

## Signaling No to Interrogation by Contractor

Although the new Sense of Congress was not binding, the executive branch cannot ignore the legislature's view.

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Congress recently opined that the U.S. military cannot contract for interrogations because that activity is an inherently governmental function. In apparent contradiction, the Defense Department simultaneously confirmed its position that, properly directed and supervised, such contract interrogations do not involve inherently government functions. As a result, new uncertainty exists about the future of interrogation contracts.

Congress is concerned about using outside contractors to perform military interrogations. The National Defense Authorization Act for Fiscal Year 2009, enacted on Oct. 14, included a nonbinding Sense of Congress provision that identified military interrogation as an inherently governmental function that cannot be transferred to private contractors. The provision also said the Defense Department should bring contract interrogations in-house within one year but did not prohibit contractors supporting interrogations by serving as linguists or interpreters or providing certain other functions.

Whether the military meets this time line, the Bush and Obama administrations cannot ignore Congress' view that government personnel should perform military interrogations. Given the importance of the issue, clear guidance from Congress and the executive branch is essential.

### **INHERENTLY GOVERNMENTAL**

In the Federal Activities Inventory Reform Act of 1998, Congress defines an inherently governmental function as one that is so intimately related to the public interest that it requires performance by federal employees. This definition is virtually identical to that in the Office of Management and Budget's policy guidance regarding inherently governmental functions, presented in Policy Letter 92-1 and Circular A-76.

Activities may be inherently governmental if they require either the exercise of discretion in applying federal

authority or the making of value judgments in decisions for the federal government.

An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to bind the United States, affect U.S. interests, or significantly affect the life, liberty, or property of private persons. A function is more likely to be inherently governmental where it commits the government to a new course of action, but less likely where the contractor does not have the authority to decide on a course of action or merely implements policy under agency oversight.

The OMB's Circular A-76 states that an agency must consider statutory restrictions that define an activity as inherently governmental. Although a Sense of Congress provision is not a statutory restriction, it is evidence of congressional intent.

Pursuant to long-standing OMB guidance, the Federal Acquisition Regulation precludes only the contracting out of the "direction and control" of intelligence and counterintelligence operations. It does not specifically bar contracting for interrogations themselves.

In a 2006 instruction, the Defense Department observed that the approval, supervision, and oversight of military interrogations is an inherently governmental function. But the department allows contractors to conduct interrogations, a practice challenged by the intent of the newly passed Sense of Congress.

The FAR requires that agency officials provide a written determination that none of the functions to be performed under a statement of work are inherently governmental.

### **BUILDING CAPACITY**

As the new bill with the Sense of Congress awaited presidential signature, the Defense Department on Oct. 9 issued a revised directive (Directive 3115.09) regarding intelligence interrogations that addressed the use of contractor personnel supervised by the Defense Department.

The directive seeks to ensure that contractors do not infringe on inherently governmental functions, as inter-

preted by the Defense Department, by restricting the discretion of contract interrogation personnel. It requires that contract interrogations be properly supervised and closely monitored in real time by Defense Department personnel and that they do not deviate from government-approved interrogation plans.

The need for contract interrogators stems from a shortage of trained military interrogators. In general, the United States for many years preferred to rely on technical means of intelligence collection, rather than developing human capabilities. It takes many years to develop proficient interrogation personnel, and the Defense Department has been attempting to catch up with the need for trained interrogators for several years.

According to the Senate Report (110-335) accompanying the October defense bill, a top Army official testified several years ago that the Army would add capability so that operational and strategic intelligence functions, presumably including interrogations, would be performed in-house. The Army has reportedly increased the number of uniformed military interrogators in the pipeline. The Senate's report further stated, however, that today about 100 contractor personnel are still conducting interrogations for the military.

The Defense Department's apparent preference for internal capability suggests that it shares Congress' belief about the desirability of having military personnel perform interrogations—yet it is having difficulty reaching that goal.

### CONGRESS' SENSE

In passing the 2009 defense act, Congress has brought a new approach to the inherently governmental function analysis. According to the Senate report on the bill, Congress contends that military interrogations are an inherently governmental function because they entail the exercise of substantial discretion, but more important, are likely to have a significant impact on the life and liberty of the individuals questioned.

Because the military interrogation activity is presumably occurring overseas, Congress implicitly concluded that a function's effect on non-U.S. citizens is relevant in determining whether a function is inherently governmental.

In the past, Congress has not sought to bar contractors' involvement in interrogations, but to ensure their compliance with law and to increase training requirements. For example, in the 2005 defense authorization act, Congress directed the military to implement training for contractors who came into contact with detainees through interrogation or otherwise.

Subsequently, the administration amended the department's FAR supplement, and contractors are now required to receive government-provided training on international treaty obligations and laws of the United States.

Congress also amended the Uniform Code of Military Justice to specifically hold contractors accountable for their conduct in military support positions during times of war or contingency operations. All interrogators, including

contract personnel, are therefore required to comply with the Geneva Conventions and other applicable federal laws, like the Detainee Treatment Act. If they fail to do so, they can now be accountable before a military court.

### FRUSTRATION AND RESTRAINT

The provision in this year's defense authorization apparently reflects Congress' frustration with the Defense Department's perceived delay in bringing interrogations in-house following the department's pronounced intent to expand its interrogation force.

In response, Congress originally passed stronger legislation (H.R. 5658 and S. 3001) than its Sense of Congress. The initial legislation (passed before the Defense Department's Oct. 9 directive) would have mandated that, within one year, the department end its use of contractor interrogators.

The OMB strongly opposed this. It stated that the use of contractors is necessary for effective interrogations because, in some cases, a contract interrogator may possess the best combination of skills to obtain the needed information. The OMB claimed that the congressionally proposed restrictions would unduly limit the ability to obtain intelligence needed to protect the country from attack. The OMB recommended that the president veto the bills.

Instead of insisting on the mandatory requirement, Congress changed the bill and presented a joint bill with only the nonbinding Sense of Congress provision.

Congress' restraint could be because it believed that a veto fight was not worth the effort, given that a new administration will take office in 2009. Congress may have been waiting to see if the new administration, regardless of party, would bring the military interrogations in-house or clarify if they are inherently governmental. The change may also reflect Congress' concern with the Defense Department's plight in its as yet incomplete attempt to bring this function in-house.

Whether using contractors for military interrogations is ultimately permissible may become moot if the Defense Department develops the necessary in-house interrogation resources.

If the Defense Department continues to need contractors for military-supervised interrogations, however, Congress has called into question the legal basis for contracting for such support. The uncertainty over whether interrogation services are an inherently governmental activity, even under the narrow scope defined in recent Defense Department guidance, presents a new risk to contractors and ambiguity to contracting officers.

Future requirements for such services may arise with little or no advance notice. This issue therefore needs to be addressed further by Congress and the executive branch to ensure clarity and consistency for this important subject.

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