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Determining Whether Activities are "Inherently Governmental" (U)

(U) In order to ensure that the U.S. Government acquires needed goods and services in the most economical and efficient manner, Executive Order 12615 (November 19, 1987), *Performance of Commercial Activities*, specifies that "commercial activities" - i.e., recurring services that could be performed by the private sector - shall be provided by private industry, except where statute or national security requires government performance. In implementing this Executive Order, Office of Management and Budget Circular Number A-76 requires that all federal agencies identify all activities performed by their personnel as either *commercial* or *inherently governmental*. In general, inherently governmental activities are those that "are so intimately related to the public interest as to mandate performance by government personnel" - e.g., positions requiring an individual to make policy decisions, or the command of military forces - whereas commercial activities "may be provided by contract support...where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight."

when there is an established private sector capability to perform certain functions, it may be more cost effective for DoD to "hire" those functions rather than perform them with government assets. Second (and more directly related to contract interrogation), doctrine states that contract support can "augment existing capabilities, provide expanded sources of supplies and services, and bridge gaps in the deployed force structure" (Joint Publication 4-0, *Doctrine for Logistic Support of Joint Operations*). In no circumstance, however, may DoD contract services that are "inherently governmental" in nature (see figure above).

(U) The fact that military intelligence

interrogation services have been acquired via contract implies that DoD does not consider interrogation to be an inherently governmental function. We did not consider the question of whether interrogation should or should not be so categorized: the Federal Acquisition Regulation - described below - specifies that the direction and control of intelligence and counter-intelligence operations is an inherently governmental function; however, our discussion proceeds from the assumption that interrogation does not constitute such "direction and control." (This issue may warrant further high-level review, particularly in light of a December 26, 2000 memorandum by the Assistant Secretary of the Army for Manpower and Reserve

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Affairs that found tactical and strategic intelligence functions to be ineligible for private performance on the grounds of inherently governmental nature and risk to national security respectively. The memo does provide for exceptions when a required intelligence capability is not resident in the Department of the Army, and further specifies - as noted during Acting Army Secretary Brownlee's and LTG Mikolashek's July 22, 2004 testimony before the Senate Armed Service Committee - that the *memo does not apply to Army forces under the operational control of other DoD components, including combatant commanders* [emphasis added].)

(U) Acquisition of contract interrogation services is therefore guided by DoD policies governing commercial activities (see figure below). In any event, the Army Inspector General Report, among others, makes it clear that contract interrogators supporting Operations ENDURING FREEDOM and IRAQI FREEDOM are "bridging gaps in force structure" - critical gaps, given the importance of HUMINT - in addition to simply providing services in the most economical fashion.

(U) The nature of the military intelligence force structure has the potential to exacerbate certain management challenges inherent to the use of

DoD Policies Regarding Contract Services (U)

(U) Sources: DoD Directive 4100.15 (March 10, 1989), *Commercial Activities Program*; and DoD Instruction 3020.37 (as amended January 26, 1996), *Continuation of Essential DoD Contractor Services During Crises*.

- (U) Rely on the most effective mix of the Total Force, cost and other factors considered, including active, reserve, civilian, host-nation and contract resources in order to fulfill assigned peacetime and wartime missions.
- (U) Achieve economy and quality through competition.
- (U) Retain governmental functions in-house.
- (U) Rely on the commercial sector to provide commercial products and services, except when [otherwise] required for national defense.

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contract services. Specifically, contract interrogators, like military interrogators, fill positions that are characterized as "combat support," rather than the logistically-oriented "combat service support" positions traditionally occupied by contractors (see figure below). This operational - versus logistical - use of contract services, which may find contract and active-duty military interrogators working side-by-side, is complicated by the fact that DoD's control of contract interrogators is exercised through the terms of their contracts, rather than through a military chain of command. Though the terms of a contract could specify a similar degree of direct military control over a contractor, this control would be specific to that contract, rather than universal. Further, this type of contractual clause is not mandated by any DoD regulation.

**Command and Control of Contract
Interrogators (U)**

(U) As noted above, contract interrogators work side-by-side with their military counterparts, who must obey the lawful orders of their superiors in the chain of command. The contractors, by contrast, are bound by the terms and conditions of the contract between their parent companies and the U.S. Government, which cannot be modified except by an officially designated DoD contracting officer. A contract may be written to offer military supervisors significant direct authority over contractors' actions in a combat support role; however, there is no guarantee that this will be the case for every such contract.

(U) Title 41 of the U.S. Code, "Public

Combat Support vs. Combat Service Support (U)

(U) Sources: Joint Publication 1-02, *DoD Dictionary of Military and Associated Terms*; Department of the Army Pamphlet 10-1, *Organization of the United States Army*.

(U) **Combat support** is the provision of fire support and other *operational* assistance to combat arms units such as infantry and armor. Military intelligence interrogation is a combat support function. **Combat service support**, on the other hand, provides for the sustainment of operating forces, and includes supply, transportation, medical, legal, and other related services.

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Contracts," requires the Secretary of Defense to "establish clear lines of authority, accountability, and responsibility for procurement decisionmaking" within DoD. The Federal Acquisition Regulation (jointly administered by DoD, the General Services Administration and NASA), in turn, specifies that only designated contracting officers may enter into contracts - or modify them - on behalf of the Government. Therefore, since the contracting officer responsible for the procurement of interrogation services may or may not be readily accessible to the military intelligence leadership in the field, it is important that the terms and conditions of such contracts are sufficiently specific to ensure contractor compliance with military commanders' expectations, yet sufficiently flexible to permit the inherently dynamic employment of contractors in operational, combat support roles. For example, a contract could specify that contract interrogators must follow FM 34-52 techniques in general, but also comply with any additional interrogation guidance provided by the military intelligence commander.

(U) Even with a well-written contract, however, the relationship between a contract interrogator and military intelligence leadership is not a direct one. If there is any disagreement regarding quality of work or interpretation of the contract's terms, the dispute must be mediated by the contracting officer (or his or her officially designated on-site representative) and the senior contractor employee present, in order to ensure that federal acquisition laws and the directives contained in the Federal Acquisition Regulation are not violated in

the process. (See figure below for pertinent, representative Army policy regarding command and control of contractors in the field). This does not, however, prevent military commanders from fulfilling their obligation to protect detainees in their custody from abuse or mistreatment. Such behavior by a contractor is a clear violation of law that is not protected by contract terms. If a contractor physically attacked or sexually harassed DoD personnel, contractual procedures would certainly not be cited as an impediment to disciplining or removing the contractor. The actions involved here are no less serious, and commanders should immediately remove any contractor involved in such behavior, immediately document the behavior, and then coordinate with the contracting officer.

(U) Under the Geneva Conventions, contractors accompanying an armed force in the field are entitled to prisoner of war privileges if captured, so long as they have received authorization from that force. Theater commanders may revoke that authorization in response to contractors' violation of orders and instructions, particularly when those violations jeopardize mission accomplishment or force protection, and may direct the contracting officer to demand that the contractor replace the offending individual (see, for example, AR 715-9). However, the fact remains that commanders' freedom of action in directing the actions of contract interrogators - short of wholesale removal - is limited by the terms and scope of the contract, and by the administrative nature of the Government-contractor relationship.

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**Excerpts from Army Regulation 715-9, Contractors
Accompanying the Force (U)**

- (U) Command and control of commercial support service personnel will be defined by the terms and conditions of the contract. The cognizant contracting officer or his/her designated representative(s) will monitor contractor performance and maintain day-to-day liaison activities...[and] communicate the Army's requirements and prioritize the contractor's activities within the terms and conditions of the contract.
- (U) The commercial firm(s) providing the battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain of command...[and] will not command, supervise, administer or control Army personnel.

(U) Finally, it is worth reiterating that the Federal Acquisition Regulation specifically designates "leadership of military personnel" and "direction and control of intelligence and counter-intelligence operations" as inherently governmental functions. Therefore, contract interrogators cannot be assigned in supervisory positions over DoD military or civilian personnel. Together with the restrictions on contractor control and discipline described above, this point illustrates that contractors may parallel, but not be part of, the military chain of command that they support.

**Interrogation-Related Training
Requirements (U)**

(U) There is no DoD policy mandating specific training requirements for contract interrogators, linguists, or analysts. Rather, it is up to contracting officers to specify in writing the functions to be performed by the contractors, including any necessary qualifications. (Note, however, that a contract may specify that contract personnel must be individually approved by the government.) A representative Army policy is illustrative:

(U) "The statement of work to be performed is established in the government contract with an employer. The...contractor is responsible for hiring qualified personnel to satisfy the identified contract/task assignment." (From Department

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of the Army Pamphlet 716-16, *Contractor Deployment Guide*.) For example, a typical contract might require that the contracting company provide interrogators with Army Military Occupational Specialty 97E (Interrogator) or equivalent U.S. Government training acquired during previous military or government service.

(U) In addition, the Army has created Individual Deployment Sites (IDS) and Continental US Replacement Centers (CRC) to provide basic, theater-specific knowledge to contract employees. Pre-deployment training at these facilities is given only if specified by the governing contract, and covers topics ranging from local customs and courtesies to the Geneva Conventions. Alternatively, the contracting company may provide equivalent training to its employees if so specified in the contract. None of this training is mandatory, though Army doctrine indicates that it "should" be provided (Army Pamphlet 716-16).

Legal Accountability of Contractors (U)

(U) As discussed previously, military commanders do not have non-judicial disciplinary authority over contract personnel short of removal of the offending individual (effected via the contracting officer). However, federal law does provide for the prosecution of contract personnel who have committed crimes while attached to forces in the field. Several bodies of law apply, depending on the

circumstances of the conflict and the status of the contract employee:

1. (U) In time of congressionally declared war, all persons serving with or accompanying an armed force in the field are subject to the Uniform Code of Military Justice (UCMJ). At other times, the UCMJ may apply in some cases (e.g., contract personnel who are retired service members drawing pay are subject to the UCMJ at all times).
2. (U) In all other cases, individuals employed by or accompanying the armed forces outside the U.S. are subject to U.S. jurisdiction under one of three legal regimes specified by U.S. Code:
 - a. (U) War Crimes (18 U.S.C. §2441): Whether inside or outside the United States, U.S. nationals who commit "grave breaches" of the Geneva Conventions or acts prohibited by certain articles of the Hague Convention may be prosecuted for war crimes. (This statute simply codifies individual accountability deriving from U.S. obligations under these conventions.)
 - b. (U) Special Maritime and Territorial Jurisdiction (18 U.S.C. §7): Any U.S. national who commits a federal offense while on the premises of U.S.

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military facilities (among other places) in foreign states may be prosecuted. (Foreign nationals committing crimes against U.S. nationals within overseas U.S. military facilities may also be prosecuted.) This is the statute under which CIA contractor David Passaro is being prosecuted, as the alleged assault took place at a U.S. military base in Afghanistan.

- c. (U) Military Extraterritorial Jurisdiction (18 U.S.C. §3261-3267): Anyone (including a foreign national) who commits a federal offense that would be punishable by imprisonment for over one year if it had occurred within the special maritime and territorial jurisdiction of the U.S. - e.g., assault - while providing contract services to U.S. armed forces anywhere outside the U.S. may be prosecuted.

(U) As this summary of pertinent jurisdiction demonstrates, DoD contract personnel are accountable for any criminal acts that might be committed during interrogation sessions. However, the summary suggests two "loopholes" which, while not applicable to DoD contractors, warrant further review.

(U) First, foreign contractors (e.g., local interpreters) employed by non-DoD agencies do not appear to fall under U.S. jurisdiction under any of these statutes even if an alleged crime were committed within a DoD facility. While it is logical that "foreign-on-foreign" crimes should fall under local rather than U.S. jurisdiction in the absence of a U.S. Government presence, the existence of a contract relationship with the U.S. might argue for the extension of Military Extraterritorial Jurisdiction-like coverage to contractors supporting all U.S. Government agencies abroad.

(U) Second, as noted in MG Fay's investigation of contract personnel at the Abu Ghraib detention facility, DoD contractors acquired through other agencies of the U.S. Government (such as the CACI, Inc. contractors at Abu Ghraib, whose contract was part of a "blanket purchase agreement" maintained by the Interior Department) may not be subject to Military Extraterritorial Jurisdiction, based on a strict interpretation of the term "Department of Defense contractor." In many cases, however, such contractors could be prosecuted under Special Maritime and Territorial Jurisdiction or the war crimes statute. In any event, as a result of the Army's Abu Ghraib investigations, this question has been referred to the Department of Justice.

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(U) Contractor Accountability: Summary

(U) The preceding discussion addressed several administrative and operational concerns regarding the employment of contractors in support of military interrogation activities. However, DoD policies and regulations for interrogation are founded on respect for humane treatment and international and domestic law: any crimes committed by DoD contract interrogators may be prosecuted, and problems of lesser severity may be dealt with by dismissal of the offending contractor.

**Specific Findings Regarding
Contractors (U)**

(U) It is clear that contract interrogators and related support personnel are "bridging gaps" in the DoD force structure in Guantanamo Bay, Afghanistan and Iraq. As a senior intelligence officer at the U.S. Central Command (CENTCOM) stated, "Simply put, interrogation operations in Afghanistan, Iraq and Guantanamo can not be reasonably accomplished without contractor support." As a result of these shortfalls in critical interrogation-related skills, however, numerous contracts have been awarded by the services and various DoD agencies without central coordination; and in some cases, in an *ad hoc* fashion (as demonstrated by the highly publicized use of a "Blanket Purchase Agreement" administered by the Department of Interior to obtain interrogation services from

CACI, Inc.). We found, nevertheless, that contractor compliance with DoD policies, government command and control of contractors, and the level of contractor experience were generally good, thanks in large part to the diligence of contracting officers and local commanders.

(U) We also found that contractors made a significant contribution to U.S. intelligence efforts. The U.S. Southern Command's (SOUTHCOM) contracting officer opined that contract interrogator performance had been "superb," an observation that our interviews with senior leaders at GTMO supported. Contract interrogators were typically former military intelligence or law enforcement personnel, and were on average older and more experienced than military interrogators; many anecdotal reports indicated that this brought additional credibility in the eyes of the detainees being interrogated, thus promoting successful interrogations. In addition, contract personnel often served longer tours than DoD personnel, creating continuity and enhancing corporate knowledge at their commands.

(U) Finally, as was described at greater length in our discussion of interrogation-related abuse, there were some, but not many instances of abuse involving contractors.

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~~SECRET/NOFORN~~Department of Defense Support to Other
Government Agencies (U)

(U) Working alongside non-military organizations/agencies to jointly execute missions for our nation, proved to be complex and demanding on military units at the tactical level.

- LTG Anthony Jones, AR 15-6 Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade

(U) As I understand this issue, the conditions were set for "ghost detainees" based on a verbal agreement between CJTF-7 staff officers and OGA to allow the agency the use of a number of cells at Abu Ghraib for their exclusive use. There was no requirement for them to in-process the prisoner when they used those cells. This cell arrangement was concluded as part of the overall intelligence cooperation effort in the country with no directive or agreement being formally consummated.

- LTG Ricardo Sanchez, Commander, CJTF-7, July 2004

Introduction (U)

(U) As part of our report, we were tasked to assess Department of Defense (DoD) support to or participation in the interrogation activities of non-DoD entities. For purposes of our discussion, these entities, also known as Other Government Agencies or OGAs, are federal agencies external to DoD with specific interrogation and/or detention-related missions in the Global War on Terror. OGAs involved with such missions include the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), Drug Enforcement

Administration (DEA), U.S. Customs and Border Protection, and the Secret Service.

(U) There were clear limitations to our investigation of DoD support to OGAs. We did not investigate the existence, location or purpose of any dedicated or OGA-run facilities. Similarly, it was beyond the scope of our investigation to pursue the activities, legal authorities, or policies governing OGA operations at those locations. Simply stated, we considered only those situations where DoD provided interrogation or detention-related support for another federal agency.

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