

**DEPARTMENT OF DEFENSE CONTRACTING IN IRAQ  
AND AFGHANISTAN**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON READINESS AND MANAGEMENT  
SUPPORT  
OF THE  
COMMITTEE ON ARMED SERVICES  
UNITED STATES SENATE  
ONE HUNDRED TENTH CONGRESS  
SECOND SESSION

APRIL 2, 2008

Printed for the use of the Committee on Armed Services



U.S. GOVERNMENT PRINTING OFFICE

44-868 PDF

WASHINGTON : 2008

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## **DEPARTMENT OF DEFENSE CONTRACTING IN IRAQ AND AFGHANISTAN**

**WEDNESDAY, APRIL 2, 2008**

U.S. SENATE,  
SUBCOMMITTEE ON READINESS  
AND MANAGEMENT SUPPORT,  
COMMITTEE ON ARMED SERVICES,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2:35 p.m. in room SR-222, Russell Senate Office Building, Senator Daniel K. Akaka (chairman of the subcommittee) presiding.

Committee members present: Senators Akaka, Levin, McCaskill, and Thune.

Committee staff members present: Richard D. DeBobes, staff director; and Travis E. Smith, special assistant.

Majority staff member present: Peter K. Levine, general counsel.

Minority staff members present: Pablo E. Carrillo, minority investigative counsel; David M. Morriss, minority counsel; and Christopher J. Paul, professional staff member.

Staff assistants present: Fletcher L. Cork, Ali Z. Pasha, and Benjamin L. Rubin.

Committee members' assistants present: Bonni Berge, assistant to Senator Akaka; Jon Davey, assistant to Senator Bayh; Stephen C. Hedger, assistant to Senator McCaskill; and Jason Van Beek, assistant to Senator Thune.

### **OPENING STATEMENT OF SENATOR DANIEL K. AKAKA, CHAIRMAN**

Senator AKAKA. The Subcommittee on Readiness and Management Support will come to order.

This subcommittee meets today to hear testimony regarding the steps taken by the Department of Defense (DOD) to implement the recommendations of the Gansler Commission on Army Expeditionary Contracting.

This is the subcommittee's second hearing on this topic. At our first hearing, last December, our Army witnesses pledged to work quickly to implement the Gansler Commission's recommendations. At that time, the Assistant Secretary of the Army for Acquisition, Technology, and Logistics testified, "The Secretary of the Army, Pete Geren, has directed swift implementation of specific recommendations of both the Commission and the Task Force. For example, the Army has approved a two-star-level Army Contracting Command (ACC) organization; the Army also plans to grow the military contracting structure, in line with the Commission's rec-

ommendations, by approximately 400 soldiers, and our civilian contracting workforce by an additional 1,000 professionals. We are currently addressing the need to expand, train, structure, and empower our contracting personnel to support a full range of military operations.”

I have a particular concern about the status of our acquisition workforce. I share the view of the Gansler Commission that the root cause of our contracting problems in Iraq and Afghanistan is “a culture that does not sufficiently value or recognize the importance of contracting, contract management, and contractors.” I also agree with the Gansler Commission’s conclusion that the Army has “excellent, dedicated people, but they are understaffed, overworked, undertrained, undersupported, and, most important, undervalued.”

It is vitally important that we work together to address these problems by implementing the Gansler Commission’s recommendations for improving the size, status, and training of the acquisition workforce, including the recommendations that we add 10 new general officers for contracting positions and 2,000 new contracting personnel to meet the needs of the Army alone. I look forward to working with the DOD, and the Department of the Army, in particular, to get this done.

Senator Thune, you have a statement, I know, and you may proceed.

Senator THUNE. Thank you, Mr. Chairman.

#### **STATEMENT OF SENATOR JOHN THUNE**

Senator THUNE. I want to thank you for holding the hearing today, and I want to thank our witnesses for joining us today, as well.

With the recent efforts of the Gansler Commission, the Army Contracting Task Force, the DOD’s Task Force in Contracting, Contract Management, and Expeditionary Operations, continuous work by the GAO and others, we finally seem to be getting our arms around how much of a problem our eviscerated acquisition workforce is, and what kinds of things need to be done to get back on track, particularly with regard to contingency contracting. I hope that with relevant legislation we enacted in our authorization bill last year, this hearing, and followup efforts by this committee, we help the Army and the DOD stay on track.

From today’s hearing, I’d like to get a particularly good understanding of what challenges lie ahead for the Army and DOD in trying to implement our legislation regarding the acquisition workforce and the recommendations of the Gansler Commission. Where the Army or the Department disagree on implementing any particular recommendation, I ask the witnesses to comment on why they disagree with the Gansler Commission’s call for a particular solution; what alternative they propose that responds to the Gansler Commission’s underlying concerns; if they agree with those concerns; and where they are in implementing that alternative.

In this regard, I’d like to focus on the recommendation to give the Army more general officer slots to address structural deficiencies with the workforce and the lack of contingency contracting capability. Would the Army benefit from more time to study where those additional billets should come from?

As I mentioned in our December hearing, support of Army leadership is going to be important here. So, if the Army or the Secretary has ideas on an interim solution, I'd like to hear about that.

I also look forward to discussing the Department's position on the use of private security contractors (PSCs) in theater, and where the Department is on implementing the legislation we enacted last year to help improve the Department's ability to manage this important component of our ability to assert our national security interests abroad.

Once again, I want to thank our witnesses for their time today. I look forward to their testimony.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Senator Thune.

Senator McCaskill.

Senator MCCASKILL. Thank you, Mr. Chairman.

I do have to preside at 3:30, so I don't know if that's good news or bad news for everyone who's here today. I won't have as much time as I would like to go into some of the issues I'd like to talk about today.

I will take just a moment, before your testimony, to reiterate how we're looking forward to the contracting commission that has become law and that will become operational within a few months—Senator Webb and Senator Levin and I are working to identify the appointees that will come from our side of the aisle from Congress. I know that the minority side is working on their representatives for the contracting commission. But I want to reiterate, we have a May 28 deadline for the appointment that must come from a recommendation of the DOD and the Secretary of State to the President. I want to make sure that I go on record today saying that I have figured out that government doesn't exactly do things quickly, and I'm a little worried that May 28 is going to be here in 10 minutes and we will not have the appointments from the administration. I know Secretary Bell has indicated that he is anxious to cooperate, and that DOD is anxious to cooperate with the contracting commission. So many of the issues we're going to talk about today, we will have an opportunity to really get into with the contracting commission, and I think it is a great opportunity for us, in a bipartisan way—not a “gotcha” mentality, but a bipartisan way—to address the overarching problems of acquisition and contract management that have become so very large as we've looked at this contingency operation.

I thank you, Mr. Chairman, for giving me a few moments to say that.

Senator AKAKA. Thank you very much, Senator.

We have on our panel today Honorable James I. Finley, Deputy Under Secretary of Defense for Acquisition and Technology; Honorable P. Jackson Bell, Deputy Under Secretary of Defense for Logistics and Materiel Readiness; Lieutenant General N. Ross Thompson III, USA, Military Deputy to the Assistant Secretary of the Army for Acquisition, Logistics, and Technology; and Jeffrey P. Parsons, the Executive Director, Army Contracting Command.

Secretary Finley, will you please begin?

**STATEMENT OF HON. JAMES I. FINLEY, DEPUTY UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND TECHNOLOGY**

Mr. FINLEY. Thank you, and good afternoon.

Senator AKAKA. Good afternoon.

Mr. FINLEY. Chairman Akaka, Senator Thune, and Senator McCaskill, I'm very pleased to be here today to address the DOD contracting in Iraq and Afghanistan.

I am fully committed to acquisition excellence and the restoration of the confidence in our leadership for the DOD acquisition system, which includes contracting. Thank you for the opportunity to participate in today's hearing.

The Department has stood up a task force to integrate the many activities associated with contracting and contract management for expeditionary operations. The task force is addressing the Commission recommendations from the report on Army Acquisition and Program Management in Expeditionary Operations, and also the associated legislative, regulatory, and policy recommendations, and also the steps to be taken by the relevant requirements of section 849 of the National Defense Authorization Act (NDAA) of 2008, and the acquisition requirements in section 807 and section 852.

Membership of the task force is crosscutting. The task force includes the Joint Staff, all the Services, the Defense Contract Management Agency (DCMA), the Joint Contingency Contracting Office for Iraq and Afghanistan, the Defense Acquisition University, and various other elements of the Office of Secretary of Defense. We are assessing joint approaches to, one, provide command, control, and acquisition authority that are in alignment with checks and balances; two, provide scalable solutions for contract management in support of large and small expeditionary operations; three, provide training for the way we fight, factoring in the lessons learned for our acquisition and nonacquisition officers; four, assess the appropriate size and competency requirements of the contracting workforce; and five, take steps to shape and leverage the DOD acquisition workforce development fund for expeditionary operations.

The Commission report on Army Acquisition and Program Management in Expeditionary Operations identified 40 recommendations. Of the 40, 22 recommendations were directed to the Army. Lieutenant General Thompson and Mr. Parsons will address those 22. My focus will be on the balance, 18 DOD-level recommendations.

The Department is addressing the stature, quantity, and career development of contracting personnel for all Services. The Department has reviewed pertinent personnel directives and issued updated guidance to support increased civilian deployment capability.

Two medals for civilian employees of the DOD have been established. First, the Secretary of Defense Medal for the Defense of Freedom, established September 27, 2001, which I have illustrated here in front of me today, and second, the Secretary of Defense Medal for the Global War on Terror, established March 12, 2003. It's to my left here in front of me, as well. I'll be happy, after the hearing, to show you the medals and explain more details about the medals.

The Department is assessing the appropriate number of general and flag officers, senior executives for contracting positions. In ad-

dition, the Department is conducting a competency assessment of the contracting workforce. The results of this assessment, along with an analysis of demographics and the workload throughput, will enable us to identify the appropriate need.

This effort was initiated last year for the entire DOD contracting career field, and is planned for completion this summer.

The Joint Contingency Contract Use Support Office, a concept implemented for Iraq and Afghanistan about 2 years ago, has provided lessons learned for our training needs for expeditionary contracting. The global war on terror is far more different than the Cold War era, especially for expeditionary contracting. We are making progress to train the way we fight. For example, the expeditionary contracting curriculum has been redesigned to support journeyman-level personnel. The Community of Practice Web Portal has been redesigned to streamline collection and analysis. An advanced expeditionary contracting training course has been developed for senior-level contracting personnel. Standardization and certification for an expeditionary contracting officer has been coordinated with all the Services to better understand the joint environment. Five programs of instruction are being developed for expeditionary acquisition for our Joint and Service staff schools, formalizing the training for the acquisition and nonacquisition career fields. Also, the Joint Contingency Contracting Handbook, which I have several examples here to share with you, were developed last year, and thousands of copies have been distributed.

We are assessing the possibility of recommending specific supportive legislation actions, as well as regulatory and policy assistance. We will provide additional information when we submit our report to Congress by May 28, 2008.

The DOD Acquisition Workforce Development Fund will help position the Department to more strategically address our acquisition workforce needs. Although the past 5 years have indicated top-line workforce stability, in terms of personnel, the workload has increased. We have a far different concept of operations with the global war on terror versus the Cold War. The preparation and planning phase to leverage this fund for expeditionary operations has started. Proposals from the components have been received and are being mapped into three areas of focus: one, recruitment and hiring; two, training and development; and, three, recognition and retention. Reviews with civilian and military leadership have started and are ongoing.

In summary, our objective is to train the way we fight, participate in exercises with expeditionary contracting personnel, and continually integrate the lessons learned in this new era of the global war on terror. We will improve with joint scalability, integration, and synchronization of expeditionary contracting and program management. Alignment of checks and balances for decision-making authorities for expeditionary operations will be improved. Utilization of the Acquisition Workforce Development Fund as a resource will be done and will help facilitate needed change. Measurable progress has been made. Much more remains to be done. A plan for that work has been established.

Chairman Akaka and members of the subcommittee, I will be pleased to address any questions you may have.

Thank you.  
 [The prepared statement of Mr. Finley follows:]

PREPARED STATEMENT BY HON. JAMES I. FINLEY

Chairman Akaka, Senator Thune, and members of the subcommittee, I am pleased to come before you today to address the Department of Defense (DOD) contracting in Iraq and Afghanistan. I am pleased that Congress has focused on contracting. I am fully committed to acquisition excellence and the restoration of the confidence in our leadership in our acquisition system that includes contracting. I pledge to work together with you and Congress, as stewards of our taxpayer dollars, to provide the capability needed for our national security. Thank you for the opportunity to appear before you to participate in today's hearing.

I will focus on the three areas outlined in your request for my testimony, summarized as follows:

- (1) The steps the DOD is taking to implement the recommendations of the Commission on Army Acquisition and Program Management in Expeditionary Operations, which released its final report, "Urgent Reform Required: Army Expeditionary Contracting" on October 31, 2007.
- (2) The Department's recommendations on legislation that may be needed to implement those recommendations; and
- (3) The steps that the Department is taking to implement relevant requirements of the National Defense Authorization Act (NDAA) for Fiscal Year 2008, including the acquisition workforce requirements in sections 807 and 852 of that Act.

In response to all of the above areas of interest, and to implement the requirements of section 849 of the NDAA for Fiscal Year 2008, we have stood up The Task Force on Contracting and Contract Management in Expeditionary Operations to address the specific Commission recommendations and to integrate with the many other relevant areas that are being addressed within the DOD. Membership of this Task Force is cross cutting to include the Services, the Defense Contract Management Agency (DCMA), the Joint Staff, the Joint Contingency Contracting cell for Iraq/Afghanistan and various elements of the Office of the Secretary of Defense. The Task Force meets weekly for progress tracking purposes, meets periodically with the Services and DCMA to ensure a coordinated and consistent Department approach, and meets about once a month with Dr. Gansler to discuss any points of clarification regarding the Commission's recommendations.

Section 849 of the NDAA for Fiscal Year 2008 directed the Secretary of Defense, in consultation with the Joint Chiefs of Staff, to evaluate the Commission's recommendations to determine the extent to which such recommendations are applicable to the other Armed Forces. In addition, section 849 requires the Secretary, not later than 120 days after enactment, to provide a report to the congressional defense committees indicating the conclusions of the evaluation and a description of the plans for implementing the Commission's recommendations for Armed Forces other than the Army. The evaluation required by section 849 is underway, and the report to the congressional committees is on schedule for submission on May 28, 2008.

I am fully committed to address the recommendations of the report of the Commission on Army Acquisition and Program Management in Expeditionary Operations, summarized as follows:

- (1) Increase the stature, quantity, and career development of military and civilian contracting personnel (especially for expeditionary operations);
- (2) Restructure organization and restore responsibility to facilitate contracting and contract management in expeditionary and continental United States operations;
- (3) Provide training and tools for overall contracting activities in expeditionary operations; and
- (4) Provide legislative, regulatory, and policy assistance to enable contracting effectiveness in expeditionary operations.

1. STEPS TO IMPLEMENT THE COMMISSION RECOMMENDATIONS

The Commission identified 40 recommendations for action. Of the 40 recommendations, 22 are directed to the Army specifically, and you will hear from Lieutenant General Thompson and Mr. Parsons about the Army response to those recommendations. Eighteen of the 40 recommendations are directed to the Department for consideration and implementation. I will focus on those 18 DOD-level recommendations.

The Task Force, at this time, is not in agreement with 2 of the 18 Commission recommendations at the DOD level, summarized as follows. The Commission recommended that the DCMA should be responsible for all base, post, camp and station contracting, and that it should be resourced to accomplish that mission. The Task Force is developing alternative approaches to achieve the Commission's goal of enhanced post-award contract management during routine times as well as during times of contingency and war. The alternatives under consideration address the Department's concern that the Services need to be able to deploy in operations of all sizes; scalability of operations is important. Through our monthly discussions with Dr. Gansler, we believe he agrees we are on a path to achieving the Commission's intent. In our assessments of the future role and structure of the DCMA we are striving to ensure the most efficient, effective contract management support for future contingencies. The Task Force believes the Department should be positioned to be able to respond to the full range of contingencies from those requiring very little contracted effort to those requiring a great deal. We must have scalable processes. The Army and Marine Corps are making the changes they believe will enable this approach. The Marine Corps has completely restructured and updated its approach to training in support of contingency operations.

We have issues today in service contract administration, and we are working to correct them in our Improvement Plan for Contract Management in response to the GAO High Risk Series. In addition, under the section 813 Panel on Contracting Integrity, subcommittees on Contracting Integrity in a Contingent Environment and on Contract Surveillance have identified their initial actions for 2008 and are on track to accomplish them. These actions include enhanced training as well as leveraging best practices and lessons learned. In addition, we have already incorporated into the Joint Contingency Contracting Handbook guidance on how to run and transition a contracting office in a contingent environment. A newer subcommittee on Procurement Fraud Indicators is assessing the need for a Procurement Fraud Indicators handbook for acquisition personnel similar to the Inspector General Procurement Fraud Indicators handbook for auditors; reviewing best practices from existing training courses to determine the potential for a training module for insertion into Defense Acquisition University (DAU) training; and pursuing the feasibility of developing a database of procurement fraud indicators available on an acquisition website. We are ensuring that we enhance our overall contract management capabilities, as well as our ability to step up to the contract management needs of contingency environments.

The Commission recommended increasing the stature, quantity, and career development of contracting personnel. We have reviewed the civilian personnel directives that pertain to civilian personnel involvement in military operations, and have issued a memorandum dated February 12, 2008, "Building Increased Civilian Deployment Capacity" to provide guidance and interim policy to promote opportunities for DOD civilians to contribute their talent to DOD's mission. This memorandum will be reflected in an update to DOD Instruction 1400.32 "DOD Civilian workforce Contingency and Emergency Planning Guidelines and Procedures" August 2008. In addition, the Department has created two new medals for civilian contributions to the global war on terror. One was established after September 11, 2001, and the other is so new that it was awarded for the first time on February 26, 2008.

The Department is actively assessing and developing its position regarding the appropriate numbers of General and Flag Officers, and Senior Executive Service authorizations, for contracting positions. Our report to the congressional committees in response to section 849 of the NDAA for Fiscal Year 2008 will contain additional information on this subject.

The Commission provided recommendations pertaining to organizational structure and responsibility to facilitate contracting and contract management. I just discussed our ongoing assessments regarding the future role of DCMA in order to ensure effective and efficient contract management support for future contingency operations. This planning is taking place in conjunction with a subcommittee formed under the section 813 Panel on Contracting Integrity with a specific focus on contract surveillance. In addition, the Department is considering the most effective approach to achieve an integrated, joint approach to contract and program management support for future contingencies. This effort was already underway in response to section 854 of the NDAA for Fiscal Year 2007. The preliminary concept of a Joint Contingency Contracting Support Office was previously reported to Congress last year in an interim report required by section 854. This initiative responds to congressional mandates for the development of capabilities for requirements definition, contingency program management, and contingency contract support. Our goal is to achieve the integration and synchronization of contract support across combatant

commands and United States Government agencies to support effective program management, and to consolidate and incorporate lessons learned.

The Commission provided recommendations to provide training and tools for over-all contracting activities in expeditionary operations. We have made significant progress, summarized as follows:

1. DAU has redesigned the contingency contracting curriculum to improve training supporting journeyman level contingency contracting operations. This will enable experienced contingency contracting officers to be deployable worldwide and be effective immediately upon arrival to support the mission. The redesigned curriculum is synchronized with the Joint Contingency Contract Handbook. It includes interactive simulations, hands-on practical work, and robust capstone projects; we emphasize cultural awareness and ethics training; and bring in subject matter experts to provide their perspective on contracting in theater.
2. DAU is redesigning its Contingency Contracting Community of Practice web-portal. The redesign will streamline the collection and analysis of after-action reports.
3. An advanced Contingency Contracting Course is also being developed by DAU. This course will provide “just in time” training to senior level contracting personnel deploying to a management position.

DAU has collaborated closely with all the Services to standardize the required training a contingency contracting officer must complete to become fully qualified/certified. This will help ensure commanders in the field get fully trained contingency contracting officers who understand the joint environment. The Army has determined the majority of their additional training requirements will be provided by the U.S. Army Logistics Management College located in Fort Lee, VA, and Huntsville, AL.

As contractors on the battlefield are a reality for future expeditionary operations, operators outside the acquisition community must be trained on the role and importance of contracting, Contracting Officer’s Representatives (CORs) and contractors in expeditionary operations. DOD actions to address these issues pre-date the Commission’s Report.

As a result of the NDAA for Fiscal Year 2007, DOD assessed noncontracting officer training courses and existing training curriculum at DOD and Service schools at all levels (basic, intermediate, and senior). Based on this assessment, the Department is developing a broad program of instruction for operational military leaders, both officer and enlisted, across all grades, on management of contractors deploying with forces.

In addition, we are developing programs of instruction on contingency acquisition for our Military Departments’ Staff Colleges and Senior Military Service and Joint Staff Schools to train, more formally, our senior planners and leaders on roles and responsibilities of planning and managing contracts and contractor personnel in forward areas. This training will focus all leaders on determining requirements, translating those requirements into statements of work and then overseeing work.

In a parallel effort, the Army has instituted junior officer training in the proper use of contractors who accompany the force in support of Army contingency operations. This training covers the role of contractors in support of Army contingency operations, describes how contractors are integrated into Army operations, and explains user responsibilities for requesting and overseeing contract support. Thus, through this emphasis on oversight in training, both military leaders and junior officers will be educated on the important role of contracting, Contracting Officers, and CORs.

With regard to increasing the number of contracting personnel, we are conducting a competency assessment for the entire DOD Contracting Career Field. We anticipate completion of the assessment this summer. Once we have completed the competency assessment, along with an analysis of our demographics and workload throughout, we will be in a position to provide the appropriate number of additional contracting personnel needed by the Department.

The Commission recommended establishing an Expeditionary Contracting Manual to support the expedited processes and tempo necessary for procuring the support needed by our warfighters in the theater of operations. The Department has developed and distributed thousands of copies of the Joint Contingency Contracting Handbook. Feedback from deployed users has been outstanding—we receive requests for more every day! The handbook provides a consolidated source of information for our contingency contracting officers, and provides the essential information, tools, and training to meet the challenges they will face, regardless of mission or environment.

This February, DAU delivered its first course to incorporate the handbook into formal training, and the feedback received from the students indicates it was an overwhelming success!

In addition, the Department has developed a draft Expeditionary Contracting Policy, which provides the foundation for the Joint handbook. This draft policy is in coordination with all relevant stakeholders, and is expected to be published in May 2008.

The Commission recommended an adequately resourced contingency operation transfer fund. The Department is considering the recommendation; however, the Department is also aware of congressional oversight concerns that have precluded the funding of these accounts in the past. The Commission also recommended that the Department ensure that policy and practice support intelligent funding apportionment for expeditionary operations. The next update of the Joint Contingency Contracting Handbook will clarify the pertinent guidance.

2. THE DEPARTMENT'S RECOMMENDATIONS ON ANY LEGISLATION THAT MAY BE NEEDED TO IMPLEMENT THOSE RECOMMENDATIONS

As the Department reviews the Commission's recommendations, and appropriate implementation actions, we are assessing the possibility of recommending specific supportive legislative actions. As required by section 849 of the NDAA for Fiscal Year 2008, we will submit a report to the congressional defense committees with the results of our assessments by May 28, 2008, and will provide additional information at that time.

3. DOD STEPS TO IMPLEMENT RELEVANT REQUIREMENTS OF THE NDAA FOR FISCAL YEAR 2008, INCLUDING THE ACQUISITION WORKFORCE REQUIREMENTS IN SECTIONS 807 AND 852 OF THAT ACT

The implementation steps we have taken for the relevant requirements of section 807 and section 852 of the NDAA for Fiscal Year 2008 are summarized as follows:

Regarding section 807, "Inventories and Reviews of Contracts for Services," we are working across the Department establishing guidelines for the military departments and Defense agencies that will identify the targeted type of services, and standardize the collection of data required to create an inventory of the contracted services. This statute amended 10 U.S.C. § 2330a, "Procurement of services: tracking of purchases," by directing us to not only collect greater granularity of data, but to share it with the public, and then conduct reviews of the contracts listed in that inventory. This is a large undertaking by the Department. We need to work with Congress to ensure we meet your intent. The inventory should be invaluable for shaping our contractor support workforce.

Regarding section 852 of the NDAA for Fiscal Year 2008, the Department has begun to take steps to shape the DOD Acquisition Workforce Development Fund (the Fund) for targeted recruitment, training and retention initiatives. The 852 initiatives could significantly improve the Department's overall management of the Defense acquisition workforce, including contract management, contingency operations and position the Department to successfully sustain and appropriately size the future acquisition workforce.

We have established partnerships within the Department and are working collaboratively with the DOD Comptroller's office and the Office of the Under Secretary for Personnel and Readiness. Additional implementation details on Section 852 will be in the DOD civilian human capital strategic plan to be delivered to Congress within the next few months.

The purpose of the fund can help to ensure the Defense acquisition workforce has the capacity, in both personnel and skills, to properly perform its mission. This includes ensuring appropriate oversight of contractor performance and that the Department receives the best value when using public funds.

We have engaged the military Services and Defense components to establish DOD enterprise initiatives. These efforts will position the Department to strategically address our acquisition workforce shortfalls.

I want to thank Congress for their support of the acquisition workforce and the flexibilities provided for using the Fund.

SUMMARY

In summary, measureable progress has been accomplished. Much work remains to be done. A plan for that work has been established with measureable criteria.

We believe that contracting and contract management are vital elements of acquisition excellence. Contracting and contract management are an important military task for leadership and execution on a global basis for all situations. The Acquisition Workforce Development Fund can be utilized to help facilitate the strategy for the achievement of acquisition excellence for Expeditionary Operations.

Mr. Chairman, I am pleased to address any questions that you may have for me. Thank you.

Senator AKAKA. Thank you, Secretary Finley.  
Now we'll hear from Secretary Bell.

**STATEMENT OF HON. P. JACKSON BELL, DEPUTY UNDER SECRETARY OF DEFENSE FOR LOGISTICS AND MATERIEL READINESS**

Mr. BELL. Thank you, Chairman Akaka and Ranking Member Thune, and Senator McCaskill. Thanks again for this opportunity today to discuss four topics of interest to your subcommittee: the role of PSCs in Iraq and Afghanistan; the role of contractors in detainee interrogations; the status of DOD efforts to implement sections 861 and 862 of the 2008 NDAA; and the status of efforts to address gaps in legal accountability of PSCs in Iraq and Afghanistan.

I've submitted detailed written testimony addressing these topics, which I will not be able to cover in my brief oral testimony today, so I request that my written testimony be incorporated into the record of this hearing.

Regarding PSCs: recently, questions have arisen about the appropriateness of using PSCs in areas of military operations. As described in more detail in my written testimony, DOD policies governing the use of PSCs in contingency operations are in compliance with existing laws and regulations. These policies, collectively, restrict PSC authority and missions to defensive operations; establish firm policies, rules, and procedures governing their conduct and their operations; provide for clear government oversight to ensure that they're not performing either inherently governmental functions or even entering areas of high risk or areas of military operations; and, finally, of course, firmly establish legal jurisdiction over their conduct.

Notwithstanding media coverage regarding PSC operations in Iraq, the frequency of serious incidents among DOD PSCs is relatively low. During the period of August 2004 through February 2008, a period of intense insurgency and sectarian violence in Iraq, more than 19,000 DOD convoy operations were recorded. Of those, less than three-quarters of 1 percent involved the use of deadly force by a DOD PSC; and then, not necessarily causing casualties.

The recent execution of a memorandum of agreement between DOD and the Department of State (DOS) is having an even more disciplining effect on PSC operations there. General Petraeus recently reported to Secretary Gates that, "There has been a 67 percent reduction in graduated-force incidents involving contractors, and both the Government of Iraq and the Iraqi people have taken notice of the changes made in the operating procedures and in the attitudes of PSCs."

Regarding contractor roles in detainee interrogations, as we all know, detainee operations are a matter of great importance to the U.S. Government, as much as they are a matter of great sensi-

tivity. My testimony today addresses only the question of DOD policies regarding the use of contractors in detainee interrogations.

This role of contractors is authorized and governed by a number of DOD policy directives and instructions that specifically establish a policy framework for the use and the supervision of contractor personnel in detainee interrogations. These are covered in detail in my written testimony.

Regarding the legal accountability of deployed contractors, all DOD civilian employees and DOD contractors deployed outside the United States in support of our military forces are legally accountable for their conduct under the jurisdiction of both the Uniform Code of Military Justice (UCMJ) and the Military Extraterritorial Justice Act (MEJA), as well as other statutes. Nonetheless, both DOD and DOS are on record about the need for legislation to strengthen the legal accountability of other U.S. Government contractor personnel deployed outside the United States in support of other U.S. Government missions, besides the DOD mission.

Regarding the status of efforts to implement sections 861 and 862, DOD is working actively now with the DOS and with the U.S. Agency for International Development (USAID) to implement, on schedule, the requirements of the 2008 NDAA. The Memorandum of Understanding (MOU), required under section 861, is already in draft form, and should be executed by July 1, with implementation targeted within the required 120 days after the MOU is executed.

Regarding section 862, work is nearing completion on an expanded framework of regulations and reporting requirements relating to U.S. Government PSCs working in Iraq and Afghanistan.

In closing, and a personal note, I would ask that this committee reconsider legislation passed in 2007, of the NDAA, that mandates the downgrade of the position of the Deputy Under Secretary of Defense for Logistics and Materiel Readiness, upon my leaving the position. This position has oversight of all DOD logistics functions, which, in 2006, represented about \$162 billion of DOD's \$537 billion budget.

Subsequent to this legislation, this position has assumed additional ongoing responsibilities, including leadership of DOD efforts to strengthen management of deployed contractors and negotiating and overseeing implementation of agreements with the DOS and USAID regarding the operations of all of our contractors in Iraq and Afghanistan, including, particularly, PSC operations in those countries.

In the future, additional work is going to be required to expand this governance to other U.S. Government departments and agencies. The downgrade of this position sends the wrong signal about the importance of these areas of responsibility at the very time of their increasing significance to DOD and in global war on terror operations.

Hopefully, this brief oral testimony and my written testimony will provide a useful baseline of information for your questions as we get into a discussion.

Thank you.

[The prepared statement of Mr. Bell follows:]

## PREPARED STATEMENT BY JACK BELL

Chairman Akaka, Ranking Member Thune, and members of the committee: thank you for the opportunity to appear before you today to discuss four topics of interest to your subcommittee: the role of private security contractors (PSCs) in Iraq and Afghanistan; the role of private contractors in the interrogation of detainees in those conflicts; the steps the Department of Defense (DOD) is taking to implement sections 861 and 862 of the National Defense Authorization Act (NDAA) for Fiscal Year 2008; and the status of efforts to address gaps in the legal accountability of and jurisdiction over PSCs in Iraq and Afghanistan.

Any discussion of the roles of contractors in performing private security services and detainee interrogations should be based on recognition of the historical background of and current policy framework governing the use of contractors in these roles.

## BACKGROUND

The use of civilian contractors in support of the armed forces is not new. Historically, contractors have been used by the U.S. Government and other governments to perform a variety of military support roles, including private security, intelligence, and interrogation. This practice has been so long established that contractors are specifically recognized in both U.S. policy and international agreements of longstanding relating to their status as prisoners of war:

- Article 50 of the U.S. Army General Order No. 100 (1863) states: “Citizens who accompany an army for whatever purpose . . . if captured, may be made prisoners of war. . . .”
- Article 13, Annex to the Hague Convention IV (1907) states: “Individuals who follow an army without directly belonging to it, such as . . . contractors, who fall into enemy’s hands . . . are entitled to be treated as prisoners of war. . . .”
- Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (1949) states: “Prisoners of war . . . [include] persons who accompany the Armed Forces without actually being members thereof, such as civilian members of aircraft crews . . . supply contractors. . . .”

Through World War II and Korea, support from the private sector was common, but normally performed in secure areas, since the battlefield was usually demarcated between secure and nonsecure areas. Contractors assumed key roles in the occupation phase of these conflicts—in the securing of peace and the reconstitution or reform of state security institutions.

As the Vietnam conflict unfolded, the nature of the battlefield changed and the role of contractors expanded to provide construction, reconstruction, intelligence, and security services in nonsecure areas. Contractors were also key players in reconstruction, economic development, and development of institutional governance capabilities of the host nation.

Since Vietnam, DOD has become increasingly dependent on contractors, both at home and when deployed, to perform critical support functions that are integral to the success of military operations, but not inherently governmental functions. Several factors contribute to the increased DOD reliance on contractor support:

- The shift to an All-Volunteer Military Force in the 1970s;
- An effort to capture a “peace dividend” following the collapse of the Soviet Union, which led to the significant reduction of United States Government military and civilian forces over the last 15 years.
- Initiatives (e.g., including A-76) to transfer work that could be done more cost-effectively by contractors than by military forces or DOD civilians;
- The increasing technical complexity of military equipment and information technology hardware and software, requiring maintenance by a narrow set of in-depth, sometimes proprietary technical skills that are not cost effective for the military force maintain a capability to support.
- The shift from traditional equipment sustainment programs to outsourced performance-based logistics programs, to improve equipment readiness at lower costs.

As a result, the U.S. military force has been reduced from 2.1 million in 1989 to less than 1.4 million today, and the total U.S. Army from 111 combat brigades to 76. As dependence on contractors has increased, it is now common for contractors to provide a wide variety of support services, and even to be embedded with our military units performing critical technical support functions. For example, the Government Accountability Office (GAO) noted in 2006 that a Stryker brigade typically deploys with 75 technical support contractors, in addition to those performing the

highly technical battle damage repairs at forward support facilities. Similarly an Apache Battalion deploys with embedded contractors, whose numbers may vary due to mission requirements to perform support missions for them in the field.

The history of DOD's (and its precedent organizations') use of civilians accompanying military forces to forward areas is shown in the table below.

CIVILIANS ACCOMPANYING THE FORCE HISTORICAL PERSPECTIVE <sup>1</sup>

War/Conflict	Civilians/Contractors	Military	Ratio
Revolution .....	(est.) 1,500	9,000	1:6 (est.)
Mexican/American .....	(est.) 6,000	33,000	1:6 (est.)
U.S. Civil War .....	200,000	1,000,000	1:5 (est.)
World War I .....	85,000	2,000,000	1:24
World War II .....	734,000	5,400,000	1:7
Korean Conflict .....	156,000	393,000	1:2.5
Vietnam Conflict .....	70,000	359,000	1:5
Operation Desert Shield/Storm .....	9,000	500,000	1:55
Balkans .....	20,000	20,000	1:1
Operation Iraqi Freedom <sup>2</sup> .....	~163,590	~160,000	1:1

<sup>1</sup> Source: Zamparelli, Steven J., "Competitive Sourcing and Privatization: Contractors on the Battlefield: What Have We Signed Up For?" Air Force Journal of Logistics, Volume XXIII, Number 3, p. 12.

<sup>2</sup> Data addresses only DOD contractors and does not address civilians or contractors supporting other U.S. Government Agencies and Departments.

At the same time, military operational tempo has increased significantly under the global war on terror and as a result of the proliferation of regional conflicts that ensued with the end of the stability engendered by the Cold War balance of power. From 1990 to 2000 the U.S. Army alone has deployed troops on 36 occasions, compared to 10 deployments during the 40 year Cold War.

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. This focus is reflected in the current DOD Directive (DODD) 1100.4, "Guidance for Manpower Management" (February 12, 2005), Paragraph 3.2.4.3., which states, "During a conflict, military personnel shall be assigned only to those tasks that directly contribute to the military effort. . . ."

"Military effort" is generally defined as the inherently governmental function of the military force role to engage in combat—to identify, close with, and destroy enemy or terrorist forces.

#### PRIVATE SECURITY CONTRACTORS

Recently, questions have been raised about the "appropriateness" of using PSCs in areas of military operations. DOD's decisions to use PSCs (including subcontractors) are in compliance with current U.S. Government policy and regulations. Relevant policy direction and guidance on this subject are found in the following:

- Circular A-76 (amended in 2003);
- The Federal Activities Inventory Reform Act of 1998; and
- The current Federal Acquisition Regulation (FAR), including the recent final rule to add a new FAR Subpart 25.3, which specifically governs the contracting for PSCs.

It is significant that the final rulemaking on Subpart 25.3 (Federal Register: February 28, 2008, Volume 73, Number 40, pages 10943-10959) explicitly recognizes that:

- The United States Government has the authority to hire security guards (i.e., PSCs) worldwide (page 10944);
- The protection of property and persons is not an inherently governmental function (page 10944); Also see FAR 7.503 (d)(19);
- There is an important distinction between self-defense and combat operations, and that individuals have an inherent right of self defense (page 10943);
- PSCs are not mercenaries and are not authorized to engage in offensive operations (page 10944);
- PSCs have been given a mission to protect other assets/persons, and so it is important that the rule reflect the broader authority of PSCs in regard to the use of deadly force (page 10944);

- The standard on the use of deadly force by PSCs should be when it “reasonably appears necessary,” a standard in DODD 5210.56 that applies to the [defensive] use of deadly force by military security personnel (page 10944);

DOD Instruction (DODI) 1100.22, “Guidance for Determining Workforce Mix” (issued September 22, 2006, and updated April 6, 2007) provides additional guidance on the strategic structuring of military, civilian, and contractor forces. It states that, “the DOD may authorize deliberate action against another sovereign government or nonstate actors on behalf of the United States (i.e., the authority to plan, prepare and execute operations to actively seek out, close with, and destroy enemy forces, including the use of firepower, and other destructive and disruptive capabilities on the battlefield. Combat authorized by the U.S. Government is IG [inherently governmental]. . . . (Paragraph E2.1.3.). PSCs are not authorized to participate in combat operations.

Other sections of DODI 1100.22 describe security operations under conditions that could make them inherently governmental or not inherently governmental, as follows:

- “Security provided for the protection of resources (people, information, equipment, supplies, et cetera) in uncontrolled or unpredictable high threat environments inside the continental United States or outside the continental United States entails a wide range of capabilities, some of which are inherently governmental and others of which are commercial. Security is IG [inherently governmental] if it involves unpredictable international or uncontrolled, high threat situations where [military] success depends on how operations are handled and there is a potential of binding the United States to a course of action when alternative courses of action exist.” (Paragraph E2.1.4.1.). PSC operations and missions are not of a scale to impact the overall success of the military mission or to bind the United States to any course of action other than the one selected by it.
- “Security forces that operate as part of a larger, totally integrated and cohesive Armed Force typically perform operations that require deadly force and substantial discretion.” (Paragraph E2.1.4.1.2.). However, DOD PSCs do not operate as an integral part of a larger military operation, and their operations are governed by strict Rules on the Use of Force (RUF) and escalation procedures on the use of force.
- “Security operations could entail defense against a military or paramilitary organization whose capabilities are so sophisticated that only military forces could provide an adequate defense. This includes situations where there is such a likelihood of hostile fire, bombings, or chemical attacks by groups using sophisticated weapons and devices that, in the judgment of the military commander, the operation could evolve into combat.” (Paragraph E2.1.4.1.3.). PSCs carry out strictly defensive security missions, with emphasis on attempting to disengage and leave the area as soon as possible.
- “Security operations that involve more than a response to hostile attacks typically entail substantial discretion and are IG.” (Paragraph E2.1.4.1.4.). Policies governing PSC operations emphasize that their security mission is strictly defensive in response to threatened hostile attacks.
- “A decision is not IG if it can be limited or guided by existing policies, procedures, directions, orders, or other guidance that identify specific ranges of acceptable decisions or conduct and subject the discretionary authority to final approval or regular oversight by government officials.” (Paragraph E2.1.4.1.5.). Again, PSCs operate under strictly defensive RUF established by the military commander, not combat-oriented Rules of Engagement.
- “Contingency contractors may provide security services for other than uniquely military functions provided the geographic combatant commander:
  - “Clearly articulates rules for the use of deadly force that preclude ceding governmental control and authority of IG functions to private sector contractors. . . . ;
  - “Sets clear limits on the use of force . . . ;

As indicated above, PSCs operate under clearly articulated policies and rules established by the geographic combatant commander and the local area commander (e.g., General Petraeus).

- Department of State and DOD are not the only Government agencies to employ PSCs with the right to use deadly force. For example, 10 CFR 73.50, permits contract security personnel protection nuclear material to use deadly force. Also, the U.S. Marshal Service employs PSCs to guard prisoners

being transported between locations, armed and with the authority to use deadly force.

In summary, DOD's current policies are in compliance with these regulations and policies. Specifically:

- The mission of PSCs is strictly defensive—protecting persons, facilities, places or supplies, depending on the specific contract under which they operate. They are specifically prohibited from engaging in combat (offensive) operations.
- PSCs do not operate as part of a larger, totally integrated and cohesive military force, where their actions could affect the success of the military mission could be adversely affected, or could bind the U.S. to a course of action where alternative courses of action exist.
- All DOD PSCs in Iraq and Afghanistan are contractually bound to follow the policies and rules established by the U.S. Central Command (CENTCOM), MNF-I, and Commander, Joint Task Force 76 commanders. These rules include specific language on RUF, which are entirely defensive in nature. These rules call for emphasis on avoidance of conflict and de-escalation of the use of force where possible. When force is required, PSCs are trained and instructed to use graduated force response-sequential actions which begin with nonlethal force response measures to ward off an attack such as firing flares, shining bright lights, or blowing horns. Only when these actions are ignored, as required by the situation, do they escalate their response, such as firing into the air or shooting into the engine block of an approaching vehicle. Use of deadly force aimed fire is authorized only as a last resort to kill or disable the individual or individuals posing the threat, while minimizing the possibility of casualties among innocent persons.
- All U.S. Government PSC operations in Iraq are under the oversight of the battle space commander to the area battlespace commander, who can redirect or terminate a private security operation that would enter an area of combat operations, or have a high risk of either being attacked or of risking causing casualties among innocent civilians. Final authority for U.S. Embassy moves rests with the Chief of Mission, but he will generally honor the battlespace commander's recommendation. The battlespace commander also has the authority to take control of any battlefield situation, including one in which a PSC is being attacked or is involved in an incident. Similar controls will be put in place shortly for Afghanistan under section 862 of the 2008 NDAA.

As of the end of the first quarter, fiscal year 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.

DOD PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN AS OF 31 DECEMBER, 2007

	Total	U.S. 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 with the guidance outlined above as well as 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 in areas 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 a recent audit of PSCs in Iraq, GAO noted significant improvements in PSC coordination and oversight and in the tracking and reporting of incidents when they happen. Notwithstanding media coverage regarding incidents involving PSCs, the frequency of serious incidents among DOD PSCs is low. The period of August 2004 through February 2008 covers a period of rampant insurgency and sectarian violence in Iraq affecting U.S. military forces. During that time, 19,268 DOD contractor convoy operations were recorded. Of those, only 151 (or less than eight-tenths of 1 percent) involved the discharge of a firearm by a PSC, and not all of those involved aimed fire at an enemy combatant. This was in spite of the fact that during that time, 1,441 hostile attacks were made against those convoys. These statistics reflect a high degree of discipline and effective management of DOD PSCs operating within a strict policy framework.

The recent execution of the Memorandum of Agreement between DOD and the State Department is having an even more disciplined effect on PSC operations in Iraq. General Petraeus recently reported to Secretary Gates that, "There has been a 67 percent reduction in graduated force incidents involving contractors, and both the Government of Iraq and the Iraqi people have taken notice of the changes made in the operating procedures and attitudes of PSCs."

In recent testimony, I have discussed the potential consequences of any policy decision to replace PSCs in Iraq and Afghanistan with military forces. Using Congressional Budget Office methodology from their 2005 contractor study on Logistics Support for Deployed Military Forces, it would require the manpower equivalent of nine brigades of manpower to support that role. Such a requirement would be a major challenge for DOD to resource.

#### CONTRACTOR ROLE IN DETAINEE INTERROGATIONS

Detainee operations are a matter of great importance to the U.S. Government, as much as they are a matter of sensitivity. This testimony addresses only the question of the role of DOD contractor personnel in detainee interrogations.

The role of contractors in detainee operations is governed by a number of DOD policy directives and instructions:

- DODD 2310.01E (September 5, 2006) specifies that,
  - "The Under Secretary of Defense for Intelligence shall exercise primary responsibility for developing policy pertaining to DOD intelligence interrogations, detainee debriefings, and tactical questioning . . ." (Paragraph 5.4.1.)
  - "All DOD contracts pursuant to which contractor employees interact with detainees include a requirement that such contractor employees receive training regarding the international obligations and laws of the United States applicable to detainee operations." (Paragraph 5.3.1.)
  - "The Under Secretary of Defense for Acquisition, Technology, and Logistics shall ensure contractor employees accompanying DOD components in conducting, participating in, or supporting detainee operations complete training and receive information on the law, regulations, and policies applicable to detention operations, and the requirements to report possible, suspected, or alleged violations that arise in the context of detention operations. . . ." (Paragraph 5.3.2.)
- DODD 3115.09 (November 3, 2005) states that,
  - "The Under Secretary of Defense for Intelligence shall exercise primary responsibility for DOD intelligence interrogations, detainee debriefings, and tactical questioning and serve as the advisor to the Secretary and Deputy Secretary of Defense regarding DOD intelligence interrogations policy." (Paragraph 4.1 and 4.1.1.)
  - "A trained and certified DOD interrogator shall monitor all interrogations, debriefings, and other questioning conducted by non-DOD or non-U.S. Government agencies or personnel." (Paragraph 3.4.4.3.)
- DODI 1100.22 (September 7, 2006) states that:
  - "Direction and control of intelligence interrogations are IG functions. This includes the approval, supervision, and oversight of interrogations. However, in areas where adequate security is available and is expected to continue, properly trained and cleared contractors may be used to draft interrogation plans for government approval and conduct government-approved interrogations consistent with DODD 3115.09, if they are properly supervised and closely monitored throughout the interrogation process by sufficient numbers of properly trained government officials." (Paragraph E2.1.6.2.)

## STATUS OF LEGAL ACCOUNTABILITY JURISDICTION OVER DEPLOYED CONTRACTORS

All DOD contractor personnel, regardless of nationality, are legally accountable for their conduct in complying with the DOD policies and regulations, as well as with the laws of the United States and applicable laws of the host country. This legal accountability proceeds from a number of statutes including:

- The Uniform Code of Military Justice, extended by section 552 of the NDAA for Fiscal Year 2007 to cover all contractors located outside the United States accompanying the military forces in the field in contingency operations against a hostile force.
- The Military Extraterritorial Justice Act provides Federal criminal jurisdiction over felony-level crimes committed by DOD civilian employees and contractors (except host country nationals) accompanying the Armed Forces outside the United States.
- Other statutes address legal accountability of U.S. citizens alleged to have committed specific crimes against other U.S. citizens and other criminal acts overseas.
- Coalition Provisional Authority Order #17 is a law signed into effect prior to the transfer of authority to the Government of Iraq in 2004 and is scheduled to expire with the conclusion of the U.N. Security Council mandate of the Multinational Force-Iraq (MNF-I), currently set for December 31, 2008. It provides non-Iraqi contractor personnel working on behalf of coalition forces (as well as those working for foreign diplomatic or consular missions, or foreign humanitarian aid, reconstruction or development projects) immunity from Iraqi legal process for acts committed pursuant to the terms and conditions of their contract. Assuming no further action by the U.N. Security Council, any continuing immunity after December 31, 2008, for individuals not covered through other means, will have to be provided for in negotiations between foreign governments and the Government of Iraq. Otherwise, such contractors may be subject to Iraqi laws and its criminal justice system.

While DOD civilian employees and DOD contractors are considered to be legally accountable for their actions, both DOD and the State Department are on record about the need for legislation to strengthen the legal accountability of other U.S. Government contractor personnel deployed outside the United States.

## STATUS OF EFFORTS TO IMPLEMENT SECTIONS 861 AND 862 OF THE 2008 NDAA

DOD has launched a number of significant initiatives to strengthen the management of DOD contractors accompanying deployed military forces. Also, we are currently implementing a Memorandum of Agreement with the State Department signed on December 5, 2007, to strengthen the coordination of DOD and State PSC operations in Iraq. We are now working actively with the State Department and the U.S. Agency for International Development (USAID) to address the requirements of sections 861 and 862 of the NDAA for Fiscal Year 2008. Section 861 requires the establishment of a Memorandum of Understanding (MOU) among DOD, the State Department, and USAID, to cover all contracts being implemented in Iraq and Afghanistan, and all contractors and contractor personnel there. In addition, Section 861 requires the establishment of a comprehensive data base of contract and contractor personnel data, available on an online basis to appropriate legislative branch committees and the GAO.

Progress is well underway regarding the drafting of an MOU responsive to the requirements of section 861, and there should be no problem in executing such an MOU by the deadline on July 1, 2008. The more difficult challenge will be the establishment of the data bases required under section 861 to provide the multi-disciplinary data bank required to be put in place. Efforts have already been launched to define the software and system requirements to support this requirement, with a view towards compliance with the requirement to implement the provisions of the MOU within 120 days of its execution.

Similarly, work is underway to implement the provisions of section 862 of the NDAA for Fiscal Year 2008. In this section, Congress has acknowledged the use of PSCs, and has prescribed specific requirements for their oversight in a declared combat operation. It requires the Secretary of Defense, in coordination with the Secretary of State, to prescribe regulations governing the policies, procedures, and operational control of PSCs under contract to DOD, the State Department, and USAID for work in Iraq and Afghanistan. In several ways, these regulations will be much broader than the currently effective MOA between DOD and the State Department relating to the coordination of PSC operations in Iraq. Nonetheless, major elements

of the MOA will form the core of the regulations currently being drafted to comply with section 862.

In closing, I would like to highlight the fact that the DOD, the GAO, the Office of Management and Budget, the Congressional Budget Office, and the Congressional Research Service 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.

Hopefully, this testimony provides a documentary baseline of the four topics I was asked to address at this hearing. I will be happy to answer any questions you have regarding the policy framework regarding contractors in these areas of concern and interest. Thank you.

Senator AKAKA. Thank you very much, Secretary Bell.  
General Thompson?

**STATEMENT OF LTG N. ROSS THOMPSON III, USA, MILITARY DEPUTY TO THE ASSISTANT SECRETARY OF THE ARMY FOR ACQUISITION, LOGISTICS, AND TECHNOLOGY; ACCOMPANIED BY JEFFREY P. PARSONS, EXECUTIVE DIRECTOR, ARMY CONTRACTING COMMAND**

General THOMPSON. Chairman Akaka, Senator Thune, Senator McCaskill, thank you for the opportunity to appear before you again today on the Army's contracting operations in Iraq and Afghanistan.

Since our last report to you, and in keeping with the recommendations of the Gansler Commission, Secretary of the Army Pete Geren directed the realignment of the Army Contracting Agency to the Army Materiel Command and the establishment of the Army Contracting Command Provisional. We stood up this organization on March 13 of this year. With me today is Jeff Parsons, our first Executive Director of the new Army Contracting Command Provisional. We have a joint written statement that I respectfully request also be made a part of the record for today's hearing.

I would like to take this opportunity to thank the committee and the committee leadership for your unwavering support to the men and women in uniform.

Mr. Chairman, the Secretary of the Army created the Special Commission on Contracting, led by Dr. Jacques Gansler, to look at the long-term strategic view of the Army's acquisition and contracting system in support of expeditionary operations. The Army Contracting Task Force, which I co-chaired with Ms. Condon of the Army Materiel Command, was formed to review current contracting operations and take immediate actions, where necessary.

The Gansler Commission's four key recommendations for improvement are consistent with the Army Contracting Task Force's findings. The Army is making steady progress in addressing the structural weaknesses and the shortcomings identified, and we continue to work very closely with the Office of the Secretary of Defense (OSD) and our sister Services on the way forward. It is clear that achieving our objective will require resources, time, and a sustained leadership focus. Our written statement outlines the major actions that we've taken to date, which include accelerating plans to set up the contracting structure recommended by the Commission and increasing the size of the contracting workforce in the Army.

As a result of the ongoing operations in southwest Asia, the Army has increased its focus on contingency contracting. Up until a year ago, we didn't have a defined structure to support expeditionary operations or to support the modular Army. We have now established a contingency contracting structure that consists of contracting support brigades, contingency contracting battalions, and four-person contingency contracting teams. We are beginning to fill those with trained military contracting officers and noncommissioned officers (NCOs): the 4 brigades, the 6 battalions, and the 121 teams that we've already established. Since we last met, we've looked at the size of that structure, and we plan on expanding that by adding 3 brigades, 5 battalions, and 51 teams to the work that we had already done.

A critically important issue is the size, the structure, and the training of both the military and the civilian contracting workforce. The acquisition workforce has declined significantly in the last decade, but the workload and the number of dollars associated with that workload have increased significantly. The Army has never fought in an extended conflict that required such reliance on contractor support.

We are addressing the need to expand, train, structure, and empower our contracting personnel to support the full range of military operations. We are developing a detailed contracting campaign plan to implement the necessary changes to contracting, and looking at changes in doctrine, organization, training, materiel, and leadership.

This is going to require the Army, OSD, administration, and Congress to work together to make the systemic fixes needed for contracting to be a government core competency.

Mr. Chairman, this concludes my opening remarks, and Mr. Parsons's, and I look forward to your questions.

[The joint prepared statement of General Thompson and Mr. Parsons follows:]

JOINT PREPARED STATEMENT BY LTG N. ROSS THOMPSON III, USA, AND JEFFERY P. PARSONS

#### INTRODUCTION

Thank you for this opportunity to report to you again on the U.S. Army's comprehensive, ongoing efforts to ensure policies and procedures are in place for all joint, expeditionary contracting operations in Iraq, Afghanistan, and Kuwait, and to better prepare the Army for acquisition and logistical support of future combat operations. In this statement, we address the: (1) work of the Army Contracting Task Force; (2) the steps that the Army is taking to implement the recommendations of the Commission on Army Acquisition and Program Management in Expeditionary Operations, which released its final report, "Urgent Reform Required: Army Expeditionary Contracting," on October 31, 2007; and (3) the steps that the Army is taking to implement relevant requirements of the National Defense Authorization Act (NDAA) for Fiscal Year 2008, including the acquisition workforce requirements in sections 807 and 852 of that Act.

We are grateful for the wisdom, guidance, and strong support that you and other Members of Congress have shown for our efforts. Our goal is to be good stewards of the resources provided by Congress and to free human and financial resources for higher priority operational needs.

As background, Secretary of the Army Pete Geren chartered the Commission on Army Acquisition and Program Management in Expeditionary Operations chaired by Dr. Jacques Gansler, the former Under Secretary of Defense for Acquisition, Technology, and Logistics. The Gansler Commission provided an independent, long-term, strategic assessment of the Army's acquisition and contracting system—and

its ability to support expeditionary operations and sustained high operational demand in an era of persistent conflict. To complement the work of the Commission, the Army Contracting Task Force was established to review current contracting operations and take immediate action where appropriate. The recommendations of the Commission were consistent with the findings of the Task Force. We are currently addressing structural weaknesses and shortcomings identified, with a view to improving both current and future expeditionary contracting operations. We are committed to finishing the development and then implementing an Army-wide contracting campaign plan to improve doctrine, organization, training, leadership, materiel, personnel, and facilities. Achieving this objective will require resources, time, and sustained leadership focus. The contracting campaign plan will continue the initiatives already underway in the Army.

Since our last report to you, Secretary Geren has directed the realignment of the U.S. Army Contracting Agency to the U.S. Army Materiel Command (AMC) and the establishment of the U.S. Army Contracting Command (ACC) (Provisional) under AMC. The ACC (Provisional) stand-up ceremony on March 13, 2008 is in keeping with the Gansler Commission's second recommendation—to restructure Army contracting organizations and restore responsibility to better facilitate contracting and contract management in expeditionary and U.S.-based operations. The ACC, whose first Executive Director, Jeff Parsons, will testify before this committee, is a two-star level command with two one-star level subordinate commands—an Expeditionary Contracting Command and an Installation Contracting Command.

Before we continue, we would also like to publicly thank Deputy Secretary of Defense Gordon England for presenting on February 26, 2008, the first Armed Forces Civilian Service Medals (AFCSM) for service in Iraq. As a result of the Gansler Commission's recommendations on contracting effectiveness, the Department of Defense (DOD) reviewed its regulations/policy with regard to the AFCSM and agreed to make this honor available for DOD civilians involved in direct support of expeditionary operations. This was a policy change and no legislation was required.

#### GANSLER COMMISSION IMPLEMENTATION UPDATE

The Commission made four overarching recommendations to ensure the success of future expeditionary operations: (1) increase the stature, quantity, and career development of military and civilian contracting personnel, particularly for expeditionary operations; (2) restructure organization and restore responsibility to facilitate contracting and contract management; (3) provide training and tools for overall contracting activities in expeditionary operations; and (4) obtain legislative, regulatory, and policy assistance to enable contracting effectiveness in expeditionary operations.

Secretary Geren directed the establishment of an Army Contracting Campaign Plan under the acting Under Secretary of the Army to ensure that the Gansler Commission's findings and recommendations are implemented as quickly as possible without the loss of any momentum. We are making steady progress in this area.

With regard to the first recommendation to increase the stature, quantity, and career development of the Army's contracting personnel, we have a number of initiatives underway. We now have a contingency contracting structure that consists of Contracting Support Brigades, Contingency Contracting Battalions, and four-person Contingency Contracting Teams. Each Contracting Support Brigade is commanded by a Colonel who assists the Army Service Component Commander (ASCC), a three-star commander, in his contracting support—by planning and coordinating contracting operations in a theater. These brigades oversee Contingency Contracting Battalions and teams—Active, Reserve, and National Guard—in executing the ASCC's contracting support plan. The contracting brigades, battalions, and teams are being activated and will eventually total 7 brigades, 11 battalions, 18 senior contingency contracting teams, and 153 contingency contracting teams. These brigades, battalions, and teams will coordinate and integrate their plans with Army Field Support Brigades. These two new brigade designs support the Army modular force in the development of a single, fully integrated planning cell to provide quick response, command, and control of acquisition, logistics, and technology activities needed to support and enable the full spectrum of operations.

The Army plans to grow our military contracting structure in the Active Force as well as our civilian contracting workforce. We realize the need for members of the military to begin their acquisition careers earlier. Plans are underway to move the accession point for military officers 2 to 3 years earlier, immediately following their Branch qualification at the Captain level (normally at the 4- to 5-year mark in their development). For noncommissioned officers, the accession point will occur upon achieving the rank of staff sergeant. We have implemented a policy stating that

military members will not deploy during their first year in contracting. This will help ensure the requisite training is accomplished prior to deploying on an expeditionary contracting mission. Lastly, the Army is formally interviewing units as they return from theater to capture "expeditionary contracting" lessons learned and incorporate the findings into doctrine, training guides, and user handbooks.

With regard to the second recommendation to restructure organization and restore responsibility, as stated in our introduction, we established the ACC on March 13, 2008. This new command will leverage contracting assets across AMC and will better prepare us to support expeditionary operations. The one-star Expeditionary Contracting Command will be a deployable Headquarters, enabling the proper oversight and structure for extended conflicts. In addition, regarding the recommendation to establish a Chief of Contracting for the U.S. Army Corps of Engineers (USACE) headed by a one-star and supported by a deputy from the Senior Executive Service, the USACE is developing a concept plan, and we are working with them to complete, publish, and implement this plan.

Concerning recommendation three to provide training and tools, the Army is assessing opportunities to improve contingency contracting training at our Combined Training Centers. In addition, we are expanding the mission of the Battle Command Training Program by including acquisition professionals to train brigade, division, and corps organizations. We are also evaluating ways to incorporate contractor training into all military exercises. At present, 12 professional military education courses have new or enhanced operational contract support subject matter, and we have put in place an intensive training and management program for our Contracting Office Representatives (CORs). In addition, all Army CORs must complete the Defense Acquisition University's on-line continuous learning module, "COR with a Mission Focus," prior to appointment. For example, since October 1, 2007, 190 CORs have been trained in Kuwait. All contracts awarded now by the Kuwait Contracting Office have a trained COR performing surveillance.

To improve our contingency contracting training and doctrine, we have taken several actions. We are taking a set of concrete steps which include: (1) working with the Joint community on the final draft of Joint Publication 4-10, Operational Contract Support, (2) distributing the recently released Joint Contingency Contracting Handbook, (3) developing Field Manual 4-10, Commanders Guide to Contracting and Contractor Management and Field Manual Interim 4-93.42, Contract Support Brigade; (4) accelerating efforts to enhance leader education in contracting and contractor management; (5) re-examining the training curriculum and timing for all newly accessed acquisition officers and civilians; and (6) re-examining the accession point for contracting officers and noncommissioned officers into the Army Acquisition Corps. In addition, we are evaluating solutions to develop and field a Virtual Contracting Enterprise to provide electronic, web-based tools to enable total visibility and analysis of the full scope of our entire contracting mission.

The Department is actively assessing and developing its position regarding the appropriate numbers of General and Flag Officers and Senior Executive Service authorizations for contracting positions. Our report to the congressional committees in response to section 849 of the NDAA for Fiscal Year 2008 will contain additional information on this subject.

As the Department reviews the Commission's recommendations and appropriate implementation actions we are assessing the possibility of recommending specific supportive legislative actions. As required by section 849 of the NDAA for Fiscal Year 2008, we will submit a report to the congressional defense committees with the results of our assessments by May 28, 2008, and will provide additional information at that time.

#### ARMY CONTRACTING TASK FORCE UPDATE

The Task Force was directed to implement reforms and corrections immediately to correct deficiencies specifically identified in Kuwait, which have already resulted in significant improvements in contracting operations. Several new leaders are now in place, along with new internal control processes for effective checks and balances.

A systematic review of Kuwait contract files from fiscal year 2003 to fiscal year 2006 was directed to identify issues that weren't already being addressed by an ongoing investigation by either the U.S. Army Audit Agency (AAA) or the U.S. Army Criminal Investigation Command (CID). A 10-person military team deployed to Kuwait and completed a review of 339 contracts under \$25,000. The team found poor contract documentation, referred several contracts to AAA and CID for additional analysis, and documented "lessons learned" for future expeditionary contracting support.

The review of contracting actions over \$25,000 is almost complete at the U.S. Army Tank-automotive and Armaments Command (TACOM) Life Cycle Management Command in Warren, MI. Roughly 90 boxes of contract files were sent there from Kuwait. The review of 319 contracts is complete. Several of these contracts have been referred to AAA and CID for further analysis. The team specifically recommended improvements in the areas of source selection procedures, lease versus buy analyses, performance-based contracting research, and solicitation and contract review processes. The TACOM team is also reviewing financial data to ensure appropriate disbursements and accounting of payments.

Work continues with the orderly transfer of existing and future major contract actions from Kuwait to the U.S. Army Sustainment Command (ASC) at Rock Island, IL, a subordinate command under AMC. ASC established a dedicated 12-member team, supported by legal professionals, charged to assist in resolving a number of claim actions, definitizing unpriced actions, and negotiating new contracts for requirements in ways that will result in significant cost avoidance or savings. The leasing of nontactical vehicles was renegotiated with an estimated savings of \$36.6 million over a 3-year period.

Several other initiatives designed to enhance contracting support for contingency operations are underway. The Army established a team to examine our contingency contracting force design and determined the need to add 3 additional contracting support brigades, 5 additional contingency contracting battalions, 3 additional senior contingency contracting teams, and 48 additional contingency contracting teams. These were included in the totals on page four.

The Army Contracting Task Force final report was completed on March 17, 2008, and has been presented to the Secretary of the Army for his review and consideration. The details in the report will be included in the Section 849 of the NDAA for Fiscal Year 2008 report to Congress.

#### ACQUISITION WORKFORCE

We would like to discuss the steps the Army is taking to implement sections 807 and 852 of the NDAA for Fiscal Year 2008, and briefly highlight section 851. The Army has implemented a contractor inventory system as referenced in section 807. In 2002, the DOD Business Initiative Council approved the Army as the DOD pilot to test a contractor manpower and cost reporting process, designed to provide better visibility over the labor and costs associated with the contract workforce and the missions supported by that workforce. The Contractor Manpower Reporting system was implemented in March 2005. With this process already in place, we will work closely with DOD to define, refine, and implement the contractor inventory requirements of section 807.

The Army is actively engaged in helping to shape DOD's response to the NDAA for Fiscal Year 2008, section 851 which requires a separate section on the Defense acquisition workforce in the DOD Human Capital Strategic Plan. This plan is directly linked to implementation of NDAA for Fiscal Year 2008 section 852. In supporting this effort, the Army is taking aggressive action to review its existing workforce development programs and define opportunities to improve the Army's acquisition workforce. Section 852 requires that DOD address acquisition workforce needs in three separate areas: recruitment, training, and retention.

A joint acquisition workforce group composed of the military Services and Defense agencies have met to facilitate the prioritization. These joint meetings have facilitated the prioritization and funding strategy in order to determine best value investment for the DOD acquisition workforce. Although some of the initiatives represent Service-specific programs, pilots, or opportunities, the proposed initiatives in many cases represent best practices from among the Services and those that have potential for enterprise across DOD. The details and merits of these and other initiatives will be presented to the Service Acquisition Executives in the near future as we move to final recommendations and decisions on how best to execute the Defense Acquisition Workforce Development Fund.

Over the next few weeks, we will jointly discuss and analyze all Section 852 initiatives to determine the best enterprise solutions for our recruitment, training, and retention challenges. This has been a very robust process, and when the funding is provided, DOD and the Services will be poised to implement the highest priority solutions in a way that optimizes DOD results. The Army appreciates the opportunities that section 852 will provide our workforce. These programs will help ensure a well-trained and educated workforce, focused on providing the soldier with world-class capabilities.

## CONCLUSION

As stewards of American taxpayers' dollars, the Army is improving its structure and capacity to manage contracts to better support expeditionary operations and improve overall contractor performance.

Expeditionary military operations in Iraq and Afghanistan have placed extraordinary demands on our contracting system and the people who make it work. As stated before, the vast majority of our military and civilian contracting personnel perform well in tough, austere conditions. We know that the success of our warfighters and those who lead them is linked directly to the success of our contracting workforce, and we are working hard to ensure that contracting is a core competency within the Army. We are also working hard to change the culture in the Army to one that recognizes the critical and complex role of contracting as a core competency. The Army's focus on contracting is not just for contracting professionals. Warfighters set requirements and help manage contract execution, and they must be totally involved in their part of the contracting process.

The commitment of our contracting professionals and to our contracting professionals must be 100 percent. They must stay focused on supporting the warfighter, and inspire the confidence of the American people. This will not be easy; it will take time, but getting it done is essential. We cannot and will not fail—our warfighters and our taxpayers deserve no less.

Senator AKAKA. Thank you very much, General.

Now I'd like to give my opening time to Senator McCaskill for your questions.

Senator MCCASKILL. Thank you very much. I really appreciate it.

Obviously, we have serious challenges, and I do appreciate the testimony of all of you today. I think everyone is working hard to implement the Gansler recommendations and the contracting task force recommendations, and I do think some progress is being made. But, obviously, in the management of acquisitions and the ongoing management of contracts, we still have great challenges.

I have reviewed a very lengthy article that was written in the New York Times on March 27, and, I have to tell you, I feel sick to my stomach about a munitions contract that we entered into with a 22-year-old man with a record of carrying a fake identification (ID) so he could drink, and became the head of his company when he was 18 years old. We've done \$200 million a year in business with him, and this stuff is coming from old Communist-bloc countries, and a lot of this ammunition is, in fact, 40 years old and unreliable, and it's not been tested. Have any of you read this article? Are you familiar with this AEY case? [No response.]

It's just mind-boggling to me how somebody like this gets this contract, and how we have a contract to supply munitions that doesn't require the same kind of standards that we would require for our military or from the North Atlantic Treaty Organization. Whoever would like to tackle that, as to how we entered into a \$200-million-a-year contract for munitions to supply the Afghan Army that is working on our behalf, and paid with taxpayer dollars, and to the Iraqis, without any kind of minimum standards or testing; I just have to figure out how that happened.

General THOMPSON. Ma'am, we have looked at that article, and the examination of that contractor and that contractor performance way predated the article. There's been about a 7-month look at that contractor and his performance.

There is an ongoing investigation. That contractor was suspended from contractor work with the U.S. Government. That suspension happened about the day the article was published, but the

investigation that led to that formal suspension action, which is a very deliberate process, had been ongoing for months.

The contract was properly let. It followed all the proper procedures. The DCMA evaluated that contractor for past performance and financial solvency before the contract was let. The requirement in that contract was for commercial ammunition in order to be used by the Afghan forces, and the requirement did not have the same specifications that we have for our military ammunition. They did meet the commercial standards.

The basis for the contractor suspension is what's under investigation right now, because it appears that he did make a false claim that the ammunition that he provided came from a certain source, when, in fact, it was Chinese-manufactured ammunition. So what you have here is a case, I think, of a contractor that was not performing, and is not performing. Therefore, we are taking the proper procedures in order to remedy that.

Senator MCCASKILL. I'm curious why, if you say proper procedures were employed, who made the decision that there was no quality assurance standards to cover packaging, storage, testing, or transport? That wasn't an important part to the contract? Who would have made that decision?

Mr. PARSONS. Ma'am, I'm very familiar with the contract on that, as well. As General Thompson said, when that ammunition was purchased, it's considered what they call "nonstandard ammunition," so we don't buy that to the same standards that we do our military ammunition.

Senator MCCASKILL. But, why? Who makes that decision, that you don't buy it to the same standards? That's what I want to find out. Who makes the decision that the ammunition that we are sending to the Afghan Army to fight terrorists for us in a dangerous situation doesn't have to have the same standards as our American military?

Mr. PARSONS. You raise a good point, and that is one of the things that we are addressing with the Joint Munitions Command now, which was responsible for that requirement, to go back and understand, why is it that the requirements for that ammunition did not meet the same standards that we use for our own U.S. ammunition? A lot of this ammunition is bought from former Soviet-bloc countries. It's, like I said, nonstandard ammunition. It's used in AK-47s and those types of weapons. But, you raise a very good point. We're taking a very hard look at a lot of our foreign military sales (FMS) procurements, where we're buying nonstandard equipment, and to address your exact position there, that we ought to be looking at the requirements and what we are buying.

Senator MCCASKILL. I want to try to figure out who's responsible, because somebody needs to be held accountable for this situation. The past performance was rated as "excellent." This is a 22-year-old that had no prior contracting experience. Now, who decided that their past performance was "excellent," and on the basis of what? Does anyone know?

General THOMPSON. Ma'am, when we let a contract with somebody, we use the DCMA to evaluate both past performance and the financial solvency, and that was the process that was used in this particular case.

Senator MCCASKILL. I'm going to follow up on this, but I want to drill down on this, and I want to figure out where in the—when you sit here and you want things to get better, it's very hard to pinpoint who is the person that's responsible for these mistakes. This contract was a terrible mistake. I assume half of what I read in the newspaper is wrong, and the other half may be slanted, but if you just sweep away a lot of the factual information that's in this article, and look at it, this contract was a mistake, and somebody has to be responsible for this mistake. It's not good enough to say, "Well, the fact that he was only 22, and he was providing hundreds of millions of dollars worth of munitions," and he was dealing with somebody in one country that we had to be called by their embassy to say the guy had been in black-market munitions.

General THOMPSON. Ma'am, like Mr. Parsons and I both have said, we are looking at all the circumstances surrounding that contract and that contractor, not just this individual contract, but any other contracts that individual's had. When we get all the facts out on the table, then we'll be able to determine what mistakes were made, and by whom.

I, like you—there's always another side of a story, and I'm not defending this contractor, in any way, shape, or form. I'm just saying, I want to get all the facts on the table. What's reported in the press, either in this article or others, is not necessarily all the facts, and we are determined to get to the bottom of it, and get all the issues out on the table, and then we will use the legal mechanisms that we have, and the contracting policy venues that we have, and I assure you, we'll make the proper decisions, and people will take appropriate action, across the board, whether in the government or outside the government.

Senator MCCASKILL. I will follow up with some more specific questions about that arms contractor, because I do think that there are some more specific questions that I hope you guys get to the bottom of as it relates to that contract.

I'm not going to have time to go into my other two questions, but I will just tell you, I will direct those questions to you, too.

The first one is on Kellogg Brown and Root (KBR), the policy that we've decided it's okay to allow a contractor to use an offshore account to avoid Medicare and Social Security and unemployment taxes. We have 10,000 Americans working for KBR that have no Medicare payments being made, and they have no unemployment compensation insurance, and they have no Social Security payments being made. There's a post office box in the Cayman Islands somewhere that's taking care of all that, so that none of those responsibilities are met by KBR. I'm not saying that what has happened is illegal, but I will ask for you all to respond in writing as to whether you think this is a good thing for us to be doing. If it's not, what help do you need from us, in terms of laws, to make sure that it's illegal? Because it's offensive.

Then the final thing is jurisdiction. Secretary Bell we talked, in a previous hearing, about jurisdiction for criminal acts by contractors. I know there has been some regulations, the guidelines that came out in that regard since the last time we spoke, but I want to make sure that anybody who's working with taxpayer money in a foreign place is held accountable if they're raping people or com-

mitting any other kinds of crimes. We have to make sure that our laws apply to them, regardless of whether they are actually physically in the United States or not. So I will have some followup questions on that, also.

I apologize that I have to leave and won't be here for another round of questions. Senator Akaka, I really appreciate your giving me a chance to ask those questions before I have to go preside.

Senator AKAKA. Thank you, Senator McCaskill.

Senator Thune.

Senator THUNE. Thank you, Mr. Chairman.

Mr. Parsons, I understand that one attractive aspect of the ACC concept is the ability to surge expeditionary contracting support capability to the field through the use of contracting support brigades. Now, given the current shortage in the acquisition workforce, where will ACC get the bodies, in terms of workforce, to acquire this surge capability, and how many total people in the workforce do you think the ACC will need, at the end of the day, to provide that surge capability?

Mr. PARSONS. Sir, you do raise a good point about the ability to bring additional people into the workforce rapidly. One of the things that we're doing, and especially General Thompson has done already on the military side, is to look at moving—General Thompson has directed that the accession point for our officers and our NCOs into contracting be moved to the left, so that we can start assessing more officers—junior officers and NCOs into the contracting workforce, so that we can get them into these contingency contracting teams and battalions and brigades, to get the training that they need.

On the civilian side, we're working closely with a lot of universities on establishing programs with them that will allow us to hire new graduates into the civilian side of the contracting workforce rather quickly.

Where we really are challenged is hiring experienced contracting personnel. Across the Federal Government, there is a huge demand for contracting subject-matter experts, whether it's the homeland security, other sister Services—Air Force, Navy—and we are very challenged in being able to try to hire experienced personnel. So, our goal, while we're trying to provide incentives, like entitlements for permanent change of station to civilians to come join us that have experience, we're really targeting the college graduates, to try to bring them on quickly.

What this new contracting command will do for us, though, is, now, by bringing 72 percent of all the contracting assets across the Army into one command, we'll now be able to surge across that command, looking for the type of expertise and talent that we need to support an expeditionary operation.

So, these contracting support brigades, while they're small, we will be able to tap into other parts of the ACC to help facilitate them.

A good example of that right now is in Kuwait. We've been challenged in being able to track trained civilians into Kuwait. We have a new contracting support brigade commander there, Colonel Bass, who has made a lot of improvements, and he has added additional personnel to his staff. But, we've also created what we call

a “reachback capability” at one of our major acquisition centers, and we’re performing an awful lot of the contracting now for Kuwait out of the contracting office in Rock Island, where we had some subject-matter experts that can perform that function.

So, we’re looking across the current command to see how best we can surge; but, the big challenge, as you point out, will be bringing the new people onboard to staff this up.

Senator THUNE. To the ACC, when do you expect to achieve initial operating capability (IOC)? What exactly does that mean to the Army Contracting Command?

Mr. PARSONS. To date—as we said, we activated the new command on March 13. It’s a provisional status, so we are in the process of building the command. We’ve requested the additional resources we need that are—from the Army—that we need for the command. I don’t expect to be in an IOC, beyond where we are today, with supporting installations and supporting expeditionary contracting, until October 1 of this year. That’s when we will bring the rest of the pieces of this command together and start bringing people onboard. I don’t expect that we’ll be fully operational and capable until the following year.

What we’ve given the Department is a 3-year plan to bring both the military and the civilians onboard, and expect to have them through their—what we call level-two certification training within that 3-year period of time. That’ll also give us a year or 2 to start getting a lot of these people training.

But, there is no short-term fix. As I said, it’s a 3-year plan before we expect that we’ll be fully operational.

Senator THUNE. Secretary Bell, your written testimony lays out the statutory and regulatory framework for the use of private contractors and the distinction that prohibits private contractors from carrying out inherently governmental functions. There are those who have argued that the line between what is an inherently governmental function, and what is not, is not as clear as it should be. The distinction may be particularly difficult to maintain in a high-risk environment, where PSCs could reasonably be expected to face circumstances requiring the use of deadly force to protect the people or property covered by their contract.

In response to those who say that private security contracts should be replaced by uniformed military forces, your written statement indicates such a policy would require the manpower equivalent of nine additional brigades of combat troops. Do existing policy guidance and oversight by battlefield commanders prevent PSCs from conducting inherently governmental functions, even in high-risk environments, or is this an area that needs more work?

Mr. BELL. I think, as you’re pointing out, Senator Thune, there are two aspects to effective management of contractors. One is to have an adequate policy framework that sets the boundaries for acceptable missions and acceptable conduct; the other part is oversight of the activity in the field.

We believe that we have an adequate policy framework that sufficiently demarks between the capabilities that are allowed under the rules of law and the regulations, and those that are permissible. There is a challenge, which we have been working on, of implementing the effective supervision in the field. We’ve been work-

ing on that, very focused, in the last 6 months, and we've made significant improvements in internal DOD management of operations in theater, as well as as a result of the MOA with the DOS, that General Petraeus has referred to in his letter to Secretary Gates.

Having said that, we believe that continuing emphasis on this, particularly now that military commanders have UCMJ authority over contractors in the field, is going to be another step in improving the effective oversight, in terms of their conduct and their permissible behavior.

It is an area that requires focus, and one that we are continuing to emphasize in our work in CENTCOM, both in Iraq and Afghanistan.

Senator THUNE. What policies, regulations, and coordination steps would ensure that PSCs working for a department or agency outside the DOD do not negatively impact the DOD's combat missions or counterinsurgency operations?

Mr. BELL. As I indicated, both in my written testimony and my oral testimony, Senator Thune, we believe, and we're on record, as is the DOS, that legislative action is required in order to establish clear-cut accountability for contractors supporting other U.S. Government missions outside the United States. There are several suggestions about the approaches to that.

Our concern is that, as we work through whatever the issues are, there is a sense of urgency that that accountability needs to be established. It is the opinion of our legal people that that requires legislation in order to accomplish that.

In addition, as you may know, the current legislation on the books, even under the 2008 NDAA, does not address the capability of the DOD and the DOS to have oversight of other U.S. Government agency PSC operations outside the United States. We believe that it's a significant step forward to extend this coverage for DOD, DOS, and USAID. But, a better approach would be to expand that to all U.S. Government—those regulations, those rules and procedures, to all U.S. Government agencies.

The additional question to be addressed, at some point down the road, is the activities of PSCs who are there working for private sector companies. To the extent that we have a sovereign state in place that has jurisdiction over those, they have that authority over them. To the extent that we have a Coalition Provisional Authority type of situation, at some point in the future, where we're exercising sovereign powers, there is the question of, how do you exercise the authority of that? Again, the focus of the 2008 NDAA is strictly on governance for DOD, DOS, and USAID.

Senator THUNE. What would be the impact on DOD of a change in the law that required uniformed military forces to perform the roles currently conducted by PSCs in high-risk environments, such as Iraq and Afghanistan?

Mr. BELL. As you indicated in your earlier comments, Senator, using the Congressional Budget Office methodology for the number of PSCs that we have, it would take the equivalent of nine combat brigades worth of military personnel to perform that function. We have approximately 9,000 armed security contractors working for DOD alone in those two countries, and that would be the equivalent requirement, which would require not only the deployment of

personnel, but, obviously, extensive training the particular skill requirements for personal security.

Senator THUNE. Is it the DOD's intention to have all of the articles of the UCMJ apply to civilians under their guidance, or just a few?

Mr. BELL. Sir, it is not. General Petraeus and I have discussed this at some length; his view is obviously to put the greatest emphasis on criminal conduct. There are a number of aspects of the UCMJ that have to do with things that essentially do not relate to civilian personnel, and he plans to take a very conservative, but firm, approach regarding criminal conduct.

Senator THUNE. I see my time's expired, Mr. Chairman.

Senator AKAKA. Yes. We'll have a second round.

The Gansler Commission report recommended the establishment of, "A core set of 10 additional general officers for contracting positions," 5 of them in the Army, and 5 of them in joint positions.

Now, General Thompson, at our last hearing you testified that you personally agree with this recommendation and, at that time, said, "I think you will see the Army reflect its support of that in the very near term." Is the Army still on track to establish the new general officer positions recommended by the Gansler Commission?

General THOMPSON. Senator, the Army has evaluated that, and we've passed our recommendation to OSD, and—both on the general officers and also the other legislative recommendations that were made in the Gansler Commission report. It's my understanding that OSD is close to finishing, or has finished, their evaluation, as well. I don't know where that is inside of the administration. But, the Army did finish their evaluation and gave their recommendations to OSD several weeks ago.

Senator AKAKA. Secretary Finley, what is the position of DOD on the need for 10 new general officer positions in the contracting field, with particular attention to the 5 joint positions?

Mr. FINLEY. Mr. Chairman, I believe we would depend on the Army leadership to know their business better than us. What we're looking at is, not only the Army, but we're looking at the cross-cutting requirements for leadership and the pipeline of all the workforce that supports that leadership, including the flag officer and the general officer population.

We have not made a determination whether or not five general officer joint positions is the right number. We have tasked the Air Force and the Navy for their positions on all of the Gansler recommendations that address the Army, and we have received those reports back from both Services, reflecting their respective positions and recommendations.

We are in the process of digesting all that information. We will be proceeding with some due diligence to understand their positions and their recommendations. In parallel, we are still conducting the competency model for contracting, which goes from entry-level to flag-level personnel, which we expect to be completed by this summer. But, by May 28, when we are required to report back to Congress, we do expect to bring some closure as to what our recommendations will be for the Army and joint general officer/flag officers requirements.

Senator AKAKA. Secretary Finley and General Thompson, do you believe that legislation is needed to authorize these new general officer positions, or can the Department establish the new positions within its existing authorization?

General THOMPSON. Sir, from the standpoint of the current legislation that authorizes a fixed number of general officers in the Army, the position that I have taken in the acquisition corps as to the recommendation is that this needs to be additive to the current Army ceiling on general officers. For us to be able to look at existing positions, which are all critically important, senior-level positions, and downgrade those positions to something less than a flag officer in order to staff the contracting general officer, would not be helpful to the Army. So, to the extent that there's a growth in the total number of authorizations allowed to the Army, that would have to be handled by legislation. But, again, that's something that has to go both through the OSD and the Office of Management and Budget administration review process; and our commitment, internally with the DOD, is to have that process completed by the time we turn in the report on the 28th.

Senator AKAKA. Secretary Finley?

Mr. FINLEY. I believe that one of the debate issues is how to best handle any changes in top line on the number of general officers/flag officers. That discussion is ongoing in the Department. We have raised those issues for discussion—not for decision yet, but for discussion—for situation awareness of our military and our civilian leadership.

I expect there are many different views. There are, I would say, pragmatic matters where we are with general officers today, in terms of the quotas that have been set, and where we are in actuality against those quotas. There are also matters of how many of our quotas are filled with joint billets, and how they're consumed and allocated across the different parts of the Services. All of this has to come together, from my perspective, from a strategic point of view, as to how we have to change the way we're going to fight the global war on terror. Fundamentally, this gets into the roles, the missions, the concept of operations, and what kind of a pipeline of military personnel/civilian personnel will we have in contracting management for the future, as we look ahead.

So, my perspective is, this is part of the debate. We have not made decisions. There are people who believe we should come forward and increase the top line. Other people believe we should take it out of hide and start to reconfigure the way we are organized, the way we are structured.

We are having that discussion, as General Thompson reflected. I do believe we will bring this to some form of conclusion before the report comes out on May 28.

Senator AKAKA. The Gansler Commission report states that "The number and expertise of the military contracting professionals must be significantly increased," to address the problems we have experienced in theater.

General Thompson, at the last hearing, you testified that the Army endorsed the Gansler Commission recommendation to grow the military contracting workforce by 400 and to grow the civilian

contracting workforce in the Army by about 1,000. Are those proposed increases still on track?

General THOMPSON. Sir, the military increase is on track. The standup of the ACC, our internal process to look at all of the actions that need to be taken, is in the form of a concept plan. We have about 16 concept plans across the Army right now that all address growth in the contracting structure or adjustments to the contracting structure to some degree. We have all of those 16 plans under review right now, but we still think the number of the civilians that need to increase is somewhere in the 800-to-1,000 range. Then the question's going to be putting the money against them.

But, the critical thing, as Mr. Parsons indicated in his answer to Senator Thune's question, is, you have to get started on hiring the right people, and we need to begin that almost right away. So, from my perspective, the quicker we get this thing resourced, and the quicker we reach out to the colleges and the universities and the population to begin to attract the right people into this career field, the quicker we're going to be able to address the long-term systemic issues. Because, like anything else, it takes people, and it takes good people, if you want to make systemic fixes.

Senator AKAKA. Secretary Finley, I understand that the military Services have resisted the recommendations to increase the DCMA workforce by 600. Can you explain what action the Department is taking to implement this recommendation?

Mr. FINLEY. Mr. Chairman, I believe what the Services have resisted, including the Army, is the Gansler Commission characterization that all post/base campaign contracting efforts go under the auspices of DCMA. In DOD, we fundamentally agree with that position, that we believe that's not an appropriate move or recommendation. But, in discussions and followup discussions—and we meet with Dr. Gansler about every 2 or 3 weeks; we meet with principals of the Commission almost on a weekly basis—understanding the intent of that recommendation, that DCMA would have global post/base campaign responsibility would be an enormous change in the headcount for DCMA, and we believe it is a fundamental role and mission of the military to conduct that business.

At this point in our discussions between Dr. Gansler and myself, the intent and where we are at in trying to evaluate alternative approaches as to how to conduct expeditionary operations between the military/civilian service, expeditionary contracting activity, I believe we are very close in terms of what we believe needs to be done.

So, I think that this is part of the process we're going through to better understand the complications as to how we're going to fight the fight, and train for the fight, in the era of the global war on terror. It is very, very different. It needs to be scalable for big operations, as well as small operations. We're going through some alternative approaches, sharing that with the Services, sharing that with the Joint Staff, sharing that with the combatant commands, as to how does this make sense? Because this is a cultural change as to how we'll fight the fight. The headcount that would go along with that, and where that would belong, has had pushback from everybody.

In the Army's case, my personal opinion is, where they're at and where they're headed, I fundamentally believe, is in the right direction. But, the actual numbers, I believe, is still up to them, not up to OSD. We will support them, if that's what they believe has to be done to make the Army do its role and mission. That would be my perspective, sir.

General THOMPSON. Senator, if I can add just a brief comment to what Secretary Finley said, the current workforce that does the contract management on the Army posts and camps, we don't believe needs to transfer to DCMA. We are putting our arms around the workforce that does that today, and understanding how many people there are, and what functions they perform.

We do think there is a role for DCMA. DCMA's role, fundamentally, for the DOD, is a quality assurance role for weapons-systems contracts in plants and factories. That is a big mission shift for them to be the Service contract management on posts, camps, and stations, but they do have a core competency in quality assurance on contract management, so there is a linkage between what DCMA can do and what the Services do for themselves in the posts, camps, and stations. The key issue, to me, really is having a trained workforce that is prepared to go on deployments to be able to provide that post, camp, and station contract management. Those are mostly a civilian workforce, so we're working that with OSD and the other Services, on what that proper balance is between DCMA and the Services.

Senator AKAKA. Thank you very much.

Mr. PARSONS. Sir, I'd just like to add, real quickly, too, that the concept plan that we had submitted as part of the ACC does build in some additional resources to start performing some of these quality assurance functions that we believe will be needed to enhance our ability to do contractor management. As General Thompson said, the piece that we're still wrestling with is, do we need additional subject-matter experts at the installations that will be trained in performing contract management functions, whether it's food services, transportation services, laundry services. So, that's the piece that we're still working on. But, we have built into this concept plan the actual requirement for quality assurance representatives that will oversee and train, work with DCMA in building up these contracting officer representatives.

Senator AKAKA. Let me call on Senator Levin for any remarks or questions, and he will be followed by Senator Thune.

Senator Levin.

Senator LEVIN. Thank you very much, Chairman Akaka.

I want to go to a question that I believe Senator Thune raised, which is the question of the private security contractors.

I guess, Secretary Bell, this question really is for you. Do you believe that PSCs in Iraq perform security operations, "in highly hazardous public areas where the risks are uncertain"?

Mr. BELL. I'm sorry, is the question as to whether I believe that's an inherently governmental function?

Senator LEVIN. No.

Mr. BELL. What is the question?

Senator LEVIN. I'll get to that in a moment. My question is, do you believe the PSCs in Iraq perform security operations in "highly hazardous public areas where the risks are uncertain"?

Mr. BELL. Actually, the way they are managed is that the military commander has the discretion to make the decision as to whether the areas in which they would operate would represent either a high risk of enemy encounter or even interfere with military operations. He has the authority to redirect any convoy operation away from those areas that he assumes to be high risk.

Senator LEVIN. He has the authority to do it. Is there a statement in that direction, that they will not be performing security operations in highly hazardous public areas where the risks are uncertain?

Mr. BELL. There is direction for them, in terms of approving the missions in advance, regarding where they're allowed to go and during what times they're allowed to go there. They are allowed, as any PSC operation, under military authority, to defend themselves in the event that they are attacked.

Senator LEVIN. Do the commanders have authority—do they have discretion to permit the contractors to perform their operations in highly hazardous public areas? Do they have the authority to allow it?

Mr. BELL. I don't know that I can answer that question.

Senator LEVIN. Why not?

Mr. BELL. I believe that's a matter of command decision, and that would be something you probably should ask General Petraeus.

Senator LEVIN. I can ask General Petraeus, but my question is the other side of the coin. Do they have authority, then, to allow the contractors to operate in those hazardous public areas?

Mr. BELL. I would assume, if they have the authority to make the decision, they would have the authority to do that. The direction in the policy is that they not do that. So, I would assume the authority does not exist.

Senator LEVIN. The authority is the direction that they not perform in highly hazardous areas, or is it simply a matter of giving authority to the commander to prohibit them from operating in those areas?

Mr. BELL. The commander has the authority to make that decision.

Senator LEVIN. All right. I think you are obviously familiar with what I'm driving at here, which is the DOD manpower-mix criteria, which says that security operations that are performed in highly hazardous public areas where the risks are uncertain could require deadly force that is more likely to be initiated by U.S. forces than occur in self-defense, as an example of where there is a governmental function being performed. It's clear you're familiar with the language that I'm talking about.

Mr. BELL. I'm quite familiar, as I'm sure you are, sir. This is a complex document. It's 56 pages of instructions. It describes a number of generalized conditions under which security functions would be inherently governmental, and it describes other conditions under which it would not be inherently governmental. Specifically, in paragraph 2.1.4.1.4, it specifically describes the conditions under

which the military commander is authorized to have PSCs functioning in a defensive role. The DOD's position is that we comply with those requirements, as well as requirements elsewhere in regulations.

Senator LEVIN. Part of that paragraph, though, also reads, does it not, that "security operations that are performed in highly hazardous public areas where the risks are uncertain" is an example of a governmental function?

Mr. BELL. As I said, it's a complex document, and that's the reason there's specific language in the document defining the conditions under which it is not inherently governmental to have PSCs perform those functions.

Senator LEVIN. I also, did I not, correctly read the part where they give an example where it is inherently governmental?

Mr. BELL. I believe you did, sir.

Senator LEVIN. All right.

Now, what about interrogation of detainees. Is it true that in the 2005 document about the use of contractors in interrogating prisoners of war, terrorists, and criminals, that "the handling of these people cannot be transferred to the private sector to contractors who are beyond the reach of controls otherwise applicable to government personnel"? Did I accurately read from the 2005 document—before we get to 2006, did I accurately read from the 2005 document?

Mr. BELL. Not having seen the 2005 document, my understanding from your counsel is that you are reading that accurately.

Senator LEVIN. All right. If I did read that accurately, is it true that we did have contractors, prior to 2006, when they were authorized to engage in detainee interrogation, that, prior to that, they were not authorized to engage in detainee interrogation?

Mr. BELL. I'm sorry, but I don't have qualified knowledge of that.

Senator LEVIN. Is there anyone here that does? [No response.]

Okay. Do you want to answer that, then, for the record? Would you give us, Secretary Bell, an answer for the record?

[The information referred to follows:]

The Department of Defense (DOD) experienced a shortage of interrogators during the onset of Operation Enduring Freedom, and the shortage continued into Operation Iraqi Freedom. The Department contracted for qualified, experienced civilian contractor employees to address this shortfall while the Army aggressively sought to recruit and train a larger government interrogator force. It appears that those responsible for acquiring these contract interrogators in 2003 and 2004 were unaware of the DOD Manpower Mix Criteria that were in effect at the time. These criteria provided: "How enemy prisoners of war, terrorists, and criminals are treated when captured, in transit, confined, and interrogated during or in the aftermath of hostilities, entails the discretionary exercise of government authority. Their handling, as well as decisions concerning how they are to be treated, cannot be transferred to the private sector to contractors who are beyond the reach of controls otherwise applicable to government personnel."

The August 2004 Fay-Jones-Kearn investigation of intelligence and detention activities at Abu Ghraib noted that there was a lack of Army policy regarding the use of contract interrogators. In response to this Fay-Jones-Kearn finding, Headquarters, Department of the Army, G-2, published guidance on February 15, 2005, addressing contract interrogator selection, employment criteria, training, validation, and disqualification. The memo continues in force today.

In addition, DOD Directive 3115.09, which establishes DOD policy on intelligence interrogations, is being updated to reflect current DOD policy on the limited but necessary role that contract interrogators may play under the proper supervision and close monitoring of Government officials throughout the interrogation process.

Senator LEVIN. Before I arrived, Mr. Secretary, you made the statement that section 862 of last year's NDAA, which is the PSC provision, applies only to the DOD, DOS, and USAID, and that the application to other government entities is needed. 862 does apply to all government agencies.

Mr. BELL. Good. Pleased to hear that.

Senator LEVIN. I'm pleased you're pleased. But, I think, then, that we would expect that that's the way it will be implemented, because there is no loophole, such as the one you described.

Thank you. I'll go back and forth. I have a few more questions, but if there's others that have questions, I've taken more than my time, probably.

Senator AKAKA. Thank you, Senator Levin.

Senator Thune.

Senator THUNE. Secretary Bell, I want to come back to this question of the legal framework that would govern a command response to any suspected illegal activity and the March 10 guidelines that the Secretary of Defense issued to commanders on the exercise of the UCMJ authority during those contingency operations. Basically, the guidelines provide that, whenever an offense allegedly committed by a civilian violates Federal criminal law, the DOD has to notify the Department of Justice (DOJ) and give it 14 days, unless extended, to decide whether it's going to prosecute the case. In the interim, DOD has the authority to investigate, make arrests, and continue to address the immediate impact of the alleged criminal act.

As a threshold matter, what is the Department's opinion about the applicability of the UCMJ to all civilian DOD employees and contractors?

Mr. BELL. Our view is that all DOD contractors and civilians who are accompanying military forces in the field—is the way the legislation reads, which we interpret to be in contingency operations—are subject to the UCMJ.

Senator THUNE. I guess the followup question then is, does that guidance reflect dissatisfaction or constitutional concerns about applying the UCMJ to civilians?

Mr. BELL. Because the MEJA law is well-established, I believe there is a preference to use that law, because it has been tested in the courts. Obviously, the legislation relating to the application of UCMJ is a new law that has not been tested in the courts. So there is some natural preference to give the DOJ the opportunity to prosecute under MEJA.

Senator THUNE. So, the DOD, at least at this point, absent that opportunity to test it in the courts, believes that MEJA provides a sounder basis for bringing justice to DOD civilian employees?

Mr. BELL. I don't believe that's the judgment, no, sir. I believe that we have full confidence in the ability of UCMJ to be applied equitably to contractors and DOD civilians. I think the concern is whether there is some basis on which the legislation might be constitutionally challenged, as opposed to being applicable for enforcement.

Senator THUNE. Okay. I guess the other question has to do with the Federal Bureau of Investigation (FBI), which doesn't currently have sufficient capability or an organizational structure outside the

States to support prosecutions in a way that would effectively implement the DOD guidance. Does that—given the lack of that capability by the FBI, except in, maybe, what are very egregious cases—suggest that the DOJ is likely going to decline to prosecute, and, in most cases, going to cede prosecution of a given case to DOD?

Mr. BELL. As a practical matter, the difficulty, we believe, in the DOJ taking the case, is that they actually have to get the U.S. Attorneys office in the location of last residence of the alleged criminal to agree to take the case to prosecute it. That means that if the individual last left Boise, ID, on his way to Iraq, where he committed a crime, that the U.S. Attorney for the area in Boise, ID, would have to agree to take the case/all other considerations, in terms of his caseload, the availability of his people, his familiarity with military operations, his familiarity with Iraq, would all be considerations that might cause him or her to agree to take the case, or not.

So, while we give them that preference, and we've limited it to 14 days, by agreement with the DOJ, because if they make a decision not to take that case, then we believe we should proceed to a speedy investigation and indictment, if it's so called for.

Senator THUNE. Would that be the outcome that the DOD had intended? It looks like it gives you the constitutional protection of giving DOJ the right of first refusal to prosecute, but ultimately, DOD is going to end up with most of those cases, it would appear.

Mr. BELL. We're certainly prepared for that. In the discussions I had when we discussed this in September, when I was over in Iraq, we discussed with General Petraeus and his staff judge advocate what some of the staffing implications would be for both investigators, as well as attorneys and paralegals, which they are prepared to support in moving ahead with UCMJ.

Senator THUNE. Mr. Parsons, the Army Contracting Task Force, found among other things, that post-award contract management was inadequate, and referred to, in particular, the failure to appoint and train contracting officer representatives. What actions will the ACC undertake to help assure that, one, an adequate number of contracting officer representatives will be retained to provide post-award contract management support for expeditionary operations, and, two, that those contract operating representatives will be sufficiently trained to provide that support?

Mr. PARSONS. Sir, we've already taken a number of actions. As I mentioned earlier, the concept plan that we have submitted—for the ACC—actually establishes what we call “quality assurance representative” positions. These individuals are experts in quality control and quality management. We are going to be assigning them the responsibility of ensuring that contracting officer representatives are, one, appointed for each contract; two, are trained; and, three, are actually performing their duties. We already have initiated this in Kuwait, where we've trained over 200 additional contracting officer representatives. Every contract in Kuwait now has an assigned and trained contracting officer representative. Now what we're doing is actually going out and evaluating how well they're performing those duties. So, we're going to take that model and start applying that across the Department of the Army.

The other thing that we have been doing is working very closely with the Combined Armed Support Command, which is part of TRADOC, the Training Doctrine Command, and they are developing additional contracting officer representative courses that are now being taught to all the logistics officers and logistics NCOs. Many of the pre-command courses now are giving the contracting officer representative training in it, as well.

General THOMPSON. Sir, if I can add to that, just a minute. We have evaluated, not just the contracting courses, but also the content for the nonacquisition personnel, to make sure they recognize the importance of contracting. The operating part of the Army, not the contracting workforce, has an inherent responsibility—and this gets back to the Gansler Commission recommendation, to recognize they have a role in contracting. Their role is helping define that requirement. What do they want? When do they want it? How much? Then, on the back end of the contract, they have a significant role in appointing contracting officer representatives. These are not professional contracting individuals—military, civilian—these are the Sergeant Thompsons or the Captain Thompsons or the Lieutenant Thompsons out there, that are there to see that the product or service that we contracted for is properly delivered and is the right product or service.

So this is part of a culture change in the operating part of the Army, that we need to get them to understand and accept, and we are actively adjusting all the course content, all the way up to the general officer level. The Chief of Staff of the Army has me, personally, talking to the general officer classes now about the importance of their role in contract requirements and in contract management, and part of that is appointing the right number and the right people to do the contracting officer representative tasks.

Senator THUNE. Mr. Finley, what will Acquisition, Technology, and Logistics (AT&L) do, if anything, to support what the Army's trying to do to develop this critical post-award contract management capability?

Mr. FINLEY. Senator Thune, AT&L will be extremely integrated and support not only the Army, but, from a best of best practices, we will take all the good things that the Army is doing, and we will factor that in with the efforts that are already ongoing, which, to a large extent, have been coordinated with the Army, the Air Force, and the Navy, but we are resetting, restructuring, implementing new coursework for all levels—acquisition, contracting, as well as nonacquisition, noncontracting personnel—geared toward the global war on terror environment that we're now in.

To a large extent, a lot of that work has been done. We have the ability to have people tap in on the Internet, when they're in theater, and come into our library of capabilities and training. I believe we're on the right track.

We have a lot of work to do, though, to get this to the next level of effectiveness to fight the fight, train the way we fight, and get this expeditionary training done more as a part of our normal way doing business in our training commands, if you will, than make it the exception.

Senator THUNE. You do see the need, though, to strengthen that capability across the other Services as well.

Mr. FINLEY. Absolutely.

General THOMPSON. Sir, the Defense Acquisition University that reports to Mr. Finley and Secretary Young has strengthened their coursework, and they do have an online course for contracting officer representative, and we continue to upgrade the content of that course with the lessons learned. It's a requirement for the Army Contracting Office Representatives (CORs) to take that online course, and then we have the additional training that we put them through now with the direct help that they get with the quality assurance representatives.

Senator THUNE. Okay.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you, Senator Thune.

Section 852 of the NDAA for Fiscal Year 2008 established an Acquisition Workforce Development Fund. Substantial amounts of money are supposed to be transferred to that fund, beginning this summer.

Secretary Finley, can you describe the steps that the Department is taking to ensure that this money is spent in a sound manner to address deficiencies in DOD's acquisition workforce?

Mr. FINLEY. Yes, Mr. Chairman. We have solicited proposals from all the components in DOD for their recommendations on how to address this Acquisition Development Fund. Those proposals have been received. We have over 80 proposals that we have received, and we have binned those into the different categories of training, retention, recruitment, hiring, and so on.

The efforts are to see how we fund this. There's many ways the Department can look to fund this—basically, what's been authorized, but not appropriated. We have met with the Comptroller's Office to provide us some alternatives on how to implement some of the funding scenarios that have been identified for going forward.

We have met with all the Services. We have integrated in with the various other organizations in OSD to start and communicate the fund, and the approach. We're taking a very strategic approach on this. Again, the global war on terror is very different than the Cold War. This is not a personnel account that needs to be tapped into, it's more of a strategic account for addressing some pockets of areas that we feel need attention.

My personal concern on this is, this is a lot of money. This needs the oversight and the checks and balances to assure ourselves that we're spending the taxpayers' money wisely.

I'm not fast to spend, but I am fast with a sense of urgency to determine where the proposals have come in, where they best fit, where are the gaps in these proposals that have come in, that we have missed the needs, if you will. That comes about by having a discussion and reflection with the Services and the Joint Staff and the members of OSD to say, "Here's what we have, here's where we're headed." This needs to be reflected in our human-capital strategic-planning process for DOD, as well as AT&L. It's receiving a very high level of attention from me, personally.

Senator AKAKA. General Thompson and Mr. Parsons, is the Army taking steps to evaluate its need for this funding and the way in which you could use it to address deficiencies in your acquisition workforce?

General THOMPSON. Yes, sir, we definitely are. The working group with the Services in the different staff elements of OSD have been tightly linked in this. We are just a couple of weeks away from taking the recommendations on those 80 proposals forward to the service acquisition executives to make some decisions. With me today is my senior person that does all of the workforce planning and initiatives for the Army, and he spent a significant amount of his time over the last couple of months helping to develop those proposals and prioritize them from the Army's perspective, leveraging what we already do. So, like Secretary Finley said, we're looking, not to duplicate what we already do, from the standpoint of recruitment, training, and retention—we're looking at where are there gaps today, and where are additional resources, and what do we get with those additional resources?

Mr. PARSONS. Sir, I'd just like to add—and it gets to the point that Senator Thune raised earlier. In order to get this contracting command the additional resources, we definitely are going to need to take advantage of some of the programs that are being considered in the area of recruitment and retention. A lot of interest has been expressed about increasing the number of interns, and looking at student loan repayment opportunities. These are all things that the team is taking a look at, in trying to prioritize and figure out how we distribute that.

Senator AKAKA. Secretary Finley, General Thompson, and Mr. Parsons, a related provision to section 852, section 807 of the NDAA for Fiscal Year 2008 requires DOD to develop inventories and review functions currently performed by contractors. The idea is that you can't effectively manage your workforce, including your contractor workforce, unless you know what they are and what they aren't doing. This provision is a counterpart to the Federal Activities Inventory Reform Act, which already requires similar inventories of functions performed by government personnel.

Can you tell us what steps the Department is taking to implement the requirements of Section 807?

Secretary Finley?

Mr. FINLEY. Yes, sir. Section 807, for us, represents a major effort to implement. There are parts of section 807 that have already been well underway, in terms of trying to understand acquisition services and address acquisition services, which is a substantial part of the overall budget. We've already implemented policy in this respect, but it's the implementation of this policy that's going to need to be executed. I would see opportunities, for example, from the 852, to leverage a fast start in the area of the 807, to get us going.

The fundamental challenge, though, is that this kind of activity—be it interns or other hiring of people—to jumpstart some short-falls, which is, I think, excellent for the short-term, but for the longer-term, this has to be POM'd into our planning for the DOD. That's where some of the planning activity right now needs to come together, from the strategic planning point of view, as to how we are, in fact, going to make this happen. My personal recommendation is that we start making this happen in the POM-10 cycle.

So, we envision that the 807 is a work in progress that needs to be further defined, further understood. How will we meet the re-

quirements of this, from a strategic planning point of view and going forward? So, we don't just shoot from the hip, we don't have a knee-jerk reaction. We have addressed this from an acquisition-of-services point of view over the past 18 months, and we have policy out there, but we are going to need to do far more work now for implementation.

General THOMPSON. Sir, from an Army perspective, before section 807 was made part of the law, the previous Army Secretary really recognized the need to get our arms around the total workforce, to include the contractors, and he required much to the chagrin of many people that had to do the reporting, for us to count noses on the contractor manpower equivalents. We've been doing that for a number of years, and have a pretty thorough process in place right now to do that.

We also are now looking at those things that are really inherently governmental, and looking at the business-case analysis and insourcing things that we are currently, in many cases, using contractors for. If it's an enduring function and it's inherently governmental, it should be a government employee who's doing that.

Just on my own staff, I use one example where we have 11 different support contracts. We've now consolidated them into one. The next step to that is taking about 50 of those contract employees and insourcing the appropriate number to be government civilians, Army civilians, because it's enduring functions that we're having contractors perform. That kind of activity is going on across the Army, and that's part of what I use as an example when I educate the senior leaders, that they need to be doing that in their organizations, as well.

Senator AKAKA. Mr. Parsons?

Mr. PARSONS. I'll just add to that, sir, that what we are finding now with our contracting people, as a way of enforcing that, is to make sure that all contract services have been reviewed by a commander and determined to be necessary with addressing these issues, like whether it's an enduring service. So, our contracting folks will not execute a contract for contract services unless approval has been in there by the commander. So, we have a very disciplined process to where we now start focusing on contract services and how we ought to be executing it.

General THOMPSON. Inside the direct-report organizations that come to me, all of those approvals for contract services come to me to be signed off on. I assure you, I ask some very hard questions.

Senator AKAKA. Thank you.

Senator LEVIN.

Senator LEVIN. Thank you, Mr. Chairman.

A few weeks ago, the Boston Globe reported that KBR employs about 10,000 Americans in Iraq through subsidiaries in the Cayman Islands. These subsidiaries are shell corporations, they have no function other than to taxes. A KBR spokesman acknowledged that these subsidiaries were created to enable the company to avoid paying Social Security and Medicare taxes, as well as State unemployment taxes. I know that Senator McCaskill raised this question, but I'd like to pursue it with you, Secretary Finley, a little bit more thoroughly than she had an opportunity to do.

Now, the tax savings are passed along to DOD, but the workers of KBR suffer, and KBR gains a competitive advantage over companies that pay their taxes. I don't think it's the intent of the Internal Revenue Code that companies be able to form shell corporations, wholly-owned subsidiaries and tax havens, and then avoid paying Medicare taxes and Social Security taxes. That cannot be the purpose of the Internal Revenue Code.

The article in the Boston Globe reports that the DOD has known about KBR's avoidance of taxes since at least 2004, when the issue was flagged in DCAA audit reports.

So, Secretary Finley, let me start with you. Does it concern you that 10,000 Americans working in Iraq are not going to have unemployment benefits and will receive less money from Social Security when they retire because of KBR's activities in the Caymans?

Mr. FINLEY. Yes, sir.

Senator LEVIN. What is the Department doing about it?

Mr. FINLEY. I'm not familiar with the details, Senator Levin. I would have to take the question for the record, and would be more than happy to get back to you on the details of what the DOD is doing.

[The information referred to follows:]

There is no prohibition on the use of foreign subsidiaries by defense contractors. Under section 3121 of title 26, U.S.C., commonly referred to as the Internal Revenue Code, a company is not subject to Federal Insurance Contributions Act (FICA) taxes, if the services are performed outside of the United States by a United States citizen or resident who is an employee of a foreign company or subsidiary. Payment of FICA taxes is a requirement of U.S. tax law, rather than contract law or regulation. Accordingly, we do not consult the Internal Revenue Service on this subject.

Senator LEVIN. Do you know whether the DOD has ever consulted with the IRS on this subject?

Mr. FINLEY. No, sir, I do not.

Senator LEVIN. Now, there's a contract going on now, a competition for LOGCAP IV, which is a follow-on to the contract that KBR currently holds, and KBR is one of the companies that's competing for the follow-on contract. Are you familiar with the competition that's going on now for LOGCAP IV, Secretary Finley?

Mr. FINLEY. I do not have a detailed familiarity with that contract.

Senator LEVIN. Okay. By the way, General Thompson, are you familiar with this issue?

General THOMPSON. On the LOGCAP IV?

Senator LEVIN. Yes.

General THOMPSON. I'll let Mr. Parsons address that.

Senator LEVIN. Okay, fine. Sure.

Mr. PARSONS. Sir, the LOGCAP IV has been under re-evaluation, based on the Government Accountability Office (GAO) decision that the protests that were filed by the two unsuccessful offers were sustainable. So, that process is underway. The evaluation has been taking place for a number of months. Beyond that, I can't really address the specifics on this exact issue on the offshore and the impact on that evaluation.

Senator LEVIN. Putting aside the impact on the evaluation of a particular contract—and I can understand the reluctance to get into the details of a competition—but, in general, are you troubled, Mr. Parsons, by what I've described?

Does it trouble you, that we have 10,000 Americans working in Iraq who lose their unemployment compensation while they're there because the company that is operating in Iraq has created a phony subsidiary in the Caymans, a total shell corporation, paper corporation, with no purpose other than to avoid taxes? Is that something which, at least on its surface, would trouble you?

Mr. PARSONS. Sir, I'm not real familiar with the issue. I do know enough that there is nothing that prohibits it in law or regulation. I'll have to defer to the DOD on this, because I really believe it's a broader policy issue than at my level or at the Army level.

Senator LEVIN. Do you know whether the IRS has ever been consulted as to whether or not this is an appropriate way to avoid taxes?

Mr. PARSONS. I have no knowledge of that, sir.

Senator LEVIN. General, would you know anything about this issue?

General THOMPSON. No, sir, I have no knowledge of that either.

Senator LEVIN. Okay. Either Mr. Parsons, then, or Secretary Finley, would you get back to the subcommittee with answers to the questions?

[The information referred to follows:]

Mr. FINLEY. There is no general prohibition on the use of foreign affiliates by defense contractors. Under section 3121, title 26, U.S.C., which is part of the Internal Revenue Code, an American employer, while not required, may elect to have the insurance system established by title II of the Social Security Act extended to services performed outside of the United States by a citizen or resident of the United States who is an employee of the American employer's foreign affiliate. By statute, the decision to extend coverage in such cases rests with the American employer. We have not consulted the Internal Revenue Service on this subject.

General THOMPSON. There is no prohibition on the use of foreign subsidiaries by defense contractors. Under section 3121 of title 26, U.S.C., commonly referred to as the Internal Revenue Code, a company is not subject to Federal Insurance Contributions Act (FICA) taxes, if the services are performed outside of the United States by a United States citizen or resident who is an employee of a foreign company or subsidiary. Payment of FICA taxes is a requirement of U.S. tax law, rather than contract law or regulation. Accordingly, we do not consult the Internal Revenue Service on this subject.

Senator LEVIN. I'm glad to hear that Secretary Finley's troubled by it, because I think Americans in these families that these workers are in would surely directly be troubled by it. It's easy to say, "DOD benefits, because their contract can go for less; because they're not paying taxes that they should be paying." That's an easy out for all the employees of the DOD. Maybe the DOD ought to stop paying taxes on all of its employees, or all contractors' employees, so that contractors can bid lower, because they're not paying taxes on their employees. We wouldn't tolerate that for 1 minute for a contractor that's operating in the United States, and I'm not sure we should. I don't think we should tolerate it for a contractor who's hiring American citizens overseas.

So I guess, Secretary Finley, maybe I should put this responsibility on you. I'm not sure whether you or Mr. Parsons is the right person to give us an answer for the record, has the Department consulted with the IRS on this issue? What's the IRS's response been? Whether or not the Department is considering including in its specifications for contracts requirements that American employ-

ees working abroad have their Medicare and their other payroll taxes deducted—would you get back to us, Mr. Secretary?

Mr. FINLEY. Yes, sir. I'd be happy to.

[The information referred to follows:]

There is no prohibition on the use of foreign subsidiaries by defense contractors. Under section 3121 of title 26, U.S.C., commonly referred to as the Internal Revenue Code, a company is not subject to Federal Insurance Contributions Act (FICA) taxes, if the services are performed outside of the United States by a United States citizen or resident who is an employee of a foreign company or subsidiary. Payment of FICA taxes is a requirement of U.S. tax law, rather than contract law or regulation. Accordingly, we do not consult the Internal Revenue Service on this subject. The clauses and provisions in our contracts relate to contract performance; we do not contractually require our contractors to comply with unrelated laws and regulations. In addition to payment of FICA taxes, related payroll taxes are also a requirement of U.S. tax law. Any requirement for a foreign company or subsidiary to pay FICA taxes and related payroll taxes must come from a change to the tax law and not by incorporating a clause in our contracts.

Senator LEVIN. Thank you.

Thank you very much, Mr. Chairman.

Senator AKAKA. Thank you, Senator Levin.

Senator THUNE.

Senator THUNE. Mr. Chairman, I don't have any further questions. I appreciate our panel being here, and thank you.

Senator AKAKA. Let me ask one question, here, before we adjourn.

The Gansler Commission reported extensively on the inadequacies of contract management in Iraq, explaining that "After the contract is awarded, there are no resources trained to monitor and ensure that the contract is performing and providing the services needed by the warfighter."

I understand that the Army is trying to address this problem by shifting existing contract oversight resources to Iraq. However, the Army and other DOD components have long had a shortage of trained, experienced, and qualified personnel to perform needed oversight on service contracts here in the United States. For example, in March 2005, GAO reported that the Army failed to even assign contract surveillance personnel to 13 of 30 contracts reviewed. In October 2005, the DOD Inspector General (IG) reported that only one-third of 23 contracts reviewed contained adequate contract surveillance plans, and 14 had no surveillance plans at all. In 2006 and 2007, the IG reported that DOD failed to perform adequate contract surveillance on 23 of 24 task orders awarded through the Department of the Interior; 15 of 61 task orders awarded through the Department of the Treasury; and 54 of 56 task orders awarded to the General Services Administration.

Secretary Finley, General Thompson, and Mr. Parsons, what steps are the DOD and Department of Army taking to address shortcomings in the surveillance of service contracts and ensure that you have the workforce you need to ensure that the Department gets the performance that it pays for?

Mr. Finley?

Mr. FINLEY. Mr. Chairman, I'm not familiar with the specific statistics that you have cited, but the efforts underway involve a review of our contracting competencies for all of the DOD. It's an effort that we started last year, and it's an effort that we expect will be completed by this summer. Within that construct, I would ex-

pect that the surveillance plans and the effectiveness of our oversight in those surveillance plans will be addressed from a contractual contract management point of view.

So, I'll be happy to take the question for the record and outline for you what work we have left to do.

[The information referred to follows:]

Since early 2007, the Army's acquisition policy for services valued greater than \$2,500 requires contracting officers to appoint certified Contracting Officer's Representatives (CORs) in writing before contract performance begins, identify properly trained CORs for all existing service contracts, and ensure that a Government Quality Assurance Surveillance Plan is prepared and implemented in service contracts. In January 2007, the Army partnered with the Defense Acquisition University to provide training in COR responsibilities. To date, they have trained more than 6,500 Army personnel to be CORs. As documented in the Army's response to the Gansler Commission Report, the Army has realigned the Army Contracting Agency (ACA) under the Army Material Command (AMC) and established the U.S. Army Contracting Command (ACC) to centrally manage all contracting activities. The ACC will contain subordinate elements designed to address those challenges identified in the past and develop and lead way ahead solutions. The Expeditionary Contracting Command (ECC), an ACC subordinate command, is designed to provide effective and agile expeditionary contracting capability across the full spectrum of military operations. The ECC will standardize operations and provide oversight of contracting activities to ensure contract compliance. Within the ECC, subordinate commanders are responsible for making available various training necessary to ensure mission readiness and success. The Installation Contracting Command (ICC), another ACC subordinate command, will provide the pre- and post-award contracting support to Army installations worldwide. The ICC will provide hands-on contracting training and experience for Army contingency contracting personnel, provide reach-back support to deployed personnel and units, and examine and assess contract management at the installation level. Section 813 of Public Law 109-364 directed the Secretary of Defense to establish a "Panel on Contracting Integrity." This Panel identified contract surveillance as an area of vulnerability that could lead to fraud, waste, and abuse. CORs are a critical element to manage this vulnerability. As such, the Panel initiated several actions to improve contract surveillance, as detailed in the Panel's 2007 Report to Congress. The Panel also recommended policy changes. One would require contracting officers to designate CORs prior to contract award, rather than prior to commencement of contract performance. Another would reinforce the COR's responsibilities and compel requiring activities to affirm that performance of COR functions be addressed as part of their annual performance assessment. Additionally, the Panel established a Sufficient Contract Surveillance Work Group to develop a DOD standard for COR functions, responsibilities, and certification.

Senator AKAKA. General Thompson?

General THOMPSON. Sir, like Dr. Finley, I'm not familiar with the specific examples cited in the GAO and the audit reports, but, from a broader perspective, we do have an Army policy now that we are enforcing that all service contracts over \$2,500 have an appointed COR. The example that Mr. Parsons gave you earlier, about the shortfall that we found in Kuwait, and now, in Kuwait, in particular, we've assigned a COR to every contract, I do know that about 100 DCMA personnel have been sent in the last couple of months to Iraq to increase the contract management ability of the Joint Contracting Command in Iraq, and there is an additional number of personnel—and I'm not sure of the exact number—that will deploy over there once we identify them and get them ready. So, this is something that we are systemically addressing across the board.

Sir, if I could just take one opportunity—I made a statement earlier, to a question that was asked by Senator McCaskill about the AEY ammo contract and the role of DCMA. DCMA did conduct a pre-award survey for that contract, but the past-performance

award was something that was done by the Army Source Selection Authority. The actions of the Army Source Selection Authority on that contract are part of what we're reviewing. So, I just want to make sure that I made that correction for the record, publicly, because I didn't want to have a misstatement for the record.

Senator AKAKA. Thank you very much. That certainly will be recorded.

Mr. Parsons?

Mr. PARSONS. Sir, I'd just like to amplify on the contracting-officer-representative discussion, that in addition to this additional training that we are providing CORs, we've developed a new training course at the Combined Armed Support Command to focus on preparing performance work statements for service contracts. Part of that training now teaches the individuals how to prepare a quality assurance surveillance plan. We are instructing our contracting personnel that, for every service contract that they issue, that that quality assurance surveillance plan must be a part of the contract surveillance in the post-award activity.

So, again, a lot of this is training the nonacquisition people on their role in contractor management and contract management; we're developing as many new courses as we can to get them additional training and better educated.

Senator AKAKA. Okay.

I thank you all very much for your part in this—your testimony and your responses in this hearing on contracting in Iraq and Afghanistan. I look forward to working with all of you to continue to try to improve our programs, wherever they are. It's a huge operation here, but we want to do the best we can to help our military be the best that they can, as well.

With that, I thank you, again. This hearing is adjourned.

[Questions for the record with answers supplied follow:]

#### QUESTIONS SUBMITTED BY SENATOR CARL LEVIN

##### MANPOWER MIX CRITERIA

1. Senator LEVIN. Secretary Bell, the 2005 version of the Department of Defense's (DOD) Manpower Mix Criteria defined the confinement, interrogation, treatment, and actions relating to enemy Prisoners of War (POWs), terrorists, and criminals as inherently governmental functions. Paragraph E1.2.2.5 of the 2005 Manpower Mix Criteria states:

“How enemy POWs, terrorists, and criminals are treated when captured, in transit, confined, and interrogated during or in the aftermath of hostilities entails the discretionary exercise of government authority. Their handling as well as decisions concerning how they are to be treated cannot be transferred to the private sector to contractors who are beyond the reach of controls otherwise applicable to government personnel.”

In 2006, this language was revised to add a new paragraph authorizing contractor employees to conduct interrogations “if they are properly supervised and closely monitored throughout the interrogation process by sufficient numbers of properly trained government officials.”

Is it your understanding that DOD was in compliance with the 2005 version of the Manpower Mix Criteria at the time that it was in effect?

Mr. BELL. The DOD experienced a shortage of interrogators during the onset of Operation Enduring Freedom, and the shortage continued into Operation Iraqi Freedom. The Department contracted for qualified, experienced civilian contractor employees to address this shortfall while the Army aggressively sought to recruit and train a larger Government interrogator force. It appears that those responsible for acquiring these contract interrogators in 2003 and 2004 were unaware of the DOD Manpower Mix Criteria that were in effect at the time. To prevent this from hap-

pening again, DOD Directive 3115.09, which establishes DOD policy on intelligence interrogations, is being updated to reflect current DOD policy on the limited but necessary role contract interrogators may play under the proper supervision and close monitoring of Government officials throughout the interrogation process.

2. Senator LEVIN. Secretary Bell, can you explain why the Manpower Mix Criteria was modified to authorize contractor employees to conduct interrogations?

Mr. BELL. In late 2005, the DOD intelligence components asked for clarification on how contractors could be used to support DOD interrogations. They believed that they could utilize contractor personnel in a support role and still retain control of all inherently governmental (IG) responsibilities. The Department concluded that there were certain functions that could be performed by contractors provided that the contractors were properly trained and cleared and the Department retained final approval authority for all products produced by the contractor and maintained constant oversight and control of all services provided by the contractor.

Initially, the 2005 Manpower Mix Criteria stated that direction and ultimate control of defense missions, functions, and operations, to include intelligence and counterintelligence operations, and interrogations were IG responsibilities. Paragraph E1.2.2.5 of the Manpower Mix Criteria stated that “how enemy POWs, terrorists, and criminals are treated when captured, in transit, confined, and interrogated during or in the aftermath of hostilities entails the discretionary exercise of government authority. Their handling as well as decisions concerning how they are to be treated cannot be transferred to the private sector to contractors who are beyond the reach of controls otherwise applicable to government personnel.”

In late 2005, this guidance was revised to specifically include “civilian internees retained persons, other detainees.” Paragraph E2.1.8.2 of the Criteria still stated that “direction and control of intelligence interrogations, to include approval, supervision, and oversight of interrogations are IG activities.” Paragraph E2.1.8.2 also stated that “performance of those aspects of an interrogation that entail substantial discretion are IG.” However, paragraph E2.1.8 revised the policy to state that “responsibility for their handling as well as decisions concerning how they are treated cannot be transferred to the private sector to contractors who are beyond the reach of controls otherwise applicable to government personnel.” Paragraph E2.1.8.2 also stated that “in areas where adequate security is available and is expected to continue, properly trained and cleared contractors may be used to draft interrogation plans for government approval and conduct government approved interrogations if properly supervised and closely monitored throughout the interrogation process by sufficient numbers of properly trained government officials as prescribed in OUSD (Intelligence) approved procedures.”

These changes are consistent with the May 29, 2003, Office of Management and Budget Circular No. A-76 (Revised). Section B.1.c of Attachment A of the Circular states that an activity may be provided by a contractor provided that “the contractor does not have the authority to decide a course of action, but is tasked to develop options or implement a course of action with agency oversight.” Section B.1.b. of Attachment A states that an action is not IG if the decisionmaking is “limited or guided by existing policies, procedures, directions, orders, and other guidance that: (1) identify specific ranges of acceptable decisions or conduct; and (2) subject the discretionary authority to final approval or regular oversight by agency officials.”

3. Senator LEVIN. Secretary Bell, is it your understanding that DOD has sufficient qualified government personnel to “properly supervise and closely monitor” contract interrogators throughout the interrogation process?

Mr. BELL. Yes, the Department believes it has sufficient qualified government personnel to properly supervise and closely monitor contract interrogators throughout the interrogation process.

4. Senator LEVIN. Secretary Bell, if DOD has sufficient qualified government personnel to supervise and monitor all interrogations, why don’t those government personnel conduct the interrogations themselves?

Mr. BELL. The DOD normally conducts interrogations with pairs of interrogators. If a contract interrogator is used, he or she is paired with a DOD civilian or military interrogator, thus fulfilling the monitoring requirement. Additionally, all interrogations are subject to remote monitoring by live video feed, which makes it possible to monitor multiple interrogations at the same time.

## CONTRACTORS AND FOREIGN SUBSIDIARIES

5. Senator LEVIN. Secretary Finley, at the hearing, I asked you about an article in which the Boston Globe reported that Kellogg Brown & Root, Inc. (KBR) employs more than 21,000 workers in Iraq, including about 10,500 Americans, through subsidiaries in the Cayman Islands, which appear to exist largely on paper. A KBR spokesman acknowledged that these subsidiaries were created to enable the company to avoid paying Social Security and Medicare taxes, as well as State unemployment taxes. You agreed that this seems inappropriate.

Has the DOD informed the Internal Revenue Service (IRS) of KBR's actions to avoid the payment of Social Security and Medicare taxes, so that the IRS can determine whether those actions are legal? If so, what position has the IRS taken on this issue?

Mr. FINLEY. In response to this question, we conferred with the IRS. The IRS confirmed that under section 3121 of title 26, U.S.C., commonly referred to as the Internal Revenue Code (IRC), a company is not subject to Federal Insurance Contributions Act (FICA) taxes if the services are performed outside of the United States by a United States citizen (or resident) who is an employee of a foreign company or subsidiary. Because the workers at KBR's subsidiaries are employees of a foreign company performing work outside the United States, KBR believes payroll taxes such as FICA are not required under the IRC. The IRS would not comment on the legality of KBR's practice because to do so would involve the disclosure of taxpayer return information, which is confidential and can only be disclosed in narrowly prescribed circumstances under section 6103 of title 26, U.S.C.

6. Senator LEVIN. Secretary Finley, does the DOD believe that legislation would be needed to preclude contractors from obtaining a competitive advantage by using foreign subsidiaries to avoid the payment of Social Security and Medicare taxes? If so, has the DOD proposed such legislation? Would the DOD support such legislation?

Mr. FINLEY. Payment of FICA taxes and related payroll taxes is a requirement of U.S. tax law, not contract law or regulation. As such legislative proposals to change the tax law would come from the Department of the Treasury. The DOD would support any legislation that is in the best interest of the United States.

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 QUESTIONS SUBMITTED BY SENATOR CLAIRE McCASKILL

## MUNITIONS CONTRACT FOR AFGHANISTAN

7. Senator McCASKILL. Lieutenant General Thompson, on March 27, the New York Times reported that in January 2007 the Army awarded a Federal contract worth nearly \$300 million to AEY, Inc., making them the main supplier of munitions to Afghanistan's army and police forces. At the time the contract was awarded, the company's president was 21 years old and the company had little substantive procurement experience, especially as it relates to a contract of such magnitude. Past contracts with AEY had been much smaller, and according to two officials involved in contracting in Iraq, AEY's performance on even those smaller contracts was troubling. These officials stated that AEY was not reliable and "if they did come through, they did after many excuses." AEY has not performed as expected under the January 2007 contract. The company has provided ammunition that is in some cases over 40 years old and in decomposing packaging. Some of the ammunition arrived in such poor condition that it was not used.

At the hearing I was informed that before AEY was awarded the contract its bid went through all the normal procurement procedures of both the Army and DOD. It seems to me the fact that normal procedures were followed and AEY was still awarded the contract indicates a flaw in how the Army is evaluating potential contractors. Furthermore, it was stated to me that the Army has been reviewing the AEY contract for the past 7 months, but when I asked which office or person was responsible for awarding this important contract to an immature, and ultimately unsuitable company, I was not able to get an answer.

Can you tell me whose office was ultimately responsible for signing off on the January 2007 AEY contract to supply munitions to the Afghans?

General THOMPSON. Headquarters, United States Army Sustainment Command (ASC), Acquisition Center, 1 Rock Island, Rock Island, IL 61299-6500. ASC was acting as the contracting office for the Joint Munitions Command, the Army's command responsible for ammunition procurement.

The total dollars awarded to AEY is \$154 million. This amount represents the total value of all delivery orders issued against the contract.

Past performance was evaluated and responses regarding AEY's performance were positive. AEY had performed under a similar contract for nonstandard ammunition and weapons with a not-to-exceed price of \$300 million with the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A).

The Afghanistan National Army and National Police did not identify or specify an age requirement for the nonstandard ammunition.

The solicitation was issued on a full and open competition basis for a 2-year requirements contract for nonstandard ammunition. This procurement action called for a best value award, which included the evaluation of past performance, price, and small business utilization. AEY was determined to be the best value. A pre-award survey was requested and completed by Defense Contract Management Agency (DCMA) with support from Defense Contract Audit Agency, which reviewed AEY's financial capability, accounting system, and transportation capabilities. The DCMA report recommended full award. The Excluded Parties List was also checked prior to award and neither AEY nor any company affiliate was listed as being suspended or debarred.

8. Senator MCCASKILL. Lieutenant General Thompson, you stated that in awarding this contract, AEY's past experience and reputation were considered. Can you tell me specifically which of AEY's past contracts indicated they were capable of delivering on a contract of the magnitude and importance of the January 2007 contract?

General THOMPSON. The past performance criteria evaluated was On-time Delivery, Quality, System Integrator, and International Movement. Past performance surveys were issued by the evaluators who received the following information regarding AEY:

AEY was awarded an Indefinite Delivery, Indefinite Quantity (IDIQ) (Contract W914NS-05-D-9012) issued by the JCC-I/A on March 15, 2005, for the same and similar ammunition items and associated weapons and components (various nonstandard ammunition items and other weapon items and components). The maximum potential value of this contract was not to exceed \$300 million or, if multiple awards were made, the aggregate total would not exceed \$300 million. JCC-I/A's Multi-National Security Transition Command-Iraq Support Division provided past performance information regarding Delivery Order 0004 for the supply and air delivery of 21 different nonstandard ammunition items, to include small caliber, shot shell, anti-tank, fragment grenade, 40mm ammunition, and the associated weapon components and systems. The input provided showed that deliveries were made within the contract schedule and that AEY performed satisfactorily against the contract requirements. Under two other contracts, AEY performed as subcontractor for other prime contractors. Positive feedback was returned indicating no performance issues.

These contracts were evaluated using a past performance criterion that addressed the magnitude and relevancy of anticipated contract requirements. Based on all of the information we received prior to the AEY contract award, all indication was that the ASC contract would be similar to the contracts previously performed by AEY.

9. Senator MCCASKILL. Lieutenant General Thompson, what was the specific value of each AEY contract that was used to rate their past performance?

General THOMPSON. The specific dollar values of the contracts that were evaluated for AEY's past performance are as follows:

a. JCC-I/A Contract No. W914NS-05-D-9012. The contract was an IDIQ Contract for various types of nonstandard ammunition, conventional ammunition, weapons, and components. It had a not-to-exceed dollar value of \$300 million.

b. AEY's other two contracts are as a subcontractor for private companies valued at approximately \$2 million.

10. Senator MCCASKILL. Lieutenant General Thompson, please describe how these contracts were related to ammunition and delivery.

General THOMPSON. These contracts were similar to the procurement in question. They also were evaluated using past performance as an evaluation criterion, and they called for the delivery of the same or similar nonstandard ammunition items and other weapons and components with deliveries from an outside continental United States (OCONUS) location into other OCONUS locations.

11. Senator MCCASKILL. Lieutenant General Thompson, you stated that the Army has been reviewing the AEY contract for the past 7 months. Please tell me what, if any, problems the Army has identified in its procurement process that allowed AEY to be able to receive a contract they seem incapable of performing? Has the Army taken any steps to correct these problems in its procurement process? If yes, please describe the changes in detail.

General THOMPSON. The Army places the safety of U.S. and allied soldiers as a priority in the global war on terror. As a result of our concern with the subject AEY contract, we are conducting a thorough review to ensure our Afghan allies are provided with good quality ammunition, and to ensure the soundness of the processes the Army uses to acquire supplies for its allies. As an Army, we continually assess how we are meeting the needs of our customers and ensuring that we are improving our business practices. As a result of our review so far into this matter, we recognize that changes need to be made in our acquisition of nonstandard ammunition. We have already made changes to our packaging requirements for nonstandard ammunition and will ensure that we cite appropriate international packaging and quality standards as the applicable U.S. standard and hold our contractors to that standard. We also have chartered a team of subject matter experts to better define the quality standards necessary for future nonstandard ammunition requirements, how and where the ammunition should be inspected, and the best DOD agency to accomplish these inspections.

12. Senator MCCASKILL. Lieutenant General Thompson, Defense Criminal Investigative Services and Immigration and Customs Enforcement initiated an investigation into AEY in October 2005 in order to look at issues dealing with violations of the Arms Export Control Act. Which, if any, contracting or auditing agencies were notified? How were they notified?

General THOMPSON. Based on direction from the Department of Justice, questions relating to investigations need to be addressed to the various investigative agencies.

13. Senator MCCASKILL. Lieutenant General Thompson, was AEY awarded any other contracts while under audit?

General THOMPSON. AEY did receive a number of other contract awards from other contracting activities across DOD and from other Federal agencies such as the Department of State.

[Whereupon, at 4:18 p.m., the subcommittee adjourned.]

