ARE ALL PROSECUTORIAL ACTIVITIES "INHERENTLY GOVERNMENTAL"?: APPLYING STATE SAFEGUARDS FOR VICTIM-RETAINED PRIVATE PROSECUTIONS TO OUTSOURCED PROSECUTIONS

Tyler Grove

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Tyler Grove (tgrove@law.gwu.edu) is a 2011 graduate of The George Washington University Law School. He was a member of the Public Contract Law Journal. *He wishes to thank Professor Steve Schooner, Professor Roger Fairfax, Judge Jeri Somers, John Sorrenti, and Raquel Tortora for their valuable insights and suggestions.*

I. INTRODUCTION

A. *Background*

Prosecutors across the country have been forced to make tough decisions as they face budget cuts for offices already maximizing their use of personnel, resources, and funding. Many have responded to such crises by exercising their discretion not to prosecute certain misdemeanor crimes.[1] For example, in May 2009 District Attorney Robert Kochly, of Contra Costa County, California, instructed local police agencies to cease investigations of "quality-of-life crimes and some drug felonies" due to a $1.9 million budget cut to his office.[2] Similarly attorney Denise Lunsford of Albemarle County Commonwealth, located near Charlottesville, Virginia, threatened to "stop prosecuting misdemeanors such as drunken driving and domestic assault" if her office did not meet a $32,000 budget shortfall.[3]

Budget deficits are not the only factors forcing prosecutors' offices to stretch their resources. Just as less money is being set aside for prosecutions, prosecutors are being asked to take on a growing number and variety of crimes. For example, with computer use on the rise, many crimes can now be automated.[4] This explosion of "cybercrime" can overwhelm prosecutors already stretched to the limits of their capacity and may also increase demands on prosecuting attorneys' technical knowledge.[5] To face these simultaneous problems of insufficient funding, an increased caseload, and an increased demand for expertise, U.S. Attorney for the District of Columbia Jeffrey Taylor proposed a novel plan to hire private law firms to assist with misdemeanor prosecutions.[6]

Prosecutions have often been cited as a traditional example of an "inherently governmental" activity that may not be contracted out to a private firm.[7]

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1. *See generally* Jesse McKinley, *Money Shortage Forces Cut in Cases to Be Prosecuted*, N.Y. Times, May 8, 2009, at A13, *available at* http://www.nytimes.com/2009/05/09/us/09tradeoffs.html.

2. Walling & Klarich, *Prosecution Rates Lowered by Budget Cuts*, S. Cal. Def. Blog (May 21, 2009), http://www.southerncaliforniadefenseblog.com/2009/05/prosecution_rates_lowered_by_b.html.

3. Brandon Shulleeta, *Lunsford: Budget Cut May Halt Some Cases*, Daily Progress (Charlottesville, VA), Oct. 8, 2009, http://www2.dailyprogress.com/cdp/news/local/local_govtpolitics/article/lunsford_budget_cut_may_halt_some_cases/46917/.

4. *See* Susan Brenner, *Private Prosecution*, CYB3RCRIM3 (June 26, 2009, 6:16 AM), http://cyb3rcrim3.blogspot.com/2009/06/private-prosecution.html.

5. *See id.*

6. Henri E. Cauvin, *U.S. Attorney in D.C. Seeks Assistance of Private Firms*, Wash. Post, Aug. 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/17/AR2007081702291.html.

7. *E.g.*, Roger A. Fairfax Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. Chi. Legal F. 265, 291 (2010) [hereinafter Fairfax, *Outsourcing Criminal Prosecution?*] ("[T]he definition of 'inherently governmental functions' excluded from [the Federal Activities Inventory Reform Act of 1998]'s competitive sourcing plan would certainly seem to include a potential contracting out of criminal prosecution"); Matthew Kalinowski, *The Office of Management and Budget's Circular A-76: What Is Its Effect on Government Lawyers?*, Fed. Law., Feb. 2005, at 38, 41 (2005) ("For instance, U.S. attorneys' jobs will never undergo

However, a close reading of the current regulatory scheme reveals that the definition of "inherently governmental" is not so clear-cut.[8] This Note finds that the current regulatory framework on "inherently governmental functions" is ambiguous and permits outsourcing of certain prosecutorial functions. While the decision of whether or not to prosecute clearly represents an inherently governmental function, other prosecutorial activities may *not* be inherently governmental and thus may be outsourced, according to this Note.

Specifically, this Note proposes utilizing the law developed by state courts for "victim-retained private prosecutions" as a means of safeguarding against contracting out inherently government functions in "outsourced prosecutions." As used in this Note, the term "victim-retained private prosecution" refers to a practice in which the victim of a crime retains private counsel (the "victim-retained private prosecutor") to bring a prosecution on the victim's behalf.[9] In contrast, the term "outsourced prosecution" refers to a situation in which the Government hires a private lawyer or law firm (the "outsourced prosecutor") to handle some portion of a prosecution.[10]

This Note begins with a discussion of outsourcing versus "insourcing" in Part I.B. Part II next considers the various definitions and interpretations of "inherently governmental functions" that appear in statutes, the Federal Acquisition Regulations (FAR), OMB Circular A-76, and judicial opinions. After analyzing these governmental and judicial definitions, Part II.E concludes that significant ambiguity exists today as to what constitutes an inherently governmental function. Part III next considers current law regarding victim-retained private prosecutions, beginning with Part III.A's comparison of victim-retained private prosecutions and outsourced prosecutions. Part III.B discusses the history of victim-retained private prosecutions in England and the United States and Part III.C examines current law with regard to such prosecutions; in particular, this subsection discusses three recent state high-court decisions in Rhode Island, New Hampshire, and New Jersey that

public-private competition, because prosecution of federal crimes is the archetypal example of activities 'intimately related to the public interest.' Exercising prosecutorial discretion is merely another way of saying that a decision will require the exercise of substantial discretion in applying governmental authority."); *cf*. Roger A. Fairfax Jr., *Delegation of the Criminal Prosecution Functions to Private Actors*, 43 U.C. Davis L. Rev. 411, 413 (2009) [hereinafter Fairfax, *Delegation of the Criminal Prosecution*] ("Most observers reasonably view criminal prosecution as a function to be performed exclusively by the state.").

8. This Note does not attempt to analyze the due process concerns that may be present when outsourcing prosecutorial activities. *See* Fairfax, *Outsourcing Criminal Prosecution?*, *supra* note 7, at 286–90 (discussing how outsourcing prosecutions raises fairness, due process, separation of powers, and nondelegation doctrine concerns); Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 424 ("[P]rivate prosecution arrangements, however, have come under serious criticism on constitutional due process grounds."); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 550–53 (1994) (discussing due process concerns with private victim-retained prosecutors).

9. *See* Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 421–23.

10. *See id*. at 416–17.

illustrate how states regulate victim-retained private prosecutions. Part IV identifies four safeguards implemented to ensure the proper use of victim-retained private prosecutions at the state level, and concludes by proposing that these safeguards be added to the FAR to better define which prosecutorial activities can and cannot be contracted out by the Federal Government.

B. *Outsourcing versus "Insourcing"*

Any discussion of privatizing government services must take into account the current debate between outsourcing and "insourcing."[11] Shortly after taking office, President Obama issued a memo directing the Office of Management and Budget (OMB) to develop policies to "clarify when governmental outsourcing for services is and is not appropriate. . . ."[12] This directive set the tone for what has been widely perceived as a step back from earlier policies favoring outsourcing.[13]

Despite this shift in policy, the outsourcing of government legal work remains a sensible practice for a number of reasons. First, precedent exists to support a related practice, in which government agencies use private law firms to assist with *civil* litigation.[14] State attorneys general, for example, occasionally hire private law firms on a contingency fee basis to bring civil suits on behalf of the State.[15] The use of private law firms allows states to overcome lacking resources, expertise, and money to bring suits where they otherwise would have been unable.[16]

Second, outsourcing legal work can lead to better value for the Government. Allowing competition between private providers and in-house providers generally has been viewed as a means of attaining better value for the Government.[17] While outsourcing to private law firms for civil and regulatory

11. "Insourcing" refers to the practice of producing goods or services in-house. *See* John R. Luckey et al., Cong. Research Serv., R40641, Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress 33 (2009).

12. Memorandum on Government Contracting, 2009 Daily Comp. Pres. Doc. 123 (Mar. 4, 2009).

13. *See, e.g.*, Matthew Weigelt, *Obama Official Hits Campaign Trail to Sell Insourcing*, Wash. Tech. (Jan. 12, 2010), http://washingtontechnology.com/Articles/2010/01/11/COVER-STORY-Insourcing-main-bar.aspx.

14. *See, e.g.*, Fairfax, *Outsourcing Criminal Prosecution?*, *supra* note 7, at 280 (giving examples of outsourced government legal work in antitrust, tobacco, and handgun litigation).

15. *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10.

16. *See* Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 588 (2009) (citing Liptak, *supra* note 15).

17. Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers*, 33 Pub. Cont. L.J. 443, 444 (2004) (citing Office of Mgmt & Budget, Exec. Office of the President, Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner 2 (2003) ("Both the public and private sectors have conducted independent studies to document the effects of public-private competition. Each has reached the same conclusion: subjecting in-house operations to competition consistently generates cost savings—anywhere from 10–40 percent on average, regardless of whether the competition is won by a private contractor or the government.")).

work may save the Government money, criminal prosecutions take the lion's share of the Department of Justice's (DoJ) annual budget. For example, in fiscal year 2010, the DoJ requested $1,500,626,000 from Congress for its Criminal Division of U.S. Attorneys versus only $399,338,000 for its Civil Division of U.S. Attorneys.[18] Thus, funds for the Criminal Division make up nearly seventy-eight percent of the DoJ's total requested budget of $1,926,003,000 in 2010.[19] Exploring ways to save costs in the Criminal Division as well as the Civil Division may lead to substantial savings for the Federal Government.

Even if private attorneys are not outright less expensive that attorneys employed by the Government, the former may provide better value because of their expertise in particular areas of law. "Even departments with significant specialization . . . can benefit from outsourcing legal services. The [DoJ's] Antitrust Division, for example, benefited enormously from the decision to hire a private-sector attorney, David Boies, to represent government interests in the Microsoft litigation."[20] Outsourcing legal work may therefore increase the depth of a particular agency's expertise, offering it the flexibility to use additional lawyers or specialized experts where necessary.

Cybercrime and terrorism represent two areas of law in which the use of private prosecutors may be appropriate. Given that cybercriminals and terrorists are not specific to any particular area in the United States, and given that they often target various locations,[21] attorneys prosecuting these crimes usually need *not* be familiar the physical location of the wrongdoing or harm suffered. Moreover, it may not be cost-efficient or even feasible for every U.S. Attorney's office to keep an expert in terrorism or cybercrime on staff full time; government agencies often lack the funds to retain highly experienced and highly skilled personnel.[22] By outsourcing this legal work to privately employed and highly compensated personnel who do possess such experience and skill, the Government can attain critical expertise without breaking its budget.

Additionally outsourcing legal work may enhance the accountability of government lawyers. One argument for keeping lawyers "in house" in government agencies is that government lawyers presumably offer a higher

18. U.S. Dep't of Justice, United States Attorneys FY 2010 Performance Budget Congressional Submission 14 (2010), *available at* http://www.justice.gov/jmd/2010justification/pdf/fy10-usa.pdf.

19. *Id*. The DoJ also requested $26,039,000 for Legal Education to reach the total requested amount of $1,926,003,000. *Id*.

20. McFadden, *supra* note 17, at 445 (citing Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 17 (2000) ("By all accounts, David Boies' performance at trial was an important factor in the government's trial victory.")).

21. *See* Brenner, *supra* note 4.

22. *See* Raj Sharma, Fed. Acquisition Innovation & Reform Inst., The Move to "Insourcing" . . . Proceed with Caution 4 (2009), *available at* http://www.thefairinstitute.org/downloads/The%20Move%20to%20Insourcing_June%202009.pdf ("Too often, programs are plagued with 'fraud, abuse and waste' because the government cannot afford to hire highly skilled, qualified people to manage programs and provide adequate oversight to contractors.").

standard of ethical conduct and service because they are motivated not just by a paycheck but also by a sense of loyalty to the Government.[23] However, when government lawyers commit ethics violations, they at times face few repercussions from the Government. In 2001, for example, the Government Accountability Office issued a report on the DoJ's Office of Professional Responsibility ("OPR") finding that the OPR rarely held prosecutors accountable for misconduct.[24] Similarly the OPR has been accused of becoming less of a watchdog organization for the DoJ and more of a tool to soften allegations of ethics violations by Justice attorneys.[25] In contrast, private attorneys and law firms doing outsourced legal work for the Government "have every incentive to perform efficiently and deliver excellent services because they hope to receive future government contracts."[26] For these reasons, onlookers ought not assume that private attorneys are necessarily less ethical than their government-employed counterparts.

Ultimately, outsourcing presents a number of advantages to agencies, including better value, more expertise, more flexibility in staffing personnel, and greater accountability. It is thus in an agency's interest to compare private-sector service providers against its own ability to produce in-house before making any acquisition decision.

II. EXISTING REGULATION

The existing law defining "inherently governmental" is inadequate and ambiguous. As the Obama administration observed recently, "the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has

23. McFadden, *supra* note 17, at 448–49.

24. Richard M. Stana, U.S. Gov't Accountability Office, GAO/GGD-00-187, Department of Justice: Information on the Office of Professional Responsibility's Operations 10 (2000) [hereinafter Stana, 2000 Report]; *see also* Richard M. Stana, U.S. Gov't Accountability Office, GAO-01-135R, Follow-up Information on the Operations of the Department of Justice's Office of Professional Responsibility 6 (2001) ("OPR acknowledged that the large number of cases (60) in which the courts either seriously criticized a Justice attorney or found misconduct, in which OPR found no misconduct, poor judgment, or other criticism, could raise the question of whether OPR had been too lenient in judging attorney conduct"). The 2000 report found that between 1997 and 2000, of the 101 dispositions initiated by complaints or criticisms in judicial findings, over half yielded no disciplinary result from OPR. Stana, 2000 Report, *supra*, at 9 tbl.3, 10 tbl.5.

25. *See, e.g.*, Carrie Johnson, *Bush Officials Try to Alter Ethics Report*, Wash. Post (May 6, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/05/05/AR2009050502219.html?nav=hcmodule ("Former Bush administration officials have launched a behind-the-scenes campaign to urge Justice Department leaders to soften an ethics report criticizing lawyers who blessed harsh detainee interrogation tactics, according to two sources familiar with the efforts.").

26. McFadden, *supra* note 17, at 445. *But see* Fairfax, *Outsourcing Criminal Prosecution?*, *supra* note 7, at 285 (arguing that "[t]he demands of the [private attorney] contractor's private matters could monopolize the attorney's time, leaving the criminal prosecution matters without the appropriate focus and attention").

been blurred and inadequately defined."[27] The sections below will examine the respective definitions of "inherently governmental" provided in federal statutes, the FAR, OMB Circular A-76, and judicial interpretations, and a final section will analyze the usefulness and shortcomings of this existing regulatory framework.

A. *Statutory Definition*

The Federal Activities Inventory Reform Act ("FAIR Act") of 1998 provides the primary statutory definition of "inherently governmental."[28] The FAIR Act defines "inherently governmental" as "a function that is so intimately related to the public interest as to require performance by Federal Government employees."[29] Recently the Office of Federal Procurement Policy ("OFPP") proposed making the FAIR Act's definition the single, government-wide definition of "inherently governmental."[30]

The FAIR Act includes in its definition of inherently governmental functions those activities that involve the "exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government. . . ."[31] The FAIR Act includes a nonexclusive list of functions that are inherently governmental, which includes functions that "significantly [affect] the life, liberty, or property interests of private persons."[32] Specifically excluded as inherently governmental are functions that involve gathering information, providing advice or ideas, or doing anything primarily ministerial in nature.[33]

B. *Federal Acquisition Regulations*

The FAR copies much of the language of the FAIR Act and generally prohibits outsourcing of "inherently governmental functions."[34] For example,

27. Memorandum on Government Contracting, *supra* note 12, at 1.

28. Luckey et al., *supra* note 11, at 8.

29. 31 U.S.C. § 501 note, § 5(2)(A) (2006).

30. Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,189 (proposed Mar. 31, 2010).

31. 31 U.S.C. § 501 note, § 5(2)(B) (2006).

32. *Id.* § 5(2)(B)(i)–(v). The other functions on the list are those carried out

> (i) to bind the United States to take, or not to take, action by contract, policy, regulation, authorization, order or otherwise; (ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; . . . (iv) to commission, appoint, direct, or control officers or employees of the United States; or (v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control or disbursement of appropriated and other federal funds.

33. *Id.* § 5(2)(C). The FAIR Act provides examples of functions that are primarily ministerial in nature, "such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services." *Id.* § 5(2)(C)(ii).

34. *See* FAR 7.503(a).

similar to the definition provided in the FAIR Act, the FAR defines "inherently governmental functions" as "activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government."[35]

Also as provided in the FAIR Act, "inherently governmental functions" under the FAR include interpretations or executions of the laws that significantly affect the "life, liberty, or property of private persons."[36] Other examples of inherently governmental functions include "[t]he direct conduct of criminal investigations,"[37] "[t]he control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution,"[38] and "[t]he determination of agency policy, such as determining the content and application of regulations, among other things."[39]

The FAR specifically excludes a number of activities from its definition of inherently governmental functions, including administrative or ministerial activities[40] and actions to provide "advice, opinions, recommendations, or ideas."[41] The FAR cautions that "certain services and actions that are not considered to be inherently governmental functions 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."[42] The FAR includes a nonexclusive list of such activities, including "[c]ontractors providing legal advice and interpretations of regulations and statutes to [g]overnment officials."[43]

C. *OMB Circular A-76*

The Office of Management and Budget's (OMB) Circular A-76 requires agencies to compare in-house services for all non-inherently governmental activities with outsourcing to private firms to find the best value for the Government.[44] The OMB ostensibly premised Circular A-76 on its theory that competition with the private sector creates an incentive for in-house government providers to improve services and create better value for taxpayers.[45]

35. FAR 2.101.
36. *Id.* This language mirrors the statutory language in the FAIR Act at 31 U.S.C. § 501 note, § 5(2)(B)(i)–(v).
37. FAR 7.503(c)(1).
38. FAR 7.503(c)(2).
39. FAR 7.503(c)(5).
40. FAR 2.101.
41. *Id.* This language is also mirrored in the FAIR Act at 31 U.S.C. § 501 note, § 5(2)(C).
42. FAR 7.503(d).
43. FAR 7.503(d)(18).
44. *See* Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-76 (Revised), Performance of Commercial Activities 1 (2003) [hereinafter OMB Circular A-76].
45. Kalinowski, *supra* note 7, at 38.

Circular A-76 defines "inherently governmental functions" as activities that are "so intimately related to the public interest as to mandate performance by government personnel."[46] Like the FAIR Act and the FAR, Circular A-76 includes a nonexclusive list of examples of inherently governmental activities, including those "[s]ignificantly affecting the life, liberty, or property of private persons."[47]

OMB Circular A-76 has a somewhat narrower definition of inherently governmental functions than the definitions provided in both the Fair Act and the FAR. While the FAIR Act and the FAR define "inherently governmental functions" as "activities that require . . . the exercise of discretion in applying Government authority,"[48] Circular A-76 defines "inherently governmental functions" as only those activities that "require the exercise of *substantial* discretion."[49] The Circular states that discretion is "substantial" if (1) it commits the Government to a particular course of action and (2) existing regulations and policies do not already limit that discretion by identifying acceptable ranges of decisions or subjecting the decision to final agency review.[50]

Additionally OMB Circular A-76 stipulates that "[a]n activity may be provided by contractor support . . . where the contractor does not have the authority to decide on the course of action[] but [instead] is tasked to develop options or implement a course of action [under] agency oversight"; it also lists six factors agencies should consider to avoid transferring inherently governmental functions to contractors.[51]

D. *Judicial Definitions and Interpretations*

The Government Accountability Office (GAO) also has addressed the distinction between inherently governmental and commercial functions. The GAO's test for what constitutes an inherently governmental function closely

46. OMB Circular A-76, *supra* note 44, at A-2. This definition is nearly identical to that in Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Exec. Office of the President, Policy Letter 92-1 § 5 (1992) [hereinafter OFPP Letter 92-1], *available at* http://www.whitehouse.gov/omb/procurement/policy_letters/921_092392.html. However, some minor differences exist. Luckey et al., *supra* note 11, at 15 ("The definition is identical . . . except for its last word and the capitalization of its next-to-last word. OFPP Letter 92-1 uses 'Government employees' where OMB Circular A-76 uses 'government personnel.' 86 OFPP Letter 92-1 is still occasionally cited as an authority on the definition of inherently governmental functions. However, the 2003 revision of OMB Circular A-76 incorporated some of its contents and superseded it.").

47. OMB Circular A-76, *supra* note 44, at A-2. OMB Circular A-76 contains verbatim the same examples included in the FAIR Act.

48. 31 U.S.C. § 501 note, § 5(2)(B); FAR 2.101.

49. OMB Circular A-76, *supra* note 44, at A-2 (emphasis added). *See also* Luckey et al., *supra* note 11, at 13 ("The current version of OMB Circular A-76 then provides some further explanations that are unlike those in the FAIR Act or other sources, however. It first distinguishes between the exercise of discretion *per se*, which it says does not make a function inherently governmental, and the exercise of *substantial* discretion, which it says makes a function inherently governmental.").

50. OMB Circular A-76, *supra* note 44, at A-2.

51. *Id*. The six factors are

resembles the definitions in the FAR and OMB Circular A-76.[52] "GAO's test of inherently governmental functions looks for (1) the exercise of substantial discretionary authority by government contractors or (2) the contractor making value judgments on the [G]overnment's behalf."[53] GAO has further distinguished between impermissibly *performing* an inherently governmental function and permissibly *advising* or *assisting* with a function.[54] GAO typically examines a function on a case-by-case basis rather than "classify[ing] functions as inherently governmental or commercial in the abstract."[55]

Federal courts that have addressed questions about inherently governmental functions "give considerable deference to the executive branch's classification of a function as inherently governmental or commercial because of the political question doctrine, under which courts decline to hear issues that have been entrusted to the discretion of another branch of government."[56] Thus, the coinage of money is an example of an inherently governmental function, but the U.S. Mint has discretion to determine whether the stamping of blanks constitutes "coinage."[57]

Only the U.S. Court of Appeals for the Ninth Circuit has addressed the issue of prosecutorial discretion as an inherently governmental function. In dicta in *Sigman v. United States*, the Ninth Circuit noted briefly that "[i]n *General Dynamics Corp. v. United States*, 139 F.3d 1280 (9th Cir.1998), we dealt with prosecutorial discretion, an inherently governmental function."[58]

(1) Statutory restrictions that define an activity as inherently governmental; (2) The degree to which official discretion is or would be limited, i.e., whether involvement of the private sector or public reimbursable provider is or would be so extensive that the ability of senior agency management to develop and consider options is or would be inappropriately restricted; (3) In claims or entitlement adjudication and related services[:] (a) the finality of any action affecting individual claimants or applicants, and whether or not review of the provider's action is de novo on appeal of the decision to an agency official; (b) the degree to which a provider may be involved in wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures; (c) the degree to which matters for decisions may involve recurring fact patterns or unique fact patterns; and (d) the discretion to determine an appropriate award or penalty; (4) The provider's authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity[,] whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas. These policies do not prohibit contracting for guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed; (5) The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons; and (6) Whether the activity in question is already being performed by the private sector.

52. Luckey et al., *supra* note 11, at 19.
53. *Id*.
54. *Id*. (citation omitted).
55. *Id*. at 20.
56. *Id*. at 21.
57. *Id*. (citing Arrowhead Metals, Ltd. v. United States, 8 Cl. Ct. 703, 717 (1985)).
58. 208 F.3d 760, 770 (9th Cir. 2000).

In *General Dynamics Corp*., the court defined "prosecutorial discretion" as the decision whether or not to prosecute.[59]

E. *Analysis of Current Regulatory Scheme*

Under the current regulatory scheme, it is clear that the decision to prosecute is an inherently governmental function that may not be contracted out to a private firm.[60] However, it is less clear which *other* activities associated with a criminal prosecution qualify as inherently governmental. For example, the FAR specifically states that the provision of "legal advice and interpretations of regulations and statutes to Government officials" by contractors is not necessarily an inherently governmental function,[61] but the "control of prosecutions" is an inherently governmental function.[62] Yet ambiguity remains as to where the line lies between merely rendering legal advice and exercising "control" over a prosecution.

The FAIR Act, the FAR, and OMB Circular A-76 all offer some guidance as to which prosecutorial duties fall outside of the inherently governmental designation. The FAIR Act and the FAR state that an "inherently governmental function" includes any activities that involve "the interpretation and execution of the laws of the United States so as to . . . *[s]ignificantly* affect the life, liberty, or property of private persons."[63] The inclusion of the modifier "significantly" suggests that Congress intended that not all actions affecting life, liberty, or property be considered inherently governmental. However, this language is broad enough to presumably prohibit private prosecutions of crimes that carry serious prison time or fines because these would seemingly "significantly" affect the liberty or property of private persons. A private firm thus probably would not be able to prosecute a homicide under this provision. These inferences aside, neither the FAIR Act nor the FAR expressly defines

59. Gen. Dynamics Corp. v. United States, 139 F.3d 1280, 1283 (9th Cir. 1998) ("We need not go through that detailed, and often difficult, analysis here because no one doubts that prosecutorial discretion is covered. As we have succinctly put it: 'The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability.' Wright v. United States, 719 F.2d 1032, 1035 (9th Cir.1983)."). It should be noted that the *General Dynamics* court never designated prosecutorial discretion as an inherently governmental function; rather, the court held that prosecutorial discretion fell within the exception from the Federal Tort Claims Act for an exercise of government discretion.

60. *See* FAR 7.503(c)(1) (listing "[t]he direct conduct of criminal investigations" as an inherently governmental function); FAR 7.503(c)(2) ("[t]he control of prosecutions and performance of adjudicatory functions . . ."); FAR 7.503(c)(5) ("[t]he determination of agency policy, such as determining the content and application of regulations"). The decision whether or not to prosecute may also be "a form of sovereign power not subject to delegation to private actors." Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 427. *But see id*. at 448 (noting that "ministerial tasks may be appropriate for delegation to private actors"). This Note agrees that the decision to prosecute is likely a nondelegable exercise of sovereign power, and a "substantial" exercise of discretion under the FAIR Act and the FAR, but argues that other activities necessary to a criminal prosecution may not rise to the level of a substantial exercise of discretion.

61. FAR 7.503(d)(18).

62. FAR 7.503(c)(2).

63. 31 U.S.C. § 501 note, § 5(2)(B)(i)–(v); FAR 2.101 (emphasis added).

what makes an action affecting life, liberty, or property "significant." It is therefore unclear whether this provision would prohibit a private firm from prosecuting a crime that carried a prison sentence less than that imposed for homicide. For example, the provision does not stipulate whether a private firm could prosecute a crime carrying a sentence of a year, or several months, or even several weeks. A crime with a high fine also might be prohibited by this provision, but the provision also fails to clarify when a fine is high enough to *significantly* affect a private person's property.

Similarly, OMB Circular A-76 is ambiguous regarding how much discretion is needed to make an activity inherently governmental. OMB Circular A-76 states that inherently governmental activities "require the exercise of *substantial* discretion."[64] Discretion is "substantial" if "it commits the [G]overnment to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, direction, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials."[65] This policy allows contractors to make discretionary decisions as long as the government agency has first defined the range of acceptable decisions and the contractor's final decision is subject to agency oversight. This definition of "substantial discretion" is too vague to provide agencies and courts clear direction as to which prosecutorial duties are inherently governmental and which could be commercial. Most significantly, the Circular fails to state when existing agency guidance is sufficient to "identify specified ranges of acceptable decisions or conduct."[66]

Ultimately, existing law as to what constitutes an inherently governmental function is ambiguous, but no law explicitly categorizes *all* prosecutorial activities as inherently governmental. Thus, the outsourcing of certain prosecutorial duties to private law firms is not necessarily prohibited under current statutory, regulatory, and judicial frameworks.

III. BACKGROUND ON VICTIM-RETAINED PRIVATE PROSECUTIONS

The term "victim-retained private prosecution" refers in this Note to the practice of allowing the victim of a crime to retain private counsel (the "victim-retained private prosecutor") to bring a prosecution on the victim's behalf.[67] The term "outsourced prosecution" refers to situations in which the Government hires a private lawyer or law firm (the "outsourced prosecutor") to handle some portion of a prosecution.[68]

64. OMB Circular A-76, *supra* note 44, at A-2 (emphasis added).
65. *Id.*
66. *Id.*
67. *See* Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 421–23.
68. *See id.* at 416–17.

Though it receives relatively little commentary or attention, the United States has a long history that continues to this day of allowing victim-retained private attorneys to initiate and prosecute crimes.[69] The role private prosecutors play in a trial can range from providing minor ministerial assistance to the public prosecutor to a much more significant role of lead attorney.[70] Victim-retained private prosecutors at trial often perform the same tasks as their public counterparts: examining witnesses, making objections, and conducting opening and closing arguments.[71]

The practice of allowing private attorneys to bring prosecutions on behalf of clients is closely analogous to the practice of outsourcing prosecutorial work to private attorneys. State laws regulating prosecutions brought by victim-retained private attorneys therefore are useful for devising federal government safeguards to protect against contracting out inherently governmental functions. This section first discusses the distinctions and similarities between victim-retained private prosecutions and outsourced prosecutions. Second, it examines the history and development of victim-retained private prosecutions in the common law, beginning first in England and continuing in the modern United States. Finally, it discusses three recent state high court decisions from Rhode Island, New Hampshire, and New Jersey that discuss and limit the ability of private attorneys to bring prosecutions.

A. *Victim-Retained Private Prosecutors and Outsourced Prosecutors Raise Similar Concerns*

A number of distinctions exist between victim-retained private prosecutions and outsourced prosecutions.[72] First, outsourced prosecutors are in privity with the state by virtue of their contract with the Government, while victim-retained private prosecutors have no such agreement with the Government.[73] Victim-retained private prosecutors also typically bring cases that the Government has declined to prosecute itself. Outsourced prosecutors, on the other hand, only work on cases that the Government has chosen to bring (assuming that the Government has not impermissibly outsourced

69. Bessler, *supra* note 8, at 512.

70. *See id.* at 532–33.

71. *Id.* at 512. Victim-retained private prosecutors are sometimes limited by state statute in what activities they may do. For example, in Tennessee, state statute requires a public prosecutor to conduct the closing argument. *Id.* at 512 n.5 (citing Tenn. Code Ann. § 8-7-401 (1988) ("The district attorney general or his deputies shall make the final and concluding argument.")).

72. This Note does not discuss in depth other contexts in which a private attorney may find herself with some portion of prosecutorial power, such as part-time prosecutors maintaining both a public and private practice, private individuals bringing *qui tam* actions on behalf of the state, or law students working in a clinical context. *See generally* Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 415–24 (discussing the various contexts where prosecutorial power is delegated to private individuals).

73. *See id.* at 425–26 (noting that the privity between outsourced prosecutors and the states retaining them potentially creates constitutional delegation issues).

the initial decision of whether to prosecute).[74] Another distinction is that victim-retained private prosecutors are " 'required by the very standards of the profession to serve two masters'—the court that appointed her and the private client who pays her bills."[75] Outsourced prosecutors, on the other hand, represent the state and not the victims of the crimes they are prosecuting.

Despite these differences, allowing a private attorney to participate in prosecutorial work raises similar concerns in both the victim-retained private prosecutor and the outsourced prosecutor settings. For example, concern may arise in both types of prosecutions that a private attorney acting as a prosecutor will abuse her power or harass the accused defendant.[76] Additionally, because both the victim-retained prosecutor and the outsourced prosecutor are likely to conduct most of their work in a private office setting, both types of private prosecutions raise questions as to accountability and transparency.[77] Furthermore, both the victim-retained private prosecutor and the outsourced prosecutor are likely to have a private practice with other private clients, raising concerns over avoiding actual or apparent conflicts of interest.[78]

Although there are notable distinctions between both types of private prosecutions, the safeguards developed in state courts to address the concerns of victim-retained private prosecutions are relevant to determining the permissible limits of outsourced prosecutions, given that both types of prosecutions raise similar concerns.[79] Through an analysis of the state-developed safeguards for victim-retained private prosecutions, therefore, it may be possible to determine what federal prosecutorial activities may be outsourced without running afoul of the regulatory framework.

B. *History and Development of Victim-Retained Private Prosecutions*

The history of victim-retained private prosecutions can be traced to early common law in England.[80] Though the idea attracts skepticism today, English common law began with entirely private prosecutions.[81]

1. Victim-Retained Private Prosecutions in Early English Common Law

English criminal prosecutions from the seventh to tenth centuries were almost entirely private and the remedies sought and awarded were almost

74. *See* discussion *infra* Part III.E.

75. Note, *Permitting Private Initiation of Criminal Contempt Proceedings*, 124 Harv. L. Rev. 1485, 1489 (2011) (citing Young v. United States *ex rel*. Vuitton et Fils S.A., 481 U.S. 787, 814 (1987)).

76. *See, e.g.*, Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 439–41 (discussing broadly concerns over corruption and abuse of power when delegating prosecutorial activities).

77. *See, e.g.*, *id*. at 441–45 (discussing concerns over performance and accountability).

78. *See, e.g.*, *id*. at 436–39 (discussing potential conflicts of interest).

79. *See id*. at 426 ("Many of the reservations regarding prosecution outsourcing will apply with equal force to victim-retained private prosecution.").

80. Bessler, *supra* note 8, at 515.

81. *Id*.

entirely monetary.[82] Beginning in the tenth century and until the fourteenth century, English code required leading nobles to arrest and present in front of a jury any persons accused of a crime.[83] Little evidence was presented in courts, however, and jurors would informally look for information on the case and seek out the accused on their own.[84] Noncompensatory remedies, especially the use of the death penalty, became increasingly frequent during this time.[85]

For the next five hundred years—from the fourteenth through the nineteenth centuries—victim-retained private prosecutions assumed a leading role in England.[86] During the fourteenth and fifteenth centuries, juries became more passive and would less frequently make accusations based on their own knowledge.[87] At the same time, juries became more reliant on the parties to present evidence in court.[88] Though this process relied a great deal on victims' efforts to achieve justice, the Government still played a prosecutorial role in that prosecutions were formally brought in the name of the Crown and royal officials provided investigative assistance to victims.[89] Nevertheless, the true leaders of these prosecutions were non-government actors.

Beginning in the nineteenth century, however, the pendulum swung to favor public prosecutions.[90] This shift is likely attributable to public pressure in response to growing urban crime, as victims "frequently did not prosecute because it was expensive, time consuming, and brought few benefits other than the satisfaction of revenge or justice."[91] The shift to public prosecutors was not without controversy, and Parliament did not pass legislation setting up a national system of public prosecutions until 1879.[92] "Even th[e] [1879] statute did not fundamentally undermine private prosecution, because public prosecutors had very limited authority. It was only with the passage of the 1985 Prosecution of Offenses Act that England established an effective system of public prosecution, and even this legislation preserved a limited right of private prosecution."[93] Though public prosecutors are now the norm in England, "the English system retains the concept that the Crown brings criminal prosecutions on behalf of the injured

82. Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 Law & Hist. Rev. 1, 5 (2001).
83. *Id*. at 5–6.
84. *Id*. at 6.
85. *Id*.
86. *See id*. at 7.
87. *Id*.
88. *Id*.
89. *Id*. For example, "[f]rom the late twelfth century, the coroner had been gathering evidence in homicide cases. Justices of the peace performed a similar function for other crimes from, at latest, the sixteenth century, and possibly as early as the fourteenth." *Id*. (footnotes omitted).
90. *Id*. at 8.
91. *Id*.
92. *Id*.
93. *Id*. (footnotes omitted).

individual, as much as or more than they are brought on behalf of the community at large."[94]

Even today the right to pursue a prosecution with a victim-retained private attorney remains in England. Requesting a summons from the Magistrates' Court commences a private prosecution.[95] "Further, some types of proceedings require the consent of a judge or the attorney general, including prosecutions for criminal libel against anyone responsible for the publication of a newspaper, prosecutions for incitement to racial hatred[,] and prosecutions for assisting suicide."[96]

After a summons has been issued and the case commences, the Crown Prosecution Service, which employs England's public prosecutors, has the right to take over a private prosecution if the prosecution fails an evidentiary test[97] or if the Government's takeover is in the public interest.[98] These safeguards provide a check against private prosecutors' bringing frivolous or harassing prosecutions and also allow the Crown Prosecution Service to take over high-profile cases or cases involving sensitive evidentiary material.

2. Development of Victim-Retained Private Prosecutions in the United States

Similar to their history in England, victim-retained private prosecutions were common in early colonial America and continue to this day. However, the office of "public prosecutor" took hold much more quickly in the United States than in England. This office seems to have existed in many American colonies since their infancy. Virginia established an office of attorney general in 1643 to initiate prosecutions of special importance to the Crown.[99] Settlements in Connecticut, New York, New Jersey, Pennsylvania, and

94. Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L.Q. 85, 102 (1992).

95. Corinna Ferguson, *Can a Member of the Public Bring a Prosecution Against the Prime Minister?*, Guardian (July 27, 2009), http://www.guardian.co.uk/commentisfree/libertycentral/2009/jul/27/liberty-clinic-prosecuting-prime-minister.

96. *Id*.

97. CPS, Code for Crown Prosecutors para. 5.1 (2004). To pass the evidential state, the "Crown Prosecutor [on the case] must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge," taking into account what cases the defense is likely to make and how such arguments will impact the prosecution's case. *Id*. at para. 5.2. In considering whether there is sufficient evidence, the CPS must consider both whether the evidence can be used in court and whether it is reliable. *Id*. at para. 5.4.

98. *Id*. at paras. 5.7–5.8. The public interest stage of the Full Code Test asks Crown Prosecutors to "balance factors for and against prosecution carefully and fairly" and to consider whether "there are public interest factors tending against prosecution which clearly outweigh those tending in favour." *Id*. The Code includes some common factors making a prosecution more likely or less likely. The Code also warns that prosecutors should "decide how important each factor is in the circumstances of each case and go on to make an overall assessment," rather than simply comparing the number of factors in favor with the number of factors against bringing a prosecution. *Id*. at para. 5.11.

99. Bessler, *supra* note 8, at 516.

Delaware often had the position of "scout," a figure similar to a sheriff and public prosecutor.[100]

The practice of reserving criminal prosecutions for public prosecutors in the United States took hold much earlier than in England. For example, Connecticut enacted a statute in 1704 providing for a system of local public prosecution.[101] In New York, the office of the district attorney became an elected rather than an appointed office in 1846, and as a result district attorneys in that state became the sole representatives of victims at trial; by the second half of the nineteenth century, New York State district attorneys had sole discretion over whether to prosecute alleged crimes in their districts.[102]

Privately prosecuting a crime continued as a common practice throughout much of the United States into the nineteenth century, despite the growing trend of using a public prosecutor. Although many state courts continued to permit victim-retained private prosecutions throughout the nineteenth century, some jurisdictions prohibited the practice.[103] For example, the Massachusetts Supreme Court suggested in dicta in 1849 that criminal convictions by a private prosecutor would be void[104] and the Michigan Supreme Court explicitly prohibited private prosecutors in 1875.[105]

The states are currently split on whether victim-retained private prosecutors are permissible. Some jurisdictions prohibit the practice, while other jurisdictions allow private prosecutors as long as the district attorney retains control over the prosecution.[106] Only a handful of states allow private prosecutions without any supervision from a public prosecutor or other safeguards.[107]

Most states allow victim-retained private prosecutions only if the public prosecutor gives consent and retains control over the case.[108] The majority

100. *Id*. at 516–17.

101. *Id*. at 516 n.19.

102. Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 Am. Crim. L. Rev. 1309, 1327 (2002).

103. Bessler, *supra* note 8, at 518–19.

104. *Id*. (citing Commonwealth v. Williams, 56 Mass. (2 Cush.) 582 (1849)). Massachusetts formally prohibited the use of a private prosecutor in 1855, *id*. at 519 n.30 (citing Commonwealth v. Gibbs, 70 Mass. (4 Gray) 146 (1855), although privately retained attorneys were permitted to sit and consult with the prosecutor at counsel's table. *Id*. (citing Commonwealth v. Herman, 149 N.E. 198 (Mass. 1925))).

105. *Id*. (citing Meister v. People, 31 Mich. 99 (1875)).

106. *Id*. at 529.

107. *Id*. These states include Alabama, Montana, and Ohio. *Id*. at 529 & n.71 (citing Hall v. State, 411 So. 2d 831, 838 (Ala. Crim. App. 1981) ("The appearance by a qualified attorney [for a private person] . . . does not require an appointment by any court, the District Attorney, or any of his assistants."); State v. Cockrell, 309 P.2d 316 (Mont. 1957) ("The court will indulge the presumption that the appointment was regularly made in the absence of a showing to the contrary."); State v. Ray, 143 N.E.2d 484 (Ohio App. 1956) (private prosecutor who admitted that he was not affiliated with the city solicitor's office was permissible)). However, even in these three states, the trial court has the discretion not to permit private prosecutors. *See id*. at 529 n.71 (citing *Hall*, 411 So. 2d at 838–39).

108. *Id*. States that require a public prosecutor to consent to and supervise all private prosecutions include California, Colorado, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana,

of states also prohibit the participation of victim-retained private prosecutors in related civil cases.[109] A few states only allow minimal participation by private attorneys in prosecutions, which may involve allowing a private attorney for the prosecution's witness to appear in court but not to otherwise participate in the witness's examination.[110] Other states have not clarified the level of participation that a private attorney acting as prosecutor may undertake.[111]

C. *Analysis of Recent Case Law*

Three recent state high court cases illustrate the different approaches taken by states on the issue of victim-retained private prosecutions. By examining these cases, it is possible to see the common safeguards and restrictions that states apply to victim-retained private attorneys prosecuting crimes and then to apply these safeguards to outsourced prosecutions under the FAR.

1. Rhode Island

In 2001 the Rhode Island Supreme Court held that an assault victim could initiate and prosecute a private criminal complaint for misdemeanor assault.[112] The complainant alleged that the defendant, the victim's husband, shoved and kicked her during an incident at their home.[113] She filed a private criminal complaint accusing the defendant of assault.[114] At trial a state prosecutor from the attorney general's office declined to prosecute the case upon learning that the victim was prepared to proceed with her own private counsel.[115] The trial justice found the defendant, who had waived his right to a jury trial, guilty and the defendant appealed.[116]

The court noted that prior precedent recognized that private misdemeanor prosecutions were valid in Rhode Island.[117] The court was quick to caution, however, that the state attorney general had the exclusive power to pursue felony indictments.[118] The court further warned that private prosecutors "stand in the shoes of the state, and thereby take upon their shoulders all of the legal, ethical, and profession responsibilities . . . of their public prosecutorial counterparts."[119]

Maine, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia. *Id*. at 529 n.72.

109. *Id*. at 529–30.
110. *Id*. at 529 n.72 (citing State v. Newman, 568 S.W.2d 276, 282–83 (Mo. App. 1978)).
111. *Id*. (citation omitted).
112. Cronan *ex rel*. State v. Cronan, 774 A.2d 866 (R.I. 2001).
113. *Id*. at 869.
114. *Id*.
115. *Id*.
116. *Id*. at 870.
117. *Id*. at 871 (citing State v. Peabody, 55 A. 323 (R.I. 1903)).
118. *Id*. at 872.
119. *Id*. at 877 (citing *Peabody*, 55 A. at 323.).

The court specifically noted several limitations on private prosecutors. In addition to the rule prohibiting anyone but the attorney general from prosecuting felonies, private attorneys also may not prosecute charges punishable by over one year or a fine over one thousand dollars.[120] Moreover, a complainant must pay all court costs if the complaint is unsupported by the evidence or the defendant is discharged after trial.[121] Lastly, private prosecutors do not share the prosecutorial immunity of the attorney general.[122]

On the specific facts of the case, the court emphasized that the attorney general had merely declined to prosecute when the complainant was prepared to do so with private counsel.[123] The court distinguished this from a recommendation to dismiss the case.[124] It then noted that in future cases the attorney general would have the power to intervene even in a misdemeanor private prosecution. "Thus, the Attorney General may file a *nolle prosequi*[125] and thereby cause a criminal case, including one initiated via a private complaint, to be dismissed at any time before the imposition of sentenc[ing]."[126]

2. New Hampshire

In 2002 the New Hampshire Supreme Court decided that a private attorney initiating a criminal proceeding may only prosecute charges that are not punished by imprisonment.[127] In the case at issue, the complainant had reported to police that the defendant committed a criminal offense against her.[128] When the police investigated and declined to bring charges, the complainant filed a private criminal complaint for disorderly conduct, which carries a possible punishment of imprisonment up to a year.[129]

The court began its reasoning by recognizing that according to prior precedent, New Hampshire common law did not preclude private citizens from initiating and prosecuting certain criminal complaints.[130] At issue was what class of crimes could be initiated and prosecuted by private attorneys. The court looked to the history of private prosecutions in New Hampshire and concluded that private citizens could bring criminal prosecutions only if the crime was within the jurisdiction of a justice of the peace.[131] Because justices

120. *Id*. at 872.
121. *Id*. at 872 n.5.
122. *Id*.
123. *Id*. at 874.
124. *Id*.
125. "*Nolle prosequi* is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further, either as to some counts of the indictment, or as to part of a divisible count, or as to some of the persons accused, or altogether. It is a judicial determination in favor of accused [sic] and against his conviction, but it is not an acquittal, nor is it equivalent to a pardon." *Id*. at 875 n.10 (citation omitted).
126. *Id*. at 875.
127. Premo *ex rel*. State v. Martineau, 808 A.2d 51 (N.H. 2002).
128. *Id*. at 52.
129. *Id*.
130. *Id*. at 53 (citing Haas *ex rel*. State v. Rollins, 533 A.2d 331 (N.H. 1987)).
131. *Id*.

of the peace only had authority over minor crimes and because no private criminal complaint had been prosecuted in the state that involved a penalty more severe than a fine, the court held that criminal offenses that may be punished by imprisonment may not be prosecuted by private attorneys.[132]

The New Hampshire court also recognized that a number of safeguards exist to protect against the potential dangers of allowing private prosecutions. These safeguards include the prohibition on court appointments of counsel for interested parties in criminal contempt actions;[133] the absence of prosecutorial immunity for private prosecutors;[134] the power of the public prosecutor to stop a criminal proceeding over the objections of that private prosecutor;[135] and the limitation on the state's payment for the private prosecution to the approval of the attorney general or solicitor.[136]

3. New Jersey

In 2005, in a case of first impression, the New Jersey Supreme Court decided that private citizens do not have a right to present evidence directly to a grand jury.[137] In that case, Larry S. Loigman, a private New Jersey lawyer, sought to present evidence of criminal activity in a federally funded state program that placed plainclothes police officers outside of liquor stores to prevent underage drinking.[138] Loigman wrote a letter to the Monmouth County Grand Jury explaining his findings and asking to appear before them but was directed by the assignment judge to the county prosecutor or attorney general.[139] After requesting to appear and being denied a second time, Loigman filed a verified petition demanding that his letters be placed before the grand jury and that a subpoena be issued for his appearance.[140] His petition was again denied.[141] Loigman appealed to the Appellate Division, which reversed and found in his favor, and the New Jersey Supreme Court then granted the State's petition for certification.[142]

The New Jersey Supreme Court reversed the Appellate Division, holding that a private citizen does not have a right to present evidence before a grand jury. Much of the court's reasoning, however, does not apply directly to the outsourcing of prosecutorial duties to private attorneys. First, the court's opinion only applies to the presentment of evidence before a grand jury, which is typically reserved for capital charges. The opinion says nothing about its

132. *Id*. at 53–54.
133. *Id*. at 54 (citing Rogowicz v. O'Connell, 786 A.2d 841 (N.H. 2001)).
134. *Id*. (citing *Haas*, 533 A.2d 331).
135. *Id*. (citing Bokowsky v. Rudman, 274 A.2d 785 (N.H. 1971)).
136. *Id*. (citing Waldron v. Tuttle, 4 N.H. 149, 151 (1827)).
137. *In re* Grand Jury Appearance Request by Larry S. Loigman, Esq., 870 A.2d 249, 259 (N.J. 2005).
138. *Id*. at 251.
139. *Id*.
140. *Id*.
141. *Id*.
142. *Id*. at 252.

applicability to private prosecutions of misdemeanors, which have previously been permitted under New Jersey law.[143]

Second, the court pointed to the prosecutor's role as a filter to ensure that only meritorious complaints are raised before the jury. The court noted the experience and training of the State's prosecutors and concluded that there is "no reason to believe that they cannot be trusted to bring before the grand jury meritorious complaints of potential criminal conduct and to weed out frivolous allegations unworthy of presentation."[144] This line of reasoning would not apply to outsourced prosecutors because those attorneys would likely be working under a public prosecutor.[145]

Third, apparently ignoring that Loigman was an attorney, the court warned that private citizens are not governed by the Attorney's Rules of Professional Conduct and that as a result a fair process could not be ensured.[146] This point is moot in the case of outsourcing certain prosecutorial duties to private attorneys because private attorneys would obviously be bound by the Rules of Professional Conduct in their jurisdiction.

Fourth, the court contemplated that allowing private citizens to present evidence before a grand jury invites harassing charges and complaints.[147] The court gave the example of a corrupt political candidate charging his opponent on the eve of an election.[148] Again, while this may be a valid concern for victim-retained prosecutors who prosecute cases bypassed by the state,[149] this concern would not apply to private attorneys doing outsourced prosecutorial work because only a public prosecutor can initiate a prosecution under both the FAIR Act and the FAR.[150] Moreover the private attorney should be subject to supervision by the public prosecutor, which further discourages corrupt behavior.

Thus, even though the New Jersey Supreme Court held that a private attorney may not present evidence of a felony before a grand jury, the court's reasoning should be limited to felony charges and should not extend to outsourcing prosecutorial work.

IV. PROPOSED SAFEGUARDS

Although the initial decision to prosecute unambiguously constitutes an inherently governmental function under the current regulatory framework,

143. *See* Bessler, *supra* note 8, at 595 (citing New Jersey v. Kinder, 701 F. Supp. 486 (D.N.J. 1988) (allowing a private attorney to prosecute a claim of criminal assault and battery that had a maximum sentence of six months)).

144. *Loigman*, 870 A.2d at 256.

145. *See* discussion *infra* Part IV.D.

146. *Loigman*, 870 A.2d at 256.

147. *Id*.

148. *Id*.

149. *See* discussion *supra* Part III.A (discussing distinction between victim-retained private prosecutors and outsourced prosecutors).

150. *See* discussion *supra* Part II.E.

the question of what other prosecutorial activities should be considered inherently governmental remains.[151] Through an examination of the laws governing victim-retained private prosecutors in the states, it is possible to clear up some of the ambiguity in the current federal regulatory framework by drawing sensible safeguards and limitations for outsourcing certain prosecutorial activities. This section discusses a number of safeguards governing victim-retained private prosecutors already in place in the states that would be useful to implement in a system of outsourced federal prosecutions. These safeguards include (a) limiting the class of cases private attorneys may litigate, (b) limiting conflicts of interest, (c) refusing to extend prosecutorial immunity to private prosecutors, and (d) giving the supervising public prosecutor absolute authority to take over the prosecution.

A. *Limit the Class of Cases*

All three recent state court decisions discussed above limit the class of cases that a victim-retained private attorney may initiate and prosecute in court to minor crimes. The New Hampshire Supreme Court, for example, concluded that victim-retained private prosecutions were limited to those punishable by a fine only.[152] It reached this conclusion by noting that prior to the adoption of the New Hampshire Constitution in 1784, justices of the peace would hear and decide minor crimes.[153] Private citizens could complain directly to the justices of the peace without a public prosecutor but needed a public prosecutor to bring an accusation of a major crime before a grand jury.[154] Similarly, victim-retained private prosecutions in Rhode Island are limited by statute to offenses punishable by no more than a year or a fine of no more than one thousand dollars.[155] The New Jersey Supreme Court also did not foreclose the possibility of victim-retained private prosecutions for misdemeanors, limiting its opinion to prohibit only private attorneys' presentation of charges before a grand jury.[156]

Limiting the class of cases that an outsourced private attorney may prosecute makes sense for a number of reasons. Foremost, it reduces the potential for conflicts of interest. Although the FAR should also employ strict standards for conflicts of interest when outsourcing prosecutorial work to private attorneys, limiting the class of cases private attorneys may prosecute mitigates any negative consequences from prosecutorial misconduct or conflicts of interest.

Additionally a rule limiting the jurisdiction of outsourced prosecutors would help ensure that those private prosecutors did not give "short shrift" to

151. *See* discussion *supra* Part II.E.
152. Premo *ex rel*. State v. Martineau, 808 A.2d 51, 54 (N.H. 2002).
153. *Id*. at 53.
154. *Id*.
155. Cronan *ex rel*. State v. Cronan, 774 A.2d 866, 872 (R.I. 2001).
156. *In re* Grand Jury Appearance Request by Larry S. Loigman, Esq., 870 A.2d 249, 258 (N.J. 2005).

their prosecutorial work and devote disproportionate attention to more lucrative private practice work.[157] By limiting the class of cases available to private attorneys seeking to do prosecutorial work, it is less likely that they will find themselves bogged down in case work and unable to devote sufficient time and resources to the prosecution. The ability of an overseeing public prosecutor to take over the case, discussed below, also will help ensure that the case will not suffer should the private prosecutor not devote sufficient time to the case.

This limit on the use of outsourced prosecutors also acts as a safeguard to keep cases with sensitive information in the hands of public prosecutors. It is probable that any case involving sensitive information, such as a national security case, would be excluded from private prosecutors under this rule. It is also unlikely that a private prosecutor would be permitted under this rule to try cases involving a risk to witnesses, for example, in a case against an organized crime syndicate.

Finally this limitation helps to ensure that contracts to outsource prosecutorial work to private attorneys comply with the current regulatory framework. Both the FAIR Act and the FAR classify actions that "significantly [affect] the life, liberty, or property interests of private persons" as inherently governmental.[158] Limiting prosecutorial work that may be outsourced to misdemeanor cases helps ensure that private attorneys do not act to "significantly" affect the life, liberty, or property of private persons.

B. *Limit Conflicts of Interest*

The states are acutely aware that conflicts of interest could arise when victim-retained private attorneys prosecute crimes. Most states prohibit victim-retained private prosecutors from also representing interested parties in civil litigation.[159] New Hampshire, for example, prohibits courts from appointing the counsel for a party to prosecute a criminal contempt of court action where that counsel is the beneficiary.[160]

Ethical concerns loom large over the use of outsourced private prosecutors as well as victim-retained private prosecutors. Especially concerning is "the potential for corruption and conflicts of interest when a lawyer who controls the tremendous power of criminal investigation and prosecution also represents private clients."[161] In the outsourced private prosecutor context, for example, a "firm could show favoritism in a criminal case to one of its private civil clients, or might use the discretionary power of criminal investigation

157. *See* Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 442.

158. 31 U.S.C. § 501 note, § 5(2)(B)(iii); FAR 2.101.

159. *See* Bessler, *supra* note 8, at 529–30; Meier, *supra* note 94, at 106 ("Most states . . . prohibit[ ] any involvement in related civil litigation.").

160. *See* Premo *ex rel.* State v. Martineau, 808 A.2d 51, 54 (N.H. 2002) (citing Rogowicz v. O'Connell, 786 A.2d 841 (N.H. 2001)).

161. *See* Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 438.

and prosecution as a weapon against a civil litigation adversary."[162] These potential conflicts of interest for a private prosecutor are similar to the conflicts of interest for public prosecutors in certain rural areas who also keep a part-time private practice.[163] Potential conflicts between the prosecutor's public duty and private interests include potentially prosecuting past, former, or current clients; suing the state in a civil suit; or imputed conflicts of interest between a criminal defendant and a member of the prosecutor's firm.[164]

To protect against these potential conflicts of interest, no attorney should be awarded a contract for prosecutorial work from the Government if, after accepting employment in a civil matter, a criminal prosecution arises from the same circumstances. Similarly, any attorney seeking to win a government contract for prosecutorial work should decline private civil work if there is a reasonable probability that any criminal prosecution might arise from the circumstances of the case.

These potential conflicts of interest, of course, exist for all private lawyers working for the Government, not just those doing prosecutorial work.[165] "Concerns over outright favoritism, nepotism, or corruption in [the source selection] process, however, would certainly not be unique or novel to legal services contracts. Ethical guidelines could be put in place to address such concerns."[166] In fact, existing regulations are already in place that deal with direct conflicts of interest and organizational conflicts of interest and that could be strengthened and supplemented to apply in this context.[167] Comment 1 to Rule 1.3 of the Model Rules of Professional Conduct governing attorney conduct, for example, already requires all attorneys to work "with zeal in advocacy" on behalf of a client "despite opposition, obstruction or personal inconvenience to the lawyer."[168] Any special conflicts presented by doing prosecutorial work for the Government that are not already covered could be addressed through a FAR rule supplementing Model Rule 1.3.

Also concerning are issue conflicts, or conflicts of interest arising from an attorney's practice area rather than from her particular clients.[169] In particular, some fear that private attorneys representing the Government may not zealously represent the public interest when that interest is contrary to the

162. Fairfax, *Outsourcing Criminal Prosecution?*, *supra* note 7, at 286 (emphasis omitted).

163. *See* Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 Ky. L.J. 1 (1993).

164. *See generally id.*

165. *See* McFadden, *supra* note 17, at 449; Tamar Frankel, *Let the Securities and Exchange Commission Outsource Enforcement by Litigation: A Proposal*, 11 J. Bus. & Sec. L. 111, 123 (2010) ("Arguably, outsourcing prosecutorial powers can invite corruption. . . . [T]his danger exists and has always existed regardless of whether the prosecutors are government employees or private sector lawyers in an outsourcing process. It is difficult to generally evaluate which of the two groups is subject to stronger temptations.").

166. McFadden, *supra* note 17, at 449–50.

167. *Id.* at 450.

168. Model Rules of Prof'l Conduct R. 1.3 cmt. (2002).

169. McFadden, *supra* note 17, at 450.

interests of the attorneys' private clients involved in similar legal issues.[170] While this may be an area that agencies would want to consider addressing, past experience has not revealed it to be highly problematic. For example, private attorney David Boies's representation of the United States in an antitrust suit against Microsoft was widely praised,[171] despite his having an extensive antitrust private practice. Issue conflicts in Mr. Boies's representation never posed a significant problem.[172]

C. *No Prosecutorial Immunity*

Prosecutorial immunity generally refers to immunity from liability for acts done as a prosecutor. In *Imbler v. Pachtman*, the U.S. Supreme Court held that prosecutors were immune from civil liability for acts done in their official capacities as prosecutors.[173] Both Rhode Island and New Hampshire do not extend prosecutorial immunity to victim-retained private prosecutors. Rhode Island goes so far as to require a complainant to pay all court costs if the complaint is unsupported by the evidence or the defendant is discharged after trial, which stands in stark contrast to the prosecutorial immunity afforded to the attorney general.[174]

This safeguard is necessary for outsourced prosecutions as well as to ensure that outsourced prosecutors do not abuse their prosecutorial power. A common objection to outsourced prosecutions is their perceived lack of accountability.[175] There is concern that "[w]hen private actors are contracted to perform the prosecution function, they exercise this power without the democratic check that theoretically applies to public prosecutors."[176] Subjecting outsourced prosecutors to civil liability makes them accountable for misconduct and takes away any incentive they may have to act illegally or unethically to win a case or to gain future business. Civil liability also could serve as a check on the danger of potentially harassing behavior by a private prosecutor.

Critics of this safeguard might warn that prosecutors must enjoy immunity or else they risk being dragged into civil court every time their professional efforts put a defendant in jail.[177] However, this criticism is less valid when applied to outsourced prosecutors. First, private attorneys doing outsourced prosecutorial work for the Federal Government, like victim-retained private

170. *See id*.
171. *Id*.
172. *Id*. at 451.
173. *See generally* 424 U.S. 409 (1976). Note that significant questions remain as to the limits of this immunity.
174. Cronan *ex rel*. State v. Cronan, 774 A.2d 866, 872 n.5 (R.I. 2001).
175. *See, e.g.*, Fairfax, *Outsourcing Criminal Prosecution?*, *supra* note 7, at 283; Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 443–45.
176. Fairfax, *Outsourcing Criminal Prosecution?*, *supra* note 7, at 283.
177. *See* Robert Barnes, *High Court Weighs Immunity Afforded to Prosecutors*, Wash. Post (Nov. 5, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/11/04/AR2009110404753.html.

attorneys bringing prosecutions in the states, are likely to function in a supplemental fashion to public prosecutors.[178] That is, the danger that prosecutors might be less inclined to bring prosecutions or prosecute zealously for fear of liability is less applicable when the private prosecutor, either victim-retained or outsourced, is only acting in a supplemental capacity to the public prosecutor. Second, outsourced prosecutors would likely benefit less from immunity in the first place because they are likely to be limited in the class of cases they prosecute. In other words it is less likely to be worth the defendant's time and money to initiate a civil suit against an outsourced prosecutor when the initial prosecution does not involve jail time or a substantial fine. The benefits of subjecting outsourced prosecutors to civil liability therefore outweigh the value of extending to them prosecutorial immunity.

D. *Public Prosecutor Must Retain the Right to Take Over an Outsourced Prosecution*

Both Rhode Island and New Hampshire give victim-retained public prosecutors the right to step in and take over a prosecution over the objection of the victim-retained private prosecutor. The Rhode Island Supreme Court, in upholding the conviction stemming from a victim-retained private prosecution, emphasized the fact that the public prosecutor did not recommend dismissal of the charge but merely declined to prosecute. "Significantly, this was not a case where the Attorney General . . . advised the Court and the private complainant that, in the Attorney General's opinion, the charge should be dismissed or that the Attorney General's office wished to assume responsibility for prosecuting the case to judgment."[179] The court concluded that the attorney general could file a formal recommendation not to prosecute at any time prior to sentencing.[180]

In the context of outsourced prosecutions, the safeguard allowing public prosecutors to intervene in privately prosecuted cases fulfills several policy goals. First, it helps ensure that outsourced prosecutors only work on cases in which there is enough evidence to justify a prosecution. If at any time prior to sentencing it becomes apparent that there is insufficient evidence to support the charge against the accused, the public prosecutor may intervene.[181]

178. *See* Meier, *supra* note 94, at 104 ("The most common context in which [victim-retained] private prosecutors are found is in the role of 'assistant' to the public prosecutor.").

179. *Cronan*, 774 A.2d at 874.

180. *Id*. at 875.

181. Allowing intervention by a public prosecutor also closely mirrors the process for allowing a private actor to bring a *qui tam* action on behalf of the Government. *See* Frankel, *supra* note 165, at 117–18 ("A private person who files a false claims action must concurrently serve a copy on the Attorney General along with written disclosure of substantially all material evidence and information the person possess[es]. The Attorney General may elect in either case to proceed with the action or, if only local funds are involved, to refer the matter to the prosecuting attorney for the local subdivision who may decide to proceed, to dismiss or to permit the private plaintiff to proceed.") (quoting 1 Ann Taylor Schwing, California Affirmative Defenses § 12:6 (2010)).

Second, the rule acts as a check against potential abuses of power and harassment by outsourced prosecutors. While subjecting outsourced prosecutors to civil liability provides *post-trial* redress to accused persons who have been victimized by the outsourced prosecutors, allowing the public prosecutor to intervene ensures that a prosecution may be halted *prior to sentencing* if it becomes clear that the outsourced prosecutor is acting questionably. Third, the rule helps guard against underperformance by the outsourced prosecutor.[182] If the outsourced prosecutor does not devote sufficient time, resources, or effort to the prosecution, the public prosecutor can intervene.

Additionally, most victim-retained private prosecutors act as assistants rather than replacements to the public prosecutor,[183] and it would be wise to also ensure that public prosecutors retain supervisory authority and "substantial" decision-making duties. This measure would help ensure that outsourced activities were ministerial in nature and thus were "appropriate for delegation to private actors"[184] and complied with the existing regulatory framework.[185] As an additional step, public prosecutors overseeing the outsourcing of prosecutorial activities may wish to issue guidance on discretionary decision making to help avoid abuses of discretion[186] by outsourced prosecutors with "substantial" discretionary power.[187]

Ultimately, state law on victim-retained private prosecutions can provide useful guidance for determining the limitations of outsourced prosecutions on the federal level. With the four aforementioned safeguards in place, outsourcing prosecutorial work is possible while maintaining the integrity and policy goals of the public procurement system.

V. CONCLUSION

The current regulatory scheme is ambiguous and needs clarification as to what constitutes an inherently governmental activity. Because the regulatory framework does not adequately define what is inherently governmental, outsourcing certain prosecutorial activities to private attorneys and law firms may be permissible. However, even if the Government adopts a more unified and clear definition of inherently governmental functions in the future,

182. *See*, *e.g.*, Fairfax, *Outsourcing Criminal Prosecution?*, *supra* note 7, at 284 (raising the concern that "it may be difficult to ensure adequate performance of outsourced prosecutors").

183. *See* Meier, *supra* note 94, at 104 ("The most common context in which private [victim-retained] prosecutors are found is in the role of 'assistant' to the public prosecutor.").

184. Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 448.

185. *See* 31 U.S.C. § 501 note, § 5(2)(C) (excluding ministerial activities from definition of inherently governmental); FAR 2.101 (same); discussion *supra* Part II.E.

186. *See* Fairfax, *Delegation of the Criminal Prosecution*, *supra* note 7, at 450–52.

187. *See* OMB Circular A-76, *supra* note 44, at A-2 (2003) (noting that discretion is not "substantial" when "already limited or guided by existing policies, procedures, direction, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials").

it should continue to allow the outsourcing of some prosecutorial functions. Outsourcing certain activities presents several advantages that could give government agencies additional manpower, expertise, and financial savings.

Despite its advantages, outsourcing prosecutorial work to private attorneys presents special concerns that should be addressed through additional regulation in the FAR. By looking at state law governing victim-retained private prosecutions, it is possible to propose safeguards for outsourcing federal prosecutorial activities to private attorneys. The FAR should therefore be amended to clarify what cases a private attorney may prosecute. Specifically, the classes of cases that private prosecutors can pursue should be limited, potential conflicts of interest should be strictly examined and mitigated, prosecutorial immunity should be expressly withheld from private prosecutors, and public prosecutors should retain the right to take over a prosecution at any time. With these safeguards in place, U.S. prosecutors' offices can utilize outsourcing both to save taxpayers' money *and* to serve the interests of justice.