

Comment from Senior Fellow Alan Morrison on *Contractors in Rulemaking*
June 3, 2022

I have a few non-substantive, clarifying suggestions/amendments.

The discussion of IGF's and closely associated IGFs at the top of page 2 would be improved if it included an explanation of WHY those functions should not be performed by contractors. I think that the reason is that the actual decisions, and important steps in the decisional process, cannot legally be performed by persons who are not officers of the United States. Indeed, that was one of the flaws identified by the Court in setting aside the statute in *Schechter Poultry*.

I suggest the following edit in the paragraph starting on line 29, page 2.

Insert "also" after "must" on line 29 to show that you are changing topics.

Line 30, I would change "Although" to "Because" and strike "nevertheless" in line 31. This makes it clearer that potential ethical issues arising from conflicts that the contractor might have must be considered, which is, I think, the problem at issue here.

Page 3, starting with line 38, I would make these changes:

Delete "will" in line 38; "will" sounds like the problem arises in the future, but it exists now. I would delete "practical benefits and challenges" and replace them with "downsides." This paragraph is not about benefits at all, but about problems, and the opening sentence does not convey that.

In the next sentence, I would add on line 40, after "on," a phrase like "the frequent use of contractors will have on" etc. You need to include the contractor part because it is not the agencies that are creating a problem.

Line 46 - delete "by" which is not needed.

Page 4, lines 58-59. I am not sure what this means. I think that you are saying that agencies should be sure that their personnel know who is a contractor and what they are doing, but I am not sure. At the least it needs to be clarified.

Page 4, line 62, I would add at the end ", including their employees." Individual employees may have conflicts, even if the contractor does not.

Page 5, line 104, I would change "if legally permissible" (which generally limits disclosure) to "unless legally precluded" which generally favors disclosure. This may require an amendment, which I am not authorized to make.

Thanks, Alan