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TESTIMONY OF

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Chairman Ortiz, Ranking Member Forbes, and Members of the Committee: thank you for the opportunity to appear before you today to discuss the question of inherently governmental functions and the role of the government in providing services and fulfilling agency core missions. My testimony today will review the policies that shape the Department of Defense's (DoD) judgment of what constitutes inherently governmental functions. I will also address the expanded use of contractors to augment a shrinking force structure, review the DoD's management of Private Security Contractors (PSCs), and discuss interagency efforts to ensure the effective management and oversight of PSCs in Iraq and Afghanistan.

The DoD's use of contractors, including private security contractors, is entirely consistent with existing U.S. Government policy on inherently governmental functions. We are guided by three main documents when determining whether an activity or function is inherently governmental: the Federal Acquisition Regulations (FAR); the Performance of Commercial Activities and the Federal Activities Inventory Reform Act, or FAIR Act, of 1998; and, Office of Management and Budget (OMB) Policy Letter 92-1, issued in 1992.

Both OMB Policy Letter 92-1 and the FAR Part 2.1 define an inherently governmental function as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. According to FAR Part 2.1 "this definition is a policy determination, not a legal determination." Both documents further state that an inherently governmental function includes activities that require the making of value judgments in making of decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, *i.e.*, the discretionary exercise of Government authority; or (2) monetary transactions and entitlements. The OMB Policy Letter 92-1 specifically identifies those functions considered to be inherently governmental (Appendix A); and those functions NOT considered to be inherently governmental (Appendix B). Security functions are specifically excluded in Appendix B as NOT being inherently governmental.

The FAR also describes, in SUBPART 7, several examples of functions generally not considered to be inherently governmental. One of the specific examples that is cited

is contractors providing special non-law enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

In October 1998, President Clinton signed into law the "Federal Activities Inventory Reform Act of 1998" (Public Law 105-270). This law requires all executive agencies to submit to the Office of Management and Budget (OMB) an annual listing, or inventory, of activities that are not inherently governmental, and to make this inventory available to the public. The FAIR Act defines an activity as inherently governmental when it is so intimately related to the public interest as to mandate performance by Federal employees. All other activities performed by Federal employees are considered commercial in nature and are included in the FAIR Act report.

Among other exceptions, this inventory does not include the large number of activities already being performed by contractors, including private security functions, in support of the DoD, nor does it include depot level maintenance and repair Full Time Equivalent, which are considered "exceptions" under the FAIR Act.

OMB Circular A-76, Performance of Commercial Activities dated May 29, 2003, describes an "inherently governmental activity" as an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.

The shift to an all volunteer force and an effort to capture a "peace dividend" following the collapse of the Soviet Union led to the significant reduction of United States Government military and civilian forces over the last 25 years. In addition, the increasing technical complexity of DoD weapons systems and equipment requires a level of specialized technical expertise, but of limited scope, that the DoD does not believe can be cost-effectively serviced and supported by a military force capability.

Consistent with applicable laws and regulations defining inherently governmental functions, the structure of our military forces has been adapted to this environment. DOD identified opportunities where competitive sourcing of contractor support for our deployed forces would allow DoD to concentrate its manpower to distinctly military activities in support of our National Military Strategy.

The current Global War on Terrorism (GWOT) deployments of DoD military forces are the first major contingency operations to reflect the full impact of the shift to reliance on DoD contractor personnel for critical support functions. The scale and duration of these GWOT operations have required a substantial increase in the commitment of contractors for DoD support, including a significant deployment of contractor personnel in forward areas. As of the first quarter fiscal year (FY) 2008, ending December 31, 2007, the U.S. Central Command (USCENTCOM) reported about 223,221 DoD contractor personnel working in the CENTCOM Area of Responsibility (AOR). This included 163,591 DoD contractor personnel in Iraq and 36,520 DoD contractor personnel in Afghanistan.

**DoD Contractor Personnel in the USCENTCOM AOR
as of 31 December, 2007**

	Total Contractors	U.S. Citizens	Third Country Nationals	Local/Host Country Nationals
Iraq Only	163,591	31,325	56,368	75,898
Afghanistan Only	36,520	5,153	3,815	27,552
Other CENTCOM AORs	23,110	5,759	13,935	3,416
TOTAL USCENTCOM AOR	223,221	42,237	74,118	106,866

Data does not include other U.S. Government Agencies/Departments

These contractor personnel provide a broad range of capabilities including construction, base support, transportation, communication, translator / interpreter support, and security. Of particular note, the continuous operations in Iraq and Afghanistan have required DoD, State, and other USG agencies to contract with private security companies to conduct a variety of important security functions in the Theater of

Operations. These functions include the protection of fixed facilities, assets, and personnel, and use of mobile convoy security to protect personnel and materiel movements, in the insecure areas outside U.S. bases.

There is also significant historical precedent for the DoD's use of Private Security Contractors ("PSCs") during and after an international armed conflict, including their use in the Balkans. By providing security for reconstruction and stabilization efforts, private security contractors contribute an essential service to the United States and the international community.

The DoD, the Government Accountability Office (GAO), the Office of Management and Budget (OMB), the Congressional Budget Office (CBO), and the Congressional Research Service (CRS) have continuously reviewed the expanded use of PSCs, the potential for their performance of inherently governmental functions, and the appropriateness and manner in which they are employed.

The CBO conducted a study in 2005 on the relative cost of contractors versus military personnel, from both short-term and long-term perspectives. Their conclusion was that when all relevant costs are considered, in the short-term, costs are comparable, but in the long-term the use of military personnel is about 90% more expensive.¹ Also, using the analytical framework of this same 2005 CBO study, *Logistics Support for Deployed Forces*, it would take 9 new brigades to match the current number of PSCs in use. This would represent a significant challenge for DoD to resource such a requirement.

As of the end of the 1st quarter, FY 2008 (December 31, 2007), CENTCOM reported that there were approximately 6,467 DoD-funded armed PSCs in Iraq and approximately 2,745 DoD-funded armed PSCs in Afghanistan. The table below illustrates the distribution by nationality and delineates armed versus unarmed PSCs in Iraq and Afghanistan.

¹ According to CBO's estimates, obtaining logistics support from a LOGCAP contractor would cost about \$41 billion (in 2005 dollars) over the 20-year period assumed for this study. Obtaining the same services using Army units would cost about \$78 billion—roughly 90 percent more (*Logistics Support for Deployed Forces*, October 2005, pages 36-37).

**DoD Private Security Contractors in Iraq and Afghanistan
as of 31 December, 2007**

	Total	US Citizens	Third Country National	Local/Host Country National
Total DoD PSCs in Iraq	9,952	830	7,590	1,532
Armed PSCs in Iraq	6,467	429	5,318	720
Total DoD PSCs in Afghanistan	2,998	19	30	2,949
Armed PSCs in Afghanistan	2,745	16	30	2,699

These PSCs are employed in accordance paragraph 6.3.5 of DoD Instruction 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, October 3, 2005. This paragraph provides that contracts shall be used cautiously where major combat operations are ongoing or imminent. In accordance with this paragraph, the Combatant Commander weighs the following factors when considering specific security contracts: where the contract security personnel will operate; the anticipated threat; what property or personnel is to be protected; the manner in which the contractor will be operating in areas of increased risk, including command and control, the sharing of threat information, and communication with forces; and the training and qualifications of the contract security personnel.

In January, 2006, the DoD Office of the General Counsel (DoD OGC) provided an opinion on the appropriateness of contracting PSCs to protect U.S. personnel (military, civilian, and contractor personnel) and property in Iraq and Afghanistan. In a memorandum responding to a request from the USCENTCOM Staff Judge Advocate, the DoD OGC concluded that there is no U.S. law, law of war, or DoD policy prohibiting the use of PSCs to protect a military facility, personnel, or personal property during the "stability" phase of these conflicts supporting newly created governments.

With the appropriateness and manner of the employment of PSCs having been evaluated and confirmed, OSD has been focusing efforts on interagency coordination to improve the management and oversight of PSCs in theater. Both DoD and the State

Department (“State”) have recognized the need to achieve more effective coordination of PSC operations in Iraq. On December 5, 2007, DoD and State signed a Memorandum of Agreement (MOA) defining a framework for improving accountability and strengthening operations of U.S. Government (USG) PSCs in Iraq. This MOA covers a broad range of management policies and operational procedures to achieve more effective management coordination of PSC operations in Iraq that will:

- Establish core standards for vetting, training and certification of all USG PSC contractor personnel;
- Require full compliance with contractor licensing and other rules and regulations of the Government of Iraq (GOI), Embassy Baghdad, and/or the Multi-National Force – Iraq (MNF-I);
- Require that all USG PSCs use only authorized weapons and ammunition;
- Adopt common standards for Rules on the Use of Force (RUF) and escalation procedures;
- Improve the effectiveness of incident management, response, and follow-up investigations;
- Assure transparent, timely reporting and investigations of incidents between U.S. Embassy Baghdad and MNF-I, with timely reporting of same to the GOI;
- Enforce compliance with Coalition checkpoint operations and requirements;
- Establish policies for timely, consistently, and appropriate condolence payments to be made for casualties or property damage among innocent persons; and
- Synchronize PSC operations outside secure bases to establish real-time battle space commander and Regional Security Officer (RSO) oversight, visibility, and coordination of PSC convoy movements in the battlespace. When the battlespace commander determines there is a need for the State PSCs or other convoy operations to alter routes or abort missions, State PSCs will comply with the recommendations of the battlespace commander. Final authority for U.S. Embassy moves rests with the Chief of Mission, but he will generally honor the battle space commander’s recommendation. The purposes are to: (1) avoid situations with a high risk of incidents occurring; and (2) integrate incident management follow-ups with the Ministry of Interior and TOC and with any persons affected by the incident.

Many aspects of the MOA have already been implemented. Interim procedures have been adopted where permanent solutions require additional work. Others are in stages of standardization and final design. At the Office of the Secretary of Defense (OSD), we are closely monitoring the implementation status of the major elements of the MOA identified above.

In the field, MNF-I has already executed Fragmentary Order 07-428, which establishes authorities, responsibilities, and coordination requirements for the Multi National Corps-Iraq (MNC-I) to establish oversight of all DoD contractors and DoD civilians. State is developing a counterpart document to reflect U.S. Embassy Baghdad's PSC policies for U.S. Government agencies working under Chief of Mission authority.

Here in Washington, DoD is working on additional measures to improve interagency coordination and meet Congressional mandates to improve oversight and management of contractors in contingency environments. DoD and State are jointly developing a Memorandum of Understanding (MOU) and planning implementation of policies and operational requirements covering matters relating to DoD, State, and U.S. Agency for International Development (USAID) contracting and contractor management in Iraq and Afghanistan as required by Section 861 of the 2008 NDAA. This MOU will cover all DoD, State, and USAID contractors and contractor personnel, not just PSCs. A draft MOU addressing these requirements is already in development. Once signed, the MOU will be implemented through DoD, State, and USAID policies and regulations. Every effort will be made to implement the provisions of the MOU within the 120 days following the MOU signing, as required in the FY 2008 NDAA.

DoD and State are also moving ahead with efforts to comply with the provisions of section 862 of the FY 2008 NDAA, regarding management of PSC operations in Iraq and Afghanistan. This will broaden the scope of coverage of the current MOA to cover USAID and PSC operations in Afghanistan as well.

The DoD – State effort builds on a DoD strategic framework for managing contractors deployed with our military forces. This framework was developed some

months ago and is about to be issued in final form. The DoD framework defines the roles, responsibilities, and processes for the management and integration of all DoD contractors operating under a covered contract in an area of combat operations. The draft of the framework was submitted to Congress in October 2007, and the final report will be submitted by April 2008. In accordance with the provisions of Section 854 of the 2007 NDAA, DoD has established a joint board to oversee and synchronize the efforts. A DoD Directive and companion DoD Instruction include implementation of the requirements of Sections 861 and 862 of the 2008 NDAA.

Recognizing the special sensitivity of PSC operations in Iraq and Afghanistan, Deputy Secretary of Defense England and Deputy Secretary of State Negroponte co-hosted a meeting of PSC company executives on January 30th to discuss new initiatives, issues, and improvements needed in contractor management of their personnel. In the meeting, DoD and State officials covered key provisions of the MOA and other initiatives, including emphasis on contractor responsibilities for the elimination of sexual harassment, ethnic discrimination, and employee misconduct. Also covered was the implementation of the Uniform Code of Military Justice (UCMJ) for DoD contractor personnel deployed with our military forces in contingency operations. We also discussed the efforts of State and DoD concerning legislation to strengthen the extraterritorial reach of U.S. criminal laws and their relationship to non-DoD U.S. Government contractors overseas. A group of PSC executives who attended the meeting is also assessing the benefits of establishing a private security association to establish credentialing and certification standards to ensure full compliance with State and DoD requirements.

As we continue to evaluate the use of contractors, we are proceeding to strengthen our deployable contract management forces. We have instituted a requirement that all contracting officers executing in an expeditionary environment complete the expeditionary contracting competency assessment. Together with the Joint staff and the Military Departments, OSD is developing career and leadership development plans and programs for all expeditionary contracting personnel. In addition, we are broadening training for operational military leaders, both officer and enlisted, across all grades on management of contractors deploying with forces. This

training will be included in professional military education programs such as the War College, service staff colleges, and basic non commissioned officer courses.

We have made significant improvements in the management of contractors supporting contingency operations over the past year, and we continue to focus on strengthening our capability to leverage, synchronize, and administer robust contract support for any contingency. DoD appreciates the interest and support Congress continues to provide to this effort.

I will be happy to answer any questions after the conclusion of prepared testimonies.