Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress

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Summary

An "inherently governmental function" is one that, as a matter of law and policy, must be performed by federal government employees and cannot be contracted out because it is "intimately related to the public interest." Concerned that the existence of multiple and/or inconsistent definitions of "inherently governmental functions" might be partly responsible for the alleged contracting out of inherently governmental functions by the Department of Defense (DOD) and other agencies, the 110th Congress enacted legislation (P.L. 110-417) requiring the Office of Management and Budget (OMB) to develop a "single consistent definition" of "inherently governmental functions." This definition is to "ensure that the head of each ... agency is able to identify each position within that department or agency that exercises an inherently governmental function." By statute, OMB is to report on its definition by October 14, 2009.

The current debate over which functions are inherently governmental is part of a larger debate about the proper role of the federal government vis-à-vis the private sector. This debate is as old as the Constitution, which prohibits privatization of certain functions (e.g., Congress's legislative function), a prohibition courts enforce under various judicial tests (e.g., nondelegation, functions "affected with the public interest," etc.). Since the 1920s, federal contracting has been a primary arena for the public/private debate, with the executive and legislative branches contesting (1) which functions the government *must* perform because they are inherently governmental; (2) which functions the government *should* perform because they are closely related to inherently governmental functions or for some policy reason; and (3) which functions should be left to the private sector. DOD functions are often central to debates over which functions are inherently governmental because of the specific functions DOD performs; its prominent role in federal contracting; and its unique workforce, which blends military and civilian personnel.

Two main definitions of "inherently governmental functions" currently exist within federal law and policy. One is a statutory definition, enacted as part of the Federal Activities Inventory Reform (FAIR) Act of 1998. This definition states that an inherently governmental function is "a function so intimately related to the public interest as to require performance by Federal Government employees." The other is a policy-oriented definition contained in OMB Circular A-76. This definition states that an inherently governmental activity is "an activity that is so intimately related to the public interest as to mandate performance by government personnel." Other statutes and regulations that define inherently governmental functions do so either by reproducing the language of the FAIR Act or OMB Circular A-76, or by incorporating the definitions of the FAIR Act or OMB Circular A-76 by reference.

Congress has several options if it is concerned that deficiencies in the existing definitions of inherently governmental functions may lead agencies to improperly contract out inherently governmental functions. Options include (1) relying upon recent statutory changes and/or the policies of the Obama Administration, which proposes to limit contracting out generally, to effect desired changes in agency contracting; (2) changing the existing definition of "inherently governmental functions"; (3) placing limits on contracting out or use of appropriated funds; (4) addressing structural factors potentially prompting agencies to rely on contractors; (5) providing for more effective oversight of executive branch contracting decisions; and (6) focusing more on questions of contracting policy (i.e., what functions should the government perform?) than on contracting law (i.e., what functions must the government perform?). The 111th Congress is considering several bills addressing inherently governmental functions, including H.R. 1436, H.R. 2142, H.R. 2177, H.R. 2647, H.R. 2682, H.R. 2868, H.R. 2736, S. 629, S. 924, and S. 1033.

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Introduction

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This report provides background, issues, and options for Congress on defining inherently governmental functions within the context of DOD operations. It situates contemporary debates over which functions are inherently governmental within the context of the broader debate about the proper roles of the public and private sectors, surveys existing definitions of "inherently governmental functions" within federal law and policy, and discusses issues and options for Congress in redefining inherently governmental functions or otherwise ensuring that the executive branch's categorization of functions corresponds to the definition of inherently governmental functions. The report focuses upon DOD because of the specific functions that it performs; its prominent role in federal contracting; its unique workforce, which consists of military and civilian personnel; and recent allegations that DOD, among other agencies, has improperly contracted out inherently governmental functions.

Background

The current debate over which functions are inherently governmental is part of a larger debate about the proper role of the federal government vis-à-vis the private sector that is as old as the Republic itself. All government functions can arguably be divided into three categories: those that must be performed by government employees, those that should be performed by government employees, and those suitable for private sector performance. However, the size and content of these categories have fluctuated throughout American history. The "must" category has arguably experienced the least fluctuation, whereas the "should" and "private" categories have significantly increased or diminished over time with changes in administrations or even within administrations (e.g., moving from peacetime to war). The "Background" section surveys the history of this public/private debate, focusing particularly upon how it has played out in the context of federal contracting.

The debate over DOD functions generally corresponds to the overall public/private debate; however, it sometimes reflects unique aspects of DOD or its procurement system. First, because DOD has two distinct workforces, military and civilian, capable of performing functions, DOD must determine which workforce will perform functions in the "must" or "should" categories. Where functions in the "must" category are concerned, DOD has to determine whether it matters which DOD employees, military or civilian, perform the function. Similarly, where functions in the "should category" are concerned, DOD must determine not only whether the function should be performed in-house or by the private sector, but also which workforce will perform functions

deemed appropriate for in-house performance. Second, DOD relies upon ammunition and armaments in its operations, items which some commentators at various periods of time have thought should be manufactured by defense agencies in arsenals or Navy shipyards, for example, instead of by the private sector.[1] The arguments for in-house manufacturing of DOD materiels have varied over the years, but have included the claim that manufacturing of weapons is an inherently governmental function and thus falls within the "must" category. However, such arguments appear to confuse considerations of national defense policy (i.e., the security of having an in-house supply of important products), which might argue for placing the function in the "should" category, with functions "intimately related to the public interest." Third, the federal government has consistently maintained two parallel acquisition systems, civilian and defense, wherein the rules for DOD are not always identical to those for the rest of the federal government.

The Constitutional Grounding for the Public/Private Debate

The Constitution, with its enumerated powers and limits on these powers, is the logical, best starting point for distinguishing between "must," "should," and commercial functions. The Constitution envisioned certain functions that must be carried out by one branch or other of the federal government. The legislative function of Article I is clearly an inherently governmental function entrusted to Congress.[2] Article II, with equal clarity, entrusted several inherently governmental functions to the President, such as the executive power,[3] the Commander-in-Chief function,[4] the appointment power,[5] the power to conduct foreign affairs,[6] and the granting of pardons.[7] The Constitution also recognized the public/private tension with explicit limitations on certain public functions when they directly affect private interests. For example, takings of *private* property under the Fifth Amendment must be for *public* purpose.[8] However, more than 200 years after ratification of the Constitution, commentators are still trying to determine what constitutes a public purpose.[9] The Constitution also recognized and provided for the other end of the spectrum: private functions. The most explicit such recognition is in the Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[10]

Very early in American history, the Supreme Court in *Marbury v. Madison* recognized that the President and other executive branch officials exercise inherent powers founded upon their discretion and accountability.[11] In *Marbury*, while addressing whether a judge whose commission was not delivered to him by a new administration had a legal remedy, the Court distinguished

[1] Daniel Guttman, Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty, 52 *Admin. L. Rev.* 859, 864 (2000).

[2] U.S. Const. art. I, § 1.

[3] U.S. Const. art. II, § 1, cl. 1.

[4] U.S. Const. art. II, § 2, cl. 1.

[5] U.S. Const. art. II, § 2, cl. 2.

[6] *Id.*

[7] U.S. Const. art. II, § 2, cl. 1.

[8] U.S. Const. amend. V.

[9] *See* Kelo v. City of New London, 545 U.S. 469 (2005) (holding that economic development by private entities constitutes an acceptable public use).

[10] U.S. Const. amend. X.

[11] 5 U.S. 137 (1803).

between "ministerial functions" of the executive branch, which officials are legally required to perform, and "political powers," in which executive officials may exercise discretion. Regarding the latter, the Court stated:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.[12]

These two issues, discretion and accountability, have remained central to discussions of what functions the government must perform to this day.[13] Various commentators would afford the executive branch different degrees of discretion in classifying particular functions as inherently governmental or commercial and seek to hold the executive branch accountable for its classifications to differing degrees and in differing ways.

In attempting to protect the public and private sectors as defined by the Constitution, post-Marbury courts articulated various theories and tests, several of which also appear in some recent discussions of inherently governmental functions. One key test focuses upon functions "affected with the public interest." Courts in the 19th century, in particular, distinguished between functions "affected with the public interest" and other functions when determining whether government regulation (an exercise of the public sector) of certain businesses (private-sector entities) was permissible. Where the business was "affected with a public interest," such as common carriers were, courts found the regulation permissible.[14] This test arguably focuses upon the functions that the government "should" or "may" perform, however, rather than those that the government "must" perform. Another key test focused upon "public interests" or "public functions." This test was used to determine when private-sector entities were accountable to individuals for certain public-sector protections, such as due process. The courts concluded that when entities, such as company towns, performed public functions, they owed individuals due process.[15] Another key test, largely used in the 1930s, was the "private delegation doctrine," which precluded Congress from delegating its power to legislate (a public-sector power) to third parties not in the government (private-sector entities).[16]

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[12] *Id.* at 165-66.

[13] *See infra* notes 116-140 and accompanying text. *See also* Arrowhead Metals, Ltd. v. United States, 8 Cl. Ct. 703, 714 (1985) (finding that coinage of money is inherently governmental but that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage and is thus exempt from OMB Circular A-76); Northrop Grumman Info. Tech., Inc. v. United States, 74 Fed. Cl. 407 (2006) (addressing information management and technology services under OMB Circular A-76); United States v. Kenney, 185 F.3d 1217 (11th Cir. 1999) (stating that functions are not inherently governmental, for purposes of contracting out, unless the contractor is in a position to make decisions that are binding on the agency); Nat'l Air Traffic Controllers Ass'n v. Sec'y of the Dep't of Trans., 997 F. Supp. (1998) (stating that air traffic control is inherently governmental because it involves national defense).

[14] *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1876).

[15] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944). *See also* Paul R. Verkuil, Public Law Limitations on Privatization of Government Functions, 84 *N.C. L. Rev.* 397, 410-15 (2006).

[16] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down as an unconstitutional private delegation legislation that would have subjected an industry to maximum hours agreed to by a supermajority of workers and producers in the industry); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down as an unconstitutional private delegation legislation that would have allowed industrial organizations or trade associations to establish "codes of fair competition" for their industry).

The Public/Private Debate Surrounding Federal Contracting

Since World War I, one of the primary arenas for the public/private debate and the definition of inherently governmental functions has been federal contracting. The emphasis on public or private entities as the preferred source of goods or services has swung back and forth over the years with the change of administrations or even during administrations. The emphasis has also shifted depending upon which agencies are conducting the procurements and the nature of the goods or services procured. In the 1920s, for example, the government had different emphases in civilian and defense contracting: while the alleged abuses of military contractors during World War I caused the military to perform more work in-house, public contracting by civilian agencies expanded.[17]

Roosevelt Administration

President Roosevelt essentially reversed the relative use of civilian and military contractors as compared to the 1920s. Prior to World War II, the Roosevelt Administration placed renewed emphasis on the government's role and the benefits of the government performing functions for socioeconomic purposes even when doing so brought it into competition with the private sector (e.g., creation of the Civilian Conservation Corps and the Public Works Administration).[18] In contrast, mobilization for World War II brought greater emphasis on using the private sector to meet the country's defense needs, as well as many changes in the ways in which the government contracted for goods and services.[19]

Truman Administration

The Truman Administration was generally a period of change and reorganization in the federal government's procurement of goods and services. Several important statutes were enacted in this period, including the Armed Services Procurement Act of 1947,[20] the Renegotiation Act of 1948,[21] the Federal Property and Administrative Services Act of 1949,[22] and the Defense Production Act of 1950.[23] These statutes greatly changed the federal procurement landscape, although they did not directly address which functions the government must perform (i.e., what is inherently governmental). They did, however, address how to make decisions as to who should perform specific functions.

[17] James F. Nagle, *A History of Government Contracting* 333-59 (2d ed. 1999).

[18] *Id.* at 364-77.

[19] *Id.* at 379-444.

[20] 62 Stat. 21 (1948).

[21] 62 Stat. 259 (1948).

[22] 63 Stat. 377 (1949).

[23] 64 Stat. 798 (1950).

Eisenhower Administration

President Eisenhower was the first to formally declare a federal policy of not competing with the private sector.[24] This policy was originally published by the Bureau of the Budget (BOB) in a directive issued in 1955:

> It is the stated policy of the administration that the Federal government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.[25]

This policy was expressed in, and entered the vernacular as, Office of Management and Budget's (OMB's) Circular A-76 in 1966 during the Johnson Administration.[26] Since that time, OMB Circular A-76 has become the primary focal point for discussions of what is an inherently governmental function because it and its four attachments establish guidelines and procedures for determining whether an activity should be performed in-house with government personnel or whether it should be contracted out to the private sector.[27]

Reagan and George H.W. Bush Administrations

The 1980s saw numerous disputes between proponents of the government and private sectors. Of these two administrations, the Reagan Administration, in particular, was a strong proponent of smaller government and had many confrontations with Congress over who should perform various functions. This administration would propose or attempt to privatize particular functions, such as depot maintenance. Congress would then respond with either an appropriations rider, prohibiting or conditioning the use of funds to implement the privatization, or with a substantive law declaring a function inherently governmental, among other things. **Appendix A** provides examples of congressional responses to proposed contracting out by the Reagan and George H.W. Bush Administrations to illustrate possible legislative responses to allegedly improper contracting out by federal agencies.

Clinton and George W. Bush Administrations

The Clinton Administration was arguably on both sides of the public/private debate, sponsoring plans, such as comprehensive health care reform, that might have expanded the public sector, as well as attempting to end "big government" with its "reinventing government" initiative and enactment of the Federal Activities Inventory Reform (FAIR) Act. The FAIR Act, which is discussed in more detail in the section on definitions of inherently governmental functions, sought to foster increased contracting out of agencies' commercial functions. The George W. Bush

[24] Nagle, *supra* note 17, at 487.

[25] BOB Bulletin 55-4, January 15, 1955.

[26] The authority cited for issuing the Circular is the Budget and Accounting Act of 1921, 31 U.S.C. §§ 501-502; the Office of Federal Procurement Policy Act, 41 U.S.C. § 401 *et seq.*; and Federal Activities Inventory Reform (FAIR) Act of 1998, P.L. 105-270. OMB Circular A-76 was substantially revised in 1967, 1979, 1983, 1991, 1999, and, most recently and extensively, in May 2003. The 1999 amendment, in particular, was issued to bring the Circular into conformance with and assist in implementation of the FAIR Act.

[27] Attachment A contains the inventory process for categorizing activities as commercial or inherently governmental. Attachment B sets out the processes to be used in public-private competitions. Attachment C gives the rules for calculating the cost of these competitions. Attachment D supplies the definitions for the Circular.

Administration could be described as having an even narrower conception of the role of the public sector. Among other things, the Bush Administration proposed amending OMB Circular A-76 so that all functions were presumed commercial unless agencies justified why they were inherently governmental.[28] The Bush Administration's extensive use of contractors in Iraq and Afghanistan also engendered much discussion as to propriety of contracting out certain functions. Critics claimed that the Bush Administration improperly contracted out acquisition, armed security, and contract management functions, among others.

Obama Administration

Recent announcements by President Obama and Secretary of Defense Robert M. Gates could signal a shift to increased governmental performance of certain functions. President Obama issued a three-page memorandum on March 4, 2009, announcing his Administration's priorities in contracting policy. It highlighted four initiatives: (1) increased competition; (2) use of fixed-price contracts; (3) ensuring that the acquisition workforce can manage and oversee contracts; and (4) ensuring that functions considered to be inherently governmental are not contracted out. As regards contracting out, in particular, the memorandum states:

> Government outsourcing for services also raises special concerns. For decades, the Federal Government has relied on the private sector for necessary commercial services used by the Government, such as transportation, food, and maintenance. Office of Management and Budget Circular A-76, first issued in 1966, was based on the reasonable premise that while inherently governmental activities should be performed by Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition.
>
> However, the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.[29]

Secretary Gates made the President's proposal more concrete with the budget announcement he issued prior to the President's submission of the budget on May 7, 2009:

> A final recommendation ... will have a significant impact on how defense organizations are staffed and operated. Under this budget request, we will reduce the number of support service contractors from our current 39 percent of the workforce to the pre-2001 level of 26 percent and replace them with full-time government employees. Our goal is to hire as many as 13,000 new civil servants in FY10 to replace contractors and up to 30,000 new civil servants in place of contractors over the next five years.[30]

[28] *See* 67 Fed. Reg. 69769 (Nov. 19, 2002). This proposal was dropped from the final version of the Circular adopted in 2003.

[29] The White House, Office of the Press Secretary, Government Contracting: Memorandum for the Heads of Executive Departments and Agencies, Mar. 4, 2009, available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government-Contracting.

[30] Defense Budget Recommendation Statement, As Prepared for Delivery by Secretary of Defense Robert M. Gates, Arlington, VA, Monday, April 06, 2009, *available at* http://www.defenselink.mil/speeches/speech.aspx?speechid=1341.

Current Definitions of "Inherently Governmental Functions"

Two main definitions of inherently governmental functions currently exist within federal law and policy. One is a statutory definition, enacted as part of the Federal Activities Inventory Reform (FAIR) Act of 1998.[31] This definition states that an inherently governmental function is "a function so intimately related to the public interest as to require performance by Federal Government employees."[32] The other is a policy-oriented definition contained in Office of Management and Budget (OMB) Circular A-76.[33] This definition states that an inherently governmental activity is "an activity that is so intimately related to the public interest as to mandate performance by government personnel."[34] Other statutes and regulations that define inherently governmental functions do so either by reproducing the language of the FAIR Act or OMB Circular A-76, or by incorporating the definitions of the FAIR Act or OMB Circular A-76 by reference. The Federal Acquisition Regulation (FAR) is a prime example of this.[35] The FAR does not provide its own definition of inherently governmental functions; rather, it incorporates the definition of OMB Circular A-76 by reference.[36]

In addition to these definitions, there are numerous statutory, regulatory, and policy provisions designating specific functions as inherently governmental or commercial. These provisions also help establish the meaning of "inherently governmental functions" by specifying what is—and is not—included within that category. Similarly, while not offering their own definitions of inherently governmental functions, the Government Accountability Office (GAO) and the federal courts have tests for identifying inherently governmental functions that they use in designating specific functions as inherently governmental or commercial.

This section surveys the current definitions of inherently governmental functions, as well as the functions that have been designated as inherently governmental or commercial by statute, regulation, policy, or GAO or judicial decision. It addresses (1) statutory definitions and declarations; (2) policy-based definitions and declarations; (3) definitions and declarations from administrative law, including GAO decisions; and (4) designations in federal court decisions.

[31] P.L. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 note).

[32] 31 U.S.C. § 501 note, at § 5(2)(A).

[33] OMB, Circular No. A-76 Revised, May 29, 2003, *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.html.

[34] OMB Circular A-76, Attachment A, at § (B)(1)(a).

[35] The FAR is promulgated by the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA) under the authority of the Office of Federal Procurement Policy Act of 1974. *See* Office of Federal Procurement Policy Act of 1974, P.L. 93-400, 88 Stat. 796 (codified at 41 U.S.C. §§ 401-438); DOD, GSA & NASA, Establishing the Federal Acquisition Regulation: Final Rule, 48 Fed. Reg. 42102, 42142 (Sept. 19, 1983).

[36] 48 C.F.R. § 7.301. The FAR does, however, reproduce the definition of OMB Circular A-76 in its own "definitions" section with some slight modifications. *See* 48 C.F.R. § 2.101 ("'Inherently governmental function' means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination.").

Statutory Definitions and Declarations

The FAIR Act provides the primary statutory definition of inherently governmental functions. There are, however, several other statutory definitions of inherently governmental functions and "functions closely associated with inherently governmental functions." Some of these definitions mirror the definitions of the FAIR Act or OMB Circular A-76, while others incorporate the definitions of the FAIR Act or OMB Circular A-76 by reference. There are also numerous statutory provisions declaring that specific functions are inherently governmental.

The FAIR Act

The FAIR Act provides the primary statutory definition of inherently governmental functions. Originally introduced as the Freedom from Government Competition Act of 1997, the FAIR Act was designed to promote executive agencies' compliance with OMB Circular A-76.[37] OMB Circular A-76 predated the FAIR Act and expressed the federal government's general policy of relying on competitive private enterprises to supply the commercial products and services it needs.[38] OMB Circular A-76 also provided procedures for agencies to conduct cost comparisons to determine whether the government or private enterprises should perform specific activities on the government's behalf.[39] However, although OMB Circular A-76 established policies and procedures, it reportedly failed to result in public-private competitions for performance of commercial activities, or agencies' contracting with the private sector for performance of their commercial activities.[40] The FAIR Act sought to address this situation by requiring agencies to compile annual lists of all commercial activities they perform and make these lists available to Congress and the public.[41] The FAIR Act does not require agencies to contract out any particular activities, however.[42] It requires only that agencies use competitive processes to select the source when they consider contracting with private sector sources for performance of certain activities performed by government employees.[43]

Although the FAIR Act's primary focus is upon commercial activities performed by government agencies, it defined inherently governmental functions in order to contrast them with commercial

[37] *See, e.g.*, H.R. 4244, Federal Activities Inventory Reform Act: Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the Comm. on Gov't Reform & Oversight, 105th Cong., 2d Sess. 1 (Aug. 6, 1998) (statement of John J. Duncan, Jr., Representative from Tennessee). As originally introduced, the Freedom from Government Competition Act would have prohibited agencies from beginning or carrying out any activity whose products or services could be provided by the private sector.

[38] Bulletin 55-4 of the Bureau of the Budget, issued on January 15, 1955, first articulated the policy of OMB Circular A-76. Bulletin 55-4 was revised in 1957 and 1960 before being reissued as OMB Circular A-76 in 1966. OMB Circular A-76 was itself revised in 1967, 1979, 1983, 1991, 1999, and 2003. For more on OMB Circular A-76, see CRS Report RS21489, *OMB Circular A-76: Explanation and Discussion of the Recently Revised Federal Outsourcing Policy*, by John R. Luckey.

[39] *See* Luckey, *supra* note 38, at 2.

[40] *See, e.g.*, H.R. 4244, *supra* note 37, at 30 (statement of Stephen Horn, Chairman, House Subcommittee on Government Management, Information, and Technology) ("Outside of the Department of Defense, not one single agency uses A-76 competitions.").

[41] 31 U.S.C. § 501 note, at § 2(a) & (c).

[42] In fact, there is no statute establishing a general federal policy of or requirement for contracting out. There is only Section 2462(a) of Title 10 of the United States Code, which says that the Department of Defense should contract out services that the private sector can provide more cheaply.

[43] 31 U.S.C. § 501 note, at § 2(e).

activities.[44] The FAIR Act's definition of inherently governmental functions is itself brief: "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."[45] This definition is, however, followed by lengthy lists of functions included in and excluded from the definition of inherently governmental functions under the act.[46]

The FAIR Act describes the "functions included" within its definition of inherently governmental function as ones 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."[47] The act then gives a non-exclusive list of examples of the types of "functions included." These are:

1. binding the United States to take, or not to take, action by contract, policy, regulation, authorization, order or otherwise;
2. determining, protecting, and advancing U.S. economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
3. significantly affecting the life, liberty, or property interests of private persons;
4. commissioning, appointing, directing or controlling officers or employees of the United States; or
5. exerting ultimate control over the acquisition, use, or disposition of the real or personal, tangible or intangible, property of the United States, including the collection, control or disbursement of appropriated and other federal funds.[48]

The FAIR Act further describes the "functions excluded" from its definition of inherently governmental functions as those involving (1) gathering information for or providing advice, opinions, recommendations, or ideas to federal officials, or (2) any function that is primarily ministerial and internal in nature.[49] It concludes by giving examples of ministerial and internal functions, which include building security, mail operations, cafeteria operations, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.[50]

The FAIR Act's definition of inherently governmental functions and listing requirements apply to all executive branch agencies named in 5 U.S.C. § 101, all military departments named in 5 U.S.C. § 102, and all independent establishments as defined in 5 U.S.C. § 104.[51] However, the FAIR Act explicitly exempts from the act's requirements (1) GAO; (2) government corporations or government-controlled corporations, as defined in 5 U.S.C. § 103; (3) non-appropriated funds

[44] 31 U.S.C. § 501 note, at § 5(2)(A). The FAIR Act does not define commercial activities. Only OMB Circular A-76 provides such a definition.

[45] *Id.*

[46] 31 U.S.C. § 501 note, at § 5(2)(B)&(C).

[47] 31 U.S.C. § 501 note, at § 5(2)(B).

[48] 31 U.S.C. § 501 note, at § 5(2)(B)(i)-(v).

[49] 31 U.S.C. § 501 note, at § 5(2)(C).

[50] *Id.*

[51] 31 U.S.C. § 501 note, at § 4(a)(1)-(3).

instrumentalities, as described in 5 U.S.C. § 2105(c); (4) certain depot-level maintenance and repair activities of the Department of Defense, as described in 10 U.S.C. § 2460; and (5) agencies with fewer than 100 full-time employees as of the first day of the fiscal year.[52]

Other Statutory Definitions

In addition to the FAIR Act, other statutes have "definitions" sections that include "inherently governmental functions" or "functions closely associated with inherently governmental functions."

Two of these statutes provide a definition of inherently governmental functions that, while closely related to the definitions of the FAIR Act and OMB Circular A-76, does not reproduce either of these definitions verbatim. The Coast Guard appropriations authorization act for FY2004 and FY2005 and the National and Community Service Trust Act of 1993 both define an inherently governmental function as:

> ... any activity that is so intimately related to the public interest as to mandate performance by an officer or employee of the Federal Government, including an activity that requires either the exercise of discretion in applying the authority of the Government or the use of judgment in making a decision for the Government.[53]

The verb "mandate" in this definition matches the verb in the definition of OMB Circular A-76, but this definition departs from the definition of OMB Circular A-76 by using "officer or employee of the Federal Government" where OMB Circular A-76 uses "Federal Government employees."[54] This definition also specifically incorporates the functions of exercising discretion and using judgment that are mentioned in OMB Circular A-76 and are among the "functions included" within the FAIR Act's definition of inherently governmental functions.[55]

Outside of the Coast Guard appropriations authorization act for FY2004 and FY2005 and the National and Community Service Trust Act of 1993, however, no statute provides a definition of inherently governmental functions different from that in the FAIR Act or OMB Circular A-76. Many statutes incorporate the definition from OMB Circular A-76 by reference when defining inherently governmental functions.[56] Several of these statutes also use the related term, "functions closely associated with inherently governmental functions," but likewise incorporate the definition of OMB Circular A-76 by reference.[57]

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[52] 31 U.S.C. § 501 note, at § 4(b)(1)-(5).

[53] National and Community Service Trust Act of 1993, P.L. 103-82, § 196, 107 Stat. 785 (codified at 42 U.S.C. § 12651g(a)(1)(C)(iii)); A Bill to Authorize Appropriations for Fiscal Years 2004 and 2005 for the United States Coast Guard, and for Other Purposes, P.L. 108-293, § 302, 118 Stat. 1028 (codified at 33 U.S.C. § 1223(e)).

[54] *Compare* 33 U.S.C. § 1223(e) *and* 42 U.S.C. § 12651g(a)(1)(C)(iii) *with* OMB Circular A-76, Attachment A, at (B)(1)(a).

[55] *Compare* 33 U.S.C. § 1223(e) *and* 42 U.S.C. § 12651g(a)(1)(C)(iii) *with* OMB Circular A-76, Attachment A, § at (B)(1)(a) *and* 31 U.S.C. § 501 note, at § 5(2)(B).

[56] *See, e.g.*, 10 U.S.C. § 2330a(g)(4) (defining inherently governmental functions by reference to 10 U.S.C.§ 2383(b)(2)). Section 2383(b)(2) of Title 10 of the United States Code does not itself define inherently governmental functions. Rather, it incorporates the FAR's definition by reference. The FAR does not define this term, however; the FAR incorporates the definition of OMB Circular A-76 by reference.

[57] *See, e.g.*, 10 U.S.C. § 2330a(g)(3) (defining functions closely associated with inherently governmental functions by reference to 10 U.S.C.§ 2383(b)(3)); 10 U.S.C. § 2463(e) (same). Section 2383(b)(3) of Title 10 of the United States (continued...)

Statutory Declarations of Specific Functions as Inherently Governmental

Several provisions of federal law declare that specific functions are inherently governmental without defining inherently governmental functions. Sometimes, specific functions are defined as inherently governmental without reference to the FAIR Act or the employees performing the functions at the time of the statute's enactment. Examples of such functions are (1) the preparation of agency strategic plans and program performance reports under the Government Performance and Results Act of 1993[58] and (2) functions connected with the operation and maintenance of hydroelectric power-generating facilities at water resources projects of the Army Corps of Engineers.[59] At other times, specific groups of employees, who were performing certain functions at the time of the statute's enactment, are classified as inherently governmental for purposes of the FAIR Act. Examples include federal employees at the National Energy Technology Laboratory[60] and instructor staff at the Federal Law Enforcement Training Center.[61] At yet other times, Congress effectively renders certain functions inherently governmental, at least temporarily, without classifying them as such, by providing that appropriated funds cannot be expended to contract them out.[62] Finally, Congress sometimes signals its concerns about the executive branch's classification of specific functions without either enacting legislation designating the functions as inherently governmental or precluding the use of appropriated funds to contract the functions out. Congress can do this by expressing its sense that certain functions are inherently governmental,[63] or by imposing additional restrictions—beyond those in the FAIR Act, OMB Circular A-76, or the FAR—upon contracting out activities that are arguably closely associated with inherently governmental functions.[64]

(...continued)

Code does not itself define functions closely associated with inherently governmental functions. Rather, it incorporates by reference the definition of the FAR, which itself incorporates by reference the definition of OMB Circular A-76.

[58] P.L. 103-62, 107 Stat. 285 (1993) (codified at 5 U.S.C. § 306; 31 U.S.C. §§ 1115-1116; & 39 U.S.C. § 2805).

[59] Water Resources Development Act of 1990, P.L. 101-640, § 314, 104 Stat. 4641 (codified at 33 U.S.C. § 2321).

[60] U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, P.L. 110-28, § 6201, 121 Stat. 112 (May 25, 2007).

[61] Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, P.L. 110-329, § 521, 122 Stat. 3574 (September 30, 2008).

[62] *See, e.g.*, Consolidated Appropriations Act, P.L. 110-161, § 730, 121 Stat. 1846 (Dec. 26, 2007) ("None of the funds made available in this Act maybe used to study, complete a study of, or enter into a contract with a private party to carry out, without specific authorization in a subsequent Act of Congress, a competitive sourcing activity of the Secretary of Agriculture, including support personnel of the Department of Agriculture, relating to rural development or farm loan programs."). *See also id.* at §§ 103, 111, 415, & 739.

[63] *See, e.g.*, Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, § 832, 122 Stat. 4535 (Oct. 14, 2008) ("It is the sense of Congress that ... the regulations issued by the Secretary of Defense pursuant to section 862(a) of the National Defense Authorization Act for Fiscal Year 2008 ... should ensure that private security contractors are not authorized to perform inherently governmental functions in an area of combat operations.").

[64] *See, e.g.*, 5 U.S.C. § 1101 (providing that functions formerly performed by the Defense Security Service and transferred to the Office of Personnel Management (OPM) may not be converted to contractor performance until the Director of OPM makes a written determination that they are commercial or appropriate for contractor performance); 10 U.S.C. § 2330a(e)(2)(B)-(C) (requiring the secretary or head of each defense agency responsible for activities on a list created under the FAIR Act to review the list and ensure that it does not include inherently governmental functions or, to the maximum extent practicable, functions closely associated with inherently governmental functions); 10 U.S.C. § 2383 (allowing the head of a defense agency to enter into a contract for the performance of acquisitions functions closely associated with inherently governmental functions only when, among other requirements, there are appropriate military and civilian employees to supervise the contractor's performance and to perform all inherently governmental functions associated with the functions to be performed under the contract).

Alternatively, but more rarely, Congress expresses its sense that certain functions are commercial,[65] or appropriates funds to contract out activities that some commentators might seek to classify as inherently governmental.[66]

Policy-Based Definitions and Declarations

OMB Circular A-76 provides the other main definition of inherently governmental functions used in federal law and policy. Office of Federal Procurement Policy Letter 92-1, which provided another significant policy-based definition of inherently governmental functions, was superseded by the 2003 revision of OMB Circular A-76. Another policy document, Department of Defense Instruction Number 1100.22, in its revision of April 6, 2007, both provides a basic definition of inherently governmental functions and designates numerous DOD functions as inherently governmental or commercial.

OMB Circular A-76

Like its predecessors, the current OMB Circular A-76 "establishes federal policy for the competition of commercial activities."[67] It both (1) articulates the "longstanding policy of the federal government ... to rely on the private sector for needed commercial services" and (2) establishes procedures for agencies to use in determining whether their commercial activities should be performed under contracts with the private sector or in-house by agency personnel. [68] Although pre-2003 versions of OMB Circular A-76 focused on listing only commercial activities, the current version of OMB Circular A-76 requires agencies to list all activities they perform and classify these activities as commercial or inherently governmental.[69] All activities classified as

[65] *See, e.g.*, National Aeronautics and Space Administration Authorization Act of 2008, P.L. 110-422, § 901, 122 Stat. 4803-04 (Oct. 15, 2008) ("It is the sense of Congress that a healthy and robust commercial sector can make significant contributions to the successful conduct of NASA's space exploration program. While some activities are inherently governmental in nature, there are many other activities, such as routine supply of water, fuel, and other consumables to low Earth orbit or to destinations beyond low Earth orbit, and provision of power or communications services to lunar outposts, that potentially could be carried out effectively and efficiently by the commercial sector at some point in the future.").

[66] *See, e.g.*, 31 U.S.C. § 3711 & 3718 (allowing use of private contractors to collect debts owed to the United States); Social Security Amendments of 1965, P.L. 89-97, 79 Stat. 286 (authorizing the Department of Health and Human Services to use contractors to administer the Medicare Insurance Program); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510, 94 Stat. 2767 (allowing use of contractors in the Superfund program).

[67] OMB Circular A-76 Revised, May 29, 2003, at § 1.

[68] OMB Circular A-76, at § 4.

[69] *Compare* OMB Circular A-76, at § 4(a) ("[A]gencies shall ... [i]dentify all activities performed by government personnel as either commercial or inherently governmental.") *with* OMB Circular No. A-76, Revised 1999, at § 10, *available at* http://www.whitehouse.gov/omb/circulars/a076/a076.html ("As required by the Federal Activities Inventory Reform Act of 1998 and Appendix 2 of the Supplement, no later than June 30 of each year, agencies shall submit to OMB a Commercial Activities Inventory and any supplemental information requested by OMB."). In fact, the current version of OMB Circular A-76 requires that agencies "justify, in writing, any designation of governmental personnel performing inherently governmental functions." This difference between the 1999 and 2003 versions of OMB Circular A-76 reflects the Bush Administration's attempt in 2002 to create a presumption that all functions of government agencies are commercial. *See* OMB, Performance of Commercial Activities, 67 Fed. Reg. 69769, 69772 (Nov. 19, 2002) ("The revised Circular will require agencies to presume that all activities are commercial in nature unless an activity is justified as inherently governmental.... To reinforce this presumption, agencies will be required to submit annual inventories of their inherently governmental positions.").

inherently governmental under OMB Circular A-76 must be performed by government personnel.[70] Only those activities classified as commercial can be considered for contracting out.

Even in its pre-2003 versions, before agencies were required to list and classify inherently governmental activities, OMB Circular A-76 defined inherently governmental functions when characterizing them as the opposite of commercial activities. The definition in OMB Circular A-76 is itself brief, like the definition in the FAIR Act. The current version of OMB Circular A-76 says only that "An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel."[71] However, OMB Circular A-76, also like the FAIR Act, follows its brief definition of inherently governmental functions with clarification and examples. The paragraph within the current version of OMB Circular A-76 that defines inherently governmental functions continues by stating:

> [Inherently governmental] activities require the exercise of substantial discretion in applying government 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. An inherently governmental activity involves:
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> (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
>
> (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
>
> (3) Significantly affecting the life, liberty, or property of private persons; or
>
> (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.[72]

This language largely corresponds to that of the FAIR Act's examples of "functions included" in its definition of inherently governmental functions.[73]

The current version of OMB Circular A-76 then provides some further explanations that are unlike those in the FAIR Act or other sources, however. It first distinguishes between the exercise of discretion *per se*, which it says does not make a function inherently governmental, and the exercise of *substantial* discretion, which it says makes a function inherently governmental.[74] It

[70] OMB Circular A-76, at § 4.b.

[71] OMB Circular A-76, Attachment A, at § (B)(1)(a).

[72] *Id.*

[73] *See* 31 U.S.C. § 501 note, at § 5(2)(B)(i)-(v). The FAIR Act does, however, explicitly include one example that is not explicitly included in OMB Circular A-76: the commissioning, appointing, directing, or controlling of officers or employees of the United States. *See id.* at § 5(2)(B)(iv).

[74] OMB Circular A-76, Attachment A, at § (B)(1)(b) ("While inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing (continued...)

then notes that "[a]n activity may be provided by contractor support ... where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight," before listing six factors that agencies should consider to avoid transferring inherently governmental functions to contractors.[75] See **Appendix B** for a listing of these six factors. The current version of OMB Circular A-76 also explicitly defines commercial activities:

> A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.[76]

Additionally, it includes—but does not define—a category of activities that are commercial but "not appropriate for private sector performance."[77]

OMB Circular A-76 and its definition of inherently governmental functions apply to all executive departments named in 5 U.S.C. § 101 and all independent establishments as defined in 5 U.S.C. § 104. There are no exemptions.

OMB Circular A-76 is, however, a statement of policy, not law. For OMB Circular A-76 to have the force of law, it would need (1) to be the product of a congressional grant of legislative authority promulgated in accordance with any procedural requirements imposed by Congress and (2) a substantive- or legislative-type rule affecting individual rights and obligations.[78] Neither of these requirements are met in the case of OMB Circular A-76.[79] Congress did not explicitly grant the executive branch legislative authority to promulgate OMB Circular A-76; rather, the

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policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials."). The focus upon the exercise of substantial discretion, as opposed to discretion *per se*, is a difference between the 1999 and 2003 versions of OMB Circular A-76. *See* OMB Circular No. A-76, Revised 1999, *supra* note 69 ("[T]hese functions include 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.") (emphasis added). Some commentators have suggested that the addition of "substantial" in 2003 represented a significant change in the definition of inherently governmental functions and helped facilitate the inappropriate contracting out of allegedly inherently governmental functions by the Bush Administration. *See, e.g.*, Am. Fed'n of Gov't Employees (AFGE), *Privatization: Cleaning Up the Mess*, Feb. 9, 2009, *available at* http://www.afge.org/index.cfm?page=2005LegislativeConferenceIssuePapers&fuse=Content&ContentID=1745 ("OMB officials illegally watered down the statutory definition when they overhauled the A-76 Circular" in 2003, leading, in part, to "uncontrolled growth in the contractor workforce" during the Bush Administration).

[75] OMB CircularA-76, Attachment A, at § (B)(1)(c).

[76] OMB Circular A-76, Attachment A, at § (B)(2).

[77] OMB Circular A-76, Attachment A, at § (C)(1). Pre-2003 versions of OMB Circular A-76 also listed examples of 108 commercial activities, grouped within 16 categories. OMB Circular No. A-76, Revised 1999, Attachment A, *supra* note 69. One of these categories was security, which included guard and protective services. *Id.*

[78] *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295-302 (1979) (articulating the requirements for a statement of executive branch policy to have the force of law).

[79] *See, e.g.*, U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth. (FLRA), 844 F.2d 1087 (4th Cir. 1988) (holding that OMB Circular A-76 does not have the force of law); Defense Language Inst. v. FRLA, 767 F.2d 1398 (9th Cir. 1985) (same).

Eisenhower Administration took it upon itself to promulgate Bulletin 55-4 of the Bureau of the Budget, the predecessor of OMB Circular A-76.[80] Similarly, OMB Circular A-76 prescribes federal policy and procedures for agencies' contracting out, matters not affecting individual rights. Contractors do not generally have due process or other rights to prospective contracts with the federal government.[81]

OFPP Letter 92-1

Prior to the 2003 revision of OMB Circular A-76, Office of Federal Procurement Policy (OFPP) Letter 92-1 was another important policy document containing a definition of inherently governmental functions.[82] It was designed to "assist Executive Branch officers and employees in avoiding an unacceptable transfer of official responsibility to Government contractors."[83] It specifically prohibited contracting out inherently governmental functions,[84] which it defined as "[functions] that [are] so intimately related to the public interest as to mandate performance by Government employees."[85] This definition is identical to that in OMB Circular A-76 except for its last word and the capitalization of its next-to-last word. OFPP Letter 92-1 uses "Government employees" where OMB Circular A-76 uses "government personnel." [86] OFPP Letter 92-1 is still occasionally cited as an authority on the definition of inherently governmental functions.[87] However, the 2003 revision of OMB Circular A-76 incorporated some of its contents and superseded it.[88]

DODI 1100.22

When DOD functions are involved, Department of Defense Instruction (DODI) 1100.22, *Guidance for Determining Workforce Mix*, also provides a basic definition of inherently governmental functions and designates specific functions as inherently governmental or commercial. Like OMB Circular A-76, but unlike the FAIR Act, DODI 1100.22 includes a clear statement that "functions and tasks that are [inherently governmental] shall be performed by government personnel."[89] DODI 1100.22 provides a basic definition of inherently governmental functions as "includ[ing], among other things, activities that require either the exercise of

[80] H.R. 4244, *supra* note 37, at 73 ("In 1954, a bill to address [government competition with the private sector] was reported by this committee, passed the House, and was reported ... in the Senate. At that point, the Eisenhower administration indicated that they would resolve the matter administratively. Bureau of the Budget Bulletin 55-4 was issued and further action on the legislation was suspended.").

[81] *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) ("We find nothing ... indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases.").

[82] OMB, Policy Letter 92-1, Sept. 23, 1992, *available at* http://www.whitehouse.gov/omb/procurement/policy_letters/92-1_092392.html.

[83] *Id.* at § 1.

[84] *Id.* at § 6(a)(1).

[85] *Id.* at § 5.

[86] *Compare id. with* OMB Circular A-76, Attachment A, at § (B)(1)(a).

[87] *See, e.g.*, Statement of P. Jackson Bell, Deputy Under Secretary, Logistics and Materiel Readiness, Department of Defense, to the House Armed Services Subcommittee on Readiness, *CQ Cong. Testimony*, Mar. 11, 2008.

[88] OMB Circular A-76, at § 2.

[89] Dep't of Def., Instruction Number 1100.22, April 6, 2007, at § 4.1, *available at* http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf.

discretion when applying Federal Government authority or value judgments when making decisions for the Federal Government."[90] This definition corresponds to the description of the types of functions included in the definitions of inherently governmental functions in the FAIR Act and OMB Circular A-76.[91]

In addition to this basic definition, however, DODI 1100.22 provides lengthy lists of what functions do—and do not—qualify as an inherently governmental in the context of DOD operations. **Appendix C** summarizes how functions performed by military personnel are classified as inherently governmental or commercial within DODI 1100.22. **Appendix D** provides a similar summary of DODI 1100.22's classification of functions performed by civilian employees of DOD.

Administrative Law Provisions and Declarations

The key administrative law source on inherently governmental functions is the Federal Acquisition Regulation. Where DOD functions are involved, the Defense Federal Acquisition Regulation Supplement also addresses inherently governmental functions. Further declarations of specific functions as inherently governmental or commercial come from Executive Orders and GAO decisions.

Federal Acquisition Regulation

In addition to the FAIR Act and OMB Circular A-76, the Federal Acquisition Regulation (FAR) is the third major source of federal law and policy on inherently governmental functions. Subpart 7.5 of the FAR is designed to provide executive branch officials with procedures for contracting out those functions that were found to be appropriate for private-sector performance under OMB Circular A-76 or other authority. Like OMB Circular A-76, which requires that agencies perform inherently governmental functions with government personnel, the FAR specifies that "[c]ontracts shall not be used for the performance of inherently governmental functions."[92]

The FAR does not furnish its own definition of inherently governmental functions. Rather, it says that its usages of "inherently governmental activity" and related terms carry the meanings given to them in OMB Circular A-76 as it was revised in May 2003.[93] The FAR then proceeds to give

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[90] *Id.*

[91] *Compare id. with* 31 U.S.C. § 501 note, at § 5(2)(B) *and* OMB CircularA-76, Attachment A, at § (B)(1)(a).

[92] *Compare* 48 C.F.R. § 7.503(a) *with* OMB CircularA-76, § 4(b).

[93] 48 C.F.R. § 7.301. The FAR does, however, reproduce the definition of OMB Circular A-76 in its own "definitions" section with some slight modifications:

> "Inherently governmental function" means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.
>
> (1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to—
>
> (i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(continued...)

lengthy, but "not all inclusive," lists of (1) functions that are to be considered inherently governmental[94] and (2) functions that, although not inherently governmental, "may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contract performance."[95] **Appendix E** illustrates the functions designated as inherently governmental, or "approaching" inherently governmental, in the FAR.

Beyond the examples in these lists, the FAR provides none of the elaboration upon the meaning or identification of inherently governmental functions given by the FAIR Act or OMB Circular A-76. The FAR also provides no guidance upon "functions that approach being inherently governmental" beyond identifying them. It does not bar agencies' contracting out these functions, and at least one decision by the U.S. Court of Federal Claims suggests that these functions can legally be contracted out.[96]

The FAR's provisions on inherently governmental functions and functions approaching inherently governmental functions apply to all executive branch agencies not specifically exempted from the FAR[97] and to all service contracts not obtained through personnel appointments, advisory committees, or under statutory authority.[98]

Defense Federal Acquisition Regulation Supplement

The Defense Federal Acquisition Regulation Supplement (DFARS) provides additional guidance on inherently governmental functions for DOD agencies. Like the provisions of the FAR, the provisions of the DFARS are developed by notice-and-comment rulemaking and have the force of law.

(...continued)

(ii) 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;

(iii) Significantly affect the life, liberty, or property of private persons;

(iv) Commission, appoint, direct, or control officers or employees of the United States; or

(v) 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 Federal funds.

(2) Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are 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.

48 C.F.R. § 2.101.

[94] 48 C.F.R. § 7.503(c).

[95] 48 C.F.R. § 7.503(d).

[96] Gulf Group, Inc. v. United States, 61 Fed. Cl. 338, 341, n.7 (2004) (treating items on the FAR's list of "functions approaching inherently governmental" as capable of being contracted out by agencies).

[97] Examples of agencies exempted from the FAR include the Federal Aviation Administration and the Postal Service.

[98] 48 C.F.R. §2.101 & 7.502.

The DFARS declares that serving as a lead system integrator[99] on a DOD contract entails performing acquisitions functions closely associated with inherently governmental functions and places certain limits on contractors serving as lead systems integrators.[100] Other provisions of the DFARS (1) establish limits, which are lacking in the FAR, on contractor performance of certain functions closely associated with inherently governmental functions;[101] (2) require written determinations that none of the functions to be performed under contract are exempt from private sector performance or inherently governmental prior to contracting them out;[102] and (3) prohibit the award of contracts for functions exempted from private sector performance, as well as those that are inherently governmental.[103]

Other statements contained in the *Federal Register* notices introducing DFARS rules, while not themselves incorporated into the DFARS, indicate that defense agencies consider protection of property and persons, as performed by private security contractors, a commercial activity.[104] Performing preemptive or other types of attacks, in contrast, is considered inherently governmental.[105]

Executive Orders

Executive Orders have also been used to designate certain functions as inherently governmental or commercial. For example, Executive Order 13180, issued by President Clinton on December 7, 2000, designated the "provision of air traffic services" as an inherently governmental function.[106] This order was effectively repealed by Executive Order 13264, issued by President George W. Bush on June 4, 2002, which removed the language designating provision of air traffic services as an inherently governmental function from its discussion of such services.[107]

[99] A lead system integrator is an agent with authority to acquire and integrate goods from a variety of suppliers on behalf of the organization that is acquiring a complex system.

[100] DFARS 252.209-7006.

[101] DFARS 207.503 (S-70) (allowing the head of a DOD agency to enter a contract for the performance of acquisition functions closely associated with inherently governmental functions only if the contracting officer (1) determines that appropriate military or civilian DOD personnel (A) cannot reasonably be made available to perform the functions; (B) will supervise contractor performance of the contract; and (C) will perform all inherently governmental functions associated with functions to be performed under the contract and (2) ensures that the agency addresses any potential organizational conflicts of interest of the contractor in performing functions under the contract).

[102] DFARS 207.503(e)(ii).

[103] DFARS 237.102.

[104] Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16765 (Mar. 23, 2005). *See also* Brian X. Scott, Comp. Gen. Dec. B-298370 (Aug. 18, 2006) (holding that DOD solicitations for private security services in and around Iraq complied with DOD policies and regulations, including those prohibiting the contracting out of inherently governmental functions, because the contractors were not allowed to conduct direct combat activities or offensive operations).

[105] Contractor Personnel Authorized to Accompany U.S. Armed Forces, 71 Fed. Reg. 34826, 34826 (June 16, 2006).

[106] Executive Order 13180 of December 7, 2000: Air Traffic Performance-Based Organization, 65 Fed. Reg. 77493, 77493 (Dec. 11, 2000).

[107] Executive Order 13264 of June 4, 2002: Amendment to Executive Order 13180, Air Traffic Performance-Based Organization, 67 Fed. Reg. 39243, 39243 (June 7, 2002).

GAO Decisions

Numerous GAO decisions have also addressed the designation of specific functions as inherently governmental or commercial. GAO comes to address this question in two contexts: (1) in issuing advisory opinions, requested by agency officials, addressing whether agencies' proposed uses of appropriated funds are permissible and (2) in deciding bid protests when a protester challenges agencies' proposed contracting out of allegedly inherently governmental functions.[108] GAO's decisions in bid protests lack the force of law and do not bind federal agencies or protesters.[109] In neither context does GAO offer its own definition of inherently governmental functions. Rather, GAO uses a test for identifying inherently governmental functions that is based heavily on OMB Circular A-76 and the FAR.[110]

GAO's test of inherently governmental functions looks for (1) the exercise of substantial discretionary authority by government contractors or (2) the contractor's making value judgments on the government's behalf.[111] Both are factors mentioned along with the definitions of inherently governmental functions in the FAIR Act and OMB Circular A-76 and illustrated by the examples in the FAR.[112] In its decision on *NRC Contracts for Reactor Licensing Tests*, for example, GAO applied this test to the Nuclear Regulatory Commission's (NRC's) proposal to contract out some of its functions in administering licensing tests for nuclear reactor operators. Under the proposed contract, the contractor would have prepared, administered, and graded the tests, as well as provided the NRC with recommendations on which candidates should be granted licenses. GAO found that the proposed contract did not involve inherently governmental functions because the NRC guidelines relating to the tests provided "such extensive detail and guidance" that the contractors had no opportunity to exercise discretion or make value judgments in preparing, administering, or grading the tests. GAO also emphasized that agency personnel—not the contractor—would ultimately decide who received licenses. When emphasizing ultimate agency decision making, GAO highlighted a further distinction between *performing* a function and *advising* or *assisting* with a function that GAO and the courts sometimes also use when identifying inherently governmental functions.[113]

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[108] *See, e.g.*, 2B Brokers et al., Comp. Gen. Dec. B-298651 (Nov. 27, 2006) (a pre-award bid protest claiming that the agency's request for proposals provided for the performance of inherently governmental functions by winning bidders); Gerald P. Carmen, Comp. Gen. Dec. B-198137.1 (June 3, 1982) (advising the General Services Administration on its proposal to contract out seven functions involved in the conduct of transportation audits).

[109] GAO may only issue recommendations to executive branch agencies because it is a legislative branch agency and the doctrine of separation of powers precludes it from compelling the actions of executive branch agencies. *See* Ameron, Inc. v. United States Army Corps of Eng'gs, 809 F.2d 979, 986 (3d Cir. 1986). However, when agencies decline to implement the recommendations in GAO bid-protest decisions, they must notify GAO within 60 calendar days. GAO then notifies four congressional committees. 31 U.S.C. § 3554(b)(3). Similarly, protesters who are unhappy with the recommendations in GAO bid-protest decisions may file suit on the same matter in the Court of Federal Claims. *See* Robert S. Metzger & Daniel A. Lyons, A Critical Reassessment of the GAO Bid-Protest Mechanism, 6 *Wis. L. Rev.* 1225, 1232 & 1248 (2007).

[110] GAO focuses on executive branch sources in identifying inherently governmental functions because it addresses whether the proposed actions of the executive branch agencies conform to the agencies' governing authorities.

[111] *See, e.g.*, Nuclear Regulatory Commission, Comp. Gen. Dec. B-242942 (Aug. 27, 1991).

[112] *Compare id. with* 31 U.S.C. § 501 note, at § 5(2)(B); OMB Circular A-76, Attachment A, at § (B)(1)(a); *and* 48 C.F.R. § 7.503.

[113] *See, e.g.*, Internal Revenue Service: Issues Affecting IRS' Private Debt Collection Pilot, Comp. Gen. Dec. B-275430 (July 18, 1997) (distinguishing between collection of taxes, which is inherently governmental, and assisting in collecting taxes by locating and contacting taxpayers to remind them of their tax liability and suggest payment methods, which is not inherently governmental).

GAO's decision in the *Matter of GSA Transportation Audit Contracts* similarly illustrates another characteristic of GAO decisions addressing whether specific functions are inherently governmental.[114] In this case, the General Services Administration (GSA) proposed to contract out seven functions it had formerly performed in-house when conducting transportation audits. GAO found that two of these functions were inherently governmental, two were commercial, and the remaining three were not clearly inherently governmental or commercial based on GSA's description of the proposed contracts.[115] As this decision illustrates, GAO examines the context of contractual performance, including the degree of actual supervision that agencies exercise over contractors allegedly assisting government agencies in performing inherently governmental functions. It does not typically classify functions as inherently governmental or commercial in the abstract.

Appendix F illustrates how GAO has classified various functions as inherently governmental or commercial. Such GAO classifications do not, however, themselves have the force of law. They are advice or recommendations to agencies.

Judicial Decisions

Federal courts have also addressed the question of whether specific functions are inherently governmental or commercial. Two contexts prompt courts to determine what is an inherently governmental function. The first context involves litigation under the FAIR Act, OMB Circular A-76, and the FAR.[116] This context actually entails a smaller number of published decisions than the second context, which involves litigation concerning constitutional rights. The litigation concerning constitutional rights itself takes two forms. First, there are cases involving the "state action doctrine," which consider whether private actors are performing inherently governmental functions in determining (1) whether those actors must provide the same constitutional rights to third parties that the government must provide and (2) whether those actors can claim sovereign immunity for certain actions like government officials can.[117] Second, there are cases involving the "private delegation doctrine," which center upon whether a private party was given impermissible authority to legislate or make rules on the government's behalf.[118] Legislating and rulemaking are inherently governmental functions.

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[114] Gerald P. Carmen, Comp. Gen. Dec. B-198137.1 (June 3, 1982).

[115] The three functions that could not be categorized as inherently governmental or commercial based upon the contractual descriptions of them were (1) answering carriers' protests on behalf of GSA, (2) communicating with bankruptcy courts, and (3) preparing proofs of claims under Chapter 11. *See id.*

[116] *See, e.g.*, Arrowhead Metals, Ltd. v. United States, 8 Cl. Ct. 703, 714 (1985) (finding that coinage of money is inherently governmental but that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage and is thus exempt from Circular A-76); Northrop Grumman Info. Tech., Inc. v. United States, 74 Fed. Cl. 407 (2006) (addressing information management and technology services under OMB Circular A-76); United States v. Kenney, 185 F.3d 1217 (11th Cir. 1999) (stating functions are not inherently governmental, for purposes of contracting out, unless the contractor is in a position to make decisions that are binding on the agency); Nat'l Air Traffic Controllers Ass'n v. Secretary of the Dep't of Trans., 997 F. Supp. 874 (1998) (stating that air traffic control is inherently governmental because it involves national defense).

[117] *See, e.g.*, Street v. Corrections Corp. of Am., 102 F.3d 811, 814 (6th Cir. 1996) (finding that operation of a prison is an inherently governmental function requiring the prison's operators to respect prisoners' constitutional rights); Giron v. Corrections Corp. of Am., 14 F. Supp. 2d 1245, 1248-50 (D.N.M. 1998) (same).

[118] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1938) (finding the Bituminous Coal Conservation Act unconstitutional, in part, because the statute penalized people who failed to observe the requirements for minimum wages and maximum hours drawn up by prescribed majorities of coal producers and employees); A.L.A. Schechter (continued...)

The courts, like GAO, do not have an independent definition of inherently governmental functions. In deciding cases under the FAIR Act, OMB Circular A-76, or the FAR, the courts use the definitions provided in these sources.[119] Moreover, in at least some cases, courts give considerable deference to the executive branch's classification of a function as inherently governmental or commercial because of the political question doctrine, under which courts decline to hear issues that have been entrusted to the discretion of another branch of government.[120] In *Arrowhead Metals, Ltd. v. United States*, for example, the court found that coinage of money is inherently governmental but that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage.[121] In reaching this conclusion, the court noted its "desire to avoid a legislative-executive controversy" regarding whether the striking of blanks in the production of coins constitutes an inherently governmental function.[122]

In other cases, the courts use a test of inherently governmental functions much like that used by GAO, focusing upon the degree to which a private party exercises substantial discretion,[123] or makes judgments,[124] on the government's behalf. Functions classified as inherently governmental under the constitutional test include conducting elections;[125] exercising the power of eminent domain;[126] providing police services;[127] investigating allegations of child abuse;[128] exercising prosecutorial discretion;[129] chartering, oversight, and regulation of companies;[130] creation of public monopolies;[131] holding the personal property of prisoners;[132] limiting the First Amendment

(...continued)

Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (finding unconstitutional the provisions of the National Industrial Recovery Act, which allowed trade and industry groups to develop codes of fair competition that would become binding on all participants in the industry once they were approved by the president); St. Louis, Iron Mt. & So. Ry. v. Taylor, 210 U.S. 281 (1908) (upholding the constitutionality of a statute which gave the American Railway Association the authority to determine the standard height of draw bars on freight cars and to certify that figure to the Interstate Commerce Commission, which was required to accept it).

[119] *See, e.g.*, Arrowhead Metals, 8 Cl. Ct. at 714; Northrop Grumman Info. Tech., 74 Fed. Cl. 407; Kenney, 185 F.3d 1217; Nat'l Air Traffic Controllers Ass'n v. Sec'y of the Dep't of Transp., 997 F. Supp. 874.

[120] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cr.) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court."). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (holding that the President acting under congressional authorization has exclusive and unreviewable power to determine when the militia should be called out); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (declining to determine whether a treaty had been broken).

[121] Arrowhead Metals, Ltd., 8 Cl. Ct. at 717. The U.S. Constitution specifies that Congress shall have the power to "coin Money." U.S. Const. art. 1, § 8, cl. 5.

[122] *Id.*

[123] *See, e.g.*, Doe v. V. of T., 2003 U.S. Dist. LEXIS 17570 (N.D. Ill., Sept. 30, 2003) (characterizing maintaining a fire department as inherently governmental because it entails "the exercise of discretion on almost every level of operation").

[124] *See, e.g.*, Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974) (emphasizing that the agency independently performed its "judgmental functions" despite the contractor's involvement).

[125] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-58 (1978).

[126] Contributors to Pa. Hospital v. Philadelphia, 245 U.S. 20 (1917); Republic of the Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987); Chesapeake & Ohio Ry. Co. v. Greenup County, 175 F.2d 169 (6th Cir. 1949).

[127] Takle v. Univ. of Wisc. Hosp. & Clinics Auth., 402 F.3d 768 (7th Cir. 2005).

[128] Kauch v. Dep't for Children, Youth & Their Families, 321 F.3d 1 (1st Cir. 2003).

[129] Sigman v. United States, 208 F.3d 760 (9th Cir. 2000).

[130] Week v. Cayman Islands, 1992 U.S. App. LEXIS 32985 (7th Cir. 1992).

[131] Republic of the Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987).

rights of prisoners;[133] taxing and paying governmental indebtedness or obligations;[134] devising tariff regimes;[135] and hiring diplomatic staff or civil servants.[136] Functions categorized as commercial, in contrast, include providing transportation services to citizens[137] and selling government land on the government's behalf.[138]

Designations of specific functions as inherently governmental in judicial decisions have the force of law, at least within the jurisdictions where the decisions are precedent and for so long as the decisions are not overturned. However, a judicial declaration that a function is inherently governmental under a constitutional test would not necessarily preclude the executive branch from contracting out this function under the FAIR Act, OMB Circular A-76, or the FAR. Rather, in the "state action" context, the designation of a function as inherently governmental means only that the contractor performing the inherently governmental function (1) owes private individuals the same constitutional rights that the government owes them and (2) can claim sovereign immunity like government officials can.[139] Similarly, in the "private delegation" context, the designation means only that any regulations issued by the contractor cannot be constitutionally applied to private individuals.[140] The "private delegation" doctrine would not necessarily preclude the contractor from performing other functions under the contract that resulted in the contractor's issuance of the regulations.

Issues and Options for Congress

The 110th Congress required the Office of Management and Budget (OMB) to review existing definitions of inherently governmental functions and "develop a single consistent definition" of inherently governmental functions by October 14, 2009.[141] Congress did so, in part, because of its concern that federal agencies may have recently contracted out inherently governmental functions due to the existence of multiple and/or inconsistent definitions of this term.[142] This section provides an overview of major policy and legal issues that could be raised by amending the

(...continued)

[132] Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976).

[133] Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976).

[134] S.J. Constr., Inc. v. Lewis & Clark Reg'l Water Sys., 2008 U.S. Dist. LEXIS 62192 (D.S.D. 2008).

[135] Royal Thai Gov't v. United States, 441 F. Supp. 2d 1350 (Ct. Int'l Trade 2006).

[136] Elliott v. British Tourist Auth., 986 F. Supp. 189 (S.D.N.Y. 1997).

[137] Helvering v. Powers, 293 U.S. 214, 216 (1934).

[138] Week v. Cayman Islands, 1992 U.S. App. LEXIS 32985 (7th Cir. 1992).

[139] *See, e.g.*, West v. Atkins, 487 U.S. 42, 55-56 (1988) (finding that a private doctor was a state actor for purposes of the Eighth Amendment duty to provide adequate medical care to prisoners). *See generally* Verkuil, *supra* note 15, at 431 ("[T]he state action concept does not limit the functions that government can delegate. Instead it 'constitutionalizes' after-the-fact delegations that amount to the exercise of public authority.").

[140] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1938) (finding the Bituminous Coal Conservation Act unconstitutional in part because the statute penalized people who failed to observe the requirements for minimum wages and maximum hours drawn up by prescribed majorities of coal producers and employees).

[141] P.L. 110-417, § 321, 122 Stat. 4411-12 (Oct. 14, 2008).

[142] *See, e.g.*, Correction of Long-Standing Errors in Agencies' Unsustainable Procurements (CLEAN-UP) Act of 2009, S. 924, 111th Cong., § 3 (congressional finding that inherently governmental functions "have been wrongly outsourced"); Concurrent Resolution on the Budget for FY2010, S. Con. Res. 13-42, 111th Cong. (requiring DOD to "review the role that contractors play in operations, including the degree to which they *are* performing inherently governmental functions") (emphasis added).

existing definitions of "inherently governmental functions," either in response to OMB's proposal or otherwise, as well as by other options that Congress could employ to prevent alleged contracting out of inherently governmental functions.

Reliance on Prior Statutory Changes and/or Policies of the Obama Administration

One option for Congress would be to enact no new legislation addressing the definition of inherently governmental functions or the classification of specific functions as inherently governmental until changes required under prior legislation or proposed by the Obama Administration have been fully implemented.

The 110th and 111th Congresses have enacted several statutes that address contracting out in general or inherently governmental functions in particular. In addition to the Duncan Hunter National Defense Authorization Act for FY2009, which required OMB to "develop a single consistent definition" of inherently governmental functions,[143] the Omnibus Appropriations Act of 2009 prohibited agencies from conducting new public-private competitions under OMB Circular A-76 through September 30, 2009.[144] Other enacted legislation:

- classified specific functions as inherently governmental;[145]
- required the Secretary of Defense to develop guidance related to personal service contracts establishing clear distinctions between DOD employees and the employees of DOD contractors;[146]
- expressed the sense of Congress that

  > ... security operations for the protection of resources (including people, information, equipment, and supplies) in uncontrolled or unpredictable high-threat environments should ordinarily be performed by members of the Armed Forces if they will be performed in highly hazardous public areas where the risks are uncertain and could reasonably be expected to require deadly force

  and required that regulations to be issued under Section 862(a) of the National Defense Authorization Act for FY2008 ensure that private security contractors are not authorized to perform inherently governmental functions in areas of combat operations;[147]
- required the Administrator for Federal Procurement Policy to develop and issue a standard policy to prevent personal conflicts of interest by contractor employees

[143] P.L. 110-417, § 321, 122 Stat. 4411-12 (Oct. 14, 2008).

[144] P.L. 111-8, Title VII, Transfer of Funds, § 737. For more on public-private competitions generally, see CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by L. Elaine Halchin.

[145] *See, e.g.*, Consolidated Security, Disaster Assistance and Continuing Appropriations Act of 2009, P.L. 110-329, § 520, 122 Stat. 3684 (Sept. 30, 2008) (classifying the functions of the Federal Law Enforcement Training Center instructor staff as inherently governmental).

[146] Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, § 831, 122 Stat. 4534 (Oct. 14, 2008).

[147] *Id.* at § 832, 122 Stat. 4535.

performing acquisitions functions closely associated with inherently governmental functions;[148]

- expressed Congress's sense that interrogation of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, or criminals captured, confined, or detained during or in the aftermath of hostilities is an inherently governmental function and cannot appropriately be transferred to private sector contractors;[149]
- required DOD to develop guidelines and procedures to ensure that DOD considers using DOD civilian employees to perform new or currently contracted-out functions that are closely associated with the performance of inherently governmental functions, among other things;[150]
- required DOD to ensure that DOD's acquisition workforce is of the appropriate size and skill level to accomplish inherently governmental functions related to the acquisition of major systems and defined a "lead system integrator" as "a prime contractor under a contract for the procurement of services the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions with respect to the development or production of a major system";[151]
- required the Commission on Wartime Contracting to make specific recommendations regarding, among other things, the process for determining which functions are inherently governmental in contingency operations, including whether providing security in an area of combat operations is inherently governmental;[152] and
- required OMB to develop an inventory to track contracts that, among other things, involve inherently governmental functions.[153]

Many of these changes have not yet been fully implemented.

Similarly, the Obama Administration has recently signaled its commitment to have more functions, in general, performed by the federal government and to ensure that inherently governmental functions, in particular, are not improperly contracted out. Some commentators attributed the alleged contracting out of inherently governmental functions during the George W. Bush Administration, in part, to President Bush's "management agenda," which prominently featured a competitive sourcing initiative.[154] The Obama Administration, in contrast, apparently

[148] *Id.* at § 841, 122 Stat. 4537-39.

[149] *Id.* at § 1057, 122 Stat. 4611.

[150] National Defense Authorization Act for FY2008, P.L. 110-181, § 324, 122 Stat. 60-61 (Jan. 28, 2008) (codified at 10 U.S.C. § 2463). A similar provision relating to civilian agencies was enacted as part of the Omnibus Appropriations Act of 2009. P.L. 111-8, § 736, 123 Stat. 689-91 (Mar. 11, 2009).

[151] *Id.* at § 802, 122 Stat. 206-07.

[152] *Id.* at § 841, 122 Stat. 230-34.

[153] Consolidated Appropriations Act of 2008, P.L. 110-161, § 748, 121 Stat. 2035 (Dec. 26, 2007).

[154] *See* OMB, Executive Office of the President, Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner, July 2003, *available at* http://www.whitehouse.gov/omb/procurement/comp_sourcing_072403.pdf.

intends to in-source, as a matter of policy.[155] Members of the administration have signaled their belief that contractors have performed inherently governmental functions,[156] and that too many functions were contracted out in prior administrations.[157] Executive agencies have also made some plans for in-house performance of two functions—acquisitions work and provision of security services—whose performance by contractors has been of particular concern to Congress.[158] Such changes in policy may suggest that the executive branch is no longer likely to contract out functions that some allege are inherently governmental.

Waiting to see whether implementation of previously enacted legislation and/or the change in administration brings the desired changes in agencies' treatment of specific functions (e.g., performance in-house as opposed to contracting out) is one option for Congress. Prior changes in the law, coupled with the change in administration, might suffice to realize Congress's intent without resorting to more extensive changes in the law that could inadvertently limit the options of future administrations.[159] For example, even without any statutory requirement to do so, the Department of Homeland Security (DHS) recently announced that it would review all newly awarded or renewed DHS contracts for services in excess of $1 million "to ensure that proposed contract awards do not include inherently government functions or impact core functions that must be performed by federal employees."[160]

Alternatively, Congress might decide that additional oversight or further statutory changes are immediately necessary to support current executive branch policy initiatives or ensure that future administrations do not have the opportunity to contract out allegedly inherently governmental functions before Congress can check them.

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[155] *See, e.g.*, Dana Hedgepeth, Contracting Boom Could Fizzle Out: Jobs Would Return to the Pentagon, *Wash. Post*, Apr. 7, 2009, at A1 ("The government said it would hire as many as 13,000 civil servants to replace contractors in the coming year and up to 39,000 over the next five years."); Holly Roth & Stephen M. Ryan, President Obama's Directive to Evaluate and Change Federal Procurement, *Monday Bus. Briefing*, Mar. 19, 2009 (noting Obama's intent to "end[] the outsourcing of work that should be performed by government workers").

[156] *See, e.g.*, Elisa Castelli, DOD Redirects Contracting Support Work, *Fed. Times*, June 15, 2008, *available at* http://www.federaltimes.com/index.php?S=3578693 (quoting Shay Assad, currently the Defense Procurement and Acquisition Policy Director, as saying "[W]e do have pockets ... that have small numbers of people that are actually performing functions I consider inherently governmental.").

[157] *Cf.* Kevin Baron, Gates' Plan for Acquisitions Seen as a Start, *Stars & Stripes*, Apr. 10, 2009, *available at* http://www.stripes.com/article.asp?section=104&article=61936 (describing Secretary of Defense Robert Gates's plan to expand the DOD's acquisition workforce by 39,000 jobs, 9,000 of which will be new positions and 30,000 of which are positions formerly filled by employees of DOD contractors).

[158] *See id.* (decreasing reliance on contractors to perform acquisition functions); Karen DeYoung, U.S. Moves to Replace Contractors in Iraq, *Wash. Post*, Mar. 17, 2009, at A7 (describing the State Department's plan to hire short-term "Protective Security Specialists," who are government employees, in lieu of private security contractors).

[159] *See, e.g.*, PSC Opposes Mikulski's Outsourcing Bill; NTEU 'Welcomes Privatization Reform Effort,' 91 *Fed. Cont. Rep.* 393 (May 12, 2009) (quoting the head of the Professional Services Council (PSC) as stating that the CLEAN-UP Act could "inappropriately limit[] the Obama administration's ability to achieve its goals").

[160] *See, e.g.*, DHS Requires Review of Professional Services Contracts Valued at More Than $1 Million, *Fed. Contr. Daily*, June 2, 2009; Alice Lipowicz, DHS Scrutiny of Service Contracts Draws Flak: Some Suspect Ulterior Motives, *Wash. Tech.*, June 10, 2009, *available at* http://www.washingtontechnology.com/Articles/2009/06/10/NEWS-DHS-contracts.aspx.

Amending the Definition of "Inherently Governmental Functions"

Standardizing the Definition of "Inherently Governmental Functions"

One common theme in the recent literature on inherently governmental functions is that there are numerous and/or inconsistent definitions of inherently governmental functions within federal law and policy. For example, in its report on the Duncan Hunter National Defense Authorization Act for FY2009, the House of Representatives noted that the task of determining which functions must be performed by government employees:

> ... is made even more difficult by the lack of a single definition and accompanying guidance on what constitutes an "inherently governmental function." Currently, the Federal Acquisition Regulation defines that term in multiple places, the Office of Management and Budget Circular A-76 also defines the term, and there is yet another definition in the Federal Activities Inventory Reform Act (P.L. 105-270). There is also the additional DOD-specific definition of [functions] "closely associated with inherently governmental functions."[161]

Similarly, in its report *Changing the Culture of Pentagon Contracting*, the New America Foundation noted that the phrase "inherently governmental functions" appears 15 times in the United States Code "without a clear or consistent definition."[162] Commentators raising this point appear to be suggesting that agencies would not contract out allegedly inherently governmental functions if (1) they did not have to determine which definition applied in particular cases and/or (2) they had clear definitions to guide their decision making in particular cases.

Despite being pervasive, however, such concerns about multiple or inconsistent definitions of inherently governmental functions may be overstated given that there are only two main definitions of inherently governmental functions in federal law and policy. Moreover, these two definitions are arguably compatible, as **Table 1** and **Appendix G** illustrate.[163] In fact, the definitions differ in only a few words, although the materials accompanying the definitions diverge to a greater degree. The FAIR Act defines an inherently governmental function as "a function that is so intimately related to the public interest as to require performance by Federal Government employees," while OMB Circular A-76 defines an inherently governmental activity as an "activity that is so intimately related to the public interest as to mandate performance by government personnel." The differences between "activity" and "function," "require" and "mandate," and "government personnel" and "Federal Government employees" are arguably not legally or operationally significant. That there is such apparent compatibility between these definitions should not be surprising, given the history of the three main documents establishing federal law and policy on inherently governmental functions. The FAIR Act was intended to encourage agencies to at least consider outsourcing their commercial functions under the policies and processes of OMB Circular A-76. OMB Circular A-76 was, in turn, amended in 1999 to bring

[161] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009: Report of the Committee on Armed Services of the House of Representatives on H.R. 5658 Together with Additional Views, 110th Cong., 2d Sess. 333-34 (2008).

[162] *See, e.g.*, Roger D. Carstens, Michael A. Cohen & Maria Figueroa Küpçü, *Changing the Culture of Pentagon Contracting* 12 (2008).

[163] *See also Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 420 (2007) ("The Panel did not believe that there was any need for OFPP to adopt a new formal definition of what constitutes an [inherently governmental function].").

it into conformity with the FAIR Act, and much of OMB Circular A-76 was later incorporated into the FAR.[164]

Table 1. Comparison of the Treatments of Inherently Governmental Functions in the FAIR Act, OMB Circular A-76, and the FAR

Feature	FAIR Act	OMB Circular A-76	FAR
Includes its own definition of inherently governmental functions	Yes (legal definition)	Yes (policy definition)	No (incorporates definition of OMB Circular A-76)
Provides elaboration on the meaning of the definition	Yes	Yes	No
Lists exemplary functions classified as inherently governmental	No	No	Yes
Explicitly prohibits contracting out inherently governmental functions	No	Yes	Yes
Defines commercial activities	No	Yes	No
Addresses functions closely associated with inherently governmental functions	No	No	Yes

Source: Congressional Research Service

Replacing "Inherently Governmental Functions" with Another Construct

Other commentators have suggested using another phrase instead of inherently governmental functions, such as "core functions," "mission essential functions," or "critical government functions."[165] Commentators making this proposal often do not clarify whether this substitution is largely semantic, with agencies to be prohibited from contracting out core functions, for example, in the same way that they are currently prohibited from contracting out inherently governmental ones, or whether the substitution is intended to shift the debate from questions of law (i.e., what may be contracted out?) to questions of policy (i.e., which of the functions that may lawfully be contracted out should be contracted out?). Proposals of the latter sort are not definitional and are discussed in the section on "Focusing on Questions of Contracting Policy" below.

Proposals of the former sort—to replace inherently governmental functions with another phrase that defines which functions agencies may lawfully contract out—would seem to be premised on the belief that agencies will more easily and accurately ascertain which functions they must perform in-house if they can consider specific functions in relation to a defined word or phrase that more clearly expresses the grounds for their decision making. That is, while agency officials may have difficulty determining which functions are inherently governmental because "inherently governmental" is an abstract-sounding concept, core or mission essential or critical functions may be easier to recognize because their very names make clear the basis for recognizing them. By its

[164] *See* Luckey, *supra* note 38, at 1-2.

[165] *See, e.g.*, Carstens et al., *supra* note 162, at 12-13 (core functions); Geoffrey Emeigh, Contracting Out: Law Professor Suggests Focus on "Core," Not "Inherently Governmental," Functions, 89 *Fed. Cont. Rep.* 649 (2008) (same); AFGE, *supra* note 74 (mission essential); Orszag Stresses Importance of Procurement Reform for Effective, Efficient Government, *Fed. Cont. Rep.*, Mar. 10, 2009 (critical government functions).

name, a "core function" would seem to be one central to an agency's activities; a mission essential function, one necessary for the successful accomplishment of a task; and a critical function, one that could have harmful consequences if not performed.

All of the terms suggested as definitional replacements for "inherently governmental functions" could also potentially connote a broader set of functions than those encompassed by the term inherently governmental functions, especially under its current definition. The range of mission essential functions, for example, could include any function necessary for the completion of a task, not just those functions that must be performed by government employees because they are "intimately related to the public interest." Translating directions from a foreign language into English could be mission essential (e.g., necessary in order for commanders to get troops from Point A to Point B) without being inherently governmental (e.g., if the troops were on a routine patrol in friendly territory). Replacing "inherently governmental functions" with one of these terms could thus expand the range of functions exempt from contracting out, which might also constitute a short-term solution to any alleged over-reliance on contractors. However, this approach would not necessarily address which functions government employees *must* perform because they are in the public interest. Moreover, tying functions more closely to agency operations than to the public interest could result in situations where a function is categorized differently by different agencies.[166] For example, translators would not necessarily be mission essential for the Interior Department, although they might be for the State Department. Similarly, translators could be essential for some DOD missions, but not for others.[167]

Defining Other Terms Related to "Inherently Governmental Functions" and Prohibiting Contracting Them Out

The Correction of Long-Standing Errors in Agencies' Unsustainable Procurements (CLEAN-UP) Act of 2009 (S. 924, 111th Congress) would effectively diminish agencies' ability to contract out inherently governmental functions, among others, by defining other categories of functions related to inherently governmental ones and precluding agencies from contracting out these functions. S. 924 would adopt the FAR's definition of functions closely associated with inherently governmental functions and create its own definition of mission essential functions. This definition includes "functions that, although neither necessarily inherently governmental nor necessarily closely related to an inherently governmental function, are nevertheless considered by executive agency officials to be more appropriate for performance by Federal employees."[168] It then would require heads of executive agencies to "ensure that inherently governmental functions, functions closely related to inherently governmental functions, and mission-essential functions are performed by Federal employees."[169]

[166] One of the criticisms of the current approach to inherently governmental functions is that the governing authorities leave room for "subjective and inconsistent judgment." *See, e.g.*, Tara Lee, Redefining Inherently Governmental, *available at* http://peaceops.com/web/v4n1/1-v4n1/4-v4n1redefininginherentlygovernmental.html?tmpl=component&print=1&page=.

[167] *See, e.g.*, Conner Bros. Constr. Co. v. Geren, 550 F.3d 1368, 1377 (Fed. Cir. 2008) (noting that military officials had characterized operation of the dining facilities and custodial services—functions then performed by contractors—as "mission essential" when troops were restricted to base while preparing to deploy).

[168] S. 924, 111th Cong., § 2. A version of the CLEAN-UP Act was introduced in the House of Representatives on June 4, 2009. It essentially corresponds to the Senate version discussed here, including in its section numbers.

[169] *Id.* at § 5.

Such a proposal would, among other things, ensure that allegedly inherently governmental functions are effectively shielded from potential contracting out by "insulating" them within additional layers of functions that could not be contracted out. Executive branch categorizations of particular functions would have less significance under this proposal than under the current law, where functions may be contracted out provided that the contracting agency determines that they are not inherently governmental. Provision of security services in combat zones is one function that might be more easily kept in-house under the CLEAN-UP Act than under existing law. Under existing law, DOD contracted out such services after finding they were not inherently governmental,[170] although some Members of Congress contend that they are inherently governmental functions or functions approaching inherently governmental.[171] Under the CLEAN-UP Act, however, DOD would have to find that these functions are not inherently governmental, closely related to inherently governmental, or mission essential in order to contract them out. The two additional categories into which functions might fall, which would keep them from being contracted out, could increase the likelihood of certain functions being performed in-house. For example, while it may seem plausible, at least to some, that private security contractors do not perform inherently governmental functions, it could seem less plausible that their functions are neither closely associated with inherently governmental functions nor mission essential.

Such a change would be a significant one, given that agencies currently may generally contract out functions that they do not find to be inherently governmental.[172] The change might, however, serve only to shift the functions about which disagreements arise. Rather than disagreements over the categorization of functions as inherently governmental, Congress and federal agencies might find themselves in disagreements over the categorization of functions as mission essential. Moreover, such disagreements might have to be resolved by the legislative or political process given the limits on standing to challenge agencies' contracting determinations[173] and the political question doctrine.[174]

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[170] *See, e.g.*, Brian X. Scott, Comp. Gen. B-298370, 2006 WL 2390513 (Aug. 18, 2006) (denying a protest alleging, in part, that DOD solicitations for contracts to transport cargo in Iraq contracted out inherently governmental functions by calling for armed security escorts). GAO reached its conclusion because the existing laws and regulations permitted contracts for armed security services when the contracts prohibited escorts from performing direct combat or offensive operations.

[171] *See, e.g.*, Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, § 831, 122 Stat. 4534 (Oct. 14, 2008) (expressing the sense of Congress that "security operations for the protection of resources ... in uncontrolled or unpredictable high-threat environments" are inherently governmental functions).

[172] *See, e.g.*, Gulf Group, Inc. v. United States, 61 Fed. Cl. 338, 341, n.7 (2004) (treating items on the FAR's list of "functions approaching inherently governmental" as capable of being contracted out by agencies). There are, however, some limits on DOD's ability to contract out functions closely associated with inherently governmental functions where lead systems integrators or the performance of acquisition functions are involved. *See* DFARS 252.209-7006 (lead systems integrators); DFARS 207.503 (S-70) (performance of acquisition functions closely associated with inherently governmental functions).

[173] The doctrine of standing requires that plaintiffs demonstrate (1) injury in fact, (2) causation, and (3) redressibility before a court hears the merits of their claims. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Standing to challenge allegedly unlawful contracting out of inherently governmental functions could potentially be difficult to demonstrate because courts generally do not recognize harms arising from the government's allegedly illegal use of taxpayers' money as sufficient injury in fact. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447 (1923) (finding that the plaintiff lacked standing to challenge alleged "taxation for illegal purposes" because the administration of federal statutes "likely to produce additional taxation to be imposed upon a vast number of taxpayers" is essentially a matter of public concern, not an individual concern).

[174] *See supra* note 120 and accompanying text.

Clarifying Terms within the Existing Definition of Inherently Governmental Functions

Another option, not widely discussed, would be to define terms within the existing definition of inherently governmental functions. The existing definition of inherently governmental functions could, perhaps, be made clearer by establishing the meaning of key terms under it. Statutes could prescribe what it means for a function to be "intimately related to the public interest" or "performed by the federal government," for example. Defining "performance by the federal government," in particular, could potentially help remove the distinction between performing and assisting with inherently governmental functions that characterizes GAO opinions and executive branch discussions of inherently governmental functions.[175] For example, in its consideration of the IRS's proposed private debt collection program—which was one of the most prominent non-DOD examples of an agency contracting out allegedly inherently governmental functions—GAO distinguished between collection of taxes, which is inherently governmental, and assisting in collecting taxes by locating and contacting taxpayers to remind them of their tax liability and suggest payment methods, which is not inherently governmental.[176]

Potential Limitations of Definitional Changes

Any definitional changes, along the lines suggested above or otherwise, may be of limited effectiveness in ensuring that executive branch agencies do not contract out functions that some Members of Congress or commentators believe are inherently governmental.[177] This is, in large part, because many functions are not patently inherently governmental or commercial, as **Figure 1** illustrates. The potential effectiveness of definitional changes is also limited by the fact that any definition—of inherently governmental functions or some other construct—would be applied in specific circumstances by executive branch officials, who might not classify functions in the same way that Congress or third-parties would classify them.[178] For example, DOD determined that private security contractors would not be performing inherently governmental functions under the existing law.[179] Some Members of Congress disagreed, however, as is evidenced by their enactment of legislation expressing the sense of Congress that "security operations for the protection of resources ... in uncontrolled or unpredictable high-threat environments should ordinarily be performed by members of the Armed Forces."[180]

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[175] *See, e.g.*, Internal Revenue Service, *supra* note 113; DODI 1100.22, *supra* note 89.

[176] Internal Revenue Service, *supra* note 113. *See also* Diane Freda, Shulman Formally Announces End of Private Debt Collection Program, 91 *Fed. Contr. Rep.* 191, Mar. 17, 2009 (referencing Representative John Lewis's "often repeated view" that tax collection is an inherently governmental function).

[177] *Cf.* Elise Castelli, DOD Redirects Contracting Support Work: Less Work to Contractors, More to GSA, Interior, *Fed. Times*, June 16, 2008, at 1.

[178] *See also* Verkuil, *supra* note 15, at 440 (noting that the definitions of OMB Circular A-76 and related authorities may not protect agencies from erroneously classifying particular functions as inherently governmental or commercial); Lee, *supra* note 166 (noting "subjective and inconsistent judgment" in DOD application of the governing laws and regulations); *Report of the Acquisition Advisory Panel*, *supra* note 163, at 420 (noting that problems with agencies' application of the definitions of inherently governmental functions are more significant than deficiencies in the current definitions of inherently governmental functions).

[179] Under the existing law, DOD could not have contracted out these private security functions had it determined that the functions were inherently governmental. Thus, its contracting out of these functions reflects a determination that they were not inherently governmental.

[180] P.L. 110-417, § 831, 122 Stat. 4534 (Oct. 14, 2008).

Figure 1. Categorization of Functions as Inherently Governmental or Commercial

Source: Congressional Research Service

Congress has attempted to address alleged deficiencies in agencies' application of the definitions of inherently governmental functions in several ways. The 110th Congress required the Commission on Wartime Contracting to include in its report recommendations on the process for determining which functions are inherently governmental in contingency operations, including whether providing security in an area of combat operations is inherently governmental.[181] The 110th Congress, as well as other Congresses, also enacted legislation classifying particular functions as inherently governmental.[182] Congress could also require agencies to provide

[181] P.L. 110-181, § 841, 122 Stat. 230-34.

[182] *See, e.g.*, Consolidated Security, Disaster Assistance and Continuing Appropriations Act of 2009, P.L. 110-329, § 520, 122 Stat. 3684 (Sept. 30, 2008) (classifying the functions of the Federal Law Enforcement Training Center instructor staff as inherently governmental). Similar legislation has been introduced in the 111th Congress. *See, e.g.*, H.R. 2868, § 3, 111th Cong. ("The approval or disapproval of a security vulnerability assessment or site security plan (continued...)

mandatory training for their contracting officers, in particular, on what constitutes an inherently governmental function. Or Congress could provide agencies with lists of functions that are inherently governmental, or potentially suitable for contracting out, like the lists found in the FAR or formerly contained in OMB Circular A-76.[183]

None of these approaches is likely to prevent the recurrence of future inter-branch differences of opinion in the classification of particular functions, however. The recommendations of the Commission on Wartime Contracting will be context-specific, and while they might adequately guide DOD in the near future in similar situations, they may not be sufficient to guide decision making by other agencies, in the future, or in dissimilar situations. Enactment of legislation classifying particular functions as inherently governmental is necessarily *ad hoc*, and often possible only after agencies have already engaged in allegedly improper contracting for performance of inherently governmental functions. Mandatory training for agency officials could cost money, and it would be hard to ensure that the persons providing the training would categorize specific functions in the same way that some Members of Congress or commentators would. These trainers would be employees of or working for the executive branch, which has its own interests in asserting its constitutional and statutory prerogatives in the realm of contracting.[184] No listing of functions could be comprehensive, and even if the list covered all functions currently of concern to Congress, problems may arise in the future related to the performance of functions not presently at issue. Some current disputes over the alleged contracting out of inherently governmental functions during the Bush Administration were arguably exacerbated by the fact that agencies categorize functions as inherently governmental or commercial without knowing all the details about how specific contracts will be performed in specific settings that often later prompt commentators to allege the functions were inherently governmental and should never have been contracted out to begin with. Had Blackwater employees not been involved in several shooting incidents in Iraq, which were unanticipated at the time the State Department entered the contracts with Blackwater, the debate over whether private security contractors perform inherently governmental functions might not have ensued.[185]

Placing Limits on Contracting Out Or Use of Appropriated Funds

Prohibiting agencies from contracting out specific functions, or from using appropriated funds to contract out specific functions, would also serve to ensure that certain allegedly inherently governmental functions are not contracted out. Section 730 of the Consolidated Appropriations Act for FY2008, for example, specifies that

(...continued)

under this section is an inherently governmental function."); H.R. 2892, § 518, 111th Cong. ("The functions of the Federal Law Enforcement Training Center instructor staff shall be classified as inherently governmental."); S. 1298, § 521, 111th Cong. (same).

[183] *See supra* note 77 and 48 C.F.R. §7.503(c)-(d).

[184] *See, e.g.*, Arrowhead Metals, 8 Cl. Ct. at 714 (finding that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage and is thus exempt from Circular A-76). Coinage is a power given to Congress under Article I of the Constitution. However, once it is delegated to the executive branch, the executive branch has discretion in performing this function, even if Congress might disagree with its exercise of this discretion.

[185] Dana Hedgpeth, State Department to Renew Deal with Blackwater for Iraq Security, *Wash. Post*, April 5, 2008, at D2. Some commentators seem to focus upon whether private security contractors perform inherently governmental functions to avoid the difficulties in holding such contractors criminally or civilly liable for their conduct. If a function is inherently governmental, it cannot be contracted out and there would no conduct for which some might wish to hold a contractor responsible.

> ...[n]one of the funds made available in this Act may be used to study, complete a study of, or enter into a contract with a private party to carry out, without specific authorization in a subsequent Act of Congress, a competitive sourcing activity of the Secretary of Agriculture, including support personnel of the Department of Agriculture, relating to rural development or farm loan programs.[186]

Such approaches do not require any changes in the definition of inherently governmental functions, and they remove all possible questions about whether the executive branch will categorize a function as Congress might wish. These approaches are probably best utilized as tailored responses to specific concerns, however, because they are reactive and potentially time-limited. Congress generally uses these approaches on an *ad hoc* basis in response to agencies' contracting out, or proposed contracting out, of specific functions. Moreover, if included in an appropriations bill, such prohibitions could be limited to specific agencies or time periods. Prohibitions in a DOD appropriations bill would not necessarily apply to the Department of State, for example, and prohibitions could be limited to funds covered by the appropriation, or automatically carried over to future appropriations bills long after the situation prompting the prohibition has otherwise been resolved.

A more general prohibition on the use of the OMB Circular A-76 process, such as is currently in place, might seem helpful in preventing the contracting out of inherently governmental functions because it addresses all contracting out under OMB Circular A-76.[187] However, such an approach is arguably both over-inclusive and under-inclusive. It is over-inclusive in the sense that prohibiting agencies' contracting out under OMB Circular A-76 encompasses all functions performed by the government, not just those that are allegedly inherently governmental. OMB Circular A-76 articulates the competitive process that agencies are to use in source selection whenever they consider contracting with private sector sources for the performance of commercial activities performed by government employees.[188] It thus potentially applies to contracts for functions that are generally not considered to be inherently governmental (e.g., custodial services), as well as to those for functions that some might argue are inherently governmental (e.g., acquisitions-related functions). A general prohibition on the use of the A-76 process is also under-inclusive in the sense that A-76 addresses only commercial functions performed by government employees. It does not apply to new functions, which have not been performed by government employees, nor does it provide a mechanism for "insourcing," or determining whether government employees or contractors should perform functions currently performed by contractors. Such a prohibition may also generate opposition from trade groups if it appears designed to protect government employees at the expense of contractor employees.[189]

Addressing Structural Factors Prompting Agencies to Rely on Contractors

Some commentators have suggested that Congress could potentially make agencies less prone to contract out allegedly inherently governmental functions, or other functions, by addressing

[186] P.L. 110-161, § 730, 121 Stat. 1846 (2008). See also *id*. at §§ 103, 111, 415, & 739. See **Appendix A** for historical examples of this approach.

[187] Consolidated Appropriations Act of 2009, P.L. 111-8, Title VII, Transfer of Funds, § 737.

[188] OMB Circular A-76, at § 4.

[189] *See* PSC Opposes Mikulski's Outsourcing Bill, *supra* note 159.

structural factors that may lead agencies to rely on contractors instead of military personnel or civil servants.[190] "Personnel ceilings" have been identified as one such factor.[191] A personnel ceiling establishes the maximum number of positions that may be budgeted in a job category or for all personnel in an organization. Although DOD is prohibited from converting a function performed by DOD civilian personnel to contractor performance to circumvent a personnel ceiling,[192] it is otherwise subject to ceilings on the number of civilian employees and military personnel. It may also hire contractors without engaging in public-private competitions under OMB Circular A-76 when converting functions from military to DOD civilian performance if the director of the local Human Resources Office determinates that civilian employees cannot be hired.[193] Some commentators have suggested that DOD relied on contractors to perform certain functions, most notably acquisition functions, in part because of the operation of such personnel ceilings.[194] Recently introduced legislation would remove personnel ceilings imposed by the executive branch, as well as certain congressionally imposed ceilings on the number of DOD personnel.[195] However, such legislation does not address congressionally imposed ceilings outside DOD, or troop needs in situations where DOD civilian personnel cannot be substituted for military ones and there are insufficient volunteers for the military.[196] However, complete removal of personnel ceilings is not possible because of limits on the use of appropriated funds and, arguably, would not comport with some Members' desire to keep agencies within their budgets.[197]

Another factor involves the ease of hiring and firing government personnel.[198] Because of the procedural requirements for hiring new federal employees, as well as the procedural protections ensuring that federal employees are not improperly dismissed, agencies can experience difficulties matching their existing personnel to the functions they need to perform when there are sudden changes in their missions. An unanticipated need for workers to perform a new function,

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[190] *See, e.g.*, Verkuil, *supra* note 15, at 440.

[191] *Id.*

[192] 10 U.S.C. § 2461(a)(3)(B).

[193] Office of the Sec'y of Defense, Military Conversions: Contracting for Services When Civilians Cannot Be Hired, Feb. 13, 2008, available at http://competitivesourcing.navy.mil/StrategicSourcing.cfm?doc=178.

[194] A key concern here has been DOD's use of lead systems integrators (LSIs) or contractors who oversee the work of other contractors. LSIs are contractors or teams of contractors hired to execute large, complex, defense-related acquisition programs, particularly so-called system-of-systems (SOS) acquisition programs. According to one estimate, DOD reduced its acquisition workforce by approximately 49%, from 592,634 personnel to 303,849 personnel, between FY1990 and FY1999 to comply with congressional mandates. Office of the Inspector Gen., Dep't of Defense, DOD Acquisition Workforce Reduction: Trends and Impacts, Feb. 29, 2000, *available at* http://www.dodig.mil/audit/reports/fy00/00-088.pdf.

[195] *See, e.g.*, CLEAN-UP Act, S. 924, § 5 (stating that the heads of executive agencies "shall not be constrained by any in-house personnel ceiling, headcount, or staffing limitation in ensuring that functions" other than inherently governmental functions, functions closely related to inherently governmental functions, or mission essential functions "are performed in the most efficient manner possible"); National Defense Authorization Act for FY2010, H.R. 2647, § 901 (repealing the limitations on the number of personnel assigned to major headquarters activities in 10 U.S.C. § 143; 10 U.S.C. § 194; 10 U.S.C. § 3014(f); 10 U.S.C. § 5014(f); 10 U.S.C. § 8014(f); and 10 U.S.C. § 194 note). The DOD authorization for FY2010 would also require the Secretary of Defense to report to Congress on progress made in replacing contractors with civilian or military personnel, including an estimate of the number of contractors performing inherently governmental functions.

[196] *See, e.g.*, David Isenberg, Dogs of War: Contractors with No Names, Apr. 10, 2009, *available on* LEXIS Newswire ("[T]he American public has made it clear that it is not willing to provide the commensurate resources, at least in terms of bodies, to allow the military ... to do their roles.").

[197] *See, e.g.*, Agency Administrative Expenses Reduction Act of 2009, S. 948, § 2 (requiring a 3% reduction in agency administrative expenses, as compared to a FY2009 baseline, by FY2010 and an 11% reduction by FY2013).

[198] *See, e.g.*, Verkuil, *supra* note 15, at 440.

or the actual or anticipated ending of a particular mission, poses particular problems. This factor may become less salient over time, however, as Congress has given, or is considering giving, agencies expedited or other hiring authorities,[199] and agencies have begun creating some term-limited positions for federal employees.[200]

More Effective Oversight of Executive Branch Contracting Decisions

Congress receives some information about agencies' contracting decisions under the FAIR Act, but this information may be insufficient to enable Congress to adequately ascertain which functions agencies may be improperly contracting out. Under the FAIR Act, agencies must compile annual lists of all activities they perform that are not inherently governmental and make these lists available to Congress and the public.[201] However, such lists include only functions that agencies currently perform, not new functions,[202] and the listings may not provide Congress or the public with enough information to ascertain whether a listed function is, in fact, commercial, as **Figure 2** illustrates. Moreover, under the FAIR Act, agencies' lists are not directed to any specific committee(s) of Congress, nor is there an established procedure for congressional review of or response to the lists once they are received.[203] This is not to say that Congress and its Members cannot or do not exercise their oversight functions in response to specific items on agencies' FAIR Act inventories. It does, however, mean that congressional involvement with FAIR Act inventories is *ad hoc*, not systemic, which could limit Congress's ability to provide effective oversight of contracting out under the FAIR Act. Systemic congressional involvement in the OMB Circular A-76 process is equally limited. OMB Circular A-76 focuses primarily upon public notice, as **Figure 3** illustrates; notice to Congress is mentioned only as an accompaniment to public notice.

[199] *See, e.g.*, P.L. 109-313, § 4, 120 Stat. 1737 (Oct. 6, 2006) (allowing agencies to reemploy retired federal personnel without salary offsets); CLEAN-UP Act, S. 924, § 10, 111th Cong. (proposing to create expedited hiring authority for "shortage category" positions); S. 629, 111th Cong. (proposing to allow federal agencies to re-employ retired federal employees on a limited basis without forcing them to take a reduction in salary corresponding to their retirement annuities). Agencies' authority under P.L. 109-313 will sunset on December 31, 2011.

[200] *See, e.g.*, DeYoung, *supra* note 158 (describing the State Department's plan to hire short-term "Protective Security Specialists," who are government employees, in lieu of private security contractors).

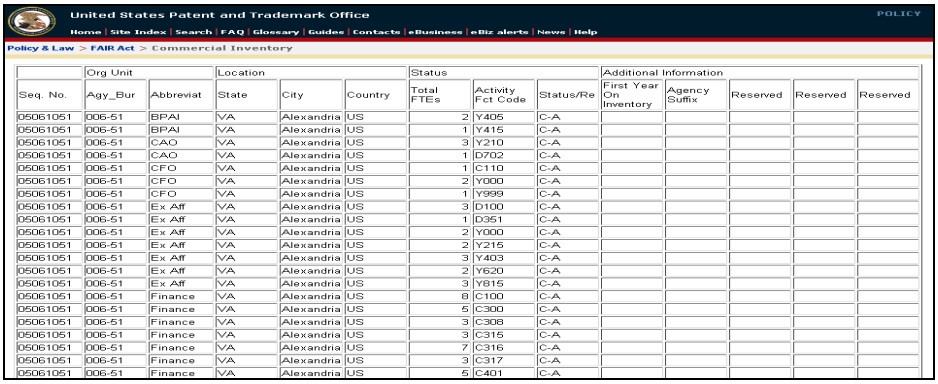
[201] 31 U.S.C. § 501 note, at § 2(a) & (c).

[202] *Id.*

[203] 31 U.S.C. § 501 note, at § (c)(1)(A) ("[T]he head of the executive agency shall promptly transmit a copy of the list to Congress and make the list available to the public."). The FAIR Act was arguably more concerned with making agencies' lists available to the public than to Congress, as it was designed to ensure that private persons were aware of potential opportunities to perform commercial functions for the government. *See* H.R. 4244, *supra* note 37, at 1.

Figure 2. Sample FAIR Act Listing of Commercial Functions

As Made Available to the Public on an Agency Website



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Policy & Law > FAIR Act > Commercial Inventory

	Org Unit		Location			Status			Additional Information				
Seq. No.	Agy_Bur	Abbreviat	State	City	Country	Total FTEs	Activity Fct Code	Status/Re	First Year On Inventory	Agency Suffix	Reserved	Reserved	Reserved
05061051	006-51	BPAI	VA	Alexandria	US	2	Y405	C-A					
05061051	006-51	BPAI	VA	Alexandria	US	1	Y415	C-A					
05061051	006-51	CAO	VA	Alexandria	US	3	Y210	C-A					
05061051	006-51	CAO	VA	Alexandria	US	1	D702	C-A					
05061051	006-51	CFO	VA	Alexandria	US	1	C110	C-A					
05061051	006-51	CFO	VA	Alexandria	US	2	Y000	C-A					
05061051	006-51	CFO	VA	Alexandria	US	1	Y999	C-A					
05061051	006-51	Ex Aff	VA	Alexandria	US	3	D100	C-A					
05061051	006-51	Ex Aff	VA	Alexandria	US	1	D351	C-A					
05061051	006-51	Ex Aff	VA	Alexandria	US	2	Y000	C-A					
05061051	006-51	Ex Aff	VA	Alexandria	US	2	Y215	C-A					
05061051	006-51	Ex Aff	VA	Alexandria	US	3	Y403	C-A					
05061051	006-51	Ex Aff	VA	Alexandria	US	2	Y620	C-A					
05061051	006-51	Ex Aff	VA	Alexandria	US	3	Y815	C-A					
05061051	006-51	Finance	VA	Alexandria	US	8	C100	C-A					
05061051	006-51	Finance	VA	Alexandria	US	5	C300	C-A					
05061051	006-51	Finance	VA	Alexandria	US	3	C308	C-A					
05061051	006-51	Finance	VA	Alexandria	US	3	C315	C-A					
05061051	006-51	Finance	VA	Alexandria	US	7	C316	C-A					
05061051	006-51	Finance	VA	Alexandria	US	3	C317	C-A					
05061051	006-51	Finance	VA	Alexandria	US	5	C401	C-A					

Source: Congressional Research Service, from http://www.uspto.gov/web/offices/ac/comp/fairact/index.html

Figure 3. Processes Under the FAIR Act and OMB Circular A-76

Activities That Involve Opportunities for Congressional or Public Notification or Objections

Source: Congressional Research Service

Congress has recently considered several proposals that would increase the information about agencies' contracting decisions available to Congress and/or the public. The CLEAN-UP Act, for example, would require that the Chief Acquisition Officer of each agency, or his or her equivalent, certify that each function to be performed under an agency service contract (including task or delivery orders and exercises of options) is not inherently governmental, closely related to inherently governmental, or mission essential.[204] In addition, agency heads would have to report to the head of OMB annually on each contract, with the report being posted on the Internet and notice of the report's availability being published in the *Federal Register*.[205] The hope is, apparently, that increased congressional or public awareness of agencies' decisions may diminish the likelihood that an agency will improperly classify as commercial an activity that is arguably inherently governmental.[206] With increased awareness of potentially problematic decisions, Congress could exercise oversight or enact legislation. However, oversight may be insufficient to get an agency to change its classification of a particular function, especially in the short term, and enacting legislation can take time.

Focusing on Questions of Contracting Policy

Another option for Congress would be to shift its focus from questions of contracting law to questions of contracting policy, or from discussions of whether specific functions are inherently governmental to discussions of which of the functions that are not inherently governmental *should* be performed in-house. The current discussions regarding the definition of inherently governmental functions, or whether certain functions are inherently governmental, do not address what should be done with those functions which are *not* inherently governmental. Agencies are presently answering these questions on an *ad hoc* basis,[207] without appreciable congressional guidance, in part because the only government-wide authorities on contracting out were designed for different purposes and focus upon contracting out of commercial functions. The FAIR Act focuses upon listings of commercial functions that could be lawfully contracted out, while OMB Circular A-76 focuses upon how to determine whether government employees or the private sector will perform specific commercial functions.[208]

No legislation, regulation, or policy document systematically addresses how agencies should determine which of the non-inherently governmental functions they perform should be performed in-house because of concerns related to transparency, accountability, employment policy, or related issues, although commentators have proposed some such frameworks. **Figure 4** illustrates one possible model for separating questions of contract law from those of contract policy, while **Figure 5** illustrates one model for deciding questions of contracting policy. The need for

[204] CLEAN-UP Act, S. 924, § 6.

[205] *Id.* See also *id.* at §§ 7-9 (requiring similar public reporting of "functions at risk," which include inherently governmental functions performed by contractors; annual inventories of functions performed by contractors; and annual strategic human capital plans).

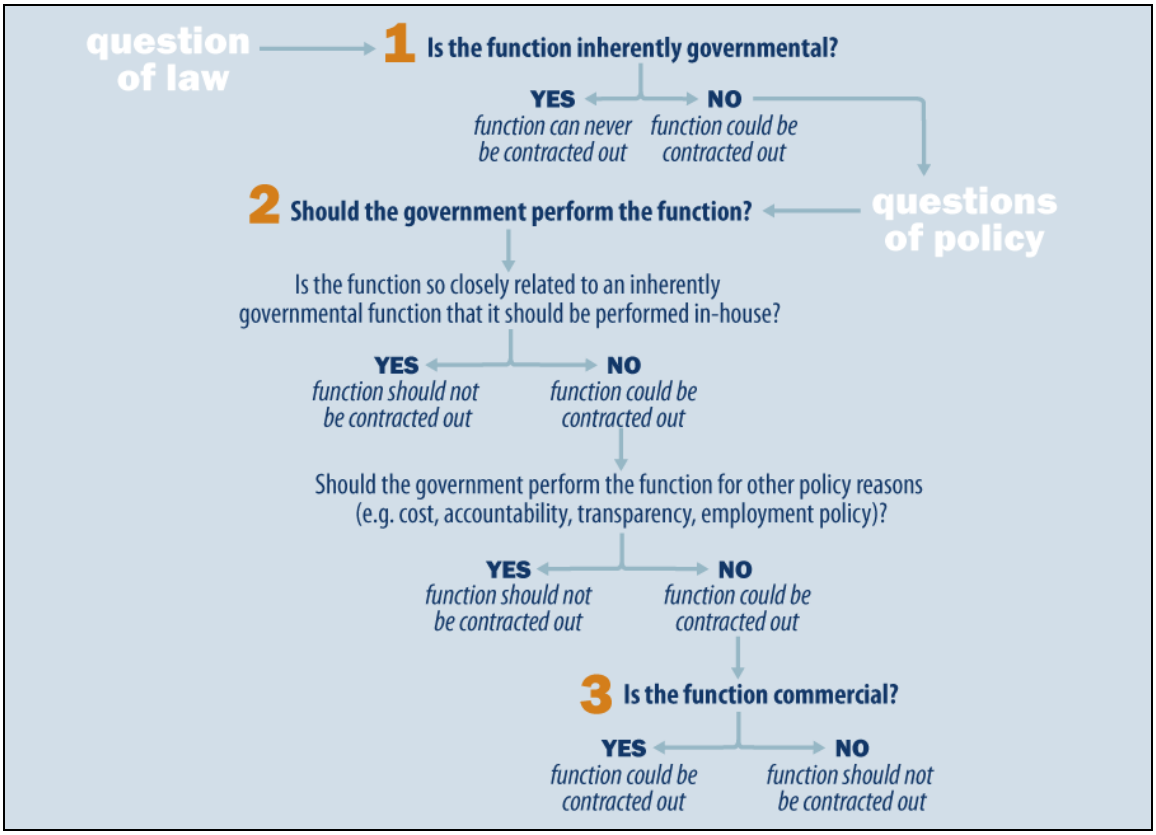
[206] *Cf. United States v. New York & Puerto Rico Steamship Co.*, 239 U.S. 88, 93, (1915) (noting that the government needs the "protection of publicity").

[207] *See, e.g.*, Gov't Accountability Office, Afghanistan: Key Issues for Congressional Oversight, Apr. 2009, at 30, *available at* http://www.gao.gov/new.items/d09473sp.pdf ("DOD's increased use of contractors at deployed locations was the result of thousands of individual decisions, not a result of a strategic or deliberate planning process.").

[208] *Cf.* Verkuil, *supra* note 15, at 440 (noting that the procedural protections of the FAIR Act and OMB Circular A-76 are directed at the competitive sourcing process, not the classification of functions as inherently governmental or commercial).

"balance" and "reasonableness" in agencies' use of contractors, as well as their need to "maintain agency capability to perform core functions" have been particularly noted.[209] However, discussions of "balance" and "reasonableness" can have two different focal points. While the focus is often on the perceived overuse of contracting out, there are those who believe that the problem is under-use of the private sector.[210] The Freedom from Government Competition of 2009, for example, takes the latter view.[211] The cost of performing functions is assessed as part of the A-76 process, although there have been some concerns about how accurately this process reflects the costs of either performance in-house or by contractors.[212]

Figure 4. A Possible Framework for Distinguishing Between Questions of Contracting Law and Contracting Policy



Source: Congressional Research Service

[209] *See, e.g.*, *Report of the Acquisition Advisory Panel*, *supra* note 163, at 420.

[210] *See, e.g.*, PSC Opposes Mikulski's Outsourcing Bill, *supra* note 159.

[211] H.R. 2682, § 2(4), 111th Cong. ("Unfair government competition with the private sector of the economy is at an unacceptably high level, both in scope and in dollar volume.").

[212] PSC Opposes Mikulski's Outsourcing Bill, *supra* note 159.

Figure 5. A Possible Framework for Addressing Questions of Contract Policy

Source: Congressional Research Service, based on Rand Research Brief, Civilian or Military? Assessing the Risk of Using Contractors on the Battlefield (2005), *available at* http://www.rand.org/pubs/research_briefs/RB9123/index1.html.

Congress has arguably recently begun to pay increased attention to questions of contract policy. Sections 3 and 11 of the CLEAN UP Act, for example, encourage executive branch agencies to pursue business process engineering, "even if such efforts reduce or increase the need for Federal employees or contractors."[213] Business process engineering is, however, more concerned with cost-savings in operations than it is with decision making as to who performs specific functions. Congress could take additional actions to focus attention on questions of contracting policy by, among other things, holding hearings at which agencies can present and discuss their developing frameworks for deciding questions of contracting policy, mandating that executive branch officials develop a framework for deciding questions of contracting policy, or legislatively establishing such a framework to be used by executive branch officials.

A focus on contracting policy may also allow Congress to better address related questions, such as the management and oversight of contractors' work, that often get caught up in the debate over inherently governmental functions, but are arguably separate from it. For example, some commentators seem to desire the expansion of the category of inherently governmental functions because there have been problems with contractor performance under specific contracts and classifying a function as inherently governmental ensures that a contractor cannot lawfully perform that function. However, while it may be tempting to conflate "shall" and "should" and categorize all functions as inherently governmental whenever there are any possible grounds for saying that the government "should" perform them, such an approach could constrain the options of future administrations and avoids the question of which functions *must* be performed by the government in every case. A function that *should* be performed by the government could potentially be contracted out in an emergency if it cannot be performed in-house. The same would not be true of an inherently governmental function.

[213] S. 924, § 3 & 11.

Appendix A. Examples of Congressional and Executive Branch Interactions in Defining Inherently Governmental Functions During the 1980s

Some illustrations of Congress's responses to attempts by the Reagan and George H.W. Bush Administrations to contract out certain functions during the 1980s may help to clarify the give-and-take in the current debate over the public and private sectors and contracting out. During this period, Congress frequently used the appropriations rider to counter contracting-out decisions. An appropriations rider places conditions—generally in the form of language specifying that "no funds shall be used for ..."—on the outsourcing of a particular type of function or on outsourcing in general. Alternatively, an appropriations rider might impose conditions that must be met before funds can be expended (e.g., a report to Congress). This type of legislation is easily tailored to particular concerns, but is generally only effective for the period of the appropriation.

Appropriations Riders

General Prohibitions on Contracting Out

An example of a general prohibition on contracting out was contained in the Further Continuing Appropriations Act for FY1983, which provided that none of the funds appropriated under the act for the General Services Administration (GSA) could be obligated or expended to contract out any service performed by GSA employees.[214] Another example of a general prohibition was contained in the National Aeronautics and Space Administration Authorization Act for FY1989, which prohibited the use of funds authorized by the act to contract out any function currently performed by federal employees at the Kansas City National Weather Service Training Center.[215]

Prohibitions on Contracting Out Specific Functions

The 1984 appropriation for GSA illustrates a more specific type of restriction on contracting out. The continuing resolution for FY1984 specified that no funds could be expended by GSA to contract out any guard, elevator operator, messenger, or custodian functions performed by GSA employees.[216] However, the act granted an exception for certain services contracted out to sheltered workshops employing the "severely handicapped."[217] Another example of a prohibition on contracting out specific functions can be found in the Treasury, Postal Service and General Government Appropriations Act for FY1989, which prohibited use of any funds made available under the act to contract out positions at the Bureau of Engraving and Printing Police Force.[218]

[214] P.L. 97-377, § 120, 96 Stat. 1913 (1982).

[215] P.L. 100-685, § 412, 102 Stat. 4101 (1988).

[216] P.L. 98-151, 97 Stat. 964 (1983).

[217] *Id.* at § 112, 97 Stat. 976.

[218] P.L. 100-440, § 525, 102 Stat. 1750 (1988).

Requiring Agencies to Meet Certain Conditions Prior to Contracting Out

There were also many instances where Congress required agencies to meet certain conditions before they could use appropriated funds to implement any outsourcing decision. The Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act for FY1989, for example, specified that none of the funds provided under the act could be obligated, or expended through a reprogramming of funds, to contract out any function or activity performed by federal employees without first notifying the Appropriations Committees of both Houses of Congress.[219] The Department of Defense Appropriations Act for FY1989 similarly prohibited the use of funds appropriated by the act for contracting out any activity performed by the Defense Personnel Support Center in Philadelphia unless the Appropriations Committees of both Houses of Congress received advance notice.[220]

Specifying Procedures for Contracting Out

Another approach was to limit agencies' discretion by prescribing how particular agencies should approach their outsourcing decisions. Congress used this approach to address both contracting out generally and contracting out of specific functions. For example, Congress sometimes enacted statutes setting out the criteria that an agency must use in making outsourcing determinations, the procedure it must follow in any public/private cost comparisons, definitions of key terms (e.g., "inherently governmental functions"), penalties for violations, and any specific or generic exemptions. Chapter 146 of Title 10 of the United States Code, which governs DOD contracting for performance of civilian commercial or industrial functions, illustrates this type of legislation.[221] Chapter 146 has provisions (1) specifying the studies and reports that DOD must perform before converting a function;[222] (2) defining and exempting "core functions;"[223] (3) listing the requirements for conducting cost comparisons involving retirement costs;[224] and (4) listing specifically exempted functions.[225]

Interestingly, Chapter 146 was not enacted as one statute, but resulted from several provisions enacted during the 1980s, as the following chronology illustrates.

- ***Department of Defense Authorization Act for FY1980***. This act prohibited DOD from converting, during that fiscal year, any commercial or industrial function of DOD performed by DOD personnel as of November 9, 1979, to performance by a contractor unless the Secretary of Defense notified Congress.[226] Two types of notification were required. First, the Secretary was to notify Congress of any decision to study possible conversion and certify that the government in-house cost calculation for the function was based on an estimate of the most efficient and cost-effective organization for in-house performance. Then, if a decision to

[219] P.L. 100-459, § 606, 102 Stat. 2227 (1989).

[220] P.L. 100-463, 102 Stat. 2270 (1988).

[221] 10 U.S.C. §§ 2461-2475.

[222] *See* 10 U.S.C. §§ 2461 & 2463.

[223] *See* 10 U.S.C. § 2464.

[224] *See* 10 U.S.C. § 2467.

[225] *See* 10 U.S.C. §§ 2465 & 2466.

[226] P.L. 96-107, 93 Stat. 803 (1979).

convert the function was ultimately made, the Secretary had to report (1) the economic impact on the employees affected, the community, and the federal government; (2) the effects of the conversion on the military mission of the function; and (3) the amount of the private bid for performance of the function, the cost if the function were continued in-house, and any costs or expenditures the government would incur because of the contract. The act also prohibited, during the fiscal year, any conversion to circumvent civilian personnel ceilings.[227] The act exempted funds appropriated for any fiscal year for DOD research, development, testing, or evaluation, or procurement or production related thereto,[228] unless the funds were obligated or expended for operation or support of installations or equipment used for research and development, including maintenance support for laboratories, operation and maintenance of test ranges, or maintenance of test aircraft and ships.[229]

- ***Department of Defense Authorization Act for FY1981***. This act contained restrictions on contracting out that were nearly identical to those included in the DOD authorization for FY1980, but made these restrictions permanent law with an effective date of October 1, 1980.[230] The act prohibited converting any commercial or industrial function of DOD performed by DOD personnel on October 1, 1980, to performance by a private contractor unless the Secretary of Defense provided the following information to Congress in a timely manner: (1) notice of any decision to study possible conversion; (2) a detailed summary comparing the cost of DOD personnel performing the function and performance by a private contractor and demonstrating that privatization of the function would result in cost savings to the government over the life of the contract; (3) certification that the government's in-house cost calculation for the function was based on an estimate of the most efficient and cost-effective organization for in-house performance; (4) a report on the economic impact of the proposed contract on the employees affected, the community, and the federal government; (5) the effects of the conversion on the military mission of the function; and (6) the amount of the private bid for performance of the function, the cost if the function were to be continued in-house, and any cost or expenditure which the government would incur because of the contract. If DOD decided to convert the function after these studies were completed, the Secretary of Defense had to report this decision to Congress. The effective date of this provision was October 1, 1980. The act also prohibited conversion to circumvent civilian personnel ceilings.[231]
- ***Department of Defense Authorization Act for FY1983***. This act amended the 1981 authorization for DOD so that the foregoing prohibitions applied only to functions performed by civilian employees of DOD, as opposed to DOD personnel.[232] It exempted functions performed by 10 or fewer DOD civilian

[227] *Id.* at § 806, 93 Stat. 813.

[228] Expenditures authorized by law under 10 U.S.C. § 138(a)(2), now 10 U.S.C. § 114(a)(2).

[229] P.L. 96-107, § 802, 93 Stat. 811.

[230] P.L. 96-342, 94 Stat. 1077 (1980).

[231] *Id.* at § 502, 94 Stat. 1086.

[232] P.L. 97-252, 96 Stat. 718 (1982).

employees, but prohibited modification, reorganization, or division of functions to take advantage of this exemption.[233] The amendment also provided that the restrictions of the act should not apply during war or declared national emergencies. The effective date of this amendment was October 1, 1982.[234] The act also specifically prohibited use of any funds appropriated pursuant to the authorization to contract out firefighting or security-guard functions at any military facility except for the renewal of existing contracts.[235] The act also placed a six-month moratorium on use of any funds appropriated under this authorization for new studies of the benefits or feasibility of contracting out functions performed by DOD civilian employees except for custodial, laundry, refuse collection, grounds maintenance, food service and preparation, and base transportation functions. The six-month period ran from October 1, 1982, to March 31, 1983.[236]

- ***Department of Defense Authorization Act for FY1984***.[237] This act continued for two years[238] the prohibition on contracting out DOD firefighting and security-guard functions that had been initiated in the DOD authorization for FY1983.[239] The extended prohibition did not apply to contracts to be performed outside the United States, situations where the use of military personnel would affect unit readiness, contracts to be carried out on government-owned but privately operated installations, or renewal of existing contracts.[240]
- ***Department of Defense Authorization Act for FY1985***. This act required the Secretary of Defense to identify logistics activities that are essential to the national defense.[241] The act prohibited contacting out these activities unless the Secretary provided Congress with a "waiver" stating that the activity was no longer required for national defense, as well as the criteria used in granting the waiver.[242]
- ***Department of Defense Authorization Act for FY1986***. This act declared that certain functions of DOD should be deemed logistics activities essential to the national defense under Section 307 of P.L. 98-525.[243] These functions were

[233] This number was increased to 40 or fewer by P.L. 99-145, § 1234, 99 Stat. 734 (1985) and then to 45 or fewer by P.L. 99-661, § 1221, 100 Stat. 3976 (1986).

[234] P.L. 97-252, § 1112, 96 Stat. 747-48. The provisions of P.L. 96-342, as amended by this act, were codified at 10 U.S.C. § 2461 by P.L. 100-370, § 2, 102 Stat. 851-52 (1988).

[235] *Id.* at § 1111, 96 Stat. 747.

[236] *Id.* at § 1111, 96 Stat. 747.

[237] P.L. 98-94, 97 Stat. 614 (1983).

[238] I.e., until October 1, 1985. This date was extended to October 1, 1986, by P.L. 99-145, § 1232, 99 Stat. 733 (1985). The prohibition on contracting out firefighting services was enacted into permanent law and codified at 10 U.S.C. § 2693 by P.L. 99-661, § 1222, 100 Stat. 3976 (1986). The prohibition on contracting out security guards was extended for one year, until October 1, 1987, by P.L. 99-661 and then codified at 10 U.S.C. § 2693 by P.L. 100-180, § 1112, 101 Stat. 1147 (1987). This provision was transferred to 10 U.S.C. § 2464 by P.L. 100-370, § 2, 101 Stat. 853-54 (1988).

[239] *See supra* discussion of P.L. 97-252.

[240] P.L. 98-94, § 1221, 97 Stat. 691-92.

[241] P.L. 98-525, 98 Stat. 2492 (1984).

[242] *Id.* at § 307, 98 Stat. 2514. This provision was codified at 10 U.S.C. § 2464 by P.L. 100-370, § 2, 101 Stat. 853-54 (1988).

[243] P.L. 99-145, 99 Stat. 583 (1985).

depot-level maintenance of mission essential materiel at certain facilities of the Army, Navy, Marines, Air Force, Defense Logistics Agency, and Defense Mapping Agency.[244]

Codifying Restrictions from Appropriations Riders

As the notes under many of the foregoing provisions indicate, numerous limitations were codified late in the 99th Congress and or in the 100th Congress.[245] The National Defense Authorization Act for FY1987,[246] for example, codified the prohibition on contracting out DOD firefighting functions that had been initiated in the DOD authorization for FY1983.[247] However, this prohibition did not apply to contracts performed outside the United States, situations where use of military personnel affected unit readiness, contracts performed on government-owned but privately operated installations, or renewal of existing contracts.[248] The prohibition on contracting out security-guard functions was continued for one year with the same exceptions as for firefighter functions. Also exempted from this prohibition were contracts for security-guard services when the requirement for the services arose after the effective date of the act and the Secretary of Defense determined that the functions could be contracted out without adversely affecting installation security, safety, or readiness.[249] The act also codified the general policy on contracting out noted earlier, (i.e., that DOD should contract out any function not prohibited by law if it would be provided at a lower cost—including any cost differential required by law, executive order, or regulation—by the private sector). Guidelines were provided for determining if money would be saved by contracting out.[250] The National Defense Authorization Act for FY1988 and 1989[251] similarly made permanent the prohibition on contracting out security-guard functions at DOD facilities, with the same exemptions as apply to firefighter functions.[252]

Permanent Laws

In addition to appropriations riders, Congress also enacted permanent laws to limit outsourcing. For example, the Veterans' Compensation, Education, and Employment Amendments of 1982 prohibited contracting out medical care provided by what was then the Veterans Administration (VA).[253] If the VA determined that an activity was not a direct patient care activity, or an activity incident to direct patient care, it could contract out the activity provided that the then-Administrator of the VA made two determinations after conducting a study required by the act.

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[244] *Id.* at § 1231, 99 Stat. 731. This provision was codified at 10 U.S.C. § 2464 by P.L. 100-370, § 2, 101 Stat. 853-54 (1988).

[245] *See* 10 U.S.C. §§ 2461-2468.

[246] P.L. 99-661, 100 Stat. 3816, 99th Cong., 2nd Sess. (1986).

[247] *See supra* discussion of P.L. 97-252.

[248] P.L. 99-661 at § 1222(a), 100 Stat. 3936. This provision was transferred to 10 U.S.C. § 2464 by P.L. 100-370, § 2, 101 Stat. 853-54 (1988).

[249] *Id.* at § 1222(b).

[250] *Id.* at § 1223. This provision was codified at 10 U.S.C. § 2462 by P.L. 100-370, § 2, 101 Stat. 853 (1988).

[251] P.L. 100-180, 101 Stat. 1019 (1987).

[252] *Id.* at § 1112, 101 Stat. 1147. *See supra* discussion of P.L. 99-661 for a description of exemptions. This provision was transferred to 10 U.S.C. § 2464 by P.L. 100-370, § 2, 101 Stat. 853-54 (1988).

[253] P.L. 97-306, 86 Stat. 1429 (1982). In 1989, the Veterans Administration became the Department of Veterans Affairs.

First, the Administrator of the VA had to determine that (1) the costs to the government (including the costs of the study) would be lower by 15% or more than the costs of in-house performance and (2) the quality or[254] quantity of health care services would be maintained or enhanced by the contract.[255]

The Comprehensive Omnibus Budget Reconciliation Act of 1986 similarly required the National Oceanic and Atmospheric Administration to notify the President of the Senate; the Speaker of the House; the Senate Committee on Commerce, Science, and Transportation; the House Committee on Merchant Marine and Fisheries; and the House Committee on Science and Technology at least 30 days before awarding any contract for the performance of a commercial activity as defined in OMB Circular A-76.[256] The notice had to include a description of the contract, a comparison of the costs of and services provided by contracting out or in-house performance, and an assessment of the benefits to the federal government of proceeding with the proposed contract.[257]

The Sikes Act Extension and Amendments authorized the Secretary of Defense to enter into cooperative plans with the Secretary of the Interior and state agencies for the development, maintenance, and coordination of wildlife, fish, and game conservation and rehabilitation on military reservations.[258] The implementation and enforcement of these plans was specifically exempted from OMB Circular A-76 and priority was given to federal and state agencies. This exemption did not apply to existing contracts, but did cover renewals of existing contracts.[259]

[254] This "or" was changed to an "and" by P.L. 98-160, § 702(19), 97 Stat. 1010 (1983).

[255] P.L. 97-306, § 409, 96 Stat. 1446. This provision was codified at 38 U.S.C. § 5110(c). P.L. 100-322, § 401, 102 Stat. 543 (1988) added the requirement that bids be received from at least two responsible, financially autonomous bidders.

[256] P.L. 99-272, 100 Stat. 82 (1986).

[257] *Id.* at § 6083, 100 Stat. 135. This provision was codified at 15 U.S.C. § 1530.

[258] P.L. 99-561, 100 Stat. 3149 (1986).

[259] *Id.* at § 3, 100 Stat. 3150. This provision was codified at 16 U.S.C. § 670a.

Appendix B. Factors Used in Determining Whether a Function Is Inherently Governmental Under OMB Circular A-76

Factor	Considerations
Statutes	Statutory restrictions that define an activity as inherently governmental.
Degree of discretion	The degree to which official discretion is or would be limited, i.e., whether involvement of the private sector or public reimbursable provider is or would be so extensive that the ability of senior agency management to develop and consider options is or would be inappropriately restricted.
Adjudication of claims or entitlement	In claims or entitlement adjudication and related services (a) the finality of any action affecting individual claimants or applicants, and whether or not review of the provider's action is de novo on appeal of the decision to an agency official; (b) the degree to which a provider may be involved in wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures; (c) the degree to which matters for decisions may involve recurring fact patterns or unique fact patterns; and (d) the discretion to determine an appropriate award or penalty.
Effect on people's life, liberty, or property	The provider's authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas. These policies do not prohibit contracting for guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed.
Special agency authorities	The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons.
Nature of the activity	Whether the activity in question is already being performed by the private sector.

Source: Congressional Research Service based on OMB-Circular A-76 Revised, May 29, 2003, Appendix A, *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf.

Appendix C. Functions Performed by Military Personnel as Classified by DODI 1100.22

Section #	Inherently Governmental Functions	Commercial Functions
E2.1.1: Operational Command of Military Forces	• Exercises of command authority through the military chain of command, including discretionary decision making, personnel safety, and mission accomplishment	• n/a
E2.1.2: Operational Control	• Ordering the arrest or confinement of members of the U.S. Armed Forces, or civilians who accompany Armed Forces in the field during a declared war for violations of the Uniform Code of Military Justice • Legally assuming command or control of military operations if the commander is killed or incapacitated	• n/a
E2.1.3: Combat operations	• Conducting combat authorized by the U.S. government, including situations where the planned use of disruptive or destructive combat capabilities is an inherent part of the mission	• Providing technical advice on the operation of weapon systems or other support of a non-discretionary nature in direct support of combat operations
E2.1.4: Provision of Security to Protect Resources in Hostile Areas	• Security operations involving unpredictable, international, or uncontrolled high-threat situations, where success depends on how operations are handled and there is a potential to bind the United States to a course of action when alternative courses of action exist • Making a show of military force that demonstrates U.S. resolve to avert or delay hostilities while preserving the option to employ the full range of destructive and disruptive capabilities of the Armed Forces • Exercising initiative and substantial discretion when deciding how to accomplish the mission, particularly when unanticipated opportunities arise or when the original concept of operations no longer applies • Defending against military or paramilitary forces whose capabilities are so sophisticated that only military forces can provide an adequate defense, including situations where there is such a high likelihood of hostile fire, bombings, or biological or chemical attacks by groups using sophisticated weapons and devices that the operation could evolve into combat • Security operations involving more than a response to hostile attacks (e.g., security operations performed in highly hazardous public areas where the risks are uncertain)	• Providing security services that do not involve substantial discretion (e.g., decisions are limited or guided by existing policies, procedures, directions, orders, or other guidance that identify specific ranges of acceptable decisions or conduct and subject the discretionary authority to final approval or regular oversight by governmental officials) • Providing physical security at buildings in secure compounds in hostile environments • Providing security services for uniquely military functions provided that certain conditions are met[a]
E2.1.5: Medical & Chaplain Services in Hostile Areas	• Services by military medical personnel and chaplains embedded in military units that engage in hostile action	• n/a

Section #	Inherently Governmental Functions	Commercial Functions
E2.1.6: Criminal Justice, Law Enforcement, & Interrogations in Operational Environments	• Determining how enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, and other criminals are to be treated when captured, transferred, detained, and interrogated during or in the aftermath of hostilities • Actual handling of such persons • Control of prosecutions and performance of adjudicatory functions • Direction and control of intelligence interrogations, including approval, supervision, and oversight of interrogations • Certain law enforcement operations, including issuing warrants, making arrests, and preserving crime scenes • Direction and control of detention facilities for enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, and other criminals in areas of operations • Direction and control of the confinement or correctional facilities for U.S. military prisoners in areas of operations	• Serving as linguists, interpreters, report writers, etc., in areas where adequate security is available, provided that certain conditions are met[b] • Drafting interrogation plans for government approval and conducting government approved interrogations where adequate security is available and expected to continue and certain conditions are met [b] • Performing special non-law-enforcement security activities that do not directly involve criminal investigations where certain conditions are met[b]
E2.1.7: Other Support Functions Performed in Operational Environments	• Direction and control of intelligence and counterintelligence operations when performed in hostile areas where security necessary for DOD civilian performance cannot be provided • Federal procurement activities with respect to prime contracts (included determining what supplies or services are to be acquired; approving, awarding, administering, or terminating contracts; and determining whether contract costs are reasonable, allocable, and allowable) when performed in hostile areas where security necessary for DOD civilian performance cannot be provided	• n/a

Source: Congressional Research Service based on Instruction Number 1100.22, April 6, 2007, *available at* http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf.

a. The geographic combatant commander must (1) clearly articulate rules for the use of deadly force that preclude ceding governmental control and authority to private sector contractors; (2) set clear limits on the use of force based on U.S. and international law and clarify what is not protected by international agreements or status of forces agreements; and (3) ensure that contracts include a description of the anticipated threat and any known or potentially hazardous situations, as well as a plan for how appropriate assistance will be provided to contract security personnel who become engaged in hostile situations.

b. These conditions are that (1) the contractors are properly trained and cleared and (2) contractors' work is properly reviewed by sufficient numbers of properly trained government officials.

Appendix D. Functions Performed by DOD Civilian Employees as Classified by DODI 1100.22

Inherently Governmental Functions	Commercial Functions
• Conducing foreign relations and determining foreign policy, including implementing international agreements and treaties, foreign military sales, and security assistance programs • Recommending and responding to Congress about changes in DOD governing legislation and commenting on draft legislation on DOD-related matters • Determining policies, directives, and regulatory guidance, including the content and application of regulations • Approving strategic plans • Determining DOD priorities for budget requests and determining budget policy, guidance, and strategy • Making discretionary decisions regarding the effective, efficient, and economical organization, administration, and operation of DOD, such as decisions to transfer functions, powers, or duties; delegate authority; or approve support agreements, cooperative agreements, or non-procurement transactions • Directing and controlling certain functions and operations, including intelligence and counterintelligence operations, criminal investigations, and adjudications • Controlling treasury accounts and the administration of public trusts and grants • Directing and exercising ultimate control over the acquisition, use, or disposal of U.S. property, including collection, control, and disbursement of funds • Establishing terms for international agreements, treaties, foreign military sales, and security assistance programs • Drafting or developing proposed changes to governing legislation and commenting on draft legislation and draft congressional testimony, agency responses to congressional correspondence, or agency responses to audit reports • Interpreting, developing, or evaluating legal opinions and implementing policy for laws, executive orders, treaties, and international agreements • Drafting, developing, or evaluating strategic plans • Developing or evaluating program and budget requests • Maintaining control and accountability of governmental operations, contracts, property, and funds • Administering and managing government operations • Conducting systems acquisition management • Allocating resources and obligating federal funds • Determining what supplies or services are to be acquired with	• Providing services involving or relating to the development of regulations, subject to proper review by government personnel • Gathering information, or providing advice, opinions, or recommendations, for use in establishing terms for international agreements, treaties, foreign military sales, and security assistance programs • Providing background information for use in drafting or developing proposed changes to governing legislation and commenting on draft legislation and draft congressional testimony, agency responses to congressional correspondence, or agency responses to audit reports • Providing non-legal advice for use in interpreting, developing, or evaluating legal opinions and implementing policy for laws, executive orders, treaties, and international agreements • Assisting in developing or evaluating program and budget requests by performing workload modeling, fact-finding, feasibility studies, should-cost analyses, and other analyses • Assisting in maintaining control and accountability of governmental operations, contracts, property, and funds by performing workload modeling, fact-finding, feasibility studies, should-cost analyses, and other analyses • Assisting in administering and managing government operations by providing advice, opinions, ideas, or recommendations; gathering information; and performing non-discretionary services • Assisting in systems acquisitions management by gathering information; providing advice, opinions, recommendations, or ideas; monitoring programs; and

Inherently Governmental Functions	Commercial Functions
prime contracts	tracking milestones and schedules
• Awarding, terminating, or administering contracts for goods and services, including changes to contract performance or quantities	• Acquiring supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by DOD
• Approving contracting documents or participating as voting members on source selection or performance evaluation boards	• Developing statements of work and providing evaluations of contract proposals, if contractors are properly supervised
• Determining whether costs are reasonable, allocable, and allowable	• Disposing of property identified by government employees at prices within clearly specified ranges and subject to other reasonable restrictions
• Determining what government property is to be disposed of and on what terms	• Conducting quality control, performance evaluations, and inspection under government oversight and with specific guidelines
• Collecting, controlling, and disbursing fees, taxes, and other public funds unless the work of the contractor is authorized by statute; the fees, etc., are from visitors to mess halls, concessions, or similar establishments; or the work involves routine voucher and invoice examination	• Assisting in adjudicatory functions by gathering information & providing advice, opinions, or ideas
• Maintaining direction and control of the DOD workforce and contract services, including actions to commission, appoint, direct, or control U.S. officers or employees, volunteers, professional service contracts, and general service contracts	• Assisting in negotiations by gathering information and providing advice, opinions, recommendations, or ideas
• Representing DOD interests at official functions	• Non-law-enforcement security activities not directly involving criminal investigations
• Controlling and performing adjudicatory functions	• Serving as arbitrators or providing alternative dispute resolution in employee labor relations
• Conducting negotiations	• Assisting in routine FOIA responses that do not require the exercise of judgment
• Conducting certain law enforcement operations, including executing and serving search warrants and making arrests	• Providing direct support in testing and evaluating systems and technologies under government oversight and in accordance with applicable laws
• Direct conduct of criminal investigations	• Drafting interrogation plans for government approval where adequate security exists & when properly trained, cleared, and supervised
• Conducting employee labor relations	
• Conducting administrative hearings to determine eligibility for security clearances or government programs	
• Approving federal licensing applications	
• Developing and clarifying DOD policies on FOIA requests	
• Conducting tests and evaluations to determine the potential utility and operational suitability and effectiveness of systems and technologies	
• Conducting intelligence and counterintelligence operations and clandestine intelligence operations entailing substantial discretion	

Source: Congressional Research Service based on Instruction Number 1100.22, April 6, 2007, *available at* http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf.

Appendix E. Inherently Governmental Functions and Functions Approaching Inherently Governmental as Classified by the FAR

Inherently Governmental Functions	Functions Approaching Inherently Governmental
• Direct control of criminal investigations • Controlling prosecutions and performing adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution • Commanding military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role • Conducting foreign relations and determining foreign policy • Determining agency policy, including the content and application of regulations • Determining federal program priorities for budget requests • Directing and controlling federal employees • Directing and controlling intelligence and counter-intelligence operations • Selecting individuals for government employment, including interviewing • Approving position descriptions and performance standards for federal employees • Determining what government property is to be disposed of and on what terms, although agencies may give contractors authority to dispose of property at prices within specified ranges & subject to other reasonable conditions • Certain conduct with respect to prime contracts in federal procurement activities[a] • Approving agency responses to Freedom of Information Act (FOIA) requests, other than routine responses that do not require exercise of judgment, or agency responses to administrative appeals of denied FOIA requests • Conducting administrative hearings to determine eligibility for security clearances, or involving actions affecting matters of personal reputation or eligibility for government programs • Approving federal licensing actions and inspections • Determining budget policy, guidance, and strategy • Collecting, controlling, and disbursing fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, but not including (1) collection of fees, etc., from visitors to or patrons of mess halls, post concessions, etc., or where the amount to be collected is easily calculated & predetermined & funds can be easily controlled using standard	• Services involving or relating to budget preparation, including workload modeling, fact finding, efficiency studies, should-cost analyses, etc. • Services involving or relating to reorganization and planning activities • Services involving or relating to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy • Services involving or relating to the evaluation of another contractor's performance • Services in support of acquisition planning • Assisting in contract management, such as when the contractor might influence official evaluations of other contractors • Technical evaluation of contract management • Assisting in developing statements of work • Providing support in preparing responses to Freedom of Information Act requests • Working in any situation that permits, or might permit, contractors to gain access to confidential business information or any other sensitive information, other than situations covered by the National Industrial Security Program described in 48 C.F.R. § 4.402(b) • Providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses • Participating in any situation where it might be assumed that contractors are agency employees or representatives • Participating as technical advisors to source selection boards or as voting or nonvoting members of source selection boards • Serving as arbitrators or providing alternative methods of dispute resolution • Constructing buildings or structures intended to be secure from electronic eavesdropping or

Inherently Governmental Functions	Functions Approaching Inherently Governmental
techniques or (2) routine voucher and invoice examination • Controlling treasury accounts • Administering public trusts • Drafting congressional testimony; responses to congressional correspondence; or agency responses to audit reports from the inspector general, GAO, or other federal audit agency	other penetration by foreign governments • Providing inspection services • Providing legal advice and interpretations of regulations and statues to government officials • Providing special, non-law-enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport, or non-military national security details

Source: Congressional Research Service based on 48 C.F.R. § 7.503(c)-(d)

a. Such conduct involves (1) 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; (2) participating as a voting member on any source selection boards; (3) approving any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria; (4) awarding contracts; (5) administering contracts, including ordering changes in contract performance or quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services; (6) terminating contracts; (7) determining whether contract costs are reasonable, allocable, and allowable; and (8) participating as a voting member on performance evaluation boards.

Appendix F. Functions Recognized as Inherently Governmental or Commercial by the GAO

Inherently Governmental Functions	Commercial Functions
• Requesting set-off actions against transportation carriers (B-198137.1)[a]	• Identifying overcharges related to billing above established audit minima (B-198137.1)
• Communicating with U.S. Attorneys to request collection actions against delinquent transportation carriers (B-198137.1)	• Sending notices of overcharges or other notices (B-198137.1)
• Functions of the organization head, contracting officer, and supply branch (B-218137)	• Collecting user fees in national forests (B-207731)[b]
• Serving as an agency hearing officer (B-237356)	• Answering an agency hotline where the answers do not involve interpretation of laws or regulations (B-237356)
• Preparing congressional testimony (B-237356)	• Examining vouchers; verifying invoice accounts; and indentifying billing errors (B-198137)
• Performing legally required audit tasks (B-198137)	• Administering programs in accordance with agency regulations and policy (B-192518)
• Deciding to accept or reject a particular candidate for a program (B-192518)	• Writer-editor services in preparing statements or testimony where the government's policy or position is established (B-192518)
• Approving departures from policy and guidance in issuing certifications (B-295936)	• Property accountability; forecasting; programming; and budgeting (B-253740.3)
• Certifying new or unproven technologies (B-295936)	• Examination, inspection and testing services necessary to issue certifications, as well as issuing of certifications (B-295936)
• Determining what constitutes a standard of safety equivalent to a required standard (B-295936)	• Provision of guard or protective services (B-298370, B-298490)
• Finding the existence of special conditions or exceptions (B-295936)	• Gathering and reporting information in investigations (GAO/T-GGD-95-186)
• Making preemptive or other attacks (B-298370, B-298490)	
• Determining individuals' suitability for employment or eligibility for clearances (GAO/T-GGD-95-186)	

Source: Congressional Research Service based on GAO decisions cited in the table

a. The combination of letters and numbers after a function's description indicates the GAO decision addressing that function.

b. The GAO's opinion on this function evolved over time. Originally, the GAO classified collection of fees as inherently governmental. *See, e.g.*, Matter of Collection of Recreation User Fees by National Forest Volunteers, Comp. Gen. Dec. B-207731 (April 22, 1983). The GAO later reversed itself and said that routine collection of established fees was not inherently governmental.

Appendix G. Side-by-Side Comparison of the Definitions of Inherently Governmental Functions from the FAIR Act and OMB Circular A-76

	FAIR Act	**OMB Circular A-76**
Type of definition	Legal definition	Policy-based definition
Used for	Compiling lists of agency functions, classified as commercial or inherently governmental, for Congress and the public	Determining which agency functions are commercial and may be contracted out; establishing procedures for contracting them out
Basic definition	*The term*[a] **'inherently**[b] **governmental** *function' means a function* **that is so intimately related to the public interest as to** *require* **performance by** *Federal* **Government** *employees.*	*An*[a] **inherently**[b] **governmental** *activity is an activity* **that is so intimately related to the public interest as to** *mandate* **performance by government** *personnel.*
Functions Included	*The term includes* **activities** *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—*	*These* **activities require the exercise of** *substantial* **discretion in applying government 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. **An inherently governmental** *activity* **involves:**
	"(i) *to bind* **the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise**;	(1) *Binding* **the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise**;
	"(ii*) 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**;	(2) *Determining, protecting, and advancing* **economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;**
	"(iii) *to* **significantly** *affect* **the life, liberty, or property of private persons**;	(3) **Significantly** *affecting* **the life, liberty, or property of private persons; or**
	"(iv) *to commission, appoint, direct, or control officers or employees of the United States*; **or**	(4) *Exerting* **ultimate control over the acquisition, use, or disposition** *of United States* **property (real or personal, tangible or intangible), including** *establishing policies or procedures for* **the collection, control, or disbursement of appropriated and other federal funds.**
	"(v) *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,**	

	FAIR Act	**OMB Circular A-76**
	control, or disbursement of appropriated and other Federal funds.	
Functions excluded	*The term does not normally include—* *"(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or* *"(ii) 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).*	*While inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.* *c. An activity may be provided by contract support (i.e., a private sector source or a public reimbursable source using contract support) where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight. An agency shall consider the following to avoid transferring inherently governmental authority to a contractor:* *(1) Statutory restrictions that define an activity as inherently governmental;* *(2) The degree to which official discretion is or would be limited, i.e., whether involvement of the private sector or public reimbursable provider is or would be so extensive that the ability of senior agency management to develop and consider options is or would be inappropriately restricted;* *(3) In claims or entitlement adjudication and related services (a) the finality of any action affecting individual claimants or applicants, and whether or not review of the provider's action is de novo on appeal of the decision to an agency official; (b) the degree to which a provider may be involved in wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures; (c) the degree to which matters for decisions may involve recurring fact patterns or unique fact patterns; and (d) the discretion to determine an appropriate award or penalty;* *(4) The provider's authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas. These policies do not prohibit contracting for guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to*

	FAIR Act	OMB Circular A-76
		whether the providers of these services are armed or unarmed; *(5) The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons; and* *(6) Whether the activity in question is already being performed by the private sector.*
Definition of commercial activities	None	*A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.*
Applicability	All executive branch agencies named in 5 U.S.C. § 101; all military departments named in 5 U.S.C. § 102; & all independent establishments as defined in 5 U.S.C. § 104, except for the GAO; government corporations or government-controlled corporations as defined in 5 U.S.C. § 103; non-appropriated funds instrumentalities, as described in 5 U.S.C. § 2105(c); certain depot-level maintenance and repair activities of DOD; and agencies with fewer than 100 full-time employees as of the first of the fiscal year. '	All executive departments named in 5 U.S.C. § 101 and all independent establishments as defined in 5 U.S.C. § 104.

Source: Congressional Research Service

a. Words in italics are unique to one of the two definitions.

b. Words in bolded text are common to both definitions.

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