

STUDENT NOTE

Outsourcing Intelligence Analysis: Legal and Policy Risks

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INTRODUCTION

Intelligence reduces uncertainty in conflict, whether in trade negotiations between allies with similar, but individual interests, or in combat operations against a foreign state or terrorist group.¹ Providing this intelligence involves collecting, processing, analyzing, and disseminating information to decision makers.² Key among these is analysis, defined by the RAND Corp. as “the process by which the information collected about an enemy is used to answer tactical questions about current operations or to predict future behavior.”³ Beyond the tactical level, analysis is also necessary to provide the strategic and operational intelligence required to establish overarching policies and to develop operational plans to execute those policies.⁴ In this manner, analysis is one of the most critical functions provided by the civilian and military entities that make up the intelligence community (IC). At the same time, analysis often is not performed by government personnel. For example, of core contract personnel within the intelligence community, 19 percent directly supported analysis and production as of 2007.⁵

This note explores the rise of outsourcing in the intelligence community and examines the legal and policy implications of outsourcing intelligence analysis in particular. First, it discusses the organizational and operational pressures that led to the increased use of contractors in the intelligence community after the September 11, 2001 attacks. Next, it identifies the origins of the inherently governmental function test, used to determine when a government activity be outsourced. In addition, this note explores executive branch policy guidance, which

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1. ROBERT M. CLARK, INTELLIGENCE ANALYSIS: A TARGET-CENTRIC APPROACH 19 (5th ed. 2017).

2. CLARK, *supra* note 1, at 31.

3. *Intelligence Analysis*, RAND CORP., <http://www.rand.org/topics/intelligence-analysis.html> (last visited May 29, 2018).

4. *See* CLARK, *supra* note 1, at 20–21.

5. L. ELAINE HALCHIN, CONG. RESEARCH SERV., R44157, THE INTELLIGENCE COMMUNITY AND ITS USE OF CONTRACTORS: CONGRESSIONAL OVERSIGHT ISSUES 9 (2015) [hereinafter 2015 CRS Report].

prescribes expanded agency oversight and internal capability requirements when outsourcing functions closely associated with inherently governmental functions, or functions that are otherwise considered critical. This note then considers how different forms of intelligence analysis relate to these categories, as well as the corresponding implications for the intelligence community based on current oversight and management practices. It turns next to a discussion of the costs of outsourcing national security-related intelligence functions. Lastly, it summarizes and provides recommendations for limiting the legal and policy risks of outsourcing intelligence analysis.

As a general matter, outsourcing and privatization present many potential benefits for the government. For the procurement of software, hardware, and many forms of information technology support, private sector sources indeed may be the only viable option.⁶ Support and administrative services often are provided more efficiently or effectively by private sector entities,⁷ although the relative total costs of government versus contractor performance of certain functions is a matter of perennial debate.⁸ The private sector also can provide the government with critical surge capacity, such as the support and logistical services provided by Halliburton and utilized by the United States during the war in Iraq to reduce the burden on the all-volunteer military forces.⁹ However, some may question whether this ability to turn to contractors (rather than expand forces through a draft) might possibly lower the “bar to entry” into a conflict by decreasing public concern, interest, or scrutiny of the action.¹⁰

For intelligence in particular, the private sector can offer “unique technical, professional, managerial, or intellectual expertise” not available within the intelligence community itself.¹¹ In these areas of key expertise, the ability to turn to contractors can provide the government with the ability to respond quickly to emerging global events.¹² For example, the possibility of obtaining private sector linguistic support enabled the United States to pivot rapidly to new operational

6. SIMON CHESTERMAN, *ONE NATION UNDER SURVEILLANCE: A NEW SOCIAL CONTRACT TO DEFEND FREEDOM WITHOUT SACRIFICING LIBERTY* 129 (2011) [hereinafter CHESTERMAN, *ONE NATION UNDER SURVEILLANCE*].

7. U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO-14-204, CIVILIAN INTELLIGENCE COMMUNITY: ADDITIONAL ACTIONS NEEDED TO IMPROVE REPORTING ON AND PLANNING FOR THE USE OF CONTRACT PERSONNEL* 22 (2014) [hereinafter 2014 GAO Report].

8. See 2015 CRS Report, *supra* note 5, at 24.

9. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 26–27 (2007).

10. Colonel David Wallace, *Privatizing the War on Terror: The Legal and Policy Challenges of Outsourcing America's Counterterrorism Fight to Private Military, Security, and Intelligence Contractors*, in *FUNDAMENTALS OF COUNTERTERRORISM LAW* 163, 176 (Lynne Zusman, ed., 2014).

11. See 2014 GAO Report, *supra* note 7, at 22; see also CLARK, *supra* note 1, at 334 (“Experts from academia and industry are often drawn in to analytic teams where their unique expertise can help the analysis process.”).

12. ALLISON STANGER, *ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY* 33 (2009).

areas in the 1990s, such as Somalia, Bosnia, Haiti, and Kosovo.¹³ This type of responsiveness, gained by a rapid contracting process, can increase the policy options and flexibility available to the United States when presented with threats to its security and interests.¹⁴

Along with its benefits, outsourcing government functions also brings certain general difficulties. Outsourcing necessarily involves oversight challenges as government employees attempt to monitor the performance of contractors and contractor employees; this oversight is particularly difficult for sole-source or large-scale contracts, especially those awarded under exigent circumstances.¹⁵ Outsourcing also presents accountability challenges. Government functions become further removed from the public eye when they are assigned to contractors, who are not subject to the same transparency and procedural requirements as government agencies.¹⁶ Some scholars argue that democratic values are undermined when the efficiency gained by outsourcing comes at the expense of government accountability.¹⁷ These challenges are present in all outsourcing decisions, and are particularly relevant for national security-related functions like intelligence analysis.

After a general move by the Obama administration toward actively managing outsourcing decisions to prevent contractors from performing or impacting government performance of inherently governmental functions, the story of outsourcing in the Trump administration is yet to be written. However, early indicators suggest the trend toward outsourcing in the intelligence arena could resume. After an initial federal hiring freeze, since lifted, the administration directed all federal agencies to take “immediate action to achieve near-term workforce reductions,” and to plan for long-term workforce reductions in future budgets.¹⁸ This may pressure agencies to turn to contracting to meet their missions.¹⁹ In addition to workforce downsizing, the administration has expressed skepticism of the intelligence community (IC) and an interest in implementing an outsider review

13. Glenn J. Voelz, *Contractors and Intelligence: The Private Sector in the Intelligence Community*, 22 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 586, 591 (2009).

14. See STANGER, *supra* note 12, at 93 (discussing the strategic use of contracted trainers to strengthen the Croatian military in the 1994–1995, whose success in combat encouraged the Serbian government to negotiate and agree to the Dayton Peace Accords).

15. See Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 13 (J. Freeman & M. Minow, eds., 2009).

16. *Id.* at 9–10.

17. See VERKUIL, *supra* note 9, at 3–4.

18. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO NO. M-17-22, COMPREHENSIVE PLAN FOR REFORMING THE FEDERAL GOVERNMENT AND REDUCING THE FEDERAL CIVILIAN WORKFORCE (Apr. 12, 2017).

19. Similar hiring freezes or reductions under the Carter and Reagan administrations led to increased outsourcing, as agencies adjusted to smaller workforces. See Charles S. Clark, *Will Trump Bring Back Outsourcing and A-76?*, GOVERNMENT EXECUTIVE (Dec. 22, 2016), <http://www.govexec.com/contracting/2016/12/will-trump-bring-back-outsourcing-and-76/134140/>.

of the IC as a whole.²⁰ Although the administration ultimately declined to appoint someone to carry out this review,²¹ this early friction might foreseeably shape the administration's views of the proper size and internal capabilities of the IC. Further, the perennial fiscal pressures faced by executive departments and agencies will continue to provide incentives to reduce the overhead expenses involved with retaining permanent government employees. Taken together, these indicators and persistent budgetary constraints suggest that increased outsourcing in the IC is on the horizon. Against this backdrop, this note seeks to explore the legal and policy implications of outsourcing intelligence analysis.

I. THE RISE OF OUTSOURCING IN THE INTELLIGENCE COMMUNITY

Although outsourcing intelligence sometimes is seen as a recent phenomenon, the use of private contractors for intelligence-related purposes, such as Native American scouts and the Pinkerton Agency, featured prominently in nineteenth and early twentieth century conflicts extending as late as the 1916 Punitive Expedition against Mexico.²² The new global orientation of American policy following the Spanish-American War, however, sparked a gradual trend toward the development of a professional intelligence corps which continued throughout both world wars.²³ By the post-war period, intelligence was primarily a government monopoly.²⁴ General privatization initiatives began in the 1950s as the Eisenhower administration directed the federal government to obtain products and services from the private sector whenever possible.²⁵ However, large Cold War-era intelligence budgets insulated the intelligence community during this period.²⁶

20. See James Risen & Matthew Rosenberg, *White House Plans to Have Trump Ally Review Intelligence Agencies*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/us/politics/trump-intelligence-agencies-stephen-feinberg.html>.

21. See, e.g., Stephen Witt, *Stephen Feinberg, The Private Military Contractor Who Has Trump's Ear*, THE NEW YORKER (July 13, 2017), <https://www.newyorker.com/business/currency/stephen-feinberg-the-private-military-contractor-who-has-trumps-ear> (discussing the administration's decision not to appoint billionaire Stephen Feinberg to conduct an independent review of the IC); see also Mark Landler et al., *Trump Aides Recruited Businessmen to Devise Options for Afghanistan*, N.Y. TIMES (July 10, 2017), <https://www.nytimes.com/2017/07/10/world/asia/trump-afghanistan-policy-erik-prince-stephen-feinberg.html> (reporting that the administration also consulted with Stephen Feinberg in an effort "to devise alternatives to the Pentagon's plan to send thousands of additional troops to Afghanistan").

22. Voelz, *supra* note 13, at 589–90. Pinkerton agents conducted espionage, counter-espionage, and interrogations during the Civil War; Native American scouts provided intelligence, reconnaissance, and translation services to include analysis-like functions such as determining enemy strength and the tribal affiliation of unknown groups. *Id.*

23. *Id.* at 590.

24. *Id.*

25. STANGER, *supra* note 12, at 13–14.

26. See Voelz, *supra* note 13, at 591. Other forms of outsourcing during the Cold War period did draw some scrutiny. For example, the 1962 Bell Report warned President Kennedy about extensive outsourcing of military research and development; 1989 Senate hearings showed concern about the use of contractors for Department of Energy security clearance determinations. See VERKUIL, *OUTSOURCING SOVEREIGNTY*, *supra* note 9, at 45.

The collapse of the Soviet Union produced a sea change for the IC, as Congress slashed national security spending to realize the so-called “peace dividend” from the end of the Cold War.²⁷ At the same time, the Clinton administration continued Reagan-era privatization efforts throughout the federal government.²⁸ During this period, the intelligence community was downsized significantly, faced strict hiring limits, and “was encouraged to ‘outsource’ as much as possible.”²⁹ These constraints, coupled with the need to adapt old methodologies,³⁰ meant that the intelligence community turned to contract support to address new national security threats in the 1990s.³¹ When the September 11, 2001 attacks took place, the intelligence community needed to pivot quickly and intensely to address al Qaeda and other non-state actors; in addition, government entities like the newly-created Department of Homeland Security now required sharply higher amounts of intelligence on terrorism risks.³² With the United States quickly embroiled in security and combat operations in Afghanistan, Iraq and beyond, it was thus most expedient for the United States to turn to contractors not only for intelligence, but for military and security functions as well.³³

The post-9/11 era outsourcing in the intelligence community was extensive in terms of spending, number of contractors, and scope of operations. A 2007 presentation from a senior procurement executive from the Office of the Director of National Intelligence revealed that 70 percent of the United States intelligence budget was spent on private contractors; one of the slides exclaimed ‘We can’t spy. . . if we can’t buy!’³⁴ Estimates of the number of contractor personnel used by the intelligence community were as high as 70,000 at one point.³⁵ Contractors became involved with the collection of both signals and human intelligence, allegedly extending to the recruitment and management of human sources.³⁶ The CIA reportedly worked with contractors in 2004 to locate and kill terrorist operatives.³⁷ Its use of private contracted aircraft for rendition and movement of

27. See Wallace, *supra* note 10, at 166.

28. STANGER, *supra* note 12, at 15.

29. 2015 CRS Report, *supra* note 5, at 1 (citing 2014 testimony from Stephanie O’Sullivan, Principal Deputy Director of National Intelligence, before the Senate Committee on Homeland Security and Governmental Affairs).

30. See CLARK, *supra* note 1, at 6 (describing how economic analysts who spent their careers analyzing the Soviet command economy had to develop new methodologies for examining post-Communist privatization).

31. Voelz, *supra* note 13, at 591.

32. See Evan Sills, Note, *Mission “Critical Function”: Improving Outsourcing Decisions Within the Intelligence Community*, 41 PUB. CONT. L.J. 1007, 1013 (2012).

33. See Wallace, *supra* note 10, at 167.

34. See Simon Chesterman, ‘We Can’t Spy . . . If We Can’t Buy!’: *The Privatization of Intelligence and the Limits of Outsourcing ‘Inherently Governmental Functions’*, 19 EUR. J. INT’L L. 1055, 1055–56 (2008) [hereinafter Chesterman, ‘We Can’t Spy . . . If We Can’t Buy!’]. Although the presentation was later removed from the Defense Intelligence Agency website, a copy is available at <https://www.fas.org/irp/dni/everett.ppt>. *Id.* at 1056 n. 2.

35. Voelz, *supra* note 13, at 587.

36. Chesterman, ‘We Can’t Spy . . . If We Can’t Buy!’, *supra* note 34, at 1058.

37. Wallace, *supra* note 10, at 169.

detainees “is now well documented,” and one scholar suggests that private contractors were chosen perhaps to avoid legal oversight (in addition to operational reasons).³⁸ Of course, clandestine actions involving aircraft will require the use of private front corporations to maintain deniability and avoid direct military involvement.³⁹ The CIA rendition program, however, is alleged to have utilized a Boeing subsidiary for key flight planning and logistical support, rather than a proprietary front company under the control of the Agency.⁴⁰ Nonetheless, there are certainly a subset of clandestine intelligence activities which may require the use of contractors for operational security reasons.

The IC’s post-9/11 outsourcing activity extended far beyond functions linked to clandestine actions, however. For example, both the CIA and the Department of Defense used contractors for interrogation; 27 out of 33 interrogators at Abu Ghraib during 2004 were employed by a private military company.⁴¹ Of note, while several military personnel were reprimanded or court-martialed for prisoner abuse at Abu Ghraib, no contractors have faced sanctions.⁴² Meanwhile, the National Security Agency (NSA) outsourced background checks for security clearance investigations to a company called USIS, starting in 1996.⁴³ Even after learning in 2006 that USIS was prematurely ending background checks, the NSA continued to utilize USIS for background investigations. In particular, USIS conducted the 2011 background investigation for Edward Snowden,⁴⁴ the Booz Allen Hamilton employee and NSA contractor who in 2013 leaked large amounts of information on NSA surveillance programs.⁴⁵

Increased public awareness and lessons learned from the years following 9/11 have resulted in reforms that have curtailed some of the most egregious practices. For example, the National Defense Authorization Act for 2010 included a waivable prohibition on the use of contractors for the interrogation of detainees held by the Department of Defense (although not those held by the CIA or other civilian intelligence community components).⁴⁶ Whereas private military contractors

38. Chesterman, *‘We Can’t Spy . . . If We Can’t Buy!’*, *supra* note 34, at 1061-62.

39. *Id.* The use of the Taiwan-based Civil Air Transport Corporation as cover for American supply operations supporting the besieged French garrison at Dien Bien Phu is one such example. *See* BERNARD B. FALL, *HELL IN A VERY SMALL PLACE: THE SIEGE OF DIEN BIEN PHU* 241 (Da Capo Press 2002) (1966).

40. Jane Mayer, *The C.I.A.’s Travel Agent*, *THE NEW YORKER* (Oct. 30, 2006), <https://www.newyorker.com/magazine/2006/10/30/the-c-i-a-s-travel-agent>; *see also* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc) (dismissing on state secrets privilege grounds a case brought against the subsidiary under the Alien Tort Statute), *cert. denied*, 563 U.S. 1002 (2011).

41. STANGER, *supra* note 12, at 4.

42. Wallace, *supra* note 10, at 171.

43. EDWARD JAY EPSTEIN, *HOW AMERICA LOST ITS SECRETS: EDWARD SNOWDEN, THE MAN AND THE THEFT* 35-36 (2017).

44. *Id.* at 36.

45. *See, e.g.*, Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, *N.Y. TIMES* (June 9, 2013), <http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html>.

46. National Defense Authorization Act for Fiscal Year 2010, Sec. 1038, PL 111-84, 123 Stat. 2190 (codified at 10 U.S.C. § 801 Note (2012)).

previously were not subject to the Uniform Code of Military Justice (UCMJ) at the time of the Abu Ghraib incident,⁴⁷ Congress subsequently expanded the UCMJ's jurisdictional article 2 to cover contractors serving with or accompanying armed forces in the field during war or a contingency operation.⁴⁸ Other measures included 2008 legislation ensuring that Inspectors General of all intelligence community components could subpoena contractors,⁴⁹ and a 2014 mandate that intelligence contractors disclose to the intelligence community when their network systems are compromised through unauthorized access.⁵⁰

While the use of contractors by the intelligence community for rendition and interrogation gained widespread notoriety due to the larger focus on abuse in those processes in general, the use of contractors for intelligence analysis is a much less visible (but still extensive) phenomenon. In 2004, the Department of Defense awarded a \$300 million contract to a British company for potentially classified "analysis of foreign intelligence services, terrorist organizations, and their surrogates targeting DoD personnel, resources and facilities."⁵¹ After an Office of the Director of National Intelligence analysis in 2007 revealed that contractors conducted around 40 percent of analytical functions in the intelligence community, the Defense Intelligence Agency announced a new major contract in 2008 for expertise and analysis across a wide range of areas.⁵² Contractors are purportedly "providing significant brainpower in intelligence processing, exploitation, and dissemination" in connection with unmanned aircraft system (UAS) operations, with at least one incident in which civilian casualties resulted from a strike based in part on intelligence analysis performed by contractors.⁵³ In 2016, the Department of Defense announced a \$9.5 million modification for an existing Army contract for intelligence analysis services performed in Germany, Italy,

47. See VERKUIL, *supra* note 9, at 129–30.

48. 10 U.S.C. § 802(a)(10). However, there have been very few contractors prosecuted under the UCMJ. Wallace, *supra* note 10, at 172. Further, it is uncertain if this expanded jurisdiction would extend to contractors performing analysis or other functions from within the territorial United States, which is frequent in unmanned aircraft systems (UAS) operations. See Major Keric D. Clanahan, *Wielding A "Very Long, People-Intensive Spear": Inherently Governmental Functions and the Role of Contractors in U.S. Department of Defense Unmanned Aircraft Systems Missions*, 70 A.F. L. REV. 119, 187 n.319 (2013).

49. See 5 U.S.C.A. App. 3 § 8G(a)(2) (West 2017) (including the National Reconnaissance Office, the Defense Intelligence Agency, the National Security Agency, and the National Geospatial-Intelligence Agency in the list of federal entities for which Inspectors General are mandated by statute); see also SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT TO ACCOMPANY THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2008, S. REP. NO. 110-75, at 29–30 (2007) (discussing the background of why certain Inspector General elements in the intelligence community lacked subpoena power).

50. 50 U.S.C.A. § 3330 (West 2017).

51. Chesterman, *'We Can't Spy . . . If We Can't Buy!*, *supra* note 34, at 1058.

52. Voelz, *supra* note 13, at 587–88.

53. Wallace, *supra* note 10, at 173–74.

and Syria.⁵⁴ While outsourcing certain intelligence activities has ended, the use of private contractors to perform intelligence analysis persists.

II. LEGAL REGULATION OF OUTSOURCING GOVERNMENT FUNCTIONS

When analyzing the relationship between the public and private sector, it is useful to conceptualize government functions in three categories: functions that *must* be performed by government employees, those that *should* be performed by government employees (at least in some circumstances), and those appropriate for performance by private actors.⁵⁵ The category that must be performed exclusively by government employees for legal and policy reasons is broadly referred to as ‘inherently governmental’ functions.⁵⁶ The contours of these categories and the definition of what is inherently governmental have fluctuated over time and through administrations.⁵⁷ This section explores the limited underlying constitutional principles surrounding privatization and outsourcing and then traces the inherently governmental function definition from its statutory and policy roots through the most recent guidance provided by the Office of Federal Procurement Policy.

A. Background Constitutional Principles

As a starting point, the Constitution enumerates and vests powers with separate branches of the government, providing an initial division of functions across the federal government. For example, it vests the executive power in the President and envisions the delegation of certain executive authority to “Officers of the United States” and “inferior Officers” in various executive departments.^{58,59} The Constitution itself is silent on outsourcing government functions to private actors, with the arguable exception of the enumerated Congressional authority to grant Letters of Marque and Reprisal.⁶⁰ However, the Letters of Marque power is expressly limited to the legislative branch and fell into disuse by the mid-nineteenth century.⁶¹ The due process clause also indirectly prevents Congress from delegating legislative authority to private persons, to the extent that the delegated authority affects the rights and property of other private citizens.⁶² Overall, however, scholars have recognized that “there are no explicit constitutional limits on

54. DEP’T OF DEFENSE, CONTRACTS PRESS OPERATIONS RELEASE NO. CR-143-16 (July 26, 2016), available at <http://www.defense.gov/News/Contracts/Contract-View/Article/873473>.

55. JOHN R. LUCKEY, ET AL., CONG. RESEARCH SERV., R40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS 1 (2009) [hereinafter 2009 CRS Report].

56. See CHESTERMAN, ONE NATION UNDER SURVEILLANCE, *supra* note 6, at 126.

57. 2009 CRS Report, *supra* note 55, at 1.

58. U.S. CONST. art. II, § 1.

59. U.S. CONST. art. II, § 2, cl. 1–2.

60. U.S. CONST. art. I, § 8, cl. 11.

61. See VERKUIL, *supra* note 9, at 103.

62. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

privatization” and thus little guidance on which functions are ‘inherently governmental.’⁶³

B. The Evolution of the Inherently Governmental Function Test and Related Outsourcing Requirements

The modern ‘inherently governmental’ function formulation first appeared during the Johnson administration in the Office of Management and Budget’s (OMB) Circular A-76, which expanded the Eisenhower administration’s policy of government not competing with the private sector for any good or service that could be procured through ordinary business channels.⁶⁴ In this context, the ‘inherently governmental’ function definition “emerged not as a sphere to be protected but rather as an exception to the more general push to privatization.”⁶⁵ The current version of OMB A-76,⁶⁶ the Federal Activities Inventory Reform Act of 1998 (FAIR Act),⁶⁷ and the Federal Acquisition Regulations (FAR) are the three primary sources of federal law and policy on inherently governmental functions upon which the Office of Federal Procurement Policy (OFPP) expanded in OFPP Policy Letter 11-01.^{68, 69} This section explores how each of these sources define and consider inherently governmental functions, establishing the policy framework necessary for evaluating the outsourcing of intelligence analysis.

1. The OMB Circular A-76 Process

The current 2003 revision of OMB A-76 “establishes federal policy for the competition of commercial activities” in recognition of the “longstanding policy of the federal government . . . to rely on the private sector for needed commercial services.”⁷⁰ The Circular directs agencies to perform inherently governmental functions with government personnel, but asymmetrically tilts toward outsourcing by requiring agencies to “justify, in writing, any designation of . . . inherently governmental activities,” without requiring a similar justification for a designation of an activity as commercial.⁷¹ OMB A-76 defines an inherently governmental function as “an activity that is so intimately related to the public interest as to

63. STANGER, *supra* note 12, at 26.

64. 2009 CRS Report, *supra* note 55, at 5.

65. See CHESTERMAN, ONE NATION UNDER SURVEILLANCE, *supra* note 6, at 126.

66. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES 1 (2003) [hereinafter REVISED CIRCULAR A-76], https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf.

67. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105–270, 112 Stat. 2382 (codified at 31 U.S.C. § 501 note (2012)).

68. OFFICE OF FED. PROCUREMENT POLICY, OFFICE OF MGMT. & BUDGET, POLICY LETTER 11-01, PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS, 76 Fed. Reg. 56227, 56227 (Sept. 12, 2011) [hereinafter OFPP POLICY LETTER 11-01].

69. See Clanahan, *supra* note 48, at 148.

70. REVISED CIRCULAR A-76, *supra* note 66, at ¶¶ 1, 4.

71. Compare REVISED CIRCULAR A-76, *supra* note 66, at A-2, ¶ (B)(1), with *id.* at A-3.

mandate performance by government personnel.”⁷² It elaborates further that inherently governmental functions “require the exercise of substantial discretion in applying government authority and/or in making decisions for the government” and goes on to state that these functions involve:

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) Determining, protecting, and advancing economic political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) Significantly affecting the life, liberty, or property of private persons; or
- (4) Exerting ultimate control over the acquisition, use, or disposition of United States property . . . , including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.⁷³

The 2003 revision also distinguishes functions that involve discretion, in general, from those involving *substantial* discretion, the threshold requirement for an activity to be considered inherently governmental.⁷⁴ The added requirement that discretion must be substantial suggests the OMB sought to narrow the inherently governmental category and increase the number of functions that would thus be suitable for contracting out.⁷⁵ This change for the 2003 revision is consistent with the general Bush administration emphasis on a “management agenda” and competitive sourcing.⁷⁶

2. The FAIR Act

While OMB A-76 requires agencies to classify all functions they perform as commercial or inherently governmental as a matter of policy,⁷⁷ the FAIR Act requires an annual inventory and classification of an agency’s activities that are

72. REVISED CIRCULAR A-76, *supra* note 66, at A-2, ¶ (B)(1)(a). The OMB A-76 phrases the inherently governmental test in terms of activities rather than functions, but these are generally equivalent and the debate revolves around the meaning of “inherently governmental” rather than on any distinction between a function and activity. *See generally* 2009 CRS Report, *supra* note 55, at 7.

73. REVISED CIRCULAR A-76, *supra* note 66, at A-2, ¶ (B)(1)(a).

74. REVISED CIRCULAR A-76, *supra* note 66, at A-2, ¶ (B)(1)(a)-(b) (emphasis added).

75. VERKUIL, *supra* note 9, at 128.

76. 2009 CRS Report, *supra* note 49, at 24.

77. *Id.* at 14; *see also* Arrowhead Metals, Ltd. v. United States, 8 Cl. Ct. 703, 717 (1985) (upholding an agency decision to cancel a contract as serving “the interests of the government by allowing further study of the important *policy issue* of contracting out work that may well involve inherently Governmental functions”) (emphasis added).

not inherently governmental as a matter of law.⁷⁸ By negative implication, this requires classifying certain activities as inherently governmental.⁷⁹ Because the FAIR Act's annual requirement to identify and publicize a list of commercial activities generally is meant to encourage outsourcing, the FAIR Act has been criticized for indirectly leaving agency officials "to determine, on an ad hoc basis, the purpose of government."⁸⁰ The FAIR Act does not directly require agencies to contract out functions *per se*, but if an agency does consider contracting with private sector sources for non-inherently governmental functions, they must use competitive processes to do so.⁸¹ The FAIR Act's core definition of inherently governmental functions essentially matches the definition in OMB A-76.⁸²

Importantly, for the intelligence analysis context, both the FAIR Act and OMB A-76 provide additional provisions that address the use of contractors to provide analysis and guidance to public officials. The FAIR Act states that an inherently governmental function "does not *normally* include. . .gathering information for or providing advice, opinions, recommendations, or ideas to Federal governmental officials."⁸³ OMB A-76 permits contractor employees "to develop options or implement a course of action, with agency oversight" so long as "the contractor does not have the authority to decide on the course of action," but recognizes that this can rise to the level of an inherently governmental function if official discretion is limited beyond a certain extent.⁸⁴

3. The Federal Acquisitions Regulations

Federal Acquisitions Regulation 7.503 affirmatively states that "[c]ontracts shall not be used for the performance of inherently governmental functions."⁸⁵ While FAR 7.503 does not uniquely define inherently governmental functions (instead, incorporating the OMB A-76 definition),⁸⁶ it provides an extensive and non-exhaustive listing of inherently governmental functions with increased detail, compared to the more general lists in OMB A-76 and the FAIR Act.⁸⁷ This list identifies several activities as inherently governmental which potentially implicate the civilian and military intelligence communities, specifically prohibiting

78. Federal Activities Inventory Reform Act of 1998, P.L. 105-270, 112 Stat. 2382 (codified at 31 U.S.C. § 501 note (2012)).

79. See FAIR Act, 31 U.S.C. § 501 note, at 2(a) (2012).

80. STANGER, *supra* note 12, at 15.

81. 2009 CRS Report, *supra* note 55, at 8.

82. FAIR Act, 31 U.S.C. § 501 note, at 5(2)(A) (2012). The FAIR Act does identify "to commission, appoint, direct, or control officers or employees of the United States" as an additional example of inherently governmental functions that is not included in the OMB A-76 list. *Cf.* text accompanying note 73, *supra*.

83. FAIR Act, 31 U.S.C. § 501 note, at 5(2)(C)(i) (2012) (emphasis added).

84. REVISED CIRCULAR A-76, *supra* note 66, at A-2, ¶ (B)(1)(c).

85. FAR 7.503(a) (2006).

86. FAR 7.301 (2006).

87. Compare FAR 7-.03(c), with REVISED CIRCULAR A-76, *supra* note 66, at A-2, and FAIR Act, 31 U.S.C. § 501 note, at 5(2)(b).

outsourcing of the command of military forces,⁸⁸ the conduct of foreign relations and the determination of foreign policy,⁸⁹ and in particular “the direction and control of intelligence and counter-intelligence operations.”⁹⁰

In another important addition, FAR 7.503 identifies a list of functions “generally not considered to be inherently governmental,” but which “may approach being in that category because of [1] the nature of the function, [2] the manner in which the contractor performs the contract, [3] or the manner in which the Government administers contractor performance.”⁹¹ At the time, the FAR did not elaborate on the purpose underlying this enumeration,⁹² but this recognition of a grey area between inherently governmental functions and commercial activities could be seen as a precursor to the categories that the Obama administration would eventually adopt in OFPP Policy Letter 11-01.

4. OFPP Policy Letter 11-01’s Expanded Definition and New Related Categories

As early as March 2009, the Obama administration began expressing concerns about outsourcing in terms of cost, efficiency, and suitability.^{93,94} The OFPP issued Policy Letter 11-01 in September 2011 in response to the administration’s concerns, as well as to directives from the Duncan Hunter National Defense Authorization Act (NDAA) of 2009 to standardize the inherently governmental function definition and provide increased guidance to agencies on its application.⁹⁵ The stated purpose of OFPP 11-01 is “to assist agency officers and employees in ensuring that only Federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector.”⁹⁶ Importantly, this implies there are some functions that are *not* inherently governmental, but that still should *not* be outsourced. Though initially addressed to the civilian components of the executive branch,⁹⁷ a 2012 correction clarified that OFPP 11-01 also applies to the military components of the executive branch (thus covering all entities of the IC).⁹⁸

88. FAR 7.503(c)(3) (2006).

89. FAR 7.503(c)(4) (2006).

90. FAR 7.503(c)(8) (2006).

91. FAR 7.503(d) (2006) (numerations added).

92. See 2009 CRS Report, *supra* note 55, at 17.

93. Clanahan, *supra* note 48, at 150.

94. Contractors and government executives had also expressed frustration with the inherently governmental function definitions from the FAIR Act and OMB A-76. See Sills, *supra* note 32, at 1018.

95. See OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56227 (summarizing background and citing specific provisions of the 2009 NDAA).

96. *Id.* at 56236.

97. *Id.*

98. OFFICE OF FED. PROCUREMENT POLICY, OFFICE OF MGMT. & BUDGET, POLICY LETTER 11-01, PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS (NOTICE; CORRECTION TO FINAL POLICY LETTER), 77 Fed. Reg. 7609 (Feb. 13, 2012).

a. Inherently Governmental Functions Under OFPP 11-01. Although the primary definition of inherently governmental functions in OFPP 11-01 “practically mirror[s]” that of the FAIR Act,⁹⁹ the policy letter elaborates significantly on the FAIR Act definition by providing two distinct tests for identifying inherently governmental functions, of which the meeting of either necessitates a finding that a function is inherently governmental.¹⁰⁰ The “nature of the function” test is premised on the idea that an activity which involves the exercise of sovereign powers of the United States, such as arresting or sentencing individuals, is inherently governmental “without regard to the type or level of discretion” involved (essentially a categorical exclusion from outsourcing).¹⁰¹ Under the more fluid “exercise of discretion” test, functions are deemed inherently governmental “if the exercise of . . . discretion commits the government to a course of action where 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.”¹⁰² Both tests can potentially implicate intelligence analysis, when such analysis is closely linked to decision making.

Limits on guidance or decision making under the exercise of discretion test are insufficient if they do not [1] “identify specified ranges of acceptable decisions or conduct” or [2] do not “subject the discretionary decisions or conduct to meaningful oversight.”¹⁰³ In this manner, OFPP 11-01 distinguishes proper contractor discretion in “providing advice, opinions, or recommended actions” to an agency official who retains final decision authority from improper contractor discretion “where the contractors’ involvement is or would be so extensive, or the contractor’s work product so close to a final agency product, as to effectively preempt the Federal officials’ decision-making process, discretion, or authority.”¹⁰⁴ Further, OFPP 11-01 emphasizes that if time, operational, or other conditions limit the ability of an agency to manage a contractor’s actions or exercise their final approval authority, “government performance may be the only way [to] retain control of . . . inherently governmental [functions].”¹⁰⁵ This recognizes that, in at least some cases, whether a function is inherently governmental can turn on an agency’s ability to carry out effective oversight and management.

b. Critical Functions and Functions Closely Associated With Inherently Governmental Functions. Elaborating significantly on FAR 7.503’s identification that some functions may approach being inherently governmental,¹⁰⁶ OFPP 11-01 recognizes two distinct categories, “functions closely associated with

99. Clanahan, *supra* note 48, at 151.

100. OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56237.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 56237–56238.

105. *Id.* at 56238.

106. *See* FAR 7.503(d) (2006).

inherently governmental functions” and “critical functions.”¹⁰⁷ These categories of functions in theory may be performed by either government employees or contractor personnel, but require special attention and consideration if outsourced.¹⁰⁸ Closely associated functions are those that “may approach” being inherently governmental “because of the nature of the function and the risk that performance may impinge on Federal officials’ performance of an inherently governmental function.”¹⁰⁹ Both civilian and military executive branch entities are required by statute to give “special consideration” to using government employees for closely associated functions.¹¹⁰ If, however, these entities choose to outsource closely associated functions, they must comply with several directives aimed at ensuring that processes are in place *ex ante* that ensure meaningful oversight by “qualified governmental employees with expertise to administer or perform the work.”¹¹¹ A non-exhaustive list of these functions is included in Appendix B to OFPP 11-01.¹¹² Key among these, in the context of intelligence, are those involving the provision of “support for developing polices, including...conducting analyses...and strategy options” and the “[p]rovision of non-law enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport.”¹¹³

OFPP 11-01 goes into much greater detail in addressing “critical functions,” said to typically be “recurring and long-term in duration,” and defined as “necessary to the agency being able to effectively perform and maintain control of its mission and operations.”¹¹⁴ Broadly, the critical functions category creates a risk-based approach under which the need for effective oversight increases relative to the importance of a function and its relation to core agency activities.¹¹⁵ This case-by-case analysis avoids the problem with the binary inherently governmental/commercial division in OMB A-76 and the FAIR Act.¹¹⁶ A risk-based approach is also in line with a recommendation made earlier in 2011 by the federal Commission on Wartime Contracting, which cited risk as the most important factor in determining whether a function is appropriate for contingency contracting.¹¹⁷

107. OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56236.

108. *Id.*

109. *Id.* at 56348.

110. *See id.* at 56238 (pointing to Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, Division D, § 736, 123 Stat. 524, 689-81 (civilian agencies) and 10 U.S.C. § 2463 (military departments)).

111. OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56241-56242.

112. *Id.* at 56241.

113. *Id.*

114. *Id.* at 56236.

115. *See id.*

116. Sills, *supra* note 32, at 1019.

117. *See* COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, FINAL REPORT TO CONGRESS, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 43-53 (Aug. 2011), available at https://cybercemetery.unt.edu/archive/cwc/20110929213820/http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf (Federal record managed by Univ. of North Texas on behalf of the National Archives and Records Administration) [hereinafter CWC Report].

OFPP 11-01 frames the oversight requirement for critical functions in terms of a fiduciary responsibility for agencies “to have sufficient internal capability to control [their] mission and operations.”¹¹⁸ This requires agencies to maintain a core cadre of government employees with the knowledge and expertise to manage and be accountable for the contractor’s activities, to include the ability to carry out the activity or effectively shift performance to another contractor in the event of contract default.¹¹⁹ In this manner, OFPP 11-01 can be seen as preventing agencies from permanently ceding critical functions to a particular contractor, which could otherwise occur if a lack of institutional expertise made an agency reluctant either to bring a function back in-house or to on-board a different contractor due to the significant transaction costs and mission risk involved. Of course, these costs and risks are magnified if no other contractor has the expertise to take over from a defaulting contractor.

These additional categories of critical functions and functions closely associated with inherently governmental functions, coupled with OFPP 11-01’s expanded tests for when a function is inherently governmental, provide the current framework for analyzing agency outsourcing decisions. With these definitions and principles in place, this note next explores how intelligence analysis at different levels fits into these categories and the corresponding implications for whether the IC can outsource analytical functions, and examines the requirements if intelligence entities choose to do so.

III. INTELLIGENCE ANALYSIS AND THE OFPP 11-01 FRAMEWORK

In general, using private entities to conduct analysis and to provide guidance, opinions, or recommendations to government officials is not inherently governmental.¹²⁰ According to one scholar, the paradigmatic example of the benefits of turning to outside consultants for analysis, research, and policy advice is the RAND Corporation’s track record of assisting in producing better government solutions.¹²¹ However, there is arguably cause for concern if a contractor is so involved in a decision-making process that the accountable government official is reduced simply to approving a contractor’s recommendation, without conducting any independent inquiry.¹²² Of course, there is a broad spectrum between these two extremes, with varying divisions of the degree of influence over the decision-making process by the contractor and the government entity.

This spectrum is more complicated in the realm of intelligence, which can be strategic, operational, or tactical in nature, with different implications in terms of how the intelligence will be used in the decision-making process.¹²³ For example,

118. OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56238.

119. *Id.*; see also Sills, *supra* note 32, at 1016 (describing the sufficient internal capability requirement in terms of protecting “institutional memory”).

120. See *supra* text accompanying note 83.

121. VERKUIL, *supra* note 9, at 44.

122. *Id.* at 43.

123. CLARK, *supra* note 1, at 20.

Army policy prior to 2000 specified that intelligence functions at the tactical level were inherently governmental while intelligence functions at the operational and strategic level were not.¹²⁴ In the dynamic twenty-first-century conflict environment, however, the line between these forms of intelligence is often blurred and intelligence can take the form of all three types simultaneously if a certain piece of intelligence becomes actionable.¹²⁵ This is particularly true for counterinsurgencies and other forms of modern warfare, which “imbed[] intelligence functions, with its significant contractor support, deep inside the military’s decision-making cycle for the execution of direct hostile action.”¹²⁶ In this manner, intelligence analysis is increasingly “directly linked to real-time targeting and direct hostile actions against enemy forces.”¹²⁷ As the 2001 Authorization for Use of Military Force involves no geographic limitation,¹²⁸ the scope of the anti-terrorism battlefield extends across international borders and further contributes to the ambiguity between levels of intelligence. These factors present the possibility that intelligence analysis could rise to the level of an inherently governmental function in certain circumstances and, even if it does not, could likely require government performance or robust oversight under OFPP 11-01 as either a function closely associated to an inherently governmental function or as a critical function.

A. Intelligence Analysis As A Potential Inherently Governmental Function

While there is no bright line rule regarding intelligence analysis itself, the “direction and control of intelligence and counter-intelligence operations” is specifically identified as inherently governmental in the FAR and OFPP 11-01.¹²⁹ However, neither of these sources further defines these terms, instead leaving this to the intelligence community itself.¹³⁰ The Department of Defense elaborates on the “direction and control” category in its 2010 Instruction on Policy and Procedures for Determining Workforce Mix (pre-dating OFPP 11-01) by indicating that oversight of “intelligence interrogations and detainee debriefings” are inherently governmental, as are functions that involve substantial discretion.¹³¹ In addition, the 2015 Intelligence Community Directive 612 on Core Contract Personnel restricts contractors from performing inherently governmental

124. Voelz, *supra* note 13, at 594 (citing Patrick T. Henry, Assistant Secretary of the Army (Manpower and Reserves), Intelligence Exemption Memorandum for the Assistant Deputy Chief of Staff for Intelligence (Dec. 26, 2000), <https://www.documentcloud.org/documents/239397-military-intelligence-exemption.html>).

125. CLARK, *supra* note 1, at 20.

126. Voelz, *supra* note 13, at 593.

127. *Id.* at 592.

128. See Authorization For Use Of Military Force, PL 107-40, 115 Stat. 224 (Sept. 18, 2001) (codified at 50 U.S.C. § 1541 Note (2012)).

129. FAR 7-503(c)(8) (2006); OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56240.

130. Clanahan, *supra* note 48, at 174.

131. DEP’T OF DEFENSE INSTRUCTION 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX 23 (Apr. 12, 2010), <http://www.dtic.mil/whs/directives/cores/pdf/110022p.pdf>.

functions in accordance with OFPP 11-01, but does not further elaborate on what it considers inherently governmental.¹³² While ODNI acknowledged in 2006 that at least some intelligence community contractors were performing work that was “borderline ‘inherently governmental,’” there is no indication whether this involved contractors engaged in analysis, and, by 2014, the ODNI Personnel Director testified that core contractors were no longer performing inherently governmental work.¹³³

1. The Nature Of Intelligence Analysis Functions Does Not Involve The Exercise of Sovereign Authority

Absent any definitional indication that “direction and control” of intelligence operations encompasses intelligence analysis, determining whether analysis is inherently governmental involves considering whether it comprises an exercise of sovereign authority or a significant exercise of discretion within the tests established in OFPP 11-01.¹³⁴ The nature of the function test does not explicitly list combat as an example of exercising sovereign authority. Still, combat could fairly be viewed as falling into the sovereign authority category, as, like the enumerated examples of arresting or sentencing persons, it involves actions significantly affecting the rights of private persons.¹³⁵ This could potentially implicate intelligence analysis, since, in the view of some scholars, the collection, analysis, and use of tactical intelligence for targeting rises to the level of direct participation in hostilities (DPH), which is “generally reserved for combatants under the laws of armed conflict.”¹³⁶ This is true in the sense that civilians who directly participate in hostilities lose their protected status on the battlefield.¹³⁷ However, in the United States’ view, civilian government employees and government contractors are authorized to accompany the armed forces,¹³⁸ and, so authorized, are not prohibited by the law of war from “providing. . . support that constitutes [DPH]” even though doing so may cause them to be targeted by the enemy.¹³⁹ Moreover, intelligence functions are generally classified as combat support, rather than combat.¹⁴⁰ Thus, while intelligence analysis could be considered DPH to the extent

132. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 612, CORE CONTRACT PERSONNEL 1 (Aug. 17, 2015), https://www.dni.gov/files/documents/ICD/ICD_612.pdf.

133. 2015 CRS Report, *supra* note 5, at 15–16.

134. *See* notes 101-02, *supra*, and accompanying text.

135. *See* OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56237; REVISED A-76, *supra* note 66, at A-2.

136. Clanahan, *supra* note 48, at 174 & n. 253.

137. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 4.8.2 (2015) [hereinafter LAW OF WAR MANUAL].

138. LAW OF WAR MANUAL, *supra* note 137, at § 4.15.1.

139. LAW OF WAR MANUAL, *supra* note 137, at § 4.15.2.2.

140. *Cf.* 10 U.S.C. § 193(f) (2012) (defining the Defense Intelligence Agency, the Defense Information Systems Agency, and the National Geospatial-Intelligence Agency as combat support agencies). In addition, the United States Army traditionally classified the Military Intelligence Corps as a Combat Support rather than Combat branch, *see* VILLANOVA ROTC PROGRAM WEBSITE, https://www1.villanova.edu/villanova/artsci/rotc/cadets/branches/branches/combat_support.html (last visited May 29,

that it arises to the level of combat support,¹⁴¹ this is distinct from combat itself (categorically defined as inherently governmental by OFPP 11-01). Consequently, intelligence analysis likely does not rise to the level of exercising sovereign authority for the purposes of the OFPP 11-01 test.

2. Intelligence Analysis Can Involve the Exercise of Discretion Absent Meaningful Oversight

The exercise of discretion test is fairly strict and only deems an exercise of discretion as inherently governmental if it “commits the government to a course of action,” absent limits or guidance from existing policies or meaningful oversight (which can include final approval by agency officials).¹⁴² In general, policy analysis or guidance are not inherently governmental functions, even if the contractor exercises some discretion in conducting the analysis, as long as an agency official makes the ultimate decision.¹⁴³

In the intelligence context, however, key assumptions made early in the process of defining the intelligence issue play a significant role in determining the validity of the conclusion of the analysis.¹⁴⁴ Thus, to avoid “effectively preempt [ing] the Federal official’s decision-making process, discretion, or authority,”¹⁴⁵ a key component of the OFPP 11-01 exercise of discretion test, the government decision maker who acts on a piece of intelligence must have an understanding of the key assumptions that went into the analysis, or must be able to rely on oversight by other government employees involved in the analytical process. If these conditions are not met, intelligence analysis could rise to the level of an inherently governmental function, thus requiring that agencies reduce the level of contractor involvement to the point at which such oversight is restored.

B. Intelligence Analysis As A “Closely Associated” Function

Although intelligence analysis is generally not an inherently governmental function (or would be only in circumstances involving exceptionally uninformed decision makers), it is significantly more likely to meet the definition for a closely associated function in many contexts. Under OFPP 11-01, functions closely associated to inherently governmental functions may qualify as such based on two factors: “[1] the nature of the function and [2] the risk that performance may

2018), although the term combat support is no longer formally defined by the Army. UNITED STATES ARMY, FM 3-90-1 OFFENSE AND DEFENSE VOLUME 1, p. xi (Mar. 2013), http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/fm3_90_1.pdf.

141. See LAW OF WAR MANUAL, *supra* note 137, at § 5.9.3 (“Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”).

142. OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56237.

143. *Id.* at 56238.

144. CLARK, *supra* note 1, at 57 (explaining that a key assumption is defined as “a hypothesis that (a) has been accepted as true and (b) will be a part of the problem definition or the final assessment product”).

145. OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56237.

impinge on [government] performance of an inherently governmental function.”¹⁴⁶ Under both measures, intelligence analysis could qualify as closely associated with inherently governmental functions. If so, this would trigger an IC obligation to give special consideration to government performance, rather than contractor performance, and to provide meaningful oversight if analysis is in fact contracted out.¹⁴⁷

The nature of the function factor is especially relevant for tactical intelligence analysis “in the age of information warfare, in which kinetic strike operations are seamlessly linked with the simultaneous act of gathering, processing, and transmitting intelligence.”¹⁴⁸ According to Army targeting doctrine, for example, “[i]ntelligence analysts use target selection standards to quickly determine targets from battlefield information,” which involves, among other steps, evaluating the reliability and accuracy of source data and determining threat validity and the potential effects of engaging the target.¹⁴⁹ When intelligence analysis is this closely linked to the targeting process, it is tied to actions that affect the life and liberty of private persons under OMB A-76. This was demonstrated in a 2010 airstrike in Afghanistan which mistakenly struck a convoy of 15 innocent civilians.¹⁵⁰ Although the airstrike was ordered by an Army captain, it was based, in part, on an analysis of live drone video feeds by a contractor from Science Applications International Corporation (SAIC) who also oversaw other analysts at Air Force Special Operations Command.¹⁵¹ Even though the intelligence contractor did not make the final decision, one scholar noted that the close causal link between her analysis and the decision to engage in an offensive strike means that the activity “should at least be considered very closely associated with inherently governmental activities.”¹⁵² Overall, when intelligence analysis is utilized for tactical targeting, the nature of the function alone is likely sufficient to qualify analysis as ‘closely associated.’ Thus, analysis linked to tactical targeting should generally be performed by government actors or subjected to vigorous oversight if performed by contractors.

More generally, intelligence analysis risks impinging on government performance of other inherently governmental functions beyond the tactical level, due to the potentially close link between intelligence analysis and the decision-making process at the highest level. In early 2003, for example, the chief executive for CACI International Inc., which provided intelligence analysis during the war in

146. *Id.* at 56238.

147. *See supra* notes 110–11 and accompanying text.

148. Voelz, *supra* note 13, at 593.

149. HEADQUARTERS, DEP’T OF THE ARMY, ARMY TECHNIQUE PUBLICATION 3-60, TARGETING ¶¶ 2-24, 2-25, 2-44 (May 2015) http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/atp3_60.pdf [hereinafter Army Targeting Manual].

150. David S. Cloud, *Civilian contractors playing key roles in U.S. drone operations*, LOS ANGELES TIMES (Dec. 29, 2011), <http://articles.latimes.com/2011/dec/29/world/la-fg-drones-civilians-20111230>; *see also* Clanahan, *supra* note 48, at 178 (describing the same event based on the Cloud article).

151. Cloud, *supra* note 150.

152. Clanahan, *supra* note 48, at 178.

Iraq,¹⁵³ stated that “[w]e’re playing a role in a large choreography to make sure the president and [Defense Secretary Donald] Rumsfeld have the right information at the right time and can disseminate their decisions back to the battlefield.”¹⁵⁴

Indeed, although intelligence analysis is an objective process, intelligence analysts must often advocate with the intelligence user after completing their analysis.¹⁵⁵ The modern target-centric approach requires analysts to “get the customer to understand the message, and get buy-in, that is, get the customer to accept the message and act on it, even if the message runs contrary to the customer’s mindset.”¹⁵⁶ At the operational and strategic level there will inevitably be less interaction between analysts and final decision makers. Instead, analysts will advocate their message to an intermediate supervisor or intelligence officer who will approve the final analytical product. Still, the dynamic nature of the target-centric approach suggests extensive involvement in the decision-making process itself, even if contractor analysts do not interact directly with the ultimate government decision authority.

As a function closely associated with inherently governmental functions then, intelligence analysis requires that agencies limit or guide the contractor’s exercise of discretion through both the *ex ante* contractual specification of acceptable conduct and through meaningful oversight during the contract itself.¹⁵⁷ However, the intelligence community and oversight committees consistently have recognized deficiencies in the quantity, training, and experience of the acquisitions workforce responsible for developing contract requirements and assessing contract performance.¹⁵⁸ For example, the Department of Defense acquisitions workforce fell by over 50 percent during the 1990s and remained essentially flat through 2007, even as the United States became involved in two prolonged counterinsurgencies and the procurement budget increased dramatically over the same period.¹⁵⁹ In one of the key findings of a 2008 report, the Defense Science Board recognized that this weakened state of the acquisitions workforce impeded both the acquisition of military capabilities and government oversight of existing

153. TIM SHORROCK, SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING 272 (2008).

154. Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST (Mar. 3, 2003), https://www.washingtonpost.com/archive/business/2003/03/03/thousands-of-private-contractors-support-us-forces-in-persian-gulf/28d49e96-4bf9-461c-bafe-231a531102d8/?utm_term=.ca8ddece64a.

155. CLARK, *supra* note 1, at 337.

156. *Id.* at 350.

157. See OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56241–56242.

158. See 2015 CRS Report, *supra* note 5, at 18-20 (citing intelligence community documents and Congressional testimony from 2007–2014).

159. DEFENSE SCIENCE BOARD TASK FORCE ON DEFENSE INDUSTRIAL STRUCTURE FOR TRANSFORMATION, DEPARTMENT OF DEFENSE, *Creating an Effective National Security Industrial Base for the 21st Century: An Action Plan to Address the Coming Crisis* 43 (July 2008) [hereinafter 2008 DSB Task Force Report]; see also STANGER, *supra* note 12, at 17 (“only about half of the military personnel in the contracting field [in 2009] ‘are certified for their current positions’”).

projects.¹⁶⁰ This means that contracts, including those for intelligence support, are less likely to specify requirements in an adequate matter or to provide for effective monitoring of contractor adherence to these requirements.

Although not directly involving intelligence analysis, the use of contractors for interrogation in Iraq and Afghanistan is a prime example of significant and negative operational impacts from “poorly written requirements statements.”¹⁶¹ Only roughly 35 percent of contract interrogators at Abu Ghraib had previous experience as interrogators, and none were trained in Geneva Conventions obligations or the rules of engagement.¹⁶² Contract interrogators operating at Bagram Air Base during the early years of the Afghanistan conflict were similarly later found to have lacked prior experience.¹⁶³ Although the use of contractors for interrogation is now subject to a waivable ban,¹⁶⁴ the diminished acquisitions workforce in the intelligence community may still affect the government’s ability to limit contractor discretion for intelligence analysis when it is closely associated with other inherently governmental functions.

Further, the lack of acquisitions personnel also means that the government often awards a large contract to a prime contractor which then subcontracts to other entities, effectively assuming the oversight role that would be played by acquisitions personnel if they could manage smaller contracts.¹⁶⁵ For example, Booz Allen Hamilton, the NSA contractor that hired Edward Snowden as an independent contractor to work as an infrastructure analyst, decreased its internal staff by over 15,000 from 2008 through 2013.¹⁶⁶ At the same time, the company increased its number of outside contractors to 8,000, a fact that it touted in at least one quarterly financial report as a cost-savings measure.¹⁶⁷ Given that prime contractors in the intelligence community have a financial incentive to provide intelligence functions at the lowest possible cost, it is imperative that intelligence community acquisitions personnel utilize contract requirements to limit contractor discretion in terms of both minimum qualifications for contractor personnel and in subcontracting beyond the prime contractor level.

Meaningful oversight is the other key element in ensuring that intelligence analysis does not impinge on government performance of inherently governmental functions. However, at the top level, the intelligence community continues to struggle with developing oversight procedures. The GAO has found that, as of 2014, the CIA, ODNI, and three other civilian intelligence agencies had not yet developed internal procedures to address the oversight of contract employees

160. 2008 DSB Task Force Report, *supra* note 159, at 10.

161. Voelz, *supra* note 13, at 601.

162. *Id.*

163. *Id.*

164. National Defense Authorization Act for Fiscal Year 2010, Sec. 1038, PL 111-84, 123 Stat. 2190 (codified at 10 U.S.C. § 801 Note (2012)).

165. STANGER, *supra* note 12, at 91.

166. EPSTEIN, *supra* note 43, at 215.

167. *Id.*

who closely support inherently governmental functions.¹⁶⁸ The same report also recognized that, in general, the Department of Defense does not adequately account for and mitigate operational risks stemming from contracting services that are closely associated with the government decision-making process.¹⁶⁹

There are indications, however, that oversight of intelligence analysis itself is improving in certain areas, such as Department of Defense UAS operations. The Air Force, for example, maintains a 10-1 or 8-1 ratio between military and contractor intelligence analysts and continues to train additional military personnel as analysts.¹⁷⁰ The Army, Navy, and Marine Corps are making similar efforts, generally ensuring that contractor analysts are under military supervision.¹⁷¹ However, as of 2013 contractors still formed the “backbone” of Navy and Marine Corps UAS intelligence missions and analysis.¹⁷² Nevertheless, as one observer concluded, the military services seem to be taking the measures necessary to ensure that contractor intelligence analysis related to UAS tactical intelligence is properly managed in a manner that does not impinge on the inherently governmental functions involved with the use of the analytical product.¹⁷³ However, sustained attentiveness by all IC entities is necessary to ensure that intelligence analysis in other areas continues to be managed and overseen by government personnel.

C. Intelligence Analysis As A “Critical Function”

Under the OFPP 11-01 definition, intelligence analysis can likely be considered a critical function in many situations, due to its core position within the intelligence community’s mission and its recurring, long-term duration. Successful analysis requires interaction with the consumers of intelligence, and “the effectiveness of this interaction depends critically on the level of mutual trust and confidence between the customer and the analyst; and, for policymakers, the road to trust can be a long, hard one.”¹⁷⁴ In this manner, because intelligence analysis is most effective when it is built on recurring, long-term relationships, it bears the hallmark of a critical function. This is especially true due to the unprecedented length of United States involvement in Afghanistan and a return to involvement in Iraq following the rise of the Islamic State. For many areas of operations, intelligence analysis has become a continual, long-standing, and essential process. Accordingly, whereas intelligence analysis for one-off events or rapidly emerging situations may not be a critical function under the OFPP 11-01 definition, as it is short-term in nature and does not impact continued operations, analysis involving

168. 2014 GAO Report, *supra* note 7, at 25.

169. *Id.* at 2-3 (citing multiple GAO reports from 2007–2011).

170. Clanahan, *supra* note 48, at 176-77.

171. *Id.* at 177.

172. *Id.* at 176.

173. *Id.* at 178 (emphasizing the importance of “assigning the majority of analysis functions to military personnel [and] placing ultimate command and decision authority with more senior military officers”).

174. CLARK, *supra* note 1, at 350.

longstanding threats and key areas of interest is significantly more critical to the IC's ability to perform and maintain control of its mission. As such, OFPP 11-01 requires IC entities to maintain the institutional knowledge necessary both to manage the use of contractors for this critical analysis and to carry out the analytical function effectively, should a contractor default or become unable to perform.

Since OFPP 11-01 requires the use of a risk-based approach examining the importance of a function when determining whether that function is critical, whether intelligence analysis is a critical function may turn on the nature of what is being analyzed and how that analysis will be used. Still another key factor that intelligence agencies should consider is the sensitivity of the intelligence involved and how damaging a leak could be to an agency's mission.¹⁷⁵ Writing prior to the Edward Snowden incident, one observer recognized that it is often more difficult to monitor contract employee adherence with security and procedural protocols (such as enforcing provisions regarding reporting foreign travel or significant personal contact with non-U.S. citizens).¹⁷⁶ Even though contractors typically are required to undergo similar security checks, the government's ability to monitor potential exposure to counterintelligence threats is likely lower, especially if this is not stipulated in the contract.¹⁷⁷ Effective monitoring is also more difficult due to the frequency with which contractors change employers.¹⁷⁸ One of the factors that allowed Snowden to gain access to NSA data was his ability to easily move between contractors.¹⁷⁹ Based on these issues, when contracting for intelligence analysis, agencies should carefully weigh security risk factors when determining what constitutes a sufficient internal capability both to oversee contract employees and to monitor counterintelligence threats.

Retention of a sufficient internal capability to provide oversight and accountability over critical functions is particularly important, as the government's ability to perform and manage critical functions can quickly atrophy if not utilized.¹⁸⁰ Further, the high start-up costs involved in returning a critical function to government actors can make it economically infeasible to do so, even if contractor performance would otherwise be ill-advised.¹⁸¹ Thus, when outsourcing intelligence analysis, the intelligence community must take steps to ensure that contractor analysts supplement, but do not subsume, the role of government analysts. This

175. Cf. OFPP POLICY LETTER 11-01, *supra* note 68, 76 Fed. Reg. at 56238 (requiring agencies to consider the agency's mission and the effect of default on mission performance when determining what constitutes sufficient internal capability to control critical functions performed by contractors).

176. Voelz, *supra* note 13, at 603.

177. *Id.*

178. *Id.*

179. See EPSTEIN, *supra* note 43, at 218.

180. VERKUIL, *supra* note 9, at 4.

181. See *id.* at 131 (citing a 2005 RAND Corp. study on Army contracting); see also CWC Report, *supra* note 117, at 39 ("Acquisition decisions that are expedient in the short term can increase costs and constrain government's options in the long term"). In addition to affecting the public sector, the problem of high costs to recapture an outsourced function also plagues private sector entities that outsource business functions to other firms. See THE ECONOMIST, *The trouble with outsourcing*, THE ECONOMIST (July 30, 2001), <http://www.economist.com/node/21524822>.

will help ensure that agencies can properly oversee analysis performed by contractors and that they also have the ability either to resume the analysis function with government personnel or to contract for the function elsewhere, should the original contractor default.

IV. THE COST OF OUTSOURCING INTELLIGENCE ANALYSIS

Many outsourcing initiatives are linked to ideas of reducing the size of the federal government and leveraging the efficiencies of the private sector.¹⁸² These concepts are generally premised on an assumption that the private sector can perform many activities more efficiently. Certainly, some contracts are cost-effective, and, in urgent situations, cost may not be a primary or even secondary concern in obtaining vital analytical support. However, the Senate Select Committee on Intelligence has noted that, in general, “contractor personnel costs tend to be substantially more than government personnel rates.”¹⁸³ Moreover, determining the relative cost-effectiveness of outsourcing is difficult. The intelligence community faces key challenges when calculating the relative cost of contractor services, due to a lack of both resources to collect cost data, a standardized methodology of analyzing costs, and even “generally accepted definitions” of the “cost of government performance and the cost of contractor performance.”¹⁸⁴ Thus, determining the validity of one of the key underlying rationales for outsourcing intelligence analysis is fraught with difficulty.

Even when outsourcing analytical functions appears cost-effective, the total cost of the decision may be obscured. Per unit cost savings may stem, in part, as a result of the government bearing the initial costs of training and providing security clearances to military or civilian intelligence personnel—personnel who then seek employment with contractors, due, in part, to the salary differential between the public and private sectors.¹⁸⁵ A contractor then can offer the services of those personnel to the government at a lower cost than the government would incur in hiring, training, and clearing new personnel. Theoretically, then, contractors can offer higher salaries than the IC, while still undercutting the lifecycle costs of additional government personnel, provided the increased salaries paid to contractor personnel are lower than the cost advantage gained by the contractor in its avoidance of the training, security clearance, and long-term benefit costs that would be incurred by the government.¹⁸⁶

182. See 2009 CRS Report, *supra* note 55, at 4–6.

183. SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT COVERING THE PERIOD JANUARY 5, 2011 TO JANUARY 3, 2013, S. REP. NO. 113–7, at 17 (2013).

184. 2015 CRS Report, *supra* note 5, at 24.

185. See Wallace, *supra* note 10, at 175.

186. Under this simplified model, the contracting firm’s profit would be the difference between the revenue for the contract and the cost of providing the contractor employees. This ignores other costs incurred by contractors that may vary based on the size of the contractor and the complexity of its contracts, such as overhead and bidding costs.

However, as the government already largely bears the training and security costs of these personnel,¹⁸⁷ as well as subsidizing contract employee salaries over the course of continued longstanding contracts, it is very likely that the government could realize cost savings over the long-term by retaining the individuals in issue as government employees in the first place. Thus, while it may be cost-effective to use contractors to bring the expertise of former intelligence analysts to bear on a temporary basis for a rapidly emerging conflict, government entities should be cognizant of the life-cycle costs that accrue when contractors are used as a long-term solution, rather than in a surge capacity.

In activities involving national security and contingency operations, the total cost of using contractors extends beyond the financial price and transaction costs of the contract itself, to include “operational risk . . . , political risk to U.S. goals and objectives, and [the] financial risk of dollars lost to contract fraud and waste.”¹⁸⁸ In the intelligence context, outsourcing analysis presents similar potential risks in the form of security breaches, real-world consequences of analytical errors, and the difficulties involved in monitoring the effectiveness of contractor employees. And, while many of these same risks arise with government employees, such risks are often easier to monitor and control.¹⁸⁹ When the total life-cycle financial and non-financial costs of outsourcing intelligence analysis are taken into consideration, long-term contracting may indeed be economically unwise, even though it might be accomplished within legal and policy constraints.

CONCLUSION

Outsourcing in the intelligence community is a fact of life, one that can provide many benefits in terms of surge capacity and the facilitation of rapid responses to emerging situations. The same is true for intelligence analysis, in which the key expertise necessary to solve a pressing intelligence issue may lie outside the government. However, outsourcing intelligence analysis involves legal and policy issues that caution against extensive or long-term contractor performance. In many ways, these legal and policy risks are common to outsourcing defense and intelligence functions in general. Thus, understanding the trend toward increased outsourcing in the IC that began in the post-Cold War environment, and exploded following the September 11, 2001 attacks, provides a useful context for examining the outsourcing of analytical functions. Further, the evolution of the inherently governmental functions test, and the related categories of critical functions and closely related functions, provides the relevant legal and policy framework for the inquiry, even as it remains important to understand that many of these legal constraints are rooted in executive branch policy that may well be changed by the current or any future administration.

187. For example, as of 2008 Booz Allen Hamilton had over 1,000 former government intelligence officials supporting its contracting efforts. TIM SHORROCK, SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING 363 (2008).

188. CWC Report, *supra* note 117, at 28.

189. See *supra* notes 176–78, and accompanying text.

Examining intelligence analysis using OFPP 11-01's tests for whether a function is inherently governmental suggests that, in the standard case, intelligence analysis is not inherently governmental, *per se*. Analysis alone does not involve the exercise of sovereign authority. However, there may well be instances in which operational constraints restrict the ability to oversee analytical functions in a sufficient manner. In these situations, intelligence analysis, and the assumptions intrinsic to the process, could involve an exercise of discretion sufficient enough to render such functions inherently governmental. When this occurs, the IC should refrain from utilizing contractors until adequate oversight can be restored.

While intelligence analysis is generally not an inherently governmental function, it will, however, regularly be closely associated to an inherently governmental function. This is certainly true for tactical intelligence, due to the close temporal and procedural links between analytical products and real-world targeting decisions. Analysis is also closely associated with inherently governmental functions above the tactical level as well, due to the importance of establishing relationships and trust among analysts, managers of analysts, and decision makers who rely on analytical products. Thus, outsourcing intelligence analysis requires vigorous, meaningful oversight to ensure that the contractor analyst informs, but does not impinge on, the ability of decision makers to make independent decisions on behalf of the government. The military services' general approach of robust oversight of contract analysts in their UAS programs serves as a potential model for the rest of the intelligence community in this regard. However, this is complicated by the fact that a weakened government acquisitions workforce often struggles to define contract requirements adequately at the time a contract is issued and likewise to oversee adherence to contracts that are in place.

Intelligence analysis will also frequently qualify as a critical function under the OFPP 11-01 definition, given the longstanding operations that the IC supports and the key role intelligence plays in these operations. Under OFPP 11-01's guidance, agencies must ensure they maintain a sufficient internal capacity to manage contractors properly and to retain ultimate accountability for the analysis products produced by intelligence contractors. This involves ensuring that IC entities have the ability either to locate and implement another contract solution, or to return analytical functions in-house in the event of contractor default. This is particularly true in the case of sole-source contracts and requires that IC entities retain oversight personnel at levels low enough to enable them truly to understand the role played by contractors in the analytical process. Consumers of analytical products within the IC, the military, and the executive branch all have a role to play in ensuring that they are making independent, informed decisions based on an analytical process guided by government personnel.

In addition to the legal and policy requirements of OFPP 11-01 and other sources, the relative costs of using contractors should also play a role in the decision whether to outsource analysis. While contractors can provide crucial surge capacity, many sources suggest that long-term reliance on contractors is not cost-

effective, especially when considering that, in many cases, the cost advantage of contractors may stem from the fact that the government has borne the initial financial burden of training and providing security clearances for contractor employees. Moreover, the use of contractors also gives rise to other forms of operational and fiscal risk that intelligence agencies should contemplate when making outsourcing decisions.

Beyond careful analysis at the agency level, Congress should work to ensure that personnel ceilings do not force intelligence community entities to outsource closely associated or critical functions, or result in a reduction of the oversight personnel necessary to hold existing contractors exercising these functions accountable. The Senate and House Select Committees on Intelligence should continue to monitor the use of contractors and remain attentive to signs that contract-provided analysis is not being subjected to meaningful oversight. Further, Congress and the executive branch should rebuild the acquisitions workforce within the civilian and military components of the intelligence community to ensure that contracts for intelligence analysis provide *ex ante* limits on discretion, as well as detailed requirements in terms of contractor employee qualifications and experience. A robust acquisitions workforce will provide for more effective monitoring and reduce incidents of fraud or abuse. Taken together, these recommendations will ensure that the intelligence community will remain capable of turning to the private sector for key areas of analytical expertise to meet emerging threats, while still maintaining long-term control over their inherently governmental functions.
