

Project On Government Oversight

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December 21, 2010

Defense Acquisition Regulations System
ATTN: Mr. Julian E. Thrash
OUSD (AT&L) DPAP/DARS
Room 3B855
3060 Defense Pentagon
Washington, DC 20301-3060

Re: DFARS Case 2010-D027

Dear Mr. Thrash:

The Project On Government Oversight (POGO) provides the following public comment to DFARS Case 2010-D027, "Prohibition on Interrogation of Detainees by Contractor Personnel" (75 Fed. Reg. 67632, November 3, 2010). POGO supports the intent of the Department of Defense's (DoD) interim rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) as required by section 1038 of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), which forbids using contractor personnel in interrogating detainees under DoD's control. However, we think the rule requires various modifications.

Interrogating enemy prisoners of war, civilian internees, and other detainees is a vital function of the U.S. military which, if done properly, can protect U.S. and host-nation forces and citizens, and further mission success. Because interrogations involve the exercise of substantial discretion and constitute a significant infringement on the life and liberty of the detainee, it should be considered an inherently governmental function suitable only for performance by federal civilian or military personnel.¹ Using government personnel to interrogate detainees ensures standardized levels of training and accountability, as well as a clearly defined command structure.

Well-publicized incidents of abusive interrogations performed or assisted by contractor personnel have had long-lasting adverse effects on U.S. missions in Iraq and Afghanistan. The most infamous incident occurred in April 2004, when explicit photographic evidence of prisoner abuse at Iraq's Abu Ghraib prison was released to the public.

¹ Federal Acquisition Regulation (FAR) Subpart 7.503(c) lists "the direction and control of intelligence and counter-intelligence operations" as an example of an inherently governmental function.

The unfortunate incidents at Abu Ghraib caused serious harm to the U.S. mission in Iraq and greatly tarnished America's image throughout the world. Yet, no criminal charges were ever filed against contractor personnel who were found to have participated in the abuse at Abu Ghraib, and attempts to hold them accountable in American civil courts have failed in the face of numerous legal obstacles.

The military has long recognized the dangers of involving contractors in military intelligence functions. Patrick T. Henry, assistant secretary of the Army, expressed these concerns in a December 2000 policy directive that classifies the gathering and analysis of intelligence as an inherently governmental function, or at least as a function that should be exempted from private sector performance on the basis of risk to national security.² The risk, according to the directive, is that contractors "may be acquired by foreign interests, acquire and maintain interests in foreign countries and provide support to foreign customers."³ The directive also warns that reliance on contractors "poses risks to maintaining adequate civilian oversight over intelligence operations."⁴

To the extent that contractors must be used in any activity relating to or supporting interrogations, DoD limits contractor personnel to performing "ancillary" functions and requires that they have proper training and security clearances; are subject to the same rules, laws, policies and procedures as government personnel; and are supervised by appropriately trained and qualified DoD personnel. The problems at Abu Ghraib can largely be blamed on insufficient supervision of contractor personnel.⁵ Establishing an effective system of managing and overseeing contractors supporting interrogations must therefore be accorded the highest priority. In fact, POGO thinks the waiver provision at 237.173-4, which allows the Secretary of Defense to waive the prohibition on contractor interrogators for up to 60 days on the ground of "national security interests of the United States," should be removed from this rule based on the fact that this function is inherently governmental and should never be performed by contractor personnel.

DoD must also prescribe a clear set of penalties for any violation of the new policy. The Army's December 2000 directive was wantonly violated at Abu Ghraib because it lacked a system for holding violators accountable. Such penalties should include civil and criminal fines, imprisonment, the withholding of contract award fees, contract termination, suspension, and debarment.

POGO is particularly concerned that there will be attempts to evade the new policy by transferring detainees to the custody of units of the U.S. government not covered by the policy or

² Memorandum Thru Administrative Assistant to the Secretary of the Army, Director of the Army Staff, for the Assistant Deputy Chief of Staff for Intelligence, regarding Intelligence Exemption (Exemption Number 2000-0004), December 26, 2000. http://projects.publicintegrity.org/docs/wow/25-d_Intelligence.pdf (Downloaded December 21, 2010) (hereinafter Memorandum)

³ Memorandum, p. 2.

⁴ Memorandum, p. 2.

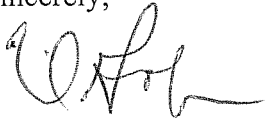
⁵ Department of Defense, *Executive Summary: Investigation of Intelligence Activities at Abu Ghraib*, August 23, 2004. <http://www.c-span.org/pdf/armyabughraib.pdf> (Downloaded December 21, 2010) See also, Government Accountability Office, *Interagency Contracting: Problems With DOD's and Interior's Orders to Support Military Operations* (GAO-05-201), April 2005. <http://www.gao.gov/new.items/d05201.pdf> (Downloaded December 21, 2010)

to foreign governments that do not prohibit the use contractor interrogators or otherwise conduct interrogations in a manner inconsistent with DoD regulations. This policy should apply to all instances of detainee interrogation carried out by any unit of the U.S. government, even when the detainee is not technically in the custody or control of DoD. This may require the issuance of a new rule that expands this policy to cover all civilian agencies. In addition, the phrase “such as the interrogation of detainees” should be added to FAR Subpart 7.503(c)(8).

Various terms in the amended DFARS sections require some clarification. For instance, the definition of *detainee* in 237.173-2 is silent on whether “hostilities” includes situations in which there has not been a formally declared war (e.g. the detainee is classified as an “unlawful combatant” rather than a “prisoner of war”). POGO assumes, but is not certain, that the “this includes but is not limited to” qualifier in that section would cover this eventuality. However, the definition of *interrogation of detainees* does not contain this qualifier, which could lead to confusion over whether this includes any other sort of non-“systematic,” “formal,” or “official” process of “questioning,” or questioning not done “for the purpose of obtaining reliable information to satisfy foreign intelligence collection requirements.”

POGO believes this new policy, if strictly enforced and without the waiver provision, will ensure greater accountability in our country’s treatment of detainees throughout the world.

Sincerely,

A handwritten signature in black ink, appearing to read 'Neil Gordon', written in a cursive style.

Neil Gordon
Investigator
ngordon@pogo.org