



September 3, 2008

## Congress and the President Appoint Members to Commission on Wartime Contracting

*Government Contractors in Iraq and Afghanistan  
To Face Scrutiny for Fraud, Waste, and Abuse*

### A. Commission to Review and Assess Federal Contracts

A key provision of the National Defense Authorization Act, passed in the 110<sup>th</sup> Congress, established a “Commission on Wartime Contracting” (“Commission”) to study federal contracting in Iraq and Afghanistan.<sup>1</sup> Originally proposed by Senators Jim Webb (D-Va) and Claire McCaskill (D-Mo), the Commission is, to some degree, modeled on the work of the Senate’s “Truman Committee”, which investigated allegations of inefficiency and fraud in the National Defense Program during and after World War II. Prior to the conclusion of its work in 1948, the “Truman Committee” directed hundreds of investigations and hearings that reportedly resulted in taxpayer savings of \$178 billion (in today’s dollars). Over the course of the next two years, the new Commission is expected to apply that same type of scrutiny to federal contracting related to Iraq and Afghanistan.

To date, Congress and the President have appointed seven of the eight members of the Commission, which is directed to provide its initial report to Congress by March 1, 2009. Upon appointment of the eighth member, the Commission will begin what is expected to be a lengthy and in-depth review of federal wartime contracting. In summary, Congress has empowered the Commission with very broad authority and duties to study and assess all federal contracts relating to reconstruction, coalition forces logistical support, and security operations in Iraq and Afghanistan. Any number of government contractors in Iraq and Afghanistan may come under close scrutiny as the Commission reviews allegations pertaining to contract performance, waste, fraud, and abuse.

The Commission has the power to seek documents and information, secure testimony under oath, hold hearings akin to congressional

For more information, contact:

**Eleanor Hill**  
(202) 626-2955  
ehill@kslaw.com

**Ted Hester**  
(202) 626-2901  
thester@kslaw.com

**Dan Donovan**  
(202) 661-7815  
ddonovan@kslaw.com

**King & Spalding  
Washington, DC**  
1700 Pennsylvania Avenue, NW  
Washington, DC 20006-4706  
Tel: (202) 737-0500  
Fax: (202) 626-3737

[www.kslaw.com](http://www.kslaw.com)



**Government Advocacy & Public Policy Practice Group**

investigative hearings, and issue reports on findings of fact and recommendations. The Commission may also refer targeted companies to the Attorney General for potential violations of the laws of war, Federal law, or other applicable legal standards. Companies under contract with the Federal government to perform security and other functions in Iraq and Afghanistan should prepare for the possibility of partisan allegations, investigations, high-profile public hearings, extensive press coverage, and potential criminal and/or civil referrals.

**B. Provisions of the National Defense Authorization Act – Sec. 841**

Duties and Scope: The Commission is charged with broad duties regarding contracting in Iraq and Afghanistan and an expansive scope of covered contracts. Congress directed the Commission to “study” Federal agency contracting in Iraq and Afghanistan for reconstruction, the logistical support of coalition forces, and the performance of security functions. The scope of covered contracting includes any contracts entered into both in the United States and abroad for performance of any of these activities.

The Commission is instructed to assess:

- the extent and impact of U.S. Government reliance on contractors to perform security and other functions
- contractor performance and the mechanisms used to evaluate contractor performance
- the extent of waste, fraud, and abuse
- the extent to which those responsible for such waste, fraud, and abuse have been held either financially or legally accountable
- the appropriateness of Defense and State Department structure, policies, practices, and resources for program and contract management
- the misuse of force by contractors, and
- potential violations of the laws of war, Federal law, or other applicable legal standards by contractors under such contracts.

Powers and Authorities: Congress equipped the Commission with broad powers and authorities to secure needed information from both government agencies and private parties. The Commission is authorized to secure the “information and assistance” it deems necessary directly from federal departments and agencies. The Commission may also hold hearings, take testimony under oath, and secure evidence, including the production of documents “as the Commission, or such portion thereof, may determine advisable.” In lieu of subpoena power, the Commission is directed to notify the relevant congressional committees of any instance where the Commission is unable to secure needed testimony or documents. Presumably, the committee of jurisdiction may then compel production pursuant to the committee’s subpoena authority. It is quite possible that, in such circumstances, the Commission’s work could spawn any number of related, but separate, congressional investigations.



**Government Advocacy & Public Policy Practice Group**

The Commission “may” refer violations or potential violations of law to the Attorney General who must report to Congress on the disposition of any such referral. The Commission is required to submit to Congress an interim report on March 1, 2009, and a final report not later than two years after the appointment of all Commission members. The final report will include findings, lessons learned, and recommendations for improvements in various aspects of contract management and processes. To carry out its mission, the Commission is authorized to hire personnel and secure Federal employees as detailees, without reimbursement to the employing department or agency.

**C. Commission Members**

Chairmen of the Commission:

*Michael Thibault* (Democratic appointment) will serve as the Commission’s Co-Chairman. Mr. Thibault is presently a director at Navigant Consulting Inc. He served as Deputy Director, from 1994 to 2005, for eleven of his thirty one years at the Defense Contract Audit Agency (“DCAA”).

*To be named* (Republican appointment) will serve as the Commission’s Co-Chairman.

Other Members:

*Clark Kent Ervin* (Democratic appointment) is presently Director of the Homeland Security Initiative at the Aspen Institute. Mr. Ervin served as the first Inspector General for the Department of Homeland Security, from January 2003 to December 2004, and as Inspector General of the U.S. Department of State, from 2001 to 2003.

*Grant Green* (Republican appointment) is presently Chairman, GMD Solutions, Inc. Mr. Green served as Under Secretary of Management at the U.S. Department of State, from March 2001 to January 2005, as Assistant Secretary of Defense at the U.S. Department of Defense, as Special Assistant to President, National Security Affairs, and as Executive Secretary for the National Security Council.

*Linda Gustitus* (Democratic appointment) is presently a lecturer at the Georgetown University, Government Affairs Institute. Ms. Gustitus worked for 23 years in the U.S. Senate and served as chief of staff to Senator Carl Levin (D-MI). She has also served as a federal and state prosecutor and as a law professor.

*Dean Popps* (Republican appointment) is presently acting Assistant Secretary of the Army for Acquisition, Logistics and Technology. Mr. Popps previously served on the Defense Department’s Coalition Provisional Authority in Baghdad.

*Charles Tiefer* (Democratic appointment) is presently a Professor of Law at the University of Baltimore School of Law. For eleven years, he served as acting general counsel, solicitor, and deputy general counsel for the U.S. House of Representatives.



**Government Advocacy & Public Policy Practice Group**

*Dov Zakheim* (Republican appointment) is presently a vice president at Booz Allen Hamilton. Mr. Zakheim served as Undersecretary of Defense (Comptroller) and Chief Financial Officer at the U.S. Department of Defense from 2001 to 2004.

---

<sup>i</sup> P.L. 110-181, the FY2008 National Defense Authorization Act, H.R. 4986 (formerly H.R. 1585), January 28, 2008.

*King & Spalding is an international law firm with more than 800 lawyers in Abu Dhabi, Atlanta, Austin, Charlotte, Dubai, Frankfurt, Houston, London, New York, Riyadh (affiliated office), San Francisco, Silicon Valley and Washington, DC. The firm represents half of the Fortune 100 and in a Corporate Counsel survey in September 2007 was among the top firms representing Fortune 250 companies. For additional information, visit [www.kslaw.com](http://www.kslaw.com).*

*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*