter?

BURMAN:

My personal view is I think private security guards are not performing inherently governmental functions. However, I do think that they are performing critical functions when looking at the totality of the circumstances.

I agree with what a number of panelists have stated today, that if you're looking at a situation that's a wartime setting with life and liberty being at risk and all of the needs for government accountability, it seems to me that there's a strong argument for the government, if it has the capacity, to perform that service itself, and to have government employees doing that job.

So I agree with Dr. Nagl and I think Dr. Avant, as well, in terms of looking at the totality of the circumstances, looking at the various activities that are going to be done and then making a

judgment based on that situation, as opposed to making an all-encompassing position across the board, saying this is or is not inherently governmental.

ERVIN:

Well, what about the specific area that Dr. Stanger raised of 'moving' security? In that specific circumstance, considering all the totality of the circumstances, should that be deemed to be inherently governmental?

BURMAN:

My judgment is in a wartime setting, if you have the staff to be able to perform that function, I think it would be advisable to use government employees to do that.

Again, you have to deal with a practical question about the ability to, in fact, have the people to do the job. And somebody needs to perform the mission. And I think Stan Soloway raised some of those considerations as well. And so I think that the judgment has to be made on a situational basis.

ERVIN:

Right. Just to close the view on that point. Certainly there are two issues here. One is whether there is the organic in-house government capacity to provide private security contractors. The government does not have that now. I think we all acknowledge that.

But it sounds like what you're saying is if the government were to have it, then private security contracting ought to be done by the government.

Now on the former point, is it realistic to expect the government to develop this organic capacity, unless and until private security contractors are phased out? As long as there's an alternative to be used of private security contractors, will, as a practical matter, the government move toward developing that organic in-house capacity?

BURMAN:

Well, again, I think that it's obviously a basic policy question to make that judgment, whether you make that judgment across the board in all cases, I'm just not sure whether that's advisable. It seems to me that there is a strong argument for accountability purposes to say that that is where the government should be moving.

ERVIN:

All right.

Dr. Nagl, to turn to you, there are a few things in your testimony that I wanted to talk to you about. Your notion that because inherently governmental, defining it, has become such a conundrum, we just should give up on that essentially. If there are certain things we can all agree are inherently governmental, fine, but chances are we will continue to disagree about that, so let's just focus on what we can agree are core competencies.

That sounds appealing in theory, but as a practical matter, won't we have the same problem? Won't there be the same disagreement about what is and isn't a core capacity? If the implication of that is that we're going to cease to contract out core competencies, I don't see how that advances the ball very much in practice.

NAGL:

Yes, sir. I think that there are some actions that there is a consensus are inherently governmental. For instance, offensive-combat operations is clearly inherently governmental. There should be no question about whether that is a capacity that only the United States government should conduct.

ERVIN:

But what about private security contractors, though?

NAGL:

For private security contractors, as we've seen on this panel, it depends. So that there is a sliding scale, I believe, of conditions under which it becomes increasingly critical to the mission accomplishment, the performance of that security mission.

And that is why I believe that a core-competencies approach would say the ability to conduct security operations, in particular the most difficult case, I agree, 'moving' security operations, that is a core competency of the United States government. We want to maintain that capacity. But it is not inherently governmental, depending on the threat conditions, depending on the kind of operation we're conducting. Depending on the degree of command and control we have, to use Dr. Avant's categories.

And, therefore, that is something that we would like in the most difficult, the most dangerous circumstances, either to be conducted by U.S. government personnel or, in those same

circumstances, if the U.S. government doesn't have the capacity, we want the performance of that mission to be overseen very, very closely by U.S. government personnel.

And that, I think, allows the flexibility to the government to acquire and develop the capacity, the capability that it wants to have for those kind of missions, but gives it the flexibility if the demand exceeds supply or in less contentious, less difficult situations to contract it out.

ERVIN:

Right. Well, let's just talk about the most contentious, the most difficult situations. I'll ask you the question that I asked at the end of Dr. Burman. Unless and until we at least establish the goal of phasing out private security contractors in these most difficult circumstances, as a practical matter, government being government, will it ever develop the organic capacity to take over that function entirely?

NAGL:

Sir, the U.S. government already has, of course, an appreciable capacity to conduct security operations. It does not have sufficient capacity to, for instance, guard the U.S. State Department in its missions abroad. And so the State Department contracts that out.

The decision to bring all of that inside the government is an enormous one, and I don't think the forcing function should be making the decision to call private security an inherently governmental function. Instead that would require dramatic changes in the force structure of the Department of Defense or the Department of State, if we decided to bring that in-house.

ERVIN:

All right. I'll come back to you, Dr. Nagl, in the next round.

Mr. Soloway, in your statement, you mentioned the following: Measured against the number of inappropriate incidents or even alleged unlawful actions, it's clear that the record is far better than the public understands, et cetera, et cetera.

I want to talk about those inappropriate incidents. Admittedly, there have been relatively few. By the way, what is your number for that?

SOLOWAY:

I don't have a specific number, but based on the literature available, that was a . . .

ERVIN:

Do you have a ballpark number?

SOLOWAY:

No. No.

ERVIN:

Relatively small is the point you're making.

SOLOWAY:

Mr. Ervin, just to clarify my statement—officially, I didn't want to be in any way excusing incidents that have taken place.

ERVIN:

I understand that.

SOLOWAY:

The point I was trying to make is that it's not clear to me, based on the evidence I've seen or that we've seen that this is sectoral, that there have been abuses by civilians and so forth and everyone should be held accountable.

ERVIN:

Let me just finish this one question.

Fair enough. I understand that.

To what degree have firms been held accountable for these incidents in terms of our judicial system? In terms of the government withholding fees? Not renewing contracts? Not awarding additional contracts? Internal industry discipline?

What degree of accountability has there been for the relatively few incidents that have existed?

SOLOWAY:

I will leave it to the State Department and DoD to talk to how they make their procurement decisions and what factors they considered in terms of the legal implications. I think that is actually a very fair question and we as an industry have long supported expansion of MEJA [Military Extraterritorial Jurisdiction Act] or other tools in which to hold people accountable where there are criminal activities involved.

So I think that from a criminal perspective, it's much the same, by the way, for federal civilians. If you're not performing on a DoD contract where there's clear jurisdictional application to either a contractor or federal employees, outside of that, there are real questions relative to U.S. jurisdiction, although the SOFA [Status of Forces Agreement] establishes some jurisdiction in Iraq.

ERVIN:

Thank you, Mr. Soloway.

SOLOWAY:

One more point, if I may? Or?

ERVIN:

Real quick.

SOLOWAY:

I'm sorry.

In the questions you asked Dr. Burman and Dr. Nagl, I think it was a great question, but let me just make one suggestion for the context of this whole discussion.

SHAYS:

You know what? You know what? Hold that thought.

SOLOWAY:

OK. I will.

SHAYS:

I'd at least like us to start out trying to be on time.

Hold the thought.

SOLOWAY:

Fair enough.

SHAYS:

And I'll give you a chance to respond to me if you don't get a chance from someone else.

Mr. Green?

GREEN:

Thank you, Mr. Chairman.

And let me add my thanks to those already expressed for your attendance here. I can already see that we have some slightly differences of opinion, and I think it should make for an interesting hearing and an interesting dialogue as we proceed with our work and making recommendations to the Congress.

And I think I have a pretty good sense of where each of you comes down on inherently governmental and the use of private security contractors. Let me focus on just one part of that, and that is the personal security details.

Because I don't think anyone on the panel would necessarily advocate that static embassy guards shouldn't be contracted out, and, as Dr. Burman said, some facilities here in the U.S. I think we accept that.

Dr. Stanger did raise the movement issue, the convoy security. But I want to concentrate on the personal security details that we see being used in theater now.

And I want to also concentrate on the longer term. I think in the short term, whether we like it or not, we've got to accept the fact that they're there, and they're going to continue. And we all would also agree that oversight and management and command of those entities—we should continue to try to improve that.

Those people who are functioning as private security details come from backgrounds where they've received a significant amount of training. As a minimum, a DS [Bureau of Diplomatic Security] agent at the State Department today, without getting into the investigative-training piece that they do, there's probably four months in training.

I'd like to get away, if I might, and follow on a little bit with what Commissioner Ervin started to talk about, get out of the hypothetical and the academic, what we'd like to see happen, maybe what should happen. And let's talk about reality.

We've talked about budgets, and we've talked about force structure. I would like to hear from any of you how you think this would be implemented if we did in fact in-source private security details.

Dr. Stanger?

STANGER:

Commissioner Green, that's a great question. And I thought about it a good deal, and I tried to think about it for my testimony.

I like the distinction between moving and static security contractors because I think if you look at where the abuses have been committed, my understanding from the publicly available information is that the majority of them are by moving-security contractors, and the other interesting fact is that most of them are committed by U.S. citizens.

And so I wanted to think about how you could potentially transition to a situation where 'moving' security would be in house. And what I realized there is that I needed additional information that I do not currently have access to, but perhaps you could get that information.

I think you would need to know, first of all, the current number of moving- versus static-security contractors in Iraq and Afghanistan, how that breaks down. You'd also want to know, and I think it's a pretty small number, but it would still be important information, how many moving security contractors are deployed elsewhere currently.

And third, you'd need to know the necessary footprint in Iraq after the Department of Defense leaves.

GREEN:

Well, I don't think it takes a rocket scientist to realize where the national security, and I include both Defense and State in this, budgets are going to go.

STANGER:

Yes.

GREEN:

Particularly as we phase out of Iraq and Afghanistan, assuming that happens on the timetable that has been suggested.

Secretary Gates has already levied on the services, each service, cuts for the next five years that will be taken out of force structure, out of modernization.

Having sat at State for four years, I know what problems they have every year with budgets.

STANGER:

Yes.

GREEN:

Defense is going to put whatever savings they accrue into the tooth side of things. So this is not going to be important. They are not going to put money against private security contractors and private security details.

So my question is, to you, how do you in-source this? How do you train? How do you assess them? And what do you do with them when it's over?

Mr. Soloway?

SOLOWAY:

I think that's a wonderful way to phrase it, to frame the question. And it gets back, I think, to part of the broader issue. To Dr. Stanger's point, moving versus static is a very broad definition because there's lots of different kinds of moving security.

I think, specifically, Mr. Green, to what you're talking about, let me sort of go back to my testimony, and actually if you sort of cut through some of our other comments . . .

GREEN:

We've got two minutes, folks.

SOLOWAY:

I understand.

GREEN:

He may cut me off.

SOLOWAY:

You find a substantial amount of degree of commonality on the panel on this.

I think the way you do that goes back to what I've put into my written testimony, which is approach private security, A, holistically, B, strategically and, third, in a hierarchical sense.

So I look across my private-security requirement. I break it all the way down. And let's get to the personal detail portion of it: As a matter of policy, the State Department, DoD, whomever, needs to decide if personal security details are that category that I think is most sensitive.

That is then where I begin to allocate my first order of resources that are going to be available for private security—my training, my development, my pay, and so forth.

GREEN:

Do we do this as an insurance policy? When we're out in Iraq and Afghanistan, are those departments going to be willing to put those resources as an insurance policy, not knowing what the next crisis is?

SOLOWAY:

The answer is probably not, and history suggests that . . .

GREEN:

Right.

SOLOWAY:

There's another layer to what I was suggesting is once we've done that sort of allocation process, then you have to look across the resources that are available, the lifetime costs, what's surge versus what's an ongoing routine requirement, and balance against that.

Weakness of the government has always been strategic human-capital alignment to resources, to long-term versus short-term needs, and so forth.

So I would suggest that we start with this sort of hierarchical approach, which is something we've all indirectly come to the same conclusion on, also measured against costs, but not allow the vicissitudes of the bureaucracy or human-capital system to be the reason for a policy decision. The policy decision ought to drive the human-capital system.

GREEN:

OK.

Ms. Brian?

BRIAN:

Mr. Green, this may be a case where the balance has already been reached, because my understanding of personal security details, when they are mission critical, they already are conducted by DS or government agents. And the vast majority of personal security details are for what wouldn't necessarily be considered a mission-critical operation.

GREEN:

Well, my time is up. But I'll follow on with this line in my next round. Thank you.

SHAYS:

We may actually get out at 12:30.

We'll go to Mr. Henke.

GREEN:

We only went over 10 seconds.

SHAYS:

No, no, I know. But I wish you had been able to ask some more questions, frankly.

Mr. Tiefer?

TIEFER:

Thank you, Mr. Chairman.

Let me start with Professor Avant and Ms. Brian because your oral and prepared testimony suggests that it is possible to me, I'm not getting rid of the differences or distinctions you'd make, but possible for me to draw some common lines, and that is in looking at the applicable negative or risk factors involved in some uses of private security.

And I'm going to tick them off and then ask how much change you'd want to make in order to get to where I'm wrong, to get away from where I might be wrong.

And the first factor is the risk to people around, especially host-nation civilians, either casualties or of reliably measured incident levels.

The second, sort of, basket of risk—negative factors or risk factors—are where there's weak command and control, including a lack of rule of law, discipline, and prosecutability.

And the third basket is loosely things that have to do with the U.S. policy objectives, whether these are mission-critical tasks that we're giving to private contractors, whether having the private contractors there—one of you already referred to Nisour Square—whether they undermine the counterinsurgency mission itself by what they do, and that includes: is there a real host-country buy-in or just a corrupt one or one involving pay-offs.

Now have I, in some respect, brought together the thoughts of the two of you?

BRIAN:

I feel good about it.

STANGER:

Generally, you have.

TIEFER:

General is fine.

OK. Generally.

STANGER:

OK.

TIEFER:

I'll take generally. All right.

Good.

That happens to be very close to way I myself think. So I'm happy to take it.

One short question to Ms. Brian: Why is it that you worry about the rule of law application to this? I'm from the University of Baltimore Law School. The rule of law is very precious to us. Why is it to you?

BRIAN:

Well, the basic reason is that that is ultimately going to be requiring more of a case of the person having to exercise discretion. If there's less rule of law, there's more likely to be some sort of incident where the person is going to be required to use force, frankly.

TIEFER:

OK.

Mr. Soloway, I'm going to take a risk, even though you've proved a glutton for time. So let's see if I can get a short one from you, OK? If you give me one short one, I'll ask you another; otherwise, not.

You speak both in your oral comments about how we have to look at objectively what PSCs are doing and in your written testimony, you talk about, and I'm going to quote, leaving a few words out, "measured against the number of inappropriate incidents, it is clear that their, the PSCs, their record is far better than the public understands or the firms get credit for."

And I think the common language we're talking about there is the incident rates from the special-incident reports that are what we all look at as the incident rate because that's what's counted.

SOLOWAY:

In general, based on the publicly available information on the incident rates—there's also publicly available information about, unfortunately . . .

TIEFER:

OK. OK.

SOLOWAY:

. . . reprehensible . . .

TIEFER:

I want to give you the second one.

SOLOWAY:

. . . in other sectors.

TIEFER:

Good. Let me get to the second one. I'll take the second, anyway.

There's a current debate going on about what kind of third-party certification to have. The Armed Services Committees have invited it. The Department of Defense has written a report on it.

I think there's some things you wouldn't go for, and I just want to ask if a third-party certifier, let's say, had the power to, after Nisour Square, say, "Blackwater, you can't get any more contracts," I think the colloquial expression is to blacklist Blackwater. You do support that? Or my impression is you don't support that, right?

SOLOWAY:

A third-party certifier for incident evaluation or for qualifications of firms in the front end?

TIEFER:

For qualifications.

SOLOWAY:

So front-end qualifications: Are you qualified for a contract?

TIEFER:

Yes.

SOLOWAY:

We have argued, as I said in my testimony, for DoD to establish a multiple-award contract, to establish standards . . .

TIEFER:

I understand you.

SOLOWAY:

. . . for qualified . . .

TIEFER:

I want to ask you if you would say that such a certifier could say about Blackwater, "you're not to get more contracts," and the U.S. government would say, "That's good enough for us. They won't get more contracts"?

SOLOWAY:

I think you're asking an enormous hypothetical that you're asking me to answer very quickly.

TIEFER:

The main example—before you tell me it's enormous—a real simple one: Blackwater, Nisour Square, independent body, could it have said "no more contracts"?

SOLOWAY:

Does the independent body have access to all of the investigative information? All of the witnesses? All of the normal terms? You're talking about the rule of law.

TIEFER:

It takes submissions by the Blackwater firm and it takes submissions by others who want to take submissions, and it makes its decision.

SOLOWAY:

I think that's a judgment for—I think that is an inherently governmental function.

TIEFER:

In other words, you're against . . .

SOLOWAY:

The Justice Department or others ought to make that judgment.

TIEFER:

OK.

All right.

Let me get some reaction.

Ms. Brian? You know that the incident-reporting system is a self-reporting system. That is only way it gets into the files of incident reporting is that a PSC firm says to the government, "Here, we have an incident to report."

And there have been a number of studies that have cast grave doubts about the completeness of these incident reports. These firms are not too eager to report certain things.

Would you consider it objective and reliable?

BRIAN:

Not at all. Self-policing is totally unacceptable as a form of oversight and accountability.

TIEFER:

OK. Secondly, about third-party certification: Would you prefer a strong and independent certifier, who, after Nisour Square, would have had the power to say, this firm should not, at least for some period of time, not be providing private security? And I'll make that a question for Dr. Avant, as well as you.

BRIAN:

This may be one moment that I agree with Mr. Soloway on something, but I agree that that's an inherently governmental function. It's something the government should be doing, not a third party that's not a part of the government.

TIEFER:

Oh, my God.

[LAUGHTER]

BRIAN:

There you go.

TIEFER:

I'm afraid to ask Dr. Avant. That's too much agreement.

Well, do you think a judgment could have been made by a certifier, wherever we place it, after Nisour Square, that Blackwater not receive.

AVANT:

Absolutely.

TIEFER:

Yes. Yes.

OK.

Thanks.

That's good enough for government work, as we'll say.

Let me ask you, Professor Avant, we have a statement from Mr. Soloway in his writing, in his written statement, he mentioned it orally as well, that Congress was told by General Petraeus that if he had to replace the approximately 15,000 private security contractors that were protecting DoD assets in Iraq with soldiers, he'd have a great deal of difficulty.

Is that what you're suggesting? Would you draw distinctions among the 15,000 that would mean it wouldn't be that kind of a burden?

AVANT:

I would absolutely draw distinctions between different services. So I don't think it would be that big of a burden.

I would also suggest that the choice is not simply in-source it entirely or rely on contractors entirely. There are a number of ways in which the U.S. could set up a potential reserve-type system, where qualified, screened people, perhaps by some certified body, would go through a certain amount of training every year and be available in case of . . .

TIEFER:

My time has expired. But I thank you for your answer.

ERVIN:

Commissioner Henke?

HENKE:

Thank you, Mr. Chairman.

I want to challenge Dr. Stanger on a point in her testimony and then refer it to other witnesses.

Dr. Stanger, in your testimony, you say one fact seems indisputable, that hiring ‘moving’ security is vastly more expensive than relying on our own arms, and you cite a March 2010 GAO study on the issue.

But I really think you distort the meaning of the GAO report and probably cherry-picked the one example from that report that seems to comport with your views.

The GAO report, first of all, it cited a CBO study on logistics that said over a 20-year period, using Army units would cost roughly 90 percent more than using contractors.

The GAO's own work, though, that you cite in your report, says they looked at five cases—four task orders and one contract, five cases—and in, to quote their words, "using contractors in Iraq is less costly than the estimated cost for State Department employees in four of the five cases we reviewed"—four of the five cases they reviewed.

In fact, one of the cases they reviewed was, or is, a situation where for the Baghdad embassy security contract, to hire civilians would have cost \$858 million and the comparative cost for a contract for the same year would be \$78 million—a factor of 11 times more expensive to in-source it.

The example you cite in your testimony where the comparison was in favor of in-sourcing, actually, if you read the next sentence in the GAO report, it says, "However, because State Department did not include," the bottom line is the costs are about equivalent.

So setting the issue of the accuracy aside, what I want to probe you on is, I want to understand do your views and other views of witnesses here, do your views hold even when the costs are 11 times more expensive?

STANGER:

Absolutely not. I'm quite familiar with that GAO study and I wouldn't call it cherry picking. I just picked out the one cost comparison that involved ‘moving’ security.

HENKE:

OK.

STANGER:

The other ones are involving static security.

HENKE:

OK.

STANGER:

I'm not making an argument about static security. And I would certainly like to see more research on the moving versus static security because everything that I know suggests that 'moving' security will always be more expensive.

HENKE:

But do you think that static security then can always be outsourced?

STANGER:

I started out believing that armed security contractors in war zone were the problem.

HENKE:

Yes.

STANGER:

As my thinking has evolved, I've come to believe that this distinction between moving and static is an important one that would allow us to transition to a system where we could in-source some inherently governmental functions and have a force that we could deploy beyond Iraq and Afghanistan.

There's an argument that the problem with in-sourcing is that these security contractors are providing a surge capacity.

HENKE:

Yes.

STANGER:

So once we're done with Iraq and Afghanistan, what are we going to use them for?

HENKE:

Right.

STANGER:

I would say that that kind of a conclusion is based on Cold War assumptions, that the new reality world we live in, where the principal threats to the United States come from non-state actors and they're a range of fragile states, in that sort of a world, there probably will be a need for 'moving' security.

HENKE:

Yes.

STANGER:

In other areas and if there is a need, we should take steps to be sure that it can be provided by government employees.

HENKE:

OK.

Mr. Soloway, we're talking, in this instance, about what are called local guard contracts at the embassies around the world. And I know Ms. Brian knows much about them from our previous hearings.

The State Department has a practice of, in I think almost all embassies, 240 or 230 or so, to have local nationals generally provide that static, that building-guard security force. They do it, as well, obviously, in Afghanistan and in Iraq.

My question for Mr. Soloway is, is there a difference between static security in Paris or Sydney, Australia, or Peru, and an active combat zone? Do you see a distinction there? Or to you, are they all the same thing, where it's always OK to have contractors perform that level of security?

SOLOWAY:

Everything is different in an active combat zone. So I wouldn't make the statement that it's exactly the same as Paris.

I think the issue, again, and I think Dr. Stanger's point, and I think there's remarkable commonality here and my point I wanted to make earlier. And I know Ms. Brian doesn't like to think that we agree, but . . .

HENKE:

OK.

SOLOWAY:

. . . We all agree that the government has to exert control over this mission, in whatever form that might take.

HENKE:

Right.

SOLOWAY:

The gradations beneath it, where much of the discussion has been confusing the question of inherently governmental that Dr. Nagl talked about, which is absolutely never, versus critical functions or closely associated or core competencies, whatever term we want to use, that does have gradations, and you have to make decisions based on availability of resources, costs, environment, risk. All of those things are part of the decision.

So I wouldn't say as a flat-out declarative statement that all convoy security is inappropriate for contractors. Nor would I say declaratively that all building security is appropriate to outsource.

I think you have to make rational, strategic, human-capital, and cost decisions in each individual case, which is why a simplistic definition—and I think this was Dr. Nagl's point—is probably not where we ought to be going. We ought to be driving DoD and State to be making broader, strategic human-capital decisions.

HENKE:

If a function is inherently governmental, if I understand the new policy letter correctly, cost does not matter.

SOLOWAY:

Correct.

HENKE:

Is that correct, Dr. Burman? Cost?

BURMAN:

That's how I read it. Yes.

HENKE:

Cost is just not a factor at the level of inherently governmental. Where . . .

BURMAN:

That's how I . . .

HENKE:

Right.

BURMAN:

And that's the policy letter that I worked on as well.

HENKE:

Where cost comes into play is where the function is closely associated, or now the new term of critical, mission critical.

And I think we all agree that, at a minimum—to use Dr. Avant's scale of options from in-source to provide better oversight—at a minimum, much better oversight, much better active

planning, de-confliction, thoughtful ways to integrate military with civilian forces, has to be done.

The question I want to ask Mr. Soloway is, and Dr. Burman, is in the case of—it's too often cited, and I take your point that it's not all Nisour Square. Right? I take that point. I understand that. And it's probably in the public mind mischaracterized.

But in the instance of Nisour Square, Mr. Soloway, did State come close to losing control of their mission or their operations as a result of that action?

SOLOWAY:

I do not have the in-depth knowledge, access to all the investigative reports, to figure out where State was or was not.

I think that we have seen too many incidents in Iraq and Afghanistan where the U.S. command-and-control structure has not functioned appropriately, whether it's through contracts or internal, including within the military. And I think that's a question for people who are really doing the in-depth analysis and investigation to look at.

We all agree that greater management, oversight, of government and nongovernment actors in this environment is absolutely essential.

HENKE:

Ms. Brian, what do you think on that issue? Did State lose control of its mission? Or come close?

BRIAN:

Well, there certainly have been a lot of comments in the military that they were very concerned about it. I don't know if specifically State did, but certainly the military raised a lot of concerns that it was undermining their mission.

HENKE:

One last comment, Dr. Burman, would you like to comment on that issue?

BURMAN:

Again, I don't know all of the specifics, but again it comes into question, the accountability of the government and whether the government is really accountable in those circumstances. And I'd say there were real questions on that.

HENKE:

OK. Thank you very much.

SHAYS:

Commissioner Schinasi.

SCHINASI:

Thank you.

And I'd like to add my thanks to you all, not just for appearing today and for your testimonies, but for the writing that you do and the thinking that you do on this subject, because, as Chairman Shays said, you know, you're not part of the governmental structure, and I think it's really important that we understand that there are diverse views outside of the government on this topic.

I will say my thinking on this changed pretty dramatically last month, when we had a representative of the Army come in, and in his statement he said the Army has 15,000 positions that it's identified that are inherently governmental that are being filled by contractors, and then he went on. So, you know, maybe by 2013, he said, the Army would be able to do something about it.

So I don't think we can just put aside, you know, what is the definition. I think we have to really look at what is going on right now.

And so I'm thinking about how the best way to frame this issue, or maybe not the best way, but different ways to frame it. And what I've gathered from your testimony today and from your other writings is that there are two ways. One is a management issue and an acquisition issue, and I'll come back to that in a moment, because I think that's where most of our questions are centered today.

But, Dr. Stanger, you also talked about the fact that this supports an overly ambitious international agenda.

And, Dr. Avant, you've talked in your other writings about how this can undermine some of the principles of democracy.

And Dr. Nagl, you've said—in your recent monograph, you've used the example of the plan to bring in thousands of Indian nationals in a contract in Afghanistan without apparent recognition that there are some issues between the Pakistanis and the Indians that we might want to be aware of before we make that decision or before we allow a contracting officer to make that decision.

So I think those kinds of topics are important as we move forward and think about this.

And so in that vein, there's one area that really my thoughts are not yet set, and that is how USAID provides security or how the government provides security for development projects.

I think, with respect to the Department of Defense, we have the capacity to do force protection. It's one of DoD's missions, you know, whether or not they should is the question.

And the State Department has the Diplomatic Security Bureau. Those are focused on some the security missions.

But how about the U.S. Agency for International Development? Is there a different set of factors there with what the U.S. is trying to accomplish with its development mission that might make military presence unacceptable or unwarranted? And then how do we deal with that issue?

So, Dr. Stanger, I'll start with you because you write about this in your book.

STANGER:

It's a good question, because I think the way that the State Department and USAID employ security contractors is quite different. I think for most of the development contractors, it's the firm that contracts for the security. So it's one step removed from the government.

But it's my understanding that if you would build up the in-house capacity within DS . . .

SCHINASI:

Yes?

STANGER:

. . . It would be possible for DS agents to be deployed on USAID missions. And I think that would be my vision for the future.

SCHINASI:

OK. Thank you.

Mr. Soloway?

SOLOWAY:

Yes, I think that Dr. Stanger's correct that in USAID, any contract or grant performed for the U.S. government overseas, it's the responsibility, as I said in my testimony, of the contractor to provide their own security. So they're the ones procuring it. It is one step removed.

And there is very clearly a cultural, a sociopolitical or a socioeconomic reason to maintain separation between military and development professionals. I mean, that's a fairly well-established tenet that the presence of the military can create an entirely different feel. So I think there is reason not to have military do that.

I do think it's with all due respect a bit simplistic to say we could just build up the DS capacity to provide the security for the thousands and thousands of development projects being performed by NGOs and companies all over the world, in particular, in dangerous and high-risk areas. Because after all it's not just Iraq and Afghanistan.

Even in Iraq and Afghanistan, we have thousands of development projects, small to large. We've had NGOs that have been assaulted and lost people. We've had companies who have lost people.

Diplomatic Security Bureau does not necessarily have the internal expertise or history of providing that kind of security. In fact, their principal security role is inside the line, not outside the line, where the projects are out on the hinterlands.

So I think that the current structure, where you have private security or others providing that capability in the field, is probably not one that is easily or simplistically changed. And it may not be realistic to even do that at this point.

SCHINASI:

Did you want to?

STANGER:

Point of clarification, I'm speaking of 'moving' security. Those numbers are much smaller.

SCHINASI:

OK. And either the smaller set or the larger set, I think, is something that I'm interested in.

Dr. Avant, I'm going to ask you next.

AVANT:

I do think that there are issues when you're thinking about the management of security, that USAID has a more difficult time with. Not just USAID as the government, but also the people that it contracts with, the NGOs, et cetera. There has been quite a lot of development of principles among many NGOs of security management.

But one of the things that I think would be really beneficial and that a certification body could do is to highlight those firms that routinely contract with personnel that have the adequate training, that have the sort of adequate management. Because one of the difficulties for NGOs, not having that kind of expertise in-house, is: how do you develop it?

And some kind of certification body that could say, you know, "These are the good firms, these are the less-good firms," would be something that would be very beneficial, I would think, to them.

SCHINASI:

Thank you.

Just one minute, if I can. Something that we have not talked about, and I may come back and ask in the second round about, enforcement of any of these things.

So I'll go back to, you know, the Army already has 15,000 inherently governmental functions. Despite what Dr. Nagl says about that being illegal, apparently it's still going on.

So any of these other prescriptions that you all have, the question is not whether or not they make sense to begin with, the question is how do you make sure they work in the end. And so enforcement and for that kind of issue, that would be my question to you as well.

Ms. Brian?

BRIAN:

Although as was mentioned before, Afghanistan is an unusual circumstance, where we're actually doing some USAID reconstruction at the same time that we're fighting a war, in theory, what this conversation about is what will happen in the future.

I don't think anyone believes we're going to be able to resolve this in the next year. But if we're looking as a policy into the future, in theory, when we're talking about USAID and reconstruction, it's much less likely that those are going to be happening in a hot zone.

And that is, from our perspective, the kind of example where it's less likely to be mission-critical and less likely to be in a place where there's a rule of law.

SCHINASI:

Yes. Thank you.

I'm going to turn to another question now.

I think that one of the things that I worry about a little bit is that this discussion revolves around acquisition and acquisition regulations. Because I think we've seen, in many of the issues that we're dealing with at the commission and also over time that the acquisition function is really relegated to a secondary status. And it does not raise to the level of a mission-critical importance.

And I think some of what you've heard about budgets and how budgets are allocated and workforce and all of that is evidence of that.

But, Dr. Nagl, you make a recommendation in your monograph about establishing three positions across the three agencies to do a better job of sort of monitoring and setting policy. But you cite those in the acquisition kind of functions. Can you talk a little bit about why you don't.

SHAYS:

It's going to be a very little bit and then . . .

SCHINASI:

Oh, I'm sorry. Yes.

SHAYS:

We're going to go to Dr. Zakheim.

NAGL:

Ma'am, I believe that the U.S. government actually has enormous enforcement capability when and if it writes the contracts correctly and provides the right contracting officers, contracting officer representatives, to ensure compliance with the terms of a well-written contract, it can then ensure that it gets the kind of behavior it wants, It can punish bad behavior and reward good behavior.

And I think that our failures in the contracting, in writing the contracts at the start and in overseeing the performance of the contracts are a very large part of the problems we're seeing.

SCHINASI:

I just note you used the term "if" to start that statement.

OK.

SHAYS:

Dr. Zakheim?

ZAKHEIM:

Thanks very much.

I'd also like to thank the panel. I've known a number of you for quite some time and appreciate everything you're doing, your writing. Reasonable people are going to differ, and that's what we're trying to sort through.

I also want to welcome two young gentlemen all the way in the back. You look like you're just interested citizens back there, and I hope you guys will see democracy at work and stay interested in serving your country as you get bigger. So welcome.

SHAYS:

That won't count against your time.

ZAKHEIM:

Thank you.

(LAUGHTER)

TIEFER:

Will the gentlemen yield so that . . .

ZAKHEIM:

Could you guys stand up, please? I just saw you walk in. There you go.

SHAYS:

OK.

Nice to have you here gentlemen.

ZAKHEIM:

One of the things that seems to come out from what all of you are saying is that it depends—context and so on.

But somebody's got to make the decision. What I haven't heard from any of you is who's going to make the decision? Who's going to make the decision that something's inherently governmental? Who's going to make the decision that the risk is too high?

Is it the commanding officer in the field?

Is it the commanding officer, say, in Baghdad and Kabul?

Is it OSD or the State Department?

How do you do this practically?

I mean, it's kind of what Grant Green was talking about as well. Let's say we follow what seems to be a consensus that we can't have hard and fast rules.

I happen to agree with Commissioner Schinasi that we do need hard and fast rules, precisely because I am confused as to who is going to make these decisions.

So let me just go down the road here, starting with Al, Al Burman. Who would make these decisions?

BURMAN:

I think that the agency would make the decision, and I think they'd do it based on this critical-function aspect of addressing the question as opposed to the inherently governmental function. I think the critical function allows the flexibility to make judgments across the spectrum of the kind of activities.

And I think it would make sense at the senior level of the agency to go through the kind of sets of risks, the kinds of things that Dr. Stanger is talking about, the kinds of things that Dr. Avant is talking about, to lay out the considerations, and then make that judgment.

ZAKHEIM:

So you think it should be somebody back at headquarters?

BURMAN:

I think it should be somebody back at headquarters.

ZAKHEIM:

OK. So there's a commander in the field out there in Helmand Province, and he or she is—you know, they've taken something over and now they want to have protection. They have convoys going back and forth. They've got to make a pretty quick decision. Is that going to go through 26 million layers?

BURMAN:

No. But presumably, if you're getting private security guards, you do have to go through some kind of process of acquiring them. So you have some kind of a contracting effort that has to be undertaken to bring them on board. Having those rules in place on how you do that, I think that makes sense.

ZAKHEIM:

OK.

BURMAN:

Obviously.

ZAKHEIM:

So you want some rules?

BURMAN:

So I'm suggesting that there should be some rules.

ZAKHEIM:

OK. Good.

BURMAN:

Yes, I am.

ZAKHEIM:

Dr. Stanger?

STANGER:

Article I, Section 8, of the United States Constitution grants Congress the power to issue letters of marque. None have been issued to date, yet privateers abound in Iraq and Afghanistan.

So I think this means that Congress has to date implicitly endorsed our current policy, but it need not do so.

ZAKHEIM:

OK.

I'm delighted you mentioned letters of marque. The last time I checked, privateers got a piece of the action—Francis Drake, Walter Raleigh. PSCs aren't getting that kind of a piece of the action. They don't go and capture something and then take some of the gold.

I think that's a highly inflammatory statement, ma'am. I think that kind of hyperbole doesn't help us at all. There are a couple of statements you made in there that kind of got my attention.

One was that the reason, you know, we have contractors is so that we can fight two wars simultaneously. I've been in the analysis business a couple of years myself, but I'll ask Dr. Nagl. If we didn't have the contractor policy we had, could we no longer fight two wars simultaneously?

NAGL:

Sir, as you know, the force-sizing construct the Department of Defense used to size itself was based on very different kinds of wars.

ZAKHEIM:

That's right.

NAGL:

So that we could, in fact, fight the kind of wars we prepared to fight—small, high-intensity, conventional combat against a conventional enemy.

What puts a strain on the force is the protracted nature of the wars we're fighting now. And, in fact, we could not fight two protracted wars of the kind we're fighting now without the assistance of contractors.

ZAKHEIM:

It's probably reasonable to say we couldn't have done it with or without contractors, frankly.

NAGL:

No, the strain on the force is still very high.

ZAKHEIM:

Absolutely.

So now let me get back to the "it depends" question, since you also said it depends. Do you agree that there should be some fixed rules? I think you do.

But then how do you deal with the critique that several of your colleagues at the table have made, that your approach is just as vague as the government's?

NAGL:

Sir, I think that there are certain inherently governmental functions. I think offensive-combat operations is one of those. I think overseeing the performance of contractors is inherently governmental. And those are clear bright lines.

For the other questions—the critical functions questions, the core-competency questions—where we would like the U.S. government to maintain capacity and capability, but where we don't necessarily want to have as much as we might ever need and where there are varying circumstances on the ground that demand different levels of government control, different levels of sensitivity, I believe that it should be the departments who make those determinations.

And I think that the department heads are accountable for those decisions in the halls of this body, sir.

ZAKHEIM:

OK. Thank you.

Stan Soloway?

SOLOWAY:

Yes, I think actually, I take a slightly . . .

ZAKHEIM:

Keep it short, I've got another question.

SOLOWAY:

I've got you.

Why is it always me you pick on?

I think that I take a slightly different perspective on this. I think the basic rule—and we all agree there need to be some rules and standards—but I think what we're generally agreeing is that the definition of inherently governmental per se is a relatively narrow one. It's beyond that where the judgments come in.

ZAKHEIM:

Right.

SOLOWAY:

In our view, I think those judgments need to be made as close to the front as possible, that the contracting officers we've talked about, the Gansler commission wrote about and others have talked about, we need to enhance the acquisition presence in theater, so they have the situational awareness and the connectivity to the commanders on the field to make rapid, knowledgeable, insightful decisions, particularly over sensitive issues, as to is this particular convoy requirement going to be in a pacified area or is it going to be on a hot zone? And so forth.

I think those are granular decisions, and the closer we can make those decisions at the front, the better we'll be.

ZAKHEIM:

Except that's why we've had problems up to now. So, OK.

SOLOWAY:

Because we haven't made it up front.

ZAKHEIM:

No, not necessarily. Well, OK, let's move on. Maybe we'll come back to it.

One of the things I heard, and I don't know if it was Dr. Avant or Dr.—and by the way, is it Avant? When you've got a name like Zakheim, you want to be sure other people have the right pronunciation.

AVANT:

Well, the correct pronunciation is Avahnt.

ZAKHEIM:

Avant, OK.

AVANT:

But my family's from Texas, so we pronounce it Ayyvant.

ZAKHEIM:

Avant?

OK.

(LAUGHTER)

Give me 10 seconds back for that.

Afghan subcontractors: now on the one hand, we're hearing that if you bring in Indians or whatever, they're not attuned to the culture. We heard that it's the Americans who seem to be the ones that are the most guilty of some of the more egregious violations.

Yet, we're also hearing that the Afghans may be working for the Taliban; they're corrupt. And that yet again, the government wants to give as much business as possible to Afghans.

So the wires are crossed 20 million ways. Very quickly, across the board, would you hire Afghan subcontractors, Al Burman?

Yes or no?

BURMAN:

It depends.

(LAUGHTER)

ZAKHEIM:

Thank you.

BURMAN:

Yes.

ZAKHEIM:

Dr. Stanger?

STANGER:

It depends, but I would insist that the information on subcontracts be made publicly available.

ZAKHEIM:

OK.

SOLOWAY:

Whether as the U.S. government, a contractor or an NGO, the answer would be: as much as I could, because I think one of the lessons we learned in Iraq was our failure to do just that.

ZAKHEIM:

Ms. Brian?

BRIAN:

Only if we have far more transparency into who they're hiring.

ZAKHEIM:

OK.

Dr. Avant?

AVANT:

Thank you.

I agree. We could do it. It requires not only transparency, but significant management capacity.

ZAKHEIM:

OK.

And Dr. Nagl?

NAGL:

We absolutely should do it to the maximum extent possible, with that oversight and control.

ZAKHEIM:

OK. Thank you very much.

SHAYS:

Thank you.

I was just trying to clarify what got Dr. Zakheim so concerned, Dr. Stanger, in your comment. And I just wanted to thank you for your comment, because it provides a little bit of color to this hearing.

And, with that . . .

ZAKHEIM:

I don't disagree with that at all.

SHAYS:

I know.

Dr. Stanger, you're at one end of the bookend, as far as I'm concerned, and Mr. Soloway, you're at the other end of the bookend.

And you all are not necessarily in the middle. You may be clinging to one side or the other. See, I'm doing something that we don't allow our law enforcement people to do. I'm profiling you. And I'm also going to try to box you in.

So first, let me ask you, do we have a disagreement on the definition? And, by the way, the Federal Activities Inventory Reform Act, I said of 1988, it's 1998.

And interestingly enough, on our staff now is John Brosnan, who was working at GAO, is probably the most knowledgeable person on contracting in general, not just contingency, and he

worked with Alan Brown, who was in the staff of Senator Fred Thompson, and they wrote the FAIR Act.

And he basically said we took the OMB definition, and when counsel got it, they changed "required" to "mandate" and "employee" to "personnel." Excuse me, they changed "mandate" to "require" and "personnel" to "employee."

But let me read the definition, and see if we disagree.

The definition of inherently governmental is, "so intimately related to the public interest as to require performance by a federal government employee."

That's it.

The disagreement isn't over the definition. Correct?

For the record, none have said there's a disagreement here. So you all agree. So it really now is a judgment call as to how this definition applies.

We, up here, aren't looking to change the definition. We are interested to see how it applies now in practical terms. So hence I want to box you in.

You've got facilities, convoys, and personnel. Within static facilities, you've got bases, government buildings, and private facilities. Within convoys, you have private vehicles, but you could have U.S. government vehicles. Within personnel, you have government personnel that you're protecting, and contractors need to be protected.

I think, listening to you all, you have basically said sometimes it's all government. Sometimes it can be private, and then there can be this combination of government-private.

So, Mr. Burman, in terms of convoys, is that inherently governmental or not?

I'm not looking for long answers. Because I've got a . . .

BURMAN:

OK.

Again, I would look at critical function rather than inherently governmental, because I think that's a better formulation for you to deal with and I would say it would depend on whether it's a wartime setting and . . .

SHAYS:

Well, first off, this is wartime. So we're talking . . .

BURMAN:

OK. In a wartime setting and in convoys, I think an agency could say that is a critical function, and that would be how I would interpret that.

SHAYS:

So would it be all government?

BURMAN:

All government agencies, you mean?

SHAYS:

Would it be government security?

BURMAN:

All government. I think that an agency could make that judgment, yes.

SHAYS:

OK.

Dr. Stanger?

Convoys?

STANGER:

Yes. I think carrying weapons and moving around with them in a war . . .

SHAYS:

Convoy? Yes.

Mr. Soloway?

SOLOWAY:

It is not, per se, inherently governmental.

SHAYS:

Would it be in between or could it even be private? I'll put you down as private?

SOLOWAY:

I'd put it down as a critical function, some of which needs to be performed by the government and some of which you'd be able to use private capabilities.

SHAYS:

OK. I'm going to put you down for both.

Ms. Brian?

BRIAN:

It depends on the circumstances. I'm sorry, I can't do them both.

SHAYS:

OK. So it could sometimes be government and sometimes be private. So give me an example of government and give me an example of private, of convoy.

BRIAN:

Fuel going to a forward operating base is clearly a critical function that would have be, from our perspective, governmental, whether it is going through a hot zone or not.

On the other hand . . .

SHAYS:

But in all cases, I'm talking contingency?

OK.

BRIAN:

Right. But I mean . . .

SHAYS:

OK. Next? What's the other case, the other way around?

BRIAN:

Laundry services.

SHAYS:

OK. But this is a convoy though.

BRIAN:

Right. But I mean, a lot of what happens is, you know, it's . . .

SHAYS:

So let's just say moving cinder blocks, you would say that doesn't need to be a government . . .

BRIAN:

If it's not mission-critical because it's not cinder blocks to repair some critical function, then it wouldn't be.

ZAKHEIM:

Yield for 10 seconds?

BRIAN:

Yes.

ZAKHEIM:

If you were moving cinder blocks into Gaza, what would the Israelis say?

They would say, "This is an act of war."

So I really think we need to be very careful about what we mean when we say that something is not inherently governmental.

You can pretty much turn around anything. I'm not saying I agree with the Israelis. I'm saying you can pretty much turn around anything, you know, and say that it's inherently governmental. That's what worries me about the distinction you're making.

BRIAN:

But I think it's for us to decide, not the Israelis. Right? I mean, we're talking about . . .

ZAKHEIM:

No, no. That wasn't my point.

BRIAN:

No. No, I . . .

ZAKHEIM:

I think you know what my point is.

BRIAN:

Yes, but I'm saying I think that we need to be focused on when—we, happily, are not engaged in that conflict and we need to be focused on what would be happening with our . . .

SHAYS:

Yes, it's not going to be on my time, I can assure you of that.

ZAKHEIM:

Right.

Let me just clarify.

The point isn't Israelis or Gaza. The point is the cement or the cinder blocks. One could argue, any military could argue, that getting cinder blocks is important for the functioning of the military.

SHAYS:

But in your case . . .

ZAKHEIM:

That's all.

And you're saying it's not inherently governmental.

BRIAN:

No, no. I'm saying if the military says it's a critical function, then it would be inherently governmental.

SHAYS:

OK.

ZAKHEIM:

Well, OK. I'll leave it.

SHAYS:

No. I'm boxing it down a little bit, and I'm not giving you a lot of time to respond. And I think you've kind of described your difference here.

GREEN:

How in the world, if you're going to slice and dice missions like that, whether they're going out 50 miles or they're going 10 miles or you carry cinder blocks or you carry ammunition or you're carrying water, how in the world are you ever going to build a force structure to accommodate that?

ZAKHEIM:

He asked it much better than I did.

BRIAN:

Well, I mean, I think the bottom line is we have to build some force structure that is capable of handling these mission-critical security functions.

GREEN:

But when you're not moving ammo, what are these folks? They're going to sit around? Or you're moving a lot of ammo and all you've got are the guys qualified to haul bricks or protect the brick movement.

BRIAN:

Well, I mean, actually, my thought on that issue of having people, more people than we need, in the long run, is we've actually outsourced all of our security functions domestically, all of our military bases everywhere, all of the functions that used to be supported by the military here.

GREEN:

Oh, I know that.

BRIAN:

So I do think in the long run, if your concern is that we create a force larger than in the long run we need, we have all kinds of needs at home that we could be using them for.

GREEN:

Well, you're much more sanguine about the resources that are going to come to Department of Defense and the Department of State than I am.

BRIAN:

Well, I would just want to mention on that, that it's not as if the contractors are free. The government's paying for them as well.

SHAYS:

Soloway, do you want to jump in?

SOLOWAY:

I just want to clarify something.

I think, again, we're having a little terminology problem. We don't do a lot of high-end, high-risk convoy security domestically. At least I hope we don't. We're moving food and fuel.

But I want to go back to your point.

SHAYS:

Let's just talk contingency.

SOLOWAY:

No, I understand. I understand. I think the terminology gets a little confusing.

Mission critical: Food is mission critical, sanitary facilities is mission critical. You've got to support the troops.

What about the thousands of movements every day of food and supplies to the reconstruction folks? To the folks doing development projects?

You could define it as mission critical, but the security around those movements in itself may or may not be inherently governmental. It's going to depend on what the requirements of the security are, where the security's taking place.

And, frankly, at that point you also have to look at the available assets and the costs you're willing to incur that will come from the mission itself. Because at the end of the day—to Mr. Green's point—I have x amount of dollars.

And so it comes away from the mission itself and you have to balance all those things out and make a rational decision. That can only be made, I believe, as close to the front as possible.

I think just because you're supporting something that's mission-critical doesn't mean the support of that is itself an inherently governmental activity.

SHAYS:

I'm going to claim my time back and go to you, Dr. Avant.

AVANT:

Yes.

SHAYS:

From Texas.

AVANT:

That's right. I'm actually from California, but . . .

SHAYS:

From California. And I was going to call you Ayvant.

AVANT:

Roots. Roots. Yes, no.

I think that . . .

SHAYS:

We're talking convoys now.

AVANT:

Yes. There's a great danger in making decisions at the field level, different ways, different times, in terms of how it affects the morale of the troops. I mean, having contractors and troops doing the same thing, you know, day to day, is somewhat of a problem for . . .

SHAYS:

Can I say, you're losing me here.

AVANT:

OK. You need to prepare. You need to decide whether you're going to prepare for the Balkans or you're going to prepare for Iraq. If you're going to prepare for Iraq, you're going to . . .

SHAYS:

OK. Do you know what I'm going to do? I'm going to define it, Iraq, Afghanistan, contingency, OK?

AVANT:

Right.

If it's in Iraq, Afghanistan, contingency, then I think convoy security is going to be something that is critical to government function.

SHAYS:

And therefore is government?

AVANT:

Well, I think it could be government, or it could be some sort of commissioned force that is under command and control . . .

SHAYS:

So you're saying government-private mixture?

AVANT:

Yes.

SHAYS:

OK.

Dr. Nagl.

NAGL:

Government-private mixture.

SHAYS:

Pardon me?

NAGL:

Government-private mixture, sir.

SHAYS:

OK.

NAGL:

Not inherently government.

SHAYS:

OK.

I'm not going to be able to get through all mine. But let me just take personnel: When I look at personnel, you're guarding government personnel. But contractors need to be protected. I'm talking not security, just the people who are doing construction.

So we've got two kinds of personnel. And you could make the argument, well, if they're out in the field, even if they're guarding contractors, if there's an incident, it impacts the mission of the United States.

So I'm going to ask you, Dr. Burman—no, I'll start with you, Dr. Nagl, we'll go the other way around—personnel, is that in government, government-private or private?

NAGL:

Government-private.

SHAYS:

OK.

Dr. Avant?

AVANT:

Agreed. Government-private.

SHAYS:

OK.

We'll go down with you, Ms. Brian.

BRIAN:

I just can't handle these boxes.

SHAYS:

This may be the last time I ever invite you.

BRIAN:

No. I mean, doesn't it depend? I mean, honestly.

SHAYS:

So tell me how it depends.

BRIAN:

If they're building a school, if the contractors are building a school, far away from activity, is that something that's considered mission critical? And maybe those contractors don't need to have government protecting them.

SHAYS:

OK. So it's interesting. Mission critical. But we do get to this issue, I thought, and I thought you made it as well, that if private security misused their capability, that in the end it impacts our mission in a very critical way.

So I'm going to take you off the argument that security folks, if they carry a weapon, even if they're private, it's OK, even if they end up causing a serious incident?

BRIAN:

No, I would never say that's OK.

But what I'm saying . . . But my point is simply are we actually asking the government to be engaged in protecting contractors when what the contractors are doing are not necessarily centrally important to the government's mission?

SHAYS:

Mr. Soloway?

SOLOWAY:

I think that the contracts, the development contracts, the reconstruction contracts, are the bulk of our mission now in nation building, and so they are mission-critical. But it is a mix.

And I would add that the question back to you, sir, or Ms. Brian, is there are incidents with people carrying guns all the time. They all affect our mission, whether they're military, civilian or contractor, or whomever.

SHAYS:

OK. But so personnel . . .

SOLOWAY:

Personnel, mixed. Absolutely.

SHAYS:

OK. And by mixed, I'm hearing two things. Sometimes it's just government. Sometimes it's just private. And sometimes it could be a combination of both, like what State Department does.

SOLOWAY:

It could be all of the above.

SHAYS:

All three.

Dr. Stanger?

Remember, you're the other end of the bookend here, so I want you to . . .

STANGER:

Yes. I don't want to let you down here, but . . .

SHAYS:

OK.

(LAUGHTER)

STANGER:

I'd just like to say, the reason I'm trying to draw a clear line is I'm fearful that if a clear line isn't drawn, nothing will happen.

SHAYS:

Yes. That's an interesting point.

STANGER:

We'll just lock.

SHAYS:

OK. So where's the clear line here. All government?

All government security?

STANGER:

'Moving' security should be performed by the military or a government employee.

SHAYS:

And personnel—guarding personnel?

STANGER:

Same thing.

SHAYS:

OK. So a private contractor, building a school, the security should only be government? That would be your position?

STANGER:

It's a good point to clarify. I don't think that would be considered 'moving' security.

SHAYS:

No, I don't think you heard me. I'm not talking moving. Well, it could be.

STANGER:

Yes. It could be static guard. I think that would be fine for that to be a contract.

SHAYS:

But, no, you have to get someone to the site.

SHAYS:

Wait a second. I can explain it to her.

The government—these contractors live in a base, in many cases, and then they go out. So in that case, tell me who you would use.

STANGER:

To escort them out, I think it should be military or a government employee.

SHAYS:

OK.

Dr. Burman?

Thank you for being true to that bookend.

BURMAN:

I'll give my short answer. Mixed.

SHAYS:

OK.

Thank you. Thank you.

We'll start again with you, Mr. Ervin, my co-chair today.

ERVIN:

Thank you very much, Mr. Co-Chairman.

I'm so glad that you ended that last exchange, Dr. Stanger, by arguing for the need for clear rules, either government or not.

I think there's considerable support for that kind of bright-line test. Because I have the same concern that you do, that if we continue to leave it unclear, we'll continue to have the consequences that we're living with right now.

So that's why I want to return to my discussion with you earlier, Dr. Nagl. If I understand your position correctly, it's that we don't want to call, we shouldn't call, the use of private security contractors inherently governmental, because if we do, that will mean that . . .

SHAYS:

Could I interrupt you for a second? I just want our timekeeper to know we're doing eight minutes this whole round. That's what Mr. Ervin and I have decided. So each of us will have eight, and you're going to give him eight again. OK.

ERVIN:

Oh, if I understand it correctly, Dr. Nagl, your position is we shouldn't call the use of private security contractors inherently governmental, because if we do, it'll make it illegal and we won't be able to use them. And we have to use them. But there's no alternative. There's no organic in-house government capacity right now.

So instead, let's call it a core competency, which means we can continue to use private security contractors until such time as we can develop that core competency.

My concern about that is, if that's a fair summation of your view, is it relates to what you just said, Dr. Stanger: Unless and until we establish a bright-line test that we're going to move toward phasing out private security contractors, the government will never develop the in-house capacity.

What's your reaction to that comment on my part?

NAGL:

Sir, your restatement of my position is correct. I do not believe that it is necessarily in the interests of the government to completely take over the private-security role.

I think that there are situations in which we want the U.S. government to have that capacity, but there are many other conditions in which it is cheaper and more efficient for the taxpayer to do it through private contractors.

I think the single most important factor, and one that we have not, I don't think, adequately covered today is the fact that there are inevitably going to be incidents of perceived misuse of force and in many cases, actual misuse of force, whether it's private contractors or U.S. military.

ERVIN:

But isn't the difference there, though, that there is clear, legal accountability for the misuse of force by government personnel, be they military or civilian? And there is still considerable legal ambiguity as to accountability for private contractors for misuse of force?

NAGL:

Sir, I believe that that is partly the case. But I think that we should solve that problem and hold people responsible, regardless of who it is and what category they fall under. And that's why I think MEJA makes sense for all contractors.

I think the single most important thing we can do in order to demonstrate to the people whose lives we're trying to improve, to whom we're trying to provide security, is that we hold people accountable, whatever uniform or lack of uniform they wear.

And we have enormous power to do that under contracts if we write them correctly. I think that we have failed to an abysmal extent in enforcing those contracts and holding people responsible.

ERVIN:

Thank you.

Dr. Stanger, do you have any comment about this in particular?

STANGER:

I have no comment.

ERVIN:

All right. I am struck by—I have kind of the opposite view of my co-chairman. I am struck by the degree of consensus among everyone here. I want to state what I think is the consensus, and if I have misstated it in anybody's view, then please, please tell me.

But it sounds like everybody is agreeing that the optimal outcome, ultimately, is some degree of in-sourcing of private security contractors, at least in the riskiest circumstances.

Then the question is what are those risky circumstances, to what degree of in-sourcing should there be and, long-term and-medium term, how do we develop the organic capacity that we need to provide whatever level of governmental takeover for private security contractors there's consensus for?

Is that a fair summation of everybody's point of view?

Mr. Soloway?

SOLOWAY:

It's close. I think the piece you're missing in there, Mr. Ervin, just to be clear about—and I think we would all agree on this—is it's not as much about how much of the current requirement do you in-source. There will be some gradation there.

It's also what resources do you need to be put in place to effectively manage and oversee whatever it is you're going to do?

ERVIN:

Sure, that's how . . .

SOLOWAY:

But that's not currently . . .

ERVIN:

Oversight's a critical issue, but I'm not talking about that. What I'm struck by is, and again, tell me if I'm wrong, is that it sounds like all of you, including you, Mr. Soloway, which is most striking, it seems to me, is agreeing that the optimal outcome is at least some degree of in-sourcing. Is that right?

SOLOWAY:

I'm not prepared to say it is or it isn't in-sourcing. I think I don't know what the balance of workforce today in Iraq or Afghanistan is. So I couldn't say we ought to in-source x percent . . .

ERVIN:

In your view, are there some circumstances under which, optimally, if we had the organic in-house government capacity today, that the function now provided by private security contractors should be performed by government?

SOLOWAY:

I . . .

ERVIN:

If we had.

SOLOWAY:

. . . totally acknowledge that the possibility exists, yes.

ERVIN:

OK. Does anybody disagree with that?

STANGER:

No.

ERVIN:

OK. All right.

Dr. Avant, I really haven't engaged you in discussion much this morning, but I was struck by your testimony, and I personally like the nuance that your testimony shows.

My concern about it, though, is, you know, given the record of government in this area in particular and given the record of government generally, particularly in the last few years with regard to a whole wide range of issues, I question the ability of the government to apply a nuanced, risk-basis test like you've laid out there.

Do you think the government's capable of weighing these factors and coming up with the right outcome in each circumstance?

AVANT:

Well, I think the government would be better if we were able to do that. And I do think that we have to decide where to put our energy. Do we want to draw bright lines? Or do we want to focus on these management issues and the legal issues?

If you focus on the management issues and the legal issues, and you actually create rules and more bright lines for those, I think you're more likely to get effective management in the field.

And I think that that would yield better policy in the long run than simply establishing categories and expecting the government to function as it always has.

ERVIN:

What about the risk of having inconsistent standards applied from one government agency to the other?

AVANT:

Actually, that's a very good point. I'm glad you brought it up because I think that while I do think that it's important for each government agency to be making decisions, in the contingency environment, the thing that's come up again and again is the fact that you have State and DoD and Justice and USAID, and all of these entities need to function together.

And there's a number of things being bandied about town about ways in which you can improve coordination. But I think that is crucial to the functioning of the management of not just private security contractors, but all contractors in contingency environments.

ERVIN:

Who would optimally provide that kind of coordination among agencies, so that you don't have inconsistent standards?

AVANT:

Right. I think there are three different ways you could do it. You know, one is what the inspector general [Special Inspector for Iraq Reconstruction] has suggested, that you have some sort of new entity.

Another is to give it to the agency that's doing it most effectively, which would definitely be DoD. There are some political issues with that.

The third is to try to use some sort of government-wide commission, independent agency, to sort of decide on governmental features.

I think the first two, you know, what the special inspector has suggested or a DoD thing would be probably the best.

ERVIN:

Thank you.

Did you have a comment on that, Dr. Nagl? It sounded like you did.

NAGL:

I would just say sir that there's a fourth option, I think, which is a senior director at the National Security Council who could coordinate the actions of the three executive branch agencies.

ERVIN:

Thank you. Thank you all.

SHAYS:

Thank you. Thank you, Mr. Ervin.

Mr. Green?

GREEN:

Dr. Stanger, you are an advocate of something referred to as "smart sourcing."

STANGER:

That's correct.

GREEN:

Would you explain how you relate that to the performance of the security function?

STANGER:

I'd be happy to do so, sir. By "smart sourcing," it relates to the bright line that I've been trying to establish in these hearings today.

I think it's pretty common to look at circumstances in Iraq and Afghanistan and to come up with the conclusion that something needs to be in-sourced. You know, it's gone too far, we need in-sourcing. We've heard that here today.

By smart sourcing, I'm looking for the sort of careful consideration of what functions should actually be in-sourced and why, as opposed to reaching the conclusion that just simply in-sourcing of any sort is going to get us where we need to go. That's the main gist of smart sourcing.

GREEN:

Dr. Nagl, doesn't that sort of track with your core competencies?

NAGL:

It does, sir. In particular, I think smart sourcing points to the extraordinary importance that I think everyone on the panel would agree of more contracting officers, more contracting officer representatives, more education for executive-branch personnel in how to use and oversee and hold accountable contractors in contingency operations.

GREEN:

OK, thank you.

Ms. Brian, let me just correct one thing for the record. I think you made a comment earlier, or a statement, about DS agents in Iraq running personal security details. Did you not?

BRIAN:

I was saying that those diplomats—I was actually thinking more of Afghanistan—but those . .

GREEN:

Well, whatever.

BRIAN:

. . . diplomats that are mission-critical are protected by DS agents.

GREEN:

But they're not. They're protected by contractors with one DS agent in the movement team.

BRIAN:

Right. I'm sorry, that's correct.

GREEN:

OK.

BRIAN:

Could I . . .

GREEN:

Sure.

BRIAN:

Since you asked me, could I just grade something that you had characterized in my testimony earlier, in saying that I was slicing and dicing? I think that, actually, that is to some extent—I'm

sorry, Mr. Chairman—but I think that a little bit what the boxes are doing is the slicing and dicing based on mission.

And, frankly, that's why I'm trying to encourage the commission instead to think rather in terms of convoy- versus personal-security detail. If instead you were thinking more in terms of what is happening in the environment, is there a rule of law?

If the military commander in the field says, "OK, this area is secure," that's how you change the terms of the debate, rather than convoy versus personal security.

GREEN:

OK, well, I can't control his boxes.

(LAUGHTER)

But let me ask one final question to all of you, really.

And I think you're all aware, or I hope you are, aware with the transition from the Defense Department to the State Department that's going to occur in Iraq and the huge mission that State is going to assume at the end of 2011, assuming this continues.

A big part of that mission involves diplomatic security and related activities. Today, the estimate from the State Department is that it will take 2,200 movement personnel in just Iraq to take over this mission.

Do you know what the size of DS is today? Do you know how many agents are overseas today?

The total DS force is about 1,800 personnel. About 800 of those are overseas. And we're talking 2,200 movement personnel in just Iraq.

Now, my question is the following, and we'll start it with Dr. Burman. Based on your knowledge of today's budget and projected budget and force structure, I'd like to know if you honestly believe we will see those kind of increases in-sourced into State and DoD?

Dr. Burman?

BURMAN:

I think it would be very difficult to do that. That would argue for, again, having as much management control as possible on . . .

GREEN:

Fine. We all agree.

Dr. Stanger?

STANGER:

It would be very difficult to do so immediately, but it could be done over time.

GREEN:

The budget is going to get better over time?

STANGER:

The only way it will happen is if Congress acknowledges the problem and allocates . . .

GREEN:

There you go. There's the key. OK.

SOLOWAY:

It's not going to happen in the short run. The key is to determine what the correct balance, whether it's one DS person or three per convoy protection, to provide the direction.

It's also going to be cost-prohibitive, because it's going to take money away from the development and the diplomatic mission . . .

GREEN:

And away from . . .

SOLOWAY:

. . . funding, which . . .

GREEN:

. . . and away from the teeth, in the case of DoD.

STANGER:

As long as you have the management in control, I think that there's clearly no way we're going to be filling all of those slots with feds.

GREEN:

OK.

Dr. Ahvant?

AVANT:

OK.

GREEN:

Ayvant.

AVANT:

There you go. You got both of them.

GREEN:

Avant.

AVANT:

Avant, there it is. Yes, I completely agree it would be very difficult to fill with government slots. And I think the management is the way to go.

GREEN:

Dr. Nagl?

NAGL:

I concur with my neighbor by whatever name.

(LAUGHTER)

GREEN:

OK, thank you. I'll give up the rest of my time.

SHAYS:

Thank the gentleman.

And we'll go now to Mr. Tiefer.

TIEFER:

Thank you, Mr. Chairman.

I have just been given by Commissioner Green the tough, practical challenge of trying to move away from a current structure, which in light of Nisour Square, the Iraqis very much don't like.

And we've been getting information about how they're increasingly through the Ministry of Interior saying, "We will not accept American PSCs. You stuck us with Blackwater a year longer than you should have." And so get rid of them to the extent you can.

Now, I want to ask Professor Avant, you know that even though the development in the State Department by which they're moving toward eased much quicker training and commissioning of people looking to fulfill some of the protective duties?

AVANT:

Well, there is this creation of . . .

TIEFER:

Security protective specialists. Go ahead.

AVANT:

Well, in the State Department for a while, there's been the talk of building a civilian reserve of some sort. I know, from my chat with you this morning, some of that is focused on security issues right now. I think that that's a smart way to go.

TIEFER:

OK, it may take time, but we might get there.

Dr. Stanger, you drew a distinction, even though you categorize it as being one end of the spectrum, between static security and moving security. I want to see if we can, even with your concerns—AID may say that for its mission it wants Iraqi locals because it has reasons that this is better for it.

In those situations, if the agency says, "We don't want to have American private security or American troops," would you accept local natives as local nationals doing the job?

STANGER:

Of course. I think that would be collaborating with the people we're trying to help. It's the reason we're there in the first place.

TIEFER:

OK.

Professor Avant, do you draw a distinction in terms of convoys between routine supply work—and let me ask you in particular with this. It's been raised: the possibility we can't build a force structure where we're not sure if a convoy is where we need to have troops or PSCs.

But we have incidents like Fallujah in 2004 where it seems there was a choice between Army and private security. Do you want to explain whether that allows you to say that you can build a force structure or that you should have one like that?

AVANT:

I'm sorry. I don't exactly understand . . .

TIEFER:

OK.

AVANT:

. . . what you're asking.

TIEFER:

Are there times where you have to make for one convoy at a time, a decision about whether to use troops or to use PSCs, and if Fallujah in 2004 is an illustration of this?

AVANT:

Right, in Iraq, that was a common occurrence at the beginning of the war.

TIEFER:

Was it right to make that distinction, convoy by convoy? What happened from us making a wrong decision about that in Fallujah?

AVANT:

Well, to begin, I don't think that the people in the field were used to making that decision time after time. I mean, there was a lot of expectation that Iraq would look more like the Balkans than what it ultimately looked at.

So I think that in the future I would expect more and more incidents where, in fact, people on the ground do have to make those decisions.

I actually agree with Ms. Brian that having a field commander that estimates the degree of stability in an area and makes a judgment about the kind of convoy security that it would require would be the way to go in terms of parsing those decisions.

TIEFER:

OK, let me ask about other moving personnel, namely the ones who go and do personal security.

We've all taken trips to the field. Some of us have been guarded by personal security details, private security details. I was guarded in both my trips to Iraq by soldiers.

Is there a way within a force structure and a budget to use some functions of this kind being one way and some functions of this kind being another way?

AVANT:

Again, I'm not . . .

TIEFER:

Can we stretch a limited government structure by also having some private security?

AVANT:

Well, absolutely. I mean, I think you can sort of look at what the State Department did, post-Nisour Square, as an example of that, where you know, you use some of your in-house personnel, in fact, in effect as a greater sort of management boost for the kind of private security contractors that you're using.

TIEFER:

Ms. Brian, do you have a comment about that, any part of that?

BRIAN:

I was just agreeing with that. I don't need to take your time.

TIEFER:

OK.

Dr. Stanger, you wrote a classic on the subject we're talking about, *One Nation under Contract: The Outsourcing of American Power and the Future of Foreign Policy*. I want you to know that we decided on the commission to buy a copy for every single member of the commission, so.

STANGER:

That's wonderful, sir. Thank you.

TIEFER:

A little plug here for the witnesses. Anyway . . .

ZAKHEIM:

I'll wait to read the Classics Illustrated version.

TIEFER:

Maybe the two youngsters you've pointed out will read it that way, also, Commissioner.

We're going to have Aegis here on Monday, and I think you got familiar with Aegis during your study for that book.

And I want to ask you two questions that jumped out when I read your section on this. One, they're headed by, at least the British group overall is headed by Tim Spicer. And your book calls him a mercenary.

And I have the impression this is not a personal exaggeration by you that you're not saying all of these people are mercenary quite. He's very separate.

Is he a mercenary? Or was he, anyway?

STANGER:

I'm moving into hyperbole again, perhaps, but that was in reference to his past activities where he was . . .

TIEFER:

Was he a mercenary in the past?

STANGER:

I believe many people would say that he was.

TIEFER:

Yes, oh, yes. And did we really set Aegis above other contractors when we gave Aegis big roles in the Armed Contractor Oversight Division in Afghanistan and the Contractor Operating Cell in Iraq?

Did we really set Aegis above other contractors, and we were having a contractor-over-contractor situation?

STANGER:

I think that's fairly well-accepted that that was the case.

TIEFER:

Is that good or bad?

STANGER:

I think it's enormously problematic to have contractors managing other contractors.

TIEFER:

So if we have a limited number of personnel in our force structure and in our budget, government personnel, should we stretch them by having the vital coordinating functions done by government people and having, say, in each group of either in each convoy or each private security detail, in each one having some government—at least one government agent? Can we stretch a limited number of government people?

AVANT:

In my view, sir, whenever you have contractors managing other contractors, it's kind of a red flag. It should be subject to strict scrutiny.

TIEFER:

I'll stop there. My time's expired.

SHAYS:

I thank the gentleman.

And I think we're going to Mr. Henke.

HENKE:

Sure. Thank you, Mr. Chairman.

I've got two questions. I'd like a response from each of the witnesses. So I'd like to go down in order.

It strikes me that this whole discussion today about inherently governmental or not, we may be asking the wrong questions. The issue seems to be whether it must be public or can it be private, very fundamentally. It must be inherently governmental, or it's eligible for commercial market forces to take place.

It strikes me that that's a business decision, first of all, a political policy decision on what is the government supposed to do. Then, it devolves to a business decision, a cost decision, an economic consideration. But it is not at its core a foreign policy decision or a national security decision.

I'd like to read a short quote from a piece, a chapter in a National Defense University Press book on outsourcing civilian capabilities—the author is Bernard Carreau—and have each of you respond to it.

Here's the quote: "This chapter considers outsourcing from a national security perspective, rather than an economic one. Instead of asking the question, 'Is outsourcing better, cheaper and faster?', it asks, 'Does outsourcing contribute to minimizing threats to U.S. military and civilians deployed and to maximizing the effectiveness of military and political goals set for the operation?'" End of the quote.

Could you each respond to that in order?

Dr. Nagl?

NAGL:

Outsourcing does not maximize the accomplishment of national security goals. However, all strategy—it isn't strategy if it isn't done in a resource-constrained environment.

So, given resource constraints, which all strategists have to deal with, I believe that the author of this chapter is, frankly, not conducting strategy if he is not considering resource limitations.

And I believe that there are very many functions that can be outsourced with the proper oversight in a way that will actually enhance the accomplishment of U.S. national security objectives because it will allow us to devote more resources to higher priority missions.

HENKE:

OK.

Dr. A?

AVANT:

I think it's not just an issue of resources. I think that there are ways in which the national security of the United States can, in fact, be strengthened by partnering with a variety of different entities around the world. We partner with countries in NATO. We partner with a variety of countries.

HENKE:

But to include the private sector?

AVANT:

I would include the private sector in that because I think that, increasingly, if you look at what's going on in Afghanistan, NGOs are delivering all of the U.S. aid that's going into Afghanistan.

There's a number of very important things that we care about a lot that are being done by a lot of people. So I actually think, managed effectively, outsourcing could actually be a way of bringing in partners as opposed to violating national security goals.

HENKE:

But the fundamental question is, are we asking the right question? Should it be how to source it or does it work toward the foreign policy objectives?

Ms. Brian?

BRIAN:

I would agree with you that I'm not sure we've been asking the right question.

And it struck me as you were talking that one of the things that I think that's missing that OFPP is asking in its analysis of what is an inherently governmental function is this question of discretion tests. And we haven't been acknowledging that very important part of this equation.

HENKE:

Yes.

Dr. Soloway?

SOLOWAY:

I agree. I agree with Dr. Avant and Dr. Nagl. Outsourcing itself is not the question. It's how you manage, oversee, plan, coordinate, and communicate whatever your mission is through whatever network of capabilities.

Although I do have to correct one comment Dr. Avant made. The aid in Afghanistan is being delivered by a network of for-profit and not-for-profit providers. But it is a network, and it is international. It's not just U.S. entities.

HENKE:

OK.

SOLOWAY:

And by the way, 90 percent host-country nationals.

STANGER:

I actually agree and wrote a book about it.

HENKE:

OK.

BURMAN:

I agree as well. I think that you really are focusing on mission-critical activities. And that's the question.

You can look at outsourcing from that perspective as well as to whether or not outsourcing something would, in fact, enable you or not enable you to accomplish your mission.

HENKE:

OK, my second question is a political one. We're in a political body. We, as a commission, report to a political body when we issue our reports.

So I want to ask you a political question with a bit of rhetoric in it and see how you respond to that.

When we all walked in this building this morning, we were met by a uniformed security guard, a government employee, a member of U.S. Capitol Police. There's a U.S. Capitol policeman in the back of this room providing security for us.

My observation is, from our trips to Iraq and from general awareness, we're understanding that our forces in Iraq are provided security at their FOBs, at their operating bases, by largely third-country nationals, Ugandans, Indonesians, many thousands of them and very often provided minimal wages.

My question is, the political question is, if it's good enough to have publicly provided security in this building by a public employee, why isn't it important enough to have it for our forces in Iraq.

Mr. Burman?

BURMAN:

Well, I think, again, the question is the resources available to do it. Perhaps if you did have the resources you might go that route. The other question is what are the circumstances and the risk that's prevalent in the area?

So I think it's not an overall question. I think you could go either way.

HENKE:

OK.

Dr. Stanger?

STANGER:

I think that there was an attempt to learn the lessons of Iraq in Afghanistan and to hire local nationals . . .

HENKE:

Right.

STANGER:

. . . as much as possible. And I think what we need to reflect on is what jobs we're hiring them to do. If most of them are to . . .

HENKE:

We're hiring in this case, in my example, we're hiring them to guard our troops.

STANGER:

We're hiring local nationals to guard our troops.

HENKE:

Well, local nationals in Afghanistan or third-country nationals in Iraq. My point being that they're privatized. So just respond to that.

STANGER:

So regarding a camp, in other words.

HENKE:

Right. They're providing force protection at the boundaries of what the LOGCAP contractor built, providing our forces the security so they can operate at a base.

STANGER:

I think if it's static, it's permissible.

HENKE:

See that's where I think your bright line does help, and I commend you for drawing that bright line.

Mr. Soloway?

SOLOWAY:

I think at the risk of going to that end of the spectrum the chairman put me at earlier, I'd say that with all due respect to the Capitol Police, who I have a great deal of respect for, having lived in this neighborhood for 30 years, I don't think it's about whether they're public or private.

If you're talking about we pay low wages to the Ugandan or Congolese forces, I think we have to look at our acquisitions system that's driving us to require folks to go to low bid with the qualifications and standards we set ourselves.

We as the customer drive what the payment will be. But the mere fact that one is public or private does not necessarily speak to whether we're providing adequate or inadequate security, as we've unfortunately seen in a number of instances.

HENKE:

So you're saying that public or private has nothing to do with quality, then.

SOLOWAY:

Absolutely.

HENKE:

OK.

BRIAN:

I think your observation raises two things in my mind. One is the Congress is always very, very good to itself.

(LAUGHTER)

That's just a fact of life.

But I have always had great discomfort with the fact that our troops at a time of war—I mean, the Green Zone wasn't very safe. It was not being very protected by our own people. And I didn't think that was alright.

So, I mean, again, it comes back to my distinction of is there a rule of law and are there real concerns about the security and control of the situation? And Iraq now is not Iraq then.

HENKE:

OK.

Dr. Avant?

AVANT:

I have to agree that I don't think public or private is absolutely the issue, even here. I think that, you know, if I were choosing, I would choose on in terms of the kinds of management structure that you have as opposed to whether it was public or private.

HENKE:

So how well you manage it?

AVANT:

Yes.

HENKE:

Dr. Nagl?

NAGL:

I'm going to disagree just slightly. I think U.S. government is the gold standard. I think that . . .

HENKE:

You're making the quality distinction.

NAGL:

I am making the quality distinction. I think U.S. government is the gold standard.

I believe that with the correct oversight mechanisms that we've been discussing today that you can approach that standard, but it is inherently more difficult to perform these functions properly and to the highest possible standard by contracting it out.

In many cases, it is still the right decision, or the best decision for the common good of the mission, based on cost-differential and other force-structure constraints, all sorts of other reasons. But I do think the U.S. government security protection is the gold standard.

HENKE:

OK, thank you very much. Thank you all.

SHAYS:

Thank you, Mr. Henke.

Ms. Schinasi?

SCHINASI:

Thank you.

Let me start by just supporting what my colleague, Commissioner Henke, that line he was pursuing. I think he said it better than I did earlier, which is this is not just an acquisition question, this really has larger ramifications.

But I'm going to ask a couple of questions based on the assumption that the better we can manage, the larger the space the contractors can inhabit effectively or efficiently or whatever word we want to use.

And I make a distinction between management and oversight. You know, I'd rather have the better management and not need so much oversight. Obviously, they are connected.

But a couple of things that I think are important, critical, I would say, and one is transparency. So I'm just going to ask yes-or-no answers. I'm sorry to do that, but you all are probably getting to the end of your time here, too.

So, Ms. Brian, I'm going to start with you: Do we have effective conflict-of-interest standards, both personal and organizational, to be able to deal with effectively using private security contractors?

BRIAN:

No.

SCHINASI:

OK.

And one of the issues that has been raised is the subcontractor issues. Many of these firms are subcontractors.

Mr. Soloway, do you think we have enough information right now from the prime contractors to be able to give the government the kind of visibility and oversight it needs to manage what, in many cases, are foreign subcontractors?

SOLOWAY:

I believe the government has the capability to ask for what information it needs. As we have advocated in our testimony, the one solution to a lot of these problems, many of the issues you all have raised is to turn the whole requirement over to a government-contract requirement, have the government manage it across the private and public sector.

But I believe the information is probably available. Whether the government has asked for it, that I don't know. And I don't know what standards they have actually laid on the companies.

SCHINASI:

OK.

SOLOWAY:

There is a . . .

SCHINASI:

OK.

Dr. Stanger, do you believe we have the information necessary from the subcontractor?

STANGER:

I don't know if the information is available within government, but I do know that it is not available within the public domain. And I believe it should be.

SCHINASI:

Dr. Avant, you talk about command and control, and you make a point that after the Kennedy report that you think we have seen more effective command and control, and that's really important to be able to have contractors in this space.

Is that something that can be done through a contract, do you believe, improving command-and-control procedures?

AVANT:

I think they can be improved. I think if I were looking at what it would take for effective management, I would not just look at the contract. I would look at coordination among government agencies. I would look at standards. I would even look at licenses for individuals.

I think . . .

SCHINASI:

You would be putting those in place.

AVANT:

Right. And I think those are the kinds of things that will move us closer in the private sector to what the government command and control is.

SCHINASI:

My last point is on accountability. And I mentioned this earlier. This is an environment where we have both foreign companies and foreign employees. We've talked about the legal ramifications of that. But is it possible to manage in this environment well enough so that we feel comfortable continuing with the status quo?

Dr. Nagl?

NAGL:

I believe it is possible to do so, but we have not written the contracts or enforced the contracts in such a way that that is the current practice.

SCHINASI:

Where do you see accountability right now?

NAGL:

I see a lack of accountability right now. I believe that the contracts can hold those performing the service responsible for their actions.

But I believe that all too often government fails to do so often because of failures in capacity and capability in contracting officers and contracting officer representatives.

SCHINASI:

So is it fair to say if we can't get accountability, there really is no accountability? I mean, I understand, and we can fix things to get to a point where we're comfortable. But if we don't have it, then we don't have it.

NAGL:

Ultimately, ma'am, the heads of executive-branch departments are responsible for the performance of any organization that works for them under their contracts. And so there is accountability, but it has not been well-enforced to this point.

SCHINASI:

Yes. So I'm going to go down the row for that.

So anybody who has an example of where there has been accountability, I'd love to hear that.

Dr. Avant?

AVANT:

You're asking for an example where there has . . .

SCHINASI:

Well, where would you say accountability now resides?

AVANT:

Yes, I think accountability is a big problem right now. And I think it's partly because government agencies don't always choose the contractors that have behaved the best. They don't always punish the contractors that behaved the worst.

Then, I think there's also this huge legal issue of actually being able to prosecute individuals who have committed criminal acts. I think that's really the \$64,000 question because that is a hard one to solve.

SCHINASI:

So we may have the tools, but right now we don't have the accountability?

AVANT:

Absolutely.

SCHINASI:

Ms. Brian?

BRIAN:

I would certainly agree with that. And that also reflects, both in terms of the corporate level, but also the individuals, with MEJA not even questionably applying to other than DoD contractors as well.

So I think we have, from my perspective, the urgent need that can be fixed soon and should be fixed soon is the accountability equation.

SCHINASI:

Thank you.

SOLOWAY:

I would like to caution the use of language. We have cases—it's rumors. We have speculation that there are thousands of orders, task orders, hundreds of contracts in the Iraq and Afghanistan theater that have been awarded competitively. The government has changed out contractors. There have been protests.

Let me just finish the thought. There is a process in place. So I wouldn't buy into the assumption that there is quote, "No contract accountability." There have definitely been gaps. I will acknowledge that. We've acknowledged that in our testimony.

But I think you could walk away from here thinking everybody agrees that this is the Wild West. And I wouldn't agree with that.

Second, I would agree with the point Ms. Brian just made. We've strongly supported for a number of years the expansion of MEJA.

I believe—Professor Tiefer can correct me if I'm wrong—my understanding under the current rules is that contractor civilians and government civilians, actually, have a very similar legal standing.

So that would be appropriate, whether we were going to hire more government civilians to do some of the security work or contractors. We still have that accountability issue.

And the third, I think we have to look at accountability holistically. I agree that everybody ought to be held accountable. I could also point to numerous cases where, OK, who's being held accountable, whether you're a contractor, whether you're a government employee, whether you're an NGO . . .

SCHINASI:

Mr. Soloway, I meant the question in the holistic way.

SOLOWAY:

So I'm saying take the whole . . .

SCHINASI:

I wasn't talking about contractors . . .

SOLOWAY:

Right, I just want to take it from a holistic perspective . . .

SCHINASI:

And that was . . .

SOLOWAY:

. . . and suggest there's some balance that needs to be brought to it.

SCHINASI:

No, but where is it? That's my question. I mean, in a holistic way, where is it?

SOLOWAY:

As I said, I think it is better than most people believe. It is not where we need it to be. We clearly have improvements that need to be made.

SCHINASI:

OK, so an example then?

SOLOWAY:

An example of, I'm sorry?

SCHINASI:

Of some place where someone has been held accountable for any of the issues that we've seen in the private security contractor world, whether it be hiring in inherently governmental functions or a contractor or a government employee.

SOLOWAY:

I don't have the visibility to review every contract and every task order that's been awarded, what the terms have been:, I guarantee you in the companies, knowing for a fact that there have been individual employees that have been fired, have been repatriated, have been taken off contracts for poor behavior. So we've definitely seen that. That's accountability.

I don't have the visibility into the chapter and verse that you all would have.

SCHINASI:

OK.

Dr. Stanger?

STANGER:

Commissioner Schinasi, I think you've put your finger on a very important point. There's an enormous accountability problem. When everyone's in charge, no one is responsible.

SCHINASI:

Thank you.

Dr. Burman?

BURMAN:

I think it is the government that ultimately is held accountable. That's one of the reasons for the sensitivity on having private contractors do this work, because, ultimately, it will come back to the government.

SCHINASI:

OK, thank you. My time is up.

SHAYS:

Thank you very, very much. It's nice to have a panel you can question of individuals who don't feel they have to parse—I'm sorry. I got so eager. It's still nice to have you here.

Dr. Zakheim?

ZAKHEIM:

Thank you.

And I agree, it's nice to have you folks here.

A couple of points, one that I don't think we have time to get into. I raised the Afghan question before, Afghan subcontractors. If ever there was a problem with accountability, it's those folks.

That would, I believe, probably require a full hearing in and of itself. We've got a government policy to hand work over to people who are certainly right now beyond our reach.

And you all, because you're all imaginative folks, need to think and write about that. We need ideas.

You know, how do you enforce it? Even if you catch an Afghan in doing something, then what? You know, our kids' lives are at risk.

So it would be helpful to hear that.

We have several times talked about the commander in the field making decisions. The problem is the commander in the field will always, in any support matter, default to the private security folks because it's easier, because it's support.

And so I tend to come down with Dr. Stanger and the need—surprised, surprised, you might be, just because we disagree about privateers—I agree with you entirely that we need bright lines.

Now, the question is, where should the bright lines be spelled out? Should it be in the FAR? Should there be legislation for it?

How should we do this in practical terms? I want to go down the list and just tell me in three words or so where these bright lines should be spelled out.

Dr. Nagl.

NAGL:

By the departments of the executive branch, sir.

ZAKHEIM:

OK.

Dr. Avant?

AVANT:

I actually think some sort of a contingency FAR would be a good idea.

ZAKHEIM:

OK.

Ms. Brian?

BRIAN:

I think the FAR is appropriate.

ZAKHEIM:

Should there be a contingency FAR kind of provision? Is that what you're talking about?

BRIAN:

Well, I mean, I think that's fine. But I do think that what you still will require, then, is someone in the field to say, "Yes, this is now under these . . ."

ZAKHEIM:

OK, well, let me make myself clear. I'm thinking if you have guidelines—you've got sentencing guidelines. Judges sentence, but they've got guidelines and frameworks.

BRIAN:

Right.

ZAKHEIM:

What I hear from you all is that the guidelines right now are just too vague.

BRIAN:

Right.

ZAKHEIM:

You could never sentence anybody on the basis of guidelines, you know, parallel guidelines. So that's what I'm asking. So I'm back to you on that.

BRIAN:

Yes, then I think that would make perfect sense.

ZAKHEIM:

Mr. Soloway.

SOLOWAY:

Yes, I think in a contingency FAR collected in a collective place, so there's one place all the contingency rules are, including how we utilize or don't private security, would be perfectly appropriate.

ZAKHEIM:

OK.

Dr. Stanger?

STANGER:

Contingency FAR makes sense, but there's also a lot of information we don't have that I would want to see.

ZAKHEIM:

Such as?

STANGER:

Information on 'moving-' versus static-security countries around the world.

ZAKHEIM:

OK.

Dr. Burman?

BURMAN:

I think it's an agency policy question that then, ultimately, could be placed in a contingency FAR.

ZAKHEIM:

OK, now let me go around again. I do want to pick up on Dr. Stanger's distinction between moving and static.

If there were bright lines drawn, would that be the place you would draw the bright line, Dr. Nigl?

NAGL:

No sir.

ZAKHEIM:

OK.

Dr. Avant?

AVANT:

I posed three risk issues, and one of them is moving versus static. So I think that's an important, but that's not the only one.

ZAKHEIM:

OK.

Ms. Brian?

BRIAN:

No.

ZAKHEIM:

Mr. Soloway?

SOLOWAY:

No.

ZAKHEIM:

You're obviously yes.

STANGER:

I think it's a promising bright line.

ZAKHEIM:

Dr. Burman?

BURMAN:

I agree with Dr. Avant.

ZAKHEIM:

OK We've talked a bit about budgets. And there's a budget paradox here that budgets are, which I know a little bit about, are coming down, are going to come down or they're certainly under a lot of pressure.

And so people are saying, "Well, how are we going to hire folks to do this job? There's so many other priorities."

There are a couple of ways where this could be done. One could be a legislated line item, specifically for this, that doesn't affect the rest of the budget, which DoD—we'd drive DoD nuts, we'd drive State nuts. But it's doable.

Another is taking Mr. Gates's approach, which essentially says, "I'm finding money, but I'm going to give it back to you." Well, he says, "Well, some of that money is going to go to finding the kinds of people we're talking about."

Because right now they're talking about in-sourcing and at the same time, they're talking about cutting budgets. And those two are not entirely consistent.

So I want to ask each of you, how would you find the money?

Dr. Nagl?

I mean, you can't throw your hands up in the air and say, "Well, we can't find the money, so this has all been an academic debate," because it's not. There's lives at stake here.

So, Dr. Nagl, how do we find the money to find the people we need in a constrained budget environment?

NAGL:

I think the people we most need are contracting officers, contracting officers' representatives. Some of that is already happening.

Secretary Gates, his primary in-source push is on, correctly, I think, on those inherently governmental functions. And I think we can get that money from some of the other administrative cost-cutting measures that he's finding in the defense budget.

ZAKHEIM:

OK, so you've got Mr. Gates, who everybody agrees is one of the best secretaries of defense we've ever had. He won't be there forever. This is a problem that could be there for many, many years.

Should there be somewhere some guidelines to sort of enforce in the future the kinds of things that we both agree Mr. Gates is doing now.

NAGL:

Sir, I've argued for, in the paper I wrote with Richard Fontaine, I've argued that we need to enhance the level of the contracting-oversight personnel in DoD, in State/USAID and at the NSC, and those people should oversee that process and ensure that we continue to have the contracting-oversight personnel and the regulations that we need to manage . . .

ZAKHEIM:

So you want the agencies to police themselves. You don't think Congress needs to say anything about this?

NAGL:

I think that Congress is saying something about this and should.

ZAKHEIM:

Could you be any more explicit?

NAGL:

It could be more explicit . . .

ZAKHEIM:

OK.

NAGL:

. . . and continue to conduct oversight.

ZAKHEIM:

Dr. Avant, what do you think?

AVANT:

I agree that Congress should be involved. But I also agree that a lot of this, the money, is going to come from reallocations.

Essentially, if you're going to have—and this is something that, actually, John and Richard talked about, too, in the report—if you're going to have a Defense Department, a State Department, a foreign-policy establishment that relies on these contractors, you need to plan for that. You need to train for it. It needs to be an integral part. And people need to get rewarded for it in terms of promotions.

ZAKHEIM:

Yes, but except that they've been saying, "Yea, verily," for eight or nine years, and it hasn't happened. It's only starting to happen.

That's why, again, I come back to you: Do we need something to box them into a corner?

AVANT:

Well, I think that's part of the process. And if you look at changes over the course of U.S. military history, they don't ever happen fast.

ZAKHEIM:

OK, so you think the process will just take care of itself?

AVANT:

I'm not saying it—well, no. It always depends on what people do. I think Congress being involved . . .

ZAKHEIM:

OK.

AVANT:

. . . Trying to push things forward is a good idea.

ZAKHEIM:

OK.

Ms. Brian?

BRIAN:

I think in this particular case, it is helpful for Congress to get involved and direct the priorities in the budget. But I also think it's important to remember that the CBO challenged the assumption that it's necessarily more expensive.

I mean, their point was that, on balance, it's not necessarily more expensive to have feds doing or the military doing this work. The problem is the long term. When we don't need them, they're having these forces.

One of the things that hasn't been discussed, but I think is an important one is to consider some sort of alternative, where you have sort of a short-term contract for these kinds of services from the feds.

ZAKHEIM:

As a former CBO person, I can tell you they don't always listen to CBO reports.

Mr. Soloway, what do you think?

SOLOWAY:

I think that I agree with Dr. Avant in general. I think that the creation of a special category of employees is actually more problematic, maybe more unrealistic than keeping the pedal to the metal on the issues we've identified, even if that makes some sense.

But the other thing is to begin. One of your favorite things, I'm sure, as a former comptroller, would be to begin looking at existing expenditures, particularly on personnel that are performing functions that are far more routine, and maybe I can transition some of that work to private sector and free up some of that money of those positions to bring in government personnel doing the most sensitive work.

So there's a balancing act on the HR structure . . .

ZAKHEIM:

You'd agree that they'll probably need congressional encouragement to do that.

SOLOWAY:

Although I remember the last time Congress encouraged acquisition-workforce attention was in the '90s when they told us to cut the acquisition workforce 25 percent a year.

ZAKHEIM:

OK. Dr. Stanger?

STANGER:

I think that Congress needs to be sure that the State Department has the resources it needs as we move forward in Iraq. And that's important to focus attention on that.

ZAKHEIM:

Dr. Burman?

BURMAN:

I think that the Congress has been looking at this whole question of acquisition capacity and strength and moving in the right direction trying to do something about it.

ZAKHEIM:

Thank you.

SHAYS:

I thank the gentleman. I'm sorry I tried to jump ahead of him.

What I was beginning to say, on Dr. Zakheim's time, was that it's really nice, First, this has been very stimulating to all of us. And it's nice to be able to question people who don't have to

parse their words and, frankly, who even though gently, were willing to criticize the co-chairman with the help of other commissioners.

I think we all agree that Congress has made it very—not completely—it has made it clear what the language is. The Federal Activities Inventory Reform Act of 1998 defines inherently governmental as so intimately related to the public interest as to require performance by a federal government employee.

OMB has defined inherently governmental so intimately related to the public interest as to mandate performance by federal government personnel.

So, I mean, it's pretty clear that there's agreement with Congress and the executive branch.

I was trying to box you in, in part to learn where you were coming from, but to also illustrate a point. You don't want to be boxed in and neither does the State Department or the Department of Defense. And if we box ourselves in too much, they won't be able to carry out their mission.

And I used you, Dr. Stanger and Mr. Soloway, just to help me kind of say you have probably the most differences.

So when Mr. Ervin pointed out that you really agree more than you disagree, and that he said that that was a difference that I had, I value what he says because he, frankly, is one of the best listeners I've ever encountered.

Sometimes at commission meetings I have him kind of summarize at the end what did he hear. So I was listening to him.

But it seems to me that I would like you all—I would like to at least come back to continue this point. We went through the convoys and we went through personnel. You have a government choice. You have a private choice. And you have the mixture in between government and private mixture, in other words, private contractors with government oversight.

In the static facilities, you have bases, you have government buildings, you have private facilities that come to my mind.

Would you all agree, and if you don't, that U.S. bases is inherently governmental?

And let me make this point to you: Inherently governmental means you don't have a choice. It is a law that it be government. There's no, this is, "Well, it's inherently governmental, but we're still going to have private folks do it."

Now, the inverse is not true, that if it's not inherently government it means it has to be private. It could still be government. So we have that flexibility, but not the other way around.

Would you all say that guarding a base is inherently governmental? I'll start with you, Dr.—a U.S. facility—and I'll even say a State Department facility or embassy.

BURMAN:

I would say it is not inherently government. I think that the whole formulation of inherently governmental is not helpful in this circumstance.

SHAYS:

OK, but you say it's not . . .

BURMAN:

So I would say that it's much better to look at the question of, is it critical that government employees . . .

SHAYS:

But . . .

BURMAN:

. . . be used for these purposes.

SHAYS:

. . . but there is a law. And the law—so are you suggesting . . .

BURMAN:

So I would say it is not inherently governmental . . .

SHAYS:

OK.

BURMAN:

. . . but that a critical look at this from a critical-function standpoint could well argue that you only want government employees to do the job.

SHAYS:

Dr. Stanger?

STANGER:

I would say that it's not inherently governmental.

SHAYS:

A base is not inherently governmental? OK.

STANGER:

Not—no.

SHAYS:

Mr. Soloway?

SOLOWAY:

I agree with Dr. Stanger.

SHAYS:

Ms. Brian?

BRIAN:

I believe if it's in a hot zone, then it is. But if it's not, then it's not.

SHAYS:

OK, well, would you say most of Iraq is a hot zone?

BRIAN:

I would say not at the moment. I don't think the bases are necessarily in the way they were five years ago.

SHAYS:

Afghanistan?

BRIAN:

It depends where in Afghanistan.

SHAYS:

I'd have to say I haven't been to Afghanistan. I think it's a hot spot.

Dr. Avant from Texas, no from California, whose parents were in Texas?

AVANT:

Got it right.

I agree with Ms. Brian.

SHAYS:

OK.

AVANT:

I think that it's not inherently governmental, generally, but there could be circumstances.

SHAYS:

OK. Dr?

NAGL:

Concur.

SHAYS:

So, you're right. There is consensus. All of you say that that's not inherently governmental.

So let me ask you in terms—well, that would have been the strongest case, because then the other cases would be the private facility, and you would all say that is not inherently governmental.

SHAYS:

OK, so since you all agree, tell me in very unusual areas where you disagree.

Dr. Burman, who do you disagree with?

BURMAN:

I think I'm in pretty much agreement with the rest of the panel. I think the approach that Dr . . .

SHAYS:

Yes, yes.

BURMAN:

. . . and Dr. Avant has suggested a framework to look at this question on levels of risk. I think that's an appropriate way to address the question.

SHAYS:

Dr. Stanger?

STANGER:

I'm in agreement with my colleagues on this panel. I would just suggest that we conduct further research on the possibility of in-sourcing 'moving' security around the world.

SHAYS:

I think Commissioner Ervin has put you all under a spell. Are you telling me that you are in agreement with everyone here, and you have no disagreement with anything that you've heard?

STANGER:

That's correct.

SHAYS:

Oh.

Mr. Soloway?

SOLOWAY:

Now she's put me in a box.

(LAUGHTER)

SHAYS:

Because you were going to disagree with her.

SOLOWAY:

I was not going to disagree. We actually are very close friends you ought to know, so . . .

SHAYS:

Well, you know, that's interesting.

(LAUGHTER)

SOLOWAY:

. . . We've debated these issues before.

I generally agree, and said earlier on to Mr. Ervin's question, I think if you cut through some of our own personal rhetoric and sort of where we start our comments, you find a tremendous degree of commonality in a general sense.

Where I do disagree with some of my colleagues is that the exercise of force is in and of itself an inherently governmental function or that the exercise of force by someone in the private sector somehow automatically brings less accountability or has a greater negative impact on the mission.

I think we have to be careful with drawing that as an automatic conclusion.

SHAYS:

Yes, but there is an argument that says if folks are carrying guns, security people are carrying guns, and they could cause an incident that would impact, that would be defined under critical but not inherently governmental. And critical would mean you might want the government to do it.

SOLOWAY:

You could make that argument. But, again, everybody doing any kind of security in Iraq is heavily armed.

SHAYS:

Right.

SOLOWAY:

So that would then argue that you . . .

SHAYS:

No, but they're not saying it's inherently governmental. If they are saying it's inherently governmental, it has to be done.

SOLOWAY:

Yes, I think, to your point, I think private security in Iraq or in Afghanistan, in a hot zone is, by definition, a critical function.

SHAYS:

But not inherent.

SOLOWAY:

It's not a routine, easy—right.

SHAYS:

OK.

Ms. Brian?

BRIAN:

My apologies. I think the only person I want to have a clarification with is with you. When you were describing the mix . . .

SHAYS:

That's not allowed, OK . . .

(LAUGHTER)

BRIAN:

. . . But I'm going to do it away. When you were describing the mix between public and private, and you described the private sector, in terms of . . .

SHAYS:

At the State Department?

BRIAN:

. . . oversight. No, well, but you described it as oversight, and I just wanted to clarify that from our perspective, it's the management that is . . .

SHAYS:

You know, that's a good clarification. I had, the times I went into Iraq, it was private security. And they would have taken a bullet for me, at least I felt they would. And they were all ex-Marines, SEALs, U.S. Army, U.S. Air Force, Navy.

BRIAN:

Law enforcement.

SHAYS:

They were incredibly well-trained. And even Xe, which was Blackwater, has lost 30 of their own folks and never lost anyone they guarded. So give them credit for that.

But I thought the system worked better when we had State Department personnel not overseeing, in the sense, managing it.

BRIAN:

Right.

SHAYS:

Yes, and that's a distinction. OK, so we don't disagree.

BRIAN:

There we go.

AVANT:

I'm in general agreement. I think the only thing that I would worry about is drawing bright lines in terms of categories rather than in terms of the way we can manage these issues.

SHAYS:

OK.

NAGL:

And I agree with that. I think that the inherently governmental bright line is useful, but only in a very limited way. And that far more of the cases we're talking about, we should give the executive branch as much flexibility as we can, while encouraging them to develop and maintain their core competencies. And in particular, I think we need to encourage them to improve their capacity in something that I do think is inherently governmental, which is managing and overseeing contracts.

SHAYS:

OK, we're going to end here. But I'm just going to make this point. We can't just say it's useful if it may not be useful. If it is the law, it has to be applied. I mean, that's not a choice.

But my sense is from all of you that you are not arguing that inherently governmental is a requirement in most instances, that it's more of a choice area.

You would argue, Dr. Stanger, that we do need a bright line, though, to help us distinguish that.

I am going to just ask is there any last comment any of you need to make before we adjourn?

You've been a great panel.

Commissioners, thank you for your work, and staff as well.

We'll adjourn.