INTELLIGENCE OUTSOURCING IN THE U.S. DEPARTMENT OF DEFENSE: THEORY, PRACTICE, AND IMPLICATIONS

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ABSTRACT

The Department of Defense expanded significantly its contracting for intelligence services after 9/11. This increased outsourcing poses as-yet unevaluated financial, structural, and normative challenges for the defense intelligence enterprise, the executive branch, Congress, and the American people. This thesis integrates findings from economics, organizational science, legal, and military privatization literatures to create a foundation for a broader inquiry into the full implications of widespread contracting for defense intelligence services. This integrative analysis yields a framework for determining the eligibility of defense intelligence functions for private performance, and applies this framework to defense intelligence contracts that were competed during the past decade. This thesis finds that intelligence outsourcing—while a useful tool—may be financially and structurally deleterious and undermines American constitutional governance when contractors are allowed to perform inherently governmental activities. This thesis concludes with a series of policy prescriptions intended to strengthen the practice of outsourcing intelligence services within the defense intelligence enterprise.
For Sarah
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INTRODUCTION

The terrorist attacks against the United States on September 11, 2001 and the subsequent American response exerted profound pressure on a Defense Department shaped by the post-Cold War peace dividend and unprepared to absorb fully the increased burden of supporting overseas contingency operations worldwide. Facing legislated manpower ceilings and cumbersome hiring practices, Defense Department leaders looked to service contracting as a means of bolstering capacity to meet the demands of America’s post-9/11 security paradigm. The longstanding practice of outsourcing defense functions grew apace over the following decade, and remains essential to achieving American national security objectives at the time of writing.

The majority of the Defense Department’s contracting activities are arguably uncontroversial. A notable exception is the Department’s use of commercial intelligence augmentation, which has received national attention due to widespread coverage of contractor malfeasance in Iraq and the Washington Post’s 2010 investigative series *Top Secret America*. The Washington Post deserves praise for methodically mining public information to elucidate the practice—an unprecedented contribution to the subject—but its broad assumptions and lack of precision raised the Intelligence Community’s ire. Nevertheless, the latter should be less swift to denounce criticism over its contracting practices. Available evidence clearly indicates commercial intelligence augmentation has become a multi-billion dollar industry, but there is nothing suggesting the Defense Department has attempted in earnest to explore the potential second- and third-order consequences of contracting out key defense intelligence functions.

The Defense Department’s use of commercial intelligence augmentation raises important positive and normative questions. As practiced, commercial augmentation poses financial
concerns for American taxpayers and possible short- and long-term structural challenges for the federal workforce. Additionally, the potential for defense intelligence contractors to be given inherently governmental responsibilities arguably undermines American national security and constitutional governance. These issues are not addressed in the literature on the subject, which remains inchoate and effectively non-existent as it pertains to the Defense Department’s intelligence enterprise. A question consequently arises: what are the financial, structural, and normative implications of commercial intelligence augmentation as practiced by the defense intelligence enterprise since 9/11? This thesis seeks to address this question.

Any rigorous inquiry into this subject requires precise definitional clarity and careful bounding. Limited though it is, the extant literature on intelligence outsourcing within the Defense Department is weaker still on defining and disambiguating its basic terminology. In fact, conflating traditional procurement with the acquisition of intelligence services is among the literature’s greatest weaknesses. Studying the implications of commercial intelligence augmentation is fraught even with a carefully defined and bounded research design; data on the subject is difficult to acquire given the secrecy in which America’s intelligence services must by necessity operate. Data limitations do not foreclose such a study, but they preclude potentially constructive analytic approaches and constrain confidence in its overall findings. This thesis begins by defining key terminology and describing the methodology used in its preparation.

While this study’s timeline is limited to the years following 9/11, the conditions that prompted the Defense Department’s recourse to intelligence service contracting were the product of decades of policy decisions by successive presidential administrations and Congressional legislation. These decisions and legislation limited the Defense Department’s immediate
response options, and their legacy continues to influence the department’s policies. This thesis traces the origins of the variables constraining Defense Department executives on September 12, 2001, before turning to the subsequent expansion of intelligence service contracting.

Following these definitional, methodological, and historical discussions, the thesis reviews existing federal law and policy to determine how the Defense Department ought to contract for intelligence services and explores how the department does so in practice. This analysis identifies areas in which contracting practices is incongruous with policy, as well as types of contracts that raise pronounced positive and normative concerns. These findings are evaluated through the lens of established economic, organizational science, public policy, and legal literatures, which yields a proposed framework for evaluating the propriety of current defense intelligence service contracting practices.

Once formulated, the proposed framework is applied to select cases that correspond to broad functions currently performed by defense intelligence service contractors. The case application’s findings serve as the foundation for concrete policy recommendations, which aim to mitigate the negative consequences of intelligence outsourcing and optimize its use. The thesis concludes that the prolonged and widespread use of intelligence service contracting within the Defense Department’s intelligence enterprise unduly burdens American taxpayers, undermines the long-term viability of the Defense Department’s civilian intelligence workforce, and transfers inherently governmental functions to private parties.

I am obligated in the interest of transparency to note that I have worked alongside and supervised defense intelligence contractors during the course of my government career, which spans the period under study. Many of these individuals are true heroes, and their services are
essential to the current operation of the Defense Department’s intelligence enterprise. The issue of contracting for intelligence services can be a visceral one in which government employees, contractors, elected officials, corporations, and interested observers alike have substantial vested equities; this thesis seeks to divorce the inquiry from unexplored assumptions and offer a foundation for future analysis into the relative merits—and optimal conduct—of intelligence services contracting within the defense intelligence enterprise.
CHAPTER I: LITERATURE REVIEW

The literature on intelligence outsourcing remains undeveloped and virtually non-existent as it pertains to the Defense Department’s intelligence enterprise. Beyond the Washington Post’s expository work on the subject, there have been at least three other attempts to clarify and evaluate the nature, extent, and implications of intelligence outsourcing within the Defense Department and the Intelligence Community. Only two of these attempts were academic in nature, and while both dealt to varying degrees with the normative character of the practice, neither addressed sufficiently the long-term financial and structural consequences of widespread intelligence services contracting. The nascent character of the intelligence outsourcing literature suggests further progress is possible by integrating findings from a closely related but far more developed field—commercial military augmentation. While this subject differs from intelligence outsourcing in several key areas, it nonetheless provides a constructive framework for evaluating the positive and normative dimensions of contracting for intelligence services.

The most comprehensive inquiries into intelligence outsourcing to date are overwhelmingly descriptive in nature and focus principally on the practice’s scope as well as its more controversial aspects. The extreme-case tendency that runs throughout the literature is likely the product of the same data shortfalls encountered during research for this thesis; indeed, this inquiry draws on some of the same information used by each of the following authors. The extant literature can be sorted into a continuum ranging from least to most alarmist, to which the level of analytic rigor is inversely proportional. Glenn James Voelz’s work is the most rigorous and balanced to date. Voelz is also the only author to offer policy prescriptions for improving contracting practices. Simon Chesterman follows Voelz in this notional continuum;
Chesterman’s work is well researched, but it lacked definitional clarity and prescriptive richness. Timothy Shorrock occupies the opposite end of the continuum from Voelz. Shorrock’s investigative research is path breaking, but his analysis is alarmist and lacks rigor. These authors and their work constitute the core of the intelligence outsourcing literature.

Voelz’s study was published in 2006 by the Defense Intelligence Agency’s Joint Military Intelligence College (now the National Defense Intelligence College). Voelz’s article proposes criteria for evaluating Defense Department contracting practices, and adopts a small-n case study approach to test the application of his criteria. Voelz’s article serves as a valuable exploration of how to improve defense intelligence contracting, but he makes several broad assumptions and omissions that undermine the contribution of his analysis. First, he offers only a brief discussion of what is meant by “inherently governmental.” While this concept is complex and central to any discussion of intelligence contracting, he proceeds from a cursory treatment to an expansive view of which intelligence functions are eligible for outsourcing. Voelz asserts correctly that the United States has a firm legal basis for contracting, but he fails to ask the more important question of whether the U.S. should or ought to outsource certain types of work.

Second, Voelz attempts to explain the growth in services contracting since 2001, but concentrates only on proximate causes and effects. Voelz accurately describes intelligence outsourcing as a means to avoid manpower ceilings, maintain a surge capacity, and obtain services not available in the government workforce. However, he fails to scrutinize these objectives individually. For example, Voelz accepts that contracting for intelligence services can provide a short-term surge capability and can be difficult to manage effectively, but he neglects

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to examine the potential long-term implications of the practice. By limiting his line of inquiry, Voelz eschews second-order analysis that could yield important policy prescriptions.

Finally, Voelz fails to evaluate critically the manner in which the defense intelligence enterprise incorporates its outsourcing practices into its strategic planning. The integration of service contractors into the government workforce poses a variety of near and long-term structural and normative challenges; among other things, it forces the defense intelligence enterprise to compete with the private sector for valuable human capital, and once that human capital is externalized the government loses control over its cultivation and further growth. Is the Defense Department accounting for the long-term health of its government employees in its drive to open intelligence functions to private sector performance? Could more rigorous planning decrease outsourcing requirements? Should or ought manpower ceilings be adjusted to accommodate currently outsourced intelligence functions? Voelz neglects to ask these questions.

Chesterman’s study postdates Voelz’s by approximately two years, and represents the most recent academic inquiry into intelligence outsourcing. While Chesterman and Voelz draw from similar sources, Chesterman focuses more heavily on the controversial aspects of the subject (e.g., cost inefficiencies and allegations of abuse). Chesterman frames his discussion around contractor involvement in intelligence collection and analysis, and uses his findings to illustrate the challenges posed by contract surveillance. Specifically, Chesterman devotes considerable attention to the difficulties posed by secrecy, conflicts of interest (a variable ignored by Voelz), and the ambiguous definition of “inherently governmental.” Chesterman’s study

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ultimately makes a broader contribution to the literature, but it lacks Voelz’s specificity and fails to address the structural issues posed by the sustained outsourcing of intelligence services.

The study’s primary limitation stems from its treatment of contractor involvement in intelligence collection, which Chesterman divides into signals intelligence (SIGINT), rendition, and interrogation. With respect to SIGINT and rendition, Chesterman focuses on firms that were complicit in domestic eavesdropping and the CIA’s rendition program. While interesting, covert partnership between the Intelligence Community and American communications firms differs fundamentally from the use of service contractors to augment the intelligence workforce. Likewise, Chesterman’s comments on the rendition program are ambiguous and appear to conflate contracting with the use of clandestine commercial and other non-official cover (a mistake also made by Shorrock). This confusion reflects a pervasive flaw in the literature’s typology and taxonomy, one that is shared by Shorrock and to a lesser extent Voelz.

Tim Shorrock’s research into intelligence outsourcing is the literature’s most comprehensive, but also the least methodologically rigorous.³ Shorrock is an investigative journalist who prior to writing his book published outsourcing-related articles in a variety of print and electronic media. Some of the data he uncovers is compelling, but it is largely derived from press reporting and tends to be alarmist in tone. His writing also contains a number of inaccuracies that could have been avoided with greater diligence. Shorrock’s objective in writing his book was to explore the problems and abuses of intelligence outsourcing, and he uses an informal extreme-case approach to do so. While informative, the result is also biased. Shorrock limits his inquiry to cases that reflect the pitfalls of outsourcing, and ignores instances

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in which the practice could be beneficial. It is important to note that Shorrock did not aim to produce a rigorous piece of scholarship, and his book is a welcome contribution to the literature insofar as it constitutes a compilation of new and obscure data.

Shorrock’s work is considerably broader than that of Voelz and Chesterman, to the point that it is undermined by its lack of focus. For example, Shorrock’s definition of intelligence outsourcing includes such categories as surveillance platforms (e.g., the U2 aircraft and CORONA satellite program), cryptologic systems, and intelligence services contracting. The breadth of this definition precludes a deeper inquiry into any of these forms of procurement, some of which are largely uncontroversial. Shorrock makes an effort to explain the Clinton Administration’s National Performance Review, and does so in greater detail than Voelz and Chesterman. Like the latter, he also addresses the issue of ethics and conflicts of interest. Shorrock also peripherally examines normative aspects of intelligence outsourcing, such as the use of contractors to engage in activities that violate foreign sovereignty (as many intelligence activities do). Read in conjunction with Verkuil (Page 11) and established U.S. policy, this could potentially serve as a basis for prohibiting specific types of intelligence outsourcing currently in practice. On balance, however, Shorrock’s primary contribution is sound reportage.

Voelz, Chesterman, and Shorrock provide a foundation for further study, but fall short of addressing fully the positive and normative implications of outsourcing what were historically considered responsibilities reserved for the Sovereign. It is here that the military privatization literature is capable of augmenting the inquiry into intelligence services contracting. The foregoing authors each draw from the work of P. W. Singer, who specializes in the outsourcing
of military operations through private military firms (PMF). Singer’s book and the
*International Security* article that preceded it are widely considered cornerstones of the literature
on commercial military augmentation, and are substantially more focused and methodologically
rigorous than Shorrock, his closest counterpart in the intelligence domain. Despite its relative
advancement, Singer observed that as of 2002 the military privatization literature remained
primarily descriptive and lacked broader integrative analysis. Singer’s work contributed
substantially to that subject’s literature, which has since been further refined. Singer’s work on
military outsourcing provides a constructive model for evaluating the implications of intelligence
outsourcing. Indeed, this thesis deploys commercial military augmentation as a proxy for
understanding the normative implications of contracting for intelligence services (Chapter 9).

First, Singer is careful to define PMF and to explore taxonomical ambiguities present in
the military outsourcing literature. Singer then uses his findings to identify three single-n case
studies, corresponding to three carefully defined PMF sub-types. In doing so, he avoids the
foregoing authors’ failures to properly classify the units and populations under examination.
Singer also makes a sounder use of the case study approach than Voelz and Chesterman, whose
small-n case studies rested on unquestioned assumptions and were methodologically uneven.

Second, Singer explores the practical and normative implications of military outsourcing.
His treatment of contractual dilemmas (e.g., contract surveillance, performance incentives) is far
more extensive than that of Voelz or Chesterman, and unlike the previous authors he addresses
the potentially deleterious effects of the market on commercially augmented military operations.
Singer also makes a robust attempt to evaluate the moral and ethical implications of military

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outsourcing; Voelz, Chesterman, and Shorrock afford less attention to the normative underpinnings of services contracting within the Defense Department’s intelligence enterprise.

Singer’s work offers a useful model, but there remain substantial incongruities between the private military industry and intelligence outsourcing. First, the private military industry as described by Singer is a global enterprise with consequently wider-ranging structural and normative implications. American PMFs may provide services to a variety of international clients, but American firms or their subsidiaries participating in intelligence-related services contracts generally provide support only to the U.S. government. A firm involved in classified work for multiple governments poses a potentially grave security risk and a fundamental moral hazard. Second, the private military industry’s global nature does not require Singer to address ethical issues specific to U.S. law and American democratic norms. A rigorous inquiry into defense intelligence outsourcing would be necessarily narrower in scope and require close scrutiny of applicable federal statutes, regulations, and constitutional principles.

Singer’s analysis of the normative character of commercial military augmentation outstrips any efforts made to date vis-à-vis defense intelligence outsourcing, but it is by no means authoritative. A more comprehensive treatment of the normative underpinnings of contracting out national security functions may be found in the work of Paul Verkuil. Verkuil is a legal scholar and is primarily concerned with assessing the broader impact of outsourcing on American sovereignty. The research and analysis behind his 2007 book was extensive; although not stated explicitly, Verkuil appears to have synthesized all applicable regulations, including the Federal Acquisition Regulation and Office of Management and Budget guidelines, as well as

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statutory law and the Constitution in formulating his argument that the widespread outsourcing of governmental functions poses a threat to American democratic principles and governance.

Taking a step not shared by the foregoing authors, Verkuil questions whether U.S. contracting law squares with constitutional principles rather than accepting U.S. regulations and statutes as a faultless foundation for determining whether and to what extent discrete governmental functions ought to be outsourced. As a piece of constitutional and legal exegesis, Verkuil’s study represents a starting point for exploring the deeper issues addressed peripherally by Chesterman and Shorrock. The application of Verkuil’s method and findings to the subject of defense intelligence outsourcing would promote a substantive broadening of the literature.

The preceding authors each contributed directly or indirectly to the literature on intelligence outsourcing, but fail to fully address the present line of inquiry. Voelz’s study is the most specific, but lacks the second-order analysis necessary to fully frame the issue and generate salient policy prescriptions. Chesterman’s article is stronger on this account, but is weak on the functional implications of intelligence services contracting. Shorrock’s work is highly detailed, but lacks academic rigor. For their part, Singer and Verkuil were not writing to address intelligence outsourcing, but their work provides a framework for a more methodical and comprehensive inquiry into the subject. Taken together, these studies reveal a number of areas that require further research pursuant to a better understanding of the positive and normative implications of intelligence outsourcing as practiced by the defense intelligence enterprise.
CHAPTER 2: DEFINITIONS

Previous attempts to study the Defense Department’s commercial intelligence augmentation practices were undermined by definitional ambiguity. The terminology most frequently employed, including “contracting” and “outsourcing,” lack *prima facie* specificity and must be narrowed further in the interest of transparency, analytic rigor, and bounding. This thesis adopts the definitions contained within the Federal Acquisition Regulation (FAR) and its Defense Department supplement (DFARS), which govern acquisition activities within the U.S. government and the Defense Department.

A “contract” is a mutually binding legal relationship obligating the seller (also known as a vendor) to furnish supplies or services and the buyer (the government) to pay for them. “Contracting” is the process of purchasing, renting, leasing, or otherwise obtaining supplies and services from nonfederal sources. Contracts and contracting do not include grants or cooperative agreements as defined under 31 USC 6301 et seq.\(^6\) Contracts can be unclassified or classified.\(^7\) Neither the FAR nor DFARS defines “outsourcing” or “privatization,” which feature prominently in the literature. For present purposes, “outsourcing” is used interchangeably with “contracting” whereas “privatization” is construed narrowly to mean the divestiture of a given activity or function from governmental performance. “Commercial augmentation” is defined broadly as the use of contracts to bolster the government’s organic capabilities.

The FAR separates contracts into two broad categories, those that acquire “supplies” and those that acquire “services.” Supplies include all property except land, including but not limited
to public works, buildings and facilities, ships and aircraft, machine tools, and the alteration or installation of the foregoing. The FAR defines a “service contract” as one that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. Services contracts can be “nonpersonal” and “personal” in nature. Nonpersonal services are those in which personnel rendering services are not subject by the contract’s terms or its administration to Government supervision and control. Personal services feature an employer-employee relationship between the government and contract personnel, and are discussed in greater depth below. This thesis focuses exclusively on the government’s acquisition of nonpersonal and personal services.

Just as there are broad categories of contracts, there are numerous contract types. An understanding of contract typology is necessary for any inquiry into contracting theory and practice; consequently, this thesis devotes considerable attention to defining the contract types under study. The government procures many services using firm-fixed price, cost-reimbursement, incentive, indefinite delivery, and time-and-materials contracts. Firm-fixed price contracts are not subject to adjustment based on vendors’ incurred cost and consequently provide a strong incentive for vendors to control costs and perform effectively. Firm-fixed price contracts include a number of variants that provide contracting parties latitude to tailor contract terms to specific services and related deliverables. Cost-reimbursement contracts establish an estimated price ceiling for the purpose of obligating funds and permit the vendor to be

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8 Ibid., 2.1-14.
9 Ibid., Subchapter F, Part 37, Subpart 37.1, 37.101, 37.1-1.
10 Ibid.
reimbursed for costs incurred above and beyond the price ceiling at the government’s approval. These contracts are frequently used to procure research and development services.\textsuperscript{13} Incentive contracts aim to motivate the vendor to provide high-quality support and discourage waste by linking the vendor’s compensation to its performance against negotiated benchmarks.\textsuperscript{14} Indefinite-delivery contracts are used to procure definite and indefinite quantities of services when the timing of future deliveries is unknown at the time the contract is awarded. These contracts provide the government flexibility in structuring the timing and quantity of contract deliverables.\textsuperscript{15} Lastly, the government uses time-and-materials contracts to acquire services at hourly rates that include wages, overhead, general and administrative expenses, and profit. Time-and-materials contracts are used when it not possible to accurately forecast the extent or duration of the work or confidently anticipate costs. These contracts provide no incentive for cost control or efficiency, and place a premium on government contract surveillance.\textsuperscript{16}

This thesis is interested principally in the government’s use of contracts to procure intelligence services for the defense intelligence enterprise, which includes the Defense Department’s intelligence combat support agencies, the intelligence components of the Military Services and Combatant Commands, and Defense Department intelligence, counterintelligence (CI) and security organizations.\textsuperscript{17} Defense Department combat support agencies include the Defense Intelligence Agency (DIA), the National Geospatial-Intelligence Agency (NGA), the National Security Agency (NSA), the Defense Threat Reduction Agency (DTRA), the Defense

\textsuperscript{13} Ibid., Subpart 16.3, 16.301-1, 16.3-1.
\textsuperscript{14} Ibid., Subpart 16.4, 16.401-1, 16.4-1.
\textsuperscript{15} Ibid., Subpart 16.5, 16.501-2, 16.5-1.
\textsuperscript{16} Ibid., Subpart 16.6, 16.601, 16.6-1.
\textsuperscript{17} Department of Defense, Department of Defense Instruction 3020.39: Integrated Continuity Program for the Defense Intelligence Enterprise, September 12, 2008, 9.

This thesis examines a narrow type of procurement—nonpersonal and personal intelligence services—by a strictly bounded population of Defense Department components. This limited scope was designed to maximize explanatory power, but it also reflects severe data constraints and methodological challenges that hinder research into the subject. These issues have significant implications for the strength of the study’s findings, and warrant discussion.

CHAPTER 3: METHODOLOGY

Research into present-day intelligence topics is often complicated by profound data constraints. These constraints are inherent to the subject, given the sensitivity of intelligence information and intelligence services’ obligation to protect their sources and methods. The classification process is consequently the *sine qua non* of effective intelligence operations, but it removes potentially valuable information from the public domain and consequently frustrates researchers. The present study is no exception.

The FAR permits classified contracts, defined as those in which the contractor or its employees must have access to classified information during the contract’s performance.\(^{23}\) Not all classified contracts feature classified contract documents, such as Statements of Work (SOW), Statements of Objectives (SOO), and Performance Work Statements (PWS). SOW are documents that specify the work to be performed, work location, performance period, delivery schedule, performance standards, and special requirements including security clearances.\(^{24}\) SOO are government-prepared documents incorporated into the solicitation that state the contract’s overall performance objectives. The government uses SOO when it intends to provide vendors the maximum flexibility for proposing innovative solutions.\(^{25}\) PWS are similar to SOW and SOO in that they clearly articulate the goals to be achieved by the contract under solicitation.\(^{26}\)

SOW, SOO, and PWS provide perhaps the best insight into the government’s goals in contracting for specific services at specific times. Per the FAR, contracting actions valued at

\(^{24}\) Ibid., Subchapter B, Part 8, Subpart 8.4, 8.405, 8.405-2.
\(^{25}\) Ibid., Subchapter A, Part 2, Subpart 2.1, 2.101, 2.1-14.
\(^{26}\) Ibid., 2.1-11.
more than $25,000 and the related documents are required to be advertised to the public through the “governmentwide point of entry.” However, full and open competition can be avoided if advertising contract details would threaten national security. Many intelligence-related contracts are consequently unavailable for public review, and those that are publicly announced often lack SOW, SOO, or PWS. This necessary exception constrains comprehensive research into and analysis of the Defense Department’s intelligence services contracting practices.

While the bulk of defense intelligence enterprise contracts are classified or otherwise unavailable for public consumption, enterprising researchers can collect some data from those contracts that are advertised for full and open competition. This thesis drew the cases cited in Chapter 11 exclusively from active and archived solicitations posted to the government-wide point of entry, Federal Business Opportunities.gov. This official U.S. government website features an incomplete record of defense intelligence contract solicitations, and only a fraction are accompanied by detailed SOW, SOO, or PWS. As such, the available population for case selection should not be construed as representative. Cases were chosen for discussion based on the richness of their data; in other words, contracts were selected for additional research and analysis if they were accompanied by detailed contract documents. This method risks selecting cases that do not represent the total population of defense intelligence contracts; nevertheless, it provides access to a reservoir of data on a subject characterized by a shortfall thereof.

While detailed information concerning the terms of defense intelligence contracts is difficult to acquire, quantitative and qualitative information concerning the actual performance of
those contracts is in even shorter supply. SOW, SOO, and PWS need not be classified, but
details concerning the performance of the corresponding contracts are almost always classified.
For example, it is possible to understand with relative certainty what services the government
attempted to acquire through a given contract, but data limitations make it generally impossible
to characterize the effectiveness with which that contract was performed, let alone ascertain
whether the contract was performed according to established law and regulations. It is
consequently easier to understand how the government intends to contract for intelligence
services than it is to know how well those services are performed following a contract’s award.

In light of these data constraints, this thesis relies heavily on examples of contract
performance that have been publicized in open sources. These examples tend to be extreme
cases; while they illustrate clearly the potential positive and normative pitfalls of contracting for
intelligence services, they are also almost certainly not representative of the population as a
whole. This thesis aims to use relevant findings from economic, organizational science, public
policy, and legal literatures to ameliorate the adverse effects caused by data limitations and to
strengthen the methodological rigor underpinning its judgments.
CHAPTER 4: HISTORY OF U.S. GOVERNMENT OUTSOURCING

Governments have been contracting for goods and services for millennia. In antiquity, Rome used frontier populations to raise and support its legions. These individuals were not Roman, but were effectively contracted to perform functions that Rome lacked the numerical strength to perform itself.\(^{30}\) French armies made heavy use of Genoese crossbowmen during the Hundred Years War; these combatants were provided not by a foreign army but by Italian nobles contracting on their own behalf with the French Crown.\(^{31}\) More recently, the U.S. constitution granted Congress the power to issue letters of marque and reprisal, which allowed privateers to seize foreign goods and attack foreign ships under the authority of the U.S. government.\(^{32}\) These privateers featured prominently during the Quasi War with France and the War of 1812.\(^{33}\)

The genesis of the current drive to “contract out” can be traced to the early years of the Cold War. Then as now, public reformers looked to the private sector for methods to achieve efficiencies and increase government effectiveness. A prominent public policy scholar in 1965 extolled the virtues of the “fusion of economic and political power” that would limit the growth of the federal bureaucracy, and the Bureau of the Budget (BOB) directed in 1967 that the federal government should consider outsourcing activities if it would economize taxpayer dollars.\(^{34}\) Other observers were less sanguine. As early as 1961 President Eisenhower warned of the danger posed by the “military-industrial complex,” and a 1962 report to President Kennedy underscored the risk of blurring lines between the public and private sectors and the potential for

\(^{32}\) United States of America, *The United States Constitution*, Article 1 Section 8.
talented civil servants to be recruited into the contractor workforce. Nevertheless, service contracting grew apace during the 1960s and 1970s and set the stage for the use of contractors as a quasi-permanent workforce not subject to civil service personnel ceilings.\textsuperscript{35}

The outsourcing movement intensified during the 1980s due to the Reagan administration’s affinity for smaller government.\textsuperscript{36} The 1967 BOB directive was superseded in 1983 by Office of Management and Budget (OMB) circular A-76, which established a process for identifying which government functions should be opened to private sector competition. Circular A-76 categorized these functions as either “commercial” or “inherently governmental,” with the commercial activities eligible for competition and outsourcing or privatization (Circular A-76 is discussed in depth in Chapter 5).\textsuperscript{37} Arguments for public-private partnerships, deregulation, privatization, and devolution gained increased currency during this timeframe.\textsuperscript{38} Federal acquisition exceeded $184 billion annually by 1989, an increase of approximately $26 billion over 1982.\textsuperscript{39} The Reagan Administration’s increased emphasis on harnessing the private sector to reduce government bureaucracy set the stage for the 1990s, which became a watershed decade for American public administration and the debate over outsourcing.

Bill Clinton campaigned for and won the presidency in 1992 on a platform of reform. Under the direction of Vice President Al Gore, this reform agenda extended to the federal government and had broad implications for the future trajectory of the federal workforce. The

\textsuperscript{38} Guttman, \textit{Government By Contract}, 5-9.
Clinton Administration’s National Performance Review (NPR) was created in March 1993 with the goal of improving the federal government’s performance and reducing its overall cost. The NPR’s initial report yielded a variety of recommendations that included consolidating like-functions within and across federal agencies, reducing the size of the federal workforce by 252,000 positions, and outsourcing government services or employing “market mechanisms” to optimize those that could not be outsourced.\(^{40}\)

The NPR—later renamed the National Partnership for Reinventing Government—spanned Clinton’s tenure in office and yielded highly significant legislation including the Federal Workforce Restructuring Act of 1994, which mandated the elimination of 202,300 government positions over five years, and the Federal Activities Inventory Reform (FAIR) Act of 1998, which required federal agencies to produce annual lists of all positions not deemed inherently governmental for competition with and performance by private vendors.\(^{41}\) This legislation had the effect of accelerating the drive to contract out; total procurement at the close of the Clinton Administration—nearly $219 billion—exceeded that at the beginning by $18 billion, an increase of $34 billion over the previous decade.\(^{42}\)

All told, nearly one million civil service and uniformed military positions were eliminated during the 1990s.\(^{43}\) The Intelligence Community was not immune to these cuts. While numbers remain classified, in 1992 Congress mandated a 17.5 percent reduction in the U.S. civilian intelligence workforce to be completed by 1997. This reduction was on track as of


1996, but it is not publicly known whether Congress’s target and deadline were met. The downsizing of the Intelligence Community was separate from the personnel reductions within the military, which comprises a substantial portion of the overall intelligence workforce. The 1990s were thus a period of acute contraction and arguably stagnation within the Intelligence Community; not only were civilian positions being eliminated, but hiring slowed to less than one percent of the overall workforce by fiscal year 1995.44

George W. Bush inherited a smaller federal workforce upon taking office in 2001. The post-Cold War “peace dividend” and the NPR contributed to diminished capacity within the Defense Department and the defense intelligence enterprise. These were the conditions that prevailed on September 11, 2001. Already disposed toward smaller government, the Bush administration turned to contracting as a means to build capacity to deal effectively with the post-9/11 security paradigm. The wars in Afghanistan and Iraq required a massive contracting effort to support deployed U.S. forces; as of 2009, contractors outnumbered American military and civilian personnel in both theaters.45 While most of these contractors provided logistical and related support services, the Defense Department also outsourced a variety of intelligence functions to support organic elements that lacked capacity to satisfy fully America’s exigent national security requirements.

According to the most recent information available, the U.S. government spent $535.4 billion on contracts in 2010, with the Defense Department accounting for 68 percent or $366.7

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billion of the federal government’s total contract expenditures.\textsuperscript{46} This represents an increase of more than $300 billion over the government’s 2001 contract expenditures.\textsuperscript{47} At the time of writing, the Obama administration and Congress have both expressed their intent to reduce the government’s reliance on contract support. The second and third order consequences of this potentially reduced role after a decade of centrality to U.S. national security are not yet clear.

CHAPTER 5: CONTRACTING POLICY

American contracting practices are governed by a constellation of policies and regulations that derive their power from Executive and Congressional authority. While the U.S. Constitution contains no reference to outsourcing or privatization, it does grant Congress authority to delegate certain enforcement powers through letters of marque and reprisal.\(^{48}\) This power is not granted to the Executive; however, the Fifth Amendment distinguishes between “public” and “private” property, and the Executive’s power to purchase goods and services has not been credibly challenged despite the Constitution’s silence on the matter.\(^{49}\)

The scope of the federal government’s contracting activities is defined by legislation and executive policy created since the early 1980s. OMB Circular A-76 is perhaps the most important of these instruments. Deriving its authorities from legislation and executive orders dating to the 1920s, Circular A-76 directs federal agencies to identify positions as either “inherently governmental” or “commercial,” and to compete commercial positions against private sector vendors to achieve cost savings for American taxpayers.\(^{50}\) The operational definitions of “inherently governmental” and “commercial” are the linchpin of the A-76 process, and the interpretation thereof has broad consequences for the functions the federal government elects to outsource or perform in-house.

Circular A-76 defines an inherently governmental activity as one that is “so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in

\(^{48}\) United States of America, \textit{The United States Constitution}, Article 1 Section 8.
\(^{49}\) United States of America, \textit{The United States Constitution}, Amendment V.
making decisions for the government.” Further, these activities involve the exercise of “sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.” According to the circular, inherently governmental activities involve “binding the United States to take or not take some action…determining, protecting, and advancing economic, political, territorial, property, or other interests…significantly affecting the life, liberty, or property of private persons… [or] exerting ultimate control over the acquisition, use, or disposition of United States property.”

The exercise of “substantial discretion” is thus central to defining inherently governmental. However, the circular emphasizes that not all discretion is inherently governmental in nature. Specifically, the use of discretion is deemed inherently governmental “if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.” The implication of this definition is that discretionary authority may be delegated in circumstances where that discretion is constrained and subject to approval and oversight.

In addition to this exercise of discretion, Circular A-76 makes allowances for the use of contractors to “develop options or implement a course of action with agency oversight.” However, functions should not be outsourced when doing so is expressly forbidden by statute, if the government’s capacity to exercise its own discretion over contractor proposals or recommendations is limited, and if doing so would “significantly and directly affect the life,

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51 Ibid.
52 Ibid.
liberty, or property of individual members of the public,” among other things. The latter prohibition is explicitly not applicable to “guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed.”

Circular A-76 defines “commercial” activities as “recurring service[s] that could be performed by the private sector and [are] resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement.” These activities are “not so intimately related to the public interest as to mandate performance by government personnel,” and they can be found “within or throughout organizations that perform inherently governmental activities or classified work.” If a government activity is deemed commercial in nature, it may be opened to competition between the government element performing the activity and private sector vendors. The A-76 process uses a market mechanism to competitively source those functions not deemed inherently governmental in nature.

Circular A-76 as revised implements the FAIR Act of 1998, but departs from the latter’s definition of inherently governmental. Both instruments begin by defining inherently governmental activities as those “so intimately related to the public interest as to mandate performance by government personnel.” The FAIR Act’s definition ends there, but goes on to enumerate inherently and non-inherently governmental functions that in general correlate with Circular A-76. However, the circular expands on the FAIR Act’s definition and permits the exercise of discretion within the parameters specified above. The FAIR Act makes no such

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53 Ibid.
54 Ibid.
allowance. Circular A-76 ultimately provided the controlling definition, given that OMB governs executive branch procurement more directly than Congress.

The lack of a unified definition of “inherently governmental” was highlighted when the National Defense Authorization Act for fiscal year 2009 required the OMB to promulgate guidance for executive branch departments more effectively identify those functions that could be properly outsourced and those that must be reserved for performance by federal employees. In early 2009, President Obama directed the OMB to respond to the congressional requirement by fiscal year 2010. The OMB missed Obama’s deadline but circulated a proposed policy memorandum in March 2010 for public comment. The proposal adopted the FAIR Act’s more parsimonious definition and offered a “discretion test” borrowed from Circular A-76. The proposal’s major contributions were its emphasis on the exercise of “sovereign power” as being central to any inherently governmental function, and its discussion of “functions closely associated with inherently governmental functions”—a category first proposed by Congress in 2005—that may be performed by contractors albeit with greater oversight.

Beyond the specified definitional issues, the OMB proposal identified examples of inherently governmental functions as well as functions closely associated with the performance of inherently governmental functions. Examples of inherently governmental functions include but are not limited to the direct conduct of criminal investigations, the performance of prosecutions and adjudicatory functions, the command of military forces, the conduct of foreign

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relations and the determination of foreign policy, the determination of agency policy, the
direction and control of government employees, and the direction and control of intelligence and
counter-intelligence [sic] operations. Functions closely associated with the performance of
inherently governmental functions include a range of activities in support of procurement and
workforce planning, and includes the provision of non-law enforcement security activities that
do not directly involve criminal investigations and non-military national security details.

The legislative record is silent on what intelligence functions contractors may perform
with the exception of a 2009 Congressional ban on the use of contractors to conduct
interrogations.\textsuperscript{59} The only publicly available policy on the subject appears to be the Office of the
Director of National Intelligence (ODNI) Intelligence Community Directive (ICD) 612, which
outlines the purposes for which contractors may be used. ICD 612 indicates contractors will be
used to meet “immediate surge” requirements, to conduct “discrete non-recurring tasks,” to
provide unique expertise, to provide specified services in support of core missions, to ameliorate
insufficient staffing by “perform[ing] work that would otherwise have been provided by a [U.S.
government] civilian given sufficient resources,” to maintain continuity in the face of personnel
or skills shortages, and to increase efficiency and effectiveness.\textsuperscript{60}

The FAR ultimately regulates how contracting will be conducted within these policy
parameters. It stipulates the types of contracts best suited for given procurement objectives, and
prescribes the steps necessary to preserve integrity in the acquisition process. Once again, the
key distinction in service contracting lies between personal and nonpersonal services. The bar

\textsuperscript{60} Office of the Director of National Intelligence, \textit{Intelligence Community Directive 612: Intelligence Community
for approving personal services contracts is set higher than nonpersonal services contracts; indeed, agencies are only permitted to contract for personal services if they are explicitly authorized to do so by statute. The Defense Department is statutorily authorized to engage in personal services contracting, but only upon determination that the desired duties are temporary or intermittent, acquisition of the services is advantageous to the national defense, Defense Department personnel with necessary skills are unavailable, and a nonpersonal services contract is impracticable, among other conditions.\footnote{U.S. Government, \textit{10 U.S. Code §129b}; Department of Defense, \textit{Defense Federal Acquisition Regulation Supplement}, Part 237, Subpart 237.104.}

The FAR acknowledges the potential ambiguity between personal and nonpersonal services contracts, and explains that providing direction for an article or service and retaining the right to reject the result does not necessarily produce the supervisor-employee relationship that would convert a nonpersonal services contract into a personal services contract. According to the FAR, a contract is likely personal in nature if the work is performed on site, if the principal tools and equipment are provided by the government, if services are applied directly to the integral effort of agencies in furtherance of assigned missions or functions, if comparable services are performed within the agencies by civil service personnel, if the need for a sought-after service can be expected to extend beyond one year, and if the nature of the work is such that it demands government direction or supervision of contract personnel.\footnote{FAR, Subchapter F, Part 37, Subpart 37.1, 37.104, 37.1-2.} If these conditions prevail, the contractor is \textit{de facto} treated as a government employee, which would ostensibly demand personal services contract procedures and controls.
In sum, there is ample legislation, policy, and regulation governing American outsourcing practices. The foregoing policy instruments are not completely aligned, but in general they agree that federal functions and activities should only devolve to the private sector if they are not so intimately related to the public interest as to mandate performance by government personnel. The exercise of discretion, the wielding of sovereign power, and the presence of effective government oversight are key to this determination. Once a determination has been made that a function is eligible for commercial performance, procurement must proceed in accordance with the FAR and with particular focus on whether contracts seek *de facto* or *de jure* personal or nonpersonal services. Having thus established a theoretical understanding of how contracting should be conducted, this thesis turns to how it is conducted in practice.
While the guidelines governing contracting are relatively transparent—albeit open to interpretation—the manner in which contracting is conducted is anything but. This problem is compounded within the defense intelligence enterprise, given the need for classification. Information concerning how service contracts are performed on a daily basis is in exceedingly short supply, and there is no requirement to report publicly whether contracted work is compliant with prohibitions against service contractors performing inherently governmental functions. It is consequently impossible to ascertain with a reasonable level of confidence the extent to which service contractors may be working outside the boundaries established by legislation, policy, and regulation. However, the public record contains several examples in which the quality of contract performance is known, and while they represent extreme cases they nevertheless illuminate areas in which existing guidelines may be insufficient or unrealistic.

Concern that service contractors may be inadvertently performing inherently governmental functions is not new. The General Accounting Office (GAO, now the Government Accountability Office) conducted in 1991 a study of 108 randomly selected service contracts to determine whether any of the associated contractors were performing inherently governmental functions. The GAO concluded that 28 of these contracts showed signs that contractors were performing potentially inherently governmental functions, although the GAO stopped short of making an authoritative determination due to the lack of a clear definition. Additionally, the GAO observed that some agencies were contracting out to avoid personnel ceilings, making the service contractors functionally equivalent to government employees. The GAO ascribed these
problems to a variety of causes, including limited management and oversight capacity and workforce planning that failed to attract and retain the proper mix of experience and expertise.\textsuperscript{63}

Judging from publicly available information, these problems persist within the defense intelligence enterprise. A constructive example may be the Counterintelligence Field Activity (CIFA), a now-defunct organization created in 2002 and tasked with developing and managing CI programs and functions to protect the Defense Department.\textsuperscript{64} According to some estimates, contractors accounted for up to 70 percent of CIFA’s workforce, raising concerns over whether the government could effectively oversee service contractors’ activities.\textsuperscript{65} Judging from CIFA’s record prior to its disestablishment, it failed to effectively do so. The Defense Department Inspector General (IG) received a series of complaints beginning in 2004 that CIFA was committing mismanagement and abuse that involved its contract workforce. An IG report published in 2006 substantiated several of these complaints, including that CIFA was using contractors to prepare SOW for which they were beneficiaries and that contractors were directing and authorizing each others’ work in direct contravention of the FAR and DFARS.\textsuperscript{66}

CIFA also came under fire in 2005 for archiving U.S. person information collected through its Threat and Local Observation Notice (TALON) program. While an IG investigation found that this information was collected legally, CIFA retained the information in violation of


\textsuperscript{65} Timothy Shorrock, \textit{Spies for Hire}, 15.

Defense Department regulations. While there is nothing to suggest the impermissible retention of U.S. person information was the result of contractor malfeasance, it underscores a pattern of mismanagement first reported to the IG in 2004 and casts further doubt on whether the field activity could effectively manage its heavily contractor workforce.

Beyond the issue of mismanagement, CIFA gained notoriety through its connection to Congressman Randy “Duke” Cunningham and MZM, Inc., a firm owned by Mitchell Wade. In addition to operating a political action committee (PAC) that donated substantial sums to Cunningham’s reelection campaigns, Wade purchased a house from Cunningham at an inflated price, gave Cunningham $600,000, and gifted Cunningham a Rolls-Royce, two boats, and a variety of luxury goods. In a statement to the FBI, Wade admitted he did so to obtain Cunningham’s assistance in securing lucrative defense contracts. CIFA features prominently in an affidavit submitted in support of the FBI’s investigation into Cunningham and Wade; CIFA’s relationship with MZM and Cunningham dated to its founding, and in 2004 it awarded to MZM without competition a $6 million contract for the construction of a “Collaboration and Data Storage Center” at CIFA headquarters. The decision to award the contract to MZM was heavily influenced by Cunningham’s direct intervention. Once awarded, MZM provided CIFA a SOW for the project in a complete reversal of FAR and DFARS protocol.

CIFA was hobbled by its successive scandals and did not survive intact. CIFA’s director and deputy director resigned in August 2006, and the organization was disestablished and its

components incorporated into DIA in August 2008 to form the Defense CI and HUMINT Center (DCHC). Whether CIFA was unique in its reliance on contract augmentation is uncertain; however, it offers a clear example of how of contract mismanagement and violation of contracting guidelines can undermine organizational effectiveness.

CIFA is not the only illustration of the consequences of contracting malfeasance. Perhaps the paradigmatic example of failure in contracting policy, procedures, and oversight is the involvement of contract interrogators in the mistreatment of Iraqi prisoners at Abu Ghraib prison. The excesses at the Abu Ghraib Joint Interrogation and Detention Center (JIDC) have been well documented and do not require further explication here; however, a discussion of the role of contract interrogators is in order.

According to the declassified results of an Army investigation, linguist and interrogator services were procured from Titan Corporation and CACI International, Inc., respectively, in 2003 to alleviate personnel shortfalls at the JIDC. The Titan linguists and CACI interrogators were consolidated into an ad hoc amalgamation of units from different battalions, groups, and operating locations that lacked a preexisting chain of command and unit cohesion. This produced acute command and control shortfalls; among other things, military personnel at the JIDC relied on a CACI site lead to interview inbound contract interrogators and to issue their assignments. Additionally, there appears to have been no Contracting Officer’s Representative (COR, also known as Contracting Officer’s Technical Representative) onsite or otherwise

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available to the JIDC chain of command, making the CACI site lead the only person at Abu Ghraib familiar with the terms of the contract.\textsuperscript{71}

To confuse matters further, interviews with soldiers assigned to the JIDC revealed they believed their supervisors were, in fact, contractors. According to these interviews, CACI interrogators were in charge of important functions like screening Iraqi subjects, and their leadership roles—and government subordinates—were identified on organizational charts.\textsuperscript{72} While contract personnel may supervise government personnel under very specific conditions, none of these conditions were articulated in the contract’s SOW. It is not difficult to imagine that contractors with greater experience than their nominal superiors may inadvertently or intentionally assume governmental responsibilities in a leadership vacuum such as that which prevailed at the JIDC. Indeed, this phenomenon was seen in the Army investigation. At least one CACI interrogator refused to take direction from his government supervisor, claiming “I have been doing this for 20 years and I do not need a 20 year old telling me how to do my job.”\textsuperscript{73}

CACI and Titan contractors were ultimately accused of abusing detainees alongside U.S. military personnel. Some accusations were substantiated by the Army’s investigation, and were followed in 2004 by litigation accusing CACI and Titan of violating the Racketing Influenced and Corrupt Organizations (RICO) Act and seeking compensation under the Alien Torts Act and common law torts including negligent hiring and supervision and unjust enrichment.\textsuperscript{74} The U.S.

\textsuperscript{72} Ibid., 51-52.
\textsuperscript{73} Ibid., 131.
District Court for the District of Columbia dismissed the plaintiff’s claims under RICO, the Alien Torts Act, U.S. contracting law, and select common law provisions, but upheld the remaining common law claims against CACI given the command and control discrepancies noted above. The Court of Appeals for the District of Columbia subsequently upheld the district court’s ruling on Titan and reversed its ruling on CACI, dismissing the plaintiffs’ remaining common law claims. The case was appealed to the Supreme Court in late 2010, but the Court has yet to grant certiorari.

The CACI interrogation contract was flawed from the outset. The Army investigation found the contract’s SOW had been authored in conjunction with a CACI employee prior to award, a violation of the FAR and DFARS. A subsequent GAO investigation found that government personnel abdicated their responsibilities and allowed CACI to perform procurement functions reserved for government personnel. GAO further found that the Defense Department used the Department of Interior to place a task order for interrogation services against an information technology contract CACI was performing for the General Services Administration (GSA) rather than competing a new contract. While this approach expedited the Defense Department’s procurement of interrogation services, those services fell outside the scope of the underlying GSA contract. The GAO report uncovered numerous breaches of contracting policy and regulations that compromised the integrity of the CACI contract before work commenced.

75 United States District Court for the District of Columbia, Memorandum Order for Civil Actions 04-1248 and 05-1165, November 6, 2007.
The foregoing examples are extreme and likely not representative of Defense Department service contracting as a whole. While they may be outliers, it is also likely that the observed failures are symptomatic of an underlying pathology. In both cases the department’s contracting practices stretched or violated legislation, policy, and regulations intended to optimize the use of taxpayer dollars and guarantee that inherently governmental functions are reserved only for government personnel. This divide between policy and practice—if extrapolated across the Defense Department and the defense intelligence enterprise—threatens the viability of outsourcing intelligence services on financial, structural, and normative grounds.
CHAPTER 7: FINANCIAL IMPLICATIONS

OMB’s Circular A-76 process and the FAIR Act are a manifestation of the belief that the private sector can perform certain functions more efficiently than the government, and that by outsourcing these functions the government can achieve substantial cost savings for American taxpayers. This may be true for services such as waste removal and public utilities, but to what extent does service contracting within the defense intelligence enterprise optimize the use of taxpayer dollars? According to an often-cited congressional estimate, Intelligence Community “core contractors” cost on average $250,000 annually, as compared to $126,500 for comparable government employees. These figures first appeared in the Intelligence Authorization Act for fiscal year 2008, but were not further explicated. In other words, it is unclear what costs were included in the topline numbers. Nevertheless, the fact that contractors may be approximately twice as expensive as government employees collapses the once-prevalent argument that contractors are more cost effective than government employees.

Beyond the apparent cost discrepancy between government employees and contractors, the act of outsourcing requires the expenditure of significant resources. Two “hidden” transaction costs are those associated with administering the contracting process from solicitation to award and monitoring contractor performance once an award has been made. Transaction Cost Economic (TCE) theory—derived from the private sector’s outsourcing experiences—suggests that outsourcing functions with a high level of idiosyncrasy (i.e., specialization) can significantly increase transaction costs by making it difficult to switch vendors and reducing the population of vendors capable of competing for a given contract. Furthermore, TCE theory

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holds that firms will take advantage of this idiosyncrasy by standardizing services to achieve economies of scale rather than tailoring their services to the unique needs of individual firms. Thus the hidden costs of outsourcing can be accompanied by diminished quality of support.\textsuperscript{80} The implication for the defense intelligence enterprise is that highly idiosyncratic functions for which there is almost no market outside the government (e.g., the conduct of intelligence operations) will yield transaction costs and may constrain the quality of the contracted services.

It is important to note that the literature strongly supports the argument that outsourcing is capable of achieving cost savings.\textsuperscript{81} A 2001 study of Defense Department A-76 competitions between 1978 and 1994 found the department saved $1.55 billion annually by subjecting commercial activities to competition with the private sector.\textsuperscript{82} Outsourcing is expected to generate savings as long as core functions—those that are central to an organization’s success—are performed in house.\textsuperscript{83} Activities that are closely related to an organization’s competitive advantage may be considered core functions and should not be outsourced as a practical matter. Doing so could result in a loss of control over the activity in question and a consequent decline in competitive advantage.\textsuperscript{84} From a financial perspective, the outsourcing of arguably core functions such as police and security services has been found to yield insignificant savings.\textsuperscript{85}

\textsuperscript{80} Jérôme Barthélemy and Dennis Adsit, “The Seven Deadly Sins of Outsourcing,” \textit{The Academy of Management Executive}, Vol. 17 No. 2, May 2003, 94.
While these findings are derived from the private sector, they have possible implications for the defense intelligence enterprise. Where the Defense Department achieved cost savings through contracting it did so by outsourcing commercial and non-core functions. To the extent that the defense intelligence enterprise contracts out core functions—as it clearly does—it risks compromising its performance and mission effectiveness in return for negligible savings. This line of reasoning assumes that the concept of competitive advantage applies in a non-profit oriented organization, which warrants further study.

Government outsourcing practices may also burden taxpayers by failing to competitively source services and awarding contracts on suboptimal terms. Theoretically, the use of sealed-bidding and fixed price contracts maximizes competition and places the burden on vendors to control costs. Further, the benefits of competition are most pronounced when there is a large population of potential vendors. However, evidence indicates the Defense Department is using negotiation and cost-reimbursement contracts to procure desired services. This method provides greater flexibility but forces the government to assume financial risk as the vendor has less incentive to perform its work on or under budget—indeed, it can encourage vendors to maximize profits by means of cost overruns.\footnote{Ruben Berrios, “Government Contracts and Contractor Behavior,” \textit{Journal of Business Ethics}, Vol. 63 No. 2, January 2006, 120-128.} This dynamic is likely also true of time-and-materials contracts, which may only be used when it is not possible to estimate costs in advance. Under these conditions, vendors are paid a fixed hourly rate and are reimbursed for any materials consumed. Time-and-materials contracts do not create a price ceiling and may incentivize vendors to perform work in a manner that maximizes profit, a component of the negotiated hourly rate. The need to closely monitor time-and-materials contract performance creates an
additional but difficult to quantify cost.\textsuperscript{87} A review of current and archived defense intelligence enterprise solicitations revealed that negotiated time-and-materials contracts outnumbered fixed-price contracts competed through sealed bidding. The defense intelligence enterprise may be forfeiting cost-savings—and possibly encouraging cost overruns—in the interests of flexibility.

The concepts of scale and scope economies are also important for determining whether the defense intelligence enterprise will obtain cost savings from outsourcing intelligence services. Economist Jonas Prager argues governments should only outsource when procurement entities are too small or large to take advantage of optimal economies of scale. For example, an agency may be wise to contract for janitorial services if the vendor specializes in that area and if its business volume is large enough that it would save the agency money after adjusting for the cost of preparing, competing, and monitoring the contract. Prager also argues that governments can only achieve cost savings if they can take advantage of economies of scope. To illustrate, an agency may wish to outsource an activity if the vendor is capable of lowering costs by having its workers perform multiple services for multiple customers.\textsuperscript{88} While the Defense Department and the Intelligence Community may large enough to create an economy of scale, the size of that economy is constrained by the size of the American national security sector. Some defense intelligence vendors also contract with private industry, but the thrust of their business is with the government. Additionally, there is no evidence to suggest that service contractors augmenting the federal workforce serve any purpose beyond that specified in their SOW. Thus they focus on the delivery of a single service, which robs the government of the potential savings that would

\textsuperscript{87} FAR, Subpart 16.6, 16.601, 16.6-1.

accrue through an economy of scope. However, establishing whether scale and scope economies exist in the defense intelligence enterprise is an empirical matter outside the scope of this thesis.

Unlike a municipality outsourcing waste removal or janitorial services, the defense intelligence enterprise does not outsource *in toto* its intelligence activities. Rather, it looks to vendors to augment functions that are performed chiefly by government personnel. This practice has demonstrably increased costs for the government and caused it to sacrifice its existing economy of scale by absorbing vendors’ expenses, including wages, overhead, administration, and profit. While some evidence exists suggesting a combined government-contractor workforce can increase savings through competition and better performance, this evidence is limited to commercial activities, assumes government and contractor personnel are in direct competition, and demands effective government oversight.\(^9\) The applicability of this theory to non-commercial services warrants further study but does not presently indicate a combined government-contractor workforce is producing savings for the defense intelligence enterprise.

The economics literature agrees that outsourcing is financially viable under specific conditions. It is also clear that the decision whether and how to outsource is central to contracting success or failure. However, it is not apparent that the Defense Department is conducting its intelligence contracting in a manner consistent with its fiduciary responsibility to husband taxpayer dollars. Judging from available evidence, the conditions that contribute to cost-effective outsourcing do not generally obtain within the defense intelligence enterprise. The extent to which this may burden American taxpayers demands further scrutiny.

CHAPTER 8: STRUCTURAL IMPLICATIONS

Available information suggests contractors comprise a substantial portion of the defense intelligence workforce. As discussed previously, contractors once constituted 70 percent of the CIFA staff. In 2007, the director of DIA acknowledged that contractors accounted for approximately 35 percent of the agency’s workforce.\(^90\) This number may have increased to 51 percent by 2009.\(^91\) According to the ODNI, “core” contractors accounted for 28 percent of the Intelligence Community’s workforce as of 2010.\(^92\) While estimates vary, there is no question that contractors constitute a significant fraction of the defense intelligence enterprise and broader Intelligence Community’s end strength. The structural consequences of this heavy reliance on commercial augmentation for the Defense Department’s organic intelligence workforce have yet to be satisfactorily explored, at least judging from the public record.

The Clinton administration’s NPR and the consequent contraction of the federal workforce in the 1990s posed significant problems for the Bush administration’s efforts to respond to the 9/11 attacks. In their efforts to meet reduction targets, agencies offered monetary incentives for employees to accept early retirement. They simultaneously reduced hiring to less than one percent of their overall workforce, causing the proportion of junior employees to shrink in relation to more seasoned employees not then eligible for retirement.\(^93\) By 2001, the defense intelligence enterprise had less capacity to respond to emerging requirements and was characterized by a distorted workforce that lacked a strong journeyman cadre. The department

\(^{91}\) Eric Rosenbach and Aki Peritz, *Confrontation or Collaboration? Congress and the Intelligence Community*, 2009, 89.
sought to build capacity by procuring intelligence services from private vendors, whose workers were drawn initially from the ranks of those induced to retire during the 1990s. What followed was a massive increase in government hiring, to the point that 50 percent of the Intelligence Community has been hired since 9/11.\textsuperscript{94} Contracting provided a key means of meeting exigent national security requirements in the breach caused by shortsighted public administration.

A unique characteristic of intelligence contracting is that workers who perform intelligence activities are generally not developed in the private sector. Personnel requirements articulated in defense intelligence SOW, SOO, and PWS frequently specify that even junior contractors must have relevant experience in the national security field. These personnel are expected to arrive fully trained and should not require additional instruction by government supervisors unless specified in the contract. If the private sector is not developing these workers, then it necessarily depends on the public sector for its labor supply.

According to the ODNI’s 2006 Strategic Human Capital Plan, the Intelligence Community is in direct competition with private vendors for skilled labor, and more often than not vendors succeed in recruiting government personnel and “leasing” them back at elevated cost.\textsuperscript{95} This dynamic was observed in 2004 among senior Special Forces personnel who left the military to join private security firms.\textsuperscript{96} The loss of crucial experience likely creates an incentive for the government to replace lost knowledge, skills, and abilities through contracting.

Surrendering vital human capital to the private sector only to rent that capital back at greater

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\textsuperscript{94} Ibid.
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expense constitutes a type of inadvertent outsourcing without an economic rationale to recommend it. This dynamic also presents a long-term practical concern; if human capital—especially at the junior and mid-career level—is recruited into the private sector, it may diminish in value if it lacks access to regular training, professional education, and structured career programs. This is an empirical matter that deserves further study.

The “blended” nature of the defense intelligence workforce presents additional challenges. Organization science literature indicates that employment externalization—including the use of contractors—has a negative influence on internal worker attitudes, psychological bonds between internal and external workers, and internal workers’ commitment to the organization. This influence is proportional to the extent and duration of externalization. These findings suggest there is a distinct social cost to outsourcing. Given the extent to which the Defense Department procures intelligence services and its reliance on contractors for workforce augmentation, the defense intelligence enterprise may be incurring hidden costs in the form of diminished esprit de corps, unit cohesion, organizational loyalty, and mission focus. Evidence for this phenomenon may be found in the apparently widespread departure of government employees for the private sector to perform identical activities for a higher salary.

Employment externalization not only impacts internal workers’ attitudes, but those of external workers as well. Research indicates the distinction between internal and external workers can lead the latter to feel inferior and reduce their affinity for the supported organization and its internal staff. This poses a problem to the extent that a strong identification with one’s organization is positively correlated to one’s performance and customer orientation.

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Additionally, short duration externalization can preclude organizational identification and adversely impact customer support. The short duration of contracts within the defense intelligence enterprise—generally one year with four additional option years—may negatively influence external workers’ attitudes and behavior. While the unique nature of the defense intelligence mission may vitiate against this dynamic, further analysis is needed.

Problems caused by poor government and contractor morale and diminished organizational identification accrue to supervisors and managers. This difficulty is compounded by the increased surveillance requirements created by the types of contracts used in defense intelligence outsourcing. Challenging under ideal circumstances, the added burden is cause for concern given what is widely considered a crisis in the federal government’s frontline supervisor cadre. The average span of control for frontline supervisors increased from 7:1 to 8:1 between 1991 and 2001, a number that may have increased further given the government’s accelerated hiring since 9/11. Furthermore, these numbers do not include service contractors who may perform their work onsite under a frontline supervisor’s direction. Research for this thesis uncovered nothing to suggest the federal government or defense intelligence enterprise trains its frontline supervisors to monitor contractor performance or to manage the dynamics produced by widespread and prolonged employment externalization. Unfortunately, poor supervisor performance in these areas is likely to undermine organizational effectiveness.

The Defense Department’s heavy reliance on contracted intelligence services raises important questions concerning the practice’s long-term consequences. Losing valuable human

capital to commercial vendors only to pay more money to rent the capital back threatens to hollow out the government workforce by surrendering the ability to cultivate fully the Intelligence Community’s future leaders when a generation of experienced intelligence officers is nearing retirement. Furthermore, the defense intelligence enterprise may be sustaining unanticipated yet significant social costs as service contractors work alongside government personnel performing sometimes identical duties for vastly different salaries. Lastly, these phenomena place additional stress on frontline supervisors who may not be adequately trained or equipped to handle the complex dynamics produced by a blended workforce. The extent to which these problems obtain within the defense intelligence enterprise is unclear, but the foregoing literature provides a foundation—and a strong rationale—to study the matter further.
CHAPTER 9: NORMATIVE IMPLICATIONS

Surprisingly little research has been conducted into the normative aspects of contracting for intelligence services. Most discussion on the subject centers on contractor malfeasance—as at Abu Ghraib—and on contractor performance of inherently governmental activities. Both issues are significant and will be addressed in due course, but they fail to capture the subject’s full normative dimensions. Given the fact the literature on intelligence outsourcing remains nascent, it is constructive to examine a similar issue that has received considerably more attention, the outsourcing of military services to privatized military firms (PMF).

In his seminal article on the subject, P.W. Singer defined PMFs as profit-driven organizations that trade in professional services intricately linked to warfare.100 Singer expanded on this definition in 2003 by classifying PMFs as Military Support Firms, Military Consultant Firms, and Military Provider Firms. This typology captures the different roles played by PMFs, ranging from logistics to tactical services.101 The PMF population expanded during the 1990s as a consequence of the post-Cold War peace dividend; while the active duty U.S. military was reduced by approximately 30 percent, demands on the military increased.102 PMFs thus benefited from an expanded labor pool and a concomitant increase in government solicitations.

According to Singer, the rise of these firms has eroded the state’s monopoly on military force, and made military capabilities available to those who could not create them organically.103 As Deborah Avant observed in 2008, the provision of military services by PMFs to international

customers occurs outside the political and functional control of interested states and may contribute to instability in prone regions.\textsuperscript{104} The implication is that profit-driven PMFs may contribute to foreign policy outcomes that are inimical to American and allied interests.

The expanding incorporation of PMFs into U.S. military operations also presents significant command and control challenges. American contracting law is clear that only authorized agents (e.g., the COR) may obligate the government to accept additional costs or otherwise act on a contract matter. Unless performing personal services, battlefield contractors are under no obligation to follow military orders unless required by their SOW or other contract documents. This problem is compounded in light of the fact that PMFs have proven incapable in some cases of controlling their contractors. The discipline inherent in the military and civilian command structure does not necessarily obtain in PMFs, which poses a critical concern where PMFs provide tactical services. Lastly, the lack of a method for reliably tracking the number of contractors in a given area of operations creates serious oversight challenges.\textsuperscript{105}

The use of PMFs by the U.S. military presents potential concerns in the form of diminished transparency. According to Singer, the George W. Bush administration successfully used PMFs to circumvent Congressional limitations on the amount of support the U.S. could provide to counterdrug efforts in Colombia.\textsuperscript{106} Whereas Congress fixed the U.S. troop ceiling at 500, an additional 355 contractors were procured to bolster the American military effort.\textsuperscript{107} In this instance contracting for military services allowed the Executive to subvert the foreign policy

\textsuperscript{107} Rebecca Vernon, “Battlefield Contractors: Facing the Tough Issues,” 376.
and national security preferences of the legislature. This opacity creates a moral hazard by encouraging the Executive to use its contracting powers to pursue otherwise unattainable military and political objectives while not technically breaching congressional limitations and avoiding popular opprobrium should the endeavor conflict with American interests and values.

The foregoing casts light on what may explain the decision to outsource military functions to PMFs at costs that exceed the expense of performing the work organically. As Jon Michaels has observed, PMFs may be sought “not because they are situated in a more efficient market…but because legally, politically, and symbolically they are not soldiers.” PMFs enable administrations to achieve with greater flexibility and less oversight goals that may not be possible with the U.S. military. This “tactical” outsourcing may be motivated less—if at all—by economic concerns than by a desire to exploit PMFs’ non-official status to achieve policy objectives. Irrespective of the Executive’s intentions, this “tactical” use of PMFs erodes Congress’s role in military affairs and undermines the constitutional balance of power.108

The constitutional dimension of the private military industry is challenging. The Constitution clearly and intentionally allocated military and foreign policy powers to both the executive and legislative branches. The Executive is empowered to command America’s military forces, but depends on Congress for funding and ex ante or ex post authorization to commit those forces to battle through declaration of war or exercise of the War Powers Act. If Congress is the closest representative of the American people, and if the American people are

construed as the source of American sovereignty, then the Executive’s intentional or inadvertent use of PMFs to circumvent congressional limitations challenges to the Sovereign’s will.\textsuperscript{109}

The use of PMFs also undermines Congress’s duty to oversee Executive appointments. The Constitution provides Congress through the Appointments Clause the power and duty to confirm the Executive’s appointment of military officers. This authority extends to even “inferior” or junior officers. While the Supreme Court found in \textit{Weiss v. United States} that inferior officers do not require the Senate’s advice and consent, Congress has been unwilling to surrender its oversight of these appointments.\textsuperscript{110} This oversight function is eroded by the use of PMF personnel who fill officer-like functions by design or omission. Congress does not scrutinize inferior officer appointments to the same degree it does general or flag officers appointments; nevertheless, using PMFs to command government personnel (as at Abu Ghraib) or PMF personnel conducting duties performed historically by the U.S. military arguably breaches the Appointments Clause and Congress’s broader oversight role.\textsuperscript{111}

The foregoing discussion is rooted in broader constitutional challenges posed by the delegation and sub-delegation of public functions to private interests. The Appointments Clause grants Congress the authority to vest the Executive with the ability to appoint without congressional review “inferior officers,” defined in \textit{Buckley v. Valeo} as those who exercise “significant authority.” \textit{Buckley} also characterized officer status as hinging on duration of employment and permanence of assigned duties. Successive administrations have interpreted the \textit{Buckley} criteria differently. A strict application of the Court’s opinion would find the delegation

\begin{footnotesize}
\begin{enumerate}
\item[Ibid., 1050-1053; Paul Verkuil, \textit{Outsourcing Sovereignty}, 14-16; U.S. Constitution, Preamble.]
\item[Jon Michaels, “Beyond Accountability,” 1071.]
\item[Ibid., 1071-1072.]
\end{enumerate}
\end{footnotesize}
of officer responsibilities to PMF employees unconstitutional if those responsibilities carried significant authority. A broader interpretation would require the other conditions to be met as well, which could allow for the delegation of significant authority for a short period of time.\footnote{112}{Paul Verkuil, \textit{Outsourcing Sovereignty}, 14-16.}

Another potential problem with Executive delegation and subdelegation to PMF personnel arises from the Due Process Clause of the 14\textsuperscript{th} Amendment.\footnote{113}{U.S. Constitution, Amendment XIV, §1.} The due process argument against these forms of delegation is rooted in the concern that private actors would wield significant authority for their own advantage and in manner deleterious to the public interest. To illustrate, the Supreme Court held in \textit{Carter v. Carter Coal} that the government acted unconstitutionally by delegating regulatory power to a private consortium of miners and mining companies and permitting them to set wages for a regional mining sector without public review.\footnote{114}{Gillian Metzger, “Privatization as Delegation,” \textit{Columbia Law Review}, Vol. 103 No. 6, October 2003, 1437-1438.} \textit{Carter} offers a potential solution for the due process challenge; however, while its proscription against private delegation remains technically intact, it is often ignored in practice. Additionally, many private delegations involve the exercise of significant authority but not private decision-making.\footnote{115}{Paul Verkuil, \textit{Outsourcing Sovereignty}, 106.} The Supreme Court acknowledged in its ruling on \textit{Flagg Bros. v. Brooks} that the Executive may seek to delegate functions to the private sector to escape its constitutional obligations, but the Court declined to articulate how much delegation—and of what functions—was constitutionally permissible under the Due Process Clause.\footnote{116}{Jody Freeman, “The Private Role in Public Governance,” \textit{New York University Law Review}, Vol. 75 No. 3, 2000, 581.}

The definition of “significant authority” is central to any inquiry into constitutional versus unconstitutional delegations. The federal government is staffed not only by officers and
inferior officers but also by “employees,” which Buckley defined as “lesser functionaries subordinate to officers of the United States.”¹¹⁷ In its 1936 opinion in Morgan v. United States, the Supreme Court held that officials could be held responsible if significant work was delegated to inferior officers or employees even if decisional power remained with the principal. In other words, officials cannot simply rubber stamp subordinates’ output.¹¹⁸ While the Morgan principle was later abandoned, the Court established in Chevron v. Natural Resources Defense Council a “deference test” that legitimizes agency decision making if “the agency considered the matter in a detailed and reasoned fashion and the decision involves reconciling conflicting policies.”¹¹⁹ In this case the agency is construed to mean the decisional authority. The implications of Morgan and Chevron are compelling; the Executive ought not delegate functions to PMFs when those functions relate materially to the exercise of significant authority, and when oversight is insufficient to affirm a “presumption of regularity” and guarantee that officers are satisfying the Chevron deference test.¹²⁰

Officers and employees of the U.S. government are bound by Article VI of the Constitution to swear an oath of office.¹²¹ While there is no question that the Executive has the power to subdelegate authority without concomitant legislation thanks to the Subdelegation Act, authority may only be delegated and subdelegated to those who swear to protect and defend the Constitution.¹²² PMF personnel swear no such oath, and their primary duty is not to the Constitution but to their firm or contract. There exists a fundamental tension between

¹¹⁷ Ibid., 106-108.
¹¹⁸ Ibid., 110.
¹¹⁹ U.S. Supreme Court, 467 U.S. 837, 1984.
¹²¹ U.S. Constitution, Article VI.
¹²² Paul Verkuil, Outsourcing Sovereignty, 122-124.
governmental and PMF aims. Whereas governments are concerned with achieving a military or policy objective, PMFs seek to maximize their profits. This encourages PMFs to package their services in a financially advantageous manner, and incentivizes cost overruns especially where contract terms are favorable. According to the Commission on Wartime Contracting, the Defense Contract Audit Agency (DCAA) uncovered $13 billion in unsupported costs associated with PMFs in Iraq and Afghanistan through 2008. Kellogg, Brown, and Root (KBR) offers a prime example; the Commission judged that billions of dollars could have been saved through aggressive contract surveillance and criticized KBR for not seeking cost savings. To the extent that corporate interests diverge from public objectives, the U.S. sacrifices control when it delegates authority to PMFs beholden to shareholders rather than the Constitution.

Lastly, PMF personnel are subject to different legal conventions than the forces they support. Contractors are not recognized under the Geneva or Hague Conventions as combatants; instead, they have historically occupied a middle ground between combatants and unprivileged belligerents. Per the Defense Department, PMF personnel are “civilians accompanying the force” and therefore qualify for protection not as combatants but as civilians. PMF status is nevertheless insufficiently resolved at the international level to guarantee the International Criminal Court cannot charge contractors with war crimes as unprivileged belligerents.

With respect to U.S. law, PMF personnel are not as a general rule subject to the Uniform Code of Military Justice (UCMJ) unlike the military service members they support. The National Defense Authorization Act for Fiscal Year 2007 extended UCMJ to cover contractors

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124 Commission on Wartime Contracting, At What Cost? Contingency Contracting In Iraq and Afghanistan, 27.
during times of war, but serious questions remain over the practicality and constitutionality of prosecuting civilians in military courts. Contractors may be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000, which permits individuals suspected of committing crimes while accompanying the military to be tried in U.S. federal court upon determination of probable cause by a U.S. Attorney. However, MEJA’s jurisdiction is confined to the “special maritime and territorial jurisdiction” of the United States, comprising primarily facilities and installations used by U.S. persons overseas.

It remains unclear whether PMF personnel may be subject to civil litigation in addition to the U.S. criminal code via MEJA or alternatively UCMJ. In September 2007, a Blackwater USA convoy opened fire in Baghdad’s Nisour Square, ostensibly in response to an oncoming vehicle that refused to stop (a claim denied by witnesses). Seventeen Iraqi men, women, and children were killed, and no evidence surfaced to indicate the convoy was under proximate threat. Blackwater was sued for war crimes under the Alien Torts Act, assault and battery, wrongful death, intentional and negligent infliction of emotional distress, and negligent hiring, training, and supervision. The parties settled the suit in January 2010 on undisclosed terms. This litigation raises important questions concerning whether contractors should share the Sovereign’s

immunity and avoid liability. Just as the government is immune to certain liabilities, the Supreme Court in *Boyle v. United Technologies Corp* extended third-party immunity to federal contractors in what became known as the “government contractor defense.”\(^{131}\) The merits of this defense are beyond the scope of the present study; however, immunity to civil liability paired with ambiguity in the criminal code arguably contributes to a lack of accountability for PMFs operating overseas. While Blackwater—now Xe—doubtless paid in treasure for its misjudgment in Nasour Square, no one has been held responsible for his role in the tragedy.

The private military industry bears more than a passing resemblance to the commercial intelligence sector. Indeed, many companies that provide services to deployed forces also provide intelligence services to the defense intelligence enterprise. The military privatization literature serves as a proxy for intelligence outsourcing, save in one important area: the private military industry is a global enterprise with wider-ranging structural and normative implications. American PMFs may provide services to international clients, but American firms performing sensitive intelligence contracts generally support only the U.S. government. A firm involved in intelligence work for multiple governments would pose a grave security risk and a fundamental conflict of interest. Beyond this albeit significant difference, the similarities are instructive.

The defense intelligence enterprise deploys service contractors into forward operating environments in a manner similar to PMFs. Given the weakness of the Defense Department’s acquisition workforce, it is reasonable to assume that forward-deployed intelligence officers may

also suffer from infrequent interaction with contracting officers.\textsuperscript{132} Without a COR onsite it is more difficult to effectively monitor a contract, ensure work is being performed to standards, and prevent contractors from assuming inherently governmental responsibilities. These consequences were observed at Abu Ghraib, where officers had a poor understanding of the CACI and Titan contract terms and failed to command and control their contact personnel.\textsuperscript{133} Additionally, just as the Defense Department lacks an accurate mechanism for tracking its contractors in Southwest Asia, only recently has the defense intelligence enterprise—through the ODNI—begun inventorying its contractors for monitoring and planning purposes.\textsuperscript{134}

The opacity that characterizes PMFs is arguably more pronounced in the case of defense intelligence contractors. Like PMF personnel, defense intelligence contractors do not count against Congressionally established personnel ceilings, and their numbers are largely hidden from view. Moreover, they are not subject to Freedom of Information Act requirements, which shields them further from public scrutiny.\textsuperscript{135} As observed in the case of PMF activities in Colombia, the Executive could theoretically procure the services of intelligence contractors to pursue intelligence priorities and national security objectives that would be impossible to achieve within Congressional limits. This moral hazard is compounded by the fact that intelligence activities are by necessity opaque. The Executive’s use of intelligence contracting to circumvent Congressional limitations threatens the constitutional balance of power and popular sovereignty.

\footnotesize{\textsuperscript{132} Commission on Wartime Contracting, At What Cost? Contingency Contracting In Iraq and Afghanistan, 9-13; Office of Management and Budget, Acquisition Workforce Development Strategic Plan Fiscal Years 2010-2014: A Framework for Enhancing the Capacity and Capability of the Civilian Acquisition Workforce, October 2009.\textsuperscript{133} MG George Fay, AR15-6 Investigation of the Abu Ghraib Detention Facility and 205\textsuperscript{th} Military Intelligence Brigade, 49-52.\textsuperscript{134} Office of the Director of National Intelligence, Key Facts about Contractors, July 2010.\textsuperscript{135} Dan Guttman, “Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty,” Administrative Law Review, 2000, 901-905.}
Questions over the legitimacy of delegation and subdelegation to private contractors are equally important in the defense intelligence enterprise as it is in the military. Appointments and Due Process Clause arguments both constrain the Executive’s ability to delegate “significant authority” to inferior officers, employees, and especially contractors. The Buckley court’s concept of “significant authority” is closely related to the concept of “inherently governmental” discussed in Chapter 5. The central question—and it has yet to be adequately resolved by any branch of American government—is what constitutes “significant authority” and “inherently governmental” in the context of intelligence activities? According to one interpretation of Buckley and Morgan, these functions extend beyond decision making to analysis, drafting, and other significant if not necessarily inherent government activities.136 There has historically been support for this position within the defense intelligence enterprise; the Assistant Secretary of the Army for Manpower and Reserve Affairs issued in 2000 a policy memorandum that classified tactical intelligence as inherently governmental and operational and strategic intelligence as non-inherently governmental but nevertheless exempt from private sector performance due to a concomitant risk to national security from relying on contractors to fulfill the function.137

Arguments for outsourcing military and intelligence functions often rely on a “presumption of regularity” wherein each officer acting under oath is presumed to fully and faithfully discharge his duty.138 If the presumption of regularity is uncertain—as it appears to be based on the empirical and theoretical observations outlined above—and inferior officers and employees cannot be trusted to meet Chevron deference test requirements, then the Executive

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136 Paul Verkuil, *Outsourcing Sovereignty*, 122-124
would be remiss in delegating authority to private actors who lack accountability to Congress and by extension the Sovereign. Furthermore, the presumption of regularity cannot extend to private intelligence contractors who swear no oath to protect and defend the constitution and who, like PMF personnel, face a different set of incentives than traditional government employees. In conditions where the presumption of regularity does not obtain, a misalignment in goals (viz. policy objectives versus profit) can distort national security efforts and surrender further constitutional powers to those not authorized to wield them.

Ambiguity over the legal status of PMF personnel also extends to defense intelligence contractors, particularly those serving overseas. Indeed, the status of contractors providing intelligence services abroad grows increasingly uncertain as the sensitivity of those services increase. Combat operations possess a clear legal dimension, in that they may be authorized under international law and their conduct is governed by multilateral conventions and the well-established principles of *jus ad bellum* and *jus in bello*. No such framework exists for intelligence operations, the conduct of which is intrinsically offensive to the concept of Westphalian sovereignty. Intelligence officers—especially collectors—engage in what a foreign nation may consider criminal activity by suborning treason. Intelligence officers may also induce foreign parties to act in a manner favorable to U.S. interests but inimical to their own. The Intelligence Community takes seriously its responsibility to protect its sources, but the fact remains that intelligence officers are called upon to operate in foreign nations in a manner that contravenes those nations’ laws and places at risk life and property, albeit not American.

The lack of an established legal framework governing intelligence operations abroad raises significant concerns over the performance of these functions by contractors. Can the
United States delegate to private individuals the authority to violate a foreign nation’s sovereignty? If a contractor is caught, will he be subject to foreign prosecution or simply declared *persona non grata* as compromised intelligence officers have been? Additionally, can the contractor be held liable and sued under the Alien Torts Act and other statutes in the event of malfeasance or nonfeasance? These issues have not come before the courts and the legal literature is silent on the subject; a detailed examination of these questions would be preferable to outsourcing in the breach. Lastly, defense intelligence contractors are subject to the same jurisdictional ambiguity discussed in the context of the private military industry.

There is also an important but infrequently discussed political dimension to both defense intelligence and military contracting. Federal and state employees are subject to the Hatch Act, which constrains their political activity. Government employees may donate to campaigns and attend rallies, but they must do so as private citizens and cannot organize to support a candidate or party. The Hatch Act does not apply to contractors, who have considerably more freedom to participate in the political process. An instructive example is MZM Inc, discussed in Chapter 6 in relation to CIFA. MZM’s eponymous PAC made large contributions to Congressional candidates—including Duke Cunningham—during the 2002-2006 election cycles. A review of donations in excess of $250 reveals the PAC’s donors were almost entirely MZM employees. Other defense intelligence contractors with PACs include ManTech, DynCorp, Lockheed Martin, SAIC, and L-3 Communications, which purchased Titan as a wholly owned subsidiary in July 2005. As with MZM, these PAC donors are company employees. This

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practice enables vendors to organize and concentrate resources to achieve greater political influence than the government personnel they support. Given the heavy contractor presence in the defense intelligence workforce, this creates an influence disparity between government employees and their contractor counterparts and undermines the spirit of the Hatch Act to the extent that service contractors gain outsize influence over the political process. The empirical consequences of this incongruity have yet to be fully explored but warrant further study.

In sum, many of the normative concerns inherent in outsourcing military functions also challenge the defense intelligence community and its widespread use of contracted intelligence services. Congress and the Executive have attempted to address concerns through legislation and policy, but the Court explicitly declined in Flagg to rule on what functions can be delegated to private actors. The consequence is a schizophrenic approach to outsourcing; on the one hand Congress and the Executive are attempting to clarify what can be delegated while evidently continuing to contract out inherently governmental functions, and on the other hand successive Courts have eroded precedent that would have constrained the practice. Normative challenges will manifest in the breach until the government closes this gap in policy and jurisprudence.

CHAPTER 10: EVALUATIVE FRAMEWORK

To this point the thesis has examined the gap between contracting policy and practice and explored the potential financial, structural, and normative implications thereof. Determining eligibility for competition on the basis of “commercial” and “inherently governmental” status is an overly simplistic heuristic that has empirically failed, at least on the margins. Any decision to outsource should be accompanied by consideration of the financial, structural, and normative implications unique to the defense intelligence enterprise. How, then, to evaluate the eligibility of intelligence functions for performance by the private sector? As discussed previously, Voelz proposed a set of evaluative criteria for determining which intelligence functions were eligible for “commercialized intelligence augmentation.” Voelz’s criteria included the acceptability of private sector involvement, suitability of vendor services, and the accountability of contract management practices.142 Voelz’s proposal constitutes a critical contribution to the intelligence outsourcing literature. Nevertheless, his criteria were designed around process, which while important fails to account for the second and third order effects of specific outsourcing decisions.

This thesis proposes a four-tiered evaluative framework for determining whether to outsource intelligence services to the private sector. This framework includes the feasibility of outsourcing (Figure 1), the relation to the public interest (Figure 2) of positions selected for contractor performance, the structural impact (Figure 3) of outsourcing these positions, and the optimization of contract terms (Figure 4) once a decision to outsource has been made. As applied, findings must favor the government at each stage to allow outsourcing to proceed.

142 Voelz, Managing the Private Spies, 36.
Feasibility

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<th>Question</th>
<th>Answer</th>
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<tr>
<td>What is the capability and capacity of the organization’s acquisition workforce?</td>
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<tr>
<td>Are there mechanisms in place to monitor contract performance, and are they in use?</td>
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<td>Do employees understand and observe their duties and constraints vis-à-vis contractors?</td>
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Figure 1

The prerequisite for any decision to outsource is determining whether an agency has the expertise and capacity to effectively administer procurement. An agency with a weak acquisition workforce risks violating its fiduciary obligations by procuring services under sub-optimal terms. Furthermore, it risks violating FAR and DFARS guidelines if it grants contractors authority to administer their own and other contracts, as illustrated in Chapter 6. Second, agencies must have in place effective methods for monitoring contract performance and must have the capacity to do so. Ineffective contract surveillance risks allowing inherently governmental functions to devolve through omission to contractors and may prevent the agency from obtaining the best value for its expense. Lastly, supervisors and line employees must understand the unique limitations placed on contractors. Government personnel are key to contract surveillance when the COR is not located on site, and ignorance of contractor limitations can result in regulatory and potentially even constitutional violations. If an agency is insufficient in these areas, it ought not outsource until it rectifies its shortfalls. As available evidence suggests, the “regularity” described in *Moffat v. United States* should not be presumed.

Relation to the Public Interest

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<td>Is the activity under consideration for outsourcing an agency “critical function?”</td>
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<td>Is the function vested with “significant authority” or “substantial discretion”</td>
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<td>Does the function determine, protect, or advance U.S. interests?</td>
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<td>Does the function have the potential to directly affect life, liberty, or property?</td>
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<tr>
<td>Can the functionary commission, appoint, direct, or control U.S. officers and employees?</td>
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<tr>
<td>Does the function relate closely to an inherently governmental function?</td>
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Figure 2
Once an agency determines it has the capacity to outsource, it must examine closely the services it wishes to procure and establish whether those services are so intimately related to the public interest as to require performance by government personnel. The questions outlined in Figure 2 are derived largely from OMB’s 2010 draft policy letter concerning the definition of inherently governmental. Each of these questions raises concerns as discussed in Chapters 8 and 9; therefore, a function should remain under government performance should any single question be answered in the affirmative.

First, agencies must determine whether the activities under consideration for outsourcing are “critical functions,” defined by OMB as “function[s] that [are] necessary to the agency being able to effectively perform and maintain control of its mission and operations.” OMB further explains that a non-critical function is one “that would not expose the agency to risk of mission failure if performed entirely by contractors.” The concept of “critical functions” is effectively equivalent to the concept of “core functions” discussed in the context of private industry in Chapter 8. As the economic literature demonstrates, firms that outsourced core functions experienced a decrease in quality, control, and competitiveness. This is arguably true of the defense intelligence enterprise as well; partial or wholesale outsourcing of a given function central to an agency’s mission effectiveness would cause that agency to incrementally lose control over the function’s performance. As applied, this suggests NGA should not outsource imagery analysis and DIA should not outsource HUMINT collection or all-source analysis.

144 Ibid.
Second, an agency must determine whether a given function is vested with “significant authority” or requires the functionary to exercise “substantial discretion.” Per *Buckley*, the exercise of “significant authority” defines an “inferior officer.” The Subdelegation Act authorizes the Executive to delegate authority to these officers without legislative review. It does not, however, authorize him to delegate significant authority to employees or private actors. If we assume that decisional power is what separates inferior officers from employees, then it stands to reason that significant authority manifests in inferior officers as discretionary power. The implication is that contractors cannot be vested with decisional powers without legislative oversight. The Appointments Clause, Subdelegation Act, and *Buckley* arguably do not authorize the Executive to delegate discretionary power *by degree*. Accordingly, the Circular A-76 provision that contractors may exercise decision-making authority under defined conditions is untenable. Any function that requires the use of discretion to commit the government to any course of action, no matter how constrained the range of alternatives, ought not be outsourced.

Third, it must be determined whether a function determines, protects, or advances U.S. interests. This formulation differs from the OMB draft policy letter, which apparently requires all three conditions to be met before an “inherently governmental” objection is triggered. While contractors may not be delegated significant authority or substantial discretion to determine U.S. interests, agencies must guard against giving contractors undue influence in the determination of those interests. The *Morgan* opinion placed significant responsibility on officers and inferior officers to make informed decisions and not simply rubber stamp employee outputs.\(^{146}\) Policy and doctrine functions should only be outsourced if the government has the capacity to weigh

\(^{146}\) Paul Verkuil, *Outsourcing Sovereignty*, 110-111.
fully inputs coming from both government and contact personnel. This function should never be outsourced in its entirety. The definitions of “protect” and “advance” are significantly broader and have no decisional or discretionary aspect. For present purposes, “protect” is construed to imply a defensive purpose (e.g., CI and security) whereas “advance” means intelligence contributions to U.S. national security objectives. A function should not be outsourced if it is central to an agency’s capabilities in these areas.

Fourth, agencies must evaluate whether functions under consideration for outsourcing have the potential to directly affect life, liberty, or property. This criterion is especially pronounced in the intelligence profession. As discussed in Chapter 9, many intelligence activities are illegal when conducted abroad. When the Intelligence Community operates unilaterally in a foreign nation, it violates that nation’s sovereignty. When analysts direct warfighters to strike or not strike targets, they may not be pulling the trigger but they are arguably pointing the gun. What distinguishes these actions from criminal activities is their sponsorship by the Sovereign, through delegation via the Constitution to the Executive. The individuals performing these activities are sworn government officers who wield sovereignty through their official agency. These activities also require discretion, which arguably triggers objections under the Appointments and Due Process Clauses as well as select case law, including Buckley, Carter, and Chevron. Intelligence contractors have no established constitutional or other legal foundation for activities that may deprive others of life, liberty, or property.

Fifth, outsourcing ought not proceed if the function in question will vest the functionary with the de jure or de facto power to commission, appoint, direct, or control U.S. officers and employees. The Constitution makes no allowance for private personnel to supervise government
employees, and policy and regulation forbid it. The exception may be private citizens assigned to federal positions under the Intergovernmental Personnel Act (IPA) of 1997. These individuals are considered federal employees for the duration of their assignments and they may supervise government personnel. Unless the IPA is invoked, existing law, policy, and jurisprudence prohibits private individuals from exercising de jure authority over the government. The Army’s experience at Abu Ghraib reveals that contractors have been granted or assumed de facto authority over military and government personnel. Failure to guard against this outcome risks violating contracting law and undermining Constitutional integrity by surrendering governmental authority to unaccountable private actors.

Lastly, agencies must resolve whether potentially outsourced intelligence services are closely related to inherently governmental functions. In the event they are deemed critical to the performance of a function that is so intimately related to the public interest as to require performance by government personnel, agencies must justify why those functions should be outsourced rather than defend why they should be performed organically. In other words, the burden of proof is on the government to demonstrate that a given function should be outsourced, vice the converse. If “inherently governmental” status is not triggered by any of the foregoing criteria, and an agency can justify that outsourcing a “closely related” service would not impair the performance of the inherently governmental function, then it may be permissibly procured from the private sector.

Once an agency determines it has the capacity to outsource effectively and that the desired services do not require performance by government personnel, it must undertake a careful evaluation of the procurement requirement’s proximate cause as well as its expected duration and potential consequences for the government workforce. Lastly, it must devise and implement a plan to eliminate the need for outsourcing. The criterion is largely pragmatic; a contract must do no harm to the agency’s workforce.

Agencies must think critically and in a structured manner about why they seek to contract for intelligence services. Is there an exigent requirement that can only be met by rapidly expanding capacity via procurement, or are there unnecessarily redundant or vestigial missions that could be eliminated to optimize organic resources? Should agency priorities be reexamined to determine whether areas exist that could be deemphasized in the interest of supporting emerging requirements without recourse to contracting for services? While it requires bureaucratic courage, agencies must look for methods of satisfying requirements using internal resources before procuring private sector support, especially in light of the cost disparity between government and contractors personnel.

After deeming internal resources insufficient, agencies must reasonably assess whether the requirement will last longer than one year. If option years will be exercised, agencies must evaluate the proximate and long-term impact on the government workforce caused by the
introduction of contract personnel. Irrespective of whether services will be personal or nonpersonal, agencies must determine whether the government workforce has the capacity to manage on-site contractors. This measure can be drawn from supervisors’ anticipated span of control and the ratio of contractors to government personnel. Agencies must also ascertain whether the receiving unit suffers or is expected to suffer from attrition such that it would rely unduly on contract support, and attempt to identify challenges caused by the integration of external workers. If a contract will continue into option years, agencies must create a mitigation strategy to restore the function to internal performance. The defense intelligence enterprise must not use contractors to circumvent personnel ceilings; doing so may violate agencies’ fiduciary responsibilities, undermine the long-term quality of the federal workforce, and evade Congress’s oversight and national security roles.

Gauging the structural impact of an outsourcing initiative is largely an empirical exercise, and results will vary across contracts and across the defense intelligence enterprise. Agencies may be willing to accept risk to accomplish exigent mission requirements, which is proper. The only time a procurement initiative should be disqualified under this criterion is when it threatens to cause near or long-term harm to the viability of an agency’s organic workforce.

<table>
<thead>
<tr>
<th>Contract Optimization</th>
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<td>Are the contract’s terms financially optimal?</td>
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<tr>
<td>Does the contract comply strictly with applicable regulations?</td>
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<tr>
<td>Is the vendor capable of delivering fully trained and highly capable personnel?</td>
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<td>Is the vendor’s performance history transparent and favorable?</td>
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Figure 4

The final criterion agencies must consider before procuring a given service is whether the contract is optimized for the government. The Defense Department is obligated to husband
taxpayer dollars and ensure that procurement actions are successful and conducted in accordance with applicable policy and regulations. Procurement ought not proceed if contract terms and execution are sub-optimal. First, proposed contracts must be financially optimal. The greatest cost savings accrue to the government when procurement is exposed to market forces; accordingly, contracts should be competed fully and openly unless circumstances preclude it. Additionally, the government should rely on sealed bidding rather than negotiation whenever possible. Sealed-bidding guarantees competition and requires firm-fixed-price contracts, which minimizes the government’s liability for vendor cost overruns.\textsuperscript{148} Negotiated contracts can be sole-source or competitive, with contract types an object of the negotiation.\textsuperscript{149} If flexibility is required, the government should consider a negotiated fixed-price contract, and only offer a cost-reimbursable contract when it is absolutely necessary. Sole-source contracts should be considered only when a single vendor is capable of providing the service needed or the risk of disruption in contract performance would place at risk the conduct of a critical agency function. In this event, a “bridge” contract should be executed to allow for full and open competition.

Second, contract terms must adhere strictly to applicable policies and regulations, including most notably the FAR and DFARS. Procurement must be executed as directed by the FAR and DFARS, and agencies must be precise in their contract language. The government must not use “fuzzy” contract typology to circumvent limits places on services contracts. Many defense intelligence contractors are in fact providing personal services under nonpersonal services contracts; indeed, time-and-materials and labor hour contracts can be used to create a de

\textsuperscript{149} Ibid., Part 15, Subpart 15.1, 15.002, 15.1-1.
facto if not de jure employer-employee relationship. Irrespective of whether this is done intentionally or inadvertently, it risks violating statutory law and could provoke a constitutional challenge such as that facing the use of defense intelligence contractors to circumvent personnel ceilings. This is an empirical matter that agencies must examine closely.

Third and finally, the government must confirm the vendor is capable of delivering fully trained and highly capable service contractors, and it must certify that its past performance recommends it for the outsourced services. The government must not be required to train contractors; doing so may divert resources that could be used to cultivate federal employees. Contractors must possess the skills and experience necessary to begin supporting the mission immediately upon entering onto duty. Finally, contractors must provide evidence of previous performance against federal contracts. Past performance should be weighed carefully in any award decision given its implications for not only best value but also for mission effectiveness.

Evaluating this criterion is an empirical process that seeks not to confirm or deny the legitimacy of an outsourcing effort but to optimize it. If a procurement initiative survives the first three criteria, the fourth criterion serves primarily to calibrate it for effectiveness and efficiency. Together these criteria offer a framework for determining not only whether a given intelligence function should be outsourced, but also how best to do so. Given that the Defense Department is actively contracting for intelligence services using only extant policy and regulations, it is instructive to apply this framework to defense intelligence enterprise contracts that have been competed and awarded to ascertain the framework’s operational effects.

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150 Major Glen James Voelz, Managing the Private Spies, 26.
CHAPTER 11: CASE APPLICATION

Research for this thesis uncovered no previous analysis of discrete defense intelligence contracts; Voelz applied his own evaluative criteria to bounded categories of outsourced intelligence services, but did not examine individual contracts to determine whether they were eligible for outsourcing. This thesis builds on Voelz’s approach by selecting for analysis contracts that exemplify bounded categories including intelligence operations, intelligence analysis, and support services. The selected cases should not be construed as representative of the total population of like contracts, as the population is unknown and not all contracts are equally detailed. The following cases illustrate how the foregoing framework would yield different outsourcing determinations than those occurring now within the defense intelligence enterprise, but their findings should not be extrapolated across the total population of defense intelligence contracts due to data limitations. Finally, the extent to which the proposed framework can be applied to publicly available defense intelligence contracts is uneven given the lack of data uniformity and information shortfalls that characterize even the most detailed contracts. While it is not possible to apply the entire framework to each contract, the thesis will evaluate each contract on the basis of as many framework elements as supported by the data.

Intelligence Operations

A search of active and archived contracts publicized through Federal Business Opportunities confirms that the defense intelligence enterprise has or is currently outsourcing intelligence services involving intelligence operations. These activities generally require an action on the part of the functionary that produces or contributes to an operational effect or yields information for analysis and exploitation. Associated functions include HUMINT collection,
interrogation, debriefing, and screening. In addition their execution, the defense intelligence enterprise has outsourced the support of these functions.

According to an archived solicitation, in April 2005 the U.S. Army Intelligence and Security Command (USAINSCOM) sought sources for a personal services contract to provide one HUMINT subject matter expert for a base period of six months in support of the U.S. Army Operations Activity (USAOA) in Iraq and Afghanistan. The personal services contractor would be required to manage “Operational Management Teams” and “Tactical HUMINT Teams,” and assist, develop, coordinate, and conduct “overt and controlled HUMINT operations in support of deployed U.S. and coalition forces” as well as conduct “other intelligence officer staff duties.” The solicitation required the contractor to have completed advanced HUMINT training courses and be able to demonstrate at least 10 years experience conducting and managing HUMINT operations.\footnote{Department of the Army, \textit{Solicitation W911W4-05-R-AOA11}, Posted: April 5, 2005. Archived: July 11, 2005.} It is unclear whether this procurement action was completed.

Not enough is known publicly about USAINSCOM’s and USAOA’s contract management capabilities to determine whether the proposed contract action was feasible. However, the solicitation does pose immediate questions with respect to its relation to the public interest. First, HUMINT collection is a critical USAOA function according to press reporting.\footnote{Sean Naylor, “Army Quietly Stands Up New Human Intel Unit,” \textit{Army Times}, May 29, 2006.} Second, the conduct of HUMINT operations requires an individual to exercise substantial discretion, and third, poor judgment on the part of the collector has the potential to directly affect the life, liberty, and property of both U.S. persons and foreign nationals. Fourth, the overt or clandestine collection of sensitive information is a crucial tool for advancing U.S. interests. Lastly, the solicitation indicates the contractor would manage teams of collectors. Under no
circumstances may private citizens supervise government employees for the reasons outlined in Chapter 10, and allowing contractors to supervise other contractors may be an unlawful delegation of authority and pose a potential conflict of interest.

The USAINSCOM solicitation also raises questions about the structural impact of outsourcing a critical USAOA function. Only the federal government provides the training and experience stipulated in the solicitation; consequently, individuals who meet the specified qualifications can only be developed by the government, making any vendor wholly dependent on the government workforce for its labor pool. Outsourcing this function triggers an objection to the extent that higher salaries may incentivize qualified government employees to decamp for the private sector. While the solicitation calls for only one contractor and structurally risky acquisitions are appropriate under certain circumstances, USAINSCOM must develop mitigation strategies to prevent this type of outsourcing from depleting USAOA’s organic capabilities.

Lastly, the solicitation appears to meet at least one Contract Optimization criterion. The solicitation calls for a personal services contract, which formally establishes the contractor will have an employee/employer relationship with the federal government. This arrangement is proper and avoids the problems caused by using “fuzzy typology” to circumvent statutory requirements. Nevertheless, the USAINSCOM solicitation produces a number of significant objections concerning the Public Interest and Structural Impact, and under the proposed framework would be considered an illegitimate use of outsourcing.

HUMINT collection is not the only operational activity outsourced by the Defense Department since 9/11. Prior to its prohibition, the Defense Department sought interrogation
services on multiple occasions beyond the use of CACI interrogators at Abu Ghraib.\textsuperscript{153} According to a 2004 solicitation, the U.S. Army’s Wiesbaden Contracting Center sought sources for a personal services contract to provide “resources and management necessary for Intelligence Support Services…including but not limited to…interrogation operations support…locally employed persons screening…open source intelligence…special security office…HUMINT support teams…and intelligence support management.” The solicitation envisioned a negotiated indefinite-delivery-indefinite-quantity (IDIQ) contract with a base year and three option years.\textsuperscript{154} It is unclear whether this procurement action was completed, and no further details are available.

Four years later, the Combined Joint Task Force-76 (CJTF-76) Joint Contracting Center at Bagram, Afghanistan, issued a solicitation for five “HUMINT collectors” to support CJTF-101 theater interrogations. These collectors would serve as contract interrogators who would “integrate into military and civilian interrogation teams, designed to increase the effectiveness of dealing with detainees, persons of interest, and enemy combatants.” Specific functions included “screening, interrogation…and debriefing of persons of intelligence value.”\textsuperscript{155} According to the SOW, contract interrogators would “conduct tactical, operational, and strategic interrogations” as well as “other intelligence activities as directed.” Contractors would also “write interrogation reports, draft intelligence information reports, and knowledgeability briefs” and respond to HUMINT collection requirements through the same means. While contractors could perform these activities on their own, they would be subject to oversight while working individually or


integrated into a “tiger team” comprising “military and/or contract analysts.” Contractors would be permitted to travel throughout their area of operations but could only conduct interrogations at fixed sites, and were authorized to carry arms for self-protection.

The SOW proceeds to outline qualifications that must be met for contractors to be eligible to perform interrogation services. Among other things, they must have “previous experience as a non-commissioned officer in the military occupational specialty of 35M” (Human Intelligence Collector) and/or completed military service or defense agency interrogation training. The contract requires six years of military or civilian experience conducting interrogations and requires contractors to show proof of interrogator certification.

The solicitation envisioned procuring services for one base year and two option years. The type of contract envisioned is nowhere specified; however, the solicitation is a “request for quotation” (RFQ), which is generally used when procuring services at an hourly rate.

These interrogation solicitations provide valuable insights into defense intelligence contracting for interrogation and related services. As with USAINSCOM, it is impossible based on available information to evaluate the feasibility of administering the Wiesbaden and CJTF-76 contracts. The solicitations nevertheless raise prima facie concerns under the proposed framework’s Public Interest criteria. Information gathered through interrogations and debriefings are crucial to advancing U.S. interests, and screening plays a key role in identifying threats and protecting U.S. forces. Additionally, interrogation is fundamentally coercive and

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157 Ibid., 1; Department of the Army, “Standard Form 1449,” Solicitation W91B4N-08-R-0023, August 2, 2008, 6.
159 Department of the Army, “Standard Form 1449,” Solicitation W91B4N-08-R-0023, August 2, 2008, 1-4; FAR, Subchapter B, Part 8, Subpart 8.4, 8.405-2, 8.4-3.
generally occurs once an individual has been deprived of his/her liberty. Irrespective of whether the contract interrogator is supervised by the government, the contractor is party to a deprivation of liberty and effectively wields the sovereign power of the United States while in the booth with his subject. Additionally, the arming of contract interrogators—even for self-defense purposes—has the potential to deprive innocent U.S. persons or foreign nationals of their lives.

The Wiesbaden and CJTF-76 solicitations also pose structural challenges. By 2008, the U.S. Army had been contracting for interrogation services since 2003. The terms of the 2004 and 2008 contracts were multi-year, indicating the Army understood the requirements were not short term. The question—which cannot be answered based on public information—is whether the Army implemented a mitigation strategy to rectify its interrogator shortfall. If it did not, it risked depleting its interrogator ranks by contracting the function to the private sector, which could afford to pay higher salaries thanks to cost differentials. The CJTF-76 solicitation required contractors to have six years of experience as a military or civilian interrogator and to have completed a certifying program. This skill set is not produced by the private sector and resides only in the intelligence and law enforcement communities. Relying on contractors to perform interrogations over the long term creates a financial incentive for those already trained by the government to resign from federal or military service and return to the booth as private citizens.

Lastly, the Wiesbaden and CJTF-76 solicitations offer an instructive contrast under the Contract Optimization criterion. The former solicitation’s reliance on a negotiated IDIQ contract provides flexibility, although it may provide the government less value given the likely lower level of competition. The Wiesbaden solicitation is also clear about its intent to procure a personal services contract, which accords with regulations and statute. The CJTF-76 solicitation
on the other hand is less transparent. Its RFQ status is buried in addenda, and suggests the services may have been intended for procurement from a small population of vendors on the basis of an hourly rate. This lowers savings for the public and incentivizes vendor cost overruns. The solicitation’s lack of transparency on whether it seeks personal or nonpersonal services is of greater concern. The SOW indicates contractors will be integrated into teams of military and civilian personnel and will be monitored by the government, but it also suggests a site lead may be responsible for direct supervision. The SOW’s ambiguity is inefficient and potentially disingenuous. If CJTF-76 seeks nonpersonal services, it must determine whether the SOW would yield a de facto employee/employer relationship between contractors and the government. Full candor is also required if personal services are desired. The CJTF-76 solicitation’s lack of transparency is a critical weakness, while the Wiesbaden solicitation’s clarity recommends it.

As with HUMINT collection more broadly, the outsourcing of interrogation, debriefing, and screening is contra-indicated by the proposed framework. What about services that support the conduct of these and other operational activities? A review of publicly available data suggests the defense intelligence enterprise routinely contracts for operational support services, including targeting, report writing, and source and collection management, among others.\(^{160}\) These activities are closely related to operations; if the conduct of operations is considered inherently governmental, then support activities may be reserved for public performance depending on their proximity to the public interest. The following solicitation provides a valuable example of operational support against which to apply the proposed framework.

The U.S. Army issued a solicitation in June 2010 for CI and HUMINT support to U.S. Forces Afghanistan (USFOR-A). According to the initial solicitation, the Army sought CI support specialists, HUMINT collection specialists, CI and HUMINT advisors, and a database manager to support USFOR-A throughout the Afghanistan Theater of Operations (ATO).\textsuperscript{161} The PWS explains contractors would be integrated into the USFOR-A CI and HUMINT Staff (CJ2X), which “provides coherence and synchronization of CI and HUMINT activities…to ensure CI and HUMINT requirements are met through agile and responsive CJ2X operations executed by a unified Theater-wide CJ2X staff…CJ2X operations deliver integrated CI and HUMINT effects…while maximizing and integrating engagement activities with the Government of…Afghanistan.”\textsuperscript{162} Contractors would be integrated into military and civilian CI/HUMINT teams operating out of fixed and mobile locations throughout the ATO.\textsuperscript{163}

The PWS calls for nine CI Support Specialists and three Senior CI Support Specialists to provide a variety of services including targeting, research and analysis, and report writing aimed at “detecting, deterring, neutralizing, and exploiting adversarial intelligence and insurgent activities targeting ISAF/USFOR-A in the support of counterespionage and strategic force protection operations.”\textsuperscript{164} The Senior CI Support Specialists would provide “day-to-day oversight” of the CI Support Specialists, and provide “strategic-level advice and assistance with a focus on identifying systemic vulnerabilities and policy deficiencies.”\textsuperscript{165} CI Support Specialist qualifications included experience as a military or civilian CI officer or non-commissioned

\textsuperscript{163} Ibid.
\textsuperscript{164} Ibid., 16-18.
\textsuperscript{165} Ibid.
officer, four years experience as a CI functional specialist, and familiarity with “military service/joint CI procedures, doctrine, and practices.”  

The PWS also calls for eight HUMINT Support Specialists and five Senior HUMINT Support Specialists to provide HUMINT-related services including operational support, coordination, order reviews and recommendations, and source operations planning guidance. These personnel would also review and provide input to joint publications, draft standard operating procedures, review recruitment packages, prepare collection plans and produce formal collection requirements, “screen documents for intelligence value,” and “conduct other… supporting activities related to…operations.”  

Senior HUMINT Support Specialists would supervise HUMINT Support Specialists and analyze “source reliability and veracity…in support of the source/asset validation process.” HUMINT Support Specialist qualifications included four years experience as a government-trained military or civilian HUMINT officer, and familiarity with military service and joint HUMINT regulations.  

Both CI and HUMINT Specialists would be expected to collect information of CI and HUMINT value through screening, liaison, and other activities. Contractors could collect information from “other than open sources” when under government supervision. Furthermore, Senior CI and HUMINT specialists would “make recommendations to address critical decisions affecting…CI/HUMINT policies in support of ISAF/USFOR-A.”  

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166 Ibid.  
167 Ibid., 24-27.  
168 Ibid.  
169 Ibid.  
170 Ibid., 26.
Specialists would have “relative independence in completing assignments…which have substantial intelligence value and establish the basis for key decisions and significant actions.”

In addition to CI and HUMINT specialists, the Army solicitation sought to procure two CI/HUMINT Special Advisors to serve as “coordinator/special advisor to the CJ2X, USFOR-A or at the Regional Command level for all matters concerning CI and HUMINT activities.” These individuals would be considered GG-14 equivalents and would be responsible for “all expert knowledge of CI/HUMINT collection support” as well as advice in support of “screening and CI/HUMINT collection operations and activities.”

CI/HUMINT Special Advisors would serve a collection management function, and would provide intelligence support to “to fully exploit actionable intelligence in support of theater [requirements] gleaned from reporting.”

To be eligible for this position, individuals required ten or more years of CI or HUMINT experience, previous deployments to Afghanistan or Iraq, familiarity with CI and HUMINT policies and procedures, and extensive experience planning and conducting screening and CI operations. Senior CI/HUMINT advisors would supervise the analysis of screening operations to identify information gaps and threats, and develop CI countermeasures and “initiate exploitation strategies.” These individuals would be expected to “apply legal principles of military intelligence law to collection activities based on a virtual absence of relevant precedents or other guidelines.” Furthermore, Senior CI/HUMINT specialists would “make formal contacts to negotiate and resolve controversial issues…which either cannot or have not been resolved at lower levels,” “direct the resolution of sensitive CI/HUMINT issues,” and recommend positions.

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172 Ibid.
173 Ibid.
for USFOR-A on intelligence issues and topics. Lastly, these individuals would be enfranchised to “lead or coordinate” projects that involve tasking supporting government supervisors and their staffs, and to “direct projects which are self generating [and are] among the most difficult, controversial, and challenging that can be encountered.”  

Finally, the USFOR-A solicitation calls for one database manager to support CJ2X information repositories. Among other things, this contractor would “develop the technical as well as the policy remedies necessary…to achieve higher quality products [and] aid in information sharing between theater-focused national databases and [the] ISAF database.”  The database manager must have four years technical experience within the Defense Department or equivalent agencies and must have a familiarity with the processes used to gather and analyze intelligence information as well as knowledge of the products resulting from that information.  

Each of the functions listed above would be procured as personal services under a fully and openly competed firm-fixed price contract with one base year and two option years. The PWS forbids contractors from drawing arms, supervising government personnel, and conducting interrogations. The contract was awarded in September 2010 to McNeil Technologies, Inc. for a sum of $6,210,442.28. This contract is under performance at the time of writing.

As with the USAINSCOM, Wiesbaden, and CJTF-76 solicitations, it is impossible to evaluate the feasibility of effective contract administration within USFOR-A due to a lack of

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174 Ibid.
175 Ibid., 23-24, 31-32.
176 Ibid.
publicly available information. Each of the specified services produce different results when subjected to the proposed framework. Of the four, only the database manager fails to trigger a serious objection. The remainder contains elements that may survive a challenge, but on balance they are too closely related to the public interest to justify outsourcing.

First, the PWS effectively vests Senior CI/HUMINT Advisors and to a lesser extent CI and HUMINT Support specialists with significant authority and substantial discretion. The Senior CI/HUMINT Advisors are empowered to apply discretion to develop courses of action, resolve controversial issues, and initiate projects. While Senior CI/HUMINT advisors will not supervise government personnel, these tasks suggest they would exercise *de facto* authority over government resources and decision-making. CI and HUMINT Specialists were also charged with duties requiring discretion, and unless the government carefully weighs these inputs it risks “rubber stamping” contractor decisions. Furthermore, the fact that Senior CI/HUMINT Advisors and Senior CI and HUMINT Support Specialists would supervise and direct lower echelon contractors suggests those personnel would be removed from the government’s immediate span of control. This effectively concentrates contract surveillance responsibilities with the contractors themselves and may constitute an unlawful delegation of governmental authority.

Second, CI and HUMINT Support Specialists and Senior CI/HUMINT Advisors arguably determine, protect, or advance U.S. interests in varying degrees. The services provided by these specialists are critical in supporting CI and HUMINT operations. Operational activities may still be possible without this support, but they would be less effective. The PWS also suggests CI and HUMINT Specialists may be responsible for conducting CI and HUMINT collection activities, which are important methods for protecting and advancing U.S. interests.
Lastly, the PWS tasks Senior CI/HUMINT Advisors and HUMINT Specialists with functions that determine U.S. interests. Senior CI/HUMINT advisors are responsible for recommending positions on policy and initiating efforts to address CI and HUMINT issues, and HUMINT Support Specialists are responsible for identifying information shortfalls and creating collection requirements that would be tasked to collection platforms. The latter represents a pronounced concern if it is conducted under contractor supervision outside the government’s span of control.

Third, CI/HUMINT Special Advisors and HUMINT Support Specialists would have a *de facto* ability to direct U.S. officers and employees. Through their ability to “lead or coordinate” multi-team projects, CI/HUMINT Special Advisors can require government personnel and other contractors to provide inputs pursuant to a given initiative. Irrespective of whether they are expressly granted this authority or delegated it by their government supervisor (leaving aside the constitutionality of such a delegation), the fact remains they are empowered to direct the expenditure of government resources. HUMINT Support Specialists may also exercise such a power through their production of collection requirements. While the authority of these requirements derives from the collection system vice the contractor, the contractors are the requirements’ authors and thus play a central role in the direction of collection activities.

Lastly, the duties assigned to CI/HUMINT Special Advisors and CI and HUMINT Support Specialists are arguably closely related to inherently governmental functions even when the foregoing objections are ignored. While OMB’s list of functions closely associated with the performance of inherently governmental functions does not include the activities described in the PWS, it does define the “direction and control of counterintelligence and intelligence operations” as inherently governmental in nature. If CI/HUMINT Special Advisors and CI and HUMINT

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Support Specialists are expected to conduct interviews, debriefings, and other CI activities, then they are arguably performing inherently governmental functions. If their support is considered so important to the conduct of operations as to warrant procurement from the private sector, then they are closely related to the performance of an inherently governmental function. Both outcomes suggest these functions should only be outsourced as a matter of last resort.

Beyond their relation to the public interest, these functions raise questions over the potential structural impact of relying on so many contractors to perform such vital functions. The knowledge, skills, and abilities required by the PWS are not produced in the private sector. Indeed, qualified candidates can only have served for an extended period in the U.S. government. The per unit cost of these contractors is unknown, but their salaries almost certainly exceed those of the civilian and especially military personnel needed to perform the service organically. This discrepancy provides a now familiar financial incentive for government employees to market their government-provided skills and abilities to private sector vendors. This is troubling given that the required experience range is likely already in demand within the government. Departure for the private sector removes personnel from the government’s professional development pipeline at a time when mid-career professionals are needed to mentor and develop the junior officers hired since 9/11 and to replace those nearing retirement. The extent of this contract’s structural impact is an empirical question that can only be answered with additional information.

The USFOR-A solicitation contrasts significantly with the USAINSCOM, Wiesbaden, and CJTF-76 contracts in that its terms are optimized for the government. The PWS likewise requests personal services, forbids contractors from carrying arms and from supervising government personnel, and articulates the regulations with which contractors must comply. The
USFOR-A contract thus offers an excellent example of how contracts should be prepared with transparency and taxpayer interests in mind. The contract’s shortfall lies in the authorities granted to contractors; the contract threatens to allow inherently governmental responsibilities to devolve to private contractors in violation of regulation, statute, and the Constitution.

Database management is the only function that did not trigger an objection under the proposed framework. The Database Manager is a technician who deploys technical solutions in response to customer requests. Hers is the only position with core skills that are concentrated in the private sector; because database management is not a critical CJTF-76 function, it makes good financial sense to outsource at least elements of that function to those who can leverage economies of scale and scope. The only potential concern is structural in nature and derives from the requirement that the Database Manager have four years of experience in the defense intelligence community. However, if technical support is a legitimate use of outsourcing it may be outsourced over an extended period, allowing vendors to specialize in providing technical services to the government and therefore not risk stripping the government of a critical skill set.

All operational services solicited by USAINSCOM, Wiesbaden, CJTF-76, and USFOR-A are ineligible for outsourcing save the USFOR-A database management function. Each contract triggered objections under different framework criteria, but on balance intelligence operations are too intimately tied to the public interest to permit private sector performance. Objections under the framework’s Structural Impact and Contract Optimization criteria were important but secondary. While the difference between current practice and the proposed framework is clear in the case of operations, what about functions that are removed from the “tip of the spear?”
Intelligence Analysis

Research into active and archived solicitations confirms the defense intelligence enterprise outsources analytic services. In September 2010, the U.S. Air Force awarded a $24.8 million contract to Booz Allen Hamilton, Inc. for CI analytic support to the U.S. Army. In August 2010, USPACOM awarded a $5.3 million contract to Global Resource Solutions, Inc. for “socio-cultural dynamics” analysis. Also in August 2010, the U.S. Air Force awarded a $22.8 million contract to Booz Allen Hamilton, Inc. for “counterterrorism analysis for the U.S. Central Command interagency action group.” Given the widespread practice of contracting for analysis services, it is instructive to select for further evaluation contracts characterized by different performance and delivery arrangements. To this end, the thesis will explore three contracts: the Survivability/Vulnerability Information Analysis Center, analytic support for the Strategic CI Directorate, and DIA’s omnibus Solutions for Intelligence Analysis. Each contract will yield different findings when evaluated against the proposed framework.

In January 2003, the DLA awarded a ten-year $282 million cost-plus fixed-fee contract to Booz Allen Hamilton, Inc. to operate the Survivability/Vulnerability Information Analysis Center (SURVIAC), a Defense Department Information Analysis Center housed within the Defense Technical Information Center (DTIC) and focused on non-nuclear survivability and vulnerability analysis. Booz Allen Hamilton was awarded option periods in 2006 for an

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180 Defense Department, Contracts, No. 701-10, August 6, 2010.
estimated $56.6 million and in 2008 for a further $50 million. A third option period was evidently awarded in January 2011, and the contract is scheduled for completion in 2013.\textsuperscript{182}

SURVIAC is sponsored by the Defense Department but is operated by the vendor with oversight provided by a COR aligned to the Aerospace Survivability and Safety Flight at Eglin Air Force Base.\textsuperscript{183} According to the solicitation, SURVIAC would be responsible for facilitating the use of scientific and technical survivability [and] vulnerability information in the design, testing, evaluation, operations, and maintenance of DoD systems…and the industrial and research base which produces and supports such systems.\textsuperscript{184} SURVIAC would also conduct analysis in support of “technical area tasks;” at the time of writing, these tasks included analysis concerning aircraft and amphibious vehicle survivability issues.\textsuperscript{185} Lastly, SURVIAC would be tasked to analyze the effectiveness of U.S. weapons against foreign systems.\textsuperscript{186}

While the SURVIAC contract lacks a publicly available SOW, PWS, or SOO, available information indicates the analytic services are nonpersonal in nature. SURVIAC is staffed and directed by contractors, who are overseen by a COR and DTIC. Like the Defense Department’s nine other Information Analysis Centers (IACs), SURVIAC is composed chiefly of scientists, engineers, and other technicians who are capable of analyzing survivability and vulnerability information provided by the government. This analysis is highly technical in nature, and indeed

\textsuperscript{186} SURVIAC, SURVIAC Brochure, Accessed March 6, 2011.
may only have a small intelligence component. Nevertheless, SURVIAC provides analytic services that are critical to protecting the U.S. military and advancing U.S. interests.

The SURVIAC contract may be more feasible than those considered above, in that the organization is homogeneous and tasked with clearly defined duties. SURVIAC is charged with responding to tasking, but those tasks are administered by the government and are not validated or generated by SURVIAC itself. The lack of empirical data makes it impossible to ascertain the effectiveness of the contract’s administration, but it is less fraught than the preceding operational contracts. SURVIAC also appears to have limited relation to the public interest. The center was never outsourced, rather it was created in the late 1990s to support the Defense Department’s Scientific and Technical Information Program, and as such it does not constitute a critical government function. The contract does not grant SURVIAC significant authority or substantial discretion, and contractors are in no position to control over government employees or directly affect life, liberty, or property. SURVIAC contributes to the protection and advancement of U.S. interests through its analysis, but this contribution is sufficiently indirect as to withstand a Public Interest challenge. Lastly, there is nothing to suggest SURVIAC is so closely related to an inherently governmental function as to preclude its performance by the private sector.

In light of the extended contract period, should SURVIAC be incorporated into the government workforce? The government does not produce the skills required to perform the SURVIAC mission; engineers, scientists, and other technicians are produced in the private sector. Opportunities to advance in these fields are likewise concentrated in industry. The government would be at a competitive disadvantage if it attempted to develop these skills.

organically, and is not positioned to harness scale or scope economies. Given that these functions are not inherently governmental and that the desired expertise is external to the public sector, there is no structural reason to internalize performance of the SURVIAC mission.

The SURVIAC contract performs poorly against the Contract Optimization criterion. As a cost-plus fixed-fee IDIQ contract, the vendor has no incentive to control costs. The award amounts specified above are therefore estimates, and it is unknown whether they were met or surpassed. SURVIAC offers an example of analytic services that are eligible for procurement from the private sector, but the terms under which they were procured was sub-optimal for the government. The Defense Department evidently recognizes this shortfall, and intends to consolidate the SURVIAC contract into a more competitive contract covering multiple IACs.\textsuperscript{188}

While the SURVIAC contract offers an instructive example of Defense Department analysis acquisition, it only indirectly invokes intelligence equities. The Department also procures services focused strictly on defense intelligence analysis. In June 2006, DISA publicized a solicitation on behalf of CIFA for analytic support to the Strategic CI Directorate (SCID) in Iraq. The solicitation envisioned a negotiated time-and-materials contract for nonpersonal services with a one-year base period and no option years. The SCID was a joint CI unit tasked to “identify, neutralize, and exploit [foreign intelligence services], terrorists, insurgents, and Former Regime Elements…[through] CI activities including CI Investigations, CI Collections, CI Analysis, Offensive CI Operations…and other functional services.”\textsuperscript{189}


SCID contract analysts were expected to conduct analysis to “enable the government to conduct CI investigations and operations to identify and neutralize or exploit…entities adversely affecting the mission.” Contractors were also expected to conduct research and analysis, generate products, analyze raw data using CI analytic tools, and conduct up to 200 “researches” weekly. The SOW requires contractors to be familiar with trend and link analysis, preparation of written threat or vulnerability assessments, and briefing. Specific qualifications included 4-11 years experience in CI analysis. Contractors must have knowledge of the intelligence cycle and be able to prepare and brief products. Senior and mid-level analysts were expected to work independently and lead projects, and would be permitted to “represent the subject matter in…external working group meetings.” The SOW indicates analysis would be performed on site at the SCID as well as at CIFA headquarters, and while it requires a program manager be appointed to oversee contract performance it doesn’t specify where that individual would be assigned.190

The SCID contract is reminiscent of an operational and collection support contract, but it is more narrowly focused on analysis. The SCID contract nevertheless provokes some of the same concerns as those highlighted previously, especially where the Public Interest is concerned. First, judging from the fact that analysis is included in the SCID mission statement and enables other SCID activities, it is reasonable to assume that analysis is a SCID “critical function.” Recalling Chapter 7, outsourcing critical or core functions risks surrendering control over the performance of those functions and threatens mission effectiveness. Second, SCID analysis directly enables activities that protect and advance U.S. interests. Unlike SURVIAC analysis, which was only remotely related to the conduct of such activities, SCID analysis is critical to

their effectiveness. The same is true of SCID analysts’ ability to affect life, liberty, and property. Lastly, SCID analysis supports the direction, control, and conduct of CI operations, which renders it too intimately related to an inherently governmental function to permit outsourcing.

The SCID contract likewise poses potential structural problems in that only the government produces analysts of the type and experience-level required by the SOW. Analysis itself is function that spans disciplines and professions, and to a degree it is a fungible skill. The SOW indicates experience in general intelligence analysis may be acceptable, but even this is limited to the public sector. The private sector may consequently be required to draw upon government employees for labor. Additionally, there appears to be a sustained requirement for this support. The solicitation envisioned only a one-year contract, but another solicitation for SCID analytic support services was issued in 2008 for one base year and four option years.\(^{191}\) CIFA clearly expected the requirement to last beyond five years, which invokes the framework’s requirement to implement mitigation strategies. Not only could the SCID contract create an incentive to leave government service, but sustained reliance on contractors may also limit career development opportunities for government analysts.

Lastly, the contract terms are sub-optimal. The use of a negotiated time-and-materials contract provides flexibility, but it is less competitive than a sealed-bid and provides no reason for the vendor to control costs. This type of support can be delivered on a fully competed firm-fixed price basis, as evidenced by the USFOR-A contract, which would deliver superior cost savings for the government. Additionally, the solicitation’s requirement for nonpersonal services may be disingenuous. The SOW fails to explain adequately how contractors would be

supervised, and the nature of their duties suggests they would in fact be subject to a *de facto* employee/employer relationship with the government. The lack of transparency on this matter is troubling, and risks breaching statutory law and constitutional principles.

Under the proposed framework, CI analytic support to the SCID—as least as described by the contract’s SOW—is ineligible for outsourcing on the basis of its proximity to the Public Interest. It also raises acute concerns under the framework’s Structural Impact and Contract Optimization criteria, which may yield a finding of ineligibility even if Public Interest objections did not obtain. If SURVIAC and the SCID represent opposite ends of a spectrum, how would the proposed framework apply to intelligence analysis services that fall toward the center?

In August 2007, DIA requested proposals for a negotiated omnibus IDIQ contract titled Solutions for Intelligence Analysis (SIA). The SIA contract would procure analytic support not just for DIA but also for the defense intelligence enterprise for one base year and four option years. This support would evidently be nonpersonal and would be procured using a level of effort contract.\(^{192}\) The solicitation received media attention due to the size of the contract, which was valued in excess of $1 billion, and prompted DIA to publicly defend the acquisition.\(^{193}\) According to DIA’s then-director, SIA was actually an aggregation of 30 existing requirements, and was being competed as an omnibus procurement to create efficiencies in contract management.\(^{194}\) DIA repeated this message during a pre-proposal conference with industry;

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specifically, the agency sought to capitalize on “internal economies and efficiencies,” “consolidate performance management and reporting,” and create performance incentives.”¹⁹⁵

According to the contract’s SOO, SIA would provide DIA, the Service intelligence centers, and the Combatant Commands “responsive, efficient, and reliable means to satisfy requirements for intelligence analysis support and related services.” The SOO identifies 29 mission areas that SIA contractors would support, including but not limited to computer network operations, defense industry, foreign denial and deception, foreign intelligence activities, military and national leadership, order of battle, strategy and doctrine, and counterterrorism. The SOO also identified five “labor categories,” including intelligence analysts, operations research analysts, security analysts, science and technology analysts, and project managers.¹⁹⁶

Per the SOO, intelligence analysts coordinate and participate “in the analysis, processing, and distribution of strategic and tactical intelligence” and solve difficult technical problems.¹⁹⁷ Their duties include “preparing all-source intelligence products;” “establishing and maintaining …intelligence records and files;” receiving and processing reports and messages; “determining the significance and reliability of incoming information;” and assisting “in the analysis and evaluation of intelligence holdings.”¹⁹⁸ Operations research analysts “help make better decisions, solve complex technical problems, and…help managers improve performance,” and security analysts develop, define, and “implement security architectures, plans, policies, and

¹⁹⁷ Ibid., 14.
¹⁹⁸ Ibid.
procedures to improve organization and project security.” \(^{199}\) Lastly, scientific and technical analysts “conduct analyses and assessment of technological, engineering, and scientific research, [as well as] new and emerging technologies.” \(^{200}\) These personnel were expected to apply scientific and mathematical principles to technical problems spanning areas ranging from space operations to environmental health and safety and nanotechnology. \(^{201}\)

SIA sought to procure analysts at multiple stages of professional development. Junior, mid-level, and senior analysts required bachelors or masters degrees, three to eight or more years of intelligence analysis experience, and specialized training. The SOO did not specify the number of junior, mid-level, and senior analysts required to satisfy the contract; the quantity of each would presumably be determined by individual task orders. \(^{202}\) Nevertheless, the number of contractors procured under SIA is likely substantial in light of the DIA’s acknowledgement that contractors constituted 35 percent of the agency’s workforce as of August 2007.

The SIA SOO does not go into significant detail concerning discrete analytic requirements beyond the generalities outlined above. Specific task orders would be competed among successful prime vendors under the auspices of the omnibus IDIQ contract vehicle, and the content of those task orders may be classified or otherwise not available for public review. \(^{203}\) The contract was awarded in December 2007 to a team of prime vendors including BAE Systems, Booz Allen Hamilton, CACI, CTC, L3 Communications, Northrop Grumman, SAIC,

\(^{199}\) Ibid.
\(^{200}\) Ibid.
\(^{201}\) Ibid.
\(^{202}\) Ibid., 12.
\(^{203}\) Ibid., 10.
and SRA International, for an amount not to exceed $1 billion over the life of the contract.\footnote{DIA, HHM402-07-R-0087, Posted: March 13, 2008.} The SIA contract remains under performance at the time of writing.

SIA is among the largest acquisitions identified during research for this thesis. It is also unique in that it serves as an omnibus vehicle for procuring analysis services for multiple defense intelligence agencies. Judging from available information, SIA provokes objections under the Public Interest criteria, although these objections are not as troubling as those provoked by the SCID contract. As written, it does not appear that contractors would be in a position to exercise significant authority or substantial discretion; directly affect life, liberty, or property; or commission, appoint, direct, or control government personnel. Furthermore, the analytic functions procured under SIA may be sufficiently removed from those activities capable of directly determining, protecting, or advancing U.S. interests to survive a challenge under that criterion, though such a determination cannot be made based on public information. However, the most compelling challenge to SIA stems from the remaining Public Interest criteria.

First, intelligence analysis is a critical DIA mission. The DIA mission statement focuses on the provision of “timely, objective, and cogent military intelligence” to its customers, and the agency maintains a directorate—the primary DIA agency-level organizational unit—dedicated to analysis. The DIA Strategic Plan for 2007-2012 features numerous references to the agency’s all-source analysis and its efforts to strengthen analysis across the defense intelligence enterprise.\footnote{DIA, “About DIA,” http://www.dia.mil/about/, Accessed March 8, 2011; DIA, Organization Chart, Accessed March 8, 2011; DIA, Strategic Plan 2007-2012: Leading the Defense Intelligence Enterprise, 2007.} SIA clearly sought to procure intelligence services that were key to DIA’s mission. Recalling the discussion of core and critical functions in Chapter 7, activities deemed critical to
an agency’s ability to accomplish its mission should not be outsourced. To invoke the OMB proposal, outsourcing analysis in its entirety to contractor performance could expose the agency to risk of mission failure. In his public defense of SIA, the DIA Director took pains to explain DIA “does not outsource analysis. DIA senior analysts and leaders rigorously review all analytic products [and] are fully in charge of this process.”206 This hair splitting exercise conflated “outsourcing” with decision-making, obscuring the fact that analysis and production—a core DIA mission—had been partially externalized. The same concern may not obtain for other organizations, especially those for which intelligence analysis is not a primary mission.

Second, the analytic services procured under SIA may be deemed ineligible for outsourcing due to their proximity to inherently governmental functions. Analysis can be so intimately linked to the direction and control of intelligence and counterintelligence operations, *inter alia,* that outsourcing the analysis could jeopardize the government’s operational efficacy or risk delegating to contractors duties and functions reserved for governmental performance. In December 2000, the U.S. Army exempted analysis from private sector performance at the tactical level on the grounds that the “analysis of intelligence…requires the exercise of substantial discretion in applying Government authority because intelligence at the tactical level is integral to the application of combat power by the sovereign authority.” The Army considered operational and strategic analysis non-inherently governmental but nevertheless ineligible for outsourcing on the grounds that relying on contractors to perform these functions would constitute a national security risk.207 DIA does not share the Army’s erstwhile procurement

policy, and further information is needed to determine which analytic functions are too closely associated with inherently governmental functions to permit private sector performance.

Beyond its relation to the public interest, a strong argument can be mobilized against SIA on the grounds of its structural impact. The contract’s scope tacitly acknowledges that the analytic workforce of the defense intelligence enterprise is insufficient to meet Defense Department requirements. Additionally, the contract’s length acknowledges that the demand for services will last at least five years. It is unknown whether DIA and the defense intelligence enterprise have attempted to identify the underlying causes of their analytic shortfall, or whether they have put a plan in place to reduce their reliance on contracting and internalize the now externalized analysis. It is also unclear whether the defense intelligence enterprise has attempted to assess the contract’s long-term impact on the government workforce. The impact of integrating substantial numbers of service contractors into the government workforce raises potential problems along the lines discussed in Chapter 8, including increased competition with vendors for human capital, potentially diminished morale and mission orientation, and loss of control over professional development. The defense intelligence enterprise must determine, if it hasn’t already, whether the SIA omnibus will prove deleterious to the government workforce, and it must put in place a plan to return the outsourced services to government performance with deliberate haste so as to maximize efficacy and forestall future imbalances.

Finally, SIA poses problems under the proposed framework’s Contract Optimization criterion. The use of an omnibus is astute given that it will decrease the costs of administering what were previously 30 separate contracts. DIA’s intention to compete individual task orders among primes will also generate savings through competition. However, the use of a level-of-
effort contract may reduce vendors’ incentives to meet budgetary targets and force the
government to incur greater financial risk. It is unclear from available information whether SIA
is a firm-fixed-price or cost-plus level-of-effort contract, but select contract documents suggest a
cost-plus labor-hours or time-and-materials arrangement, which offers few performance-based
incentives and may encourage vendors to engage in cost overruns. Additionally, the contract
calls for nonpersonal services but appears to integrate contractors into existing government
chains of command. Recalling Chapter 5, the FAR stipulates that a contract is likely personal in
nature if the work is performed on site, if tools and equipment are provided by the government, if
services are applied directly to the integral effort of agencies, if comparable services are
performed by civil service personnel, if the need for a service is expected to extend beyond one
year, and if the nature of the work demands government direction or supervision. All of these
conditions appear to prevail within the defense intelligence enterprise, which arguably converts
contractors into de facto if not de jure government employees and renders their services personal
vice nonpersonal in nature. The SIA contract’s lack of transparency on this issue is a potentially
critical shortcoming with the potential to provoke statutory and constitutional challenges.

The proposed framework suggests the services procured under SIA may be permissibly
outsourced by an agency for which analysis is not a critical function, and as long as that analysis
is not intimately related to the performance of an inherently governmental function. The
objections raised by the Structural Impact and Contract Optimization criteria are serious but
rectifiable with greater deliberation and adherence to applicable regulations. In sum, the
proposed framework indicates the permissibility of outsourcing analytic services depends chiefly

on the proximity of those services to functions that would trigger objections under the Public Interest criterion. The further removed an analytic function from the public interest, the more eligible it is for private performance. In this regard, SIA occupies a middle ground between the SURVIAC and SCID contracts, and is likely to partially survive a Public Interest challenge. Intelligence analysis is therefore eligible for outsourcing under certain conditions assuming the Feasibility, Structural Impact, and Contract Optimization criteria are satisfactorily met.

**Support Services**

Just as the defense intelligence enterprise contracts for operational and analytic services, it also contracts for non-intelligence support services. These include logistical, engineering, facilities, administrative, information technology, and other services necessary to facilitate defense intelligence mission execution. An example of such a service—the USFOR-A database contractor (see Page 85)—was considered previously and deemed eligible for outsourcing. Given the uncontentious nature of outsourcing support services, this thesis applies the proposed framework to one contract selected on the basis of data richness and representative character.

In August 2008, DIA publicized a pre-solicitation notice apprising vendors of its intent to compete a multiple award, IDIQ omnibus contract with firm-fixed-price, cost-plus fixed-fee, time-and-materials, labor-hour, and other task orders for a variety of information technology services at the unclassified and classified levels.²⁰⁹ According to DIA, the Solutions for the Information Technology Enterprise (SITE) omnibus created “an acquisition framework for delivering Information Technology services and capabilities that will support the global

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intelligence Command and Control (C2) assets vital to the security of the United States.\footnote{DIA, “Solutions for the Information Technology Enterprise,” http://www.siteidiq.gov/SITE/default.aspx, Accessed January 31, 2011.} The SITE contract was valued at more than $6 billion over a term of up to five and half years.\footnote{DIA, Presolicitation HHM402-08-R-0150R, Posted: September 7, 2008, Archived: September 7, 2009.}

Like SIA, the SITE omnibus consolidated previously independent contracts and sought support for the broader defense intelligence enterprise. SITE replaced DIA’s $300 million Department of Defense Intelligence Information System Integration and Engineering Support Contracts (DIESCON3), the Air Force’s $700 million Intelligence Information, Command and Control, Equipment, and Enhancements (ICE2) contract, and numerous smaller contracts, and was designed to achieve efficiencies, strengthen enterprise management, and increase transparency.\footnote{Techweb, DIA Awards $6.6 Billion IT Contract, May 18, 2010; Defense Industry Daily, “The DIA’s $6.6 Billion SITE IT Contract,” Defense Industry Daily, May 17, 2010; Defense Intelligence Agency, SITE (Solutions for the Information Technology Enterprise) Pre-Solicitation Conference, September 3, 2008, 6; Defense Intelligence Agency, Acquisition Executive Statement on the Solutions for the Information Technology Enterprise Request for Proposal, February 10, 2009.} As of September 2008, the contract’s customer base included among others the ODNI, Defense Department intelligence agencies including DIA, the National Ground Intelligence Center, the Office of Naval Intelligence, the National Air and Space Intelligence Center, and the Marine Corps Intelligence Activity; other Defense Department activities including CIFA, the Joint Improvised Explosive Device Defeat Organization, and DISA; the military services; the Combatant Commands; the U.S. Coast Guard; and non-Defense customers including the FBI and the Departments of Energy, Treasury, and State.\footnote{DIA, SITE Pre-Solicitation Conference, September 3, 2008, 6.}

The SITE omnibus aimed to procure all the information technology services required to conduct the mission of the defense intelligence enterprise. According to the contract’s PWS, the former DIESCON services that would be performed under SITE included but were not limited to
enterprise information technology development and integration; commercial off-the-shelf
enhancement, configuration, and integration; systems engineering; operations and maintenance
of hardware and software; and information assurance. Additionally, the contract would procure
former ICE2 services including but not limited to logistical support and inventory management,
network and computer operations center support, service desk support, web services, and system
administration. These services would be provided in part through “regional service centers” in
Washington, DC; Tampa; Colorado Springs; Honolulu, and Stuttgart, Germany. As of
September 2008, these centers supported nearly 70,000 user accounts, nearly 30,000
workstations, over 3,700 servers, and more than 4,000 terabytes of data storage.

SITE procures labor on the basis of a variety of categories corresponding to technical
specialties and corresponding services. These labor categories include but are not limited to
maintenance technicians, installation specialists, network administrators and engineers, service
desk specialists, database administrators, computer network defense specialists, process
improvement analysts, and project and program managers. These labor categories require
different education, experience, and proficiency levels ranging from minimal (service desk
specialists) to extensive (program managers). All contractors are required to arrive fully trained
“in the latest…advances related to equipment maintenance, system/network administration, and
computer operating systems available on the commercial market.” Most SITE contractors

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216 Ibid., 14-18.
would be expected to at a government facility, but there is no information available concerning how these personnel would be integrated into the government workforce, it at all.\textsuperscript{218}

DIA awarded the SITE omnibus in May 2010 for $6.6 billion to 11 prime contractors including BAE Systems Information Technology, Blue Canopy Federal Group, CenTauri Solutions, Enterprise Information Services, General Dynamics Information Technology, Lockheed Martin, Northrop Grumman Systems, Red Arch Solutions, SAIC, Systems Research and Applications, and Worldwide Information Network Systems.\textsuperscript{219} Each prime teamed with sub-contractors to win the award; for example, Lockheed Martin joined with at least 1Force and Freedom Consulting Group, SAIC teamed with at least By Light Inc. and Agilex Technologies Inc., and Enterprise Information Services partnered with at least Dexisive Inc. and Colsa Corporation.\textsuperscript{220} Research failed to uncover a complete listing of all SITE subcontractors. The contract remains under performance at the time of writing.

SITE is a large and complex acquisition, but as above it is impossible to assess effectively DIA’s and supported agencies’ procurement and contract management capacities based on publicly available information. The scope of the contract nevertheless demands rigorous performance surveillance, and the proposed framework’s Feasibility criteria must be

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met in order for outsourcing to continue. Feasibility aside, SITE provokes no *prima facie* objections under the Public Interest or Structural Impact criteria, although it poses potential though not decisive concerns under the Contract Optimization criteria.

Information technology support is sufficiently removed from inherently governmental functions so as to permit performance by the private sector. First, the activity cannot be considered a “critical function” in that it is not inextricably linked to mission effectiveness. This requires careful parsing. Mission success within the defense intelligence enterprise is predicated on an effective information technology infrastructure; indeed, information technology is arguably the *sine qua non* of modern defense intelligence operations. However, the mission of the defense intelligence enterprise is not to provide policymakers and warfighters information technology capabilities, but to “provide timely, objective, and cogent military intelligence” to defense intelligence consumers. This mission relies on the performance of myriad activities that rely on information technology for execution but do not have it as their object. Reserving for government performance services such as information technology, electricity generation, facilities construction and maintenance, food preparation, and other enabling functions would sacrifice the cost savings that may be achieved through outsourcing to those with access to specialized labor as well as economies of scale and scope. If one accepts this argument, then information technology services are eligible for outsourcing even though their provision is a necessary condition for agency operations. Furthermore, a determination that information technology is not an agency critical function also immunizes it from objections on the grounds that it determines, protects, or advances U.S. interests; that it has the potential to directly affect life, liberty, and property; and that it is closely related to an inherently governmental function.
Second, the SITE PWS places vendors and contractors in a customer support role and does not grant them “significant authority” or “substantial discretion.” The possible exception may be contractors identified as project managers, program managers, and process improvement consultants, who appear to be vested with a degree of oversight responsibility as well as the authority to recommend courses of action for government adjudication. To the degree these specialized contractors are allowed to exercise discretion, the government must ensure that appropriately experienced and technically proficient federal employees are on hand to weigh contractor recommendations in keeping with the Morgan principle. As discussed, the presumption of regularity established in Moffat must survive an empirical inquiry. Provided it does, outsourcing even project management, program management, and process improvement functions discussed above would survive a challenge under this Public Interest criterion.

Lastly, no SITE contractor is assigned responsibilities that could likely yield the commission, appointment, direction, or control of U.S. officers and employees. This unlawful delegation of governmental authority could only result from a wholesale corruption of the contract oversight process and governmental malfeasance or nonfeasance. While nothing is impossible, such an outcome should be easily anticipated by a deliberate effort to assess contract management capacity within DIA and the defense enterprise. If such an outcome is anticipated, procurement should not proceed.

Just as SITE survives scrutiny under the Public Interest criteria, it also fails to trigger serious Structural Impact objections. The sheer size of the SITE contract tacitly acknowledges that the defense intelligence enterprise lacks the human capital required to meet the department’s information technology requirements. However, there is a legitimate question over whether the
enterprise should perform this function organically given that it is sufficiently removed from the public interest to permit private performance. The skills necessary to excel in information technology are pioneered by and produced within the private sector, not the government. Unlike operations, collections, and intelligence analysis, the government is not the primary source of supply and demand, only a single albeit large customer in a far broader market for information technology services. Furthermore, it would be cost prohibitive for the government to attempt to replicate industry’s training and certification infrastructure, given that it lacks economies of scale and scope. This inefficiency is even more pronounced in the areas of research, development, testing, and evaluation. Defense intelligence information technology services are undoubtedly highly specialized and require contractors to obtain and maintain security clearances; nevertheless, the defense intelligence enterprise remains a single public niche of a largely private market. Information technology services may consequently be procured in perpetuity from the private sector without attempting to internalize support, but the defense intelligence enterprise must guard against the recruitment of experienced government overseers into the private sector given the contract surveillance demands created by such widespread outsourcing.

The most significant challenge facing SITE arises from the proposed framework’s Contract Optimization criteria. The choice to consolidate contracts under the auspices of a single omnibus is likely to achieve efficiencies, and the use of an IDIQ contract vehicle may create savings by forcing primes to compete for discrete task orders. DIA’s use of fixed-price contracts is also astute, given that it forces vendors to observe price ceilings and incentivizes them to perform work in an efficient and effective manner. DIA’s use of cost-reimbursement, time-and-materials, and labor-hour contracts is sub-optimal in light of their lack of cost-saving incentives
and the concomitant financial risk that accrues to the government. While these challenges are serious, they are insufficient to bar information technology services from private performance.

Information technology services are more closely linked to defense intelligence enterprise mission effectiveness than any other non-intelligence support function, but they survive a challenge under the proposed framework on the basis that it is sufficiently removed from the public interest to permit private performance. This determination opens the functions to financially based arguments in favor of service externalization that ultimately carry the day. This is not to say that broadly outsourcing information technology services is risk free, but on balance the government will receive better support from the private sector than it would by performing these services organically. This likely holds true for other services that emanate from the private sector and for which the defense intelligence enterprise is but one customer.
CHAPTER 12: CONCLUSION

The Defense Department’s ability to meet America’s post-9/11 national security challenges depends as much upon human capital as it does on materiel. This is especially the case within the defense intelligence enterprise. Experienced and capable intelligence operators and analysts take years, if not decades, to develop to the full performance level. Continuous vocational and academic education and the application of one’s skills are critical to developing as an intelligence professional. The capacity of the defense intelligence enterprise depends on its stewardship of its most important resource—its workforce.

Yet the story of the defense intelligence workforce is a troubling one. The NPR and Cold War Peace Dividend starved agencies of new employees while inducing experienced personnel to retire. This shrunken and unbalanced workforce lacked the capacity to respond fully to 9/11, leading to a dramatic increase in the use of service contracting. This surge bought precious capacity but was administered in the breach. Contracting policy and law did not keep pace with acquisitions, leading to the undeniable and unconstitutional delegation by omission, malfeasance, and nonfeasance of inherently governmental responsibilities to private citizens, with broad strategic implications for the United States (e.g., CACI and L-3 at Abu Ghraib).

Extreme cases aside, the massive scope of intelligence services contracting presents fundamental problems given the continued lack of a unified U.S. government definition of “inherently governmental” and the lack of academic and policymaker attention paid to the second and third-order effects caused by using private citizens as auxiliaries to augment the permanent government workforce. This thesis has attempted to sketch the broad outlines of defense intelligence outsourcing’s financial, structural, and normative implications. The
proposed framework takes a step toward an integrative method for weighing outsourcing decisions, but it serves chiefly as a foundation for future research and analysis. Nevertheless, the framework yields different outsourcing determinations than those currently made within the defense intelligence enterprise. Of the bounded categories evaluated in the case application, the framework dissents from all operational outsourcing decisions and some analytic outsourcing decisions, while it concurs with the outsourcing of support services. This profound divergence between the present theoretical model and current practice is reason alone for further study.

Beyond a general call to arms for further interdisciplinary academic investment in the intelligence outsourcing literature, this thesis yields the following recommendations:

• The OMB ought to review its proposed policy memorandum defining “inherently governmental” with a view to capturing the financial, structural, and normative characteristics of outsourcing government services. The OMB must finalize its definition soon, or risk perpetuating ambiguity over which functions are reserved for government performance. Congress should reiterate its demand for authoritative guidance if OMB fails to act in a timely manner.

• The GAO should undertake a new effort—on the model of its 1982 study—to methodically determine whether government contractors are performing inherently governmental functions. Despite the numerous examples of unlawful delegations of authority, no survey of this nature has been published in nearly 30 years. The GAO should also attempt to establish a government-wide benchmark for the costs of government versus contractor full time equivalents to replace the questionable Congressional estimate cited above.
• The Defense Department Inspector General, in partnership with the Undersecretary of Defense for Intelligence and the Service Secretaries, should undertake a comprehensive study of intelligence services outsourcing practices across the defense intelligence enterprise. This study should draw upon all available classified and unclassified information and focus on at least economy, effectiveness, the use of “fuzzy” contracting typology (i.e., personal versus nonpersonal services) and its consequences, and whether defense intelligence contractors are being allowed to perform inherently governmental functions. Congress should require this study in the national defense authorization acts for fiscal year 2012 or 2013 if the Defense Department proves unwilling to undertake it.

• The Defense Department must continue to invest in its acquisition workforce. The push for efficiencies within the department, while admirable, must not be allowed to diminish further the capacity of this critical workforce. Adequate training and direction must accompany the hiring of sufficient acquisition personnel, lest the problems seen during recent years—especially in contingency contacting—be allowed to continue.

• The Defense Department must invest in comprehensive contracting training for frontline supervisors, given that they may interact more with intelligence services contractors than organizations’ CORs. This is especially the case for personal services contractors, and it holds true for nonpersonal services contractors under “fuzzy” contract typology. Insufficient awareness of contracting policy may lead to an impermissible delegation of authority or breaches of SOW or PWS, especially if they are not made available to supervisors.
• The U.S. Supreme Court should grant certiorari in Saleh v. Titan. A writ of certiorari would bring several key issues before the Court, including the “battlefield preemption” doctrine that extends sovereign immunity to contractors on the basis of the Constitution’s delegation of war making powers to the Executive. While the primary matter before the Court in Saleh is not constitutional versus unconstitutional delegations of authority, certiorari in this case would provide the Court an opportunity to establish precedent concerning the extent to which sovereignty devolves to private parties. Beyond Saleh, legal activists should seek to bring a case before the judiciary that addresses directly the issue of unlawful delegations of authority to private parties as a means of filling the breach in constitutional exegesis on the matter.

• The academic community is ideally positioned to conduct additional research into an “Iron Triangle” variant peculiar to the defense intelligence enterprise: defense intelligence vendors, the bureaucracy, and Congress. The distortive effects of these alliances can be seen in extremis in the case of CIFA, as discussed in Chapter 6. Congress and the Executive both stand to extract rents through their dealings with the defense intelligence industry; consequently, the GAO and the Defense Department may be unlikely to evaluate aggressively the full impact of these arrangements. Academia’s independence recommends if for elucidating the nature and extent of this phenomenon.

• Lastly, the defense intelligence enterprise should evaluate carefully the manner in which it publicizes contracts. The posting of highly detailed contracting documents to the government-wide point of entry poses operational security concerns. Even when this
information is unclassified, it allows the public—including potentially foreign intelligence services—to piece together the basics of unit roles, responsibilities, and missions.

Transparency in contracting could be maintained by requiring those accessing the site to register for accounts and sending SOW, PWS, or SOO via fax rather than posting online. The deleterious impact of this change on the general public’s ability to monitor defense intelligence contracting could be ameliorated by creating a contract audit capability within OMB that would be subject to Congressional—and thereby the Sovereign’s—oversight.

In the final reckoning, the outsourcing of intelligence services is a useful tool for addressing exigent national security requirements as long as it is practiced deliberately in a financially, structurally, and normatively optimal manner. Regrettably, this is not how the Defense Department has conducted intelligence outsourcing since 9/11. Failure to address the pitfalls of this practice places Congress and the Executive in breach of trust with the Sovereign—the American people—and therefore undermines the integrity of American constitutional governance. Further study by those within and without government, combined with courageous public administration, promises to reconcile the difficulties that plague intelligence outsourcing and produce and preserve a defense intelligence workforce capable of meeting fully America’s national security challenges.
BIBLIOGRAPHY


Department of Defense, *Department of Defense Instruction 5525.11: Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, March 3, 2005.


