

September 19, 2017

No. 234

Bureaucratic Dark Energy

How the Failure to Enforce the Anti-Deficiency Act's Prohibition on "Personal Services" Enlarges the Federal Bureaucracy via the Proliferation of Contractors

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There are thousands of felonies committed every day in Washington, D.C. Not in the places one might imagine, but in federal office buildings throughout the nation's capital. The crime? Circumventing the power of Congress and the president to control the bureaucracy.

The U.S. civil service's growth is limited by the budgets enacted by Congress and executed by the president. But many federal agencies do an end run around any hiring freeze by hiring contractors instead of federal employees to perform government work. Bureaucracy expands rather than shrinks, congressional oversight is lost, ethical restrictions do not apply, and government expansion continues in defiance of the laws. In the federal government, this mechanism of expansion is illegal. So how can this be happening?

Federal law generally prohibits federal agencies from employing contractors to augment the federal workforce. The prohibition on hiring contractors for their specific skills to fill ongoing federal jobs has been law since the 1880s. Without specific authorization from Congress, hiring contractors in this manner is a felony. But many agencies do it nonetheless, as these laws are nearly never enforced.

Prohibition on "Personal Services." The prohibition on hiring contractors was first enacted in 1884, through the Anti-Deficiency Act (ADA, 31 USC §§ 1341 and 1342). "No Department or officer of the United States shall accept voluntary service for the Government or employ personal services in excess of that authorized by law except in the case of sudden emergency involving the loss of human life or the destruction of property," reads the statute.¹

The Anti-Deficiency Act is a series of laws prohibiting expenditures except as appropriated and authorized by Congress. Section 1341 prohibits expending federal funds without prior appropriation and authorization by Congress. 31 USC § 1342 explicitly prohibits accepting voluntary services and "personal services," the hiring of contractors for their particular skills in order to augment the federal staff, without express authorization by statute.

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The term “personal services” means hiring a particular individual for his or her skills—nearly all positions in the federal civilian workforce are “personal services.”² The term is frequently misunderstood to mean misuse of employees to benefit an individual outside their employment, such as having federal contractors build a backyard deck. That is indeed a form of corruption, but it is not the legal meaning of “personal services.”

Willful misappropriation and the employment of “personal services” without statutory authorization are both subject to termination and criminal penalties under the ADA. Federal employees do the work of the government and they may be hired for their skills. But contracting out for the personal services of non-government-employees is what the law forbids. Any federal employee who accepts voluntary services or employs personal services may be terminated, fined, and imprisoned for up to two years. But remarkably, the prohibition on personal services is rarely recognized, much less enforced.

There are very few examples where hiring personal services is authorized by law. The broadest exemption is allowance for hiring experts and consultants, who provide skills not available among federal staff.³ On the other hand, there are few, if any, statutory authorities for hiring staff to augment the federal bureaucracy—staff who prepare budgets, write reports to Congress, prepare newsletters, and perform other roles normally filled by federal staff. While contracting for these services is contrary to the law, this practice has become so ubiquitous in government that it passes without notice.

As a consequence, when calls to reduce the bureaucracy arise, and both the president and Congress focus on reducing the hiring of federal employees, agencies with discretionary budgets respond by simply hiring more contractors, with neither approval nor oversight from Congress. The bureaucracy grows ever larger thanks to this bureaucratic “dark energy”—an invisible force that allows government to expand at the discretion of the bureaucracy alone.

The federal government is a monopoly; lacking the forces of competition there is no way to ensure efficiency. And so often, the easiest “fix” is to simply add more staff. The only limit on the size of the bureaucracy is the budget that Congress provides for it. By ignoring the prohibition on personal services, even this “limit” can be freely exceeded, as it often is. When the prohibition is flouted, the benefits accrue mostly to the Washington, D.C. region.

A Brief History of Section 1342. The statutes collectively known as the ADA were prompted by the actions of federal employees, entrusted with Treasury funds, acting in ways Congress had not approved.

The 48th Congress in 1884 wrote the core text of Section 1342. Although the prohibition on personal services and accepting voluntary services applied to all of the federal government, it was placed in the section directing funds to correct deficiencies in the Bureau of Indian Affairs in the Department of the Interior. Apparently, the abuse of funds entrusted to Indian Affairs agents had been sufficiently egregious that the 48th Congress decided to act.⁴

Deficiency spending had apparently become a matter of course. In addition to the Act of May 1, 1884, the 48th Congress was compelled to pass acts covering deficiencies on February 1, 1884, July 7, 1884, and March 3, 1885. In total these acts fill 59 pages of the 22nd volume of the Statutes at Large, or approximately 10 percent of the total text devoted to Acts of the 48th Congress.

Misappropriation is, at best, a usurpation of the Article I authority of Congress and at worst, a form of public corruption uniquely available to federal employees entrusted with taxpayer funds. Yet, enforcement of the Act has been weak. By 1905 Congress established criminal penalties for both misappropriation and personal services; in addition to being “summarily removed from office” the guilty party could “be punished by a fine of not less than one hundred dollars or by imprisonment of not less than one month.”⁵ In 1950 the penalty stood at “not more than \$5,000 and imprisoned for not more than 2 years” and there it remains today.⁶ Despite the effects of inflation, the real penalties for ADA violations remain being removed from employment in the federal government. But a near complete lack of enforcement makes these penalties largely moot.

The Prohibition on Personal Services Matters but Is Rarely Enforced. The statutes that constitute the ADA are the legislative embodiment of the U.S. Constitution’s Article 1, Section 9—“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” The ADA’s prohibition on the hiring of personal services is key to enforcing this principle.

When any office of the federal government hires support personnel through contract, it is “employing personal services.” The case law on this subject is important to the topic and is discussed in the appendix. Although there are broad exceptions and exemptions, a large fraction of the contractor employees working in agencies in Washington, D.C. are employed in contravention of the law.

Exemptions are the rare specific authority to hire for personal services. Exceptions include arms-length contracts, in which the contractor supplies personnel and equipment and is solely responsible for supervision. For example, all the janitors in federal buildings use equipment provided by their company in order not to fall into the federal definition of employee. However, many contractors, such as those hired to manage budgets or write reports to Congress, use entirely federal equipment and are functionally indistinguishable from federal employees. (See Comptroller General decision in appendix.)

Does Congress know of these contracts, and has it explicitly or implicitly approved them? Frequently, the answer to both questions is no.

The prohibition on personal services is an anti-corruption statute. The wrong it was intended to correct was federal employees entrusted with appropriated funds using a portion of those funds to hire others to help with their work—and in some cases perform it entirely. Congress appropriates funds for specific activities; the funds may be legally expended solely for the intended purpose. When a federal employee uses a portion of these funds to hire assistants through contracts, it is almost never reported to Congress. In any case, merely

reporting the illegal expenditure does not validate it; there is no such thing as “implied authorization for personal services.” Misappropriation of this type may continue as a matter of course for decades but it is still illegal.

A Case Study. The National Nuclear Security Administration (NNSA), a semi-autonomous agency within the Department of Energy (DOE), provides a good example of this phenomenon. The NNSA (where this author works as a federal employee) has no authorization to use program funds for support service contractors, and is under a cap on federal staff explicitly intended to reduce transactional oversight.⁷ Yet, within the NNSA, over \$100 million per year are redirected from programs to hire support contractors just in the Washington D.C. area.

And while officials might argue that such unauthorized staff augmentations are needed for the agency to accomplish its mission, the experience of other agencies—and the rest of DOE—suggests otherwise. While the Department of Energy itself spends billions annually on contracts, this author has not found a single example of improper use of contractors to augment the DOE’s workforce. Congress has not appropriated funds for this purpose. Until very recently, the NNSA had never even officially acknowledged this practice, and then it did only when required to by statute in 2016.

The NNSA is only one example. In the modern federal government, contractors are so widely used that it is impossible to get an accurate head count.⁸ In a somewhat perverse twist, rather than prompt stricter enforcement of the law, this situation has led to calls to end this “obsolete prohibition”⁹ or “dead letter.” However, widespread violations of the prohibition do not make it obsolete.¹⁰

On the contrary, ignoring the law has resulted in the growth of a shadow bureaucracy, largely invisible to Congress and to the American people. The result is increased overhead on federal programs used to enable increased bureaucracy, as federal employees use funds authorized and appropriated by Congress to hire others to do their own jobs. Far from being a “dead letter,” each violation of Section 1342 flouts Congress’ power of the purse and violates the Constitution every cabinet secretary and agency head has sworn to uphold.

More to point, the ADA, from its roots in the early 1880s to today, is designed to fight corruption. Allowing federal employees to choose and hire contractors, using public funds appropriated for other purposes, to do the jobs the federal employees should be doing themselves, is the essence of waste, fraud, and abuse.

Misappropriation in the Hiring of Personal Services Contractors. Where do the funds to pay for these contractors come from? If the contractors are paid out of funds appropriated to pay for agency staffing, then that would provide a limit to the total number of employees. Most, if not all, agencies are allocated appropriations intended solely for paying for administrative staff and overhead expenses, including contractors (“administrative funding”). But for many federal agencies the majority of their budget is intended for grants (education, science or applied research and development) or acquisitions (purchasing goods or services from the private sector).

At many agencies and cabinet departments, such as the National Aeronautics and Space Administration (NASA) (a special case discussed in the appendix), the Environmental Protection Agency (EPA), and the Departments of Agriculture, Defense, Energy, and the Interior, the acquisition and R&D budgets—under the category of “program funds”—dwarf the costs of the federal staff. Program funds are entrusted to federal staff to allocate to the projects and organizations around the United States that execute the programs authorized by Congress.

However, by writing subcontracts using a portion of the budgets appropriated for other purposes to hire additional support service contractors, federal employees can avail themselves of an almost limitless supply of assistants to do much of the tedious work of the government. To obtain contract staff, federal staff do not have to go through onerous federal hiring mechanisms, fight for funds from limited administrative accounts, or grant contractors any of the protections afforded to federal employees.

These hypothetical federal employees have also just violated Sections 1341 and 1342 of the ADA, circumvented the Classification Act, the Civil Service Act, and in some cases violated additional laws intended to cap the size of the federal bureaucracy. Another example at the Department of Energy well illustrates the situation.

In the early 1990s it became evident to Congress that these abuses were widespread at DOE. This situation was summarized in congressional report language:

The conferees are aware of the extensive use of support service contractors by the Department of Energy at headquarters and the field offices. In many instances these contractors are performing inherently governmental functions such as assisting in program management and program execution duties, representing program organizations at meetings inside and outside the Department, preparing briefing materials, newsletters, and budget justifications, and providing daily administrative and clerical support.¹¹

The next section of the same report created the requirement that all budgeting for staff be put into a newly created administrative account:

Within each appropriation account, each organization should have one program direction line for all full-time equivalent employees (FTEs), both field and headquarters, and provide object class information for all expenses. No Federal employees are to be funded in program accounts.¹²

The conference report accompanying the enacted 1996 NDAA also noted that the DOE:

... has employed support service contractors to perform inherently governmental or core governmental functions at the headquarters level. *The conferees direct the Department to discontinue that practice and to transfer savings to field operations.* [Emphasis added]

So, Congress became aware of the situation in 1996 and attempted to remedy it. This report language did not make the practice illegal. Rather, it put the Department of Energy on notice that Congress was aware that it was engaged in misappropriation that was *already illegal*.

In fact, Congress let the DOE off the hook to a great extent. No one was terminated, no fines were levied, and the Department was given a year to correct the situation. Since 1996 the DOE as a whole seems to have gotten the message. Subsequent laws have focused on reducing the size of the federal staff, particularly at the National Nuclear Security Administration, the semi-autonomous agency that comprises approximately 40 percent of the DOE budget.¹³

Yet, as of this writing, the NNSA spends well in excess of \$100 million per year of program funds to employ support service contractors in the Washington, D.C. area alone.¹⁴ Many of these contractors assist in program management and program execution duties, representing program organizations inside and outside the NNSA (including with foreign governments), preparing budgets, program plans, briefing materials, newsletters, and reports to Congress.

While greater ease of firing might seem like an advantage from a taxpayer perspective, hiring contractors with funds appropriated for other purposes in the first place undermines agencies' accountability to elected officials. In practice, the advantage of at-will employment is rarely, if ever, realized. In a typical "personal services relationship" (as is the norm at NNSA), the federal employees and contractors work closely together, socialize, and become so intertwined in the operations and culture of the agency that firing a contractor is no more common than firing a federal employee.

Furthermore, if done in accordance with the law, federal staff do not have the right to terminate individual contractor employees. An agency administrator in theory could terminate a complete contract or ask the contracting company to replace a single individual on the contract for poor performance. But in practice, these are rare occurrences. In fact, there are numerous contractor employees working in place of federal staff at the NNSA who have been working there for a decade or more.

Several major contractor corporations have formed an "Enterprise-Wide Technical and Engineering Support Alliance" solely to market themselves to the NNSA and coordinate filling positions among themselves, even producing a brochure.¹⁵ None of these support contractor staff are counted against the statutory limit on the number of NNSA employees.

If this is a legal practice, it raises the question: Why does NNSA need most of its federal staff? The agency manages billions of dollars in program funds. If \$100 million can be redirected to hiring assistants, why not \$200 million or \$300 million? Why have any federal staff at all? If federal agencies can contract out writing reports, preparing newsletters and press releases, budgeting, accounting, legal services, and oversight of programs, then a very much smaller federal workforce should suffice.

An internal NNSA study documented these issues. In 2014, NNSA's practices came to the attention of the House Armed Services Committee staff. Subsequently, the Strategic Forces Subcommittee chairman requested an investigation from the DOE Inspector General (IG). After DOE IG Gregory Friedman ignored the request to report on the issue of the use of program funds to hire contractors, the Defense Authorization committees added a section to the 2016 National Defense Authorization Act that requires NNSA to report all of the contracts, the number of full time equivalent personnel employed under them, how they are funded, and the number of contractor employees who have been employed under contract at the NNSA for more than two years.¹⁶

This report must be delivered with the president's budget request each year. The first such report was submitted with the 2017 DOE budget justification. The agency was not entirely forthcoming. In response to the requirement that NNSA report the number of contractors employed over two years the following statement appeared: "NNSA does not have information to address paragraph (f)(4), it is the responsibility of individual contractors/employers to determine how to address contract requirements and who will perform the work."¹⁷

This is an astonishing statement, given that the contractor employees working at NNSA *all* have government-issued identification, access to secure buildings, and frequently offices and phone numbers assigned to particular units of the NNSA. Hundreds of contractor employees appear year after year on the rosters of offices and divisions throughout the agency. They are placed in hierarchies reporting to individual federal staff and perform tasks identical to many federal employees within NNSA and DOE. For the NNSA to "not have information" on who these people are and how long they have been around seems negligent at best.

Conclusion. The prohibition on personal services has been law for over 130 years. But in the last few decades it has been so thoroughly eroded that few government attorneys, much less congressional staff or members of the public, comprehend what the term "personal services" even means. The purpose of this prohibition remains as valid as it was in the 19th century, and if anything it is needed now more than ever. Any attempt to reduce the size, increase the efficiency, or even slow the growth of government requires Congress to be in control of appropriations. The executive branch must ensure that appropriations are only used for authorized purposes.

The use of funds not appropriated for the purpose of hiring contractors circumvents the control of Congress. The use of contractors on an ongoing basis for particular tasks normally assigned to federal employees evades the intent of the Civil Service Act and the Classification Act, and in each case it may be a violation of the prohibition on personal services (31 USC Section 1342).

The National Nuclear Security Administration provides an example, but the conditions that allow for this sort of abuse can and do occur at many federal agencies. Anecdotal evidence, and this author's experience, suggests that the most widespread abuse—in terms of dollars spent if not fraction of budget—is at the Department of Defense. It can occur at any agency

where the federal staff are entrusted with discretionary funds intended for contract acquisitions or grants. Those include the Departments of Health and Human Services, Homeland Security, Housing and Urban Development, and the Environmental Protection Agency, among others. Federal staff at these agencies are entrusted with funds intended for particular purposes across the United States, but if they skim these funds to hire contractors for personal services, the beneficiaries are entirely local to the Washington, D.C. region. In a very real sense, this practice shorts federal funds to every congressional district in the United States outside of Southern Maryland and Northern Virginia.

Agencies are not going to enforce the prohibition themselves. Congress must insist on enforcement of the Anti-Deficiency Act and punish civil servants who outsource their own jobs. It is essential not to reward agencies for bad behavior by converting the contractors to federal staff while keeping in place the federal employees who hired them.

Ultimately, hiring contractors for personal services is corruption, as it is funded through misappropriation. Worse, federal employees allowed to hire personal services contractors are contracting out their own jobs. The public is being double-billed for the same “work.” The bureaucracy grows without limit, and out of sight of Congress.

The key problem is the lack of enforcement of the provisions of the ADA itself. Historically, this was the responsibility of the Comptroller General. The successor of the Comptroller General’s office is the Government Accountability Office (GAO), which relies on the inspectors general of the various agencies to police the agencies themselves and report ADA violations. This system has broken down to the point that felony violations of the ADA routinely go unreported and unpunished.

To address this, Congress should impose reporting requirements similar to those imposed on the NNSA by the 2016 National Defense Authorization Act, Section 3138. This requires the NNSA to report the total number of contractors (in full-time equivalents), the source of funding used to pay for these contracts, and the number of contractor employees who have worked at NNSA for over two years. To date this has resulted in the one report, buried in the 2017 DOE budget submission referred to above.

When agencies are unwilling to police themselves, private action could fill the gap. Congress should establish a private civil cause of action for ADA violations, akin to standing provisions of the Sherman Act and Qui Tam provisions of the False Claims Act. There may be hundreds of cases at dozens of agencies amounting to billions of dollars in misappropriation. A small fraction of these sums awarded to successful plaintiffs should be a powerful incentive.

Appendix: A Legal History of the Anti-Deficiency Act's Prohibition on Personal Services

The present prohibition on personal services is found in 31 USC § 1342:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government *or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.*¹⁸
[Emphasis added]

The statute itself is frequently referred to as the “limitation on voluntary services.”¹⁹ The clause prohibiting “voluntary services” is widely enforced. This prohibition is cited in closing national parks, museums, and some of the less “essential” government agencies whenever there is a lapse in appropriations. Federal employees who have the temerity to show up for work during a “shutdown” are threatened with termination and prosecution under the felony provisions of this statute.²⁰ In 2014, for example, the Consumer Product Safety Commission (CPSC) prosecuted one of its own employees for working during the government “shutdown.” But those who hire contractors for personal services are rarely if ever penalized—much the contrary.

The Federal Acquisition Regulations (FAR) repeat this prohibition in § 37.104 and include a series of indicia of when a personal services relationship may have been established:

- (d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:
- (1) Performance on site.
 - (2) Principal tools and equipment furnished by the Government.
 - (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
 - (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
 - (5) The need for the type of service provided can reasonably be expected to last beyond 1 year.
 - (6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to—
 - (i) Adequately protect the Government's interest;
 - (ii) Retain control of the function involved; or
 - (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.
- (e) When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.
- (f) Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Personnel Management has established requirements which apply in acquiring the personal services of experts or consultants in this manner

(e.g., benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.

Items 1 through 6 derive directly from the “Pellerzi Standards,” articulated in a 1967 memo from the General Counsel of the U.S. Civil Service Commission related to the legality of contracts at the NASA Goddard Space Flight Center.²¹ These were later interpreted in an explanatory memo by the subsequent U.S. C.S.C. General Counsel (*Mondello*) in 1968.²² These were subsequently extensively analyzed and interpreted in extensive litigation deriving from a NASA reduction in force. These standards were later incorporated into the federal acquisition regulations as a guide to when a personal services contract may have been established.

Lodge and the Pellerzi-Mondello standards. In 1967 NASA initiated a reduction in force (RIF) of personnel at the George C. Marshall Space Flight Center in Huntsville, Alabama. Lodge 1858 of the American Federation of Government Employees filed suit, representing the employees subject to the RIF. The litigation of this case helped establish the current interpretation of the prohibition on personal services and the standards for identifying a prohibited personal services relationship found in FAR 37.104.

The RIF notices were issued to the NASA employees on December 6, 1967. On December 12, 1967 the Civil Service Commission (CSC) published the letter opinion written by General Counsel Leo Pellerzi in October 1967 (apparently in anticipation of this RIF) regarding the legality of two of the support service contracts at Goddard Space Flight Center. In this letter Pellerzi established the “standards of review to be applied in determining whether or not an employer-employee relationship had been established between NASA and private contractor employees by the terms and performance of each of the support service contracts.”²³

The *Pellerzi* standards were cited with approval by the D.C. District court in 1976.²⁴ The court applied the *Pellerzi* standards and the 1968 explanatory memo by subsequent CSC General Counsel Anthony L. Mondello (July 5, 1968), by its analysis of each of 32 contracts at NASA-Marshall that had been challenged by the plaintiffs and subsequently evaluated by the Civil Service Commission. The CSC had found that none of the 32 contracts created an “employer-employee” relationship. In its reanalysis and application of the *Pellerzi-Mondello* standards to the contracts, the court found that 17 of the contracts met all of the standards “notwithstanding attempts to program the contracts to avoid the appearance of an employer-employee relationship” due to the “inherent nature of the services, or in the manner in which they are provided, reasonably requires *directly or indirectly* federal direction or supervision of contractor employees.”

The appeals court disagreed and reversed the trial court’s finding with regard to the propriety of the personal services contracts. In looking back over the analysis of the contracts conducted by the CSC, the appeals court deferred to the CSC findings that the contractor personnel were not being continually supervised by federal employees, and were in fact always under the supervision and control of their own companies.²⁵

But the appeals court did not conduct the same detailed contract-by-contract analysis and application of the *Pellezi* standards carried out by the trial court.

In fact, what the appeals court found dispositive in *Lodge* was that the NASA administrator had been granted broad discretion to establish personal services contracts in the NASA Enabling Act (42 U.S.C. 2437(b)(5)) and that as these contracts were regularly reported to Congress and funded through appropriations, there could be no doubt they were approved by Congress.²⁶ *Lodge* simply states that the administrator of the National Aeronautics and Space Administration has broad authority to hire contractors for personal services; this is unique in the federal government. Hence, while *Lodge* is often cited as standing for the principle that the sixth *Pellerzi* standard essential to establishing an employer-employee relationship, the courts' discussion on this topic is mostly dicta.²⁷

Enforcement and Interpretation of Section 1342. The vast majority of the rare ADA enforcement actions are handled internally by federal agencies as personnel actions, which are documented—if at all—only through summary reports submitted to the Government Accountability Office. The documented “case law” on the subject is mostly in the form of Comptroller General Decisions and a single notable case in the D.C. Circuit.

In 1926 the United States Veterans Bureau had hired Louise M. Cambouri for translation services on a contract for the fiscal year of 1927. The Comptroller General, citing section 4 of the Act of 1882, and the fact that the Classification act of 1923 had classified translators as graded positions within the civil service, determined that this was “essentially personal service to be performed by regular employees of the government.”²⁸

In 1943 the Comptroller General clarified where the line stood between “personal” and “non-personal” services (which could be contracted out).²⁹ This decision was in response to a letter from the liaison officer of the Office for Emergency Management, inquiring as to the legality of acquiring janitorial services for field offices through contracts. Both the letter and the decision of the Comptroller General noted that the 1882 Act only applied strictly to contracting for personal services in the District of Columbia. The Comptroller General determined that:

The objection to contracting with a firm or third party for personal services (in field offices) is not based on that act, but upon the fact that such contracts delegate to the contractor the right to select persons to render services for the government in contravention of section 169, revised statutes, as amended by the act of June 26, 1930, 46 Stat 817 which requires that all appointments of officers and employees be made by the head of the department or agency, or with respect to field services, by a subordinate officer to whom that duty has been delegated. Also, the services rendered by the contractor's employees would not be subject to *direct supervision* such as is generally exercised over federal employees.

Accordingly, where janitor *services are exclusively personal*, that is to say, *where the government agency furnishes all supplies and equipment, leaving nothing but the labor of the individual to be furnished*, the matter is one for performance by government employees, either whole or part time, appointed in accordance with the civil service regulations.³⁰ [Emphasis added]

This decision went on to determine that in field offices, in cases where the services were on a non-personal basis—the contractor supplying the workers and all the equipment and supplies—the use of contracts for services was allowed.

Hence, as of 1943 the understanding of “personal services” remained hiring a person to do a particular job for the government, using government resources on government sites. All the jobs that appear in the Classification Act are “personal services”—if government employees normally did the work, then contracting for the service was prohibited. The narrow exception opened here was to draw a distinction between personal and “non-personal services” defined as when the contractor has complete control of the personnel, equipment, and supplies. A “non-personal” contract then has no supervision whatsoever by government employees; the government merely judges the work of the contractor and has no say over who is doing the work or how they go about doing it.

The post-World War II expansion of the U.S. government brought pressure for growth in contracting and for loosening the limits of the prohibition on personal services. For example, in a 1953 decision, the Comptroller General determined that purchasing credit history reports required for personnel security background checks was acceptable due to the fact that it would cost vastly more to do this work with government employees.³¹

A subsequent decision in 1953 clarified that this was a limited liberalization of the rule—there is no exemption to hire contract employees to augment the federal staff, even during wartime, were an agency attempted to invoke the “emergency” exception in the statute.³² The Army assistant chief of engineers requested a decision from the Comptroller General regarding the propriety of continuing contracts with an engineering contracting company for processing shipping orders and requisitions. The request from the Army noted that Congress had capped civilian personnel at the Department of Defense in the Appropriations Act for 1952. The need for additional personnel for handling contracts due to the Korean War was consequently addressed by letting a contract for services normally performed by government personnel. The Comptroller General strongly disagreed with this rationale for contracting:

It would be unreasonable in the extreme to presume that Congress, while imposing a ceiling on the number of graded civilian employees that could be employed in the Department of Defense, intended to authorize the procurement by contract from outside sources of services which would be performed by employees of the type involved but for the personnel ceiling. Otherwise the limitation would be meaningless.³³

Recent Applications of Section 1342. Violations of the ADA “must be” reported by the head of the agency to the president and Congress, but they rarely are.³⁴ The Government

Accountability Office collects agency reports of ADA violations and catalogs them on its public website. Most of the reported violations relate to overspending appropriations. The following list is compiled from the GAO Anti-Deficiency Act Reports from 2007 to 2014 and copied verbatim.

- 2014: Treasury reported that four individuals who were providing uncompensated services as student interns in the Office of International Affairs (OIA) were not students as defined by 5 U.S.C § 3111. Treasury determined that it improperly accepted voluntary services, thus violating the Anti-Deficiency Act.
- 2014: [The] Consumer Product Safety Commission reported that an employee worked without authorization while in furlough status as part of an orderly Government shutdown from a lapse in appropriations. CPSC reported that the employee received and signed a furlough notice that instructed the employee not to work on any official business, even as an unpaid volunteer, during the furlough period. CPSC reported the employee continued to work, without his supervisor's knowledge or approval on October 2, 2013, which violated the voluntary services prohibition of the Anti-Deficiency Act (ADA).³⁵
- 2012: [The] National Labor Relations Board (NLRB) reported that the violation of 31 U.S.C. § 1342 occurred when NLRB's Human Resources Branch entered into a personal services contract with a former employee.
- 2009: The United States Merchant Marine Academy (in 2007) used personal services contracts with one of its contractor employees—known as “non-appropriated fund instrumentalities (NAFIs)—for the use of the NAFI staff, to carry out the government's business, without express authority, thus violating 31 U.S.C. § 1342.³⁶
- 2004-2007 (also reported in 2009): To supplement the capabilities of USMMA's full-time teaching staff, USMMA employed approximately 50 part-time teaching staff through 96 adjunct professor contracts (some individuals had more than 1 contract), which constituted personal services contracts in excess of those authorized by law, in violation of 31 U.S.C. § 1342.
- 2005: National Guard Personnel, Army funds used for training instead of O+M [operations and maintenance]. Also, voluntary services accepted from civilians who helped conduct training (Fiscal years 1998-1999).

This list might indicate that violations of Section 1342 are rare, but the paucity of reported incidents may have more to do with the fact that agencies have to find the violations themselves and report them to GAO. This depends on a culture of compliance with the ADA—in which case there are likely to be no violations to report—or an Inspector General who actively investigates the agency and pursues violations. At least in the case of the personal services prohibition this is rare, but it is not unheard of. In 2013 the Securities and Exchange Commission (SEC) Inspector General reported numerous apparent violations of the FAR provisions governing personal services.³⁷ None of these appear in the GAO reports, possibly because at no point in the SEC IG report is there any recognition that FAR 37.104 is the regulatory application of 31 U.S.C. § 1342. The SEC IG can be forgiven for this oversight; many lawyers who specialize in government contract law have been making the same mistake.

Criticisms of the Prohibition on Personal Services. The Anti-Deficiency Act’s prohibition on personal services remains in effect, but a number of legal and policy analysts suggest that it having been ignored for decades have rendered it a dead letter. Such a view is not justified by the law. An analysis of some of these criticisms follows.

The Services Acquisition Reform Act of 2003—part of the National Defense Authorization Act of 2004³⁸—established an Acquisition Advisory Panel (AAP) to review laws, regulations and policies “regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility and the use Government wide contracts.”³⁹ While it has many important observations and sensible recommendations, the panel failed to recognize the purpose and necessity of the prohibition on personal services.

In its analysis of the Federal Acquisition Regulations’ prohibition on personal services, the report attributes both the rationale of the prohibition on personal services and the *Pellerzi-Mondello* opinions, which established criteria for determining the existence of an employer-employee relationship in federal employment, to “the concern that government supervision of contractor personnel would act to create an employer–employee relationship between the government and the contractor’s personnel.”⁴⁰ However, the existing FAR provisions do not derive directly from the *Pellerzi-Mondello* opinions, but from the interpretation of those opinions and existing case law in *Lodge*.⁴¹ The six factors cited in the FAR were not used by the court in *Lodge* to establish a bright line rule to prevent contractor employees from gaining federal employee status. The appeals court in *Lodge* was considering the question raised by a union of whether certain contractors hired by NASA were in violation of the prohibition on personal services. The court determined in this case that Congress granted the NASA administrator broad authority to hire contractors in the statute establishing NASA. The factors live on, and are intended to be considered when federal officials evaluating if a personal services relationship has been created.

The “concern” in *Lodge* and the FAR itself is in protecting the integrity of the civil service laws and the power of Congress to control the amounts and purposes of appropriations. A further concern (unstated in *Lodge* but implicit in the FAR) is protecting the authority of Congress to determine the number of federal employees or the amount of funding devoted to paying them. By casting Section 1342 as merely protecting the government from a blurring of lines between federal and contractor employee, the AAP panel misread the case law, the U.S. Code, and the FAR. The purpose of the law is to prevent unauthorized expenditures.⁴²

Another widely cited critique of the prohibition on personal services is an award-winning note by Collin D. Swan, then a student at George Washington University Law School, published in 2012. Swan focused on another obvious problem with using personal services contractors in place of government employees.⁴³ While the contractors are given extensive discretion to advise and even make some decisions for the government, they are subject to virtually none of the ethics laws applied to government employees. This means that contractors can in effect lobby on behalf of their company—for example, for more work to be directed to the company or recommend additional staff to be hired from the company.

They can accept gifts from other contractors. They can engage in political activities, which are prohibited for government employees by the Hatch Act. Finally, they are not subject to any of the financial reporting or conflict of interest evaluations applied to federal staff. Swan recommends adding a statutory requirement that all contractors employed to augment the federal staff must follow the same ethics laws.⁴⁴

In the above observations Swan is undoubtedly correct. But rather than note the obvious fact that this “absurd situation”⁴⁵ is the natural product of an inherently illegal activity, he goes on to conclude that the widespread violation of 1342 has rendered it a “dead letter” and recommends that Congress solve the problem by first repealing the FAR prohibition, somehow missing the point that the FAR merely restates the U.S. code in this case.⁴⁶ Swan does not cite 31 U.S.C. 1342, and appears not to recognize that the prohibition on personal services is found in the Anti-Deficiency Act. Instead, he focuses entirely on the Federal Acquisition Regulations.⁴⁷

There are other flaws in Swan’s analysis. He misstates the history and authority of the FAR section 37.104. Contrary to Swan, the Comptroller General did not “promulgate the prohibition in the early 1900s through advisory opinions to executive agencies.”⁴⁸ It does not exist principally to prevent employment relationships or identify prohibited relationships. Rather, it is an indicator of what is really prohibited: corruption in the form of misappropriation, and the creation of unauthorized expenditures and public liabilities as a result of those expenditures.

Swan is not alone in these fallacies; these are common misperceptions of the prohibition among Washington policy makers and their staff. By treating this statutory embodiment of the Article 1 “power of the purse” as mere “advice” to be disregarded at will the bureaucracy can grow without inconvenient limits.

Furthermore, Swan asserts that due to efforts to reduce the size of government, many federal agencies are “strapped for personnel” and “have no choice but to turn to service contractors ... to fulfill their mandates.” This argument rests on the fallacy that all the positions that an agency deems necessary are, in fact, necessary.⁴⁹ But the bureaucratic imperative is to expand staff and budget.

Notes

¹ 31 U.S.C 1342

² The present prohibition on personal services is found in 31 USC § 1342: “An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”

³ 5 U.S.C. 3109

⁴ Chap. 37 – An act to provide for certain of the most urgent deficiencies in the appropriations for the service of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty four, and for other purposes. “To enable the Secretary of the Interior to pay the employees temporarily employed and rendering service in the Indian Office from January first up to July first eighteen hundred and eighty-four, two thousand one hundred dollars, *and hereafter no Department or officer of the United States shall accept voluntary service for the*

Government or employ personal services in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property.” (23 Stat. L. 17). [Emphasis added]

⁵ 33 Stat. L. 1258.

⁶ 64 Stat. L. 765.

⁷ Author’s note: At this point one may reasonably wonder why I wrote this paper. In 2011 I was involved in an internal study of the use of contractors at the National Nuclear Security Administration, which was initially intended by agency’s management to optimize their utilization. In the course of this study, I discovered that despite the ubiquitous presence of contractor personnel throughout NNSA, the agency had no authorization for this practice and was using funds intended for other purposes to pay for the contracts. I reported this to my supervisor, to my supervisor’s supervisor, to the NNSA general counsel, to the DOE Inspector General, and to the GAO. At no point was I given any explanation for why this practice was legal. I wrote the first draft of this article and circulated it in NNSA and DOE requesting an explanation for how my analysis was flawed—what authorization had I missed? No one offered any explanation beyond, “We need these people.” It soon became clear that this practice is so entrenched that no one within the department wanted to touch it. But that is precisely how bureaucracies grow without end, and no hiring freeze or cap on federal pay can stop it. So I decided to publish it through one of the few organizations in Washington, D.C. dedicated to reducing the size of government. Thank you, CEI!

⁸ In 2003 the Brookings Institution estimated that the number of jobs produced from government contracts and grants totaled 8 million in FY 2002, for a “true size” of the federal workforce of 12.1 million in October 2002. Paul C. Light, “Fact Sheet on the True Size of Government,” Brookings Institution, September 5, 2003, <http://www.brookings.edu/research/articles/2003/09/05politics-light>.

⁹ Acquisition Advisory Panel, Report to the Office of Federal Procurement Policy and the United States Congress 401 (2007), https://acquisition.gov/comp/aap/24102_GSA.pdf.

¹⁰ Colin D. Swan, “Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors,” *George Washington Law Review*, Issue 80:2, Note, Vol. 80 (February 2012), <http://www.gwlr.org/dead-letter-prohibitions-and-policy-failures-applying-government-ethics-standards-to-personal-services-contractors/>.

¹¹ Conference Report 104-293 (accompanying HR-1905 (P.L. 104-46), October 26, 1995).

¹² A further complication, particularly evident at the Department of Energy, is that most of the budget goes to pay for “contractors” running the many DOE national laboratories. This latter group is frequently referred to by the shorthand “contractor,” though they are a different category altogether. This is an important distinction. The laboratories and other DOE facilities are government-owned contractor-operated facilities (GOCOs). A subset of them—most of the national laboratories—are also federally funded research and development centers (FFRDCs). The FFRDCs are designated by Congress and have a “special relationship” with the government that extends to the employees of FFRDCs being quasi-governmental employees. For example, the Intergovernmental Personnel Act (IPA) applies to employees of FFRDCs. This means that employees of an FFRDC, such as the Sandia National Laboratory, can be sent under the authority of the IPA to work for the Department of Defense at the Pentagon. While at DOD the Sandia employees have all the authority of a regular federal employee, except to the extent that they must not engage in any activities that raise a conflict of interest with their employer. Several hundred such employees just from DOE laboratories are employed in Washington, D.C. at any time. Typically, they are assigned for three years but some may be on IPA assignments for a decade or more. This is all perfectly legal and is not a problem; at least it is not a problem we are discussing here. When we are discussing contractors and violations of the FAR or the ADA, we are not referring to the career employees of GOCOs.

¹³ 2013 NDAA (P.L. 112-239) “By October 1, 2014, the total number of employees of the Office of the Administrator may not exceed 1825.” The law goes on to define the counting rules for this total. It does not refer to counting support service contractors, since having “fixed” that problem in 1996, there should be no such contractors. The text also does not refer to “federal” employees, just “employees” with no further elaboration. The intent of the law is to limit the total number of individuals working at the NNSA.

¹⁴ Department of Energy, FY 2017 Congressional Budget Request, National Nuclear Security Administration, Office of Chief Financial Officer, February 2016, Volume 1, p. 24, <https://www.energy.gov/sites/prod/files/2016/02/f29/FY2017BudgetVolume1.pdf>. According to the Department of Energy’s budget request for the National Nuclear Security Administration, in FY 2016 the NNSA reported employing 753.7 contractor full time equivalent employees (FTEs). At least 316 of these contractors were employed on program funds without any authorization from Congress. The true number of program funded FTEs is hidden in the report, as contractors providing 362.2 FTEs were reported as being

funded by both program and program direction funds. At a conservative average of \$250,000, including overhead, the total bill is over \$188.2 million *per annum*. Of this total, the amount available from “program direction” can be estimated. “Program direction” funds come from the account designated “Federal Salaries and Expenses” in the budget. In 2016, this amount was \$369.6 million, which had to cover both contract support and the federal staff costs, including travel. The NNSA is limited to 1,690 federal employees. At the (low) estimated cost of \$200,000 per FTE, the cost of just the federal staff is \$338 million. (I have used lower figures for the federal staff cost than contractors to ensure a conservative estimate). The difference between these two numbers is the amount of “program direction” funds authorized and appropriated by Congress—approximately \$31 million. Even allowing for errors in this estimate, there could not be more than \$50 million left which NNSA is authorized to use for contractor support. So the total amount misappropriated is well in excess of \$100 million. In the FY 2018 budget request the total number of contractors reported was 788.8 FTE, of which 559 FTEs were on contracts solely funded by funds skimmed from programs. Department of Energy, FY 2018 Congressional Budget Request, National Nuclear Security Administration, Office of Chief Financial Officer, May 2017, Volume 1, https://energy.gov/sites/prod/files/2017/05/f34/FY2018BudgetVolume1_1.pdf. This suggests that the total of funds redirected from congressionally authorized actions to hiring helpers for the federal staff is now well over \$200M per annum.

¹⁵ See, for example, the marketing brochure produced by the combination of the majority of the NNSA support service contractor organizations,

http://www.techsource-inc.com/docs/E-TESA_MarketingBrochure-FINAL-DIGITAL-1.pdf.

¹⁶ SEC. 3138. ANNUAL REPORT ON NUMBER OF FULL-TIME EQUIVALENT EMPLOYEES AND CONTRACTOR EMPLOYEES. Section 3241A of the National Nuclear Security Administration Act (50 U.S.C. 2441a) is amended by adding at the end the following new subsection:

(f) ANNUAL REPORT.-The Administrator shall include in the budget justification materials submitted to Congress in support of the budget of the Administration for each fiscal year (as submitted with the budget of the President under section 1105(a) of title 31, United States Code) a report containing the following information as of the date of the report:

(1) The number of full-time equivalent employees of the Office of the Administrator, as counted under subsection (a).

(2) The number of service support contracts of the Administration and whether such contracts are funded using program or program direction funds.

(3) The number of full-time equivalent contractor employees working under each contract identified under paragraph (2).

(4) The number of full-time equivalent contractor employees described in paragraph (3) that have been employed under such a contract for a period greater than two years.

In the 2017 budget justification in response to this section DOE reported “NNSA does not have information to address paragraph (f)(4), it is the responsibility of individual contractors/employers to determine how to address contract requirements and who will perform the work.”

¹⁷ *Ibid*.

¹⁸ 31 USC § 1342 [Emphasis added]

¹⁹ See for example, the title on the page for Section 1342 on the Legal Information Institute website:

<https://www.law.cornell.edu/uscode/text/31/1342>

²⁰ This was not the original intent of the prohibition on voluntary services. This part of the law was intended to prevent “volunteers” from creating liabilities for the federal government, or later presenting a bill for their services. In current practice a law intended to control spending by executive branch agencies has been turned into a weapon to pressure Congress for more money.

²¹ Federal Personnel Manual Letter 380-8, December 12, 1967.

²² FPM 300-12, August 20, 1968.

²³ *Lodge 1858, American Federation of Government Employees v. Administrator of NASA*, 424 F. Supp. 186 (D.D.C. 1976, reversed 580 F. 2d 496.

²⁴ *Ibid*. at 190-191.

²⁵ 580 F.2d 496, 188 U.S. App. D.C. 233.

²⁶ In performance of its functions the Administrator (NASA) is authorized without regard to section 529 of Title 31, to enter into and perform such Contracts, leases, cooperative agreements, or other transactions as

may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof or *Any person, firm, association, corporation* or educational institution. [Emphasis added]

²⁷ The D.C. circuit recognition that the statutory exemption allowing for personal services could be implicit is reflected in section (e) of FAR 37.104: “When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.”

²⁸ A-16312, November 27, 1926, 6 Comp. Gen. 364.

²⁹ B31670, January 25, 1943, 22 comp. Gen 700

³⁰ 6 Comp Gen 474.

³¹ 31 Comp. Gen. 372, February 11, 1952. “The general rule established by decisions of the accounting officers is that purely personal services may not be obtained on a contractual basis but are required to be performed by regular employees who are responsible to the government and subject to its supervision. 18 COMP. GEN. 539; 19 ID. 594. Exceptions to such rule have been recognized in a few cases where employees were not available or qualified to perform the work involved and where unusual conditions encountered in the accomplishment of an object for which a particular appropriation was made so necessitated. In this connection it may be observed that the requirement is one of policy rather than positive law and, where it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances, to have the work involving personal services performed by non-government parties, and that is clearly demonstrable, this office will not object to procurement of such work through proper contract arrangement.”

³² 32 Comp Gen 427.

³³ *id.* at 3.

³⁴ Once it is determined that there has been a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517(a), the agency head “shall report immediately to the President and Congress all relevant facts and a statement of actions taken.” 31 U.S.C. Sections 1351, 1517(b). The reports are to be signed by the agency head. The report to the President is to be forwarded through the Director of OMB. In addition, the heads of executive branch agencies and the Mayor of the District of Columbia shall also transmit “[a] copy of each report ... to the Comptroller General on the same date the report is transmitted to the President and Congress.” 31 U.S.C. §§ 1351, 1517(b), as amended by the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (December 8, 2004).

³⁵ While there appears to be widespread ignorance among agencies regarding the prohibition on personal services, the Section 1342 prohibition of “voluntary services” is cited whenever there is a lapse in appropriations to justify sending federal employees home (although to date they are always paid in arrears for not working and maintain all their benefits). This interpretation of the intent of the law also seems to be counter to the intent of the 47th Congress; it has evolved from a defensive measure intended to prevent non-government employees from submitting bills for their “voluntary” services after the fact to a tool used by executive branch agencies to pressure Congress for emergency appropriations. I will explore this topic in a later article.

³⁶ 10 U.S. Code 1587. “The term ‘nonappropriated fund instrumentality employee’ means a civilian employee who is paid from nonappropriated funds of Army and Air Force Exchange Service, Navy Exchange Service Command, Marine Corps exchanges, or any other instrumentality of the United States under the jurisdiction of the armed forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the armed forces. Such term includes a civilian employee of a support organization within the Department of Defense or a military department, such as the Defense Finance and Accounting Service, who is paid from nonappropriated funds on account of the nature of the employee’s duties.”

³⁷ Securities and Exchange Commission, Office of the Inspector General, *Audit of SEC’s Controls over Support Service, Expert and Consulting Service Contracts*, Redacted Public Version, Report No. 513, March 29, 2013, <http://www.sec.gov/about/offices/oig/reports/audits/2013/513.pdf>.

³⁸ Pub L. 108-1336, 117 Stat. 1663 (2003).

³⁹ *Ibid.* at §1423(a). The panel consisted of 14 members with expertise in government acquisitions, contract law, administration, legislation, and support service contracting. The final AAP report, delivered in January 2007, runs to 460 pages.

⁴⁰ AAP report at 402.

⁴¹ *Lodge 1858 American Federation of Government Employees v. Administrator of NASA*, 424 F. Supp 186 (D.D.C. 1976). *Aff’d in part, vacated in part*, 580 F. 2d. 96 (D.C. Cir), cert denied, 439 U.S. 927 (1978).

⁴² In many cases where contractors have filed lawsuits seeking federal benefits and the legal protections extended to federal employees, courts have found that the “personal services relationship” created—wrongly—by the agency makes them de facto federal employees. Many times the solution is to make them actual federal employees. Contrary to Swan’s argument that the courts are recognizing the legitimacy of creation of the personal services relationship, the agencies are being forced to recognize the relationship and thereby order the expenditure of federal funds on behalf of the contractor employees. This is just one reason why the prohibition is a key component of the ADA. Violating the prohibition can and does result in expenditures without any Congressional authorization or oversight.

⁴³ Swan.

⁴⁴ *Ibid.* at 697.

⁴⁵ *Ibid.*, at 668.

⁴⁶ *Ibid.*

⁴⁷ The casual reader would be led to believe that the “dead letter prohibition on personal services” exists solely in the Federal Acquisition Regulations, has no statutory basis whatsoever, and exists merely to prevent the risk of an “unauthorized employment relationship.” The judges of the American Bar Association Section of Public Contract Law 2011 Writing Competition (Division I) are such casual readers. Swan’s note won first place.

⁴⁸ Swan, at 675.

⁴⁹ C. Northcote Parkinson has addressed this issue much more ably than can be addressed here. “Work expands to fill the time available for its completion” C. Northcote Parkinson, “Parkinson’s Laws and Other Studies in Administration,” p. 2. From this observation Parkinson proceeds to explain the steady growth of bureaucracies generally and the civil service in particular. There is no end to the calls for additional staff, so the bureaucracy itself cannot be trusted to determine its own size.