

**A Shutdown Should Not Mean Shut Out:  
Redressing Injustice by Promoting Back Pay for Workers Employed by  
Contractors During Federal Government Shutdowns (revised May, 2023)**

**SUMMARY**

**Problem:** Since the 21-day shutdown provoked by Newt Gingrich in December, 1995 to the 2019 shutdown - the longest ever, lasting 35 days - these events have occurred with increased frequency and consequence. There has been one notable through-line: the disparate treatment of employees of Federal contractors, who - unlike federal civilian employees - are not provided with back pay to cover furloughs and other workforce actions required during a lapse in appropriations.

- Approximately 800,000 direct federal employees were affected by the 2019 shutdown - approximately 500,000 who worked without pay and roughly 300,000 who did not work. They were, in most instances, eventually awarded back pay.<sup>1</sup>
- We estimate that more than half a million employees of Federal contractors - 544,000 - were without work, and were not provided back pay when the shutdown ended.<sup>2</sup>
- The impact was likely greater on women and people of color, who comprise a larger proportion of the low-wage workforce, are more likely to experience layoffs and have the fewest financial resources to cope. They and their families should not suffer the consequences of a shutdown that they did not cause.<sup>3</sup>

The 2019 shutdown for the first time brought to public awareness the consequences for workers employed by Federal contractors.

- The Fair Compensation for Low-Wage Contractor Employees Act ([H.R. 678/ S. 162](#)) was added to the House-passed spending bills to rectify the suffering of hardworking federal contracted workers who went without wages and work.

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<sup>1</sup> “[Frequently asked questions: The impact of the partial federal government shutdown on the Employment Situation for January 2019](#),” U.S. Bureau of Labor Statistics, February 1, 2019, p. 6.

<sup>2</sup> Paul C. Light, “[The True Size of Government. Tracking Washington’s Blended Workforce, 1984–2015](#),” The Volcker Alliance, Issue Paper, October 2017, Table 1, p. 3, estimates the size of the direct Federal workforce as 2,042,000, of which, according to BLS, 300,000 (or 14.69%) of the direct Federal workforce were not working during the 2019 shutdown. If a similar proportion of contractor employees were not working during the shutdown, the result would be 543,823 (3,702,000 x .1469).

<sup>3</sup> See Karla Walter and Anastasia Christman, “[Service Contract Workers Deserve Good Jobs](#),” CAP Action, April 9, 2021; “[Job or Health? Restarting the Economy Threatens to Worsen Economic Inequality: The coronavirus recession has exacerbated the racial and income divides in America. Lifting restrictions too soon will make them worse and leave workers with a bleak choice.](#)” *New York Times*, April 27, 2020; “[Economy For All: Building a Black Women Best Legislative Agenda](#),” report by the Congressional Caucus on Black Women and Girls, p. 34.

- But this language did not make it into the final spending bill. Once again, only direct Federal employees were made reasonably whole, while employees of Federal contractors were once again shut out.

**Solution:** Through regulatory action the Biden Administration can rectify this long-standing injustice so that when the next government shutdown occurs, all workers who serve the public on behalf of the Federal government are treated equally, regardless of the employer who signs their paychecks. In particular, we propose an amendment to the Federal Acquisition Regulations' section relating to back pay and also propose language to incorporate this proposed change into agency service contracts.

## **NARRATIVE**

The Service Employees International Union (SEIU) proposes that the White House Task Force on Worker Organizing and Empowerment redress a long-standing injustice whereby employees of Federal contractors, unlike their direct Federal employee counterparts, generally do not receive back pay for periods of non-work during a government shutdown. Contract workers perform jobs that are absolutely vital to the government, yet in the event of a shutdown face extreme hardships, with no guarantee of retroactive compensation. This injustice takes on a particular racial and gender dimension in that low-wage service occupations, where women and

people of color comprise a larger proportion of the workforce,<sup>4</sup> are more likely to experience

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<sup>4</sup> See Karla Walter and Anastasia Christman, “Service Contract Workers Deserve Good Jobs,” CAP Action, April 9, 2021.

“Enacting these protections will raise pay and benefits for federal contract workers and help to correct long-standing disparities across the contracted workforce based on occupational segregation. Women and Black or African American and Hispanic or Latino workers are overrepresented in many contract industries where low wages and poor benefits are commonplace, including building and administrative services, nursing care, and security services.” Note 37: U.S. Bureau of Labor Statistics, “Labor Force Statistics from the Current Population Survey: Household Data Annual Averages 18. Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity”; USAspending.gov, “Advanced Search.” The author searched for federal contract funds obligated in fiscal year 2019 in the following industries: services to buildings and dwellings (NAICS 5617); office administrative services (NAICS 5611); security guards and patrol services (NAICS 561612); nursing care facilities (NAICS 6231); and animal slaughtering and processing (NAICS 3116).

The same research (conducted by Anastasia Christman) formed the basis for the following claims in the white paper outlining our federal service contract policy agenda, written by the SEIU-CWA-NELP-CAP policy team and submitted to the Biden Administration. The white paper was reviewed by John D’Elia and Alex van Schaick before submission:

Because of occupational segregation and ongoing systemic bias, the contracting focus on lowest bids first and foremost especially harms the Black, brown, and women workers who are disproportionately employed in low-pay and high-risk industries.<sup>4</sup> The federal government contracts billions of dollars each year to businesses in industries like building services (41% Latinx, 56% female, 13% Black), administrative services (45% female, 12% Black), warehousing (22% Black, 20% Latinx), food service (52% female, 14% Black, and 27% Latinx), security services (26% Black, 23% female, 18% Latinx), waste management and remediation (22% Latinx, 15% Black), construction (30% Latinx), health care (78% female, 18% Black, and 14% Latinx), and manufacturing (30% Latinx).<sup>5</sup> Moreover, the Trump administration weakened existing anti discrimination protections and does not properly implement or enforce essential worker protections. By failing to prioritize quality services over low price and insufficiently safeguarding workers’ right to organize, federal contracting is helping to perpetuate economic segregation that consigns women and workers of color to the low pay that results in multigenerational wealth disparities.

See An “Economy For All: Building a Black Women Best Legislative Agenda,” a report by the Congressional Caucus on Black Women and Girls, p. 34:

Black women are sorted into low-wage service sector occupations such as these due to a deep history of occupational segregation. Five occupations account for more than half of all the jobs in which Black women work (Current Population Survey 2021). This is consistent with a large body of feminist economic literature that shows women, including Black women, tend to be crowded in low-wage occupations, not just in the United States, but in many other parts of the world.

layoffs<sup>5</sup> and have the fewest financial resources to cope.<sup>6</sup> They and their families should not suffer the consequences of a shutdown that they did not cause.

Providing back pay is not only the right thing to do, it will also promote economy and efficiency in procurement by helping recruit and retain talented and experienced workers, while at the same time promoting worker organizing and collective bargaining. We propose an amendment to the Federal Acquisition Regulations (“FAR”) section relating to back pay. We have also prepared sample contract language, based on this proposed amendment, that would permit agencies to reimburse contractors for periods of non-work in the event of a government shutdown. We propose that federal agencies be directed to amend such language to currently active service contracts wherever permissible. With these provisions in place, Federal contracting officers should be able to work with contractors and the unions who represent their employees to provide back pay for workers who lost wages as a result of a government shutdown.

### **Background: The 2019 Shutdown, The Invisible Workforce and Disparate Impacts**

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<sup>5</sup> See “Job or Health? Restarting the Economy Threatens to Worsen Economic Inequality: The coronavirus recession has exacerbated the racial and income divides in America. Lifting restrictions too soon will make them worse and leave workers with a bleak choice.” *New York Times*, April 27, 2020.

Americans who earn \$50,000 a year or less are more than twice as likely to say they or a family member have lost jobs amid the crisis as those who earn more than \$150,000, the polling found. Higher earners and whites are far more likely to say they can work from home during the pandemic than lower earners and black and Latino Americans, according to an April poll for The New York Times by the online research firm SurveyMonkey.

The University of Chicago economists Simon Mongey and Alex Weinberg released a study last month on the Americans who work in jobs that require people to be in close physical proximity (like nail salon workers) or allow little chance to work from home (like fast-food or maintenance workers). They found those workers were disproportionately nonwhite, low income, born outside the United States and not college graduates.

<sup>6</sup> See “Job or Health? Restarting the Economy Threatens to Worsen Economic Inequality: The coronavirus recession has exacerbated the racial and income divides in America. Lifting restrictions too soon will make them worse and leave workers with a bleak choice.” *New York Times*, April 27, 2020.

Black and Latino Americans have less ability to withstand a prolonged job loss than whites, because they entered the crisis with lower incomes and less wealth. The median black household had just under \$18,000 in wealth in 2016, Federal Reserve statistics show, while the median Hispanic household had just under \$21,000. The median white household had nearly 10 times more: \$171,000.

In 2018, the typical Hispanic household earned three-quarters of what a typical white household earned, according to census data. The typical black household earned three-fifths of what the typical white household earned, and their household income had yet to return to pre-financial-crisis highs.

Shutdowns have become an increasingly familiar and destructive Republican tactic with devastating effects on the United States economy in general, on the delivery of Federal services to the people, and on the workers providing these services, especially for those who work for contractors. Since the 21-day shutdown provoked by Newt Gingrich in December, 1995,<sup>7</sup> there have been four such events in the previous decade.<sup>8</sup> The 2019 shutdown was the longest ever, lasting 35 days,<sup>9</sup> and resulted in an estimated loss of \$3 billion in foregone economic activity.<sup>10</sup> There has been one notable through-line: the disparate treatment of employees of Federal contractors, for whom Congress - unlike for federal civilian employees - has not appropriated funds for back pay to cover furloughs and other workforce actions required during a lapse in appropriations.<sup>11</sup> This failure was intolerable in decades past when the size of the contracted workforce was relatively smaller, but it grows more egregious and more untenable as the size of the contractor workforce has grown - it is now considerably larger than the directly employed civilian workforce - and its essential role is increasingly acknowledged.<sup>12</sup>

The 2019 shutdown for the first time brought to public awareness the consequences for workers, especially the disproportionate effects on low- and middle-wage workers of color.<sup>13</sup> Furloughed workers or those who were laid off were left without economic support for 35 days, making many of them wonder how they would cover their rent, bills, and food. Some contractor employees had their health insurance coverage put on hold because employers couldn't afford to pay premiums, forcing on workers the burden of paying for medications and consultations out of pocket or deciding to go without proper treatment.<sup>14</sup>

Numbers are imprecise, but according to the Bureau of Labor Statistics, about 800,000 direct federal employees were affected, including approximately 500,000 who worked without pay and roughly 300,000 who did not work during the shutdown.<sup>15</sup> Notwithstanding the obvious deprivations these workers suffered, they were, in most instances, eventually awarded back pay.

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<sup>7</sup> Gonyea, Don, "[The Longest Government Shutdown In History. No Longer — How 1995 Changed Everything.](#)," National Public Radio, January 12, 2019.

<sup>8</sup> "[Past Government Shutdowns: Key Resources](#)," Congressional Research Service, Updated June 14, 2021, p. 1

<sup>9</sup> *Id.*

<sup>10</sup> "[The Effects of the Partial Shutdown Ending in January 2019](#)," Congressional Budget Office, January 2019, pp. 6-7.

<sup>11</sup> See statement of David J. Berteau, President & CEO, Professional Services Council, "[Government Shutdowns: Contract Killers](#)," Committee on Oversight and Reform, United States House of Representatives, May 6, 2019, p. 5. PSC is the national trade association of the government technology and professional services industry.

<sup>12</sup> Paul C. Light, "[The True Size of Government, Tracking Washington's Blended Workforce, 1984-2015](#)," The Volcker Alliance, Issue Paper, October 2017, *see* Table 1, p. 3. For an update of Light's analysis, *see* "[The true size of government is nearing a record high](#)," Brookings, October 7, 2020.

<sup>13</sup> *See, e.g.* Graf, Heather, "[Furloughed Federal Workers and Contractors Brace for First Missed Payday](#)," ABC News, January 9, 2019; Lartey, Jamiles, "['Barely Above Water': US Shutdown Hits Black Federal Workers Hardest](#)," The Guardian, January 11, 2019.

<sup>14</sup> Zhou, Li, "[Only One Republican has Signed on to a Bill Guaranteeing Back Pay for Federal Contractors](#)," Vox, February 1, 2019.

<sup>15</sup> "[Frequently asked questions: The impact of the partial federal government shutdown on the Employment Situation for January 2019](#)," U.S. Bureau of Labor Statistics, February 1, 2019, p. 6.

According to the authoritative report of the United States Senate's Permanent Subcommittee on Investigations, while "federal law prevents most federal employees from working and most are sent home without pay," in recent shutdowns, "the spending legislation ultimately agreed upon by Congress and the President provided back pay for federal employees."<sup>16</sup>

The story is dramatically different for the employees of Federal contractors who were not working during the 2019 shutdown. According to the Professional Services Council, "unlike federal civilian employees, contractor employees have never been provided back pay to cover furloughs and other workforce actions required during a lapse in appropriations."<sup>17</sup>

This is a largely invisible workforce - even its total size is a matter of dispute<sup>18</sup> - and there are simply no estimates of how many employees of Federal contractors were affected or how harshly. But given its size - nearly 3.7 million people - if the same proportion was not working as was the case for direct employees, then up to 544,000 contract employees may have been without work.<sup>19</sup> However, of the 26 Federal agencies surveyed by the Senate subcommittee that investigated the 2019 shutdown, only *four* reported any data at all about layoffs, accounting for slightly more than 600 laid-off contracted workers - a tiny proportion of the affected workforce.<sup>20</sup> According to the Senate staff report:

Department of the Treasury: "As a general matter, the contractors are responsible for managing those employees, including decisions as to whether a contractor's employees are reassigned to other work, laid off, or required to use leave during any period when performance on a contract is interrupted."<sup>21</sup>

Department of Transportation: "The Department told the Subcommittee that it does not make staffing decisions for DOT grantees and contractors, and therefore does not maintain information related to employees of those entities. For example, if a DOT

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<sup>16</sup> Staff Report, United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, "[The True Cost of Government Shutdowns](#)", September 17, 2019, p. 1.

<sup>17</sup> See statement of David J. Berteau, President & CEO, Professional Services Council, "[Government Shutdowns: Contract Killers](#)," Committee on Oversight and Reform, United States House of Representatives, May 6, 2019, p. 5. PSC is the national trade association of the government technology and professional services industry.

<sup>18</sup> Paul Light estimates that in 2015 there were nearly 3.7 million contract employees. See Light, "The True Size of Government," Table 1, p. 3.

<sup>19</sup> Light, "The True Size of Government," Table 1, p.3, estimates the size of the direct Federal workforce as 2,042,000, of which, according to BLS, 300,000 (or 14.69%) of the direct Federal workforce were not working during the 2019 shutdown. If a similar proportion of contractor employees were not working during the shutdown, the result would be 543,823 (3,702,000 x .1469).

<sup>20</sup> The four agencies were the Department of Energy (*see* p. 74), the Office of National Drug Control Policy (*see* p. 89), the Small Business Administration (*see* pp. 99-100), and the Smithsonian Institution (*see* p. 114). Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, "[The True Cost of Government Shutdowns](#)," Staff Report, September 17, 2019.

<sup>21</sup> *Id.* at pp. 30-31.

component issued a stop-work order to a contractor, the Department would not require any information on whether the contractor made any resulting staffing decisions.”<sup>22</sup>

General Services Administration: “...contractors ‘manage their own workforces’ and that as a result, the agency does not know how many contractor employees ‘were laid off, used leave, transferred to other projects, or paid while not performing duties under a GSA contract.’”<sup>23</sup>

Their own words reveal the agencies effectively disavowing any responsibility for the well-being of the very workers on whom their mission depends.

In 2019, as has been the pattern in previous shutdowns, Congress acted to ensure direct employees would receive back pay.<sup>24</sup> However, this time the plight of contractor employees received significant media attention and the workers’ cause, elevated by SEIU and Local 32BJ SEIU, was championed by leaders of the new Democratic majority in the House.<sup>25</sup> The Fair Compensation for Low-Wage Contractor Employees Act ([H.R. 678/ S. 162](#)) was added to the House-passed spending bills to rectify the suffering of hardworking federal contracted workers who went without wages and work. But this language did not make it into the final spending bill; once again, only direct Federal employees were made reasonably whole, while employees of Federal contractors were once again shut out.<sup>26</sup>

Thus, despite the fact that the contractor workforce is now estimated to be by far the single largest component of what Light calls the Federal government’s ‘blended workforce,’ despite the fact that in the absence of these workers government would cease to function, and despite the fact that these employees often work side-by-side with direct employees, they were - almost uniquely among all government employees - left to shoulder personally the financial burden caused by the 2019 shutdown. That this workforce is disproportionately comprised of low-wage women and people of color, who possess the fewest resources to weather a shutdown, only intensified the disparate treatment endured by contract workers as a whole.<sup>27</sup>

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<sup>22</sup> Id. at p. 56.

<sup>23</sup> Id. at p. 136-37.

<sup>24</sup> Yoder, Eric, “[Congress approves back pay — eventually — for furloughed federal employees](#),” Washington Post, January 11, 2019.

<sup>25</sup> Karant, Julie, “[House passes the Fair Compensation for Low-Wage Contractor Employees Act of 2019](#)”, SEIU 32BJ, 25 June 2019.

<sup>26</sup> See S. 24 (16 Jan. 2019), the “Government Employee Fair Treatment Act of 2019.”

<sup>27</sup> See Karla Walter and Anastasia Christman, “[Service Contract Workers Deserve Good Jobs](#),”

CAP Action, April 9, 2021; “[Job or Health? Restarting the Economy Threatens to Worsen Economic Inequality: The coronavirus recession has exacerbated the racial and income divides in America. Lifting restrictions too soon will make them worse and leave workers with a bleak choice.](#)” *New York Times*, April 27, 2020; “[Economy For All: Building a Black Women Best Legislative Agenda](#),” report by the Congressional Caucus on Black Women and Girls, p. 34.



## **Economy and Efficiency *Through* Encouraging Worker Power and Collective Bargaining**

Left unrectified, this injustice undermines the economy and efficiency of government procurement. The instability and burdens caused by government shutdowns for contract employees will likely increase the difficulty of recruiting and retaining talented and experienced workers. Moreover, the current practice, whereby decisions about who to furlough or lay off are left to the discretion of contractors invites bad behavior by contractors, some of whom may conceivably base their decisions on favoritism, retaliation, or discrimination. That such discretion is wielded by contractors ensures unevenness in treatment of contract employees both within and across agencies.

Our proposal will promote the aims of the Task Force to encourage worker organizing and collective bargaining. In 2019, of the four Federal agencies reporting any information about the experiences of their contractors' employees, only one - the Smithsonian Institution - reported any details of their experience. According to the Senate staff report,

The Smithsonian told the Subcommittee that during the FY 2019 shutdown, a total of 385 contract security guards were laid off and offered employment under other (non-Smithsonian) contracts, and that “many” of those guards were also authorized to take leave during the shutdown.<sup>28</sup>

Without mentioning it - and perhaps it was unaware - the Smithsonian was reporting on the collaboration between their security contractor, Allied Universal, and Local 32BJ SEIU, whose security officer members faced the loss of work as they were deemed non-essential during the shutdown. The union and employer identified alternatives to layoffs that would cushion the shutdown's financial impact: Allied placed some of the affected officers on leave and transferred others onto Allied's non-Smithsonian contracts, where they could continue their employment.<sup>29</sup> The union-contractor relationship helped ensure that this valuable workforce would not be lost to Federal service once the shutdown ended, nor would their union membership and representation be ended.

In this manner, labor-management negotiations helped ensure an outcome that was superior for workers and the public, simultaneously promoting economy and efficiency in government procurement.

But the Smithsonian experience was a small exception to the overall pattern of disparate treatment of contractor employees, and was made possible only by the extremely mature bargaining relationship between Allied Universal and 32BJ SEIU. But it does point to our

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<sup>28</sup> Permanent Subcommittee on Investigations, *The True Cost of Government Shutdowns*, p. 114.

<sup>29</sup> See Vitali, Ali and Koenig, Kailani, “[Shutdown pain for federal contractors gets more dire by the day](#),” NBC News, 24 Jan. 2019.



proposal's importance for creating for the first time a common floor for all workers during a shutdown, whether they are direct Federal employees or employed by a contractor. Such a provision creates opportunities for unions to work with employers to find alternatives to layoffs, mitigate the shutdown's impact, and to secure the continued service of workers when the shutdown ends. The proposal would also aid recruiting into Federal contract employment, and give incentives for non-union contract employees to form unions.

It is important to stress that the Professional Services Council, the premier industry association representing government technology and services contractors, advocated for Congress:

...to ensure equal treatment for all affected contractor employees with regard to back compensation. We are simply asking that Congress provide the same redress for government contractors that is provided for federal civilian employees.

Significantly, PSC asked in 2019 for "parity in treatment" that "would be a lifeline for many contractor employees still facing a financial hardship brought on through no fault of their own."<sup>30</sup>

## **Our Proposal**

The Biden Administration now has the opportunity through regulatory action to rectify this long-standing injustice so that when the next government shutdown occurs, all workers who serve the public on behalf of the Federal government are treated equally, regardless of the employer who signs their paychecks.

The administration can take steps without legislation to ensure that contracted workers are not shut out and denied back pay in the event of future government shutdowns. This can be done by amending the Federal Acquisition Regulations, 48 CFR 31.205-6 (Compensation for personal services), by adding a new clause to subsection (h) as follows:

(h) Backpay. Backpay is a retroactive adjustment of prior years' salaries or wages. Backpay is unallowable except as follows:

- (1) Payments to employees resulting from underpaid work actually performed are allowable, if required by a negotiated settlement, order, or court decree.
- (2) Payments to union employees for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiation are allowable.

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<sup>30</sup> See statement of David J. Berteau, President & CEO, Professional Services Council, "[Government Shutdowns: Contract Killers](#)," Committee on Oversight and Reform, United States House of Representatives, May 6, 2019, p. 5.

(3) Payments to nonunion employees based upon results of union agreement negotiation are allowable only if -

(i) A formal agreement or understanding exists between management and the employees concerning these payments; or

(ii) An established policy or practice exists and is followed by the contractor so consistently as to imply, in effect, an agreement to make such payments.

(4) Any payments to employees as the result of a lapse in appropriations are allowable:

(i) to provide compensation, at an employee's standard rate of compensation, to any employee who was furloughed or laid off, or who was not working, who experienced a reduction of hours, or who experienced a reduction in compensation, as a result of the lapse in appropriations (for the period of the lapse); or

(ii) to restore paid leave taken by any employee during the lapse in appropriations, if the contractor employs to use paid leave as a result of the lapse in appropriations.

In addition to this and where allowable under the contracts in question, agencies should be directed to amend provisions to their contracts for personal services to allow for payment of backpay consistently with this proposed FAR amendment. Here is a sample contract section marked up accordingly:

#### H. 10 OBSERVANCE OF LEGAL HOLIDAYS/FEDERAL NON-WORK DAYS

C. There are certain types of irregularly occurring circumstances that prompt the Government to close its offices where Contractor personnel are working, either on a national or local basis (i.e. bomb threats, inclement weather, power outages, or death of a national figure, or funding lapses). Contractor staff shall not work if the Government is closed, unless otherwise authorized by a fully executed Task Order or the Contracting Officer. However, notwithstanding the above, Non-work due to the Government closing its facility(ies) due to a lapse in funding/appropriations is not an expense directly reimbursable to the Contractor. However Moreover, in those rare instances when the Government operations are curtailed for the balance of a workday that has already commenced, the Contractor may bill for the balance of the scheduled workday with the written acknowledgement of the COTR and final approval of the Contracting Officer.

## Conclusion

Contract workers, especially low-wage workers of color, perform vital work for the Federal government on behalf of the people. Many live paycheck to paycheck, which can make it incredibly difficult for them to pay their bills in the event of a shutdown they did not cause, but for which they suffer the consequences. Unlike their counterparts who are direct employees, if they return to work Congress historically does not ensure they receive back pay. To ease the burden on those without blame and with the fewest resources, to discourage contract employees from seeking other jobs that have less chaos and uncertainty, and to ensure all workers who serve the public are treated with respect and fairness, the Biden Administration should rectify a long-standing injustice and provide back pay for employees of Federal contractors in any future government shutdowns. Doing so is not only the right thing to do, but is in the best interest of the federal government and consistent with the goals of the White House Task Force.