**MISSING THE FOREST FOR THE TREES**

**The Covenant Against Contingent Fees as a Misplaced Check on Influence Peddling in Public Procurement**

Kevin Mansheim

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# INTRODUCTION

On September 29, 2023, Representative Mike Gallagher, a Republican from Wisconsin, introduced the Deterring Attempts at Dirty Deals by Youngsters (DADDY) Act, which would prohibit the family members of the President and other cabinet-level officials from being employed by a foreign company.[[1]](#footnote-2) While the prohibition would not apply to the family of other government officials (members of the House of Representatives, for instance), and raises constitutional issues by broadly prohibiting employment from firms based outside the United States or a select list of friendly countries, the bill nevertheless seeks to touches upon the legitimate public concern of influence peddling.[[2]](#footnote-3)

Substance issues aside, the bill has no chance of becoming law. Rather, it is a political effort to score points against the millions of dollars Hunter Biden received through selling paintings, serving on the board of a Ukrainian energy firm, and collecting consulting fees from Chinese businesses while, and after, his father was Vice President.[[3]](#footnote-4) The muted reaction from Democrats echoes that of Republicans years before when a sweeping ethics reform bill, introduced to respond to Donald Trump’s children and in-laws enriching themselves through coveted loans, foreign contracts, and federal money, failed survive a Senate filibuster.[[4]](#footnote-5)

While politicians’ sensitivity to cases of influence peddling fluctuates depending on their party’s political fortunes, the public’s generally does not: in a recent poll approximately 85% of Americans believe adult children of Presidents always or sometimes profit from their parents’ status, or “get away with things others do not.”[[5]](#footnote-6) This is in keeping with a long realized understanding in the United States, that influence peddling—the use of personal or political influence in exchange for money or preferential treatment—is a risk to the democratic process. These politically charged examples largely do not implicate the public treasury, yet they nevertheless violate the public’s expectation of fair play and undermine trust in government.

This risk is particularly acute in the field of public procurement, given the hundreds of billions of dollars of taxpayer money at stake. The federal government introduced tools to combat influence peddling in soliciting government contracts soon after the Civil War, and state and local governments followed its lead. This effort has been shaped and transformed through common law rulemaking, executive orders, regulations, and political compromise, and the Covenant Against Contingent Fees is the weathered result. It prohibits contractors from hiring third parties to solicit contracts with the government for a fee that is contingent upon their success.

This paper argues that the Covenant’s potency has eroded through decades of political compromises, and that the focus on the compensation structure distracts from the overarching problem of influence peddling. While the risk has long concerned the federal government, state and local governments are particularly vulnerable to actors willing to abuse their access and influence. Ultimately, federal, state, and local regulations should be amended to address the risk of influence peddling directly, return to an era of robust disclosure, and allow transparency and the democratic process to determine how much influence is improper.

Section II of this paper will discuss the history of the problem, and the foundations of modern state and local efforts to regulate contingency fees. Section III will discuss the inadequacies of the Covenant Against Contingent Fees and their state and local equivalents in preventing influence peddling. Finally, Section IV will provide recommendations for reform.

# CONTINGENT FEES AND THE INFLUENCE PEDDLER

This section begins with an explanation of why influence peddling undermines the objectives of the public procurement system and why state and local governments are uniquely vulnerable. This concern is enshrined in case law dating to the Civil War which, over time, gave rise to the Covenant Against Contingent Fees in the federal system. This section concludes by describing how this federal evolution has shaped the legal landscape at the state and local government level as well.

## Influence Peddling in Public Procurement

Influence peddling is a concern that is not unique to public procurement, as the Biden and Trump family profiteering headlines demonstrate. It can distort the decision-making process in employment, commercial transactions, criminal justice, or lawmaking as well. The often-hazy distinction between influence peddling and lobbying has long been a source of public suspicion and is regulated primarily through transparency measures.[[6]](#footnote-7) The perception that individuals are receiving special treatment because of who they are and who they know, as opposed to merit and ability, offends the public’s expectation that success should be earned and not given or born into.

This is particularly true in the realm of government contracts. In 2020, approximately $3.2 trillion of tax-payer money was obligated through contracts by federal, state, and local governments.[[7]](#footnote-8) Under the principal-agent theory, success in public procurement requires the principal (the taxpayers, as represented by the government) and the agent (the agency and contracting official) be aligned in intent and purpose.[[8]](#footnote-9) When aligned, a legislature appropriates money to achieve a desired end state, an agency identifies the means of getting there, and a contracting official purchases the most cost-effective goods or services required to get the job done. In so doing, the government delivers results at the least expense to the taxpayer.

However, the introduction of influence peddlers exposes the vulnerabilities inherent to the principal-agent model of government procurement. The agent is entrusted with the solemn responsibility of safeguarding the government’s purse, yet they are only human, subject to temptation and seemingly anonymous within a sprawling bureaucracy. If the agent directs procurements to a friend, relative, or person of influence rather than the offeror providing the best value, their interests have diverged from that of their principal.[[9]](#footnote-10) Money gets wasted, the government receives unnecessary or poor-quality goods and services, the average taxpayer gets stuck with the bill, and government becomes seen as the problem, not the problem-solver. Thus, instances of influence peddling in public procurement have the tendency to undermine the wider democratic system.

## Vulnerability of State and Local Governments

While corruption is a concern at all levels of government, state and local governments possess structural vulnerabilities that increase the risk posed by influence peddling. This is not a universally accepted notion: much conventional thinking holds that decentralized and smaller governments encounter less vulnerability to corruption under a ‘public choice theory,’ whereby government officials are closer geographically, culturally, and socioeconomically to their constituents, and therefore have greater personal incentive to deliver good governance. [[10]](#footnote-11) In other words, there is a closer bond between the principal and the agent. Despite this theory, there is growing empirical evidence that corruption is actually less prevalent in large governments than in small governments.[[11]](#footnote-12)

Several factors suggest an increased opportunity and incentive structure for principal-agent divergence in state and local procurement relative to the federal system. While subnational procurement systems in the United States are far from a monolith, many of them employ less formal processes than the federal system, are staffed by contracting officials with less training, experience, and oversight, and are reviewed by generalist as opposed to specialized adjudicative bodies. Additionally, individual state and local procurement decisions may be more influenced by politicians or special interests than at the federal level.[[12]](#footnote-13) Furthermore, as politics in the United States becomes ever more nationalized, the public is less likely to be aware of state and local government actions and therefore less able to hold these officials accountable, removing a key incentive for an agent to subordinate themselves to the will of the principal.[[13]](#footnote-14) This trend is only exacerbated by the decline in local journalism and the scrutiny applied to local officials.[[14]](#footnote-15) The result is a greater potential for an “asymmetry of information” between the agent and principal at the state and local level, which introduces an increased susceptibility to “moral hazard” on behalf of the agent.[[15]](#footnote-16)

Whether at the state and local level or federal, maintaining alignment between the agent and principal has historically been accomplished through monitoring and sanctions.[[16]](#footnote-17) Monitoring includes mechanisms for transparency and oversight to verify that the agent is acting within their scope of authority, whereas sanctions are a means of holding the agent accountable through punishment when that authority is exceeded.[[17]](#footnote-18) The prohibition on contingency fees has historically relied on both monitoring and sanctions in preventing the influence peddler from corrupting the principal-agent model of public procurement. The next section will discuss how the effort to immunize the procurement system against influence peddling gave rise to the Covenant Against Contingent Fees.

## Historical Origins of the Covenant Against Contingent Fees

As with many corruption issues involving public procurement law in the United States, the origins of the Covenant against Contingent Fees date to the Civil War. In 1961, Mr. Norris, a man “who had led a somewhat miscellaneous sort of life,” arrived in wartime Washington “with a view of making business – anything generally.”[[18]](#footnote-19) This was the first true industrial war, and public procurement dollars were streaming out of the national capital on an unprecedented scale.[[19]](#footnote-20) Norris arrived in Washington hoping to profit, despite the apparent lack of any particular expertise.

He entered into an agreement with the Providence Tool Company tasked with securing a government contract to supply arms to the Union. For compensation, Norris would receive anything the government paid in excess of seventeen dollars per rifle. He then “set himself to work…concentrating influence” at the Secretary of War and Senators Anthony and Simmons from Rhode Island. Senator Anthony immediately demurred, finding Norris’ overture “discreditable,” while Senator Simmons offered only a note of introduction to the Secretary. Norris protested, stating “you will certainly not decline to go with me…and state that the Providence Tool Company is a responsible corporation….I want the weight of your *presence* with me. *I want the influence of a Senator.*”[[20]](#footnote-21) The effort was successful, and at the contract price of twenty dollars per rifle, Norris stood to make $75,000 (worth approximately $2.6 million today).

By modern standards, Norris possessed only meager influence to peddle, yet he drew the Supreme Court’s ire when he sought to enforce his contract with Providence Tool. Writing for the court, Justice Stephen Field struck the agreement as invalid on policy grounds, noting that the use of a contingent fee “suggest[s] the use of sinister and corrupt means” to seek influence, regardless of whether “improper influences were contemplated or used.”[[21]](#footnote-22) Going further in dicta, the court added that the “evil tendencies of an agreement to procure favor” exist in the absence of a contingent fee arrangement, as influence peddling “directly lead[s] to the inefficiency in the public service, and to unnecessary expenditures of the public funds.”[[22]](#footnote-23) Justice Field’s disapproval is palpable, declaring “the transaction is creditable to no one concerned but to Mr. Anthony,” the Senator who refused to take part.[[23]](#footnote-24)

The court in *Providence Tool* believed contingent fees tend to corrupt the personal incentive structure of intermediaries, but the ultimate “evil” it sought to address was influence peddling, no matter the compensation structure.[[24]](#footnote-25) If the Providence Tool Company could provide the best value to the War Department, then an unadulterated procurement system would invariably single the it out for the contract, and there would be no need for disreputable intermediaries like Mr. Norris to prostrate themselves among the ante-rooms of various government officials. The fact that fifteen percent of a procurement directly supporting the war effort would constitute Mr. Norris’ fee surely explains Justice Field’s severe tone.

Ten years later in *Trist v. Child,* the Supreme Court would declare lobbying generally as an illegitimate and corrupting influence, which was only exacerbated by contingent fees. “[T]he Supreme Court equated ‘lobbying’ and ‘lobby agents’ with the secret, venal, and corrupt use of personal influence” that would invariably overshadow facts, reason, and sound public policy in government decision-making.[[25]](#footnote-26) Nevertheless, while influence peddling, or the appearance of it was the source of the court’s rancor, the precedential value of these cases would prove to be the unenforceability of contingent fee arrangements due to their tendency to exacerbate the problem.

No statute or regulation prohibited contingent fees prior to World War II, yet Courts understood *Providence Tool* as a bar to enforcement in subsequent cases.[[26]](#footnote-27) This led to an increasingly singular focus on the compensation structure to the detriment of influence peddling. In *Hazelton v. Sheckels*, the Supreme Court held invalid a contingent fee arrangement, noting that whether or not improper influence was actually wielded was a secondary concern.[[27]](#footnote-28) The result of the pre-World War II cases was a bright-line rule against the enforceability of contingent fees as a legitimate compensation structure, and an increasing estrangement from the primary concern in *Providence Tool* that influence peddling is a threat to public procurement objectives.

## Toward Federal Regulation

The jurisprudential rejection of contingent fees inspired the Covenant Against Contingent Fees in 1918 when President Wilson’s Attorney General, convinced that influence peddling funded by contingent fees degrades public procurement, directed executive agencies to include the Covenant in all government contracts. The Covenant barred contingent fee arrangements without exception and required the contractor to “expressly warrant” that no such intermediary was employed “to solicit or obtain [the] contract on his behalf.” Violation of the Covenant would void the contract.[[28]](#footnote-29)

This hardline prohibition was consistent with the spirit of *Providence Tool* and *Trist*, even if the emphasis on contingent fees detracted from the primary ‘evil’ of influence peddling. Yet the 1874 *Trist* holding planted a seed which had slowly taken root by distinguishing influence peddling arrangements from “an agreement…for purely professional services.”[[29]](#footnote-30) Thus, when news of the Attorney General Gregory’s outright prohibition on contingent fees reached the public, it was met with vocal protest from industry, sales representatives, and lobbyists. Responding to the criticism, President Wilson intervened, declaring that “our single object [in proposing the Covenant] was to prevent the contingent fee based upon no real service whatever” and thereafter expressly exempted “bona fide commercial representatives employed by the contractor.”[[30]](#footnote-31)

President Wilson’s intervention represented a philosophical shift in the evolution of the Covenant Against Contingent Fees whereby lobbying was increasingly recognized as a legitimate professional service as opposed to a ‘sinister’ and corrupting practice. Indeed, when the House of Representatives passed H.R. 7304 to prohibit the use of contingent fees in 1942, the Senate was inundated with protests similar to those faced by President Wilson years prior, and the bill failed. “Thus, the attempt to ban unconditionally such contingent fee contracts, as a panacea for the problem of the unscrupulous agent, met with the same fate in Congress as it did in the Executive Branch.”[[31]](#footnote-32)

The federal requirement that public procurement contracts include the Covenant Against Contingent Fees was finally codified through the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949.[[32]](#footnote-33) Both statutes contained the “bona fide employees” exception. Today the Covenant endures in the Federal Acquisition Regulation (‘FAR’) virtually unchanged in substance.[[33]](#footnote-34)

The FAR recognizes contingent fee arrangements as “contrary to public policy because such arrangements may lead to [the] attempted or actual exercise of improper influence.” This sentence echoes *Providence Tool* but concedes in the next sentence that “Congress affirmed this policy, but permitted certain exceptions.”[[34]](#footnote-35) The FAR provides a list of sanctions for violations, including rejection of a bid (if knowledge is received prior to award), annulment of the contract or recovery of the value of the contingent fee, suspension or debarment, or a criminal referral in the case of fraud.[[35]](#footnote-36) Though the regulation directs a government personnel who suspect or receive evidence of such an arrangement to notify the contracting officer, it imposes no monitoring mechanism on either the contractor or the contracting officer.[[36]](#footnote-37)

In summary, the journey from *Providence Tool* to today’s FAR has deviated from the concerns that animated the Supreme Court in 1865. A casual reader of the Covenant Against Contingent Fees as it now exists could be forgiven for failing to connect the regulation with the policy concerns which inspired it: the “evils” and “sinister” intentions of influence peddlers securing government contracts through personal relationships as opposed to the merits of their offer. Nevertheless, the Covenant persists in every federal public contract ostensibly to safeguard the procurement system from the improper influence of these agents.

## State and Local Regulation

As is often the case in public procurement law, state and local systems look to federal law for guidance in setting policy regarding contingency fees. An “overwhelming majority” of state and local governments incorporate a version of the FAR’s contingency fee regulation in their procurement codes.[[37]](#footnote-38)

For example, the American Bar Association’s Model Procurement Code, which is drafted to guide state and local governments in developing public procurement laws, addresses contingency fees in Article 12 concerning ethics in public contracting. Section 207 states that it is a “breach of ethical standards” to “solicit or secure a State contract” on the basis of a contingent fee. Like the FAR, the Model Code’s ‘prohibition’ against contingent fees is, in reality, a ‘restriction,’ as “*bona fide* employees” or “commercial selling agencies for the purpose of securing business” are excepted.[[38]](#footnote-39) Like the FAR, the Model Code’s restriction on contingent fees is intended to be incorporated into every government contract.

While the Model Code is highly influential, state and local procurement laws are not a monolith, and there exists variation among jurisdictions in how contingent fees are regulated. For example, some states do impose an outright prohibition similar to Attorney General Gregory’s 1918 order to executive agencies.[[39]](#footnote-40) Under such a model, the Arkansas code prohibits any “person engaging in lobbying” from “contract[ing] to receive or accept compensation that is dependent” upon the “securing of a procurement contract.”[[40]](#footnote-41) There exists no *bona fide* employee or agent exception, and violation of the code is punishable by criminal sanction. New York’s law is much the same.[[41]](#footnote-42)

In contrast, many other jurisdictions follow the FAR in maintaining a Covenant with exceptions. For example, Maryland’s public procurement code requires all contracts to include a clause requiring contractors to warrant the absence of contingent fee lobbying “other than a *bona* *fide* employee [or] agent.”[[42]](#footnote-43) The District of Columbia follows suit, with language closely resembling the text of the FAR.[[43]](#footnote-44)

Finally, there are outliers such as Montana, which does not prohibit contingent fees but merely requires disclosure: “a principal may not make payments to influence official action by any public official unless that principal files” a required report.[[44]](#footnote-45) Yet despite the differences between the jurisdictions, they are all informed by the federal experience and the FAR, which seeks to address influence peddling primarily through regulating the manner in which compensation is disbursed. By addressing lobbying by name, some of the state codes speak more directly to the type of conduct the law seeks to mitigate. Ultimately however, state and local procurement law replicates the federal fixation on contingency fees and obscures the animating concerns of *Providence Tool*.

# WEAKNESSES IN CONTINGECNY FEE REGULATION

The existing legal landscape contains two glaring shortcomings in its ability to reign in influence peddling. First, the ‘bona fide’ exception present in federal and many state systems produces confusion about what professional services are exempted, and renders enforcement of the Covenant more difficult. Second, the FAR as it exists today contains no disclosure requirements on behalf of contractors, thus eliminating the monitoring function necessary to verify compliance.

## Bona Fide Exception

As discussed, the FAR exempts *bona fide* employees and agencies from the Covenant Against Contingent Fees.[[45]](#footnote-46) *Bona fide* agencies “means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts….” *Bona fide* employees are conventional employees on recurring payroll that perform sales functions without exerting improper influence. Improper influence exists whenever a government employee performs an act relating to a contract “on any basis other than the merits of the matter.”[[46]](#footnote-47)

This regulatory exemption was originally promulgated in 1952 to alleviate confusion regarding who qualified as a *bona fide* agency or employee. Yet the regulation did little to demarcate legitimate services from improper influence wielding.[[47]](#footnote-48) Rater than relying on the revamped regulation, guidance was initially found from a list of factors identified in a 1950 Senate Subcommittee report on influence peddling known as “the 5-Percenter Investigation.”[[48]](#footnote-49)

The list of factors were eventually incorporated into the FAR, and were to be evaluated on a ‘totality of the circumstances’ basis. The factors were:

1. Proportional Fee—The agent’s fee ‘*should* not be inequitable or exorbitant when compared to services performed or customary fees for similar services related to commercial business.’
2. Knowledge of Business—The entity ‘*should* have adequate knowledge of the contractor’s products and business, and other qualifications necessary to sell the products or services on their merits.’
3. Continuing Relationship— ‘The contractor and entity *should* have a continuing relationship or, in newly established relationships, should contemplate future continuity.’
4. Established/Ongoing Concern—The entity ‘*should* be an established concern that has existed for a considerable period or be a newly established going concern likely to continue in the future.’
5. General Representation—An entity that ‘represents the contractor in Government and commercial sales *should* receive favorable consideration,’ although an entity that ‘confines its selling activities to Government contracts is *not* disqualified.’[[49]](#footnote-50)

Yet this guidance is prone to subjective interpretation, allows firms to find creative contractual arrangements to arguably conform to most of these factors, and resulted in inconsistent application in federal and state courts.[[50]](#footnote-51) Furthermore, different courts utilized different tests in applying these factors. Some analyzed the factors and asked whether the contractors conduct had a *tendency* to induce improper or corrupt means, while others looked to the facts and circumstances of the specific conduct to determine if *actual* corrupt means were used.[[51]](#footnote-52)

The result is an unnecessarily complex regulatory balancing test, and an awkward tool to prevent influence peddling. Over seventy years have passed since the regulations were published to alleviate confusion over what constitutes a *bona fide* agency or employee, and yet the distinction remains obscured. These regulatory ambiguities and the subjective tests to resolve them undermine the ability to reduce improper influence in public procurement. In any event, the five-factor analysis was removed from the FAR in 1996, and though some courts continue to refer to them when cases arise,[[52]](#footnote-53) due to the removal of a second contingent fee provision from the FAR, such cases are increasingly rare.

## Lack of a Disclosure Requirement

To reinforce the effectiveness of the warranty that no improper contingent fee arrangements existed, the FAR required successful offerors submit Standard Form 119 (SF-119), disclosing the identity of any agents used in seeking the award, duties performed, and details regarding their compensation.[[53]](#footnote-54) The contracting officer would then review the SF-119 submission and guarantee that no contingency fees were made, or if they were, that the recipient satisfied the *bona fide* agent or employee exception. This disclosure was essential in enabling the Government to investigate and remedy violations of the Covenant Against Contingent Fees.[[54]](#footnote-55)

Yet this disclosure requirement was eliminated in 1996 to streamline and simplify the federal procurement system.[[55]](#footnote-56) With its removal, a fundamental regulatory monitoring tool was removed, as “any violation of the covenant is unlikely to be discovered without Government investigative efforts (which might not take place until long after the contract is awarded, if at all.)[[56]](#footnote-57) Returning to the principal-agent model of public procurement, the elimination of the disclosure requirement results in less information available, reduced monitoring, and greater freedom for the agent to depart from the will of the principal. Absent a whistleblower, the contractor’s warranty today is offered without substantiation, further degrading Covenant’s effectiveness. Without monitoring, violations are unlikely to be identified, and any sanctions available will be rendered a nullity.

As it relates to state and local governments, the removal of the disclosure requirement from the FAR only alters federal law. Yet given the gravitational pull that federal procurement law has on the subnational systems, it is at best a corrosive influence on the willingness of governments to tackle influence peddling; at worst, it will serve as a model to follow.

In summary, the Covenant Against Contingent Fees has long been a misplaced tool to control the problems of undue influence in public procurement identified in *Providence Tool*. Yet the regulatory reforms of 1996 have only introduced holes in what was already an imperfect fix. As a result, reforming the Covenant will require more than turning the clock back to 1995; it will require acknowledging the concerns that so animated Justice Fields in 1865.

# RECAPTURING THE SPIRIT OF *PROVIDENCE TOOL*

The Covenant Against Contingent Fees has long been an ill-suited tool for controlling influence peddling. The singular focus on compensation structure can be easily circumvented by placing the influence peddler on regular payroll and offering lucrative bonuses for “good performance.” Alternatively, the arrangement can be structured to fit neatly within a *bona fide* agent exception. Yet while these arrangements remain within the bounds of the Covenant, they nevertheless “tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service.”[[57]](#footnote-58)

*Providence Tool* warned of the corrupting influence lobbying tends to have on government functions, and in so doing, refused to enforce a contingent fee contract. Yet, “as lobbying evolved, [] courts tended to ignore pronouncements in the earlier cases rejecting as improper all forms of lobbying.” “During the same time, a few state and lower federal courts were faced with lawsuits involving contingent fee lobbying…and tended to cite [*Providence Tool*] solely for the proposition that contingent fee lobbying was against public policy and hence forbidden.”[[58]](#footnote-59) In other words, lobbyists undermined a prohibition against lobbying.

Though the American public’s perception of lobbyists may not differ significantly from Justice Fields’ opinion in *Providence Tool*, the lobby industry is here to stay. Not only is it an Influential and well-funded industry, but any outright prohibition would likely introduce First Amendment concerns,[[59]](#footnote-60) particularly in a post-*Citizens United* era.

Nevertheless, federal, state, and local governments as purchasers can take substantive steps to immunize themselves against influence peddling. To do so, contingent fee regulations should be rewritten to emphasize that warranting against undue influence is the primary objective to be achieved. Contingency fees should be mentioned as an enabling risk, but the regulations should emphasize that improper influence can be introduced under any compensation scheme. Thus, the regulation will address the problem to be avoided directly, so that contracting officers and firms can ask themselves in moments of uncertainty a simple question: ‘is this procurement being awarded strictly on the merits of the offer, or something else?’

Disclosure must also be reintroduced to safeguard principal-agent alignment. Rather than focus on contingency fees, a successful offeror should submit a standard form to the government listing all individuals, regular staff or intermediaries, that interacted with the government before the award decision was made. The disclosure should include whether these individuals are former government employees, the agency they worked for, and what function they performed. The contracting officer would then review the form and certify the absence of any conflict of interest in making the award.

Finally, the disclosure, with names redacted, should be publicly released with the notice of award, providing an essential monitoring function on the contracting officer. In so doing, the public can decide what level of influence they are comfortable with in the procurement process. Disclosures would surely indicate a significant number of former government employees hired by contractors. Perhaps this arrangement is innocuous and makes good business sense for government and firms alike. Nevertheless, under the current regulatory framework there is a vast asymmetry of information between the taxpayers (the principal) and those involved in the procurement process. Safeguarding public trust in public procurement requires closing the information gap.

# CONCLUSION

The Covenant Against Contingent Fees, and its state and local equivalents, have evolved from a recognition that influence peddling threatens the quality of public procurements, wastes taxpayer money, and betrays the public trust. Though the concerns expressed in *Providence Tool* over one-hundred-fifty years ago survive in the current regulatory structure, history has dulled its potency. What remains is an ineffective check on influence peddling. Yet by returning to its founding principles, the Covenant can be reformed into a tool which directly addresses the ‘evils’ that concerned Justice Fields, and is compatible with the political realities of the world we live in today.

1. *Gallagher Introduces DADDY Act to Ban Hunter Biden-Like Influence Peddling*, Office of Congressman Mike Gallagher (Sep. 29, 2023) https://gallagher.house.gov/media/press-releases/gallagher-introduces-daddy-act-ban-hunter-biden-influence-peddling. [↑](#footnote-ref-2)
2. Deterring Attempts at Dirty Deals by Youngsters Act of 2023, H.R. 5835, 118th Cong. (2023). [↑](#footnote-ref-3)
3. Tom Winter et al., *Analysis of Hunter Biden’s hard drive shows he, his firm took in about $11 million from 2013 to 2018, spent it fast*, NBC News (May 19, 2022 11:29am) https://www.nbcnews.com/politics/national-security/analysis-hunter-bidens-hard-drive-shows-firm-took-11-million-2013-2018-rcna29462. As an aside, Hunter Biden’s business dealings after his father left the Vice Presidency and before the 2020 inauguration would not violate the DADDY Act, as it does not seek to curtail employment by the family members of former covered persons. [↑](#footnote-ref-4)
4. Joe Walsh, *Report: U.S. Government Paid Over $2.5 Million To Trump’s Businesses*, Forbes (Oct 27, 2020 3:28pm), https://www.forbes.com/sites/joewalsh/2020/10/27/report-us-government-paid-over-25-million-to-trumps-businesses/; Jesse Drucker et al., *Kushner’s Family Business Received Loans After White House Meetings*, N.Y. Times (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/business/jared-kushner-apollo-citigroup-loans.html; Nicholas Fandos, *Aiming at Trump, Democrats Lay Out Agenda for a Post-Shutdown Congress*, N.Y. Times (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/us/politics/house-democrats-ethics-voting-rights.html; Barbara Sprunt, *Senate Republicans Block Democrats’ Sweeping Voting Rights Legislation*, NPR (Jun. 22, 2021 8:22pm), https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate. [↑](#footnote-ref-5)
5. Taylor Orth, *Most Americans think presidents’ children – including Hunter Biden – often profit off their parents*, YouGov (Aug. 23, 2023), https://today.yougov.com/politics/articles/46013-most-americans-think-presidents-children-profit?redirect\_from=%2Ftopics%2Fpolitics%2Farticles-reports%2F2023%2F08%2F23%2Fmost-americans-think-presidents-children-profit. [↑](#footnote-ref-6)
6. *Transparency and Integrity in Lobbying*, OECD at 1 (2013) https://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf. Research into the role of influence peddling invariably leads to the subject of lobbying. Lobbying generally seeks to influence, properly or improperly, official government action. This can take the form of law or rule makings, or public procurement, which is the subject of this paper. Ethics rules, court analyses, and regulations that govern lobbying often make little distinction between lobbying for procurement or legislation, and this paper will at times draw on analysis that relates to lobbying outside the procurement context. The author attempted to do so only when the analysis is equally applicable to either context, as legislative lawmaking is outside the scope of this paper. Indeed, the review of caselaw in subsection (c) will demonstrate how courts find the principles and concerns to be equally applicable to lawmaking and public procurement. [↑](#footnote-ref-7)
7. *A Snapshot of Government-Wide Contracting for FY 2020 (infographic)*, GAO (Jun. 22, 2021), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic; *State and Local Expenditures*, Urban Inst., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures, (last visited Dec. 12, 2023). [↑](#footnote-ref-8)
8. Christopher Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L. J. 63, 64 (2010). [↑](#footnote-ref-9)
9. *See id.* [↑](#footnote-ref-10)
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14. *Serge Schmemann*, *A Powerful Tool for Fighting Corruption is Going Extinct*, N.Y. Times (Nov. 26, 2023), https://www.nytimes.com/2023/11/26/opinion/local-newspapers-democracy-journalism.html. [↑](#footnote-ref-15)
15. Yukins, *supra* note 8, at 64. [↑](#footnote-ref-16)
16. *Id.*, at 65. [↑](#footnote-ref-17)
17. *Id.*, at 66. [↑](#footnote-ref-18)
18. *Providence Tool Co. v. Norris*, 69 U.S. 45, 46 (1864) (quotation omitted) [↑](#footnote-ref-19)
19. James Nagle, A History of Government Contracting, 175 (George Washington Univ., 2d ed. 1999). [↑](#footnote-ref-20)
20. *Providence Tool*, 69 U.S. at 46-7 (original emphasis). [↑](#footnote-ref-21)
21. *Id*., at 54-5. [↑](#footnote-ref-22)
22. *Id*., at 50-1, 54. [↑](#footnote-ref-23)
23. *Id*., at 51. [↑](#footnote-ref-24)
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29. *Trist v. Child*, 88 U.S. 441, 450 (1874). [↑](#footnote-ref-30)
30. Swan, *supra* note 26, at 324. [↑](#footnote-ref-31)
31. Barron, *supra* note 28, at 135-6. [↑](#footnote-ref-32)
32. *Id*., at 137. [↑](#footnote-ref-33)
33. 48 C.F.R. 48 § 3.4; C.F.R. § 52.203-5. [↑](#footnote-ref-34)
34. 48 C.F.R. 48 § 3.402. [↑](#footnote-ref-35)
35. 48 C.F.R. § 3.405. [↑](#footnote-ref-36)
36. *Id.* [↑](#footnote-ref-37)
37. Danielle Conway, State and Local Government Procurement, \*265 (Am. Bar Ass’n, 2012). [↑](#footnote-ref-38)
38. 2007 MC PIP § 12-207. [↑](#footnote-ref-39)
39. Conway, *supra* note 37, at \*265. [↑](#footnote-ref-40)
40. AR. Code § 21-8-607 (2020). [↑](#footnote-ref-41)
41. *See* NY Legis L § 1-K (2022) [↑](#footnote-ref-42)
42. MD. State Finance and Procurement Code § 13-223 (2014). [↑](#footnote-ref-43)
43. D.C. Code § 2–354.16. [↑](#footnote-ref-44)
44. Conway, *supra* note 37, at \*265; MT. Code § 5-7-209. [↑](#footnote-ref-45)
45. 48 C.F.R. § 3.402(b). [↑](#footnote-ref-46)
46. 48 C.F.R. § 3.401 [↑](#footnote-ref-47)
47. *See* Barron, *supra* note 28, at 141-44. [↑](#footnote-ref-48)
48. *See* Swan, *supra* note 30, at 4. The 5-Percenter referred to the typical contingent fee rate of five percent of the contract value, if the solicitation proved successful. [↑](#footnote-ref-49)
49. *Id.* (emphasis added); referencing 48 C.F.R. § 3.408-2(c) (1995). This FAR provision was removed in 1996. [↑](#footnote-ref-50)
50. *See* Swan, *supra* note 30, at 4. [↑](#footnote-ref-51)
51. Susman, *supra* note 24, at 327. [↑](#footnote-ref-52)
52. *See* Swan, *supra* note 30, at 4. [↑](#footnote-ref-53)
53. *Id.*, at 5; 48 C.F.R. § 3.408-1 (1995). [↑](#footnote-ref-54)
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55. *Id.* [↑](#footnote-ref-56)
56. *Id.*, at 6. [↑](#footnote-ref-57)
57. *Providence Tool*, 68 U.S. at 54. [↑](#footnote-ref-58)
58. Susman, *supra* note 24, at 320-21. [↑](#footnote-ref-59)
59. *Id.*, at 332-40. [↑](#footnote-ref-60)