

# ABOLISHING THE PROHIBITION ON PERSONAL SERVICE CONTRACTS

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## INTRODUCTION

President Clinton used to say that the “era of big government is over.”<sup>1</sup> Yet, nothing could be further from the truth. The government is bigger than ever, and growing.<sup>2</sup> One reason for this trend is the growth in the service contractor industry. Service contractors perform services and do jobs on behalf of the federal government. The services that contractors perform run the gamut from low-level janitorial work to background checks, and classified intelligence work. Service contractors are doing the exact same work as federal employees; so although the size of the federal civil service<sup>3</sup> has been reduced, the number of contractors working on behalf of the government has skyrocketed.

In the Obama Administration, the era of service contracting has begun in earnest. Government by service contract is now an enduring phenomenon, a part of the trend of privatizing more and more governmental functions.<sup>4</sup> Given the current budget debate, it behooves us to further examine whether we should allow service contractors to perform more functions, especially if a policy change would be cost-effective.

Privatization, otherwise understood as the contracting out of government services to the private sector,<sup>5</sup> has been hailed as a way for government to operate

1. See The President's Radio Address, 32 WEEKLY COMP. PRES. DOC. 126 (Jan. 27, 1996) (“We will meet these challenges, not through big government. The era of big government is over.”).

2. See PAUL C. LIGHT, ORG. PERFORM. INITIATIVE, RESEARCH BRIEF NO. 2, THE NEW TRUE SIZE OF GOV. 11 (2006), available at [http://wagner.nyu.edu/performance/files/True\\_Size.pdf](http://wagner.nyu.edu/performance/files/True_Size.pdf) [hereinafter LIGHT, NEW TRUE SIZE].

3. The Federal Civil Service consists of all the official employees that work for the federal government. See 5 U.S.C. § 2101 (1) (2006) (“[T]he ‘civil service’ consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States . . .”).

4. See Lawrence L. Martin, *Performance Based Contracting for Human Services: Lessons For Public Procurement?*, 2 J. Pub. PROCUREMENT 55, 55 (2002) (“[G]overnments at all levels (federal, state and local) today are making increased use of service contracting.”)

5. See Steven J. Kelman, *Contracting*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 282, 282 (Lester M. Salamon ed., 2002) (“Contracting . . . is a business arrangement between a government agency and a private entity in which the private entity promises, in exchange for money, to deliver certain products or services to the government agency . . .”); *id.* (calling the contracting the most ubiquitous tool of government).

more efficiently.<sup>6</sup> By making government leaner and meaner, contractors are now the principle means of “reinventing government.”<sup>7</sup> Besides efficiency, contractors can also provide flexible services than can expand and contract with government demand.<sup>8</sup> The government is contracting out everything from clerical and sanitation services work, to military, policing, and regulatory responsibilities.<sup>9</sup> Private firms are hired by agencies to manage their personal systems, to build and run their information technologies, and to do consulting work.<sup>10</sup> Private contractors are taking on larger and more sensitive roles in carrying out public functions.<sup>11</sup> They are also doing the same work as federal employees, in the same offices, and supervised by the same government managers. Simply put, privatization has become a national obsession,<sup>12</sup> due to our unshakeable belief that market

6. JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 57 (1989) (“Except for a handful of ideologues, few people would be very interested in privatization unless private suppliers promised superior efficiency.”); E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 4-6, 119-230 (1987) (“[P]rivatization, properly carried out, generally leads to large increases in efficiency while improving or at least maintaining the level and quality of public services . . . .”); Donald G. Featherstun et al., *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 651 (2001) (“The decision to contract out . . . hinges on the expectation that cost savings and/or enhanced quality will result.”); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1296 (2003) (“[P]rivatization is a means of improving productive efficiency: obtaining high-quality services at the lowest possible cost . . . .”) [hereinafter Freeman, *Extending Public Law Norms*]; Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 717-18 (2010) [hereinafter Michaels, *Privatization’s Pretensions*]; see also Stuart Butler, *Privatization for Public Purposes*, in *PRIVATIZATION AND ITS ALTERNATIVES* 17, 22 (William T. Gormley, Jr., ed., 1991) (finding that the dominant argument for contracting out is that it leads to “greater opportunity of finding a more innovative or less expensive service”); Mark H. Moore, *Introduction*, 116 HARV. L. REV. 1212, 1218 (2003) (“Much of the appeal of privatization is based on claims that some form of privatization will increase the efficiency and effectiveness of government.”); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 400 (2008) (finding that “economic efficiency” is privatization’s key “measure of success”).

7. Michaels, *Privatization’s Pretensions*, *supra* note 6, at 717-18; see also DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR*, at xv-xxii (1992); Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 323, 329-30 (2004) [hereinafter Guttman, *Governance by Contract*]; Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1424-30 (2003); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 400 (2006).

8. See Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 153, 155 (Jody Freeman & Martha Minow eds., 2009) (describing the benefits of hiring contractors to perform services outside of an agency’s “core competencies”); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1063-64 (2004) [hereinafter Michaels, *Beyond Accountability*].

9. Michaels, *Privatization’s Pretensions*, *supra* note 6, at 725.

10. John Donahue, *Outsourcing the Wrong Jobs*, N.Y. TIMES (Apr. 3, 2011) <http://www.nytimes.com/roomfordebate/2011/04/03/is-privatization-a-bad-deal-for-cities-and-states/outsourcing-the-wrong-jobs>.

11. Michaels, *Privatization’s Pretensions*, *supra* note 6, at 725; see also Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT* *supra* note 8, at 7-8; Michaels, *Beyond Accountability*, *supra* note 8, at 1012-20; Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L. J. 389, 389 (2003) (“The government has increasingly relied on private means to achieve public ends, not only involving services to the public, but the origination and implementation of regulatory policy as well . . . .”).

12. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003); see also Leonard Gilroy, *Competition Brings Savings*, N.Y. TIMES (Apr. 4, 2011),

competition makes private firms more efficient at producing services than government agencies.<sup>13</sup> Because of this belief, the federal government now spends approximately \$530 billion annually on a wide range of goods and services.<sup>14</sup>

As the privatization phenomenon has ballooned, there has been a corresponding increase in service contractors. A long-standing ban on a particular type of service contractors, called *personal* service contractors,<sup>15</sup> however, is a phantom barrier to this form of employment. A personal service contract is a contract that, by its express terms, or as administered, makes the contractor employee appear to be a regular government employee.<sup>16</sup> Thus, a personal service contract is a contract that creates a *de facto* employment relationship between the contractor employee and the federal government.<sup>17</sup> Personal service contracts allow a government supervisor to directly control the contractor employees' work. Yet, the Federal Acquisition Regulations (FAR)<sup>18</sup> prohibits the use of these personal service contracts in an effort to prevent agencies from circumventing the civil service laws. The FAR mandates that all personal services be obtained by direct hire.<sup>19</sup>

Due to the privatization phenomenon, government agencies are signing contracts that specifically say they are *not* personal service contracts. But the agencies are administering the contracts exactly like personal service contracts, with federal government supervisors treating and supervising contractor employees exactly like federal employees. Put slightly differently, contractor employees are now often being used for the same positions as civil servants, creating a blended workforce of contractors and federal civil servants.<sup>20</sup>

The reason that *de facto* personal service contracts are so pervasive now is that

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www.nytimes.com/roomfordebate/2011/04/03/is-privatization-a-bad-deal-for-cities-and-states/competition-brings-savings ("For decades, [public sector managers] increasingly relied on contracting out for the delivery of a wide range of services . . .").

13. See, e.g., KEVIN R. KOSAR, CONG. RESEARCH SERV., RL33777, *PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION* 6 (2006) ("[P]romoters of privatization believe that private firms can provide goods and services 'better, faster, and cheaper' than government. Competition and the profit-motive, they say, goad private firms to better produce products and services than government, which they construe as a 'monopoly.'), available at <http://www.fas.org/sgp/crs/misc/RL33777.pdf>; Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 466-67 (1988); Harvey B. Feigenbaum & Jeffrey R. Henig, *The Political Underpinnings of Privatization: A Typology*, 46 WORLD POL. 185, 194 (1994); Freeman, *Extending Public Law Norms*, *supra* note 6, at 1299.

14. *Office of Federal Procurement Policy*, THE WHITE HOUSE, [http://www.whitehouse.gov/omb/procurement\\_mission](http://www.whitehouse.gov/omb/procurement_mission) (last visited May 9, 2011).

15. See Russell N. Fairbanks, *Personal Service Contracts*, 6 MIL. L. REV. 1, 1 (1959).

16. FAR 2.101 (2011).

17. *Id.*

18. Federal Acquisition Regulations System, C.F.R. tit. 48 (2011). The FAR is the principal set of rules governing the purchasing of goods and services by agencies. The FAR has "the force and effect of law," *Davies Precision Machining, Inc. v. United States*, 35 Fed. Cl. 651, 657 (1996), and nearly all agencies must comply with FAR.

19. FAR 37.104(a) (2011).

20. Indeed, the lines separating contractors and government employees are being erased. The U.S. Supreme Court has recently eroded the difference between contractors and federal employees further by finding that contractor employees are subject to the same extensive preemployment background checks as federal employees. See *NASA v. Nelson*, 131 S. Ct. 746 (2011) (holding that NASA's background checks for contractors working with the agency do not violate any constitutional right to informational privacy that the contractor employees may have).

there has been a bipartisan trend to gut the federal workforce. Between 1990 and 2002, over 418,000 civil service jobs were cut.<sup>21</sup> This has created a skeletal workforce at federal agencies, forcing them to hire personal service contractors to fill the void.<sup>22</sup>

With more personal service contractors, federal courts and the Equal Employment Opportunity Commission (EEOC) are taking the affirmative step of letting contractor employees sue their government supervisors for claims of employment discrimination, even though there is no formal employment relationship between these two parties. Thus, courts are often finding that the federal government is a contractor employee's joint employer. Because government supervisors are exercising so much supervisory control over contractor employees' work, these contractor employees are being deemed *de facto* government employees when their employment rights are violated.

This Article argues that the personal service prohibition should be abolished because it is an inefficient policy that does not serve its intended purpose. Instead of a government supervisor being able to directly monitor its contractor employees, the prohibition forces government supervisors to tell a contract supervisor what the contractor employee is supposed to do. Thus, the prohibition creates an unnecessary middleman. If the prohibition was lifted, government supervisors will be able to more efficiently and effectively supervise their contractor employees.

The prohibition's original purpose was to prevent service contractors from being construed as *actual* government employees: that is, employees who could obtain government benefits like retirement. Yet, courts have unanimously held that contractors can never be deemed to be actual civil servants.<sup>23</sup> Becoming a civil servant is a formal process, which can never happen accidentally; this is in contrast to how courts are implying that the government is a joint employer for purposes of employment laws.

If the prohibition is lifted, though, limits must be set on what functions and jobs can be contracted out. The first limit is that inherent governmental functions—those functions that are so intimately related to the public interest as to require performance by federal employees<sup>24</sup>—should never be contracted out. Just enforcing this rule has been difficult. For instance, in every intelligence and counterterrorism agency, contractors are performing inherently governmental functions.<sup>25</sup> It seems, then, that the most important inquiry for regulating personal service contracts is to determine what jobs are inherently governmental and mission critical, and to make sure those positions are not outsourced. The next step is to figure out which jobs *should* be contracted out due to potential cost-savings.

The prohibition on personal services obstructs this regulatory process since a blanket ban on personal service contracts prevents lawmakers from creating effective rules for personal service contracts. Proper regulation and control of

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21. See *infra* note 31 and accompanying text.

22. See *infra* note 33 and accompanying text.

23. See *infra* note 79 and accompanying text.

24. See *infra* note 223 and accompanying text.

25. See *infra* note 247 and accompanying text.

personal service contractors—not an all-out ban—is the best way to harness the power of private markets, while making sure that service contractors are properly managed.

This Article does not take a normative position on the debate over the size of the Federal Civil Service. Generally, progressives favor a robust civil service, whereas conservatives favor less government in general. This Article assumes that the frequent use of service contractors is not going to change. Contractors are already used heavily, and the current prohibition does not seem to create a meaningful hurdle to their use. The purpose of this Article is to stimulate debate about how to more effectively regulate service contractors.

This Article proceeds in four Parts. Part I examines the explosion of personal service contracting, and how agency personnel ceilings have contributed to this phenomenon. Agencies are purposely working around their personnel limits by hiring service contractors. Part II examines personal service contracts, and the problems of distinguishing personal service contracts from nonpersonal service contracts. This Part then examines case studies in which agencies violated the prohibition. Part III examines why courts are allowing contractor employees to sue their government supervisors as joint employers. This Part also examines the relationship between the personal service prohibition and these joint employer suits by contractor employees. Finally, Part IV offers solutions to fixing this broken service-contracting regime. Rather than insourcing more government workers, which would be a politically impossible task, I offer a pragmatic solution: Congress and the White House should abolish the personal service prohibition (except for inherent governmental functions), then regulate the specific jobs that can and cannot be held by service contractors.

## I. THE EXPLOSION OF PERSONAL SERVICE CONTRACTS

The amount of tax money the federal government spends on service contracts is staggering. In 2009, the federal government spent nearly \$300 billion on professional services, which was awarded through some 750,000 contracts.<sup>26</sup>

These expenditures have supported a ballooning of the number of contractors working for the government. Between 1990 and 2002, approximately 727,000 contractor jobs were created to support the Federal Government.<sup>27</sup> But from 2002–2005, 2,466,000 contractor jobs were created, for a total of 7,634,000 contract jobs in 2005.<sup>28</sup> The increase in contract jobs suggests that many of these new jobs

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26. GREGORY SANDERS ET AL., CTR. FOR STRATEGIC & INT'L STUDIES, *STRUCTURE AND DYNAMICS OF THE U.S. FEDERAL PROFESSIONAL SERVICES INDUSTRIAL BASE 1995-2009*, at 8 (2010), available at [http://csis.org/files/publication/101112\\_fps\\_report\\_2010.pdf](http://csis.org/files/publication/101112_fps_report_2010.pdf).

27. PAUL C. LIGHT, BROOKINGS INST., CTR. FOR PUB. SERV., *FACT SHEET ON THE NEW TRUE SIZE OF GOVERNMENT* 5 tbl.2 (2003), available at [www.brookings.edu/~media/Files/rc/articles/2003/0905\\_politics\\_light/light20030905.pdf](http://www.brookings.edu/~media/Files/rc/articles/2003/0905_politics_light/light20030905.pdf) [hereinafter LIGHT, FACT SHEET].

28. LIGHT, *NEW TRUE SIZE*, *supra* note 2, at 11. Indeed, by 2005 over 60 percent of all federal procurement dollars were spent on service contracts, a percentage that has been increasing. See Steven L. Schooner & Collin D. Swan, *Suing the Government as a 'Joint Employer' – Evolving Pathologies of the*

involve “the outright purchase of labor, whether to build roads, manage parks and forests, or manage public outreach, technology services, financial systems, and personnel.”<sup>29</sup> Instead of manufacturing discrete goods like guns or ships, contractors are now increasingly working side-by-side with federal civil service employees, performing the exact same duties.

So how did we get to this contracted out government that relies on contractors to perform governmental services? Professor Steven Schooner explains: “[I]n the name of ‘new public management,’ the Clinton administration aggressively turned to the private sector as it trumpeted a massive Government downsizing initiative. . . . Federal employee rolls . . . were reduced out of a political desire to ‘end the era of big Government.’”<sup>30</sup> Between 1990 and 2002, over 418,000 federal civil servant jobs were cut as part of this bipartisan effort.<sup>31</sup> Now agencies just have a skeletal workforce that lacks the in-house capacity to perform their broad range of duties.<sup>32</sup>

With a skeletal federal workforce, it is no surprise then that agencies have had to rely on personal service contractors to fulfill their programmatic mandates.<sup>33</sup> And it is even less surprising that with the gutted workforce, contractor employees are now performing the same jobs as civil servants.<sup>34</sup>

#### *A. Personnel Ceilings Encourages the Use of Contractors*

One factor that has increased the use of personal service contractors is federal

*Blended Workforce*, 52 GOV'T CONTRACTOR ¶ 341 (2010); see also SANDERS *supra* note 26, at 8.

29. LIGHT, NEW TRUE SIZE, *supra* note 2, at 9 (emphasis added).

30. Schooner & Swan, *supra* note 28, ¶ 341; see also GORE, *supra* note 7.

31. LIGHT, FACT SHEET, *supra* note 27, at 5 tbl.2; Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J. 311, 312 (2004) [hereinafter Light, *Outsourcing*]. This effort to cut the size of the federal civil service and to privatize in general has enjoyed a broad bipartisan support. See 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, 861 (2000) [hereinafter Guttman, *Public Purpose*] (“Whether the term used is ‘privatization,’ ‘reinvention,’ or ‘contracting out,’ the past decade has been marked by bipartisan agreement on the need to reform and reduce ‘Big Government.’”); see also Guttman, *Governance by Contract*, *supra* note 7, at 323; Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 276-77 (2004).

32. Schooner & Swan, *supra* note 28, ¶ 341; see also E-mail from Steven L. Schooner, Professor at George Washington University Law School, to author, (Mar. 2011) (on file with author) (characterizing AID, NASA, and DHS as “agencies that are so outsourced that they’re basically skeletal structures”).

33. See, e.g., Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 559 (2005) (“[G]iven the administration’s competitive sourcing initiative, the most rapidly growing area of procurement activity lies in service contracting. Successful service contracts are difficult to draft and, more importantly, require significant resources to administer or manage.”); Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. CONT. MGMT., Summer 2008, at 12; Collin D. Swan, Note, *Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors*, 80 GEO. WASH. L. REV. 668, 680-83 (2012).

34. Schooner & Swan, *supra* note 28, ¶ 341; see also LIGHT, NEW TRUE SIZE, *supra* note 2, at 9 (“For example, the Transportation Security Administration uses contracts to manage virtually all aspects of the hiring, training, and payroll process for its baggage and passenger screeners. All of these jobs could have been placed in the civil service, which is how almost these services are provided in other departments and agencies.”).

agency personnel ceilings. These ceilings set the maximum number of civil servants an agency can employ. They are enacted with the hope that natural attrition will decrease employment levels at agencies.<sup>35</sup>

In trying to end the era of big government, President Clinton helped pass legislation that required a ten percent reduction in the federal workforce.<sup>36</sup> One part of the act required the President to “take appropriate action” to ensure that there was no increase use of service contractors because of the act.<sup>37</sup> Yet, no appropriate action was ever taken. One report found that the shrinking number of federal employees caused agencies to fill their positions with contractors to fulfill the same tasks.<sup>38</sup> According to this report, many agencies could have saved millions by performing these functions in house, but personnel ceilings forced them to contract out.<sup>39</sup> Thus, the actual size of government was not reduced by personnel ceilings.<sup>40</sup>

When agencies are required to carry out programs but cannot hire civil servants

35. Michaels, *Privatization's Pretensions*, *supra* note 6, at 752; *see also* Guttman, *Governance by Contract*, *supra* note 7, at 326; Guttman, *Public Purpose*, *supra* note 31, at 889. Under federal law, each agency and the military can only employ the number of employees as Congress appropriates for. *See* 5 U.S.C. § 3101 (2006).

36. Federal Workforce Restructuring Act of 1994, Pub. L. No. 103-226, 108 Stat. 111 (1994) (codified as amended in scattered sections of 5 U.S.C.); Jeff Gerth, *As Payroll Shrinks, Government's Costs For Contracts Rise*, N.Y. TIMES, Mar. 18, 1996, at A13; *see also* AL GORE, COMMON SENSE GOVERNMENT: WORKS BETTER AND COSTS LESS 291-92 (1995) (explaining that the Clinton Administration cut more federal jobs than mandated by the statute).

37. Federal Workforce Restructuring Act of 1994, P.L. 103-226, § 5(g), 108 Stat. 115 (codified at 5 U.S.C. § 3101 (2006)).

38. OFF. OF MGMT. & BUDGET, SUMMARY REPORT OF AGENCIES' SERV. CONTRACT. PRACTICES (1994), *reprinted* in 61 FED. CONT. REP. (BNA) 58 (Jan. 17, 1994) (surveying seventeen federal agencies and finding that “[g]overnment reliance on contracted services is increasing and many agencies are being required to do more with less staff. . . . Agencies often assume that traditional government personnel will not be authorized and therefore, there is no alternative but to contract for needed services.”).

39. *Id.*; GOV'T ACCOUNTABILITY OFF., GAO/T-GGD-95-131, GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE FEDERAL CONTRACTING-OUT PROGRAM 6 (1995) (statement of L. Nye Stevens) (“[P]ersonnel ceilings . . . frequently have the effect of encouraging agencies to contract out regardless of the results of cost, policy, or high-risk studies.”), *available at* <http://archive.gao.gov/t2pbat1/153858.pdf>; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-NSIAD-97-110, DEFENSE OUTSOURCING: CHALLENGES FACING DOD AS IT ATTEMPTS TO SAVE BILLIONS IN INFRASTRUCTURE COSTS 10 (1997) (statement of David R. Warren) (“[T]he goal of downsizing the federal workforce is widely perceived as placing DoD in a position of having to contract for services regardless of what is more desirable and cost effective.”); NAT'L ASS'N OF PUB. ADMIN., RENEWING HUD: A LONG-TERM AGENDA FOR EFFECTIVE PERFORM. (1994) (finding that “[b]ecause of staff shortages, (the Department of Housing and Urban Development) HUD has relied on contractor assistance in instances where considerations of efficiency and economy would favor performance in-house.”); Gerth, *supra* note 36, at A13.

40. Michaels, *Privatization's Pretensions*, *supra* note 6, at 752-53; *see also* Dan Guttman, *Inherently Governmental Functions and the New Millennium: The Legacy of Twentieth-Century Reform*, in MAKING GOVERNMENT MANAGEABLE: EXECUTIVE ORGANIZATION AND MANAGEMENT IN THE TWENTY-FIRST CENTURY 40, 41 (Thomas H. Stanton & Benjamin Ginsberg, eds., 2004) (“[hereinafter Guttman, *Inherently Governmental Functions*]” (noting the “bipartisan belief that the polity would indulge in the fiction that Big Government does not grow if the civil service does not”); Verkuil, *supra* note 7, at 400 (“In the United States, at least, privatization . . . is concerned less with the amount of government expenditures than with where to place responsibility for the activity. The size of government, viewed as a percentage of the Gross Domestic Product, could well grow in a privatized environment . . . .”); LIGHT, NEW TRUE SIZE, *supra* note 2, at 2 (The government used contracts “to hide its true size, thereby creating the illusion that it is smaller than it actually is . . . encourag[ing] the public into believing that it truly can get more for less . . . .”).



because of personnel ceilings, they hire contractors instead.<sup>41</sup> Service contractors supply the labor that the agency cannot hire directly, even if this backfilling is prohibited.<sup>42</sup> These contracts are colloquially called “body shop contracts,” or to use the politically correct term, “staff augmentation contracts.”<sup>43</sup> They supply agencies with contractor “bodies” who work side-by-side with government employees, and perform the same tasks.<sup>44</sup> This increase of service contractors has created a blended workforce of federal employees and contractors, in which the practical distinctions between the two have blurred.<sup>45</sup>

### B. Workarounds as Analytical Framework

The use of personal service contracts can be thought of as a workaround<sup>46</sup> (read: end-run around) to the civil service laws. As Professor Jon Michaels explains, government officials “turn to privatization for more than the customary . . . objective of providing the public with the *same* goods and services more efficiently than the government bureaucracy can.”<sup>47</sup> Rather, contracting out

41. AM. FED’N OF GOV’T EMP., *Back to the Future: Arbitrary Cuts in Civil Servants*, in AFEG 2011 ISSUE PAPERS 31 (“Using civil servants and contractors, agencies carry out the programs that are established by Congress. If Congress wants agencies to use significantly fewer civil servants, then Congress must either eliminate or weaken those programs. As proven by the Federal Workforce Restructuring Act, if agencies can’t use civil servants to carry out programs, they will simply contract out those programs, even if such backfilling is prohibited.”), available at <http://www.afge.org/Index.cfm/2011IssuePapers.DOCX?Fuse=document&documentID=2642&FileID=2787>; see also GEN. ACCOUNTING. OFF., FPCD-81-54, IMPROVING THE CREDIBILITY AND MANAGEMENT OF THE FEDERAL WORK FORCE THROUGH BETTER PLANNING AND BUDGETARY CONTROLS, 5 (1981) (“[T]he use of personnel ceilings reinforces the misconception that containing the staffing level of the direct Federal work force controls the cost of Government.”); cf. Guttman, *Inherently Governmental Functions*, *supra* note 40, at 41 (“Since World War II bipartisan limits on the numbers of federal employees have, like a hydraulic force, caused the government to fuel its growth through reliance on third parties.”); Light, *Outsourcing*, *supra* note 31, at 312 (noting that promises of reducing the size of the federal workforce “were only true using the narrowest definition of Government as being composed solely of full-time equivalent civil servants”). The reason this happens is that the public desires the same amount of services while having reduced taxes. DONAHUE, *supra* note 6, at 31-32; cf. Chester A. Newland, *Public Personnel Administration: Legalistic Reforms vs. Effectiveness, Efficiency, and Economy*, 36 PUB. ADMIN. REV. 529, 534-35 (1976) (finding that the conflicting realities of legally mandated program responsibilities and arbitrarily low personnel ceilings often make efficiency in government impossible).

42. Kathleen Clark, *Ethics for an Outsourced Government*, ADMIN. CONF. U.S., 29 (October 6, 2010), <http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=23>.

43. *Id.*

44. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-621T, DEFENSE ACQUISITIONS: DOD’S INCREASED RELIANCE ON SERVICE CONTRACTORS EXACERBATES LONG-STANDING CHALLENGES 4 (2008).

45. See Schooner & Greenspahn, *supra* note 33, at 16 (“Despite longstanding legal and policy objections to the use of personal services contracts, we have witnessed an explosive growth in what are referred to as ‘body shop’ or ‘employee augmentation’ arrangements, through which the government, as a matter of practice and necessity, hires contractor personnel to replace, supplement, or work alongside civil servants or members of the armed forces. . . . Civil servants work alongside, with, and at times, for contractor employees who sit in seats previously occupied by government employees. Unfortunately, no one stopped to train the government workforce on how to operate in such an environment, referred to as a ‘blended workforce.’”).

46. Workarounds are defined as “government contracts . . . that provide the outsourcing agency with the means of achieving distinct public policy goals that . . . would be impossible or much more difficult to attain in the ordinary course of nonprivatized public administration.” Michaels, *Privatization’s Pretensions*, *supra* note 6, at 719.

47. *Id.* at 718-19.

can be used as way to evade, or work around, personnel limitations.<sup>48</sup>

For example, an agency head might be at odds with its own federal employees, who may resist the agency head's policy goals.<sup>49</sup> Using personal service contractors to bypass these obstinate civil servants may be tempting. Another example of workarounds has to do with military contractors. Heavily used in our recent engagements in Iraq and Afghanistan, military contractors filled the void when the Pentagon needed many more troops than they had available. Instead of scaling back the scope of our military engagements, or reinstituting a civilian draft, the government hired an army of contractors.<sup>50</sup>

## II. FEDERAL ACQUISITION REGULATIONS' INEFFICIENT PROHIBITION OF PERSONAL SERVICE CONTRACTS

Before codification,<sup>51</sup> the prohibition of personal service contracts was originally promulgated by the Comptroller General<sup>52</sup> in the early part of the 1900s through advisory opinions to executive agencies.<sup>53</sup> Yet the modern prohibition, as

48. See Donald Klingner, *Reinventing Public Personnel Administration as Strategic Human Resource Management*, 22 PUB. PERSONNEL MGMT. 565, 569 (1993) (finding that contracting out is "attractive because they enable personnel administrators to reduce benefit costs, and to circumvent personnel ceilings and civil service rules").

49. Michaels, *Privatization's Pretensions*, *supra* note 6, at 746.

50. See, e.g., P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 63-64 (2003); Michaels, *Beyond Accountability*, *supra* note 11, at 1004 & n.4. Right now there are more total contractors in Iraq than service members, and roughly a 1-to-1 ratio of contractors to military personnel in Afghanistan. MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40835, *THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS* 8, 9 fig.3, 11, 12 fig.7 (2011), available at <http://www.fas.org/sgp/crs/natsec/R40835.pdf>. One category of these military contractors that is especially important is *security* contractors—armed contractors that provide support during combat or stability operations. The staggering growth of security contractors in these war zones looks like a workaround. See Michaels, *Privatization's Pretensions*, *supra* note 6, at 721-22, 753-56. In Afghanistan, for instance, as of December 2010, there were nearly nineteen thousand private security contractors working for the DOD, the highest number ever recorded. SCHWARTZ, *supra*, at ii. These private security contractors perform nearly identical work as military personnel and their work is controlled by army supervisors. Consider also that contractor deaths now represent over twenty-five percent of all U.S. fatalities in Afghanistan and Iraq. Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERVICE CONTRACTOR., Sept. 2010, at 16, available at [www.govexec.com/pdfs/092210kp1.pdf](http://www.govexec.com/pdfs/092210kp1.pdf); see also Steven Schooner, *Why Contractor Fatalities Matter*, PARAMETERS, Autumn 2008, at 78.

51. The personal services prohibition was first codified in 1959 for civilian agencies and in 1968 for defense agencies. See Miscellaneous Amendments to Armed Services Procurement Regulations, 33 Fed. Reg. 19,900, 19,929 (Dec. 28, 1968). The modern form of the prohibition was codified when the FAR was created in 1983. See Establishing the Federal Acquisition Regulations, 48 Fed. Reg. 42,102, 42,366 (Sept. 19, 1983) (to be codified at 48 C.F.R. ch. 1).

52. The Comptroller General, as the head of the Government Accountability Office, has authority to "investigate all matters related to the receipt, disbursement, and use of public money" to ensure that public money is being used effectively. 31 U.S.C. § 712 (2006); see also 31 U.S.C. § 3554(b) (1) (Supp. III 2009) (authorizing the Comptroller General to review federal contracts to "determine whether the solicitation, proposed award, or award complies with statute and regulation").

53. Letter from Acting Comptroller Gen. Elliott to the Chairman, Soc. Sec. Bd., 17 Comp. Gen. 300, 301 (1937) ("The general rule is that purely personal services may not be engaged by the government on a nonpersonal service contract basis but are required to be performed by Federal personnel under Government supervision."); Letter from Comptroller Gen. Warren to the Sec'y of the Army, 32 Comp. Gen. 427, 430 (1953) ("[I]t would be unreasonable in the extreme to presume that the Congress, while imposing a ceiling on

codified in the FAR, was formulated in response to litigation by a federal employee labor union who alleged that NASA's use of independent contractors violated personnel statutes.<sup>54</sup> This Part will explain the policies behind the personal services prohibition, why the prohibition is not being enforced or followed, and why the prohibition is ineffective.

### *A. Defining Service Contracts*

What is a service contract anyway?<sup>55</sup> The FAR distinguishes between nonpersonal and personal service contracts.<sup>56</sup> A "personal service contract" is "a contract that, by its express terms or as administered makes the contractor personnel appear to be, in effect, Government employees."<sup>57</sup> Government agencies cannot "award personal services contracts unless specifically authorized by statute."<sup>58</sup> The FAR defines a personal service contract in term of the employer-employee relationship: "A personal services contract is characterized by the employer-employee relationship it creates between the [federal] Government and the contractor's personnel."<sup>59</sup> Under the FAR, an "employer-employee relationship" arises when "contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee."<sup>60</sup>

Of course, context is crucial for distinguishing between personal and

the number of graded civilian employees that could be employed in the Department of Defense, intended to authorize the procurement by contract from outside sources of services which would be performed by employees of the type involved but for the personnel ceiling. Otherwise the limitation would be meaningless.").

54. See *Lodge 1858*, Am. Fed'n of Gov't Emps. v. Adm'r NASA, 424 F. Supp. 186, 190 (D.D.C. 1976), *aff'd in part, vacated in part*, 580 F.2d 496 (D.C. Cir. 1978).

55. FAR 37.101 (2011) ("'*Service contract*' means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.").

56. *Id.*

57. FAR 2.101 (2011).

58. 48 C.F.R. § 37.104(b) (2011). One issue with the "prohibition" is that there are so many statutory exceptions. See, e.g. 50 U.S.C. § 403j(a)(1) (2006) (providing CIA with personal services contracting authority); 22 U.S.C. § 2396(a)(3) (2006) (authorizing the Agency for International Development to execute personal services contracts); 48 C.F.R. 437.104 (2011) (finding that USDA has a special statutory authority under 7 U.S.C. § 2225 (2006) to contract for personal services); 48 C.F.R. 637.104–70 (2011) (summarizing statutory authorities available to the Department of State for personal services). One major statutory exception authorizes agencies to use personal service contracts to hire temporary experts, consultants or an organization. 5 U.S.C. § 3109(b) (2006). Whether an agency is authorized to use personal service contracts under section 3109 has been an important consideration in multiple cases. Compare *Point Elementary Sch. Teachers Ass'n v. Fed. Labor Relations Auth.*, 855 F.2d 936, 940–41 (2d Cir. 1988) (finding that the Army's use of personal service contracts in hiring of civilian teachers was unlawful hiring practice since the Army did not have the required statutory authorization to sign such contracts under 5 U.S.C. § 3109), with *Techniarts Eng'g v. United States*, 51 F.3d 301, 304–05 (D.C. Cir. 1995) (finding that the United States Information Agency (USIA) could enter into personal service agreements needed to provide for televised news broadcasts to Cuba since the USIA had express statutory authorization to enter into service contracts under section 3109).

59. 48 C.F.R. § 37.104(a) (2011).

60. *Id.* § 37.104(c) (1) ("[G]iving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.").

nonpersonal contracts:

Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: *Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?* The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account.<sup>61</sup>

Although personal service contracts are prohibited, nonpersonal service contracts are encouraged.<sup>62</sup> Nonpersonal contracts do not create employer-employee relationships between the government and contractor employees because the government exercises little supervision and control over this type of contractor employee.<sup>63</sup> To use the common law name, nonpersonal service contractors are considered independent contractors. Professor Schooner describes this distinction in terms of functions: "In a classic (nonpersonal) services contract, the government delegates a function to a contractor. Conversely, in personal services contracts, the government retains the function, but contractor personnel staff the effort."<sup>64</sup>

The key to distinguishing between nonpersonal services contracts and personal services contracts is analyzing how the contract is actually performed. Most contracts explicitly state they are *nonpersonal* services contracts, but they are solicited, bid upon, and performed as *personal* service contracts.<sup>65</sup> Thus, in addition to reading the contract to see if it is for personal services, one has to examine the actual behavior of the contracting parties to determine if personal services are being provided.<sup>66</sup> Obvious indicators of a personal service contract are when a government supervisor can make hiring, firing, promotion, or compensation decisions for contractor employees; less blatant indicators are those listed in the

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61. *Id.* § 37.104(c) (2) (emphasis added). The FAR lists six factors as a guide to assess whether the contract is for personal services, all centering around whether the government intimately controls the contractor's work: "(1) Performance on site; (2) Principal tools and equipment furnished by the Government; (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission; (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel; (5) The need for the type of service provided can reasonably be expected to last beyond one year; and (6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to —(i) Adequately protect the Government's interest; (ii) Retain control of the function involved; or (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee." *Id.* § 37.104(d). Further, case law establishes that the mere award of a contract to individuals, instead of awarding to a business, does not by itself establish a personal services contract. *Monarch Enterprises, Inc.*, Comp Gen Dec B-233303, 89-1 CPD 222, 1989 WL 240497, at \*7 (1989).

62. *Id.* § 37.602(b).

63. *Id.* § 37.101.

64. Schooner & Greenspahn, *supra* note 33, at 16.

65. Thomas A. Marcinko, *Personal Services Contracts: Should Prohibition be Repealed?*, CONT. MGMT, July 2009, at 50, 52.

66. *Id.*

FAR.<sup>67</sup> As one commentator points out:

The more the government supervisor limits her interaction to the contractor's management, the less likely it will be that the contract is for personal services. Conversely, the more the government employee interferes directly with the contractor employees, the more likely it will be that the contract is for personal services.<sup>68</sup>

### *B. Problems Distinguishing Personal Service Contracts From Nonpersonal Service Contracts*

Despite the clear policy that personal service contracts are banned, this policy is practically unenforceable.<sup>69</sup> As far back as 1959, one procurement specialist explained:

The rule that personal services for the Government must be performed only by Government employees is not difficult to enunciate. *The rub comes in finding out what it means. What are personal services?* Are personal services always personal, or are they by some sort of alchemy nonpersonal when they are unobjectionable? What is wrong with personal services being performed by independent contractors anyway? What is the evil intended to be cured by the rule? Is the law . . . sufficiently precise . . . ?<sup>70</sup>

Indeed, it is nearly impossible to predict whether a particular contract *as administered* offends the policy against personal service contracts.<sup>71</sup>

In contrast, it appears quite easy to tell whether a contract violates the prohibition just by examining the four corners of the contract itself. The Government Accountability Office (GAO) has authority to review federal contractor bid protests and reject contracts that authorize personal service contracts.<sup>72</sup> Yet, these GAO opinions almost universally find that the contract is not

67. *Id.*

68. *Id.* at 52-53.

69. Swan, *supra* note 33, at 678-79.

70. Fairbanks, *supra* note 15, at 5 (emphasis added).

71. *Id.* at 39-40. A big source of this difficulty derives from the fact that Congress has never explicitly prohibited the procurement of personal services. *Id.* at 6. Instead, Congress recognized early on that such procurement was necessary. *Id.* Fairbanks cites both an 1861 congressional statute, Act of 2 March 1861, ch. 84, § 10, 12 Stat. 220, and the Administrative Expenses Act of 1946, ch. 744, § 9(a), 60 Stat. 806, 809 (codified as amended at 41 U.S.C. § 5 (2006)), as evidence of Congress's acceptance of personal services. *See* Fairbanks, *supra* note 15, at 6-7. These statutes, demonstrate that Congress "has repeatedly recognized the need for the performance of personal services for the Government by persons not engaged pursuant to the civil service and classification laws, and indeed has placed the contracts for such services in a preferred category." *Id.* at 8.

72. *See* 4 C.F.R. § 21 (2011). For our purposes, the GAO only reviews whether the contract solicitation violates the personal services rules. Steven W. Feldman, *Personal Service Contracts*, 2 GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING § 25:25 (2011) ("If a firm alleges that the agency is improperly administering the contract in violation of these rules, the GAO will decline jurisdiction because

one for personal services,<sup>73</sup> which makes sense because the agency is not going to openly state in the contract that it is violating the prohibition. The more difficult issue, however, is figuring out whether a contract issued as a nonpersonal service contract is being administered as a personal service contract, a question the GAO has no authority to review.<sup>74</sup>

### *C. The Prohibition is an Inefficient Policy*

The prohibition recently suffered another blow from a report by the Acquisition Advisory Panel (AAP), a research panel established by Congress to investigate government contracting.<sup>75</sup> As the AAP notes, one senior official testified that “we have now a definition and a rule based on a ban . . . on personal service contracts that’s been with us for years and years and doesn’t take proper recognition of where we are as a work force today.”<sup>76</sup> As agencies routinely rely on service contracts to replace their depleted government staffs, the prohibition against personal service contracts is now seen as a dead letter—a failed policy that is seldom enforced and in need of reform.<sup>77</sup>

The AAP concluded that the existing FAR prohibition on personal service contracts, “which focuses upon the type of supervision provided to contractor

the issue relates to contract administration and not contract formation.”; see also 4 C.F.R. § 21.5 (2011) (“The administration of an existing contract is within the discretion of the agency.”).

73. See, e.g., *Carr’s Wild Horse Center*, B- 285833 (Comp. Gen.), 2000 CPD P 210, 2000 WL 1474096, at \*1 (2000) (finding that a solicitation will not result in impermissible personal services contract where the government will not exercise continuous supervision and control over contractor personnel performing the contract); *Danoff & Donnelly*; *Kensington Associates*, B- 243368 (Comp. Gen.), B- 243368.2, 91-2 CPD P 95, 1991 WL 149681, at \*1 (1991) (requiring that contractor obtain approval for employment of key personnel does not create a personal services contract); *Americorp*, B- 231644 (Comp. Gen.), 88-2 CPD P 331, 1988 WL 227965, at \*1 (1988) (finding that where solicitation provides for the contractor to monitor employees and ensure that its employees meet the requirements of the solicitation, any contract awarded under the solicitation will not result in an illegal personal services contract); *Logistical Support, Inc.*, B- 224592 (Comp. Gen.), 86-2 CPD P 709, 1986 WL 64523, at \*1 (1986) (finding that minimum manning requirement in solicitation for fixed-price services contract does not create a personal services contract where the contractor is required to maintain control and supervision of its employees); *McGregor FSC, Inc.*, B- 224634 (Comp. Gen.), 86-2 CPD P 537, 1986 WL 64284, at \*1 (1986) (finding that an agency contract for counseling services does not create illegal employer-employee relationship where the services will not be subject to direct government supervision and adequate direction is provided to the contractor through detailed written specifications contained in the solicitation’s statement of work); *Work System Design, Inc.*, B- 213451 (Comp. Gen.), 84-2 CPD P 226, 1984 WL 46571 at \*1 (1984) (finding that an agency contract for technical support services does not create illegal employer-employee relationship where the services rendered do not require government direction or supervision of contractor employees and adequate direction is provided through written technical directions issued under the contract).

74. Peter J. Ritenburg, *Contracting for the Services of Specific Individuals: Avoiding “Personal Services Contracts,”* 10 No. 2 NASH & CIBINIC ¶ Rep. 10, Feb. 1996, (finding that contracting for personal services is complex, and that nowhere is the complexity more apparent than in the area of personal/nonpersonal services contracting; also adding that the confusing FAR coverage adds to the complexity).

75. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1423, 117 Stat. 1392, 1669 (2003).

76. REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 400 (2007), available at [www.acquisition.gov/comp/aap/finalaapreport.html](http://www.acquisition.gov/comp/aap/finalaapreport.html) [hereinafter ACQUISITION ADVISORY PANEL] (testimony of William Woods).

77. See Schooner & Swan, *supra* note 28, ¶ 341.

personnel in an effort to preclude the creation of an employer-employee relationship, is not compelled by applicable statutes and case law.”<sup>78</sup> The AAP found that based on the statutory definition of a federal employee and the constitutional definition of a federal officer, personal services contracts cannot create *actual* employer-employee relationships between the government and contractor employees.<sup>79</sup> In other words, service contractors can never claim that they are actual government employees who are entitled to benefits.

Moreover, the AAP found that the prohibition adds unnecessary inefficiencies and costs for both agencies and contractors.<sup>80</sup> The prohibition chokes off the ability of government supervisors to properly manage contractor employees.<sup>81</sup> Close supervision and control by a government supervisor over a contractor employee increases the risk that the contract will be deemed a personnel service contract.<sup>82</sup> Thus, the prohibition forces agencies to create complex and inefficient supervisory schemes: government supervisors are told not to supervise contractors directly;

78. ACQUISITION ADVISORY PANEL, *supra* note 83, at 404.

79. *Id.* The AAP finds that “a contract cannot confer employee status upon contractor personnel in the absence of an appointment to the federal service.” *Id.* at 402. Their argument is both constitutional and statutory. The Appointments Clause provides that “The President shall appoint all officers . . . unless Congress vests such authority in the department heads or courts.” U.S. CONST. art. II, § 2, cl. 2. Thus, the Supreme Court confirmed that an individual had to be appointed to a government position before she could become a government officer. *See United States v. Smith*, 124 U.S. 525, 531-32 (1888); *United States v. Mouat*, 124 U.S. 303, 307 (1888). Courts have also interpreted the Appointment’s Clause to require that regular federal employees must be appointed by government officers, and not through contracts. *See, e.g., Baker v. United States*, 614 F.2d 263, 267 (Ct. Cl. 1980).

As for statutory arguments, courts have stringently interpreted the official definition of an employee under 5 U.S.C. § 2105 (2006). Three requirements must be satisfied for a person to be deemed a federal employee: (1) appointment by an authorized federal employee or officer, (2) performance of a federal function, and (3) supervision by a federal employee or officer. *Id.* § 2105(a); *see Costner v. United States*, 665 F.2d 1016, 1020 (Ct. Cl. 1981) (“It is obvious from the statutory language that there are three elements to the definition—appointment by an authorized federal employee or officer, performance of a federal function, and supervision by a federal employee or officer—and that they are cumulative. . . . An abundance of federal function and supervision will not make up for the lack of an appointment.”); *see also United States v. Testan*, 424 U.S. 392, 402 (1976) (“The established rule is that one is not entitled to the benefit of a [Government] position until he has been duly appointed to it.”) (internal citations omitted); *Horner v. Acosta*, 803 F.2d 687, 692-94 (Fed. Cir. 1986) (finding that an appointment as a federal employee requires “a significant degree of formality” and “evidence that definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C. § 2105(a),” and that indicia of appointment include whether the person’s compensation and benefits are paid and funded by the civil service, whether an appointive document was executed, and whether the oath of office was administered.). For a recent example of a court finding that a worker was not appointed under the civil service laws, *see Lees v. Evans*, 31 F. App’x 680, 682-83 (Fed. Cir. 2002) (finding that the worker in question was a personal service contractor, not a government employee).

Thus, the prohibition on personal services contracts, which was derived from opinions seeking to assure that the supervision of contract personnel by federal employees did not confer federal employment status upon such personnel, is unnecessary to achieve its intended purpose. ACQUISITION ADVISORY PANEL, *supra* note 76, at 403.

80. *Id.*

81. For instance, DOD rules restrict military officials from instructing and disciplining contractor employees, which creates inefficiencies and dangers on the battlefield. *See John P. Figura, Comment, You’re in the Army Now: Borrowed Servants, Dual Servants, and Torts Committed by Contractors’ Employees in the Theaters of U.S. Military Operations*, 58 EMORY L.J. 513, 525-26 (2008).

82. *See* ACQUISITION ADVISORY PANEL, *supra* note 76, at 404.

rather, government supervisors are supposed to use a middleman—a contractor supervisor—to tell the contractor employees what to do.<sup>83</sup> This extra layer of supervision leads to numerous inefficiencies because it is much easier for a government supervisor to direct the contractor employees herself, rather than work through a middleman.<sup>84</sup> As a result, “[s]ome agencies have expended significant resources prescribing policies and guidance designed to help avoid . . . ‘employer-employee relationships’ identified in the FAR.”<sup>85</sup>

The prohibition was further eroded in 1989 when the Office of Personnel Management (OPM)<sup>86</sup> authorized federal agencies to hire temporary staff through personal services contracts.<sup>87</sup> This rule allows an agency to use personal service contractors from temporary employment firms for brief or intermittent use if there is a critical need.<sup>88</sup> Whether there is a critical need is up to the agency’s discretion,<sup>89</sup> and this decision is likely unreviewable under the Administrative Procedure Act.<sup>90</sup> Interestingly, OPM acknowledged that this regulation openly contradicts the personal services prohibition, but OPM stated there must be an exception for “the now-established role which temporary help services perform.”<sup>91</sup> In an era where political efforts to downsize government have forced many federal agencies to employ contractors in positions traditionally reserved for government employees, the usefulness of the prohibition is questionable.<sup>92</sup>

#### *D. Personal Service Contract Case Studies*

Below are two recent examples of how the prohibition creates inefficient supervisory relationships between government supervisors and contractor

83. *Id.* at 419.

84. *See id.*

85. *Id.*

86. OPM is an independent agency that manages all federal government civil service employees. *See About OPM*, OFFICE OF PERSONNEL MANAGEMENT, [http://www.opm.gov/about\\_opm/](http://www.opm.gov/about_opm/) (last visited Oct. 10, 2011).

87. 54 Fed. Reg. 3762, 3762 (Jan. 25, 1989) (codified at 5 C.F.R. §§ 300.501-.507 (2011)); *see also* FAR 37.112 (2011).

88. *See* 5 C.F.R. § 300.503 (2011). “Brief or intermittent use” can mean that an agency can hire an individual temporary employee for up to 240 workdays. *Id.* §§ 300.503(a), 300.504(a)-(b).

89. *See* 5 U.S.C. § 701(a) (2006) (exempting from judicial review agency action that is “committed to agency discretion by law”); *Webster v. Doe*, 486 U.S. 592, 600 (1988) (exempting from judicial review nonconstitutional allegations of wrongful termination of an agency employee when the relevant statute authorizes the agency head to fire employees whenever she “shall deem such termination necessary or advisable”). As Professor Jon Michaels explains, “[p]rivatization of government responsibilities is frequently a means of evading constraints such as the Administrative Procedure Act and judicial review.” Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 805 (2011) [hereinafter Michaels, *Presidential Spinoffs*]; *see also* Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1553-56 (2001); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1745-46 (2002); Guttman, *Public Purpose*, *supra* note 31, at 894-96; Michaels, *Privatization’s Pretensions*, *supra* note 6, at 718.

90. *See* 5 U.S.C. §§ 551-559, 701-706 (2006).

91. Government Use of Private Sector Temporaries, 54 Fed. Reg. 3762, 3762 (Jan. 25, 1989).

92. *See id.* at 403.



employees. These studies were chosen because they are representative of the larger trend happening across government.<sup>93</sup>

### 1. Department of Health and Human Services

The Inspector General (IG)<sup>94</sup> of the Department of Health and Human Services has recently accused the Centers for Disease Control and Prevention (CDC) of violating the prohibition on personal services contract in the CDC's administration of a \$106 million contract.<sup>95</sup>

The CDC utilizes extensive service contracts to help accomplish its mission. From 2000 through 2008, the CDC awarded more than \$1.9 billion in service contracts.<sup>96</sup> And like other agencies, the CDC is required to follow the FAR when acquiring services. Tasked with auditing the CDC, the IG examined a 2003 CDC contract for management and consulting services in which an estimated 110 service-contractor employees would be utilized.

The IG concluded that the CDC inappropriately administered the contract as a personal service contract, and that the CDC's policies and procedures were not adequate to ensure compliance with the prohibition. The IG found that the CDC violated the FAR because the CDC used contractor employees just like government employees, directly supervising and controlling contractor employees, evaluating their performance, and signing their timecards.<sup>97</sup> The CDC also arranged for onsite performance of their work, furnished contractor personnel with equipment and supplies, used contractor services to directly advance the agency's mission, and expected the need for the services to last more than one year.<sup>98</sup>

The most telling sign that this was a personal services contract was that CDC supervisors exercised relatively continuous supervision and control over contractor personnel who worked onsite at the CDC. These CDC supervisors gave routine daily assignments to individual contractor employees. Contractor employees also directly reported to CDC supervisors, even when the contractor employees wanted

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93. Agencies are not likely to divulge on their own that they are violating the prohibition. As for reported court cases, according to Westlaw, as of January 7, 2012, there are only eight cases in total citing 48 C.F.R. § 37.104, which defines personal services contracts and admonishes agencies not to award personal service contracts. I found that none of the other reported cases illustrate the blended workforce as well as the case studies I chose. Moreover, the examples that come out of the GAO-Controller General bid protest opinions only tell us whether the contract on its face is for personal services. These opinions, though, do not detail how the contractor employees and government workers interact in practice, which is my primary focus.

94. IGs are executive branch accountability officers that have the power to investigate legal violations by agencies. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 86 (2010).

95. Alice Lipowicz, *Did CDC Violate Contract Rules? Agency, Auditors Disagree*, FED. COMPUTER WK., (Jan. 25, 2010), <http://fcw.com/articles/2010/01/25/web-hhs-ig-cdc-personal-services-contract.aspx>.

96. DANIEL R. LEVINSON, DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE INSPECTOR GEN., REVIEW OF THE CENTER FOR DISEASE CONTROL AND PREVENTION'S COMPLIANCE WITH APPROPRIATIONS LAWS AND ACQUISITION REGULATIONS—CONTRACTOR A (A-04-08-01059) 1 (2010) [hereinafter INSPECTOR GEN. REV.], available at <http://www.oig.hhs.gov/oas/reports/region4/40801059.pdf>.

97. See *id.* at 7. Eventually, the CDC prohibited CDC supervisors from signing or reviewing contractor timecards. *Id.*

98. *Id.* at 8-9.

to take time off from work.<sup>99</sup>

Also telling is that CDC supervisors wrote the annual performance evaluations for contractor employees.<sup>100</sup> Although the CDC is responsible for evaluating the overall performance of a contractor, they are not supposed to evaluate individual contractor employees. Additionally, about eight-five percent of the contractor personnel were required to work onsite at CDC offices.<sup>101</sup> The CDC also provided onsite contractor personnel with equipment and supplies, including computers and telephones.<sup>102</sup> What's more, the CDC used these contractor employees to supplement its government staff and to further the CDC's mission.<sup>103</sup> Finally, the CDC needed the contractor's services on a long-term, ongoing basis.<sup>104</sup> Based on all of this evidence, the IG report recommended that the CDC further evaluate its contracts for compliance and institute additional policies and procedures to prevent the creation of personal service contracts.<sup>105</sup>

## 2. Army Contracting Center of Excellence

In another example, the GAO examined the Army Contracting Center of Excellence's (CCE)<sup>106</sup> contract with CACI, a private military contractor. The GAO found that CACI contractors represented approximately forty-two percent of the CCE's contract specialists, and that the CACI contractors worked side-by-side with government workers on the same projects.<sup>107</sup> These projects were "generally assigned [by CCE staff] based on knowledge and experience, not whether the specialist [was] a government or contractor employee."<sup>108</sup> This assignment strategy seems to be efficient: it enables the government to utilize each person's unique skills where they would be most effective.<sup>109</sup>

Although effective, this practice of assigning jobs without differentiating

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99. *Id.* at 6-7.

100. *Id.* at 6-8.

101. *Id.* at 8.

102. *Id.*

103. *Id.* at 9.

104. *Id.*

105. *Id.* at 12-13. Then a fight broke out between the CDC and the IG, with the CDC writing a letter to the IG stating "we do not believe the contracts were regularly administered as personal services." Letter from Thomas R. Frieden, Dir., Ctr. for Disease Control and Prevention, to Daniel R. Levinson, Dep't of Health & Human Servs. Inspector Gen. (Oct. 7, 2009), available at <http://oig.hhs.gov/oas/reports/region4/40801059.pdf>. The IG claimed, however, that the CDC did not address the finding that CDC employees provided relatively continuous supervision and control of onsite contractor personnel, violating the personal services prohibition. INSPECTOR GEN. REV., *supra* note 96, at 13.

106. CCE is an Army department that provides contracting support services. See *About CCE*, CONTRACTING CENTER OF EXCELLENCE, [http://web.archive.org/web/20071227072348/http://dcccw.hqda.pentagon.mil/about\\_cce/history.asp](http://web.archive.org/web/20071227072348/http://dcccw.hqda.pentagon.mil/about_cce/history.asp) (last visited Oct. 4, 2011).

107. 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) [hereinafter GAO-08-360, DEF. CONTRACTING]; see also Robert Brodsky, *Pentagon Blurred Line Between Contractors, Feds*: GAO, GOV. EXEC. (Mar. 27, 2008), [www.govexec.com/dailyfed/0308/032708rb1.htm?oref=relink](http://www.govexec.com/dailyfed/0308/032708rb1.htm?oref=relink).

108. *Id.* at 10.

109. See Swan, *supra* note 33, at 688-89.

between contractors and government employee's strategy runs dangerously close to violating the personal services prohibition. The GAO notified the CCE that their arrangement with CACI created a personal services contract. This forced the CCE to put up a wall between the government employees and the contractors.<sup>110</sup> The contractors were forced to work in separate areas from government employees, and placed onto separate teams.<sup>111</sup> While it would have been more efficient to allow government supervisors to tell contractors directly what they wanted, CACI managers were required to supervise the CACI employees so that the prohibition would not be violated.

As these examples suggest, the personal service prohibition is inefficient since it forces government supervisors to utilize contract supervisors, who are usually just unnecessary middlemen. Without the prohibition, government supervisors could work directly with contractor employees, saving everyone time and money.

### III. GOVERNMENT JOINT EMPLOYERS AND TITLE VII: THE PERSONAL SERVICES PROHIBITION HAS NOT PREVENTED COURTS FROM IMPLYING EMPLOYMENT RELATIONSHIPS BETWEEN CONTRACTOR EMPLOYEES AND THE GOVERNMENT

In the blended workforces, as we have seen, contractors are increasingly working alongside civil servants, making contractors and federal employees nearly indistinguishable.<sup>112</sup> With this blurring, a distinct problem arises. Agencies from the Defense Department (DOD) to the Energy Department are now finding that they have to deal with the complex questions of defining whether their contractors could be considered *de facto* government employees by courts for purposes of the antidiscrimination laws. The issue has become increasingly important as to whether a federal agency is responsible for when a worker is wronged, especially when disputes emerge over pay, workers compensation, harassment, discrimination claims, and other workplace issues.<sup>113</sup> Contractor employees are now frequently suing the government, alleging discrimination by their government supervisors or even coworkers.<sup>114</sup> These wronged contract employees are claiming that the agency is their "joint employer," thereby opening the doors for the agency to be sued.

The prohibition has not been effective at preventing courts from finding that the government is a joint employer of an employee (along with the contractor itself). Although the personal service prohibition is still the law, agencies are consistently acting like regular supervisors of contractor employees, forcing courts to hold agencies accountable.

#### *A. The Joint Employer Doctrine as Applied to the Federal Government*

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110. GAO-08-360, DEF. CONTRACTING, *supra* note 107, at 17.

111. *Id.*

112. Schooner & Swan, *supra* note 28, ¶ 341.

113. Dana Hedgpeth, *Federal Contractors Travel Obscured Path in Mediation Efforts*, WASH. POST, Oct. 25, 2010, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/24/AR2010102402229.html>.

114. See Schooner & Swan, *supra* note 28, ¶ 341.

Title VII of the Civil Rights Act of 1964<sup>115</sup> prohibits employment discrimination.<sup>116</sup> In 1972, Congress also chose to protect federal employees by amending Title VII to allow federal employees the ability to sue the government for discrimination.<sup>117</sup> Congress intended to protect workers with a *direct* employment relationship with the government, like civil servants.<sup>118</sup> No one foresaw contractor employees suing their government supervisors for discrimination.<sup>119</sup>

But in 1979—just seven years after Congress created protections for federal employees—a circuit court held that contractor employees can sue the government for discrimination if the government supervisor exercises enough control over the contractor employee. In *Spirides v. Reinhardt*,<sup>120</sup> a female broadcaster, working as an independent contractor for an agency, sued the agency for sex discrimination.<sup>121</sup> The court held that it was improper to ask whether the contractor is considered a federal employee under the civil service laws. Rather the court asked whether she should be deemed an employee of the agency for purposes of Title VII.<sup>122</sup>

To determine whether the individual is an employee or independent contractor, the court applied the general principles of agency law.<sup>123</sup> This approach requires an examination of all aspects of the relationship between the contractor employee and the government to determine if a *de facto* employer-employee relationship exists. The most important factor is the extent to which the employer has the right to control the means and manner of the worker's performance.<sup>124</sup> There are many additional factors to consider as well, and no single factor is determinative.<sup>125</sup>

115. 42 U.S.C. §§ 2000e to e17 (2006).

116. Employers cannot discriminate against employees because of an employee's race, color, religion, sex, national origin, age, disability, or genetic information. 29 C.F.R. § 1614.101 (2011). Discrimination is defined as denying "the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants." 29 CFR § 1607.11 (2011). It is illegal for an employer to discriminate in any aspect of employment, including hiring and firing, assignment and transfer of employees, or other terms and conditions of employment. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [www.eeoc.gov/facts/qanda.html](http://www.eeoc.gov/facts/qanda.html) (last visited May 9, 2011).

117. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec 11, § 717(c), 86 Stat. 103, 112 (codified as amended at 42 U.S.C. § 2000e-16 (2006)).

118. See *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979).

119. See *Schooner & Swan*, *supra* note 28, at ¶ 341.

120. 613 F.2d 826 (D.C. Cir 1979).

121. *Id.* at 827-28.

122. *Id.* at 831.

123. *Id.*

124. *Id.* at 831-32 ("If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.").

125. *Id.* at 832 ("[Factors to be considered include] '(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i. e.* [sic], by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security

Basically, if the government supervisor treats the contractor employee like a regular employee, the *Spirides* court held that the contractor can sue the government for discrimination. In other words, the government can be a joint employer of the contractor employee.

The *Spirides* case created the federal contractor joint-employer test.<sup>126</sup> In the years after *Spirides*, as the federal workforce became more blended, federal courts and the EEOC are facing a rising number of employment discrimination complaints brought by contractor employees against their federal supervisors.<sup>127</sup> Consequently, the joint-employment doctrine continues to evolve as courts and the EEOC have been asked to determine what circumstances contractor employees should be considered *de facto* federal employees under Title VII.<sup>128</sup> Indeed, the seminal EEOC administrative case,<sup>129</sup> where the EEOC first applied the joint-employer doctrine, has been cited in 350 administrative decisions.<sup>130</sup> And in the last decade, the EEOC has decided more than ninety cases in favor of contract employees;<sup>131</sup> this means that an agency was deemed a joint employer because the agency had sufficient control over that contractor employee, and that the agency discriminated against the employee.

There are two other reasons why there has been a spike in these joint-employer suits. The first has to do with the contract bid process. The government's funding restrictions force agencies to seek cost savings. When the government makes requests for proposals from contractors for a job that requires contractor employees to work on a government worksite, the proposals do not usually include requirements for space allocation for the contractor employees, or for direct labor hours for a supervisor of contractor employees.<sup>132</sup> Because the contractor wants to grow her government business, the contractor will agree to these terms and agree to manage her contractor employees from a remote location. This makes it difficult for the contractor supervisor to be personally involved in the day-to-day management of her employees.<sup>133</sup> Thus, because contractor supervisors have to manage their employees remotely and there is no space allocated for contractor employees at government worksites, it is likely that government supervisors are going to control the contractor employees directly.

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taxes; and (11) the intention of the parties.”).

126. This is essentially the same test used in the private context. *See, e.g., Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1359-61 (11th Cir. 1994).

127. *See Schooner & Swan, supra* note 28, ¶ 341.

128. In 1997, the EEOC even adopted specific guidelines for this joint-employer phenomenon. The guidelines stated that an employee may be considered a *de facto* employee of an agency if the agency “has the requisite control over that worker.” EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915-002, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), *available at* 1997 WL 33159161, at \*7.

129. *Ma v. Dep’t of Health & Human Servs.*, EEOC Decision No. 01962390, 1998 WL 295965 (May 29, 1998).

130. This number was reached by doing a KeyCite of the *Ma* decision on Westlaw on May 20, 2011.

131. Hedgpeth, *supra* note 113.

132. *Recommending a FAR Change*, TIDEWATER GOV’T-INDUSTRY COUNCIL (last visited Apr. 16, 2011), [www.tasc-tgic.org/tgic/initiatives.htm](http://www.tasc-tgic.org/tgic/initiatives.htm) [hereinafter PERSONAL SERVICES COMM. REP.].

133. *Id.*

Second, there is also the natural tendency for the contractor employee to want to please the customer (read: the government supervisor). There is usually no direct knowledge of the contract scope or terms by members of either the contractor or government teams. Without limitations, work relationships quickly develop, resulting in contractor employees being supervised and treated like government employees.<sup>134</sup>

### *B. Joint-Employer Case Studies*

These two case studies illustrate the joint-employer doctrine, and how pervasive the blended workforce is.<sup>135</sup>

#### 1. The Sexually Harassing Navy Supervisor

In 1995, a court clarified the *Spirides* joint-employer test, finding that the federal government can still be a joint-employer despite the fact that the individual is a primary employee of a contractor. In *King v. Dalton*,<sup>136</sup> Stephanie King was employed by a contractor providing support services for the Navy.<sup>137</sup> The Navy supervisor in charge of King's project, made sexually explicit comments to King, and touched her inappropriately.<sup>138</sup> Because of this conduct, King sued the Navy for sexual harassment.<sup>139</sup>

The court analyzed the relationship between King and the Navy supervisor to see if the government was a joint-employer. The court found that the Navy supervisor had some influence over King's work product as well as the pace and direction of the overall project.<sup>140</sup> It was also clear that if the supervisor complained to King's contractor supervisors regarding her work, King's performance reviews might be affected.<sup>141</sup> And while neither the supervisor nor the Navy had the power to fire King, the court concluded that if the supervisor strongly objected to King's continued participation in the project, he could persuade the contractor to remove her.<sup>142</sup> This was true given the ever-present possibility that the Navy could simply take their business elsewhere.<sup>143</sup>

Yet, looking at the totality of the circumstances, the court found that the Navy was not King's joint-employer since the Navy did not maintain direct, supervisory

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134. *Id.*

135. These examples are just the tip of the iceberg. Most joint-employer suits are settled out of court because the contractor and the government just want the problem to disappear.

136. 895 F. Supp.831 (E.D. Va. 1995).

137. *Id.* at 834-35.

138. *Id.* at 835.

139. *Id.*

140. *Id.* at 841.

141. *Id.*

142. *Id.*

143. *Id.*

control over the daily details of her work.<sup>144</sup> Although the court found that the Navy was not King's joint-employer, this case clearly established that the government cannot shield itself from liability, simply by asserting that it does not *directly* employ or pay the contract employee.<sup>145</sup>

## 2. Pregnancy Discrimination at the DOJ

In a recent case, *Harris v. Attorney General of the United States*,<sup>146</sup> Carla Harris was assigned as a background checker to the Executive Office for United States Attorneys (EOUSA) of the Justice Department by her primary employer, a contractor, who held a service contract with EOUSA.<sup>147</sup> Harris was hired before her pregnancy was visible, but started work at the EOUSA two months later, by which time she was visibly pregnant.<sup>148</sup> Harris was discharged after a few hours at the EOUSA.<sup>149</sup> Harris then sued, claiming that her EOUSA supervisor fired her because she was pregnant.<sup>150</sup> Apparently, the supervisor had discharged four other pregnant workers and commented on Harris' pregnancy.<sup>151</sup>

In determining whether Harris was a joint employee of the EOUSA, the court relied heavily on standards developed under the common law of agency. Courts use the common law because Title VII only sets forth a nominal definition of employee: "an individual employed by an employer."<sup>152</sup> Finding that that this definition "is completely circular and explains nothing," the Supreme Court encourages the use of traditional agency law principles to answer this question.<sup>153</sup> The Court has suggested that, for the purposes of all employment discrimination statutes,

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144. *Id.* (arguing that the other *Spirides* factors also point away from a conclusion that the Navy was her employer: (1) the contractor provided her work place, as well as all of her equipment and supplies; (2) the Navy did not hire, train, or fire her, and other than her meetings with the supervisor she had little contact with Navy personnel; (3) King's work involved a specific, isolated contract that the contractor had with the Navy; (4) King received no compensation, annual leave, or retirement benefits from the Navy, nor did the Navy pay her social security taxes; and (5) the parties did not intend to create an employer-employee relationship, they structured the contract as a nonpersonal services contract).

145. *Id.* at 843-44.

146. 657 F. Supp. 2d 1 (D.D.C. 2009).

147. *Id.* at 4.

148. *Id.*

149. Allegedly Harris used profane language. *Id.* at 5-6.

150. *Id.* at 6-7.

151. *Id.* at 14.

152. 42 U.S.C. § 2000e(f) (2006).

153. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (interpreting "employee" in the context of ERISA); *see also* *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law [such as the term 'employee'], a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (interpreting employee in the context of the Copyright Act). The Court, in *Nationwide*, also referenced the Restatement (Second) of Agency §220(2) (1958) as listing nonexhaustive criteria for identifying a master-servant relationship, and Rev. Rul. 87-41, 1987-1 C. B. 296-99, an IRS revenue ruling setting forth 20 factors in determining whether an individual qualifies as a common law employee in various tax law contexts. *Nationwide Mut. Ins. Co.*, 503 U.S. at 324.

including the Americans with Disabilities Act,<sup>154</sup> Title VII, and the Age Discrimination in Employment Act,<sup>155</sup> employee status can be determined by applying the common law of master-servant relationships, with the control factor being the principal guidepost.<sup>156</sup>

The *Harris* court then applied the *Spirides* joint-employer test. Looking at the control factor, the court found that the EOUSA supervisors exercised control over Harris' daily tasks, furnished her work environment, and the contractor's role was largely limited to signing paychecks.<sup>157</sup> Harris had a nominal contractor supervisor, who did not actually do any supervision; he was just a liaison between the contractor and the EOUSA.<sup>158</sup> In contrast, the EOUSA supervisor provided supervision over the contractor employees in Harris' group, setting their schedule and duties, and providing performance evaluations.<sup>159</sup> These tasks were supervisory, and they fell to the EOUSA, not to the contractor.<sup>160</sup> The other *Spirides* factors also supported the conclusion that the EOUSA was Harris' joint employer.<sup>161</sup>

In conclusion, the court held that the level of control exercised by DOJ over Harris and the economic realities of the workplace demonstrated that Harris was an employee for the purposes of Title VII.<sup>162</sup> The court noted that DOJ employees, particularly her supervisor, directed Harris' daily tasks in the same way that they would direct and evaluate federal employees who worked alongside Harris performing identical work.<sup>163</sup> The factors in favor of the EOUSA—focused largely on payroll matters and formalization of hiring and termination—did not outweigh the evidence that EOUSA had the right to control the means and manner of Harris' performance,<sup>164</sup> which is consistent with established precedent.<sup>165</sup>

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154. Americans with Disabilities Act of 1990, 42 U.S.C. §§12101-12213 (2006).

155. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2006).

156. See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 446 n.6 (2003) (interpreting "employee" in the context of the Americans with Disabilities Act); see also Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 158 (2010). At common law, an employee is an agent whose principal has the right to control the agent's physical conduct. Restatement (Second) of Agency § 2(1)-(2) (1958); Restatement (Third) of Agency § 7.07(3)(a) (2006); see also STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCs 19 (2004) ("[T]he single most influential source of legal rules in this area remains the . . . Restatement of Agency.").

157. *Harris*, 657 F. Supp. 2d at 11-12.

158. *Id.* at 12.

159. *Id.* at 11.

160. *Id.*

161. *Id.*

162. *Id.* at 12-13.

163. *Id.* at 12.

164. *Id.* at 11.

165. Compare *Int'l Union v. Clark*, No. 02-1484 2006 WL 2598046, \*2-3,\*8. (D.D.C. 2006) (holding that court security officers hired by contract but trained and directed by the United States Marshals Service were deemed joint federal employees, where the government determined the qualifications for hiring and the tasks that the officers performed, specified the manner in which the tasks and the daily duties were performed, conducted a two to three day residential training program for the officers, provided the essential equipment for the job, and decided whether to remove individual officers from the contract), with *Redd v. Summers*, 232 F.3d 933, 938, 940 (D.C. Cir. 2000) (holding that a tour guide whose federal supervisor directed the plaintiff's employment for a brief period in nine months was a contractor), and *Simms v. D.C. Gov't*, 587 F. Supp. 2d



### *C. Putting the Personal Services Prohibition and the Joint-Employer Doctrines Together*

As these case studies suggest, the personal service prohibition has not stopped agencies from entering into contracts that create *de facto* employer-employee relationships between contractor employees and government supervisors. To deal with the flouting of the prohibition, courts created the joint-employer doctrine to hold government supervisors accountable for discrimination claims by contractor employees.

With the astronomical rise of service contracts, these joint-employer suits have been steadily rising.<sup>166</sup> What is troubling is that government agencies might be playing both sides of the fence: when it is convenient for an agency or when the agency wants to have a tight rein over the contractor employee, like when the worker wants to take time off, then the worker is deemed an “employee” by the government. But when agencies need to distance themselves from a worker, then they categorize her as a contractor.<sup>167</sup> Experts find that the policies on how to deal with these situations where a worker is paid by a contractor but works daily and side-by-side with federal employees, and takes orders from federal supervisors, have not caught up to the widespread use of contractors across the federal government.<sup>168</sup> For instance, the GAO has found that the DOD provided their supervisors with little guidance on how to determine whether a personal service contract even exists.<sup>169</sup>

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269, 274-75 (D.D.C.2008) (holding that a mental health worker providing services to inmates with no direction from prison personnel was a contractor), and *Amiri v. Stoladi Prop. Gp.*, 407 F. Supp. 2d 119, 124 (D.D.C. 2005) (holding that a security guard was not an employee of a property manager with “no authority to direct or control” him), and *Mason v. African Dev. Found.*, 355 F. Supp. 2d 85, 95-98 (D.D.C. 2004) (holding that a receptionist for a government agency was a contractor where the work was initially arranged through a temporary services agency, the services were not integral to defendant’s business, and the receptionist paid her own social security taxes), and *Zhengxing v. Nathanson*, 215 F. Supp. 2d 114,118, 120 (D.D.C. 2002) (holding that a translator and producer of radio programs, working independently and paid by the assignment, was a contractor).

166. One experienced federal employment attorney found:

You’re absolutely seeing more of these types of cases . . . People work for the federal government, they sit in a government cubicle all day and get their orders from government supervisors. But it is a private contractor that signs their paycheck, so when it comes to who to sue if something goes wrong, it becomes unclear who is liable.

You’re ricocheted back and forth between the contractor and the agency.

Hedgpeth, *supra* note 113.

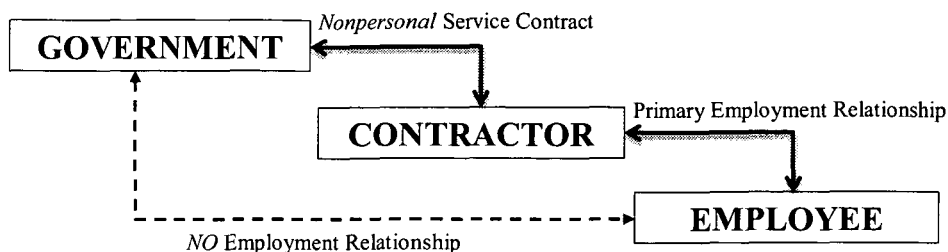
167. *Id.*

168. *Id.*

169. *E.g.*, GAO-08-360, DEF. CONTRACTING, *supra* note 107, at 17 (“[The GAO] found no additional DOD guidance that elaborated on the factors contracting officers or program officials should consider in determining whether a personal services contract exists and how to mitigate against this risk when contractors are working side by side with their government counterparts, perhaps even receiving their daily task assignments from a government supervisor.”). It is important that government supervisors realize that they can and likely will be sued by disgruntled contract employees under the antidiscrimination laws. Government supervisors need to be trained so that joint-employer lawsuits can be avoided. See Mathew J. Gilligan, *Federal Agency “Joint Employer” Liability: Employment Discrimination Claims by Independent Contractor Employees*, ARMY LAW., Dec. 1999, at 54, 58-59 (explaining the Army guidelines for processing

These legal relationships between contractors, contractor employees and the government, and the relationship between the personal service prohibition and the joint-employer doctrines, are shown visually below. Figure 1 displays the relationships in a nonpersonal service contract.

**FIGURE 1. NONPERSONAL SERVICE CONTRACTS**



Here there is a contract between the government and the contractor stating that contractor employees will do some task for the government. This relationship is governed by general contract law and the FAR. Here, each party should understand his rights and obligations under the contract, and disputes should be resolved through established procedures.<sup>170</sup>

The contractor and the contractor employee also have a defined legal relationship. This relationship is regulated by employment laws, the FAR, company policies, and employment contracts. Just like the relationship between contractor and government, the contractor and the contractor employee can resolve their disputes through established procedures and guidelines. There is no legally recognized relationship between the government and the contractor employees in a nonpersonal services contract, however.<sup>171</sup> The government is not allowed to treat the contractor employees like its own. The temptation, though, is often too great.

As one expert explains, a “government employee who enters into a supervisor/subordinate relationship with a contractor employee is working in a gray area that is neither predictable nor risk free for any of the parties involved.”<sup>172</sup> This legal gray area is depicted in Figure 2.<sup>173</sup>

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discrimination complaints by independent contractor employees); *Schooner & Swan*, *supra* note 28, ¶ 341 (explaining why government officials and contractors should be worried about these lawsuits).

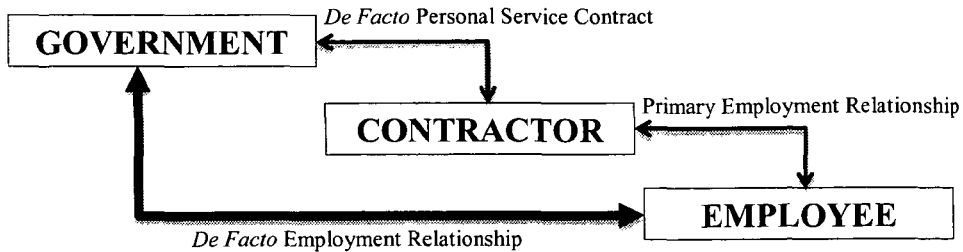
170. Marcinko, *supra* note 65, at 53.

171. *Id.*

172. *Id.*

173. See *infra* notes 176 and accompanying text (describing personal service contracts as legal gray holes)

FIGURE 2. DE FACTO PERSONAL SERVICE CONTRACTS



This Figure shows where the personal services prohibition and the joint employer doctrines collide. The contract between the contractor and the government never says it is for personal services, which would be illegal. Rather, the contract says that it is for nonpersonal services,<sup>174</sup> but then the contract language is disregarded. The government supervisors treat the contractor employees just like government employees.<sup>175</sup> This is what happened in the Health and Human Services case study discussed above. As that case study showed, when the government uses the contractor employees as its own, the contract becomes a *de facto* personal services contract. That is why the IG told the agency head to stop using the contractor employees as if they were normal federal employees.

Similarly, when the government exercises control over contractor employees, the government runs the risk of a court finding that the government is a joint employer of the contractor employees. This is because the tests of whether the government is operating a personal service contract or whether the government is a joint employer are largely the same. If the government extensively controls the contractor employees, it is likely that the contract is for personal services and that the government is the contractor employees' joint employer.

#### IV. SOLUTIONS TO THE PERSONAL SERVICES CONUNDRUM

There seems to be two general solutions: either strictly enforce the prohibition, or abolish it entirely. The current middle path of quasi-enforcement is not working. The prohibition is now a gray hole in government accountability because the prohibition is established, but disregarded.<sup>176</sup>

174. Indeed, the FAR requires that contracting officers ensure that proposed contract for services is only for *nonpersonal* services. See 48 C.F.R. § 37.103(a) (2011) (requiring the officer to specifically document that the contract is for nonpersonal services, which should include the opinion of legal counsel in doubtful cases). Cf. *Tech Sys., Inc. v. United States*, 98 Fed.Cl. 228, 250 (2011) (calling this process a “routine aspect[] of government services contracts”).

175. Marcinko, *supra* note 65, at 52.

176. One way to view the personal-service-contracting problem is through an executive accountability metaphor that compares non-reviewable executive actions to black holes. Legal black holes are domains where executive branch officers and supervisors are patently free from legal checks; the executive here does not have to comply with the rule of law, as their actions are excluded from judicial review. DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006); Michaels, *Presidential Spinoffs*, *supra* note 89, at 884; see also Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096-98 (2009) (finding that extending legality in an attempt to eliminate these black and gray holes is impracticable and utopian). Nevertheless, executive officials are supposed to comply

Crafting a workable solution will be difficult, though, because we do not know the extent of the problem. It is impossible to determine how many personal services contracts are out there; the government does not keep statistics on illegal practices.<sup>177</sup> Besides the cases, and the experts who have stated that personal services contracts are prevalent,<sup>178</sup> there are some macro data points that suggest that personal service contracts are commonplace.

For example, the GAO found that a significant number of defense contractor employees are working side-by-side with government employees at the DOD. At fifteen of the twenty-one offices that the GAO reviewed, contractor employees outnumbered DOD employees and comprised as much as eighty-eight percent of the workforce.<sup>179</sup> Also, the Director of National Intelligence reported that 37,000 contractor employees work side-by-side with government intelligence workers.<sup>180</sup>

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with the personal services prohibition, even if they do not. That makes personal service contracting more like a disguised black hole, or a legal gray hole. See DYZENHAUS, *supra*, at 3. Gray holes arise when “there are some legal constraints on executive action . . . but the constraints are so insubstantial that they pretty well permit government to do as it pleases.” *Id.* at 42. In a sense, federal agencies are doing as they please in terms of personal service contracts. Besides government watchdogs like the Inspectors’ General, there is little enforcement of the personal services prohibition.

Also, there is no political accountability pressuring the government to comply with the rules. Political constraints are deeply problematic with non-headline issues. The effectiveness of political constraints depends on whether the public can appreciate what the government is doing, whether it cares about the particular issue, and whether it cares about the issue sufficiently to register objections. See Michaels, *Presidential Spinoffs*, *supra* note 89, at 884. In this area of personal service contracting, the public is not paying enough attention to hold the government accountable. The concept of political accountability has been attacked by scholars. See, e.g., Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1391 (2008); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1002-07 (1997); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197 (1995); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1265-77 (2009). *But see* Clinton v. City of New York, 524 U.S. 417, 488-490 (1998) (Breyer, J., dissenting) (finding that the President and her officers are highly sensitive to voter preferences and will take into account the majoritarian view, or else be punished in the next election).

There is even less political accountability in agencies that work in the realm of national security, where affairs are purposefully kept secret. Michaels, *Presidential Spinoffs*, *supra* note 89, at 885; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2337 (2001) (finding that political accountability is greatest when the issue is highly visible to the public); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1744 (2009) (finding that where the President can control information, there is less political accountability); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2475 (2006) (indicating that there is especially little accountability “in the areas of national security and foreign affairs, [where] much executive action is done in secret”).

177. Marcinko, *supra* note 65, at 54.

178. Schooner & Swan, *supra* note 28.

179. U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-169, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 3 (2008).

180. Robert O’Harrow Jr., *Contractors Augment Intelligence Agencies*, WASH. POST., Aug. 28, 2008, at D1, available at [www.washingtonpost.com/wp-dyn/content/article/2008/08/27/AR2008082703142.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/08/27/AR2008082703142.html). Professor Michaels has extensively catalogued the post 9/11 private-public partnerships in the intelligence field, including the extensive use of contractors. He has also outlined the potential dangers of these arrangements. See Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 904-06, 936, 960 (2008); Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1435-36, 1452, 1466 & n.141 (2010).

Even Congress has taken notice of the extensive use of personal services contracts, and has required DOD to create guidelines.<sup>181</sup>

This Part analyzes three proposals (not mutually exclusive) for dealing with the personal services conundrum: (1) insource by hiring more government employees and enforce the prohibition; (2) abolish the prohibition and regulate it, and (3) authorize more congressional oversight of service contracts. I ultimately conclude that the FAR regulations on personal service contracts should be amended so that personal service contracts are generally allowed, except for service contracts that perform inherently government functions. More congressional oversight is needed as well.

### *A. Insourcing the Work by Hiring More Government Employees*

One possible way to stop the personal services workaround is for the government to hire more federal employees. This would lessen the demand for service contractors. This process is called insourcing (the opposite of outsourcing). Insourcing happens when the government directly performs the function itself, instead of contracting it out. This option would please public employee unions, who were the first to challenge agencies use of contractors.<sup>182</sup>

Yet insourcing is not politically popular. The creation of the Transportation Security Administration (TSA)<sup>183</sup> provides a vivid example.<sup>184</sup> After the September 11, 2001 terrorist attacks, the Senate immediately took steps to nationalize the administration of airport security throughout the country.<sup>185</sup> The Bush Administration and Republican lawmakers,<sup>186</sup> however, were concerned with the size of the federal government.<sup>187</sup> Eventually, a compromise was reached that federalized all airport screeners but allowed airport operators to opt out of the federal program by showing that private screeners were just as effective.<sup>188</sup> Three

181. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 831, 122 Stat. 4356, 4534 (2008) (forcing the DOD to (1) require a clear distinction between DOD employees and DOD contractor employees; (2) provide appropriate safeguards with respect to when the DOD can enter into personal services contracts; and (3) assess and mitigate the risk that nonpersonal services contracts, as implemented and administered, become personal services contracts).

182. See, e.g., *Lodge 1858 American Federation of Government Employees v. Adm'r NASA*, 424 F. Supp. 186, 189 (D.D.C. 1976), *aff'd in part, vacated in part*, 580 F.2d 496, 507 (D.C. Cir. 1978).

183. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(a), 115 Stat. 597, 597-602 (2001) (codified as amended at 49 U.S.C. § 114 (2006)).

184. See Swan, *supra* note 33, at 693-94.

185. See *id.*; 147 CONG. REC. 22, 895 (2001) (statement of Rep. Jackson-Lee) (“[W]e will have a federalized system. All the employees will be trained and there will be standards, and we will be able to say that the long arm, the effective arm, the strong arm, the equal opportunity arm of the government will stand in the place of securing our airports and airlines.”).

186. See Verkuil, *supra* note 7, at 446 (“The Republican distaste for increasing government employment (in this case by 28,000) stymied the legislation until an opt-out compromise was accepted. The White House also objected to providing airport screeners with civil service protections and demanded the right to hire and fire personnel.”).

187. *Id.*; Lizette Alvarez, *A Nation Challenged: Airline Safety; Senate Votes to Federalize Job of Airport Screening*, N.Y. TIMES (Oct. 12, 2001), <http://www.nytimes.com/2001/10/12/us/nation-challenged-airline-safety-senate-votes-federalize-job-airport-screening.html> (“President Bush ‘has serious concerns that full federalization of the screener work force’ could cause significant problems.”).

188. See Aviation and Transportation Security Act §108(a), 115 Stat. at 611-13 (codified as amended at 49 U.S.C. §§ 44919-20 (2006)).

years after the TSA's creation, some lawmakers began questioning the need for the TSA at all, claiming that its creation was a kneejerk response to 9/11.<sup>189</sup> These lawmakers claimed that private screeners could do a more efficient job than an agency.<sup>190</sup> The Obama Administration, however, decided not to allow any more private screeners, finding no clear advantage for using contractors.<sup>191</sup> This political battle illustrates how difficult it is to build enough support for the creation of new civil service jobs, even in sensitive domains like national security.

Moreover, because there are many benefits to relying on private contractors to perform services, such as surge capacity, greater flexibility, and competitive incentive schemes, critics will argue that hiring more government workers will waste taxpayer dollars.<sup>192</sup> Private contractors have a greater ability to hire more qualified workers by paying them more, advancing them faster, and they have a greater ability to fire employees they do not like.<sup>193</sup>

In contrast, rigid civil service laws make the hiring and firing process slow.<sup>194</sup> These laws also limit an agency's ability to use performance incentives.<sup>195</sup> What is more, President Obama's recent decision to freeze the pay of civil servants through 2012 will surely erode the ability of the government to attract the best talent.<sup>196</sup>

It is also a misconception that service contracts can save the government money because service contractors are more cost-effective; contract workers are not always cheaper than government workers. For instance, the average intelligence contract worker costs the government about \$207,000 annually, compared with about \$125,000 for a government employee.<sup>197</sup>

189. See *Some in GOP Want Private Airport Screeners*, USA TODAY (June 1, 2004), [http://www.usatoday.com/travel/news/2004-06-01-screeners\\_x.htm](http://www.usatoday.com/travel/news/2004-06-01-screeners_x.htm) ("Republicans, who were never entirely comfortable with creating a new bureaucracy, want to return all airport security screener jobs to the private sector, where they were before Sept. 11, 2001").

190. See *id.*

191. Mike M. Ahlers & Jeanne Meserve, *TSA Shuts Door on Private Airport Screening Program*, CNN (Jan. 29, 2011), [http://articles.cnn.com/2011-01-29/travel/tsa.private\\_1\\_tsa-government-screeners-screening-program?s=PM:TRAVEL](http://articles.cnn.com/2011-01-29/travel/tsa.private_1_tsa-government-screeners-screening-program?s=PM:TRAVEL).

192. See, e.g., Schooner & Greenspahn, *supra* note 33, at 13 ("Using outside contractors for surge capacity offers the government the ability to supplement limited governmental resources far more quickly, efficiently, and effectively than the existing federal personnel or acquisition regimes permit.").

193. *Id.* at 10.

194. See DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* 180 (2011) (noting the increased use of contractors because the civil service laws made the hiring process too slow); P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 529 (1958) ("[I]ncreasing red tape, greater procedural controls, more restrictive dismissal procedures, and more review and appeal boards—all in the name of justice, security, and fair play for civil employees, [are] all wreaking havoc with flexibility, administrative discretion, decentralization, and, ultimately, the individual again.").

195. See Schooner & Greenspahn, *supra* note 33, at 10 ("While the government can employ similar tools [as private companies], their effect—or the degree to which these tools can influence behavior—is at least perceived as far less dramatic, given a heavily constrained promotion and bonus regime and an impenetrable *de facto* tenure system."); see also Howard Risher, *Pay For Performance: The Key to Making it Work*, 31 PUB. PERS. MGMT. 317, 318 (2002) (finding that when performance compensation was tried under the Civil Service Reform Act of 1978 and then under the Performance Management and Recognition Act starting in 1984, the experience was so bad that the laws were allowed to sunset and the idea of pay for performance was all but forgotten).

196. See Peter Baker & Jackie Calmes, *Obama Declares Two-Year Freeze on Federal Pay*, N.Y. TIMES, Nov. 30, 2010, at A1.

197. O'Harrow, *supra* note 180; see also PRIEST & ARKIN, *supra* note 194, at 180-81 (noting that the idea

Proponents of insourcing also have to contend with the fact that the federal civil service is in dire need of repair. As the National Commission on Public Service explains:

There are too many decision makers, too much central clearance, too many bases to touch, and too many overseers with conflicting agendas. Leadership responsibilities often fall into the awkward gap between inexperienced political appointees and unsupported career managers. . . . Policy change has become so difficult that federal employees themselves often come to share the cynicism about government that afflicts many of our citizens. [As a result] *too many of the most talented leave the public service too early; too many of the least talented stay too long.*<sup>198</sup>

It does not help that presidents, in defense of their aggregation of power, routinely bash the civil service. Ronald Reagan and George W. Bush used this rhetoric most aggressively, but Democrats can play this game as well.<sup>199</sup> To be sure, the poor performance of the civil service has many causes, including low pay and bad working conditions.<sup>200</sup>

Still, there are strong arguments in favor of insourcing:

A government manager operating in a personal services environment is able to circumvent not only the civil services rules, but basic employment law as well. It is like having your cake and eating it too. The manager can direct the personnel on a day-to-day basis without having to deal with the bureaucratic and legal challenges of hiring, compensating, disciplining, transferring, promoting, or terminating civil servants. While this may result in accomplishing work more efficiently, is it an appropriate employment model for government? . . . *If the government needs employees, it should hire them.* If the current personnel system and the approach to funding agencies do not allow this than they should be changed.<sup>201</sup>

Besides offering an illusion that the federal government has gotten smaller, personal service contracts significantly benefit contractors and please antiunion politicians and their supporters.<sup>202</sup> Pure politics should not be the reason why the government contracts out.

But, given the current political climate, hiring more federal civil servants seems like an untenable policy. The recent attacks on public-employee unions across the

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that contractors would be less expensive has been thoroughly repudiated because a 2008 study published by the Director of National Intelligence found that contractors made up twenty-nine percent of the workforce in intelligence agencies, but costs the equivalent of forty-nine percent of their personnel budgets).

198. NAT'L COMM'N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY I (2003) (emphasis added).

199. See RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY AND THE ENVIRONMENT 126 (2010).

200. *Id.* at 216–18; see DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 141–42 (2008) (“[T]he best workers will choose the private sector over government work because the private sector is more likely to reward them for their performance.”).

201. Marcinko, *supra* note 65, at 55–56 (emphasis added).

202. *Id.* at 55.

country<sup>203</sup> and the significant obstacles to reforming civil service pay to make it performance based<sup>204</sup> are reason enough to think that a push for insourcing would be dead on arrival.<sup>205</sup>

### 1. Better Enforcement of the Prohibition

If the personal services prohibition is kept, there would need to be a renewed enforcement effort. That would mean that IGs would have to audit more contracts; and if agencies were found to be using personal service contracts, there would have to be real penalties. This is what is supposed to be happening now, but it is obviously not working.

Whether IGs will actually be able to stop the operation of personal service contracts is questionable. It is less than clear though whether IGs can effectively promote executive accountability and stop the use of personal service contracts.<sup>206</sup>

There are also difficulties in terminating existing personal service contracts. Even if an IG wants an agency to cancel a contract, government agencies are still likely to continue the contractual relationship because the alternative—starting the process over or insourcing the responsibilities—is prohibitively expensive.<sup>207</sup>

203. For differing perspectives on the merits of public sector unions, see *Wisconsin's Blow to Union Power*, N.Y. TIMES (Feb. 18, 2011), [www.nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees](http://www.nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees).

204. Patricia Wallace Ingraham, *Building Bridges over Troubled Waters: Merit as a Guide*, 66 PUB. ADMIN. REV. 486, 493-94 (2006) (finding that merit is not cultivated in the present civil service system, and that reforms focused on merit should be a fundamental objective); see, e.g., *Is DHS Too Dependent on Contractors to Do the Government's Work?: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 110th Cong. 4 (2007) (statement of Steven L. Schooner, Co-Director Gov't Procurement Law Program, Geo. Wash. Law Sch.) ("While we continue to witness efforts to reform the civil service system and inject more potent performance incentives, history reminds us that this is a daunting task.").

205. Professor Michaels notes in his most recent draft article that insourcing is less likely to happen the further you get away from when the services were outsourced; this is because the "short-term fiscal costs might seem too great to bear—especially for legislators and chief executives subject to frequent and competitive electoral challenges." Jon D. Michaels, *Privatization's Plateau* 3 (Jan. 8, 2012) (unpublished manuscript on file with author). There is also the perception that federal government workers are overpaid, which likely reduces the political will to create more federal jobs. See, e.g., Andrew Biggs & Jason Richwine, *Yes, They're Overpaid: The Truth about Federal Workers' Compensation*, WKLY. STANDARD (Feb. 14, 2011), [www.weeklystandard.com/articles/yes-they-re-overpaid\\_541409.html?nopager=1](http://www.weeklystandard.com/articles/yes-they-re-overpaid_541409.html?nopager=1).

206. The leading study on IGs concludes: "[T]he Inspectors General have been more or less effective at what they do, but what they do has not been effective. That is, they do a relatively good job of compliance monitoring, but compliance monitoring alone has not been that effective at increasing governmental accountability." William S. Fields, *The Enigma of Bureaucratic Accountability*, 43 CATH. U. L. REV. 505, 516-17 (1994) (reviewing PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993)).

207. Michaels, *Privatization's Pretensions*, *supra* note 6, at 719, 770 n.219; Super, *supra* note 6, at 414-21 (describing the difficulties of replacing contractors). This is true even though the government has wide latitude to unilaterally terminate contracts for their convenience. FRANK M. ALSTON ET AL, *CONTRACTING WITH THE FEDERAL GOVERNMENT* 375 (2d ed. 1988). Termination for convenience clauses provide government contracting officers with the right to terminate contracts when it is in the government's best interest. See 48 C.F.R. § 49.103 (2011). The regulations implementing this power contain no limits on when this power may be exercised. 48 C.F.R. pt. 49 & 52.249-1 to 7 (2011).



### *B. The Best Option: Abolish the Prohibition then Regulate*

The strongest argument for abolishing the prohibition is that government managers will be able to more efficiently supervise their service contractors. Without the prohibition, the government would not have to go through a middle man to supervise a contractor employee. If the government could supervise the contractor employees directly, this would save money.

Eliminating the personal services prohibition would also allow federal agencies and Congress to better regulate personal service contractors. Currently, no regulation can be enacted because the government cannot regulate conduct that is already illegal.<sup>208</sup> A ban on personal service contractors has constrained lawmakers from regulating personal service contractors.

Moreover, abolishing the prohibition would not eliminate the *legal* distinction between federal government employees and service contractors. Civil service employees would still need to be formally appointed and hired, and they would keep their extensive job protections.<sup>209</sup>

One commentator is quite skeptical about abolishing the personal services prohibition:

If personal services are legalized, it will be even easier to circumvent the protections our civil servants currently enjoy. It makes little sense to implement a series of employment safeguards while simultaneously implementing a way to circumvent them. Also, *the entire framework of our compliance system, as it relates to personal service contracts, will need to be revised if the prohibition is repealed.* Additional restrictions must be developed for the contractor employees working in a personal services

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208. Swan, *supra* note 33, at 690 & fn.143.

209. Professor Light found that “[i]f you want to fire an employee, you’re taking on a task that is very intense and difficult, and biased in favor of protecting employees, and it can take a year or more to complete.” Angie Drobnic Holan, *Firing Federal Workers is Difficult*, POLITIFACT (Sept. 5, 2007, 5:52 PM), [www.politifact.com/truth-o-meter/article/2007/sep/05/mcain-federal/](http://www.politifact.com/truth-o-meter/article/2007/sep/05/mcain-federal/); see also STEVEN KELMAN, UNLEASHING CHANGE: A STUDY OF ORGANIZATIONAL RENEWAL IN GOVERNMENT 28 (2005) (“Dismissing or reassigning recalcitrant employees is considerable more difficult in government than in most business firms.”); Freeman, *Extending Public Law Norms*, *supra* note 6, at 1297; Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 945 (1976) (finding that civil servants basically have life tenure).

A civil service job is a form of “new” property that cannot be taken away without due process. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539-41 (1985) (holding that nonprobationary civil servants have a property right to continued employment, and such employment could not be denied to employees unless they were given an opportunity to hear and respond to the charges against them prior to being deprived of continued employment); *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976); *Service v. Dulles*, 354 U.S. 363, 382-89 (1957).

Thus, a federal employee is entitled to a *Loudermill* hearing prior to firing her. The purpose of the pretermination hearing is to provide an “initial check” against erroneous discharge. *Loudermill*, 470 U.S. at 545. After an employee of most Executive Branch agencies is fired, the employee can request that an administrative judge of the U.S. Merit Systems Protection Board conduct a hearing into the matter. The agency will have to prove that the action was warranted, and the employee will have the opportunity to present evidence to the contrary. See CHARLES W. HEMINGWAY, AM. BAR ASS’N, THE U.S. MERIT SYSTEMS PROTECTION BOARD: OVERVIEW OF EMP. RIGHTS AND MSPB PROCEDURE (1999), available at [www.bna.com/bnabooks/ababna/annual/99/annual151.pdf](http://www.bna.com/bnabooks/ababna/annual/99/annual151.pdf).

environment and the responsibility for compliance must shift, at least in part, from the contractor to the government managers.<sup>210</sup>

In any event, abolishing the prohibition would take a tremendous amount of effort to create a new compliance system for service contracts. Also, new personal service regulations would further complicate the already too complicated FAR. But abolishing the prohibition seems to be the direction we are heading in.<sup>211</sup> In these next sections, I propose regulations that should be enacted when the prohibition is abolished.

### 1. Contractor Ethics

Government employees are subject to extensive ethics laws.<sup>212</sup> Contractors have no such obligations. This encourages some federal agencies to rely more heavily on service contractors because agencies do not have to enforce the ethics laws on contractors.<sup>213</sup> Given the blurring of the distinction between contractors and federal employees, it no longer makes sense for ethics laws to differentiate between service contractors and government employees.

Congress should make service contractors subject to some ethics laws so that contractors are not allowed to put their interests above those of the government. There is already one type of government employee—special government employees (SGE)<sup>214</sup>—that Congress could use to help model ethics laws for service contractors. SGEs are short-term employees<sup>215</sup> that are often recruited because they provide outside expertise or perspectives that might be unavailable among an agency's regular employees.<sup>216</sup> Most importantly, SGE's are considered government employees for the purposes of a specific set of conflict of interest and ethics rules. SGEs are subject to less restrictive conflict of interest requirements and ethics rules than regular government employees, but are subject to more restrictive requirements than nonemployees like contractors.<sup>217</sup> Congress should model their reform off of SGE ethics laws. Service contractors should be subject to some ethics regulations like SGEs, but probably not all of the same ethics laws as actual government employees.<sup>218</sup>

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210. Marcinko, *supra* note 65, at 56 (emphasis added).

211. *Id.* at 57.

212. See 18 U.S.C. §§ 201-219 (2006).

213. See generally Swan, *supra* note 33, at 697-701 (arguing that service contractors should be free from personal conflicts of interest).

214. For the statutory framework, see 18 U.S.C. 202(a) (2006); 5 C.F.R. § 2641.101 (6) (2011).

215. *United States v. Del Toro*, 513 F.2d 656, 662 (2d Cir. 1975), *cert. denied* 423 U.S. 826 (1975).

216. *Ethics Training for Special Government Employees*, U.S. OFFICE OF GOV. ETHICS, [http://education.oge.gov/training/module\\_files/ogesge\\_wbt\\_07/14.html](http://education.oge.gov/training/module_files/ogesge_wbt_07/14.html) (last visited May 9, 2011) (explaining that SGEs are generally used as advisory committee members, individual experts, or consultants).

217. *Id.*

218. Agencies are already starting to implement contractor ethics reform. In a final rule, contractors and subcontractors who are performing acquisition functions are now required to identify and prevent personal conflicts of interest of their employees and prohibit employees who have access to non-public information from using such information for personal enrichment. See Federal Acquisition Regulation; Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017 (Nov. 2, 2011) (to be codified at 48 C.F.R. pt. 1, 3, 12, & 52). Some scholars would go even further

## 2. Eliminating the Employment Law Status Differential Between Personal Service Contractors and Government Employees

Congress should also consider eliminating the legal-status differential<sup>219</sup> between service contractors and government employees in relation to employment laws. To implement this proposal, Congress would have to force agencies to label particular contract employees as personal or nonpersonal service contractors. If a particular contract employee was labeled a personal service contractor by a government official, she would be allowed to sue the government for discrimination violations more easily (she would not have to prove that the government was her joint employer), or be able to seek non-legal remedies like mediation.

The benefit of this proposal is that it puts everyone on fair notice as to what their legal rights and obligations are. Moreover, this change would protect contractor employees from discrimination. In return, the government would be able to intimately control the contractor employees' work.

Of course, for this regulation to be successfully implemented, the contractor employee would have to be designated as a personal service contractor by the government. Whether the government would be motivated to properly designate contractor employees is another question.

## 3. Stopping Contractors From Performing Inherently Governmental Functions

One of the primary reasons for the prohibition in the first place was that the government was concerned that service contractors would perform inherently governmental functions. As early as 1926, the Comptroller General overturned a Navy contract for the sampling of tea by personal service contractors; the government claimed that this work should be done by government workers, not contractors.<sup>220</sup> Basically the Comptroller General argued that some services should not be contracted out because they are inherently governmental.

It seems the Comptroller got it right. There should not be a complete prohibition on personal service contracts. Rather, the prohibition should be narrowed to only those personal service contracts for which inherently governmental functions are performed. Whether the contractors perform inherently governmental functions should be the primary concern. Instead of having a rigid prohibition, Congress and the Executive should decide which jobs and functions are

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and subject all personal service contractors (once the prohibition is abolished) to *all* government ethics laws. See Swan, *supra* note 33, at 697-701.

219. Legal-status differentials exist when contractors are treated differently than government actors even though they do the same tasks. See, e.g., John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C. § 802(a)(1) (2006)) (eliminating some the differentials between military contractors and soldiers); Military Extraterritorial Jurisdiction Act of 2000 Pub. L. No. 106-523, § 3261(a), 114 Stat. 2488, 2489 (codified at 18 U.S.C. §§ 3261-67 (2006)) (extending criminal jurisdiction to contractors working for the DOD in overseas military engagements).

220. See Comp. Gen. A-13436, 6 Comp. Gen. 140, at 142; Comp. Gen. A-13436, 7 Comp. Gen. 374, at 379-80 (1927); see also Robert Erwin Korroch, *Rethinking Government Contracts for Personal Services* 11-13 (Sept. 30, 1997) (unpublished LLM thesis, George Washington University Law School), available at [www.pubklaw.com/papers/korrochthesis.pdf](http://www.pubklaw.com/papers/korrochthesis.pdf).

inherently governmental. This will allow the government to draw more coherent lines on what jobs should be contracted out.

Further, the prohibition is stopping the government from holding contractors accountable. A recent GAO report acknowledged that there is an “inherent tension between the government’s responsibility to refrain from exercising relatively continuous supervision and control over contractor employees... and the government’s responsibility to ensure enhanced oversight when contracting for functions that closely support inherently governmental functions.”<sup>221</sup> If the prohibition was lifted, the government could better supervise contractors who are performing sensitive functions.

These next subsections will examine the law on inherently governmental functions, and Obama’s Policy Letter on what functions should not be contracted out.

#### a. Current Law

Longstanding government regulations direct federal agencies to contract out where (1) outsourcing does not lead to the delegation of inherently governmental responsibilities to contractors, and (2) it is efficient to do so.<sup>222</sup> Agencies are instructed to make an inventory of their responsibilities, distinguishing inherently governmental activities from those that are commercial in nature. Activities designated as inherently governmental cannot be contracted out, even if it would be more efficient.<sup>223</sup>

An “inherently governmental function means a function that is so intimately related to the public interest as to require performance by Federal Governmental employees.”<sup>224</sup> Besides inherently governmental functions, agencies must give “special consideration” to using government personnel in performing functions closely associated with the performance of inherently governmental functions.<sup>225</sup>

221. GAO-08-360, DEF. CONTRACTING, *supra* note 107, at 17 n.20. The GAO report specifically cited FAR 37.114(b) as evidence of this greater responsibility. *See id.*; FAR 37.114(b) (2010) (“A greater scrutiny and an appropriate enhanced degree of management oversight is exercised when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions.”).

222. *See* 48 C.F.R. §§ 14-15 (2011); OFF. OF BUDGET AND MGMT., CIRCULAR A-76 (REVISED), PERFORMANCE OF COM. ACTIVITIES 1 (May 29, 2003), *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/about\\_omb/a76\\_inc\\_tech\\_correction.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/about_omb/a76_inc_tech_correction.pdf) [hereinafter OMB A-76].

223. *See* Federal Activities Inventory Reform Act of 1998 (FAIR Act), Pub. L. No. 105-270, § 2(d), 112 Stat. 2382, 2382 (1998) (codified at 31 U.S.C. § 501 (2006)); OMB A-76, *supra* note 222, at A (1-4).

224. FAIR Act § 5(2)(A); *see also* OMB A-76, *supra* note 222, at A-2 (“These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.”).

Examples of inherently governmental functions include: (1) binding the U.S. to take some action; (2) determining, protecting, and advancing economic, political, and territorial, property interests by military or diplomatic action, civil or criminal judicial proceedings, contract management; (3) significantly affecting the liberty or property of private persons; and (4) exerting ultimate control over U.S. property. *See* OMB A-76, *supra* note 222, at A-2.

225. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 324(a)(1), 122 Stat. 60 (codified at 10 U.S.C. § 2463(b)(1)(B)) (defense agencies); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 736(b)(2)(A)(ii), 123 Stat. 690 (civilian agencies); *see also* L. ELAINE HALCHIN ET AL., CONG. RESEARCH SERV. INHERENTLY GOVERNMENTAL FUNCTIONS AND OTHER WORK RESERVED FOR

According to the FAR, functions that are not themselves inherently governmental nonetheless can approach being inherently governmental because of “the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contract performance.”<sup>226</sup>

#### b. Obama’s Policy Letter on the Proper Use of Contractors

The Obama Administration has taken steps to reign in the explosion of service contracts. The Administration recently released its new government-wide definition of inherently governmental functions in a Policy Letter, directing federal agencies to tighten their use of contractors for “critical functions” and functions “closely associated” with the core work of those agencies.<sup>227</sup> This policy continues the Obama administration’s efforts to swing the pendulum away from contracting for government functions to the direct performance of government functions by federal employees.<sup>228</sup>

Congress tasked the Obama Administration with (1) reviewing existing definitions of “inherently governmental function” to determine whether such definitions are “sufficiently focused” to ensure that only government personnel perform inherently governmental functions; (2) developing criteria for identifying “critical functions” that should be performed by government personnel; and (3) developing criteria for identifying positions that government personnel should perform in order to ensure that agencies have capacity to perform their missions and oversee contractors’ work.<sup>229</sup> The goal of the Obama Administration in this proposal was to implement these goals, and ensure that contractors are accountable to the President.<sup>230</sup>

There are at least five reasons why this Policy Letter helps protect against recklessly contracting out important functions. First, in order to create a single consistent definition of inherently governmental function, the Policy Letter adopts the definition in the FAIR Act, as mentioned above,<sup>231</sup> as well as giving twenty-four helpful examples of inherently governmental activities such as awarding and administering contracts, determining budget priorities and hiring or firing federal

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PERFORMANCE BY FED. GOV. EMPS.: THE OBAMA ADMINISTRATION’S PROPOSED POLICY LETTER, at Summary (2010), available at [inthepublicinterest.org/sites/default/files/CRS%202011%20Inherently%20Governmental%20.pdf](http://inthepublicinterest.org/sites/default/files/CRS%202011%20Inherently%20Governmental%20.pdf).

226. FAR § 7.503(d) (2011). The FAR lists 19 functions that “approach being” inherently governmental, *id.* at § 7.503(c); *see also* Gulf Group, Inc., v. United States, 61 Fed. Cl. 338, 341, n.7 (2004) (treating items on the FAR’s list of “functions approaching inherently governmental” as capable of being contracted out by agencies), and nineteen functions that generally can be contracted out. *Id.* § 7.503(d). These lists are not exhaustive.

227. DANIEL I. GORDON, POL’Y LETTER 11–01: TO THE HEADS OF CIVILIAN EXEC. DEP’T’S AND AGENCIES: PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS, 76 Fed. Reg. 56227 (Sept. 12, 2011) [hereinafter POL’Y LETTER 11–01], available at [www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf).

228. *OFPP Issues Proposed New Definition of “Inherently Governmental,”* MCKENNA LONG & ALDRIDGE LLP (Apr. 2, 2010), [www.mckennalong.com/news-advisories-2283.html](http://www.mckennalong.com/news-advisories-2283.html).

229. *See* Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 321(a)(1)-(4), 122 Stat. 4411 (2008).

230. POL’Y LETTER 11–01, *supra* note 226, at 56236.

231. *Id.*

employees.<sup>232</sup> Second, the Policy Letter requires that agencies take certain preventative and corrective steps in the pre-award and post-award contract phases to ensure that they do not contract out inherent government functions, or excessively contract out closely associated and critical functions.<sup>233</sup>

Third, the new policy also requires federal agencies, to the maximum extent practicable, to minimize reliance on contractors performing functions closely associated with inherently governmental functions—defined as those functions where “the nature of the function and the risk that performance may impinge on federal officials’ performance of an inherently governmental function.”<sup>234</sup> Agencies are required to monitor these closely associated functions so that contractor’s performance of them does not expand to include performance of inherently governmental functions or otherwise interfere with the government’s ability to carry out inherent functions.<sup>235</sup> If agencies find that contractors are performing inherently governmental functions, agencies need to fix the situation quickly. Moreover, the policy directs agencies to give special consideration to having these functions performed by federal employees, mirroring both the Obama administration’s policy preference for government employees over contractors in this area, and the language of the 2009 Omnibus Appropriations Act,<sup>236</sup> which directs the insourcing of these functions.<sup>237</sup>

Fourth, the Policy Letter also regulates critical functions, defined as those functions that are “necessary to the agency being able to effectively perform and maintain control of its mission and operations.”<sup>238</sup> The Policy Letter requires that agencies (1) dedicate a “sufficient number of employees to the performance of critical functions so that federal employees may maintain control of agencies’ missions and operations”<sup>239</sup> and (2) make sure the contract is cost effective.<sup>240</sup> Besides those limitation, the Policy Letter otherwise allows agencies to contract out critical functions.<sup>241</sup>

Finally, the new policy requires agencies to conduct Strategic Human Capital Planning to determine what is necessary to develop and maintain their in-house critical functions at agencies, provide for continuity of operations, retain institutional knowledge, and ensure sufficient personnel are available to manage and control contractors.<sup>242</sup>

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232. *Id.* at 56240-41. The Policy Letter also creates a number of tests to help agencies identify inherent governmental functions. *Id.* at 56237-38.

233. *Id.* at 56238-39.

234. *Id.* at 56238.

235. *Id.* at 56236.

236. Omnibus Appropriations Act, 123 Stat. at 524.

237. *OFPP Issues Proposed New Definition of “Inherently Governmental,” supra* note 228.

238. POL’Y LETTER 11-01, *supra* note 226, at 56236.

239. *Id.*

240. *Id.* at 56238.

241. *Id.*; see also HALCHIN, *supra* note 225, at 7 (the agency can contract out critical functions provided that the agency determines in writing, prior to issuing a solicitation, “that it (1) has sufficient internal capability to control its missions and operations and (2) the cost-savings of private-sector performance ‘clearly outweigh’ any considerations relating to performance or risk that favor federal employee performance of the functions.”).

242. POL’Y LETTER 11-01, *supra* note 226, at 56237.

This Policy Letter shows that the Obama Administration is not hostile towards contractors; rather, Obama is just concerned about the use of contractors for sensitive functions.<sup>243</sup> This Letter has been praised by contractors and unions alike because it has provided helpful guidance on what functions should and should not be contracted out.<sup>244</sup>

### *C. Proposal to Amend the FAR's Personal Services Contract Prohibition*

Based on this Policy Letter, it seems like the absolute ban on inherent governmental functions performed by contractors and the preference that important functions be insourced, should be the primary focus when regulating service contractors. Examples of contractors performing inherently governmental functions and closely associated functions are widespread,<sup>245</sup> partially because there has never been a government wide definition of inherent governmental functions before,<sup>246</sup> nor sufficient monitoring to stop outsourcing these functions.<sup>247</sup>

The policy reasons against contracting out inherently governmental functions and closely related functions are more persuasive than the policy reasons for not using personal service contractors. Inherent functions should not be outsourced

243. *Id.* at 56236 ("Nothing in this guidance is intended to discourage the appropriate use of contractors.").

244. *Proposed OFPP Policy Letter Would Define "Inherently Governmental," Provide Guidance*, 93 FED. CONT. REP. 270 (Apr. 6, 2010) (reporting that both industry groups and unions representing government employees had positive reactions to the proposed policy letter); Robert Brodsky, *Administration Puts its Stamp on 'Inherently Governmental,'* GOV. EXEC. (Mar. 31, 2010), [www.govexec.com/dailyfed/0310/033110rb1.htm](http://www.govexec.com/dailyfed/0310/033110rb1.htm) (same for industry groups).

245. For example, in every intelligence and counterterrorism agency, contractors are performing inherently governmental functions, Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST. (July 20, 2010), [available at projects.washingtonpost.com/top-secret-america/articles/national-security-inc/](http://projects.washingtonpost.com/top-secret-america/articles/national-security-inc/). In a recent the GAO report, the U.S. Army identified 2,357 contractors doing inherently governmental functions, while 45,934 contractors are doing Army jobs that are closely associated with inherently governmental functions. GOV. ACCT. OFF., GAO-11-192, DEFENSE ACQUISITIONS: FURTHER ACTION NEEDED TO BETTER IMPLEMENT REQUIREMENTS FOR CONDUCTING INVENTORY OF SERV. CONTRACT ACTIVITIES 19 (2011). The GAO found that 1,877 contractors are performing unauthorized personal services for the Army as well. *Id.* Other military services as well as civilian agencies are probably employing thousands of contractors with similar conflicts. Pratap Chatterjee, *Insourcing "Inherently Governmental" Work Will Save Money*, AM. PROGRESS (Jan. 25, 2011), [www.americanprogress.org/issues/2011/01/army\\_insourcing.html](http://www.americanprogress.org/issues/2011/01/army_insourcing.html).

246. *Cf.* Guttman, *Inherently Governmental Functions*, *supra* note 40, at 54 (arguing that the Supreme Court's two centuries of jurisprudence on inherently governmental functions has failed to explicate the concept); *id.* at 65 ("[T]he concept of inherently governmental function has long been a placeholder for a host of basic and unanswered questions raised by the legacy of mid-twentieth-century government reform."); Schooner, *supra* note 33, at 556 n.22 (2005) (describing infighting between government officials over outsourcing possible inherently governmental functions).

247. *Cf.* Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT, *supra* note 8, at 4 (finding that there is insufficient oversight of contractors because agency personnel are insufficiently resourced and badly trained for contract management); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1016 (2005) (finding that current governmental practices allow the contracting out of inherent government functions because there is an insufficient amount of monitoring); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 464-65 (2006) (arguing for greater accountability in determining which activities are inherently governmental by encouraging exchanges between agencies and outside groups; then the process for commenting on agency inherently-governmental-function decisions could be regularized by employing procedures associated with notice and comment rulemaking).

because we demand that our government be loyal to protecting the public interest, not private interests. There are also public values we want the government to maintain, which will be eroded if certain government functions are contracted out to businesses. It seems that if the government strictly enforced the prohibition on contractors performing inherent functions and Obama's Policy Letter in general, this would provide more than adequate protection against contractor abuses.<sup>248</sup>

As mentioned above, there are three primary reasons why the personal service prohibition is no longer relevant. First, the original rationale for banning personal service contracts—that contractor employees could claim they were *actual* employees and claim government benefits—has been extinguished by the courts. Second, the rationale that service contracts let the government evade civil service laws is no longer persuasive. Personal service contractors are so prevalent today that it does not make sense to “ban” the practice, when the ban is so often circumvented. Third, the threat that there will be an improper delegation of an inherently governmental function is no longer an issue because the government—as seen in Obama's Policy Letter—is taking pains to make sure that inherent functions and closely related functions are no longer contracted out. Resources should be spent following Obama's policy on both inherently governmental functions and closely related functions, not on distinguishing between personal and nonpersonal service contractors.<sup>249</sup>

Accordingly, *the current FAR 37.104 should be modified to allow personal services contracts in all cases except for contracts that perform inherently government functions.*<sup>250</sup> Paragraph “a.” of FAR 37.104 should be amended so that all services can be contracted out subject to a determination by the responsible government party that these services are commercial in nature and not inherently governmental. The rest of this section can be deleted.

This change should be implemented because it reflects the reality that service contracts are already used to run many government programs. Given the current budget crisis then, barriers to service contract use should be struck down so that government officials can utilize service contractors when they will reduce costs.

The Obama Administration is right: clamping down on contracting out of inherently government functions is the most important inquiry.<sup>251</sup> It matters more

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248. See Korroch, *supra* note 213, at 79.

249. The Policy Letter does not take an official stance on personal contractors. It only states that agencies should follow the current FAR by making sure that the agencies do not award personal service contractors. Or if personal service contracts are being performed by the agency, the agency is required to take “prompt corrective action.” POL’Y LETTER 11–01, *supra* note 227, at 562339. As argued throughout the Article, the personal prohibition is a misguided policy. For instance, the Letter even calls for contractor employees and government employees to be physically separated at the worksite, and that contractors should be working offsite. See Brodsky, *supra* note 244. But this is not good policy because it reduces the ability of government managers to effectively supervise contract employees.

250. See PERSONAL SERVICES COMM. REP., *supra* note 132. For a similar proposal, see Ritenburg, *supra* note 74 (“[The FAR] should be revised to “expressly recognize that a requirement for personal performance of an individual or individuals does not necessarily result in an employment relationship.”).

251. Cf. BARACK OBAMA, THE WHITE HOUSE MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: GOVERNMENT CONTRACTING (Mar. 4, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government) (finding that “the 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 . . .



what *type* of function is being contracted out, not whether the government is acting like a supervisor over a contractor employee. Although it is difficult to define what inherent governmental functions actually are, lines eventually will be drawn that satisfy the need to protect against illegal delegations and the need to utilize contractors for efficiency gains.

Proponents of privatization will agree with my proposal. E.S. Savas finds that “false alarms are raised about privatizing services that are said to be ‘inherently governmental’: the responsibility for providing the service can be retained by government, but the government does not have to continue producing it.”<sup>252</sup> But opponents will argue that without banning pure personal service contracts, almost all governmental functions can be privatized. Besides “a handful of functions dealing with national security and criminal justice, it is not clear that there is a pure and inherently governmental function left today.”<sup>253</sup> To opponents, then, overturning the personal service prohibition might be the final nail in the coffin, thereby opening the floodgates in allowing contractors to do everything except run the White House.

### 1. Creating a Public Accountability Regime

Opponents do make a valid point: there is a possibility that removing the personal service prohibition will further make our government one of contractors, not of loyal civil servants. That is why there needs to be a public accountability regime set up to monitor and track contractors. But a blanket ban on personal service contractors is not the answer. The prohibition is now just a dead letter—the unfortunate product of bureaucratic inertia<sup>254</sup>—that is not steadily followed.

Although accountability is a vague concept, for our purposes it means that Congress and the Executive will be able to make the contractors answerable for their mistakes. More specifically, an accountability regime has six important factors:

[1] *who* is liable or accountable to [2] *whom*; [3] *what* they are liable to be called to account for; [4] *through what processes* accountability is to be assured; [5] *by what standards* the putatively accountable behavior is to be judged; and, [6] *what the potential effects* are of finding that those standards have been breached. These basic features, *who*, *to whom*, *about what*, *through what processes*, *by what standards*, and *with what effect*, describe . . . an ‘accountability’ regime.<sup>255</sup>

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the Federal Government must ensure that those functions that are inherently governmental in nature are performed by executive agencies and are not outsourced.”).

252. E.S. SAVAS, *supra* note 6, at 62.

253. PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT*, *supra* note 2 at 9-10 (1999).

254. See, e.g. STEVEN KELMAN, *UNLEASHING CHANGE: A STUDY OF ORGANIZATIONAL RENEWAL IN GOVERNMENT* 28 (2005) (“Behavior in government organizations is harder to change than in other organizations—and bureaucratic organization in government is particularly resistant to change.”).

255. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 115, 118 (Michael Dowdle ed., 2006).

These basic questions need to be answered when designing programs that personal service contractors will work on. Agencies need to design programs that can reap the benefits of contractors, but the programs need to be ones where contractors are answerable to government officials. Right now, the personal service prohibition gets in the way of effectively managing contractor employees.

In answering these six questions, it is important to realize that our political beliefs about outsourcing governmental functions and our normative commitments to accountability will affect the manner in which we want contractors to be held accountable to the government.<sup>256</sup> The trick, though, is to “design programs [for personal service contractors] that can be made accountable, not accountability regimes that support programs.”<sup>257</sup> In other words, we need to figure out what positions can and should be outsourced to personal service contractors, and which positions should never be outsourced.

This means that Congress and the President need to continue to work together to systematically classify what jobs or categories of jobs are inherently governmental, and therefore not subject to outsourcing. One example of classifying functions comes from President Clinton’s administration, when he classified air traffic controllers as inherently governmental.<sup>258</sup> (President George W. Bush then abolished this order.<sup>259</sup>) Thus, the political branches—based on their normative commitments of which jobs should be outsourced—are perfectly capable of defining what functions are inherently governmental. Further, since Obama’s Policy Letter could be modified at any time, Congress always has the option of codifying it, or amending it to Congress’s liking. The point is that the political branches should do a better job of specifically defining what functions can or cannot be contracted out in the first place. The question that should be answered is why, or under what circumstances, is it preferable to use personal service contractors?<sup>260</sup>

Democrats have introduced legislation that removes agency discretion to contract out inherently governmental functions, functions closely related to inherently governmental functions, and mission essential functions. These functions, according to this bill, should be performed by Federal employees.<sup>261</sup> This legislation seems to be a good start, but subsequent legislation should also abolish the prohibition.

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256. *Id.* at 155.

257. *Id.* at 156.

258. Executive Order 13180, 65 Fed. Reg. 77493 (Dec. 7, 2000) (designating the “provision of air traffic services” as an inherently governmental function).

259. Executive Order 13264, 67 Fed. Reg. 39243 (June 4, 2002) (removing this designation).

260. See John Donahue, Op-Ed., *Outsourcing the Wrong Jobs*, N.Y. TIMES (Apr. 4, 2011), <http://www.nytimes.com/roomfordebate/2011/04/03/is-privatization-a-bad-deal-for-cities-and-states/outsourcing-the-wrong-jobs> (“Tasks that are well-defined, easy to monitor and available from competitive suppliers . . . are prime candidates for privatization. Tasks that are complex and mutable, lack clear benchmarks or are immune from competition . . . should be kept in-house.”).

261. See Correction of Long-Standing Errors in Agencies’ Unsustainable Procurements Act of 2009, S. 924, 111th Cong. §5(a) (2009) (introduced by Senator Barbara A. Mikulski, D-MD); see also Letter from Senator Barbara A. Mikulski et al., to Peter Orszag, Director of the Office of Management and Budget (Mar. 18, 2010) available at [http://mikulski.senate.gov/\\_pdfs/Press/MikulskiLetterToOrszag.pdf](http://mikulski.senate.gov/_pdfs/Press/MikulskiLetterToOrszag.pdf) (“Specifically, we suggest that the new ‘inherently governmental’ definition include . . . [a]n expansion of the definition to cover all sensitive functions so that managers won’t need designations like ‘core,’ ‘critical,’ and ‘mission-essential’ to shield jobs they know are best performed by federal workers.”).

Opponents of this Article's proposal will argue that we will run into the same enforcement problem with the personal service prohibition. In this case though, they will argue, contracts would be written saying that they are *not* for inherently governmental functions, but the contract will actually be used for inherent functions.

My answer is that we need to build an accountability regime that can reign in potential abuses. Besides categorizing what jobs can be contracted out, there needs to be accountability over federal programs that are run by contractors. This means that administrative statutes should be amended to improve public oversight of privatized programs, there should be greater regulation and contractual controls on recipients of government funds, and participants in privatized government programs run by contractors should probably have private law remedies.<sup>262</sup> Further, public law norms should be imposed on personal service contractors that have highly discretionary duties of fundamental importance, and are received by vulnerable populations.<sup>263</sup>

Further, given the reluctance of the political branches to change, courts should have more of a role to play when government service contractors do harm. Traditionally, courts will hold private actors accountable if they are considered state actors that work on behalf of the government. The test of whether a contractor is a state actor is whether their activity "may be fairly treated as that of the State [i.e., a government] itself."<sup>264</sup> Thus, if a court finds that a private contractor is a state actor, this means that the contractor can be directly liable for constitutional violations. But, according to Professor Metzger, courts do not have to directly apply these constitutional limits to private actors to achieve constitutional accountability<sup>265</sup>:

[T]he crucial constitutional question is whether adequate accountability mechanisms exist by which to ensure that private exercises of government power comport with constitutional requirements. *If such mechanisms are lacking, the appropriate judicial response is not subjecting private entities to direct constitutional scrutiny, but instead requiring that the government create such mechanisms as the constitutionally-imposed price of delegating government power to private hands.* A central advantage of this approach

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262. See Metzger, *supra* note 12, at 1372. For proposals to reform administrative statutes and oversight, see Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1500-05 (2001). For proposals to expand conditions on funding, see MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 112-19, 142-50 (2002); Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1608-10 (2001); Jody Freeman, *Extending Public Law Norms*, *supra* note 6, at 1315-17. For arguments on the importance of private law remedies, see Jack M. Beermann, *Administrative-Law-Like Obligations on Privatized Entities*, 49 UCLA L. REV. 1717, 1721-24 (2002) (arguing that existing corporate law doctrines offer means of ensuring accountability); Freeman, *The Contracting State*, *supra* note 5 at 201-07 (2000) (discussing ways to use government contracts to enhance accountability in privatized governance); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 635-39 (2001) (emphasizing potential of a contractual third-party beneficiary approach to ensure accountability of privatized programs).

263. Freeman, *Extending Public Law Norms*, *supra* note 6, at 1343-48.

264. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (alteration to original) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

265. Metzger, *supra* note 12, at 1374.

is that it gives governments an incentive to adopt measures that protect against potential private abuses. . . . Equally important, avoiding direct constitutional scrutiny of private actors allows the government greater flexibility because the government can choose among a variety of accountability mechanisms in structuring instances of privatization to meet constitutional demands.<sup>266</sup>

Metzger's approach should be adopted by courts. Thus, if Congress does not set up an accountability regime, courts could impose accountability regimes themselves to guard against constitutional violations by private actors.

## 2. Mandatory Reform: Congressional Oversight of Personal Service Contracts

No matter what happens with the prohibition, there needs to be better monitoring of service contracts. If the prohibition is overturned, there definitely will need to be better monitoring. If the prohibition is kept, it still needs to be enforced, which also requires monitoring. Indeed, the federal contracting oversight regime is broken.<sup>267</sup>

There is a range of opportunities for Congress to monitor personal services contracts by executive agencies: formal review of service contracts where contracts are sent to Congress for scrutiny prior to their execution; informal meetings with agency officials to voice concerns about a particular contract; threats to withhold agency funding for the relevant programs unless the contracts are rewritten; public grandstanding to shame the agency into crafting a new deal; or gentle reminders to the agency that the legislators are keeping watch.<sup>268</sup>

This oversight should, in theory, provide more accountability over personal service contracts.<sup>269</sup> Congress can force agency heads to testify about why they are using personal service contracts, or using contractors for inherent governmental functions. The purpose of this oversight is to force agencies to change their practices, or be sanctioned. Ultimately, Congress has control over the funding, which it can cut off if an agency is recalcitrant.<sup>270</sup>

266. *Id.* (emphasis added); see also Robert S. Gilmour & Laura S. Jensen, *Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of "State Action,"* 58 PUB. ADMIN. REV. 247, 253-56 (1998) (arguing that there needs to be greater control systems over contractors, which could be done by following the author's four-part test for recognizing state action); Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 554 (2011) ("Constitution does not authorize private parties to exercise decisional authority over their peers. The interest in accountability presupposes that only publicly responsible entities affect the legal rights of private parties.").

267. Senator Russ Feingold, Statement for the Record, Federal Contracting Oversight and Reform Act of 2010, S. 3362-3363, 111th Cong. (2010), available at <http://ombwatch.org/files/budget/FeingoldStatement.pdf>.

268. Michaels, *supra* note 6, at 769-70; see also Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69-71 (2006); Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-67 (1984). Congressional inquiries can reach employment matters and the assignment of personnel too. JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 172 (6th ed. 2009).

269. But see Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT, *supra* note 8, at 1 ("Yet even when Congress does actively investigate wrongdoing, the hearings and follow-up measures tend to be reactive and superficial, offering relatively little by way of meaningful reform.").

270. MASHAW, *supra* note 268, at 168.

If the prohibition is abolished, one of the first oversight changes that Congress should enact is to require all agencies to give annual reports to Congress about their use of personal service contracts. This self-reporting would provide valuable information to our political leaders so they can make more informed decisions. This is what happens at the DOD. The DOD has wide latitude to enter into personal service contracts,<sup>271</sup> but it is required to submit an annual report to Congress on its use of personal services contracts.<sup>272</sup> This DOD model should be implemented throughout the government.

Despite some of the benefits of congressional oversight, many commentators claim that congressional oversight is neglected and ineffective.<sup>273</sup> Congress may be good at fire alarm oversight, where it oversees executive agencies in response to complaints.<sup>274</sup> But Congress is not good at centralized police-patrol oversight, where Congress “examines a sample of executive agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations.”<sup>275</sup> There are many reasons why Congress prefers putting out fires instead of looking for problems before they happen.<sup>276</sup> But the personal services contracting phenomenon is a fire by any estimate, and it should be sounding Congress’ alarms.

There is also the possibility that legislators will “hijack oversight of the contracts such that parochial interests prevail.”<sup>277</sup> A legislator might have a powerful contractor in her district who is a large donor; that Congressperson might be tempted then, to do everything she can in the oversight process to make sure this contractor can keep her contract, even if keeping the contractor is not in the public interest. It is well known that political parties tend to distort the oversight process.<sup>278</sup>

271. See 10 U.S.C. § 129b (2006). Moreover, 48 C.F.R. 206.001(b) of the Defense acquisition regulations states that personal service contracts are expressly authorized at the DOD by 10 U.S.C. § 1091 (2006).

272. 10 U.S.C. § 2330a (2006).

273. See, e.g., James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277, 281 (1975) (“Paradoxically, despite its importance, congressional oversight remains basically weak and ineffective”); *id.* at 288 (“[O]versight is a vital yet neglected congressional function.”).

274. McCubbins & Schwartz *supra* note 268, at 165-67; see also Bernard Rosen, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 87 (3d ed. 1998) (finding that unless the oversight activity reveals a scandalous situation with possibilities for favorable publicity for the legislator, the work is considered dull and potentially troublesome . . . .); U.S. SENATE COMM. ON GOV’T. OPERATIONS, 95<sup>TH</sup> CONG.: STUDY ON FED. REGULATION: CONG. OVERSIGHT OF REG. AGENCIES 66 (Comm. Print 1977) (“The oversight effort is usually initiated not in accordance with any preplanned set of priorities, but rather in response to a newspaper article, a complaint from a constituent or special interest group, or information from a disgruntled agency employee.”).

275. McCubbins & Schwartz, *supra* note 268, at 166. But see JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 95 (1990) (finding that Congress is well equipped to monitor executive branch activities through police-patrol oversight).

276. McCubbins & Schwartz, *supra* note 268, at 167-169. But see ABERBACH *supra* note 275, at 95 (finding the reactive style is more typical than other styles but not overwhelmingly so, and that the fire-alarm style, identified as typical of congressional committees, is not dominant).

277. Michaels, *supra* note 6, at 770.

278. The party in Congress that is loyal to the President is going to challenge the Executive less often. For instance, the Obama Administration faced relatively little congressional oversight in the first two years of office when Congress was controlled by Democrats. In this time, the House Oversight and Government Reform panel has held 197 oversight hearings. Gail Russell Chaddock, *With New Oversight Powers, House GOP Aims to Put Obama on Defensive*, CHRISTIAN SCI. MONITOR (Jan. 13, 2011),

In any event, the proper default rule for congressional oversight should be one where contractors can be easily monitored. Right now, there is no such system. That is why Congress should enact the Federal Contracting Oversight and Reform Act of 2010<sup>279</sup> or a similar bill. This Act will allow all members of Congress and the American people to view the database that compiles contractor performance and misconduct statistics; the Act also creates a mechanism for an annual report on contractor abuse, and it requires IGs of each federal agency involved in the procurement process to conduct an annual audit of the agencies' contracts.<sup>280</sup> Given the current importance of service contractors to the proper functioning of our government, increased contractor oversight is necessary.

### CONCLUSION

This Article has shown that the prohibition on personal service contracts is an inefficient constraint on the Executive and a dead letter. The prohibition should be abolished, but before that can be done, there needs to be a compliance system set up to monitor the use of personal service contractors. Congress and the White House need to continue the difficult task of systematically identifying what jobs are inherently governmental and critical to agencies.<sup>281</sup>

Eventually, the goal should be to figure out what jobs or functions should be contracted out and which should be provided in-house.<sup>282</sup> Given the ongoing struggle over the federal budget, scholars, legislators, and policymakers should continue to examine where service contractors would bring the most savings. Overall, following Obama's policy on the use of contractors is more helpful for stopping contractor abuses than following the prohibition.

The regulations that should be created to fix the service-contracting issues discussed in this Article should not be so burdensome that they undermine the efficiency reasons for outsourcing in the first place.<sup>283</sup> Even the Obama Administration finds that personal service contractors can bring efficiencies:

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[www.csmonitor.com/USA/Politics/2011/0113/With-new-oversight-powers-House-GOP-aims-to-put-Obama-on-defensive](http://www.csmonitor.com/USA/Politics/2011/0113/With-new-oversight-powers-House-GOP-aims-to-put-Obama-on-defensive). But after Republicans swept the 2010 midterm elections, the Republican chairman had planned for over 280 hearings in 2011 alone. *Id.* The reality is that legislatures probably identify more with their party rather than their institution (Congress). This means that the political party who does not have control over the presidency will be more likely to provoke an unwarranted fight over contractors, or the political party who has the presidency is more likely to let the executive evade the personal services prohibition. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314 (2006); Michaels, *Privatization's Pretensions*, *supra* note 6, at 770.

279. Federal Contracting Oversight and Reform Act of 2010, S. 3233, 111th Cong. (2010).

280. *Id.*

281. Government officials should make every attempt to continue to standardize across government what functions can permissibly be outsourced. The current the Policy Letter leaves room for agencies to classify functions inconsistently, since each individual agency will be making its own decisions about whether the function is inherently governmental, closely associated, or critical. See *OFPP Issues Final Policy Letter Defining "Inherently Governmental Functions,"* MCKENNA LONG & ALDRIDGE LLP (Sept. 20, 2011), [www.mckennalong.com/news-advisories-2605.html](http://www.mckennalong.com/news-advisories-2605.html).

282. Similarly, policymakers should always consider why, or under what circumstances, it could be preferable to use contractors. See HALCHIN, *supra* note 225, at 17.

283. See, e.g., Kelman, *supra* note 8, at 162-64 (viewing additional rules as undermining privatization's efficiency goals); Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1219 (2008) (citing proposed legal remedies to privatization as overly burdensome on unproblematic contracts).

“[c]ontractors can provide expertise, innovation, and *cost-effective* support to federal agencies for a wide range of services.”<sup>284</sup> Of course, when making these proposed reforms, policymakers should ensure that the public values of government are not circumvented.

What I propose will be an arduous task, but it is a necessary step to better provide federal agencies with cost-effective support. Given these economic times, Congress and the Executive should take note.

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284. POL’Y LETTER 11–01, *supra* note 227, at 56236 (emphasis added).