

# Government by Contract:

Considering a Public Service Ethics  
to Match the Reality of the “Blended”  
Public Work force

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## About the Author

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Mr. Guttman is a highly-regarded expert on third-party governance. *The Shadow Government* (1976) which he co-authored is recognized as a seminal study in modern government contracting. In 1978 he authored perhaps the first law journal article (in the *Harvard Journal on Legislation*) on modern contractor conflict-of-interest laws. He was special counsel to US Senator David Pryor in Senate investigations of the Federal government's use of contractors to do its basic work. He has written extensively on contracting and testified many times before Congress and other public bodies on this topic. He shared in an investigative journalism award for a 2004 study of \$900 billion in Defense Department contracting. As a private lawyer, Mr. Guttman's practice has involved a broad range of areas of law.

Mr. Guttman wishes to thank the numerous scholars, students, citizens, and government and contractor employees who have helped further his understanding that led to this paper. In particular, he is greatly indebted to the late Harold Seidman, scholar and public servant, who provided seminal understanding of the evolution, and importance of, the dual sets of rules governing civil servants (and political appointees) and private citizens who perform the work of government under contract. The contents and opinions expressed in this report are those of the author who is solely responsible for any errors or omissions.



## Foreword

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While succeeding generations of members of Congress and presidents have vowed in the name of efficiency to shrink Big Government, the size of the federal civil service work force has remained fairly constant for decades.<sup>1</sup> Beyond the symbolic politics surrounding philosophical differences over the appropriate size of government are the often less discussed, but fundamental issues raised by the “fourth branch” or “shadow government” which has expanded in scope and function in recent decades.<sup>2</sup> This refers to the vast array of private contractors who work in every area of government from building weapons to writing regulations. While data on the number of civil servants is available, there is no comparable data on the number of government contractors and their employees who perform work of the kind that citizens might think of as the work of the government.<sup>3</sup> For decades, this had been Washington’s “best kept secret” according to the late Harold Seidman, a distinguished scholar of public administration who advised both President Dwight Eisenhower and President John Kennedy when their administrations struggled with the governing implications of the growing number of government contractors.<sup>4</sup> The most troubling aspect of the blended public-private work force resulting from “government by contract” is the challenge for accountability.

Dan Guttman, a fellow at The Johns Hopkins University Center for Advanced Governmental Studies and a highly-regarded expert on issues of third-party governance, in this paper, *Government by Contract: Considering a Public Service Ethics to Match the Reality of the “Blended” Public Work force*, discusses how the current reliance on contractors to do the government’s work has its origins in a Cold War era bipartisan reform of government. While the use of contractors has yielded great successes, as Guttman explains, the challenges today of increased dependence on their use driven by limits on official personnel and increased government work need to be considered as well. Guttman’s intent is to spur consideration of a public service ethics that could address the current reality of how contractors operate in governance today. Namely, “private” contractors are an often inseparable part of the decisional chain in the performance of the government’s basic work (whether it is called “inherently governmental” or the “core” work of government). Furthermore, it can no longer be presumed that the official work force has the capacity to hold the contractor work force accountable.

Efforts to further think through the implications of “government by contract” could not be more timely. President Barack Obama in March 2009 issued a Memorandum on Government Contracting which directed the Office of Management and Budget (OMB) to develop government-wide guidance regarding contracting to better ensure competition and efficiency.<sup>5</sup> OMB focused first on government procurement issues given that the amount spent on government contracts more than doubled to \$500 billion in 2008 from its level in 2001. In December 2009, OMB issued its “Acquisition and Contracting Improvement Plans and Pilots: Saving Money and Improving Government” and continues to re-examine what constitutes “inherently governmental” and cannot be delegated to private sources.<sup>6</sup>

Guttman astutely asks, “Where contractors have had the privilege of being trained on taxpayer funding, what is the commensurate obligation? Do they have to use their learning in a way that does not take undue advantage of what they know by virtue of the privileges of access and training and funding?” The questions of accountability and what is an “inherently governmental function” are fundamental to assessing the integrity of our system of government. The initial reform efforts that led to government contracting were predicated on the notion that in order to gain the benefits of the private sector work force contractors could not be subjected to the same laws (and rules) that govern the civil service. This premise of dual sets of rules, Guttman notes, makes sense if contracting is limited, if contractors provide “temporary and intermittent” service, and if the civil service work force retains the capacity (i.e., expertise, experience, and numbers) to oversee and account for contractors. From the mid-20<sup>th</sup> century on, however, this premise has continually been eroded by the determination to grow the government through contractors while limiting the numbers of civil servants (through, e.g., “personnel ceilings”).

Whereas mid-20<sup>th</sup> century contractors may have provided “temporary and intermittent” services, today contractors, and their employees, increasingly work full time and long term for the government. For example, today, a consulting firm is likely to actually write the government’s regulations, not just provide technical assistance in their development. Indeed, that private entity may also be consulting with state governments and with companies that will be subject to those very regulations. Other areas of blurring between public and private efforts include the commonplace practice for contract employees to work within federal agencies and be indistinguishable from federal employees even though that is technically illegal. The reach of federal contracting continues to expand and now even contract management is being contracted out by government.

Guttman suggests that the core challenge in contractor accountability is where laws, rules and policies presume that officials are in control (i.e., “the presumption of regularity”), but the reality is the opposite. The problems of accountability posed by the discrepancy between official and contractor capacity are, according to Guttman, in basic ways similar to those posed in other settings of “information asymmetry” in the relationship between experts and those they advise and serve. In the case of doctors and lawyers, most classically, there are special ethical principles to assure that the “professional” (and expert) does not take advantage of the information asymmetry. In the case of government and contractor, these principles have not been considered because it has been presumed that officials are in control and, in contrast to a patient or law client, because the government is all knowing. Guttman proposes an approach to developing a public service ethics which would apply to both those in the public and private sectors engaged in “government work.” His point is not that identical rules should apply to contractors and officials, but that ethical principles to address the current reality may be a new tool of accountability. Further, he suggests that the very process of thinking through the value of ethical principles to address the current reality of “third party government” will be useful.

As Professor Seidman wisely observed in his classic work, *Politics, Position, and Power*, “We will compound the problem [of government by contract] if we demand simple answers . . . Whatever strategy is devised must be as sophisticated as the problems it seeks to solve.”<sup>7</sup> The Johns Hopkins Center for Advanced Governmental Studies expects Guttman’s paper to be an important part of informing a “sophisticated” discussion of the governance strategy to better manage our “government by contract.”

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## Introduction

The Iraq War brought to public attention the reality that much of the basic work of government is done by contractors, and that the government's ability to account for its contractors cannot be taken for granted. In the emerging public discussion, the public learned of the sheer dimensions of the growth of contracting — from under \$200 billion at the Defense Department (which has the lion's share of contract dollars) in fiscal year 2001 to close to \$400 billion in fiscal year 2008,<sup>8</sup> at the same time there was a decline in the official ("in-house") "acquisition work force" needed to account for contractors.<sup>9</sup> The public learned that core laws enacted to hold officials and servicemen to account often do not apply to contractors; thus, for example, Blackwater's Iraq work force was not subject to the same rules that servicemen were.<sup>10</sup> They also learned that laws and policies designed to account for contractors—including the statutory preference for competition in contracting<sup>11</sup> and the longstanding White House policy that "inherently governmental" work can only be performed by public officials<sup>12</sup> — are too often more form than substance. Citizens learned that the management of contracting itself was increasingly contracted out.<sup>13</sup> And they learned that the basic dimensions of contracting were as invisible to top officials as they are to the citizen.<sup>14</sup> Indeed, in fall 2010 they learned that the US military itself was evidently unaware that contractors employed to guard Afghanistan bases harbored Taliban connections.<sup>15</sup>

Mid-20<sup>th</sup> century Congressional hearings focused on the cost of contracting and "cost overruns" came into the vocabulary but as the GAO reflected in a January 2010 report on Defense Department contracting<sup>16</sup>: "Despite decades of reform efforts, these outcomes and their underlying causes have proven resistant to change and, in fact, both DOD weapon system acquisition and DOD contract management have been on our high-risk list for nearly 20 years." Now 21<sup>st</sup> century concerns include not only "how to buy"—levels of competition and contract types and clauses—but also "what to buy?"—how much of the basic work of government is being contracted out, and how much should be?<sup>17</sup>

Candidate Obama urged reform, and the new Administration was quick to act. Among other things, it promised renewed efforts to ensure competition, to revise the inherently governmental policy, and to bolster the acquisition work force.<sup>18</sup> Nonetheless, the proposed Obama reforms leave untouched basic "rule-of-law" premises that form the framework for the mid-20<sup>th</sup> century growth of government contracting — including the premises on which it is assumed the government can account for contracting.

The first premise is that fundamentally different rules can and should govern officials and contractors. This premise is at the core of the American "rule of law" tradition, which provides that special laws apply to government and officials to define their authority and protect citizens against abuse. These laws begin with the Constitution, notably the Bill of Rights and 14<sup>th</sup> amendment, but have come to include pay caps, Freedom of Information law(s), ethics rules, and limits on political and labor activity. In the rule of law tradition, these rules apply to government and officials, but not, with some exceptions, to private actors.

The second premise, related to the first, is the presumption that the application of differing rules to public officials and contractors is acceptable because officials will in fact have the capacity to account for contractors. In the context of American administrative law, this is the "presumption of regularity"—the presumption that officials must and can have the requisite experience, expertise, and capacity to account for the work of government (including accounting for contractors).<sup>19</sup>

These "rule-of-law" premises, in turn, fit with the notion that "public" and "private" "actors" (civil servants and contractors) are fundamentally different in the qualities they can bring to public service — differences related to institutional obligations and incentives, to freedom to serve multiple interests and civil service tenure expectations, and to the nature of expertise. If the presumption of regularity is valid in fact, then it is possible to have differing rules for contractors — because they can be presumed to be subject to oversight by officials with requisite capacity, expertise and experience. But what if, as evidence strongly suggests, the presumption of regularity is no longer valid? What, for example, if the rules that



protect us against official abuse are not applied to those who, in fact, increasingly do the government’s work? What if, for example, the presumption that officials have the capacity to oversee contractors runs against the reality that they do not and, indeed, that the work of contractor management is itself often contracted out?

What should we do then? Here, there appears to be at least three choices. First, we can abandon the premises of mid-20<sup>th</sup> century contract reform. We can bring much more work in-house than now contemplated or, alternatively, apply to contractors the same rules that apply to officials. Assuming this were politically plausible (hardly likely at present), if the premise of contract reform were correct, this would negate the institutional differences for which contractors are valued.<sup>20</sup> Second, we can hope that current attention will permit us to “muddle through.” But again, given the reality, this cannot be assumed. Finally, there is the possibility that we can begin to think of approaches — new tools, if not entirely new visions — to employ if the presumption of regularity cannot be assumed.

In this context, this paper takes a look at one such tool. It considers a public service ethics for contractors doing the government’s basic work. It does so on the assumption (“as if”) the presumption of regularity cannot be assumed.

The focus is on ethics as a tool for several reasons:

- 1 Contractor ethics rules have historically received very limited attention, however, this has been changing with the recognition by government and contractors of their utility;
- 2 ethics principles that govern in other situations of “expert/client” “information asymmetry” (for example, doctor/patient and lawyer/client) have not been applied in the government/contract setting because, in part, the government is presumed to be a competent and authoritative sovereign — and not a dependent patient or client;
- 3 The focus proposed, at least initially, is on an ethics based on disclosure not prohibition. Today, the dependency on contractors is so substantial that to enforce current laws would often be to deny the government of the work force needed to do its work. The alternatives are to continue to, in essence, ignore noncompliance (on the premise that there is no practical alternative and/or the hopeful presumption that noncompliance is not routine) or to try to determine the extent to which the rules are disobeyed and, if substantial, to determine whether they should be enforced, reconsidered, or eliminated. Thus, a core purpose of the ethics proposed, is the development of information that, in turn, might be used to craft new policy and, at the least, to give officials and citizens better understanding of how the system now works.

In sum, what is considered is not a fix for current ills, but a new ingredient that may provide the basis for moving forward in a world where the accountability premises of the current system are too often at odds with the reality.

## Background: Mid-20<sup>th</sup> Century Contracting Was Seen By Those Present at the Creation as a Reform of Fundamental (Constitutional) Dimensions

While Iraq stimulated popular awareness of the role played by contractors in doing the Federal government’s work, the role of contractors was the predictable consequence of a dynamic set in motion a half century earlier. At mid-20<sup>th</sup> century, US reformers undertook to grow government through the use of contractors. Scientists, businessmen, and officials, spurred by the success of the Manhattan Project and other wartime contracting, and in the shadow of the defeated totalitarian systems, saw that harnessing private enterprise to public purpose would provide technical expertise and political support for needed defense and welfare tasks, while allaying concern that the result would be Big Government.

Those present at the creation of this new mode of contracting saw that they were engaging in reform of Constitutional dimensions, i.e., a reform that would alter basic structures of government. In his 1965 *The Scientific Estate*, Don Price, the first dean of Harvard's Kennedy School of Government declared:

"...the general effect of this new system is clear; the fusion of economic and political power has been accompanied by the diffusion of sovereignty. This has destroyed the notion that the future growth of the functions and expenditures of governments...would necessarily take the form of a vast bureaucracy."<sup>21</sup>

Similarly, in his 1971 book *Business in the Humane Society*, John Corson, a New Deal social welfare official who opened the business consulting firm McKinsey's Washington DC office at mid-century, explained:

"There is little awareness of the extent to which traditional institutions, business, government, universities and others, have been knit together in a politico-economic system which differs conspicuously from the venerated pattern of our past."

Corson, like Price, welcomed the "choice" America made as a "new form of federalism." (*Business in the Humane Society*, at 78)<sup>22</sup> "Historians in the twenty-first century," Corson wrote, will recognize that the "progressive expansion of the public interest" meant that the public had to choose between "steadily enlarging the machinery of government or finding ways to entrust nongovernmental agencies for carrying out public functions." The American people "chose the latter." (Corson, at 17).

As public administration scholar Paul Light has catalogued, the mechanics for implementing the reform were simple and direct. From the mid-20<sup>th</sup> century on, caps or limits on the numbers of civil servants ("personnel ceilings") were imposed by the White House and Congress. By consequence, when new programs, or new agencies, were created, the hydraulic force of personnel ceilings ensured that it was contractors who would do the basic work.<sup>23</sup> As the Federal government grew, contractors, not officials, were the work force necessarily deployed to do the government's basic work. When the government funded the creation of new bodies of skill and knowledge, most notably information technology, it was contractors who were by default funded to get the learning.

Cold War agencies, such as the Atomic Energy Commission, Department of Defense, National Aeronautics and Space Administration ("NASA"), US Agency for International Development ("USAID"), provided the initial template for the deployment of contractors as a permanent work force for the performance of central public tasks. Building on informal relationships established before the Second World War and cemented by wartime contracts between and among government, industrial firms, and universities, these agencies shaped the building blocks which served as the Legos for future developments.<sup>24</sup> For example:

- » Under the "project management" model, famously exemplified by nuclear weapons complex "management and operating contractors" and Defense Department weapons project "systems managers" and "systems analysts," the government delegated public projects central to Cold War missions to contractors. Agencies created new contract institutions – "independent nonprofits" such as Rand, Mitre, and Aerospace – to manage contractor teams and advise on planning and spending.
- » Under the "support service" model, perhaps most famously identified with NASA, agencies called on contractors to provide personnel on an "as needed" basis to supplement the civil service in the daily work of government, be it planning, rule writing, dealing with citizens or other contractors, and/or clerical support.
- » Under the "technical assistance" model, pioneered in Cold War foreign aid programs, contractors were called on to aid other governments (initially foreign, but then state and local) in social and economic development.

In the 1960's and 1970's these models were transferred from Cold War agencies to new civilian agencies such as the Departments of Transportation and Housing and Urban Development, Office/Department of Education, and the Environmental Protection Agency. The transfer was eased by the (pre-Vietnam) charisma of contractor-associated management techniques, but driven in any event by the force of personnel ceilings. As in the case of the Cold War agencies, the promoters of “third party government” viewed third parties as purveyors of new management techniques, but also as tools in the politics of bureaucratic reform.

Thus, John Corson was able to note in his 1971 book, “in 1969 a number of federal agencies (NASA, for example) performed more of their work through contracts with private businesses than with their own employees.” (*Business in the Humane Society*, at 17). Post-9/11 growth of contracting to do the work of homeland and national security agencies has been dramatic in size and public impact, but, nonetheless, a predictable outcome of the framework established decades earlier.<sup>25</sup>

## From the Outset, There Were High-Level Warnings that Reform Challenged the Presumption that Officials Can Account for the Work of Government

Price and Corson saw the “diffusion of sovereignty” and the “new federalism” as profound but desired changes. Others saw them as no less profound, but as challenging, in essence, the rule of law tradition and the presumption of regularity. In response to the reality that, since the Manhattan Project, the day-to-day management of the nation's nuclear weapons complex sites was under private management, the Eisenhower Administration introduced the concept of “inherently governmental” function.<sup>26</sup> This concept, which has been embraced by every White House since, holds that there is some work that can only be done by public officials, and that cannot be contracted out.<sup>27</sup> At the onset, the policy embodied the principle that there is a “public interest” which can only be entrusted to officials, and not to those with “private interests” (e.g. contractors).<sup>28</sup>

In retrospect, the Eisenhower Administration's assertion of the inherently governmental principle may have been the first high level admission that the horse had already left the barn. As Siegfried Hecker, former director of Los Alamos National Laboratory (which first tested the atomic bomb) later put it, “[t]he development, construction, and life-cycle support of the nuclear weapons required during the Cold War were inherently governmental functions...the government realized that it could not enlist the necessary talent to do the job with its own civil service employees.” Instead it “enlisted contractors to perform the government's work on government land, in government facilities, using the specialized procurement vehicle of an M&O (management and operations) contract.”<sup>29</sup>

In his 1961 Farewell Address to the Nation, President Eisenhower saw developments lauded by Price and Corson as “imperative” – but fraught with “grave implications.” The conjunction of an immense military establishment and a large arms industry, is new in the American experience. The total influence, economic, political, and even spiritual, is felt in every city, every state house, every office of the Federal Government. We recognize the imperative of this development yet we must not fail to comprehend its grave implications. In the councils of government, we must guard against the acquisition of unwarranted influence by the military-industrial complex.<sup>30</sup>

In the wake of the Eisenhower address. President Kennedy commissioned a Bureau of the Budget/Cabinet level review ( the “Bell Report”) to assess the reliance on contractors for Cold War “R and D” – the new bestiary of contract organizations, including the Rand Corporation, Mitre, and Aerospace, created by national security agencies to help plan and manage the contract system.<sup>31</sup>

The 1962 Bell Report stands, with President Eisenhower's address, as the highwater mark of White House and public understanding of the double-edged dynamic unleashed by the mid-century reform.<sup>32</sup> The Bell report deemed it “axiomatic” that officials must have the competence to account

for the government's work. But it found that already – by 1962 – reliance on contractors had “blurred the traditional dividing line between the private and the public sectors of our Nation.” This meant the emergence of “profound questions affecting the structure of our society [due to] our inability to apply the classical distinctions between what is public and what is private.” Pointedly, the panel expressed concern that officials would lose control to contractors, particularly those contractors “performing the type of functions which the government itself should perform.”

The Bell Report put its finger on what, combined with the ceilings on civil servants, was, and remains, the core challenge. The discrepancy between rules governing public officials and those governing contractor employees provides incentives for core government competencies, both in terms of people and knowledge, to migrate into the contractor work force. Why should an experienced official stay in government when more interesting work at higher pay, and with fewer ethical constraints, is available as a contract employee? In the short term, the Bell Report agreed, use of contractors to respond to an emergency (at the time, the Cold War) seems to make sense. However, over the longer term, the axiom of official control is imperilled.

The Bell Report backed away from answering the difficult questions it raised. In the decades since, driven by both the dual sets of laws and the hydraulic force of bipartisan limits on civil servants (personnel ceilings), with each new government program, third-party government grew without regard to whether work was “inherently governmental,” or whether there was official capability to oversee the contractors. The challenge to the premise of official control remained unaddressed. On the contrary, bipartisan limits on the number of civil servants (“personnel ceilings”) assured that as government grew, third parties would be increasingly needed to perform its basic work.

## “What if?” A Public Service Ethics To Match Evolving Public Service Reality

The 20th-century reform yielded profound successes. Nonetheless, it drained the country of government capability needed to oversee the contractor work force and left it with a body of laws which treat officials and contractors differently. It did so on the presumption that the official work force is in control and can account for the contractor work force. The Bell Report, as noted, identified the problem with the presumption, but begged off addressing it. There is not yet a 21<sup>st</sup>-century replacement vision.

As noted at the onset, there are several alternatives. First, there is the hope that the tools that have long been available will turn the tide. As proposed by the Obama Administration this would include more contract managers and better contract management, commitments to more competition, “performance contracts” and wiser choice of contract types, some increased civil service staff, reformulation, and reassertion of inherently governmental policy. Maybe this can be so.<sup>33</sup> However, as continued surprises such as the fall 2010 revelation that US contractors may employ those affiliated with the Taliban punctuate, there can be little confidence of this outcome. Second, there is the possibility of applying the same rules to contractors and civil servants. This approach would negate a core premise of reform – that there are fundamental differences between civil servants and “independent contractors,” and the desirable qualities of both may be jeopardized as rules governing them converge. Third, there is the alternative of bringing to bear new tools. In this context, the tool of a public service ethics that addresses the “what if” is suggested.

### The Logic of an Ethics “As if” the Presumption of Regularity Does Not Govern

Professional codes have evolved to limit abuse by experts in dealings with clients – doctors and lawyers most famously. Ethical codes govern those who perform the public’s work as civil servants.<sup>34</sup> Following recent attention to contracting, government and contractors have begun to declare the need for ethical codes for contractors. However, as discussed below, these efforts may be said to presume regularity. They presume that officials possess the capacity and expertise to account for contractors. By a similar token, they focus on contractor conduct which is already covered by current law – bribery or kickbacks or false claims for payment, for example.

If we cannot presume officials are in fact in control, the focus of ethics discussion must be on the special problems posed where:

- 1 There is information asymmetry of the kind that characterizes expert/client relations in other settings; but
- 2 In contrast to other professional/client settings, the client in this case is the sovereign – not a potentially vulnerable patient or legal client.

Thus, we may focus on ethical questions of a kind that are generally recognized elsewhere. At the same time, they have not yet been addressed in the government/contractor setting because of the assumption that the client is, in fact and law, all knowing and all capable.<sup>35</sup>

### Information Asymmetry in the Government/Contractor Context

It is a tenet of modernity that information asymmetries dog relationships between experts and laypeople, or, in a related vein, between principals and agents. Unless controlled, the actor with more information may be able to take advantage of the client or principal who has called on him or her for help. Information asymmetry between government officials and contractors who do the government’s basic work is a primary legacy of 20<sup>th</sup>-century contract reform with literally catastrophic life or death implications.

For example, NASA, conceived as a response to the Cold War space race, has been fundamentally dependent on contractors since its birth.<sup>36</sup> Following the Columbia tragedy, the *Washington Post* observed that “NASA may hire the astronauts”, but “at the Johnson Space Center...the contractors are in charge of training the crew and drawing up flight plans. The contractors also dominate mission control, though the flight directors and the ‘capcom’ who talk to the crew in space are NASA employees.”<sup>37</sup> NASA shuttle official Linda Ham further limned NASA’s dependency on contractors for what proved to be life or death information, explaining that:<sup>38</sup>

“she had relied on an analysis by Boeing that indicated no threat to the mission from the impact of the foam. ‘We must rely on our contractor work force who had the systems expertise to go off and do that analysis,’ she told reporters last month. ‘We don’t have the tools to do that. We don’t have the knowledge to do that or the background or expertise to do that kind of thing.’”

Information asymmetry in the government/contractor context has several characteristics. First, by dint of decades of personnel ceilings, as in the case of NASA, in many cases the core experts on a subject are contractor employees. With officials increasingly relegated to contract management roles, the day-to-day work of developing and managing programs – and learning about them – is delegated to contractors. Second, as the Bell Report posited, the dual sets of rules governing officials and contractors provide incentives for experts the government does possess to migrate to the contractor work force (i.e. the “revolving door”). Third, contractors, in contrast to officials, may work for multiple organizations

at the same time. In this way they may reap the benefits of extended access to information and experience. Finally, the potential for information asymmetry must be seen in the context of the organization of government responsibility for procurement. Historically, there has been a division of labor between those with legal authority to enter into and modify contracts (Contracting Officers or “COs”) and those who are the eyes and ears that might oversee the work in the field once contracts are awarded (“COTRs” or Contract Officer Technical Representatives who are designated for each contract).

“COs,” generally located in Washington or in regional contract offices, are rarely present or involved in the day-to-day work of contract administration. As contracts have grown in size and complexity, it develops that COTRs themselves may be nowhere near the actual use of the contract. Thus, when investigators began to look at contract use in Iraq, they learned that COTRs were few and far between.<sup>39</sup> In the past two decades this division of labor has been compounded by an order(s) of magnitude by several factors. First, there has been increase in the amount of contracting and decline in the acquisition work force (see notes 8-15). Second, there has been an increase in the contract management that is contracted out. Finally, in the name of efficiency, 1990’s procurement reforms compartmentalized contract management so that those with legal authority/responsibility for contracts (COs) often are not even housed in the agency that uses the contractors. Indeed, as Iraq contract investigations showed, they may not even be on the same continent.<sup>40</sup> In short, the reality is that contract officials with legal responsibility may see little or nothing of what happens to a contract after its award, relying not only on others, but on others located in other government agencies, and even other continents.

Professional codes evolved to limit the abuse of information asymmetry by experts in their dealings with those they serve or advise. Doctors, for example, must fully disclose and obtain informed consent of patients.<sup>41</sup> Ethical codes also, of course, govern those who perform the public’s work as civil servants.

There are no generally applicable ethical principles that govern special ethical problems when private citizens do public service on taxpayer dollars. In part, the very need for such principles has been obscured by repeated official proclamations that officials must be in control. In contrast to a patient or a legal client, the US government might be thought to have the resources (authority, people, knowledge, money) to make decisions and protect itself. Indeed, this thought is given legal form in the presumption of regularity and the inherently governmental principle. But it is simply not the case today.

### **Reciprocity: A Root For Contractor Ethical Obligation**

To a continually increasing degree, the contract work force is qualified to do what it does because it is the beneficiary of taxpayer-funded on-the-job training. At its modern mid-20<sup>th</sup> century inception, the contract work force was comprised of industrial and service firms who could bring to government work experience gained in the private sector – and continued to work for the private sector. Government contracting was a part time job. Manhattan Project contractors such as Eastman Kodak, Dupont, and Union Carbide were private enterprises that primarily served private markets. Similarly, professional service companies like Booz Allen and Hamilton, Arthur D Little, AT Kearney, Cresap McCormick and Paget, McKinsey, and the (then) “Big Eight” accounting firms made their names serving private enterprise. Today, the contract employee although technically in the private sector, may have a full-time career of government work no less than a civil servant. Brands that once were proud providers of goods and services to the private sector – Lockheed and Booz Allen and Hamilton – are now nearly full-time government servants. Others of today’s leading contractors, such as SAIC, were born in service to government.

Taxpayer dollars provide the contract work force with two kinds of learning – textbook/technical and practical.<sup>42</sup> By dint of the force of personnel ceilings, civil servants are increasingly contract managers. Contract employees are paid to learn new fields.<sup>43</sup> Late 20<sup>th</sup>-century information technology may be a contractor preserve. At the same time, contractors gain practical knowledge of how the



government actually works. (By the measure of the Freedom of Information Act, for example, contractors often have routine real-time access to information that may take considerable time and effort for citizens to obtain, if they know it exists and can obtain it at all).<sup>44</sup> In the old days, the practical “inside” knowledge may have been limited to those who come to contracting through the government revolving door. Today, as contractors sit side by side with officials in government offices, it may come no less as a contract employee.<sup>45</sup>

Some say that the revolving door is a benefit to the public because the public can still benefit from government-trained expertise. By the same token it is increasingly taxpayer-funded experience that permits contractor employees to make their living. It might, as a corollary, be said that just as civil servants have an ethical obligation not to use their position for private gain, those who participate by virtue of learning gained on taxpayer dollars and with privileged access to government, have a reciprocal obligation not to exploit that knowledge for private gain.

To be clear, it is not suggested that rules governing contractors and officials should be identical. To state that contractor employees cannot use knowledge gained in public service for private gain would be to negate much of the possibility of contractor use. Rather, the suggestion is that it is time to reflect on the bounds between reasonable and unreasonable use of what is learned by virtue of government work. Where contractors have had the privilege of being trained on taxpayer funding, what is the commensurate obligation? Do they have to use their learning in a way that does not take undue advantage of what they know by virtue of the privileges of access and training and funding?

### Further contexts, Morality and Law

Before proceeding to specifics, it is useful to comment on the relation between the proposed discussion of ethics, on the one hand, and considerations of morality and law, on the (second and third) hand. First, to urge consideration of ethics is, of course, not to suggest that the population at issue is unethical (or, at least, any more or less ethical than the population at large). On the contrary, it is to suggest that honorable individuals are inclined to follow ethical principles – if the issues at stake and the logic of the principles to address them have been thought out and explained.

This premise of Federal ethics codes was well stated in *US v. Mississippi Valley Generating Company*, 364 520 (1961). The decision is the core explication of the conflict of interest standard applicable to civil servants.<sup>46</sup> The Supreme Court explained:

“[T]he statute does not specify as elements of the crime that there be actual corruption or that there is actual loss suffered by the Government as a result of the defendant’s conflict of interest...The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by business they transact on behalf of the government “Id. At 549–500.

As to law, we may not now know enough to make good law. In part because of basic lack of transparency, in part because the presumption of regularity has served as a placebo to limit inquiry, information on the day-to-day workings of the system is too limited. The consideration of ethics principles should be a tool to help our understanding of which laws work and which do not, which need revision or replacement, or which should be repealed.

The focus of what is proposed here, at least at the onset, would be on disclosure, not prohibition. Disclosure might serve as (1) a preventive/deterrent to conduct that does not survive reflection; and (2) a means to develop information about how the system now works so to educate and inform the use of already existing tools. For example, as discussed below, if contractors routinely disclose that their work appears to be in violation of law or policy, and if officials routinely determine there is no alternative but to

proceed, then the White House and Congress will know that such law or policy is not serving the intended function, and is in need of repair or replacement or elimination.

## The Proposed Method: Development and Discussion of Index Cases

The proposed approach to the public service ethics would be to:

- 1 Develop from real-world case studies, “index” cases<sup>47</sup> – cases that illustrate potentially routine problems that may exist if the presumption of regularity cannot be assumed:
- 2 Compare the index cases to ethics policies possessed by contractors and officials, on the one hand, and government and public expectations of contractors, on the other; and
- 3 Convene discussion of the cases and alternative principles of conduct that emerge from them.

The process—the bringing to public consideration of cases and alternatives — may be more important than particular principles chosen. Similarly, the adoption of particular principles by a particular company may itself be not as important as the definition and disclosure of the principles that each contractor adopts.

### Index Cases: A Start

Discussion might begin with the following:

- 1 Circumstances where there may be frequent violation of a law enacted (at least in part) to regulate contractors. As distinguished from circumstances of fraud (or bribery), the focus here is on cases where government officials should be presumed to know about these violations. That is, if the presumption of regularity governed government officials would be aware of the problems and address them. For the contractor’s part, the violation may be justified on grounds such as “everyone does it,” and/or “we are only doing what the government asks,” and/or “the government is supposed to police these things, not the contractor.”
- 2 Circumstances where the inherently governmental line—however defined—is crossed—again, with justifications such as those just stated (particularly, “someone has to do the work, and it is impossible to hire more officials”).
- 3 Circumstances where the contractor knowingly accepts work that it suspects or knows may not be useful or may be counterproductive, again on grounds such as “the government asked us,” or “if we don’t do it a competitor will.”
- 4 Contractor conflict-of-interest rules, which do exist, but were crafted on the assumption that the presumption of regularity governs.

### Case(s) 1: “Industry Practice” Violations (“Everyone does it”)

- » A contractor or its employee is called on to perform work that is outside the scope of what is permitted under the contract. The law provides that “out of scope” work is unlawful.
- » A contract employee reports to work each day in a government office, working alongside civil servants, with work parcelled out depending on what needs to be done. The work is in violation of the prohibition against “personal service” contracting—essentially the substitution of contractors for civil servants.<sup>48</sup>

What is the obligation of the contract employees who go to work on these assignments? For example, should he/she query their supervisors about appropriateness? Should the supervisor formally query responsible officials?

### Out-of-Scope Contracting

The celebrated use of contractors in the Abu Ghraib prison, which has been subject of official inquiries, lawsuits, a book by one of the contractors (CACI),<sup>49</sup> scholarly articles, and innumerable news reports, provides an index case. Among other things, the interrogation contracting brought to public light the reality that much of GSA’s “supply schedule” contract work, such as one for prison interrogation, is impermissibly done outside the scope of the contract. In the CACI case, (1) the General Services Administration (GSA) awarded CACI a supply service contract, i.e. the right to offer services specified by the contract to other government agencies; (2) the GSA assigned the administration of the contract to the Department of the Interior and the Army then contracted through the Department of Interior to employ CACI to find interrogators for Iraq. It might be presumed that GSA was not likely in the business of awarding contracts to provide interrogation or battlefield intelligence services. Nonetheless, the error was evidently not caught by the government.

As a GAO summary of Army, GSA, and Interior post mortems on the contract process put it: (at 7)<sup>50</sup>

“Orders issued outside the scope of the underlying contract do not satisfy legal requirements under the Competition in Contracting Act for competing the award of government contracts. [fn omitted] ...The Interior IG [Inspector General] and GSA have determined that 10 of the 11 task orders issued by Interior to CACI for interrogation and other services in Iraq were outside the scope of the underlying GSA information technology contract. [fn omitted]. The Army has also determined that interrogation services were outside the scope of the contract.”

GAO further found, at 3, that the government lacked official oversight capacity:

“Significant problems in the way Interior’s contracting office carried out its responsibilities in issuing the orders for interrogation and other services on behalf of DOD were not detected or addressed by management. Further, the Army officials responsible for overseeing the contractor, for the most part, lacked knowledge of contracting issues and were not aware of their basic duties and responsibilities in administering the orders.”

### Personal Services Contracting

Abu Ghraib also likely involved violation of the prohibition against personal service contracts. (See fn. 48). The interrogators were, it appears, located by CACI for the Army. They did not constitute a preexisting CACI “interrogation team.” The existence of personal service contracting is, by anecdote, and increasingly by formal audit, commonplace. Indeed, a review of 24 Iraq contracts by the Department of Defense Inspector General, found that ten were “personal service contracts prohibited by the Federal Acquisition Regulation (many also evidently through GSA schedules).<sup>51</sup> The IG found, at 22, that:

“Personnel could have been hired as Government employees, as some of the top ranking members of the ORHA [Office of Reconstruction and Humanitarian Assistance] staff were hired. Hiring these individuals as Government employees would have also reduced the overall cost to the Government for the subject matter experts. Hiring the subject matter experts by way of the [GSA] Federal Supply schedules caused the Government to pay contractor overhead costs for very little added benefit.”

Indeed, the problem of illegal personal services contracting now implicates contract management itself. A 2008 GAO report<sup>52</sup> on the Army’s use of contractor contract specialists (including some supplied by CACI) at the Army Contracting Agency’s Center for Contracting Excellence (CCE),<sup>53</sup> found that:

“[i]n August 2007, contractors—who work side by side and perform the same functions as their government counterparts – comprised 42 percent of CCE’s contract specialists.” GAO Report, at 1.

GAO found that “the actual working element for the contractor contract specialists at CCE touched on all six [FAR personal service contract] elements.” *Id.*, at 15.

### Out-of-Scope and Personal-Service Contracting as Acceptable Industry Practice

The Abu Ghraib contracts revealed that contractor officials and attorneys may be of the view that a contractor has no obligation to take action in the face of such violations (assuming, for present purposes, and as in the cases cited above, the violations are plain or most likely).<sup>54</sup> When asked about contractor obligations under out of scope contracts, as in Abu Ghraib, contractor lawyers explained to a *Washington Post* reporter that it was not for the contractor to “police” the government.<sup>55</sup>

CACI, one of the contractors involved, explains in its book on the controversy that it was called on the carpet by GSA “plainly and simply” because of the Abu Ghraib controversy, “not because we faced an out-of-scope issue larger than any other company’s.” (*Our Good Name*, at 30). Similarly, in response to GAO’s critique, CACI urged that there was no “out-of-scope” contracting because the “course of dealing” between the government and contractor established that the work could be done under the contract. That is, since CACI had been doing the work for some time, the work must have been within the scope.<sup>56</sup>

If the presumption of regularity were valid, then it might be argued that contractors may rely on government for the “regularity” of contracts. But where it is known that official oversight may be limited, and where contractors talk of themselves as “partners” to government, there is a question of whether contractors can rely on the presumption of regularity to justify participation in relationships they have reason to know violate the law. In sum, (1) it cannot be presumed that laws against personal service contracting and out-of-scope contracting are routinely policed and enforced by government; (2) it may be presumed that contractors have, at the least, equal knowledge of such violation.

It is understood why the violations may take place—the need for assistance is always pressing and employment of contractors is said to be easier than civil servants. It can be asked if such rules today are impractical to enforce—that perhaps they should be abolished. At the same time, questions arise as to how the functions originally served by enactment of the rules are to be served today—or whether these functions are no longer useful. These questions, in turn, depend on empirical knowledge of the extent of violations, and the conduct expected of contractors when the laws are not followed. A disclosure focused ethics code might provide such information.

### Case 2: Performance of Work Known by the Contractor to Be of Limited Value

What is the obligation of contract employees, and top management, when work sought by the government is known to be of limited or no value, or perhaps even counterproductive? Is it enough to say “the government asked for it,” (and/or “if we don’t do it, a competitor will”). An example of an index case may be the FBI’s effort to bring its case management system into the 21<sup>st</sup> century—to replace the “stovepiped” data gathering that 9/11 laid bare. Essentially coincident with 9/11, the FBI undertook to computerize its case management system. The project was to include computers, networks, and software. The design of the software—“Virtual Case File”—was contracted to SAIC. In March, 2004 FBI Director Mueller told Congress the system would be operational that year. The project was abandoned in 2005.

The SAIC case is an interesting “index case” because of its centrality to homeland security, the ubiquity of national security information systems, and the extent to which the record has been developed through Congressional testimony, National Research Council and GAO review and media investigation. There appears to have been an SAIC employee “whistleblower” whose efforts to question feasibility were quashed. In 2002 the employee suggested on a website that there might be problems with the system. He was reported to the FBI by SAIC management as a “disgruntled” employee and effectively removed from the project.<sup>57</sup>

Former SAIC Senior VP David Kay (who served as chief weapons inspector in Iraq) told the *Washington Post*, as it paraphrased, that “the company knew the FBI’s plans were going awry but did not insist on changes because the bureau continued to pay the bills as the work piled up.” Kay said the company “was at fault because of the usual contractor reluctance to tell the customer, “You’re screwed up...”<sup>58</sup>

As the *Post*’s 2006 article summarized:

“Whoever is at fault, five years after the Sept. 11, 2001 terrorist attacks and more than \$600 million later, [FBI] agents still rely largely on the paper reports and file cabinets used since federal agents began chasing gangsters in the 1920s.”

In a March, 2010 report on Sentinel, the successor to the failed SAIC project (which was awarded to Lockheed), the Department of Justice Inspector General reported “serious concerns” about the project’s progress.<sup>59</sup>

### Case 3: Performance of Work Contrary to Inherently Governmental Policy

When a contract employee is asked to perform work that is clearly, or arguably, contrary to inherently governmental policy, what is his or her obligation?

#### Background: Practical and Conceptual Limits of the Concept <sup>60</sup>

Since the 1950’s, White House policy has been that only officials can perform “inherently governmental functions.” This policy is a cornerstone of the presumption of regularity.

The principle of “inherently governmental” functions, as noted, was codified by the Executive Branch as its practical import was being negated by the force of personnel ceilings. In 1998 the concept was embodied in legislation, the Federal Activities Inventory Reform Act (“FAIR” Act) which requires agencies to inventory positions to determine which are/are not inherently governmental—so that those which are not can be targeted for contracting. The G.W. Bush Administration determined to put civil service jobs which were not inherently governmental – initially identified as about 800,000 – out for competition with contractors.<sup>61</sup> In 2010, the Obama Office of Federal Procurement Policy (OFPP) proposed to clarify and amplify the inherently governmental policy.<sup>62</sup>

As years of discussion have revealed however, the definition and application of the inherently governmental principle has basic practical and theoretical problems. First, as a practical matter, the mid-20<sup>th</sup> century determination to grow government through use of contractors – effectuated by official personnel ceilings—meant that the policy was declared just as the ability to effectuate it was effectively nullified.

As noted above, from the get go with the contracting out of the Manhattan Project, it might be said that quintessentially governmental functions were contracted out. In 1980 a Senate Government Affairs committee staff report examined Department of Energy (successor to the Atomic Energy Commission as official manager of the nuclear weapons complex) headquarters contracting and found Headquarters support service contractors to be performing work indistinguishable from that assigned to the civil service.<sup>63</sup>

In 1989, Senator David Pryor’s (D-AR) staff asked the Environmental Protection Agency to provide “deliverables” (work produced under contract) by contractors serving the EPA headquarters. The work product provided included: 1) a *Federal Register* notice; 2) enforcement letters to private companies (on EPA letterhead, complete save for signature); 3) draft guidance on assessing civil penalties for violations of underground storage tank standards; 4) waste minimization policy; 5) a draft of the Administrator’s

response to Appropriations Committee request; 6) draft guidelines, on EPA letterhead, on the preparation of Superfund Memoranda of Agreement; 7) a draft Powerpoint, under EPA authorship, on “Long-Term Superfund Contracting Strategy,” 8) draft Congressional testimony; and a draft “red border review” (for OMB) of notice of proposed rulemaking.<sup>64</sup> In short, violations of the inherently governmental policy are not a recent aberration.

Second, the concept has no comfortable fit with the American legal tradition. In *Flagg Brothers, Inc. v. Brooks*, 436 US 149 (1978) the Supreme Court surveyed tradition and precedent to determine whether “binding conflict resolution” was an “exclusive public function.” The case involved a claim that a warehouseman’s sale of goods entrusted for storage, pursuant to New York State’s adoption of the Uniform Commercial Code, constituted state action. The majority reported back that only two activities (elections and the activities of company towns) could be termed “exclusive public functions.” The majority noted that “the Court has never considered the private exercise of police functions.”<sup>65</sup>

Third, there is the epistemological question of whether the test for inherently governmental is one of form (who signs off on a decision) or substance (whose work is really embodied in the decision). Of course, government decisions are often shaped by many forces. By design, as Don Price explained, the intent of 20<sup>th</sup>-century contract reform was to “diffuse sovereignty.” If the design succeeded, contractor work will necessarily be part of the decisional process. In short, if the test for inherently governmental is whether an official signs his name on a policy or rule or order, it may be easy to meet—but one of form and not substance. If the test is whether a contractor has a significant role in a decision, the test may be hard to meet and impossibly resource and time consuming to police.

In 1989, Senator Pryor put the question to the Comptroller General of the Government Accountability Office (GAO). The Senator asked whether the inherently governmental principle was violated where: 1) the Department of Energy (DOE) relied on contract hearing examiners to review security clearance determinations; 2) DOE relied on a contractor to prepare congressional testimony (including that given by the Secretary of Energy); and 3) EPA contracted out its “Superfund Hotline.” The GAO declared the test is one of substance, not form. DOE’s argument that the Secretary could review the decisions of the (contractor) hearing examiner was not persuasive, nor was the fact that the Secretary of Energy, and not the contractor, appeared before Congress to read the Secretary’s testimony. “Our decisions and the policy established by OMB Circulars,” the Comptroller General stated, “are based on the degree of discretion and value judgment exercised in the process of making a decision for the government.”<sup>66</sup>

OFPP policy on inherently governmental functions retains a test that is substantially one of form. OFPP policy provides for use of contractors for “advice, opinions, recommendations, or ideas to Federal government officials.”<sup>67</sup>

### Notwithstanding Difficulties, Bright Lines Exist and Instances Requiring Question are Omnipresent

Even so, because of the FAIR Act, bright lines exist and are crossed. Here, again, the Abu Ghraib interrogator contracts may serve as “index” case.<sup>68</sup> Following the 1998 FAIR Act the Army undertook to inventory activities and provide explanations for determinations of whether an activity is/is not inherently governmental. (Ironically, the Army maintained the determinations on the website of a contractor.) In December 2000 the Army determined that intelligence work — such as that assigned to contract interrogators at Abu Ghraib — is inherently governmental. A memo by the Assistant Secretary of the Army for Manpower and Reserve Affairs explained why sensitive intelligence work must be performed only by government officials:

“Private contractors may be acquired by foreign interests, acquire and maintain interests in foreign countries, and provide support to foreign customers. The contract administration oversight exerted over contractors is very different from the command and control exerted over military and civilian employees.



Therefore, reliance on private contractors poses risks to maintaining adequate civilian oversight over intelligence operations.”

The determination was, of course, not followed in the determination to contract out interrogation services. The Assistant Secretary’s memo directed that the rule barring contractors from intelligence work be added to the next edition of the Army Contractors on the Battlefield Field Manual. The volume, which was itself written by an Army contractor, did not include the determination.

Nonetheless, circumstances where bright lines exist are far outnumbered by those where questions exist. It is these circumstances on which ethics principles should be focused.

#### **Case 4: Conflict of Interest: A Relatively Longstanding Contractor Ethics Policy, But one Rooted in the Presumption of Regularity**

Organizational conflict of interest (“OCI”), the term applied to contractor conflict of interest, is a creature of the Cold War era. OCI rules are the first ethics rules applied to contractors in the context of mid-20<sup>th</sup> century reform. The impetus for these rules was not government, but contractors themselves. The OCI rules embrace the core premise that contractors and officials should be subject to differing rules because, among other reasons, officials will have capacity to oversee contractors. Thus, to talk about contractor conflict of interest rules is not to talk about a case in which there are no rules, but it is to talk about a case in which the rules that exist are rooted in the premise that the presumption of regularity holds.

The suggestion is that OCI rules need review, 1) because of affirmative evidence of violation, 2) because of the absence of routine independent audits that might show compliance; and 3) because it can no longer be presumed that the official work force has capacity to oversee OCI.

#### **Federal Conflict-of-Interest Regulation: Brief Background**

Since the Civil War era, civil servants and public officials have been governed by criminal conflict-of-interest principles. As signally interpreted in *US v Mississippi Valley Generating Co.*, discussed above, the aim is not to prevent actual wrongdoing, but to prevent honorable people from entering into relations fraught with temptation. The core principle (appearing in Title 18 US Code Section 208) is simple; covered public servants must disclose financial interests and, with limited exceptions, cannot be possessed of financial interests that might conflict with their government work. The provision is criminal. A civil servant who works, say, for an oil company and the Department of Energy at the same time faces criminal penalty (potential jail as well as a fine).

The rules governing contractors are of much more recent vintage, and fundamentally different. They focus on requiring contractors to disclose relevant interests. They do not preclude government use of contractors who may possess potentially conflicting interests. They are not part of the criminal code (or, with some exceptions, imposed by statute), but are part of Federal Acquisition Regulations (FAR, Subpart 9.5 and agency supplements). Assuming the presumption of regularity holds, there are sound reasons for distinct conflict rules for officials and contractors. First, at least as conceived at the dawn of 20<sup>th</sup> century contract reform, contractors are not supposed to be civil servants. They will not perform “inherently governmental functions.” They are not supposed to be full time and long-term government employees. Second, the qualities for which they were initially valued – expertise in modern management and industrial processes, innovative technology – were qualities gained as part of, and in association with, private enterprise. To hold such companies to the same strictures to which civil servants were held would be to limit their ability to develop and make use of the qualities for which they were valued in the first place.

In his 1965 *Scientific Estate* Don Price proclaimed that the very logic of 20<sup>th</sup>-century contract reform would be contradicted if conflict rules applicable to civil servants were applied to contractors (Price at 50): (emphasis added)

“Congress has shown that it understands the extent to which our economics and politics are merging, not by enacting any new theories but by what it does at the grubby level of law enforcement and legislative investigations. This comes up mostly in the conflict-of-interest problem. The conflict-of-interest statutes on the books a few years ago were based on the technology of the Civil War, and were designed to protect the government from the rapacity of the salesmen of blankets and shoes and rifles and fodder. This protection was to take the form of an enforced separation of economics and politics; no government official was to have any connection with any private contractor doing the work of government. But the new nature of science and technology makes our weapons systems depend upon a considerable fusion of private contractors (universities as well as industries) with the government. And this means that many positions having great influence on strategic decisions must be filled by men who are valuable because they have a variety of interests – indeed, a formal conflict of interest.

Third, if the presumption of regularity holds, it may be presumed that officials, who follow stringent conflict rules, have the capacity—both in quantity and quality—to oversee contractors, and to discount, as appropriate, for contractor conflicts.

### The Evolution of OCI

At the outset of mid-20<sup>th</sup>-century contract reform, there were no conflict-of-interest rules to apply to contractors. In fact, the concept initially emerged at the urging of contractors, to protect contractor interests in access to the government market.<sup>69</sup> Defense Department “hardware” contractors (builders of planes and missiles and other “hardware” weaponry) saw themselves as disadvantaged by the award of contracts to plan and manage Defense hardware to entities associated with their competition. Specifically, what became the modern Rand Corporation was originally an Army Air Force contract located within the Douglas Aircraft corporation. When Douglas’ competitors protested, the Rand contract was, with help from the Ford Foundation, spun off into the Rand Corporation, “an independent nonprofit.”<sup>70</sup> A similar set of events led to the creation by the Defense Department of the Aerospace Corporation as a nonprofit to manage the Intercontinental Ballistic Missile Program.<sup>71</sup> These episodes yielded the “hardware ban” clause—the initial government contractor “conflict of interest” provision. The provision, applicable at the Defense Department’s discretion, could ban recipients of planning or management contracts from competing for hardware contracts that might stem from their work.

As initially conceived, the hardware ban was designed to protect competitors or competition, but not necessarily the public interest at large. Thus, a planning contractor who did not threaten to get into the hardware business might also work with, or through its board of directors be connected to, the aerospace industry at large. As Don Price pointed out in 1965, like Sherlock Holmes’ “watchdog that did not bark,” in the 1950s “no Congressmen” chose to make “political capital out of an investigation of the interlocking structure of corporate and government interests in the field of research and development.”<sup>72</sup>

It was only in the 1970’s that, in the enactment of legislation creating the Department of Energy, the notion of a broader public interest concern was added. For example, the possibility that a “study” contractor that produced no hardware could be potentially biased because it simultaneously worked for private companies that could benefit (or suffer) from its analysis. In this context, the OCI rule is 1) essentially a disclosure rule—it requires disclosure by contractor to the government of interests, essentially financial, that may pose conflicts; 2) it permits the government to employ a contractor even where there is a finding of potential conflict, hopefully with appropriate steps to address the effect of the conflict, but if needed even where the conflict cannot be “mitigated;” and 3) it is not, as is the rule governing civil servants, part of the criminal code.

### There is Reason to Doubt the Workings of the Current OCI Rule in a World Where the Presumption of Regularity Does Not Hold

As of 2011, decades after the initial development of OCI rules, there have been remarkably few independent reviews, much less periodic or systematic reviews, that might provide a gauge of how well the OCI rule works. Reviews that have taken place give basis for systemic doubt. In short, consideration of public service ethics as if the presumption of regularity does not govern should address means to determine how well OCI works. At the forefront, the workings of OCI rules are opaque to the public at large. OCI disclosures made by contractors to government are typically not matters of public record. The materials are said to be exempt from disclosure under the Freedom of Information Act commercial information exemption.

Today, as at its onset in the hardware ban concept, the enforcement of organizational conflict-of-interest prohibitions is essentially an insider's game. A disappointed bidder may raise concerns about an award to a competitor without due regard to OCI. Citizens have not yet obtained rights to participate in these proceedings.<sup>73</sup> Conflicts that threaten a competitor may be policed, but not necessarily those that threaten the larger public interest. There has been stunningly limited independent audit of the process. Those audits that have taken place are not reassuring. Most recently, as discussed below, GAO reports that while DOD contractors may have ethics programs, it cannot be presumed that DOD contract oversight work force oversees their adherence to the programs.

Public audits of the conflict of interest review process are few and far between. In 1980, and again in 1989, Senator Pryor's subcommittee reviewed compliance and enforcement in Department of Energy (DOE) OCI. The reviews found that even on key national energy security and nuclear nonproliferation issues, contractors too often failed to disclose relevant interests, and when disclosure was made, the government too often failed to take note.<sup>74</sup>

The subcommittee's work found systematic failure of implementation. First, the subcommittee found, and the DOE confirmed, that contractors too often did not comply with disclosure requirements. Often, the failure to disclose was readily apparent when the conflict-of-interest disclosure was compared to the portion of the proposal in which the contractor touted its experience. Second, the subcommittee found procurement officials (COs or contract officers, as discussed above), delegated legal responsibility for procurement rules, know procurement rules, but not necessarily the subject matter of the contracts they oversee. The procurement officials relied on program officials to alert them to the significance of the information that is disclosed. Meanwhile, the subcommittee reported, “program officials, who depend on contractors to get their work done, assume that procurement officials will adequately apply DOE conflict rules.”<sup>75</sup>

Third, rather than see conflict, program officials may see the indicia of conflict as evidence that the contractor should be hired, and not avoided.<sup>76</sup> As Professor Louis Jaffe's article on lawmaking by private groups observed: “Those performing the operation or constituting a part of the relation to be regulated are likely to have a more urgent sense of the problem and the possibilities of effective solution; experience and experiment lie immediately at hand.”<sup>77</sup> Thus, from the program officer's perspective, valued expertise may be the flip side of what, to the outsider, is a conflict of interest.

In July 2008, a federal jury found SAIC, one of the largest national security service contractors, guilty of making 77 false claims/statements to the Nuclear Regulatory Commission.<sup>78</sup> “It is one of these cases that does go right to the heart of the procurement process,” the *Washington Post* quoted an anonymous official.<sup>79</sup> The case was not one in which concerns were raised by competing contractors. Rather, it was one in which information was disclosed only in discovery in a court proceeding brought by a union which was affected by the company's work.

The union (and supporting environmental NGO intervenors) found SAIC was part of a team operating under a quarter-billion dollar fixed-price DOE contract. In bidding a fixed price, the contract

team assumed it could clean up and recycle the radioactive waste for unrestricted use in commerce. The unrestricted use required regulatory approval by a Tennessee state agency acting under the Nuclear Regulatory Commission's jurisdiction. The court discovery showed that SAIC was to receive millions of dollars for work related to these regulatory considerations.

In June 1999, US District Court Judge Gladys Kessler ruled that a statutory bar on Superfund citizen suits precluded court consideration of the worker and environmental groups' claims.<sup>80</sup> The judge proceeded, however, to state "the court's concerns." Judge Kessler explained: "The court acknowledges and shares the many concerns raised by [workers and environmental interveners]. The potential for environmental harm is great, especially given the unprecedented amount of hazard." She found that "plaintiffs allege and [DOE and contractors] have not disputed, that there is no data regarding the process efficacy or track record with respect to safety."

The judge termed "startling and worrisome" the absence of opportunity for "public scrutiny or input on a matter of such grave importance." She explained that "the lack of public scrutiny is only compounded by the fact that the recycling process which BNFL intends to use is entirely experimental at this stage." She also found "quite troubling" that DOE and contractors "have provided no adequate explanation" for their failure to provide for public notice of the recycling project.

The popular, media, and congressional concern that followed the judge's decision led DOE Secretary Richardson to place a moratorium on recycling. At the same time, however, the Nuclear Regulatory Commission proceeded with a rulemaking that would have permitted the recycling to take place. At the public hearing on the rulemaking, the rulemaking document made available by NRC showed that the NRC had hired SAIC to prepare the document — even as SAIC was part of DOE contract team whose success depended on favorable regulations for recycling.

Following the raising of the issue in a NRC public hearing, it developed that the NRC, notwithstanding SAIC's disclosure obligations (and Judge Kessler's decision), did not know that SAIC was working on a rule for which it might also be a primary potential beneficiary. Shortly after the revelation NRC terminated the SAIC contract. Thereafter, the Department of Justice brought suit against SAIC under the False Claims Act. In court discovery, the Department of Justice found that SAIC's DOE recycling contract was the tip of the iceberg for a larger plan to make money from recycling DOE nuclear waste, that SAIC staff on the DOE and NRC contracts overlapped, and that an SAIC official who was also an official of the recycling trade association had lobbied the NRC on the rule.<sup>81</sup>

## The Obama Inherently Governmental Policy Proposal and Contractor Ethics Developments Underscore the Value of a "What If" Consideration of Contractor Ethics

### OFPP's New Inherently Governmental Proposal

In March, 2010 the Office of Federal Procurement Policy (OFPP) gave notice of its proposal to modify the inherently governmental policy.<sup>82</sup> The proposal underscores the utility of considering ethics principles to address circumstances where the presumption of regularity may not pertain. The proposed policy recognizes, as had prior policy, that the definition of inherently governmental functions is not simple. It also recognizes that there may be functions that, while not inherently governmental, may be so closely related to the ability of officials to account for government that the ability of officials to oversee these activities must be considered.

By the same token, the proposed new policy is not directly connected to the core reality of contracting—the limits on official personnel and the dual sets of rules that govern officials and contractors. The proposal also does not address the realities of budget and personnel development that have driven the contracting out of inherently governmental functions. Budgets are not developed based on the idea of an integrated (government and contractor) work force.<sup>83</sup>

### The Need for Contractor Ethics is Now Accepted by Government and Contractors

It might be hypothesized that there would be resistance by contractors (and perhaps government) to the notion of ethics codes or principles for contractors – another unwarranted burden on the procurement process. However, both government and contractors have embraced the idea of ethics codes. The question now is not whether codes are in order, but what they should cover –and how well they work.

In 2008 Federal acquisition officials issued a rule that requires ethics codes. The rule focuses on the requirement for codes and not on the substance.<sup>84</sup> The specified focus of the codes appears to be enhanced disclosure of items that already have long been unlawful. Thus, the new rule appears to require that contractors timely disclose evidence of certain violations of federal criminal law or violations of the False Claims Act. In short, there is no indication that they will address circumstances where, as discussed here, regularity cannot be presumed.

Indeed, a 2009 GAO review of DOD contractor ethics programs underscores the likelihood that regularity in oversight cannot be presumed in the very case of the new ethics rules.<sup>85</sup> The GAO reported that, on paper, leading contractors had programs. The GAO found that once a contract was awarded there is little likelihood of practical official oversight. GAO summarized:

“in verifying implementation of contractor ethics programs during contract administration, the impact of the FAR rules on oversight at this point is negligible. GAO found that DOD had no plans to change contract administration offices’ oversight because authority for oversight is not explicit nor is organizational responsibility clear.”<sup>86</sup>

Federal regulations are now supplemented by contractor initiatives, further indication of recognition of the acceptance of the importance of ethics codes. At the same time, these efforts 1) do not provide public access to particular company codes (or their implementation); and 2) do not appear to address circumstances where it is the failure of the presumption of regularity that poses ethics problems.<sup>87</sup>

### Conclusion

In sum, it is time to explore the possibility and efficacy of an ethos or ethic of public service to govern all those who do the work of government, not just the civil service. If ethics may seem a weak reed to account for the powerful forces unleashed by 20<sup>th</sup>-century reform, then the logic by which contracting information asymmetry has grown may provide a comparative advantage in the development of ethical principles. The “revolving door” assures that there will be a steady flow of contractor officials who understand the government perspective (in ways, indeed, that doctors or lawyers may not understand their patient or client perspective).

There is also the important consideration of America’s role as the pioneer of modern government by contract which has historical significance. The American system is unique among modern governance systems in its scope of reliance on contractors to do the basic work of government. Contracting for government work appears to be a growing global phenomenon, for which the American system may be a model for study and, with appropriate local modifications, adoption. Strengthening the ability of the American system to creatively address and solve the difficult questions that are the legacy of 20<sup>th</sup>-century contract reform may be crucial in the globalized world and best in keeping with the genius that was the spirit of mid-20<sup>th</sup>-century reform.

# Endnotes

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## Foreword

- 1 US Office of Personnel Management, 2011, "Historical Federal Work force Tables," [www.opm.gov/feddata/HistoricalTables](http://www.opm.gov/feddata/HistoricalTables). This number includes all those employed by the executive branch as well as postal service workers, uniformed military personnel, and employees of the legislative and judicial branches.
- 2 The use of the term "shadow government" in this respect is the title of a seminal book Dan Guttman co-authored on the vast extent of government contracting. Guttman and Willner, *The Shadow Government: The Government's Multi-Billion-Dollar Giveaway of its Decision-Making Powers to Private Management Consultants, "Experts," and Think Tanks* (New York: Pantheon Books, 1976).
- 3 For the most frequently cited estimates of the "true" size of the government work force, see Paul Light, 1999, "The True Size of Government," *Government Executive* (<http://www.govexec.com/features/0199>). Light estimates the numbers of those employed on Federal taxpayer dollars to be substantially in excess of the numbers of "government employees"---however the numbers include those providing commercial goods and services, as well as work the citizen might call the work of government.
- 4 Seidman, Harold, 1998, *Politics, Position, and Power: The Dynamics of Federal Organization*, 5th Edition (New York: Oxford University Press), p. 112.
- 5 Office of the President, "Memorandum for the Heads of Executive Departments and Agencies on Government Contracting," Washington, DC, March 4, 2009.
- 6 US Office of Management and Budget, 2009 (December), "Acquisition and Contracting Improvement Plans and Pilots: Saving Money and Improving Government" ([www.omb.gov/assets/report/2009/Acquisition](http://www.omb.gov/assets/report/2009/Acquisition)).
- 7 Seidman, p. 221.
- 8 US Government Accountability Office, *Defense Acquisitions: Actions Needed to Ensure Value for Service Contracts*, GAO-09-643T, April 23, 2009.

## Introduction – Conclusion

- 9 The 2007 "Gansler Report" on Army contracting found, "No increase in work force, despite seven-fold increase in workload." The Report explained:  

"In 1990, the Army had approximately 10,000 people in contracting. This was reduced to approximately 5,500, where it has remained relatively constant since 1996...both the number of contract actions (workload) and the dollar value of procurements (an indicator of complexity) have dramatically increased in the past decade while the contracting work force has remained constant. The dollar value of Army contracts has increased 331 percent from \$23.3 billion in 1992 to \$100.6 billion in 2006, while the number of Army contract actions increased 654 percent from approximately 52,900 to 398,700 over the same period."

"Urgent Reform Required: Army Expeditionary Contracting," Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations," October 31, 2007, p. 30.
- 10 As law scholar Laura Dickinson notes, the practical consequences of the differing rules remains to be seen. See, Laura Dickinson, "Torture and Contract," *Case Western Reserve Journal of International Law* 37(2006): 267.
- 11 The Competition in Contracting Act of 1984 (41 USC. 253 et seq) declares "full and open competition" to be the norm, subject to exceptions. In practice, the exceptions often appear to be the norm. For example, a review of 2.2 million contract actions totalling \$900 billion in Defense Department contract expenditures for the Fiscal Year 1998–2003 period, found that the top 10 contractors got 38% of dollars and only one of them (SAIC) won a majority of their contracts through "full and open competition" (as preferred by statute). Larry Markinson, "Outsourcing the Pentagon," *Center for Public Integrity*, September 29, 2004.
- 12 For example, a summer 2010 *Washington Post* report on the growth of post 9/11 national security bureaucracy reported that:  

"Contractors kill enemy fighters. They spy on foreign governments and eavesdrop on terrorist networks. They help craft war plans. They gather information on local factions in war zones. They are the historians, the architects and the recruiters in the nation's most secretive agencies. They staff watch centers in the Washington DC area. They are among the most trusted advisers to the four star generals leading the nation's wars."

Dana Priest and William M. Arkin, "National Security Inc.," *Washington Post*, July 20, 2010.
- 13 In January, 2010 the Government Accountability Office told Congress:  

"Central to the better managing of risks is a capable acquisition work force. However, DOD lacks key information about the current number and skill sets of its acquisition work force and what it needs. To supplement its in-house acquisition work force, DOD relies heavily on contractor personnel. Such reliance is symptomatic of DOD's overall reliance on contractors to provide additional capacity and expertise. Yet, precision on the total size of the contractor work force and what roles they are fulfilling is elusive, hindering DOD's ability to make key work force decisions and increasing the risk of transferring government responsibilities to contractors."

US Government Accountability Office, *Defense Acquisitions: Managing Risk to Achieve Better Outcomes*, GAO 10-374 T, January 20, 2010, p. 3.



- 14 A 2009 GAO report on the Defense Department noted:

“At the DOD-wide level the department should have an understanding of what it needs to contract and why. However, we have frequently noted that the department continues to be challenged to understand how reliant it is on contractors...For example, at this time the department does not have complete and accurate information on the number of service contracts in use, the services being provided by these contracts, the number of contractors providing these services, and the number and types of contracts awarded.”

US Government Accountability Office, *Defense Acquisitions: Actions Needed to Insure Value for Service Contracts*, GAO 09-643T, April 23, 2009, p 4.

- 15 *The New York Times*, reporting on a Senate investigation, explained:

“The Pentagon’s oversight of the Afghan guards is virtually nonexistent, allowing local security deals among American military commanders, Western contracting companies and Afghan warlords who are closely connected to the violent insurgency, according to the report by investigators on the staff of the Senate Armed Services Committee.” James Risen, “Afghans Linked to the Taliban Guard US Bases,” *New York Times*, October 7, 2010.

The United States military has almost no independent information on the Afghans guarding the bases, who are employees of Afghan groups hired as subcontractors by Western firms awarded security contracts by the Pentagon.

- 16 US Government Accountability Office, *Defense Acquisitions: Managing Risk to Achieve Better Outcomes*, GAO 10-374 T, January 20, 2010, p. 1.

- 17 I thank Richard Loeb, Adjunct Professor of Contract Law at the University of Baltimore Law School, for this categorization.

- 18 See, “Briefing Room - Presidential Memorandum on Government Contracting” and related materials on the Office of Federal Procurement Policy, March 2009, available at [http://www.whitehouse.gov/omb/procurement\\_index\\_gov\\_contracting](http://www.whitehouse.gov/omb/procurement_index_gov_contracting).

- 19 Under this presumption, as applied, for example, in court challenges to official action, officials are presumed to have the experience and capacity to do the right thing—and do it. For example:

“Although the fairness of the Board’s own procedure is not before us, we note that a presumption of regularity attaches to the actions of government agencies.” *United States Postal Service v. Gregory*, 534 US 1 (2001).

“The presumption as to the regularity of the proceedings which precede the issue of a patent of the United States for land, is founded upon the theory that every officer charged with supervising any part of them, and acting under the obligation of his oath, will due his duty, and is indulged as a protection against collateral attacks of third parties.” *Moffat v. United States*, 112 US 24 (1884).

“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties...Under that presumption, it will be taken that [an official] acted upon knowledge of the material facts.” *United States v. Chemical Foundation, Inc.* 272 US 1 (1926).

- 20 In the mid-20<sup>th</sup> century, contract reform brought to government service corporations that primarily served business. Today, contractors once famed for private sector work (such as Lockheed and Booz Allen & Hamilton) may work essentially fulltime for government, and new companies have sprung up to work fulltime for government. “In what sense is a company that works 100% for government a private enterprise?” This question was raised by mid-century contract reformers, but not addressed. Today, more than ever, it merits independent consideration.

- 21 For more extensive background on the origins of reform, see Daniel Guttman and Barry Willner, *The Shadow Government* (New York, NY: Pantheon Books, 1976); Daniel Guttman, “Organizational Conflict of Interest and the Growth of Big Government,” *Harvard Journal of Legislation* 15 (1978): 297; Daniel Guttman, “Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty,” *Administrative Law Review* 52, no. 3 (2000); Daniel Guttman, “Inherently Governmental Functions: the Legacy of 20<sup>th</sup> Century Reform” in *Making Government Manageable*:

*Executive Organization and Management in the 21st Century* (Baltimore, MD: Johns Hopkins University Press, 2004); Daniel Guttman, “Science’s Troubled Legacy,” *Science Progress*, (2009).

- 22 “It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.” Alexander Hamilton, “Federalist No. 1” in *The Federalist Papers*.

- 23 Paul Light, *The True Size of Government* (Washington, DC: Brookings Institution Press, 1999), Appendix C.

- 24 Daniel Guttman, “Contracting United States Government Work: Organizational and Constitutional Models,” *Public Organization Review: A Global Journal*, September 2003.

- 25 In Iraq and Afghanistan’s war-fighting and nation building, contractors do the work of project management (e.g., hospital, electric power (re) construction projects), provide support services (e.g., the famed Halliburton “Logcap” contract for logistics support) and provide technical assistance (that is, provide such services to Iraq or Afghanistan under US funding).

- 26 See Daniel Guttman, “Inherently Governmental Functions: The Legacy of 20<sup>th</sup> Century Reform,” in *Making Government Manageable: Executive Organization and Management in the 21st Century* (Baltimore, MD: Johns Hopkins University Press, 2004).

- 27 Initially embodied in Bureau of the Budget Circular A-49, which addressed “management and operating contractors” such as those who managed nuclear weapons complex sites, the policy has long since been a component of Office of Management and Budget Circular A-76 (which addresses the contracting out of “commercial functions” performed by the civil service—i.e., those not inherently governmental.)
- 28 Interview with Harold Seidman, April 4, 2000. Professor Seidman (then Professor Emeritus, Political Science, Johns Hopkins University) was involved in the conception of the policy as a Budget Bureau official in the Eisenhower White House, and, as Assistant Director of the Bureau of the Budget for Management in the Kennedy–Johnson era, oversaw Budget Bureau (now OMB) circulars. The “public interest” concept is embodied in the 1998 Federal Activities Inventory Reform Act, which defines inherently governmental functions in terms of “intimately related to the public interest.”
- 29 Siegfried Hecker, “Nuclear Weapons Stewardship in the Post Cold War Era: Governance and Contractual Relationships,” Statement to Senate Committee on Energy and Natural Resources (1997).
- 30 Dwight D. Eisenhower, “Farewell Radio and Television Address to the American People,” January 17, 1961.
- 31 The Bell Report was the subject of the “Hollifield” committee hearings on “Systems Development and Management,” Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 87<sup>th</sup> Congress, 2d Session.
- 32 Bureau of the Budget, 87th Congress, Report to the President on Government Contracting for Research and Development (named the “Bell Report” after Bureau of Budget Director David Bell).
- 33 As Kennedy School public management scholar and former Office of Federal Procurement Policy (“OFPP”) Administrator Steve Kelman has hypothesized (attributing to a colleague): “one should not overestimate the number of situations where government needs access to its own functional expertise. It is easier to recognize a good idea than to come up with one.” Steve Kelman, “Remaking Federal Procurement,” Working Paper Number 3, John F. Kennedy School of Government Visions of Governance in the 21st Century (2003), p. 58.  
  
See, similarly, Professor Kelman’s chapter “Achieving Contracting Goals and Recognizing Public Law Perspectives” in Jody Freeman and Martha Minow, eds., *Government by Contract: Outsourcing and American Democracy* (Cambridge, MA: Harvard University Press, 2009), p. 153.
- 34 See, e.g. 5 Code of Federal Regulations Part 2635 (Standards of Ethical Conduct for Employees of the Executive Branch) and supplemental agency regulations; 18 US Code Sections 203–209 (criminal code provisions relating to conflict of interest and other matters).
- 35 November, 2008 regulations now do require contractors to disclose violations of criminal law or fraud against the government—but do not appear to address the questions raised here. See November 12, 2008 *Federal Register* at 67064.
- 36 Walter A. McDougall, *The Heavens and the Earth: A Political History of the Space Age* (Baltimore, MD: Johns Hopkins University Press, 1985). The Congressional determination to rely fundamentally on contractors was analyzed (and approved) in *AFGE v. Webb* (1978), where civil servants who were subjected to reductions in force unsuccessfully challenged NASA’s decision to contract out NASA’s basic work. Faced with statutorily imposed personnel ceilings, the court found that NASA had no recourse but to call on support service contractors.
- 37 Ariana Cha, “At NASA: Concerns on Contractors,” *Washington Post*, February 17, 2003.
- 38 Matthew Wald and John Schwartz, “Shuttle Inquiry Uncovers Flaws in Communication,” *New York Times*, August 4, 2003.
- 39 See, Department of Defense Inspector General, *Contracts Awarded for the Coalition Provisional Authority by Defense Contracting Command—Washington, D-2004-057*, March 18, 2004.
- 40 Thus, as the public learned in the case of one of the contracts involved in the Abu Ghraib prison interrogation: (1) the work was under a contract initially awarded by the General Services Administration (GSA) in Washington; (2) the GSA had turned the contract over to an arm of the Department of Interior to administer; (3) the Army used the GSA contract to add to its work force in Iraq. See discussion below.
- 41 On the evolution of informed consent, see, *The Human Radiation Experiments: Final Report of the President’s Advisory Committee*, Part I (“Ethics of Human Subject Research: A Historical Perspective”) (1995).
- 42 The formulation here is from Michael Oakeshott’s *Rationalism in Politics*. Similar formulations include distinctions between formal and informal learning, Polanyi’s notion of “tacit knowledge,” and the vernacular of “insider knowledge” or “industry practice.” See, Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Fund, 1962).
- 43 As Don Price noted in 1965, “of course, a corporation [on government research and development contract] obtained intangible benefits from having a large team of scientists trained and exercised at government expense.” Don K. Price, *The Scientific Estate* (Cambridge, MA: Belknap Press, 1965), p. 40.
- 44 This includes both information that is exempt from disclosure to citizens under FOIA and also, since contractors are not “agencies” covered under FOIA, the vast body of information that is developed by contractors but not turned over to the government—for example, data underlying reports.
- 45 In an article on the “revolving” door from financial regulatory agencies to private law and lobby firms following 2010 enactment of financial reform legislation, the *New York Times* reported:

“One corporate lobbyist who worked as a regulator, asked whether he believed he had an inside edge in lobbying his ex-colleagues, said: “The answer is yes, it does. If it didn’t, I wouldn’t be able to justify getting out of bed in the morning and charging the outrageous fees that we charge our clients, which they willingly pay.”

The lobbyist, who spoke on condition of anonymity because of concerns about alienating government officials, added that “you have to work at an agency to understand the culture and the pressure points, and it helps to know the senior staff.”

Eric Lichtblau, “Ex Financial Regulators Get Set to Lobby Agencies,” *New York Times*, July 27, 2010.

Of course, there is the empirical question of whether the circumstances of “lobbyists,” private lawyers, and contractors present similar “fact patterns” and pose the same ethical questions.

- 46 The case involved a “dollar a year” man who was working for the Bureau of the Budget, but also had related private interests.
- 47 The term “index case” is borrowed from epidemiology, with intent to embody cases that help identify a particular circumstance needing attention.
- 48 Unless specifically provided by statute, contracting for “personal services” is unlawful. The general intent is to protect the integrity of the civil service (to which special rules apply, as discussed above) and to recognize that civil service and contractor statuses embody differing rights and obligations.

The concept is rooted in the common law distinction between an “employee” and an “independent contractor.” The general idea is that the two kinds of workers are subject to different rules, with different rights and obligations.

In general, an employee is integrated into the day to day work of an enterprise, while the contractor performs according to contract. There is no hard and fast test for determining whether a personal service contract exists, but a series of factors to be considered in each case.

The Federal Acquisition Regulations, following the common law, employs a six factor test — whether the work is performed at government or contractor facilities, who supplies tools and equipment, whether civil service perform the same activities, whether the services will likely last more than a year, whether the services are applied “directly to the integral effort of the agency or an organizational subpart in furtherance of its assigned function or mission,” and “the inherent nature of the service.” Federal Acquisition Regulations, at Subpart 37.104(d).
- 49 J. Phillip London, *Our Good Name: A Company's Fight to Defend Its Honor and Get the Truth Told about Abu Ghraib* (Washington, DC: Regnery Publishing, 2008).
- 50 US Government Accountability Office, *Interagency Contracting: Problems with DOD's and Interior's Orders to Support Military Operations*, GAO-05-201, April 2005, p. 7-8.
- 51 Department of Defense Inspector General, *Contracts Awarded for the Coalition Provisional Authority by Defense Contracting Command-Washington*, D-2004-057, March 18, 2004, p. 4.
- 52 US Government Accountability Office, *Defense Contracting: Army Case Study Delineates Concerns with use of Contractors as Contract Specialists*, GAO-08-360, March 26, 2008.
- 53 The CCE website explains that CCE, which traces its history to 1884:

“provides contracting and acquisition support to the Secretary of the Army, the Army Headquarters staff, and other customers within the National Capital Region. CCE not only support [sic] the Army but also various other Department of Defense organizations in the National Capital Region (NCR). The acquisition and contracting support provided to our customers span from pre-award through contract close-out.”
- 54 In light of its import continuing front page attention, the Abu Ghraib case has itself been specifically addressed. After Abu Ghraib, until the recent statutory prohibition and of contract interrogation in the National Defense Authorization Act for FY2010, the Army specifically relied on 10 USC 129d statutory exception for personnel services for intelligence. The method and substance of this approach to addressing the complex of Abu Ghraib contract questions of course is itself useful for discussion of the case.
- 55 Ellen McCarthy, “Government Contractors Sometimes Stretch Their Deals,” *Washington Post*, May 31, 2004.
- 56 See, CACI August 5, 2005 Comments on GAO Draft report (GAO-05-201) at IIIA (“Failure to Consider Prior Course of Dealing”). Indeed, in the context of commercial contracts, “course of dealing” may be evidence of the interpretation of a contract.
- 57 Harry Goldstein, “Who Killed the Virtual Case File?” *IEEE Spectrum*, available at “<http://spectrum.ieee.org/computing/software/whokilledthevirtualcasefile>,” September 2005.
- 58 Dan Eggen and Griff Witte, “The FBI's Upgrade That Wasn't: \$170 million Bought an Unusable Computer System,” *Washington Post*, August 18, 2006.
- 59 Department of Justice Office of the Inspector General, *Status of the Federal Bureau of Investigation's Implementation of the Sentinel Project*, Report 10-22, March 2010.
- 60 See, Guttman, “Inherently Governmental Functions,” footnote 26.
- 61 See, e.g. Executive Office of the President, Office of Management and Budget, *Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner*, July 2003; US Government Accountability Office, *Competitive Sourcing: Greater Emphasis Needed on Increasing Efficiency and Improving Performance*, GAO 04-367, February 2004. The Bush effort appears to have been effectively abandoned.
- 62 Daniel Gordon, Office of Management and Budget, Office of Federal Procurement Policy, *Work Reserved For Performance by Federal Government Employees*, March 31, 2010.
- 63 Staff of Senate Committee on Governmental Affairs, 96<sup>th</sup> Congress, 2d Session, “Oversight of the Structure and Management of the Department of Energy,” Committee Print.

- 64 Memo from Subcommittee on Federal Services to Senator Pryor Re: Attached Contractor Prepared Documents, February 6, 1990.
- 65 The Court in *Flagg Brothers* wrote in terms of “exclusive public functions,” and not “inherently governmental functions.” The potential confusion between “public” and “governmental,” however, does not appear to impair the purport of the majority’s finding. The emphasis in *Flagg Brothers* means tough sledding for anyone who hopes to look to Constitutional and/or historic traditions to find an easy dividing line between governmental and non-governmental functions.
- 66 Comptroller General of the United States, Letter to Honorable David Pryor, Chairman, Federal Services, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, United States Senate, B-237356, December 29, 1989.
- 67 In March, 2010 OFPP proposed a revised policy which incorporates the notion that official oversight capacity shall be included, on case by case basis, in determining where the line is. As discussed below, the relation between the policy and the resources needed to do this is not clear.
- 68 See Guttman, “The Shadow Pentagon,” Center for Public Integrity website (and sources linked to therein).
- 69 For more detail, see Guttman, “Organizational Conflict of Interest and the Growth of Big Government” footnote 21; Daniel I. Gordon, “Organizational Conflicts of Interest: A Growing Integrity Challenge,” 35 *Public Contract Law Journal* 25 (2005).
- 70 The story was initially told to the public in Bruce L.R. Smith’s corporate biography *The Rand Corporation* (1966).
- 71 This story was initially told, with reference to the “Hollifield” Congressional hearings on the Bell Report, in H.L. Nieburg’s *In the Name of Science* (1966).
- 72 Price, *supra*, at 51.
- 73 See, Gordon, *supra*, footnote 62.
- 74 See “Contractors Lied on Conflict of Interest, Says DOE,” *Energy Daily*, March 27, 1990, p. 3.

75 Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy: Hearings Before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, 101st Congress, 63 (1989), at 69.

76 Thus, Senator Pryor’s 1989 review found that Department of Energy (DOE) was using a contractor to help shepherd a highly controversial effort to ship plutonium to Japan (for use in Japan nuclear reactors). The proposal required presentation to (though not approval by) Congress. There it was opposed on bipartisan basis as potential opportunity for terrorists. (Senators Helms and Quayle among those joining Democratic senators in opposition). DOE itself lacked experts to explain the deal to Congress; its experts had left government to join a contractor. So DOE hired the contractor.

In fact, a publically available contractor report showed that the contractor also worked for Japan’s trade ministry (MITI). Presumably, as Japan was beneficiary of the treaty, this would give pause to DOE. But the DOE program officers explained to subcommittee staff that they knew of the relation with Japan’s ministry, and saw this as confirmatory of contractor expertise. As it developed, the subcommittee staff learned of another relationship which had not been disclosed to DOE. At the same time that it was working for the Administration, the contractor was working for the Japanese utility industry beneficiaries of the treaty. It was reporting back on its work for the US government. The reports included reports on dealings with the Congress—including a pithy view of the chief of Staff for Senator Glenn’s Governmental Affairs Committee (identified as opponent) and a report on the contractor’s effort to dissuade a House Committee chair from seeking GAO review of the proposal.

The story is summarized by John Fialka in the *Wall Street Journal*: “Consultant Doubled as Adviser to Japanese Firms and the US Playing its Dual Roles with Ease,” March 27, 1990.

In its 1980 review of DOE contracts, the Pryor staff found a similarly disturbing conflict involving foreign clientele. The DOE had hired a contractor to provide strategic planning in the case of another OPEC oil embargo. In the OCI disclosure form, the contractor limited disclosure of work to activities for an electric utility. In fact, the contractor not only also worked for oil companies, but, in a wholly separate bid for a US Department of Transportation contract to provide assistance in the Middle East the contractor boasted that it provided oil planning advice to Libya, Algeria, and Abu Dhabi.

- 77 Louis L. Jaffe, “Lawmaking by Private Groups,” *Harvard Law Review* 51 (1937), pp. 201, 212.
- 78 See, “Judgment,” *United States of America v. Science Applications International Corporation*, Civil Action 04-1543, US District Court for the District of Columbia, October 8, 2008.

The False Claims Act, or whistleblower law, penalizes the making of false claims on behalf of government benefit—such as contract award. The essential claim in the case was that a contractor did not fully disclose its potential conflicts in response to the government disclosure requirements. Following identification of omitted information at a public hearing, the Nuclear Regulatory Commission (NRC) terminated the contractor; thereafter the Department of Justice brought False Claims Act suit. (The NRC OCI provision is statutory as well as under FAR). (The author was the de facto whistleblower, and testified at the jury trial on behalf of the Department of Justice.)

- 79 Robert O’Harrow, Jr., “Potential for Conflict Grows with Government’s Use of Contractors,” *Washington Post*, August 18, 2008.

In a lengthy December, 2010 decision, the US Court of Appeals for the District of Columbia affirmed the trial court decision in part, and vacated and remanded to the trial court for further proceedings “consistent with this opinion.” *United States of America v. Science Applications International Corporation*, No. 09-5385, December 3, 2010 (“slip opinion”). Following summary of key evidence presented by the government, slip opinion at 7, the Court of Appeals found, slip opinion at 26, that “[t]he record was sufficient to permit the jury to find that SAIC breached its obligations both to avoid potential conflicts and to disclose any that arose during the course of performance.” However, the Court of Appeals

found error in the instructions to the jury by the judge regarding “collective knowledge” and damages to the government. In regard to the “scienter” standard for proving False Claims act fraud, the Appeals court found that while the jury could have found, based on the facts at trial, that the company had requisite knowledge, the court’s instruction allowed the jury to “find that SAIC knowingly submitted false claims for payment even if the jury also concluded (1) that no individual at SAIC was simultaneously aware (or was recklessly aware) of the company’s NRC contract and its relationships with other companies involved in the recycling of radioactive materials; and (2) that SAIC, acting on the basis of the knowledge of its individual employees, took reasonable steps to identify potential conflicts.” (slip opinion, at 30)

- 80 *Oil, Chemical and Atomic Workers v. Secretary of Energy* 62 F. Supp. 2d 1 (D.DC 1999); affirmed, *Oil, Chemical and Atomic Workers v. Secretary of Energy Richardson*, 214 F. 1379 (DC Cir. 2000).
- 81 Key discovery findings are summarized in “United States Responsive Statement of Genuine Issues of Material Fact,” *United States v. Science Applications International Corporation*, November 16, 2007.
- 82 Gordon, *supra* footnote 62.
- 83 In August 2010 Secretary of Defense Gates made front page news by announcing the Department’s intent to cut military, civilian and contractor personnel, in the context of an effort to hold the line on the defense budget. See, e.g. Thom Shanker, “Pentagon Plans Steps to Reduce Budget and Jobs,” *New York Times*, August 9, 2010.
- 84 See 72 *Federal Register* 65873, 2008 “Federal Acquisition Revision to address “Improper Business Practices and Personal Conflicts of Interest.”
- 85 US Government Accountability Office, *Defense Contracting Integrity: Opportunities Exist to Improve Oversight of Contractor Ethics Programs*, GAO 09–501, September 2009.
- 86 The GAO report amplified, at 23, with regard to the Defense Contract Management Agency (DCMA):

Despite DCMA having the important role of performing contract administration services for many of DOD’s contracts after award, the impact of the new FAR rules on changing the CAO function to include some degree of oversight to verify implementation of contractor ethics programs has been negligible. For example, most of the nine CAO staff we talked to who provide ongoing contract administration and oversight of seven major DOD contractors told us that they may receive information from the contractors or from DCAA on the status of contractors’ ethics programs. In addition, they monitor contractor ethics program actions to correct internal control deficiencies for integrity and ethical values in response to deficiencies discovered during DCAA audits. However, other than reacting as information comes to them from the contractor and DCAA, the CAO staff indicated that they were not planning to routinely verify contractor ethics program efforts. Some of these staff indicated that they were willing to monitor contractors’ ethics programs but noted that it is currently not required by the FAR. Some staff indicated that if such a task was required, criteria or instructions on what to look for would be needed. However, the new FAR rules are silent with regard to contracting officer review or standards for examining contractor ethics programs during contract administration. As such, without further guidance, CAO staff will continue as before the new FAR rules were implemented with limited oversight of contractors’ ethics programs.

- 87 The Defense Industry Initiative (DII), an association of Defense contractors, encourages members to have ethics codes, and provides related training and support. The DII effort does not appear to address the “what if?” circumstances discussed here. The DII website explains that:

“The purpose of your company’s code of conduct is to set forth your company values and important business conduct information for your employees. It is important that your code is a straightforward, brief, understandable, and useful tool for your employees. Many companies choose a relatively general employee code of conduct or handbook that provides brief descriptions of various company policies, with references to the more expansive policies for more detailed information on topics relevant to their specific work situations or issues.

Items you may want to include in your company code of conduct:

- » A letter from the Chairman/Executive Office
- » Statement of company values (if you selected one-word values, you may choose to add a phrase or sentence to expand upon and explain each value)
- » Instructions to ask a question or report a concern related to ethics
- » Your company’s policies on confidentiality, non-retaliation and approach to investigation of employee concerns
- » Other resources employees may contact for advice on specific topics (such as employee benefits, legal problems, contract issues or safety concerns)
- » Your company’s telephone line for asking questions or reporting concerns
- » A list of questions to consider when approaching an ethical dilemma
- » Answers to frequently asked questions.





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