RULEMAKING BY CONTRACT

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Contractors have become a ubiquitous presence in the administrative state. How these private sector entities intersect with the rulemaking process, however, is not well understood. Unpacking contractors' role in rulemaking is important, not least because rulemaking is the executive branch's core lawmaking function. It is also important because there is a potential accountability blind spot when it comes to contractors in rulemaking. The web of law and policy surrounding contractors is complicated. Protections in place relating to procurement, ethics, recordkeeping, and disclosure are broadly conceived and not readily applied to the nuances of rulemaking.

Building on a survey of agency rulemaking contacts and interviews with forty-five agency officials, contractors, and experts, this empirical study provides a comprehensive account of contractors' roles in rulemaking. We describe how agencies perceive contractors in rulemaking, the tasks that contractors perform, and why and how agencies use them to support rulemaking. Our primary finding is that contractors are involved in almost every aspect of the rulemaking process, from soup to nuts. We conclude that, at many agencies, contractors are largely unexamined, but core, contributors to the contemporary rulemaking process and, as such, legal scholars, policymakers, and practitioners should take a closer look.

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> Contractors are us—they're feds—but in italics.[1]
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> To the extent that a contractor would be involved at all [in rulemaking], which in and of itself strikes me as highly irregular, I cannot think of an instance where such participation would be anything more than clerical or non-substantive.[2]

INTRODUCTION

The strained—some might even say beleaguered—condition of administrative capacity in the United States is widely acknowledged. Despite steady increases in federal spending, the size of the federal civilian workforce has remained relatively level since about 1960.[3] Faced with growing

1. Interview 13.
2. Survey response.
3. JOHN DIIULIO, BRING BACK THE BUREAUCRATS 15–16 (2014).

demands for government services and scarce bureaucratic labor, government has increasingly come to rely on the services of private sector[4] contractors.[5] Contractors have become a significant presence in federal agencies, taking on numerous functions like professional services, logistics, general health care, and information technology.[6]

Contractors' reach into government is deep—some scholars even describe them as the "shadow" of the federal civilian workforce.[7] Their reach is so deep, in fact, that it touches the notice-and-comment rulemaking process, the core policymaking apparatus within the administrative state.[8] Yet little is known about contractors' roles in rulemaking.[9] What rulemaking tasks do

4. We use the term "private sector" in this Article to mean non-governmental. The term encompasses both for-profit and non-profit organizations.

5. For example, a 2011 report by the Government Accountability Office (GAO) documents that, over a five-year period, spending on contracts for professional and management support services at civilian agencies increased 44%. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-87, MANAGING SERVICE CONTRACTS: RECENT EFFORTS TO ADDRESS ASSOCIATED RISKS COULD BE FURTHER ENHANCED 7 (2011); *see also* Memorandum from Douglas W. Elmendorf on Federal Contracts and the Contracted Workforce to Representative Chris Van Hollen, (Mar. 11, 2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49931-FederalContracts.pdf.

6. For example, in Fiscal Year (FY) 2020, the U.S. government spent $665 billion on contracts for goods and services. *A Snapshot of Government-Wide Contracting For FY 2020 (Infographic)*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG (June 22, 2021), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic. Service contracts made up $391.8 billion, or roughly 59% of that total. *Id.*

7. *E.g.*, DANIEL GUTTMAN & BARRY WILLNER, THE SHADOW GOVERNMENT (1976). Professor Light also describes contractors as a "shadow of government." PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 1–6 (1999) [hereinafter TRUE SIZE OF GOVERNMENT]. Estimates of the number of contractors vary. According to the *Washington Post*, in 2010, the ratio of contractors to federal employees in the Department of Homeland Security was one to one. Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST. (July 20, 2010, 12:00 PM), https://www.washingtonpost.com/investigations/top-secret-america/2010/07/20/national-security-inc/. Meanwhile, Light finds that, in 2017, across the federal government there were roughly three private contractors for every one federal employee. PAUL C. LIGHT, THE GOVERNMENT INDUSTRIAL COMPLEX 36–38 (2019) [hereinafter INDUSTRIAL COMPLEX]. Finally, Professors Schooner and Swan note that the number of contractor support personnel in Iraq and Afghanistan frequently exceeded the number of military personnel. Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-examined Effect of Surrogates on the Public's Casualty Sensitivity*, 6 J. NAT'L SEC. L. & POL'Y 11, 17 (2012).

8. *See* Rachel A. Potter, *How much of Rulemaking is Done by Contractors?*, BROOKINGS INST. (Feb. 16, 2022), https://www.brookings.edu/research/how-much-of-rulemaking-is-done-by-contractors.

9. One reason for this knowledge deficit is that tracking contract spending that is

contractors actually perform? Do all agencies use contractors to help with their rules? And how does this all intersect with the legal limits in place with respect to both rulemaking and procurement?

This Article summarizes findings from an empirical study we conducted that examined how federal agencies use contractors to support the rulemaking process. Our primary finding is that contractors are involved in almost every aspect of the rulemaking process. Our research reveals wide variation, however, in how agencies approach the use of contractors in rulemaking. Not only do agencies have highly divergent attitudes about what contractors may and should do in rulemaking, they also perceive different risks and benefits of contractor use and manage contractors in different ways. What emerges is a complex picture, with contractors essential to rulemaking at some agencies, occasionally useful to a subset of agencies, and kept away from rulemaking at other agencies.

Part I situates these findings in the larger literature on outsourcing, and Part II explains some of the legal considerations that attend contracting. Part III draws upon a set of in-depth interviews with forty-five agency officials, experts, and contractors and a survey of agency rulemaking officials[10] to describe agency perspectives on the appropriateness of contractors in rulemaking. Part IV inventories dozens of discrete tasks that contractors perform in the rulemaking context. Part V considers the reasons why agencies use (or do not use) contractors when writing rules, and Part VI describes agency practices (i.e., written policies, workflow integration, and transparency) for when they do.

I. BACKGROUND

Contractor involvement in the rulemaking process is part of a larger landscape of government contracting. The rise of government contracting,[11]

specifically tied to rulemaking is challenging and inherently limited. *See id.*; *see also* Bridget C.E. Dooling & Rachel Augustine Potter, Contractors in Rulemaking 4–5 (May 9, 2022) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/Contractors%20in%20Rulemaking%20Final%20Report.pdf [hereinafter Dooling & Potter, ACUS Report] (discussing data limitations).

10. For discussion of the methodological approach employed in the survey and the interviews, see Dooling & Potter, ACUS Report, *supra* note 9. The design we employ is qualitative, chronicling the roles that contractors take on in rulemaking and issues associated with their use. Our research permits us to say clearly that some agencies use contractors for a variety of rulemaking tasks beyond what has previously been documented. It does not, however, allow us to answer questions about "most agencies" or "most contracting firms."

11. We note that different terminology is used in this literature, including "outsourcing," "contracting," "contracting out," and "privatizing," among other terms. For purposes of this Article, we use the terms outsourcing and contracting interchangeably. We understand privatization to mean the conversion of formerly public assets into private assets, which is not a topic we cover in this Article.

intended to improve the efficiency and effectiveness of government, has drawn the attention of scholars and oversight bodies concerned about the implications of this trend. These observers have noted both the considerable benefits and the considerable risks of using contractors to provide government services. We outline these benefits and risks below.

A. Potential Benefits of Contractor Use

The turn toward private sector provision of government services has occurred in concert with political support for outsourcing.[12] These political efforts were rooted in an understanding that buying goods and services from the private sector would yield three principal benefits: efficiency, flexibility, and expertise.[13]

Efficiency refers to the idea that "private firms can provide goods and services 'better, faster, and cheaper' than government."[14] In 2012, the Office of Management and Budget (OMB) reported that "[g]overnment-wide strategic sourcing of items such as office supplies and domestic shipping services has already saved nearly $200 million since [Fiscal Year (FY)] 2010" and that "agency-level strategic sourcing of goods like IT and medical equipment have saved hundreds of millions more."[15] Cost-savings may also be available for other kinds of services, though this is contested.[16] In short, the idea is that at least for some goods and services,

12. *See* Dooling & Potter, ACUS Report, *supra* note 9, at 5–6 (discussing political environment).

13. *See* Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT 15 (Jody Freeman & Martha Minow eds., 2009).

14. KEVIN R. KOSAR, CONG. RSCH. SERV., RL33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION 6 (2006).

15. Joe Jordan, *Historic Savings in Contracting – and Plans for More*, OBAMA WHITE HOUSE: BLOG (Dec. 6, 2012, 12:20 PM), https://obamawhitehouse.archives.gov/blog/2012/12/06/historic-savings-contracting-and-plans-more.

16. *Compare* Aaron Barkley, *Cost and Efficiency in Government Outsourcing: Evidence from the Dredging Industry*, 13 AM. ECON. J. MICROECON. 514, 517 (2021) (estimating savings of twenty three percent for larger projects), *with* Paul Chassy & Scott Amey, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, PROJECT ON GOV'T OVERSIGHT (Sept. 13, 2011), https://www.pogo.org/report/2011/09/bad-business-billions-of-taxpayer-dollars-wasted-on-hiring-contractors/. Professor Sclar also notes that, in practice, government's efficiency gains are rarely realized to their full theoretical potential: "Most public contracting takes place in markets that range from no competition (monopoly) to minimal competition among very few firms (oligopoly). Although oligopoly is preferable to monopoly, it is still far removed from the salutary competition venerated by privatization advocates." ELLIOTT SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 69 (2001).

private firms are able to provide a better deal for the taxpayer and for the government, especially when the contracts are awarded competitively.[17]

Second, contracting for services may offer *flexibility* to agencies. As Fukuyama notes, "because the rules for dismissing civil servants are so cumbersome, it is often easier to hire a contractor to undertake a job, which can be terminated when no longer necessary."[18] This agility provides agencies with "surge capacity" to manage high workload periods.[19] For example, when Congress passes a major piece of legislation, that new law may direct an agency to issue many new rules. Such directives often include deadlines, which compel agencies to issue regulations quickly. Including contractors in the regulatory workflow might help an agency to smooth out this sudden demand for regulatory productivity. This type of support may be particularly useful for agencies that issue rules infrequently and, therefore, do not maintain a large staff of regulatory personnel.

Finally, government agencies can expand their *expertise* by outsourcing.[20] For instance, it may be difficult for an agency to lure a top scientist with expertise in a niche area away from a university or the private sector and into government service. Further, the services of such an expert might only be required for a time-limited project. Hiring this expert as a contractor allows the government to tap into expertise, without making an unnecessary long-term investment.

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17. Where markets lack competitors for government contracts, this will impede efficiency. Jocelyn M. Johnston & Barbara S. Romzek, *The Promises, Performance, and Pitfalls of Government Contracting* 404, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY (Robert Durant ed. 2010); KOSAR, *supra* note 14. Efficiency is further hampered when agencies themselves limit competition by offering non-competitive contracts, a trend that is increasingly common. Recent government reports have decried decreased competition in the awarding of federal procurement contracts. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R40516, COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS 1 (2015); MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 110TH CONG., MORE DOLLARS, LESS SENSE: WORSENING CONTRACTING TRENDS UNDER THE BUSH ADMINISTRATION (June 2007).

18. Francis Fukuyama, *The Intrinsic Functions of Government*, *in* PUBLIC SERVICE AND GOOD GOVERNANCE FOR THE TWENTY-FIRST CENTURY 110 (James L. Perry, ed., 2020).

19. Office of Federal Procurement Policy, Inherently Governmental Functions Policy Letter, 56 Fed. Reg. 65,279, 65,280 (Dec. 16, 1991) [hereinafter IGF Letter 1991] (explaining that "[a]gencies award service contracts for various reasons, such as . . . to meet the need for intermittent service").

20. *Id.* (explaining that agencies also award service contracts "to acquire special skills not available in the Government").

B. Concerns About Contracting for Government Services

Despite the sizable potential benefits afforded by contracting, many have also noted its many potential downsides.[21] A general theme is that efficiency may come at the expense of important public law principles.[22] We focus on three of the most prominent critiques relating to the implications of contracting: government capacity, accountability, and ethics.

First, concerns about contracting for government services often focus on the hollowing out of long-term government *capacity*.[23] The crux of this concern is whether, in the context of broad-scale outsourcing of services, government retains the ability to meaningfully oversee the work that contractors do. A 2008 report by the Government Accountability Office (GAO), for example, found that nearly half of the contract specialists overseeing contracts at one Department of Defense (DoD) agency were themselves contractors.[24] Examples like this naturally raise questions about whether appropriate safeguards are in place to ensure work is done well and to prevent problems like self-dealing. Scholars have characterized the mechanisms intended to ensure that the government maintains sufficient capacity as "weak."[25]

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21. *E.g.*, Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, *in* GOVERNMENT BY CONTRACT, *supra* note 13, at 123.

22. *E.g.*, Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, *in* GOVERNMENT BY CONTRACT, *supra* note 13, at 128 (noting the problem of using efficiency as the sole criterion of success).

23. Recent scholarship has been highly critical of the extent of government reliance on contractors. *E.g.*, Kimberly N. Brown, *We the People, Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1349 (2013) (characterizing the current situation as an "accountability vacuum"); INDUSTRIAL COMPLEX *supra* note 7, at 8–14 (2019) (referring to the "government-industrial complex"); DIIULIO, *supra* note 3, at 6 (2014) (noting the "Leviathan by proxy"); JON D. MICHAELS, CONSTITUTIONAL COUP 111 (2017) (describing "deep service contracting" as a form of "Constitutional Coup"); CHIARA CORDELLI, THE PRIVATIZED STATE 7–13 (2020) (discussing the "regression to the state of nature").

24. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-360, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 3 (2008).

25. Fukuyama discusses the weak enforcement of protection provisions associated with private sector competitions managed under the U.S. Office of Management and Budget (OMB) Circular A-76, while Verkuil describes the feeble protections associated with the inherently governmental function test, a standard we describe later in this Article. Fukuyama, *supra* note 18, at 108; PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 127–29 (2007) [hereinafter OUTSOURCING SOVEREIGNTY].

Second, concerns about *accountability* have several dimensions.[26] On a broad level, it is often quite difficult for those outside the agency—members of Congress, scholars, the media, or the public—to observe which government functions are being performed by a contractor versus a government employee.[27] Much of this disconnect owes to the fact that many federal transparency laws do not apply to contractors in the same way they do to federal agencies and their employees. One scholar explains, there are several "statutes mandating transparency at an agency and individual level, including the Freedom of Information Act (FOIA), the Government in the Sunshine Act, the Federal Advisory Committee Act, and a host of financial and political disclosure requirements imposed on anyone hoping to work for the federal government. None of these rules apply to contractors[.]"[28] Even when limited insight into what contractors do is possible, the highly technical nature of some agency and, therefore, contractor work, and the use of subcontractors (which further extends the accountability chain), can also impede the ability of those outside the agency to hold contractors to account. Relatedly, the government's decision about whether to outsource a particular function tends to be reviewed only in particular contexts, such as contract disputes or the decision to privatize a function, and not in the context of a challenge under the Administrative Procedure Act (APA).[29]

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26. By accountability we mean the ability of government to hold contractors responsible for the actions taken (or not taken) during the course of a contractual relationship.

27. Minow acknowledges these oversight challenges: "the lack of transparency and disclosure makes it difficult for the public—and for me—to know what is going on with the military's use of private contractors. The private firms disclose some of their activities in promoting their services, but they can resist media and Congressional inquiries, claiming that they need to do so to protect proprietary information." Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, Democracy*, 46 B.C. L. REV. 989, 999 (2005).

28. Fukuyama, *supra* note 18, at 112. We understand this to refer to whether contractors have obligations to act in accordance with these laws, e.g., Federal Advisory Committee Act of 1972 (FACA), 5 U.S.C. App. when performing functions for agencies. There is a separate issue of whether the government's obligations under FACA are triggered when the government seeks the advice of contractors or consultants. *See* Pebble Ltd. P'ship v. U.S. Env't Prot. Agency, 2015 WL 12030515, No. 14-cv-0171, at *5 (D. Alaska June 4, 2015) (providing examples of different holdings on this issue). Fukuyama further muses that "the lack of transparency can then affect the legitimacy of government as a whole, as citizens are not sure who it is that is responsible for delivering services, or whom to hold accountable when things go wrong." Fukuyama, *supra* note 18, at 112.

29. *E.g.*, Just in Time Staffing v. United States, 143 Fed. Cl. 405, 413 (2019) (discussing relevance of inherently governmental functions in a contract dispute); OUTSOURCING SOVEREIGNTY, *supra* note 25, at 195 ("Since 1996, bid protests have been considered in the U.S. Court of Federal Claims. Judicial review of decisions whether to treat a government function as inherent or not can be obtained by granting plaintiffs (government officials who

Agencies may also struggle to effectively oversee the contractors that work for them. The use of overly rigid contracting vehicles may lock agencies into suboptimal contract relationships. For instance, an agency may be aware that a vendor is underperforming in some way but be unable to remedy the situation due to legal and procedural constraints. One scholar notes that a growing tendency for agencies to use "omnibus" contracts, which bundle several services under one umbrella, can exacerbate accountability problems as "they create a series of secondary relationships between contractors and subcontractors that may displace government as a voice in directing the production of goods and services."[30] Problems like these make it difficult for agencies to exercise appropriate oversight, presenting another obstacle for contractor accountability.

Third, *ethics* pose a concern to anyone working in or for the government given the importance of the public trust. However, the safeguards in place for government employees and contractors are different. While government employees are subject to a host of ethics statutes and regulations that relate to their positions, including disclosures of financial holdings and limitations on political activities, contractors face many fewer limitations. Indeed, as one scholar notes, most ethics restrictions "do not apply to government contractor personnel, even those employees working side by side with and performing the same functions as government employees. As a result, government contractor personnel may routinely be giving advice that is tainted by conflicts of interest."[31]

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lost competitions and their unions) standing to challenge results under existing law."); Nat'l Air Traffic Controllers Ass'n v. Sec'y of the Dep't of Transp., 654 F.3d 654, 656, 660 (6th Cir. 2011) (discussing relevance of inherently governmental functions to a privatization dispute); *see also* Brown, *supra* note 23, at 1363. Agencies should also be aware that they may face scrutiny for how they use contractors under the Federal Advisory Committee Act. *See, e.g.*, *Pebble Ltd. P'ship*, 2015 WL 12030515, at *5 (noting the possibility that FACA could apply to contractors and denying, in relevant part, the government's motion to dismiss).

30. TRUE SIZE OF GOVERNMENT *supra* note 7, at 185.

31. Kathleen Clark, Ethics for an Outsourced Government 23 (Mar. 10, 2011) (report to Admin. Conf. of the U.S.) [hereinafter Clark, Ethics for an Outsourced Government], https://www.acus.gov/sites/default/files/documents/K-Clark-Final-Report.pdf. This report informed an ACUS recommendation on the topic of contractor ethics. Adoption of Recommendations Notice: Compliance Standards for Government Contractor Employees, 76 Fed. Reg. 48,789, 48,792 (Aug. 9, 2011) [hereinafter Compliance Standards for Contractor Employees]; *see also* Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts of Interest In and Out of Government*, 62 ALA. L. REV. 961, 964–65, 991 (2011); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 898–900 (2000) (documenting how thin conflicts-of-interest provisions can be in practice).

At their core, questions about contractor ethics center on employee allegiance. Federal employees swear an oath to uphold the Constitution, report to others who have also sworn that same oath, and are held to a wide array of ethical requirements to discourage self-interested action in the course of employment.[32] Contractors, in contrast, serve three sets of interests: their contractual obligations to the government, the interests of their private sector employers, which may have organizational goals that are different from or even conflict with those of the federal agency, and their own individual interests. Contractors do not swear an oath[33] and while some are covered by ethical requirements arising from individual agency regulations,[34] specific contract terms, or due to their own companies' policies, the result is uneven application of these expectations.[35]

II. LEGAL CONSIDERATIONS

The APA is considered the "backbone for the rulemaking process"[36] as it lays out the basic steps that agencies must follow when promulgating new rules. The APA's rulemaking language speaks to *what* an agency must do in a procedural sense,[37] but it is not especially prescriptive with respect to the details of *how* an agency must fulfill these basic requirements. For example, while the APA requires that upon receiving comments on a proposed rule "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose,"[38] it does not indicate how the agency might go about writing the concise general statement, who has that

32. We discuss contractor ethics requirements *infra* Part II.B.

33. Verkuil explains the power of the oath: "the oath is meant to divide the public and private sectors . . . when freely entered into, the oath can inspire those who take it and become a source of professional pride." PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT 97 (2017).

34. Some agencies have adopted customized procurement regulations addressing potential conflict of interest issues relating to ethics. For example, the Environmental Protection Agency (EPA) limits the ability of certain Superfund contractors to simultaneously provide rulemaking support. *See* FAR 1552.209-74(d) (2022) (stipulating that "[t]he Contractor and any subcontractors, during the life of this contract, shall be ineligible to enter into an EPA contract or a subcontract under an EPA contract, which support's EPA performance of Superfund Headquarters policy work *including support for the analysis and development of regulations*, policies, or guidance that govern, affect, or relate to the conduct of response action activities, unless otherwise authorized by the Contracting Officer." (emphasis added)).

35. Ethics for an Outsourced Government, *supra* note 31, at 28–30 (mapping applicability of ethics restrictions); Compliance Standards for Contractor Employees, *supra* note 31, at 48,792.

36. RACHEL A. POTTER, BENDING THE RULES 28 (2019).

37. 5 U.S.C. § 553 (2020).

38. § 553(c).

responsibility, or whether a contractor might reasonably assist the agency in performing such a function.[39] It follows that, although it constitutes the core of the rulemaking process, the APA is not an especially helpful guide to understand the legal considerations relevant to the question of contractors in the rulemaking process.[40] Instead, we consider three legal dimensions of particular relevance: federal procurement law and policy (with particular emphasis on the concept of an "inherently governmental function"), ethics laws, and federal recordkeeping and disclosure requirements.

A. Federal Procurement Law and Policy

A complete description of federal procurement law and policy—that is, the web of statutes, regulations, guidance, and judicial opinions that constitute the legal environment in which federal contracting takes place—is beyond the scope of this Article. There has long been a notion in procurement law, however, that certain functions are reserved by the government and are therefore inappropriate for contractors.[41] This principle

39. Scholars have considered ways that the Adminsitraitve Procedure Act (APA) could be used to help ameliorate problems caused by the status quo. *E.g.*, Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1315 (2003) (suggesting that Congress could amend the APA to subject contracts to its requirements); Alfred C. Aman, *Privatization and Democracy: Resources in Administrative Law*, *in* GOVERNMENT BY CONTRACT, *supra* note 13, at 284 (suggesting that the public should have an opportunity to comment on proposed contracts, like they do for proposed rules). One scholar responded that this was using a "nuclear weapon to kill a gnat." Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, *in* GOVERNMENT BY CONTRACT, *supra* note 13, at 187.

40. Along similar lines, scholars have raised potential constitutional issues triggered by expansive use of contractors in agency policymaking, but these concerns have yet to find traction in the courts. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1410–45 (2003) (noting the inability of the state action doctrine to address constitutional concerns with privatization and advocating, instead, for such arrangements to be analyzed as private delegations subject to extra scrutiny); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1913–15 (2015) (explaining how courts could oversee the executive's duty to supervise privatized arrangements); MICHAELS, *supra* note 23, at 126–27 (arguing that contractors are a threat to, among other things, the "administrative separation of powers" when retained by political appointees and therefore more compliant with political direction than civil servants); Paul R. Verkuil, *Outsourcing and the Duty to Govern*, *in* GOVERNMENT BY CONTRACT, *supra* note 13, at 314 (discussing limitations on delegations to contractors as a matter of the Appointments Clause); Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1511–19 (2001) (considering how the Appointments Clause and the Tenth Amendment might apply to certain privatization efforts).

41. The exact articulation of this policy has gone through many iterations issued in

finds its roots in Supreme Court decisions in which the Court delineated the boundary lines of what Congress could delegate to private industry.[42]

Understanding inherently government functions requires cobbling together policy actions taken by both the Executive Branch and Congress over many decades. Most notable is the Federal Acquisition Regulation (FAR), "the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds."[43] The FAR addresses inherently governmental functions, although—as we explain below—not definitively so.[44] This body of regulation is jointly issued by the DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) under Title 41 of the U.S. Code.[45] Agencies may supplement the FAR with their own regulations as needed.[46]

Apart from the FAR, the Office of Federal Procurement Policy (OFPP) in OMB is authorized by statute to provide "overall direction" for government-wide procurement activities.[47] OFPP occasionally issues policy letters and other materials that contain guidance, some of which gets added to Circular A-76, the primary document "establish[ing] Federal policy regarding the performance of commercial activities . . . ."[48]

In 1979, Circular A-76 referred to "inherently governmental" functions and explained that its various provisions did not apply to such functions because they

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legislation, the Federal Acquisition Regulation (FAR), and in Office of Federal Procurement Policy (OFPP) guidance. *See* Thomas J. Laubacher, *Simplifying Inherently Governmental Functions: Creating a Principled Approach from its Ad Hoc Beginnings*, 46 PUB. CONT. L.J. 791, 793–94 (2017).

42. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935) (finding Congress may not delegate unlimited lawmaking discretion to the Executive Branch); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding Congress may not regulate purely local private industry under the Commerce Clause).

43. FAR Foreword (2022). The FAR includes hundreds of provisions, including those on improper business practices and personal conflicts of interest, FAR pt. 3 (2022); classified information, FAR 4.4; types of contracting vehicles, FAR pt. 16; and much more. As of FY 2019, the FAR was almost 2,000 pages long.

44. *See* FAR 7.5.

45. *See id.* 1.103, 1.101; 41 U.S.C. § 13 (2012).

46. As explained in the U.S. Department of Labor Acquisition Regulation (DOLAR), "[t]he purpose of the DOLAR is to implement the FAR, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR." FAR 2901.101(b) (2019). A list of agency-specific regulations is available at *Regulations*, ACQUISITIONS.GOV, https://www.acquisition.gov/content/regulations (last visited Nov. 12, 2022).

47. Office of Federal Procurement Policy Act § 6, 41 U.S.C. § 1121 (2018).

48. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1999) [hereinafter CIRCULAR A-76].

must be kept in-house.[49] Later revisions of Circular A-76 explained that "[c]ertain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees."[50] While this line is readily distinguishable on a conceptual level, practicable distinctions that apply to day-to-day practice in government were—and continue to be—elusive. The principle does not, for example, expressly reference rulemaking or other specific types of government action.

In 1998, Congress further refined policy relating to inherently governmental functions; the Federal Activities Inventory Reform Act of 1998 defines these functions to include "activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements."[51] It goes on to say that such functions involve "the interpretation and execution of the laws of the United States so as . . . to bind the United States to take or not take some action by . . . regulation."[52] It also notes that the definition does not "normally include" information gathering or provision of "advice, opinions, recommendations, or ideas" to the government.[53] The line that emerges is one of decisionmaking.

The FAR further elaborates with a list of twenty examples of functions that are considered inherently governmental (e.g., "direct conduct of criminal investigations"), and nineteen that are not considered inherently governmental (e.g., "[s]ervices in support of acquisition planning").[54] The list includes rulemaking examples as well.[55] The "determination of agency policy, such as determining the content and application of regulations, among other things" is considered inherently governmental, while a broad range of services associated with "planning activities," "analysis, feasibility studies, and strategy options to be used by agency personnel in developing policy," and—most directly—the "development

49. *Id.* at 1–2; *see also* Laubacher, *supra* note 41, at 801–02.

50. CIRCULAR A-76, *supra* note 48, at 1–2.

51. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2)(B), 112 Stat. 2382, 2385.

52. *Id.*

53. *Id.* The FAR incorporates this definition and also clarifies that "[t]his definition is a policy determination, not a legal determination." FAR 2.101 (2022).

54. Federal Acquisition Regulation; Inherently Governmental Functions, 61 Fed. Reg. 2627, 2628–29 (Jan. 26, 1996) (establishing FAR 7.503(c)–(d)).

55. *Id.*

of regulations" is not considered inherently governmental.[56] Again, the line is between advice-giving and decisionmaking.

The FAR also notes that there is a set of functions that are not considered inherently governmental functions, but which "may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the government administers contractor performance."[57] The FAR does not define this category of activities.

While the idea that some tasks are inappropriate for contractors has long been clear, the challenge of finding the line in practice has drawn the attention of policymakers, practitioners, and academics.[58]

In 1985, the Administrative Conference of the United States (ACUS) issued a recommendation on the use of consultants in the preparation of "regulatory analysis documents," which was defined to include various forms of analysis that agencies were required to prepare as part of their rulemaking activities.[59] The recommendation states:

> Agencies can benefit from entering into consulting contracts with qualified experts to aid in gathering and analyzing information for regulatory analysis documents. However, agency personnel should retain the ultimate responsibility for the contents of regulatory analysis documents and guard against consultant conflict of interest. To these ends, agencies should ensure that: (1) Agency employees, not consultants, draft regulatory analysis documents, and (2) when a regulatory analysis document relies upon consultant reports, the reports are placed in the public file of the rulemaking proceeding, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. [§]552(b)(5) might apply to portions of the reports.[60]

OFPP has taken several steps over the last several decades to more fully explain how agencies should determine whether an activity is inherently governmental.[61] In 1991, OFPP issued a proposed policy letter to further define the term "because executive agencies, Members of Congress, and the General Accounting Office have from time to time either requested guidance regarding,

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56. *Id.*

57. FAR 7.503(d).

58. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-92-11, GOVERNMENT CONTRACTORS: ARE SERVICE CONTRACTORS PERFORMING INHERENTLY GOVERNMENTAL FUNCTIONS? REPORT TO THE CHAIRMAN, FEDERAL SERVICE, POST OFFICE AND CIVIL SERVICE SUBCOMMITTEE, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE (1991); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 555 (2005); Minow, *supra* note 27, at 1015.

59. Recommendations of the Amdinistratrative Conference regarding Adminsitrative Practice and Procedure, 50 Fed. Reg. 28,363, 28,365–66 (July 12, 1985).

60. *Id.*

61. Laubacher, *supra* note 41, at 793–94.

or inquired about, the propriety of awarding contracts for certain types of functions or administering contracts in certain ways."[62] OFPP acknowledged that "[w]hile it is clear that certain functions, such as the command of combat troops, may not be contracted, others, such as building maintenance and food services, may be. There is, however, some difficulty in determining whether services that fall between these extremes may be acquired by contract."[63]

As we discuss below, rulemaking includes many activities that fall between these extremes. Rulemaking tasks, like many government activities that involve internal administrative processes, can readily be distinguished from the use of contractors to command combat troops. Contractor involvement in analytical tasks, for example, is different, because "[t]he situation considered here is more subtle. The contractor is not asked to perform government functions directly (whether 'inherent' or not), but for help in making decisions."[64] This raises questions: "If the contractor does all the work to prepare a decision, has the decision line itself been crossed? When an official rubber-stamps a contractor's recommendation, who is performing the government function?"[65]

In a final policy letter issued in 1992, OFPP acknowledged that prior guidance to agencies lacked detail and that "sometimes [f]ederal agencies have permitted contractors to perform functions that should be performed by Government personnel."[66] OFPP also accepted that the challenges would endure.[67] The ongoing ambiguity has led to criticism. In the introduction to their volume *Government by Contract*, Jody Freeman and Martha Minow note that

62. IGF Letter 1991, 56 Fed. Reg. 65,279, 65,280 (Dec. 16, 1991).

63. *Id.*

64. OUTSOURCING SOVEREIGNTY, *supra* note 25, at 43.

65. *Id.*

66. Office of Federal Procurement Policy: Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,096, 45,096 (Sept. 30, 1992).

67. *Id.* at 45,100 (noting that "[a]dditional problems in this area will probably arise in the future" but that its 1992 guidance was "much more detailed than anything that was available to agencies in the past"). Subsequently, Congress enacted the Federal Activities Inventory Reform (FAIR) Act of 1998 requiring agencies to prepare annual lists of agency activities that are not considered to be inherently governmental. Federal Activities Inventory Reform (Act of 1998, Pub. L. No. 105-270, § 2, 1998 U.S.C.C.A.N. (112 Stat. 2382) (codified as amended at 31 U.S.C. § 501 note)).

> [m]any critics are also concerned about the instability of the "inherently governmental" designation and its failure in practice to rule functions in or out of eligibility for contracting. If the government may contract with private companies to provide military, national security, and criminal justice functions, why not contract out criminal prosecutions and executions or the Federal Reserve Board's regulation and supervision of national monetary and financial systems?[68]

In 1993, Congress enacted the Government Performance and Results Act (GPRA), which requires agencies to develop a variety of strategic plans and accountability metrics. However, in delegating this work to agencies, Congress carved out the "drafting" of certain management tasks, including strategic plans, performance plans, and performance reports as inherently governmental work that was to be reserved for performance by federal employees.[69]

In 2008, Congress required OMB, in consultation with federal stakeholders, to review and revise the definition of inherently governmental function.[70] In 2009, President Obama explained:

> [T]he line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.[71]

He directed OMB to "clarify when governmental outsourcing for services is and is not appropriate," consistent with the 2008 legislation.[72]

Following a proposed policy letter in 2010, OFPP issued a final policy letter in 2011.[73] Among other changes, the policy letter created a new category for "functions closely associated with the performance of inherently governmental functions" in light of "the risk that performance may impinge on [f]ederal officials' performance of an inherently governmental

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68. Freeman & Minow, *supra* note 13, at 13.

69. Government Performance and Results Act of 1993, Pub. L. No. 103-62, § 4, 107 Stat. 285, 286–89 (codified as amended at 31 U.S.C. §§ 1105(a), 1115–17). An analogous provision applies to the U.S. Postal Service. § 7, 107 Stat. at 292–94 (codified as amended at 39 U.S.C. § 2801–05).

70. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4356, 4411–12 (codified as amended at31 U.S.C. § 501 note).

71. Presidential Memorandum of March 4, 2009, Government Contracting, 74 Fed. Reg. 9755, 9756 (Mar. 6, 2009).

72. *Id.*

73. Office of Federal Procurement Policy: Proposed Policy Letter on Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188 (Mar. 31, 2010); Office of Federal Procurement Policy: Final Policy Letter 11-01 on Performance of Inherently Governmental Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011) [hereinafter OFPP Final Policy Letter 11-01].

function."[74] These activities may be performed by either federal employees or contractors.[75] The final policy letter applies these categories to four functions: budget development; policy and regulatory development; human resources management; and acquisition planning, execution, and management.

Under current policy, "functions closely associated with the performance of inherently governmental functions" are a special category, in light of "the risk that performance may impinge on [f]ederal officials' performance of an inherently governmental function."[76] For "policy and regulatory development" functions, the "[t]he determination of the content and application of policies and regulations" is inherently governmental, while "[s]upport for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options" is closely associated with inherently governmental functions.[77] When contractors receive tasks that are closely associated with inherently governmental functions, "the [f]ederal official's review and approval must be meaningful; that is to say, it cannot be a 'rubber stamp' where the government is completely dependent on the contractor's superior knowledge and is unable to independently evaluate the merits of the contractor's draft or to consider alternatives to that draft."[78] To this end, agencies are directed to use a checklist designed to "ensure contractors are not performing, interfering with, or undermining the agency's decisionmaking responsibilities."[79]

Stepping back, the web of procurement laws and policies surrounding inherently governmental functions has evolved over time, but policymakers still chase the elusive distinction between tasks that can appropriately be delegated to contractors and those that ought to be reserved for government employees. With little rulemaking-specific guidance to rely on, practitioners must draw their own line using broad government-wide principles.

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74. OFPP Final Policy Letter 11-01, *supra* note 73, at 56,238, 56,241.

75. *Id.* at 56,227.

76. *Id.* at 56,238, 56,241.

77. *Id.* at 56,234. Intriguingly, the final policy letter notes that mere drafting of "official agency proposals for legislation, [c]ongressional testimony, responses to [c]ongressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity" is inherently governmental. *Id.* at 56,241; *see generally* Bridget C.E. Dooling & Rachel A. Potter, *Regulatory Body Shops* (discussing how, under current law and policy, "drafting" is sometimes inherently governmental, and sometimes not) (manuscript on file with the authors).

78. OFPP Final Policy Letter 11-01, 76 Fed. Reg. at 56,231.

79. *Id.* at 56,233 (explaining the agency's oversight responsibilities). The checklist directs agencies to assign enough qualified government staff to give "special management attention" to the contractor's work, for example. *Id.* at 56,232.

B. Ethics Laws

In addition to federal procurement law and policy, several other statutes and policies intersect with government contracts for rulemaking activities. Chief among them are federal ethics laws. Professor Clark produced a detailed ACUS report that surveyed the range of ethical restrictions on federal employees and compared them to contractor duties, finding several gaps.[80] She explained that the "extensive and complex array of ethics statutes and regulations restrict current and former government employees' activities and financial interests . . . [mostly] do not apply to contractor personnel."[81] She noted that while a patchwork of agency-specific ethics rules apply to contractors in certain situations, "[t]here is no comprehensive regulation of government contractor ethics, even of those individuals who are working in government offices, side by side with government employees, providing services and exercising substantial discretion."[82]

There are two main types of conflicts of interest associated with government contracting.[83] The first type of conflict is *organizational conflicts of interest* presented by the use of contractors in functions related to the procurement process, in which the contractor presumably has ongoing business interests.[84] The second type of conflict is *personal conflicts of interest*, which involve the applicability of ethics rules to individual contractor employees.[85] Government employees are subject to a host of ethical rules intended to ensure that public interest is not eclipsed by the private interests of decisionmakers.[86] In practice, this means required ethics training and disclosures of certain activities and interests, as well as reviews of those disclosures, and investigations of alleged violations.[87]

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80. Clark, Ethics for an Outsourced Government, *supra* note 31, at 28–30, 41–49 (mapping applicability of ethics restrictions). Clark's extensive work built upon prior legislation and reports. *See* Dooling & Potter, ACUS Report., *supra* note 9, at 19–22.

81. Clark, Ethics for an Outsourced Government, *supra* note 31, at 4.

82. *Id.*

83. REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 24–25, 391–419 (2007)[hereinafter ACQUISITION ADVISORY PANEL REPORT], https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

84. *Id.* at 405–07.

85. *Id.* at 407–14.

86. *See* 5 C.F.R. § 2635.101(a) (1992) (describing the duty "to place loyalty to the Constitution, laws and ethical principles above private gain").

87. Clark, Ethics for an Outsourced Government, *supra* note 31, at 4.

Both civil and criminal penalties may follow from ethical violations.[88] The legal landscape for contractors is different, and "contractor personnel are not subject to the foregoing comprehensive set of statutory and regulatory ethics rules, even though in some cases they are working alongside government employees in the federal workplace and may appear to the public to be government employees."[89]

ACUS and others have recommended new requirements to deal with both personal and organizational conflicts of interest.[90] In 2014, the FAR Council proposed a rule extending the "limitations on contractor employee personal conflicts of interest to apply to the performance of all functions that are closely associated with the inherently governmental functions."[91] The FAR Council withdrew the proposed rule in 2021, citing "the passage of time since the proposed rule was issued in 2014, and the fact that section 829 did not require any changes to the FAR."[92]

C. Recordkeeping and Disclosure Frameworks

Another set of laws relevant to the use of contractors in rulemaking is the statutory requirements that govern decisionmaking processes and associated disclosure requirements. For example, the government must retain certain governmental records under the Federal Records Act,[93] and it must disclose some under the FOIA.[94] In addition, some agencies

88. ACQUISITION ADVISORY PANEL REPORT *supra* note 83, at 409.

89. *Id.* at 410.

90. *See* Clark, Ethics for an Outsourced Government, *supra* note 31, at 31–38; Compliance Standards for Contractor Employees, 76 Fed. Reg. 48,792–48, 795; U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-169, ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 31–32 (2008); ACQUISITION ADVISORY PANEL REPORT, *supra* note 83, at 25.

91. Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts of Interest, Proposed Rule, 79 Fed. Reg. 18,503 (Apr. 2, 2014).

92. Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts of Interest, Proposed Rule; withdrawal, 86 Fed. Reg. 14,862 (Mar. 19, 2021).

93. Federal Records Act, 44 U.S.C. § 3101 (2020).

94. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2020). One partial exception to contractors' exclusion from FOIA and information disclosure more generally is the so-called "Shelby amendment." Enacted in 1999, this amendment required OMB to amend Circular A-110 to say that certain data obtained via a federal "award" is subject to FOIA. Omnibus Consolidated and Emergency Supplemental Appropriations Act FY 1999, Pub. L. No. 105-277, 112 Stat. 2681-495 (Oct. 21, 1998) (Executive Office Appropriations Act FY 1999, title III). For rulemaking, this means that contractor data used to support a regulatory analysis could be subject to potential disclosure if it was obtained with an award as that term is used in the Shelby amendment and Circular A-110. However, Circular A-110 does not

are subject to additional process and disclosure requirements under the Government in the Sunshine Act.[95]

These laws form a web of provisions that confer a measure of accountability upon government actions. Contractors, however, are not subject to these various requirements.[96] The accountability blind spot in which contractors operate is important because accountability can suffer when the government turns to contractors.[97] For Professors Rosenbloom and Piotrowski, "when government activities are privatized or outsourced, democratic norms embodied in constitutional and administrative law are apt to be lost."[98] These norms are deeply embedded in the rulemaking process. When agencies rely on contractors for support in rulemaking functions, activities that these laws would otherwise cover shift into the blind spot.[99]

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apply to contracts. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-110, UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS (1999) (listing definitions); ERIC A. FISCHER, CONG. RSH. SERV., R42983, PUBLIC ACCESS TO DATA FROM FEDERALLY FUNDED RESEARCH: PROVISIONS IN OMB CIRCULAR A-110 (Mar. 1, 2013).

95. Government in the Sunshine Act, 5 U.S.C. § 552b (2020).

96. Brown, *supra* note 23, at 1362–63; Freeman, *supra* note 39, at 1306; *see also* Guttman, *supra* note 31, at 901–05 (tracing the development of case law on FOIA inapplicability to contractors). One notable exception to the broader rule that contractors are not subject to accountability and disclosure requirements is that contractors are prohibited from making political contributions to parties, committees, or candidates for public office while they are negotiating contracts or performing contract work. *See* 52 U.S.C. § 30119(a)(1). The U.S. Court of Appeals for the D.C. Circuit recently upheld the statutory ban on contractor contributions from individuals and firms. *See* Wagner v. Fed. Election Comm'n, 793 F.3d 1 (D.C. Cir. 2015) (en banc).

97. *E.g.*, Beermann, *supra* note 40; Brown, *supra* note 23.

98. David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. PUB. ADMIN. 103 (2005).

99. The practical consequences of subjecting contractors to these various regimes are worthy of deep consideration. *See, e.g.*, Kelman, *supra* note 39 185–86 (discussing the challenges of applying FOIA to contractors). One notable exception to this accountability blind spot is the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3521 (2020), a law which addresses both agency information collection and recordkeeping requirements. Contractors are broadly subject to the PRA's information collection provisions; at least one agency, the Department of Education, has made the PRA's applicability to contractors explicit in their FAR supplement. *See, e.g.*, FAR 3452.208-72 (2022).

III. HOW ARE CONTRACTORS PERCEIVED IN RULEMAKING?

While prior research has expressed concern that contractors are playing an increasing and problematic role in rulemaking,[100] this Article offers the first detailed study of whether and how agencies use contractors in the rulemaking process.[101] On one end of the spectrum, one participant characterized the use of contractors in rulemaking as "highly irregular" outside of clerical or "non-substantive" tasks.[102] This response stakes out one view, which is that contractors should not, as a matter of principle, be involved in the substantive aspects of the rulemaking process. Other respondents had a more neutral perspective, but they still concluded that contractors' roles should be limited when it comes to rulemaking. One respondent explained that contractors "seldom—if ever—play a role in our Agency's rulemaking activities."[103] Another commented: "I am not aware that [agency name] has ever used contractors in its rulemaking."[104] And yet another respondent noted that, in their experience, contractors "usually work in back-office (IT) roles," but not on rulemakings, which are handled by "[f]ull-time staff."[105]

Among survey respondents who answered that contractors were not used in the rulemaking about which they were surveyed, and who provided reasons from a pre-set list, the most frequently selected reasons were "need for expertise," "past practices," "adequacy of agency resources," and "consideration of inherently governmental functions." One respondent explained that their agency's regulatory program is "robust," and that the process is handled internally.[106]

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100. *See, e.g.*, MICHAELS, *supra* note 23, at 111 (arguing that "[e]verywhere we look, the federal government is engaged in deep service contracting: the outsourcing of sensitive policy design and policy-implementing responsibilities" including rulemaking activities (emphasis omitted)); OUTSOURCING SOVEREIGNTY, *supra* note 25, at 24–25, 191 (arguing that "[a]gencies contract with regularity for a variety of private management services" including rulemaking activities and that some of these activities "cross[] the line").

101. We offer two caveats on scope. First, the regulatory process in the United States is expansive and, for the purposes of this Article, we have limited the scope to the rule writing process within federal agencies. Typically, this process ranges from the data collection phase that precedes the publication of a proposed rule to the publication of a final rule in the Federal Register. This means that we generally exclude post-promulgation activities, such as enforcement. *See, e.g.*, Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Environmental Decision Making*, *in* GOVERNMENT BY CONTRACT, *supra* note 13, at 104–07 (describing third-party entities used for certification, compliance, and enforcement).

102. Survey response.

103. Survey response.

104. Survey response.

105. Survey response. Here and throughout, we use gender-neutral pronouns to protect the identity of study participants.

106. Survey response.

Another explained that "[w]e have a division [name omitted] that is responsible for handling the rulemaking activities, in conjunction with other Agency divisions [names omitted] as necessary."[107] Relatedly, one respondent raised the extent and complexity of rulemaking as significant barriers to the use of contractors in rulemaking. They noted that their agency "is a small agency" with rules that "tend to be non-significant as provided under [Executive Order] 12866, and we tend to get few comments."[108] This view was supported by several personnel from other agencies who also indicated that their agency does not use contractors in the rulemaking process.[109]

A middle group on this spectrum is characterized by the sense that an agency's default is not to use a contractor.[110] One survey respondent explained that "[o]n occasion we might need actuarial assistance for the development of Regulatory Impact Analysis [(RIA)]."[111] Another indicated that their team used a contractor to process comments when there was a contract in place, but that this work is now handled internally.[112] Our interviews revealed a rich range of perspectives about when and why agencies engage contractors for rulemaking tasks. We describe these considerations in Part IV.

At the other end of the spectrum, some respondents indicated that contractors are integral to rulemaking. Some agencies lean on contractors to supplement their staff resources in an ongoing way. One interviewee explained that contractors are "basically staff augmentation"[113] and another

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107. Survey response.

108. Survey response. Another response was similar: "Out of the 20+ regulations I have worked on, we have never used an external contractor. There has not been a need for one." Survey response. A third echoes a similar view: "We are a small agency with relatively few rulemaking actions . . . . We have extremely limited resources, so cannot afford contractors for rulemaking purposes, but we also don't really have a need for those extra resources in most cases." Survey response.

109. In our ACUS Report, we describe some of the methods—aside from contractors—that agencies use to enhance their capacity. This includes paying agency employees overtime for surge work; hiring additional full-time staff; hiring temporary staff (including bringing staff in from other programs, agencies, or departments, as well as from outside the federal government); rehiring retired employees; and hiring experts or consultants using a pathway other than a contract (e.g., obtaining informal assistance from other government colleagues); borrowing another agency's contract; and relying on a Federally Funded Research and Development Center. Approaches like this blend into what one respondent described as "rich human capital planning" that can help an agency achieve its mission while operating within constraints. Interview 33; *see* Dooling & Potter, ACUS Report, *supra* note 9, at 53–61 (discussing these methods in more detail).

110. Interview 12.

111. Survey response.

112. Survey response.

113. Interview 1.

indicated that "[c]ontractors are us—they're feds—but in italics."[114] One survey respondent indicated that "turnover and lack of staff" led to extensive use of contractors on at least one rulemaking.[115]

Our research allows us to describe respondents' views about whether to use contractors in the rulemaking process. Quite clearly, views about the proper role of contractors in rulemaking vary considerably, perhaps in part because of ambiguity about what it means for a task to be an inherently governmental function. While some interviewees expressed shock about the possibility of using contractors to help with rulemaking, others found it not just normal but necessary to pursue their agency's mission.

This wide variation gives us pause. On the one hand agencies might be refraining from contractor use when it would actually be permissible and possibly beneficial; on the other hand, agencies might be treading close to or over the line in terms of which rulemaking tasks they entrust to contractors. Overall, the wide variation we found suggests that the general issue of contractor use in rulemaking is one that is ripe for additional debate and consideration.

IV. WHAT TASKS DO CONTRACTORS PERFORM IN RULEMAKING?

Among those agencies that use contractors for rulemaking functions, the types of tasks given to contractors are wide-ranging. These tasks differ on several dimensions; for example, there are differences in duration, contractor enmeshment into the workflow, and policy significance of the tasks.

In terms of duration, some tasks map directly onto time-limited stages of a rulemaking project, such as assistance with sorting and analyzing public comments, while others are ongoing, such as writing and research assistance. Others are special one-time projects (e.g., drafting internal guidelines for RIA) or more general, ongoing assistance (e.g., clerical support). The type of working relationship can vary, too, from specific, arms-length type engagements, such as writing an expert report or literature review, to long-term staffing assignments in which the contractors work side by side with agency employees.[116] Tasks also range in terms of their policy significance,

114. Interview 13.

115. Survey response.

116. Frequency is another way in which contractor use varies. For example, with respect to comment management and analysis for economically significant rules, one interviewee said "I don't think [reviewing comments] was ever done internally" at their agency. Interview 18. On the other hand, some reported turning to contractors for help with public comments only for rare, high-profile rulemakings. Interview 9. One interviewee explained that although their agency began using contractors because of a sudden comment surge, the agency subsequently came to use contractors for this purpose more routinely. Interview 1.

from the ministerial to those closely tied to policymaking. For example, contractors help with formatting documents, but they also help agencies interact with the public and with other parts of the executive branch, including the regulatory review process managed by the OMB.

This Part offers a compilation of all tasks we uncovered in our research.[117]

A. Contractor Tasks by Rulemaking Stage

Agencies follow a few general steps when promulgating rules.[118] The rulemaking process typically involves a pre-rule stage, the creation and publication of a proposed rule, a period for public comment on the proposal, and the drafting and publication of a final rule. In Table 1, we display contractor tasks arranged by these key rulemaking stages.

117. Of course, this list is not exhaustive and there may be additional tasks that did not arise in our research. Another important caveat is that no respondent indicated that contractors were doing *all* of the tasks described below. Finally, it should also be noted that in cataloging tasks in this Part, we do not mean to imply that having contractors support rulemaking efforts is an entirely new phenomenon; it is not. Writing in 1991, Professor McGarity explains how contractors were used to support regulatory impact analysis (RIA) at some agencies. For instance, he notes that, at the time, the Occupational Safety and Health Administration, "nearly always hire[d] contractors to survey the relevant industry or industries, create an industry profile, and identify a range of feasible engineering controls." THOMAS O. MCGARITY, REINVENTING RATIONALITY 171 (1991). McGarity previously considered these issues in a report for ACUS, which is available on ACUS's website. Thomas O. McGarity & Sudney A. Shapiro, Report for Reccomendation 87-1: OSHA Rulemaking Procedures (Jan. 12, 1987) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/1987-01%20OSHA%20Rulemaking%20Procedures.pdf. However, the breadth of tasks for which agencies rely on contractor support—for RIA and for ministerial and other kinds of substantive support beyond RIA—is heretofore undocumented. Following broader trends of service outsourcing in the federal government, we suspect that the extent of rulemaking support at some agencies has also increased over time, although we cannot verify this assertion using the methodology underlying this Article.

118. The basic steps of agency rulemaking are laid out in the APA, 5 U.S.C. § 553.

Table 1: Tasks Performed by Contractors during the Rulemaking Process

Stage	Tasks
Pre-Rule Stage	Plan regulatory timelines and strategies Conduct research: Collect scientific data (e.g., including samples) Gather industry or other data Perform risk analysis Review literature Conduct site visits Determine stakeholder views Run surveys Develop models
Proposed Rule Stage	Draft and edit internal materials Draft proposed rule: Write first draft (or portions) including preamble and regulatory text Review drafts Format documents Provide data or other analytical support Draft analyses: Prepare Regulatory Impact Analysis (RIA) and other analytical sections (e.g., RegFlex) Compose PRA materials Help agency understand and reconcile reviewer feedback from other parts of agency (e.g., legal counsel) and executive branch (e.g., other agencies, OMB, EOP) reviewers
Public Comment Stage	Monitor comments during comment period Process comments: Transfer comments from agency to regulations.gov, and vice versa Maintain integrity to CBI Organize into a worksheet Analyze comments, including with use of NLP/AI tools Draft summaries for final rule preamble Help ensure agency responds to all comments
Final Rule Stage & Beyond	Same as Proposed Rule Stage, plus: Develop fact sheets, guidance, rollout materials Deliver Congressional Review Act reports to Congress Support implementation Provide litigation support

1. Pre-rule Stage

In this stage, the agency conducts internal planning and research, which might also include some amount of formal or informal public engagement.

Plan regulatory timelines and strategies. Some contractors assist agencies in crafting or recrafting regulatory programs. At one agency, this kind of help meant the contractor worked with the agency to reformulate how a fee program worked, including a strategy for rewriting the agency's fee-related regulations.[119] At another agency, an interviewee described that a Federally-Funded Research and Development Center (FFRDC)—a special kind of contractor-run entity sponsored by a federal agency—serves as a "thought partner" for longer-term regulatory planning.[120] This involves helping to define strategic direction for policies over a three- to five-year timeframe and includes research as described just below. The FFRDC staff are "deeply embedded" in strategic planning as well as helping to write particular rules.[121]

Conduct research. Survey respondents indicated that contractors conduct preliminary or other research.[122] Interviewees reported that contractors help prepare advisory analyses that serve as inputs into agencies' regulatory decisions. This could include producing a recommendation to the agency or merely gathering information.[123] It could also include technical or other scientific data such as taking samples from site visits and running analysis on the samples.[124] Others mentioned environmental scans, literature reviews, white papers, surveys, dashboards, data analyses, reports, and other types of policy analysis.[125] Contractors also convene stakeholders to gather views and other information at this stage.[126]

Develop models. In addition to the data-gathering and research tasks, contractors also assist with building analytical models that agencies use for regulatory proposals.[127] One interviewee mentioned a contractor's proprietary model that their agency paid to access, which industry groups also use for their own purposes.[128]

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119. Interview 3; Interview 7.

120. Interview 22.

121. *Id.*

122. Survey responses.

123. Interview 1; Interview 16; Interview 27; Interview 22. One interviewee noted that part of the contract could include a requirement for the contractor to convene an outside expert panel to review the contractor's recommendation. Interview 21.

124. Interview 14; Interview 23; Survey responses.

125. Interview 22; Interview 26; Interview 27.

126. Interview 22.

127. Interview 7.

128. Interview 15; Interview 18.

2. Proposed Rule Stage

In this stage, agencies compile the statement of basis and purpose (or preamble) of the proposed rule, along with the regulatory text, which all gets published in the Federal Register as the "notice of proposed rulemaking" or "proposed rule." The proposed rule can include certain analytical material, including an RIA, that helps justify the choices made by the agency in the proposal. Agencies must make a number of policy decisions before completing this stage.

Draft and edit internal materials. Contractors help agency staff prepare memos for internal deliberations.[129]

Draft proposed rule. Proposed rules have multiple components, including the preamble, analysis sections, and regulatory text, all of which might include contractor inputs.[130] Some respondents discussed broad contractor involvement in preamble development; others described that certain aspects of a proposed rule, e.g., regulatory text, were exclusively handled by agency employees.[131] This involvement could include writing the first draft or editing agency staff work "for clarity."[132] One interviewee estimated that a contactor could write about 40% of a preamble, and that contractor review of agency drafts was "excruciatingly useful" in terms of their ability to identify places where the agency had not fully explained its decisions.[133] Two interviewees noted their agency's use of a FFRDC to formulate options and draft regulatory text.[134] In one case, the FFRDC wrote the first draft, sent it to agency staff who reviewed it to ensure alignment with the agency's goals and to think through any operational challenges, and provided comments back to the FFRDC.[135] From there, the FFRDC made edits, and then the agency put the revised draft into departmental clearance for internal agency review, with the FFRDC handling any necessary edits along the way. On the more ministerial side, one respondent also shared that their agency uses contractors to make sure rule and other documents align with templates and other formatting guidelines.[136] Another noted that contractors help prepare the word processing file into the format required for transmission to the Federal Register for publication.[137]

129. Interview 25.
130. Survey responses.
131. Interview 13; Interview 16; Interview 18; Interview 27.
132. Interview 25; Interview 27.
133. Interview 13.
134. Interview 21; Interview 22.
135. Interview 22.
136. Interview 23.
137. Interview 3.

Provide data and other analytical support. While drafting the rule, the agency might realize it lacks data and turn to a contractor to help fill those gaps. Interviewees shared that contractors might convene experts, undertake surveys of the relevant industry, and conduct literature reviews.[138] This helped one interviewee "see what was going on in the world."[139]

Draft analyses. Beyond preparing inputs into the analytical materials noted just above, contractors also help draft the analyses themselves.[140] This work sometimes includes different aspects of an RIA, including economic analysis, Paperwork Reduction Act (PRA) analysis, Regulatory Flexibility Act analysis, and more.[141] Some interviewees noted that they were unaware of their agency ever asking a contractor to prepare an RIA "from soup to nuts" or in its entirety.[142] Another explained that their agency had done so, but that the results "left such a bad taste in folks' mouths" that "nobody really asked to use contractors after that."[143]

Help respond to reviewer feedback from within the agency or executive branch. One contractor explained that their firm helped their agency client address feedback received on the rule from other government reviewers.[144] For example, after the draft rule went to the agency's legal counsel for review, the contractor would help the agency staff "understand and reconcile" feedback given.[145] The contractor noted that they had "to understand the policy to be able to do this," and that their own subject matter knowledge grew over time. They described their function as "extra hands" to help the agency work through reviewer comments.[146] The contractor noted that their firm fulfilled this function for feedback received from the OMB review process, though they noted that the agency staff always handled communication with OMB.[147] Survey respondents also indicated that contractors helped manage all or

138. Interview 18; Interview 19.

139. Interview 18.

140. Interview 21.

141. Interview 13; Interview 16; Interview 20; Interview 21; Interview 25; Survey responses. This could include statistical support, development of a survey, fielding a survey, drafting the package of written materials used to support the agency's request for OMB approval of an information collection request, or attending internal meetings within the agency or with OMB. Interview 20. This could also include developing estimates to be used in PRA documentation. Interview 14; Interview 31.

142. Interview 19.

143. Interview 3.

144. Interview 25.

145. *Id.*

146. *Id.*

147. *Id.*

portions of OMB review, as well as management of interagency collaborations or interagency working groups.[148]

3. Public Comment Stage

In this stage, the agency gathers and reviews public comments sent in during the comment period.[149] This stage might include some formatting and file management. It also involves reading and considering the comments as required by the APA. Agencies discharge the APA requirement to consider comments by writing responses to comments that get included in the preamble of the final rule.[150] An agency's response to comments is informed by—and informs—the policy choices it makes for the final rule.[151]

Monitor comments during comment period. One interviewee noted that a contractor gave updates to the agency as the comment period proceeded.[152] This might include, for example, summaries of who has filed comments and the number of comments received.

Process comments. Interviewees identified several distinct activities under this general topic. Multiple respondents explained that for rulemakings with a large number of comments, contractors help organize the comments in various ways.[153] Part of this could involve extracting comments from Regulations.gov or adding comments received by the agency to the record on Regulations.gov.[154] Several interviewees mentioned organizing comments into a spreadsheet, table, or other searchable database.[155] This task could also include the use of natural language processing tools to help identify mass comment campaigns, for example, or subject matter themes.[156] The contractor might take the first pass at determining these groupings,

148. Survey responses.

149. *See* OFF. OF THE FED. REG. A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (noting that the public comment stage usually lasts between thirty and sixty days) [hereinafter GUIDE TO RULEMAKING PROCESS].

150. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (describing the agency's obligation to respond to "significant" comments submitted during the notice-and-comment process), *cert. denied*, 417 U.S. 921 (1974).

151. *See* GUIDE TO RULEMAKING PROCESS, *supra* note 149 (stating that the final rule must include a statement of "basis and purpose" which outlines the agency's response to the comments as a whole).

152. Interview 26.

153. Interview 1; Interview 3; Interview 14; Interview 15; Interview 20.

154. Interview 9.

155. Interview 1; Interview 13; Interview 18; Interview 26.

156. Interview 6; Interview 26; Interview 27.

perhaps using text analysis tools, or the agency might provide the contractor with categories it should use.[157] This could also be an iterative process with multiple rounds of feedback between the agency and the contractor on the comment categories.[158] One interviewee noted that contractors help "maintain integrity" for any confidential business information that may have been submitted as part of a comment.[159] Contractors also develop summaries of the comments.[160] One former agency employee noted that "we ended up reading [the comments] anyway" and that their agency never used the summaries verbatim, explaining that the contractors were helpful to sort and summarize the comments—and helpful to get a sense of which issues attracted a lot of comments—but that only agency staff had the subject matter expertise needed to consider the comments.[161] Others agreed, and the term "subject matter expertise" came up in other interviews apropos of why agency staff were better-suited to review comment substance.[162]

Draft preamble response to comments. One respondent noted that their agency directed contractors to write language for the preamble "to answer this way, that way" in response to public comments, after which the agency staff would review the contractor's work.[163] In that case, agency staff would review the contractor's draft.[164] Contractors might also help the agency ensure that it is responding to all comments received.[165]

4. Final Rule Stage and Beyond

In this stage, the agency writes the text for its final rule; the final rule includes the regulatory text, an RIA if appropriate, and a response to comments.[166] This final rule is what will become law. The tasks described above for contractors during the proposed rule stage also occur in the final rule stage. In addition, although our research plan did not set out to include downstream activities like implementation assistance, compliance, and enforcement activities, we included here the post-promulgation tasks that respondents shared with us of their own accord.

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157. Interview 13; Interview 15.

158. Interview 26; Interview 27.

159. Interview 13.

160. Interview 6; Interview 20; Interview 27.

161. Interview 18.

162. Interview 9; Interview 13; Interview 14.

163. Interview 15.

164. Interview 15.

165. Interview 20.

166. *See* GUIDE TO RULEMAKING PROCESS, *supra* note 149, at 7 (listing the requirements for the final rule).

Develop fact sheets, guidance, rollout materials. One interviewee noted that contractors would help prepare communications materials that the agency would use to announce the rule to the public.[167] Survey respondents also indicated that contractors helped with public outreach, including meetings, fact sheet preparation, press release drafting, etc.[168]

Deliver Congressional Review Act reports to Congress. This includes the use of a contractor to deliver reports to Congress as required by the Congressional Review Act "due to the antiquated submission methods required for those reports."[169]

Support implementation. One interviewee noted that contractors could staff an implementation hotline or take other actions to support a rule's implementation.[170] Another explained that contractors help with outreach and education, monitoring and evaluation, and systems support for data collection systems used by the public.[171]

Provide litigation support. One interviewee noted that contractors helped agency staff review the rulemaking record in litigation to find support for the agency's position.[172]

B. Ongoing Activities and Special Projects

The tasks described above fit neatly into the stages of rulemaking; however, many contractor tasks are ongoing and seem to float across a rulemaking project. Other tasks involve one-time, special projects. Table 2 shows these two categories of tasks.

167. Interview 13.

168. Survey responses.

169. Survey response. Recently, ACUS recommended that Congress pass technical reforms to the Congressional Review Act. The recommendations included requiring these reports to be submitted electronically. Adoption of Recommendation Notice: Technical Reform of the Congressional Review Act, 87 Fed. Reg. 1715, 1719 (Jan. 12, 2022); *see also* Jesse M. Cross, Technical Reform of the Congressional Review Act 22 (Nov. 30, 2021) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/CRA 20Final%20Report%2011.30.21.pdf.

170. Interview 13.

171. Interview 22.

172. Interview 13.

Table 2: Ongoing Activities and Special Projects Performed by Rulemaking Contractors

Ongoing Activities	Project management: Keep master document templates, project plans, timelines, document flow Meeting and negotiation support: Attend internal policy meetings Take notes Help make slides for internal policy briefings Facilitate meetings with external stakeholders Convene expert panels Handle operations for negotiated rulemaking Writing & editing services: Edit documents for style, clarity, and grammar Ensure documents conform with drafting templates Statistical/data support: Offer statistical support, collecting, pooling, and analyzing data Policy development: Develop guidance documents Review agency drafts and provide substantive comments and feedback Training General support
Special Projects	Develop guidelines for regulatory analysis Coordinate interagency review Recommend program design changes that that lead to new regulations Develop IT systems for rulemaking process (e.g., document management system) One-off reviews of rule-related documents

1. Ongoing Activities

Project management. One respondent explained that their agency relies on contractors to help manage the workflow of regulatory projects.[173] This involves keeping master documents up to date to avoid version control issues, maintaining templates, keeping the project plan up to date, and providing overall project management support. One interviewee called this "start to

173. Interview 1.

finish" rulemaking support.[174] In that case, the contractor was also providing policy research analysis, comment analysis, editing assistance, document management through all stages of the rulemaking, and communications support once the final rule was issued.[175] Another interviewee described using an FFRDC for rulemaking project management.[176]

Meeting and negotiation support. Contractors might attend internal agency policy meetings to stay updated on internal thinking and to take notes for the agency.[177] One respondent noted that contractors contributed information to slides for internal briefings.[178] A contractor might also take notes in meetings with external stakeholders and help the agency determine whether the stakeholder offered something new beyond the comment they submitted.[179] One interviewee, who has experience at an agency that used negotiated rulemaking procedures, explained that it was standard for the agency to hire a contractor to facilitate negotiations.[180] The work involved managing communications between the agency and the negotiating parties as well as strategizing about how to move the negotiation forward. Another interviewee whose agency used a contractor to conduct negotiated rulemaking noted that contractors helped organize those negotiations.[181]

Writing and editing services. Several respondents mentioned contractors helping to improve the quality of various written documents by writing first drafts or editing.[182]

Statistical and data support. One interviewee explained that their agency uses contractors to conduct routine data analysis of the agency's multiple large data sets using "set formulas or methodologies."[183]

Training. One contractor shared that their firm offers regular training to agency staff on the rulemaking process in general as well as on drafting techniques.[184] Another mentioned having contractors offer training to agency employees on plain writing techniques.[185]

174. Interview 25.
175. Interview 25.
176. Interview 22.
177. Interview 14; Interview 25.
178. Interview 13.
179. Interview 13.
180. Interview 9.
181. Interview 16.
182. Interview 25.
183. Interview 21.
184. Interview 36.
185. Interview 24.

General support. One respondent acknowledged that contractors served as support staff at their agency, serving as administrative assistants, paralegals, and in clerical roles.[186]

2. Special Projects

Develop guidelines for regulatory analysis. Interviewees from two agencies explained that they use contractor support to help prepare agency-wide guidelines for the preparation of RIAs, including economic analysis.[187]

Coordinate interagency review. One respondent explained that their agency uses contractors to help the agency respond when the Office of Information and Regulatory Affairs part of OMB, sends other agencies' rules over for review.[188] Contractors help triage requests, working closely with agency staff to determine which of the agency's components should review the draft regulation. Contractors also circulate documents internally using standing e-mail distribution lists and otherwise solicit staff input. If agency reviewers have comments, the contractors gather them up, and a staff member takes it from there.

Develop IT systems for rulemaking process (e.g., document management system). One interviewee shared that their agency worked with a contractor to build an in-house version of what would ultimately be replaced by Regulations.gov.[189]

One-off reviews of rule-related documents. One interviewee explained that the agency they previously worked for retained them later as a consultant to review draft documents on an ad hoc basis. This would include reviewing an analysis that an agency staff member had written or providing input on a literature review—tasks that they could do despite not being "as involved in what was happening at [the agency]."[190]

C. Discussion

Agencies use contractors for a wide range of rulemaking activities, far greater than has previously been documented.[191] The tasks range from administrative tasks that do not involve the exercise of discretion to those deeply embedded into the agency's planning and deliberations. The inherently governmental function test draws a line at decisionmaking, but rulemaking offers a rich set of examples that demonstrate how challenging

186. Interview 8.
187. Interview 18; Interview 19; Interview 23.
188. Interview 23.
189. Interview 6.
190. Interview 11.
191. Potter, *supra* note 8.

it can be to apply the test to tasks that feed into complex and interactive agency decisionmaking processes.

The set of tasks involved in managing public comments illustrates this principle. Aspects of this function could be considered ministerial, such as downloading the comments from Regulations.gov. But there are other discretionary tasks embedded in managing—and certainly in responding to—comments. How comments are organized may tend to emphasize different issues more than others, the summaries may give the impression of more or fewer significant issues, and all of this could shape agency impressions of the public's reactions to the rule.

This is just one example of the points of discretion and judgment that are upstream from the ultimate policy choices reflected in an agency's rule. The concern is that when contractors exercise judgment as part of tasks like this, their own interests could manifest, either knowingly or unknowingly. Close collaboration between the agency staff and contractors, rather than having the contractor handle things alone, may help to blunt some of the risk of improper influence. Some agency interviewees reported that they would use contractor-developed comment tables to orient themselves to which comments to read on different issues but then rely on their own subject matter expertise and judgment to interpret the comments.[192] As another example, drafting responses to comments to include in the preamble to the final rule is a task laden with policy choices. While we did not encounter anyone who indicated that this task was entirely delegated to contractors, it seems clear that if contractors write the preamble or even just edit it, they have the potential to influence the rule's outcome.[193] Indeed, when agency staff see contractors as team members, the agencies may welcome their views. As one interviewee described it, albeit in another context, good work is good work no matter who does it, and why should the government not accept this kind of help from contractors?[194] For contracts in which the contractors work side by side with agency staff and there is considerable trust, this might especially be the case. The flip side of this is that decisions might be made iteratively—through the course of the drafting process itself[195]—and therefore contractor involvement along the way almost necessarily involves some measure of influence. At these points of influence, management control and contractor ethics are especially important. If managers are unaware of contractor conflicts of interest, they are unable to properly supervise contractors' work.

192. Interview 14; Interview 22.

193. Interview 21.

194. Interview 31.

195. Interview 5.

When it comes to determining what is inherently governmental, this granular discussion shows that managing the public comments includes a mix of ministerial and policymaking tasks, and as such "managing comments" does not lend itself to a binary classification of inherently governmental or not. Overall, the activities described in this Part prompt questions about the systemic use of contractors, as well as queries about contractor use for any given task. At a systemic level, one-time engagements are different in kind from multi-year contracts in which contractors work side by side with agency staff.[196] The latter offers the opportunity for efficiency, with deeply interconnected workflows between agency and contractor, but it also opens the door to more significant harm from self-dealing. A looming question, discussed more below, is how agencies come to rely too extensively on contractors for certain regulatory projects. The roots of this question are worthy of additional study. A review of ongoing contracts that effectively supplement agency staff could be an effective way to assess whether such arrangements are ultimately in the public interest.

While one-time or special project contracts are generally conducted at an arm's length and offer opportunities to bolster agency capacity and credibility, they can have their own challenges, including misaligned expectations, duplicative work, and other ethical concerns. For example, contracting for access to a proprietary model introduces the potential for conflicts of interest as well as challenges in compiling the administrative record if the model is not publicly available. One-time contracts can also beget longer term arrangements, as the contractor gets to know the agency's needs, and the agency becomes comfortable with the contractor's work. What might be a reasonable, iterative business development strategy for a contractor can be a slippery slope for an agency, especially if the agency very much needs assistance. In general, existing contract management techniques should account for this type of incremental creep and consider whether modified controls and other policies could better address contractor arrangements.

196. These arrangements may come close to "personal services" contracts, which are generally prohibited by the FAR. FAR 37.104 (2022). A personal services contract, "by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees." FAR 2.101. This prohibition may have become a dead letter. *See e.g.*, Collin D. Swan, Note, *Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors*, 80 GEO. WASH. L. REV. 668 (2012); *see also* Kelman, *supra* note 39, at 177 (noting that the prohibition on personal services contracts is often "skirted de facto").

V. WHY DO AGENCIES USE CONTRACTORS IN RRULEMAKING?

Contractors perform many functions in rulemaking, but sometimes agencies use them and sometimes they do not. What factors guide this decision? In this Part, we recount how agency officials perceive the advantages and disadvantages of contractors in rulemaking. Some of these benefits and drawbacks are straightforward and discussed extensively in the academic literature reviewed earlier, whereas others are more specific to the rulemaking process.

A. Advantages of Relying on Contractors

Agency respondents highlighted numerous benefits associated with contractor use. Most notably, contractors bring *outside expertise* to the rulemaking process. Often this expertise is highly domain-specific and not a skill set that the agency requires on a full-time basis. For example, one interviewee at an agency that regularly issues economically significant rules noted that when it came time for the agency to revise its guidelines for the Value of a Statistical Life (VSL), they used a contractor to hire academics with niche expertise in this field.[197] This contract allowed the agency to write new standards that were consistent with current academic research on the VSL, something that would not have been possible internally given the agency's own in-house expertise. Contractors may also have access to tools that the agency does not, such as survey software or panels of survey respondents,[198] or expertise in managing big projects.[199] By hiring a contractor, the agency can expand its toolkit for specific projects.

Not all contractor expertise is specific to individual rulemaking projects, however. For instance, interviewees at multiple agencies highlighted how useful contractors can be in writing rules.[200] Often, program staff have subject matter expertise in other fields, like engineering, and this expertise does not necessarily translate to rule writing and drafting.[201] Contractors can offer writing skills that complement agency staff expertise, stepping up to either draft documents directly or edit and revise documents initiated by program staff.[202]

Contractors can also serve in a *surge capacity* function, helping to ease workloads during peak rulemaking periods. Because contractors are free from government hiring requirements, they may be able to quickly increase

197. Interview 19.
198. Interview 18.
199. Interview 32.
200. Interview 1; Interview 13; Interview 15.
201. Interview 5; Interview 13.
202. Interview 13.

staffing in response to demands during the rulemaking process and decrease it after the surge has passed.[203] One contractor we interviewed noted that they simply assigned more staff from another of the firm's divisions to help out when a rule hit a particularly time-sensitive period, such as comment processing, something that may not be as easily accomplished within an agency setting.[204] This ability to add staff during peak periods can be especially useful when contractors can quickly assemble a diverse team with different skill sets.[205]

Flexibility is another important advantage of incorporating contractors into the rulemaking process. Our subjects raised this point most often in terms of the ability to hire staff quickly during peak periods. Some agencies face difficulties in hiring full-time equivalent (FTE) staff. These difficulties arise because of FTE caps imposed on agencies, as well as budgetary concerns regarding financing an FTE line in future years.[206] Additionally, hiring a new federal employee can be a cumbersome and time-intensive process;[207] one agency interviewee suggested that while it takes an agency about eight months to hire a new FTE, it would only take a contractor about three months to find and hire someone with the desired expertise.[208]

One agency respondent also noted that contractor flexibility was particularly useful during periods of transition between presidential administrations.[209] Often, these periods are characterized by a push to

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203. Contractors have a comparative advantage relative to government agencies in terms of the ability to staff up quickly. However, this advantage is not absolute. One contractor we spoke with indicated that it was hard for them to staff one agency rulemaking project that was particularly "intense," "visible," and on an accelerated timeline. Although the firm rose to the occasion, they faced staff burnout issues the next time a similarly intense agency project arose. Interview 25.

204. Interview 26.

205. Interview 1; Interview 25; Interview 26.

206. Interview 16.

207. *See, e.g.*, OFF. OF POL'Y & EVALUATION, U.S. MERIT SYS. PROT. BD., REFORMING FEDERAL HIRING: BEYOND FASTER AND CHEAPER (2006); NAT'L COMM'N ON MIL., NAT'L, AND PUB. SERV., INSPIRED TO SERVE EXECUTIE SUMMARY: FINAL REPORT TO CONGRESS (2020); Eric Katz, *The Federal Government Has Gotten Slower at Hiring New Employees for 5 Consecutive Years*, GOV'T EXEC. (Mar. 1, 2018), https://www.govexec.com/management/2018/03/federal-government-has-gotten-slower-hiring-new-employees-five-consecutive-years/146348/.

208. Interview 19; Interview 21.

209. This respondent explained that staffing needs changed significantly between the Obama Administration, which had a robust regulatory agenda, and the Trump Administration, which issued fewer rules in that program area. This person also mentioned that several agency staff departed in the Trump Administration. Then, in the Biden Administration, they expected an increase in the number of rules to be issued, which meant they needed to ramp up staff resources once again. This experience led the this respondent

complete new rules by the outgoing administration and, subsequently, a demand for new rules by the incoming administration—all without accompanying staff increases. Contractors can help agencies smooth the workflow during these junctions.

Neutrality, or the ability of a contractor to serve in an arm's length capacity, can also be an asset in the rulemaking process. The nature of the regulatory relationship makes it such that regulated entities may be hesitant to share information directly with agencies and may even sometimes put agencies in an adversarial role; contractors can be used as an outside third party in such situations.[210] The interviewee who noted that contractors are regularly used as mediators in negotiated rulemaking, or "reg neg," explained that having a neutral broker between the agency and the negotiating stakeholders can set the right tone.[211] Another official at a different agency indicated that contractors were very helpful when the agency needed to collect data about the industry it regulated; industry partners were reluctant to give potentially sensitive information directly to the agency, but more willing to acquiesce to data requests when a contractor was making the request.[212]

There are myriad other benefits associated with contractor use. Numerous respondents noted their impression that contractors can exclusively *focus* on a specific rulemaking task.[213] Agency employees typically have multiple assignments on their plates, often dividing their attention over multiple projects. This might include long-term projects that lack firm internal deadlines but which the agency nevertheless wants to complete. Once a specific task is delegated to a contractor, the task is more likely to get the contractor's undivided attention and be completed in a timely fashion. Another benefit is that contractors can serve as a point of *stability* and *institutional memory*, particularly in program areas where federal employees tend to cycle in and out.[214] Finally, one person noted that contractors were often a set of "*fresh eyes*" in that they asked questions about agency practices and sometimes served as a "good push" to update those practices.[215]

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to conclude that using contractors was a better use of resources than hiring new staff who might again be left without much to do in a future administration. Interview 1.

210. Interview 6; Interview 30.

211. Interview 9.

212. Interview 18; Interview 19.

213. Interview 6; Interview 13; Interview 18; Interview 19; Interview 23.

214. Interview 13; Interview 25.

215. Interview 6.

B. Disadvantages of Relying on Contractors

Although contractors in rulemaking confer numerous benefits, many respondents pointed out the disadvantages and risks of using contractors in this setting. An overarching theme that united such comments was the *disconnect in workplace culture and shared values* between contractors and agency employees. At its worst, these concerns centered on trust issues—like whether a contractor is more likely to disclose confidential information[216] or violate ex parte communication rules during rulemaking[217]—or a perceived lack of professionalism among some contractors.[218]

Most of the concerns raised, however, regarded the fact that contractors are often (understandably) unfamiliar with agency workflow and processes, and that this lack of familiarity can breed problems.[219] For example, one agency official explained that contractors they had worked with in the past had general experience conducting cost-benefit analysis (CBA), but were less familiar with CBA in a regulatory context.[220] Specifically, this official noted that the contractor was not well acquainted with the CBA requirements in OMB Circular A-4,[221] which cost the agency in terms of a slowed rulemaking process and increased time spent overseeing the contractor. An agency can run into these problems even when using an experienced government contractor, as internal rulemaking processes are often agency-specific.

A related downside associated with the use of contractors in rulemaking is the *resource-intensive nature of contract management*. Several agency officials noted that considerable time and resources must be devoted to building the knowledge of first, how to set up contracts and, second, how to oversee contractors.[222] Many indicated that it might not be worth the effort to

216. Interview 1.

217. Interview 5. A somewhat related issue is whether agency contacts with their contractors can be considered ex parte communications. *See* United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1218 (D.C. Cir. 1980) (declining to require disclosure of a consultant's report because the consultant was the "functional equivalent" of agency staff for purposes of ex parte analysis).

218. Interview 6.

219. Interview 7; Interview 18; Interview 31.

220. Interview 19.

221. *Id.*

222. Interview 5; Interview 21. Kelman notes that "the vast majority of what good program and contract managers need to be good at are the same things that *any* good manager needs to be good at." Kelman, *Achieving Contracting Goals supra* note 39, at 153, 174 . However, contract managers face considerable obstacles to effectively overseeing contracts. For instance, Michaels notes that while procurement personnel are "well positioned to ensure that the contractors are not being wasteful or fraudulent," they are "not necessarily well versed in the substantive policy or legal domains within which the contractors are working."

use a contractor for smaller or less important rules.[223] Not only must the official(s) overseeing the contract bridge any workplace culture gaps, but they must also do so within the scope of the existing contract and the time frame of the rulemaking. When an agency delegates a specific rulemaking task to a contractor, the contractor might move at a different pace than the agency staff. Sometimes this is a quicker pace, but other times it is slower, potentially disrupting agency rulemaking timetables.[224] Additionally, the contract must be structured to put the agency on the best footing; for example, if an agency contracts out for an analysis at the proposed rule stage, the contract must be structured so that the contractor is available to make amendments at the final rule stage or the agency must ensure that it has the in-house expertise on hand to handle any changes.[225]

The lurking potential for personal or organizational *conflicts of interest* is another risk of relying on contractors in rulemaking.[226] One expert noted a

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MICHAELS, *supra* note 23, at 133–34 (2017). Additionally, strong contract management skills are not always valued within an agency. Professor Kettl explains that "[i]n an agency dominated by scientists, technical expertise, not administrative finesse, marked the fast track upward. Technicians and other scientifically trained contract managers thus had strong motivation to escape from the task . . . as quickly as possible." DONALD F. KETTL, SHARING POWER 123 (1993). Finally, the GAO has repeatedly identified shortages in agencies' acquisition workforces as an area that not only places contracts at risk, but government more broadly. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-119SP, HIGH-RISK SERIES: DEDICATED LEADERSHIP NEEDED TO ADDRESS LIMITED PROGRESS IN MOST HIGH-RISK AREAS 31–32 (2021).

223. Interview 3; Interview 13; Interview 14; Interview 23.

224. Interview 7.

225. Interview 19.

226. Recent *ProPublica* reporting highlights how this kind of risk can present itself in the course of agency policymaking. *ProPublica* reports that over a twelve-year period, McKinsey & Company, a consulting firm, provided the Food and Drug Administration (FDA) with upwards of $50 million in consulting services, including helping the agency to define its strategic goals and objectives and develop a "new operating model" for its drug regulation division. Ian MacDougall, *McKinsey Never Told the FDA it was Working for Opioid Makers While Also Working for the Agency*, PROPUBLICA (Oct. 4, 2021 5:00 AM), https://www.propublica.org/article/mckinsey-never-told-the-fda-it-was-working-for-opioid-makers-while-also-working-for-the-agency. During the same time period, the firm "counted among its clients many of the country's biggest drug companies—not least those responsible for making, distributing and selling the opioids that have ravaged communities across the United States, such as Purdue Pharma and Johnson & Johnson." *Id.* The overlap between McKinsey's agency client and its private sector clients raises important questions about the advice it provided to the agency—and to members of the pharmaceutical industry—when the firm's own financial interests were at stake or when the clients' interests conflicted. *ProPublica* also reported that McKinsey failed to disclose these organizational conflicts to the FDA in a clear violation of its contract with FDA. This shows the limits of a conflicts-of-interest regime that places the onus on the contractor to disclose its

specific type of contractor self-dealing within agencies that might arise in response to rulemaking contracts; specifically, the prospect of relying on the same contractor for different regulatory functions could create perverse incentives for the contractor.[227] For example, a contractor that helped to write program regulations might be motivated to steer the rules in such a way that resulted in more profitable business margins for its contract to help with regulatory enforcement after the rule is finalized.

Although conflicts-of-interest concerns were raised by the experts we spoke with, this risk was less salient for agency officials. Few mentioned this potential. However, one agency official noted that they preferred to work with their agency's FFRDC on sensitive rulemakings because those entities have stronger conflict of interest protections in place than most contractors and, therefore, avoid many of these potential issues.[228]

Another risk of contracting out rulemaking functions is the potential for a *slippery slope*, a concern with at least two dimensions. First, some respondents worried about crossing the inherently governmental function line with rulemaking.[229] Current guidance indicates that making policy choices is an inherently governmental function, and that many of the tasks listed in Part II can be considered "closely associated with inherently governmental functions." Many delegated tasks, like drafting a proposed rule, reflect a policy decision that agency personnel have already made. However, because rulemaking involves iterative and complex decisionmaking, there is potential for contractors to creep up to—or even pass—the inherently governmental function line. While the 2011 OFPP final policy letter included a checklist to be used when agencies use a contractor for functions that are closely associated with inherently governmental functions, only one interviewee mentioned that their agency uses such a checklist.[230] In that case, the checklist was part of a larger procurement package agency staff fill out to justify using a contractor. The extent to which it actually informed management practices throughout the contract's administration—which was OFPP's stated goal—is unclear.

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potential conflicts. Although the FDA's contracts with McKinsey were not clearly tied to rulemaking, this type of organizational conflict of interest poses obvious risks in that context. For example, consider a contractor assisting an agency's regulatory development while also advising clients on how to comment on, comply with, or push back on an agency's regulations.

227. Interview 31.

228. Interview 21.

229. *Id.*

230. Interview 1. *See also supra* note 73 and accompanying text (explaining the 2011 OFPP policy letter on tasks that are closely associated to inherently governmental functions).

A second concern regards the potentially additive nature of rulemaking contracts, where in some cases an agency can add rulemaking tasks à la carte. At least one agency official worried that rulemaking contracts have the potential—incrementally—to become unwieldy and difficult to manage.[231] When this happened with a prior contract at the official's agency, the Contracting Officer Representative was forced to find innovative ways to fund a contract that grew to be much larger than initially planned.

Finally, as noted earlier, *transparency* is limited with contractors. With respect to rulemaking, one expert noted that transparency is a core value.[232] To the extent that contractors engage in proprietary work that is more shielded from the public than agency work, contractor use is potentially in conflict with this core value.

C. Discussion

Agencies grapple with a complex set of advantages and disadvantages surrounding their choices to turn to contractors for rulemaking support. The findings of this Part are closely related to those from the prior Parts of this Article: understandings of these advantages and disadvantages are colored by perceptions of the appropriateness of contractors in rulemaking more generally. And respondents told us about the benefits and drawbacks of contractor use in the context of the specific tasks for which they personally had experience working with contractors.

We emphasize that given the number of legal, political, and operational constraints that agencies work under, the benefits of using contractors in rulemaking are numerous and considerable. Agencies can benefit from contractors' outside expertise, flexibility (including surge capacity), perceived neutrality, and their ability to concentrate on a specific set of tasks.[233] Contractors also can serve as sources of workforce stability and institutional memory and offer an outsider's perspective on agency work.[234]

Although contractors offer the possibility of access to these benefits, the road to get there can be fraught. With respect to disadvantages, a lack of shared culture and values can limit contractor effectiveness and agencies may struggle to muster resources to adequately manage contractors.[235] Using contractors may also expose agencies to new levels of ethical risk that are not present or

231. Interview 16.

232. Interview 31.

233. *See supra* Parts V.A–B (summarizing the advantages and disadvantages respondents have found when working with contractors in rulemaking).

234. *See supra* Part I.A. (outlining potential benefits of using contractors).

235. *See supra* Part I.B (summarizing what government officials have found to be the drawbacks of using contractors in the rulemaking process).

are significantly lessened when government employees perform rulemaking work. Specifically, relying on contractors can lead to a slippery slope, where contractor work unintentionally creeps up to—and potentially even encroaches on—the performance of tasks that are inherently governmental.

Additionally, the potential for conflicts of interest—both on the personal and organizational levels—warrants special consideration in rulemaking. Rules issued by government agencies can have considerable financial and policy implications, meaning those with special access to an agency's decisionmaking on a rule could inappropriately use that information for financial or personal gain in the short- or long-term.[236] We note that this issue did not rate as highly salient in our conversations with agency officials. While we have no reason to suspect that there is widespread abuse happening on this dimension, the normative consequences are significant. Agencies should structure rulemaking contracts and manage rulemaking contractors in ways that account for potential conflicts of interest.

The findings in this Part highlight a recurrent theme of this Article: the critical importance of agency managers to the successful use of contractors in rulemaking. Harnessing the benefits of contractors—while simultaneously minimizing the disadvantageous aspects of contractor use—requires savvy and competent government managers who are willing to shoulder the risks and burdens to reap the rewards. This observation is consistent with broader academic arguments about the vital role of strong management in overseeing government contracts.[237]

VI. WHAT ARE CURRENT AGENCY PRACTICES FOR THE USE OF CONTRACTORS IN RULEMAKING?

Among agencies that rely on contractors in rulemaking, there are a wide variety of practices regarding how to manage contractors. Most of these practices are informal and unwritten; below we lay out some of the different approaches to contractor and task management in rulemaking that respondents shared with us.

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236. *Cf.* MacDougal, *supra* note 226 (discussing how, outside of rulemaking, McKinsey maintained a contractual relationship with the FDA while retaining top drug companies as clients, thereby creating potential for a financial conflict of interest).

237. For example, Kettl argues that "[g]overnment relationships with the private sector are not self-administering; they require, rather, aggressive management by a strong, competent government." KETTL, *supra* note 222, at 6; *see also supra* note 222 and accompanying text.

A. Written Policies About Contractors in Rulemaking

While agencies have written policies in place about all manner of activities, our research did not uncover any instances of written agency policies about the use of contractors in rulemaking specifically. No interview subject or survey respondent definitively indicated the existence of such a policy.[238] Instead, agency practices about what contractors do in rulemaking follow informal norms, fall under broader agency "umbrella" policies that cover contractor use or procurement, or are of a more idiosyncratic nature. For example, one former contractor noted that it was difficult to operate within a "standard practice" because an agency's policy about what contractors could do in rulemaking was highly variable and subject to change over time.[239]

Despite the lack of official written policies, there is *widespread but incomplete* awareness of the existence of an inherently governmental function line with respect to rulemaking. The awareness is *widespread* in that many agency officials noted that contractors should not be involved in making policy decisions.[240] One agency official described what contractors can do as "everything up to pushing the big red policymaking button,"[241] while another indicated that contractors should be "kept out of the policy piece."[242] Often, such statements were organically volunteered by respondents, whereas other times respondents offered this information when asked specifically about which tasks contractors should or should not do.

Awareness of an inherently governmental function line is *incomplete* in that few respondents were able to explicitly name the terms inherently governmental function or "IGF," and many could not articulate a clear sense of where the policy line at their agency fell for rulemaking. For example, one contractor that we spoke with indicated they had not heard of the term inherently governmental function in the many years they had been performing rulemaking work for their agency, but that this lack of knowledge had not "interfered" with their work.[243] Of course, the term "inherently governmental function" is a term of art; someone might not need to know the exact words to perform their job effectively. However,

238. The survey asked respondents about the factors that guided decisions about tasks that a contractor took on versus an agency employee. Four respondents indicated that a "written agency policy on contracting for rulemaking" was a factor. We followed up with all four respondents; two indicated that this selection was made in error or that their understanding was incorrect upon more careful consideration. The remaining two did not respond to our follow-up inquiries.

239. Interview 31.

240. Interview 1; Interview 15; Interview 16; Interview 23; Interview 25; Interview 26.

241. Interview 16.

242. Interview 15.

243. Interview 25.

the lack of familiarity with the term suggests that at least some respondents might not know that an official line in the procurement regulations exists, nor do they know how to decide what contractors should and should not do. On the agency side, one expert noted that senior agency managers are responsible for maintaining the inherently governmental function line with contractors in rulemaking precisely because not all agency staff were familiar with such principles.[244]

Among respondents who showed greater familiarity with the inherently governmental function principle, several expressed confusion with how to apply the principle to rulemaking in practice. For example, one former agency official stated that it would be appropriate for contractors to work on writing a proposed rule if all policy decisions had been made.[245] However, this person also noted that, in practice, policy decisions were rarely settled at the outset. Rather, in this person's nearly thirty years of rule-writing experience, with the exception of one rule, the official could not think of another case where the program did not make changes based on writers' questions and feedback.[246] On a different point, one expert noted that using contractors in rulemaking "can get really muddy" because of the technical nature of rulemaking.[247] For instance, if an agency contracted out for a highly technical portion of the rulemaking, it might be difficult to have enough subject matter expertise in-house to evaluate the work and ensure consistency with the agency's policy decisions. Given these difficulties, a third agency official noted that more examples of inherently governmental functions or activities that are closely associated with inherently governmental functions in the context of rulemaking would be helpful.[248]

B. Integrating Contractors Into an Agency's Workflow

While some tasks given to contractors are completed at an arm's length (e.g., taking soil samples and writing a technical report), others are done side by side with agency staff. For the latter, the lack of written rulemaking policies combined with divergent attitudes toward the appropriateness of contractors in rulemaking means that agencies have numerous ways to incorporate—or limit—contractors into the rulemaking workflow.

For example, respondents reported different approaches to inviting contractors to rulemaking-related meetings. At an agency that relied extensively on contractors to complete rulemakings, one contractor reported that they

244. Interview 29.
245. Interview 5.
246. *Id.*
247. Interview 31.
248. Interview 4.

regularly attended policy meetings related to rulemaking projects and that their input was welcomed at these meetings.[249] This contractor noted that:

> [W]e work very closely with [the agency] to get access to their systems, kind of work as part of their team, attend their staff meetings, and hear most of what they're saying. Just having that very open collaborative process I think is very useful because it eliminates pretty much most of the distance between the client and us.[250]

In contrast, other agencies had a more limited approach as to which meetings contractors could attend. For example, one agency official indicated that contractors were not invited to attend meetings with agency leadership due to issues of "trust."[251] Another senior official noted that they could not recall ever being in a substantive meeting with a contractor present and said that their agency did not allow contractors to brief political appointees.[252]

The confluence of limitations on contractors' access to meetings, the compartmentalization of rulemaking by program areas, and the discrete nature of some contractor tasks means that for some agencies, contractor work becomes inward-facing. In these cases, contractors tend not to represent the agency externally, either to the public or to other component units (e.g., if the agency is part of a broader department). For instance, contractors at one agency were not allowed to interact with the agency's office of general counsel, since it was understood that the attorney–client relationship did not extend to contractors.[253] Additionally, one expert noted that contractors are barred from attending meetings related to the FAR rulemakings.[254] However, contractors' roles are not universally constrained to be internally-facing. As the prior Part illuminated, many contractors have explicitly outward-facing roles and are given limited license to act on the agency's behalf.[255]

Assigning contractors government email addresses is another way that agencies integrate contractors into rulemaking. At one agency where contractors were integrated into the rulemaking workflow, a contractor noted that having an agency email address not only helped them to

249. Interview 25.

250. *Id.*

251. Interview 13.

252. Interview 15.

253. Interview 21.

254. Interview 32; FAR OPERATING GUIDE 21–22 (2015), https://www.acq.osd.mil/dpap/dars/docs/far_dfars_guide/FAR_Operating_Guide_July_2015.pdf ("Attendance at team meetings is limited to Government employees. Other attendees will be allowed only on a case-by-case basis as approved by all FAR Principals and should not be present during substantive discussions of the case.").

255. For example, some contractors convene stakeholders on behalf of the agency, serve as negotiators in an agency's regulatory negotiation proceedings, and even participate in the agency's meetings with OMB.

coordinate with agency officials, but also helped make them feel a part of the agency's team.[256] Meanwhile, at other agencies, officials noted that contractors were still delineated from agency staff despite having agency email addresses, either because the contractors were required to disclose their affiliation in their email signatures[257] or because the email address had a specific extension that denoted contractor status.[258] Importantly, agency policies regarding contractor email addresses are not specific to rulemaking; they are part of broader agency policies regarding contractor use.

Finally, the way that contractors are integrated into the social fabric and culture of an agency differs. Some rulemaking contractors sit on-site and work side by side with agency staff,[259] whereas others work remotely.[260] Some contractors felt that the agency treated them like their own staff and that the relationship between agency personnel and contractors was highly collegial.[261] However, at other agencies there were cultural barriers between contractors and agency personnel. For instance, at one agency in our interview sample, each one of the five people we interviewed independently offered that contractors were decidedly not part of the culture of their agency. While the agency did use contractors for some tasks, they were not rulemaking tasks. Even then, one person indicated that contractors were physically segmented off from agency staff, and there was an implicit message that agency staff were discouraged from "cross-pollinating" in a social way with contractors.[262]

C. Transparency Over Contracted Rulemaking Tasks

Transparency is a core feature of the rulemaking process, but it is not evenly distributed across contractors and agency personnel. Absent policies on contractors in rulemaking, agencies handle transparency over contracted tasks on an ad hoc basis. We consider two types of transparency: internal transparency—visibility within the agency about the role of contractors in performing different tasks—and external transparency—visibility outside the agency to the public.

Like other aspects of contracting for rulemaking, there are divergent levels of internal transparency at the agencies we contacted. At some agencies, managers, typically at the program level, are keenly aware of which tasks contractors have done, what the scope of work for a particular rulemaking

256. Interview 25.

257. Interview 1.

258. Some agencies include the extension ".ctr" in contractors' email addresses. Interview 23.

259. Interview 25.

260. Interview 26; Interview 36.

261. Interview 25; Interview 26.

262. Interview 10.

contract entails, and what it excludes.[263] This was not the case universally; however, a program official at one agency noted that staff would have trouble discerning which documents in a rulemaking were prepared by contractors as there was no obvious way to distinguish the work products.[264]

Several officials interviewed for this project noted that senior leadership is ultimately responsible for making policy choices in rulemaking and deciding how the process should be managed internally.[265] To them, keeping oversight at the management level mitigates concerns about self-dealing from contractors because all major policy decisions related to the rule are centralized within one tier of the agency.[266] This form of hierarchy places extra emphasis on internal transparency; to ensure that contractors are not performing inherently governmental functions and that ethics requirements are being followed (among other considerations), management must have insight into which jobs are being done by whom. While respondents overseeing the day-to-day interactions with contractors expressed confidence in their own oversight, we observed that at senior leadership levels there was generally less visibility into how a rule was put together. Instead, we heard the sentiment from more senior leaders that knowing what tasks had been performed by a contractor was "below my level."[267]

Generally speaking, our interviews and our informal review of agency rulemaking materials suggest that contractor contributions to rulemaking have limited external transparency. However, the extent of visibility can vary by the type of task at hand. For example, while comment analysis is often a task performed by contractors, interviewees explained that the contractor's role is not usually disclosed in the final rule.[268] Agency officials noted that while contractors may provide an agency with a matrix of comments or some other form of comment summary, agency staff review this analysis, and it is not a final agency product. In the case of rule text drafting, officials similarly noted that contractors' roles are also not discernible, even in an instance where the contractor wrote the first draft of a proposed rule.[269] However, respondents were again careful to highlight

263. Interview 1.

264. Interview 15.

265. *Id.*

266. There are potential problems with managing risk in this way. Verkuil describes how this strategy can backfire if agency officials simply rubber-stamp contractor work product. The risk is particularly acute "in those [agencies] strapped for decision personnel [where] the temptation to let the contractors do the thinking for them may be too hard to resist." OUTSOURCING SOVEREIGNTY, *supra* note 25, at 46.

267. Interview 4; Interview 13; Interview 15.

268. Interview 1; Interview 22.

269. Interview 3.

the agency's role in overseeing contractors' work—redrafting text where necessary or revisiting the underlying comments to make sure the core issues were reflected in a comment summary.[270]

One task where there is sometimes greater transparency—internally and externally—is contractor assistance with RIAs.[271] Contractors who work on RIAs might be academics or industry experts who are known in their respective fields, and as one agency official put it, "it never occurred to us not to" disclose the work that these outside experts did.[272] Another official suggested that divulging who worked on an RIA is in keeping with academic standards about co-authorship and while disclosure was "not a legal requirement," it seemed like the right thing to do.[273] Finally, a third official indicated that being transparent about who worked on an RIA (and their associated levels of expertise) could actually enhance public perceptions of the legitimacy and quality of the agency's analysis.[274]

Transparency over contractor use in RIAs need not be burdensome or overly formal. Figure 1 below shows an example of an agency, the Office of the Inspector General at the Department of Health and Human Services (HHS), disclosing that a proposed rule's RIA relied on analyses from two actuarial firms, in addition to analysis conducted by another unit in its department, the Center for Medicare and Medicaid Services' Office of the Actuary. Both contracted firms—Milliman and Wakely Consulting Group—are mentioned by name and each firm's analysis is discussed extensively in the RIA section of the proposed rule. Additionally, the agency posted both contractors' analytical reports as "supporting material" in the proposed rule's docket on Regulations.gov and solicited comment on the contractors' assumptions.[275]

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270. Interview 1; Interview 14; Interview 15; Interview 17.

271. Interview 3; Interview 18; Interview 19. Additionally, ACUS has previously recommended that agencies place RIA consultant reports in the rulemaking docket. *See* Recommendation of the Administirative Conference Regarding Administrative Practice and Procedure, 50 Fed. Reg. 28,363, 28,366 (July 12, 1985) (recommending that "when a regulatory analysis document relies upon consultant reports, the reports are placed in the public file of the rulemaking proceeding, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. § 552(b)(5) might apply to portions of the reports.").

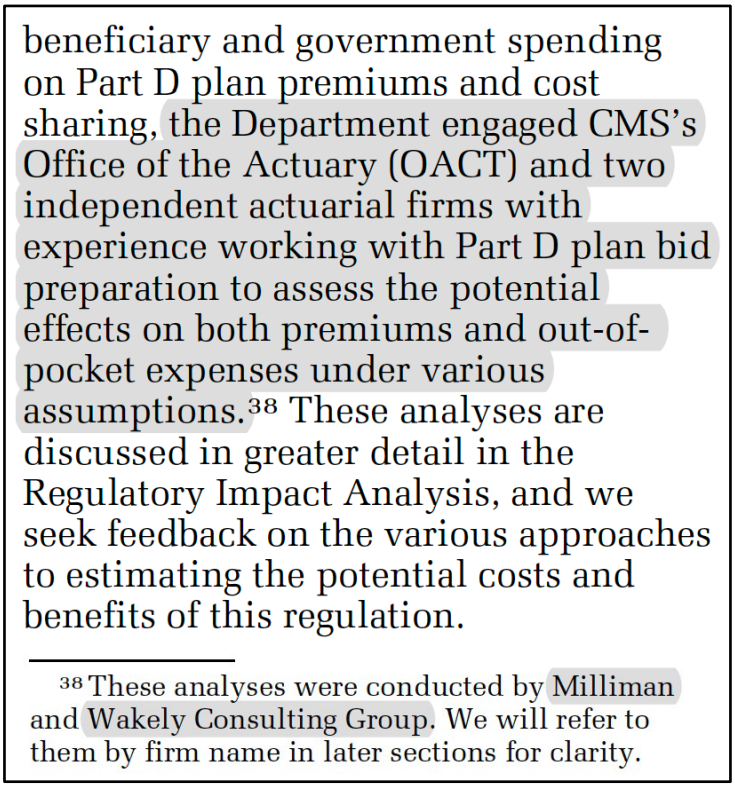
272. Interview 19.

273. Interview 3. The D.C. Circuit found that a consultant's report that synthesized information in the rulemaking record was part of the agency's internal, deliberative process that did not need to be disclosed in the record. United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1218–20 (D.C. Cir. 1980). Professor Lubbers highlights that the court drew a distinction between synthesizing existing information and generating new information. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 359 (2018) (citing *Marshall*, 647 F.2d at 1218–19).

274. Interview 19.

275. WAKELY CONSULTING GROUP, ESTIMATES OF THE IMPACT ON BENEFICIARIES,

Figure 1: Example of Contractor Disclosure in Proposed RuleText


beneficiary and government spending on Part D plan premiums and cost sharing, the Department engaged CMS's Office of the Actuary (OACT) and two independent actuarial firms with experience working with Part D plan bid preparation to assess the potential effects on both premiums and out-of-pocket expenses under various assumptions.[38] These analyses are discussed in greater detail in the Regulatory Impact Analysis, and we seek feedback on the various approaches to estimating the potential costs and benefits of this regulation.

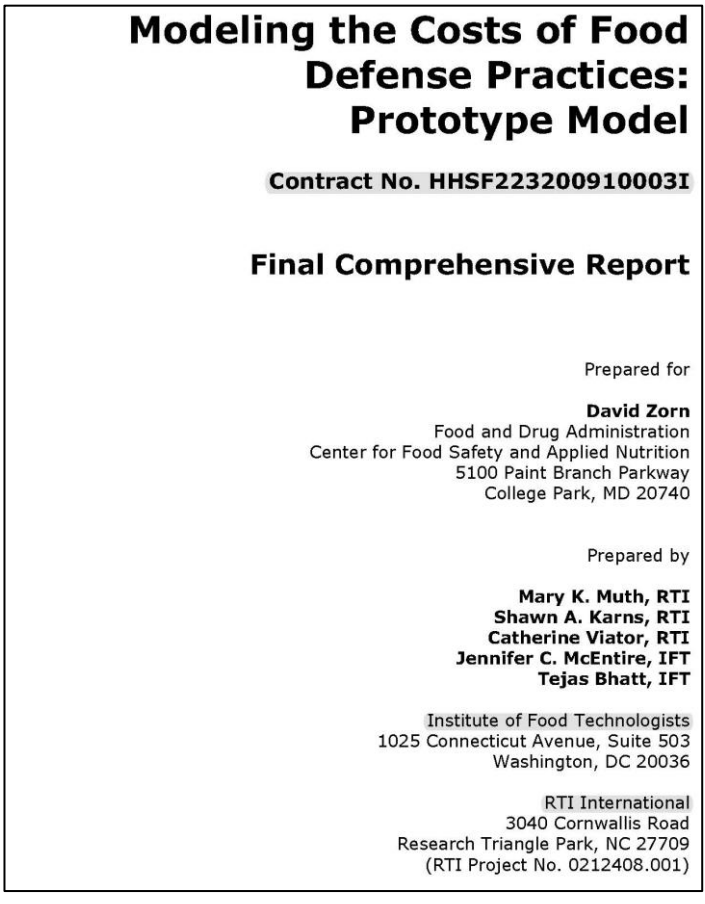
[38] These analyses were conducted by Milliman and Wakely Consulting Group. We will refer to them by firm name in later sections for clarity.

Notes. Screenshot of HHS's proposed rule on safe harbor regulation concerning prescription pharmaceutical discounts. 84 Fed. Reg. 2,340 (proposed Feb. 6, 2019) (to be codified at 42 C.F.R. § 1,001) (text highlighting added for emphasis). This text discloses that the agency relied on the analyses of two actuarial firms to explore the potential impacts of the proposed policy changes. Both the Milliman and Wakely Consulting Group analyses were discussed in the text of the proposed rule and both analyses were included in the proposed rule's docket on Regulations.gov.

CMS, AND DRUG MANUFACTURERS IN CY2020 OF ELIMINATING REBATES FOR REDUCED LIST PRICES AT POINT-OF-SALE FOR THE PART D PROGRAM (2018) https://aspe.hhs.gov/sites/default/files/private/pdf/260591/WakelyImpactAllPartiesManufacturerRebatesPointSale.pdf (presenting an analytical report prepared by an independent organization for use by the Office of the Assistant Secretary for Planning and Evaluation); MILLIMAN, INC., IMPACT OF POTENTIAL CHANGES TO THE TREATMENT OF MANUFACTURER REBATES (2019) https://aspe.hhs.gov/sites/default/files/private/pdf/260591/MillimanReportImpactPartDRebateReform.pdf (providing a report conducted on behalf of the Office of the Assistant Secretary for Planning and Evaluation to be used as supplemental information).

Another way to increase contractor-related transparency in a non-burdensome way is for contractors' reports to clearly disclose relevant contract information. Figure 2 offers an example of this; it shows the cover sheet for a contractor report that was used in a RIA for a rule issued by the Food and Drug Administration. Specifically, it displays the names of the individual contractors, the names of the two contracted firms (the Institute of Food Technologists and RTI International), and the associated contract number for the contract supporting this work. Each of these three pieces of information are important: disclosing individual names increases transparency related to potential personal conflicts of interest, disclosing firm names increases transparency related to potential organizational conflicts of interest, and having the contract number allows interested parties to connect the work to relevant contracting actions and procurement databases.

Figure 2: Example of Contractor Disclosure in Rule RIA



Modeling the Costs of Food Defense Practices: Prototype Model

Contract No. HHSF223200910003I

Final Comprehensive Report

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Notes. Screenshot of the cover sheet for a contractor report prepared by the Institute of Food Technologists and RTI International in support of the Food and Drug Administration's rule on Mitigation Strategies to Protect Food Against Intentional Adulteration. 81 Fed. Reg. 34,166 (May 27, 2016) (to be codified at 21 C.F.R. § 121). Text highlighting added to show the contractor affiliations and associated contract number. Individual contractor names are also disclosed.

Agencies disclosing contractors' roles in performing specific tasks is not the only form of transparency over contractors in rulemaking. One expert noted that, on the front end, competition over a contract to perform a rulemaking task is a form of transparency.[276] And, on the back end, the Federal Procurement Data System (FPDS) and USAspending.gov (the more user-friendly interface for public procurement data) provide some information about which firms receive

276. Interview 29.

federal contracts. However, the FPDS is a spending database and it does not include contract-related documents (e.g., the scope of work for a contract, task orders, etc.). Additionally, as we explained earlier, this system does not provide detailed information about the nature of services performed under a contract (e.g., the name of the rule, rulemaking tasks). This makes it difficult to discern rulemaking contracts from other types of professional services in the data.[277]

Enhanced external transparency around contractors in rulemaking is not necessarily an unmitigated good. Publicly disclosing that a contractor drafted the text of a proposed rule or initially compiled a comment analysis, for example, might needlessly undercut the legitimacy of an agency's rulemaking enterprise.[278] Raising these kinds of concerns may often not be warranted, particularly if the agency has good contractor oversight practices in place.

Relatedly, one expert noted that transparency around specific contractor tasks in the rulemaking process might invite frivolous or otherwise unwarranted legal challenges to a rule.[279] Further, the expert worried that it might not be journalists who mine the data in practice, but rather competitor firms eager to disrupt an awarded contract and undermining the rule in the process.[280] The expert preferred to keep these kinds of competitive disagreements to the bid protest venue rather than having them spill over into APA review of agency rules.[281] As ACUS and the government weigh options for external transparency, unintended consequences like this should be considered.[282]

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277. The Project on Government Oversight (POGO) has proposed transparency reforms to the government's procurement spending database that would partially address some of the issues raised here. Specifically, POGO recommends that the database should be improved "so it becomes the one-stop shop for all federal spending information. This means including actual copies of contracts, delivery or task orders, modifications, amendments, other transaction agreements, grants, and leases." *Judicious Spending to Enable Success at the Office of Nuclear Energy: Joint Hearing Before the Subcomm. on Investigations & Oversight, and the Subcomm. on Energy of the H. Comm. on Sci., Space, and Tech.,* 117th Cong. 69 (2021) (statement of Scott Amey, General Counsel and Executive Editorial Director, Project on Govenrment Oversight). This would likely be a very resource-intensive change. Rulemaking contracts are only one slice of the service contract reporting that would need to be overhauled to achieve this goal. As such, while the change would vastly improve transparency, calling for broad changes to the FPDS or USAspending.gov is beyond the scope of this Article.

278. Verkuil notes that contractors may enjoy less deference in judicial review, potentially putting government interests at greater risk. OUTSOURCING SOVEREIGNTY, *supra* note 25 at 109–11 (2007).

279. Interview 29.

280. *Id.*

281. *Id.*

282. The government's need to balance transparency interests against other needs is not limited to the issue of contractor use. *See, e.g.*, Cary Coglianese, Richard Zeckhauser

D. Discussion

Among the agencies we studied, practices around contractors in rulemaking are not standardized or written down. This absence of formalization means that the way contractors interact with agencies varies meaningfully across agencies, resulting in different approaches to handling all manner of contractor interactions from their exposure to officials within the agency to whether contractors are invited to the holiday party. Practices can also vary across rules within the same agency. Variation among agencies is to be expected and, in and of itself, it is not problematic. However, in the context of inherently governmental functions, this kind of variation introduces risk for at least two reasons.

First, agency officials may not be well positioned to spot or prevent potential violations of the inherently governmental standard. As this Part documented, at the staff level there is a widespread but incomplete understanding of the term inherently governmental function and what it means in the context of rulemaking. At the same time, the lack of internal transparency surrounding rule production means that agency leaders, who are expected to be responsible for maintaining the inherently governmental line, do not always have sufficient insight into which tasks agency staff are performing and which tasks contractors are performing.[283] This problem is exacerbated by senior leaders who adopt an attitude that who does what in a rulemaking is a detail that is "below my paygrade."

Second, when it comes to rulemaking, contractor roles are not always as clearly delineated as one might hope. In some cases, contractors can be deeply enmeshed with an agency, functioning for many intents and purposes as agency staff. Meanwhile, in other cases, interviewees noted that contractor roles can creep—starting with one smaller task and then, over time, growing to encompass more and larger tasks.[284] These kinds of entanglements can become problematic in rulemaking when the policy decisions associated with a rule—a part of rulemaking that is definitionally inherently governmental—are not settled matters from the outset. Unfortunately, the nature of rulemaking means that it can be very difficult, and perhaps at times impossible, to neatly segment off the policy aspect of the rule from its production. For example, someone drafting a rule preamble or regulatory analysis might reasonably ask questions or make

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& Edward A. Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policy Making*, 89 MINN. L. REV. 277, 279 (2004) (noting that "while transparency serves important goals, it also inhibits some beneficial government activities").

283. This finding is consistent with earlier research. *E.g.*, Guttman, *supra* note 31, at 873 (noting lack of internal transparency about which materials were prepared by contractors).

284. Interview 1; Interview 21.

suggestions that ultimately result in a policy being tweaked or changed in some way. The implications of this feedback are different if the person in question is a contractor rather than an agency employee.

These two points suggest that agencies might be well served to adopt written policies regarding appropriate contractor roles in and contractor management strategies for rulemaking. A policy like this might accomplish multiple goals simultaneously. By taking a clear stand on what the term inherently governmental function means in the context of rulemaking, this document could serve as an educational resource for staff with limited knowledge about the principle and what it means for rulemaking. Additionally, the policy could function as an internal management control to help agency leaders preserve the inherently governmental function line in the rulemaking arena.

This Part has also raised the question of what obligations an agency should have in terms of disclosing contractors' rulemaking contributions outside of the agency. Currently, external transparency is limited and ad hoc, making it hard for anyone outside the agency to have insight into contractor roles. We see value in encouraging disclosure around contractors in rulemaking, but we are cautious about encouraging transparency for transparency's sake. Sunlight may not be the best disinfectant given the potential for unintended consequences.[285]

In our estimation, the costs of creating a system where all contractor rulemaking roles are publicly disclosed for all rulemakings outweigh the benefits. Instead, we urge a tailored approach, where agencies consider instances where external disclosure of contractors' rulemaking contributions is both feasible and in the public interest. By feasible, we mean that an agency would be able to clearly articulate the contractor's role without excessive cost to the agency and that disclosing the contractor's role would not compromise the contractor's confidential business information in some way. By in the public interest, we mean that disclosing a contractor's role would not unduly undermine the agency's position or invite unwarranted or frivolous lawsuits. One practice that threads this needle, for example, is making contractor-drafted inputs into a RIA available in the docket on Regulations.gov. Importantly, we see value in agencies standardizing external disclosure practices across their rulemaking projects, ideally as part a broader written policy concerning contractors in rulemaking. This will help the public know what to expect in agency materials.

285. *Contra* Loius D. Brandies, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 1913, at 10 ("Sunlight is said to be the best of disinfectants . . . .").

CONCLUSION

This Article has provided the most descriptive account available of contractors in rulemaking: how they are perceived, what they do, and why and how agencies use them. Recounting these findings gives rise to many normative, practical, and legal questions that are worthy of additional study and consideration.[286] By summarizing these descriptive findings in this Article, we hope to stimulate discussion and debate about the appropriate role for contractors in rulemaking. Contractors are a core part of the rulemaking process at many agencies. As we have highlighted, this means that contractors are both a feature and a bug; bringing them into an agency's workflow introduces new opportunities and new risks. Looking ahead, these facts should prompt scholars, policymakers, and practitioners to take contractors' presence seriously.

286. Our recommendations to ACUS are available in our final report. Dooling & Potter, ACUS Report, *supra* note 9, at 61.