NOTE

Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors

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ABSTRACT

The last two decades have been marked by numerous political efforts to reduce the size of the federal workforce and declare the end of the "era of big government." These efforts left the federal government strapped for personnel and resources and have forced many agencies to increasingly rely on service contractors in general, and personal services contractors in particular, to fulfill their mandates. According to the Federal Acquisition Regulation, a personal services contract is a contract that creates an employer-employee relationship between the contractor and the federal government. Despite a longstanding—and, arguably, outdated—regulatory prohibition on the use of personal services contracts, many agencies are increasingly employing personal services contractors in positions traditionally reserved for government employees. The result is an absurd situation in which government ethics laws apply differently to service contractors and federal employees who work alongside each other, perform similar discretionary tasks, and have the same potential to engage in corrupt practices.

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This Note argues that the personal services prohibition represents an outdated and inefficient method of protecting the government's interest and should be abolished. Given the government's current reliance on service contractors, procurement officials should not be concerned with whether a contract creates an employment relationship with the government, but instead with whether contractor personnel are being properly managed and supervised. Congress should thus explicitly abolish the personal services prohibition and apply government ethics laws to personal services contractors. This would reduce the ability of personal services contractors, who often perform discretionary functions on the government's behalf, to act in their own personal interest to the detriment of the government's mission.

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INTRODUCTION

When Marine Lieutenant General Gary McKissock retired, he joined the Board of Directors of Sapient,[1] a federal contractor that has received almost $100 million in federal contracts, including $20 million in defense contracts.[2] Defense contractors often aggressively recruit generals and admirals because of their valuable knowledge, experience, and contacts within the Pentagon.[3] While working at Sapient, however, General McKissock also served as a consultant to the Marines, receiving twice the salary he originally earned while on active duty.[4] Yet despite the apparent conflict of interest, nothing in General McKissock's contract with the Marines prevented him from promoting Sapient's products, lobbying the very officers he was charged with advising, or using information he obtained as a consultant to help Sapient obtain future military contracts.[5]

And he was not alone. *USA Today* reported in 2009 that more than 158 retired generals and admirals were employed by the Department of Defense as "senior mentors" to run war games and offer advice to former military colleagues.[6] The report revealed that approximately eighty percent of these senior mentors had financial ties or held permanent positions with defense contractors like Northrup Grumman, Lockheed Martin, and BAE Systems.[7]

Normally, these connections would have violated government ethics rules, which protect the government's interest by prohibiting federal employees from working on matters in which they have a financial interest.[8] The Pentagon, however, employed its senior men-

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1 Tom Vanden Brook et al., *Military's 'Senior Mentors' Cashing In*, USA TODAY, Nov. 18, 2009, at 1A.

2 *Prime Award Spending Data*: *Sapient Corporation*, USASPENDING.GOV, http://www.usaspending.gov/explore?fromfiscal=yes&typeofview=detailsummary&fiscal_year=2011&contractorid=317312&fiscal_year=&tab=by+Prime+Awardee&fromfiscal=yes&carryfilters=on&Submit=Go (last visited Dec. 22, 2011). USAspending.gov is a website authorized by the Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186 (to be codified at 31 U.S.C. § 6101 note), that publicly tracks the level of government spending on contracts, grants, direct payments, and other spending types, and is administered by the Office of Management and Budget. *See id.*; *see also Learn About USAspending.gov.*, USASPENDING.GOV, http://usaspending.gov/learn?tab=About%20the%20Site (last visited Jan. 2, 2012).

3 Vanden Brook et al., *supra* note 1.

4 *Id.*; *see also* Tom Vanden Brook & Ken Dilanian, *Gates Sets Limits for Military 'Mentors*,' USA TODAY, Apr. 2–4, 2010, at 1A.

5 Vanden Brook et al., *supra* note 1.

6 *Id.*

7 *See* Vanden Brook et al., *supra* note 1; Tom Vanden Brook, *Shift Seen on Role of Military 'Mentors*,' USA TODAY, Feb. 3, 2010, at 1A.

8 18 U.S.C. § 208(a) (2006).

tors as independent contractors, which are exempt from almost all government ethics obligations.[9] Furthermore, senior mentors often performed similar functions as federal employees.[10] *USA Today* reported that "[n]othing is illegal about the arrangements. In fact, there are no Pentagon-wide rules specific to the various mentor programs, which differ from service to service."[11] Indeed, according to Brigadier General John R. Ranck, avoidance of government ethics rules was a major factor in the military's decision to hire mentors as independent contractors instead of as government employees.[12]

This example is, unfortunately, emblematic of the government's increasing reliance on independent contractors.[13] Although public and congressional scrutiny led the Defense Department to require all senior mentors to file public financial disclosures[14] and to eventually prohibit the hiring of senior mentors through contract,[15] independent contractors in general still remain exempt from government ethics standards.[16] These same contractors, however, are increasingly per-

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9 *See* KATHLEEN CLARK, ETHICS FOR AN OUTSOURCED GOVERNMENT 19–20 (rev. drft. 2011), *available at* http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=118.

10 Vanden Brook et al., *supra* note 1. Many senior mentors were hired under personal services contracts. *See id.* As explained below, personal services contracts are officially prohibited by the Federal Acquisition Regulation unless authorized by statute. *See* FAR 37.104(b) (2010). However, federal law allows agencies to use personal services contracts to hire temporary experts and consultants. *See* 5 U.S.C. § 3109(b) (2006).

11 Vanden Brook et al., *supra* note 1.

12 *Id.* ("Ranck, the general examining Air Force mentoring programs, says one reason that mentors are not hired as employees is so they can get higher pay and have freedom from the government ethics bureaucracy.").

13 *See, e.g.*, Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 155 (2000) ("[F]ederal, state, and local governments now routinely employ contracts with private providers to furnish services, deliver benefits, and perform significant (and sometimes traditionally 'public') functions."). For an interesting discussion of privatization on the international stage, see generally LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE (2011); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006).

14 *See* Mandy Smithberger & Nick Schwellenbach, *Pentagon's Senior Mentors to File Public Financial Disclosure Reports*, PROJECT ON GOV'T OVERSIGHT (Oct. 14, 2010), http://pogoblog.typepad.com/pogo/2010/10/pentagons-senior-mentors-to-file-public-financial-disclosure-reports.html.

15 Services of Senior Mentors, 75 Fed. Reg. 71,563, 71,564 (Nov. 24, 2010) (to be codified at 48 C.F.R. pt. 237). All senior mentors must now be hired as "'highly qualified experts,' a type of civil service position under 5 U.S.C. § 9903." *Id.*

16 *See* CLARK, *supra* note 9, at 23–29. This is also true with respect to the government's use of military contractors in Iraq and Afghanistan, and their failure to adhere to international human rights norms. *See generally* DICKINSON, *supra* note 13, at 144–88; Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355, 356–59 (2010) (arguing that private military contractors lack the institutional culture of the military, which instills respect for core public law values). For a

forming functions that are indistinguishable from those performed by their federal counterparts.[17] The result is an absurd situation in which government ethics laws apply differently to service contractors and federal employees who work alongside each other, perform similar discretionary tasks, and have the same potential to engage in corrupt practices.[18]

This situation not only implicates the scope of government ethics laws but also dramatically increases the risk that agencies will violate the longstanding—but outdated—prohibition on personal services contracts. According to the Federal Acquisition Regulation ("FAR"),[19] a personal services contract is a contract that creates an employer-employee relationship between the contractor and the federal government.[20] This prohibition thus discourages close government supervision of contractor personnel due to the risk that such supervision would create an unauthorized employment relationship.[21] Discouraging close supervision of contractor personnel is especially problematic when those same contractor personnel are not subject to government ethics laws and there is no check on their personal incentives.[22] Moreover, the practical need of many agencies to augment their dwindling workforces, the flexibility that contractors provide to these agencies in terms of hiring, firing, and compensation, and a general lack of enforcement have all but made the prohibition a dead letter.[23]

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broader discussion of the gaps in political, legal, and market oversight created by military privatization, see Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, *in* GOVERNMENT BY CONTRACT 110, 110–11, 118, 122–23 (Jody Freeman & Martha Minow eds., 2009).

17 *See* CLARK, *supra* note 9, at 20–22; Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 725 (2010).

18 *See* CLARK, *supra* note 9, at 20, 21, 23; Michaels, *supra* note 17, at 727.

19 Federal Acquisition Regulations System, 48 C.F.R. (2010). The FAR is the government-wide regulations that establish "uniform policies and procedures for acquisition by all executive agencies." FAR 1.101.

20 *See* FAR 2.101. FAR 2.101 defines a personal services contract as "a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees." *See id.* The FAR mandates that the government obtain all personal services by direct hire unless specifically authorized by Congress. *See* FAR 37.104(a).

21 *See* Steven L. Schooner & Collin D. Swan, *Suing the Government as a 'Joint Employer'—Evolving Pathologies of the Blended Workforce*, 52 GOV'T CONTRACTOR ¶ 341 (2010). According to the FAR, employment relationships are commonly created when "contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee." FAR 37.104(c)(1).

22 *See* CLARK, *supra* note 9, at 23.

23 *See* Schooner & Swan, *supra* note 21. Some scholars have even argued that this increased privatization affects the limits of the Due Process Clause. *See* Gillian E. Metzger, *Pri-*

In fact, this prohibition's usefulness is questionable in an era where political efforts to downsize government have forced many federal agencies to employ contractors in positions traditionally reserved for government employees.[24] A bipartisan effort to reduce the size of the federal workforce and declare the end of the "era of big government" left many federal agencies strapped for personnel and resources.[25] As a result, many agencies have had no choice but to turn to service contractors in general,[26] and personal services contractors in particular, to fulfill their mandates.[27]

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vate Delegations, Due Process, and the Duty to Supervise, *in* GOVERNMENT BY CONTRACT, *supra* note 16, at 291, 298–300; Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 964–65 (2005). Other scholars, however, have argued that privatization will not result in reduced transparency of government operations. *See* Jack M. Beermann, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 UCLA L. REV. 1717, 1734 (2002) ("The fact that privatization is likely to be politically controversial means that its effects are likely to be muted with close scrutiny of privatized entities and strong demands for increased regulation or deprivatization if serious failures occur."). For an interesting discussion of privatization in the intelligence-gathering context, see Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 904–05 (2008); Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1435–36 (2010).

24 *See* Schooner & Swan, *supra* note 21. For a more in-depth discussion of privatization, see Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1516–19 (2001); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–78 (2003); Metzger, *supra* note 23, at 291–92.

25 Schooner & Swan, *supra* note 21; *see* Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffuse 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.'"). For a broader discussion of outsourcing, see generally Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321 (2004); Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J. 311 (2004); Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263 (2004).

26 In 2009, the federal government spent $280 billion on professional services and awarded some 750,000 service contracts. 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. All dollar values in this report are in FY 2009 dollars. *See id.* at 3.

27 *See* Michaels, *supra* note 17, at 725 ("From humdrum clerical and sanitation services to military, policing, and even regulation-writing and enforcement responsibilities, private contractors are assuming ever larger and ever more sensitive roles in carrying out public functions, all ostensibly in the name of efficiency and good governance."); 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."); Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. CONT. MGMT., Summer 2008, at 9, 12.

The result is a phenomenon known as the "blended workforce," in which the practical distinctions between contractors and civil servants in the federal workplace have become opaque, if not completely unrecognizable.[28] For example, some federal courts have even held that contractors may be considered de facto federal employees for employment discrimination law purposes.[29] In essence, federal courts are acknowledging with increased frequency the very type of employment situation the personal services prohibition disallows.[30]

This Note argues that the personal services prohibition represents an outdated and inefficient method for protecting the government's interest and should be abolished. Given the government's current reliance on service contractors, procurement officials should not be concerned with whether a contract creates an employment relationship with the government, but instead with whether contractor personnel are being properly managed and supervised. Congress should thus explicitly abolish the personal services prohibition and apply government ethics laws to personal services contractors. This would reduce the ability of personal services contractors, who often perform discretionary functions on the government's behalf, to act in their personal interests to the detriment of the government's mission.

Part I of this Note presents a brief outline of the current state of the personal services prohibition, the federal workforce's growing reliance on service contractors, and the disparate ethics obligations of government employees and contractors. Part II then argues that the personal services prohibition is an inefficient method of protecting the government's interest in the current environment and should be eliminated by Congress. Finally, Part III argues that Congress should enact a statute that subjects all personal services contractors to current government ethics laws.

I. Background: The Personal Services Prohibition, Growth of Service Contractors, and Disparate Ethics Standards

Before understanding why the personal services prohibition should be abolished and government ethics laws extended to personal

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28 *See* Schooner & Greenspahn, *supra* note 27, at 16 ("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.'").

29 *See, e.g.*, Harris v. Attorney Gen., 657 F. Supp. 2d 1, 12 (D.D.C. 2009); King v. Dalton, 895 F. Supp. 831, 837 (E.D. Va. 1995).

30 *See Harris*, 657 F. Supp. 2d. at 13–14.

services contractors, the reader first must be familiar with the history of this prohibition and the current state of the federal workforce. This Part thus begins with a brief overview of the policy behind the personal services prohibition and its turbulent application. It then discusses how contractors are exercising more discretion on the government's behalf due to the recent decline of the federal workforce, the government's growing reliance on service contractors to perform critical functions, and the blurring distinctions between contractors and federal employees. Finally, this Part explains that, although numerous ethics obligations are imposed on government employees, very few personal conflict of interest laws apply to contractor employees.

A. Turbulent Prohibition: Overview of the Ban on Personal Services Contracts

The prohibition on personal services contracts is found in FAR 37.104(b), which provides that "[a]gencies shall not award personal services contracts unless specifically authorized by statute . . . to do so."[31] According to FAR 37.104(a), "[a] personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel."[32] FAR 37.104(c) defines an "employer-employee relationship" as one in which "contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee."[33] Because of the highly contextual nature of employer-employee relationships, the FAR requires that "[e]ach contract arrangement . . . be judged in the light of its own facts and circumstances."[34]

The Comptroller General[35] originally promulgated the prohibition in the early 1900s through advisory opinions to executive agencies.[36] The prohibition was eventually codified in the civilian-based

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31 FAR 37.104(b) (2010).

32 *Id.* 37.104(a).

33 *Id.* 37.104(c).

34 *Id.*

35 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 efficiently and effectively. 31 U.S.C. § 712 (2006). Inherent in this authority is the power to review payments made under contract by federal agencies. *See* Russell N. Fairbanks, *Personal Service Contracts*, 6 MIL. L. REV. 1, 2 (1959). Specifically, 31 U.S.C § 3554(b)(1) authorizes the Comptroller General to review federal contracts to "determine whether the solicitation, proposed award, or award complies with statute and regulation." 31 U.S.C. § 3554(b)(1).

36 *See* Fairbanks, *supra* note 35, at 1–3; *see also* Comptroller Gen. Warren to the Sec'y of

Federal Procurement Regulations in 1959[37] and in the Armed Services Procurement Regulations in 1968,[38] which later became the Defense Acquisition Regulations.[39] When the FAR replaced both the Federal Procurement Regulations and the Defense Acquisition Regulations in 1984, the prohibition was incorporated into FAR Part 37 governing service contracts.[40]

The FAR distinguishes personal services contracts from "nonpersonal services contracts," which do not result in an employment relationship between contractor personnel and the government.[41] A typical example of a nonpersonal services contract is a supply or construction contract in which the government describes its desired end product, such as a fighter jet or an office building, but has no control over exactly how the contractor plans to build that product.[42] To

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the Army, Apr. 3, 1953, 32 Comp. Gen. 427, 430 (1953) ("[I]t would be unreasonable in the extreme to presume that the Congress . . . 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."); Acting Comptroller Gen. Elliott to the Chairman, Soc. Sec. Bd., Oct. 4, 1937, 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.").

37 *See* Federal Procurement Regulations, 24 Fed. Reg. 1933, 1951 (Mar. 17, 1959) (codified at 41 C.F.R. § 1–3.204 (1960)) (explaining that personal services contracts may be "negotiated without formal advertising if . . . [p]rocurement of the services is authorized by law and is effected in accordance with the requirements of applicable law"). The Federal Procurement Regulations governed the procurement activities of civilian agencies until the FAR's enactment in 1984. *See* Establishing the Federal Acquisition Regulations, 48 Fed. Reg. 42,102, 42102 (Sept. 19, 1983) (codified at 48 C.F.R. ch. 1 (1984)).

38 *See* Miscellaneous Amendments to Armed Services Procurement Regulations, 33 Fed. Reg. 19,900, 19,929 (Dec. 28, 1968) (codified at 32 C.F.R. pt. 22 (1969)) (explaining that federal personnel laws "shall not be circumvented through the medium of 'personal services' contracting, which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Government").

39 *See* 32 C.F.R. pts. 1–39 (1979).

40 *See* Establishing the Federal Acquisition Regulations, 48 Fed. Reg. 42,102, 42,366 (Sept. 19, 1983) (codified at 48 C.F.R. ch. 1 (1984)). The FAR, which became effective on April 1, 1984, was established by the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration. *See id.* at 42,102.

41 *See* FAR 37.101 (2010). Contractor personnel under a nonpersonal services contract "are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." *Id.*

42 Professor Steven L. Schooner, the Co-Director of The George Washington University Law School's Government Procurement Law Program, and Daniel S. Greenspahn describe the distinction between personal services and nonpersonal services contracts in the following terms: "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." Schooner & Greenspahn, *supra* note 27, at 16.

maintain the distinction between contractors and employees, government policy encourages federal agencies to use nonpersonal services contracts to the maximum extent practicable when contracting.[43]

The FAR also underlines the policy behind the prohibition: "The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract."[44] This policy is based on opinion letters by two General Counsels of the United States Civil Service Commission, Leo Pellerzi and Anthony L. Mondello,[45] in response to litigation by a labor union of federal employees alleging that the National Aeronautics and Space Administration's ("NASA") use of independent contractors violated personnel statutes.[46] Pellerzi's opinion letter outlined six characteristics that indicate the existence of a personal services contract.[47] Mondello later supplemented Pellerzi's original opinion by stating that the "touchstone of legality under the personnel laws is whether the contract creates what is tantamount to an employer-employee relationship between the Government and the employee of the contractor."[48] According to this rationale, if a service contract, either by its terms or

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43 FAR 37.602(b) ("Agencies shall, to the maximum extent practicable . . . [d]escribe the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided . . . .").

44 *Id.* 37.104(a).

45 ACQUISITION ADVISORY PANEL, REPORT TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 401 (2007), *available at* http://www.acquisition.gov/comp/aap/finalaapreport.html.

46 *See* Lodge 1858, Am. Fed'n of Gov't Emps. v. Adm'r, NASA, 424 F. Supp. 186, 190 (D.D.C.), *aff'd in part*, *vacated in part sub nom.* Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb, 580 F.2d 496, 506–07 (D.C. Cir. 1976).

47 *Id.* at 190–91. These six factors are:

> [1] Performance on-site[;] [2] Principal tools and equipment furnished by the Government[;] [3] Services are applied directly to 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[;] [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: [a] To adequately protect the Government's interest or [b] To retain control of the function involved, or [c] To retain full personal responsibility for the function supported in a duly authorized Federal officer of [sic] employee.

Id.

48 *Lodge 1858*, *Am. Fed'n of Gov't Emps. v. Webb*, 580 F.2d at 507. The D.C. Circuit overturned the lower court's decision and held that NASA was authorized to obtain technical

through its administration, would create an employer-employee relationship between the government and the contractor, those functions should only be performed by government employees.[49]

Despite this seemingly clear policy statement, the prohibition has proven extremely difficult to apply in practice. As early as 1959, Lieutenant Colonel Russell N. Fairbanks, working as the Chief of the Procurement Law Division of the U.S. Army's Judge Advocate General's School, attempted to shed light on the origins and current state of the prohibition.[50] In a research study, Fairbanks found that, although the prohibition is easily definable in the abstract, the line between personal and nonpersonal services contracts is far from clear.[51] Determining whether any given contract will violate the Comptroller General's policy and constitute an unauthorized procurement of personal services can be incredibly difficult, especially because the Comptroller General would frequently authorize personal services contracts in the name of economy, feasibility, or necessity.[52] Fairbanks concluded his analysis by anticipating that "in the future as in the past, it will be next to impossible to predict with any degree of certainty whether a given arrangement will offend the Comptroller General's policy."[53]

Furthermore, the prohibition's rationale began to conflict with the government's practical needs as early as 1989, when the Office of Personnel Management ("OPM") authorized federal agencies to hire temporary staff through contract.[54] This authorization permits "the occasional use of a private sector temporary for a few days or weeks when . . . an agency is faced with an immediate, critical need which cannot be met readily through temporary appointment procedures."[55]

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services by contract and that NASA did not inappropriately treat the employees of the contractors as its own employees. *See id.* at 503, 506.

49 FAR 37.104(a).

50 *See* Fairbanks, *supra* note 35, at 1.

51 *Id.* at 5. As Fairbanks rightfully asks his reader: "Is the law, or the rule, or the policy sufficiently precise so that procurement officers in the executive branch can determine without reference in every case to the Comptroller General what are personal services, and thereby avoid the impact of the prohibition?" *Id.*

52 *See id.* at 39. Fairbanks cites one example where the Comptroller General "authorized the procurement by contract of the services of certain coffee inspectors, a service which he said was undoubtedly personal." *Id.* (citing Comptroller Gen. Warren to the Sec'y of the Navy, June 23, 1945, 24 Comp. Gen. 924 (1945)).

53 *Id.* at 39–40. A major source of this difficulty derives from the fact that Congress has never explicitly prohibited the procurement of personal services. *Id.* at 6.

54 Government Use of Private Sector Temporaries, 54 Fed. Reg. 3762, 3762 (Jan. 25, 1989) (codified at 5 C.F.R. pt. 300 (2011)).

55 *Id.*

OPM acknowledged that this regulation directly contradicts the personal services prohibition but stated that the status quo "must give way to a new interpretation based on court decisions, the statutory definition of a Federal supervisor, evolving experience, and the now-established role which temporary help services perform."[56]

In a more recent study, the Acquisition Advisory Panel ("AAP")—a congressionally mandated research panel established in 2004[57]—concluded in its 2007 report to Congress that the existing FAR prohibition on personal services contracts "is not compelled by applicable statutes and case law."[58] The AAP quoted testimony from William T. Woods, the Director of Acquisition and Sourcing Management at the Government Accountability Office ("GAO"), who explained: "[W]e 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."[59] The AAP ultimately found that the prohibition creates numerous inefficiencies that increase costs and decrease contractor effectiveness.[60] The difficulty of determining if a personal services contract exists has led "[s]ome agencies . . . [to] expend[ ] significant resources prescribing policies and guidance designed to help avoid the sorts of 'employer-employee relationships' identified in the FAR."[61] There is every indication that these inefficiencies will continue to exist in the near future.

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56 *Id.* Additional guidance on the hiring of private sector temporaries is available in the FAR. *See* FAR 37.112 (2010).

57 The AAP was established by the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1423, 117 Stat. 1392, 1669 (2003), to "review laws and regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts." *Id.*

58 ACQUISITION ADVISORY PANEL, *supra* note 45, at 404.

59 *Id.* at 400.

60 *See id.* at 404 (stating that the personal services prohibition, "to the extent it is observed in practice, often creates inefficiencies and adds to costs for both agencies and contractors").

61 *Id.* at 419. The AAP also presented some examples:

> [T]he U.S. Air Force has issued a *Guide for the Government-Contractor Relationship* to address [contractor-employee distinctions]. This guide addresses a wide range of topics that arise in the multisector workforce, including among others, personal services vs. non-personal services contracts, proper identification of contractor personnel, use of government resources, and time management. The Missile Defense Agency, which is staffed in large part by contractor employees, has also identified procedures to avoid the creation of an employer-employee relationship with contractor personnel.

Id. (footnote omitted).

B. *Is the "Era of Big Government" Really Over?: The Gutting of the Federal Workforce and the Government's Growing Dependence on Service Contractors*

Not surprisingly, the personal services prohibition was implemented at a time when the government relied on contractors primarily to procure supplies and construction.[62] Since the late 1980s, however, federal procurement has radically shifted from a supply market to a market for services.[63] According to a recent report by the Center for Strategic and International Studies' Defense-Industrial Initiatives Group, the service contracting industry has expanded at a rate of five percent annually over the last fifteen years, from $137 billion in 1995 to $280 billion in 2009.[64] In 2007, services accounted for over sixty percent of all procurement dollars spent by the federal government.[65]

This dramatic increase in the use of services is due primarily to the downsizing of the government workforce.[66] Changes in the United States' national security requirements following the end of the Cold War led to a dramatic reduction in government employees.[67] The Commercial Activities Panel[68] estimated that the federal workforce downsized from 2.3 million employees in 1986 to 1.8 million employees in 2001.[69] Both Congress and the White House aggressively looked to slash federal employees out of a political desire to "end the era of big Government,"[70] resulting in the loss of 418,000 federal civil servant jobs between 1990 and 2002.[71] As a result, federal agencies were "left with little more than a skeletal workforce that

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62 *See* COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT 25–27 (2002).

63 *See id.* at 27.

64 SANDERS ET AL., *supra* note 26, at ix.

65 *See* ACQUISITION ADVISORY PANEL, *supra* note 45, at 2–3.

66 *See* COMMERCIAL ACTIVITIES PANEL, *supra* note 62, at 29–30.

67 *See id.* at 27–28.

68 The Commercial Activities Panel is a research panel convened by the Comptroller General pursuant to the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 832, 114 Stat. 1654, 1654A-221 to -222 (2000).

69 COMMERCIAL ACTIVITIES PANEL, *supra* note 62, at 27. Most of this decrease occurred within the Department of Defense. *Id.* at 27–28.

70 Schooner & Swan, *supra* note 21; *see also* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1291–92 (2003) ("In the last two decades, privatization has been championed by conservative policymakers, academics, and public intellectuals as instrumental to reducing the size of government and broadly restructuring society in line with a conservative agenda."); Guttman, *Public Purpose*, *supra* note 25, at 861.

71 PAUL C. LIGHT, BROOKINGS INST., FACT SHEET ON THE NEW TRUE SIZE OF GOVERNMENT 5 (2003), *available at* http://www.brookings.edu/~/media/Files/rc/articles/2003/0905politics_light/light20030905.pdf; *see also* Light, *supra* note 25, at 313.

lack[ed] the in-house personnel resources to sufficiently achieve their mandates and perform the Government's broad range of duties and responsibilities."[72]

To cope with a severely reduced federal workforce, many agencies turned to employee augmentation, or "body shop" contracts, to fill the void.[73] These contracts "supply the government with laborers ('bodies') to work in government offices, side-by-side with government employees, and often to perform exactly the same tasks as government employees."[74] Contractor employees working under these contracts perform many of the same functions as their government counterparts, including "defining and managing project resources, developing briefings, financial plans and budgets, evaluating and managing programs, advising on the selection of contractors, making trade-off decisions among costs and capabilities, and conducting management oversight."[75]

As a result, the government's spending on contracts has more than doubled over the last ten years.[76] In fiscal year 2001, the federal government spent approximately $235 billion on procurement contracts;[77] in fiscal year 2010, that number reached $538 billion.[78] Since 1986, a sizeable portion of this increased spending has been on service contracts.[79] According to the Commercial Activities Panel, federal

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72 Schooner & Swan, *supra* note 21. This led to a drastic increase in the privatization of government functions. *See* Metzger, *supra* note 24, at 1377. In fact, the United States has dramatically increased its dependence on contractors to perform military functions. *See* COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN 20–22 (2009), *available at* http://www.wartimecontracting.gov/docs/CWC_Interim_Report_At_What_Cost_06-10-09.pdf. Predictably, this has also led to a startling increase in the number of fatalities suffered by contractors in support of our Nation's wars. *See* Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERVICE CONTRACTOR, Sept. 2010, at 16, 17; Steven L. Schooner, *Why Contractor Fatalities Matter*, PARAMETERS, Autumn 2008, at 78, 86.

73 *See* CLARK, *supra* note 9, at 20.

74 *Id.*

75 *Id.* (internal quotation omitted).

76 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-443, FEDERAL PROCUREMENT: SPENDING AND WORKFORCE TRENDS 3 (2003) [hereinafter GAO-03-443] ("Federal agencies procured more than $235 billion in goods and services during fiscal year 2001[ ] . . . ."); *Prime Award Spending Data*, USASPENDING.GOV, http://www.usaspending.gov/trends?trendreport=default&viewreport=yes&&carryfilters=on&tab=Graph%20View&tab=List%20View&Go_x=21&&formFields=&&tab=List%20View&fiscal_year=2011&carryfilters=on (last updated Dec. 20, 2011).

77 GAO-03-443, *supra* note 76, at 3.

78 *Prime Award Spending Data*, *supra* note 76.

79 COMMERCIAL ACTIVITIES PANEL, *supra* note 62, at 27; *see also* Michaels, *supra* note 17, at 725 (stating that "private contractors are assuming ever larger and ever more sensitive roles in carrying out public functions, all ostensibly in the name of efficiency and good governance").

agencies only spent thirty-one percent of their procurement dollars on services in fiscal year 1986; in fiscal year 2001, that number increased to fifty-one percent.[80] In fiscal year 2005, over sixty percent of procurement dollars was spent on service contracts.[81] According to Dr. Paul Light—a professor at New York University's Wagner Graduate School of Public Service, and a former researcher at the Brookings Institution[82]—as many as 727,000 contractor jobs were created between 1999 and 2002 to support the government.[83] These numbers, however, are merely estimates; the federal government has not maintained reliable data on the number of contractors it employs.[84]

Furthermore, the government's failure to hire enough managers and acquisition officials to keep up with the increased procurement spending has exacerbated a deepening contract-management crisis and enabled contractors to exercise an incredible amount of discretion on the government's behalf.[85] Agencies are suffering from the "additional demands that service contracting places on the acquisition workforce," as the unique nature of services often requires more attention and oversight "to ensure that [the government] is receiving the services for which it has contracted."[86] In fact, the shortage of govern-

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80 COMMERCIAL ACTIVITIES PANEL, *supra* note 62, at 27.

81 ACQUISITION ADVISORY PANEL, *supra* note 45, at 9; *see also Acquisition Advisory Panel Calls for More Competition, Transparency in Government Procurements*, 49 GOV'T CONTRACTOR ¶ 2 (2007).

82 *Paul C. Light*, BROOKINGS INST., http://www.brookings.edu/experts/lightp.aspx (last visited Jan. 1, 2012).

83 LIGHT, *supra* note 71, at 5. More than 500,000 of these jobs were created within the Department of Defense, the Department of Energy, and NASA. *See id.* at 6.

84 CLARK, *supra* note 9, at 22 ("Secretary of Defense Robert Gates recently made the 'terrible confession' that he was unable to determine how many contractors were working for him—not in the Defense Department as a whole, but in the Office of the Secretary of Defense itself."). For example, a GAO report found that "DOD has struggled to obtain accurate and reliable information on contracts and the contracted workforce supporting contingency operations in Iraq and Afghanistan." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-192, DEFENSE ACQUISITIONS: FURTHER ACTION NEEDED TO BETTER IMPLEMENT REQUIREMENTS FOR CONDUCTING INVENTORY OF SERVICE CONTRACT ACTIVITIES 2 (2011).

85 *See* CLARK, *supra* note 9, at 21. In its final report to Congress, the Commission on Wartime Contracting concluded that federal "[a]gencies over-rely on contractors for [military] operations." COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 16 (2011), *available at* http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf. With respect to the conflicts in Iraq and Afghanistan, the Commission cited both a general "failure to effectively prepare to rely on contractors" and an overuse of contractors that has "overwhelmed the government's capacity to manage [these contractors] effectively." *Id.* at 16–17.

86 ACQUISITION ADVISORY PANEL, *supra* note 45, at 356; *see also* Schooner, *supra* note 27, at 559 ("Successful service contracts are difficult to draft and, more importantly, require significant resources to administer or manage.").

ment personnel, specifically acquisition officials, is so severe that the government is now outsourcing the acquisition function, further reducing the ability of agencies to ensure contractors operate in the government's best interests.[87]

C. *Unequal Treatment: Disparate Ethics Standards of Contractors and Federal Employees*

Although the practical distinctions between contractors and federal employees are eroding, the legal distinction between these two groups has yet to change.[88] This has led to the formation of two sets of workers performing similar discretionary functions on the government's behalf but subject to two completely different legal regimes.[89]

A conflict of interest generally arises when a person has a personal interest that conflicts with his or her professional obligations to the government.[90] According to Professor Kathleen Clark, a conflict of interest may be present whenever an individual or organization has the power to exercise discretion on the government's behalf.[91] Parties in such a position may be inclined to make decisions that benefit themselves or third parties but are not in the government's best interest.[92] To mitigate this risk, the government has imposed numerous regulations on its federal employees by requiring disclosure—and sometimes disgorgement—of an employee's personal financial interest,[93] prohibiting bribery and illegal gratuities,[94] restricting the ability to obtain outside income,[95] and limiting post-government employment.[96] This complex framework of ethics obligations is in place to

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87 CLARK, *supra* note 9, at 21; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-360, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 1–3 (2008) [hereinafter GAO-08-360] (discussing how the Army's Contracting Center of Excellence has increased its use of procurement contracts to acquire contract specialists). For an interesting case study on the problems associated with outsourcing prisons to private companies, see generally Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

88 *See* CLARK, *supra* note 9, at 23.

89 *See id.*

90 *See, e.g.*, Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 28–29 (2005).

91 *See* CLARK, *supra* note 9, at 24 (explaining that a conflict of interest "arises when [an individual] has access to government resources, can exercise discretion in a way that could benefit herself or another person or organization with whom she is associated, or can allocate government benefits among third parties").

92 *See id.*

93 18 U.S.C. § 208 (2006).

94 *Id.* § 201.

95 *Id.* § 209.

96 *Id.* § 207.

ensure that federal employees do not place their own personal interests above their duties to the government.[97]

Surprisingly, this complex web of regulations does not apply to contractors. Under the current regime, very few regulations exist that govern *personal* conflicts of interest of individual contractor employees.[98] This made sense when the government marketplace consisted of supplies, equipment, and construction. In such a marketplace, the government primarily dealt with contractors as *organizations*—e.g., construction or manufacturing companies—and had little concern over the personal interests of individual contractor employees.[99] Individuals working under a supply contract generally had neither significant access to government resources nor the ability to exercise discretion on the government's behalf.[100] As a result, individual contractor employees were not in a position to significantly harm the government's interest, and very few regulations were promulgated to govern personal conflicts of contractor employees.[101]

Thus, the major focus with contractors was on mitigating *organizational* conflicts of interests ("OCI"). The FAR defines an OCI as a situation in which, "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."[102] Although the FAR definition references "persons," in practice, OCIs can only occur between the government and a contracting organization.[103] As Daniel I. Gordon, former Administrator of the Office of Federal Procurement Policy at the Office of Management and Budget, explained, "[s]ince this is a definition of an OCI, not a personal conflict of interest, we have to presume that the FAR is using the word 'person' in the legal sense, which would include treating a company or

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97 *See* CLARK, *supra* note 9, at 11–17 (discussing the relationship between ethics rules and employees' fiduciary duties). Criminal conflict of interest statutes can be found at 18 U.S.C. §§ 201–219, while relevant regulations can be found at 5 C.F.R pts. 2634–2640 (2010).

98 *See* CLARK, *supra* note 9, at 23.

99 *See id.* at 4.

100 *See id.* at 24–25.

101 The criminal prohibitions on bribery and illegal gratuities do extend beyond government employees and apply to any "person acting for or on behalf of the United States," including contractor employees. 18 U.S.C. § 201(a); *see also* 41 U.S.C. § 8701 (2006) (detailing laws of kickbacks relating to public contracts).

102 FAR 2.101 (2010).

103 *See* Gordon, *supra* note 90, at 29 ("In a personal conflict of interest, the conflicted party will be an individual. In an OCI, the conflicted party, not surprisingly, will be an organization.").

other organization as a 'person.'"[104] As a result, conflicts that occur between the government and individual contractor employees are not covered under the OCI regime.[105]

The FAR requires government agencies to take steps to identify and mitigate OCIs before awarding a contract.[106] Current regulations are generally designed to mitigate two types of conflicts: (1) "conflicting roles that might bias a contractor's judgment;"[107] and (2) situations in which a contractor has an "unfair competitive advantage."[108] Situations involving conflicting roles commonly occur when contractors help the government structure future contracts with the intent to compete for those very contracts.[109] To ensure that contractors provide objective advice to the government, the FAR prohibits contractors from competing for those future contracts.[110] Unfair competitive advantage situations occur when a contractor has access to (1) proprietary information obtained without authorization; or (2) information relevant to a contract but not available to other competitors.[111] This situation is mitigated by either disqualifying the contractor with the proprietary information or imposing restrictions that prevent the contractor from using this information to its advantage.[112]

As the government becomes more dependent on service contractors, however, the potential for *personal* conflicts of interest among individual contractor employees begins to grow. Contractor employees now are working side-by-side with federal employees and performing similar functions, but doing so under different ethics

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104 *Id.* at 31.

105 *See id.*

106 *See* FAR 9.504(a) ("Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to—(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.").

107 *Id.* 9.505(a).

108 *Id.* 9.505(b).

109 Gordon, *supra* note 90, at 32.

110 *See* FAR 9.505-2. For an example of how agencies are expected to deal with this type of scenario, see the hypothetical illustration set forth in FAR 9.508(a):

> Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (i.e., turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (e.g., fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

Id.

111 *Id.* 9.505(b).

112 *See id.* 9.505-4.

standards.[113] Although ethics obligations have been proposed for certain contractors, particularly those employed in contract management and oversight positions,[114] the government has yet to actually implement a systematic contractor ethics regime. This requires many agencies to address personal conflicts among contractors on an ad hoc basis.[115] The GAO has reported that even the Department of Defense, despite being the government's largest procuring agency, "lacks a departmentwide policy requiring safeguards against personal conflicts of interest for contractor employees . . . [and] fails to require that contractor employees be free from conflicts of interest . . . ."[116] As the government continues to increase its reliance on service contractors to fulfill its missions, the need to protect against personal conflicts among contractor employees will continue to become more pronounced.

II. A Dead Letter Prohibition: Congress Should Abolish the Prohibition on Personal Services Contracts

Given the government's growing reliance on personal services contractors and the blurring of distinctions between contractors and government employees, this Note argues that additional protections are needed to ensure personal services contractors act in the best interests of the government. Currently, contractor employees and civil servants are governed by two different legal regimes even though they perform similar work.[117] Additionally, the personal services prohibition unnecessarily limits the ability of agencies to supervise their contractor employees and creates a disincentive for the government to manage its contractors.[118] Therefore, Congress should explicitly repeal FAR 37.104(b) through legislation and apply current government

113 *See* Schooner & Swan, *supra* note 21.

114 *See* Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58,584, 58,585 (proposed Nov. 13, 2009) (to be codified at 48 C.F.R. pts. 3, 52) ("OFPP and the Councils are proposing a policy that will require each contractor that has employees performing acquisition functions closely associated with inherently governmental functions to identify and prevent personal conflicts of interest for such employees.").

115 *See, e.g.*, U.S. Gov't Accountability Office, GAO-08-169, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 15 (2008). For example, "[t]he Air Force's Electronic Systems Center uses a contract clause as a safeguard to prevent conflicts of interest for contractors involved in source selection and other activities critical to mission-support and government decision making." *Id.*

116 *Id.* at 12.

117 *See* Clark, *supra* note 9, at 4, 23.

118 According to the FAR, one of the major characteristics of a personal services contract is the "relatively continuous supervision and control" of a contractor by a federal employee. FAR

ethics laws to all personal services contractors employed by federal agencies.[119] This would enable the government to better manage and supervise its contractor personnel and ensure that these personnel are free from damaging conflicts of interest.

Although there is currently no statute prohibiting the use of personal services contracts, the FAR provides that personal services contracts are illegal absent statutory approval from Congress.[120] An act by Congress would thus be the best approach to repealing the personal services prohibition. This Part explains why the prohibition should be abolished: (A) the prohibition prevents agencies from adequately and efficiently supervising their service contractors; (B) the prohibition has become so ineffective at preventing employment relationships that officials outside of the procurement realm are beginning to implement ad hoc mechanisms to regulate these relationships; and (C) increasing the size of the civil service to meet the government's needs is neither politically feasible nor practically efficient.

A. The Personal Services Prohibition Prevents Agencies from Adequately and Efficiently Supervising Their Contractors

As previously discussed, the FAR provides that the major characteristic of a personal services contract is the "relatively continuous supervision and control" of a contractor by government employees.[121] As a result, the personal services prohibition generally limits the amount of oversight that agencies can exercise over their contractors.[122] As contractors become more involved in the critical functions of government, however, enhanced oversight is vital to ensure that contractors are acting in the government's best interest.[123] A policy letter from the Office of Federal Procurement Policy acknowledged that agencies may need to "strengthen[ ] contract oversight using government employees . . . . However, agencies must ensure that increasing the level of government oversight and control does not result in unauthorized personal services. . . ."[124] Indeed, a recent report by the

37.104(c)(1) (2010). The prohibition thus provides a disincentive for federal agencies to supervise and control their contractors so as to not run afoul of the prohibition.

119 The text of FAR 37.104(b) states, "Agencies shall not award personal services contracts unless specifically authorized by statute . . . to do so." *Id.* 37.104(b).

120 *See id.*

121 *Id.* 37.104(c)(1).

122 *See* GAO-08-360, *supra* note 87, at 1.

123 *See id.*

124 Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, 76 Fed. Reg. 56,227, 56,239 (Sept. 12, 2011).

GAO acknowledged this "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."[125]

The personal services prohibition has forced many agencies to create complex and inefficient supervision schemes to maintain sufficient control over their contractors without violating the prohibition. The AAP, in its 2007 report to Congress, found that "[s]ome agencies have expended significant resources prescribing policies and guidance designed to help avoid the sorts of 'employer-employee relationships' identified in the FAR."[126] The AAP also found that these efforts prevent federal officers and employees from directly reviewing contractor employees, requiring instead the involvement of private supervisors in the agency's day-to-day operations.[127] Undoubtedly, the AAP concluded that this extra layer of supervision leads to numerous inefficiencies that tie up agency resources.[128]

For example, the GAO examined the Army Contracting Center of Excellence's ("CCE") contract with CACI International Inc., a private business,[129] for contract specialists that "perform a range of acquisition services in support of government contracting officers."[130] CCE, as a division of the Army Contracting Command, provides contracting and acquisition support services to the Secretary of the Army and the Army Headquarters staff.[131] The GAO found that CACI contractors represented about forty-two percent of CCE's total contract specialists in August 2007 and that these contractors worked directly alongside their government counterparts on the same projects.[132] According to GAO interviews with CCE staff, projects were "generally

125 GAO-08-360, *supra* note 87, 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) ("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.").

126 ACQUISITION ADVISORY PANEL, *supra* note 45, at 419.

127 *Id.*

128 *Id.*

129 *See* GAO-08-360, *supra* note 87, at 3.

130 *Id.* at 1.

131 *See About Army Contracting Command*, U.S. ARMY CONTRACTING COMMAND, http://www.acc.army.mil/about/ (last visited Jan. 1, 2012).

132 GAO-08-360, *supra* note 87, at 3. As discussed below, two of the reasons for this high percentage are the time-consuming process of hiring government employees and the high demand for contract specialists in the private sector, which generally offers better employment incentives than government work. *See id.* at 11.

assigned based on knowledge and experience, not whether the specialist [was] a government or contractor employee."[133] Conventional wisdom dictates that this is the most efficient assignment strategy, as it enables the employer to utilize each individual's knowledge and experience where it would be most effective. Unfortunately, the GAO informed CCE that this assignment strategy ran dangerously close to violating the personal services prohibition, and CCE was forced to take steps to separate its contractors from their government counterparts.[134] All contractors were placed onto a separate team and became supervised by CACI managers instead of government supervisors.[135] CCE also planned to move all contracting personnel to a separate area.[136]

Without the personal services prohibition, CCE would not have needed these inefficient reforms to reduce control over its contractor employees and avoid the creation of a personal services contract. Instead, CCE would have been able to continue employing its contract specialists based on their individual skill and expertise, irrespective of whether they were CACI or government employees.[137]

B. The Personal Services Prohibition No Longer Reflects the Current Reality of the Federal Workforce

Although the government officially continues to proscribe personal services contracts, the personal services prohibition has failed to prevent a rising number of employment discrimination suits by contractors against their government supervisors.[138] This indicates that the prohibition no longer reflects the practical reality and has failed to prevent employment relationships between contractors and the government.[139] Both federal courts and the Equal Employment Opportu-

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133 *Id.* at 10. The obvious exception to this was when there was a possible OCI between the contractor and CCE. *Id.*

134 *Id.* at 15–17.

135 *Id.* at 17.

136 *Id.*

137 This is not meant to imply that the government contractor-employee distinction should be completely eliminated. The GAO report identified concerns that CCE contractors sometimes failed to properly identify themselves as such in meetings, on telephone calls, and on contract documents. *Id.* at 13–14. Contractor personnel should identify themselves as such because in the acquisition support field, the authority to negotiate and approve the terms of a government contract ultimately resides with the government agency. *Id.* at 7. Contractors have no direct authority to speak on behalf of the government. *See id.* at 7, 13–14. These issues, although important, are beyond the scope of this Note.

138 *See* Schooner & Swan, *supra* note 21.

139 *See id.* In another example, the GAO examined a joint report to Congress by the Department of Defense, the Department of State, and the U.S. Agency for International Develop-

nity Commission ("EEOC") have, with increased frequency, allowed contractors to take advantage of employment discrimination laws[140] if they appear to be, in effect, government employees.[141] This phenomenon suggests that officials from outside the procurement community have started to recognize and address these employment relationships. Officials within the procurement community, however, have yet to acknowledge the need to reform the current policy.[142] Moreover, the fact that personal services contracts are still legally prohibited severely constrains the ability of procurement officials to regulate these "illegal" contracts, as the government cannot regulate conduct that is already illegal.[143]

This phenomenon is significant because federal employment discrimination laws apply only to "those individuals in a direct employment relationship with a government employer."[144] As an example,

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ment ("USAID"). *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-886, IRAQ AND AFGHANISTAN: DOD, STATE, AND USAID CANNOT FULLY ACCOUNT FOR CONTRACTS, ASSISTANCE INSTRUMENTS, AND ASSOCIATED PERSONNEL 1–2 (2011). In its finding that USAID underreported its contract obligations, the GAO stated that "USAID officials told us they did not report personal services contracts because they consider such contractor personnel to be USAID employees." *Id.* at 12.

140 *See id*. One such employment discrimination law is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2006), which prohibits employment discrimination in the workplace. *See id.* As currently applied, Title VII prohibits employers from discriminating against employees or applicants for employment on the basis of "race, color, religion, sex, national origin, age, disability, or genetic information" or to retaliate against an individual for "opposing any practice made unlawful by title VII of the Civil Rights Act" or "for participating in any stage of administrative or judicial proceedings under those statutes." 29 C.F.R. § 1614.101 (2010).

141 When applying Title VII of the Civil Rights Act, courts have refused to use the term "employee" as defined by 5 U.S.C. § 2105(a) (2006). *See* Spirides v. Reinhardt, 613 F.2d 826, 830 (D.C. Cir. 1979). Section 2105(a) requires an official appointment into the civil service before an individual is considered an "employee." 5 U.S.C. § 2105(a). However, courts have held that the § 2105(a) definition applies only to the civil service laws. *See Spirides*, 613 F.2d at 830. Accordingly, use of the § 2105(a) definition of "employee" for Title VII purposes would be improper. *See id.* at 831. Instead, courts have distinguished between employees and independent contractors by applying "general principles of the law of agency to [the] undisputed or established facts" of the case. *Id.* This approach requires an examination of all aspects of the relationship between the individual and the alleged employer to determine if an employment relationship exists. *Id.* Although no single factor is determinative, the most important element is the extent of the employer's right to control the "means and manner" of the individual's work performance. *Id.* "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." *Id.* at 831–32.

142 *See* GAO-08-360, *supra* note 87, at 17.

143 *See* Schooner & Swan, *supra* note 21. As Schooner and I stated in another article, "Ultimately, it is hard to manage a problem when you deny it exists. Accordingly, it is time for either the Office of Federal Procurement Policy or Congress (or both) to revisit the utility of perpetuating the now anachronistic personal services prohibition." *Id.*

144 *Spirides*, 613 F.2d at 829. In 1972, Congress increased the scope of Title VII by waiving

consider the recent case of *Harris v. Attorney General*.[145] There, Carla Harris was assigned as a personnel security specialist to the Department of Justice ("DOJ") by her employer, Integrated Management Services, Inc., which held a support service contract with the DOJ.[146] Harris was fired and subsequently sued the government claiming that her DOJ supervisor fired her because she was visibly pregnant.[147] The District Court for the District of Columbia held that "the level of control exercised by [DOJ] over [Harris] and the economic realities of the workplace demonstrate that [Harris] was an 'employee'" for employment discrimination purposes.[148] The court noted, "[DOJ] employees, particularly [Harris's supervisor], were to direct [Harris's] daily tasks in the same way that they would direct and evaluate federal employees who worked alongside [Harris] performing identical work."[149]

The EEOC has also dealt with an increasing number of cases similar to *Harris* and applied the same "common law agency test" to determine whether the contractor employee is a de facto employee of the federal government.[150] According to a recent article in the *Washington Post*, the EEOC has decided ninety cases in the last decade in favor of the contractor because the federal agency had sufficient control and supervision over that individual's work.[151]

This raises serious concerns about the continued necessity of the prohibition, which has been openly flouted. Although the official policy of the federal government, as stated in FAR 37.104, continues to be that agencies are prohibited from supervising their contractors like employees,[152] this policy has become so ineffective at preventing the creation of employment relationships that federal courts and the EEOC have begun to adopt ad hoc policies to remedy the situation, even if solely in the employment discrimination context. In 1997, the

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its sovereign immunity and including federal employees within Title VII's protections. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-16 (2006)). This amendment explicitly gave federal "employees or applicants for employment" the ability to bring a civil action against the government for employment discrimination. 42 U.S.C. § 2000e-16.

145 Harris v. Attorney Gen., 657 F. Supp. 2d 1 (D.D.C. 2009).

146 *Id.* at 4.

147 *Id.* at 3–4.

148 *Id.* at 13.

149 *Id.* at 12.

150 *See, e.g.*, Ma v. Shalala, Nos. 01962390, 01962389, 1998 WL 295965, at *1–2 (E.E.O.C. May 29, 1998).

151 Dana Hedgpeth, *Federal Contractors Travel Obscured Path in Mediation Efforts*, WASH. POST, Oct. 25, 2010, at A17.

152 *See* FAR 37.104(b) (2010).

EEOC adopted guidance specifically recognizing the possibility that a contractor employee may be considered a de facto employee of a government agency if that agency "has the requisite control over that worker."[153] This guidance, along with federal court precedent, explicitly recognizes the possibility of an employment relationship between contractors and the government and seeks to regulate—rather than merely prohibit—this relationship.

Although this trend is a step in the right direction, the general prohibition on personal services contracts remains the official policy of the government. As such, this policy is fundamentally inconsistent with any attempt to regulate employment relationships between contractors and the government. The GAO has found that agencies often provide very little guidance on how to properly manage personal services contracts.[154] Although having a legal prohibition against personal services contracts suggests that agencies should not need to regulate these contracts, the practical reality indicates that the use of personal services contracts is expanding unchecked and unregulated. Although positive steps have been taken by the federal courts and the EEOC in the employment discrimination context, many other aspects of personal services contracts remain unregulated and outside the purview of government ethics laws. The government contracting community should not continue to turn a blind eye to the existence of de facto employer-employee relationships. Eliminating the prohibition will allow agencies to better manage these contracts.

C. Enlarging the Government Workforce Is Neither a Feasible Nor Efficient Alternative

Critics will likely argue that an alternative to abolishing the personal services prohibition would be to undergo civil service reform to reduce the government's reliance on service contractors. However, numerous structural and political obstacles stand in the way of any meaningful reform in the near future.[155] Past experience contains nu-

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153 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), 1997 WL 33159161, at *7.

154 *See* GAO-08-360, *supra* note 87, 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.").

155 *See, e.g.*, *Is the Department of Homeland Security Too Dependent on Contractors to Do the Government's Work?: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong. app. at 61 (2007) (prepared testimony of Steven L. Schooner, Co-Director,

merous examples that demonstrate the difficulties of insourcing tasks from private contractors to government agencies, the reluctance of elected officials to move beyond their political devotion to "small government,"[156] and the dogged determination of public unions to fight against any changes to their compensation scheme and benefits.[157]

One of the best examples demonstrating the difficulties of expanding the government workforce is the controversial creation of the Transportation Security Administration ("TSA") not more than two months after September 11, 2001.[158] After the events of September 11, the Senate immediately took steps to nationalize the administration of airport security throughout the country.[159] President George W. Bush and House Republican lawmakers, however, were hesitant to expand the size of the federal government.[160] Specifically, lawmakers were concerned about increasing the size of the federal workforce by as much as 28,000 employees, and the White House refused to provide these new employees with civil service protections.[161] 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.[162] Not more than three years after TSA's creation, some lawmakers began questioning the need for TSA at all, claiming that its creation was a knee-jerk re-

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Government Procurement Law Program, The George Washington University Law School) ("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.").

156 *See* Schooner & Swan, *supra* note 21.

157 *See* Karen Rutzick, *GAO Employees Move Toward Vote on Union Representation*, GOV'T EXECUTIVE (Jan. 23, 2007), http://www.govexec.com/story_page.cfm?articleid=35933&ref=rellink. For an interesting discussion on the need to move to a more performance-driven federal employment system, see DAVID M. WALKER, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-1048T, HUMAN CAPITAL: DESIGNING AND MANAGING MARKET-BASED AND MORE PERFORMANCE-ORIENTED PAY SYSTEMS 3 (2005).

158 *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, sec. 101(a), § 114, 115 Stat. 597, 597–602 (2001) (codified as amended at 49 U.S.C. § 114 (2006)); 147 Cong. Rec. 22,897 (2001) (statement of Rep. Thomas Delay).

159 *See* Aviation and Transportation Security Act, sec. 101(a), § 114, 115 Stat. at 597; 147 Cong. Rec. 22,895 (statement of Rep. Sheila 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.").

160 *See* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 446 (2006); Lizette Alvarez, *Senate Votes to Federalize Job of Airport Screening*, N.Y. TIMES, Oct. 12, 2001, at B11.

161 *See* Verkuil, *supra* note 160, at 446.

162 *See* Aviation and Transportation Security Act, sec. 101(a), § 114, 115 Stat. at 597; *id.*, sec. 108(a), § 44919, 115 Stat. at 611.

sponse to the September 11 attacks.[163] These lawmakers claimed that private screeners could do a more efficient job than a government agency.[164]

This example demonstrates the tremendous difficulties with insourcing major functions. Despite a strong national imperative to reform airport security following September 11, it took a considerable amount of political haggling to successfully establish the TSA and justify the expansion of the federal government. Arguably, in the absence of the September 11 attacks, establishing an agency like the TSA would have been politically impossible.[165]

In fact, implementing broad-based civil service reforms and performance-driven pay scales would be even more politically difficult and would require dramatic changes in the government workforce's compensation scheme.[166] In 2005, the GAO examined the possibility of implementing federal pay reform and concluded that these reforms, while possible, would require considerable effort on the part of each specific agency to ensure that any new scheme provides sufficient transparency and accountability.[167] Furthermore, Professor Richard J. Pierce Jr. sees "no possibility that Congress will [increase] the upper end of the government salary scale to the point at which the government can hire enough people to perform all government functions

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163 *See Some in GOP Want Private Airport Screeners*, ASSOCIATED PRESS, June 1, 2004, *available at* http://www.usatoday.com/travel/news/2004-06-01-screeners_x.htm ("[House Aviation Subcommittee Chairman John] Mica and other 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.").

164 *See id.*

165 *See* Freeman, *supra* note 70, at 1296–97 ("Pragmatic privatizers typically . . . tak[e] for granted that government has a responsibility to establish service levels but view[ ] government as ill-designed and poorly equipped in most cases to deliver services directly." (footnote omitted)). For a more in-depth analysis of the tensions between privatizing airport security and keeping it a public function, see Paul R. Verkuil, *The Publicization of Airport Security*, 27 CARDOZO L. REV. 2243, 2251 (2006) ("Security is a role government is designed to perform, but it can still delegate some of that function to private hands.").

166 *See* Schooner & Greenspahn, *supra* note 27, at 10 ("Ultimately, the private sector enjoys the flexibility to offer far greater economic rewards for success and threaten more credible sanctions for less than desirable performance. While we continue to witness efforts to reform the civil service system and inject more potent performance incentives, doing so remains a daunting task.").

167 WALKER, *supra* note 157, at 3 ("[W]e need to move forward with human capital reforms, but how it is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful. Human capital reforms to date recognize that the 'one-size-fits-all' approach is not appropriate to each agency's demands, challenges, and missions.").

with government employees."[168] We will instead continue to see an "increase in the proportion of the federal workforce that consists of contractors' employees."[169] This demonstrates the numerous obstacles and difficulties standing in the way of civil service reform.[170]

This debate also implicates a broader dichotomy between those who believe that all major government functions should be staffed primarily by government employees and those who advocate for the efficiency benefits of relying on private sector contractors.[171] Although this debate over the proper role of government is, at its core, an ideological concern, the practical reality is that the federal government remains heavily dependent on contractors to fulfill its ever-growing mandate.[172] Professor Steven L. Schooner has repeatedly explained that "[d]espite a generation of bipartisan efforts to portray a 'small government' to the public, government mandates continue to increase, leaving agencies no choice but to increasingly rely upon contractors to provide mission-critical services."[173] Although increasing the size of the federal workforce would undoubtedly reduce the government's dependence on contractors, the example of the TSA demonstrates that such an approach is probably not a feasible alternative, even in the face of a national crisis.[174]

There are also numerous benefits to relying on private contractors to perform certain functions. These benefits include surge capacity, greater flexibility, and more competitive incentive schemes.[175]

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168 Richard J. Pierce, Jr., *Outsourcing is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1227 (2008) (book review).

169 *Id.*

170 In 2005, the GAO itself moved to a market-driven pay system. *See* Karen Rutzick, *GAO to Move Employees to Market-Based Pay*, GOV'T EXECUTIVE (Dec. 28, 2005), http://www.govexec.com/dailyfed/1205/122705r1.htm?oref=rellink. This created a certain level of anxiety among GAO employees, as not every employee would automatically receive an annual pay increase under the new system. *See* Rutzick, *supra* note 157. GAO employees ultimately made the decision to unionize at a time when "the Bush administration [had] tried to curb the power of unions in departments with new personnel systems, to give management more freedom to hire, fire and compensate employees." *Id.*

171 *See, e.g.*, Schooner & Greenspahn, *supra* note 27, at 10.

172 *See* Schooner & Swan, *supra* note 21.

173 Schooner & Greenspahn, *supra* note 27, at 10; *see also* Metzger, *supra* note 24, at 1377 ("[H]istory demonstrates that increased privatization often goes hand in hand with expansion rather than contraction in public responsibilities. The government turns to private entities to provide the expertise and personnel it needs to fulfill its new tasks.").

174 *See supra* notes 158–66 and accompanying text.

175 Schooner & Greenspahn, *supra* note 27, at 13; *see also* Pierce, *supra* note 168, at 1230 ("[T]he United States is better off with its present heavy reliance on private contractors to perform military functions than if the United States had the much more robust military capability it would have with a draft-supported public military.").

According to Professor Schooner, "[u]sing 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."[176] The CCE example indicates that this has proved true in practice.[177] Typically, CCE takes several months to hire contract specialists through the federal personnel system.[178] Through the contracting process, however, CCE has the ability to "order and have a contractor employee in place within as little as a couple of weeks."[179]

Private contractors are also subject to a more diverse range of incentive structures, including compensation schemes, advancement opportunities, and the risk of termination.[180] By contrast, many aspects of the civil service system limit the ability of government agencies to employ these incentives.[181] This is one of the many reasons why CCE is so heavily dependent on private sector contract specialists. Given the high demand for contract specialists in both the government and the private sector, CCE officials have often experienced difficulty in providing adequate incentives to retain in-house specialists and prevent them from moving to private-sector firms.[182] Compounding these difficulties was President Obama's decision to impose a pay freeze for civilian federal employees through the end of 2012.[183]

This strongly suggests the government will not reduce its dependence on contractors in the short-term. As a result, necessary steps must be taken to ensure contractors are properly managed and regulated. Abolishing the personal services prohibition is a vital element in this strategy. The prohibition has not only failed to prevent the

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176 Schooner & Greenspahn, *supra* note 27, at 13; *see also* U.S. CONG. BUDGET OFFICE, LOGISTICS SUPPORT FOR DEPLOYED MILITARY FORCES 23 (2005) ("Using contractors also provides DoD with flexibility. For example, the military's 'up-or-out' promotion system causes many highly trained personnel to leave active duty every year. When DoD is able to employ those personnel as contractors, it continues to recoup some of its training investment.").

177 *See supra* Part II.A.

178 GAO-08-360, *supra* note 87, at 12. CCE officials stated to GAO that "the government's hiring process takes too long and that potential candidates are often hired by a contractor or another agency before CCE can make an offer." *Id.*

179 *Id.*

180 Schooner & Greenspahn, *supra* note 27, at 10.

181 *Id.* ("While the government can employ similar tools, 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.").

182 GAO-08-360, *supra* note 87, at 11–12.

183 *See* Press Release, The White House, Office of the Press Sec'y, Fact Sheet: Cutting the Deficit by Freezing Federal Employee Pay (Nov. 29, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/11/29/fact-sheet-cutting-deficit-freezing-federal-employee-pay.

government's current dependence on service contractors but also legally constrains agencies from appropriately supervising their contractors. This forces agencies to create elaborate legal fictions to avoid violating the prohibition, while other agencies ignore the prohibition completely and risk being held liable for regulatory violations.[184]

III. Equalizing the Divide: Applying Government Ethics Standards to Personal Services Contractors

In addition to eliminating the personal services prohibition, which would allow federal agencies to better regulate service contractors, Congress should take steps to apply current government ethics obligations to contractors providing personal services. Given the blurring distinction between contractors and federal employees in the government workplace,[185] it no longer makes sense for ethics rules to treat differently these two categories of individuals. Contractors performing tasks previously reserved for government personnel are no less influenced by personal conflicts of interest than federal employees; if left unchecked, both sets of individuals can easily allow these conflicts of interest to affect their discretion.[186]

The current scheme creates an unbalanced incentive structure that allows federal agencies to take advantage of the convenience of not having to enforce government ethics laws against service contractors. This was a major factor in the Department of Defense's decision to hire its senior mentors through contract instead of as government employees.[187] Additional protections are needed to deter personal services contractors from acting in ways that may be adverse to the government's interests.

Therefore, Congress should enact a statute mandating that all individuals employed under a personal services contract be considered "federal employees" for government ethics purposes and thus subject

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184 *See SARA Panel Seeks to Ease Ban on Personal Services Contracts*, 48 Gov't Contractor ¶ 282 (2006).

185 *See* Schooner & Swan, *supra* note 21.

186 *See* Clark, *supra* note 9, at 24–25. A GAO report on the Department of Defense's use of service contractors found that, despite relying on contractors to perform numerous tasks previously reserved for government personnel, "such as contracting support, intelligence analysis, security services, program management, and engineering and technical support for program offices," the Department of Defense does not apply "the same laws and regulations that are designed to prevent personal conflicts of interests among federal employees" to these contractors. U.S. Gov't Accountability Office, GAO-08-621T, Defense Acquisitions: DOD's Increased Reliance on Service Contractors Exacerbates Long-Standing Challenges 1, 3–4 (2008).

187 *See* Vanden Brook et al., *supra* note 1.

to all government ethics laws. This Note proposes the following language:

> Solely for government ethics purposes, all personal services contractors, as currently defined by FAR 2.101 and FAR 37.104, are to be deemed "federal employees" and treated as such when applying government ethics laws, including 18 U.S.C. §§ 201–219 and all regulations promulgated by the Office of Government Ethics. The FAR Council[188] should promulgate applicable regulations within the FAR to this effect.

This statute would incorporate the FAR's definition of a personal services contract, which is a contract that "makes the contractor personnel appear to be, in effect, Government employees."[189] This statute would also expand government ethics laws to better reflect the current situation by treating personal services contractors the same as their government counterparts.

The idea of applying government ethics laws to personal services contractors has already gained some traction within government procurement policy circles. The newly resurrected Administrative Conference of the United States ("ACUS"), an independent federal agency working to improve governmental procedures and the administrative process, initially recommended a similar approach in its draft recommendations on how to best implement more comprehensive ethics standards for contractors.[190] Although this proposed course of action was only briefly mentioned as part of a much larger effort to

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188 The FAR Council is the body that issues and maintains the FAR and consists of the Administrator of the Office of Federal Procurement Policy, the Secretary of Defense, the Administrator of NASA, and the Administrator of General Services. *See* 41 U.S.C. §§ 1301–1303 (2011).

189 FAR 2.101 (2010).

190 *See* ADMIN. CONFERENCE OF THE U.S., IMPLEMENTATION OF COMPREHENSIVE ETHICS STANDARDS FOR GOVERNMENT CONTRACTORS AND CONTRACTOR EMPLOYEES, Draft Recommendation, para. 2 (drft. 2010) [hereinafter ACUS DRAFT RECOMMENDATION], *available at* http://www.acus.gov/wp-content/uploads/downloads/2010/12/COA-Draft-Recommendation-POSTED-ON-WEB.pdf ("Congress should also consider enacting a statute repealing the 'personal services prohibition' but mandating that such service contractor employees are deemed to be government employees for purposes of government ethics statutes."). Although ACUS omitted this course of action in its final recommendation, it did state that many activities, "such as those in which a contractor employee performs tasks that can influence government action . . . may pose a significant risk of personal conflicts of interest." ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-3: COMPLIANCE STANDARDS FOR GOVERNMENT CONTRACTOR EMPLOYEES—PERSONAL CONFLICTS OF INTEREST AND USE OF CERTAIN NON-PUBLIC INFORMATION 10 (2011), *available at* http://www.acus.gov/wp-content/uploads/downloads/2011/06/COA-FINAL-Contractor-Ethics-Recommendation.pdf.

reform the contractor ethics system, ACUS recognized that this would help "to eliminate disparate treatment [between contractor employees and federal employees] and to provide comparable standards for both government employees and employees of federal contractors who effectively act as government employees."[191] Of course, this statute should be limited only to government ethics laws and should not be used to make personal services contractors government "employees" for other purposes. This will prevent personal services contractors from taking advantage of the civil service laws and other government programs.[192]

In conjunction with this statute, the FAR Council should promulgate a new FAR clause mandating that all individuals working under a personal services contract file financial disclosure forms before starting work, and periodically for longer contracts. This clause should also require contractors to certify that they are free from all personal conflicts of interest and will abide by all government ethics laws. This clause implements the above statute through the current contracting process by being incorporated into every personal services contract.[193] The text of this new clause should be structured as follows:

> **52.237-XX Ethical Obligations of Personal Services Contractors**
>
> (a) Every individual assigned to this personal services contract shall, before starting work on that contract, file a public financial disclosure form as mandated by the Office of Government Ethics and its regulations. 5 C.F.R. §§ 2634.301–.311.
>
> (b) If this contract lasts longer than one (1) year, all individuals under this contract shall be required to file public financial disclosure forms pursuant to section (a) for each year under the contract.
>
> (c) Pursuant to [the statute proposed above], every individual assigned to this personal services contract hereby acknowledges and agrees that he/she is subject to all government ethics laws applicable to federal employees, including 18 U.S.C. §§ 201–219 and all regulations promulgated by the Office of Government Ethics.

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191 ACUS DRAFT RECOMMENDATION, *supra* note 190, Draft Recommendation, para. 2.

192 Currently, 5 U.S.C. § 2105(a) requires an individual to be formally appointed into the civil service before she is considered a federal employee under the civil service laws. *See* 5 U.S.C. § 2105(a) (2006). The statute proposed by this Note does not affect this definition.

193 Under FAR part 52, this new clause could then be directly incorporated by reference into the relevant contracts as dictated by the FAR Matrix. *See* FAR 52.301.

This clause would not alter the definition of a personal services contract beyond what is currently provided in FAR 2.101 and the six characteristics provided in FAR 37.104.[194] This new clause would simply implement the above proposed congressional statute and be incorporated into the current contracting process. Agencies would thus be responsible for adhering to this definition and ensuring that all applicable FAR clauses are incorporated into the contract.[195] Any conflicts of interest that are subsequently discovered would not only subject contractor employees to the relevant criminal statutes under 18 U.S.C.,[196] but also would constitute a violation of their contractual agreement with the United States.

Although personal services contractor employees are undoubtedly not the only government contractors in a position where personal conflicts of interest could harm the government,[197] there is a consensus among procurement officials that applying government ethics laws to all government contractors would significantly burden the overall contracting system.[198] For example, contractors that manufacture and deliver goods (e.g., computers or office equipment) to the government are typically not acting as the government's fiduciary and are thus not

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194 *See Id.* 2.101, 37.104.

195 Additionally, longstanding legal precedent holds that contractors are put on constructive notice of all relevant FAR clauses published in the *Federal Register*, and contractors may not assert that a relevant FAR clause does not apply simply because the agency failed to incorporate it into the contract. *See* G. L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963) (holding that contractor had constructive notice of a contract term required by the Armed Services Procurement Regulations, a predecessor of the FAR, but not actually included in the contract).

196 Criminal conflicts of interest statutes can be found at 18 U.S.C. §§ 201–219 (2006).

197 Contractors performing inherently governmental functions should also arguably be subject to some form of government ethics laws, although current policy requires agencies to "ensure that contractors do not perform inherently governmental functions." Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, 76 Fed. Reg. 56,227, 56,236 (Sept. 12, 2011). This issue, however, is beyond the scope of this Note.

198 *See* CLARK, *supra* note 9, at 33 ("[R]eflexively imposing every government ethics restriction on all contractor personnel . . . may provide only limited benefit for the government while imposing substantial costs, such as imposing ethics restrictions on contractor personnel (such as those mowing lawns) who are not in a fiduciary position."). The AAP, in its 2007 report to Congress, found that "[a] blanket application of the government's ethics provisions to contractor personnel would create issues related to cost, enforcement, and management." ACQUISITION ADVISORY PANEL, *supra* note 45, at 418. Additionally, Robert I. Cusick, the former Director of the United States Office of Government Ethics, expressed concern at an ACUS meeting that expanding the scope of ethical obligations too broadly could impose excessive costs on contractors and increase the difficulty of enforcing these obligations. *See* ADMIN. CONFERENCE OF THE U.S., COMM. ON ADMIN., MINUTES FOR NOVEMBER 3, 2010 (2010), *available at* http://www.acus.gov/wp-content/uploads/downloads/2010/12/COA-Formal-Minutes-POSTED-TO-WEB.pdf.

in a position to harm the government due to personal conflicts of interest. Even low-level services, such as janitorial or landscaping services, do not require contractor employees to exercise discretion on the government's behalf. In these cases, the costs of imposing ethics restrictions on these contractors, which include administrative costs and reduced flexibility, would far outweigh any benefits the government might receive from these additional protections.[199]

Conflicts of interest among contractor employees are more likely to present real concerns in positions where contractors perform similar functions as federal employees, are being directly supervised by federal employees, and are ultimately able to exercise discretion on the government's behalf.[200] As is the case with government employees, the concern over potential conflicts of interest increases as contractor employees exercise greater levels of authority.

CONCLUSION

The solution proposed by this Note would eliminate the unbalanced ethics scheme between government employees and contractors and would reduce the need for federal agencies like the Army's CCE to separate its contractors from its government employees. Agencies would be able to directly supervise their contractor personnel, and both personal services contractors and federal employees would be subject to the same set of government ethics laws. Agencies would ultimately be able to more efficiently designate tasks according to which individual was best qualified, based on knowledge and experience, to handle that specific project.

This solution would apply to senior mentors employed under personal services contracts through the Pentagon's senior mentor program. This approach would not allow the Pentagon to avoid applying ethics laws to its senior mentors simply by hiring them under contract. These senior mentors would instead be subject to the same ethics rules as the regular Pentagon officials with which they work. As such, General McKissock would have been considered a "federal employee" for government ethics purposes and would have been required to file a public financial disclosure form before he started consulting for the Marines. If he decided to remain as a director of Sapient, General McKissock would be prohibited from working on any government project for which Sapient planned to compete, and he

199 *See* CLARK, *supra* note 9, at 33.

200 *See id.* at 25 (stating that the potential for conflicts "exists anytime contractor personnel exercise discretion on behalf of the government or have access to government resources").

certainly would not be allowed to lobby the officers he advised. Most important, this approach would extend beyond the Department of Defense and apply to all executive agencies.

To be clear, this new approach does not completely abolish every distinction between contractors and government employees, nor would it be desirable to do so. Matters concerning hiring, firing, and compensation would still differ between these two categories, as the civil service laws would continue to apply only to employees formally appointed into the civil service. Nevertheless, abolishing the personal services prohibition and expanding the scope of government ethics laws to personal services contractors is a necessary step toward properly managing the government's growing use of service contractors. Shifting the focus of policymakers toward ensuring proper oversight, management, and accountability of service contractors will help guarantee that contractors are being used appropriately in the government.