

GOVERNMENT BY CONTRACT: THE WHITE HOUSE NEEDS CAPACITY TO ACCOUNT FOR THE LEGACY OF 20TH CENTURY REFORM[†]

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INTRODUCTION

Signature priorities of the Bush and Obama administrations highlighted the deep and oft unaccountable roles of private contractors in the basic work of government, including national security activities and public welfare activities of highest level White House priority. Following 9/11, the country learned that, in addition to designing and building weapons, much of the work of war fighting is contracted out—through companies like Halliburton, Blackwater, CACI—contractors in the mess halls, on the battlefield, in Abu Ghraib prison. The “roll out” of the Obamacare, the domestic policy signature of the Obama Administration, was jeopardized by the reliance on contractors whose work was seemingly beyond official control. The post 9/11 dependence of national security cyber intelligence gathering on contractors was punctuated by the ability of a contractor employee—Edward Snowden—to access and release a trove of ostensibly deep national secrets.

In fact, today’s Federal reliance on grant and contractor employees to perform such basic work of government is neither an accident nor a recent

[†] Portions of this article are taken from the author’s previous work. See generally, DAN GUTTMAN, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION TRANSITION PAPER (2008); Dan Guttman, *Government by Contract; Considering a Public Service Ethics to Match the Reality of the “Blended” Public Workforce*, 2 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 1 (2015); see also Dan Guttman, *Contracting, an American Way of Governance: Post 9/11 Constitutional Choices*, in THOMAS H. STANTON, MEETING THE CHALLENGE OF 9/11: BLUEPRINTS FOR MORE EFFECTIVE GOVERNMENT (2006); Dan Guttman, *Private Purpose and Public Service*, 2:4 OECD J. OF BUDGETING (2003).

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development. It is the predictable and predicted product of mid-20th century reform that produced profound successes, but left a legacy of fundamental questions that have lain ill addressed and oft unexamined by Congress and the Executive. Indeed, President-elect Trump’s post-election tweets about “out of control” military weapons costs resonate with a “back to the future” mid-20th century Congressional investigations, and promised Pentagon reform, of military contract “cost overruns.” The White House needs the capacity to understand this legacy and revision the reform for the 21st century.

At the dawn of the reform some reformers were aware that, as a 1962 cabinet level report to President Kennedy warned, the “blurring of the boundaries between public and private” would erode the ability of the official workforce to understand and account for the work of government. These early concerns were ignored. For decades, third party government has grown on automatic pilot. Driven by the inexorable force of bipartisan limits on the number of officials (“personnel ceilings”), the creation of new programs or agencies has meant that work is necessarily contracted out without due regard to its “inherently governmental” nature or the ability of officials to account for contractor work. Now, President elect Trump, as incoming President Bill Clinton, promises to cap and/or reduce the civil service workforce—but there is yet to be clear regard to the capacity of the civil service to account for contractors who, by default, will increasingly become the government with reduced civil service capacity.

Thus, over the past seven decades, contractors have come to play a daily role in the basic work of government—drafting rules, plans, policies, and budgets, writing statutorily required reports to Congress, interpreting and enforcing laws, dealing with citizens seeking government assistance and with foreign governments, managing nuclear weapons complex sites and serving in combat zones, providing the workforce for foreign aid “nation building,” and selecting and managing other contractors and the official workforce itself.

By consequence, today:

- (1) *We have a White House that, for over half a century, has declared governance principle that is increasingly a fiction*

Since the Eisenhower Administration, White House policy has been that only officials can perform “inherently governmental” work—even as limits on official personnel have made this policy a mantra detached from reality.

The White House needs capacity to know which vital government functions may no longer be within the grasp of officials—and the extent to which longstanding White House policy is a placebo or fig leaf.

- (2) *We have a Government the bulk of whose workforce is too often invisible to even the highest political appointees.*

The most basic data on Contractors and contractor work is too often invisible at the highest levels of government, as well as the public at large. Prior to the onset of the Iraq War the Secretary of the Army informed top Pentagon officials that the Army lacked basic data on the numbers of people employed under contract, their pay or location.¹

The White House needs the capacity to know whether top officials know the basic dimensions and identity of the human resources at their call.

- (3) *We can no longer presume that those who do government's most basic work are themselves governed by the laws enacted to define the limits of government and to protect citizens against "official" abuse.*

Key rules governing officials (and soldiers) do not govern private actors who perform the work of government. These include the Bill of Rights, Freedom of Information, ethics, and pay laws. Where third parties are relied upon solely for "commercial" assistance, and accountable to officials, it makes sense to have one set of rules to govern the civil service and another to govern third parties. Where third parties do the work of government, this logic requires review.

The White House needs the capacity to know when those doing sensitive government work on taxpayer dollars are not subject to rules enacted to govern such activities.

¹ See, Dan Guttman, *Contracting, an American Way of Governance: Post 9/11 Constitutional Choices* 237, 272, in THOMAS H. STANTON, *MEETING THE CHALLENGE OF 9/11: BLUEPRINTS FOR MORE EFFECTIVE GOVERNMENT* (2006).

- (4) *We have an official workforce whose ability to account for the government and its private workforce is increasingly problematic.*

With the added impetus of personnel ceilings, the dual sets of rules governing officials and contractors have, for decades, stimulated, a migration of talent from the official workforce into the contractor/grantee workforce.

The White House needs the capacity to know whether resources needed to use and account for contractors are adequate.

- (5) In the absence of an adequate official oversight workforce and a rule of law tradition to apply to contractors who do the work of government, we rely on tools of accountability—competition, performance management, and transparency—that do not or cannot bear the weight placed on them.

The White House needs the capacity to determine how well the central tools of accountability are working.

In short, the next President needs the capacity to provide for a truth in government review of the legacy of 20th century reform.

I. BACKGROUND: WHERE WE ARE AND HOW WE GOT HERE— A CAPSULE SUMMARY

A. *Contracting Out: Mid-20th Century Reform of Constitutional Dimensions*

The writings of the public servants, businessmen, and scholars present at the creation show that the post-World War II growth of the contract bureaucracy was the product of design, not bureaucratic happenstance. At the Dawn of the Cold War, reformers believed that the harnessing of private enterprise to public purpose would serve two complementary purposes. First, the private sector would provide both technical expertise and powerful political support for increased federal commitment to national defense and public welfare tasks. Second, the private bureaucracy would countervail against the dead hand of the official bureaucracy and alleviate concern that a growing government meant a centralized Big Government. The officials, consultants, and scholars saw themselves as engaged in reforms of profound, even Constitutional dimensions

In his 1965 *The Scientific Estate*, public policy scholar Don Price, first dean of the Kennedy school, described the transformational import of the “fusion of economic and social power” and the “diffusion of sovereignty”:

. . .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.²

This basic and benign reconstitution of government, marveled John Corson, a New Deal civil servant who, at mid-century, opened the management consulting firm McKinsey’s Washington office, took place with “little awareness.” Post-war contracting, Corson proclaimed in his 1971 book *Business in the Humane Society* was a “new form of federalism” under which the federal government gets its work done by private enterprise.³

At the same time, others saw developments differently. Most famously, in his 1961 Farewell Address President Eisenhower warned of the military industrial complex.

Less noticed, but no less insightful and prophetic, was a 1962 Cabinet level report to President Kennedy (the “Bell Report,” after Bureau of the Budget Director David Bell) on the use of contractors in “R and D.” The Bell report reported the following three things:

- (1) declared that reliance on contractors has “blurred the traditional dividing line between the private and the public sectors of our Nation;⁴
- (2) deemed it “axiomatic” that government officials (*i.e.*, civil and special services and appointees) must have the competence required to account for all work of government;⁵ and
- (3) warned that, unless corrective actions were taken, there would be a brain drain of officials into the contractor workforce.⁶

² DON K. PRICE, *THE SCIENTIFIC ESTATE* 75 (1965).

³ JOHN J. CORSON, *BUSINESS IN THE HUMANE SOCIETY* (1971).

⁴ DAVID E. BELL, *REPORT TO THE PRESIDENT ON GOVERNMENT CONTRACTING FOR RESEARCH AND DEVELOPMENT*, S. Doc. No. 94, 87TH CONG., 2d Sess. (1962).

⁵ *Id.* at 18.

⁶ *Id.* at 5.

The Bell Report put its finger on the problem. In the short term, the use of contractors to respond to Cold War emergency made sense; over the longer term, the axiom of official control would be challenged unless corrective action were taken. The discrepancy between the rules governing officials and those governing contractor employees provided incentive for official talent to migrate into the contractor workforce. Why should an experienced official stay in government when more interesting work at higher pay, and with lesser ethical constraints, was available as a contract employee?

The Bell Report backed away from answering the questions it raised. The new public/private mix, it found, was essential to Cold War programs, and “philosophical issues” need be deferred.⁷ Following the Bell Report, driven by the hydraulic force of personnel ceilings, third party government grew without pause for further White House level review.

B. New Organizational Relationships: A Capsule Summary

Cold War agencies, the Atomic Energy Commission, Department of Defense, National Aeronautics and Space Administration (“NASA”), U.S. Agency for International Development (“USAID”), provided the initial template for the deployment of contractors as a permanent workforce 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.⁸

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 and Aerospace—to manage contractor teams and advise on planning and spending.

- Under the “support service” model, agencies called on contractors to provide personnel on an “as needed” basis to supplement the

⁷ *Id.* at 13.

⁸ Dan Guttman, *Contracting Out U.S. Government Work: Organizational and Constitutional Models*, 3 PUB. ORG. REV.: A GLOB. J. 281, 281–99 (2003).

civil service in the daily work of government, be it planning, rule-writing, dealing with citizens or other contractors.

- 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 1960s and 1970s these models were transferred from Cold War agencies to civilian agencies such as the Departments of Transportation and Housing and Urban Development, 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 also as tools in the politics of bureaucratic reform. The reformers claimed that social problems could be solved if “institutional obstacles” to change were overcome, *e.g.*, teacher unions that resist school reform.⁹

C. *The Age of Governance*

In the 1980s and 90s, the notion of smaller government gained popular support around the globe. Citizens, however, generally wanted no diminution in governmental functions. To address this inconsistency, new strategies for the reform took hold in the U.S. and elsewhere under the banner of terms such as “reinventing government”, “public-private partnerships”, “devolution”, “privatization” and “deregulation.”

In the federal government, the new strategies were embraced with little regard for the fact that they had long been adopted. Thus, after identifying the “new” means to use non-government actors to deliver social services, Osborne and Gaebler the authors of the highly influential book *Reinventing Government*, noted that “surprisingly” many of these innovations had already been deployed by the federal government.¹⁰ Nonetheless, American public agencies rushed to put old wine in new bottles. Programs that had long been operated through private contract were, following the Thatcher revolution, now said to be examples of “privatization.”

⁹ DAN GUTTMAN & BARRY WILLNER, *THE SHADOW GOVERNMENT* (Pantheon Books 1976).

¹⁰ DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 30 (1993).

On taking office, the Clinton Administration's government reinventors committed to reducing the civil service workforce by 300,000. Reinventors acknowledged, even boasted, that their regimen would blur conventional boundaries between government and the private sector. *Reinventing Government* explains:

Those who still believe government and business should be separate tend to oppose these innovations. . . . But the world has changed too much to allow an outdated mindset to stifle us in this way. 'We would do well, [public administration scholar] Harland Cleveland writes. . . .' to glory in the blurring of public and private and not try to draw a disappearing line in the water.¹¹

The G.W. Bush Administration's competitive outsourcing program, a component of the Administration's Management Agenda, was, in historical context, the latest turn in the reform tradition. The Agenda, of course, was overwhelmed by the new Agendas of 911 and Iraq, and the related, and predictable, deployment of contractors to meet them. The Obama Administration promised reforms, but, as evidenced by Obamacare's rollout and the Snowden disclosures, contractors too often remained beyond account even in the highest priority and most sensitive work of government.

II THE 21ST CENTURY CONSEQUENCE OF 20TH CENTURY GOVERNMENT BY CONTRACT: THE PRESUMPTION OF REGULARITY DISPELLED

By consequence of the mid-20th century reform, the presumption of regularity—the “axiomatic” proposition expressed by the Bell report and long presumed in law that officials must have the capacity to evaluate and supervise all government work—can no longer be taken for granted.

In December, 2002 Comptroller General David Walker told *Government Executive Online*: “I'm not confident that agencies have the ability to effectively manage cost, quality and performance in contracts.”¹² The GAO's high risk list then included contracting at the Departments of Defense, Energy, and Housing and Urban Development, NASA and the IRS.¹³

Bush (II) and Obama era developments highlight difficulties with a continued presumption of regularity. These include:

¹¹ *Id.*, at 43.

¹² *See supra* note 2, Part II.

¹³ *See infra* note 20.

A. *The Contract Workforce Remains Invisible at the Highest Levels of Government*

As the new millennium began, high level Defense officials lacked rudimentary data on how DOD is spending its contract dollars, particularly the more than one hundred billion dollars now being spent on “services” (people’s time). The Department hired a contractor to perform a “spend analysis,” and a further contractor to analyze the kinds of services DOD is buying and the market of providers.¹⁴

In a March, 2002 memo to the Defense Department hierarchy, Army Secretary White explained:

In the past eleven years, the Army has significantly reduced its civilian and military work force. These reductions were accomplished by an expanded reliance on contractor support without a comparable analysis of whether contractor support services should also be downsized. Currently, Army planners and programmers lack visibility at the Departmental level into the labor and costs associated with the contractor workforce and of the organizations and missions supported by them.¹⁵

In April, 2002 the Army told Congress that it lacked basic information about the sheer size of the contractor support service workforce, with its own estimates ranging from 100-600,000.¹⁶ In the period since, DOD has struggled to provide data on the numbers and attributes of its contract workforce in Iraq.

B. *There Is No Systematic Awareness of the Degree to Which Vital Functions Have Already Been Contracted out beyond Practical Official Control*

The development and production of nuclear weapons—the Manhattan Project—provided a template for the use of contractors to perform what, as the former director Los Alamos note¹⁷ might readily be called inherently governmental functions (management of the ultimate weapons of destruction.

As the 2007 Blackwater shootings, as well as abundant further contractor reliance in post 911 war fighting, confirm, contractors may exercise life or

¹⁴ See *supra* note 2, Part II.

¹⁵ *Id.* at 230, 232 (quoting White, 2002).

¹⁶ *Id.* (citing Brown, 2002).

¹⁷ SIGFRIED HECKER, NUCLEAR WEAPONS STEWARDSHIP IN THE POST COLD WAR ERA: GOVERNANCE AND CONTRACTUAL RELATIONSHIPS (1997).

death powers because contractors are doing work officials (in this case soldiers) presumably should do. In other cases, however, the official workforce lacks the fundamental expertise or experience needed to account for contractors.

NASA, conceived as a response to the Cold War space race, has been fundamentally dependent on contractors since its birth.¹⁸ In its January 2003 report on high risk areas, the GAO stated:

Much of NASA's success depends on the work of its contractors—on which it spends over \$12 billion a year. Since 1990, we have identified NASA's contract management function as an area at high risk, principally because it has lacked accurate and reliable financial and management information on contract spending, and it has not placed enough emphasis on end results, product performance, and cost control.¹⁹

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.”²⁰ NASA shuttle official Linda Ham further limned NASA's contractor dependency, explaining that:

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.”²¹

¹⁸ See WALTER A. MCDUGALL, *THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE* (1985).

¹⁹ U.S. GOV'T GENERAL ACCT. OFF., GAO-03-119, *HIGH RISK SERIES: AN UPDATE 28* (2003).

²⁰ Ariana Eunjung Cha, *At NASA, Concerns on Contractors*, WASH. POST (Feb. 17, 2003), https://www.washingtonpost.com/archive/politics/2003/02/17/at-nasa-concerns-on-contractors/4200d6d4-45c4-479d-996c-557988a86d90/?utm_term=.6b9363c3f040].

²¹ Matthew L. Wald & John Schwartz, *Shuttle Inquiry Uncovers Flaws in Communication*, N.Y. TIMES (Aug. 4, 2003), <http://www.nytimes.com/2003/08/04/us/shuttle-inquiry-uncovers-flaws-in-communication.html>.

C. Contractors May Already Be the Network Called for by 21st Century Networked Government, but with Little Public Understanding of How and How Well This Network Works

Stovepiping, a commonplace in modern government was a focus of postmortems on 911. Little attention, however, was given to the role of contractors who work simultaneously for multiple intelligence agencies (and for differing components within them), who possess numerous employees who were trained in the agencies, and who may serve relevant non Federal clients as well.

In an age where there is a premium to networked solutions to public problems,²² contractors offer themselves up a possible readymade networks, however, there has been little review of the network role served by contractors in fact.

D. There Is No Coherent Vision of the Workforce Available and Required to Account for Contracting

Even as procurement has increased the procurement workforce has been downsized.²³ At the same time more and more of the basic work of contract management is contracted out—whether through direct reliance on contractors to perform components of contract management or through the award of mega contracts through which prime contractors, through the award of subcontracts, become de facto government contracting offices.

There is general agreement of the need for better training or upgrading of the official procurement workforce. However, there is less understanding of the following three areas: (1) how this is to be done when that workforce is diminished with necessary increase in the size and complexity of contractor arrangements increases; (2) how the official workforce is to relate to the growing contractor based contract management workforce; (3) the dimensions of supplementary oversight resources, including official auditors and inspectors; but also non-contractor third parties, such as whistleblowers.

²² William D. Eggers & Stephen Goldsmith, *Governing by Network: The New Shape of the Public Sector*, (2004).

²³ *See Generally, Federal Procurement*, GAO, http://www.gao.gov/browse/topic/Government_Operations/Procurement/Federal_procurement/ (last visited Jan. 15 2017) (detailing various federal procurement statistics and various GAO Reports).

E. Continued Hopes in Competition and Performance Management as Panaceas Must Be Held to the Light of over a Half Century of Experience with Big Ticket Systems Contracting

In 2007 Congressman Waxman reported on 187 contracts that, according to reports drawn on, are linked to over \$1 trillion in fraud waste and abuse.²⁴ In an essential respect the report suggested how little had changed in the past half century. The vast bulk of this trillion dollars had nothing to do with Blackwater or Halliburton, or Abu Ghraib—the contracts for services—such as soldiering—that have occupied front page attention during the many years of Iraq and Afghanistan war fighting.

Rather, the bulk of the \$1 trillion was accounted for by the traditional “big ticket” weapons systems contracting that has been performed by a dwindling number of aerospace industry companies. Indeed, a dozen contracts identified to three contractors—Boeing, Lockheed, and Northrop—comprised about \$750 billion of the total. These companies are the survivors of the contractors whose “cost overruns” were front page news nearly a half century ago. Thus, it should be no surprise that it was out of control costs on Lockheed’s F-35 and the potential multibillion dollar costs of Boeing’s new Air Force One that were President Elect Trump’s initial salvos against contractor “fraud, waste and abuse.”

F. Big Brother Is Being Contracted Out

Homeland and national security information gathering programs are subject to considerable scrutiny by those concerned about civil liberties; there has been less congressional or executive scrutiny of the reality that these programs are often performed by contractors. For example, in late 2002 public controversy developed over the Defense Department’s “Total Information Awareness” program, a high tech effort to mine and organize personal data controversy focused on government as Big Brother, generally neglecting the reality that the program was primarily performed by contractors, overseen by a skeleton official team.²⁵ In 2010 a *Washington Post* report on the dimensions of the Post 911 intelligent gathering bureaucracy-titled “Washington, Inc.”—focused

²⁴ See Majority Staff, *More Dollars Less Sense: Worsening Contract Trends Under the Bush Administration*, U.S. HOUSE REPRESENTATIVES COMMITTEE ON OVERSIGHT & GOV’T REFORM (2007), also available at <https://www.hsdl.org/?view&did=475628>).

²⁵ Adam Mayle & Alex Knott, *Outsourcing Big Brother*, CTR. FOR PUB. INTEGRITY (Dec. 17, 2002, 8:33 PM), <https://www.publicintegrity.org/2002/12/17/3164/outsourcing-big-brother>.

on the deployment and deep reliance on contractors to do the day to day work of surveillance and analysis.²⁶ In 2013, Edward Snowden, rocked the world with secret documents obtained, evidently, in his capacity as employee of Booz Allen & Hamilton. In 2016 the press reported evidence, which remains to be unraveled, of perhaps a substantial further breach of security by a Booz Allen & Hamilton employee.²⁷

III. CONCLUSION: THE WHITE HOUSE NEEDS CAPACITY TO KNOW THE CURRENT WORKFORCE REALITY AND TO FASHION A VISION FOR THE FUTURE

A. *Truth in Government: The White House Needs to Assure That the Government Workforce Can Be Seen as a Whole*

The White House and (and Congress and public) must be able to view he workforce doing the basic work of government as a whole. This would require abandonment of the fiction that government equates to the official workforce. While the outcome of this effort cannot, and should not, be predicted, the initial steps seem clear:

- (1) Periodic high level reviews of Federal personnel and procurement policy can no longer be “stovepiped,” as if there were no relationship between the integrity of the federal workforce and the utility of the contractor workforce.
- (2) The third party workforce must be rendered visible—to Congress, officials, and the public. Federal budgets, organization charts, and agency directories provide details on the Federal workforce; there is no such detail on the third party workforce, even where it works in Federal buildings and even where it outnumbers officials. Inside agencies, as well as in transmissions to Congress and the public, third party prepared materials are presented as if they were the handiwork of officials.

²⁶ DANA PRIEST & WILLIAM M. ARKIN., *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* (2011).

²⁷ Chris Strohm, *Another NSA breach hits Booz Allen: will anything change?*, BLOOMBERG (Oct. 7, 2016, 11:32 AM EDT), <https://www.bloomberg.com/news/articles/2016-10-07/another-breach-at-nsa-involves-booz-allen-will-anything-change>.

B. OMB/OFPP Must Have the Capacity to Conduct or Coordinate Research and Analysis Needed to Address the Legacy of 20th Century Reform

Because reliance on contractors to perform the basic work of government remains invisible in substantial respects, independent analyses of how and how well the system works are few and far between. If there is to be informed choice among Constitutional visions, there is ample room for further research and analysis to support this choice. The White House (through the Office of Federal Procurement Policy, in coordination with other elements of the Office of Management and Budget) needs to be able to perform, or coordinate, research and analysis that addresses key topics including:

- (1) The extent to which functions vital to national security and wellbeing are now, or in endangered of being, contracted beyond official oversight capability;
- (2) The extent to which performance management, including reviews of past performance, are, in fact, used and useful in contracts for the performance of the work of government;
- (3) The role of contractors in Networked Government; how and how well contractors who work for multiple agencies (or public agency and private regulatees) perform network functions;
- (4) The adequacy of the procurement oversight workforce, including the availability of third party resources (both contractors and citizens providing oversight capability through the False Claims Act or otherwise).

C. The White House Must Have Capacity to Lead in Harmonization of the Law and Ethics of Public Service with the Reality of The Workforce

In sum, today dual sets of laws and policies governing the use of contractors who increasingly work side by side performing the same work. By consequence the laws enacted over two centuries to define and limit government and protect Americans against abuse, increasingly do not apply to those doing the real work of government.

There must be public review and comparison of the differing rules that apply to Federal employees and to non-governmental actors in the performance of the government's work. The rules to be reviewed would include, at least,

those governing Constitutional protections afforded citizens in relation to official conduct, ethics, political activity, and transparency.

It should be understood that this task may not produce clear cut answers, and will not be a panacea. Generations of procurement law reform have had mixed results, and the attempt to relate procurement and personnel law will be all that more difficult. More to the point, mechanical application of uniform rules to officials and contractors may be counterproductive, and negate qualities for which contractors and civil servants are valued.

D. There Is Need for a Public Service Ethics to Cover the Entirety of the Government Workforce—Civil Service and Non-Civil Service

Thus, at the same time, there need be consideration of the development of ethics principles—an ethics of public service—to be applicable to all those paid by taxpayers to serve the public. This effort should identify common ethical problems posed by the current degree of reliance on contractors to do the basic work of government and consider whether there may be principles that can be applied practically to protect the public interest.

It is a tenet of modernity that information asymmetry dogs relationships between experts and non-expert, or, in a related vein, 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.

A primary legacy of 20th century contract reform is the increasing potential for abuse of information asymmetry. First, in many cases—because of personnel ceilings—the only experts on a subject are those in the contracting sector. Second, the dual sets of rules governing officials and contractors provides incentives for those experts the government does possess to join, and inform the work of, the contractor workforce. Third, as discussed, information asymmetry is further amplified by the compartmentalization of the procurement process that attended 1990s contract reforms; officials with responsibility see part of the Big picture, but contractors, with contacts, contracts and work experience throughout government, may see the whole playing field.

Professional codes have evolved to limit the abuse of information asymmetry experts in their dealings with clients. Doctors, for example, must fully disclose and obtain informed consent of patients.

In the case of contract employees, there are not generally applicable ethical principles that govern special ethical problems faced 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—and this thought is given legal form in the presumption of regularity and the inherently governmental principle.

At the same time, however, ethical codes govern civil servants. Moreover, the contracting system has a comparative advantage in the development of ethical principles that remains to be put to use. The Revolving Door that famously characterizes the system, assures that there will be a steady flow of senior contractor officials with the understanding of the government perspective needed to understand and address problems that might not be easily captured in law or rule.

In sum, while the effort may be unavailing, it is time to explore, at the highest level, the possibility and efficacy of an ethos or ethics of public service to govern all those who do the work of government—and not just the civil service.²⁸

²⁸ See the further discussion in Dan Guttman, *Government by contract; considering a public service ethics to match the reality of the “blended” public workforce*, 2 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 1 (2015).