
‘We Can’t Spy ... If We Can’t Buy!’: The Privatization of Intelligence and the Limits of Outsourcing ‘Inherently Governmental Functions’

Simon Chesterman*

Abstract

Though it lags behind the privatization of military services, the privatization of intelligence has expanded dramatically with the growth in intelligence activities following the 11 September 2001 attacks on the United States. The recent confirmation by the Director of the CIA that contractors have probably participated in waterboarding of detainees at CIA interrogation facilities has sparked a renewed debate over what activities it is appropriate to delegate to contractors, and what activities should remain ‘inherently governmental’. The article surveys outsourcing in electronic surveillance, rendition, and interrogation, as well as the growing reliance on private actors for analysis. It then turns to three challenges to accountability: the necessary secrecy that limits oversight; the different incentives that exist for private rather than public employees; and the uncertainty as to what functions should be regarded as ‘inherently governmental’ and thus inappropriate for delegation to private actors.

On 14 May 2007 a senior procurement executive from the Office of the Director of National Intelligence gave a presentation to an intelligence industry conference in Colorado convened by the Defense Intelligence Agency (DIA), part of the US Department of Defense.¹ Her unclassified PowerPoint presentation, ‘Procuring the Future’,

* Simon Chesterman is Global Professor and Director of the New York University School of Law Singapore Programme and an Associate Professor of Law at the National University of Singapore. Many thanks to Madan Mohan and Lakshmi Ravindran for invaluable research assistance on this project. Errors, omissions, and violations of Official Secrets Acts are the responsibility of the author alone.

¹ Defense Intelligence Acquisition Conference hosted by the Office of the Acquisition Executive, Defense Intelligence Agency, 14–17 May 2007, at Keystone Resort and Conference Center in Keystone, Colorado. See www.dia.mil/publicaffairs/Press/press17.htm.

was posted on the DIA website, but later modified and subsequently removed.² In it, she revealed that the proportion of the US intelligence budget spent on private contractors is 70 per cent. By removing the scale from a table on intelligence expenditures but not the underlying figures, she also revealed that the amount the United States spends on such contractors is US\$42 billion, out of an implied total intelligence budget of US\$60 billion for the 2005 financial year. At its midpoint the presentation cheerily exhorted: 'We can't spy ... if we can't buy!'³

Though it lags behind the privatization of military services, the privatization of intelligence has expanded dramatically with the growth in intelligence activities following the 11 September 2001 attacks on the United States.⁴ In a report published three days after those attacks, the Senate Select Committee on Intelligence encouraged a 'symbiotic relationship between the Intelligence Community and the private sector'.⁵ In addition to dollars spent – dominated by large items such as spy satellites – this has seen an important increase in the proportion of personnel working on contract. More than 70 per cent of the Pentagon's Counterintelligence Field Activity (CIFA) unit is staffed by contractors, known as 'green badgers', who also represent the majority of personnel in the DIA, the CIA's National Clandestine Service, and the National Counterterrorism Center. At the CIA's station in Islamabad contractors reportedly outnumber government employees three to one.⁶

Controversy over government reliance on outsourcing in this area frequently coalesces around issues of cost (a contractor costs on average US\$250,000 per year, about double that of a government employee), 'brain-drain', and periodic allegations of self-dealing and other forms of corruption. More recently, however, the confirmation by the Director of the CIA that contractors have probably participated in waterboarding of detainees at CIA interrogation facilities has sparked a renewed debate over what activities it is appropriate to delegate to contractors, and what activities should remain 'inherently governmental'.⁷

² A copy remains available from the Federation of American Scientists at: www.fas.org/irp/dni/everett.ppt.

³ Everett, 'Procuring the Future: 21st Century IC Acquisition (PowerPoint Presentation)' (Defense Intelligence Agency, Keystone, Colorado, 14 May 2007), available at: www.fas.org/irp/dni/everett.ppt; Shorrock, 'The Corporate Takeover of U.S. Intelligence' (Salon.com, 1 June 2007), available at: www.salon.com/news/feature/2007/06/01/intel_contractors/; Hillhouse, 'Update: DNI Inadvertently Reveals Key to Classified National Intel Budget' (The Spy Who Billed Me, 4 June 2007), available at www.thespywhobilledme.com/the_spy_who_billed_me/2007/06/update_dni_inad.html.

⁴ See, e.g., Sanders, 'Letter to the Editor: The Value of Private Spies', *Washington Post*, 18 July 2007. Everett's figures suggest that since 2000 the amount spent on private contractors has more than doubled: Everett, *supra* note 3.

⁵ Senate Report on Intelligence Authorization Act for Fiscal Year 2002 (Senate Select Committee on Intelligence, Report 107-63, Washington, DC, 14 Sept. 2001), available at: www.fas.org/irp/congress/2001_rpt/srep107-63.html.

⁶ Pincus, 'Lawmakers Want More Data on Contracting Out Intelligence', *Washington Post*, 7 May 2006; Keefe, 'Don't Privatize Our Spies', *New York Times*, 25 June 2007. The Director of the DIA wrote an unusual letter to the editor advising that the proportion of contractors was in fact only 35% of the workforce: Maples, 'Letter to the Editor: Consolidating Our Intelligence Contracts', *Washington Post*, 24 Aug. 2007.

⁷ Cf. Percy, 'Morality and Regulation', in S. Chesterman and C. Lehnardt (eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007), at 11 (discussing the appropriateness of private actors carrying out military functions).

(This is, of course, separate from whether such activities should be carried out in the first place – a topic that is not the focus of this article.⁸)

Privatization of intelligence services raises many concerns familiar to the debates over private military and security companies (PMSCs). One of the key problems posed by PMSCs is their use of potentially lethal force in an environment where accountability may be legally uncertain and practically unlikely; in some circumstances, PMSCs may also affect the strategic balance of a conflict.⁹ The engagement of private actors in the *collection* of intelligence exacerbates the first set of problems: it frequently encompasses a far wider range of conduct that would normally be unlawful, with express or implied immunity from legal process, in an environment designed to avoid scrutiny. Engagement of such actors in *analysis* raises the second set of issues: top-level analysis is precisely intended to shape strategic policy, and the more such tasks are delegated to private actors the further they are removed from traditional accountability structures such as judicial and parliamentary oversight, and the more influence they may have on the executive.

This article will survey the manner in which US intelligence functions have been outsourced in collection activities such as electronic surveillance, rendition, and interrogation, as well as the growing reliance on private actors for analysis. It will then turn to accountability issues raised by this new phenomenon, focusing on three areas: first, the necessary secrecy that limits oversight of intelligence and thus militates against further removal of such activities from democratic structures; secondly, the different incentives that exist for private rather than public employees; and finally the uncertainty as to what functions should be regarded as 'inherently governmental' and thus inappropriate for delegation to private actors.

1 Outsourcing Intelligence

The term 'intelligence' is often not well defined. At its most general, it is used synonymously with 'information' – reflecting the importance of publicly available ('open source') material in developing policy and suggesting an appropriate analogy between much of intelligence and quality journalism. For present purposes, it will be used in two narrower senses. The first denotes the *collection of information* that is not intended to be made public, sometimes referred to as 'secret intelligence'. This embraces two subcategories which have remained essentially unchanged since the Second World War: intelligence obtained wittingly or unwittingly from individuals, known as human intelligence (HUMINT), and communications intercepts and other 'signals' intelligence (SIGINT).¹⁰ The second sense is a broader understanding of the term intelligence as the *analytical product* of intelligence agencies, best understood as a risk assessment intended to guide action.¹¹ Both areas have seen significant growth in the role of non-government employees.

⁸ For a discussion of this point see S. Chesterman, 'Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis', 28 *Michigan J Int'l L* (2007) 553.

⁹ See generally Chesterman and Lehnardt, *supra* note 7.

¹⁰ M. Herman, *Intelligence Power in Peace and War* (1996), at 61–81.

¹¹ See *ibid.*, at 111–112.

A Collection

Contracting out hard- and software requirements is probably the biggest single item of outsourcing, but is not significantly different from other forms of government contracting. There are occasional scandals, such as the National Security Agency's (NSA) contract with Science Applications International Corporation (SAIC) to modernize its ability to sift vast amounts of electronic information with a proposed system known as 'Trailblazer'. Between 2002 and 2005 the project's US\$280 million budget ballooned to over US\$1 billion and was later described as a 'complete and abject failure'.¹² Perhaps the most spectacular such failure was Boeing's Future Imagery Architecture, a 1999 contract with the National Reconnaissance Office (NRO) to design a new generation of spy satellites. It was finally cancelled in 2005 after approximately US\$10 billion had been spent.¹³ Nevertheless the pool of potential contractors – in particular given the requirement for security clearances – remains small. Thus when the NSA sought a replacement for the failed Trailblazer, the contractor it retained to develop the new program ExecuteLocus was SAIC.¹⁴

Somewhat more sensitive than contracts for equipment and software is direct involvement in covert operations. Abraxas, for example, a company founded by CIA veterans in McLean, Virginia, devises 'covers' for overseas case officers.¹⁵ In Iraq US reliance on contractors appears to have extended also to recruiting and managing human intelligence sources.¹⁶ In 2004 Aegis Defence Services Ltd, a British company, was awarded a US\$300 million contract which explicitly required hiring a team of analysts with 'NATO equivalent SECRET clearance'; responsibilities include 'analysis of foreign intelligence services, terrorist organizations, and their surrogates targeting DoD personnel, resources and facilities'.¹⁷

The reasons given for reliance on private contractors in the intelligence services are similar to those given by the military: the need for swift increases in skilled personnel that were scaled back during the 1990s, and the flexibility of such increases being temporary rather than adding permanent government employees.¹⁸ In addition, such hires have been used to avoid personnel ceilings imposed by Congress; it is also alleged

¹² Keefe, *supra* note 6.

¹³ *Ibid.*; Taubman, 'In Death of Spy Satellite Program, Lofty Plans and Unrealistic Bids', *New York Times*, 11 Nov. 2007. Though on a smaller scale, FBI efforts at information technology modernization are, rightly, the subject of ridicule. Its main information system, the Automated Case Support (ACS) system, cost US\$67 million and was launched in 1995 with 1980s technology; it proved so unreliable that many agents simply did not use it, preferring to keep case files in shoeboxes under their desks: A.B. Zegart, *Spying Blind: The CIA, the FBI, and the Origins of 9/11* (2007), at 44. Even in 2001 the ACS system was incapable of performing a data search using more than one word. One could search for the word 'flight', for example, or 'schools' – but not 'flight schools'. FBI Director Louis Freeh had his own computer removed from his office entirely because he never used it. The 11 September 2001 attacks provided new energy to the technology reform process, but in February 2005 Robert Mueller, who had taken over as Director of the FBI just a week before the attacks, abandoned the new electronic case filing system Trilogy as a US\$170 million failure: *ibid.*, at 136–139.

¹⁴ Keefe, *supra* note 6.

¹⁵ Miller, 'Spy Agencies Outsourcing to Fill Key Jobs', *Los Angeles Times*, 17 Sept. 2006.

¹⁶ *Ibid.*; Bamford, 'This Spy for Rent', *New York Times*, 13 June 2004.

¹⁷ Fainaru and Klein, 'In Iraq, a Private Realm of Intelligence-gathering', *Washington Post*, 1 July 2007.

¹⁸ Sanders, *supra* note 4.

that such outsourcing enables the intelligence agencies to avoid congressional and other oversight of specific activities. Some of these justifications have been accepted, but oversight bodies have emphasized that 'in the long term' the intelligence community must reduce its dependence on contractors, if only for reasons of cost.¹⁹

This section will focus on three sets of activities where privatization is more problematic because it has allowed private actors to intrude into areas that may be construed as 'inherently governmental'. One test of this is where activities significantly affect the 'life, liberty, or property of private persons',²⁰ a test that would at least raise questions with respect to electronic surveillance, rendition, and interrogation.

1 *Electronic Intercepts*

The controversy over warrantless electronic surveillance as part of the 'Terrorist Surveillance Program' (TSP), authorized by President Bush soon after 11 September 2001, is well-known. Interception of telephone calls by the NSA between a party in the United States and a party in a foreign country is governed by the Foreign Intelligence Surveillance Act (FISA), allowing for interception when a warrant is procured in advance or, in some circumstances, within 72 hours of beginning the intercept. A warrant may be issued if 'there is probable cause to believe that ... the target of the electronic surveillance is a foreign power or an agent of a foreign power'.²¹ The law was passed in 1978 following intelligence scandals; in the following years the court rejected just five of around 19,000 requests for wiretaps and search warrants.²² Under the TSP this check on the NSA's activities was removed in cases where it was suspected that one party to a telephone conversation had links to a terrorist organization such as al Qaeda. The presidential authorization creating the programme is classified, and it appears that even congressional intelligence committees were only partially briefed on its scope, though President Bush said the authorization was renewed 'approximately every 45 days'.²³ Administration lawyers defended the programme variously on the basis that congressional authorization was implied in the 18 September 2001 Congressional Joint Authorization for the Use of Military Force, or that the President enjoys the inherent power to authorize such activities in his constitutional role as Commander-in-Chief. These arguments were largely rejected by legal academics and the programme was declared unconstitutional by a District Court judge, though

¹⁹ Senate Report on Intelligence Authorization Act for Fiscal Year 2008 (Senate Select Committee on Intelligence, Report 110-75, Washington, DC, 31 May 2007), available at: <http://intelligence.senate.gov/11075.pdf>, at 11 ('[a]nother concern of the Committee is the Intelligence Community's increasing reliance upon contractors to meet mission requirements. It has been estimated that 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. Given this cost disparity, the Committee believes that the Intelligence Community should strive in the long-term to reduce its dependence upon contractors').

²⁰ *Infra* note 94.

²¹ 50 USC §1805(a)(3).

²² Leonnig, 'Secret Court's Judges Were Warned About NSA Spy Data', *Washington Post*, 9 Feb. 2006 (citing figures from 1979 to 2004).

²³ G.W. Bush, 'President's Radio Address' (White House, Washington, DC, 17 Dec. 2005), available at: www.whitehouse.gov/news/releases/2005/12/20051217.html.

her decision was stayed pending appeal to the 6th Circuit Court of Appeals.²⁴ That Court overturned her decision on the basis that the plaintiffs lacked standing to bring the action.²⁵ A subsequent appeal to the Supreme Court was turned down without comment.²⁶

Legislation was hastily passed in August 2007 to fill the legal void,²⁷ but as its sunset date of 1 February 2008 approached there was a debate over whether to extend it. The two major points of contention were the appropriate levels of oversight for such powers (the 2007 Act essentially substituted internal NSA processes for the requirement of FISA warrants) and, crucially, whether to grant immunity to telecommunications companies that had helped the government to conduct surveillance without warrants and thus potentially exposed themselves to civil liability.²⁸ President Bush authorized a 15-day extension and urged Congress to grant ‘liability protection’ to those companies:

In order to be able to discover enemy – the enemy’s plans, we need the cooperation of telecommunication companies. If these companies are subjected to lawsuits that could cost them billions of dollars, they won’t participate; they won’t help us; they won’t help protect America. Liability protection is critical to securing the private sector’s cooperation with our intelligence efforts.²⁹

John Ashcroft, Attorney-General from 2001 to 2005, had weighed in earlier, arguing that, whatever one’s view of warrantless surveillance and its legal basis, allowing litigation against cooperative telecommunications companies would be ‘extraordinarily unfair’. As noted in his byline, Ashcroft now heads a consulting firm with telecommunications companies as clients.³⁰

The legislation ultimately lapsed. The following week, the Bush administration asserted that the government had ‘lost intelligence information’ because of the failure by Democrats in Congress to pass appropriate legislation, causing some telecommunications companies to refuse to cooperate. This was retracted hours later, apparently after the last holdout among the companies agreed to cooperate fully, even without new authorizing legislation.³¹ Five months later, legislation was passed essentially granting the companies immunity as part of an overhaul of FISA.³²

²⁴ *ACLU v. NSA*, 438 F Supp 2d 754 (US DC, ED Mich., 17 Aug. 2006) No. 06-CV-10204.

²⁵ *ACLU v. NSA*, 493 F 3d 644 (6th Cir. CA, 6 July 2007) Nos. 06-2095/2140, available at: www.ca6.uscourts.gov/opinions.pdf/07a0253p-06.pdf.

²⁶ See www.supremecourtus.gov/docket/07-468.htm

²⁷ Protect America Act 2007.

²⁸ The number of ‘contractor facilities’ cleared by the National Security Agency grew from 41 in 2002 to 1,265 in 2006; Keefe, *supra* note 6.

²⁹ G.W. Bush, ‘President Bush Discusses Protect America Act’ (Washington, DC, 13 Feb. 2008), available at: www.whitehouse.gov/news/releases/2008/02/20080213.html. The companies concerned included AT&T, Sprint, and MCI. See, e.g., Shorrock, ‘Watching What You Say’, *The Nation*, 11 May 2006.

³⁰ Ashcroft, ‘Uncle Sam on the Line’, *New York Times*, 5 Nov. 2007.

³¹ Eggen and Nakashima, ‘Spy Law Lapse Blamed for Lost Information; Some Telecom Firms not Cooperating for Fear of Liability, U.S. Says’, *Washington Post*, 23 Feb. 2008; Meyer, ‘White House Backtracks on Lost Intelligence; Officials Acknowledge that Telecom Firms Are Furnishing All Requested Information’, *Los Angeles Times*, 24 Feb. 2008. See also Lichtblau, ‘Return to Old Spy Rules Is Seen as Deadline Nears’, *New York Times*, 10 June 2008 (warning of the expiry in Aug. 2008 of secret wiretapping laws authorized under the lapsed legislation).

³² Lichtblau, ‘Senate Approves Bill to Broaden Wiretap Powers’, *New York Times*, 10 July 2008.

Examples of potential problems in outsourcing collection in this manner are not hard to find. As a result of an 'apparent miscommunication', an Internet provider complying with a warrant to forward emails from one account instead gave the FBI emails from every account on a small domain for which it served as host. Intelligence officials refer to this as 'overproduction', when third parties provide them with more information than actually required.³³ In the case of the NSA's programme, the absence of the requirement for a warrant, the secrecy of the programme (which was revealed only after the *New York Times* published a story it had withheld for more than a year³⁴), and the self-interest of companies engaging in legally questionable activity suggest little reason for confidence in oversight. Legislators became involved only after the story had become public, at which point Attorney-General Alberto Gonzales said in a press conference that the administration had had 'discussions with Congress in the past – certain members of Congress – as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible'.³⁵

2 Rendition

In the case of telecommunications companies, involvement of private actors was necessary as a technical matter in order to access information. With respect to private involvement in rendition, recourse to the private sector appears to have been part of a clear effort to avoid oversight.

The CIA's use of private aircraft for moving detainees between black site (secret) detention centres is now well documented. Enterprising journalists, blogger activists, and hobbyist plane spotters combined to share information about planes that are believed to have been at the heart of the 'extraordinary rendition' programme,³⁶ which was originally authorized under the Clinton administration.³⁷ The use of

³³ Lichtblau, 'Error Gave FBI Unauthorized Access to E-Mail', *New York Times*, 17 Feb. 2008.

³⁴ Risen and Lichtblau, 'Bush Lets US Spy on Callers Without Courts', *New York Times*, 16 Dec. 2005. The story was ultimately published, it appears, because of the forthcoming book by one of the journalists that would have rendered the *Times's* discretion moot. See now J. Risen, *State of War: The Secret History of the CIA and the Bush Administration* (2006).

³⁵ Gonzales (Attorney General) and Hayden (Principal Deputy Director for National Intelligence), 'Press Briefing' (19 Dec. 2005), available at: www.whitehouse.gov/news/releases/2005/12/20051219-1.html. He later clarified that he had intended to say that it would have been difficult, if not impossible, to obtain legislation without compromising the programme.

³⁶ S. Grey, *Ghost Plane: The True Story of the CIA Torture Program* (2006); Mayer, 'Outsourcing: The CIA's Travel Agent', *New Yorker*, 30 Oct. 2006.

³⁷ Presidential Decision Directive 95: US Policy on Counterterrorism (PDD-95) (White House, Washington, DC, 21 June 1995), available at: www.fas.org/irp/offdocs/pdd39.htm ('[w]hen terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them. ... If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77, which shall remain in effect'). PDD-39 was declassified in 1997 but remains heavily redacted. National Security Directive 77 (NSD-77) was issued by President George H.W. Bush in January 1992 and remains classified.

Cf. R.A. Clarke, *Against All Enemies: Inside America's War on Terror* (2004), at 143–144 ('[t]he first time I proposed a snatch, in 1993, the White House Counsel, Lloyd Cutler, demanded a meeting with the

proprietary or ‘front’ companies by the CIA is not unusual, though the reliance upon private companies for active support rather than cover is atypical. Officials who were involved in the practice suggested this was in order to protect government officials from involvement in a legally questionable process:

‘Our policymakers would never confront the issue,’ said Michael Scheuer, a former CIA counterterrorism officer who has been involved with renditions and supports the practice. ‘We would say, “Where do you want us to take these people?” The mind-set of the bureaucracy was, “Let someone else do the dirty work”’.³⁸

The rendition programme became a scandal in Europe, with a report from the European Parliament leading to a resolution recommending, among other things, that ‘all European countries that have not done so should initiate independent investigations into all stopovers made by civilian aircraft carried out by the CIA’.³⁹

3 Interrogation

In February 2008 CIA Director Michael V. Hayden testified before the Senate and House, appearances most memorable for his confirmation that the United States had waterboarded at least three detainees.⁴⁰ He was also asked about the use of contractors. Before the Senate Select Intelligence Committee he confirmed that the CIA continued to use ‘green badgers’ at its secret detention facilities.⁴¹ In testimony before the House two days later he was asked whether contractors were involved in waterboarding al Qaeda detainees. He responded by saying ‘I’m not sure of the specifics. I’ll give you a tentative answer: I believe so.’⁴²

The involvement of private contractors in interrogation raises the most serious questions about the accountability of persons outside the government structure wielding extraordinary authority and discretion in an environment clearly weighted against either investigation or prosecution. As in the case of private military contractors using potentially lethal force in a conflict zone, these concerns include the dubious prospects

President to explain how it violated international law. Clinton had seemed to be siding with Cutler until Al Gore belatedly joined the meeting, having just flown overnight from South Africa. Clinton recapped the arguments on both sides for Gore: Lloyd says this. Dick says that. Gore laughed and said, “That’s a no-brainer. Of course it’s a violation of international law, that’s why it’s a covert action. The guy is a terrorist. Go grab his ass”).

³⁸ Priest, ‘Jet Is an Open Secret in Terror War’, *Washington Post*, 27 Dec. 2004.

³⁹ Transportation and Illegal Detention of Prisoners: European Parliament Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (P6_TA-PROV(2007)0032 - (2006/2200(INI)), 2007), available at: www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf, at para. 190.

⁴⁰ Shane, ‘CIA Chief Doubts Tactic to Interrogate Is Still Legal’, *New York Times*, 8 Feb. 2008.

⁴¹ Hearing of the Senate Select Committee on Intelligence: Annual Worldwide Threat Assessment (Senate Select Committee on Intelligence, Washington, DC, 5 Feb. 2008), available at: www.dni.gov/testimonies/20080205_transcript.pdf, at 26 (referring to ‘greenbaggers’, presumably a transcription error). See also Hillhouse, ‘The CIA’s Black Sites Have Gone Green’ (*The Spy Who Billed Me*, 6 Feb. 2008), available at: www.thespywhobilledme.com/the_spy_who_billed_me/2008/02/the-cias-black.html.

⁴² Hearing of the House Permanent Select Committee on Intelligence: Annual Worldwide Threat Assessment (House Permanent Select Committee on Intelligence, Washington, DC, 7 Feb. 2008), available at: www.dni.gov/testimonies/20080207_transcript.pdf, at 26. See also Gorman, ‘CIA Likely Let Contractors Perform Waterboarding’, *Wall Street Journal*, 8 Feb. 2008.

for after-the-fact accountability, but also the absence of standardized levels of training and position within a defined command structure.

The justification for both sets of concerns was evident in the aftermath of revelations that prisoners had been abused at the US-run Abu Ghraib prison in Iraq. Though investigations by the US Army Criminal Investigation Command appear to have predated public knowledge of the abuse in April 2004,⁴³ it was only after humiliating photographs of detainees were widely disseminated that serious action was taken.⁴⁴ Twelve uniformed personnel were convicted of various charges; most were given minor sentences, but a handful of soldiers received multiple-year prison terms.⁴⁵ Only one person above the rank of staff sergeant faced a court-martial and was cleared of any wrongdoing; no charges have been laid for abuses other than those that were photographed.⁴⁶ No charges have been laid against contractors, despite repeated allegations that they participated in abuse. The companies Titan and CACI provided interpreters and interrogators to the US military respectively; the commanding officer at the prison, Brigadier General Janis Karpinski (later demoted to colonel), claimed in an interview with a Spanish newspaper that she had seen a letter signed by Secretary of Defense Donald Rumsfeld allowing civilian contractors to use techniques such as sleep deprivation during interrogation.⁴⁷ A class action brought against Titan and CACI under the Alien Tort Claims Act was lodged in 2004 and is ongoing in the US District Court for the Southern District of California.⁴⁸ The case against Titan was dismissed as its linguists were found to have been 'fully integrated into the military units to which they were assigned and that they performed their duties under the direct command and exclusive operational control of military personnel'.⁴⁹ As CACI interrogators were subject to a 'dual chain of command', with significant independent authority retained by CACI supervisors, the case against it was allowed to continue.⁵⁰

There appears to be only one case of a contractor being convicted of a crime in the United States connected with interrogations during the 'war on terror'. David A.

⁴³ Scherer and Benjamin, 'Other Government Agencies (The Abu Ghraib Files)' (Salon.com, 14 Mar. 2006), available at: www.salon.com/news/abu_ghraib/2006/03/14/introduction, at chap. 5.

⁴⁴ See generally K.J. Greenberg and J.L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005).

⁴⁵ Multiple-year terms were awarded to Cpl. Charles Graner Jr (10 years' prison and demotion to private), Staff Sgt. Ivan Frederick of Buckingham (8½ years), and Pfc. Lynndie England (3 years). Other punishments of imprisonment included those imposed on Spc. Jeremy Sivits (1 year), Spc. Roman Krol (10 months), Spc. Armin Cruz (8 months), Spc. Sabrina Harman (6 months), and Sgt. Javal Davis (6 months). Brig. Gen. Janis L. Karpinski was demoted to colonel; Sgt. Santos Cardona was given 3 months' hard labour and reduction in rank to Specialist; Spc. Megan Ambuhl was discharged without prison: see 'Fast Facts: Abu Ghraib Convictions', Associated Press', *Associated Press*, 27 Sept. 2005; 'Chronology of Abu Ghraib', *Washington Post*, 17 Feb. 2006; Schmitt, 'Army Dog Handler is Convicted in Detainee Abuse at Abu Ghraib', *New York Times*, 22 Mar. 2006.

⁴⁶ Gourevitch and Morris, 'Exposure: Behind the Camera at Abu Ghraib', *New Yorker*, 24 Mar. 2008, at 56.

⁴⁷ 'Rumsfeld Okayed Abuses Says Former US Army General', *Reuters*, 25 Nov. 2006.

⁴⁸ See generally Centre for Constitutional Rights, Current Cases: *Saleh v. Titan* (2008), available at: <http://ccrjustice.org/ourcases/current-cases/saleh-v.-titan>.

⁴⁹ *Saleh v. Titan* (US DC for DC, 6 Nov. 2007) Civil Action No. 05-1165, available at: http://ccrjustice.org/files/Saleh_summaryjudgmentdec_11_07.pdf, at 21.

⁵⁰ *Ibid.*, at 22.

Passaro was convicted of misdemeanour assault and felony assault with a dangerous weapon charges for his connection with the torture and beating to death of Abdul Wali in Afghanistan in June 2003. In February 2007 Passaro was sentenced to eight years and four months' prison. His background is testimony to the danger of contracting out such interrogations: both his previous wives have alleged that he was abusive at home, and he had been fired from the police force after being arrested for beating a man in a parking lot brawl.⁵¹ Soon after the Passaro story broke a 'Detainee Abuse Task Force' was established but does not appear to have brought any charges against contractors.⁵²

B Analysis

The involvement of contractors in analysis raises somewhat different questions from their involvement in collection of intelligence. A company's analytical work is less likely to be linked to abusive behaviour or the type of activities typically discussed in the context of PMSC accountability. And yet through its participation in and influencing of high-level decisions about national security, the consequences are troubling if they indicate a removal of such decisions from democratically accountable structures.

For the most part, the challenges that have been publicly identified tend to be at the level of personnel, notably the drain encouraged by significantly higher salaries in the private sector. A practice known as 'bidding back' sees officials leaving for industry and then being brought back in the capacity of consultant at a higher salary. Some estimate that as many as two-thirds of the Department of Homeland Security's senior personnel and experts have left for industry in recent years.⁵³ A 2006 report of the Office of the Director of National Intelligence noted that the intelligence community increasingly finds itself in competition with its contractors:

Confronted by arbitrary staffing ceilings and uncertain funding, components are left with no choice but to use contractors for work that may be borderline 'inherently governmental' – only to find that to do that work, those same contractors recruit our own employees, already cleared and trained at government expense, and then 'lease' them back to us at considerably greater expense.⁵⁴

From 1 June 2007 the CIA began to bar contractors from hiring former agency employees and then offering their services back to the CIA within the first year and a half of retirement.⁵⁵

⁵¹ Dao, 'A Man of Violence, or Just "110 Percent" Gung-Ho?', *New York Times*, 19 June 2004. See also Gaston, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement', 49 *Harvard Int'l LJ* (2008) 221, at 229.

⁵² Burke, 'Accountability for Corporate Complicity in Torture', 10 *Gonzaga J Int'l L* (2006) 81, at 85; Amnesty International USA, 'Corporate Accountability in the "War on Terror"' (2007), available at: www.amnestyusa.org/War_on_Terror/Private_Military_and_Security_Contractors/page.do?id=1101665&n1=3&n2=26&n3=157.

⁵³ Keefe, *supra* note 6; Bamford, *supra* note 16.

⁵⁴ The US Intelligence Community's Five Year Strategic Human Capital Plan (An Annex to the US National Intelligence Strategy) (Office of the Director of National Intelligence (ODNI), Washington, DC, 22 June 2006), available at: www.odni.gov/publications/DNIHumanCapitalStrategicPlan18October2006.pdf, at 6.

⁵⁵ Pincus and Barr, 'CIA Plans Cutbacks, Limits on Contractor Staffing', *Washington Post*, 11 June 2007.

As indicated earlier, a second general concern is the cost of retaining contractors. In May 2007 the Senate Select Committee on Intelligence criticized the intelligence agencies' 'increasing reliance on contractors'.⁵⁶ The CIA subsequently announced that it would reduce the number of contractors by 10 per cent.⁵⁷

In addition to individual contractors, firms such as Booz Allen Hamilton have established themselves as consultants to the intelligence community. Booz Allen currently employs former CIA director R. James Woolsey, former executive director of the President's Foreign Intelligence Advisory Board Joan Dempsey, and former director of the National Reconnaissance Office Keith Hall. Mike McConnell headed the NSA and then went to Booz Allen in 1996 as a Senior Vice President working on intelligence and national security issues; in 2007 President Bush appointed him as Director of National Intelligence.⁵⁸ The firm's website includes dedicated personnel for job applicants with security clearances.⁵⁹

Though there are occasional breathless accounts of contractor involvement in high-level analytical documents such as the President's Daily Brief,⁶⁰ it is enough to note for present purposes that even the perception of a conflict of interest should raise questions about the involvement of the corporate sector in the analytical functions of the intelligence services. It might be argued that this is little different from the influence of wealth on US politics more generally, though, as the next section argues, the secrecy, incentive structures, and potentially abusive powers of the intelligence community warrant special care in regularizing the participation of private actors.

2 Accountability

As in the case of private military and security companies, obvious accountability issues arise when private actors wield potentially lethal force under the actual or apparent authority of the state but outside formal oversight structures. This section will not rehearse such arguments, but will instead focus on three areas specific to the privatization of intelligence: secrecy, incentives, and the difficulty of defining what activities should be regarded as 'inherently governmental'.

⁵⁶ Senate Report on Intelligence Authorization Act for Fiscal Year 2008, at 11 ('[i]t has been estimated that 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. Given this cost disparity, the Committee believes that the Intelligence Community should strive in the long-term to reduce its dependence upon contractors. The Committee believes that the annual personnel assessment tool will assist the Director of National Intelligence and the congressional intelligence committees in arriving at an appropriate balance of contractors and permanent government employees').

⁵⁷ Keefe, *supra* note 6; Tarallo, 'Hayden Wants Fewer CIA Contractors', *Federal Computer Week*, 25 June 2007.

⁵⁸ Shorrock, 'The Spy Who Came In from the Boardroom' (Salon.com, 8 January 2007), available at: www.salon.com/news/feature/2007/01/08/mcconnell.

⁵⁹ Available at: www.boozallen.com/careers/9001843/cleared_intelligence_opportunities.

⁶⁰ See, e.g., Hillhouse, 'Corporate Content and the President's Daily Brief' (The Spy Who Billed Me, 23 July 2007), available at: www.thespywhobilledme.com/the_spy_who_billed_me/2007/07/corporate-content.html.

A *Secrecy*

Oversight of intelligence services is always difficult, given the secrecy necessary for many of their activities to be carried out effectively.⁶¹ In the case of privatization of these services within the US intelligence community, however, secrecy appears to have compounded ignorance.

In May 2007 – the same month as the ‘We can’t spy ... if we can’t buy!’ presentation⁶² – the House Permanent Select Committee on Intelligence reported that

Intelligence Community leaders do not have an adequate understanding of the size and composition of the contractor work force, a consistent and well-articulated method of assessing contractor performance, or strategies for managing a combined staff–contractor workforce. In addition, the Committee is concerned that the Intelligence Community does not have a clear definition of what functions are ‘inherently governmental’ and, as a result, whether there are contractors performing inherently governmental functions.⁶³

Legislators subsequently called for the Department of Defense to compile a database of all intelligence-related contracts,⁶⁴ and for a Government Accountability Office investigation of contractors in Iraq.⁶⁵

Reports have been commissioned before. In fact, only one month before the House report a year-long examination of outsourcing by US intelligence agencies was held up by the Director of National Intelligence, and then reclassified as a national secret.⁶⁶ The secrecy was justified on the basis that the United States does not reveal the cost and size of its intelligence operations, though recent disclosures on that topic by senior officials belie this explanation.

In December 2007 legislation approved by the House–Senate Conference on the Intelligence Authorization Act called on the Office of the Director of National Intelligence (ODNI) to produce a report by 31 March 2008 ‘describing the personal services activities [*sic*] performed by contractors across the intelligence community, the impact of such contractors on the intelligence community workforce, plans for conversion of contractor employment into government employment, and the accountability mechanisms that govern the performance of such contractors’.⁶⁷ This language was included in the Intelligence Authorization Act for Fiscal Year 2008 but the legislation was vetoed by President Bush due to provisions intended

⁶¹ See, e.g., Schreier, ‘The Need for Efficient and Legitimate Intelligence’, in H. Born and M. Caparini (eds), *Democratic Control of Intelligence Services: Containing Rogue Elephants* (2007), at 25.

⁶² *Supra* note 2.

⁶³ House of Representatives Report on Intelligence Authorization Act for Fiscal Year 2008 (Permanent Select Committee on Intelligence, Report 110-131, Washington, DC, 7 May 2007), available at: <http://intelligence.house.gov/Media/PDFS/IAAFY08.pdf>, at 42. Cf. Conference Report on Intelligence Authorization Act for Fiscal Year 2008 (House of Representatives, Report 110-478, Washington, DC, 6 Dec. 2007), available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr478.110.pdf, at 68.

⁶⁴ W. Pincus, ‘Defense Agency Proposes Outsourcing More Spying’, *Washington Post*, 19 Aug. 2007.

⁶⁵ Fainaru and Klein, *supra* note 17.

⁶⁶ S. Shane, ‘Government Keeps a Secret After Studying Spy Agencies’, *New York Times*, 26 Apr. 2007; Hillhouse, ‘Who Runs the CIA? Outsiders for Hire’, *Washington Post*, 8 July 2007.

⁶⁷ Conference Report on Intelligence Authorization Act, *supra* note 63, at 11.

to prohibit waterboarding by the CIA. An effort to override the veto failed on 11 March 2008.⁶⁸

Such information as does exist about the involvement of contractors often remains classified. Much is available to the contractors themselves, however, who are able to lobby members of Congress using that information. SAIC, for example, spent well over a million dollars in each of the past 10 years on lobbying; in that period it was awarded between one and three billion dollars in government contracts annually.⁶⁹ Earmarks, in which members of Congress add provisions to legislation directing funds to specific projects, have long been acknowledged in the intelligence sector but rarely made public. In some cases a list of the amounts of projects might be made available, but redacting the names of companies.⁷⁰ In November 2007 Congress broke with tradition by releasing information about US\$80 million worth of earmarks included in a defence appropriations bill.⁷¹

As is frequently the case, this new-found transparency was driven in significant part by scandal. The previous year Randy 'Duke' Cunningham, a Republican congressman from California, had been sentenced to eight years in prison for accepting US\$2 million in bribes from MZM, a defence contractor. Cunningham had used his position on the House appropriations and intelligence committees to win MZM tens of millions of dollars' worth of contracts with the CIA and the Pentagon's CIFA office. In a related case, Kyle 'Dusty' Foggo, a former executive director of the CIA (its third-ranking official), was indicted for conspiring with former MZM CEO Brent Wilkes (who inexplicably lacked a folksy nickname) to direct contracts to the company.⁷²

In addition to undermining effective oversight either by formal or informal means, such as media scrutiny,⁷³ access to secrets creates the possibility of abuse of those secrets. In 2006 the Boeing Corporation, a major defence contractor, agreed to a US\$565 million civil settlement arising from its use of sensitive bid information to win rocket launch contracts. The information had been provided by an engineer formerly employed by a competitor for the contracts who had moved to the Department of Defense.⁷⁴

⁶⁸ See <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02082>.

⁶⁹ Shorrock, *supra* note 3; Barlett and Steele, 'Washington's \$8 Billion Shadow', *Vanity Fair*, Mar. 2007, available at: www.pogo.org/p/contracts/c/co-030613-saic.html.

⁷⁰ Shorrock, *supra* note 3.

⁷¹ R. Tiron, 'Congress Discloses Intel Earmarks for First Time', *The Hill*, 24 Nov. 2007. See Conference Report on Making Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 2008, and for Other Purposes (House of Representatives, Report 110-434, Washington, DC, 6 Nov. 2007), available at: www.conferencereport.gpoaccess.gov, at 378-379.

⁷² Shorrock, *supra* note 3. The Foggo trial was moved to Virginia in Feb. 2008 and is scheduled to take place in Nov. 2008.

⁷³ See, e.g., Caparini, 'Controlling and Overseeing Intelligence Services in Democratic States', in Born and Caparini, *supra* note 61, at 3; Chesterman, *supra* note 8.

⁷⁴ Semiannual Report to the Congress, April 1, 2006-September 30, 2006 (Inspector General, United States Department of Defense, Washington, DC, 2006), available at: www.dodig.osd.mil/sar/SAR_Cover_121306.pdf, at 55.

B *Incentives*

The abuse of sensitive information is suggestive of the potential conflict of interests on the part of private actors engaged in intelligence activities. Discussions of this issue frequently paint a somewhat idealized picture of the patriotism and competence of full-time government employees, but there are reasonable grounds to be wary of inserting a profit motive into intelligence activities. The former head of the CIA's clandestine service has been quoted as saying that '[t]here's a commercial side to it that I frankly don't like ... I would much prefer to see staff case officers who are in the chain of command and making a day-in and day-out conscious decision as civil servants in the intelligence business.'⁷⁵

It is also arguable that the freedom to outsource alters the incentives of the intelligence agencies themselves. John Gannon, a former CIA Deputy Director for Intelligence and now head of BAE Systems' Global Analysis Group, has noted that this freedom offers flexibility but also avoids the need to justify a full-time employee and allocate responsibility, thereby breeding duplication and inhibiting collaboration. In the 1980s, 'what we discovered was that having smaller numbers forced collaboration, and collaboration was a good thing. As you [*sic*] soon as you start throwing money at the intelligence community, not only does it lead to more contractors, it also leads to individual units thinking "We want to get one of our own."⁷⁶ This in turn makes it harder to contain costs.⁷⁷

It is possible, of course, that a profit motive may encourage *better* behaviour through the operation of a kind of market. There is evidence that this may be happening gradually in the context of PMSCs, particularly through professionalization of the industry and the creation of industry associations such as the British Association of Private Security Companies (BAPSC) and the International Peace Operations Association (IPOA). This is largely being driven by self-interest, as some actors seek to establish themselves as 'legitimate' and thereby raise the costs of entry for competitors while enabling the charging of higher fees for similar services.⁷⁸

Markets can indeed be an effective form of regulation, but operate best where there is competition, an expectation of repeat encounters, and a free flow of information. It is far from clear that these qualities obtain in the commercial military sector;⁷⁹ there is even more reason to be wary of embracing it in the realm of intelligence.

Competition is severely restricted by the requirement that intelligence contractors meet security clearances. The process of granting new clearances is famously inefficient⁸⁰ while the government frequently needs to hire people quickly. This was

⁷⁵ Miller, *supra* note 15.

⁷⁶ Abbot, 'The Outsourcing of U.S. Intelligence Analysis' (Newsinitiative.org, 31 Aug. 2006), available at: http://newsinitiative.org/story/2006/07/28/the_outsourcing_of_u_s_intelligence (quoting John Gannon).

⁷⁷ O'Harrow, Jr., 'Costs Skyrocket as DHS Runs Up No-Bid Contracts', *Washington Post*, 28 June 2007.

⁷⁸ Chesterman and Lehnardt, 'Conclusion: From Mercenaries to Market', in Chesterman and Lehnardt, *supra* note 7, at 254–255.

⁷⁹ *Ibid.*, at 254.

⁸⁰ This appears to have affected even the Director of National Intelligence: Wright, 'The Spymaster', *New Yorker*, 21 Jan. 2008, at 42 (McConnell, upon landing in Farmington, delivered his speech before [a

exacerbated in April 2006 when the Department of Defense stopped processing new clearance applications following a funding dispute with the Office of Personnel Management.⁸¹ The 'market' thus tends to be dominated by former military and civilian officials who already have such clearances, exacerbating the 'brain drain' problems cited earlier⁸² and creating predictable monopoly-type problems.

Though this has led to established relationships with a select group of firms, in respect of individuals being retained to collect human intelligence – particularly interrogators and interpreters connected to the 'Global War on Terror' – the need to get personnel on the ground and results back home has negated considerations of repeat encounters. As in the case of PMSCs, the assumption that such activities are atypical reduces the incentive to use any leverage that does exist to require adequate training or oversight.⁸³

Finally, and most obviously, the secrecy necessary for certain intelligence operations undermines the possibility of information flowing freely. In some circumstances there may be collusion in avoiding oversight, as when activities – such as rendition – are outsourced precisely for this reason. More generally, the movement of a limited number of individuals between the government and private intelligence worlds may encourage a form of regulatory capture when government employees are nominally tasked with overseeing former colleagues and future employers.

C 'Inherently Governmental' Functions

The simplest way of containing some of the problems outlined in this article would be to forbid certain activities from being delegated or outsourced to private actors at all. Intelligence services have a chequered history of abuse, but their legitimate activities tend to be justified in established democracies by reference to their grounding in the rule of law – a relatively recent requirement in some countries⁸⁴ – and the existence of an accountability chain to democratic institutions.⁸⁵

In the United States, this question is framed in the language of 'inherently governmental' functions, which are presumed to be carried out by government employees

group of] government contractors. "There was a study done in 1955," he told them. "One conclusion it came to was that it was an abomination that the government takes *fifteen months* to clear someone! I'm happy to tell you we got that down to eighteen months." The contractors laughed in recognition. "When I agreed to take the DNI post, the first surprise was being told, 'Fill out the form,'" McConnell continued. "I've been cleared for forty years! Then the agent shows up. He wants to know if I am a Communist and do I advocate the violent overthrow of the U.S."").

⁸¹ Abbot, *supra* note 76.

⁸² See *supra* notes 53–55.

⁸³ See, e.g., Minow, 'Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy', 46 *Boston College L Rev* (2005) 989, at 1005–1016.

⁸⁴ The UK, for example, operated its Security Service (MI5) until 1989 on the basis of a one-page administrative directive issued in 1952: the Maxwell-Fyfe Directive (issued by the UK Home Secretary, Sir David Maxwell-Fyfe, to the Director-General of MI5, 1952), reprinted in L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (1994), at 517; Lustgarten and Leigh, 'The Security Service Act 1989', 52 *MLR* (1989) 801. The Secret Intelligence Service (MI6) found a legislative basis only in 1994: Wadham, 'The Intelligence Services Act 1994', 57 *MLR* (1994) 916.

⁸⁵ See generally Born and Caparini, *supra* note 61.

only.⁸⁶ Debates concerning public functions in the United States frequently emphasize not the need to maintain certain functions in public hands but rather to justify passing them to the government in the first place;⁸⁷ the definition of ‘inherently governmental’ has thus emerged not as a sphere to be protected but rather as an exception to the more general push to privatization. Legislation adopted by Congress in 1998 as part of a larger privatization effort required government agencies to identify inherently governmental functions in order to enable cost comparisons between private bids and public budgets for everything else.⁸⁸ An inherently governmental function was defined as a ‘function that is so intimately related to the public interest as to require performance by Federal Government employees’.⁸⁹

The Government Accountability Office (GAO) noted in a 2002 report that there had been some uncertainty about how to apply this broad definition, but argued that it was

clear that government workers need to perform certain warfighting, judicial, enforcement, regulatory, and policy-making functions ... Certain other capabilities, ... such as those directly linked to national security, also be retained in-house to help ensure effective mission execution.⁹⁰

Uncertainties about the limits continue, however, and the Department of Defense in particular has failed to adopt or apply consistently a clear interpretation.⁹¹

The executive has adopted various guidelines seeking to elaborate a definition. The 1983 version of an Office of Management and Budget (OMB) circular on this topic stated that ‘[c]ertain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by

⁸⁶ Cf. provisions of the Geneva Conventions requiring, for example, that prisoner-of-war camps be ‘be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power’: Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), done at Geneva, 12 Aug. 1949, available at: www.icrc.org/ihl, at Art. 39. Similarly places of internment for civilians are to be put ‘under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power’: Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), done at Geneva, 12 Aug. 1949, available at: www.icrc.org/ihl, at Art. 99.

⁸⁷ ‘Concern about which federal agency activities are inherently governmental functions is not new. It goes back as far as the early days of the nation, as evidenced, for example, by the discussion in the Federalist Papers among the framers of the Constitution over what functions are appropriate for the federal government to exercise’: US General Accounting Office, ‘Government Contractors: Are Service Contractors Performing Inherently Governmental Functions?’ (GAO/GGD-92-11, Washington, DC, 18 Nov. 1991), available at: <http://archive.gao.gov/t2pbat7/145453.pdf>, at 2. See also Khattab, ‘Revised Circular A-76: Embracing Flawed Methodologies’, 34 *Public Contract LJ* (2005) 469. For historical context see Madison, 44 *The Federalist* (1788), available at: www.law.emory.edu/law-library/research/ready-reference/us-federal-law-and-documents/historical-documents-the-federalist-papers/the-federalist-no-44.html.

⁸⁸ Federal Activities Inventory Reform (‘FAIR’) Act of 1998, 31 USC § 501 (2000); Minow, *supra* note 83, at 1015.

⁸⁹ Sect. 5 of Federal Activities Inventory Reform Act of 1998, PL 105-270, codified at 31 USC 501 (1998).

⁹⁰ US General Accounting Office, ‘Commercial Activities Panel: Improving the Sourcing Decisions of the Federal Government’ (GAO-02-847T, Washington, DC, 27 Sept. 2002), available at: www.gao.gov/new.items/d02847t.pdf, at 21.

⁹¹ Schooner, ‘Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government’, 16 *Stanford L and Policy Rev* (2005) 549, at 554–557.

Federal employees'.⁹² The definition was elaborated as including 'those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government' and were said normally to fall into two categories:

(1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions, and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services, activities performed exclusively by military personnel who are subject to deployment in a combat, combat support, or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers, and other natural resources; *direction of intelligence and counter-intelligence operations*; and regulation of industry and commerce, including food and drugs.

(2) Monetary transactions and entitlements, such as tax collection and revenue disbursements; control of the treasury accounts and money supply; and the administration of public trusts.⁹³

A 1992 'Policy Letter' from the Office of Federal Procurement Policy defined inherently governmental 'as a matter of policy' by essentially repeating the text above, which was described as including 'the interpretation and execution of the laws of the United States so as to ... significantly affect the life, liberty, or property of private persons'.⁹⁴ The illustrative list of examples provided in an appendix included the 'direction *and control* of intelligence and counter-intelligence operations'.⁹⁵ The 1999 revision of OMB Circular No. A-76 maintained the 1983 language.⁹⁶

The policy is now codified in the 2003 revision of OMB Circular No. A-76.⁹⁷ This kept the general definition in place,⁹⁸ but opened up significant loopholes by allowing for activities to be performed by contractors 'where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or

⁹² OMB Circular No. A-76: Performance of Commercial Activities (superseded) (White House Office of Management and Budget, Washington, DC, 1983), at para. (b), quoted in Luneburg, 'Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis', 63 *Notre Dame L Rev* (1988) 399, at 419, n. 91.

⁹³ *Ibid.*, para. (e) (emphasis added).

⁹⁴ Policy Letter 92-1: Inherently Governmental Functions (Office of Federal Procurement Policy, Washington, DC, 23 Sept. 1992), available at: www.whitehouse.gov/omb/procurement/policy_letters/92-1_092392.html, at para. 5(c).

⁹⁵ *Ibid.*, Appendix A, para. 8 (emphasis added).

⁹⁶ OMB Circular No. A-76: Performance of Commercial Activities (Revised 1999) (superseded) (White House Office of Management and Budget, Washington, DC, 1999), available at: www.whitehouse.gov/omb/circulars/a076/a076.html.

⁹⁷ OMB Circular No. A-76 (Revised): Performance of Commercial Activities (White House Office of Management and Budget, Washington, DC, 29 May 2003), available at: www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf.

⁹⁸ *Ibid.*, Attachment A: Inventory Process, at para. B(1)(a) ('[a]n inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government

implement a course of action, with agency oversight'.⁹⁹ The revision also dropped any reference to intelligence or counter-intelligence operations. Another aspect of the Circular worthy of note is the ability of the Defense Department to 'determine if this circular applies to the Department of Defense during times of a declared war or military mobilization'.¹⁰⁰ It is not clear whether this provision has been implemented.

The ODNI in its 2006 'Five Year Strategic Human Capital Plan' noted that OMB had requested it to conduct a study to determine whether contractors were engaged in intelligence community work that was "inherently governmental" and hence improper'.¹⁰¹ The study was said to be underway as an effort to determine the optimum mix of civilian, military, and contractor personnel', but was ultimately classified secret and, apparently, buried.¹⁰² In June 2007 the CIA announced its own plans to review the use of contractors, including the identification of jobs that should be performed only by government personnel.¹⁰³

In the absence of strong political direction, there is little prospect of intelligence agencies adopting a robust definition of 'inherently governmental' functions. In any case, the significance of this limitation is diminished by the ability to outsource even inherently governmental functions in so far as they may be construed merely as implementing policy with some form of oversight.¹⁰⁴

With respect to the activities considered in section 1 of this article, electronic surveillance by telecommunications companies may be an acceptable or necessary delegation of the implementation of government policy, though in some circumstances it might have fallen foul of the broader 'control' of intelligence operations test included in the 1992 Policy Letter.¹⁰⁵ Rendition might also be construed as mere implementation of government policy, though it may violate other laws – notably including those of the territories through which CIA transport planes have passed.¹⁰⁶ There would, however, seem to be some prospect for agreement at the political level that interrogation

authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements').

⁹⁹ *Ibid.*, Attachment A: Inventory Process, at para. B(1)(c).

¹⁰⁰ *Ibid.*, at para. 5(h).

¹⁰¹ Strategic Human Capital Plan, *supra* note 54, at 14.

¹⁰² *Supra* note 66.

¹⁰³ Barr, 'This CIA Mission – Better Contract-Workforce Management – Isn't Classified', *Washington Post*, 11 June 2007.

¹⁰⁴ *Supra* note 99. See also Abbot, *supra* note 76.

¹⁰⁵ *Supra* note 95.

¹⁰⁶ Rendition was found by the Venice Commission to be in violation of Arts 2, 3, and 5 of the European Convention on Human Rights. See Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program', 101 *AJIL* (2007) 442. The European Parliament also noted that the CIA flights might be in violation of the Chicago Convention on Civil Aviation. Extraordinary Rendition: European Parliament Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Adopted Midway Through the Work of the Temporary Committee (P6_TA(2006)0316 - (2006/2027(INI)), 2007), available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0316+0+DOC+XML+V0//EN&language=EN. See also European Parliament Resolution on Transportation and Illegal Detention of Prisoners, *supra* note 39.

of detainees falls 'squarely within the definition of an inherently governmental activity'.¹⁰⁷ Analysis by private contractors is somewhat trickier: clearly if it amounted to direction or the exercise of government discretion this would cross the line, but in most circumstances it would be easy to construe the work as merely as 'develop[ing] options'.¹⁰⁸

Uncertainty in this area appears to be intentional and thus exacerbates the accountability challenges posed by secrecy and problematic incentives. At the very least the responsibility to determine what is and is not 'inherently governmental' should itself be an inherently governmental task.¹⁰⁹

3 Conclusion

The assertion in the presentation cited at the beginning of this article – that private contractors are essential to the intelligence community's work – is at least partly accurate. Procuring hardware and software from the private sector and engaging in electronic surveillance through the cooperation of telecommunications companies may be the only way to carry out such functions effectively. More troubling are those circumstances in which outsourcing has been undertaken to avoid oversight, as in the case of rendition, where it places the life or liberty of persons in the hands of private actors, as in the case of interrogation, or where it renders the formulation of national security policy susceptible to actual or apparent influence.

Consideration of these issues has tended to focus on overblown costs, drains on government personnel, and episodic outrage at scandals in the form of corruption or, more recently, abuse. This article has argued that addressing the problems raised by privatization of intelligence services requires engagement with the structural bars to accountability considered in section 2. Accepting the necessary secrecy of much – but not all – of these activities requires a corresponding limitation on their further removal from public scrutiny. Understanding the incentives also suggests the need for

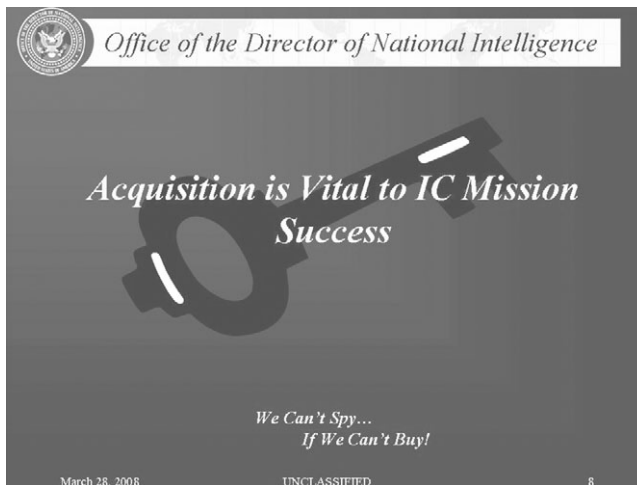
¹⁰⁷ Feinstein, Letter to the Honorable Michael B. Mukasey, Attorney General of the United States (6 Feb. 2008), available at: http://tpmmuckraker.talkingpointsmemo.com/2008/02/wsj_contractors_likely_involve.php; Gorman, *supra* note 41. The Senate Intelligence Committee has proposed banning the CIA from using private contractors to interrogate detainees. The restriction would be introduced as a part of a new bill authorizing intelligence expenditure in 2009 and would restrict the CIA to interrogation techniques that have been approved by the military and allow the International Red Cross access to all their prisoners. Similar restrictions imposed by the 2008 Intelligence Authorization Bill were vetoed by President Bush: see 'Notes from the War on Terror', *New York Times*, 2 May 2008.

¹⁰⁸ *Supra* note 99.

¹⁰⁹ Cf. Minow, *supra* note 83, at 1016. *Contra* Khattab, *supra* note 87, at 516 (arguing that a revision of OMB Circular No. A-76 should be entrusted to 'private sector outsourcing experts'). See also 'Defense Federal Acquisition Regulation Supplement (DFARS)', 71(116) *Federal Register* (2006) 34826, at 34826–34827 ('[i]t is the responsibility of the combatant commander to ensure that the private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks, or any other types of attacks. Otherwise, civilians who accompany the U.S. Armed Forces lose their law of war protections from direct attack if and for such time as they take a direct part in hostilities': quoted in *Matter of Brian X. Scott* (US Government Accountability Office, 18 Aug. 2006) B-298370 and B-298490, available at: www.gao.gov/decisions/bidpro/298370.htm.

wariness in embracing a market regulatory approach to the problem. Clarity could most effectively be achieved by a transparent definition of what functions should be ‘inherently governmental’, though this requires political capital that is unlikely to be spent in the absence of scandal.

Such a scandal in the form of Blackwater’s activities in Iraq pushed the United States and Iraq to revisit the accountability of private military companies.¹¹⁰ Despite revelations that contractors employed by the US government appear to have engaged in torture, in the form of waterboarding, this was insufficient to start a major debate on the topic. Instead, reforms – if any – seem most likely to come because each of those torturers cost the US taxpayer double the salary of a Federal employee.



¹¹⁰ 'Blackwater's Impunity', *New York Times*, 16 May 2008.