SOVEREIGNTY UNDER CONTRACT:
AMERICAN SECURITY CONTRACTING AND GRAND STRATEGY

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For the first time in the history of major American wars, the ratio of contractors to military servicepersons increased to more than 1:1 at the height of the Iraq war in 2007. What tensions do security contractors reveal for American sovereignty and grand strategy? Contractors represent a challenge to conventional perspectives because sovereign states are not supposed to outsource war to private forces. However, contracting also helps sustain American power by avoiding counting contractors in the political costs of war. This paper examines the politics of sovereignty under contract by drawing on two research efforts. First, it delves into one security contractor, Blackwater (now known as Academi), using an originally assembled archive of all 2,238 articles in seven news sources on Blackwater between 2000 and 2016, publicly available data in Congressional hearings, and documents from Blackwater trials. Second, it explores the history of American contracting by examining all bureaucratic memos and legislative reports on contracting from 1950 till present. The analysis fuses IR and American political development to present accountability gaps in Blackwater’s contracting practices while also situating security contracting within a moment in the state of American contracting where all contracting becomes securitized. The paper contributes to a new understanding of sovereignty and grand strategy where buried in bureaucratic politics are dramatic redefinitions of “inherently governmental functions” and changing contours of sovereign authority.

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DRAFT: PLEASE DO NOT CIRCULATE OR CITE.
I. TIPPING THE SCALE IN AMERICAN SECURITY

The war will be won in large measure by forces you do not know about, in actions you will not see and in ways you may not want to know about, but we will prevail.

At the height of the war in Iraq in 2007, contractors outnumbered American troops with estimates of 180,000 contractors from 630 companies and 100 countries deployed alongside 160,000 soldiers. By late 2009, 104,000 contractors and 64,000 American troops were on the ground in Afghanistan. For the first time in the history of major American wars, the ratio of contractors to military servicepersons increased to more than 1:1 (Table 1). A third of all Iraqi reconstruction funds went to security contractors, equaling the combined payments of “more than 90 percent of all taxpayers” who “might as well remit everything they owe directly to [contractors].” The trend led practitioners to observe that “in Iraq, the postwar business boom was not oil, it was security,” and scholars to examine the “growing market for force [that] now exists alongside, and intertwined with, state military and police forces.”

The epigraph quotes from the Central Intelligence Agency’s (CIA) then number three official, Buzzy Krongard, whose reference to “forces you do not know about” could be a general nod to physical forces or events. But Krongard’s statement also foreshadows an unprecedented contractor force in American security. This paper contextualizes the emerging security market within the larger American bureaucratic apparatus for contracting and explores the accountability gaps of sovereignty under contract. The effort reveals the bureaucratic scaffolding behind a grand strategy that tips the scale of American security toward a hybridized public and private force.

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3 Ibid.
<table>
<thead>
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<th>War</th>
<th>Contractors</th>
<th>Military</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Revolution</td>
<td>1,500</td>
<td>9,000</td>
<td>1:6</td>
</tr>
<tr>
<td>Mexican/American</td>
<td>6,000</td>
<td>33,000</td>
<td>1:6</td>
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<td>Civil War</td>
<td>200,000</td>
<td>1,000,000</td>
<td>1:5</td>
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<td>World War I</td>
<td>85,000</td>
<td>2,000,000</td>
<td>1:20</td>
</tr>
<tr>
<td>World War II</td>
<td>734,000</td>
<td>5,400,000</td>
<td>1:7</td>
</tr>
<tr>
<td>Korean War</td>
<td>156,000</td>
<td>393,000</td>
<td>1:2.5</td>
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<td>Vietnam War</td>
<td>70,000</td>
<td>359,000</td>
<td>1:6</td>
</tr>
<tr>
<td>Gulf War</td>
<td>50,400</td>
<td>541,000</td>
<td>1:10</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>104,000</td>
<td>64,000</td>
<td>1.6:1</td>
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<tr>
<td>Iraq War II</td>
<td>180,000</td>
<td>160,000</td>
<td>1:1</td>
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</tbody>
</table>

Security contracting reflects the general predicament governments face in a “make or buy” decision when industry is capable of providing comparable goods or services for governance. The conventional wisdom for the rise in global security contracting is that the end of the Cold War “gave states a reason to downsize their military forces, freeing up millions of former military personnel from a wide variety of countries, many of them Western. At the same time, the end of the Cold War lifted the lid on many long-simmering conflicts held in check by the superpowers.” Security contractors filled the vacuum for these peripheral conflicts when the U.S. and others turned a blind eye. This market-driven narrative makes sense for security contractors in what political scientists term “weak states” like Sierra Leone (who used Executive Outcomes) and Papua New Guinea (who used Sandline). However, the explanation falls short of accounting for the rise in American security contracting for a “strong state.”

The American security market is traditionally dominated by weapons manufacturers like Lockheed Martin, which as the largest federal contractor received $36.8 billion in 2016, more than the budgets of the Department of Commerce, the Department of Interior, the Small Business Administration, and Congress combined.

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8 Isenberg 2008: 1.
9 I use the language of the discipline, even though the weak state/strong state distinction is ultimately unhelpful for understanding contracting.
In Iraq, security contracting diversified beyond manufacturing to include service provision. Contractor roles varied from logistical “life support,” like setting up bases, to security roles when protecting top diplomats during counterinsurgency campaigns. Indeed, “with every week of insurgency in a war zone with no front, these companies [were] becoming more deeply enmeshed in combat, in some cases all but obliterating distinctions between professional troops and private commandos. More and more, they give the appearance of private, for-profit militias.”

This paper examines the politics of sovereignty under contract by drawing on two research efforts. First, it delves into one security contractor, Blackwater (now known as Academi), using an originally assembled archive of all 2,238 articles in seven news sources on Blackwater between 2000 and 2016, publicly available data in Congressional hearings, and documents from Blackwater trials. Second, it explores the history of American contracting by examining all bureaucratic memos and legislative reports on contracting from 1950 till present. The analysis presents specific accountability gaps in Blackwater’s contracting practices and also situates security contracting within a moment in the state of American contracting where all contracting becomes securitized. In other words, the paper argues for understanding the rise of security contracting within the broader American bureaucratic apparatus. In doing so, the paper contributes to a new understanding of sovereignty and grand strategy with the lens of security contracting. In short, the purpose and form of sovereign governance is far from self-evident. When sovereignty is under contract, as in security contracting, we are allowed a rare glimpse into the behind-the-scenes of producing the aims and means of political authority. The paper then uses the particularities of security contracting and Blackwater to investigate the broader debates raging for the past five decades on how to accommodate private within public. We cannot fully appreciate the stakes of sovereignty under contract for grand strategy until we pay attention to the wider context of producing these arrangements that are only now subject to scrutiny.

Many scholars in international politics study security contractors systematically, or as single-case studies, in historical and contemporary accounts. A popular line of inquiry is asking “whether privatization of security in strong states will lead to disruptive change in military effectiveness or will be folded into a new reinforcing process of control.” The conventional investigations of security contractors follow two classic problems for sovereignty: Weberian monopoly of force and Huntingtonian civil-military relations. Contractors represent a challenge to conventional sovereignty because sovereign states are not supposed to outsource war to private forces. Security contractors also disrupt the civil-military balance by posing as a hybrid entity that does not face the same loyalty tests as the military or the same scrutiny as civilians. For some, contractors raise a deep challenge to the guardians of the public as “a government dependent on contractors to function too easily loses sight of those things that only government can do well.”

This paper questions any taken-for-granted notion of “things that only government can do well.” It argues that public and private interact in messy ways rather than stay apart in tidy boxes. These overlapping relations arrangements force a re-evaluation of the public-private distinction, a master relation in politics that structures other foundational binaries like domestic and international, internal and external, and legal and illegal. The Blackwater archival materials show accountability gaps in finance,

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17 Avant 2005: 256.

law, and politics where the same demands that sustain contracting ultimately undermine effective accountability. Blackwater is often pushed to a parallel sphere of “shadow” governance separate from a purer sovereign space. However, contractors are a part not apart from sovereign politics. Such inclusion raises its own set of problems that we are ill-equipped to recognize from the Weberian and Huntingtonian dilemmas. Namely how public and private are treated interchangeably without symmetric obligations for political authority.

Scholars of grand strategy consider the various military, economic, and diplomatic means for high-level foreign policy coordination. 9 Grand strategy involves collective deliberation on four key elements: defining national interests; identifying state threats; allocating state resources; and mobilizing policy support.20 For some, grand strategy reflects a macro-micro gap where high-level deliberations stand apart from on-the-ground decisions.2  However, for others, it “takes a whole apparatus of the state to execute a grand strategy.”22 Most recently, a new direction in grand strategy research pushes scholars to evaluate the “politics of collective mobilization” in power politics from traditional realpolitik to critical security studies.23 However, discussions of implications of security contractors for grand strategy are in its infancy.24 Perhaps contractors provide a back-door to achieve a hegemonic grand strategy where the U.S. maintains a “role of guarantor of global stability at a time when the American public is unwilling to provide the resources necessary.”25 The Iraq war represents how “almost no

25 Isenberg 2009: 5.
thought had been given to an overall strategy to determine which jobs and functions should be handled by the government, and which could be turned over to private companies.\textsuperscript{26}

This paper highlights the bureaucratic struggle in maintaining a grand strategy of sovereignty under contract by connecting the macro-micro gap and taking seriously the labor of collective mobilization in power politics. From Eisenhower’s outsourcing directive to the current massive contracting apparatus, American bureaucrats engaged in debates on demarcating the role of contractors so that they do not take over “inherently governmental functions.” Buried in bureaucratic politics are the dramatic redefinitions of “inherently governmental functions” and the changing contours of sovereign authority. In order to accommodate security contractors, bureaucrats create new categories of government functions, revise examples of necessary governmental authority, and prohibit particular types of contracting relations that affect all facets of governance. In doing so, the state of American contracting became “securitized.” While the deployment of security contractors enables a particular fulfillment of American grand strategy abroad with limited political costs, the use of contractors initiates another set of grand strategic bargains about the form and purpose of governance. At the heart of these grounded practices of grand strategy is a productive tension where contracting continually defies the bureaucratic borders of public and private within sovereign power.

The rest of the paper proceeds as follows. The second section introduces the context and sovereign dilemmas in security contracting. The third section introduces the case of Blackwater and uses it to illustrate accountability gaps in finance, law, and politics. The fourth section broadens the lens to trace the history of American contracting in general and the bureaucratic construction of “inherently governmental” functions. The fifth section concludes by specifying how American security contracting dynamically interacts with bureaucratic demarcations of public and private in sovereign politics.

II. FROM BUREAUCRATS TO VENTURE CAPITALISTS

In 1992, former Vice-President and then Secretary of Defense Dick Cheney commissioned a study from Halliburton on how to quickly privatize the military bureaucracy. By the end of his term, Cheney reduced military spending by $10 billion and the number of troops by 27% from 2.2 million to 1.6 million. As the budget and manpower shrunk, Cheney’s “idea was to free up the troops to do the fighting while private contractors handled the back-end logistics.” As Cheney went on to lead Halliburton, in 1995 a Defense Science Board report suggested that “the Pentagon could save up to $12 billion annually by 2002 if it contracted out all support functions except actual warfighting.” During this time, the U.S. diversified its international security and peacebuilding operations to include contractors. For instance, in 1996, the Clinton administration sent Military Professional Resources Incorporated (MPRI) to train the Croatian military against Yugoslavia, “a contract that ultimately tipped the balance of that conflict.” DynCorp, another early contractor, “supported every major U.S. military campaign since Korea.” Outside international wars, “virtually all U.S. contributions to international civilian police units in the 1990s were DynCorp employees.”

By 2000, American security contracting was in position for an unprecedented boom. Secretary of Defense Donald Rumsfeld continued Cheney’s transformation, stating that the Pentagon “must behave less like bureaucrats and more like venture capitalists.” The military moved to expand the 1985 Logistics Civil Augmentation Program, or LOGCAP, under which “contractors provided services ranging from building bases to cooking food and doing laundry.” Apart from Cheney, the George W. Bush administration appointed many former executives of defense contractors, like

29 Isenberg 2008: 2.
30 Scahill 2008: 52
31 Isenberg 2008: 2.
Under Secretary of Defense Pete Aldridge (Aerospace Corporation), Army Secretary Thomas White (Enron), Navy Secretary Gordon England (General Dynamics), and Air Force Secretary James Roche (Northrop Grumman). Following the 9/11 attacks, the military awarded a 10-year $32 billion LOGCAP contract to Halliburton/KBR for the “war on terror.”

Defense contractors make up a large share of all American contracting (Table 2). Whereas most defense contractors have long established manufacturing links with the American government, the Iraq war saw a proliferation of security service providers deployed alongside the military. A 2013 investigation by The Financial Times estimates the U.S. spent at least $138 billion on security contractors, with former Halliburton subsidiary, Kellogg, Brown and Root (KBR), awarded the highest contract value of at least $39.5 billion. None of the top contractors in Iraq included weapon manufacturers. Instead, the demand for security contractors in Iraq came from needs outside traditional combat.

Table 2. Top 10 American Contractors by Contract Value and Industry, 2016

<table>
<thead>
<tr>
<th>Rank</th>
<th>Name</th>
<th>Contract Value</th>
<th>Industry</th>
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<tbody>
<tr>
<td>1</td>
<td>Lockheed Martin</td>
<td>$36.8 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>2</td>
<td>Boeing</td>
<td>$16.5 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>3</td>
<td>General Dynamics</td>
<td>$13.8 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>4</td>
<td>Raytheon</td>
<td>$12.7 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>5</td>
<td>Northrop Grumman</td>
<td>$11 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>6</td>
<td>McKesson</td>
<td>$8.4 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>7</td>
<td>United Technologies</td>
<td>$7.2 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>8</td>
<td>L-3 Communications</td>
<td>$5.4 billion</td>
<td>Defense</td>
</tr>
<tr>
<td>9</td>
<td>Bechtel Group</td>
<td>$4.9 billion</td>
<td>Defense, Energy</td>
</tr>
<tr>
<td>10</td>
<td>BAE Systems</td>
<td>$4.6 billion</td>
<td>Defense</td>
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The State Department’s Bureau of Diplomatic Security began a Worldwide Personal Protective Services in 2002, “originally envisioned as a small-scale bodyguard operation to protect small groups of U.S. diplomats and other U.S. and foreign officials. In Iraq, the administration turned it into a paramilitary force several thousand strong.

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35 Scahill 2008: 53.
37 Bloomberg Government: https://about.bgov.com/bgov200/
Spending on the program jumped from $50 million in 2003 to $613 million in 2006.”

In 2007, former Ambassador Ryan Crocker stated, “there is simply no way at all that the State Department’s Bureau of Diplomatic Security could ever have enough full-time personnel to staff the security function in Iraq. There is no alternative except through contracts.”

While competitors, the security firms coordinated and subcontracted with each other, leading one government official to foresee how “each private firm amounts to an individual battalion. Now they are all coming together to build the largest security organization in the world.” The coordination stepped up in May 2004 when the U.S. awarded a $293 million three-year contract to the newly formed British firm Aegis Defense Services, founded by Tim Spicer who previously ran Sandline.

Aegis was contracted to “coordinate and oversee the activities and movements of the scores of private military firms in the country servicing the occupation, including facilitating intelligence and security briefings.” The resulting self-regulation worried politicians that “the fastest-growing component of government is the ‘shadow government’ represented by private companies doing public work under federal contract.”

The shadow government nature of security contractors recalls two conventional dilemmas in sovereign politics.

**Dilemmas in Sovereign Politics**

American security contracting challenges what it means to be a sovereign state by disrupting the Weberian monopoly of force. The Weberian state is one that “(successfully) claims the monopoly of the legitimate use of physical force within a given

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42 Scahill 2008: 223-224.
The lines between various “public” and “private” relations inform state-sanctioned, state-controlled, and state-legitimated security practices. Security contractors directly control governmental resources and decision-making by their participation in the “formal capacity to decide over the use of force.” Within this context,

the private provision can change the underlying meaning of the state. Because the state is the sphere within which public is defined, moving from public to private provision can shift people's expectations of the proper size and responsibilities of the public sphere and thus the value attached to the public delivery of services.

When the use of force goes beyond public control, the state undergoes a transformation to determine its political authority. In addition, security contractors indirectly control governmental resources and decision-making because of close ties with politicians (Cheney and Halliburton being the most obvious example). As such, an accountability gap emerges where security contractors exert tremendous discretionary power in interpreting their mandated duties, especially in uncertain war zones. Former Ambassador to Iraq, Joe Wilson, echoes these concerns in Weberian terms:

I think it’s extraordinarily dangerous when a nation begins to outsource its monopoly on the use of force and the use of violence in support of its foreign policy or national security objectives. The billions of dollars being doled out to war companies makes them a very powerful interest group within the American body politic and an interest group that is in fact armed. And the question will arise at some time: to whom do they owe their loyalty?

There are two related issues. The first is that outsourcing a monopoly on the use of force undermines American standing as a sovereign state. The second and less commonly articulated is that precisely because this is about the use of force, security contractors are not the same as any other interest group. They are armed and have the capacity to use force, which further undermines Weberian sovereign power.

Ambassador Wilson’s final point about loyalty sounds less Weberian and more resonant of a distrust of contractors long preceding sovereign states. Machiavelli famously railed against mercenaries:

45 Leander 2005: 807.
46 Avant 2005: 43-44.
Mercenary and auxiliary troops are both useless and dangerous; and if any one attempts to found his state upon mercenaries, it will never be stable or secure. [...] The reason of all this is, that mercenary troops are not influenced by affection, or by any other consideration except their small stipend, which is not enough to make them willing to die for you. They are ready to serve you as soldiers so long as you are at peace; but when war comes, they will either run away or march off.\(^{48}\)

Security contractors then also complicate standard civil-military relations. Samuel Huntington identifies a theory of civil-military relations where “objective civilian control” is crucial to striking the balance between a military strong enough to keep a state from conquest yet obedient enough to not result in a coup.\(^{49}\) Huntington addresses this “civil-military problematique”\(^{50}\) by advocating for societal ideology to align with a conservative-realist military ethic and making the military politically sterile through professionalization.\(^{5}\) However, security contractors create a third civil-military actor beyond military and society that has implications for striking any Huntingtonian balance. Security contractors also alter civil-military relations by serving as leverage between government and soldiers. For instance, in 1997, Papua New Guinea’s military mutinied and toppled the government after the latter contracted with Sandline, sliding into the coup portion of Huntington’s problematique.\(^{52}\)

Moreover, while contractors are often functionally like soldiers, they may not share Huntington’s professionalization or conservative-realist ethic. To be sure, most security contractors have a military background, with special forces being in especially high demand, but it is not clear if the military ethic travels to those who do not wear a military uniform. The difference is about obligation. Whereas military personnel are obligated to risk their lives or face disciplinary action, security contractors have been known to break their service contracts when the risk is too high without significant


\(^{51}\) Huntington 1957: 91.

costs. In doing so the security contractors endanger their reputation, but this is a different kind of cost under a different ethic than the one faced by soldiers.\textsuperscript{53}

The Weberian and Huntingtonian dilemmas play out in contemporary American security contracting. However, tensions go deeper than such conventional frames to raise more profound implications for accountability and authority. To fully understand the scope of the new security dilemmas, it is useful to dig into one particular contractor and its politics.

III. THE “FEDEX OF NATIONAL SECURITY”

Blackwater is perhaps the most infamous American security contractor. Its founder, Erik Prince, has stated his corporate goal is “to do for the national security apparatus what FedEx did to the postal service.”\textsuperscript{54} Prince is an ex-Navy SEAL and well-connected billionaire from Michigan. His sister, Betsy DeVos, is Trump’s Secretary of Education. Prince established Blackwater in 1996 as a military training facility, receiving an FBI contract to train police officers after the Columbine school shootings and a Navy contract for counter-terrorism after the bombing of the USS Cole destroyer in 1999. Following the 9/11 attacks, the FBI extended their contract to include counter-terrorism and the CIA contracted to protect stations in Afghanistan, which led to a big contract in 2003 to protect Paul Bremmer, the top American diplomat in Iraq. By 2005, Blackwater had more than half a billion dollars in federal contracts and in 2007 they had more than a billion.

All throughout, Blackwater headhunted high-ranking government officials. After stepping down from the CIA, Buzzy Krongard went on to work as an executive at Blackwater. In 2005, Joseph E. Schmitz, the Pentagon’s Inspector General, and “the top U.S. official in charge of directly overseeing military contractors in Iraq and Afghanistan,” resigned to serve as the Prince Group’s chief operating officer and general


\textsuperscript{54} Erik Prince speaking at West 2006 conference, January 11, 2006.
counsel. J. Cofer Black, the State Department’s head of counterterrorism and leader of the hunt for Bin Laden, joined Blackwater in 2004 as the company’s vice chairman.

Between 2001 and 2008 Blackwater saw an incredible growth of 162,000% from less than a million dollars in federal contracts to over $1.2 billion (Figure 1). These are only the contracts we know about. Many contracts, like with the CIA, are off-the-books or known as black contracts. In September 2007, Blackwater contractors killed 17 and injured dozens of Iraqi civilians in Nisour Square, Baghdad, provoking public outrage. Blackwater rode out the scandal for a couple of years, changed their name, and then sold the company now known as Academi.

![Figure 1. Value of Blackwater Federal Contracts, 2001-2008](image)

The rise of Blackwater offers an effective prism to evaluate the politics of sovereignty under contract. Journalists cited Blackwater as building “a privatized parallel structure to the U.S. national security apparatus.” Politicians echoed this concern, like in a Congressional hearing focused entirely on Blackwater whose purpose was “to question whether [Blackwater] created a shadow military of mercenary forces

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57 Scocca 2008: 43-44.
that are not accountable to the U.S. Government or to anyone else.”

Scholars maintain that “systemic privatization” shrinks the state and “changes who guards the guardians.” However, Blackwater does not reflect a parallel apparatus or shrinking of the state; instead, it reflects the diversification of security structures to include both public and private actors. The hybridity creates alternative narratives where contractors are seen as an intrinsic part of a state’s “self” or just one of many “help for hire.”

At first, contractors like Blackwater are just one cog of the larger security arrangement that governments marshal to meet their needs. Congressman Yarmouth questions Erik Prince whether Blackwater poaching Navy SEALs is part of the state competing with itself:

But in this situation, the American taxpayers are bidding against themselves. Because we trained Navy SEALs, Navy SEALs then go into your employ, then the Navy has to bid, as I understand, in one report, $100,000 to get them back. But we are bidding against ourselves, aren’t we? We are not bidding against another external competitor.

Both the government and contractor perspectives deploy this “demand-based” argument for initial contracting. As Krongard warned the American public about the coming war on terror and hidden forces, he also brokered Blackwater’s first major war contract. In early 2002, Krongard visited the CIA’s outpost in Kabul and “realized the agency’s new station was sorely lacking security. Blackwater received a $5.4 million six-month no-bid contract to provide twenty security guards for the Kabul CIA station in April 2002.”

A little over a year after the Kabul contract, Blackwater employees, under contract with Iraq’s Coalition Provisional Authority (CPA), “carried weapons, had their own helicopters and fought off insurgents in ways that were hard to distinguish from

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The convergence between contractors and government functions then forces a position of public and private demarcation vis-à-vis the state.

In response, the demand-contingent arguments shift to a universal appeal to normalize contracting. After the CPA contract, Prince began to position Blackwater as “a patriotic extension of the U.S. military, and in September 2005 he issued a company-wide memorandum requiring all company employees and contractors to swear the same oath of loyalty to the U.S. Constitution as the Pentagon, State Department and intelligence agencies.” When asked why there was no clause in Blackwater’s by-laws forbidding it to work for American enemies, Prince replied:

This idea that we have this private army in the wings is just not accurate. The people we employ are former U.S. military and law enforcement people, people who have sworn the oath to support and defend the Constitution against all enemies, foreign and domestic. They bleed red, white and blue. So the idea that they are going to suddenly switch after having served honorably for the U.S. military and go play for the other team, it is not likely.

Prince opened several new offices in Baghdad, Amman, and Kuwait City, “as well as headquarters in the center of the U.S. intelligence community in McLean, Virginia, that would house the company’s new Government Relations division.” After a 2004 ambush of four Blackwater guards in Fallujah, “under the guise of doing damage control and briefings, Prince and his entourage would be able to meet with Washington’s power brokers and sell them on Blackwater’s vision of military privatization at the exact moment that those very senators and Congressmen were beginning to recognize the necessity of mercenaries in preserving the occupation of (and corporate profits in) Iraq.” Key to Prince’s sell was to move away from the language of mercenaries and loyalty tests to a partnership against emerging threats. For instance, Prince argued, “the

67 Scahill 2008: 211.
Oxford Dictionary defines a mercenary as a professional soldier working for a foreign government. And Americans working for America is not it.”

The efforts paid off as legislators began referring to Blackwater as “our silent partner in this struggle.”

The argument shifts again from patriotic partners to contractors as a special kind of security actor informally part of the state but where the government benefits from plausible deniability:

The existence of a powerful shadow army enabled the waging of an unpopular war with forces whose deaths and injuries went uncounted and unreported. It helped keep a draft, which could make the continuation of the war politically untenable, off the table. It also subverted international diplomacy because the administration didn’t need to build a “coalition of the willing”: it rented an occupation force. Private soldiers were hired from countries that had no direct stake in the war or whose home governments opposed it, and were used as cheap cannon fodder.

Security contractors like Blackwater keep down the political costs of war and reduce incentives for coaxing precarious alliances. Other than mitigating domestic audience costs and international cooperation, contracting also allows governments to do more in war. Prince tells how “Blackwater’s work with the CIA began when we provided specialized instructors and facilities that the Agency lacked. In the years that followed, the company became a virtual extension of the CIA because we were asked time and again to carry out dangerous missions, which the Agency either could not or would not do in-house.” Prince then echoes the perception of Blackwater as an extension of the U.S. government taking advantage of legal ambiguity for strategic purpose.

There are three ways to understand Blackwater: a standard demand-based security supplier; a patriotic partner of new American security; and a shadow agent that does the U.S.’s dirty security work. No one framing is truer than the other as representation depends on the audience. However, the competing narratives point to the indeterminacy of hybrid status. It is this indeterminacy that ultimately raises profound tensions for American security. While the Weberian and Huntingtonian dilemmas may keep scholars awake, for practitioners deciding what Blackwater is and

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70 Scahill 2008: 46.
what it is for is tied to accountability in governance. From this vantage point, Blackwater represents a new security dilemma in contractual relationships between public and private actors where it is often difficult to oversee contracts and maintain channels of accountability that are symmetric for both public and private purposes. In other words, in sovereignty under contract, problems arise when contracting relationships formally serve public functions without formal public oversight and accountability. For the American contracting state, such ambiguity is a strategic asset that also poses fundamental problems for the nature of governance. I discuss these accountability problems next.

**Accountability Gaps**

What the Weberian and Huntingtonian dilemmas miss about sovereignty under contract is that the same pressures to contract out result in spiraling accountability gaps. During the massive security contracting boom in 2006, the size of the U.S. federal workforce had remained the same since 1963.\(^{72}\) However, the size of the federal budget has grown three fold. Each federal employee was now responsible for seeing over a million dollars more with the same resources. The government has made investments, especially in computers, in the last 40 years, but these were not enough to keep track of an additional $2 trillion with the same workforce. Critically, the human capital shortfall also sustained the demand for contractors while making it more difficult to oversee them. Oversight is the first step for accountability.

At a minimum, oversight requires knowing how many contractors are employed by the government. But counting contractors is difficult. For instance, in December 2006, two different government groups came up with wildly different counts of the number of contractors in Iraq. The bipartisan congressional Iraq Study Group estimated the number at 5,000 contractors whereas the Pentagon’s central command estimated the number at 100,000. It is difficult to count contractors because of different definitions and black contracts. But the biggest reason is subcontracting. A federal contract can go through as many as three layers of subcontracts and firms refuse to publically disclose subcontractors for proprietary reasons. In 2004, four Blackwater contractors were...

\(^{72}\) Stanger 2009: 13.
murdered in Fallujah, Iraq, and their families filed a wrongful death suit against Blackwater. The slain contractors had inadequate protection, including vehicles without armor, which the families claimed was against their contract. A Congressional oversight committee tried to figure out whose contract Blackwater was operating under, which eventually turned out to be with Halliburton. However, Halliburton denied subcontracting with Blackwater until 2007. It took regulators three years to figure out whether Blackwater violated its contract because it was unclear whose contract it was under.\footnote{U.S. House of House of Representatives Committee on Oversight and Government Reform, Hearing on “Blackwater USA,” October 2, 2007: 5.}

Contractors also remain outside public scrutiny. Conservative estimates suggest at least a quarter of all American casualties in Iraq were of contractors. By May 2007, \textit{The New York Times} reported the total number of contractors killed to be at least 917, along with more than 12,000 wounded.\footnote{Isenberg 2008: 12.} By February 2008, the U.S. Department of Labor adjusted the figure to 1,123 contractors killed and over 13,000 injured.\footnote{Scahill 2008: 304.} Even though contractors performed key roles on the new battlefield and represented at least a quarter of the casualties, they did not receive proportionate attention. According to a study from the Project for Excellence in Journalism, less than 0.25\% of coverage about the Iraq war in a sample of 100,000 news stories between 2003 and 2007 mentioned contractors.\footnote{“A Media Mystery: Private Security Companies in Iraq—A PEJ Study,” June 21, 2007, \url{http://journalism.org/node/6153}; Isenberg 2008: 13.} My own media study of Blackwater revealed more coverage in the aggregate (2,238 stories on Blackwater between 2000 and 2016); however, I lack a comparative context of the general war coverage.

When media scrutiny is present, investigations are often restricted by blocks to Freedom of Information Act (FOIA) requests. Some activities of security contractors should be covered by the Arms Export Control Act, which opens contractors up to public disclosure and Congressional approval.\footnote{Rebecca Ulam Weiner, “The Hidden Costs of Contracting: Private Law, Commercial Imperatives and the Privatized Military Industry, International Security Program, Belfer Center for Science and International Affairs Paper, December 2008: 10.} However, many contractors circumvent
the export regime by working under the Foreign Military Sales Program where they are employed as a Pentagon liaison to foreign governments. This program avoids the export controls and also provides a reason to deny FIOA requests. For instance, “when journalists sought access to information about Halliburton subsidiary Kellogg, Brown, and Root’s work to repair oil fields in Iraq, significant portions of a Pentagon audit sent to the international monitoring board were blacked out.”78 KBR successfully claimed proprietary information could be used by its competitors to censor the report.

Three accountability gaps concerning finance, law, and politics emerge without proper oversight and public scrutiny. While IR scholars cover the implications of security contractors for democratic politics, the emphasis is often restricted to legal responsibility or industry self-regulation.79 I expand the accountability domains to finance and politics.

First, financial accountability becomes a problem when there are not enough people to oversee fair and open competition. Of Blackwater’s total contracts worth over a billion dollars, only $47 million or less than 5% were under full and open competition, meaning the contract was awarded when more than one competitor made a bid. $87 million or less than 9% were under partial competition, meaning the contract was awarded with open competition but no other competitors made a bid, which happens with extremely short deadlines. A third of all contracts were awarded under no competition, meaning the contract was closed to bids from other competitors.80 There is no data on more than half of all Blackwater contracts worth half a billion dollars, but we can assume these were also awarded under partial to no competition.

The lack of fair and open competition can result in monopoly and waste. For instance, Blackwater held 84% of all State Department diplomatic protection contracts

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80 Data obtained from the Federal Procurement Data System (https://www.fpds.gov) and legal briefs filed on behalf of Blackwater in civil trials.
around the world in 2007. This monopoly made it difficult to terminate the relationship when things went wrong. This was indeed the case following the 2008 Nisour Square civilian shootings, when the State Department retained the Blackwater contract as otherwise there would have been a security vacuum. Monopolies also shift the bargaining leverage to contractors. A lack of oversight can also result in abuse and waste. Blackwater’s original contract with the State Department in 2004 was originally of $229.5 million for five years, but by “June 30, 2006, just two years into the program, it had been paid a total of $321,715,794. A government spokesperson later said the estimated value of the contract through September 2006 was $337 million. By late 2007, Blackwater had been paid more than $750 million under the contract.”

Subcontracting compounds the waste. In a typical relationship, Blackwater’s subcontracting charges of a $600 daily rate per contractor increased to more than three times as the main contractor charged the government $2,500 for the same job.

Second, legal accountability is especially elusive for contractors as they are ruled by an unclear legal status since they “are not quite civilians, given that they often carry and use weapons, interrogate prisoners, local bombs, and fulfill other critical military roles” and “yet they are not quite soldiers.” Contractor obligations under international humanitarian law remain muddy with questions of “state responsibility for the actions of those acting in their name.” Contractors do not fit the “lawful combatant” definition under the third Geneva convention because they do not wear military uniforms or answer to a military hierarchy. Nor do contractors fit the “mercenary” definition under Article 47 of the First Additional Protocol to the Geneva Conventions or the UN Mercenary Convention because they do not have a clear overriding profit motive or foreign national status. Contractors perhaps fit best under the Bush administration’s

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81 Blackwater legal brief, filed May 1, 2008.
82 Mahoney 2017: 41.
83 Scahill 2008: 229-230.; Scahill E-mail from State Department representative, August 2006.
85 Peter W. Singer, Outsourcing War Foreign Affairs 82 (2), 2005: 126.
“illegal enemy combatant” status deployed for Guantanamo Bay detainees. In any case, a lack of clear legal status makes international regulatory action very difficult. Most recently, a multistakeholder process with the help of the International Committee for the Red Cross and the Swiss government culminated in the Montreux Document for industry self-regulation. However, the Montreux Document is nonbinding and relies on government adoption into contracts. The scope of adoption remains to be seen.

In terms of U.S. law, a patchwork of contractor protections developed during the Iraq war. In 2004, right before he left Iraq, Paul Bremmer issued Order 17 stating that “contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.” Order 17’s immunity effectively barred the Iraqi government from prosecuting contractors. In 2006, Rumsfeld classified contractors as part of the “Defense Department’s Total Force,” seen as “its active and reserve military components, its civil servants, and its contractors” that “constitute its warfighting capability and capacity.” Blackwater jumped on Rumsfeld’s “Total Force” language in its legal battles, claiming immunity from the Fallujah families suit arguing it was “performing a classic military function—providing an armed escort for a supply convoy under orders to reach an Army base—with an authorization from the Office of the Secretary of Defense” and that “any other result [than immunity] would amount to judicial intrusion into the President’s ability to deploy a Total Force that includes contractors.” Blackwater was successful in dismissing the suit in favor of forced arbitration, which was appealed by the families, who later settled.

Armed with immunity reserved for the military, contractors also remained outside the Pentagon’s Uniform Code of Military Justice (UCMJ). The in-between legal status was most evident in 2006 when a drunken Blackwater contractor shot and killed a bodyguard for the Iraqi Vice-President. Instead of criminal proceedings, he was fined

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89 Coalition Provisional Authority Order Number 17, June 27, 2004.
91 Blackwater appellate brief, filed October 31, 2005.

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and sent home. The accountability gap is stark: were this contractor in the U.S. he would face criminal charges or if in the military he would have faced a court martial. An exchange between Erik Prince and Congresswoman Maloney highlights the discrepancy:

Mr. PRINCE. Look, I am not going to make any apologies for what he did. He clearly violated our policies.

Mrs. MALONEY. OK. All right. Every American believes he violated policies. If he lived in America, he would have been arrested, and he would be facing criminal charges. If he was a member of our military, he would be under a court martial. But it appears to me that Blackwater has special rules. That is one of the reasons of this hearing.92

In fact, it was unclear which U.S. laws could apply to Blackwater. In the aftermath of the 2007 Nisour Square shootings, a team led by diplomat Patrick Kennedy concluded that they were “unaware of any basis for holding non-Department of Defense contractors [like Blackwater] accountable under U.S. law.”93 In addition to immunities under Bremmer’s Order 17 and Rumsfeld’s Total Force categorization, the State Department offered immunity to contractors willing to cooperate with the investigation without prior authorization from the Department of Justice. As a result, the State Department admitted “it might be the case that Blackwater can’t be held accountable” for the Nisour Square killings.94 Iraq ended the Order 17 immunity for contractors as of December 31, 2008 during the next Status of Forces agreement with the U.S.95

Meanwhile, the U.S. began a lengthy process to hold Blackwater contractors accountable for the Nisour Square shootings. A Federal Bureau of Investigation (FBI) report found Blackwater guards killed 14 of those civilians without cause.96 However, the first criminal proceedings against four Blackwater contractors resulted in a mistrial because of the State Department’s immunity deal, “which made it significantly harder

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93 Scahill 2008: 36.
for the Justice Department to build its case.”97 There were further reports of the State Department helping to cover up the crime scene in Nisour Square as the FBI investigated, and some senior Justice officials in turn undermined the FBI’s intention to bring more serious weapons charges.98 After a re-trial in 2014, the four contractors were convicted of the shootings – one of murder and the other three of manslaughter and firearm charges – in the first known criminal conviction of security contractors under U.S. law and were sentenced in 2015.99 However, the verdict now faces an appeal because it is not entirely settled whether the Justice Department had jurisdiction to prosecute: “Under federal law, the government has jurisdiction for overseas crimes committed by defense contractors or those supporting the Pentagon’s mission. Blackwater was working for the State Department, a distinction that jurors concluded did not matter but which has not been tested.” 00

Finally, political accountability rests on determining whom the contractors represent. During the Nisour Square sentencing trial, one witness observed: “Blackwater had power like Saddam Hussein. The power comes from the United States.” 01 The statement speaks directly to a concern from Congressman Cummings “that the ordinary Iraqi may not be able to distinguish military actions from contractor actions. They view them all as American actions.” 02 For regulators like Congressman Kucinich, such conflation is a problem because contractors are not seen as representing U.S. public interest:

If war is privatized and private contractors have a vested interest in keeping the war going, the longer the war goes on, the more money they make. Eighty-four percent of the shooting incidents involving Blackwater are where they fired first, and Blackwater

Politically, there are two interrelated issues about the public interest. First, the private interest in war-profiteering is at odds with the public interest in security, which might not include prolonging conflict. Of course, this distinction breaks down with the military-industrial complex and the incentives to justify high defense spending. Second, the private interest of protecting assets might actually undermine public efforts to win hearts and minds in a counterinsurgency campaign like Iraq.

In most military accounts, the second political accountability issue comes up more often than the first. Ann Starr, a former CPA advisor, exemplifies this perspective: “Those, for example, doing escort duty are going to be judged by their bosses solely on whether they get their client from point A to point B, not whether they win Iraqi hearts and minds along the way.” Another Colonel said “the problem is in protecting the principal, they had to be very aggressive and each time they went out, they had to offend locals, forcing them to the side of the road, being overpowering and intimidating, at times running vehicles off the road, making enemies each time they went out.” Blackwater was “actually getting our contract exactly as we asked them to, at the same time hurting our counterinsurgency effort.” Security contracting, then poses a challenge to the broader political obligations of the security mission. In this case, to Iraqis who rely on American support and to the other U.S. servicepersons whose lives become riskier because of contractor backlash.

The three accountability gaps pose costs financially, legally, and politically that ultimately force the government to demarcate clearer lines between the public and private when sovereignty is under contract. The call to demarcate usually appears as follows:

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104 U.S. House of House of Representatives Committee on Oversight and Government Reform, Hearing on “Blackwater USA,” October 2, 2007: 77-78.
We need more accountability. We need to clarify and update our laws. We need to restore the Government’s ability to manage any such contracts. We need to punish corporations that commit fraud or undermine our security. Basically, we need to reconsider which jobs should be private and which jobs should remain in the public sector.  

Demarcating public and private roles is tantamount to determining the nature of sovereign governance. These demarcation efforts are not limited to security contracting and the next section examines the emergence of overall American contracting through a bureaucratic history.

IV. THE STATE OF AMERICAN CONTRACTING

American contracting is not a new phenomenon even though the scale of contracting has recently exploded. The U.S. government’s prime contract obligations in federal procurement spending varies from 1984 to 2014 (Figure 2). Federal contract spending had a downward trend with some spikes until 2001, after which it increased 86% between 2000 and 2005 from $300 billion to $477.5 billion. By 2009, the U.S. was spending $612.4 billion on contracting, spending more than “40 cents of every discretionary dollar on contracts with private companies.” Accompanying this rise in American contracting are increasingly complex bureaucratic guidelines to regulate such activity. The U.S. Code of Federal Regulations states that “contracts shall not be used for the performance of inherently governmental functions.” However, confusion remains with defining “inherently governmental” versus “commercial” functions that may be contracted. Typical examples of commercial activities include “audiovisual products and services, automatic data process, food and health services, management

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108 “America’s first experience with privatization happened in 1492 when Queen Isabella hired an Italian contractor to explore the western ocean. [...] And America itself is named after a contract mapmaker Amerigo Vespucci.” U.S. House of Representatives, Subcommittee on Government Operations, Hearing on Contracting Fairness, July 8, 2016: Testimony of John M. Palatiello, President, Business Coalition for Fair Competition.
112 48 C.F.R. § 7.503(a).
support services, system engineering, and transportation.” 3 Contractor associations refer to this as the “yellow pages test,” where “if you can find firms in the Yellow Pages of the phone book providing contracts or services that the government is also providing, then the government service should be subject to market competition.” 4 In deciding the rules of contracting, bureaucratic politics demarcate public and private roles within sovereign governance.

![Figure 2: U.S. Government Prime Contract Spending in Inflation-Adjusted Billions, 1984-2014](image)

**Bureaucratic Wrangling**

Early American bureaucratic discussions of contracting included a 1932 special House of Representatives Committee on “government competition with private enterprise.” By 1953, the Intergovernmental Relations Subcommittee of the House

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3 U.S. Office of Management and Budget, Circular A-76 (Revised), August 4, 1983, Attachment A.
Committee on Government Operations “reported that the number of [commercial and industrial] activities conducted by Government agencies posed a real threat to private industry and imperiled the tax structure,” recommending that “a permanent, vigorous, preventive and corrective program be inaugurated.” 5 Moreover, two reports from the Commissions on Organization of the Executive Branch of Government in 1949 (First Hoover Commission) and 1955 (Second Hoover Commission), developed 22 recommendations aimed at moderating government competition with the private sector. 6

The big breakthrough came in 1955 under President Eisenhower when the Bureau of the Budget, the predecessor of the Office of Management and Budget (OMB), issued Bulletin Number 55-4: “It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.” 7 In 1966, the Johnson administration formalized the first permanent directive for government contracting with the Bureau of the Budget’s Circular A-76: “Each agency will compile and maintain an inventory of its commercial or industrial activities having an annual output of products or services costing $50,000 or more or a capital investment of $25,000 or more.” 8 Moreover, Circular A-76’s policy statement was to ensure that “[i]n the process of governing, the Government should not compete with its citizens.” 9 A memo from President Johnson explained that Circular A-76 offered “uniform guidelines and principles to conduct the affairs of the Government on an orderly basis; to limit budgetary costs; and to maintain

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7 Information about the bulletin was obtained from the U.S. Office of Management and Budget, Office of Federal Procurement Policy. Two subsequent bulletins, Numbers 57-7 (February 5, 1957) and 60-2 (September 21, 1959), reiterated this policy of governmental reliance on the private sector. Congressional Research Service Report for Congress, “The Federal Activities Inventory Reform Act and Circular A-76,” April 2007, p. 3.
the Government’s policy of reliance upon private enterprise.”  

The OMB revised the circular in 1967, 1979, 1983, 1996, 1999, 2000, and 2003. In 1977, the OMB acknowledged that implementation of “Circular A-76 has been heavily criticized as inconsistent and frequently inequitable.” As additional guidance, the OMB then published the Supplemental Handbook in 1979, “intended to promote more effective and consistent implementation.” The 1979 version of Circular A-76 also revised the 1966 policy statement to add a specific type of political system: “In a democratic free enterprise economic system, the Government should not compete with its citizens. The private enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength.” The next major change came in 1996 when the Clinton Administration used Circular A-76 to insert language on “reinventing government.” Specifically, they claimed “Circular A-76 is not designed to simply contract out. Rather, it is designed to empower federal managers to make sound and justifiable business decisions.” W. Scott Gould of the U.S. Department of Commerce echoed:

Throughout the first Clinton administration, while the Office of Management and Budget was revising the A-76 supplemental handbook, we at Commerce shifted our emphasis to the principles of government-wide reinvention. [Commerce also explored] downsizing, reengineering, reinvention labs, performance-based organizations, franchise funds and customer service improvement.

125 Quoted in Stanger 2009: 15.
Following this revision, the Clinton administration pushed for the passing of the Federal Activities Inventory Reform (FAIR) Act of 1998 that gave statutory force to Circular A-76’s requirement for submitting annual inventories of commercial functions. Prior to the FAIR act, federal agencies had a spotty record in submitting their inventories on time. For instance, “in 1971, the OMB gathered data on the status of A-76 efforts and discovered that 16% of agency activities had not been reviewed despite the fact that the deadline had been June 30, 1968.” 27 Then in June 1996, “the OMB requested that agencies submit their inventories by September 13, 1996. Six of the 24 largest agencies had not submitted their inventories as of April 1998. 28 Agency reporting under FAIR improved dramatically.

After the FAIR act, Circular A-76 had a major revision in 2003 when the OMB required agencies to submit inventories of their inherently governmental activities in addition to commercial activities. 29 Moreover, the revised policy statement in 2003 changed the 1979 language of a free enterprise system: “The longstanding policy of the federal government has been to rely on the private sector for needed commercial services.” 30 Finally, the 2003 revisions also eliminated the 1966 policy statement that the government should not compete with its citizens. After the record contracting booms depicted in Figure 4, in the 2009 budget, the Obama administration placed a moratorium on public-private competition that would covert federal employee positions to contractors. 3 The Department of Defense faced a separate moratorium with the passing of the 2010 National Defense Authorization Act. 32 Both moratoriums remain till today. 33

As of 2016, the Federal government has 2.6 million Executive Branch employees (excluding uniformed military and postal service). The OMB estimates that among

132 Public Law No. 111-84 §325 (2010).
agencies covered by the FAIR act, 1.12 million full-time employees are engaged in performance of functions that are not inherently governmental, or that 43% are commercial functions. Circular A-76, the FAIR act and related policy letters together create the backdrop for American contracting. They also attempt to define which functions were unsuitable for contracting for being “inherently governmental.” In other words, the bureaucracy aims to draw the line between public and private.

**Inherently Governmental**

For 25 years, American bureaucrats used Circular A-76’s sparse definition of “inherently governmental” as “a function which is so intimately related to the public interest as to mandate performance by Government employees.” In 1992, the H.W. Bush administration published the first comprehensive clarification on “inherently governmental” in Policy Letter 92-1:

Inherently governmental” functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) The act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.

Policy Letter 92-1 specifies discretionary exercise of authority and control over money as the basis of an inherently governmental function. The letter lists 19 illustrative inherently governmental functions in its Appendix A, such as conducting criminal

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35 OMB Circular A-76 (Revised), August 4, 1983, 6(e).
(a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
(b) 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;
(c) significantly affect the life, liberty, or property of private persons;
(d) commission, appoint, direct, or control officers or employees of the United States; or
(e) 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 appropriated and other Federal funds.”
investigations, commanding military forces, conducting foreign policy, and hiring federal employees. Meanwhile, the letter also states that information gathering, recommendations, and other “ministerial and internal” activities, like “building security, mall operations, operation of cafeterias,” are not inherently governmental functions.\textsuperscript{37} Policy Letter 92-1 also introduces functions that are “closely associated” with inherently governmental functions as “services and actions that are not considered to be inherently governmental functions. However, they may approach being in that category because of the way in which the contractor performs the contract or the manner in which the government administers contractor performance.”\textsuperscript{38} All subsequent Circulras A-76 insert a version of Policy Letter 92-1’s definition. The FAIR Act also used the same definition verbatim to statutorily define inherently governmental functions.\textsuperscript{39}

However, right on cue with the contracting boom from the war in Iraq, the 2003 revised Circular A-76 modified Policy Letter 92-1’s definition: “[inherently governmental] activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.”\textsuperscript{40} After this modification and in response to the slight variations on “inherently governmental functions” in the U.S. Code of Federal Regulations, a 2009 Presidential Memo urged the Office of Federal Procurement Policy (OFPP) in the OMB to “create a single definition for the term ‘inherently governmental function’ that addresses any deficiencies in the existing definitions and reasonably applies to all agencies.”\textsuperscript{41} In response, the OFPP issued Policy Letter 11-01, which is the latest guidance for contracting. Policy Letter 11-01 adds three crucial components to the debate. First, it adds more illustrative examples

\textsuperscript{37} OMB Policy Letter 91-1, Sept. 30, 1992, p. 45101. “Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include any functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.”

\textsuperscript{38} OMB Policy Letter 91-1, Sept. 30, 1992, Attachment B.


\textsuperscript{40} OMB Circular A-76 (Revised), May 29, 2003, Attachment A, §(B)(i)(a); emphasis added.

of inherently governmental functions. Second, it develops a new category of work, “critical functions,” that agencies must maintain in-house. Third, it offers agencies guidance on how to negotiate contracting when functions are “closely associated” with inherently governmental functions.

First, Policy Letter 11-01 adopts the 1992 letter’s definition of inherently governmental functions, ignoring the 2003 Circular A-76’s addition of substantial discretion. Policy Letter 11-01 also expands the illustrative listing of inherently governmental functions to 24. Table A1 in the appendix lists these examples. In addition, Policy Letter 11-01 further clarifies “closely associated” functions:

For instance, within the function of source selection, the tasks of determining price reasonableness and awarding a contract are inherently governmental, the task of preparing a technical evaluation and price negotiation memorandum are closely associated (provided the government has sufficient time and knowledge to independently evaluate alternative recommendations and decide which is in the government’s best interest) and the task of ensuring the documents are in the contract file is neither inherently governmental nor closely associated. In this example, within the same function, various tasks could be coded as governmental, closely associated with governmental, and neither. Policy Letter 11-01 slightly modifies the list of “closely associated with governmental functions” from the 1992 letter. Table A2 in the appendix lists these examples. Of particular interest is the contracting process itself. While awarding and terminating contracts are inherently governmental functions, governments may contract out “contract management,” in “the evaluation of a contractor’s performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and providing support for assessing contract claims and preparing termination settlement documents.” However, if the basis of awarding and terminating contracts depends on contractor evaluation, then the inherently governmental line becomes more complicated.

Second, Policy Letter 11-01 develops the category of “critical functions” as a response to the increase in hiring contractors. Specifically, “if contractors are used to

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perform [closely associated with inherently governmental functions], agencies must give special management attention to contractors’ activities to guard against their expansion into inherently governmental functions.”44 Management safeguarding means requiring “agencies to identify their ‘critical functions’ in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency’s mission and operations. 45 The OMB will “hold an agency responsible for making sure that, for critical functions, it has an adequate number of positions filled by Federal employees.”46 Crucially, “so long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to allow contractor performance of positions within critical functions.”47 Of course, critical functions are dependent on a particular agency’s mission and will hugely vary across agencies. The introduction of critical functions then makes it more difficult to assess government contracting outcomes as “over-relying” on contractors now depends on whether agencies maintain overall control rather than the overall number of contractors. Recall Rumsfeld’s inclusion of contractors into the Defense department’s Total Force, who “serve in thousands of locations around the world, performing a vast array of duties to accomplish critical missions.”48 While the OMB develops even more fine-grained definitions of agency functions, especially with “critical functions,” Rumsfeld uses the same language of mission-criticality to include rather than exclude contractors from the public interest.

Third, Policy Letter 11-01’s most ambitious goal is to “refine existing criteria (e.g., addressing the exercise of discretion) and provide new ones (e.g., focused on the nature of the function), to help an agency decide if a particular function that is not identified on the list of examples is, nonetheless, inherently governmental.”49 Since 2003, the OMB recognized that “the line between inherently governmental activities and commercial activities has become blurred, which may have led to the performance of

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inherently governmental functions by contractors and, more generally, an overreliance on contractors by the government.”\textsuperscript{50} Since almost half of all discretionary spending was going to contractors, the OMB sought to develop tests for identifying inherently governmental functions that do not fall within the illustrative list. Policy Letter 11-01 includes two tests. The first test is functional:

(i) \textit{The nature of the function.} Functions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.\textsuperscript{5}

The first test explicitly introduces sovereignty and sovereign powers to what used to be referred to as just governing. However, the nature of the function test kicks the “inherently governmental” definitional question over to “sovereign powers” from “governing authority” and it is not clear that the former offers a more straightforward governmental test than the latter. This first test is also purely functional and “without regard to the type or level of discretion,” which expands the previous definitions. The second test applies when the function is unclear:

(ii) \textit{The exercise of discretion.}

(A) A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that:

(I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and

(II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.

(B) A function may be appropriately performed by a contractor consistent with the restrictions in this section—including those involving the exercise of discretion that has the potential for influencing the authority, accountability, and responsibilities of government officials—where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor’s action. The fact that decisions are made, and discretion exercised, by a contractor in performing its

\textsuperscript{50} OMB Policy Letter 11-01, September 12, 2011, p. 56228.
duties under the contract is not, by itself, determinative of whether the contractor is performing an inherently governmental function. 52

The second test further specifies the conditions under which discretion applies to an inherently governmental function as being when “two or more alternative courses of action exist” without precedence. This test wades into murkier waters than the first test because it identifies that one reason why inherently governmental functions blur with closely associated functions is because contractors exercise discretion often. In fact, the illustrative list in Figure 3 shows examples of discretion in commercial activity. This was one reason why the 2003 revision of Circular A-76 modified the inherently governmental definition to read “substantial” discretion. In Policy Letter 11-01, the OMB goes in a different direction to state that a closely associated function is when a “contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor’s action.” In other words, the difference is not discretionary authority, it is decision-making authority. However, this too is complicated in security contracting. The final section brings together the larger American contracting apparatus with public and private tensions in security contracting.

V. TENSIONS IN SECURITY CONTRACTING

The paper thus far foregrounds how the purpose and form of sovereign governance is far from self-evident. When sovereignty is under contract, as in security contracting, we are allowed a rare look at the bureaucratic apparatus that produces the aims and means of political authority. The grounded context is an underappreciated facet of understanding sovereign politics and grand strategy. This section will conclude by integrating the pieces that have come before on Blackwater and bureaucratic debates to show three tensions in security contracting that also offer broader implications.

The first tension is about the blurring of public and private within sovereign authority. Security contracting creates bureaucratic tensions for sovereignty when public and private actors are intertwined in formal relationships and are treated

interchangeably. For instance, security contractors claim they are part of the
government, or its total force, for sovereign privileges like international legal immunity
but that they are not part of the government’s sovereign obligations to disclose their
finances and practices. Crucially, while security contracting challenges traditional
sovereignty from the Weberian perspective, it also helps sustain sovereign power by
avoiding counting contractors in the political cost of war. Congressman John Tierney
observes: “The all-voluntary professional force after the Vietnam War employed the so-
called Abrams Doctrine. The idea was that we wouldn’t go to war without the sufficient
backing of the Nation. Outsourcing has circumvented this doctrine. It allows the
administration to almost double the force size without any political price being paid.”
Contracting poses a special problem because “this alliance between public and private
agents, between governmental and corporate elites, is working a reconfiguration
of authority relations. It is blurring the distinction between the public and private
realms and enhancing the legitimacy of the latter as a source of authority.”

Such blurring is a challenge to the traditional use of the public and private
distinction that defines roles and obligation in law and politics. For instance, “public
war (bellum hostile) referred to war between two sovereign Christian princes, in which
spoils could be taken but prisoners had the right to expect to be ransomed. Feudal,
covered war, or what came to be known as private war, referred to other conflicts where
warring parties had license to wound or kill, but not to burn or take spoils.” In
international law there is a separate body of international public law that is separate
from private commercial law based on whether states are involved. The public and
private distinction, then, serves to demarcate boundaries. It is not a surprise, then, that
when the distinction is blurred, we see attempts to redraw boundaries. Like general
American contracting, for regulators, “contracts for the use of force in war also pose
legitimate questions about the propriety of hiring private firms to perform such a public,

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53 U.S. Congressman John F. Tierney, U.S. House of House of Representatives Committee on
54 A. Claire. Cutler, Artifice, Ideology and Paradox: The Public/Private Distinction in International
some would say inherently governmental, function.” 56

However, the public and private distinction is about more than just creating actors who are considered public or private. Instead, the distinction “allows us to distinguish between various social relations, such as the following: society/individual, civil society/family, state/family, state/civil society, state/market, and we may add international society/domestic state, and international society/global civil society.” 57

Feminists extend the insight that distinctions are about hierarchy and power:

The public/private distinction is a pivotal point in the common sense of politics, in the language game of power. There are a series of parallel distinctions: between man and woman, between public and private, and between international and domestic. In each case the distinction allocated over and prestige to the first category – man, public, international – over the second – woman, private, domestic. 58

For instance, on the U.S. Supreme Court Citizens United ruling, ”while feminists rallied around the notion that the private is the public, large corporate interests were quietly insisting that the public is the private.” 59 In other words, making claims in reference to the public and private distinction also rearticulates the categories themselves. Moreover, the public and private distinction inscribes an imperative to demarcate while also proving public and private categories are made not inherently given.

The second tension is about demarcating the public and private distinction in spite of their blurred nature. We can follow the labor of producing the distinction through the bureaucratic processes, such as the 2011 OMB Policy Letter 11-01 in light of the Iraq war and American security contracting. Per standard practice, before publishing Policy Letter 11-01, the OMB issued a proposed policy letter 10-01 on March 31, 2010, which was made available for public comment. 60 When the last proposed Policy Letter 91-1 opened for comment in 1991, it received 35 responses. Proposed Policy Letter
10-01 received 30,350 responses. However, all but approximately 110 responses were submitted as a modified form letter. One form letter was submitted by more than 29,900 respondents and was critical of government outsourcing. “The form letter recommended expanding the definition of inherently governmental functions and approved of creating the critical functions category. The letter also proposed augmenting the list of inherently governmental functions to include all security functions and intelligence activities, training for interrogation, military and police, and maintenance and repair of weapons systems.” A second form letter from 240 respondents was supportive of contracting and cautioned against the “increased attention on having non-inherently governmental functions performed by Federal employees.” The remaining 110 responses were a mix with general support of the proposed policy letter but with additional suggestions for clarifying the scope of contracting.

The public comments showed concern for the new tests of inherently governmental functions. The OMB’s move to the “sovereign functions” test was unclear to some:

A number of comments questioned the likely effectiveness of the proposed “nature of the function test,” which would ask agencies to consider if the direct exercise of sovereign power is involved. Some respondents suggested that the term “sovereign” be explained while others concluded that the manner in which sovereign authority is exercised is so varied that it is better explained by example than further definition. The comments highlight how the bureaucratic efforts to replace governing authority with sovereign functions do not bring in additional clarity on the nature of inherently governmental functions. In addition, respondents were also concerned about including security contractors in governmental functions, whether inherently or closely associated:

I can understand, and agree with, the use of private contractors in war zones if they are engaged, as KBR and Halliburton have sometimes been, in civilian activities such as construction and engineering, but I strongly oppose using them in paramilitary activity, including guarding important persons (as in the case in Baghdad in which Blackwater

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employees slaughtered 17 civilians in self-defense. We must not use contract workers as mercenaries or in any roles approaching that. This response is attuned to the difference in contractor roles, separating “civilian” support contractors like Halliburton from combat contractors like Blackwater. However, the respondent still lacks information about subcontracting and the interchangeable civilian and combat roles in counterinsurgency. Finally, respondents felt that the proposed the illustrative list of inherently governmental functions was too narrow and “suggested the addition of functions involving private security contractors, especially when performed in hostile environments or involving intelligence.”

The third tension is about security contractors coopting the conversation on public and private relations across all contracting. While the draft policy letter 10-01 concerned all government contracting, security contractors took center stage in shaping most public grievances. Most respondents against contracting cite accountability – national, international legal, and moral – and aim to situate security contractors within the public purview:

It’s outrageous that we would use contractors to fight our dirty wars that the American people wouldn’t have wanted if they had known the circumstances. The people would not have sanctioned the war if their own sons and daughters were being killed. The company involved makes ludicrous amounts of money stolen from the American people, they have no accountability, we are absolved from any national or international legal accountability, but the world knows that it does not absolve us from any moral accountability. We have lost face in the eyes of the world, and have created a lifetime of hatred in the countries we have attacked.

This comment covers all the accountability dilemmas where contractors “steal” American money, are absolved of legal accountability, and jeopardize political accountability by “losing face” in international relations. If security contracting stood-in for all government contracting, then Blackwater stood-in for all security contracting. Of the 110 non-form responses, 65 responses mentioned Blackwater. A typical comment included:

It is important that we have representatives of the government who have some accountability rather than private corporations like Blackwater and Halliburton who

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166 Public comment from “Bianca de Leon” on proposed OMB Letter 10-02, accessed online on regulations.gov (Docket ID OFPP–2010–0001).
seem accountable to no one and have actually interfered with the work of the soldiers, etc. They are mercenaries and only in it for the money so they have no concern about human rights, morals, etc. Don’t waste taxpayers money on these people who give America a bad name.  

Again, the themes of financial, legal, and political accountability laced with morality comes through in the public outrage rather than concerns about monopoly of violence or civil-military relations.

The main changes from the proposed policy letter were accommodating the tensions of security contracting with the new bureaucratic guidelines. Based on the public comments in the final policy letter 11-01, the OMB: “added to the list of inherently governmental functions: (i) All combat and (ii) security operations in certain situations connected with combat or potential combat. OFPP concluded these were clear examples of functions so intimately related to public interest as to require performance by Federal Government employees.” The key addition here is of “situations connected with combat or potential combat.” In Blackwater’s case, for instance, it would be hard to find a situation when it was not connected with potential combat in a war zone. In fact, as the nature of warfare changes to move beyond easily distinguishable front-lines of combat, any conceivable international security deployment would involve potential combat.

However, even moving away from combat roles, security contractors complicate the governmental functions in other ways: “For example, serving as an interpreter during an interrogation of an enemy prisoner of war could potentially constitute a function approaching inherently governmental. It is less clear that transcribing a recording of that interrogation approaches being inherently governmental.” For such entanglements, the OMB introduces a further test to check whether a function should be contracted out:

A function is not appropriately performed by a contractor where the contractor’s involvement is or would be so extensive, or the contractor’s work product so close to a

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167 Public comment from “Millie Brady” on proposed OMB Letter 10-02, accessed online on regulations.gov (Docket ID OFPP-2010-0001).
final agency product, as to effectively preempt the Federal officials’ decision-making process, discretion or authority. [...] For example, providing security in a volatile, high-risk environment may be inherently governmental if the responsible Federal official cannot anticipate the circumstances and challenges that may arise, and cannot specify the range of acceptable conduct (as required by paragraph 5-1(a)(ii)). Agencies should also consider if the level of management and oversight that would be needed to retain government control of the operation and preclude the transfer of inherently governmental responsibilities to the contractor would result in unauthorized personal services. In such cases, the function should not be contracted out. ⁷⁰

In summary, the new revisions single out security contractors as an instance of not contracting out a closely associated function such as in a “volatile, high-risk environment,” or most war-zones where security contractors are required.

Given the trends in American security contracting, the Defense Department would find these revisions to inherently governmental functions as problematic. On January 10, 2006, the Pentagon’s Office of General Counsel issued an opinion permitting the use of contractors to protect U.S. personnel and property. The opinion does not directly address whether security contractors perform inherently governmental functions, but does state that “when using contractors for security services, the purpose must be to provide such services other than uniquely military functions.”⁷ The opinion goes on to state that it would be inappropriate to use armed security contractors in “situations where the likelihood of direct participation in hostilities is high. For example, they should not be employed in quick-reaction force missions, local patrolling, or military convoy security operations where the likelihood of hostile contact is high.”⁷² In July 2009, the Pentagon addressed the issue more directly, stating that “[c]ontractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.”⁷³ However, defensive response still assumes presence in situations of potential combat with volatile, high-risk environments. Since the 2010 moratorium on new contracts, the Defense Department

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⁷¹ Department of Defense, Office of General Counsel Memorandum, Request to Contract for Private Security Companies in Iraq, January 10, 2006, p. 2.
⁷² Department of Defense, Office of General Counsel Memorandum, Request to Contract for Private Security Companies in Iraq, January 10, 2006, p. 4.
has not had an opportunity to respond to the new 2011 guidelines against security contractors. However, the debate is far from settled for the next major American war.

The three tensions in security contracting point to broader implications for politics. The public and private are intertwined in hybrid arrangements where their functions become blurred. The blurring is perhaps useful to maintain a specific grand strategy without the political costs of a fully public security force abroad. However, security contracting also brings accountability problems that challenge how we conventionally allocate responsibility in sovereign politics. The problems lead to bureaucratic attempts to redefine the aims and means of sovereign authority. The subsequent wrangling over the many manifestations of American federal contracting guidelines show the effort it takes to codify a neat public and private distinction that defies stability. Meanwhile, security contractors monopolize the debate on all contracting, in a sense securitizing the American bureaucratic apparatus. Security contracting then reveals the productive tensions in sovereign politics and ties grand strategy’s macro goals to micro foundations. Ultimately, this paper suggests that perhaps one inherently governmental function is to demarcate public and private functions in what remains a fluid relationship.
### Appendix

**Table A1. Examples of Inherently Governmental Functions per Policy Letter 11-01**

1. The direct conduct of criminal investigation.
2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).
3. The command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role.
5. Security provided under any of the circumstances set out below. This provision should not be interpreted to preclude contractors taking action in self-defense or defense of others against the imminent threat of death or serious injury.
   - (a) Security operations performed in direct support of combat as part of a larger integrated armed force.
   - (b) Security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.
   - (c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.
6. The conduct of foreign relations and the determination of foreign policy.
7. The determination of agency policy, such as determining the content and application of regulations.
8. The determination of budget policy, guidance, and strategy.
9. The determination of Federal program priorities or budget requests.
10. The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
11. The direction and control of Federal employees.
12. The direction and control of intelligence and counter-intelligence operations.
14. The determination of what government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
15. In Federal procurement activities with respect to prime contracts:
   - (a) determining what supplies or services are to be acquired by the government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
   - (b) participating as a voting member on any source selection boards;
   - (c) approving of any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;
   - (d) determining that prices are fair and reasonable;
   - (e) awarding contracts;

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(f) administering contracts (including ordering changes in contract performance or contract quantities, making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and accepting or rejecting contractor products or services);
(g) terminating contracts;
(h) determining whether contract costs are reasonable, allocable, and allowable; and
(i) participating as a voting member on performance evaluation boards.
16. The selection of grant and cooperative agreement recipients including: (a) approval of agreement activities, (b) negotiating the scope of work to be conducted under grants/ cooperative agreements, (c) approval of modifications to grant/cooperative agreement budgets and activities, and (d) performance monitoring.
17. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
18. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in government programs.
19. The approval of Federal licensing actions and inspections.
20. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including: (a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is predetermined or can be readily calculated and the funds collected can be readily controlled using standard cash management techniques, and (b) routine voucher and invoice examination.
21. The control of the Treasury accounts.
22. The administration of public trusts.
23. The drafting of official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity.
24. Representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract.
Table A2. Examples of Functions Closely Associated with Inherently Governmental Functions per Policy Letter 11-01\textsuperscript{75}

1. Services in support of inherently governmental functions, including, but not limited to the following:
   (a) performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should-cost analyses.
   (b) undertaking activities to support agency planning and reorganization.
   (c) providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.
   (d) providing services to support the development of regulations and legislative proposals pursuant to specific policy direction.
   (e) supporting acquisition, including in the areas of:
      i) acquisition planning, such as by— I) conducting market research, II) developing inputs for government cost estimates, and III) drafting statements of work and other pre-award documents;
      ii) source selection, such as by— I) preparing a technical evaluation and associated documentation; II) participating as a technical advisor to a source selection board or as a nonvoting member of a source selection evaluation board; and III) drafting the price negotiations memorandum; and
      iii) contract management, such as by— I) assisting in the evaluation of a contractor’s performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and II) providing support for assessing contract claims and preparing termination settlement documents.
   (f) Preparation of responses to Freedom of Information Act requests.

2. Work in a situation that permits or might permit access to confidential business information or other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).

3. Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.

4. Participation in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of an agency.

5. Service as arbitrators or provision of alternative dispute resolution (ADR) services.

6. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

7. Provision of inspection services.

8. Provision of legal advice and interpretations of regulations and statutes to government officials.

9. Provision of non-law-enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

\textsuperscript{75} OMB Policy Letter 11-01, September 12, 2011, p.56241.