

INTELLIGENCE COMMUNITY CONTRACTORS: ARE WE STRIKING THE RIGHT BALANCE

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE
DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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INTELLIGENCE COMMUNITY CONTRACTORS: ARE WE STRIKING THE RIGHT BALANCE?

TUESDAY SEPTEMBER 20, 2011

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, THE FEDERAL WORKFORCE,
AND THE DISTRICT OF COLUMBIA,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:32 a.m., in Room SD-342, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Subcommittee, presiding.

Present: Senators Akaka, Levin, Landrieu, Begich, Johnson, Coburn and Moran.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. I call this meeting and hearing of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia to order.

I want to welcome our guests and our witnesses. Aloha and thank you so much for being here.

Today, the Subcommittee will examine the Intelligence Community's (IC) reliance on contractors and whether the IC has rebalanced its workforce in the decade since the September 11, 2001 attacks.

After the attacks, intelligence agencies had to rapidly surge their workforces and turned to private contractors to fill gaps. While I understand the initial need to rely on the contractors, I am concerned that 10 years later the IC remains too heavily dependent on contractors. According to an investigation by the *Washington Post*, close to 30 percent of the current IC workforce are contractors.

Although contractors undoubtedly have contributed greatly to keeping this country safe over the last decade, our overreliance on contractors raises a number of concerns. Federal workforce challenges contribute to the heavy reliance on contractors. The IC has gaps in language, technical and certain other skills. IC contracting firms often pay more, increasing the challenge of recruiting and retaining Federal employees instead of contracting for the work.

Despite these challenges, the Office of the Director of National Intelligence (DNI), which oversees the 16 elements of the IC, last published an IC Strategic Human Capital Plan in 2006. The IC must invest in the strategic planning and training needed to ad-

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dress its long-term workforce needs, and Congress must make sure the IC has the tools required to recruit and retain the best.

Additionally, I am concerned that contractors are improperly performing inherently governmental functions that are reserved for Federal employees. The IC must exercise sufficient oversight to make sure those tasks are completed by a Federal worker.

The acquisition workforce is critical for proper contractor oversight and management, but there are significant shortfalls governmentwide, including within the IC. We must ensure that the IC acquisition workforce has the staff and training needed to promote the efficient, effective, and appropriate use of contractors.

Given the current budget pressures, I am also concerned about the high cost of IC contractors. Several estimates show that contract employees cost significantly more than Federal employees in the IC. A recent study by the Project on Government Oversight (POGO) on governmentwide contracting found that Federal employees were less expensive than contractors in 33 out of 35 occupational categories. In the decade since September 11, 2001, intelligence contracting firms have reaped huge profits paid for by the American taxpayer.

Finally, the movement between government and contracting firms raises a risk that decisions made within the IC could be influenced by conflicts of interest. Former Central Intelligence Agency (CIA) Director Michael Hayden instituted a cooling off period at the CIA, but there is no IC-wide approach. I would like to hear from our witnesses on how conflicts can be prevented.

As part of its effort to rebalance the workforce, the Administration announced plans to insource core governmental functions that should be reserved for Federal employees. I hope to learn today whether these efforts have been effective and what additional steps are needed.

I look forward to the testimony and to a productive discussion with our witnesses.

I want to welcome our witness for the first panel, Daniel I. Gordon, who is the Administrator of the Office of Federal Procurement Policy (OFPP) at the Office of Management and Budget (OMB).

As you know, it is the custom of the Subcommittee to swear in all witnesses, and I would ask you to stand and raise your right hand.

Do you solemnly swear that the testimony you are about to give the Subcommittee is the truth, the whole truth, nothing but the truth, so help you, God?

Mr. GORDON. I do, sir.

Senator AKAKA. Thank you very much.

Let it be noted for the record that the witness answered in the affirmative.

Before we start, I want you to know that your full written statement will be made a part of the record, and I would also like to remind you to please limit your oral remarks to 5 minutes.

Administrator Gordon, please proceed with your statement.

**TESTIMONY OF HON. DANIEL I. GORDON,¹ ADMINISTRATOR,
FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGE-
MENT AND BUDGET**

Mr. GORDON. Thank you, Chairman Akaka. Good morning.
Senator AKAKA. Good morning.

Mr. GORDON. I very much appreciate the opportunity to appear before you this morning to discuss the rebalancing of the mix of work performed by Federal employees and contractors.

As you know, last week, our office issued the final version of the policy letter² on the *Performance of Inherently Governmental and Critical Functions*. That policy letter, and its issuance, is an important milestone. It clarifies for the Federal agencies and for the public how we are going to balance the capabilities and capacity of Federal employees and the contractors who support us in our work.

This has been a long process, a very public and transparent process, in which we received many comments, and the final issuance of this policy letter fulfills the commitment by the President in March 2009, in his Memorandum on Government contracting that we need to clarify the line that has become blurred over the years between work that can be contracted out and work, as you say, Mr. Chairman, that needs to be reserved for performance by Federal employees.

I cannot say that the new guidance dramatically changes the current policy landscape, and in fact, the final version of our policy letter largely tracks the draft, but there are several improvements and changes that I would like to briefly highlight this morning because we think that those improvements should help the agencies understand the proper role for Federal employees and for contractors in today's world, which I should say is notably more complex than when we last issued a policy letter almost 20 years.

I appreciate that this morning you are particularly interested in the application of these policies to the Intelligence Community. As I explained in my written statement, our work in the Office of Federal Procurement Policy is governmentwide procurement policy, and consistent with that the policy letter takes a governmentwide approach. That said, I will point out in my statement, now and in response to questions, particular issues related to the Intelligence Community. And, of course, we talked with agencies in the Intelligence Community throughout the development of the policy letter.

We do think that the policy letter will serve the Intelligence Community well as they work to strike the right balance between the use of Federal employees and contractors.

That said, three points in brief:

First, the policy letter establishes a single standard definition of what inherently governmental functions are. It adopts the statutory definition from the Federal Activities Inventory Reform Act (FAIR Act). We appreciate having that single definition will require changes to the Federal Acquisition Regulation (FAR) and other documents, and we plan to proceed to do that expeditiously.

The policy letter goes beyond the definition though. It provides criteria and tests and examples for agencies, not exhaustive lists

¹ The prepared statement of Mr. Gordon appears in the appendix on page 41.

² The policy letter referenced by Mr. Gordon appears in the appendix on page 83.

because we appreciate that when we identify something as an inherently governmental activity it does not mean that things not on the list can be performed by contractors. That is why we provide the criteria and the tests.

We preserve in the policy letter what has been long established, and that is that the direction and control of intelligence and counterintelligence operations continues to be viewed as an inherently governmental function.

The final version does address some other areas of particular importance overseas, such as the use of contractors in security operations connected with combat, or potential combat.

Second, and perhaps most important, in the area of definitions, the policy letter calls on agencies to identify their critical functions and to assess whether they are unduly dependent on contractors in those critical functions. We emphasize that agencies need to maintain control by Federal employees, of their mission and operations, of particular relevance in the intelligence area.

And third, the policy letter lays out management responsibility that agencies have to follow to ensure that the rebalancing is happening and that they are not unduly dependent on contractors. That is important in the area of closely associated functions; that is, functions closely associated with inherently governmental ones, an important area in the Intelligence Community.

It is also important in the area of insourcing. We are very concerned that insourcing not be taken, done, in a way that unduly harms small businesses, and we provide guidance in that area.

I should say, Mr. Chairman, that we have worked with agencies, including in the Intelligence Community, in my almost 2 years in this position, and I think it is fair to say that the agencies, particularly in the Intelligence Community, are already following the core elements of the policy letter. We do not expect to see a widespread shift away from contractors because of the issuance of the policy letter. We do think that the policy letter will help agencies do a better job in identifying if, and when, rebalancing is needed and to take action if action is needed.

As I said, we will be working to implement areas of the policy letter in the Federal Acquisition Regulation, and other documents as we assess what training is needed and we help the agencies establish training, to be sure that the message gets out that we need to be careful that we respect the line between work that can be contracted out and work that needs to be reserved for performance by Federal employees.

I very much appreciate your interest and the Subcommittee's interest, Mr. Chairman, in this important topic. We look forward to working with the Subcommittee and with other Members of Congress as we move forward.

This concludes my brief opening remarks. I would be honored to answer any questions the Chairman may have.

Senator AKAKA. Thank you very much.

Administrator Gordon, as you know, part of the President's plan for economic growth and deficit reduction seeks to end the overpayment of Federal contract executives. Of course, that is the latest word.

In justifying this proposal, he indicates that it is inappropriate for taxpayers to fund Federal contractor salaries that are—and he uses the word—multiples of what Federal employees are paid. The proposal is expected to save \$300 million annually.

Would you elaborate on this proposal and why the Administration supports it?

Mr. GORDON. With pleasure, Mr. Chairman.

As you know, in most cases, when the Federal Government buys the way Americans buy in general; that is to say we pay fixed prices.

However, in the government contractor arena, in a minority of our purchases, we have a different arrangement and one that is somewhat riskier for the government. In that minority of cases, we reimburse contractors for their costs and then on top of reimbursement we pay them a fee for their profit. In those cases, there is concern about how much we are paying those contractors because, obviously, if we reimburse someone their costs, just like if I were to tell a plumber in my home, I will reimburse whatever your costs are, they have no incentive to limit their costs.

And as a result, we have a number of statutory and regulatory limits on how much we will reimburse. The general rule of thumb, if you will, is reimbursement should not go beyond what is reasonable. That is a general limit.

In the area of reimbursement for executives' compensation, we are usually talking about indirect costs pools. And without getting into too many details, the bottom line is that Congress, a number of years ago, established a cap on how much the government should reimburse contractors for their executive compensation for their five most highly paid executives.

Those caps used to be on the order of \$200,000 or \$300,000 a year in terms of the compensation that we would be willing to compensate, that we would be willing to pay the contractors for. Over the years, the statutory formula that Congress crafted in the 1990s has worked in a way that I do not think anybody anticipated so that the cap has gone up dramatically by hundreds of thousands of dollars and is now well over \$600,000 a year.

It is that payment that strikes us as excessive. I do not think anybody anticipated that the cap would go up so fast. And what we are saying is in a time when we are limiting Federal employees' salaries, and in fact, freezing Federal employees' salaries, it seems unreasonable to continue to dramatically increase the amount that we compensate through the reimbursement process to contractors.

If the contractors want to pay their executives millions of dollars, they are free to do that. We are saying we will only reimburse up to this cap.

Senator AKAKA. Thank you, Administrator Gordon.

OFPP invited public comment on its draft policy guidance in March 2010. A number of respondents, including 30,000 who signed a form letter, argued that the list of examples of inherently governmental functions was too narrow and should include more functions, particularly involving intelligence. The final guidance contains only one intelligence example, which is unchanged from the draft.

How did OFPP determine which functions to include and why did you not expand examples related to intelligence?

Mr. GORDON. Thank you, Mr. Chairman.

As you say, we received a good number of comment letters. Many of them were form letters, but we received 110 comment letters that were not form letters. They addressed various issues from different aspects because, of course, this was a very public process.

In the area of intelligence, we actually received fairly few comments. It is true that a few called for an expansion of the list of inherently governmental functions. One area that they noted in particular was interrogations, and we considered adding something to the list of inherently governmental functions. Let me explain why we decided not to add interrogation as an inherently governmental function.

The fact is that Congress enacted legislation that generally bars, in particular the Department of Defense (DOD), from using contractors in certain interrogation functions. So to a certain extent, the problem did not need to be addressed. But in addition, in that prohibition Congress allowed the Secretary of Defense to waive the restriction.

In our view, the very fact that the Secretary is allowed by statute to waive the restriction suggests that Congress did not view the function as inherently governmental per se because, of course, you do not want to have a member of the Cabinet allowing inherently governmental functions to be contracted out. As a result, we thought it was wiser to leave the statutory scheme in place and not change the list.

I will tell you, as I mentioned in my opening statement, we worked very carefully and closely with both the intelligence agencies and with the Department of Defense more generally, and I think it is fair to say that they were very comfortable with the guidance that we developed. I think that the management guidance and the guidance in the area with respect to critical functions is going to be particularly helpful in the Intelligence Community.

Senator AKAKA. Thank you.

Administrator Gordon, I am pleased that the Administration issued the final policy guidance last week. How will you go about educating both Federal employees and contractors about its contents? And I am particularly interested about your outreach and education efforts for the IC workforce.

Mr. GORDON. In everything that we do in the Office of Federal Procurement Policy, Mr. Chairman, we work very closely with the agencies across the Executive Branch, both in the Intelligence Community and outside.

We have explicitly stated in the policy letter that every agency, except for the very small ones, needs to identify one or more senior officials who are going to be accountable for the implementation of the policy letter, to us in the Office of Management and Budget.

We direct the agencies that they need to develop and maintain internal procedures to be sure that the policy letter is implemented.

We require them to review the guidance that they have at least once every 2 years to be sure that they are acting appropriately.

We tell the agencies that they need to ensure that their employees understand their responsibilities under the policy letter.

We require training no less than every 2 years to improve agency employee's awareness of their responsibilities.

And, we require management controls.

I should say that we will be working with the Defense Acquisition University and the Federal Acquisition Institute to be sure that appropriate materials for training are developed government-wide.

I would add, Mr. Chairman, that I think that the Intelligence Community has been really ahead of the curve in these past several years in being focused on the need to address rebalancing and concern about excessive reliance on contractors so that in many ways I think the Intelligence Community has been a role model in terms of its sensitivity to the need to address overreliance on contractors.

There is a limit to what I can say here in this open session, but I know that you will have the opportunity later this morning to hear from the leadership in the Intelligence Community, and you will hear much more by way of specifics than I can disclose here, about the progress that they are making.

Senator AKAKA. Thank you very much.

Administrator Gordon, as you know, the final policy guidance defines critical functions as those functions necessary to an agency being able to effectively perform and maintain control of its mission and operations. What process should the IC use to determine whether specific functions are critical as defined in the policy letter?

Mr. GORDON. Mr. Chairman, again, I think in this area the Intelligence Community has actually shown leadership that other agencies can learn from. In particular, the Intelligence Community has focused on the need to have an inventory of contractors, what the contractors do, and the many other agencies across the Department of Defense and in the civilian agencies actually are struggling to put together an inventory of their service contractors that is as comprehensive and as thoughtful as what has been created within the Intelligence Community.

The term, "critical function", may be a relatively new term for the Intelligence Community, but I think that what they have been looking at, when they look at core contract personnel, very much overlaps the idea of critical functions and the idea of functions that are closely associated with inherently governmental ones.

So I think that the agencies in the Intelligence Community and elsewhere need to focus on what are their critical functions, and in those critical functions they need to do an assessment, as I think the Intelligence Community has been doing now for several years, about whether Federal employees are present in sufficient numbers, with sufficient capabilities, to maintain control of the agencies' mission and operations.

Senator AKAKA. I see. Well, I want to thank you very much, Administrator Gordon, and commend you for what you have been doing and the progress that has been made. But we needed to highlight some of these things so that we can see what actually is happening.

So do you have further comments?

Mr. GORDON. If I could, Mr. Chairman, I would say that I think that your commitment to this issue and the Subcommittee's interest in the issue are particularly timely today.

I think that your commitment will be tested in the months to come because there are those who, I think in a myopic way, focus on reducing the size of the Federal Government and what they really mean is reducing the size of the Federal workforce.

The fact is in the Intelligence Community, as in other agencies, the Federal Government has important tasks that need to be done. And if arbitrary reductions in the size of the Federal workforce are put in place, we could have a situation, as we have unfortunately seen in the past, where agencies turn in an unjustified and unthoughtful way to contractors to do work that, on reflection, the agencies recognize should be done by Federal employees, so that your vigilance in thinking about and preserving the appropriate balance between work done by Federal employees and by contractors, I think, will be tested in the months to come. And I very much appreciate your commitment to ensuring that the right balance is struck.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Administrator Gordon. You are correct when you say that it is timely. And with the situation our country is in economically, we need to do this throughout the system really, not only with the IC, and see what we can do in helping our country.

Mr. GORDON. Thank you, Mr. Chairman.

Senator AKAKA. So I want to thank you so much for your testimony and your responses. It will be helpful because I know you understand that we are doing this to try to work together to improve the systems that we have in place. And, of course, intelligence is one of the areas that is so important to our Nation, and we need to have it work well, as well as sustain it the best that we can, and we need to work together to do this.

So I thank you so much for your work.

Mr. GORDON. Thank you sir.

Senator AKAKA. Thank you.

So let me ask the second panel to please come forward.

I want to welcome Charles E. Allen who is the Senior Intelligence Advisor, Intelligence and National Security Alliance, Dr. Mark M. Lowenthal who is President and CEO of the Intelligence and Security Academy, Scott H. Amey, General Counsel of the Project on Government Oversight, and Joshua Foust, a Fellow at the American Security Project.

As you know, it is the custom of this Subcommittee to swear in all witnesses. So I would ask you to stand and raise your right hands.

Do you swear that the testimony you are about to give the Subcommittee is the truth and nothing but the truth, so help you, God?

Mr. ALLEN. I do.

Dr. LOWENTHAL. I do.

Mr. AMEY. I do.

Mr. FOUST. I do.

Senator AKAKA. Thank you.

Let it be noted for the record that the witnesses answered in the affirmative.

Before we start, I want to again remind you that your full written statements will be included in the record, and we ask you to please limit your oral remarks to 5 minutes.

So, Mr. Allen, will you please proceed with your statement.

TESTIMONY OF HON. CHARLES E. ALLEN,¹ SENIOR INTELLIGENCE ADVISOR, INTELLIGENCE AND NATIONAL SECURITY ALLIANCE.

Mr. ALLEN. Thank you, Mr. Chairman. It is a pleasure to be here and to have the opportunity to speak on this very vital subject.

As you indicated, I am representing the Intelligence and National Security Alliance (INSA). INSA is a small nonprofit organization that serves as a forum where individuals from the public, private, and academic sectors associated with intelligence and national security communities can come together to discuss issues of common concern and offer suggestions to policymakers.

Most recently, INSA has published papers on cyber intelligence, homeland security intelligence, organizational conflict of interest and recommendations for smart reductions for the Intelligence Community in the current challenging fiscal environment. We will soon publish a paper on improving the security clearance process for contractors.

INSA tries to represent the best interests and concerns of both public and private sectors, and I believe we can provide you a unique perspective on the topic of Intelligence Community contractors.

I have been associated with the Intelligence Community for over 50 years. I joined the CIA in 1958 and served there 47 years. I was the Under Secretary for Homeland Security for Intelligence and Analysis from 2005 to 2008.

In many of these assignments, particularly when we were trying to develop new organizations and capabilities to confront new threats, we would inevitably be faced with a dilemma, that we needed an individual with a certain skill or talent that was not readily available within the organization, for example, unique foreign language skills or unconventional information technology skills. Often, the best solution in those circumstances was enter into a contract with a trusted private company which could provide such a skill set in short term.

In earlier days, the numbers were small. In recent years, because of the complex asymmetric threat of terrorism, these numbers have grown substantially, and finding the right balance of government workers supported by qualified contractors with unique skill sets has become increasingly complex.

It was a good thing and very timely that the Office of Federal Procurement Policy finalized the policy letter on "*Performance of Inherently Governmental and Critical Functions*" last week. While the Intelligence Community has been carefully following interim guidance issued in March 2010, publication of this definitive policy sends a clear message regarding the importance of the topic.

¹ The prepared statement of Mr. Allen appears in the appendix on page 47.

The policy letter does a good job of outlining what constitutes “inherently governmental” and what constitutes “critical functions”, and provides the guidance the Intelligence Community needs to ensure that functions that are intimately related to the public interest are performed only by Federal employees.

Requiring Intelligence Community agencies to carefully prioritize critical functions and judiciously maintain management, oversight, and control of those functions ensures that the agencies operate effectively and maintains control of their missions and operations, but it gives them the flexibility to find the right Federal employee/contractor balance when very unique skills may be required to perform the critical function.

I do believe that Intelligence Community agencies have dramatically improved management of the contractor workforce as part of the strategic workforce planning efforts that the Director of National Intelligence requires.

When I was the Under Secretary for Intelligence and Analysis at the Department of Homeland Security (DHS), I did not ask if the intelligence products or inputs were developed by a contractor or by government employees, but I knew I had put in proper safeguards to ensure that priorities and final analytic judgments—inherently governmental functions in my estimation—were the ultimate responsibility of Federal employees. That said, from my perspective, contractors were part of the team and they were held to the same standard as other government employees on my staff.

The Intelligence Community has a lot of experience in lessons learned, managing the contractor workforce, particularly over the last 10 years when the need for manpower and expertise increased exponentially, then the Intelligence Community had little choice initially, than to seek immediate support from qualified, trusted companies in the private sector.

In your letter of invitation, you asked me to comment on how the Intelligence Community addresses organizational conflict of interest (OCI). The potential for OCI is always there and there must be management procedures to safeguard against any such conflict.

We did a study at INSA earlier this year and could not come across a single instance of an IC contractor intentionally playing the role of a bad actor in any Intelligence Community activity.

The study also found that each Intelligence Community agency had its own policy with regard to OCI and that these policies were not always consistent. We recommended that the Director of National Intelligence should provide policy guidance to create some level of consistency on the issue of OCI.

With regard to hiring, training and retention challenges in balancing the Intelligence Community, they differ little from the challenges facing the Federal Government writ large. The IC has a large portion of its workforce nearing retirement, and replacing such expertise will be a challenge because of a gap in the mid-career population created by the hiring freezes in the 1990s, pre-September 11. Conversely, well over 50 percent of the workforce has been hired since September 11, 2001. These demographics would suggest that the Intelligence Community continue to rely on contractors for certain skills, at least until these challenging demographics moderate themselves over time.

I will stop there and look forward to your questions, Mr. Chairman.

Senator AKAKA. Thank you very much, Mr. Allen.

Mr. Lowenthal, will you please proceed with your testimony?

**TESTIMONY OF MARK M. LOWENTHAL,¹ PH.D., PRESIDENT
AND CEO, THE INTELLIGENCE AND SECURITY ACADEMY, LLC**

Dr. LOWENTHAL. Thank you, Mr. Chairman. Thank you for the opportunity to appear today.

I spent 25 years in Federal service. During my last tour in 2002 to 2005, I was the Assistant Director of Central Intelligence for Analysis and Production, which was the third highest ranking position in the Intelligence Community. And I would note that half of my staff were made up of contractors, and their services were vital to me and vital to the mission that Director George Tenet had given to me. Since then, I have been a contractor. I was also a contractor from 1997 to 2002. So I have seen this from both sides. I was also the Staff Director of the House Intelligence Committee. So I have also seen this from the congressional perspective.

The question that is posed in the title of the hearing is one of balance. Let me suggest another way of looking at this. Instead of balance and ratios, I think we should be asking ourselves what is the most efficient, most cost effective way of getting the necessary jobs done. And it is not necessarily a balance and ratio answer.

Your letter asked me to comment on four questions, and I will do that briefly. Regarding the OFPP letter, I think that the letter has done a very good job, as Mr. Allen just said, in defining inherently governmental functions. I think their lists in the letter and in Appendix A make sense and are fairly easy to follow and should be implemented. And the Intelligence Community is pretty much doing that as far as I can tell.

I have some issues with Appendix B, which is functions closely associated with the performance of inherently governmental functions because several items on that list strike me as being areas where you could have a contractor do good work.

I come to this conclusion based on my own experience as the Assistant Director because two of our major initiatives that we undertook—the National Intelligence Priorities Framework (NIPF) and the Analytic Resources Catalog (ARC), both of which we built to manage the Intelligence Community under President George Bush and which President Barack Obama continues to use to manage the community—were built with major inputs from contractors, and their work was the highest quality. It was highly objective, and it was absolutely necessary. And we could not have put in place these major programs without contractor support.

Second was the question of how we assess the value of contractors. I think we have to recognize why contractors get hired. It is the budget you get. If the budget says you can hire so many full-time employees and so much money for contracting, there is your answer. Agencies will spend the money they get in the lanes in which they get it, but they do not have a lot of say about the allocations once Congress produces a budget and the President signs it.

¹The prepared statement of Dr. Lowenthal appears in the appendix on page 52.

We seem to be going through a series of fashions regarding contractors. In the 1990s, it was generally assumed that contractors were cheaper than Federal employees because you could terminate a contract at will and you were not committed to their health care and to their pension costs, and therefore, contractors were cheaper. Now everybody knows that contractors load their rates because they are paying for health care and pensions costs. So it was probably a null set, but we tended to hire more contractors.

At the same time, the intelligence budget in the 1990s was flat, and so the shortfall in personnel was made up for by hiring contractors. Then, after we were attacked in 2001 and it was necessary to ramp up our skill set quickly, we turned back to contractors again because that is where the relevant talent was. So we sort of have this up and down, back and forth fashion.

The third issue is the question of how we manage and oversee Intelligence Community contractors. The vital issue here, the major difference in intelligence contractors and the Department of Defense contractors is the issue of getting security clearances. You have to have a clearance to be a contractor in those areas.

The letter inviting me to testify, in your opening statement, made reference to the *Washington Post* series on the use of contractors. I would tell you, sir, that most of my professional colleagues found that series to be hyperbolic in tone and highly subjective and not terribly informative.

Yes, there are a lot of contractors with clearances, but the reason you get clearance is because the government tells you in order to work on this contract you need cleared employees. It is not our idea. I assure you it would be easier to run my firm if I did not have to have clearance requirements.

This leads to two interesting side effects. One you have already noted is rating Federal employees to hire as contractors. You made reference to General Hayden's one year cooling off period. I think his rule is a very sensible rule, and I think that would be a good rule to put across the Intelligence Community.

Second, it creates competition among contractors to acquire other firms not so much for the work they have but to pick up a lot of people who are cleared.

And so, the requirement for cleared employees has an interesting side effect.

Finally, there is the issue of the balance of the workforce. The demographics of our analytic workforce are very disturbing in my view, as somebody who used to manage the workforce. The budget was flat in the 1990s, and as Director Tenet pointed out several times, we lost the equivalent of 23,000 positions across the Intelligence Community, either people who were never hired or people who were not backfilled when they left. And so, the net result is a huge loss in manpower.

Then, after we were attacked in 2001, we started hiring a lot of new people. So if you look across the 16 agencies, 50 percent of the analytic workforce has less than 5 years of experience. So we probably have the least experienced analytic workforce that we have had since 1947 when we first created the community.

And so, the way that we have made up for this is to hire contractors because the contractors, the people who left the community, were the people who had the residual expertise.

And this demographic is going to play out for several years to come, and so the demographics on the analytic side are a little bit scary, if you will.

I have in my prepared statement some other ideas I think the Subcommittee should look at. In the interest of time, I will skip over those.

I will just close with what I said at the beginning. I do not think it is so much a question of balance and ratio. I think it is a question of what is the best way to get the job done, and I think there are lots of alternatives. And it has to be, I think, a case-by-case kind of issue.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Dr. Lowenthal.

Mr. Amey, will you please proceed with your testimony?

**TESTIMONY OF SCOTT H. AMEY,¹ GENERAL COUNSEL,
PROJECT ON GOVERNMENT OVERSIGHT.**

Mr. AMEY. Good morning. I want to thank Chairman Akaka and the Subcommittee for asking the Project on Government Oversight to testify today.

In light of today's hearing, the Members of this Subcommittee should be asking what intelligence services are we buying and whether we have the appropriate balance of Federal and contractor employees supporting the IC.

I am typically able to provide a general assessment of an agency's contracting portfolio because the public has access to basic information via the Web. However, in the case of the IC, the doors to such data are closed. For example, missions, contract awards, dollar amounts, and the number of contractor personnel are classified and therefore not publicly available.

Data had been made available in the mid-2000s with an inventory of IC core contractor personnel which documented that the IC's budget was roughly \$42 billion, approximately 70 percent of the IC budget was spent on contracts and that the government workforce was approximately \$100,000, and contractors comprised approximately 28 percent of the total IC workforce.

Based on the public release of the overall intelligence appropriations request earlier this year for \$55 billion, it does not look like much has changed. POGO is concerned that despite some additional disclosures prompted by previous calls by Congress and the Intelligence Community Directive 612, little has changed over the years.

For example, a 2009 report by the Senate Select Committee on Intelligence stated that it was trying to enhance personnel management authority, improve IC personnel planning, account for the number and use of the growing number of contractors and replace contractors with Federal employees. The increased cost due to reliance on contractors was also cited in that report.

¹The prepared statement of Mr. Amey appears in the appendix on page 59.

However, last week, Senator Feinstein raised IC concerns at a joint hearing of the Senate and House Select Committees on Intelligence. The Senator raised concerns about the continued high use of contractors, the use of IC contractors for inherently governmental functions that should be performed by government employees and the high cost of using contractors.

Those are separated by approximately 2 years but sound very similar.

Earlier this month, DOD released a report about its fiscal year 2010 insourcing actions. Intelligence work involved about 1 percent of the jobs insourced by DOD. Not surprising, the rationale for insourcing those 170 intelligence jobs was cost 64 percent of the time, inherently governmental functions 16 percent of the time and closely associated functions about 9 percent of the time.

The cost of hiring contractors has been raised before by the government, and in POGO's most recent report called "*Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*," many of the job classifications POGO analyzed are typically characterized as commercial services that can be found in the Yellow Pages.

However, with respect to the subject of today's hearing, it is worth pointing out that in 2008 the government outsourced approximately 28 percent of its intelligence workforce and paid contractors 1.6 times what it cost to have that work performed by government employees. The ratio was \$207,000 annually for a contractor employee versus \$125,000 for a Federal employee.

POGO's analysis supported those findings. POGO analyzed the costs associated with outsourcing language specialists, which are frequently used to perform intelligence functions, and found that contractors may be billing the government on average \$211,000 per year, more than 1.9 times the \$110,000 per year the government compensates a Federal employee.

Outsourcing work to Federal contractors is premised on the theory that it provides flexibility to the government to meet its needs. That may be true in certain circumstances, but outsourcing work, especially in certain sensitive program areas, may actually cost the government because you have to remember government employees, unlike contractors, can perform both inherently governmental functions as well as noninherently governmental functions.

The government might be more flexible to adapt to changing policies, missions, and intelligence operations if we did not have to worry about its contractors staying in inherently governmental work. We do not want contractors and contracting officers bickering in the field over what is or is not an inherently governmental function, and taxpayers should not have to pay for the additional expense to supplement the contractor workforce every time work treads close to the inherently governmental function line.

POGO recommends that IC agencies and Congress conduct assessments of IC service contracts in order to gain a better understanding of the type of services procured, the total dollars awarded, and to compare the cost of using Federal employees as compared to contractors. To the extent possible, these assessments should be made publicly available.

I would also urge all IC agencies to review the Office of Federal Procurement's new guidance on work reserved for government em-

ployees to ensure that contractors are not performing inherently governmental functions.

Finally, I would urge the Senate to consider not imposing IC full-time equivalent (FTE) ceilings. Such restrictions prevent the government from operating at optimal efficiency and flexibility, and in the long run might result in increased costs for agencies and taxpayers.

Thank you for inviting me to testify today. I look forward to answering any questions and working with the Subcommittee to further explore how intelligence contracting can be improved.

Senator AKAKA. Thank you very much, Mr. Amey, for your testimony.

Mr. Foust, will you please continue with your testimony?

**TESTIMONY OF JOSHUA FOUST,¹ FELLOW, AMERICAN
SECURITY PROJECT**

Mr. FOUST. Chairman Akaka, thank you very much for inviting me here this morning.

So there is very broad public agreement that the government must take measures to respond to the explosive growth of contracting in the IC. Now the government tends to contract out services when it does not have employees with the skill set to perform a given function, like building a drone, understanding a certain piece of information that has come in, or so on.

But this public consensus that contracting needs to be curtailed is based on some, I think, faulty assumptions. One of them is that the industry of contracting has grown beyond anyone's ability to control it, that it results in widespread fraud, waste, and abuse, and that the fundamental nature of contracting itself presents analysts, agents, and officers of the Intelligence Community with irreconcilable conflicts of interest.

I think these are actually the wrong issues to be focusing on because they do not address the real problems that plague the IC's reliance on contractors. The biggest problem facing the IC contracting industry is not that some contractors might abuse the system but rather that the government has designed a system that can encourage abuse.

Missing in the public examination of the IC contracting industry is the role that the government itself plays. Ultimately, the government is responsible for the conduct of the companies that it hires to perform functions. While any violations of rules that are already in place merit investigation and prosecution, contractor behavior commonly labeled as misconduct is really perfectly legal and within the bounds of the contract agreements that companies sign with their government clients.

The current state of contracting within the IC is incoherent. There is broad confusion about the nature of what are appropriate government roles and contractor roles, along with inconsistent accountability and poor resourcing for accountability mechanisms. Contracts are often worded vaguely or incompletely, and with ever-changing requirements, deliverables, and performance metrics, all of which are supposed to catalogue and record how a company ful-

¹ The prepared statement of Mr. Foust appears in the appendix on page 65.

fills a contract. They create an environment rife for exploitation by companies seeking to extract revenue from the process.

Every contract that the government issues for a company to perform work is defined by a Statement of Work (SOW). This is a document that defines the parameters of the work the contractor will perform, including a description of the project, expected duties the contractor must fulfill, and the outputs and metrics by which performance will be measured. These are often poorly written, kept intentionally vague and wind up not actually addressing the stated intent of the contracts.

As one example, every statement of work I've had to either administer, edit, review, or write has stated as a basic metric of performance the number of employees the contractor should hire. That is the basic means by which the government measures the contractor's performance is based first and foremost on the number of people hired to work on the contract. This has two serious consequences that affect the contracting environment. It removes the distinction between the employees that would make work products better, and it confuses the number of employees with contract performance.

This bizarre system of hiring intelligence contractors is born from several interdependent processes that I go into more detail in my written testimony.

But there is a very real distinction between the qualifications and credentials that are put in place to hire contractors to perform work. Often, a high level clearance is mistaken as qualification to perform a given type of work, which leads to questionable product outcomes and questionable program outcomes.

Furthermore, poorly worded SOWs can place contractors in positions that introduce potential conflicts of interest. This can include hiring contractors to work in a government facility security office which puts them in charge of reading on competitor contracts, which is also a situation I have encountered while working in the Intelligence Community.

The SOW system is also unclear on what constitutes deliverable and contractor outcomes. This makes it difficult for the government to control costs, measure outputs, and measure if the contractors are performing the terms of their contracts in a reasonable way.

It also misidentifies what outcomes really are. Simply sitting in a chair and turning out reports might be an outcome the government desires, but absent measuring the context of those reports and the value that the contractors provide the government, it is difficult to say for certain that the contracted tasks actually help the government function.

The broader question of what constitutes an inherently governmental function is slightly beyond my perspective and authoritativeness. I do not have direct experience that would give me an authoritative stance on functions that should never be performed by a civilian contractor, but I have encountered situations in which contractors are put in charge of life and death decisions, either in targeting analysis shops, running drones programs, and similar situations. This makes me deeply uncomfortable, and I would be more comfortable seeing employees that have taken an oath on the Con-

stitution making life and death decisions in the Intelligence Community.

However, many of the problems that exist within the IC contracting industry begin with the government lacking the knowledge and means to design and manage its contracts. Rather than focusing on the numbers and balance of the contracted workforce, it would be better to examine the broader systemic issues that require the use of contractors in the first place. By fixing the need for contractors and by making the process of contracting both more transparent and more accountable, many, if not most, issues of balancing contractor and government employees will resolve themselves.

Thank you, Senator, and I look forward to your questions.

Senator AKAKA. Thank you very much, Mr. Foust, for your testimony.

Dr. Lowenthal, Mr. Foust's testimony indicated that he believes there is broad confusion about which roles should and should not be filled by contractors within the IC. During your time at CIA, was there a clear understanding of what roles should be reserved for Federal employees?

Dr. LOWENTHAL. Mr. Chairman, as I said, when I was the Assistant Director, half of my staff were made up of contractors predominantly from one federally funded research development center (FFRDC) and from two private sector firms, and I do not think anybody in my office had any confusion about what they could and could not do, or I do not think any of my government employees had any confusion about what they could ask contractors to do.

They could not monitor other contracts. They could not be involved in solicitations. They could not be involved in acquisitions.

Beyond those sorts of common-sense rules though, I used them as an integral part of my staff. I had them manage planning projects for me. As I said, I had them help create the priorities framework that is used by the President. I had them run investigations for me. I had them help set up meetings and represent me at meetings, all of which seemed to be within bounds.

So I think it is generally understood, at least within the Intelligence Community as I saw it, what contractors could and could not do. And I never saw any confusion on the part of my contractors, and I never had a situation where I felt a contractor had gotten out of his or her lane either.

They pretty much understood why they were there and what they had been hired to do in support of my office, and so I just did not see it as a problem, sir.

Senator AKAKA. Mr. Allen.

Mr. ALLEN. Yes, Mr. Chairman, we are talking here about what we call core contractors, not those that build satellites or do high end, exquisite, exotic engineering, and scientific work for the Intelligence Community, or the ones that do the support services because we do contract for heating and air conditioning and for mowing the lawn. But we are talking here about those who are working in a more integrated fashion, as Dr. Lowenthal just described, with the government employees.

From my perspective, when I was the Assistant Director of Central Intelligence for Collection where I had a social and environ-

mental impact assessment (SEIA) of contractor support, and when I was the Under Secretary at Homeland Security it was very clear that the government was in charge and the government made the final decisions.

The government makes decisions relating to achievable intelligence. Life and death decisions are not made by contractors. That, I can assure you. I know that from personal experience, having worked at the Central Intelligence Agency most of my life.

I believe that we are getting much better. I believe that the guidance that has come from the Director of National Intelligence, looking hard at the core contractors, this middle band that we are talking about. I think we are looking at what is inherently governmental and what is not.

And where we need the expertise—unique expertise, surge expertise, short-term expertise of core contractors, I think it is spelled out more clearly. Admiral Dennis Blair, when he was Director of National Intelligence, signed Intelligence Community Directive 612 which spells out very clearly the responsibilities of core contractors.

Senator AKAKA. Mr. Foust.

Mr. FOUST. Thank you, Senator.

So I should probably clarify that my experience in the Intelligence Community has not been as a part of the Central Intelligence Agency. I have worked for the Defense Intelligence Agency, other military intelligence agencies and organizations. So it is possible that there is a difference of experience between civilian and military intelligence agencies.

However, I can say that within the military Intelligence Community there are contractors who are in charge of selecting targets for assassination in Iraq and Afghanistan. There are also contractors who are put in charge of functions that we would ordinarily consider sensitive. So I do not have any knowledge as to whether or not this happens in a civilian agency, but within the military community it has happened in the recent past.

At the same time, I think when we are looking at this question of whether or not the government has a good handle on it, this comes back to what I write in my written testimony about how good program design and good management will naturally resolve the question of whether or not contractors are being used properly.

I have worked on projects where there was a good government manager, and that government manager kept contractors in their lane. There was no confusion about roles, duties, and people did not step out of their line.

I have also worked at projects where that has not been the case. And if government management is either not properly trained or if the contracting officer representative (COR) who is in charge of administering the contract and interacting with the contractor program manager is not properly trained, resourced, or given the mandate to their job, there can be serious problems of either contractor overstep or contractor misconduct.

And I want to make clear that when I call these things misconduct or overstep I do not mean to imply that there is any maliciousness on the intent of the contractor. Like everyone else on this panel, I have never encountered a contractor or a contractor manager or executive who behaves mendaciously or I think has any-

one's worst interests at heart. Rather, the system itself encourages conduct that we would consider to be unacceptable. I think this is unintentional and a consequence of design rather than malice.

Senator AKAKA. Thank you Mr. Foust.

Mr. Allen, there are governmentwide problems with having enough acquisition professionals with the right training—

Mr. ALLEN. Yes.

Senator AKAKA [continuing]. To clearly define contracting requirements and performance metrics from the outset and to effectively oversee them. This can lead to, of course, cost overruns and poor outcomes. The need to rapidly expand intelligence activities after the September 11, 2001 terrorist attacks, of course, worsened this problem within the IC.

What should be done to enhance government contract management to improve outcomes?

Mr. ALLEN. I think, Mr. Chairman, you put your finger on a problem.

I think in the cold war we had wonderfully experienced acquisition experts, contracting officers who were deeply experienced, contracting officers, technical representatives that helped manage and control that. We had the drawdown. We grew exponentially after September 11, 2001. We really have yet to develop, I think, the richness of experienced contracting officer's technical representatives (COTRs).

In acquisition, my view is that there needs to be a lot more emphasis on this. I see it at the National Reconnaissance Office where General Bruce Carlson, I think, is improving the whole acquisition process. He has had six highly successful launches with great, exquisite payloads and space that are operating absolutely and completely effectively.

My view is that it is going to take time. We have management schools that can build this. We are building it now. The Director of National Intelligence, General James Clapper, understands that this is a deficiency, but we are working to get it better.

My view is that we are not quite there yet. We need to continue to improve that area.

Senator AKAKA. Thank you very much.

Mr. Foust, your written testimony discussed flawed IC contracting practices such as shortfalls in contract statements of work and performance metrics. Would you elaborate on what the IC must do to address these problems, including whether the ODNI should be responsible for setting better contracting standards across all IC elements?

Mr. FOUST Yes, Senator. So there is a need to keep statements of work for contracts, to a certain degree, flexible so that contractors can respond to what their government clients want them to do in the future.

The shortfalls that I highlight in my written testimony come down to situations where that flexibility, I think, ended up being taken a couple of steps too far. The most obvious one that we have already mentioned earlier today has been the use of contractors in interrogation, in particular, contractors running interrogation at Abu Ghraib. They were originally hired on an information technology (IT) support contract for the U.S. Army and wound up doing

detainee interrogations in Iraq. I think that is a very obvious example of taking vaguely worded statements of work and just abusing the process.

A more common use involves what could be more charitably called mission creep, at least within the analytic community. So that involves hiring a contractor to perform work on a given topic and then along the way the government realizing that they want to have expertise or analysis performed on another topic and using a phrase like "other functions as assigned" to then require the contractor to hire new people to perform another job function that was not contained in either the original request for proposals or the statement of work as written.

As far as fixing this, from the government's perspective, I think there is a lot of room to tighten up contract language. One of the processes that I discuss in my written testimony comes down to measuring what actual project outcomes are, what you intend this project to do.

This is not a problem that I think would be limited simply to contractors. I think it gets at a broader systemic issue of poor project design and a lack of strategic thinking in terms of what specific agencies and then branches within agencies want to perform.

There are some job functions like simply maintaining awareness, or understanding message traffic or information coming out of an area, that you cannot really put metrics on. There is no way to measure whether what you are doing is really going to meet some objective or not because you may not know what that objective is.

But I think that is when it starts to clarify the question of whether it is appropriate to be having contractors performing indefinable tasks with uncertain outcomes. I think that is a situation that implies a certain permanence to the function, in which case it would make sense to be assigning permanent Federal employees to be performing it rather than temporary contractors.

Beyond that, I mean there have been a couple of mentions here that there is a lot of case-by-case examples that need to be taken, and I think maintaining that flexibility is important because every intelligence function is not the same. And instituting community-wide guidelines for how to tighten up statements of work could be really difficult without getting into an expansive bible of regulations about how to make it work.

Senator AKAKA. Thank you. Mr Amey.

Mr. AMEY. If I may, I think your last two questions to the panel are related. You are going to make mistakes in the process if you do not have the adequate number of acquisition personnel that are able to oversee the large amount of contracts. This is not just in the IC community. This is in the government overall. We have seen a dramatic increase in contract spending. Especially service contract spending now makes up the bulk of the contract dollars that we award each year. And therefore, if we are operating under a quantity rather than a quality policy directive, then at that point we are prone to make mistakes. And so, that is where enhancing the acquisition workforce, getting them better trained will also help in better requirements definition, better programs, better market research. Unfortunately, I think we have been just in a position

where we have to award contracts as quickly as possible, that we have made mistakes which will lead to waste, fraud, or abuse.

Dr. LOWENTHAL. Mr. Chairman, may I?

Senator AKAKA. Dr. Lowenthal.

Dr. LOWENTHAL. If I just can comment on something Mr. Foust said, certainly, when you are hiring contractors to support your analysis, which is something I know fairly well, you need a certain amount of flexibility because you really do not know what you are going to be analyzing next beyond a couple of easy guesses. I managed the President's intelligence priorities for 3 years, and one of the hardest things about that is trying to forecast 6 months out, where do I need my next set of analysts.

To give you an easy example, if I was still managing the system in December 2010, I would not have assigned an awful lot of analysts to Tunisia. I think I might have assigned an analyst to watch Tunisia while watching Algeria and Libya. In January, I would have had a whole bunch of analysts watching Tunisia.

Certainly, when you are managing the analytical system or the collection system that Mr. Allen used to manage, you need a certain amount of inherent flexibility. The world is nonlinear because of the crises that we all deal with. But in the Intelligence Community, you are supposed to anticipate those. So if you have a workforce that is stuck in certain lanes in analysis and collection, you are not going to have the flexibility to respond to the needs of policymakers in the time that you need them.

Senator AKAKA. Thank you.

Dr. Lowenthal, your written testimony discuss how the IC Federal workforce is fairly young and inexperienced relative to the contractors that they oversee. How does that dynamic impact the ability of the Federal IC workforce to appropriately oversee the contractor workforce?

Dr. LOWENTHAL. I think we actually have three different populations operating simultaneously.

The workforce, the young workforce that I mentioned and that you just referenced, tend to be younger analysts who are not doing contract supervision. They are working as analysts. The problem is that across the community—CIA, the Defense Intelligence Agency (DIA), the National Security Agency (NSA), DHS—there are too many of them, not that we want to get rid of them, but we hired so many of them after the shortfalls in personnel in the 1990s that the demographic is skewed.

So we have former IC employees coming in as contractors, but they tend to be supervised by middle level people who are more experienced than the young analysts.

I do not think there is a problem in supervising the contractors. That tends not to be done by the young analysts. The problem with the young analysts is simply the fact that they just do not have a lot of experience and they are there in much larger numbers than anything we have seen in the preceding 50 years.

But I think in terms of managing the contractors, that is happening at a level above those new analysts, and so I do not perceive that as a problem, sir.

Mr. ALLEN. Mr. Chairman, I would just like to comment on that as well.

Senator AKAKA. Mr. Allen.

Mr. ALLEN. I agree totally with Dr. Lowenthal on the issue. When I came to the Department of Homeland Security, I had a contractor population analytically of about 60 percent, government about 40 percent.

We started changing that ratio. I talked to Congressman Thompson and Congressman King on this issue, and I said we are going to correct this. We changed it over 3 years. Today, my successor now has it at about 60 percent government, 40 percent contractor, and she is well on her way to becoming 70-30.

So it was a matter of we brought in a lot of experience, former agency, CIA and other officers who mentored those young analysts, but the decisions were always in the hands of the Federal Government. They were always my decisions or my deputy's decisions, on any product that we produced.

Senator AKAKA. Thank you very much.

Mr. Amey, your statement recommends that Congress remove ceilings limiting on how many Federal employees an agency can hire. In this budget environment, some might view this as a green light to grow the size and cost of government. Would you discuss how removing these ceilings could actually lead to reduced costs and more efficient government?

Mr. AMEY. Certainly, Mr. Chairman. I think, as Dr. Lowenthal had mentioned, this is not about ratios. It really is about efficiencies and providing an effective government.

So with that point, if we have a workforce that is in the IC and we have an office that is 10 percent government employees but we have to supplement them with 40 percent contractor employees, we have a total workforce of 50 percent. We need to reconsider that number and see if there are cost efficiencies, that we do not need potentially 40 percent IC contractor employees supplementing that office.

We are spending the money somewhere. It is not like we removed it from the Human Resources (H.R.) budget of an agency. All we have done is supplement it with a contractor award—a contract award—and we have just supplemented it with a new contractor employee workforce.

So that is what I think we need to make sure that we go back and really look at the efficiencies and the effectiveness of agencies, to make sure that we have the right balance and there are going to be savings there, if we take a look at that, whether that work is insourced and we hire more Federal employees or if that work is outsourced.

If we find that contractors provide the work more cheaply, then maybe we do not need Federal employees to perform those functions unless they are inherently government or closely associated or critical. And that is where you are just going to have to operate under a weigh test on whether government employees should, not whether it is legal for a contractor employee to perform a function, but should a government employee perform that function, and that is a different scenario.

And I think that is what we need to really do, and that is what the Department of Defense has done with their insourcing study. We have 43 jobs that they found that were inherently govern-

mental or closely associated. So at that point, they have taken a look at those jobs.

And when you asked the question to Mr. Gordon earlier on the first panel, on how do you plan to see this kind of washed down through the system, I think the OFPP policy letter is a great step forward.

But I like to see something from ODNI that comes out and takes it a step further: Here are missions, here are functions, that we think should be performed by government employees. And take a look at those and also ask for a cost efficiency study to be done and performed to make sure that we are saving as much money as possible.

Senator AKAKA. Mr. Amey, as you know, the Intelligence Community keeps much of its facts and figures regarding the use of contractors secret. To a large degree, this is necessary to protect the national security, but it also makes it extremely difficult for the public and groups like POGO to hold intelligence agencies accountable.

How could we better balance the need to protect national security secrets with transparency and accountability?

Mr. AMEY. Well, obviously, this Administration has taken a big step forward in revealing what the budget request was earlier this year, and I think that is where we can start, with total figures. I do not necessarily need to know what the breakdown of every operating personnel is for the IC community, whether as a Federal employee or as a contractor employee, but if we just start with kind of the low-hanging fruit dollar amounts.

If you have read Dr. Ronald Sanders conference call, it is very difficult. He gets grilled. This was a few years ago, but he was getting grilled by reporters on what the size of the workforce was. It was very circular because he was giving a total number for the number of Federal employees but the percentage was not a percentage of the total.

I mean I had difficulty in following it, and I think so did every reporter that was on that conference call.

There are places where I think we can add transparency. We just have to make sure that it is done with kid gloves to make sure we do not reveal something that really does place the Nation in harm or national security at risk.

Mr. ALLEN. Mr. Chairman, I would just like to add that, as you know, you are going to be hearing later in a classified session. I believe that the Senate Select Committee on Intelligence has been especially active in this area of looking at contracts, looking at the number of contractors and the ratios and the balance involved.

As you know, in the past, the DNI has published the numbers of core contractor personnel. There is an enormous transparency in a classified environment. So there is nothing held back.

And Director Clapper, who is a good friend, has spoken very bluntly about this, that he is going to get it right and he is going to work on what is inherently government and adhere to that.

Senator AKAKA. I would like to ask this next question to the entire panel.

In your written statements, several of you raised the issue of how competition for employees with security clearances impacts IC

contracting. Of course, security clearances are important to protecting classified information within the IC.

This Subcommittee has focused extensively on improving the speed and quality of the security clearance process, but I believe there is room for improvement. What changes to the security clearance process could improve IC contracting and the quality of contractors hired? Mr. Allen.

Mr. ALLEN. Mr. Chairman, I am currently head of a task force sponsored by the Intelligence and National Security Alliance which is looking at the security clearance process and suitability, and the emphasis is on contractors because we know that the system today is arcane in many ways. It is not efficient. We know there is waste.

And in moving clearances among contractors, the transportability, if a contractor has Top Secret Sensitive Compartmented Information (SCI) clearance at DIA, is working on a contract and his unique skills are needed at CIA, there should be just simply electronic transfer of his clearances. Today, we have a fairly painful process.

And we could cite almost any agency of the 16 agencies and the antiquated way in which we operate.

This study will be out in the December timeframe. We will make it available to you and to your Subcommittee staff to review. It is a white paper directed at the Director of National Intelligence focused on just small, incremental steps that could be made to improve this.

And we will save, I think, a substantial amount of money. We will more effectively use contractors than we do today. Sometimes they have to wait weeks or months in order to get those clearances transported from one agency to the other even though the individual involved have—they are fully cleared, been vetted by all the security organizations.

I look forward to finishing this study and presenting it to you, sir.

Senator AKAKA. Thank you. Dr. Lowenthal.

Dr. LOWENTHAL. Mr. Chairman, I would just echo what Mr. Allen said. We have an arcane process that does not even reflect the technology that is available to us.

I was hiring a government employee on my staff. He was a DIA officer, and it took me 10 months to transfer his clearances to CIA. I was astounded. It was a breathtaking moment. We deal with an arcane process that really does not catch up with the rules.

But one of the ironies of this is that Mr. Allen and I have probably done, between us, hundreds of interviews with people as references for people who are getting clearances. All those people who interviewed us were contractors. So we hired contractors to conduct the security clearance process, which is an interesting irony.

But we could clearly make the process quicker. We know that there is a problem when you hire a government employee as we lose some of them because of how long it takes to hire them.

Mike McConnell, when he was the DNI, tried to get the security community, the people who are in charge of this, to move from risk avoidance to risk management. I think that was a good idea that the Director had. It would be a very difficult cultural shift because if you are a security officer your main goal in life is to make sure

that nothing bad happens on your watch and you are not going to be liable to say well, let's cut corners here, let's make the process faster.

So one of the issues you have to deal with is what are the incentives for the people who actually manage this system, who are totally separate from the contractor workforce or the people setting out contractors. It is a whole different community of people.

But I think there is room for improvement that would make the system better and less expensive.

Senator AKAKA. Thank you so much.

Mr. AMEY. I will leave this question for the other panelists. I do not have any information that would be as insightful as what they have already had to offer.

Senator AKAKA. Thank you. Mr. Foust.

Mr. FOUST. Thank you, Senator.

So I think this question about the clearance process comes back to the point I made in my written testimony about the difference between qualifications and credentials. Contractors tend to be used for two primary functions—either to bring expertise into the IC that it does not already have or to simply fill seats on a requirement that they need. I think Tunisia is a good example where the two coincide, but that does not always happen.

Right now, the security clearance process tends to exclude the most highly qualified area experts because having substantial family, social, or other personal contacts in areas of interest, say the Middle East, North Korea, or other areas that pose substantial security risks, can actually get in the way of their getting a clearance to then participate in the intelligence process. This is a substantial barrier for both Federal and contracted employees.

I think from the contractor's perspective the real advantage that contractors bring to the intelligence process is their flexibility, their ability to be rapidly hired and rapidly fired.

The problem this introduces in a cleared environment is that firing a contractor immediately cancels or suspends their clearance if they cannot be immediately transferred onto another contract.

I am not sure exactly how the specifics of this could be worked out, but decoupling one's clearability or one's cleared status from having to be attached to an active contract currently drawing money from the Federal Government would go a long way toward increasing the flexibility that cleared contractors can provide to the community. There is probably a lot more research to be done on that, but that is one idea that could be brought in front of more knowledgeable people than I.

Senator AKAKA. Thank you very much.

And finally, I have another question for the entire panel.

As you know, contractors often recruit IC employees because they have the needed clearance and expertise. We have heard stories of government employees quitting one day and returning to the same job as a contractor the next day, often for more pay.

As you are aware, former CIA Director Hayden instituted a cooling off period so that CIA employees who left before retirement could not return immediately as a CIA contractor.

Do you think this policy has been effective and should it be implemented across the IC? Mr. Allen.

Mr. ALLEN. Yes, Mr. Chairman, I think it has been very effective.

General Hayden saw what was happening at the Agency where people were coming in, working for 2 or 3 years, getting a lot of expertise working in operations, or in science and technology, or analysis, and then seeing opportunities to make more money by immediately going out and keeping their clearances, coming back as an contractor employee. He instituted that change. That was a wise decision. I think it has not affected the efficiency of the Central Intelligence Agency.

My view is if you are retiring and getting your annuity, that is fine to go work for a contractor. I have no problem with that.

But we need a more stable workforce, and occasionally, we had contractors quite actively recruiting some of our best personnel. And what General Hayden did at CIA should be emulated by the rest of the community.

Senator AKAKA. Dr. Lowenthal.

Dr. LOWENTHAL. I mentioned this in my summary remarks, Mr. Chairman. I agree with Charlie. I think what Mike did in the Agency was a very good idea.

I spent a lot of my time, when I was the Assistant Director, counseling younger people who said I have just been offered this amount of money to go work in another firm. And they get a bonus for having a clearance. It is like a signing bonus in baseball. It is not just that they are being offered a higher salary, but they will get a bonus because they are coming in cleared.

So I think what General Hayden instituted at the agency was a very sensible, nonpunitive policy. I think it probably helped safeguard his workforce. And like Mr. Allen, I would see that as a rule that could be easily implemented across the community to the benefit of the government.

Senator AKAKA. Thank you. Mr. Amey.

Mr. AMEY. I would agree. There is a lot of emphasis on hiring government employees, but you do not have as much emphasis on retention of government employees, and so whatever we can do to improve the retention policy.

A cooling off period, I have seen it manipulated with defense agencies where the cooling off period actually states that you cannot receive compensation. So somebody will go there and not accept compensation for a year, but then come out and get a bonus 366 days later.

So it always can be manipulated, but anything that we can do to try to retain qualified government employees that are highly trained.

And that is where part of the overhead that the government invests. When people talk about the cost to the government for a government employee is so high. Well, we do spend a lot of money on training and on educating, and at that point we do not want to see all that just kind of spill over and poached by the contracting industry.

Senator AKAKA. Thank you. Mr. Foust.

Mr. FOUST. Yes, I would agree with everyone else here, that was a very good rule.

I have seen where that rule is not in place, in the defense community, be abused, where government employees go work for con-

tractors in the same role and in the same office for more pay, and I think a cooling off period would be very useful to implement community-wide.

Senator AKAKA. Thank you very much. I thank our witnesses very much, our first two panels as well.

The Intelligence Community has played a critical role in keeping us safe in the decade since the September 11, 2001 attacks. Our oversight is intended to help make sure that the IC is as effective as possible. Given the difficult budget environment, we must also understand the cost implications of contracting versus insourcing different functions in the IC.

I look forward to working with the Administration and my colleagues in the Senate to ensure that the IC's total workforce is properly balanced to further its important mission.

We are now going to take a short recess and reconvene the hearing to receive testimony in closed session. While the third panel will be closed to the public, we will work with the Administration to release an unclassified transcript of as much of the proceedings as possible.

The hearing record will be open for 2 weeks for additional statements or questions from other Members of the Subcommittee.

So this hearing is now in recess until 11:15 a.m. Thank you.

[Whereupon, at 11:02 a.m., the Subcommittee proceeded to closed session.]

**INTELLIGENCE COMMUNITY CONTRACTORS:
ARE WE STRIKING THE RIGHT BALANCE?
(CLASSIFIED SECRET SESSION)**

TUESDAY SEPTEMBER 20, 2011

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, THE FEDERAL WORKFORCE,
AND THE DISTRICT OF COLUMBIA,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, in classified SECRET session, at 11:38 a.m., in Conference Room 1, Senate Visitors Center, Hon. Daniel K. Akaka, Chairman of the Subcommittee, presiding.

(This transcript reflects unclassified excerpts of that session).

Present: Senator Akaka (presiding).

Also Present: Christian Beckner, Ray Ciarcia, Troy Cribb, Counsel of the full Committee, Lisa Powell, Staff Director, and Eric Tamarkin, Counsel, Subcommittee staff; Peggy Evans, Hayden Milberg, Jared Rieckewald, and Renee Simpson, Senate Select Committee on Intelligence staff; David Beaupre, George Bremer, Sharon Flowers, Edward Haugland, Mary Keller, Alexander Manganaris, Jeanette McMillian, Eric Pohlmann, and Paula Roberts, Office of the Director of National Intelligence; and Anne McDonough-Hughes, Government Accountability Office.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. I call this hearing of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia back to order. I want to welcome our witnesses on our third panel. Aloha and thank you for being here.

The witnesses on our third panel are: Edward Haugland, Assistant Inspector General for Inspections, Office of Director of National Intelligence; and Paula J. Roberts, Associate Director of National Intelligence for Human Capital and Intelligence Community Chief Human Capital Officer, in the Office of the Director of National Intelligence.

It is the custom of the Subcommittee to swear in all witnesses, so would you stand and raise your right hand.

(Witnesses Haugland and Roberts sworn.)

(29)

Let it be noted for the record that the witnesses answered in the affirmative. If you would please try and limit your oral remarks to 5 minutes, although your full written statements will be made a part of the record.

Mr. Haugland, please proceed with your statement. Before we continue, I just want to remind you we don't have mikes, so if you cannot hear me or I can't hear you I'll let you know. Thank you. Will you please proceed, Mr. Haugland.

TESTIMONY OF EDWARD L. HAUGLAND, ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS, OFFICE OF INSPECTOR GENERAL, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, ACCOMPANIED BY GEORGE D. BREMER, JR.

Mr. HAUGLAND. Thank you, Mr. Chairman. Thank you for the invitation to the Inspector General of the Office of the Director of National Intelligence to testify on the topic of the use of contractors in the Intelligence Community. I'm honored to represent Roslyn Mazer, the ODNI Inspector General, and serve as her designee at today's proceedings. As you know, the ODNI Inspector General recently completed an inspection that evaluated the ODNI's use of core contractors. The findings and recommendations from this report, which have been presented to the Subcommittee as the statement for the record, will be the basis for my testimony here today.

To begin, I will respond to the four items that you asked our testimony to address.

First, the findings and recommendations of our report. We developed three findings and several recommendations. The findings are: First, the ODNI has not fully performed the strategic and human capital planning activities required of all Federal agencies. As a result, there is not a road map upon which to plan for the effective application and management of core contractor workforce.

The second finding: Since its standup, the ODNI has leveraged CIA to provide contracting services through an interagency acquisition agreement. However, the ODNI has not implemented internal controls necessary to ensure the acquisition process is meeting its needs.

The third finding is that the ODNI is not managing contracting officer's technical representatives (COTRs), as an essential element or component of the ODNI's acquisition workforce.

Each finding resulted in several recommendations that, in summary, are designed to: One, ensure the ODNI complies with the Government Performance Results Act (GPRA), including development of a strategic plan and strategic human capital plan; ensure that internal controls are in place to improve the oversight of core contracts; and, further, empower the contracting officer technical representatives and improve the ODNI's management of them.

The DNI has endorsed our recommendations fully, which are intended to mitigate the findings in our report.

The Subcommittee also requested that we discuss whether the ODNI is properly managing and overseeing its core contractor workforce, to include whether the contractors are performing core governmental functions, and whether the ODNI is implementing a strategy to balance the Federal employee-to-contractor mix.

In both of these areas, we found the ODNI was not performing optimally and we made recommendations designed to remedy those shortfalls.

Finally, the fourth item the Subcommittee asked us to address dealt with the ODNI Inspector General suggestions on issues involving the use of contractors that should be investigated across the Intelligence Community.

During the course of our evaluation, we did review a variety of other assessments that suggest issues identified in our report are not unique to the ODNI. However, as our office has not specifically assessed or evaluated other Intelligence Community elements, we are not in a position at this time to recommend an investigation of systemic issues. Our evaluation was focused solely on assessing the risks associated with the administration and management of core contractors in the ODNI.

This concludes my opening remarks, Mr. Chairman. I look forward to answering any questions the Subcommittee may have.

Senator AKAKA. Thank you very much, Mr. Haugland.

Ms. Roberts, will you please proceed with your testimony.

TESTIMONY OF PAULA J. ROBERTS, ASSOCIATE DIRECTOR OF NATIONAL INTELLIGENCE FOR HUMAN CAPITAL AND INTELLIGENCE COMMUNITY CHIEF HUMAN CAPITAL OFFICER, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, ACCOMPANIED BY ALEX MANGANARIS AND SHARON FLOWERS

Ms. ROBERTS. Good morning, Mr. Chairman. It is my pleasure to update you on the Director of National Intelligence's ongoing efforts to oversee our core contractor personnel by assessing their functions, quantities, and costs. It is worth noting, as part of our overall efficiencies work that we are doing across the IC, that the Director of National Intelligence has directed the agencies to reduce their reliance on core contractor personnel.

Before I address our efforts, let me give you some overall context. The IC workforce is composed of three distinct elements: Civilian personnel, military personnel, and core contractor personnel. Together they comprise the IC's "total force." Together they address intelligence mission needs and requirements. For the Intelligence Community to perform strategic workforce planning of all three elements, all of the intelligence needs have to be considered.

[REDACTED]

I would like to specifically address core contractor personnel, who should be distinguished from other contractors. Commercial contractors provide services, such as landscaping or IT support. They are not core contractors. Commodity contractors are not core either—they deliver commodity services, such as building a satellite. Likewise, we may contract for a commodity service such as a specific study.

Core contractor personnel provide direct support to civilian and military personnel. In 2005, we had 16 intelligence agencies, with no single standard to count or distinguish contractors. When Congress established the ODNI, we were able for the first time to bring together the Intelligence Community and establish core definitions and standards for contractors.

In 2006, the ODNI began to conduct an annual inventory of those core contractor personnel that directly support IC missions. In 2009, the Director of National Intelligence approved and signed Intelligence Community Directive (ICD) 612 to guide the use of core contractor personnel. First, it affirms the prohibition on the use of core contractor personnel to perform inherently governmental activities. Second, it generally describes the circumstances in which core contractor personnel may be employed to support IC missions and functions. Third, it makes the inventory an annual requirement; and fourth, it provides a standard definition of core contractor personnel.

In the ICD, we give examples of when to use core contractor personnel for immediate surges, discreet, non-reoccurring tasks, unique expertise, specified services, cases where we may have insufficient staffing, the transfer of institutional knowledge and cases where it is more efficient or effective.

[REDACTED]

You asked me to address our views on the Office of Federal Procurement Policy's recent policy letter, "*Performance of Inherently Governmental and Critical Functions*." The policy letter provides a framework and reinforces much of the work that we have done, and we hope to continue making progress with this additional policy.

Implementation of this policy will be shared responsibility across the Intelligence Community's acquisition, human capital, and financial management communities. We believe many of our core contractor personnel practices capture the essence of the policy letter, and we are reviewing the details carefully to consider where we may need to make additional refinements to our policies to best implement this policy across the Intelligence Community.

In conclusion, Mr. Chairman, I believe we are striking the proper balance with the use of core contractor personnel in the Intelligence Community. Contractor personnel will remain an integral part of the IC's total force. At the same time we will continue to strengthen our oversight mechanisms and management controls to ensure that core contractor personnel are used appropriately, and we will continue our efforts to reduce our reliance on core contractor personnel as appropriate.

I stand ready to answer your questions, sir.

Senator AKAKA. Thank you very much for your testimony, Ms. Roberts.

Ms. Roberts, given the ODNI's charge to oversee the IC and provide policy and budget guidance, what is the ODNI's strategic vision over the next 5 to 10 years for its use of contractors.

Ms. ROBERTS. We see core contractors as a part of the total force, and it is imperative that we conduct workforce planning looking across several years to determine the best use of contractors as they complement the civilian workforce.

We will continue our efforts to do outreach and recruitment to try to obtain the skilled workforce we need, and the core contractor personnel will be complementary to what we're able to do with the civilian workforce.

Senator AKAKA. As a follow-up, are ODNI's current statutory authorities sufficient to implement its strategic vision?

Ms. ROBERTS. We believe that we have many of the authorities that we need to facilitate strategic workforce planning. We do have a legislative request in to get more flexibility in the workforce ceiling, so that we may have the ability to hire the workforce that we need and to convert core contractor positions to government civilian positions as necessary.

Senator AKAKA. Ms. Roberts, as you know, OFPP recently released guidance on inherently governmental functions. What process do you use or intend to use to aid or guide IC agencies in determining whether specific functions must be performed by Federal employees?

Ms. ROBERTS. As part of our workforce planning work, we look specifically at the skills we need and what's involved in terms of competencies to do the work that we need to have done in the intelligence mission. We are working carefully with the acquisition and procurement folks on what we can expect to have contractors do to supplement the work that we do.

We make sure we work together to recruit government employees who meet our needs, and we work very carefully with the acquisition and procurement folks.

Senator AKAKA. Ms. Roberts, in your testimony you discuss how contract personnel were used to provide key language skills following the September 11, 2001 attacks. As you know, I believe foreign language skills are critical to our national security. Could you elaborate on the steps your office is taking to improve the language skills within the IC's government workforce and reduce reliance on contractors for critical language skills?

Ms. ROBERTS. Yes. We have a strategic plan that we have put together to look specifically at language requirements. When we think about language skills, we think about two things: Linguists and foreign language skills that analysts need to have. So we work with the IC elements on an annual basis to understand what requirements they have, and we are currently investing in training and education to improve the proficiency of the people who have foreign language skills.

We likewise have invested quite a bit in outreach to universities to attract young people with foreign language skills. In fact, we work very closely with the Department of Defense on a scholarship program that works directly with universities and colleges. In addition, we have some outreach to K through 12 to get the word out on the importance of studying foreign languages. We have a very deliberate program that is focused on outreach, education and training, and developing skills for the IC workforce in both linguists and in the cases where analysts need to have foreign language skills.

Senator AKAKA. Mr. Haugland, in its report on the administration and management of ODNI core contractors, the Inspector General recommends that ODNI issue instructions for enhanced control when contractors closely support inherently governmental functions. Would you elaborate on the concerns underlying this recommendation and what these instructions should contain?

Mr. HAUGLAND. Yes, Mr. Chairman. Through our evaluation, we did not identify any examples, specific examples where contractors were doing inherently governmental functions. However, through

the overall evaluation the control processes that were used to clarify distinctions, the training, those aspects or areas that required from our perspective improvement. So in our recommendations we offer specific steps as relates to training, relates to enhancing internal controls, and also relating to the reward system for the COTRs.

If I could turn to George Bremer, who actually conducted the evaluation, he may assist me in providing some clarity on the specifics, other specifics.

Mr. BREMER. Yes, Senator. As it specifically relates to those closely supporting inherently governmental functions, and the FAR requires that when there are contractors performing functions that closely support inherently governmental functions there ought to be enhanced management controls to ensure the contractors aren't influencing the government in making policy decisions.

We don't specify what the enhanced controls are. We just found that we couldn't find any examples of advanced controls or enhanced controls, with the exception of some people thought that award fee criteria might fall into that category. We disagreed. So we recommended that there be controls to make sure that government decisions weren't being swayed by contractors where those contractors were the experts in that field.

Senator AKAKA. Would you please identify yourself.

Mr. BREMER. I was the project lead for the contractor evaluation. I work for Mr. Haugland.

Senator AKAKA. Your name, sir?

Mr. BREMER. George Bremer, sir.

Senator AKAKA. I want to ask, Ms. Roberts, if you have any further comments on that question?

Ms. ROBERTS. No, thank you.

Senator AKAKA. Mr. Haugland, your report concludes that ODNI has not fully performed the strategic capital planning areas required of all the Federal agencies. How does this finding affect ODNI's ability to manage its core contractors, and what are the most important elements that ODNI must include in a strategic human capital plan to correct this finding?

Mr. HAUGLAND. Well, Mr. Chairman, in terms of affecting the management of the ODNI's core contractors, the strategic planning basically would spell out the core functions, core mission areas, and core criteria. The strategic human capital planning would then expound on that to offer criteria related to the balance between the core contractors and the number of government staff.

So without that, as we stated in the report, it's not really a road map to define what the balance should be or what that allocation is and therefore strategic planning for the number of government employees or the number of contractors may not be as sufficient or optimized as possible in terms of affecting the ability to oversee and manage the core contractors.

There are a number of elements we identify within our report that are ongoing. There's continued work and training with the COTRs, there's a new contracting database and training efforts under way to further expand the knowledge and understanding. So within the ODNI there are measures that are being taken and we don't want to leave you with the understanding that there were no

controls in place, there was no training in place, of the ODNI in management of the core contractors.

However, through our evaluation, as Mr. Bremer indicated, because we did not find any specific written procedures, written internal controls, that was one of our findings.

Senator AKAKA. Thank you.

Ms. Roberts, would you make any further comments on this question?

Ms. ROBERTS. I don't have any comments on that question sir.

[REDACTED]

I'm going to invite Alex Manganaris to help address some of the experience we've had looking at the core contract inventory over the last 3 years. But as he comes forward to talk about that, I would mention once again the effort that we have in place within the IC right now to look at efficiencies based on constraints we have with tight budgets. The DNI has specifically been working with all of the agencies and asked us to look very carefully at efficiencies, and so each of the IC elements are encouraged to look at ways to reduce contractors.

It's important for us to do the workforce planning and to ensure that everyone is following the proper procedures and policies that we've laid out. On a recurring basis, we bring together experts from across the IC elements to have discussions about these core contractors to ensure that everyone understands how to interpret the policies.

But let me ask Mr. Manganaris to address some of the experience we've had with the inventory.

Senator AKAKA. Would you please identify yourself.

Mr. MANGANARIS. Alex Manganaris. Good morning, Senator Akaka.

[REDACTED]

Over the years, though, the general direction has been a declining reliance on contractors. Ms. Roberts talked about the fact that the workforce planning process is ongoing and that there are times, there are exceptions, when an event happens, an emergency, where we have to increase the number of contractors.

Senator AKAKA. Thank you.

[REDACTED]

Ms. ROBERTS. Well, each of the Intelligence Community agencies look independently at their workforce and what they are contracting for. We ask them to look each year to see what changes they need to make in terms of that balance. Now, one of the things that's very important that I would like to clarify is, when it's time for us to look at potentially bringing a function "in house," that we go through a competitive process in hiring government employees. So any contractor, just like anyone else, would have to go through the competitive process to become a government employee, it's not a direct conversion.

But we do have some strategic goals for making conversions, and in those cases a lot of times the contractors are the most competitive. Each IC element is a little different. They make the decisions on what they can afford to bring in house and we work with them to understand what their plans are on an annual basis.

The number that we have in the statement reflects what we were able to gather out of the recent meetings we've had with IC elements.

Senator AKAKA. Thank you.

Ms. Roberts, you mentioned personnel ceilings have led to greater reliance on contractors rather than government workers to perform important IC functions. As you know, the House recently passed the Intelligence Authorization Act for Fiscal Year 2012, which would give ODNI relief from this personnel ceiling. Will you further explain how personnel ceilings have contributed to the IC's reliance on contractors and discuss whether the House passed provision would adequately address the problem?

Ms. ROBERTS. We believe the House passed Intelligence Authorization Act will greatly help give us the flexibility that we feel we need in order to go out and hire and recruit key personnel. We have certainly looked at the strategic skills that we need and it often takes a while to go out and hire, bring in an employee, and give them the training and development they need in order to be fully functional.

On an annual basis we do this workforce planning and we understand what our needs are. When we look at cases where we want to, for example, bring in some of the functions that were contracted out, in order for us to do this conversion work, we need the flexibility to be able to exceed the ceiling so that we can bring them in.

Another example of where the ceiling sometimes will give us a constraint is when we have to surge to quickly to respond to something that is happening in the world, and we may need to go out and hire some additional key personnel. Sometimes if we're constrained with the ceilings it hinders our ability to go out and get the talent that we need.

I would just see if anyone has anything else to add.

Mr. MANGANARIS. Senator Akaka, I would like to mention the challenge that NGA had in trying to reduce its number of contractors. During the fiscal year 2011 budget process, NGA requested an increase in its civilian workforce which included contractor conversions, and they were denied that request because there's a lot of visibility on the civilian numbers and the contractor numbers, and the budget requests are much more general.

[REDACTED]

Senator AKAKA. Ms. Roberts, do you have an estimate of what percent of current IC contracting is the result of personnel ceilings?

Ms. ROBERTS. Mr. Manganaris or Ms. Flowers, do either of you know the percentage? I don't know myself.

Senator AKAKA. Mr. Haugland, the Inspector General's report finds that ODNI is not managing its acquisition personnel, in particular contracting officer's technical representatives, as an essential component of its workforce. How can ODNI elevate and empower acquisition personnel within ODNI?

Mr. HAUGLAND. Well, Mr. Chairman, thank you for the question. I think our recommendations go right to the heart of your question in terms of, one, is ensuring that the contracting officer technical representative roles and functions are included in the performance report; and two is that there's an incentive and reward system in

place to facilitate the recognition of COTRs for their job, their important role within their—three, to make sure that there is enhanced training to ensure the COTRs fully understand their roles; and four, from a management oversight perspective we remain there is an inherently—that the government managers who oversee the COTRs understand their roles, understand their functions, and then provide proper oversight and recognition that it is indeed a core function.

Those different elements that are within the recommendations of our report—and if I've missed anything I'll turn to Mr. Bremer—I think are key to ensuring that the COTR function is not only enhanced, but recognized, but then used to help drive overall accountability within management of the contractor and acquisition workforce.

Senator AKAKA. Ms. Roberts, what will ODNI do to make sure it has a robust acquisition workforce, including adequately trained and empowered employees?

Ms. ROBERTS. Just recently my office worked very closely with the ADNI for Acquisition and we have teamed to put together a strategic workforce plan for the acquisition workforce. The strategic plan addresses the core skills that we feel we need, the types of training that the workforce requires, and the specific milestones for implementation of the plan.

So we have already spent quite a bit of time working with acquisition on these, specifically what skills do the contracting representatives need to have, the procurement officials, the different types of people that all come together to manage the contract workforce.

Ms. Flowers, do you want to add anything?

Ms. FLOWERS. Sharon Flowers, DNI senior procurement executive.

I would just add that right now, as the DNI actually evolves into a robust organization that actually has an acquisition function—in the past, we've actually depended on an agreement with the CIA to do our contracting for us. So with that, the highlights of the IG inspection, with the facts that we have become a very robust member of the community—we're actually looking at our processes again to figure out the best way and determine the most economical and effective and efficient way to do contracting internal to the DNI.

We actually have very robust external oversight of the rest of the community, but the internal function of DNI is the part that we want to make more robust.

Ms. ROBERTS. Perhaps I could clarify the reference I made just a moment ago on strategic workforce planning for the acquisition corps: It was a community-level document, and internal to the ODNI, as per the comments we heard from the IG, the ODNI staff itself has some work to do.

Senator AKAKA. Thank you.

Mr. Haugland, your report raises concerns about ODNI's reliance on CIA to carry out much of its contracting functions. I understand that CIA manages the contracts for core contract employees, who make up a large percentage of ODNI's workforce. Would you elabo-

rate on the line of concerns and corrective actions that should be implemented?

[REDACTED]

Mr. HAUGLAND. In terms of how we're looking to strengthen that, that goes to our second set of recommendations, on the internal controls, is the overall relationship with CIA was done in concert with or in compliance with the Economy Act. So, given that, in terms of the overall benefit to the government, ensuring that, our recommendations asked the ODNI to put in specific controls and go to the performance of those contracts, the performance of the contracting, of the contractors themselves, and other internal controls related to the designation and delegation of responsibilities from the contracting officers to the COTRs.

So there are several steps in there we're taking a look at within our recommendations to ensure a better understanding of the performance of the output, of the outcome of the contractors despite the outsourcing to CIA for the functions.

Senator AKAKA. Thank you.

[REDACTED]

Ms. ROBERTS. I think that the ODNI staff is maturing. It's only been in place for a few years, and I think at the standup of the ODNI it was important to go out and get the talent that it needed to oversee the IC, and in some cases, in many cases, core contractor personnel were brought in to help supplement the staff to do this job.

As we're getting more experienced now with the functions and the work that we need to do, I would expect to see the ODNI migrate more towards civilian personnel to perform many its duties and to reduce the number of core contractors.

Senator AKAKA. Mr. Haugland and Ms. Roberts, I want to thank you very much for taking the time to testify today and thank you for your service to our country as well. As you know, the ODNI serves an essential role in integrating and overseeing the Intelligence Community. Our oversight is intended to help ODNI focus on finding an appropriate balance of contractors and Federal workers across the IC and investing in the Federal workforce where needed to accomplish that. I look forward to working with you on these issues.

This hearing of three panels has helped us examine this issue so we can improve the system to be efficient and to continue to serve the country.

This hearing record will be open for 2 weeks for any additional statements or questions from other Members of the Subcommittee.

Again, I want to say thank you very much. This hearing is adjourned.

[Whereupon, at 12:02 p.m., the hearing was adjourned.]

A P P E N D I X

FOR IMMEDIATE RELEASE: September 20, 2011
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STATEMENT OF CHAIRMAN DANIEL K. AKAKA

Intelligence Community Contractors: Are We Striking the Right Balance?

Hearing

Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Senate Committee on Homeland Security and Governmental Affairs

Aloha and thank you for being here. Today, the Subcommittee will examine the Intelligence Community's (IC) reliance on contractors and whether the IC has rebalanced its workforce in the decade since the September 11, 2001, attacks.

After the attacks, intelligence agencies had to rapidly surge their workforces and turned to private contractors to fill gaps. While I understand the initial need to rely on the contractors, I am concerned that ten years later, the IC remains too heavily dependent on contractors. According to an investigation by the Washington Post, close to 30 percent of the current IC workforce are contractors.

Although contractors undoubtedly have contributed greatly to keeping this country safe over the last decade, our overreliance on contractors raises a number of concerns. Federal workforce challenges contribute to the heavy reliance on contractors. The IC has gaps in language, technical, and certain other skills. IC contracting firms often pay more, increasing the challenge of recruiting and retaining federal employees instead of contracting for the work. Despite these challenges, the Office of the Director of National Intelligence (ODNI), which oversees the 16 elements of the IC, last published an IC Strategic Human Capital Plan in 2006.

The IC must invest in the strategic planning and training needed to address its long-term workforce needs, and Congress must make sure the IC has the tools required to recruit and retain the best. Additionally, I am concerned that contractors are improperly performing inherently governmental functions that are reserved for federal employees. The IC must exercise sufficient oversight to make sure those tasks are completed by a federal worker.

The acquisition workforce is critical for proper contractor oversight and management, but there are significant shortfalls government-wide, including within the IC. We must ensure that the IC acquisition workforce has the staff and training needed to promote the efficient, effective, and appropriate use of contractors.

Given the current budget pressures, I am also concerned about the high cost of IC contractors. Several estimates show that contract employees cost significantly more than federal employees in the IC. A recent study by the Project on Government Oversight on government-wide contracting found that federal employees were less expensive than contractors in 33 out of 35 occupational categories. In the decade since September 11, 2001, intelligence contracting firms have reaped huge profits paid for by the American taxpayer.

Finally, the movement between government and contracting firms raises the risk that decisions made within the IC could be influenced by conflicts of interest. Former Central Intelligence Agency (CIA) Director Michael Hayden instituted a cooling off period at the CIA, but there is no IC-wide approach. I would like to hear from our witnesses how conflicts can be prevented.

As part of its effort to rebalance the workforce, the administration announced plans to insource core governmental functions that should be reserved for federal employees. I hope to learn today whether these efforts have been effective and what additional steps are needed. I look forward to the testimony and to a productive discussion with the witnesses.

-END-

STATEMENT OF
THE HONORABLE DANIEL I. GORDON
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

SEPTEMBER 20, 2011

Chairman Akaka, Ranking Member Johnson, and members of the Subcommittee, I appreciate the opportunity to appear before you again to discuss rebalancing the mix of work performed by Federal employees and contractors. When I last discussed this subject with you in May 2010, the Office of Federal Procurement Policy (OFPP) had just begun a formal process for reviewing and improving, with the public's input, the policies for determining when functions must be carried out by Federal employees and when they may be performed by either Federal employees or contractors. Earlier this month, OFPP completed this process with the finalization of Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, following careful deliberation of public comments and modest refinements to the contents and structure of the guidance. Issuance of the policy letter marks an important step forward in improving how we leverage the capabilities and capacity of government employees – the lifeblood of our Government – and the contractors who bring added expertise and innovation to support our employees in carrying out agency missions.

As stewards of taxpayer funds, we are entrusted with delivering the most effective and efficient government performance possible, and to do so we must understand the proper role for federal employees and for contractors. Unfortunately, many of the rules for drawing the line between work that may be contracted out and work that must be reserved for Federal employees were written nearly two decades ago and do not fully reflect the present-day challenges of managing the Government. As the President said in his March 2009 Memorandum on Government contracting, this line has become blurred. Both the President and Congress directed OMB to improve these rules. Policy Letter 11-01 answers this call by providing strengthened guidance to help agencies draw on each sector's skills in the most appropriate and effective manner possible in meeting the needs of our taxpayers.

Your letter of invitation expresses a particular interest in understanding how these policies may help the Intelligence Community in rebalancing the relationship between government employees and contractors. As the Administrator for Federal Procurement Policy, my initiatives generally focus on issues that address the needs of the Federal procurement community at large. For this reason, my office did not concentrate specifically on the Intelligence Community in developing the policy letter and my comments today will address the broader application of these policies. That said, the general principles in the final policy letter

should serve all agencies well, including those within the Intelligence Community, as they work to strike the right balance in their use of Federal employees and contractors. My understanding is that the Intelligence Community is taking full advantage of current guidance addressing the relationship between government employees and contractors, including that in OMB Memorandum M-09-26, which explains that rebalancing actions must be based on a reasoned analysis, taking into account each agency's mission and priorities, and associated human capital needs. I further understand that the Intelligence Community is carefully reviewing how to best employ new concepts in Policy Letter 11-01, such as that of a "critical function" (discussed in greater detail below), to support its ongoing efforts to achieve a healthy balance in its government employee to contractor mix.

Today, I would like to highlight for the Committee four significant features of Policy Letter 11-01 that we anticipate will help the Intelligence Community and the rest of the Executive Branch in its efforts to strike a balance that best protects the public's interest and serves the American people in a cost-effective manner.

1. Establishing a single definition for the term "inherently governmental function."

Over time, confusion has arisen over the definition of "inherently governmental function" because the authoritative sources for guidance on this issue – including the Federal Acquisition Regulation (FAR) and OMB Circular A-76 – contain overlapping but potentially inconsistent language for determining whether or not a function is inherently governmental. To help eliminate this confusion, the policy letter establishes a single definition for this term, essentially directing agencies to adhere to the single existing statutory definition as set out in the Federal Activities Inventory Reform (FAIR) Act. That definition states that a function is inherently governmental if it is "so intimately related to the public interest as to require performance by Federal Government employees," and the Act includes further clarifying language.

In addition, the policy letter lays out criteria for agencies to use in applying the definition and deciding if a function that is not called out in the definition is, nonetheless, inherently governmental. The policy letter also provides a list of examples of inherently governmental functions. Many of the examples are taken from current regulatory guidance – such as the hiring of Federal employees, the awarding of Federal contracts, and the direction and control of intelligence and counter-intelligence operations. Additionally, in response to public and agency comment, the final policy letter updates the list to clarify the inherently governmental status of several functions where there has been particular confusion over the role of contractors.

One such area of confusion regards the use of contractors to perform security operations connected with combat or potential combat. The policy letter makes clear that contractors may take action in self-defense or defense of others against the imminent threat of death or serious injury, but cannot take part in security operations: (i) performed in direct support of combat as part of a larger integrated armed force, (ii) where there is significant potential for the operation to evolve into combat, or (iii) where security entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.

Another area of confusion involves certain Federal contracting activities. Here, the list makes clear that the determination of price reasonableness – which is a prerequisite to awarding

a contract – is an inherently governmental function. This includes approval of any evaluation relied upon to support a price reasonableness determination. That said, an agency is not precluded from using the services of a contractor to provide input for government cost estimates. It is important, however, that whatever the government relies on to determine price reasonableness is reviewed and approved by a government employee who is not simply “rubber stamping” the recommendation because he or she is completely dependent on the contractor’s superior knowledge and unable to independently evaluate the merits of the contractor’s work or to consider alternatives.

2. Clarifying when work should be considered “closely associated with inherently governmental functions.” It has long been recognized that the practice of identifying functions that are closely associated with inherently governmental functions serves an important management purpose in helping agencies guard against losing control of inherently governmental functions. The attention given to these functions across agencies, however, has not been consistent. The policy letter strengthens guidance in this area by: (i) identifying a list of examples of closely associated functions, such as support for policy development, budget preparation, or acquisition activities (again taken from existing guidance, but clarified based on public and agency comment); and (ii) reminding agencies of their statutory responsibility to give special consideration to Federal employee performance of these functions.

The policy letter also provides a comprehensive checklist of special management responsibilities that agencies must address when contractors perform work that is closely associated with inherently governmental functions in order to minimize the risk of “mission creep.” These responsibilities include: (i) assigning a sufficient number of qualified government employees, with expertise to administer or perform the work, to give appropriate management attention to the contractor’s activities, and (ii) taking appropriate steps to avoid or mitigate conflicts of interest, such as by conducting pre-award conflict of interest reviews that will help to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflicts of interest or reduce the risk involved with a potential conflict of interest.

3. Ensuring that agencies have the internal capacity to perform their critical functions.

In the FY 2009 National Defense Authorization Act, Congress identified a new category of “critical functions,” which are functions that, while not inherently governmental, are needed for an agency to effectively perform its mission and maintain control of its operations. The introduction of this new category fills a void in current policy and provides an important concept to help agencies ensure they are not overly dependent on contractors in performing functions that are core to an agency’s mission.

Unlike inherently governmental functions, which can only be performed by Federal employees, critical functions often can be performed by both Federal employees and contractors. However, there always must be a sufficient number of Federal employees performing, or managing, the function so that the agency can maintain control of its mission and operations. This determination will vary from agency to agency. For this reason, the policy letter requires Federal officials to evaluate, on an agency-by-agency basis, whether they have sufficient internal

capability, taking into account factors such as the agency's mission, the complexity of the function, the need for specialized staff, the current size and capability of the agency's acquisition workforce, and the potential impact on mission performance if contractors were to default on their obligations. At the same time, the policy letter makes clear that, so long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to contract out positions within critical functions.

4. Ensuring management accountability. Some of the confusion that has arisen in connection with deciding when work must be performed by Federal employees and when it may be performed by contractors has been caused by limited guidance addressing responsibilities for the implementation and oversight of policies governing this determination. Policy Letter 11-01 addresses these management weaknesses in several ways.

First, the policy letter reinforces the 2009 guidance in OMB Memorandum M-09-26, making clear that striking the right balance of work performed by Federal employees and contractors is a shared responsibility between human capital, acquisition, program, and financial management offices. For example, human capital and program offices must work together to ensure that a sufficient amount of work is dedicated to performance by Federal employees to build competencies, provide for continuity of operations, and retain institutional knowledge of operations. Acquisition offices must also be engaged to help ensure there are sufficient personnel with appropriate training, experience, and expertise to manage the contractor's performance and evaluate and approve or disapprove the contractor's work products and services, recruiting and retaining the necessary Federal talent where it is lacking.

Second, the policy letter spells out a number of management responsibilities that must be taken to ensure that appropriate attention is given to the nature of functions both before and after a contract is awarded. For example, as part of acquisition planning, the agency must confirm that the services to be procured do not include work that must be reserved for performance by Federal employees and document the contract file if the procurement of services is above the simplified acquisition threshold (currently \$150,000). After award, agencies must review, on an ongoing basis, the functions being performed by their contractors. In particular, agencies must pay attention to the way in which contractors are performing work and how agency personnel are managing the contractors performing work closely associated with inherently governmental or critical functions. Agencies will be expected to support this post-award responsibility through the annual development of service contractor inventories, as required by law. A contractor inventory can give an agency greater insight into how contract resources are distributed. This insight can then help an agency determine if its practices are creating an over-reliance that requires increased contract management or rebalancing to ensure the government is effectively managing risks and getting the best results for the taxpayer.

It should be noted that the Intelligence Community has been a role model for its use of service contract inventories as a management tool to assist its understanding of how services are being used to support mission and operations and whether its contractors' skills are being used in an appropriate manner. The Intelligence Community is using these inventories to help identify where there may be areas of over-reliance on contractors and, if so, how such overreliance is best addressed.

Third, Policy Letter 11-01 addresses management responsibilities in connection with small business contracting and insourcing. Concern has been expressed, including during the public comment process, that small businesses are bearing the brunt of agency insourcing actions. To help address these concerns, the policy letter reiterates OMB guidance, including that in M-09-26, making clear that insourcing is a management tool, not a goal, and should only be used in a targeted and reasoned way. Equally important, the policy letter instructs agencies to place a lower priority on reviewing work performed by small businesses where the work is not inherently governmental and where continued contractor performance does not put the agency at risk of losing control of its mission or operations, especially if the agency has not recently met, or currently is having difficulty meeting, its small business goals. Agencies are encouraged to involve their small business advocates if considering the insourcing of work currently being performed by small businesses. If an agency makes a management decision to insource work that is currently being performed by both small and large businesses, the policy letter calls on agencies to apply the "rule of two" to the work that will continue to be performed by contractors (the rule of two calls for a contract to be set aside for small businesses when at least two small businesses can do the work for a fair market price).

Fourth, Policy Letter 11-01 requires agencies to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies. With respect to training, in particular, OFPP will work with the Federal Acquisition Institute and the Defense Acquisition University on appropriate instructional materials for the acquisition workforce and other affected stakeholders. One of many important training points will be to remind agencies that functions often include multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. For instance, within the acquisition function of source selection, the tasks of determining price reasonableness and awarding a contract are inherently governmental, the task of preparing a technical evaluation and price negotiation memorandum are closely associated, and the task of ensuring the documents are in the contract file is neither inherently governmental nor closely associated. By identifying work at the activity level, an agency can more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors.

As I said when I appeared before you in 2010, the policy letter should not lead to a widespread shift away from contractors. I continue to hold this belief today for a number of reasons. Most agencies have been informally following many of the overarching principles of the policy letter for more than a year and there has not been a significant shift to date. In addition, as explained earlier, agencies may, with proper management and oversight tools, rely on contractors to perform functions closely associated with inherently governmental functions. They may also permit contractors to perform critical functions that are core to the agency as long as the agency has the in-house capability to maintain control of its mission and operations. Moreover, in many cases, overreliance on contractors may be corrected by allocating additional resources to contract management. In other words, rebalancing does not require an agency to insource. That said, we expect every agency to give appropriate attention to identifying if and when rebalancing is needed and to take action, when necessary, to fix imbalances created either

by improper reliance on contractors, such as where the outsourced work is inherently governmental, or overreliance on contractors, such as where the agency is at risk of losing control of its mission and operations.

Over the coming weeks and months, OFPP will be working closely with the Federal Acquisition Regulatory Council to develop appropriate changes to the FAR to implement Policy Letter 11-01. We are optimistic that the final policy letter will lead to meaningful and lasting improvements in the way we use the talents of our Federal employees and contractors to serve the American people. I look forward to working with the Committee, other members of Congress, and our other stakeholders as we move forward together on this important effort.

This concludes my prepared remarks. I am happy to answer any questions you have.

Statement of
Mr. Charles E. Allen
to the
Senate Subcommittee on Oversight of Government Management, the
Federal Workforce, and the District of Columbia
September 20, 2011

Intelligence Community Contractors: Are We Striking the Right Balance?

Good Morning. Chairman Akaka, Senator Johnson and members of the Committee, thank you for the opportunity to speak to you today regarding this important subject.

I would like to make clear for the record that I am appearing today in my capacity as the Senior Intelligence Advisor to the Intelligence and National Security Alliance, and not as a representative of the Chertoff Group. INSA is a small non-profit that serves as a forum where individuals from the public, private and academic sectors associated with the intelligence and national security communities can come together to discuss issues of common concern and offer suggestions to policy makers. INSA is one of the key thought leaders in this arena and has produced white papers and other recommendations for leaders in the White House, the Congress, the Department of Defense, the Intelligence Community, and the Department of Homeland Security. Most recently, INSA has published papers on cyber intelligence, homeland security intelligence, organizational conflict of interest, and recommendations for "smart" reductions for the intelligence community in the current, challenging fiscal environment. We will soon publish a paper on improving the security clearance process for contractors. Because INSA tries to represent the best interests and concerns of

both the public and private sectors, I believe we can provide you a unique perspective on this topic of intelligence community contractors.

Additionally, I have been associated with the IC for over 50 years. I joined the CIA in 1958 and have worked with the IC in some capacity ever since. I was the Under Secretary of Homeland Security for Intelligence and Analysis from 2005-2008. In many of these assignments, particularly when we were trying to develop new organizations and capabilities to confront new threats, we would inevitably be faced with the dilemma that we needed an individual with a certain skill or talent that was not readily available within the organization, for example unique foreign language skills or unconventional information technology skills. Often, the best solution in those circumstances was to enter into a contract with a trusted private company who could provide such a skill set in the short term. In earlier days, these numbers were small. In recent years, because of the complex, asymmetric threat of terrorism, these numbers have grown substantially, and finding the right balance of government workers, supported by qualified contractors with unique skill sets has become increasingly complex.

It was a good thing and very timely that the Office of Federal Procurement Policy finalized their policy letter on "Performance of Inherently Governmental and Critical Functions" last week. While the IC has been carefully following the interim guidance issued in March 2010, publication of this definitive policy sends a clear message regarding the importance of this topic.

Based on my experience and what I have been able to determine, the policy letter does a good job of outlining what constitutes "inherently governmental" and what constitutes "critical functions" and provides the guidance the IC needs to ensure that functions that are intimately related to the public interest are performed only by Federal Government employees. Requiring IC agencies to carefully prioritize "critical functions" and judiciously maintain management oversight and control of these functions ensures that the agency operates effectively and maintains control of its mission and operations, but also gives them the flexibility to find the right federal employee/contractor balance when very unique skills may be required to properly perform the "critical function."

In the instances where I oversaw contractors and in observing other supervisors who managed significant contractor work forces, I believe that in most instances, contractors are pretty seamlessly integrated into the workforce. If it were not for “blue badges” representing federal employees and “green badges” representing contract employees, one would have a hard time differentiating. Federal managers are required to keep contracting officers (CO) and contracting officer technical representatives (COTR) well –informed regarding the performance of the contractors under their supervision so that the contractor knows whether their performance is satisfactory or if remedial action or termination of the contract is warranted.

I do believe that IC agencies have dramatically improved management of the contractor workforce as a part of the strategic workforce planning efforts that the DNI requires. When I was the Under Secretary for Intelligence and Analysis at DHS, I did not ask if intelligence products or inputs were developed by contractor or government employees, but I knew that I had put in the proper safeguards to ensure that priorities and final analytic judgments – inherently governmental functions in my estimation – were the ultimate responsibility of federal employees. That said, from my perspective, contractors were part of the team and they were held to the same standard as other government employees on my staff.

The IC has a lot of experience and lessons learned managing the contractor workforce, particularly over the past 10 years when the need for manpower and expertise increased exponentially and the IC had little choice, initially, than to seek immediate support from qualified, trusted companies in the private sector. The IC is, in fact, reducing its reliance on contractors as it develops the requisite expertise internally for recurring, long-term requirements. It is my understanding that most IC agencies have established goals and strategic manpower plans to move toward an optimal federal employee/contractor mix.

In your invitation letter, you asked me to comment on how the IC addresses organizational conflict of interests. The potential for organizational conflict of interest is always there and there must be management procedures to safeguard

against any such conflict. Interestingly, INSA did a study on OCI earlier this year and could not come across a single instance of an IC contractor intentionally playing the role of a "bad actor" in any intelligence community activity. This study also found, however, that each IC agency had its own policy with regard to OCI and that these policies are not always consistent. INSA recommended that the DNI should provide policy guidance to create some level of consistency on the analysis and understanding of OCI. The INSA paper also recommended that the DNI establish an OCI board to meet regularly to assess OCI issues facing the agencies within the IC. The ODNI has taken these recommendations under advisement. Personal conflicts of interest are more common, but all IC agencies have rigorous procedures to ensure that senior personnel and those engaged in contract award and management are aware of the law and policies regarding ethics and potential conflicts of interest.

With regard to hiring, training, and retention challenges in balancing the IC workforce, they differ little from the challenges facing the federal government writ large. The IC has a large portion of its workforce nearing retirement and replacing such expertise will be a challenge because of a gap in the mid-career population created by the hiring freezes of the 90's, pre-9/11. Conversely, well over 50% of the workforce has been hired since 9/11. These demographics would suggest that the IC will continue to rely on contractors for certain skills, at least until these challenging demographics moderate themselves over time.

An additional challenge is that few young people entering the work force today expect to stay in the same job or organization for 20 years. My understanding is that few if any of the IC agencies have a shortage of applicants, but many of those that are hired will likely want to move between organizations and between the private and public sector multiple times. Our HR and security clearance procedures do not currently encourage such ambitions, but it is probably something we should consider, as a person who has such varied experiences is likely to be a significant asset. Those entering the workforce now have different expectations than most of us had when we entered the workforce --- in my case 53 years ago. We need to figure out ways to respond to these evolving expectations.

In closing, I would like to offer a few thoughts about valuable services contractors could provide. First, it happens on a case-by-case basis now, but we could view some contractors as a resource to hire and develop talent on the government's behalf, with the idea that the government would actually hire the best of their employees, under carefully managed, appropriate circumstances. They absorb the hiring and development infrastructure until we are ready to take over, and then they hire behind those we hire to continue the pipeline, adjusting as our needs evolve. Obviously, appropriate safeguards would have to be established to ensure the integrity of such an arrangement. A second constructive role for contractors can be as providers of specific talent where we just don't have the talent on board and cannot hire and develop it in time to meet mission requirements. In these instances, we can judge whether the services are required just for a transitional period, in which the contractor would provide the services throughout the period, or longer-term requirements, where we use the contractor to augment our capability as we hire and develop government talent to fill the emerging requirements. Finally, we turn to a contractor to do work that is not core to our basic mission - more traditional outsourcing such as IT infrastructure operations or logistics and maintenance of facilities. One could come up with a longer list of variants and combinations of these scenarios.

Again, thank you for the opportunity to speak with you today and I look forward to your questions.

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The Intelligence & Security Academy, LLC
Education, Training and Consulting in National Security

**STATEMENT OF DR. MARK M. LOWENTHAL,
PRESIDENT OF THE INTELLIGENCE & SECURITY ACADEMY, LLC;
FORMER ASSISTANT DIRECTOR OF CENTRAL INTELLIGENCE FOR ANALYSIS &
PRODUCTION**

**U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL
AFFAIRS**

**SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE
FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA**

SEPTEMBER 20, 2011

***INTELLIGENCE COMMUNITY CONTRACTORS:
ARE WE STRIKING THE RIGHT BALANCE?***

Mr. Chairman, Members of the Committee, I am very pleased to be given an opportunity to testify on the use of contractors in the U.S. Intelligence Community.

By way of introduction, I spent 25 years in federal service. During my last three years, 2002-2005, I served as the Assistant Director of Central Intelligence for Analysis & Production, the third ranking official in U.S. intelligence. About half of my staff was made up of contractors and their services were vital to the programs we undertook and carried out. Since my retirement in 2005, I have made my living as a contractor, as I did from 1997-2002. My firm provides education services to an array of intelligence and national security agencies, private sector firms and some U.S. allies. So, I have seen this issue from both sides. I would also note that I served as the staff director of the House Permanent Select Committee on Intelligence (104th Congress, 1995-96), so I have some appreciation for the perspective of Congress as well.

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The question posed in this hearing is one of balance between federal employees and contractors. I would offer an alternative way of looking at this: are we choosing the best way of getting the job done – in terms of necessary skills and inevitable costs? I think it is less a question of balance or ratios than it is securing the talents and services we need in the most efficient means possible.

Your letter inviting me to appear at this hearing asked me to address four specific points, as follows:

- *The March 31, 2010 draft policy letter by the Office of Federal Procurement Policy (OFFP) that addresses the issue of "inherent government functions."*

As the Committee knows, this letter touches on the crucial distinction that has always been made between federal employees and contractors: functions that are "inherently governmental" and therefore could only be conducted by federal employees. As the OFFP letter notes, this has always been a somewhat difficult line to draw and it has not been done so consistently across the federal government.

I believe the draft letter does a good job in defining the "inherently governmental function." The definitions of that term and of "critical function," both in Section 3 of the draft letter, make sense and should be easy enough to follow. I believe that Appendix A of the OFFP letter, "Examples of inherently governmental functions" also makes sense.

That said, I do have some concerns about Appendix B of the OFFP draft, "Examples of functions closely associated with the performance of inherently governmental functions." Several of the items on this list, although important, do not seem to have the same "inherent" quality and could, in my view, be carried out by contractors without any problem or conflict of interest. These include:

- "workforce modeling, fact finding, efficiency studies..."
- "planning activities."
- "Services that involve or relate to analyses, feasibility studies, and policy options to be used by agency personnel in developing policy."

I cite these examples in particular from Sections 1-3 in Appendix B because they strike me as less "inherently governmental" than the others and also because these are some of the activities where I used contractors during my tenure as Assistant Director of Central Intelligence. Two of the major initiatives that my office undertook were the creation of the National Intelligence Priorities Framework (NIPF) and the Analytic Resources Catalog (ARC), both of which

became major management tools under President Bush and continue to be used by the Intelligence Community leadership under President Obama. The services performed by contractors in these areas were objective and unbiased and of the highest quality and, quite frankly, I could not have created and implemented these programs without my contractor support.

It is also important to understand that whenever one attempts to define roles and functions, no list can be completely inclusive. In this case, whatever is omitted from the list becomes fair game for contractor activity. Therefore, OFFP and the Committee must be certain that the list has not omitted activities and also that it is not drawn up as to be overly restrictive in areas where contractors can be helpful.

- *Second, the Committee asked how the federal government assesses the value of contractors and utilizes their product.*

Before characterizing the use of contract employees it is important to understand why they get hired in the first place. Federal agencies have very little say in the employee/contractor ratio. This is largely determined by the budget and the budget is in the hands of the Congress. The President's budget may suggest allocations between employees and contractors but the ultimate decision rests here, in the Senate and the House.

We seem to go through different "fashions" of approach regarding contractors. In the 1990s, it was widely assumed that contractors were inherently less costly than full time federal employees as the contracts could be terminated more easily than employees could be dismissed. Moreover, contractors do not entail lifetime federal obligations regarding health care and retirement -- although their billing rates indemnify their employers for these costs as long as they are on a contract. But at a time when the Intelligence budget was flat and saw no growth, during the 1990s, contractors were seen as a viable alternative. After the terrorist attacks of 2001, contractors were seen as an expeditious way to ramp up during a sudden national security emergency. Now we have come full circle and are again concerned about the use of contractors.

Given the diverse range of activities undertaken by the Intelligence Community it is very difficult to make broad generalizations about the use of contractors. Like every other part of the federal government, the Intelligence Community relies on private sector vendors to provide some of our key equipment, whether information technology or high-end intelligence collection systems. Technical specifications for collection systems are created in a long and inclusive internal Government process. The actual building of these systems is carried out by

contractors. The quality and durability of our overhead systems is a testament to their success.

Contractors have also been used to support what might be called "front office managerial functions." This certainly was true during my time on the Intelligence Community Staff (now called the Office of the Director of National Intelligence). Again, this as seen as the most expeditious way to ensure that these functions, which include some of the activities mentioned in the OFFP Letter, Appendix B, referenced above, such as planning and studies. As I noted, I do not view these contractor activities as stepping over the line into "inherently governmental" functions.

Contractors have also been used to provide additional analytic support. In most cases, these are Intelligence Community veterans, whose knowledge and experience are not commodities that should be lost entirely if at all avoidable. There are very strong demographic reasons for this that I will discuss below.

- *Third, is the issue of how the federal government manages and oversees the Intelligence Community contractor workforce.*

A major issue and one that distinguishes the Intelligence Community contractor workforce from virtually all other contractor groups, with the exception of the Defense Department, is the requirement for security clearances. Everyone understands the reasons for this requirement but not many are aware of its effects.

The Committee's letter inviting me to testify referred to a *Washington Post* series on the use of contractors. I will tell you that most of my professional colleagues found that series to be hyperbolic in tone and highly subjective in its approach. Yes, there are a lot of contractors with security clearances. What the article failed to note is that this is not driven by the contractor community but by Government requirements. I am not suggesting that security requirements be abandoned or made more lax but we do need to appreciate why this is happening. There are many contracts where a certain level of clearance is a requirement. Therefore, in order to compete, contractors need employees who have clearances and who can be given access to secure sites. This has two interesting effects:

- First, there is a certain amount of competition among contractors for cleared employees. Contractors are always looking out for employees who can be enticed to switch employers. This somewhat relentless demand for cleared employees also becomes a major impetus for

acquisitions of firms. The attraction may be less the work that a firm does or the contracts that it has than the number of employees with clearances.

- o Second, contractors have an interest in getting Government employees with clearances to join their firms. This has led to a certain amount of raiding, for lack of a better term, of federal employees with clearances. During his tenure as Director of the CIA, General Michael Hayden issued what I thought was a very sensible rule to address this particular problem. He said that if an employee had reached retirement age, he or she could return immediately as a contractor. But if the employee was leaving early in one's career to join a private sector firm, there would have to be a 1-year cooling off period before that person could come back to CIA as a contractor.

Beyond the demand for security clearances, I am not aware of any major differences in how the Intelligence Community manages and oversees its contractor workforce and the practices elsewhere in the federal government.

- *Finally, there are the issues of hiring, training and retention challenges in balancing the Intelligence Community workforce.*

This is an important set of issues. Most of my remarks will reflect trends in the analytic community, the part of the Intelligence Community with which I am most familiar.

The demographics of the analytic community are interesting if not disturbing. As I noted above, in the 1990s, the intelligence budget was flat. What post-Cold war "peace dividend" there was came primarily from holding down intelligence spending, not from defense, which made little sense given the 10:1 disparity in favor of defense. The net result, as former DCI George Tenet has stated, was the loss of 23,000 positions across the Intelligence Community – positions that were never budgeted for and filled or positions that were left vacant if the incumbent left. During this same period, however, contractor funds did not suffer as much, for the reasons stated above. Therefore, there was an influx of contractors at the same time that the permanent workforce was decreasing.

In the wake of the terrorist attacks in 2001, President Bush gave orders to increase the size of the analytic and operational cadres in CIA by 50 percent each. The net effect, in analysis, was that the number of new employees was disproportionate to the veteran employees. Other intelligence agencies, such as NSA and DIA also saw increases in the number of employees. We also stood up new entities, such as DHS. This has left us with a skewed analytic demographic:

today, some 50 percent of the analysts across the Intelligence Community have five years of experience or less. We have, in effect, the least experienced workforce in U.S. intelligence analysis that we have had since setting up the Intelligence Community in 1947.

At the same time, the Community hired larger numbers of contractors to meet the increased analytic and operational demands. In many cases, these contractors also brought more experience and expertise than the new employees could possibly have.

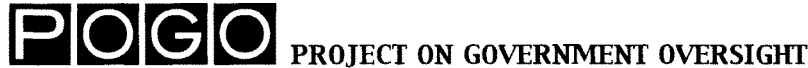
The National Intelligence Program (NIP) now faces rather steep cuts, along with many other federal programs. DNI James Clapper will face some rather stark choices. Again, it is easier to terminate contracts than to fire employees. At the same time, many of these contractors have more experience than the employees. The new employees also have a tremendous need for training, given their relative lack of experience. Unfortunately, education and training is always seen as one of the easiest places to make cuts, as it does not cut into manpower. DNI Clapper has said that he is going to try to protect education and training. I hope he does but the cuts he is facing will be deep.

I would like to offer the committee some other suggestions that I believe should be considered as you continue your examination of this issue:

- The Government should focus on value/performance based contracting as opposed to the current trend of low cost/technically acceptable contracting. Cost must always be weighed against capability and performance. For example, a senior experienced individual who is bid at \$150,000 a year may deliver better service than two relatively inexperienced individuals bid at a total of \$100,000 a year – but under the low cost/technically acceptable concept the low bid will win.
- E.O. 13495 (January 30, 2009) and subsequent Department of Labor final rules create a mandate that contractors who win a recompeted service contract from an incumbent contractor must first offer to hire the employees of the losing incumbent. The stated rationale is to reduce the disruption of a transition and to minimize the loss of experienced contract workers. Every contractor has experienced the pain of losing a contract and the results within their staff but the entire concept of recompeting a contract is for the government to see if there are better offers available. The incumbent hiring rule vitiates the entire rationale for a recompete. It also has the effect of forcing firms to underbid in order to win the contract and then keeping incumbent staff only if they will accept salary cuts, hardly the outcome that was intended.

- The current trend towards contract consolidation favors the larger contracting firms who will be more capable in filling and managing these new, larger contracts. This puts smaller, perhaps more innovative firms at a disadvantage, in effect forcing them out. Ideally, consolidated contracts should have set-asides for smaller firms. The overall net effect may also be higher rates, which larger firms tend to be able to charge, vice the smaller firms.

Therefore, I think we come back to the place where I began. The question is not so much one of balance as it is of overall effectiveness. What is the best way for the Intelligence Community to be staffed in terms of expertise, demographic trends and costs? It is not an either/or choice between employees and contractors. It has to be a mix and it probably has to be on a case-by-case, agency-by-agency basis.



**Testimony of Scott Amey, General Counsel
Project On Government Oversight
before the Senate Committee on Homeland Security
and Governmental Affairs, Subcommittee on
Oversight of Government Management,
the Federal Workforce, and the District of Columbia**

“Intelligence Community Contractors: Are We Striking the Right Balance?”

I want to thank Chairman Akaka, Ranking Member Johnson, and the Subcommittee for asking the Project On Government Oversight (POGO)¹ to testify about issues related to intelligence contracting. I am Scott Amey, POGO’s General Counsel.

Throughout its thirty-year history, POGO has created a niche in investigating, exposing, and helping to remedy waste, fraud, and abuse in government contract spending. We have supported many reforms that enhance competition, accountability, and oversight. Additionally, we have voiced concerns about aspects of the acquisition and contracting systems that place taxpayer funds at risk. Many acquisition reforms were imposed prior to the large increase in federal contract spending (which exceeded \$537 billion in fiscal year 2010),² consolidation in the contractor community, the large-scale hiring of contractors to perform government services, and increased demands on the acquisition workforce, all of which have led to waste, fraud, and abuse.

In light of today’s hearing, the members of this Subcommittee should be asking:

1. What intelligence services are we buying?
2. How are we buying those intelligence services?

The first question requires a comprehensive look at the government’s overall acquisition planning structure and how best to place agencies in a position to achieve their missions. Simply

¹ Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO’s investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. For more information about POGO, please visit www.pogo.org.

² USASpending.gov, “Prime Award Spending Data, FY 2010.”
http://usaspending.gov/explore?fiscal_year=2010&tab=By+Agency&fromfiscal=yes&carryfilters=on&Submit=Go
(Downloaded September 16, 2011)

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stated, what goods and services are required to meet the intelligence community's (IC) needs? The "how are we buying it" question places us more in the contracting weeds. The answer to that question often involves a discussion about types of contracts, level of competition, costs, award and incentive fees, duration, accountability, oversight, and transparency.

I am typically able to provide a general assessment of an agency's contracting portfolio because the public has access to basic contracting data via the Web. However, in the case of the IC, the doors to such data are closed. For example, missions, contract awards and dollar amounts, and the number of contractor personnel are classified and therefore not publically available. The best data that has been made publicly available is from a mid-2000s inventory of IC core contractor personnel, which documented that the IC budget was roughly \$42 billion, approximately 70 percent of the IC budget was spent on contracts (not contractors), the government workforce was approximately 100,000, and contractors comprised approximately 28 percent of the total IC workforce.³

That inventory of contractor personnel found that many government services are being performed by contractors—supporting intelligence collection and operations, information technology (IT) activities, analysis and production, and other administrative functions.⁴ Outsourcing those functions was largely the result of the downsizing of the federal workforce in the 1990s, and the subsequent surge and mission demands after 9/11.⁵ There is no doubt that contractors play a role in the IC, but with more flexibility to bring intelligence jobs in-house,⁶ mission accomplishment could be enhanced and performed more cost-efficiently.

Last week, Senator Feinstein raised IC contracting concerns at a joint hearing of the Senate and House Select Committees on Intelligence:

In the immediate aftermath of the 9/11 attacks, the IC hired thousands of contractors as a matter of convenience, and for their expertise. Contractors were tasked to conduct intelligence operations, collection, exploitation, and analysis and all are critical tasks for the Intelligence Community and include – I would argue – inherently governmental functions that should be done by government employees at one-third less cost per employee.

³ Conference Call with Dr. Ronald Sanders, Associate Director of National Intelligence for Human Capital, "Results of the Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel," August 27, 2008, pp. 2-3. http://www.asisonline.org/secman/20080827_interview.pdf (Downloaded April 28, 2011) (Hereinafter Call with Dr. Ronald Sanders); Office of the Director of National Intelligence, "Key Facts about Contractors," no date provided, pp. 1-2. http://www.dni.gov/content/Truth_About_Contractors.pdf (Downloaded September 16, 2011) (Hereinafter Key Facts about Contractors); Tim Sharrock, "The corporate takeover of U.S. intelligence," *Salon*, June 1, 2007. http://www.salon.com/news/feature/2007/06/01/intel_contractors (Downloaded September 16, 2011)

⁴ Call with Dr. Ronald Sanders, pp. 2-3.

⁵ Call with Dr. Ronald Sanders, p. 2.

⁶ Last week, the House passed the Intelligence Authorization Act for Fiscal Year 2012 (H.R. 1892), which includes a provision that will allow "the employment of civilian personnel in excess of the number of full-time equivalent positions for fiscal year 2012 authorized by the classified Schedule of Authorizations." <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1892pcs/pdf/BILLS-112hr1892pcs.pdf>

The Office of the DNI recently reported that for Fiscal Year 2010 “core contractors” accounted for 23% of the total IC Human Capital Workforce, down only one percent from the year before. The overall number of contractors is in the tens of thousands; the numbers across intelligence, defense, and homeland security is in the hundreds of thousands.

We had an agreement in 2009 to reduce IC contractor numbers by 5 percent a year, but it is clear that progress has not been maintained and sufficient cuts are not being made.⁷

The first concern raised by Senator Feinstein involves the use of contractors to perform inherently government functions—functions that, by law, must be performed by government employees.⁸ Just last week, the Office of Federal Procurement Policy issued a final policy letter stating that “[t]he direction and control of intelligence and counter-intelligence operations” are considered inherently governmental functions.⁹ However, although the government is prohibited from directly outsourcing the direction and control of intelligence operations, there are instances when contractors appear to have crossed the line.

For example, in 2004, accounts of physical, psychological and sexual abuse of detainees in Iraq’s Abu Ghraib prison were made public.¹⁰ Interrogations at the facility were the responsibility of the U.S. Army’s military police and intelligence divisions, which hired contractors to augment interrogation, analyst, and linguist personnel.¹¹ To obtain interrogation services, the Department of Defense (DoD) relied on a Department of the Interior contracting office, which issued task orders to CACI International for interrogation, screening, and other intelligence-related services through a General Services Administration (GSA) Schedule information technology contract.¹² Not only were 11 of the 12

⁷ Opening Statement of Senator Dianne Feinstein, Chairman, Senate Select Committee on Intelligence, at the Joint Senate Select Committee on Intelligence/House Permanent Select Committee on Intelligence hearing regarding the “Anniversary of the 9/11 Attacks,” September 13, 2011, p. 3. <http://intelligence.senate.gov/110913/feinstein.pdf> (Downloaded September 14, 2011)

⁸ Federal Activities Inventory Reform Act of 1998, Public Law 105-270, Sec. 5(2)(A): “The term ‘inherently governmental function’ means a function that is so intimately related to the public interest as to require performance by Federal Government employees.” http://www.whitehouse.gov/omb/procurement_fairact (Downloaded September 16, 2011); FAR Subpart 7.503(a) “Contracts shall not be used for the performance of inherently governmental functions.” https://www.acquisition.gov/far/html/Subpart%207_5.html

⁹ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11–01, Performance of Inherently Governmental and Critical Functions,” September 12, 2011, *Federal Register*, Vol. 76, No. 176, p. 56240. <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf> (Downloaded September 16, 2011)

¹⁰ Seymour Hersh, “Annals of National Security: Torture at Abu Ghraib,” *The New Yorker*, May 10, 2004. http://www.newyorker.com/archive/2004/05/10/040510fa_fact (Downloaded September 16, 2011)

¹¹ Government Accountability Office, *Interagency Contracting: Problems with DoD’s and Interior’s Orders to Support Military Operations* (GAO-05-201), April 2005, pp. 1-2. <http://www.gao.gov/new.items/d05201.pdf> (Downloaded September 16, 2011)

¹² Memorandum from Earl E. Devaney, Inspector General, Department of the Interior, to the Assistant Secretary for Policy, Management and Budget regarding the “Review of 12 Procurements Placed Under General Services Administration Federal Supply Schedules 70 and 871 by the National Business Center (Assignment No. W-EV-OSS-0075-2004),” July 16, 2004, p. 1. <http://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-2004-i->

procurements found to be “outside the scope of work” for the schedules,¹³ but important questions about inherently governmental functions were raised about the use of contractors in intelligence activities.¹⁴

The Government Accountability Office (GAO) and the Department of Homeland Security Inspector General (DHS IG) have found instances of contractors performing intelligence work very closely associated with inherently government functions. The GAO review of DHS professional and management support service contracts found one contractor providing intelligence threat analysis.¹⁵ A DHS IG review of the Customs and Border Protection’s Secure Border Initiative program found contractors drafting or helping to draft highly sensitive intelligence program planning and acquisition documents.¹⁶

To ensure that contractors’ day-to-day activities do not transform into inherently governmental functions, agencies need robust contract administration and oversight offices, which is not always the case.

Outsourcing work to federal contractors is premised on the theory that it provides the government with flexibility to meet its needs. That is true in certain situations, but outsourcing work, especially in certain sensitive program areas, might constrain agency missions because government employees, unlike contractors, can perform both inherently governmental and non-inherently governmental functions. The government might have more flexibility to adapt to changing policies, missions, and intelligence operations if it did not have to worry about its contractors straying into inherently governmental work. We do not want contractors and contracting officers bickering in the field over what is or is not an inherently governmental function, and taxpayers should not have to pay the additional expense to supplement the contractor workforce each and every time the work treads close to the inherently governmental function line.

Senator Feinstein’s opening statement also raised concerns about the costs of outsourcing intelligence services. The government spends hundreds of billions of dollars annually on

0049/pdf/GPO-DOI-IGREPORTS-2004-i-0049.pdf (Downloaded September 16, 2011) (Hereinafter Devaney Review)

¹³ Devaney Review, p. 1; Government Accountability Office, *Interagency Contracting: Problems with DoD’s and Interior’s Orders to Support Military Operations* (GAO-05-201), April 2005, p. 2.

¹⁴ <http://www.gao.gov/new.items/d05201.pdf> (Downloaded September 16, 2011)

¹⁵ Memorandum from Patrick T. Henry, Assistant Secretary of the Army, to the Assistant Deputy Chief of Staff for Intelligence regarding “Intelligence Exemption,” December 26, 2000.

¹⁶ http://projects.publicintegrity.org/docs/wow/25-d_Intelligence.pdf (Downloaded September 16, 2011); Dan Guttman, “The Shadow Pentagon: Private contractors play a huge role in basic government work—mostly out of public view,” *The Center for Public Integrity*, September 29, 2004.

¹⁷ <http://projects.publicintegrity.org/pns/report.aspx?aid=386> (Downloaded September 16, 2011)

¹⁸ Government Accountability Office, *Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services* (GAO-07-990), September 2007, p. 11.

¹⁹ <http://www.gao.gov/new.items/d07990.pdf> (Downloaded September 16, 2011)

²⁰ Department of Homeland Security, Office of Inspector General, *Better Oversight Needed of Support Services Contractors in Secure Border Initiative Programs* (OIG-09-80), June 2009, p. 4.

²¹ http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_09-80_Jun09.pdf (Downloaded September 16, 2011)

services—in fact, approximately one-quarter of all discretionary spending now goes to service contractors.¹⁷ The cost issue is the responsibility of both the government and the contractors. The government is at fault when it does a poor job of defining requirements or utilizing contract types that do not protect the taxpayer.¹⁸ Contractors are at fault when their performance results in cost overruns and delays.

But we must also ask a more fundamental question: Is the government actually making contracting decisions based on cost-saving concerns? Certainly, competition between contractors allows the government to obtain best value, low prices, and enhanced contractor performance. And for years, Washington has operated under the premise that outsourcing saves money. However, according to a report POGO released last week,¹⁹ contracting out services may be costing taxpayers, on average, **83 percent more** than if federal employees had done the work, based on our analysis of 35 job classifications.

Many of the job classifications POGO analyzed are typically characterized as “commercial”—services that can be found in the yellow pages. However, with respect to the subject of today’s hearing, it’s worth pointing out the federal government also outsources functions and activities that are critical to national security. For example, the Office of the Director of National Intelligence reported in 2008 that the government outsourced 28 percent of its intelligence workforce²⁰ and paid contractors 1.66 times what it costs to have this work performed by federal employees (\$207,000 annually for a contractor employee versus \$125,000 for a federal employee).²¹ POGO’s analysis supports these findings. POGO analyzed the costs associated with outsourcing language specialists, who are frequently used to perform intelligence functions, and found that contractors may be billing the government, on average, **\$211,203 per year, more than 1.9 times the \$110,014 per year the government compensates a federal employee.** And contractors may be billing the federal government **nearly 3.5 times**, on average, what private sector language specialists are compensated on the open market.²²

Today’s hearing will help us learn more about how service contractors are supporting the IC. Looking at the issue from both a mission-achieving and a cost-saving perspective is imperative.

¹⁷ In 2010, service contracts accounted for \$320 billion of the nearly \$1.26 trillion discretionary spending total. According to data compiled by POGO from the Federal Procurement Data System – Next Generation (FPDS-NG), the federal government awarded \$320 billion in service contracts in fiscal year 2010.

https://www.fpds.gov/fpdsng_cms/ (Downloaded September 16, 2011); Office of Management and Budget, *Budget of the United States Government*, Fiscal Year 2012, p. 200.

<http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/budget.pdf> (Downloaded August 18, 2011)

¹⁸ Robert O’Harrow Jr., “Costs Skyrocket As DHS Runs Up No-Bid Contracts,” *The Washington Post*, June 28, 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/27/AR2007062702988.html> (Downloaded September 16, 2011)

¹⁹ Project On Government Oversight, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, September 13, 2011, pp. 1, 13-15. <http://pogoarchives.org/m/co/ig/bad-business-report-only-2011.pdf> (Hereinafter *Bad Business*)

²⁰ Key Facts about Contractors, p. 2.

²¹ Call with Dr. Ronald Sanders, p. 8.

²² *Bad Business*, p. 17.

Perhaps the IC community might find that significant cost savings can be realized while strengthening national security.

POGO recommends that IC agencies, Congress, and the Committees with jurisdiction conduct assessments of IC service contracts in order to gain a better understanding of the types of services procured, the total dollars awarded, the contract vehicles utilized, and contractor performance history. To the extent possible, these assessments should be made publicly available. I would also urge all IC agencies to review the Office of Federal Procurement Policy's new guidance on work reserved for government employees to ensure that contractors are not performing inherently governmental functions.

In addition, the government needs an improved cost comparison methodology that fairly and accurately compares the government's full life-cycle costs of hiring or retaining government employees with the costs of awarding service contracts. Finally, I would urge Congress to reconsider its decision to impose government employee FTE ceilings. Such restrictions prevent the government from operating at optimal efficiency and flexibility and, in the long run, might result in increased costs for agencies and taxpayers.

Thank you for inviting me to testify today. I look forward to answering any questions and working with the Subcommittee to further explore how intelligence contracting can be improved.

Making Intelligence Contracting Smarter: Reexamining Government Roles and Oversight

Testimony prepared for the U.S. Senate Committee on Homeland Security and Government Affairs,
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of
Columbia

Hearing on “Intelligence Community Contractors: Are We Striking the Right Balance?”

September 20, 2011

Joshua Foust
Fellow, American Security Project



INTRODUCTION

Chairman Akaka, Senator Johnson, and distinguished Members: Thank you for inviting me to speak about Intelligence Community contracting. There is broad public agreement that the government must take measures to respond to the explosive growth of contracting in the Intelligence Community (IC) during the past decade. The government tends to contract out services when it does not have employees with the skill set to perform a function (like building a surveillance drone), or when it needs to rapidly fill personnel gaps in a new program area. In the ten years since the September 11 attacks, however, contractors have grown from filling gaps in the intelligence community to being a large percentage of the people working on behalf of the country's intelligence agencies.

This public consensus that contracting must be curtailed is based on the assumption that contracting has grown beyond anyone's ability to control it, that it results in widespread fraud, waste, and abuse, and that the fundamental nature of contracting presents analysts, agents, and officers of the intelligence community with irreconcilable conflicts of interest. These are the wrong issues to worry about. Rather, while those assumptions about contracting are sometimes true, they do not address the real problems plaguing the IC's use of contractors.

The biggest problem facing the IC contracting industry is not that some contractors abuse the system, but that the government has designed a system that encourages abuse. Missing in the public examination of the IC contracting industry—best exemplified in the Top Secret America series of articles published over the last year by the Washington Post,¹ but also covered by countless other journalists and analysts—is the role the government itself plays. Ultimately, the government is responsible for the conduct of the companies it contracts to perform functions; while violations of the rules in place merit investigation and prosecution, contractor behavior labeled as “misconduct” is often perfectly legal and within the bounds of the contract agreements companies sign with their government clients.

I argue in this testimony that the first step in fixing the issues we associate with IC contractors really begins with fixing the government. I propose that by examining the system of intelligence contracting, we can best understand the systemic challenges facing the contracting reform.

In this testimony, I will examine one situation involving a contractor by name, but I do not intend to single out that company for wrongdoing. Rather, it happens to represent a very high profile example of how the system of contracting invites questionable conduct. Similarly, while I will speak from personal experience and in all likelihood will implicate other contractors and agencies, I do not mean to imply they are examples of misconduct. Rather, I believe the issues I highlight this morning to be systemic in nature and not the fault of any particular company or agency.

FIXING THE GOVERNMENT

The current state of IC contracting is incoherent. There is broad confusion about the nature of what are appropriate government roles and contractor roles, along with inconsistent accountability and poor resourcing for accountability mechanisms. Contracts are often worded vaguely or incompletely, and ever-changing requirements, deliverables, and performance metrics (all of which are supposed to catalogue and record how a company fulfills a contract) create an environment rife for exploitation by companies seeking to extract revenue from the process.²

Perhaps the most prominent example is the “blanket-purchase agreement” awarded by the Department of the Interior (DoI) to the contracting firm CACI in 1998 to supply, among other services, inventory control for the U.S. Army. The contract was worded vaguely, with poor government controls, and its structure—the contract was awarded by the DoI but administered by the Department of the Army—made accountability difficult if not impossible.³ By 2004, CACI contractors, hired under this inventory and logistics contract, had been assigned to the interrogation facility at Abu Ghraib in Iraq. While none of the contractors involved in prisoner interrogation were indicted for misconduct, the vaguely-worded contract awarded by the government allowed for the contractors it hired to be used inappropriately.

Most contracts never approach that level of questionable conduct, however. Rather, through vague language, open-ended requirements, and unclear performance metrics these contracts allow companies to send workers into government facilities without clear expectations for work output and job performance. Worse still, even for multi-million-dollar contracts I have personally encountered poorly trained government Contracting Officer Representatives (COR) who only perform their COR duties part time, and must perform other duties assigned by their superiors.

It is difficult in many cases for the government to keep track of all contractor activities on a given project.⁴

The problem of poor government oversight should not imply simply more funding as a solution. Funding will not address the issue of contract wording, nor will it fix the very real cases of the government asking contractors to perform inappropriate tasks. This is where a more stringent definition—created in conjunction with Congress and the Director of National Intelligence—of what constitutes inherently governmental job functions will allow for tighter contract wording, and thus less opportunity for inappropriate conduct. An enforcement mechanism, whereby contracts can be ended or amended without penalty for improper job assignment, would also help to address this problem. The only way to arrive at a proper definition of what constitutes an inherently government job is to define the nature of the jobs the IC must hire for. Right now, many of those jobs remain so vague as to be indefinable.

THE SLOPPY GOVERNMENT CONTRACT

Every contract the government issues for a company to perform work is defined by the Statement of Work (SOW). This is a document that defines the parameters of the work the contractor will perform, including a description of the project, expected duties the contractor must fulfill, and the outputs and metrics by which performance will be measured. These are often poorly written, kept intentionally vague, and wind up not actually addressing the stated intent of the contracts.

As one example, every SOW I’ve had to either administer, edit, review, or write has stated as a basic metric of performance the number of employees the contractor should hire. That is, the basic means by which the government measures the contractor’s performance is based first and foremost on the number of people hired to work on the contract. This has two serious consequences that affect the contracting environment: it removes the distinction between employees that would make work products better, and it confuses the number of employees with contract performance.

The frankly bizarre system of hiring intelligence contractors is born from several interdependent processes: getting a security clearance, getting hired, and getting “read on” to work at a government site. The system of getting a clearance is structured such that those with clearances are given preference above those without clearance, regardless of the relevant experience of either employee. In other words, if two candidates are competing for a job with a contractor, and one has deep relevant experience but no clearance, she will most likely lose to a candidate with less relevant experience but a current and active security clearance.

In 2008, the Security Clearance Oversight Group reported that the average Top Secret clearance took 220 days to process⁵ and could cost upward of \$15,000.⁶ Repeated thousands of times a year, this extreme hurdle for hiring employees in cleared jobs—especially in intelligence analysis, but also in other fields—excludes highly qualified people from working on behalf of the intelligence community, and limits and restricts the pool of available talent to choose from. Once hired, these candidates then must wait an unreasonably long period of time for the government to then “read them on,” or clear them to work to the project they’ve been hired for. I have experienced read-on times lasting from weeks to months, depending on the agency and the contractor in question. During the lengthy read-on process, employees cannot usually charge their time to the contract, which creates a perverse incentive for the contractor to only hire those currently cleared and employed—removing a key assumption of contractor value (which is the ability of a contractor to rapidly hire qualified people from the outside). This presumption of cleared employee uniformity is a serious issue when hiring for jobs that require analytic judgment and research skill.

In other words, there is a very real distinction between qualifications and credentials. A security clearance has virtually no relation to one’s qualification to do a given job; it simply means an employee can enter a room and use a computer. A high clearance says nothing about an employee’s ability to perform any task. Focusing on extraneous details like the status of one’s clearance is focusing on credentials. It is unrelated to the qualifications a given candidate has to perform to contracted task.

Furthermore, poorly worded SOWs can place contractors in positions that introduce potential conflicts of interest. This can include hiring contractors to work in a government facility security office, putting them in charge of “reading on” competitor contractors (where they have an incentive to exclude or delay employees of competing firms), and it can also include contractors assisting the government in writing new contracts, new Requests for Proposals, and new Statements of Work—all of which present opportunities for serious abuse.

INPUTS V. OUTPUTS

The SOW system is also unclear on what constitutes deliverables and contract outcomes. In the analytic community, this is most often expressed as a certain number of reports drafted by each contractor. This, too, is a poor measurement of performance. One contract I worked on counted a 2-page report as equivalent output to a 35-page study. It also misidentifies what an outcome is. Simply sitting in a chair and turning out reports might be an outcome the government desires, but absent measuring the context of those reports, and the value that the contractors provide the government, it is difficult to say for certain that the contracted tasks actually help the government function.

Requiring the production of a required number of reports from a required number of contracted analysts is not a measurement of output. The intelligence community produces nearly 50,000 reports

every year⁷—more than any one agency can physically read, much less understand and act upon. The reports the IC generates each year are not just outputs from the analytic process but *inputs to the policy process*. If the output being measured by the SOW is irrelevant or inconsequential to the decisions being made, then is it really measuring the effect of the contract, or merely the paper it generated?

Describing the specific outcome of hiring a contractor to perform a given task is surprisingly difficult. Because the government often does not actually measure outputs in the form of outcomes—that is, because they don't measure what result a report or process had, but rather whether it existed or not—it cannot determine if the contractors it hires are performing work that is vital or peripheral to the project. I have written dozens of reports that counted toward my employer's fulfillment of a contract, but which had nothing to do with the government's preferences or needs for making a decision. In hindsight, while I'm glad I learned about the topics I wrote about, I feel like I wasted time, effort, and money writing things virtually no one ever read.

PROJECT DESIGN FIRST, EMPLOYMENT MIXTURE LATER

A basic sense of project design is absolutely necessary to properly balance contractors and government employees. For example, in response to the rising threat of terrorism from Al Qaeda in the Arabian Peninsula (AQAP), the Defense Intelligence Agency last year decided to dramatically expand the number of analysts working on Yemen. This expansion was not based on an increase in messaging traffic coming into the DIA, nor was it based on a need for increased analyst output: they necessarily didn't need a larger number of reports. Rather, the government decided that studying Yemen was a priority, so it assigned extra personnel billets to study Yemen—and because hiring government employees is a time-consuming process to begin with, but requires an intolerable amount of time for the intelligence community, it asked contractors to bid for the opportunity to staff this new priority research area. The government could only staff this new research area in a timely way with contractors. But the decision to increase the number of staff working on Yemen was unrelated to the value extra analysts would bring to the table.

Proper program design requires a strategic mindset. It requires setting out the ends, and means of a given program, and the resources and timeframes needed to achieve them. For the IC, this would require an idea of what a specific process is supposed to produce: understanding of a terrorist organization, the technical details of another country's weapons system, a predictive model of the political climate of a negotiating partner, the monitoring and maintenance of a system, and so on. Once the purpose of the program is in place, then the job types needed to accomplish that purpose can be assigned and filled.

Right now, the government does not engage in solid program design for two reasons: some of its programs defy traditional design methods, and often needs are generated far faster than the government can fill them. Both reasons should give program managers pause before seeking to fill job roles with contractors. If a program must be staffed immediately, but it is expected to last a long time (Yemen, for example, will most likely require substantial intelligence resources for many more years), then that, too, should call into question the hiring of contractors rather than government employees.

At the same time, if a program is designed properly, and if the government knows what it is measuring and what it wants to accomplish, there is little reason to restrict the participation of a contracted workforce. Even in less measurable programs, like media monitoring or systems

administration, good program design can take advantage of a contracted workforce without creating a free-for-all.

CONCLUSIONS

There is broad agreement that the intelligence contracting industry is badly in need of reform. While the inherent opacity of intelligence work will make imposing accountability difficult in some cases, relatively minor changes can allow the government to better police itself. Good program design and output measurements can alleviate many of the issues normally attributed to contractor misconduct, as they would close programmatic loopholes and prevent overcharging. Similarly, training government CORs, to include writing tighter contracts with better oversight mechanisms and more specific measurements of output and performance, can close many of the loopholes that plague the contractor-government relationship. Simplifying the system of hiring and firing government employees would also remove the need to rely on contractors for projects with short lead times.

The broader question of what constitutes an inherently governmental function is beyond the scope of this testimony. I do not have direct experience that would give me an authoritative stance on functions that should never be performed by a civilian contractor, though I do not think life and death decisions should be made by contractors. However, the many conflicts of interest that arise from involving contractors in the contracting process can be very easily addressed by prohibiting their involvement in writing contracts, in approving employees from other firms at government facilities, and in assisting the government in evaluating contractor performance. The government should prioritize insourcing where contractors make up the majority of a workforce so that evaluation and accountability systems can be put in place to monitor contractor conduct.

Many of the problems that exist within the intelligence contracting community begin with the government lacking the knowledge and means to design and manage its contracts. Rather than focusing on the numbers and balance of the contracted workforce, it would be better to examine the broader systemic issues that require the use of contractors in the first place. By fixing the need for contractors, and by making the process of contracting both more transparent and more accountable, many, if not most, issues of balancing contractor with government employees will resolve themselves.

¹ Dana Priest and William Arkin, "Top Secret America," *Washington Post*, July 19, 2010, available at <http://projects.washingtonpost.com/top-secret-america/>

² Author experience writing proposals and contracts for various IC contractors, 2006—2010.

³ Ellen McCarthy, "CACI Contract: From Supplies to Interrogation," *Washington Post*, May 17, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A31611-2004May16.html>

⁴ Author experience working as a contracted senior analyst on three different programs spread across the Department of Defense, 2007—2011.

⁵ Security Clearance Oversight Group, "Report of the Security Clearance Oversight Group Consistent with Title III of the Intelligence Reform and Terrorism Prevention Act of 2004," February, 2008, available at <http://www.fas.org/sgp/othergov/scog2008.pdf>

⁶ William Henderson, "Cost of Security/Suitability Investigations – FY2011," *Security Clearance Jobs Blog*, September 21, 2010, available at <http://www.clearancejobsblog.com/cleared-news/cost-of-securitysuitability-investigations-2/>

⁷ Dana Priest and William Arkin, "A hidden world, growing beyond control," *Washington Post*, July 19, 2010, available at <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>

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**Post-Hearing Questions for the Record
Submitted to Paula Roberts
From Senator Daniel Akaka**

**“Intelligence Community Contractors: Are We Striking the Right Balance?”
September 20, 2011**

1. **The Office of the Director of National Intelligence (ODNI) last published a five-year Intelligence Community (IC) Strategic Human Capital Plan in 2006. When will ODNI publish a new strategic plan? If internal strategic human capital plans exist, please provide them for the record.**

(U) The Office of the Assistant Director of National Intelligence for Human Capital is working on the next IC Strategic Human Capital Plan, which will cover 2012-2017. As soon as the new plan is finalized and approved by the Director of National Intelligence it will be transmitted to Congress.

2. **Has the ODNI specifically prepared a written product delineating its strategic plan over the next 5-10 years for its use of contractors? If so, please provide that strategic plan for the record.**

(U) The ODNI will publish a Strategic Plan which will be delivered with the FY13 budget request. The ODNI Strategic Plan will address ODNI strategic workforce planning to include government and contractor personnel.

3. **You testified that statutory personnel ceilings have led to greater reliance on contractors - rather than government workers - to perform important IC functions. What percentage of the current IC contractors is the direct result of personnel ceilings? Please explain how you determined that percentage.**

(U) The reason code that most closely matches personnel ceilings is “Insufficient Staffing Resources.” According to the FY 2010 contractor inventory, 7.9% of core contractors were acquired for this reason. Please note, however, that “Insufficient Staffing Resources” includes other limitations, such as the reliance on supplemental appropriations to fund agency operations which limit the ability of IC agencies to hire permanent staff.

4. **You testified about efforts to reduce reliance on IC contractors. Are there particular types of contracting that you are targeting? More specifically, do you expect to reduce reliance on particular reason codes used in the IC Core Contractor Inventory. If so, please explain and specify the particular reason codes and the expected or targeted reduction.**

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(U) The DNI's FY 2012 Consolidated Intelligence Guidance directs the IC to reduce core contract personnel in support areas. Additionally, reductions could be taken out on non-support areas if that was deemed a better alternative by the agency. However, there is no direction to target reductions to core contract personnel by budget category or reason code, nor do we expect IC agencies to specifically target particular reason codes for reductions. The FY 2011 inventory will reveal where agencies reduced their reliance on core contractors.

5. **Under Director Michael Hayden, the CIA expanded upon existing statutory post-employment restrictions by barring former CIA employees who resigned before retirement eligibility from serving on a CIA contract for 18 months. Was this policy effective in slowing the loss of valuable employees, and should it be implemented across the IC?**

(U) We believe the post-employment restrictions combined with other factors such as the downturn of the U.S. economy slowed the loss of valuable employees from the CIA.

(U) With respect to whether this policy should be implemented across the IC, the ODNI believes that the existing statutory restrictions on post-employment activities adequately protect the government's equities.

(U) The CIA restriction exceeds the legal requirement to address the low retention rates CIA was facing. It is difficult to say whether this policy, or the general state of the economy, has driven down the loss of government personnel. While this seems to have been a successful policy for the CIA (1.0 percent is extremely low), the ODNI is not considering imposing this standard across the IC as long as each IC element meets or exceeds what is required by law.

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BACKGROUND
INTELLIGENCE COMMUNITY CONTRACTORS: ARE WE STRIKING THE RIGHT
BALANCE?
SEPTEMBER 20, 2011

BACKGROUND

The U.S. Intelligence Community (IC) consists of 17 executive branch agencies and organizations that work both independently and collaboratively to gather the intelligence necessary to conduct foreign relations and national security activities.¹ At the conclusion of the Cold War, the IC workforce went through a period of dramatic downsizing, where some IC agencies lost 40 percent of their workforce capability.²

While the IC historically has relied on contractors to help meet national security goals, that reliance deepened after the September 11, 2001, attacks, when IC agencies had to rapidly rebuild their workforces and turned to private contractors to fill these gaps.³

A decade after the attacks, the IC remains heavily reliant on contractors, which conduct a wide variety of work all over the world. According to an investigation of intelligence contracting by *The Washington Post*, close to 30 percent of the current IC workforce are contractors.⁴ Some reasons proffered for this continued reliance on contractors include: (1) specialized technical capability deficiencies within the government workforce; (2) cultural, military, or linguistic expertise deficiencies within the government workforce; and (3) greater flexibility with contractors that allows government to quickly fill and remove positions.⁵ The extensive

¹ *About the Intelligence Community*, available at <http://www.intelligence.gov/about-the-intelligence-community/> (last visited Sept. 7, 2011). The 17 IC member agencies are: Air Force Intelligence; Army Intelligence; the Central Intelligence Agency; Coast Guard Intelligence; the Defense Intelligence Agency; the Department of Energy, Office of Intelligence and Counterintelligence; the Department of Homeland Security, Office of Intelligence and Analysis; the Department of State, Bureau of Intelligence and Research; the Department of the Treasury, Office of Terrorism and Financial Intelligence; the Drug Enforcement Administration; the Federal Bureau of Investigation; Marine Corps Intelligence; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; the National Security Agency; Navy Intelligence; and the Office of the Director of National Intelligence. *Id.*

² Media Conference Call with Dr. Ronald P. Sanders, Chief Human Capital Officer, Office of the Dir. of Nat'l Intelligence (Jan. 14, 2010), http://www.dni.gov/content/CHCO/2010_CHCO_Media_Call.pdf.

³ Conference Call with Dr. Ronald P. Sanders, Assoc. Dir. of Nat'l Intelligence for Human Capital (Aug. 27, 2008), http://dni.gov/interviews/20080827_interview.pdf ("We bottomed out on September 11th or thereabouts. And on September 12th, as our operating tempo increased dramatically and demands on our personnel increased dramatically, contractors in this capacity operated more or less like the intelligence community's reserves. We were able to expand very, very quickly by using contract personnel. In many cases, these personnel were former intelligence community employees. They were able to come in quickly and perform the mission even as we were busy recovering the IC's military and civilian workforce."); see also ERIC ROSENBACK & AKI J. PERITZ, THE BELFER CTR., HARVARD UNIV., *The Role of Private Corporations in the Intelligence Community, in CONFRONTATION OR COLLABORATION?: CONGRESS AND THE INTELLIGENCE COMMUNITY*, at 88-89 (2009), available at <http://belfercenter.ksg.harvard.edu/files/IC-book-finalasof12JUNE.pdf>.

⁴ Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST, July 20, 2010, at A01, available at <http://projects.washingtonpost.com/top-secret-america/articles/national-security-inc/>.

⁵ ROSENBACK & PERITZ, *The Role of Private Corporations in the Intelligence Community*, at 88-89.

corporate presence within the IC has been controversial, as contractors outnumber government employees in some IC workspaces.⁶

In order to perform an annual IC contractor workforce assessment, ODNI has divided contractors into three groups. The first group of contractors is those who provide commercially available services (*e.g.*, food or janitorial services). The next group is those who provide a specified commodity, such as a satellite or information system. The final group is core contractors, who provide direct support to IC mission areas such as collection activities and operations (both technical and human intelligence), intelligence analysis and production, basic and applied technology research and development, acquisition and program management, and management support to these functions. Core contractors perform staff-like work, often fully integrated with federal workers and working in federal workspaces. Furthermore, they produce work products such as reports, analyses, and intelligence estimates that are often indistinguishable from those produced by federal personnel.

KEY CONCERNS

Performance of Inherently Governmental Functions

Because of the unique role of core contractors in the IC, some have raised concerns that they are performing “inherently governmental functions” that are reserved for federal workers. Office of Management and Budget (OMB) Circular A-76 established the federal government’s policy for determining whether government employees or contractors should perform certain functions and indicated that government personnel should perform inherently governmental functions.⁷ OMB defined an inherently governmental function as a function that is “so intimately related to the public interest as to mandate performance by government personnel.”⁸ While the Office of the Director of National Intelligence (ODNI) issued a directive indicating that “core contract personnel will not engage in inherently governmental activities,”⁹ it is unclear whether or how the ODNI or other IC agencies oversee compliance with that directive.

Despite the longstanding policy that “inherently governmental functions” should be performed by federal government employees, the contours of what constitutes an inherently governmental function is not clearly defined and has been interpreted in a variety of ways. In an effort to reconcile the definitions and examples of inherently governmental functions, the Fiscal Year (FY) 2009 National Defense Authorization Act directed OMB to, among other things, (i) develop a single consistent definition of an “inherently governmental function,” (ii) establish criteria for agencies to identify critical functions, and (iii) provide guidance to improve internal agency staffing decisions to ensure that federal employees are filling critical management roles.¹⁰

⁶ *Id.*

⁷ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), *available at* http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction.

⁸ *Id.*

⁹ INTELLIGENCE COMMUNITY, INTELLIGENCE COMMUNITY DIRECTIVE NO. 612, INTELLIGENCE COMMUNITY CORE CONTRACT PERSONNEL 1,1 (2009), *available at* http://www.dni.gov/electronic_reading_room/ICD_612.pdf.

¹⁰ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4356, 4411–12 (2008).

Furthermore, in a March 2009 Presidential Memorandum on Government Contracting, President Obama stated that government outsourcing for services was a concern and that the line between inherently governmental activities and commercial activities had been blurred and was not adequately defined.¹¹ The President directed OMB to clarify when governmental outsourcing for services is and is not appropriate.¹²

In response, OMB's Office of Federal Procurement Policy (OFPP) issued proposed policy guidance on March 31, 2010, inviting interested parties from the public and private sectors to comment before June 1, 2010.¹³ OFPP specifically requested public input on whether IC contractors should be permitted to engage in intelligence activities such as covert operations or intelligence interrogation of detainees, including interrogations in connection with hostilities.¹⁴ According to OFPP, a number of respondents provided feedback that the proposed list of examples of inherently governmental functions should include more functions in the realm of intelligence.¹⁵

The final policy guidance, published in the Federal Register on September 12, 2011, establishes the 1998 Federal Activities Inventory Reform (FAIR) Act definition of "inherently governmental function" as the single government-wide definition.¹⁶ The final guidance includes "the direction and control of intelligence and counter-intelligence operations" as an example of an inherently governmental function.¹⁷ This example was unchanged from the proposed policy guidance, and no additional examples specifically referencing intelligence were included. The guidance also describes how officials should avoid an overreliance on contractors for functions that are "closely associated with inherently governmental" or that are "critical" for the agency's mission. The only intelligence-related task provided as an example of such a "closely associated" function is the construction of structures intended to be secure from electronic eavesdropping or other penetration by foreign governments. Additionally, a range of services may fall into this category if they are performed in support of inherently governmental functions.

Acquisition Workforce

Some concerns have been raised regarding whether the IC has an acquisition workforce that is sufficiently equipped to promote the efficient, effective, and appropriate use of contractors.

¹¹ Memorandum from President Obama on Government Contracting to Heads of Exec. Dep'ts and Agencies (Mar. 4, 2009), available at <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-subject-government-contracting>.

¹² *Id.*

¹³ OFFICE OF MGMT. & BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY, Work Reserved for Performance by Federal Government Employees – Notice of Proposed Policy Letter, 75 Fed. Reg. 16188, 16188–89 (Mar. 31, 2010), available at http://www.whitehouse.gov/omb/procurement_index_work_performance.

¹⁴ *Id.*

¹⁵ OFFICE OF MGMT. & BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY, Performance of Inherently Governmental and Critical Functions – Publication of the Office of Federal Procurement Policy Letter 11-01, 76 Fed. Reg. 56227, 562429 (Sep. 12, 2011), available at http://www.whitehouse.gov/omb/procurement_index_work_performance.

¹⁶ *Id.*; see also Federal Activities Inventory Reform Act, Pub. L. No. 105-270, § 5, 112 Stat. 2382, 2384–85.

¹⁷ 76 Fed. Reg. at 562429.

Weaknesses in the IC's acquisition workforce could have serious implications, including an increased risk that contract costs may exceed the value of services rendered and that contractors may inappropriately perform inherently government functions.

In response to pre-hearing questions from the Senate Select Committee on Intelligence, Principle Deputy Director of National Intelligence (DNI) nominee Stephanie O'Sullivan noted that the "crucial operating principle" regarding the use of contractors "is how well the government directs and oversees" them.¹⁸ She further stated that "this requires that the government maintains sufficient cadres of qualified USG [United States Government] personnel to ensure contractors meet their contractual obligations, and do so in an ethical manner."¹⁹ During his nomination hearing, DNI James Clapper similarly stressed the importance of maintaining "a cadre of government employees who do have the expertise to assess and evaluate the performance of the contractor."²⁰ He warned that when "the contractor has a monopoly of knowledge and you don't have a check and balance in your own government workforce, you've got a problem."²¹

Despite the importance of a strong IC acquisition workforce for proper contractor management, internal and external reviews of that workforce have identified significant shortfalls. For example, the ODNI Office of Inspector General recently found that Contracting Officer's Technical Representatives within ODNI, who have primary responsibility for developing contract requirements and assessing contractor performance, are not managed as an essential component of ODNI's acquisition workforce and may not receive sufficient training in service contracts, including those that are used to acquire the services of core contractors.²² Likewise, a report on IC acquisitions by the Intelligence and National Security Alliance (INSA) found that "there are too few acquisition and procurement officials available to review and process... contracts, many of whom are over-extended and under-experienced."²³ Another INSA report concluded that there is a "need for competent people who can both partner with industry and challenge industry's estimates and programs."²⁴ It should be noted that acquisition workforce deficiencies have been found across the government as multiple Government Accountability Office reports have cited problems at the Department of Defense (DoD), the Department of Homeland Security (DHS), and other federal agencies.²⁵

¹⁸ *Nomination of Stephanie O'Sullivan to be Principal Deputy Director of National Intelligence: Hearing Before the Select Comm. on Intelligence*, 112th Cong. (2011).

¹⁹ *Id.*

²⁰ *Nomination of Lieutenant General James Clapper, Jr., USAF, Ret., to be Director of National Intelligence: Hearing Before the Select Comm. on Intelligence*, 111th Cong. 18 (2010).

²¹ *Id.*

²² ODNI OFFICE OF INSPECTOR GEN., EVALUATION OF THE ADMINISTRATION AND MANAGEMENT OF ODNI CORE CONTRACTS SUPPORTING CRITICAL MISSIONS 13-17 (2011).

²³ THE INTELLIGENCE AND NAT'L SEC. ALLIANCE, CRITICAL ISSUES FOR INTELLIGENCE ACQUISITION REFORM 2 (2008), available at <http://insaonline.org/assets/files/White%20Papers/Acquisition%20Reform%20White%20Paper%20Final%20Version%20%283%29.pdf>.

²⁴ THE INTELLIGENCE AND NAT'L SEC. ALLIANCE, SMART CHANGE 10 (2011), available at http://www.insonline.org/assets/files/White%20Papers/INSA_SMART_CHANGE_FINAL.PDF.

²⁵ See e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-672, ACQUISITION PLANNING: OPPORTUNITIES TO BUILD STRONG FOUNDATIONS FOR BETTER SERVICES CONTRACTS (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-

High Cost of Contract Employees

Although the Bush Administration reportedly believed that outsourcing intelligence functions would be more efficient, according to a former Central Intelligence Agency (CIA) official, “the idea that the government would save money on a contract workforce is a ‘false economy.’”²⁶ As the ODNI reported in 2008, the cost of a federal employee in the IC, including all benefits, was approximately \$125,000, while the direct cost (excluding overhead) for each contractor employee was \$207,000.²⁷ According to a report accompanying the FY 2009 Intelligence Authorization bill, “the average annual cost of a United States Government civilian employee is \$126,500, while the average annual cost of a ‘fully loaded’ (including overhead) core contractor is \$250,000.”²⁸ In a report examining costs of contractors as compared to federal workers government-wide, the Project on Government Oversight (POGO) found that federal government employees were less expensive than contractors in 33 out of 35 occupational categories.²⁹ For language specialist contractors, who are frequently used in intelligence functions, POGO found that the government paid an average of 1.9 times the cost of a similarly skilled government employee.³⁰ As discussed below, contractors often cost more in part because they often pay more.

Reducing the IC’s dependence on contracting may become increasingly pressing in the current restricted budget climate. Indeed, in testimony before the joint Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence hearing, CIA Director David Petraeus committed to look at the use of contractors as “one of the areas in which we’re going to achieve some savings.”³¹

Competition for Employees

The rapid growth of both federal employee and contract intelligence and security employees since the attacks of September 11, 2001, has set a premium on workers with relevant expertise and security clearances. Intelligence contracting firms often recruit such employees from the IC. Retaining experienced IC federal workers has proven difficult given that “contractors can offer more money— often twice as much— to experienced federal employees than the government is allowed to pay them.”³²

616T, ACQUISITION WORKFORCE: DOD CAN IMPROVE ITS MANAGEMENT AND OVERSIGHT BY TRACKING DATA ON CONTRACTOR PERSONNEL AND TAKING ADDITIONAL ACTIONS (2009); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-990, DEPARTMENT OF HOMELAND SECURITY: IMPROVED ASSESSMENT AND OVERSIGHT NEEDED TO MANAGE RISK OF CONTRACTING FOR SELECTED SERVICES (2007).

²⁶ Priest & Arkin, *National Security Inc.*.

²⁷ Conference Call with Dr. Ronald Sanders (Aug. 27, 2008).

²⁸ SELECT COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2009, REP. NO. 110-333, at 6 (2008).

²⁹ PROJECT ON GOV’T OVERSIGHT, BAD BUSINESS: BILLIONS OF TAXPAYER DOLLARS WASTED ON HIRING CONTRACTORS I (2011), available at <http://www.pogo.org/pogo-files/reports/contract-oversight/bad-business/co-gp-20110913.html>.

³⁰ *Id.* at 17.

³¹ Joint Hearing on The State Of Intelligence Reform: Hearing Before the Senate Select Comm. on Intelligence and the House Permanent Select Comm. on Intelligence, 112th Cong. (2011).

³² Priest & Arkin, *National Security Inc.*

An ODNI Strategic Human Capital Plan included a frank assessment of IC recruiting challenges. The Plan observed that “the IC finds itself in competition with its contractors for our own employees.”³³ The Plan further remarked that “contractors recruit our own employees, already cleared and trained at government expense, and then ‘lease’ them back to us at considerably greater expense.”³⁴

As more experienced employees move to the private sector, “the government has been left with the youngest intelligence staffs ever”³⁵ and has lost “a wealth of institutional knowledge, extensive personal contacts and an understanding of world affairs.”³⁶

Conflicts of Interest and Misaligned Incentives

Another concern with the growth of the IC contractor workforce, and the “revolving door” between the government and contractors, is the increased risk that decisions made within the IC could be influenced by conflicts of interest. A conflict of interest occurs where employment or financial relationships impair an individual employee’s or a corporation’s ability to act impartially, objectively, and in the best interest of the government.

In addition to clear conflicts of interest, the different incentives of corporations and their employees versus federal agencies and their employees create the need for robust oversight. For example, the need to make corporate profits could create an incentive to provide analysis or decision support services in a manner that is likely to increase future business opportunities. Additionally, because contract employees owe a duty of loyalty to their employers rather than the U.S. government, they may have incentives to act in the interest of their employers rather than in the interests of the government where those interests differ.

In particular, questions have been raised about whether some IC contracting firms hold undue influence within the IC because senior intelligence officials are often recruited from, and often return to, these firms.³⁷ A “revolving door” where employees move between public and private sector service increases the risk that decisions made by either contractor or government employees could be influenced by past professional relationships or potential future employment opportunities. Some have also highlighted concerns about contractors who immediately return to their former IC agency, but serve in the same capacity and at greater expense to the government. For example, according to a former top CIA officer at a U.S. embassy, “you would see people leave the CIA on a Friday and come back on Monday in the same job but working for Abraxas [an IC contractor].”³⁸

³³ OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, THE U.S. INTELLIGENCE COMMUNITY’S FIVE YEAR STRATEGIC HUMAN CAPITAL PLAN (2006), available at <http://www.odni.gov/publications/DNIHumanCapitalStrategicPlan18October2006.pdf>.

³⁴ *Id.*

³⁵ Priest & Arkin, *National Security Inc.*

³⁶ Julie Tate, *CIA’s brain drain: Since 9/11, some top officials have moved to private sector*, WASH. POST, Apr. 13, 2011, at A01, available at http://www.washingtonpost.com/world/cias-brain-drain-since-911-some-top-officials-have-left-for-private-sector/2011/03/25/AF3Nw1RD_story.html.

³⁷ See Tim Shorrock, *Clapper: Managing the Intelligence Enterprise*, FOREIGN POL’Y IN FOCUS (June 18, 2010), http://www.fpi.org/articles/clapper_managing_the_intelligence_enterprise.

³⁸ Julie Tate, *CIA’s brain drain*.

DNI Clapper testified during his nomination hearing about potential conflicts of interest, saying “I don’t think it is a widespread thing, but it does happen and you must have the management mechanisms in place to ensure that doesn’t happen.”³⁹

IC agencies have taken different approaches to the problem of contracting firms aggressively recruiting IC federal workers. Under Director Michael Hayden, the CIA expanded upon existing statutory post-employment restrictions⁴⁰ by barring former CIA employees who resigned before retirement eligibility from serving on a CIA contract for 18 months.⁴¹ General Hayden explained that he “did not want [the CIA] to become the AAA farm team for a bunch of organizations around the beltway and provide them trained personnel to sell back” to the agency.⁴²

The Defense Intelligence Agency recently announced reforms to its employee entry and exit process, including changes to make it easier for former DIA employees to return to government service.⁴³

Inadequate Strategic Human Capital Planning

Each component of the IC has a designated Chief Human Capital Officer (CHCO) or similar official who is responsible for developing workforce strategy, attracting and retaining talent, and assessing workforce needs. The Chief Human Capital Officers Act, enacted as part of the Homeland Security Act of 2002, specifically requires that the following Departments that house IC components have a CHCO: DoD, Department of Energy, DHS, Department of Justice, Department of State, and Department of the Treasury.⁴⁴ The Act specifies particular roles and responsibilities of CHCOs, including the creation of a strategic human capital plan.⁴⁵

The ODNI last published a five-year IC Strategic Human Capital Plan in 2006.⁴⁶ As noted above, the plan included some frank assessments of the community’s challenges in retaining its federal workforce and managing its contractor workforce. The plan also stated that, as a result of government employee ceilings, “the use of contractors is often tactical and exigent, driven by factors unrelated to mission.”⁴⁷

³⁹ *Nomination of Lieutenant General James Clapper, Jr., USAF, Ret.*, at 18.

⁴⁰ See 18 U.S.C. § 207 (outlining restrictions on the ability of former executive branch employees to represent a third party, such as a contracting firm, before the federal government).

⁴¹ Press Release, Central Intelligence Agency, Director’s Statement on Contractor Study (May 30, 2007), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/statement-on-contractor-study.html>.

⁴² Alex Kingsbury, *CIA Works to Limit Number of Contractors*, U.S. NEWS AND WORLD REP. (Sept. 4, 2009), available at www.usnews.com/news/national/articles/2009/09/04/cia-works-to-limit-number-of-contractors.

⁴³ Jason Miller, *DIA to Reform ‘Revolving’ Door for Employees*, FED. NEWS RADIO (Aug. 18, 2011), available at <http://www.federalnewsradio.com/index.php?nid=110&sid=2501052>.

⁴⁴ See Chief Human Capital Officers Act, Pub. L. No. 107-296, Title XIII, § 1302(a), 116 Stat 2135, 2287 (2002) (codified at 5 U.S.C. § 1401) (citing 31 U.S.C. § 901(b)).

⁴⁵ See 5 U.S.C. § 1402.

⁴⁶ OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, THE U.S. INTELLIGENCE COMMUNITY’S FIVE YEAR STRATEGIC HUMAN CAPITAL PLAN.

⁴⁷ *Id.*

The plan listed a number of goals and objectives to address these issues, but it is unclear to what extent they have been accomplished. Recently, the ODNI Office of Inspector General faulted ODNI for not fully performing the strategic and human capital planning activities regarding its own workforce as required by the Government Performance and Results Act of 1993. As a result, the report concluded, ODNI has no roadmap upon which to plan the effective application and management of its core contractor workforce.⁴⁸

While some departments that house IC components, such as the Department of Justice and the DoD, have recently published strategic human capital plans, they only touch on minimal aspects of IC workforce challenges. Little else is publically available regarding strategic human capital planning efforts within the IC. A 2009 report by the Kennedy School of Government and the Belfer Center concluded that “the current contractor staffing levels stem from a lack of a long-term strategic plan by the IC for hiring and retaining personnel.”⁴⁹

EFFORTS TO REBALANCE THE IC CONTRACTOR WORKFORCE

As part of its effort to rebalance the workforce, the Obama Administration announced plans to insource core governmental functions that should be reserved for federal employees, including inherently governmental, closely associated to inherently governmental, and mission critical functions. In the FY 2011 budget submission, the President specifically called on agencies to “be alert for situations in which excessive reliance on contractors undermines the ability of the Federal Government to control its own operations and accomplish its missions for the American people.”⁵⁰ OMB, DoD, DHS, and other federal agencies initiated programs to review their reliance on contractors and in some cases insource functions that had been performed by contractors.

Within the IC, the CIA under General Hayden prioritized the reduction of the contractor workforce by cutting the number of contractors by 15 percent.⁵¹ In 2009, then ODNI Chief Human Capital Officer Ronald Sanders announced a new plan regarding the use of contractors where the IC “would treat contract personnel as reserves” rather than as semi-permanent staff. However, he indicated that ODNI would leave specific insourcing and workforce balance issues up to individual IC elements.⁵² Furthermore, Dr. Sanders advocated the removal of statutory ceilings that limited the number of government employees within the IC, arguing that the ceilings caused greater reliance on contractors and limited insourcing.⁵³ ODNI General Counsel

⁴⁸ ODNI OFFICE OF INSPECTOR GEN., EVALUATION OF THE ADMINISTRATION AND MANAGEMENT OF ODNI CORE CONTRACTS, at 6–7.

⁴⁹ ROSENBACK & PERITZ, *The Role of Private Corporations in the Intelligence Community*, at 89.

⁵⁰ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2011, at 105.

⁵¹ Alex Kingsbury, *CIA Works to Limit Number of Contractors*.

⁵² Stephen Losey, *Thousands of Intel Jobs Being Insourced*, FEDERAL TIMES (July 28, 2009), available at <http://www.federaltimes.com/article/20090728/ACQUISITION02/907280301/1012/ACQUISITION02>.

⁵³ *Id.*

Robert Litt reiterated in testimony this year that inflexible personnel ceilings have led to greater reliance on contractors to perform important IC functions rather than government workers.⁵⁴

Recently, there have been suggestions that the Administration may be scaling back its insourcing plans. According to Shay Assad, DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, DoD no longer has the goal of insourcing approximately 10,000 workers over the next several years.⁵⁵ Dan Gordon, OFPP Administrator, noted that there was a level of misunderstanding about the Administration's plans regarding insourcing and that "we never intended to do massive insourcing."⁵⁶ It is not clear to what extent earlier review and insourcing efforts within the IC have been continued and how potential changes in the Administration's approach to insourcing will impact IC efforts.

⁵⁴ *Hearing on the Administration's Fiscal Year Intelligence Authorization Proposal: Hearing Before the Senate Select Comm. on Intelligence*, 112th Cong. (2011).

⁵⁵ Matthew Weigelt, *DoD Eases Off Original Insourcing Target*, DEF. SYS. (Mar. 18, 2011), available at [http://prhome.defense.gov/RSI/REQUIREMENTS/INSOURCE/docs/Articles/DoD%20Eases%20Off%20Original%20Insourcing%20Target%20\(Defense%20Systems\)%20-%20Mar%2018,%202011.pdf](http://prhome.defense.gov/RSI/REQUIREMENTS/INSOURCE/docs/Articles/DoD%20Eases%20Off%20Original%20Insourcing%20Target%20(Defense%20Systems)%20-%20Mar%2018,%202011.pdf).

⁵⁶ *Id.*



OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy.

ACTION: Notice of final policy letter.

SUMMARY: The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is issuing a policy letter to provide to Executive Departments and agencies guidance on managing the performance of inherently governmental and critical functions. The guidance addresses direction to OMB in the Presidential Memorandum on Government Contracting, issued on March 4, 2009, to clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110-417). Section 321 requires OMB to: (i) Create a single definition for the term "inherently governmental function" that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (ii) establish criteria to be used by agencies to identify "critical" functions and positions that should only be performed by Federal employees; and (iii) provide guidance to improve internal agency management of functions that are inherently governmental or critical. The Presidential Memorandum is available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/. Section 321 may be found at http://www.dod.gov/dodgc/olc/docs/2009NDAA_PL110-417.pdf.

DATES: The effective date of OFPP Policy 11-01 is October 12, 2011.

FOR FURTHER INFORMATION CONTACT: Mathew Blum, OFPP, (202) 395-4953 or mblum@omb.eop.gov, or Jennifer Swartz, OFPP, (202) 395-6811 or jswartz@omb.eop.gov.

SUPPLEMENTARY INFORMATION:

A. Overview

OFPP is issuing a policy letter to provide guidance on managing the performance of inherently governmental and critical functions. The policy letter is intended to implement direction in the President's March 4, 2009, Memorandum on Government Contracting that requires OMB to "clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note)." The policy letter:

- *Clarifies what functions are inherently governmental and must always be performed by Federal employees.* The policy letter provides a single definition of "inherently governmental function" built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270. The FAIR Act defines an activity as inherently governmental when it is so intimately related to the public interest as to mandate performance by Federal employees. The definition provided by this policy letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR). The policy letter provides examples and tests to help agencies identify inherently governmental functions.
- *Explains what agencies must do when work is "closely associated" with inherently governmental functions.* Specifically, when functions that generally are not considered to be inherently governmental approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function, agencies must give special consideration to using Federal employees to perform these functions. If contractors are used to perform such work, agencies must give special management attention to contractors' activities to guard against their expansion into inherently governmental functions. The policy letter includes examples to help agencies identify closely associated functions and a checklist of responsibilities that must be carried out

when agencies rely on contractors to perform these functions.

- *Requires agencies to identify their "critical functions" in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency's mission and operations.* The policy letter holds an agency responsible for making sure it has an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce. Federal officials must evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency's mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.

- *Outlines a series of agency management responsibilities to strengthen accountability for the effective implementation of these policies.* Agencies must take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in "closely associated" and critical functions. Agencies are also required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies.

OFPP will work with the Federal Acquisition Regulatory Council, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council to develop and implement appropriate changes to the FAR to implement this policy letter. In addition, OFPP will review other relevant policy documents, such as guidance in OMB Circular A-76 implementing the FAIR Act, and take appropriate action to ensure they conform to the policies in this letter. Finally, OFPP will work with the Federal Acquisition Institute and the Defense Acquisition University on appropriate training materials for the acquisition workforce and other affected stakeholders.

B. Summary of Proposed and Final Policy Letters

The Presidential Memorandum on Government Contracting required the Director of OMB to develop guidance addressing when governmental outsourcing of services is, and is not, appropriate. The Memorandum states

that the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private-sector performance has become blurred, which may have led to the performance of inherently governmental functions by contractors and, more generally, an overreliance on contractors by the government. It directs OMB to clarify when outsourcing is, and is not, appropriate, consistent with section 321 of the NDAA for Fiscal Year (FY) 2009.

Section 321 directs OMB to: (1) Create a single, consistent definition for the term "inherently governmental function" that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (2) develop criteria for identifying critical functions with respect to the agency's mission and operations; (3) develop criteria for determining positions dedicated to critical functions which should be reserved for Federal employees to ensure the department or agency maintains control of its mission and operations; (4) provide criteria for identifying agency personnel with responsibility for (a) maintaining sufficient expertise and technical capability within the agency, and (b) issuing guidance for internal activities associated with determining when work is to be reserved for performance by Federal employees; and (5) solicit the views of the public regarding these matters.

1. Proposed Policy Letter

OMB's OFPP issued a proposed policy letter on March 31, 2010, entitled "Work Reserved for Performance by Federal Government Employees," to implement the requirements of the President's Memorandum and section 321 (75 FR 16188-97). The proposed policy letter, which was issued after OFPP reviewed current laws, regulations, policies, and reports addressing the definition of inherently governmental functions, as well as feedback from a public meeting held in the summer of 2009, proposed to consolidate in one document a number of policies, definitions, and procedures associated with identifying when work must be performed by Federal employees that are currently addressed in multiple guidance documents, including the Federal Acquisition Regulation (FAR), OMB Circular A-76, and various OMB memoranda. The document proposed the following policy actions to address inherently governmental functions, functions closely associated with inherently governmental functions, and functions

that are critical to the agencies' mission and operations.

a. Proposed Steps To Address Inherently Governmental Functions

- Create a single definition for the term "inherently governmental function" by directing agencies to adhere to the statutory definition for this term set forth in the FAIR Act and eliminate variations of this definition found in other documents, such as the FAR and OMB Circular A-76.
- Preserve a long-standing list of examples set out in the FAR of the most common inherently governmental functions, such as the determination of agency policy, hiring of Federal employees, and awarding of Federal contracts.
- Refine existing criteria (e.g., addressing the exercise of discretion) and provide new ones (e.g., focused on the nature of the function), to help an agency decide if a particular function that is not identified on the list of examples is, nonetheless, inherently governmental.

b. Proposed Steps To Address Functions Closely Associated With Inherently Governmental Functions

- Reiterate requirements in the Omnibus Appropriations Act, 2009 (Pub. L. 111-8) to give special consideration to Federal employee performance of functions closely associated with inherently governmental ones.
- Reinforce and refine guidance in the FAR and Attachment A of OMB Circular A-76 requiring special management attention when contractors perform functions closely associated with inherently governmental functions to guard against their expansion into inherently governmental functions. Steps might entail providing clearer prescriptions in the statement of work of what the contractor may and may not do, and ensuring adequate and adequately trained personnel to oversee the contractor's work.
- Preserve a long-standing list of examples set out in the FAR of the most common functions closely associated with inherently governmental functions, such as support for policy development or support for the selection of contractors.

c. Proposed Steps To Address Critical Functions

- Recognize a new category of work, "critical functions," which must be evaluated to determine the extent to which performance by Federal employees is required. Define the term as a function that is "necessary to the

agency being able to effectively perform and maintain control of its mission and operations.”

- Hold an agency responsible for making sure that, for critical functions, it has an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency’s requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce. To meet this responsibility, require Federal officials to evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency’s mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.
- Make clear that, so long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to allow contractor performance of positions within critical functions (subject to any other applicable legal or regulatory requirements).

Finally, the proposed policy letter would require agencies to take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in the performance of “closely associated” and critical functions. Agencies would also be required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies. The proposed policy letter emphasized the need for a shared responsibility between the acquisition, program and human capital offices within the agency to effectively implement its provisions.

The proposed policy letter was published in the **Federal Register** on March 31, 2010 (75 FR 16188–97) for public comment. OFPP encouraged respondents to offer their views on a series of questions to elicit feedback on some of the more difficult or pressing policy challenges, such as whether and how best to use the “discretion” test to identify inherently governmental functions, how best to explain the difference between critical functions and functions that are closely associated with the performance of inherently governmental functions, and how to properly classify certain functions related to acquisition support and security.

For additional background on the proposed policy letter, see discussion in the preamble at 75 FR16188–94.

2. Final Policy Letter

Based on public comments received in response to the proposed policy letter (which are discussed in greater detail below), and additional deliberations within the Executive Branch, OFPP has refined the proposed policy letter to:

- Rename the policy letter “Performance and Management of Inherently Governmental and Critical Functions” to more accurately capture its scope and purpose;
- Add to the illustrative list of inherently governmental functions the following: (i) All combat, (ii) security operations in certain situations connected with combat or potential combat, (iii) determination of an offer’s price reasonableness, (iv) final determinations about a contractor’s performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and (v) selection of grant and cooperative agreement recipients;
- Clarify the illustrative list of functions closely associated with the performance of inherently governmental functions to expressly recognize a variety of work to support Federal acquisitions that includes conducting market research, developing inputs for independent government cost estimates, drafting the price negotiations memorandum and collecting information, performing an analysis or making a recommendation for a proposed performance rating to assist the agency in determining its evaluation of a contractor’s performance;
- Establish a comprehensive responsibilities checklist for functions closely associated with inherently governmental functions;
- Caution that, in many cases, functions include multiple activities that may be of a different nature—some activities within a function may be inherently governmental, some may be closely associated, and some may be neither—and by evaluating work at the activity level, an agency may be able to more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors;
- Clarify that determining the criticality of a function depends on the mission and operations, which will differ between agencies and within agencies over time;
- Establish that if an agency makes a decision to insource some portion of a function that is currently being performed for the agency by a combination of small and large

businesses, the “rule of two” should be applied to determine who will perform the work that remains in the private sector (the “rule of two” requires that acquisitions be reserved for award to small businesses, or certain subsets of small businesses, if there are two or more responsible small businesses capable of performing the work at fair market prices); and

- Reorganize and consolidate the discussion of management associated with inherently governmental, closely associated, and critical functions to more clearly recognize that oversight responsibilities for these functions are interrelated and should not be stove-piped.

C. Public Comments

OFPP received public comments from more than 30,350 respondents on the proposed policy letter. All but approximately 110 comments were submitted in the format of a form letter. Respondents were divided in their reaction to the proposed guidance. One form letter, submitted by approximately 30,000 respondents, expressed concern about excessive outsourcing and recommended expanding the definition of an inherently governmental function to encompass critical functions and functions closely associated with inherently governmental functions. The letter also proposed augmenting the list of inherently governmental functions to include all security functions and intelligence activities, training for interrogation, military and police, and maintenance and repair of weapons systems. A second form letter, submitted by approximately 240 respondents, raised significantly different concerns, cautioning that the policy letter and the increased attention on having non-inherently governmental functions performed by Federal employees will inappropriately discourage Federal managers and agencies from taking full and effective advantage of the private sector and the benefits of contracting. The roughly 110 responses that were not form letters were generally supportive of OFPP’s efforts to clarify policies and management responsibilities, though respondents were divided over whether too much or not enough work would be reserved for Federal employees if policies were implemented as proposed.

Copies of the public comments received are available for review at <http://www.regulations.gov> (Docket ID OFPP–2010–0001). A short summary description of the comments and OFPP’s responses and changes adopted in the final policy letter are set forth below.

1. Scope of the Policy Letter

A number of respondents offered views on the general focus of the policy letter. Several respondents stated that the policy letter was too narrowly focused and cautioned that the overall tone of the policy letter, as set by the title and purpose section, could be construed as being concerned only about ensuring that work is properly reserved for Federal employees—as opposed to also needing to strike the right balance between work that may be contracted out and work that must be reserved. Some respondents recommended that the scope of the policy letter be broadened to more expressly address the performance of commercial activities and advisory and assistance services.

Response: OFPP concurs that the overall purpose of the policy letter should be clarified. While a key goal of the policy letter is to ensure that inherently governmental work is reserved for Federal employees, agencies have an equally important responsibility, in cases where work is not inherently governmental, to evaluate how to strike the best balance in the mix of work performed by Federal employees and contractors to both protect the public's interest and serve the American people in a cost-effective manner. The policy letter's title and purpose statement have been revised accordingly. In particular, rather than focusing the title on work reserved for Federal employees, it now focuses on performance of inherently governmental and critical functions, which expressly acknowledges that functions closely associated with inherently governmental functions and critical functions are often performed by both Federal employees and contractors, and states that reliance on contractors is not, by itself, a cause for concern, provided that the work that they perform is not work that should be reserved for Federal employees and that Federal officials are appropriately managing contractor performance.

OFPP does not believe the scope of the policy letter should be broadened to include an extended discussion of contractor performance of commercial activities and instead prefers to keep the main focus on inherently governmental functions, functions closely associated with them, and critical functions. Recent studies of the role of employees and contractors, and the overall increase in reliance on contractors over the past decade, do not suggest a general difficulty or hesitation in taking advantage of contractors to provide expertise, innovation, and cost-effective

support to Federal agencies. By contrast, these studies and general contracting trends, as well as the President's Memorandum on Government Contracting in March 2009, point to a need for guidance to clarify when work must be performed by Federal employees and the steps agencies need to take to ensure they maintain control of their mission and operations, when extensive work is performed by contractors. OFPP believes any questions regarding the intended use of contractors will largely be addressed by clarifying the overall scope of the policy letter, as described above, and reinforcing that an agency may frequently be able to address overreliance on contractors by allocating additional resources to contract management while continuing to use contractors for support.

OFPP carefully considered the merits of adding discussion on advisory and assistance services and other professional and technical services. These functions are likely to be commonly found among those considered to be either critical or closely associated with inherently governmental functions and spending in this area has grown disproportionately over the past few years. In November 2010, OFPP identified these functions for special management consideration based on concern of increased risk of losing control of mission and operations as identified through a review of reports issued in recent years, such as by the Government Accountability Office, the Commission on Wartime Contracting, agency Inspectors General, Congressional Committees, and the Acquisition Advisory Panel. Agencies were instructed to consider if contractor support for these "special interest functions" is being used in an appropriate and effective manner and if the mix of Federal employees and contractors in the agency is appropriately balanced. See OFPP Memorandum, *Service Contract Inventories*, Memorandum to Chief Acquisition Officers and Senior Procurement Executives (November 5, 2010), available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf>. OFPP will work with agencies as they review their use of support contractors in these areas and consider the need for additional guidance in conjunction with these efforts.

2. Inherently Governmental Functions

Respondents offered a number of comments regarding the scope of the

definition of "inherently governmental function," the tests proposed to determine whether or not a function is inherently governmental, and the illustrative list of examples.

a. *Definition.* Many respondents stated that use of the FAIR Act definition of an inherently governmental function is reasonable. Some respondents, including those offered through one of the two form letters, urged that the definition be expanded to include functions closely associated with inherently governmental functions and critical functions, in order to effectively prevent the inappropriate outsourcing of work that should be reserved for performance by Federal employees. A number of respondents inquired as to OMB's plans for ensuring that, going forward, the definition set forth in the policy letter is recognized as the single authorized definition for the term.

Response: Based on its review of public comments, prior feedback (including that provided at a public meeting held in the summer of 2009, in connection with the President's Memorandum on Government Contracting) and its review of relevant reports (such as the report of the Congressionally-chartered Acquisition Advisory Panel), OFPP believes the FAIR Act definition is reasonable. OFPP does not believe it is appropriate to expand the definition to encompass closely associated or critical functions. Agencies must give special attention to functions falling into those categories to ensure that the government does not lose control of either inherently governmental functions (in the case of closely associated functions) or activities that are core to the agency's mission or operations (in the case of critical functions), but such functions can, in appropriate circumstances, be performed by contractors.

To ensure that the definition in the FAIR Act is recognized as the single authorized definition for the term, OFPP intends to work with the Federal Acquisition Regulatory Council, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council to develop and implement appropriate changes to the FAR to implement this policy letter. In addition, OFPP will review other relevant policy documents, such as OMB Circular A-76, and take appropriate action to ensure they conform to the policies in this letter.

b. *Tests.* Respondents generally did not raise concerns regarding the continued use of tests to help agencies determine if functions are inherently governmental, but a number cautioned

of potential pitfalls, and others offered suggestions for how application of the tests could be improved. A number of recommendations, mostly clarifications, were offered to help improve the "discretion" test, which asks agencies to evaluate if the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action. Recommendations included: (i) Emphasizing that the evaluation should generally focus on how much discretion is left to government employees as opposed to how much discretion has been given to contractors, and (ii) distinguishing between fact-finding and making decisions based on the fact-finding. A number of comments questioned the likely effectiveness of the proposed "nature of the function test," which would ask agencies to consider if the direct exercise of sovereign power is involved. Some respondents suggested that the term "sovereign" be explained while others concluded that the manner in which sovereign authority is exercised is so varied that it is better explained by example than further definition. A few respondents recommended that the final policy letter adopt a new "principal-agent" test that would require agencies to identify functions as inherently governmental where serious risks could be created by the performance of these functions by those outside government, because of the difficulty of ensuring sufficient control over such performance.

Response: OFPP has made refinements to the "discretion" test. First, it has more fully distinguished the type of discretion that may be appropriately exercised by a contractor from that which would not be appropriately exercised by a contractor. Second, it has clarified that inappropriate delegations of discretion can be avoided by: (i) Carefully delineating in the statement of work contractor responsibilities and types of decisions expected to be made in carrying out these responsibilities and effectively overseeing them and (ii) subjecting the contractor's discretionary decisions and conduct to meaningful oversight and, whenever necessary, to final approval by an agency official. OFPP agrees that it is appropriate to consider how much discretion is left to government employees but, at the same time, also believes there is merit in considering the nature of the discretion given to contractors, as well as whether circumstances, such as time constraints, may limit the ability to effectively manage the contractor's actions or

inappropriately restrict government employees' final approval authority. It also concluded that the proposed language was sufficiently clear to help agency officials differentiate between fact-finding that could appropriately be performed by contractors from binding decision-making based on fact-finding that needed to be performed by Federal employees.

Only minimal changes were made to the "nature of the function test." OFPP appreciates that the value of this test may be limited, but believes it still can contribute to an agency's overall understanding and analysis in differentiating between functions that are inherently governmental and those that are not. OFPP considered, but did not adopt, the "principal-agent" test. While recognizing that risk is an underlying factor in reserving work for Federal employees and the definition of inherently governmental function, OFPP concluded that the test would not likely lead to identification of significantly different functions as inherently governmental and was concerned that application of the test could lead to greater confusion about what may be performed by contractors and what must be performed by Federal employees.

c. Examples. While most respondents did not object to retaining a list with illustrative examples, they offered mixed reactions to the specific examples given. A number of respondents felt the proposed list is too narrow and should be modified to add additional functions while at least one respondent thought the list was too broad. Many of those who believed the list was too narrow suggested the addition of functions involving private security contractors, especially when performed in hostile environments or involving intelligence. Some acquisition functions were also recommended for the list, such as developing independent government cost estimates, and preparing documentation in support of a price negotiation memorandum and price reasonableness determination. One respondent who thought the list was too broad recommended refinements to more precisely identify the inherently governmental characteristic of the action, such as "a judge exercising the authority of the Federal government" rather than "the performance of adjudicatory functions." The respondent explained that deciding a dispute is not, *per se*, inherently governmental since arbitration and alternative dispute resolution processes can be performed by non-Federal employees, even when one of the parties is a Federal agency.

Response: Based on public comment and additional deliberations, OFPP has added to the list of inherently governmental functions: (i) All combat and (ii) security operations in certain situations connected with combat or potential combat. OFPP concluded these were clear examples of functions so intimately related to public interest as to require performance by Federal Government employees; hence, the addition of these activities to the list of inherently governmental functions would contribute to clarifying the line between what work must be reserved for Federal employees and what work may be performed by contractors. OFPP also clarified that making final determinations about a contractor's performance (including approving award fee determinations or past performance evaluations) and taking action based on these assessments are also inherently governmental because such actions involve the exercise of substantial discretion. In addition, OFPP added selection of grant and cooperative agreement recipients to the list of examples of inherently governmental functions because such actions bind the government.

With respect to contract pricing, the list identifies price reasonableness determinations as inherently governmental. This includes approval of any evaluation relied upon to support a price reasonableness determination, such as a price negotiation memorandum or approval of documentation cited as the government's independent cost estimate, which, by definition, must be the government's own final analysis. That said, an agency is not precluded from using the services of a contractor to develop inputs for government cost estimates or to draft a price negotiation memorandum as long as whatever the government relies upon to determine price reasonableness has been reviewed and approved by a government employee. As in other situations where a Federal official must review and approve documents prepared by a contractor, the Federal official's review and approval must be meaningful: that is to say, it cannot be a "rubber stamp" where the government is completely dependent on the contractor's superior knowledge and is unable to independently evaluate the merits of the contractor's draft or to consider alternatives to that draft. For that reason, while an agency may appropriately choose to have Federal employees prepare documentation in support of a price negotiation memorandum and price reasonableness

determination, OFPP does not view this work as inherently governmental, but rather closely associated with an inherently governmental function—and has added this work to the list of closely associated functions. If this work is performed by contractors, the agency must apply special management attention to ensure the work does not expand to include decision-making (which is inherently governmental) or otherwise interfere with the government's ability to exercise independent judgment, in this case, to determine that offered prices are fair and reasonable.

Regarding the performance of adjudicatory functions, OFPP retained the language on the proposed list, without change, and notes that the language currently in the FAR and the proposed policy letter already provides a carve-out for certain types of adjudicatory functions that are not inherently governmental, such as those relating to arbitration or other methods of alternative dispute resolution.

Similar to the list appearing in the FAR today, the list in the final policy letter is illustrative and not exhaustive. In addressing security operations, for example, the list identifies where security operations would be inherently governmental in connection with combat. This should not be read as a determination that all security performed in any hostile situation other than actual combat may be performed by contractors. Rather it means that those situations should be evaluated on a case-by-case basis to determine what security functions and activities are inherently governmental and what can be performed by contractors with appropriate management and oversight.

Finally, OFPP has added a caveat to recognize that many functions include multiple activities, some of which may not be inherently governmental. These other activities performed in conjunction with the function may be closely associated or neither inherently governmental nor closely associated. This caveat helps to clarify that the identification of a function on the list does not mean every action associated with the function is inherently governmental. For additional discussion, see response to comment no. 5, below.

3. Functions Closely Associated With Inherently Governmental Functions

Respondents offered a range of comments. Some call into question the purpose of this category; others raise concerns about the extent to which contractors should perform these

functions; still others offer refinements to the proposed list of examples.

a. *Purpose.* A number of respondents recommended that the guidance on closely associated functions be clarified. Many of them pointed out that discussion of this concept appears to overlap with the new concept of critical function in that both appear to address the same risk, namely of the government losing control of its operations. Some thought this confusion might be avoided by defining the term "closely associated" so that its scope as a functional category can be more clearly understood. Others favored adding an explanation of the different purposes served by the two concepts. Some proposed doing away with the category, pointing out that the "closely associated" concept is more appropriately viewed as a management practice rather than as a separate functional category.

Response: OFPP does not agree that the concept of "closely associated" should be eliminated, as it serves an important management purpose in helping agencies guard against losing control of inherently governmental functions. However, OFPP agrees that the concept is more relevant to management practices, or internal control mechanisms, as opposed to serving as a stand-alone functional category. For this reason, the discussion of this concept in the policy letter has been reorganized so that it is now addressed as part of the discussion on identifying inherently governmental functions. This reorganization should also help to clarify the different reasons for tracking contractors who are performing closely associated functions and those who are performing critical functions. In the case of closely associated functions, the agency is trying to prevent contractor performance from interfering with Federal employees' ability to perform inherently governmental functions. In the case of critical functions, the agency is looking to determine if the agency is at risk of losing control of its ability to perform its mission and operations. OFPP does not believe a definition will necessarily provide greater clarity, but has created a new checklist to summarize in one place the various actions that must be taken if the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate.

b. *Performance.* A number of respondents (including those using one of the two form letters) stated that only Federal employees should be allowed to perform functions closely associated with inherently governmental functions

(with contractor performance allowed only in limited or exceptional circumstances). These respondents generally recommended that the concept of "closely associated" be incorporated into the definition of inherently governmental function to effectively protect the government against improper reliance on contractors.

Response: Agencies must carefully guard against contractor performance of inherently governmental functions, but managing this risk does not require that performance of closely associated functions be reserved exclusively for Federal employees. Such a bar would inappropriately limit an agency's ability to take advantage of a contractor's expertise and skills to support the agency in carrying out its mission. For example, limiting performance of functions closely associated with inherently governmental functions could inappropriately limit an agency's ability to take advantage of a Federally Funded Research Development Center (FFRDC) or University Affiliated Research Center that provides essential engineering, research, development, and analysis capabilities to support agencies in the performance of their responsibilities and mission. As explained in FAR 35.017: "An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources. FFRDCs enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency."

Effective risk management can be achieved if agencies are mindful of their responsibility to give special consideration to Federal employee performance and effectively apply special management attention when contractor performance is determined to be appropriate. With respect to special consideration, the policy letter reminds agencies of their responsibilities under the law and OMB's management guidance on this issue. (These responsibilities are also reiterated in guidance OFPP issued last fall to help agencies in evaluating the activities of their service contractors in accordance with section 743 of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117). See OFPP Memorandum *Service Contract Inventories* (refer to response to comment no. 1, above, for cite).

With respect to contractor performance of closely associated functions, the final policy letter includes a new checklist that summarizes the various contract

management actions that agencies must take to ensure contractors are not performing, interfering with, or undermining the agency's decision-making responsibilities. The checklist, which is largely taken from existing guidance in the FAR and other documents, identifies steps such as: (i) Establishing specified ranges of acceptable decisions and/or conduct in the contract, (ii) assigning a sufficient number of qualified government employees to perform contract management, (iii) ensuring reasonable identification of contractors and contractor work products if there is a risk that the public will confuse contractor personnel or work products with government officials or work products, and (iv) avoiding or mitigating conflicts of interest.

In the case of an FFRDC, the FAR has long required that such organizations conduct their business in a manner befitting their special relationship with the government—which includes access, beyond that which is common to the normal contractual relationship, to government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property. As stated in FAR 35.017, FFRDCs must operate in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of their affairs to the sponsoring agency.

c. *Examples.* Respondents offered varied reactions to maintaining a list of examples of "closely associated" functions. Several felt a list should not be included in the final policy letter because it introduces unnecessary ambiguity and allows for unnecessarily broad interpretation that could include either an inappropriate presumption in favor of insourcing or an inappropriate presumption that the work is appropriately performed by a contractor. Of those who favored (or did not oppose) the continued use of a list, some felt the list was too broad, either because it included functions where the potential for encroaching on inherently governmental responsibilities should not be viewed as a significant concern in need of heightened scrutiny or because the function as described was indistinguishable from those identified as inherently governmental.

Response: OFPP believes the list, which is currently set forth in the FAR, continues to serve as a useful tool to assist agencies in identifying functions where they must give special consideration to performance by Federal employees or special contract management attention if performed by

contractors. The reorganized discussion of this issue (as described above) in combination with the checklist should help to avoid inappropriate presumptions regarding the performance of these functions.

With respect to the substance of the list, OFPP has made three types of modifications. First, as was done with the list of inherently governmental functions, OFPP has added a caveat that many functions include multiple activities, only some of which are closely associated with inherently governmental. Other activities performed in conjunction may be inherently governmental or not closely associated. This caveat helps to clarify that the identification of a function on the list does not mean every action associated with the function is closely associated with an inherently governmental function. (See comment no. 5, below for additional discussion.) Second, the list more carefully delineates activities that are performed in direct support of inherently governmental functions (e.g., analyses and feasibility studies to support the development of policy), which are closely associated activities, from those that involve making binding decisions (e.g., the final shape of a policy), which are inherently governmental. Third, OFPP has added additional examples to further describe the types of acquisition support that are closely associated functions. These added functions include: Conducting market research, developing inputs for independent government cost estimates, assisting in the development of a price negotiation memorandum, and supporting agency personnel in evaluating a contractor's performance, such as by collecting information or conducting an analysis that can be used by a Federal employee to make a determination about the quality of the contractor's performance.

4. Critical Functions

A number of respondents recognized that the creation of "critical function" as a new category helps to fill a void in current policy, but sought clarification and recommended refinements to ensure agencies properly identify and address functions that are at the core of an agency's mission and operations. Some confusion was voiced, as noted above, regarding the difference between critical functions and closely associated with inherently governmental functions. Some respondents suggested that a list providing examples of critical functions be developed, similar to that developed for inherently governmental and closely associated functions, but others advised against developing a list, noting that the

criticality of a function depends on an agency's mission and current capabilities. A number of respondents addressed how an agency might go about differentiating between a critical and a non-critical function. Some suggested that agencies be authorized, if not encouraged, to identify categories of service contracts that may be presumed to be non-critical in order to avoid unnecessary analyses. Others expressed concern that a list will lead to inappropriate generalizations that will hinder, rather than facilitate, meaningful rebalancing.

Response: OFPP intends to work with FAI and DAU to develop appropriate training to support the successful implementation of the policy letter. However, OFPP does not support the creation of a list of critical functions. A function's criticality is dependent on an agency's mission and operations. The policy letter has been clarified to emphasize that the criticality of a function depends on mission and operations, which will differ between agencies and potentially within agencies over time. Whether an agency is over reliant on a contractor to perform a critical function also will vary from agency to agency depending on its current internal capabilities compared to those needed to maintain control of its mission and operations. Similarly, OFPP does not support the creation of a government-wide list of non-critical functions, as this may also differ between agencies based on their mission and operations.

5. Terminology

Several respondents raised concerns regarding how the policy letter uses the terms "function," "activity," and "position." These respondents state that the terms are used interchangeably to cover different concepts, namely: (1) A process, (2) tasks undertaken in conjunction with the process, and (3) billets filled by individuals to perform tasks. They recommend that clarification be provided, perhaps with the addition of definitions.

Response: OFPP recognizes that the terms have different meanings and agrees that more careful use of these terms may help to avoid inappropriately broad generalizations regarding the characterization of work. A function, for example, often includes multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. By identifying work at the activity level, an agency can more easily differentiate tasks within a function that may be performed only by

Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors. The chart below provides several examples. For instance, within the function of source selection, the tasks of

determining price reasonableness and awarding a contract are inherently governmental, the task of preparing a technical evaluation and price negotiation memorandum are closely associated (provided the government has sufficient time and knowledge to independently evaluate alternative

recommendations and decide which is in the government's best interest) and (although not shown on the table), the task of ensuring the documents are in the contract file is neither inherently governmental nor closely associated.

| Function | Work that is inherently governmental and therefore must be performed by Federal employees | Work that is closely associated with inherently governmental functions and that may be performed by either Federal employees or contractors |
|--|---|---|
| Budget development | The determination of budget policy, guidance, and strategy, and the determination of Federal program priorities or budget requests. | Support for budget preparation, such as workforce modeling, fact finding, efficiency studies, and should-cost analyses. |
| Policy and regulatory development. | The determination of the content and application of policies and regulations. | Support for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options. |
| Human resources management. | The selection of individuals for Federal Government employment, including the interviewing of individuals for employment, and the direction and control of Federal employees. | Support for human resources management, such as screening resumes in accordance with agency guidelines. |
| Acquisition planning, execution, and management. | <p><i>During acquisition planning:</i></p> <ul style="list-style-type: none"> (1) Determination of requirements, (2) approval of a contract strategy, statement of work, incentive plans, and evaluation criteria, (3) independent determination of estimated cost based on input from either in-house or contractor sources or both. <p><i>During source selection:</i></p> <ul style="list-style-type: none"> (1) Determination of price reasonableness of offers, (2) participation as a voting member on a source selection board, and (3) awarding of contracts. <p><i>During contract management:</i></p> <ul style="list-style-type: none"> (1) Ordering of any changes required in contract performance or contract qualities, (2) determination of whether costs are reasonable, allocable, and allowable, (3) participation as a voting member on performance evaluation boards, (4) approval of award fee determinations or past performance evaluations, and (5) termination of contracts. | <p><i>Support acquisition planning by:</i></p> <ul style="list-style-type: none"> (1) Conducting market research, (2) developing inputs for government cost estimates, and (3) drafting statements of work and other pre-award documents. <p><i>Support source selection by:</i></p> <ul style="list-style-type: none"> (1) Preparing a technical evaluation and associated documentation; (2) participating as a technical advisor to a source selection board or as a nonvoting member of a source evaluation board; and (3) drafting the price negotiation memorandum. <p><i>Support contract management by:</i></p> <ul style="list-style-type: none"> (1) Assisting in the evaluation of a contractor's performance (e.g., by collecting information, performing an analysis, or making a recommendation for a proposed performance rating); and (2) providing support for assessing contract claims and preparing termination settlement documents. |

Further analyzing work from the perspective of the number of positions required to perform an activity enables an agency to differentiate those tasks that may require rebalancing from those that do not. The fact that contractors are performing some portion of a particular activity is not an automatic signal that rebalancing is required, except where work is inherently governmental. In other cases, the number of positions, or slots, that should be held by government employees versus contractor personnel to perform a particular activity will depend on a number of considerations, such as whether the work is critical or closely associated with inherently governmental functions, the particular mission of the agency, the current capability of government employees to understand the mission and manage contractors, and how the function will

be delivered to the agency by the contractor.

A number of clarifications have been made throughout the document to capture these differences, such as in connection with the lists of inherently governmental and closely associated functions in Appendix A and Appendix B. OFPP does not believe definitions need to be added to the policy letter at this time, but will review with the FAR Council if further clarification is required as regulatory changes are developed to implement the policy letter.

6. Small Business Contracting

Many respondents expressed concern that the rebalancing called for in the policy letter could harm small businesses. These respondents offered a number of recommendations to mitigate this impact, such as excluding all contracts that were awarded under set-

asides from insourcing without a formal justification and approval, and having the Small Business Administration review proposed insourcing actions.

Response: OFPP does not anticipate a widespread shift away from contractors as a result of the requirements in the policy letter. As the policy letter explains, insourcing is intended to be a management tool—not an end in itself—to address certain types of overreliance on contractors. In many cases, overreliance may be corrected by allocating additional resources to contract management—i.e., an agency does not necessarily need to take work away from contractors and have it performed by Federal employees. However, some insourcing is taking place and will be undertaken in the future in some situations, such as where an agency determines that outsourced work is inherently governmental or

where the agency is at risk of losing control of its operations regarding work of a critical nature. To minimize the negative impact of these actions on small businesses, the final policy letter requires agencies to take two actions. First, when prioritizing what contracted work should be reviewed for potential insourcing, agencies are instructed to generally place a lower priority on reviewing work performed by small businesses where the work is not inherently governmental and where continued contractor performance does not put the agency at risk of losing control of its mission and operations. Second, agencies are instructed to apply the "rule of two" to work that will continue to be performed by contractors following the insourcing of part of the work (the rule of two calls for a contract to be set aside for small businesses when at least two small businesses can do the work for a fair market price). Application of this rule should increase the amount of residual work remaining in the hands of small businesses that can perform the work cost effectively.

7. Human Capital Planning

A number of respondents acknowledged the connection that exists between human capital planning, clear guidance on the performance of inherently governmental, closely associated, and critical functions, and the ability to effectively evaluate the need for rebalancing. However, reactions were mixed regarding the value of addressing hiring ceilings and funding constraints. Some thought these were appropriate considerations for assessing the current and desired mix of Federal employees and contractors in an organization. Others felt that the assessment should remain focused exclusively on the nature of the function.

Response: Striking the right balance of work performed by Federal employees and contractors is a shared responsibility between human capital, acquisition, program, and financial management offices. Issues such as hiring ceilings and funding constraints were referenced in the guidance document because these issues are part of the challenges that agency officials must address in executing their responsibilities and determining the best mix of labor resources. OFPP and other organizations within OMB are working with the Chief Human Capital Officers (CHCO) Council to ensure agency human capital officers understand their role and responsibilities. OMB will work with the CHCO Council to determine the appropriate type of supplementary

materials that might be needed when the policy letter is finalized.

8. Other Issues

a. The role of cost in rebalancing decisions. Several respondents raised concern that the policy letter provides insufficient guidance on the parameters for insourcing when based on a determination that public sector performance is more cost effective than private sector performance. They suggested that the policy letter lay out the steps for performing a cost comparison and define key terms such as "cost effective," "fully loaded cost" and "indirect cost."

Response: The proposed policy letter's discussion of insourcing focuses primarily on situations where an agency identifies improper reliance on contractors, namely, where the outsourced work is inherently governmental, or where the agency is at risk of losing control of its mission and operations. These circumstances, in particular, were highlighted in section 321 of the FY 2009 NDAA and the President's Memorandum on Government Contracting and have been the subject of reports issued in recent years addressing the use of contractors. The policy letter acknowledges that cost may also be a basis for insourcing, and requires in such situations that agency officials ensure that the agency's analysis fairly takes into account the full cost of performance by both sectors to support a determination that insourcing will save money. OFPP agrees that additional guidance in this area may be beneficial, and is reviewing the need for such guidance, but believes that additional coverage of the type described by the respondents, if appropriate, is better addressed as a supplement to existing guidance on insourcing, such as that in Appendix 3 of OMB Memorandum M-09-26, *Managing the Multi-Sector Workforce* (July 29, 2009), which implements section 736 of Division D of the Omnibus Appropriations Act, 2009 (Pub. L. 111-8), or Circular A-76, which addresses the use of public-private competition to outsource or insource work that may appropriately be performed by either sector.

b. Management responsibilities. Some respondents recommended that the contents of the policy letter be reorganized, such as by consolidating the discussion of management responsibilities, rather than addressing these responsibilities separately for inherently governmental, closely associated and critical functions. A few respondents also recommended listing, either in the text or an additional

appendix, all laws that require work to be performed by Federal employees.

Response: OFPP has reorganized the policy letter to create a comprehensive and consolidated discussion of management responsibilities that agencies must undertake before and after awarding a contract to ensure proper and effective implementation of policies associated with the performance of inherently governmental, closely associated, and critical functions. This consolidated discussion of pre-award and post-award responsibilities more clearly recognizes that oversight responsibilities for each of these functional categories are interrelated. The policy letter includes citations to relevant laws with government-wide or broad applicability but does not include a list of all laws requiring reservation, a number of which are agency-specific and best addressed individually by affected agencies.

c. Tribal organizations.

Representatives of Tribal organizations requested that language be added to the policy letter exempting Federal government agreements with Tribal government organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA), as amended, 25 U.S.C. 450 *et seq.* They provided a number of statutory and policy reasons for differentiating these agreements, which address a government-to-government relationship, from government procurement contracts, the principal purpose of which is to acquire products and services for the direct benefit or use of the United States Government. They stated that the ISDEAA, at 25 U.S.C. 458aaa-9, expressly exempts the former agreements from the application of Federal acquisition regulations.

Response: The policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, which charges the Administrator for Federal Procurement Policy with providing overall policy direction for agencies' acquisition of products and services. In accordance with the OFPP Act, the policy letter focuses on the relationship between the Federal government and its contractors—that is, entities who are providing a product or service for the direct benefit of an agency under a Federal procurement contract. The policy letter is not intended to modify or otherwise affect any rights or limitations set forth under the Act, including either the right of Tribal governments to assume and carry out functions under the ISDEAA or limitations imposed by the ISDEAA on a Tribal government's ability to assume

responsibility for an inherently Federal function as that term is used under the Act.

d. *Foreign indirect hire employees working with U.S. Forces.* During the disposition of comments, a question was raised regarding the applicability of this guidance to foreign indirect hire employees, as that term is defined in Defense Department (DoD) guidance.

Response: DoD guidance defines indirect hire employees as "local national personnel assigned by the host government to work with U.S. Forces." This guidance goes on to state that such personnel are not employees of the United States and cannot perform inherently governmental functions." See DOD Financial Management Regulation, Volume 5, Chapter 33, § 330204 (August 2010). Nothing in this policy letter is intended to modify the Department's guidance. Thus, restrictions on the use of contractors to perform inherently governmental functions would also apply to foreign indirect hire employees working with U.S. Forces.

Daniel I. Gordon,
Administrator.

POLICY LETTER 11-01

TO THE HEADS OF CIVILIAN EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Performance of Inherently Governmental and Critical Functions

1. **Purpose.** This guidance establishes Executive Branch policy addressing the performance of inherently governmental functions and critical functions. The policy is intended 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. The policy is further intended to help agencies manage functions that are closely associated with inherently governmental functions and critical functions, which are often performed by both Federal employees and contractors.

Nothing in this guidance is intended to discourage the appropriate use of contractors. Contractors can provide expertise, innovation, and cost-effective support to Federal agencies for a wide range of services. Reliance on contractors is not, by itself, a cause for concern, provided that the work that they perform is not work that should be reserved for Federal employees and that Federal officials are appropriately managing and overseeing contractor performance.

2. **Authority.** This policy letter is issued pursuant to section 6(a) of the

Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President's March 4, 2009, Memorandum on Government Contracting, and section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417.

3. Definitions.

"Inherently governmental function," as defined in section 5 of the Federal Activities Inventory Reform Act, Public Law 105-270, means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(a) The term includes functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as —

(1) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(2) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(3) to significantly affect the life, liberty, or property of private persons;

(4) to commission, appoint, direct, or control officers or employees of the United States; or

(5) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriations and other Federal funds.

(b) The term does not normally include—

(1) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or

(2) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

"Critical function" means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.

Typically, critical functions are recurring and long-term in duration.

4. **Policy.** It is the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials. Adherence to this policy will ensure that the act of governance is performed, and decisions of significant public interest are made, by officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress. To implement this policy, agencies must reserve certain work for performance by Federal employees and take special care to retain sufficient management oversight over how contractors are used to support government operations and ensure that Federal employees have the technical skills and expertise needed to maintain control of the agency mission and operations.

(a) *Performance of work by Federal employees.* To ensure that work that should be performed by Federal employees is properly reserved for government performance, agencies shall:

(1) ensure that contractors do not perform inherently governmental functions (see section 5-1);

(2) give special consideration to Federal employee performance of functions closely associated with inherently governmental functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors' activities to ensure that contractors' duties do not expand to include performance of inherently governmental functions (see sections 5-1(a) and 5-2(a) and Appendices B and C); and

(3) ensure that Federal employees perform and/or manage critical functions to the extent necessary for the agency to operate effectively and maintain control of its mission and operations (see sections 5-1(b) and 5-2b).

(b) *Management and oversight of Federal contractors.* When work need not be reserved for Federal performance and contractor performance is appropriate, agencies shall take steps to employ and train an adequate number of government personnel to administer contracts and protect the public interest through the active and informed management and oversight of contractor performance, especially where contracts have been awarded for the performance of critical functions, functions closely

associated with the performance of inherently governmental functions, or where, due to the nature of the contract services provided, there is a potential for confusion as to whether work is being performed by government employees or contractors. Contract management should be appropriate to the nature of the contract, ensure that government officials are performing oversight at all times, and make clear to the public when citizens are receiving service from contractors.

(c) *Strategic human capital planning.*

(1) As part of strategic human capital planning, agencies shall—

(i) dedicate a sufficient amount of work to performance by Federal employees in order to build competencies (both knowledge and skills), provide for continuity of operations, and retain institutional knowledge of operations;

(ii) ensure that sufficient personnel with appropriate training, experience, and expertise are available, and will remain available for the duration of the contract, to manage and oversee every contractor's performance and evaluate and approve or disapprove the contractor's work products and services, recruiting and retaining the necessary Federal talent where it is lacking; and

(iii) consider the impact of decisions to establish a specified level of government employee authorizations (or military end strength) or available funding on the ability to use Federal employees to perform work that should be reserved for performance by such employees and take appropriate action if there is a shortfall.

(2) Agencies' annual Human Capital Plan for Acquisition shall identify specific strategies and goals for addressing both the size and capability of the acquisition workforce, including program managers and contracting officer's representatives. The number of personnel required to administer a particular contract is a management decision to be made after analysis of a number of factors. These include, among others:

(i) scope of the activity in question;

(ii) technical complexity of the project or its components;

(iii) technical capability, numbers, and workload of Federal management officials;

(iv) inspection techniques available;

(v) proven adequacy and reliability of contractor project management;

(vi) sophistication and track record of contract administration organizations within the agency;

(vii) importance and criticality of the function; and

(viii) the level of risk associated with performance of the function and its performance by a contractor.

5. Implementation guidelines and responsibilities. Agencies shall use the guidelines below to determine: (1) whether their requirements involve the performance of inherently governmental functions, functions closely associated with inherently governmental functions, or critical functions; and (2) the type and level of management attention necessary to ensure that functions that should be reserved for Federal performance are not materially limited by or effectively transferred to contractors and that functions that are suitable for contractor performance are properly managed. Determining the type and level of management required typically requires agencies to consider the totality of circumstances surrounding how, where, and when work is to be performed. Special exceptions to these guidelines may exist, such as for statutorily authorized personal services contracting.

5-1. Guidelines for identifying inherently governmental functions and critical functions. Agencies must ensure that inherently governmental functions are reserved exclusively for performance by Federal employees. Agencies must further ensure that a sufficient number of Federal employees are dedicated to the performance and/or management of critical functions so that Federal employees can provide for the accomplishment of, and maintain control over, their mission and operations. Proper identification of inherently governmental and critical functions is the first step for meeting these requirements.

(a) *Determining whether a function is inherently governmental.* Every Federal Government organization performs some work that is so intimately related to the public interest as to require performance by Federal Government employees. Agencies should review the definition of inherently governmental functions in section 3, any other statutory provisions that identify a function as inherently governmental, and the illustrative list of inherently governmental functions in Appendix A. In no case should any function described in the definition, identified in statute as inherently governmental, or appearing on the list be considered for contract performance. If a function is not listed in Appendix A or identified in a statutory provision as inherently governmental, agencies should determine whether the function otherwise falls within the definition in section 3 by evaluating, on a case-by-case basis, the nature of the work and

the level of discretion associated with performance of the work using the tests below.

(1) *Tests for identifying inherently governmental functions.* A function meeting either of the following tests should be considered inherently governmental.

(i) *The nature of the function.*

Functions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.

(ii) *The exercise of discretion.*

(A) A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that 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 that:

(I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and

(II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.

(B) A function may be appropriately performed by a contractor consistent with the restrictions in this section—including those involving the exercise of discretion that has the potential for influencing the authority, accountability, and responsibilities of government officials—where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor's action. The fact that decisions are made, and discretion exercised, by a contractor in performing its duties under the contract is not, by itself, determinative of whether the contractor is performing an inherently governmental function. For instance, contractors routinely, and properly, exercise discretion in performing functions for the Federal Government when, providing advice, opinions, or recommended actions, emphasizing certain conclusions, and, unless

specified in the contract, deciding what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, or how frequently to test.

(C) A function is not appropriately performed by a contractor where the contractor's 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. Such circumstances may be avoided by: (i) carefully delineating in the statement of work the contractor's responsibilities and types of decisions expected to be made in carrying out these responsibilities and (ii) having Federal employees oversee and, as necessary, give final approval of contractor conduct and decisions. This requires that a sufficient number of in-house personnel with the appropriate training and expertise be available and remain available through the course of the contract to make independent and informed evaluations of the contractor's work, approve or disapprove that work, perform all inherently governmental functions, and preclude the transfer of inherently governmental responsibilities to the contractor. Agencies should consider whether time constraints, the operational environment, or other conditions may limit their ability to effectively manage the contractor's actions or inappropriately restrict their final approval authority. If this is the case, government performance may be the only way that Federal officials can retain control of their inherently governmental responsibilities. For example, providing security in a volatile, high-risk environment may be inherently governmental if the responsible Federal official cannot anticipate the circumstances and challenges that may arise, and cannot specify the range of acceptable conduct (as required by paragraph 5-1(a)(1)(ii)). Agencies should also consider if the level of management and oversight that would be needed to retain government control of the operation and preclude the transfer of inherently governmental responsibilities to the contractor would result in unauthorized personal services. In such cases, the function should not be contracted out.

(2) *Functions closely associated with inherently governmental functions.* As agencies identify inherently governmental functions, they should bear in mind that certain services and actions that generally are not considered to be inherently governmental functions may approach being in that category

because of the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function. See Appendix B for list of examples. Although closely associated functions are not reserved exclusively for performance by Federal employees, section 736 of Division D of the Omnibus Appropriations Act, 2009, Public Law 111-8, requires civilian agencies subject to the FAIR Act to give special consideration to using Federal employees to perform these functions. Similarly, the Department of Defense is required to ensure special consideration is given to Federal employee performance consistent with the requirements of 10 U.S.C. 2463. The Department is further required, to the maximum extent practicable, to minimize reliance on contractors performing functions closely associated with inherently governmental functions consistent with 10 U.S.C. 2330a. Civilian agencies shall refer to OMB Memorandum M-09-26, *Managing the Multi-Sector Workforce* (July 29, 2009), Attachment 3 for criteria addressing the in-sourcing of work under Public Law 111-8. The OMB Memorandum is available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf.

(b) *Determining whether a function is critical.* Determining the criticality of a function requires the exercise of informed judgment by agency officials. The criticality of the function depends on the mission and operations, which will differ between agencies and within agencies over time. In making that determination, the officials shall consider the importance that a function holds for the agency and its mission and operations. The more important the function, the more important that the agency have internal capability to maintain control of its mission and operations. Examples of critical functions might include: analyzing areas of tax law that impose significant compliance burdens on taxpayers for the Internal Revenue Service's Office of the Taxpayer Advocate and performing mediation services for the Federal Mediation and Conciliation Service. Where a critical function is not inherently governmental, the agency may appropriately consider filling positions dedicated to the function with both Federal employees and contractors. However, to meet its fiduciary responsibility to the taxpayers, the agency must have sufficient internal capability to control its mission and

operations and must ensure it is cost effective to contract for the services.

(1) *Sufficient internal capability—*
(i) generally requires that an agency have an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, take other appropriate actions to properly manage and be accountable for the work product, and continue critical operations with in-house resources, another contractor, or a combination of the two, in the event of contractor default; and

(ii) further requires that an agency have the ability and internal expertise to oversee and manage any contractors used to support the Federal workforce.

(2) Determinations concerning what constitutes sufficient internal capability must be made on a case-by-case basis taking into account, among other things the:

- (i) agency's mission;
- (ii) complexity of the function and the need for specialized skill;
- (iii) current strength of the agency's in-house expertise;
- (iv) current size and capability of the agency's acquisition workforce; and
- (v) effect of contractor default on mission performance.

(c) *Handling of work performed by Federally Funded Research and Development Centers (FFRDCs) and University Affiliated Research Centers (UARCs).* In some circumstances, work that is closely associated with the performance of inherently governmental functions, or work that is critical to maintaining control of an agency's mission and operations, may be performed by FFRDCs or UARCs (with appropriate oversight by Federal officials and pursuant to properly executed contracts). These contractors provide essential engineering, research, development, and analysis capabilities to support agencies in the performance of their responsibilities and mission. FFRDCs and UARCs and their employees are not allowed to perform inherently governmental functions. Agencies shall also refer to the requirements in FAR Part 37 regarding requirements pertaining to the conduct of FFRDCs.

5-2. Management responsibilities in connection with the planning and awarding of contracts.

(a) *Pre-award.* As part of acquisition planning, agencies shall confirm that the services to be procured do not include work that must be reserved for performance by Federal employees and that the agency will be able to manage the contractor consistent with its

responsibility to perform all inherently governmental functions and maintain control of its mission and operations. For the procurement of services above the simplified acquisition threshold, the contract file shall include documentation of this confirmation from the agency head or designated requirements official to the contracting officer. The contract file should include analysis that establishes, at a minimum, that:

(1) the function to be contracted does not appear on the list of inherently governmental functions in Appendix A and does not otherwise qualify as an inherently governmental function, taking into consideration, as necessary, the tests in subsection 5-1(a);

(2) a statute, such as an annual appropriations act, does not identify the function as inherently governmental or otherwise require it to be performed by Federal employees;

(3) the proposed role for the contractor is not so extensive that the ability of senior agency management to develop and consider options or take an alternative course of action is or would be preempted or inappropriately restricted;

(4) if the function is closely associated with an inherently governmental one—

(i) special consideration has been given to using Federal employees to perform the function in accordance with applicable law and implementing guidance;

(ii) the agency has sufficient capacity and capability to give special management attention to contractor performance, limit or guide the contractor's exercise of discretion, ensure reasonable identification of contractors and contractor work products, avoid or mitigate conflicts of interest, and preclude unauthorized personal services;

(iii) the agency will comply with the checklist of responsibilities in Appendix C; and

(5) if the function is a critical function, the agency has sufficient internal capability to control its mission and operations as provided at subsection 5-1(b).

(b) *Post-award.* Agencies should review, on an ongoing basis, the functions being performed by their contractors, paying particular attention to the way in which contractors are performing, and agency personnel are managing, contracts involving functions that are closely associated with inherently governmental functions (see subsection 5-1(a) and Appendix B) and contracts involving critical functions (see subsection 5-1(b)). These reviews should be conducted in connection with

the development and analysis of inventories of service contracts. Through the use of an inventory, an agency manager can gain insight into where, and the extent to which, contractors are being used to perform activities by analyzing how contracted resources are distributed by function and location across the agency and within its components. Civilian agencies should refer to section 743 of Division C of the Consolidated Appropriations Act, 2010 (Public Law 111-117) and OFPP Memorandum to Chief Acquisition Officers and Senior Procurement Executives, *Service Contract Inventories*, November 5, 2010. Department of Defense services and agencies should refer to section 2330a of Title 10 of the United States Code.

(1) Contractor performance of inherently governmental functions. If a determination is made that a contractor is performing work that is inherently governmental (or involves unauthorized personal services), but the contract, properly defined, does not entail performance of inherently governmental functions or unauthorized personal services, the agency shall take prompt corrective actions. In some cases, government control over, and performance of, inherently governmental responsibilities can be reestablished by strengthening contract oversight using government employees with appropriate subject matter expertise and following the protocols identified in FAR 37.114 (see also Appendix C). However, agencies must ensure that increasing the level of government oversight and control does not result in unauthorized personal services as provided by FAR 37.104. If government control of inherently governmental functions cannot be reestablished, agencies will need to in-source work on an accelerated basis through the timely development and execution of a hiring plan timed, if possible, to permit the non-exercise of an option or the termination of that portion of the contract being used to fulfill inherently governmental responsibilities.

(2) Overreliance on contractors to perform critical functions. While contractor performance of critical functions is common, if the agency determines that internal control of its mission and operations is at risk due to overreliance on contractors to perform critical functions, requiring activities should work with their human capital office to develop and execute a hiring and/or development plan. Requiring activities should also work with the acquisition office to address the handling of ongoing contracts and the

budget and finance offices to secure the necessary funding to support the needed in-house capacity. Agencies should also consider application of the responsibilities outlined in Appendix C, as appropriate.

If an agency has sufficient internal capability to control its mission and operations, the extent to which additional work is performed by Federal employees should be based on cost considerations. Supporting cost analysis should address the full costs of government and private sector performance and provide like comparisons of costs that are of a sufficient magnitude to influence the final decision on the most cost effective source of support for the organization.

(c) *Analyzing functions.* A function often includes multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. By evaluating work at the activity level, an agency may be able to more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors.

5-3. Management responsibilities in connection with small business contracting.

(a) *Lower prioritization for review.*

When prioritizing what outsourced work should be reviewed for potential insourcing, agencies generally should place a lower priority on reviewing work performed by small businesses when the work is not inherently governmental and where continued contractor performance does not put the agency at risk of losing control of its mission or operations, especially if the agency has not recently met, or currently is having difficulty meeting, its small business goals, including any of its socioeconomic goals. The agency should involve its small business advocate if considering the insourcing of work currently being performed by small businesses.

(b) *Considerations when contracted work is identified for insourcing.* If part of a contracted function to be insourced is currently being performed by both small and large businesses, the "rule of two" should be applied in deciding between small and large businesses that will perform the contracted work that remains in the private sector. The "rule of two" set out in FAR subpart 19.5 requires that acquisitions be reserved for award to small businesses, or certain subsets of small businesses, if there are

two or more responsible small businesses capable of performing the work at fair market prices. The agency should involve its small business representative in the same manner as it would in working with the acquisition and program office in evaluating opportunities for small businesses for new work. In addition, if contracted work not currently being performed by small businesses is reduced as part of an insourcing, the agency should carefully consider during recompetition whether it can be totally or partially set-aside for small businesses.

5-4. Additional agency management responsibilities.

(a) *Duty of Federal employees.* Every Federal manager and their employees have an obligation to help avoid performance by contractors of responsibilities that should be reserved for Federal employees. Although contractors provide important support to the agency, they may not be motivated solely by the public interest, and may be beyond the reach of management controls applicable to Federal employees. As part of this obligation, Federal managers and employees who rely on contractors or their work product must take appropriate steps, in accordance with agency procedures, to ensure that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors. These steps shall include increased attention and examination where contractor work product involves advice, opinions, recommendations, reports, analyses, and similar deliverables that are to be considered in the course of a Federal employee's official duties and may have the potential to influence the authority, accountability, and responsibilities of the employee.

(b) *Development of agency procedures.* Agencies shall develop and maintain internal procedures to address the requirements of this guidance. Those procedures shall be reviewed by agency management no less than every two years.

(c) *Training.* Agencies shall take appropriate steps to help their employees understand and meet their responsibilities under this guidance. Steps should include training, no less than every two years, to improve employee awareness of their responsibilities.

(d) *Review of internal management controls.* Agencies should periodically evaluate the effectiveness of their internal management controls for reserving work for Federal employees

and identify any material weaknesses in accordance with OMB Circular A-123, *Management's Responsibility for Internal Control*, and OFFP's *Guidelines for Assessing the Acquisition Function*, available at http://www.whitehouse.gov/omb/circulars_a123/.

(e) *Designation of responsible management official(s).* Each Federal agency with 100 or more full-time employees in the prior fiscal year shall identify one or more senior officials to be accountable for the development and implementation of agency policies, procedures, and training to ensure the appropriate reservation of work for Federal employees in accordance with this guidance. Each such agency shall submit the names and titles of the designated officials, along with contact information, by June 30 annually to OMB on the following MAX Web site: <https://max.omb.gov/community/x/VwkQlg>.

6. **Judicial review.** This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.

7. **Effective date.** This policy letter is effective October 12, 2011.

Daniel I. Gordon,

Administrator.

Appendix A. Examples of inherently governmental functions

The following is an illustrative list of functions considered to be inherently governmental. This list should be reviewed in conjunction with the list of functions closely associated with inherently governmental functions found in Appendix B to better understand the differences between the actions identified on each list.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be inherently governmental.

1. The direct conduct of criminal investigation.

2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).

3. The command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role.

4. Combat.

5. Security provided under any of the circumstances set out below. This provision should not be interpreted to preclude contractors taking action in self-defense or defense of others against the imminent threat of death or serious injury.

(a) Security operations performed in direct support of combat as part of a larger integrated armed force.

(b) Security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.

(c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.

6. The conduct of foreign relations and the determination of foreign policy.

7. The determination of agency policy, such as determining the content and application of regulations.

8. The determination of budget policy, guidance, and strategy.

9. The determination of Federal program priorities or budget requests.

10. The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.

11. The direction and control of Federal employees.

12. The direction and control of intelligence and counter-intelligence operations.

13. The approval of position descriptions and performance standards for Federal employees.

14. The determination of what government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

15. In Federal procurement activities with respect to prime contracts:

(a) determining what supplies or services are to be acquired by the government (although an agency may

give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(b) participating as a voting member on any source selection boards;

(c) approving of any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;

(d) determining that prices are fair and reasonable;

(e) awarding contracts;

(f) administering contracts (including ordering changes in contract performance or contract quantities, making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and accepting or rejecting contractor products or services);

(g) terminating contracts;

(h) determining whether contract costs are reasonable, allocable, and allowable; and

(i) participating as a voting member on performance evaluation boards.

16. The selection of grant and cooperative agreement recipients including: (a) approval of agreement activities, (b) negotiating the scope of work to be conducted under grants/cooperative agreements, (c) approval of modifications to grant/cooperative agreement budgets and activities, and (d) performance monitoring.

17. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

18. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in government programs.

19. The approval of Federal licensing actions and inspections.

20. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including:

(a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base

exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is predetermined or can be readily calculated and the funds collected can be readily controlled using standard cash management techniques, and

(b) routine voucher and invoice examination.

21. The control of the Treasury accounts.

22. The administration of public trusts.

23. The drafting of official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity.

24. Representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract.

Appendix B. Examples Of Functions Closely Associated With The Performance Of Inherently Governmental Functions

The following is an illustrative list of functions that are generally not considered to be inherently governmental but are closely associated with the performance of inherently governmental functions. This list should be reviewed in conjunction with the list of inherently governmental functions in Appendix A to better understand the differences between the actions identified on each list.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be closely associated with performance of inherently governmental functions.

1. Services in support of inherently governmental functions, including, but not limited to the following:

(a) performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should-cost analyses.

(b) undertaking activities to support agency planning and reorganization.

(c) providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.

(d) providing services to support the development of regulations and legislative proposals pursuant to specific policy direction.

(e) supporting acquisition, including in the areas of:

i) acquisition planning, such as by—
I) conducting market research,
II) developing inputs for government cost estimates, and

III) drafting statements of work and other pre-award documents;

ii) source selection, such as by—

I) preparing a technical evaluation and associated documentation;

II) participating as a technical advisor to a source selection board or as a nonvoting member of a source selection evaluation board; and

III) drafting the price negotiations memorandum; and

iii) contract management, such as by—

I) assisting in the evaluation of a contractor's performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and
II) providing support for assessing contract claims and preparing termination settlement documents.

(f) Preparation of responses to Freedom of Information Act requests.

2. Work in a situation that permits or might permit access to confidential business information or other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).

3. Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.

4. Participation in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of an agency.

5. Service as arbitrators or provision of alternative dispute resolution (ADR) services.

6. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

7. Provision of inspection services.

8. Provision of legal advice and interpretations of regulations and statutes to government officials.

9. Provision of non-law-enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

Appendix C. Responsibilities Checklist For Functions Closely Associated With Inherently Governmental Functions

If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate, the agency shall—

(1) limit or guide a contractor's exercise of discretion and retain control of government operations by both—

(i) establishing in the contract specified ranges of acceptable decisions and/or conduct; and

(ii) establishing in advance a process for subjecting the contractor's discretionary decisions and conduct to meaningful oversight and, whenever necessary, final approval by an agency official;

(2) assign a sufficient number of qualified government employees, with expertise to administer or perform the work, to give special management attention to the contractor's activities, in particular, to ensure that they do not expand to include inherently governmental functions, are not performed in ways not contemplated by the contract so as to become inherently governmental, do not undermine the integrity of the government's decision-making process as provided by subsections 5–1(a)(1)(ii)(b) and (c), and do not interfere with Federal employees' performance of the closely-associated inherently governmental functions (see subsection 5–2(b)(2) for guidance on steps to take where a determination is made that the contract is being used to fulfill responsibilities that are inherently governmental);

(3) ensure that the level of oversight and management that would be needed to retain government control of contractor performance and preclude the transfer of inherently governmental responsibilities to the contractor would not result in unauthorized personal services as provided by FAR 37.104;

(4) ensure that a reasonable identification of contractors and contractor work products is made whenever there is a risk that Congress, the public, or other persons outside of the government might confuse contractor personnel or work products with government officials or work products, respectively; and

(5) take appropriate steps to avoid or mitigate conflicts of interest, such as by conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest.

[FR Doc. 2011–23165 Filed 9–9–11; 8:45 am]

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THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities, The National Foundation on the Arts and the Humanities.

ACTION: Cancellation of panel meeting.

Notice is hereby given of the cancellation of the following meeting of the Humanities Panel at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 which was published in the *Federal Register* on August 23, 2011, 76 FR 52698.

Dates: September 27, 2011.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review applications for Request for Proposals for A Cooperative Agreement with NEH to Support Bridging Cultures at Community Colleges, submitted to the Division Education Programs at the August 23, 2011 deadline.

Michael P. McDonald,
Advisory Committee, Management Officer.

[FR Doc. 2011–23264 Filed 9–9–11; 8:45 am]

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