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# The Intelligence Community and Its Use of Contractors: Congressional Oversight Issues

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## Summary

Contractors have been and are an integral part of the intelligence community's (IC's) total workforce (which also includes federal employees and military personnel). Yet questions have been raised regarding how they are used, and the size and cost of the contractor component. Of particular interest are core contract personnel, who provide direct technical, managerial, and administrative support to agency staff. Examples of these types of support are collection and operations, analysis and production, and enterprise information and technology. The use of core contract personnel enables the IC to meet its needs, which may involve obtaining unique expertise or surge support for a particular mission, or augmenting insufficient in-house resources.

The IC has undertaken the following initiatives designed, or used, to track contractors or contractor employees:

- The Office of the Director of National Intelligence (ODNI), through Intelligence Community Directive (ICD) 612 (dated October 30, 2009), requires the IC elements to provide inventories of their core contract personnel to the Assistant Director of National Intelligence for Human Capital (also known as the Chief Human Capital Officer (CHCO, or ADNI/CHCO)).
- Section 305(a) of P.L. 111-259, Intelligence Authorization Act (IAA) for FY2010, directs each IC component to provide estimates of the number and costs of core contract personnel for the upcoming fiscal year to ODNI.
- Section 339 of P.L. 111-259 also contained a one-time requirement for the Director of National Intelligence (DNI) to report to the intelligence committees and the armed services committees on the IC's use of personal services contracts.

While the initiatives themselves are unclassified, the information gathered, or produced, as a result of each initiative—e.g., an inventory of core contract personnel—may be classified. This list of initiatives may not be comprehensive as the IC may engage in other, classified initiatives to assess its use of core contract personnel.

Contractors perform a variety of essential functions for the federal government, including the IC, yet using contractors is not without risk. Questions raised by Congress and others involve the possibility that IC core contract personnel perform inherently governmental activities (which, generally, only federal employees are allowed to perform) or functions, and that the IC's acquisition workforce does not have sufficient capacity to monitor contractor employees who perform critical functions or functions closely associated with inherently governmental functions. IC components unable to properly oversee contractor employees run the risk of ceding control over their mission and operations to contractors.

Information about how the IC uses contractors may be useful for purposes of oversight, legislating, and policymaking by the House Permanent Select Committee on Intelligence (HPSCI), the Senate Select Committee on Intelligence (SSCI), and other committees that may have an interest in this topic.

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## Introduction

A then-unknown employee of Booz Allen Hamilton, Edward Snowden, burst onto the national agenda in June 2013. The publication of news articles that included or referenced classified information he had obtained while working as a contractor employee<sup>1</sup> for the National Security Agency (NSA) garnered attention both outside and within the United States—including Congress, the Obama Administration, and the intelligence community (IC).<sup>2</sup>

Whereas interest in the IC’s use of contractors spiked with the Snowden revelations, and spawned policies and initiatives designed to prevent, mitigate, or recover from similar incidents, the intelligence community’s reliance on the private sector is not a new phenomenon. Following the end of the Cold War, workforce drawdowns coupled with retirements and limits on hiring federal employees degraded the intelligence community’s capabilities, and the IC “was encouraged to ‘outsource’ as much as possible.”<sup>3</sup> In the aftermath of the September 11, 2001, terrorist attacks, the IC turned to contractors “to meet rapidly evolving mission demands.”<sup>4</sup> A 2006 or 2007 slide presentation attributed to the Senior Procurement Executive in the Office of the Director of National Intelligence (ODNI) suggested that 70% of the IC budget may be spent on contracts.<sup>5</sup> In

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<sup>1</sup> For the purpose of this report, the term *contractor* refers to a company or business (i.e., an entity) that has been awarded a contract by a federal agency, while *contractor employee* refers to an individual who works for a contractor. The ODNI identifies another category, independent contractor, and defines this type of contractor as a “self-employed individual with whom an IC element enters into a contract....” Office of the Director of National Intelligence, “Intelligence Community Core Contract Personnel,” Intelligence Community Directive Number 612, October 30, 2009, p. 4, at [http://www.dni.gov/files/documents/ICD/ICD\\_612.pdf](http://www.dni.gov/files/documents/ICD/ICD_612.pdf). **Appendix A** contains definitions of terms used in this report.

<sup>2</sup> The intelligence community consists of the following organizations and organizational elements: Office of the Director of National Intelligence (ODNI); Central Intelligence Agency (CIA); National Security Agency (NSA); Defense Intelligence Agency (DIA); National Geospatial-Intelligence Agency (NGA); National Reconnaissance Office (NRO); intelligence elements of the Army, Navy, Air Force, Marine Corps, Coast Guard, Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Department of Energy (DOE); Bureau of Intelligence and Research, State Department; Office of Intelligence and Analysis, Department of the Treasury; Office of Intelligence and Analysis, Department of Homeland Security. The IC also includes “[o]ther offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs” and “[s]uch other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned.” 50 U.S.C. §3003(4). Other agency components that perform intelligence or intelligence-related activities are not included in the definition of *intelligence community* and thus are not included in this report.

<sup>3</sup> Stephanie O’Sullivan, Principal Deputy Director of National Intelligence, Office of the Director of National Intelligence, statement for the record, U.S. Senate, Committee on Homeland Security and Governmental Affairs, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” unpublished hearing, June 18, 2014, p. 1, at <http://www.hsgac.senate.gov/hearings/the-intelligence-community-keeping-watch-over-its-contractor-workforce2>.

<sup>4</sup> Office of the Director of National Intelligence, “Intelligence Community Core Contract Personnel,” Intelligence Community Directive Number 612, October 30, 2009, p. 4, at [http://www.dni.gov/files/documents/ICD/ICD\\_612.pdf](http://www.dni.gov/files/documents/ICD/ICD_612.pdf).

<sup>5</sup> Terri Everett, Senior Procurement Executive, Office of the Director of National Intelligence, “‘Procuring the Future’ 21<sup>st</sup> Century IC Acquisition,” n.d., p. 10, at <http://www.fas.org/irp/dni/everett.ppt>. Although this particular slide does not include a timeframe, text on another slide suggests the timeframe might be FY2006. Subsequent to the disclosure of the unclassified slides, the Acting Director of Public Affairs, Office of the Director of National Intelligence, issued a press release regarding the contents of the slides. The press release stated, in part: “In recent reports, information contained in an unclassified Office of the Director of National Intelligence presentation at a government acquisitions conference has been mistakenly assumed to be representative of the overall budget of the U.S. Intelligence Community. The slides and accompanying presentation were designed to illustrate general trends in Intelligence Community contracting for conference participants. They concerned overall procurement award trends; they did not address the issue of Intelligence Community contractors (personnel under contract), or the size of the Intelligence Community budget, in relative or actual terms.” Ellen Cioccio, Acting Director of Public Affairs, Office of the Director of National

2008, the then-head of human capital in ODNI offered the following assessment of the IC's use of contractors:

The nature of contractors is such that you do have a great deal more flexibility. You can expand and contract more readily using contract personnel. So in any given day, week, month, or year, that number may go up or down. Our objective is to stabilize our military and civilian workforce and then use contractors as appropriate to deal with temporary work surge, unique expertise, et cetera.<sup>6</sup>

Many experts believe the federal government's reliance on contractors is necessary to accomplish its mission, and this is no less true for the IC.<sup>7</sup> Using contractors is not without risk, however. Depending on the circumstances, an agency could, unknowingly or unintentionally, cede the performance of, or control over, certain agency functions to contractors. As the Chairman of the Senate Homeland Security and Governmental Affairs (HSGAC) noted: "First and foremost, an agency that turns over too much responsibility to contractors runs the risk of hollowing itself out and creating a weaker organization. The agency could also lose control over activities and decisions that should lie with the government, not with contractors."<sup>8</sup> Mitigating these risks involves agencies' complying with and implementing applicable statutory provisions, regulations, definitions, and policies.

This report presents, in the "Background" section, a discussion of inherently governmental functions, functions closely associated with inherently governmental functions (closely associated functions), and critical functions. (These three terms are defined in the "Background" section and **Appendix A**.) This section also addresses challenges involved in exercising oversight over the IC and summarizes the IC's efforts to determine the optimum mix of its workforce, which consists of federal civilian employees, military personnel, and contractors. The section titled "Contractors and Contractor Personnel in the IC" describes several initiatives designed, or used, to track contractors or contractor employees. While the initiatives themselves are unclassified, the information gathered as a result of each initiative may be classified. This section also includes

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Intelligence, "Statement by Ellen Cioccio, Acting Director of Public Affairs," June 19, 2007, press release, at [http://www.odni.gov/files/documents/Newsroom/Press%20Releases/2007%20Press%20Releases/20070619\\_release.pdf](http://www.odni.gov/files/documents/Newsroom/Press%20Releases/2007%20Press%20Releases/20070619_release.pdf)

<sup>6</sup> Ronald Sanders, Associate Director of National Intelligence for Human Capital, Office of the Director for National Intelligence, "Conference Call with Dr. Ronald Sanders, Associate Director of National Intelligence for Human Capital, Results of the Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel," August 27, 2008, p. 6.

<sup>7</sup> In its 2010 article titled "Top Secret America," the *Washington Post* purported to describe, in the following passage, some of the work performed by contractors for the IC.

Contractors kill enemy fighters. They spy on foreign governments and eavesdrop on terrorist networks. They help craft war plans. They gather information on local factions in war zones. They are the historians, the architects, the recruiters in the nation's most secretive agencies. They staff watch centers across the Washington area. They are among the most trusted advisers to the four-star generals leading the nation's wars.

Dana Priest and William M. Arkin, "National Security Inc.," *Washington Post*, July 20, 2010, at <http://projects.washingtonpost.com/top-secret-america/articles/national-security-inc/>.

In the aftermath of the *Post's* series, an ODNI fact sheet stated that IC contractors "cover[ed] major acquisitions such as satellites and computer systems, as well as commercial activities such as rent, food service, and facilities maintenance and security." Office of the Director of National Intelligence, "KEY FACTS ABOUT CONTRACTORS," n.d., p. 1. Copy available from author to congressional clients upon request. (Underlining and capitalization in original.) This document was released July 19, 2010.

<sup>8</sup> *CQ Congressional Transcripts*, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on the Intelligence Community Contractor Workforce," statement of Thomas Carper, Chairman, Senate Select Committee on Intelligence, June 18, 2014, p. 1.

information gleaned from the IC's initial effort (which occurred around 2005-2006) to inventory its contractor workforce. In the section on congressional oversight issues, the report discusses the risks and possible implications of using contractors to perform certain categories of work for the federal government and, in particular, the IC. In particular, this section addresses the questions of whether IC contractor personnel are performing inherently governmental functions and whether the IC's acquisition workforce is equipped to monitor contractors performing critical functions or closely associated functions. The conclusion briefly comments on the challenge of exercising oversight over the IC.

Security issues and concerns regarding the IC's use of contractors and the IC's procurement policies, procedures, and practices are beyond the scope of this report and thus are not included in this report.

## Background

The report examines, from an acquisition perspective, several reasons for interest in the IC's use of contractors, notably, the types of functions contractors perform, whether the IC's acquisition workforce has the capacity to oversee contractors. The crux of the matter is how an agency function is designated—inherently governmental, commercial, critical, or closely associated with inherently governmental functions (closely associated function).<sup>9</sup> The designation determines who should, or may, perform a particular agency function.<sup>10</sup> With several exceptions (one of which is addressed below), only federal employees may perform inherently governmental functions, while either federal employees or contractor employees may perform commercial functions. Closely associated functions and critical functions are particular types of commercial functions.<sup>11</sup> Either agency employees or contractor personnel may perform closely associated functions or critical functions. The following description of *closely associated function* signals why contractor performance of this type of activity warrants special attention and oversight by an agency.

[A closely associated function involves] certain services and actions that generally are not considered to be inherently governmental functions [but] may approach being in that

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<sup>9</sup> A commercial activity is a “recurring service that could be performed by the private sector. This recurring service is an agency requirement that is funded and controlled through a contract, fee-for-service agreement, or performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.” U.S. Office of Management and Budget, *Performance of Commercial Activities*, p. D-2. An inherently governmental activity is a “function that is so intimately related to the public interest as to require performance by Federal Government employees. (a) The term includes functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements.” U.S. Office of Management and Budget, Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” 76 *Federal Register* 56236, September 12, 2011. See **Appendix A** for the complete definition. Examples of inherently governmental functions include the “direct conduct of criminal investigations,” the “conduct of foreign relations and the determination of foreign policy,” and the “determination of Federal program priorities for budget requests.” 48 C.F.R. §7.503(c)(1), (4), and (6).

<sup>10</sup> Office of Federal Procurement Policy Policy Letter 11-01 provides policy, definitions, and guidance involving the performance of inherently governmental, closely associated, and critical functions. The policy letter is available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

<sup>11</sup> With the issuance of Office of Federal Procurement Policy Policy Letter 11-01 in September 2011, two subsets of commercial functions were created: functions closely associated with inherently governmental functions and critical functions.

category because of the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function.<sup>12</sup>

A *critical function* is “a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. Typically, critical functions are recurring and long-term in duration.”<sup>13</sup> An agency may be at risk of losing control over its mission and operations if it fails to effectively monitor contractor employees who are performing critical functions for the agency.

An issue interwoven throughout this report is the challenge of exercising oversight when the focus—the IC—is a mix of classified and unclassified activities and materials. While the data collection initiatives described below are themselves unclassified, the data gathered or produced may be classified. Additionally, the IC may be engaged in additional, classified initiatives for obtaining information about its contractors or their employees.

Examples of congressional interest in the IC's contractor workforce include legislation; language found in several of the Senate Select Committee on Intelligence's (SSCI's) biannual reports; a 2011 hearing on IC contractors; and a Senate Homeland Security and Governmental Affairs hearing in 2014, which featured a Government Accountability Office (GAO) report requested by the committee. For example, SSCI has expressed, over the years, various concerns regarding the IC's use of contractors, such as the need for “[m]inimal controls over the use of contractor support,”<sup>14</sup> room for improvement regarding incentivizing contractor performance and the monitoring of contractor performance,<sup>15</sup> and the costs of using contractors compared to the costs of using government personnel.<sup>16</sup> Senator Daniel K. Akaka expressed his concerns regarding

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<sup>12</sup> U.S. Office of Management and Budget, Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56238. Examples of closely associated functions are as follows:

Work in a situation that permits or might permit access to confidential business information or other sensitive information.... Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.... Participation in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of an agency.... Provision of legal advice and interpretations of regulations and statutes to government officials. Ibid., p. 56241.

<sup>13</sup> Ibid., p. 56236.

<sup>14</sup> U.S. Congress, Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence United States Senate Covering the Period January 4, 2005 to December 8, 2006*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., April 26, 2007, S.Rept. 110-57 (Washington: GPO, 2007), p. 19.

<sup>15</sup> U.S. Congress, Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence United States Senate Covering the Period January 3, 2009 to January 4, 2011*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 17, 2011, S.Rept. 112-3 (Washington: GPO, 2011), p. 41.

<sup>16</sup> U.S. Congress, Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence United States Senate Covering the Period January 5, 2011 to January 3, 2013*, 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 22, 2013, S.Rept. 113-7 (Washington: GPO, 2013), p. 17. SSCI also expressed an interest in the number of contractors.

In order to keep core contractors from increasing in number, the Committee has recommended in the classified annex that the number of core contractors in each element of the Intelligence Community should be capped at the Fiscal Year 2010 levels in Fiscal Year 2012. Additionally, the Committee believes that ... all elements of the IC should be able to track the number of its core contractors on a regular basis. Currently, most IC agencies have only the capability to compile data on contractors once a year to respond to the ODNI core contractor review. The Committee believes that IC elements should be able to determine their use of contractors on a weekly or monthly basis.

U.S. Congress, Senate Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2012*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., August 1, 2011, S.Rept. 112-43, p. 22. A similar statement also appeared in U.S. Congress, Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence United States Senate Covering the*



“contractors ... improperly performing inherently governmental functions,” “the high cost of IC contractors,” and “significant shortfalls” in the IC’s acquisition workforce at a 2011 hearing.<sup>17</sup> SSCI and the House Permanent Select Committee on Intelligence (HPSCI) may also be involved in classified efforts to monitor, or provide direction regarding, the IC’s use of contractors. Generally, these two committees conduct their business in closed hearings and meetings.

Congressional interest in intelligence matters, including the IC’s use of contractors, is not limited to the intelligence committees. Members who do not sit on either intelligence committee (referred to as “non-committee members”) may have an interest in intelligence topics and issues. HSGAC’s request for a GAO report and its related 2014 hearing are examples of other non-committee members’ interest in the IC’s contractors and related issues.<sup>18</sup>

While the IC has continued to rely on the private sector for the provision of goods and services, it has shifted its approach, striving to achieve an appropriate balance among the different components (federal civilian employees, contractor employees, and military personnel) of its workforce, which is consistent with the Obama Administration’s focus on multi-sector workforce management.<sup>19</sup> This shift has been acknowledged, over the years, in various documents. The IC’s

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*Period January 5, 2011 to January 3, 2013*, 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 22, 2013, S.Rept. 113-7 (Washington: GPO, 2013), p. 17. The issue of the cost of contractor performance, and, in particular, the cost of contractor performance relative to the cost of federal employee performance, though not central to this report, is a related issue. A brief treatment of this topic may be found at **Appendix B**.

<sup>17</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Intelligence Community Contractors: Are We Striking the Right Balance?* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., September 20, 2011, S.Hrg. 112-391 (Washington: GPO, 2012), p. 2.

<sup>18</sup> The Senate Homeland Security and Governmental Affairs Committee (HSGAC) asked GAO to prepare a classified report and an unclassified version that addressed the use of certain contract personnel by the eight civilian components of the IC. The reports were released in 2013 and 2014, respectively.

In September 2013, GAO issued a classified report that addressed (1) the extent to which the eight civilian IC elements use core contract personnel, (2) the functions performed by these personnel and the reasons for their use, and (3) whether the elements developed policies and strategically planned for their use. GAO reviewed and assessed the reliability of the elements’ core contract personnel inventory data for fiscal years 2010 and 2011, including a review of a nongeneralizable sample of 287 contract records. GAO also reviewed agency acquisition policies and workforce plans and interviewed agency officials. In January 2014, GAO issued an unclassified version of the September 2013 report, GAO-14-204.

U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting and Planning for the Use of Contract Personnel*, GAO-14-692T, June 18, 2014, “Highlights,” at <http://www.gao.gov/assets/670/664168.pdf>.

<sup>19</sup> O’Sullivan, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” p. 2. See U.S. Office of Management and Budget, “Managing the Multi-Sector Workforce,” M-09-26, July 29, 2009, at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m-09-26.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf) and CRS Report R42341, *Sourcing Policy: Selected Developments and Issues*, by Elaine Halchin. The President’s FY2012 budget request included the following passage:

**Improves Oversight of and Includes Reductions to the Contractor Workforce.** The IC continues to improve its oversight of the contractor workforce by implementing guidance on the proper use of contractors and by refining its understanding of this part of the workforce through the annual core contractor inventory. Moreover, the IC continues to strive for the appropriate mix of civilians, military, and contractors in its multi-sector workforce. The NIP [National Intelligence Program] budget includes reductions to the contractor workforce as the DNI seeks to streamline operations and make the IC more efficient.

Executive Office of the President, *Fiscal Year 2012 of the Budget of the U.S. Government*, p. 66, at <http://www.gpo.gov/fdsys/pkg/BUDGET-2012-BUD/pdf/BUDGET-2012-BUD-8.pdf>. (Boldface in original)

Earlier budgets (FY2002-FY2010) either did not have a section on the NIP, or, if a particular budget did, there was no



five-year Strategic Human Capital Plan, which was an annex to the 2006 U.S. National Intelligence Strategy (NIS), noted the NIS needs a human capital strategy that, among other things, will “determin[e] the optimum mix of military, civilian, contractor, and other human resources necessary to meet” mission critical human resource requirements.<sup>20</sup> Each of the National Intelligence Program Congressional Budget Justification books for FY2011, FY2012, and FY2013 addressed the need to engage in planning for a multi-sector workforce. The FY2013 budget justification stated, “The CMA [Community Management Account] Program expects the Human Capital and Learning project to accomplish the following in FY2013: ... Fully plan for the multi-sector workforce to consider the best mix of U.S. Government, military, and contract personnel to address emerging needs and meet enduring requirements.”<sup>21</sup> Testifying before a congressional committee in June 2014, the Principal Deputy Director of National Intelligence (PDDNI) acknowledged that contractors are “an integral part” of the IC while noting that the community’s needs have changed which, in turn, has prompted the IC “to rebalance [its] workforce with fewer core contractors.”<sup>22</sup> The outcome of this effort is not known.

The PDDNI’s comments echoed language found in the President’s FY2014 budget request that referenced a continuing effort to reduce the IC contractor workforce while maintaining the

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mention of contractors or contractor personnel. (See **Appendix A** for a definition of *National Intelligence Program*.) The President’s FY2013 and FY2014 budget requests maintained agency personnel at their current levels and “continue[d] to reduce the IC contractor workforce.” Executive Office of the President, *Fiscal Year 2013 of the Budget of the U.S. Government*, p. 87, at <http://www.gpo.gov/fdsys/pkg/BUDGET-2013-BUD/pdf/BUDGET-2013-BUD-8.pdf>, and Executive Office of the President, *Fiscal Year 2014 of the Budget of the U.S. Government*, p. 77, at <http://www.gpo.gov/fdsys/pkg/BUDGET-2014-BUD/pdf/BUDGET-2014-BUD-8.pdf>. The President’s FY2015 budget request included the following language: “The Budget reduces Government personnel levels, as supported by the Congress, with a continued aim to rightsize the workforce while focusing on sustaining the skills in the current IC workforce that have been developed over the past decade.” Executive Office of the President, *Fiscal Year 2015 of the Budget of the U.S. Government*, p. 65, at <http://www.gpo.gov/fdsys/pkg/BUDGET-2015-BUD/pdf/BUDGET-2015-BUD-7.pdf>.

<sup>20</sup> Office of the Director of National Intelligence, *Strategic Human Capital Plan, An Annex to the US National Intelligence Strategy*, June 22, 2006, p. 1, at <http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/DNIHumanCapitalStrategicPlan18October2006.pdf>. The phrase “other human resources” may refer to, or include, “retiree reserves.” This list of “Total IC Force” components appears later in the human capital plan: “civilian, military, contractor, even retiree ‘reserves’.” *Ibid.*, p. 9.

<sup>21</sup> Office of the Director of National Intelligence, *National Intelligence Program, FY2013 Congressional Budget Justification*, Vol. XII, Community Management Account, February 2012, pp. 96-97, at <http://fas.org/irp/dni/cbjb-2013.pdf>. The relevant entries in the budget justification books for FY2012 and FY2011 used the following language, respectively: “Refine multi-sector workforce planning methodology for the IC to consider the best use of U.S. Government, military and contract personnel where appropriate and cost effective,” and “Establish a multi-sector workforce planning methodology for the IC to consider the best use of US Government, military and contract personnel where appropriate and cost effective.” Office of the Director of National Intelligence, *National Intelligence Program, FY2012 Congressional Budget Justification*, Vol. XII, Community Management Account, February 2011, p. 98, at <http://fas.org/irp/dni/cbjb-2012.pdf>; Office of the Director of National Intelligence, *National Intelligence Program, FY2011 Congressional Budget Justification*, Vol. XII, Community Management Account, February 2010, p. 42, at <http://fas.org/irp/dni/cbjb-2011.pdf>.

<sup>22</sup> *CQ Congressional Transcripts*, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on the Intelligence Community Contractor Workforce,” 113<sup>th</sup> Cong., 2<sup>nd</sup> sess., statement of Stephanie O’Sullivan, Principal Deputy Director, Office of the Director of National Intelligence, June 18, 2014, p. 6, at <http://www.cq.com/doc/congressionaltranscripts-4499626?4> (subscription required). In her testimony, the Principal Deputy Director of ODNI stated that the IC’s appropriate workforce mix was not static and suggested it could vary from year to year and from IC element to IC element. She added that the optimal workforce mix for each IC element is “determined based on an analysis of [its] needs” and that the factors used in analyzing and determining an element’s needs include “[f]unding, critical skill needs, ... mission requirements ... the length of time involved in hiring the government employee and whether the function is intended for the long-term.” O’Sullivan, statement for the record, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” p. 4.

“Government personnel levels.”<sup>23</sup> The following fiscal year’s (FY2015) summary of the National Intelligence Program (NIP) in the President’s budget continued this theme, but also noted that the budget would reduce government personnel levels.<sup>24</sup> Omitting references to any particular component of the IC workforce, the 2014 NIS mentions, in the context of workforce planning, the importance of ensuring “the IC has the right people with the right skills in the right place at the right time to accomplish the mission in high-performing teams and organizations.”<sup>25</sup>

## Contractors and Contractor Personnel in the IC

This section describes unclassified efforts to collect data about the IC’s contractors or contractor employees. The information collected as a result of, or in relation to, the policies or statutory provisions described below does not appear to be publicly available and may be classified. This report is not necessarily comprehensive as the IC may engage in classified initiatives to track its contractors or contractor employees.

### Inventory of Core Contract Personnel

The IC divides its contract personnel into two categories: non-core and core. The non-core category includes individuals who perform services not related to the mission or operations of the IC (e.g., food services), or who are not required to have security clearances.<sup>26</sup> Of particular interest to the IC, and others, is the community’s use of core contract personnel. Core contract personnel generally perform mission-related work, which, as discussed below could, under certain circumstances, have implications for the ability of IC components to maintain control over inherently governmental functions and their missions and operations. ODNI describes this category as follows:

[Core contract personnel] are those independent contractors or individuals employed by industrial contractors who augment USG [U.S. government] civilian and military personnel by providing direct technical, managerial, or administrative support to IC elements. Core contract personnel typically work alongside and are integrated with USG civilian and military personnel and perform staff-like work.<sup>27</sup>

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<sup>23</sup> FY2014 President’s Budget, “National Intelligence Program,” p. 77, at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/intelligence.pdf>.

<sup>24</sup> “Recognizing the challenges of this fiscal environment, the IC continues to review its operational, investment, and infrastructure programs to identify efficiencies. The Budget reduces Government personnel levels, as supported by the Congress, with a continued aim to rightsize the workforce while focusing on sustaining the skills in the current IC workforce that have been developed over the past decade.” U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2015*, (Washington: GPO, 2014), p. 65, at <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/budget.pdf>.

<sup>25</sup> “Workforce planning is a framework addressing the total workforce balance (civilian, military, and core contract personnel) to ensure the IC has the right people with the right skills in the right place at the right time to accomplish the mission in high-performing teams and organizations.” Office of the Director of National Intelligence, *The National Intelligence Strategy of the United States of America 2014*, p. 14, at [http://www.dni.gov/files/documents/2014\\_NIS\\_Publication.pdf](http://www.dni.gov/files/documents/2014_NIS_Publication.pdf).

<sup>26</sup> The category of non-core contract personnel includes contractor employees who produce, or supply, goods and equipment; provide “widely available commercials and functions” such as food services, janitorial and maintenance services, and facility security, “which are not specific or tailored to the business or mission of the IC,” or individuals “who are not required to possess a security clearance in order to perform their work, unless they are performing work specific to the mission of the IC, e.g., open source collection and analysis.” O’Sullivan, statement for the record, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” p. 1.

<sup>27</sup> Office of the Director of National Intelligence, *Intelligence Community Core Contract Personnel*, p. 4.

The intelligence community uses core contract personnel for these reasons:

- “Immediate Surge: To provide surge support for a particular IC mission area. In this regard, the use of a contractor enables the IC element to rapidly expand to meet a mission or business exigency, and then curtail that contract support when the exigency passes. A surge requirement may be of extended duration.”
- “Discrete Non-Recurring Task: To accomplish a discrete, nonrecurring, or temporary project, work assignment, or task of definite or deliverable, such that the contract ends when the project, assignment, or task is completed.”
- “Unique Expertise: To provide unique technical, professional, managerial, or intellectual expertise to the IC element, where such expertise is not otherwise available from U.S. Government (USG) civilian or military personnel.”
- “Specified Service: To provide a specified service, including technical assistance, in support of a core mission or function, where that service is of indefinite quantity.”
- “Insufficient Staffing Resources: To perform work that would otherwise have been provided by a USG civilian given sufficient resources.”<sup>28</sup>
- “Transfer of Institutional Knowledge: To maintain critical continuity or skills in support of a particular mission or functional area in the face of skills gaps, the loss (anticipated or otherwise) of mission-essential USG civilian or military personnel, or other similar exigency.”
- “More Efficient or Effective: To provide support or administrative services, where the provision of such services by contract personnel is determined to be effective or efficient.”<sup>29</sup>

The IC initiated its first inventory of core contract personnel in 2006.<sup>30</sup> The reasons for undertaking this effort included “congressional concern, ODNI concern, a desire to get a handle on the role of contractors, and the extent of contracting in the intelligence community.”<sup>31</sup> A few years after the IC compiled its initial inventory, the Associate Director of National Intelligence for

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<sup>28</sup> The ODNI’s human capital strategy published in 2006 commented on the role agency personnel end-strength ceilings play in IC elements’ use of contractors in lieu of in-house manpower.

[T]he decision to use [contractor] resources is often predicated on arbitrary end-strength ceilings ... restrictions that may literally preclude the use of US government (USG) civilians or military personnel, even where that makes the most sense from a mission and cost standpoint. Thus, the use of contractors is often tactical and exigent, driven by factors unrelated to mission. Office of the Director of National Intelligence, *Strategic Human Capital Plan, An Annex to the US National Intelligence Strategy*, p. 14. (Ellipsis in original.)

Generally, personnel ceilings for the IC’s elements are established for a given fiscal year by the applicable IAA and are listed in the classified Schedule of Authorizations that accompanies the act. The DNI may authorize an adjustment in the personnel ceiling for civilian personnel for an IC element, but the adjustment may not exceed a specified percentage of the number of civilian personnel authorized for that particular element. The percentage has been 3% for several years (see the IAAs for FY2012 (P.L. 112-87), FY2013 (P.L. 112-277), FY2014 (P.L. 113-126), and FY2015 (P.L. 113-293)).

<sup>29</sup> Office of the Director of National Intelligence, *Intelligence Community Core Contract Personnel*, p. 2.

<sup>30</sup> There was “no comprehensive effort” to compile such data prior to June 2006. U.S. Congress, House Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2010*, report to accompany H.R. 2701, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., June 26, 2009, H.Rept. 111-186, p. 60.

<sup>31</sup> Sanders, “Conference Call with Dr. Ronald Sanders, Associate Director of National Intelligence for Human Capital, Results of the Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel,” p. 1.

Human Capital (also known as the Chief Human Capital Officer (CHCO) or ADNI/CHCO) participated in a conference call with several journalists in which he described the results of the inventory, which involved the total workforce of the NIP.<sup>32</sup> In FY2007, approximately 100,000 civilian employees and military personnel were part of the IC workforce.<sup>33</sup> During the same time period, contractor personnel made up 27% of the IC's total workforce.<sup>34</sup> The breakdown of functions performed by contractor employees in FY2007 was as follows:

- 27% of core contract personnel “supported collection and operations”;
- 22% “supported enterprise information and technology”;
- 19% “supported analysis and production”;
- 19% supported “enterprise management and support”;
- 4% supported “mission management”; and
- 9% supported “processing, exploitation, and research and development activities.”<sup>35</sup>

The IC's inventory also included the reasons why IC elements used contractors and the location of contractor personnel.

- Over one-half (56%) of core contract personnel provided unique expertise;
- 11% performed work that would have been performed by federal civilian employees if sufficient funding had been available;
- approximately 10% were used because it was more cost effective than federal employee performance;
- approximately 8% worked for the IC because of funding uncertainties;
- 5% supported surge requirements; and
- 3% worked on non-recurring projects.<sup>36</sup> (The remaining 7% was not addressed during the conference call.)

Most (73%) contractor personnel were located on IC premises; 27% were located off-premises (facilities “owned and operated by their contract employer[s]”). The greater Washington-Baltimore metropolitan area was home to 81% of core contract personnel.<sup>37</sup>

In October 2009, ODNI issued Intelligence Community Directive (ICD) 612, which addresses the IC's use of core contractor personnel. In addition to requiring IC contractors to provide certain

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<sup>32</sup> Presently, the title is *Assistant* Director of National Intelligence for Human Capital. (Italics added to highlight the change.)

<sup>33</sup> Sanders, “Conference Call with Dr. Ronald Sanders, Associate Director of National Intelligence for Human Capital, Results of the Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel,” p. 4.

<sup>34</sup> For at least a brief period, the percentage of contractor personnel in the IC's total workforce decreased. Contractor personnel made up 24% of the IC's total workforce in FY2009 and 23% in FY2010. Senator Dianne Feinstein, Chairman, Senate Select Committee on Intelligence, “Opening Statement of Chairman Dianne Feinstein, Joint SSCI/HPSCI Hearing: 10<sup>th</sup> Anniversary of 9/11,” September 13, 2011, Joint House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence Hearing, p. 3, at <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/091311FeinsteinOpening.pdf>.

<sup>35</sup> Sanders, “Conference Call with Dr. Ronald Sanders, Associate Director of National Intelligence for Human Capital, Results of the Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel,” pp. 2-3.

<sup>36</sup> *Ibid.*, p. 3.

<sup>37</sup> *Ibid.*, p. 4.

compensation information and encouraging IC elements to reemploy federal civilian annuitants under the National Intelligence Reserve Corps, this directive established an annual requirement for IC elements to provide information about core contract personnel to the ADNI/CHCO.<sup>38</sup> Additionally, the IC elements are to “determine, review, and evaluate the actual and projected number and uses of core contract personnel in support of their intelligence mission[s].” The results of an IC element’s review are to be “reflected in [its] annual budget submission.”<sup>39</sup> ODNI is to provide “the results of the inventory to OMB [Office of Management and Budget] and [the IC’s] oversight committees and include [an] analysis of the inventory submissions.”<sup>40</sup> The “scope, form, and format” of the information required to be reported by ICD 612 was to have been promulgated as an Intelligence Community Standard.<sup>41</sup> Neither the IC Standard for core contract personnel nor the IC elements’ inventories of core contract personnel appear to be available on the ODNI website. Information contained in a GAO report that examined several of the IC’s core contract inventories revealed the inventory contains 10 data fields, including the following, as described by GAO:

- “the number of full-time equivalents (FTEs) on core contracts”<sup>42</sup>
- “the functions performed by core contract personnel”
- “the reasons for using [core contract] personnel”
- “fiscal year obligations”
- “budget category”
- “primary contractor occupation and competence expertise”
- “name of the contractor”
- “number of direct labor hours”<sup>43</sup>

GAO also reported that the “number and types of data fields available vary by fiscal year.”<sup>44</sup>

GAO examined the core contractor inventories of the eight civilian components of the IC and reported its findings and recommendations in an unclassified study that was released in January

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<sup>38</sup> The Assistant Director of National Intelligence for Human Capital established the IC Core Contract Personnel Inventory Control Board. Its membership includes representatives from all of the IC elements and it provides a “forum to resolve differences in the interpretation of IC CHCO’s [Assistant Director of National Intelligence for Human Capital’s] guidance for the inventory.” U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting on and Planning for the Use of Contract Personnel*, GAO-14-204, January 29, 2014, p. 13, at <http://www.gao.gov/assets/670/660486.pdf>. A classified version of this report was provided to the Senate Committee on Homeland Security and Governmental Affairs, which had requested the report, in September 2013.

<sup>39</sup> Office of the Director of National Intelligence, *Intelligence Community Core Contract Personnel*, p. 3.

<sup>40</sup> O’Sullivan, statement for the record, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” p. 4.

<sup>41</sup> *Ibid.*

<sup>42</sup> The methodology for calculating the number of IC contractor FTEs is unknown and may vary from component to component. The methodology for calculating the number of contractor FTEs for civilian agencies that are required to compile, and submit to OMB, inventories of their service contracts pursuant to Section 743 of Division C of P.L. 111-117, Consolidated Appropriations Act for FY2010, is as follows: number of direct labor hours divided by 2,080. Email from U.S. General Services Administration, Legislative and Intergovernmental Affairs, January 29, 2014. The figure of 2,080 is the product of multiplying 40 (hours) by 52 (weeks).

<sup>43</sup> U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting on and Planning for the Use of Contract Personnel*, GAO-14-204, pp. 3, 4, and 7.

<sup>44</sup> *Ibid.*, p. 7.



2014.<sup>45</sup> (A classified version was issued in September 2013.) The reports addressed “(1) the extent to which the eight civilian IC elements use core contract personnel, (2) the functions performed by these personnel and the reasons for their use, and (3) whether the elements developed policies and strategically planned for their use.”<sup>46</sup> GAO determined that the “comparability, accuracy, and consistency” of the inventories were limited, because of the following problems: variations in the definition of *core contract personnel* over the years, a lack of standardization among IC elements in calculating the number of contractor FTEs and missing documentation for calculating contractor FTEs, and contract cost data that “were inaccurate or inconsistently determined.”<sup>47</sup> Faced with these challenges, GAO was unable to determine accurately the extent to which the IC’s civilian components have used core contract personnel.<sup>48</sup> Specifically, GAO could not reliably determine “the number of core contract personnel” performing functions for the civilian IC or the reasons they were used.<sup>49</sup>

Questions about the data’s reliability and accuracy may undermine its potential utility as a tool for policymaking and oversight by the IC leadership and Congress.

## Personnel Level Assessment

Beginning in 2011, the DNI is required to complete, in consultation with the head of each IC component, an annual personnel level assessment that includes information about each component’s core contract employees and agency personnel. The HPSCI report accompanying H.R. 2701 (111<sup>th</sup> Congress, enacted as P.L. 111-259) stated that this requirement “should assist the DNI and the congressional intelligence committees in determining the appropriate balance of contractors and permanent government employees.”<sup>50</sup> The statutory requirement, which may be found in Section 305(a) of P.L. 111-259, Intelligence Authorization Act for FY2010, directs each component to report its “best estimate of the number and costs of core contract personnel to be

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<sup>45</sup> The eight civilian components studied by GAO are the Central Intelligence Agency (CIA), Department of Homeland Security’s Office of Intelligence and Analysis (DHS I&A), Department of Energy’s Office of Intelligence and Counterintelligence (DOE IN), Department of State’s Bureau of Intelligence and Research (State INR), Department of the Treasury’s Office of Intelligence and Analysis (Treasury OIA), Drug Enforcement Administration’s Office of National Security Intelligence (DEA NN), Federal Bureau of Investigation (FBI), and ODNI. *Ibid.*, p. 1.

<sup>46</sup> U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting and Planning for the Use of Contract Personnel*, GAO-14-692T, June 18, 2014, “Highlights,” at <http://www.gao.gov/assets/670/664168.pdf>; *Ibid.*, “Highlights.”

<sup>47</sup> *Ibid.*, p. 12.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, p. 20.

<sup>50</sup> U.S. Congress, House Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2010*, p. 60. A member of SSCI during the 111<sup>th</sup> Congress also weighed in on the desirability of the IC maintaining an appropriate mix of its workforce.

Similarly, the intelligence community must get a handle on its personnel levels. In these tough economic times, it is more important than ever to make sure that the intelligence community is appropriately resourced so it can effectively perform its national security missions. This is not, however, an open invitation for more contractors. Far too many times, contractors are used by the intelligence community to perform functions better left to government employees. There are some jobs that demand the use of contractors, for example, certain technical jobs or short-term functions, but the easy, quick fix has been to just hire contractors, not long-term support. And so, our bill includes a provision calling for annual personnel level assessments for the intelligence community. These assessments will ensure that, before more people are brought in, there are adequate resources to support them and enough work to keep them busy. Sen. Christopher S. Bond, “Intelligence Authorization Act for Fiscal Year 2010,” remarks in the Senate, *Congressional Record*, daily edition, September 27, 2010, p. S7558.



funded by [it] for the upcoming fiscal year,” and provide numerical and percentage comparisons with the same information for the current fiscal year and the preceding five fiscal years. IC components are also required to provide similar information regarding their federal employees and FTE positions.<sup>51</sup> Each element’s assessment is to include a “justification for the requested personnel [federal employees] and core contract personnel levels” and the “best estimate of the number of intelligence collectors and analysts employed or contracted” by each IC element.<sup>52</sup> With the passage of the Intelligence Authorization Act for FY2015 (P.L. 113-293), the IC’s personnel level assessments are to include *descriptions of the functions* performed by contractors serving as intelligence collectors and analysts.<sup>53</sup> The personnel level assessments are to be submitted to the intelligence committees “each year at the time that the President submits to Congress the budget.”<sup>54</sup>

## Report on Personal Services Contracts

A one-time requirement for the DNI to report on the IC’s use of personal services contracts was enacted in 2010.<sup>55</sup> Section 339 of P.L. 111-259, Intelligence Authorization Act for FY2010, required the DNI to report the following information to the intelligence committees and armed services committees: “the use of personal services contracts across the intelligence community, the impact of the use of such contracts on the intelligence community workforce, plans for conversion of contractor employment into United States Government employment, and the accountability mechanisms that govern the performance of such person services contracts.”<sup>56</sup>

Generally, an agency’s use of personal services contracts garners attention because an agency is not permitted to use this type of contract unless it has statutory authority to do so. Relatedly, the use of personal services contracts (PSCs) could have implications for the federal government’s merit staffing procedures which are used to hire employees. The Federal Acquisition Regulation (FAR) includes this caution regarding personal services contracts:

The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.”<sup>57</sup>

The IC’s use of personal services contracts is also addressed below, in the section titled “Are Contractor Employees Performing Inherently Governmental Work?”

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<sup>51</sup> A full-time equivalent is the “staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776) rather than annual available hours that includes non-productive hours (2,080 hours).” U.S. Office of Management and Budget, *Performance of Commercial Activities*, Circular No. A-76 (Revised), May 29, 2003, p. D-5, at [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf).

<sup>52</sup> Sec. 305(a) of P.L. 111-259; 50 U.S.C. 3098(c)(7)-(11).

<sup>53</sup> Sec. 327 of P.L. 113-293; 50 U.S.C. 3098(c)(12). (Italics added to highlight the change.)

<sup>54</sup> Sec. 305(a) of P.L. 111-259; 50 U.S.C. 3098(b).

<sup>55</sup> As defined by the Federal Acquisition Regulation (FAR), a personal services contract is “a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees....” 48 C.F.R. §2.101(b). Another provision of the FAR expands upon this definition: “An employer-employee relationship under a service contract occurs when, as a result of (i) the contract’s terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee.” 48 C.F.R. §37.104(c)(1).

<sup>56</sup> Section 339(a) of P.L. 111-250. Section 339(b) contains a more-detailed description of the information required to be included in the report.

<sup>57</sup> 48 C.F.R. §37.104(a).

## Inventory of Commercial Activities and Inherently Governmental Activities

Information available from the ADNI/CHCO's website indicates that the office compiles inventories of the IC's commercial activities and inherently governmental activities.

The Workforce Planning team collects and consolidates data for all 17 IC agencies to perform Federal Activities Inventory Reform (FAIR) Act reporting on which IC activities are inherently governmental and which must be performed by government employees, along with a service contractor inventory to provide an opportunity for integrat[ing] the two inventories to support balanced workforce analyses.<sup>58</sup>

Although the inventories do not include information about an agency's contractors or contractor personnel, agency staff may find the process of compiling the inventories, or the inventories themselves, to be useful in determining the appropriate mix of personnel (federal employees and contractors) for their agency.

With the enactment of the Federal Activities Inventory Reform (FAIR) Act of 1998 (P.L. 105-270), federal agencies subject to the statute are required to compile, and submit to OMB, an annual inventory of their commercial activities.<sup>59</sup> The requirement for agencies subject to the FAIR Act to also submit inventories of their inherently governmental activities began during the Administration of President George W. Bush.<sup>60</sup> An agency's inventory is to include, for each function listed, the following information:

- Department and bureau names
- Function code<sup>61</sup>
- Product or service code<sup>62</sup>
- Total number of FTEs

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<sup>58</sup> Office of the Director of National Intelligence, "Chief Human Capital Office, Workforce Planning & Worklife," at <http://www.dni.gov/index.php/about/organization/workforce-planning-worklife>. It is possible this passage should read as follows (italics added to identify the change): "The Workforce Planning team collects and consolidates data for all 17 IC agencies to perform Federal Activities Inventory Reform (FAIR) Act reporting on which IC activities are *commercial* and which must be performed by government employees...." Absent this suggested change, the excerpt, as it appears on the ODNI website, refers only to inherently governmental activities. Yet the FAIR Act applies only to commercial activities. (A memorandum issued by OMB in 2001 established the requirement for agencies subject to the FAIR Act to include inherently governmental activities in their FAIR Act inventories. See footnote 60.)

<sup>59</sup> The FAIR Act applies to executive departments (5 U.S.C. §101), military departments (5 U.S.C. §102), and independent establishments (5 U.S.C. §104). It does not apply to the Government Accountability Office (GAO), government corporations or government-controlled corporations (5 U.S.C. §103), nonappropriated funds instrumentalities (5 U.S.C. §2015(c)), and certain DOD activities that perform depot-level maintenance and repair (10 U.S.C. §2460). Sec. 4 of P.L. 105-270. A commercial activity is a "recurring service that could be performed by the private sector. This recurring services is an agency requirement that is funded and controlled through a contract, fee-for-services agreement, or performance by government personnel." U.S. Office of Management and Budget, *Performance of Commercial Activities*, p. D-2.

<sup>60</sup> Sean O'Keefe, Deputy Director, U.S. Office of Management and Budget, "Year 2001 Inventory of Commercial Activities," memorandum M-01-16, April 3, 2001, p. 1, at <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m01-16.pdf>.

<sup>61</sup> A list of function codes is available at [https://www.whitehouse.gov/omb/procurement\\_fair\\_2006\\_inv\\_function\\_codes/](https://www.whitehouse.gov/omb/procurement_fair_2006_inv_function_codes/). It is not known whether this list is current.

<sup>62</sup> The list of product or service codes is available at [https://www.fpd.gov/wiki/index.php/PSC%2C\\_NAICS\\_and\\_more](https://www.fpd.gov/wiki/index.php/PSC%2C_NAICS_and_more) (click on the link "Product or Service Code (PSC)").

- Reason code<sup>63</sup>
- City, state, and country where the function is located
- The first year the function was included in the inventory
- Unit name<sup>64</sup>

Under the FAIR Act, OMB’s responsibilities include publishing a notice in the Federal Register announcing when agencies’ FAIR Act inventories are available.<sup>65</sup> The first year agencies were required to produce inventories was 1999, and OMB’s December 30, 1999, announcement included two entries identifiable as IC elements: “Intelligence Community Management Staff and Central Intelligence Agency,” and “Intelligence Community: Other Agencies.” Both of these entries included this caveat: “Appropriate security clearance and need to know must be established for access.”<sup>66</sup> The Central Intelligence Agency (CIA) was the only readily identifiable IC component included in OMB’s announcements in 2000 and 2001. The entry for each year stated “[n]o website available.”<sup>67</sup> To date, the only additional Federal Register announcement that mentioned the IC involved the 2003 inventories; the entry for “Intelligence agencies” indicated the website was not available.<sup>68</sup>

The excerpt from the ADNI/CHCO’s website (see above) also mentions a service contractor inventory, which may be a reference to a service contracts inventory. Two separate statutory provisions require the Department of Defense (DOD) and certain executive branch civilian agencies to prepare and submit to OMB annual service contracts inventories.<sup>69</sup> The inventories are to include the number of contractor employees (or an equivalent measure) for each contract listed. Information provided in a 2014 GAO report suggests, however, that the IC’s efforts to inventory its contractors are not related to either of these statutory provisions. GAO wrote,

One tool identified by OFPP [Office of Federal Procurement Policy] that can help agencies plan for the use of contract personnel and mitigate associated risks is a service contract inventory, which for the IC is the annual core contract personnel inventory.<sup>70</sup>

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<sup>63</sup> Reason codes A through F are used for commercial functions. Reason code I identifies an inherently government function. Lesley A. Field, Acting Administrator, Office of Federal Procurement Policy, “Federal Activities Inventory Reform (FAIR) Act Submission for Fiscal Year 2012,” memorandum M-12-09, March 26, 2012, p. 5, at [https://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-09\\_0.pdf](https://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-09_0.pdf).

<sup>64</sup> Ibid.

<sup>65</sup> Sec. 2(c)(1)(B) of P.L. 105-270.

<sup>66</sup> U.S. Office of Management and Budget, “Public Availability of Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (P.L. 105-270) (‘FAIR Act’),” 64 *Federal Register* 73595-73596, December 30, 1999.

<sup>67</sup> U.S. Office of Management and Budget, “Public Availability of Year 2000 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (P.L. 105-270) (‘FAIR Act’),” 66 *Federal Register* 9730, February 9, 2001; U.S. Office of Management and Budget, “Public Availability of Year 2001 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (P.L. 105-270) (‘FAIR Act’),” 67 *Federal Register* 369, January 3, 2002.

<sup>68</sup> U.S. Office of Management and Budget, “Public Availability of Fiscal Year (FY) 2003 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (P.L. 105-270) (‘FAIR Act’),” 69 *Federal Register* 3401, January 23, 2004.

<sup>69</sup> Section 743 (Division C) of P.L. 111-117, as amended, applies to civilian agencies. DOD is subject to a similar statutory requirement, which may be found in Section 807 of P.L. 110-181, National Defense Authorization Act for FY2008. To access a civilian agency’s inventory, conduct a search on the agency’s website. For example, see <https://www.dhs.gov/publication/service-contract-inventory-fy-2013> to access the Department of Homeland Security’s FY2013 inventory. DOD’s inventories are available at [http://www.acq.osd.mil/dpap/cpic/cp/acquisition\\_of\\_services\\_policy.html](http://www.acq.osd.mil/dpap/cpic/cp/acquisition_of_services_policy.html).

<sup>70</sup> U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting on and Planning for the Use of Contract Personnel*, GAO-14-204, p. 30.

As discussed above, ICD 612 requires the IC to compile an annual core contract personnel inventory.

## Oversight Issues

Over the years, questions have been raised regarding the possibility that contractor employees performing work for the IC are performing inherently governmental functions. Several years after the issuance of OFPP Policy Letter 11-01, some observers questioned whether IC components are properly managing their critical and closely associated functions, including oversight of contractor employees performing these functions.<sup>71</sup>

### Are Contractor Employees Performing Inherently Governmental Work?

Although the ODNI's ICD 612 prohibits using contractor personnel to perform inherently governmental activities, there have been indications that contractor personnel performed, or might have performed, inherently governmental activities for the IC. In its 2006 human capital strategy, ODNI acknowledged that some of the work performed by IC contractors might be "borderline 'inherently governmental.'" <sup>72</sup> The same document also noted OMB's interest in the possibility that contractor employees were doing inherently governmental work. OMB had requested that ODNI "conduct a study to determine if contractors may be engaged in IC work that is 'inherently governmental' and hence improper." ODNI stated it had initiated the study and expected to complete it by the end of FY2006.<sup>73</sup> Neither the status of the study nor its results, if any, are known. Several years later, the ODNI issued ICD 612, which states: "Core contract personnel will not engage in inherently government activities, as defined by Office of Management and Budget *Circular A-76*, as revised."<sup>74</sup> Yet, an appendix to a 2011 hearing on the IC and contractors stated "it is unclear whether or how the ODNI or other IC agencies oversee compliance with that directive [ICD 612]."<sup>75</sup>

Although, generally, only federal employees may perform inherently governmental activities, a contractor employee who works for an agency pursuant to a personal services contract is permitted, under the Federal Acquisition Regulation, to perform inherently governmental activities.<sup>76</sup> At times, ODNI's definition of *core contract personnel* has included language that could be interpreted as suggesting such personnel might perform inherently governmental work pursuant to personal services contracts. ODNI's definition of *core contract personnel* for its

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<sup>71</sup> U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting on and Planning for the Use of Contract Personnel*, p. 24.

<sup>72</sup> The ODNI-developed human capital strategy included the following passage: "Confronted by arbitrary staffing ceilings and uncertain funding, [IC] components are left with no choice but to use contractors for work that may be borderline 'inherently governmental.'" Office of the Director of National Intelligence, *Strategic Human Capital Plan, An Annex to the US National Intelligence Strategy*, p. 6.

<sup>73</sup> *Ibid.*, p. 14.

<sup>74</sup> Office of the Director of National Intelligence, *Intelligence Community Core Contract Personnel*, p. 1.

<sup>75</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Intelligence Community Contractors: Are We Striking the Right Balance?* p. 75.

<sup>76</sup> 48 C.F.R. §7.502. A difference may exist, however, between federal employees and contract personnel in the IC with regard to whistleblower procedures. For information on the intelligence community and whistleblower protections, see CRS Report R43765, *Intelligence Whistleblower Protections: In Brief*, by Rodney M. Perry.

FY2007, FY2009, and FY2010 inventories included the following statement: “[T]hese [core contract] employees are functionally indistinguishable from U.S. government personnel whose mission they support.”<sup>77</sup> As discussed above, a personal services contract is “a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees....”<sup>78</sup>

The 2014 HSGAC hearing provided Congress (and other interested parties) insight into the IC’s use of contractors. The hearing featured the PDDNI, who described ODNI’s efforts to manage and oversee the IC’s contractor workforce, and GAO’s Director of Sourcing and Management whose testimony identified potential issues surrounding the IC’s use of contractors.<sup>79</sup>

In her testimony, the PDDNI addressed the nature of the work performed by contractor personnel. She testified that “[c]ore contractors do not perform inherently governmental work, meaning they don’t make decisions on priorities, strategic direction or commitment of resources. Only government employees make those decisions.”<sup>80</sup> As for closely associated functions, she noted that IC elements had reviewed the work performed by their contractor workforce and had “taken steps to remedy situations where there was over-reliance on core contract personnel in tasks closely associated with inherently governmental functions.”<sup>81</sup> Referring to critical functions, the PDDNI stated that “[w]e believe our ‘core contract personnel’ practices are responsive to the policy letter’s guidance<sup>82</sup> and we are reviewing the details carefully to consider where we may need to make additional refinements to our inventory to best implement this policy letter across the IC.”<sup>83</sup> Specifically, she noted that ODNI had “issued a policy reaffirming the OFPP letter, so it’s capturing the need to track critical and closely associated with inherently governmental function contractor activities” and disclosed the existence of a current debate within the IC procurement community revolving around “how to incorporate” the definitions of *critical functions* and *closely associated functions* in the IC’s core contract inventory.<sup>84</sup> O’Sullivan also summarized the IC CHCO’s efforts in this area.

The IC CHCO issued guidance in the fall of 2013 as part of the core contract personnel inventory data call requesting that IC elements describe steps taken to ensure compliance

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<sup>77</sup> U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting on and Planning for the Use of Contract Personnel*, GAO-14-204, p. 48.

<sup>78</sup> 48 C.F.R. §2.101(b).

<sup>79</sup> Whereas the GAO representative’s testimony focused on the civilian components of the IC, the PDDNI spoke generally about the IC when discussing contractors and contractor personnel.

<sup>80</sup> *CQ Congressional Transcripts*, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on the Intelligence Community Contractor Workforce,” statement of Stephanie O’Sullivan, p. 6. Three years earlier (2011), the ADNI/CHCO made the following statement at a congressional hearing: “We believe many of our core contractor personnel practices capture the essence of [Office of Federal Procurement Policy Policy Letter 11-01], and we are reviewing the details carefully to consider where we may need to make additional refinements to our policies to best implement this policy across the Intelligence Community.” U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Intelligence Community Contractors: Are We Striking the Right Balance?* p. 32. OFPP Policy Letter 11-01 provides policies, definitions, and guidance regarding inherently governmental, critical, and functions closely associated with inherently governmental functions.

<sup>81</sup> O’Sullivan, statement for the record, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” p. 5.

<sup>82</sup> This is a reference to OFPP Policy Letter 11-01.

<sup>83</sup> O’Sullivan, statement for the record, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” p. 5.

<sup>84</sup> *CQ Congressional Transcripts*, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on the Intelligence Community Contractor Workforce,” statement of Stephanie O’Sullivan, p. 21.



with this [OFPP] Policy Letter; we are in the process of assessing Community compliance with this direction.<sup>85</sup> Within ODNI, last September the Chief Management Officer issued ODNI Instruction 40.09, ‘Commercial Industrial Contracts,’ which includes guidance to mitigate risks associated with the performance of core contracts for work that is deemed critical or closely related to inherently governmental functions.<sup>86</sup>

During her testimony, the PDDNI also broached the subject of the IC’s use of personal services contracts. Without specifying whether *one instance* referred to a single function, contract, or component, or other unit of measure, she acknowledged “we do have one instance of core contract employees hired on Personal Services Contracts in accordance with the Federal Acquisition Regulation subpart 37.104....”<sup>87</sup> The remainder of her remarks noted it was necessary for “mission reasons” to have the contractor employees “appear to be government employees,” adding that “the government continues to exercise full control over their work. The IC utilizes only a very small portion of such contract personnel and for a limited duration. Such contracts require high level of approval.”<sup>88</sup>

Testifying at the same hearing, GAO’s representative raised concerns that core contract personnel in the civilian IC elements are performing the type of work or functions that “may affect an IC element’s decision-making authority or control of its operations.”<sup>89</sup> In the following excerpt, after identifying several of the functions core contract personnel perform, GAO pointed to the lack of guidance and procedures as contributing to the problem.

Within the IC, core contract personnel perform functions that could influence the direction and control of key aspects of the U.S. intelligence mission, such as intelligence analysis and operations. Our prior work and OMB policies have underscored the importance of agencies having guidance, strategies, and reliable data to inform decisions related to the appropriate use of contractor personnel.... Yet, of the agencies we reviewed, ODNI, CIA, DOJ, DOE, and Treasury have not fully developed such procedures or established required time frames for doing so. Without these procedures in place, ODNI, CIA, and the civilian IC elements within these three departments risk not taking appropriate steps to manage and oversee contract personnel, particularly those performing work that could influence government decision making.<sup>90</sup>

The Department of Homeland Security and the State Department are the two agencies that had developed internal procedures to implement OFPP’s policy regarding scrutiny of contractors performing closely associated activities.<sup>91</sup>

## **Is the IC Equipped to Monitor Contractor Employees?**

Generally, a well-trained, fully staffed acquisition workforce is needed for an agency to be able to conduct sufficient oversight of its contractors, including monitoring contractor employees who

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<sup>85</sup> The acronym *IC CHCO* may be a reference to the ADNI/CHCO.

<sup>86</sup> O’Sullivan, statement for the record, “The Intelligence Community: Keeping Watch Over Its Contractor Workforce,” p. 6.

<sup>87</sup> *Ibid.*, p. 2.

<sup>88</sup> *Ibid.*

<sup>89</sup> U.S. Government Accountability Office, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting on and Planning for the Use of Contract Personnel*, GAO-14-204, p. 8.

<sup>90</sup> *Ibid.*, pp. 29-30.

<sup>91</sup> *CQ Congressional Transcripts*, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on the Intelligence Community Contractor Workforce,” statement of Timothy DiNapoli, Director, Acquisition and Sourcing Management, U.S. Government Accountability Office, p. 10.



are engaged in closely associated functions or critical functions.<sup>92</sup> An acquisition workforce that is lacking—in terms of training, experience, or size, for example—may not be able to accomplish all of the necessary tasks for every procurement.

The DNI and the PDDNI acknowledged, separately and respectively in 2010 and 2011, the importance of maintaining a robust, knowledgeable acquisition workforce.<sup>93</sup> Information provided by ODNI and one of its oversight bodies suggests that fielding a fully capable acquisition workforce is a challenge for the IC, although the capability and effectiveness of agency oversight could vary from element to element. A 2007 slide presentation attributed to ODNI's senior procurement executive contains several statements acknowledging the importance of, or identifying problems with, the IC's acquisition workforce at that time.

- “The IC Acquisition Workforce has not kept pace with increased requirement demands and workload.”<sup>94</sup>
- “Insufficient, Inexperienced Workforce.”<sup>95</sup>
- “World class, experienced COs/COTRs [contracting officers/contracting officer technical representatives] are crucial; career management is important; Profession needs core competency status.”<sup>96</sup>
- “Partner with Chief Human Capital Officer to develop and implement innovative recruitment, training, and retention strategies that will motivate and retain acquisition professionals.”<sup>97</sup>

In 2008, SSCI's Audit and Evaluations Staff conducted an audit of the IC's acquisition capability. The staff concluded the following:

[The IC] has insufficient experienced professionals to properly oversee the execution and management of billions of dollars in annual acquisitions, and there is a need for better management and training of the workforce. There is also a need for a skills assessment, establishment of tenure requirements for acquisition managers, and succession planning.<sup>98</sup>

Additional findings gleaned from the audit, which was begun during the 110<sup>th</sup> Congress and completed during the 111<sup>th</sup> Congress, were reported by SSCI in S.Rept. 112-3.

[T]he IC did not have enough experienced acquisition professionals to oversee billions of dollars in annual acquisitions; and the IC needed better management training and career planning for its workforce. In addition, the audit raised serious concerns about the role of

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<sup>92</sup> Testifying in 2011, the then-head of the Office of Federal Procurement Policy stated that a “capably and appropriately sized workforce serving as stewards of taxpayer dollars is a critical element in providing better acquisition outcomes and improving government performance.” He also noted several problems caused by the lack of a sufficient acquisition workforce, including the “failure to adequately oversee the contractor and ensure that it delivers what it committed to, in terms of cost, schedule, and performance.”

<sup>93</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Intelligence Community Contractors: Are We Striking the Right Balance?* p. 77.

<sup>94</sup> Everett, “‘Procuring the Future’ 21<sup>st</sup> Century IC Acquisition,” p. 9.

<sup>95</sup> *Ibid.*, p. 12. This phrase appears under the heading “Challenges” on a slide titled “IC Procurement Strategic Focus.”

<sup>96</sup> *Ibid.*, p. 13. This text appears under the heading “Acquisition Workforce Advocacy” on a slide titled “DNI PE Top Priorities.” The acronym *PE* refers to procurement executive.

<sup>97</sup> *Ibid.*, p. 16.

<sup>98</sup> U.S. Congress, Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence United States Senate Covering the Period January 4, 2007 to January 2, 2009*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., March 9, 2009, S.Rept. 111-6 (Washington: GPO, 2009), pp. 43-44.

contractors in overseeing acquisitions; the insufficient government monitoring of contractor performance and the need to better incentivize contractor performance; and the need to improve contract audit services.<sup>99</sup>

The committee’s final audit report contained recommendations, but they were not included in SSCI’s publicly available report. SSCI said it would track the IC’s “implementation of these recommendations and its overall acquisition performance in coming years.”<sup>100</sup>

Appearing before a HSGAC subcommittee hearing in 2011, the ADNI/CHCO indicated her office was working on a strategic workforce plan for the acquisition workforce. The plan was to address core skills, training, and implementation milestones.<sup>101</sup> The need for a comprehensive plan that, when implemented successfully, would meet the IC’s requirements was highlighted by an excerpt from the appendix to the same hearing in 2011.

Despite the importance of a strong IC acquisition workforce for proper contractor management, internal and external reviews of that workforce have identified significant shortfalls. For example, the ODNI Office of Inspector General recently found that Contracting Officer Technical Representatives [COTRs] within ODNI, who have primary responsibility for developing contract requirements and assessing contractor performance, are not managed as an essential component of ODNI’s acquisition workforce and may not receive sufficient training in services contracts, including those that are used to acquire the services of core contractors. Likewise, a report on IC acquisitions by the Intelligence and National Security Alliance (NSA) found that “there are too few acquisition and procurement officials available to review and process ... contracts, many of whom are over-extended and under-experienced.” Another INSA report concluded that there is a “need for competent people who can both partner with industry and challenge industry’s estimates and programs.” It should be noted that acquisition workforce deficiencies have been found across the government as multiple Government Accountability Office reports have cited problems at the Department of Defense (DOD), the Department of Homeland Security (DHS), and other federal agencies.<sup>102</sup>

Testimony provided by ODNI in 2014 echoed SSCI’s findings. The PDDNI suggested that ODNI might not be able to maintain sufficient numbers of contracting officers and contract lawyers.<sup>103</sup>

## Conclusion

Similar to the rest of the federal government, the IC has relied on contractors for many years to perform a variety of functions. Core contractor employees, in particular, are an essential component of the IC’s workforce, providing skills and expertise, bolstering the in-house workforce (i.e., agency employees), providing support services, and accomplishing short-term programs or projects.

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<sup>99</sup> U.S. Congress, Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence United States Senate Covering the Period January 3, 2009 to January 4, 2011*, p. 41.

<sup>100</sup> *Ibid.*

<sup>101</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Intelligence Community Contractors: Are We Striking the Right Balance?* p. 37.

<sup>102</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Intelligence Community Contractors: Are We Striking the Right Balance?* p. 77.

<sup>103</sup> *CQ Congressional Transcripts*, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on the Intelligence Community Contractor Workforce,” statement of Stephanie O’Sullivan, p. 19.

Using contractors is not without risk, however. The challenge for the IC leadership is to monitor contractors and the work their employees do, ensure contractor personnel are not performing inherently governmental work (unless circumstances permit them to do so), track contractor performance of closely associated functions, and retain control over its mission and operations when contractor personnel perform critical functions. A related challenge for the IC is to maintain an acquisition workforce that has the capacity, in terms of size, expertise, and training, to oversee the many contractors and contractor employees performing work for the intelligence community.

The challenge for Congress, and other interested parties, that exercise, or would like to exercise, oversight over the IC is the nature of the community's work and activities. The IC is a mix of classified and unclassified activities and materials, and it appears that the IC's efforts to effectively manage its contractors and their employees largely take place outside of public view and may be classified. The initiatives described above may be useful resources, particularly for members of HPSCI and SSCI.

# Appendix A. Definitions

## Glossary

<b>Closely associated function</b>	See <i>Function closely associated with inherently governmental activity or function</i> .
<b>Commercial activity or function</b>	“A recurring service that could be performed by the private sector. This recurring service is an agency requirement that is funded and controlled through a contract, fee-for-service agreement, or performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.” <sup>104</sup>
<b>Contractor</b>	A company or business (i.e., an entity) that has been awarded a contract by a federal agency. The Office of the Director of National Intelligence (ODNI) identifies another category, independent contractor, and defines this type of contractor as a “self-employed individual with whom an IC element enters into a contract....” <sup>105</sup>
<b>Contractor employee</b>	An individual who works for a contractor.
<b>Core contract personnel</b>	“For the purposes of this Directive [Intelligence Community Directive 612], core contract personnel are those independent contractors or individuals employed by industrial contractors who augment USG [U.S. Government] civilian and military personnel by providing direct technical, managerial, or administrative support to IC elements. Core contract personnel typically work alongside and are integrated with USG civilian and military personnel and perform staff-like work.” <sup>106</sup>
<b>Critical activity or function</b>	A critical function is “a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. Typically, critical functions are recurring and long-term in duration.” <sup>107</sup>
<b>Function closely associated with inherently governmental activity or function</b>	A closely associated function involves “certain services and actions that generally are not considered to be inherently governmental functions [but] may approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials’ performance of an inherently governmental function.” <sup>108</sup>
<b>Full-time equivalent (FTE)</b>	“The staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776) rather than annual available hours that includes non-productive hours (2,080 hours).” <sup>109</sup>
<b>Independent contractor</b>	“A self-employed individual with whom an IC element enters into a contract to provide specific services.” <sup>110</sup>

<sup>104</sup> U.S. Office of Management and Budget, *Performance of Commercial Activities*, Circular No. A-76 (Revised), May 29, 2003, p. D-2, at [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf).

<sup>105</sup> Office of the Director of National Intelligence, “Intelligence Community Core Contract Personnel,” Intelligence Community Directive Number 612, October 30, 2009, p. 4, at [http://www.dni.gov/files/documents/ICD/ICD\\_612.pdf](http://www.dni.gov/files/documents/ICD/ICD_612.pdf).

<sup>106</sup> Office of the Director of National Intelligence, *Intelligence Community Core Contract Personnel*, Intelligence Community Directive Number 612, October 30, 2009, p. 4, at [http://www.dni.gov/files/documents/ICD/ICD\\_612.pdf](http://www.dni.gov/files/documents/ICD/ICD_612.pdf).

<sup>107</sup> U.S. Office of Management and Budget, Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” 76 *Federal Register* 56236, September 12, 2011.

<sup>108</sup> *Ibid.*, p. 56238.

<sup>109</sup> U.S. Office of Management and Budget, *Performance of Commercial Activities*, p. D-5.

<sup>110</sup> Office of the Director of National Intelligence, *Intelligence Community Core Contract Personnel*, p. 4.

<b>Industrial contractor</b>	“A commercial business entity (other than independent contractor or sole proprietorship), which enters into contracts with the IC to provide goods or services.” <sup>111</sup>
<b>Inherently governmental activity or function</b>	“[A] function that is so intimately related to the public interest as to require performance by Federal Government employees. (a) The term includes functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—(1) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; (2) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (3) to significantly affect the life, liberty, or property of private persons; (4) to commission, appoint, direct, or control officers or employees of the United States; or (5) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriations and other Federal funds. (b) The term does not normally include—(1) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or (2) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).” <sup>112</sup>
<b>Intelligence community (IC)</b>	Office of the Director of National Intelligence (ODNI); Central Intelligence Agency (CIA); National Security Agency (NSA); Defense Intelligence Agency (DIA); National Geospatial-Intelligence Agency (NGA); National Reconnaissance Office (NRO); Bureau of Intelligence and Research, Department of State; Office of Intelligence and Analysis, Department of the Treasury; Office of Intelligence and Analysis of the Department of Homeland Security (DHS); the intelligence elements of the Army, Navy, Air Force, Marine Corps, Coast Guard, Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Department of Energy (DOE); “[o]ther offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs”; and “[s]uch other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.” <sup>113</sup>
<b>National Intelligence Program (NIP)</b>	“The term ‘National Intelligence Program’ refers to all programs, projects, and activities of the intelligence community, as well as any other programs of the intelligence community designated jointly by the Director of National Intelligence and the head of a United States department or agency or by the President. Such term does not include programs, projects, or activities of the military departments to acquire intelligence solely for the planning and conduct of tactical military operations by United States Armed Forces.” <sup>114</sup>

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<sup>111</sup> Ibid.

<sup>112</sup> U.S. Office of Management and Budget, Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56236.

<sup>113</sup> 50 U.S.C. §3003(4).

<sup>114</sup> 50 U.S.C. §3003(6).

**Non-core contract personnel**

Core contract personnel are not (1) Individuals employed by contractors that produce or supply a particular industrial commodity or product, such as satellites or other manufactured equipment, or provide ongoing operational support to such a system that is an integral part of a product's value chain life cycle. (2) Individuals employed by contractors that provide widely available commercial services and functions, as defined by Office of Management and Budget *Circular A-76* and the *Federal Acquisition Regulation*, such as food and catering; janitorial, grounds, and facilities maintenance; and building or facility security; which are not specific or tailored to the business or mission of the IC. (3) Individuals employed by contractors who are not required to possess a security clearance in order to perform their work, unless they are performing work specific to the mission of the IC, e.g., open source collection and analysis.<sup>115</sup>

**Personal services contract**

"[A] contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees."<sup>116</sup>

"A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.... An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee."<sup>117</sup>

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<sup>115</sup> Office of the Director of National Intelligence, *Intelligence Community Core Contract Personnel*, p. 4. (Italics in original.)

<sup>116</sup> 48 C.F.R. §2.101(b).

<sup>117</sup> 48 C.F.R. §35.104(a) and (c)(1).



## Appendix B. Cost of Using Contractors

Discussions about the federal government’s use of contractors often include questions about the cost of contractor personnel, and, relatedly, the cost of contractor employees relative to the cost of federal employees for the performance of a particular function. The Senate Select Committee on Intelligence noted this concern with regard to the IC’s use of contractors when it wrote the following:

The Committee for some time has been concerned about the dramatic increase in the use of contractors by the Intelligence Community since 9/11. While contractors can serve an important role in providing expertise and filling an emerging need quickly, the Committee notes that contractor personnel costs tend to be substantially more than government personnel rates. Therefore, the Committee commends the Intelligence Community for its efforts to reduce core contractors and to convert core contractors where appropriate to government employees. However, data reviewed by the Committee indicates that some elements of the IC have been hiring additional contractors after they have converted or otherwise removed others, resulting in an overall workforce that continues to grow.<sup>118</sup>

Concerns about cost were raised again several years later, during a Senate Homeland Security and Governmental Affairs Committee hearing, when the committee chairman advised that “[W]hen agencies turn to contractors as a default option without careful analysis, they run the risk of paying more to get work done than they would have paid if they had just relied on federal employees.”<sup>119</sup>

Calculating the cost of contractor employee (or federal employee) performance is beset by a host of challenges, not the least of which is developing generally accepted definitions of *cost of government performance* and *cost of contractor performance*. Other challenges include the lack of “a standard process for performing cost analysis [and] resources needed to collect data” and methodological and practical considerations.<sup>120</sup> See CRS Report R42341, *Sourcing Policy: Selected Developments and Issues*, by Elaine Halchin, for information about several efforts by federal agencies and other interested parties to develop cost analysis models.

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### Disclaimer

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<sup>118</sup> U.S. Congress, Senate Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2012*, p. 22. A similar statement also appeared in U.S. Congress, Senate Select Committee on Intelligence, *Report of the Select Committee on Intelligence United States Senate Covering the Period January 5, 2011 to January 3, 2013*, 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 22, 2013, S.Rept. 113-7 (Washington: GPO, 2013), p. 17.

<sup>119</sup> *CQ Congressional Transcripts*, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on the Intelligence Community Contractor Workforce,” statement of Thomas Carper, June 18, 2014, p. 2.

<sup>120</sup> CRS Report R42341, *Sourcing Policy: Selected Developments and Issues*, by Elaine Halchin, p. 39.

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