Privatisation, Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and The Evolving Law of Diffused Sovereignty

by

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Introduction and summary

The 1992 book Reinventing Government, the template for the identically named Clinton-Gore initiative, identified 36 alternatives to “standard delivery service”. Surprisingly, the authors wrote, the federal government already relies on many of these alternatives.\(^1\) Similarly, the basic tools identified by the Reagan Commission on Privatisation – vouchers, sale of government assets, and contracting – were not new.\(^2\)

Whether the term used is “privatisation”, “reinvention”, or “contracting out”, the past decade has been marked by bipartisan agreement on the need to reform and reduce “Big Government”. However, there is little awareness that the various means suggested to cure today’s ills have long been in use. In fact, even as the ink was drying on the Administrative Procedure Act, reformers were engineering a basic change in the structure of federal public administration. With a primary focus on the federal government’s use of private contractors to perform the basic work of government, this article will review the basic, even constitutional, changes contemplated by the reformers, the new rules and rulemaking processes that are evolving, and the questions raised by these rules and processes.

The article begins with a capsule history of the post-World War II “contracting out” of much of the work of the federal government – including the past and present context of the developments at the core of this article.

Part 2 shows that the growth of the contract bureaucracy was the product of design, and not bureaucratic happenstance. At the dawn of the Cold War, reformers believed that the harnessing of private enterprise to public purpose would serve two complementary purposes. First, the private sector would provide both technical expertise and powerful political support for increased federal commitment to national defence and public welfare tasks. Second, the private bureaucracy would counteract against the dead hand of bureaucracy and alleviate concern that a growing government meant a centralised Big Government. The officials, consultants, and scholars who were present at the creation believed that they were involved in developments of profound, even constitutional, implications, and stated their theories of reform with sophistication.

Part 3 discusses the bipartisan ratification of the reformers’ design. The premise was operationalised by capping the number of civil service personnel;
thus, as Big Government’s programmes and budgets grew, new work necessarily flowed to private parties. There was tacit bipartisan understanding, however, that the philosophical and constitutional questions raised by reform would not be squarely and publicly addressed. This understanding is evidenced in official organisation charts, phone books, budget materials, and periodic pronouncements on the size of the “federal” workforce – all of which would lead citizens to believe that Big Government is essentially limited to those we call “civil servants”.

Part 4 goes on to consider the rules that govern the new private workforce, and compares them to the rules that govern the civil service workforce. I consider the default rules that applied at the onset. In essence, the default rules consisted of: i) the proclamation that only “officials” can perform governmental functions; and ii) the regulation of those who perform the basic work of government – officials and third parties – by two different sets of rules: those governing employees and those governing “procurement” (or grants). The decision to contract out went hand in hand with the official proclamation that there are “inherently governmental functions” which can only be performed by officials. That is, the basic work of government would continue to be done by officials, while private actors would provide work that was not inherently governmental (or to merely assist the real decision-makers). This principle – murky in its own right – increasingly became a fiction (or fig leaf) by the limits imposed on the allowable numbers of civil servants.

Thus, in practice, two different sets of regulations have come to govern those doing the basic work of government. The rules created to protect Americans against abuse by a bureaucracy of civil servants – including rules on conflict of interest, openness, and pay limits – are essentially inapplicable to those who do the same work in the status of contractors.

In Part 5, this article reviews the way in which the rules governing the private workforce are modified and evolve – in essence – the new rule-making process and the new rules governing the third party workforce (when they perform governmental functions). As case studies will explain, salient aspects of the process include:

1. In the absence of comprehensive attention from Congress and the Executive, third party rules are developed on an ad hoc basis; third parties themselves drive rule-making.

2. The rules do not preclude private actors from performing governmental functions, but oblige those who do so to follow selected rules of a kind that impose similar constraints on officials in similar settings.

3. The new rules reflect the interests of the third parties that call for them, but not necessarily the interest of the public at large. There is no assurance that the larger public interest will be represented.
4. There is a tension inherent in the reliance on third parties: the design to privatise is potentially at war with itself (or, perhaps, self-correcting.) First, while contractors are employed in the name of avoiding the dead hand of bureaucracy, they are themselves a new interest group or constituency that demands its own due process and dispute resolution fora. Second, where contractors are employed because they are said to qualitatively differ from civil servants (e.g. public institutions are stodgy, private institutions are entrepreneurial), rules that render private parties accountable to public purposes may alter the qualities making contractors the better choice.

Part 6 considers the opportunities of the Supreme Court to focus on the rules governing the third party workforce. By Executive and congressional branch default, the court’s decision-making has taken place in the absence of even a minimally adequate picture of the larger setting by which the logic of its case-by-case analyses bears testing. Given the absence of a full picture of developments, the official assertion of the “inherently governmental” principle may provide an unwarranted presumption of regularity that hinders necessary court exploration of the use of traditional “public/private” ordering concepts – such as non-delegation, government instrumentality, business affected with a public interest, and the law of contracts itself – to render third party government accountable.

The article concludes by placing the theory and practice of third party government by contract in the context of the broader spectrum of the ongoing “diffused sovereignty”.

1. **Third party government: A capsule history of mid-century reform and its context**

   Today’s federal government relies fundamentally on grants, contracts, cooperative agreements, and other formal arrangements by which public money is transferred, directly and through state programmes, to non-federal institutions who help perform the basic work of the government. A 1999 study reported that the number of federal employees (civil service and political appointees) numbered 1.9 million, while those employed on federal grants and contracts approximated 8 million.³

   Today, the network of federal grant and contract relationships is based on a template established in the early 20th century, when private funders created private research institutions to serve as levers for the reform of the American Government. This template was mobilised for World War II research and development efforts, with the lion’s share of funding coming, for the first time, from taxpayers. The success of the wartime relationships among government, industry, and university led to the determination to make them a permanent fixture of post war America, with demobilised government employees
receiving funding through contracts and grants. The post-war network itself spawned new institutions: “independent non-profits”, employed by government, but themselves governed by representatives of the contractor and grant establishment.4

The military’s post-war contracting out of weapons research, development, and production was not mandated by law, and indeed, the military had a tradition of in-house arsenals.5 From their Cold War birth, the Atomic Energy Commission and the National Aeronautics and Space Administration, “civilian” Cold War agencies, performed the bulk of their work through “management” or “support” contractors.6

The contracting out of military, atomic energy, and space programmes was hardly a secret. Whether these public/private partnerships were boon, boondoggle, or peril was a matter of public debate. The growth of third party bureaucracies as appendages to new “civilian” agencies (such as the Office of Economic Opportunity, the Department of Housing and Urban Development, and the Environmental Protection Agency) was less visible, but no less exorable. Driven by the force of bipartisan limits on the number of official personnel (“personnel ceilings”), those directing new agencies or new programmes had no recourse but to call on third parties to do the work of government.

With the end of the Cold War, and widespread concern about the growth of Big Government, the wheel began to turn full circle. Activities – including the operation of government-owned nuclear weapons complex sites – that had long been conducted through reliance on contractors in the first instance, were put up for “privatisation”.

1.1. The Progressive era template

The template for the mid-century explosion of the grant and contract economy lay in the expectations and understandings embodied in relationships established during the first decades of the 20th century.

The genesis of the Brookings Institution, now the most venerable of Washington “think tanks”, illustrates the way in which private actors came to serve not simply as advisers, but to play active roles in the reform of official bureaucracies. In 1910, President Taft called on Progressive era municipal reformers to serve on a Commission on “efficiency and economy in government”.7 In 1916, partisans of the Commission’s recommendations organised the Institute for Government Research (IGR) to promote the Commission’s reforms and pursue “scientific investigations into the theory and practice of government administration”.8 The work of IGR led to the Budget and Accounting Act of 1921, which created the General Accounting Office, the Executive branch Bureau of the Budget, and the means by which
Congress and the Executive managed the 20th century growth of the federal government. In 1926, the IGR merged with the Institute for Economics and the Robert Brookings Graduate School to form the Brookings Institution.9

When the 1921 Act was passed, President Harding turned to the IGR to prepare the initial federal budget. Brookings’ in-house history records:

Institute staff had been conducting the detailed studies needed to put the budget into operation. When Charles G. Dawes came to Washington as the first Budget Director, he maintained his office for a time at the IGR, where he called on the staff for help in determining the form of the budget … and working out many of the technical questions involved in inaugurating the new system. [IGR head] Willoughby loaned Dawes a team of IGR technicians headed by Henry Seidemann. Dawes said later that their efforts determined the whole form of the new budget … 10 Seidemann was largely responsible for the presentation of the budget in 1921 and again in 1922.11

If this history is credited, official responsibility was, in fact, delegated to a private institution and its experts. Moreover, the delegation appears to have been a matter of course, not one requiring reflection on the proper role of private actors in the exercise of public responsibility and authority.

World War I further crystallised the relationship between the government and private expertise. Robert Brookings himself chaired the “price-fixing” commission of the War Industries Board. Economist Wesley Mitchell came to Washington to head the board’s “price section”. Mitchell sought official acceptance for a post-war data gathering bureau. When that failed, he found private support for the creation of the National Bureau of Economic Research (NBER).12

NBER joined Brookings as part of the three-cornered relationship among private dollars, private advice, and official action. NBER provided the framework for the measurement of the growing national economy, working with Department of Treasury officials to establish accounting systems and performance indicators. Secretary of Commerce Herbert Hoover called on Mitchell to direct studies of unemployment. The government placed its imprimatur on the studies, but the Carnegie Foundation paid the bill. President Hoover commissioned social scientists to assess American progress. Mitchell chaired a recent social trends study, which was administered by the Social Science Research Council (another non-profit) and funded by the Rockefeller Foundation. President Roosevelt called on the Social Science Research Council to coordinate his Committee on Administrative Management. The Committee’s work was reflected in Roosevelt’s decision to create the Executive Office of the President in 1939.13
In sum, the first decades of the 20th century saw the establishment of a network of personal and institutional relationships and understandings on which mid-century developments would build.

1.2. World War II: Government funding of the public/private network

The Manhattan Engineer District (The Manhattan Project), established within the Army in 1942 to build the atomic bomb drew the nation’s universities and industrial firms into super secret public service. Under the direction of General Leslie Groves, industrial corporations like Dupont were called on to manage newly created secret atomic cities in Washington state, Tennessee, and New Mexico. Researchers from Berkeley, Chicago, Harvard, Rochester and other campuses were pressed into government service, while others remained on campus to work under government contract or grant.

President Roosevelt created the Office of Scientific Research and Development (OSRD) to oversee military research. Under the direction of MIT's Vannevar Bush and Harvard's James Conant, the OSRD would contract out most of its programmes to universities, de-emphasizing federal laboratories... The contractor was responsible for results and deadlines, but retained a measure of independence from public supervision. Banking on the patriotism of private citizens and the hunger of universities for long denied federal subsidy, Bush established the practice of state-funded but privately executed R&D. In a matter of months, patterns that had characterised American research throughout its history were undone.

There was little expectation that the researchers pressed into service during the war would stay in government or the military. The question was whether the expanded relationship would continue by grant and contract. Bush took the lead in assuring that the post-war period would build on the wartime relationships, but those to be consulted were already working close at hand. As Bush recalled, when President Roosevelt called for advice on post-war science:

It was soon possible to gather together committees on various aspects of the problem, for the men who could contribute were already working together. It did not take five years to come to conclusions, as it sometimes does on such matters; it took only a few months for there was an extraordinary consensus of opinion. The result was [a report] called Science the Endless Frontier. It called for heavy federal support of the scientific effort in the post-war scene.

Nonetheless, concerns that public dollars would taint private institutions lingered:

Frank Jewett [President of Bell Telephone Labs before the War], as good a friend as a man could have, certainly thought I had gone berserk... He was sure that we were inviting federal control of colleges and universities, and of industry for that
matter, that this was an entering wedge for some form of socialistic state, that the independence which has made this country vigorous was endangered.\textsuperscript{20}

1.3. New institutions and their management techniques: 
Government/industry created non-profits

Physicists and mathematicians were the stars of the Manhattan Project, and in the aftermath of Hiroshima there was apprehension that the political system could not control such world shattering genius.\textsuperscript{21} But the Manhattan Project, and similar though necessarily less famed efforts, demonstrated that American management know-how – the ability to assemble and mesh diverse organisation towards projects whose ends had never been known and whose means had yet to be conceived, and to do so in secrecy in a brief moment in time – was, in its manner, stunning. Following the war, the military agencies and their industrial contractors created, between them, a new breed of institution – the “independent non-profit” – that embodied and symbolised the ability to plan and manage on such previously unimagined scale.

The Rand Corporation – the archetypal think tank – was the template for the new breed of institution. Project Rand was an Air Force contract to the Douglas Aircraft Corporation for post-war work on German rocketry. The work was to be done by engineers who had worked during the war in the OSRD.\textsuperscript{22} Rand’s Air Force sponsors understood, indeed hoped, that Rand would be a tool they could employ to lever the military service bureaucracies into the space age, and the Air Force into an independent role among these bureaucracies. At the war’s end, the Army Air Force was still a ward of the Army, and its leaders – notably Generals “Hap” Arnold and Curtis LeMay – perceived that “space circling rocket ships” and other “Buck Rogers” technology was essential to national defence and would be key to an independent Air Force. The Air Force bureaucracy opposed the plans LeMay and Arnold had for the Rand contract. Rand biographer Bruce Smith recounts:

\textit{There was a good deal of opposition to the Douglas proposal... [P]articularly sharp opposition came from the delegation of material and procurement officers from Wright Field. They objected that what was being proposed was civilian assistance in military planning... The Wright Field delegation proposed instead a tightly controlled programme telling the contractor what it should do and specifying in rigid detail [a research programme]...} \textsuperscript{23}

Fortunately for the future of Project Rand, General LeMay exercised the prerogatives of his office and overruled these objections. He pointed out that the purpose of the project was not to state a requirement and tell the contractor what to do. Rather, the contractor was to perform long-range research that might form the basis for a future military requirement.
Rand was not merely a technical enterprise, but a tool in the politics of bureaucracy, or, in the eyes of its promoters, of bureaucratic reform. With help from the Ford Family, then transforming a small family fund into the modern Ford Foundation, the Rand contract team left Douglas and created an “independent non-profit” corporation. As an independent non-profit, Rand was located at the nexus of the official defence bureaucracy and its private partners. Rand’s governing board, Rand’s President told Congress, was “one-third from industry, one-third from the academic field, and one-third which we call the public interest, like foundation presidents and so on”.

Rand soon acquired fame as the source of “systems analysis” and successor generations of “policy science” techniques that gave the country confidence that the Cold War was under the charge of the brilliant and the efficient. Alongside Rand, the source of policy and plans, the Defence complex spawned non-profits expert in “systems management” – the direction of the weapons projects that flowed from the recommendations of the systems analysts. Thus, the Aerospace Corporation was created to manage the development of the intercontinental ballistic missile (ICBM) programme, and Mitre to manage the computerisation of air defence.

The Navy’s success as an exception to the Air Force’s contractor management proved the rule. The Navy team was no ordinary group of government employees, but an elite corps headed by an American original – Admiral Hyman Rickover. Even the Rickover team, moreover, evidently felt obliged to dress its clear competence in private management garb to “make us okay with the people who had the money”.

By the 1960’s Rand and other think tanks attained a form of institutional celebrity in a period where “action intellectuals” were the stuff of cover stories. As Theodore White, chronicler of The Making of the President 1960 explained to Life Magazine’s many readers, action intellectuals were “a new priesthood, unique to this country and to this time”. For them, “now is the Golden Age and America is the place. Never have ideas been sought more hungrily or tested more readily against reality. From White House to City Hall scholars stalk the corridors of power”.

1.4. Atomic energy and space: Government by support service contractor

NASA and the Department of Energy (through its predecessor the Atomic Energy Commission), imported the military contract bureaucracies into the “civilian sector”. For example, when Sputnik was launched in 1957, the nation’s space programme was in the hands of the National Advisory Committee for Aeronautics (NACA). NACA, created during World War I to direct aeronautical R&D, was a small organisation that “channeled only 2% of
its funds to private contractors”.34 NASA was created in 1959; by 1960, its budget was $1 billion and growing, 85% of which was spent on contracts.

The Department of Energy’s (DOE) primary mission is the management (and environmental cleanup) of the nation’s nuclear weapons complexes, housed at sites including Oak Ridge, Tennessee; Los Alamos, New Mexico; and Hanford, Washington.35 Since their Manhattan Project inception, these sites have been operated for the government by private entities, including non-profits (such as the University of California), as well as profit-making corporations, such as Dupont, Lockheed, and Bechtel.

In 1980, the Senate Subcommittee on Civil Service, under the direction of Senator David Pryor, undertook to assay the extent of the DOE’s reliance on contractors. The subcommittee found that the DOE employed approximately 20,500 full-time and 1,400 part-time “official” employees at a cost of $640 million. By contrast, the DOE disbursed about $9.6 billion in contracts, grants, and similar arrangements. The DOE did not know how many “man years” of employment this purchased; the subcommittee staff estimated the number could approach 200,000.36

The subcommittee found that contractors pervade the activities of the department’s Washington, DC headquarters, as well as manage the vast field operations. The “reliance on contractors is so extreme that if the terms of its contracts, the resumes of its contractors and their employees, and the contractor work the department adopts as its own are to be believed, it is hard to understand what, if anything, is left for officials to do.”37

In 1989, Senator Pryor’s subcommittee revisited DOE, this time to construct a “truth in government” organisation chart to identify the balance of official and contractor workforces within sensitive DOE Headquarters activities.38 The subcommittee report summarised:

DOE relies on a private workforce to perform virtually all basic governmental functions. It relies on contractors in the preparation of its most important plans and policies, the development of budgets and budget documents, and the drafting of reports to Congress and congressional testimony. It relies on contractors to monitor arms control negotiations, help prepare decisions on the export of nuclear technology, and conduct hearings and initial appeals in challenges to security clearance disputes. In addition, a contractor workforce is relied on by the Inspector General.39

DOE’s top management still lacked the basic information needed to understand the dimensions of the contractor workforce. Indeed, the use of contractors remained invisible within the department: “congressional testimony, DOE long-range plans, budget documents, internal directives, and memos drafted by contractors are transmitted within DOE as if prepared by DOE officials themselves”.40
The driving force behind the reliance on contractors was not a mystery. As the department’s workload grew, “personnel ceilings” (limits on the number of federal employees) forced the department to wholesale out work through “support service” contracts.41 “Support service” contractors provide the workforce needed to perform whatever tasks may befall that portion of the agency being supported. The DOE’s support service contract’s statement of work, “read like loud cries of ‘Help!’ In many cases, the statements of work amount to descriptions of the mission of the government office to be ‘supported’, and the declaration that the contractor will be available to ‘assist’ in these activities as needs arise”.42

At the onset of the Clinton Administration, Energy Secretary O’Leary testified that department lacked the capacity to manage its contractors, and promised “contract reform”.43 By the Second Clinton Administration, the banner of “contract reform” was tattered and replaced by the slogan of reform through “privatisation”. Privatisation, however, ran its course by 2000, as showcase environmental cleanup contracts (with Lockheed and British Nuclear Fuels) were terminated following substantial cost-overruns and critics pointed out that privatisation was merely contract reform under another name.44

1.5. The contracting out of social and regulatory agencies: Personnel ceilings, patronage, and reform

Less publicised than the “military industrial complex” was the growth of a contract bureaucracy as an adjunct to social and regulatory programmes. In form, the dominant public feature of social spending programmes was (and is) federal grants-in-aid to state and local agencies and/or non-profits.45 However, contractors filled the interstices of the new federalism, assisting Washington in the implementation of new laws, localities in their search for grants under the laws, participating in the awards, and then evaluating the success of the grant programme.46

The hydraulic force of personnel ceilings meant that as agencies or programmes were created, contracting became the norm for the administration of this growth. Post-war foreign aid programmes, particularly those administered by the Agency for International Development, have been profoundly dependent on support contractors.47 Pre-World War II regulatory agencies, such as the Federal Energy Regulatory Commission were born in reliance on official staff, and, while using contractors, rely primarily on official staff. The Environmental Protection Agency, created during the Nixon Administration is, by contrast, heavily dependent on support contractors.48

The reliance on third party government also characterises post-World War II entitlement programmes. Thus, Medicare and Medicaid disbursed
taxpayers’ monies to private intermediaries, such as Blue Cross; relied on other private organisations, such as the Joint Committee for the Accreditation of Hospitals and the Professional Service Review Organisations to provide standard setting; and provided opportunities for further third parties to attach themselves to other public and private participants in the process.49

More visible than the role of consultants of all stripes as the grease in the grant mechanisms, was the promise that the techniques and institutions brought to bear on Cold War defence problems could solve intractable social problems as well.

In August, 1965, President Johnson promised to bring government into the space age by directing civilian agencies to apply PPBS, a budgeting technique which Rand, through the offices of Secretary of Defence McNamara, had introduced into the Defence Department.50 Cadres of consultants were soon at work throughout government installing and explaining PPBS, the first in a line of consultant driven budgeting techniques.51

At the Office of Economic Opportunity, the Department of Housing and Urban Development, and the Department of Transportation, Great Society officials and contractors explained that problems like poverty, poor inner city housing, transportation, and education were artefacts of backward institutions that required reform, and that government sponsored intervention by aerospace-age corporations and techniques were the means to bring about reform. Aerospace non-profits found work in the civilian agencies, but the agencies created their own “independent non-profits” as well.52 As in the case of the military agencies, the promoters of third parties understood them to be both purveyors of new management techniques and tools of the politics of bureaucratic reform.53

From another perspective, however, civilian contracting was neither efficiency enhancing, nor a reform, but a new cloak for politics as usual. A “political personnel manual”, prepared by the Nixon White House and unearthed during Watergate, provided this differing perspective:

In 1966, Johnson offered legislation, which Congress passed [that] required the Executive branch ... to reduce itself in size to the level of employment in fact existing in 1964. The cosmetic public theory ... was that ... a personnel ceiling for the Executive branch would first cut, and then stabilise, federal expenditures connected with personnel costs... What the Johnson Administration did after passage ... was to see to it that “friendly” consulting firms began to spring up, founded and staffed by many former Johnson and Kennedy Administration employees. They then received fat contracts to perform functions previously performed within the government by federal employees. The commercial costs, naturally, exceeded the personnel costs they replaced.54
1.6. The “Privatisation” of the Cold War legacy: contracting in extremis

In the 1980s “Thatcherism” gave “privatisation” a global cachet. However, there was a mismatch between the new global rhetoric and the American reality. In Britain, and elsewhere, privatisation often, though by no means completely, meant the asset sale of state-owned industries that, by and large, were not under public ownership in the United States. By contrast, as a 1997 General Accounting Office survey noted, “privatisation” in the United States, in practice, means contracting out, an activity in which America pioneered.

If there is an American analogue to global industrial privatisation, it is the ongoing privatisation of the United States’ nuclear weapons complex. The frontiers of “privatisation” are now being tested by the privatisation of the United States Enrichment Corporation (USEC), the largest privatisation conducted by the federal government since Conrail (in 1987).

In 1992, Congress approved the transfer of federal facilities used for the enrichment of uranium for use in nuclear power plants from the DOE to a US government corporation. In 1996, Congress provided that the government corporation could be “privatised”, through either a public stock offering or a sale to a private entity. In July 1998, privatisation took place through a stock offering.

By statute, Congress conditioned the sale of USEC on a determination that the privatised entity would continue to comply with a series of congressionally designated public purposes. In addition to the public purposes declared by Congress, the new corporation is the United States’ Executive Agent for implementing the US/Russia Agreement for the purchase of Russian nuclear weapons grade uranium – a cornerstone of post-Cold War US nuclear non-proliferation policy.

Prior to privatisation, independent experts, members of Congress, and the press pointed out that there was little likelihood that the conflicting mandates set by Congress could be fulfilled by privatisation. The critics pointed to: i) conflicts between the private corporation’s legitimate interest in pursuing shareholder profit and the potential additional costs of fulfilling the congressional mandates; and ii) potential conflicts among the mandates. The critics quickly proved to be correct. Shortly after privatisation, Congress appropriated $325 million to assure the continuation of the Russian agreement. In 1999, USEC unsuccessfully sought a further $200 million bailout; its stock plummeted from the $14.50 initial public offering price to the $5 range. In early 2000, USEC’s credit was downgraded, triggering a US Nuclear Regulatory Commission inquiry into USEC’s viability and congressional hearings on USEC’s future.
USEC privatisation brings textbook questions of law and public policy to the forefront. When an entity has been “privatised”, what is the binding effect of statutory predicates to privatisation? When the term is applied to an entity that will always have public purposes and that has already been operated under private contract, what is the virtue of removing the activity from direct government control?

2. Constitutional reform: Mid-century visions

From today's vantage the contract bureaucracy seems to have grown like Topsy. However, its growth was the product of considered human design. The designers were, like Vannevar Bush and James Conant, leading citizens in the government/non-profit/corporate network that grew prior to World War II. They saw themselves as reformers who had found a media that would permit government to grow to serve the public interest, without growing into the Big Government that they knew Americans cannot tolerate. The reformers, and their astute critics, understood that developments were of profound, even constitutional proportions.

2.1. The “fusion of economic and social power” and the “diffusion of sovereignty”

Don Price, the first Dean of Harvard's Kennedy School of Government, wrote and taught at the centre of post-war developments. His 1965 book, The Scientific Estate, addressed the origins and character of the new network of think tanks, universities, and corporations, and lauded the simultaneous “fusion of economic and political power” and “diffusion of sovereignty” they portended. Price found reassuring precedent for 20th century Cold War era developments in 19th century farming. Washington and Jefferson, Price explained, wanted to foster scientific improvements in agriculture but, were blocked by lawyers’ scruples about states’ rights. But the agricultural scientists found a way to their goal by a different route – one that evaded constitutional barriers by merging federal and state interests through federal grants of either land or money to the states ... from [the land grant college] grew the experiment station, the extension programme, and the whole interlocking system of institutions which let the federal government play a more effective role in the agricultural economy than the government of any supposedly socialised state.

In the 20th century, technology driven corporations played the central role in the “fusion of economic and political power”. Federal contracting dollars, Price observed, were the mother's milk of the corporate world’s changed perspectives about growing government. By mid-century, Price noted, the federal government was paying the lion's share of the nation’s research and development budget. The result, Price explained, was to “make
the old arguments about socialism versus private enterprise a series of obsolete abstractions. Practically, it suggests that some new abstractions might be very fruitful indeed”.70

In combination, the fusion and diffusion were of profound but healthy import:

But the general effect of this new system is clear: the fusion of economic and political power has been accompanied by the diffusion of authority. This has destroyed the notion that the future growth of the functions and expenditures of governments ... would necessarily take the form of a vast bureaucracy.71

The danger, Price concluded, was not likely to come from secrecy, excess of central authority, or a drift toward socialist dictatorship. Rather, the danger would come from the untrammeling of special interests or public opinion.72

2.2. “Business in the Humane Society”

John Corson’s 1971 book, Business in the Humane Society, parallels The Scientific Estate in presenting the vision of reform from the perspective of the boardroom.73 Corson began his career in a New Deal Social welfare agency, served as an executive of the Washington Post, and, at mid-century joined the nascent Washington, DC office of McKinsey, the blue chip management consultant to corporate America.

In the 1950s, Corson and McKinsey came to advise the federal government as well. Corson himself studied the organisation of the Army with the Davies Commission, federal grants-in-aid with the Kestnbaum Commission, the Russian nuclear threat with the secret Gaither Commission, and served on commissions to study higher education, the public health service, and air traffic control. When NASA was created, McKinsey staffed a blue ribbon committee that recommended that NASA contract out extensively.74

In the preface to his book Corson noted that the developments he would describe likely were news to most Americans. “[T]here is”, he observed, “little awareness of the extent to which traditional institutions, business, government, and universities and others, have been adapted and knit together in a politico-economic system which differs conspicuously from the venerated pattern of our past.”75

Corson, like Price, welcomed burgeoning “public-private” partnerships. “Even those readers ... familiar with the Washington scene”, Corson explained, “will be impressed with the magnitude and scope of the subsidy, contract, grant, and regulatory processes as they have evolved...”76 Contracting out, in particular, was a source of marvel. Post-war contracting, he observed, has been described as the greatest desocialisation that this country has experienced. It has established a “new form of federalism”, i.e. a “federation”
through which the federal government gets work done in association with private enterprise.\textsuperscript{77} By consequence, “in 1969 a number of federal agencies (NASA, for example) performed more of their work through contracts with private business than they performed with their own employees.”\textsuperscript{78} Corson, like Price, did not see the end of “official” government or government officials. Rather, like Price, he saw the health of the official workforce as essential to the well-being of its private partners.\textsuperscript{79}

Even as he noted that the change he would portray had escaped public reflection, Corson declared it to be the result of public choice. “Historians in the 21st century”, Corson wrote, will recognise that the “progressive expansion of the public interest” meant that the American people had to choose between “steadily enlarging the machinery of government or finding ways to entrust to nongovernmental agencies for carrying out public functions”\textsuperscript{80} The American people “chose the latter course”.\textsuperscript{81} The result has been the “blurring of the dividing line between 'public' and private”.\textsuperscript{82}

2.3. The “military-industrial complex”

It was left to President Eisenhower, in his farewell address, to provide an alternative perspective on developments.

The conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence, economic, political, and even spiritual, is felt in every city, every state house, every office of the federal government. We recognise the imperative of this development. Yet we must not fail to comprehend its grave implications.

In the councils of government, we must guard against the acquisition of unwarranted influence ... by the military-industrial complex.\textsuperscript{83}

2.4. Hamilton, Madison, and Jefferson: The mid-20th century vision of the third way

The Founding Fathers, particularly Hamilton and Madison, predicated their constitutional vision on the view that human nature, while not wholly benign, was predictable, and, therefore, could be the basis for social ordering. This view, expressed most famously by Madison in his analysis of factions in the Tenth Federalist paper, owed much to the Scottish Enlightenment philosophers, and their view that, with an understanding of human nature in hand, politics, as David Hume said, can be reduced to a science.\textsuperscript{84}

Hamilton recognised that private interests could do more than merely balance one another, but could be actively harnessed to promote otherwise unattainable public purposes. He famously sought to harness the merchant class through his successful efforts to ensure the integrity of “Public Credit”, and his less successful effort to promote “Manufactures”.\textsuperscript{85} Hamilton’s vision
was, in the conventional perspective, submerged by his death and the ascendency of the Jeffersonians – believers in a nation of small government and agrarian farmers. However, the Jeffersonian tradition also embodied a readiness to link the advancement of knowledge with national purpose. The role of science in the 19th century agricultural programmes, Price perceived, provided the key to the via media between the Hamiltonian and Jeffersonian traditions.

In the 20th century, Price and Corson perceived science played a double role. As in the case of 19th century agricultural programmes, 20th century physics, chemistry, and biology, provided a powerful catalyst for the fusion of otherwise antithetical public and private interests. As Price put it, “[a] great deal of private enterprise is now secreted in the interstices of government contracts. In short, what the grant-in-aid programmes did to the arguments for states’ rights, the new contractual systems are doing to those for pure private enterprise.”

In addition, as Enlightenment social science had provided the insights on human nature that undergirded the Constitution, modern management technique had provided the means to understand, control, and harness stultifying official bureaucracies by meshing them to the modern industrial corporation and the modern non-profit research institution. Official bureaucracies, private non-profits, and private profit-making entities all had their special qualities, and all would play a role in the reconstituted system. Techniques such as “systems analysis”, “systems management”, PERT, and PPBS, and their now numerous offspring, would provide confident means for managing the networked whole.

From other perspectives, however, the reconstitution embodied in third party government was both less and more than proclaimed. From the perspective of the Nixon Administration’s personnel manual, the rhetoric of third party government was a veneer for the conduct of partisan politics as usual. From the perspective of President Eisenhower, the demands of Cold War national purpose were being satisfied by the institutionalisation of an unholy alliance of political and economic power.

3. Tacit bipartisan agreement: third party government on automatic pilot

The official high-water mark of the dialogue between those who viewed developments with alarm and those who applauded them lies in the 1962 report of a cabinet-level panel convened by President Kennedy to consider the contracting out of military research and development. The report described the “blurring of public and private” with acuity, but begged the “philosophical” questions thereby raised. In succeeding years, and by tacit bipartisan consent
imposed through personnel ceilings, third party government grew as if on automatic pilot.89

3.1. The Bell Report: “Begging profound questions”

The “Bell Report” (named after its primary author, Bureau of the Budget Director David Bell) addressed the “highly complex partnership among various kinds of public and private agencies, related in large part by contractual arrangements”.90 The report was accompanied by congressional hearings on “systems development and management”.91

The panel found that, “the developments of recent years have inevitably blurred the traditional dividing lines between the public and private sectors of our nation.”92 It portentously declared the emergence of “profound questions affecting the structure of our society [due to] our inability to apply the classical distinctions between what is public and what is private”.93 Most pointedly, the panel expressed concern that officials would lose control to contractors, particularly where contractors were performing “the type of management functions which the government itself should perform”.94

The panel neatly laid out the seductive psychology of the new system – short-term rationality, but possibly, long-term irrationality. From the vantage point of politicians and officials, the choice of contractors to perform new missions made sense; they could be deployed quickly and brought new political support to programmes and, in theory, they could be disposed of when no longer needed. In the short-run, the employment of contractors to serve vital Cold War needs seemed undeniably reasonable. However, the panel perceived that the “cumulative” effects of contracting could be debilitating. The salaries of contractor employees was not capped, and their work was increasingly more interesting than that performed in-house. Over the long-run, the intelligence of government needed to control contractors might only be found within the contractors themselves.95 The danger was compounded because of the qualitative difference in the interests of contractors, as well as the rules governing those interests. The conflict of interest rules applicable to federal employees did not apply to contractors and their employees (on the presumption that they will be overseen by competent officials, who themselves are conflict free).96

Having laid out the problems and their import, the Bell Report backed away from the abyss. The Cold War was no time to address such fundamental issues of governance.97 Instead, the task was to learn the best uses of the panoply of institutional tools – profits, independent non-profits, universities, and in-house research groups – at hand.
3.2. Personnel ceilings: third party government on automatic pilot

Following the Bell Report’s passage into the archives, the questions it posed ceased to command presidential or, with some exception, congressional attention. Rather, through caps on the number of federal employees, both branches (and both major parties) gave tacit endorsement to the continued growth of third party government. By default, the creation of new programmes and the expansion of old ones meant reliance on third parties to do most of the new work.

If there is a public imprimatur for the new governing principle, it lies in the creation of NASA. Lodge 1858, American Federation of Government Employees vs. Webb, \(^98\) captures the moment in amber. Webb stemmed from a 1967 reduction in force (RIF) at NASA’s Marshall space centre. The laid off federal workers complained that “NASA was employing many technical service workers at Marshall supposedly as independent contractors, but actually with a degree of control by NASA and with other characteristics that made them functionally employees of the United States.”\(^99\) The use of contractors, instead of federal employees, they claimed, violated civil service laws, the NASA Enabling Act, and their collective bargaining agreement.

Indeed, there was apparent conflict within the NASA Enabling Act, which provided that federal employees would perform NASA’s basic work, but capped their number, and then provided broadly for the deployment of contractors. The Court of Appeals explained:

> At the same time that Congress enacted the enabling act which compelled NASA to produce a mammoth space effort, “the number of civil service personnel that could be hired was limited due to personnel ceilings imposed within the Federal Civil Service.” Thus, it is not surprising that support service contracts [were] a way of life at Marshall...\(^100\) NASA, the court observed, “resorted to support service contracts as the alternative means of overcoming the civil service personnel ceilings”.\(^101\)

The court concluded that the provision for contracting provided a “separate means, independent of [the federal employee provision] for performing NASA’s functions”.\(^102\) NASA’s reliance on contractors was no secret. In 1971-72 Congress “directed reductions in NASA’s civil service workforce at the same time that it continued to approve its budget requests for funds to meet its obligations under support service contracts that were in existence”.\(^103\)

3.3. Privatisation, downsizing and reinvention: reform without reflection

The quiet workings of personnel ceilings were accompanied by bipartisan silence on the changing nature of the federal workforce. Blue Ribbon
Commissions on public service continued to address only federal employees (while procurement was addressed by its own panels). Government budget documents, organisation charts, and phone books captured the full dimensions of the official workforce, but gave no hint of the dimensions of the private workforce. The basic documents of government – budgets, plans, rules – were presented to Congress and the public as if the official workforce were home alone.

In this setting, a new generation of reformers – the Privatizers, Downsizers, and Reinventers of the 1980s and 1990s – came to argue for reform of Big Government with little evident knowledge of the history or legacy of past reforms. When, in 1993, the Clinton Administration announced its intent to “reinvent government”, the focal point of the announcement was a commitment to reduce Big Government – by reducing the number of federal employees. Fittingly, just before the century’s end, it was the Brookings Institution that reported the discovery that the official federal workforce was only a fraction of the size of the “shadow of government”. Brookings proclaimed that the “first rigorous estimates of just how large this blended work force is... challenges recent conclusions regarding the end of the era of big government”, and should “reframe the contemporary debate about how government performs its tasks...”.

3.4. The Bush Administration stays the course

The Bush Administration, following the Clinton Administration, quickly and publicly chose to follow the bipartisan reform tradition. The administration's active pursuit of the bipartisan tradition takes the form of the administration's “Management Agenda” and “Faith Based Initiative”.

On assuming office, the Bush Administration announced that it would call on religious organisations to provide social welfare services, under contracts and grants. The “Faith Based Initiative” was immediately controversial, with opponents arguing that the provision of public funds to religious organisations would violate constitutional traditions requiring “separation of church and state”. (As of late 2002, effectuation of the initiative was limited as debate and discussion of congressional compromise continues.)

Nonetheless, when viewed from the vantage of the story told here – the bipartisan reform effort to grow government through the use of third parties – the Bush proposal is true to the tradition. Contractors and grantees had long since been deployed by federal and local agencies to provide social welfare. The Bush proposal was nothing new in this regard; rather, the administration explains, it seeks to deploy the kind of third party that, in the administration's view, could best perform them.
The debate over the Faith Based Initiative highlights the continuing tensions underlying third party as a reform. Supporters of the initiative state that the use of religious organisations will bring better management and better results to the programme; opponents state that the funding of religious organisations is not a reform, but a form of political patronage to a favoured Republican party constituency.\footnote{110}

Moreover, in support of the need for religious organisations to administer social programmes, the White House argues that third parties who now perform these services are substantially unaccountable – raising basic questions about the “accountability” of third party government.\footnote{111}

The Bush Administration’s Management Agenda, directed by the Office of Management and Budget (OMB), “grades” agencies annually on their performance of “management objectives” set by the administration.\footnote{112} The objectives include the requirement that agencies provide for “competitive outsourcing” of current civil service jobs that are not “inherently governmental”, with agencies to receive grades depending on the number of such jobs put out to competition.\footnote{113}

In contrast to Reinventing Government – which began with a promise to cut hundreds of thousands of civil service jobs – the Bush Administration refrains from declaring that civil service jobs must be eliminated. Rather, the Management Agenda provides that civil servants may themselves compete with third parties to win contracts, with “the best man to win”. The proponents of the Management Agenda explain that exposure of the civil service to competition, not arbitrary reduction in civil servants, is the essence of this reform.

The Bush Administration’s determination to avoid calling for “cuts” in the civil service, likely reflects the bipartisan criticism directed at the arbitrary cuts directed by Clinton era Reinventing Government Even so, the Bush Administration’s approach does not confront the actuality that, in more and more critical areas, civil service oversight capability is likely inadequate to oversee its contractor workforce.

For example, as discussed above, Congress and the Executive branch have long recognised that the Department of Energy (DOE) lacks the in-house workforce needed to supervise and control its contractors – most of whom manage and operate the nuclear weapons complex. In 2001, DOE reported that it had 14 700 employees (civil servants and officials), and over 100 000 contractor employees; 44% of the official workforce was over 50, and nearing retirement.\footnote{114} Nonetheless, the Bush Management Agenda identifies 9 889 official jobs as eligible for outsourcing.\footnote{115} In brief, an agency that could not manage the (100 000 plus) contractor workforce with 15 000 officials, may
soon be called on to manage an even greater number of contractor employees with a less experienced workforce of, perhaps, 10,000 employees or less.

Similarly, in October, 2002, the Secretary of the Army announced that the Army will permit private contractors to compete for “non-core” positions, including those now held by 154,910 civilian workers – more than half of the Army’s civilian workforce – and 58,727 military personnel. As in the case of other federal agencies, this effort comes on top of years of “downsizing” and “outsourcing”, the consequences of which, by the Army’s own admission, remains unexamined. A March 2002 memo to the Department of Defence management hierarchy Army Secretary White explained:

In the past 11 years, the Army has significantly reduced its civilian and military workforce. These reductions were accomplished by an expanded reliance on contractors’ support without a comparable analysis of whether contractor support services should also be downsized. Currently, Army planners and programmers lack visibility at the departmental level into the labour and costs associated with the contractor workforce and of the organisations and missions supported by them.

In sum, the Bush initiatives, like the Clinton era reforms, further highlighted tensions and fault lines within the longstanding bipartisan design to grow government through third parties without assurance that the remaining official workforce retains oversight capability.

4. The default rules of the new public service: inherently

4.1. Governmental fiction and dual regulatory reality

The more government relied on contractors, the more vigorously it proclaimed that contractors could not, as a matter of policy – although not necessarily law – perform the “inherent” work of government. Given the concerted absence of visible evidence to the contrary, this policy supported a presumption of regularity – i.e. that officials in fact remained responsible for the basic work of government. With this presumption, there was no need to bind third party employees by the constraints imposed on officials; they could be governed by rules that preserved their autonomy and fostered the qualities of innovativeness and expertise that they would bring to bear in support of officials. Thus, as contractor and official employees came to work side-by-side on the basic work of government, they continued to be governed as if nothing had changed.
4.1.1. Inherently governmental functions: Axiom and fig leaf

Even as the Bell Report described the blurring of the lines between public and private, it deemed it “axiomatic” that certain “functions” can only be performed by officials:

There are certain [research and development] functions which should under no circumstances be contracted out. The management and control of the federal research and development effort must be firmly in the hands of full-time government officials clearly responsible to the President and the Congress.

We regard it as axiomatic that policy decisions ... must be made by full-time government officials clearly responsible to the President and the Congress. Furthermore, such officials must be in a position to supervise the execution of work undertaken, and to evaluate the results. These are basic functions of management which cannot be transferred to any contractor if we are to have proper accountability for the performance of public functions and for the use of public funds.118

The panel emphasised that the test for government control is one of substance, not form. “There must be sufficient technical competence within the government so that outside technical advice does not become de facto technical decision-making.”119

The principle of “inherently governmental” functions was codified by the Executive branch just as its practical import was being negated by the force of personnel ceilings. In the 1950s, the Bureau of the Budget included this principle in Circular A-49, which governed Defence/NASA/AEC use of “management” contractors,120 and Circular A-76, which provided that “commercial” functions should, by contrast, be contracted out.121 In 1992, the Office of Federal Procurement Policy (OFPP) placed the principle in a “Policy Letter”122 which, in turn, is embodied in the Federal Activities Inventory Reform Act of 1998.123

The concept is also at the core of Clinton/Gore era Reinventing Government, which counsels that government should do the “steering” (a.k.a. “policy decisions”), while the private sector does the “rowing” (“service delivery”).124 The developments discussed here show essential difficulties with the inherently governmental concept. Most immediately, its public assertion has coincided with caps on official employment that render its rigorous application academic.

In 1992, the Comptroller General, prodded by Senator Pryor’s inquiries, reported that “GAO’s review of historical documents, relevant books and articles, prior GAO work, applicable laws, government policy, and federal court cases showed that the concept of ‘governmental functions’ is difficult to
When viewed with regard to decisional responsibility (e.g. budgeting, rule-making) without regard to subject matter, there is another difficulty. When, as is the case, third parties are not limited in their “advisory” or “assistance” roles, is the test for decisional responsibility one of form or substance? If a Cabinet Secretary signs a document he has not read, does it make a difference whether the document was drafted by officials or third parties?

In 1989, Senator Pryor put the question to the Comptroller General. The Senator asked whether the inherently governmental principle was violated where: i) the Department of Energy (DOE) relied on contract hearing examiners to review security clearance determinations; ii) DOE relied on a contractor to prepare congressional testimony (including that given by the Secretary of Energy); and iii) EPA contracted out of its “Superfund Hotline”.

The GAO declared the test is one of substance, not form. DOE’s argument that the Secretary could review the decisions of the (contracted) hearing examiner were not persuasive, nor was the fact that the Secretary of Energy, and not the contractor, appeared before Congress to read the Secretary’s testimony. “Our decisions and the policy established by OMB Circulars”, the Comptroller General stated, “are based on the degree of discretion and value judgment exercised in the process of making a decision for the government”.

By contrast, the OFPP, policy on inherently governmental functions, which flowed from Senate and GAO inquiries, retains a test that is substantially one of form. OFPP policy provides for liberal use of third parties where the role is said to be limited to the provision of “assistance”.

If the inherently governmental principle is to have bite in current circumstances, the test for the line between “assistance” and de facto decisional responsibility must, as the Bell Report and the GAO have concluded, be one of substance and not form. But, by the same token, where sovereignty is intentionally diffused, the likelihood that such test will be more than a fig leaf is not overwhelming.

4.1.2. Employees and contractors: dual regulatory systems

American governmental bodies, at all levels of government, possess a long and growing tradition of rules enacted to prevent abuse of power by government “officials”. These rules include those that address conflict of interest, assure that government activities are (with limits) “open” to the public, limit the pay for official service, and limit the participation of officials in political activities.
The rules governing federal employees are generally stated in Title 5 of the United States Code (and corresponding regulations). In addition, Title 18 of the Code contains criminal prohibitions against conflict of interest and other ethics violations. The third party workforce is generally governed by distinct laws and rules.\textsuperscript{130}

1. **Truth in government organisation.** Employees, but not contractors, are covered by routine practices – such as the publication of agency phone books and organisation charts – that inform the public of the name, title, and location of those who serve it. These practices do not, with small exception, cover contractors (or their employees) – even where contractors may work side-by-side with officials and even outnumber them. Similarly, agency budget presentations to Congress typically identify the number of civil servants in each box of the organisation chart by number(s) and pay grade. By contrast, there is rarely disclosure of the number, job titles, and pay grades of contractor employees attached to these organisational chart boxes. Indeed, as noted, it was not until the end of the millennium that a non-federal institution provided the first raw estimates of the gross dimensions of the third party workforce.\textsuperscript{131}

2. **Freedom of information.** The work of the official workforce is, with important limitations, subject to the Freedom of Information Act (FOIA).\textsuperscript{132} As discussed below, the FOIA has, historically, not been applied to contractors and other third parties – even where they admittedly perform substantial decisional roles.\textsuperscript{133}

3. **Ethics.** Title 18, section 208 of the United States Code provides for criminal sanctions for federal employees who work on matters in which they have substantial financial interests.\textsuperscript{134} Federal employees are also bound by “Standards of Ethical Conduct for Employees of the Executive branch”.\textsuperscript{135} In short, the work of the official workforce is subject to a body of stringent conflict of interest and further ethical provisions. These provisions do not govern the third party workforce. The evolution of the rules that govern that workforce will be discussed below.

4. **Further rules.** There are further respects in which the rules enacted to constrain official conduct differ qualitatively from those which govern private actors, even where those actors come to work alongside officials in the daily performance of the work of government. Thus, federal (and local) officials, but not third party workers, are subject to pay caps,\textsuperscript{136} restrictions on political activity, and prohibitions on the right to strike.\textsuperscript{137}
5. Third party government: the default rule-making process

Where third parties are relied upon solely for “commercial” products or services (e.g. janitorial service, office supplies, utilities, weaponry) there is logic to their governance by distinct sets of rules. This is not the case today. Where the presumption that only officials are performing inherently governmental functions remains a bipartisan governing principle, the rules governing third party employees who perform such work are, by default, being made on an ad hoc basis in which third parties themselves are often the driving force. The following examines the rule-making process at work.

5.1. Third party ethics: contractor interests, agency interests, and the public interest

5.1.1. Organisational conflict of interest: rule-making by contractors

The circumstances that gave birth to the Rand Corporation, simultaneously crystallised the application of the conflict of interest concept to the contractor bureaucracy. As noted, Rand was initially a contract within the Douglas Aircraft Corporation.\(^1\)\(^3\)\(\text{8} When competing aircraft manufacturers complained that the Rand contract would give Douglas an “in” on lucrative weapons contracts that flowed from Rand’s analysis, the Rand team determined that it was essential to operate independent of Douglas. With assistance from the Ford family and its growing Foundation, the Rand contract was removed from Douglas and given new life as a non-profit corporation.

As the prototypical independent non-profit, Rand was, in law, independent of the interests of any particular aerospace contractor. At the same time, however, it was dependent on a single client (the Air Force), and governed by a board comprised of the aerospace industry (including non-profits) writ large.\(^1\)\(\text{3}9 As Don Price observed, during the 1950s, “no Congressmen chose to make political capital out of an investigation of the interlocking structure of corporate and government interests in the field of research and development”.\(^1\)\(\text{4}0\)

The Air Force’s ICBM programme led to the formalisation of the “hardware ban” principle implicit in Rand’s creation. The Air Force initially delegated management of the programme to a small consulting firm, which merged with an auto parts manufacturer.\(^1\)\(\text{4}1\) When established aircraft manufacturers complained that the new entity would be a competitive threat, the Aerospace Corporation, a new independent non-profit, was created to house the missile development management work. Aerospace’s charter precluded it from bidding on “hardware” contracts.\(^1\)\(\text{4}2\)

As the wheel turned, it was discovered that agency “clients”, as well as contractor competitors, had interests that required protection. Robert
McNamara, President Kennedy’s Secretary of Defence, proclaimed that he would bring the service agencies under control and called on Rand and Rand alumni to help him do so. The Air Force viewed Rand’s work for the Secretary as a breach of its obligation to serve the Air Force as trusted confidant and advocate. In the time since the McNamara episode, the proposition that the Executive is not a monolith, but is itself comprised of interests that command attention and protection in their own right, has taken root.

It was only in the 1970s that the “public interest” – and not simply the interests of contractors and their clients – was discovered to be a component of the “organisational conflict of interest”. Today’s organisational conflict of interest concept, as embodied in the Federal Acquisition Regulations and some statutes, has three salient characteristics. First, in contrast to the initial concept, it does recognise that a conflict can occur when the interests of a contractor may be at odds with the “public interest”. Second, it operates by requiring disclosure of potentially conflicting interests to government clients. Third, as discussed below, the contractor rules provide for waiver (in the presence of a conflict) where the contractor’s use is deemed essential.

In sum, the application of conflict of interest rules to contractors (organisational conflict of interest) was driven by contractors, and then by their official clients. The notion that an independent “public interest” required protection – e.g. an interest above and beyond that of individual contractors or agencies – was a latecomer to organisational conflict of interest policy.

5.1.2. The enforcement of organisational conflict of interest rules: an insiders game

The enforcement of organisational conflict of interest prohibitions is an insider’s game. There is reason to doubt that – in the absence of vigilance by competing contractors – the rules are enforced with consistent rigor.

Public audits of the conflict of interest review process are few and far between. In 1980, and again in 1989, Senator Pryor’s Subcommittee reviewed enforcement in the DOE. The subcommittee’s work found systematic failure of implementation. First, the subcommittee found, and the DOE confirmed, that contractors did not comply with disclosure requirements. Often, the failure to disclose was readily apparent when the conflict of interest disclosure was compared to the portion of the proposal in which the contractor touted its experience. Second, the subcommittee found procurement officials, delegated legal responsibility for procurement rules, know procurement rules, but not necessarily the subject matter of the contracts they oversee. The procurement officials relied on programme officials to alert them to the significance of the information that is disclosed. Meanwhile, the subcommittee reported, “programme officials, who depend on
contractors to get their work done, assume that procurement officials will adequately apply DOE conflict rules.”

Third, programme officials may see the indicia of conflict as evidence that the contractor should be hired, and not avoided. As Professor Jaffe’s article on lawmaking by private groups observed: “Those performing the operation or constituting a part of the relation to be regulated are likely to have a more urgent sense of the problem and the possibilities of effective solution; experience and experiment lie immediately at hand.” Thus, from the programme officer’s perspective, valued expertise may be the flip side of what, to the outsider, is a conflict of interest.

5.1.3. The convergence of official and contractor rules?

On the presumption that contractors are overseen by officials, and do not themselves perform inherently governmental work, organisational conflict of interest rules provide for employment of the contractor even where a conflict exists and cannot be avoided. By contrast, where the conflict possessed by an employee is “substantial”, the prohibitions in Title 18, Section 208, cannot be waived by commitment to mitigate the conflict or under claim that the employee’s work is essential.

The 1998 privatisation of the US Enrichment Corporation (USEC) suggests a sub silentio revision of the longstanding statutory principle governing officials to render its conflict of interest constraints as lenient as those applicable to contractors. USEC’s Chief Executive, a government official subject to Title 18, Section 208 was given a Section 208 waiver (by the USEC Board Chairman) to participate in decision-making on privatisation. On its face the waiver letter confirmed that the official’s financial interest in the privatisation decision was substantial (because he stood to benefit or lose depending on the method of privatisation, if any, chosen). The letter explained that the official’s services were needed and would be overseen by the board. The letter, therefore, declared that the statutory predicate for waiver had been met, even as it noted that the financial interest of the individual was substantial. There appears to be no public precedent for the determination to apply the waiver standard applicable to third parties to officials.

5.2. Freedom of information: Third party autonomy vs. third party accountability

Courts have long held that contractors (and other third parties) are generally not subject to the Freedom of Information Act (FOIA), because they are not “government agencies”. The analysis reflects the view that the qualities private actors bring to the public service will be compromised if
constrained by FOIA. In the recent past, the tension between third party accountability and autonomy has been brought to a head.

The evolution and logic of the judicial perspective is embodied in a trilogy of cases which turned on whether third parties were “agencies” for purposes of FOIA.

Washington Research Project vs. Department of Health, Education, and Welfare\textsuperscript{159} concerned evaluations by outside consultants of mental health grant applications. The Court of Appeals agreed that, “the [evaluations] may be presumed to be very influential in the funding decision.”\textsuperscript{160} The court deemed the “important consideration [to be] whether [the third party] has any authority in law to make decisions.”\textsuperscript{161} Deeming the role of the consultants to be advisory, the court concluded that the consultants were “performing staff functions through the medium of outside consultancies, and were not agencies”.\textsuperscript{162} Therefore, the court concluded, the evaluations were subject to the “intra-agency” deliberation exemption.\textsuperscript{163}

In Forsham vs. Harris,\textsuperscript{164} the Supreme Court considered physicians group’s request for diabetes research data collected and maintained by a university research consortium. The funding agency (the Department of Health, Education, and Welfare or HEW) denied the request on grounds that the data was untouched by official hands.\textsuperscript{165} HEW boldly proclaimed that “no branch of HEW had ever reviewed or seen the raw data”, since the task of assessing the validity of the study had been assigned to a further grantee.\textsuperscript{166}

The Court concluded that data generated by a “privately controlled” organisation using federal funds, but that have “not been obtained by the agency” are not agency records.\textsuperscript{167} The fulcrum for the opinion was the majority’s view that private grantees are, and should be, qualitatively different creatures from official agencies. The court explained that:

This treatment of federal grantees under the FOIA is consistent with congressional treatment of them in other areas of federal law. Grants ... do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision.\textsuperscript{168}

Congress, the court explained, has sought to “maintain the autonomy of federal grantees and their records”.\textsuperscript{169} With its point of view established, the majority gave short shrift to the argument that official reliance on the grantees' records should tip the balance in favour of disclosure. Thus, the court concluded, “without first establishing that the agency has created or obtained the document, reliance or use is similarly irrelevant”.\textsuperscript{170}

Justices Brennan and Marshall had little patience for the majority’s deference to the autonomy of private grantees, where public understanding was at stake.\textsuperscript{171}
Forsham arguably did not require the court to bite the bullet – to choose between the autonomy and accountability of third party decision-makers. Shortly following Forsham, Public Citizen Health Research Group vs. Department Health, Education, and Welfare confirmed that, at least in the FOIA context, the judiciary was not shy in preferring third party autonomy to accountability.

Public Citizen sought documents from a Professional Service Review Organisation (PSRO), a non-profit designated by HEW to implement Medicare and Medicaid programmes. PSROs, provided for by statute, are “peer review” groups that determine, inter alia, whether services rendered by institutions are medically necessary. Congress provided that PSRO determinations “shall constitute the conclusive determination on these issues ... for purposes of payment...”

The district court, following Washington Research Project's suggestion that formal decisional authority could render a private entity an “agency”, concluded that the PSRO “has such authority and exercises it daily”. The Appellate majority did not bite. Following Forsham, the majority viewed the essential point to be the preservation of the unique qualities private actors bring to public service:

It is preferable and appropriate that organisations of professionals undertake review of members of their profession rather than for government to assume that role ... PSRO physicians ... must be active hospital staff members. The purpose here is to assure that only doctors knowledgeable in the provision and practice of hospital care will review such care.

As did the Forsham majority, the Public Citizen majority pointed to congressional intent to protect third party autonomy:

PSROs should be independent medical organisations operated by practicing physicians in the private sector, and not government agencies run by government employees ... A holding that the [PSRO], an organisation of private physicians, constitutes a government agency would be inconsistent with the congressional purpose.

True, the majority conceded, the opinions of the private experts were “conclusive”. Nonetheless,

By rendering such opinions they do not and should not become part of a government organisation ... A moment’s reflection will demonstrate that any other arrangement would be impractical: if the department undertook to review each of the hundreds of thousands of medical opinions submitted the result would be the creation of an unworkable bureaucratic monster.

In 1998, the tension between accountability and autonomy burst at the seams. Following industry complaints that EPA would not provide the grantee...
maintained data underlying proposed clean air rules, Congress amended FOIA (the Shelby Amendment) to substantially override Forsham.\textsuperscript{179} The Shelby Amendment quickly became a cause celebre within the non-profit community. Likely fuelled by the internet and email, 10 000 comments were filed in response to the Office of Management and Budget's 1999 proposal to implement the amendment.\textsuperscript{180} The comments and related proposals to revise or repeal the Shelby Amendment illustrate the interesting politics of third party government. Regulated industries urged openness in government, while non-profits complained that the application of FOIA to them would be chilling to their activities and impair the public's ability to obtain valued research.\textsuperscript{181}

With the debate over the Shelby Amendment, the wheel that began to spin at mid-century has turned full cycle. Prior to mid-century, a portion of the non-profit establishment opposed federal funding on the grounds that the private institutions would be “tainted” by public funds.\textsuperscript{182} As Don Price recorded at the time, these concerns were dissolved by federal dollars. “[T]he adamant arguments of many scientific leaders of the 1930s against federal support of science now seem[ed]... ancient and irrelevant. ... [N]o major university today could carry on its research programme without federal money.”\textsuperscript{183}

5.3. Government flexibility vs. government accountability: third party enforcement of the law of third party government

The growth of third party government has been accompanied by a sea of change in the law of standing, including the standing of contractors to challenge the government contract process, and the standing of other third party beneficiaries of government entitlements or largesse to challenge the integrity of the process by which these dispensations are awarded. The grant of litigation rights to third parties underscores another tension in the process of third party government – the balance between the flexibility ostensibly inherent in the use of third parties and the rights of third parties to due process.

In its unanimous decision in Perkins vs. Lukens Steel Co.,\textsuperscript{184} the Court rejected the iron and steel industry's right to challenge wage determinations imposed on it as government contractor(s) under the Public Contracts Act of 1936. Justice Black explained:

\textit{Like private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies ... Courts have never reviewed or supervised the administration of such an executive responsibility. Judicial restraint of those who administer the government's purchasing would constitute a break with settled judicial practice and a departure into fields wisely and happily apportioned by the genius of our polity to the administration of another branch of government.}\textsuperscript{185}
If Forsham stands as a high-water mark of the court’s determination that grantee autonomy is the *sine qua non* of the grantee/government relationship, Perkins stands as the high-water mark of the court’s determination that Executive branch flexibility is the *sine qua non* of the government/contractor relationship.\(^{186}\) However, foreshadowing that which was to come, Justice Black declared – without explanation – that the act “does not represent an exercise by Congress of regulatory power over private business or employment”.\(^{187}\)

In Scanwell Laboratories, Inc. *vs.* Shaffer\(^{188}\), the Court of Appeals determined that disappointed bidders had standing, even though there is no right to a government contract. Moreover, courts have found that third parties with adequate interest in a governmental process have standing to assert the integrity of that process. Standing does not require that the plaintiffs be guaranteed winners in the process.

In West Virginia Association of Community Health Centres, Inc. *vs.* Heckler\(^{189}\), a health centre association challenged an HHS formula for awarding grants. HHS argued that the plaintiff lacked standing because, even if West Virginia’s allocation were increased, there was no guarantee that the plaintiff would be funded. The court reviewed the Supreme Court’s decisions in *Village of Arlington Heights vs. Metropolitan Housing Development Corporation*,\(^{190}\) and Regents of the University of California *vs.* Bakke.\(^{191}\) In the former case, the Supreme Court found that a developer had standing to challenge a rezoning even where there was no guarantee that the project would be built. In Bakke, a medical school applicant was held to have standing to challenge an affirmative action plan even in the absence of proof that he would have otherwise (i.e. in the absence of the plan) been admitted. Noting further holdings that community health centres have standing to challenge allegedly misspent funds on grounds that they might – but would not necessarily – benefit from recovery, the court summarised: “Under this line of cases, once appellants demonstrated that they would qualify to receive these funds, they need not shoulder the additional burden of demonstrating that they are certain to receive funding.”\(^{192}\)

Whether or not the frontiers of third party standing will be pushed back remains to be seen. Questions include the ability of contract beneficiaries other than contractors to challenge procurement decisions,\(^{193}\) particularly those that allegedly violate the basic policies stated in OMB/OFPP circulars – which the Executive branch strives mightily to render non-reviewable.\(^{194}\) Historically, federal worker representatives vainly sought standing to challenge decisions to contract out their work on grounds of non-compliance with these circulars.\(^{195}\) However, the Sixth Circuit has provided an analysis under which such suits are permitted.\(^{196}\)
In the context of the developments discussed here, the majority opinion by Justice Scalia in *Lujan vs. Defenders of Wildlife* – a keystone decision on standing and environmental law in its own right – emerges as a bookend to the Perkins decision by Justice Black. In denying standing to plaintiffs seeking to enforce the Endangered Species Act, Justice Scalia found that, in the absence of plaintiffs’ ability to demonstrate injury to their own interests, Congress could not provide standing for “procedural injury” under a “citizens suit” provision. “Vindicating the public interest (including the public interest in government observance of the Constitution and laws)”, he declared, “is the function of Congress and the Chief Executive” – and not private parties. Thus, the court reaffirmed the existence of a “public interest”, and its location in “Congress and the Chief Executive”. At the same time, however, Justice Scalia reaffirmed the constitutionality of third party law enforcement through “bounty hunter” statutes, such as the Federal False Claims Act. In these cases, he explained, “Congress has created a concrete private interest in the outcome of a suit against a private party for the government’s benefit, by providing a cash bounty to the victorious plaintiff.” In short, in affirming the distinction between “public” and “private” interest, the court affirmed the legitimacy of an historical means by which “public” enforcement powers have been indirectly conferred on “private” interests.

### 5.4. Procurement management and stakeholder politics: the suboptimization of third party accountability

In the absence of congressional/Executive branch oversight of the generally funded workforce as a whole, the regulation of the government by third parties falls, by default, to the promise of better procurement management or to stakeholder efforts to vindicate their interests (or rights) through *ad hoc* actions (such as those that led to the hardware ban and the Shelby Amendment). Both approaches have much to commend them, but they also have plain limitations.

In the best of times, promises of better procurement management through the use of new contracting techniques and/or competitive bidding – have not been panaceas. The promise of “performance” or “incentive” contracting, for example, may be of least value where it is most needed – i.e. when, as with better weapons or better education, the products or services are not easy to define or attain, and the definition of performance may itself change in mid-contract with shifts in political or bureaucratic winds. Similarly, the promise of accountability through the required evaluation of past performance has proved illusory where past performance – even in relatively cut and dried circumstances – is either not readily measurable or is just not measured. The promise of accountability through competition poses a further set of “trade-offs”.

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197 Lujan vs. Defenders of Wildlife
198 *Perkins decision by Justice Black*
199 Constitution and laws
200 panaceas
201 mid-contract with shifts in political or bureaucratic winds
202 not readily measurable or is just not measured
203 trade-offs
Most importantly, the continued and increased reliance on third parties comes at the expense of official oversight capability. The Bell Report shows that as early as 1962 there was reason for concern about the “cumulative” effect of contracting – the prospect that higher pay and more interesting work would drive the best officials into the contractor workforce. This awareness was accompanied by an acute concern for the need to assure an official workforce capable of overseeing the civil service. Today, the “cumulative” effect is exacerbated by the downsizing of the official workforce and the concurrent view that a career in “public service” lacks glamour.

In sum, agency stakeholders (or interest groups) may play a valuable role in oversight of third party government. Advances in information technology – which permit public access to governmental activities on an immediate and widespread basis – may provide for quantum leaps in stakeholder oversight capability.\textsuperscript{204} At the same time, as has been well recognised and illustrated by the above cases, stakeholder perspectives necessarily reflect their own interests and may not represent the requisite breadth of the public interest.\textsuperscript{205}

6. The Supreme Court as default interlocutor of the new rules of public service

In the absence of coherent Executive and congressional oversight the court, necessarily on a case-by-case basis, plays a default role in determining the rules by which third party government will operate and the extent to which non-federal entities vested with public purposes will be constrained by the rules that constrain officials.

6.1. The court on “exclusively public” functions

While the Executive, as discussed above, views the concept of “inherently governmental functions” as “axiomatic”, the Supreme Court has not provided the concept with abundant content. In Flagg Brothers, Inc. vs. Brook, the court surveyed tradition and precedent to determine whether “binding conflict resolution” was an “exclusive public function”.\textsuperscript{206} The case involved a claim that a warehouseman’s sale of goods entrusted for storage, pursuant to New York State’s adoption of the Uniform Commercial Code, constituted state action. The majority reported back that only two activities – elections and the activities of company towns – could be termed “exclusive public functions”.\textsuperscript{207} The majority noted that “the court has never considered the private exercise of police functions.”\textsuperscript{208}
In dissent, Justices Marshall, Stevens, and White, proclaimed that New York had “authorised the warehouseman to perform what is clearly a state function”.\textsuperscript{209} The “overwhelming historical evidence” is that:

Whether termed “traditional”, “exclusive”, or “significant”, the state power to order binding, non-consensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the state’s delegation of that power to a private party is, accordingly, subject to due process scrutiny.\textsuperscript{210}

The Court in Flagg Brothers wrote in terms of “exclusive public functions”, and not “inherently governmental functions”. The potential confusion between “public” and “governmental”, however, does not appear to impair the purport of the majority’s finding. The emphasis in Flagg Brothers means tough sledding for anyone who hopes to look to constitutional and/or historic traditions to find an easy dividing line between governmental and non-governmental functions.\textsuperscript{211}

\textbf{6.2. The court as arbiter of the public status of third parties: the constitutional roots of the tension between third party autonomy and accountability}

Lebron vs. National Railroad Passenger Corporation,\textsuperscript{212} emerges as a bookend to Flagg Brothers. If Flagg Brothers shows that the Supreme Court is ill inclined to find many “exclusively public” functions, Lebron shows that the court is willing to override even express congressional declaration that an entity is not a governmental actor.

Lebron dealt with Amtrak’s refusal to permit an artist to post his work in a station. Amtrak is a “government corporation” pursuant to the Government Corporation Control Act.\textsuperscript{213} In creating Amtrak, Congress took pains to free it from constraints otherwise applicable to agencies (e.g. federal procurement rules). Most directly, Congress declared that Amtrak “will not be an agency or establishment of the United States Government”.\textsuperscript{214}

Justice Scalia, for the majority in Lebron, explained that the Amtrak statute “is assuredly dispositive of Amtrak’s status as a government entity for purposes of matters that are within Congress’ control”,\textsuperscript{215} for example, the applicability of the Administrative Procedure Act, the Federal Advisory Committee Act, and federal procurement laws. But, he explained, “it is not for Congress to make the final determination of Amtrak’s status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions.”\textsuperscript{216}

On review of the circumstances surrounding Amtrak’s creation and operations, including the public purposes mandated for Amtrak in the statute and the appointment of a majority of the board members by the President, the
majority held that Amtrak “is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the government by the Constitution”.217

Lebron evinces the readiness of the court to serve as active arbiter of “public” status (for purposes of the Constitution). Congress cannot immunise an entity from public status by sheer declaration. Private entities assigned public purposes cannot “evade the most solemn obligations imposed by the Constitution by simply resorting to the corporate form”.218

At the same time, Lebron shows that the tension between the autonomy and accountability of third parties is constitutionally rooted. It may be desirable to render entities like Amtrak free from the constraints applied to officials, because such freedom will permit them to more efficiently pursue the public purpose. But to the extent that the purpose remains a public purpose, the Constitution may require that the entity be constrained as if still in official hands.

6.3. The court as arbiter of third party right to public employee status: the selective equation of the dual regulatory systems

In Lebron, the court considered the imposition of the constraints of officialdom on an ostensibly non-governmental body. In further recent cases the court has considered the extent to which third parties are entitled to claim the privileges and immunities that befall officials.

In Boyle vs. United Technologies Corp.,219 the court considered whether a defence contractor can be held liable under state tort law for defective design that led to a fatal helicopter crash. Justice Scalia, for the majority, provided that though the case involved an independent contractor “rather than an official performing his duty as a federal employee, ... there is obviously implicated the same interest in getting the government’s work done”.220 Justice Scalia found that federal contracting is a “uniquely federal” interest, “[t]he imposition of liability on government contractors will directly affect the terms of government contracts: either the contractor will decline to manufacture the design specified by the government; or it will raise its price. Either way, the interests of the United States will be directly affected.”221

Justice Scalia explained that the finding of a unique federal interest was not sufficient to pre-empt state law. However, there was a conflict between the duty of care arguably imposed by state law and the contractor’s duty to follow government specifications. The majority, therefore, held that liability for design defects in military equipment will not be imposed pursuant to state law where the United States approved reasonably precise specifications, where the equipment conformed to the specifications, and where the supplier warned the government about defects not known to the United States.222 The
majority couched the holding in terms of the government’s “discretionary function” exemption from tort suit (under the Federal Tort Claims Act); “[t]he design ultimately selected may well reflect a significant policy judgment by government officials whether or not the contractor rather than those officials developed the design.” 223

In dissent, Justices Brennan, Marshall, Blackmun, and Stevens took issue with the majority’s equation between contractors and officials. 224 The invocation of “unique federal interest” to extend “discretionary function” immunity, the dissenters stated, had hitherto only applied to “officials.” 225

In Boyle, it appears that the proximity of contractors to the protected official decisional process provides protection for the contractor as well.

In Board of County Commissioners vs. Umbehr, 226 the court considered whether an independent contractor is entitled to First Amendment protections that would apply to an official employee. 227 Umbehr hauled trash for several cities within Waubansee County, Kansas. The District Court assumed, for summary judgment purposes, that Umbehr’s contract was terminated because of his speech, and that he sustained consequential damages. 228 The District Court, however, found that the commissioners were free to consider Umbehr’s speech in their contracting decision. 229 The Court of Appeals reversed, finding that an independent contractor is entitled to the same qualified First Amendment rights to which an official is entitled under Pickering vs. Board of Education. 230

In their arguments, the parties “each invited the [Supreme] Court to differentiate between independent contractors and employees.” 231 In the majority’s view, there was an essential similarity, at least in relation to First Amendment protection: “[i]ndependent government contractors are similar in most relevant respects to government employees, although both the speaker’s and government’s interests are typically, though not always, somewhat less strong in the independent contractor case.” 232 The majority took notice that “independent contractors are often employed to perform ‘tasks that would ... otherwise be performed by salaried government employees’”. 233 The majority declared that, given the essential similarity of independent contractors and employees, it would be improper to determine the application of First Amendment protections “on the basis of such formal distinctions [as employee and contractor status.] which can be manipulated largely at the will of the government agencies concerned”. 234 Thus, the majority’s grant of official status for First Amendment purposes looked to the functional equation between contractors and employees, and found substantial equivalence.

In a colourful dissent, Justice Scalia challenged the equivalency found by the majority on historical and functional grounds. As a matter of historical
fact, Justice Scalia correctly noted, contractors and employees have historically been governed by two differing sets of rules. Moreover, contracting has traditionally served a valued patronage function:

There can be no dispute that, like rewarding one’s allies, the correlative of refusing to reward one’s opponents – and at bottom both of today’s cases involve exactly that – is an American political tradition as old as the Republic ... also in the area of government contracts ... If that long and unbroken tradition of our people does not decide these cases, then what else does?235 In response to the majority’s equation of officials and contractors, Scalia proclaimed an essential difference between the status and incentives of contractors and employees:

[The] public employee is always an individual, and a public employee below the highest level ... is virtually always an individual who is not rich; the termination or denial of a public job is the termination or denial of a livelihood. A public contractor, on the other hand, is usually a corporation; and the contract it loses is rarely its entire business.236

In short, the Umbehr majority: i) equated the work performed by contractors and employees; ii) rejected the notion that formal legal status (as contractor or employee) should be the basis for distinction, because this status is subject to official manipulation, and; iii) concluded that, at least in regard to the First Amendment, contractors are entitled to the benefits of the same test as officials.

The dissent: i) relied on historical and empirical findings to distinguish the character of contractor and official employment; ii) relied on the historic existence of dual regulation of contractors and employees as basis for denying the equation urged by the majority, and; iii) concluded that the historic tradition of dual regulation should not be disturbed.237

Richardson vs. McKnight,238 provided the next go round between Justice Scalia and the majority. Richardson involved a prisoner’s constitutional tort claim for injury allegedly inflicted by two prison guards. The prison guards were employees of a privatised corporate prison. The question was whether the guards were entitled to the qualified immunity from suit which was available to officials, under Harlow vs. Fitzgerald.239

The equation between contractor work and employee work, which had been dispositive for the majority in Umbehr, was rejected in Richardson. The guards in Richardson argued that they performed the same work as official prison guards, and “must require immunity to the same degree”.240 Rather than embrace this equivalency, the majority looked to the “special policy concerns involved in suing government officials” to determine if the immunity were applicable to contractors.241

Justice Breyer found that immunity was required to “protect[] the public from unwarranted timidity on the part of public officials”.242 Judge Hand,
Justice Breyer noted approvingly, explained that threatened liability would “dampen the ardour of all but the most resolute, or the most irresponsible” officials.\(^{243}\)

In Umbehr, the majority had little patience for Justice Scalia’s effort at distinction between the qualities of officials and contractors. In Richardson, the distinction was dispositive.

Justice Breyer explained:

> Petitioners’ [prison guards] ... overlook certain important differences that, from an immunity perspective, are critical. First, the most important special government immunity-producing concern – unwarranted timidity – is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison. Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement.\(^{244}\)

In other words, marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or “non-arduous” employee job performance. ... To this extent, the employees before us resemble those of other private firms and differ from [other] government employees.\(^{244}\)

Private employees – at least private prison guards – are, as a matter of law, more intrepid than public employees. Significantly, Justice Breyer took pains to point out that the difference between the guards was not one of their individual natures, but one of the institutions in which humans work:

> This is not to say that government employees, in their efforts to act within constitutional limits, will always, or often, sacrifice the otherwise effective performance of their duties. Rather, it is to say that government employees typically act within a different system ... that system is often characterised by multi-department civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments to reward, or punish, individual employees.\(^{245}\)

Justice Scalia’s dissent attacked the majority’s reliance on “status” instead of “function” to determine immunity. The functions of public and private prison guards, Justice Scalia noted, are essentially identical.\(^{246}\)

Justice Scalia took issue with the empirical logic in the majority’s institutional analysis. “[S]hort of mismanagement so severe as to provoke a prison riot, price (not discipline)\(^{247}\), will be the basis on which political agencies award prison contracts. On the majority’s observation that liberation from civil service constraints provides rewards (e.g. higher pay) as well as risks, Justice Scalia noted that a justification for out-sourcing is the claim that it will avoid “civil service salary and tenure encrustations”.\(^{248}\)
6.4. The constitutionality of third party enforcement: the Federal False Claims Act

While the tradition of third party government traced here dates to the early 20th century, there is a much older tradition of the use of private attorneys general or bounty hunters to vindicate public rights, acting in the name of the king or the sovereign. Since its Civil War inception, the Federal False Claims Act (the “qui tam” law)\(^{249}\) has been directed primarily, if not exclusively, at fraudulent acts engaged in by government contractors, particularly profiteering defence contractors.\(^{250}\) Not surprisingly, therefore, contractors have been prominent in efforts to invalidate the False Claims Act (or, at least, the Private Relator provision) on one or more constitutional grounds (particularly standing and separation of powers).\(^{251}\)

In November 1999, the Supreme Court heard the question of whether or not a state is subject to suit by a citizen under the False Claims Act (which permits citizens to bring suit in the name of the United States). Shortly before arguments, the court called for briefs on the question of the constitutionality of the law, raising the possibility that the court was, indeed, considering a fundamental review of the lawfulness of third party law enforcement.

In May 2000, the court, through Justice Scalia, solidly affirmed the constitutionality of the law.\(^{252}\) In theory, the decision might have shed light on the relation between the court’s view on the imperatives of the separation of powers and non-delegation doctrines, on the one hand, with the practical reality that third party enforcement is essential when the government workforce is downsized and the third party workforce is increased. In fact, Justice Scalia’s opinion rested on, first, a recitation of over 500 years of English and American tradition, and, second, the explanation that whistleblowers (relators under the act) have standing as assignees of the government’s claims.\(^{253}\)

Justice Scalia’s affirmation of the constitutionality of the law, consistent with the earlier opinions discussed above, has the substantial virtue of preferring historical and practical experience to abstract logical analysis. In doing so, however, Justice Scalia, and the court, left for another day an explication of the permissible bounds of third party performance of third party law enforcement functions.

6.5. Case or controversy without the benefit of a full deck

Given the obscurity of third party government, the Supreme Court’s decision-making has not benefited from the context needed to test the logic of its necessarily case-specific analyses. Nor, perhaps as a corollary, has the court given contemporary meaning to common law and constitutional
concepts that might order “public/private” relations when, as now, the “inherently governmental” on/off switch is less than completely satisfactory.

6.5.1. **The court is due the full context of third party government to test its decisions**

The court’s construction and use of the equation between official and third party work bears reflection in the larger context. In Umbehr, for example, the decision as to whether third parties should benefit from the First Amendment protections given officials turned on assessment of the functional equivalence of their work. The majority, finding contractors and employees to be functionally fungible, concluded that the same basic rule should apply to both. However, as discussed above, it may be broadly presumed that, when measured by work assignment, there is hardly any official work that is not performed by contractors. If the test of functional equivalency is employed, what is its stopping point? Why should there be two sets of rules governing contractors and employees in the first instance regarding, for example, pay, openness, and ethics?

Second, the Court’s presumption regarding the distinctive qualities of officials and third parties bears reflection. In Richardson, the majority relies on a presumed distinction between the character traits of inhabitants of official bureaucracies and inhabitants of the private sector. In short, as the majority suggests, and as Justice Scalia emphasised in his dissent in Umbehr, decisions about the rules to govern third parties vis-à-vis officials embody notions about their relatively distinct qualities. As the Richardson majority takes pains to note, perceived distinctions may themselves be a function of organisational, and not individual nature. Where, as a matter of judicial notice, do such presumptions come from, and how are they subject to change?

Third, the empirical balance, or tension, between third party autonomy and accountability must be attended to. If third parties were merely “temporary and intermittent” adjuncts to the decisional process, whose work could be predictably directed and evaluated by officials, then constraints applied to officials need not apply to third parties. However, as discussed above, the growth of third party government is characterised by an increasing divergence between the de jure commitment to the “axiom” that only officials will perform “inherently governmental functions” (by whatever definition), and the reality that resources devoted to this commitment render it doubtful.

Finally, the presumption of regularity that underlies the dual regulatory system – i.e. the presumption that the basic work of government is likely to be under the de facto, as well as the de jure control of “officials” – may be up for grabs.
Indeed, the decisions reviewed above indicate recognition that the presumption of regularity should be tested by reality. Thus, in Lebron, the majority looked beyond the congressional declaration that Amtrak was not an “agency or instrumentality” and considered the substance of Amtrak’s public role.\textsuperscript{258} Thus, in Umbehr, the majority noted that official determinations of “contractor” or “employee” status could not be relied on, because they were too readily subject to manipulation.\textsuperscript{259}

These decisions indicate an appreciation of the contemporary contingency (and manipulability) of the formal distinction between governmental and non-governmental status. However, they do not address the cumulative effect of differences between the regulatory system governing officials and that governing third parties. As the Bell Report explained in 1962, there was then basis for concern that the talent needed to oversee third parties would flow to third parties and be lost to the government. Today, the incentives identified in 1962 (\textit{e.g.} pay differentials and more interesting work) remain, and there is no longer a high status value assigned to a career in “public service”.

6.5.2. Old tools of accountability revisited

The empirical and legal fictions of government regularity have likely inhibited the deployment of traditional legal principles to order the performance of public purpose by private actors. Our legal tradition has long recognised that private actors may perform public purposes. This, for example, is the common law premise of modern public utility regulation.\textsuperscript{260} If, however, it is assumed that third parties do not exist and/or do not have responsibility for public purposes, there is little reason to invoke the tradition. It is suggested that continued official and scholarly proclamation of the empirical and legal fictions discussed above – \textit{i.e.} that officials both should, and in fact do perform the inherent work of government – have inhibited the deployment of such traditional concepts that might order the performance of public purposes by private entities. These concepts include the (non)delegation doctrine, the notion of government instrumentality, the concept of “business affected with a public interest”, and the common law of contract.

\textit{A priori}, the (non) delegation doctrine, would seem to lend itself to application to third party government. Analytically, there appear to be three strands of the doctrine. As a manifestation of the separation of powers principle, the application of the doctrine to third parties should be a derivative of its application to their official clients. As a manifestation of the principle that the sovereign cannot alienate authority outside itself,\textsuperscript{261} delegations of authority to private parties have been upheld – at least in the absence of a presumption of regularity governing official control.\textsuperscript{262} However, when viewed...
as a due process doctrine, the attenuation of accountability involved in third party government may render third parties subject to distinct treatment.263

From opposing directions, the concepts of “government instrumentality” and “business affected with a public interest” provide for the attribution of sovereign status and/or the constraints imposed on the sovereign to non-governmental entities.

The concept of “government instrumentality” is used in many statutes, and has been the subject of numerous judicial decisions. The concept has been used: i) to define the identity of those to whom statutes apply;264 ii) to examine claims to “intergovernmental immunity” i.e. whether a state or local government can regulate or tax an entity that is not clearly an official body;265 iii) to analyse whether allegedly anti-competitive behaviour is immune from the antitrust laws because it has been, to the requisite degree, directed by the state;266 iv) to assess whether an entity is sufficiently governmental as to implicate constitutional prohibitions/ protections (such as the First Amendment),267 and; v) to determine the bounds of sovereignty in international law and treaties.268 An entity can be a government instrumentality in whole or in part, for some purposes and not for others.

Historically, government contractors have generally not been deemed government instrumentalities.269 However, as Lebron indicates, where fact patterns merit it, the Supreme Court may be prepared to find instrumentality status.

The common law concept of “business affected with a public interest” treats entities that are, in the first instance, private. In establishing the common law based constitutional predicate for modern public utility regulation in Munn vs. Illinois,270 the Supreme Court expressly dealt with and rejected the argument that the concept can only apply to a business premised on a public grant or benefit (e.g. a grant of monopoly status from the king).

Finally, the common law of contract may offer a means by which the public, through the courts, can keep an eye on the de facto location of responsibility for public purpose, and hold it to account. Thus, in Oil, Chemical and Atomic Workers International Union vs. Richardson,271 the Court of Appeals suggested that a third party claimant who lack standing to make a claim under a statute may nonetheless have a claim as a third-party beneficiary of a contract that implements the statute. Similarly, the law of contract may provide the language needed to translate between public and private status, while maintaining the distinction between the two. Thus, as Justice Scalia has begun to elaborate in regard to the False Claims Act, private parties do not have the direct right to enforce a public interest (a power that remains with Congress and the President), but may attain the effective right to do so when assigned the proper “interest” by Congress. Questions of the
translating between public authority to enforce the public interest and the empowerment of private interest sufficient to enforce the public interest remain to be explored.\textsuperscript{272}

**Conclusion: the culture of contracting out in the larger historical and comparative context of diffused sovereignty**

The legal rules that define third party government lag well behind real world developments, and float atop deeper cultural premises and expectations that drive the “blurring of lines between public and private”. The premises include:

- The notion that institutions – official agencies, non-profits, and profit-making entities – have inherently differing qualities, which, in turn, will be predictably embodied in those who work in them;\textsuperscript{273}

- the notion that – by dint of modern management and public policy understanding – these institutions can be arranged in a way that permits the growing pursuit of public purposes without the growth of official bureaucracies; and,

- by dint of the operation of these notions over the course of a century, the creation of shared understanding among those whose career paths run between and among the institutions about their presumed qualities and emerging roles.

The ability of courts and legislatures (and legal scholars) to bring legal tradition to bear on developments has been doubly impaired. First, as recounted above, there has been determined bipartisan political, and consequential scholarly, neglect of the big picture degree to which third parties have been relied on to perform, \textit{de facto}, the basic work of government.\textsuperscript{274} Second, and as a corollary, this neglect has been aided and masked by the continued insistence that the basic work of government is, in fact and in law, performed by officials.

The resulting limitation on official and citizen understanding has limited the application of traditional legal concepts that might order developments and render third party government accountable. Most notably, the common law, as embodied in 20th century public utility regulation and antitrust law, provides rich basis for doing so.

Finally, the validity of the premises and questions identified by examination of contracting out might usefully be explored in historical and comparative contexts where public purposes and private actors are intertwined. In what is now a literally global context, the 20th century
American deployment of the contract to perform public purposes emerges as part of a spectrum that includes:

- The regulation of public (i.e. privately owned) utilities, comprising:
  - the 19th and 20th century tradition of expert “regulatory” agencies;
  - the late 20th century deregulation of such utilities, with the simultaneous government directed restructuring of the market to ensure service competitiveness and reliability;\(^{275}\)
  - the development of controls for the Internet, the public utility of the 21st century, in the absence of confidence in government controls;\(^ {276}\)
- the privatisation of dispute resolution, through judicial and administrative reliance on private actors as facilitators and procedures that seek, through consensus among disputants, solutions that might not be directly achievable by official action;\(^ {277}\)
- the historical de facto, and increasingly broad de jure, governmental reliance on standards set by (privately funded) private or quasi-public standard setting organisations (such as the American Law Institute and the American National Standards Institute);\(^ {278}\) and,
- the global development of transboundary regulation by combines of public and private institutions.\(^ {279}\)

In sum, the 20th century story of American Government by contract shows that the law of diffused sovereignty owes more to the force of happenstance and tacit cultural understandings than to informed and reflective deliberation. At the same time, the story indicates that the diffusion of sovereignty has not itself been a random set of developments, but has been driven by human designs. With a better understanding of this design and its consequences to date, traditional legal ordering concepts may yet play a deliberate and reflective role in future developments.

**Notes**

3. See Paul C. Light, *The True Size of Government* (1999) (“As of 1996, this ‘shadow of government’, ... consisted of 12.7 million full-time equivalent jobs, including 5.6 million generated under federal contracts, 2.4 million created under federal grants, and 4.6 million encumbered under mandates to state and local government.”).
4. The growth of military contracting was paralleled by the explosion of biomedical research funding to universities and other research institutions. See Final Report of the Advisory Committee on Human Radiation Experiments, Ch. 1 (1996).
5. The classic study of Cold War weapons contracting explains:

[T]he preference for private enterprise conduct of US weapons development and production work ... is essentially an unwritten law, and, indeed, statutory references seem to contradict it, for the Secretary of the Army is directed to “have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis”. However, in practice, private enterprise has been favoured to meet the expanded military demands of the past two decades, and the role of government arsenals and shipyard has declined both relatively and absolutely.


8. Id. at 112.


11. See Id.


13. See Guttman and Willner, supra note 7, at 67-72.


16. Vannevar Bush, who had been second command at MIT, recalled that “Conant and I had become acquainted through a couple of arguments while he was President of Harvard and I was once representing Tufts and once MIT.” Bush, * supra* note 15, at 32.

17. McDougall, * supra* note 6, at 79.

18. Vannevar Bush recalled, “I was as anxious to get out of government as were nearly all of those who manned the war laboratories.” Bush, * supra* note 15, at 64.

19. * Id.*

20. * Id.*


25. Professor Seidman summarises: The distinct characteristics which made Rand “different” were: 1) its extremely broad terms of reference; 2) a high degree of autonomy in the choice of research projects and in setting deadlines; 3) acceptance as part of the Air Force team; 4) independence of the established organisational hierarchy and military chain of command; 5) access to top decision-makers; and 6) a research “atmosphere” conducive to original and nonconformist thinking. * Id.* at 261.

26. * Systems Development and Management: Hearings Before a Subcommittee of the House Committee on Government Operations, 87th Congress 917, 940 (1962) (statement of F.R. Collbohm, President, Rand Corp.). The selection of “industrial”, “academic and scientific”, and “public interest” trustees was provided for by the Rand bylaws. The Ford Foundation also helped in the formation of the non-profit
Institute for Defense Analysis, from an office inside the government. Guttman and Willner, supra note 7, at 319 n.28.

27. From the vantage of technical originality, Rand itself acknowledged that “systems analysis” owed its heritage to earlier corporate enterprise. As Rand’s David Novick explained in 1966, “probably the greatest innovations in systems analysis were initiated in the 1920s in the Bell Laboratories. The Bell Labs’ method of analysis then and today bears a close resemblance to what we called weapons systems analysis in the Defense Department or in other organisations such as Rand.” David Novick, “Origin and History of Programme Budgeting”, Rand Paper P-3427 (Oct. 1966), reprinted as The Origin and History of Programme Budgeting, in Programme Budgeting: Programme Analysis and the Federal Budget, at xxiii (David Novick ed., 1967).


30. The Rickover mystique, if such things could be quantified, was likely at least the equal of that of Rand. Former President Jimmy Carter is the most prominent of many successful alumna of the Rickover team.

31. Harvey M. Sapolsky, The Polaris System Development: Bureaucratic and Programmatic Success in Government, 94-130 (1972) (discussing PERT (Programme Evaluation Review Technique) and managerial effectiveness). A turn of the century management expert gave his name to the Gantt chart, a simple graph on which the sequence of tasks is ordered. The chart was used in military arsenals during World War I. But the Polaris project involved thousands of components, whose relationships could not be graphed on a simple chart. The Navy commissioned Booz, Allen and Hamilton to update the Gantt chart, and the result was PERT which replaced a graph with a computerised network of data. See id. at 114-15. In fact, MIT researcher Harvey Sapolsky found, PERT was largely useless to the Navy in practice, but of immense public relations value in obtaining continued funding. See id. at 129. By virtue of its association with the Polaris project, PERT took off as a management fad; consultants installed PERT in schools, city governments, and even barber shops.


33. Id.

34. McDougall, supra note 6, at 165.

35. In 1947, the Atomic Energy Commission was created to house the nuclear weapons complexes. In 1974, the Commission was separated into the Nuclear Regulatory Commission, which regulates nuclear power and materials, and the Energy Research and Development Administration. The Department of Energy was created in 1977.

37. Id.

38. The staff examined the files of 125 contracts administered by the Headquarters procurement office. The contracts supported virtually all components of the Headquarters. Following examination of the files, the staff requested the contractor work product for a number of contracts and met with procurement and programme officials.


40. Id. at 66. The department’s procurement officials, based on the representation of programme officers, initially denied that contractors were being used to prepare congressional testimony – even though contractor invoices showed that the department was being billed for such work. The denials dissolved when a contractor placed a “help wanted” ad in the Sunday Washington Post stating: Systematic Management Services, Inc. (SMS), a rapidly expanding national company, has two positions ... immediately open in its Washington, DC Office in L’Enfant Plaza [the locale of DOE Headquarters] for legislative analysts. Duties for these positions include assisting the Department of Energy with legislative analysis, document coordination, testimony preparation and review, floor statement development and preparation of position papers.

41. DOE testified that ceilings were imposed without regard to the relative costs of contractor and official employees. Assistant Secretary of Energy Donna Fitzpatrick testified that a recent department study found that contract employees would cost the department in the range of 20-25% more than civil servants (on average and including benefits). See id. at 11.

42. Id. at 72. For example, the statement of work under a contract to support the Assistant Secretary of Energy for Defense Programs (ASDP) – the office with responsibility for the United States nuclear weapons complex – stated, in part: C. The contractor shall provide all the technical and administrative personnel, equipment, materials, supplies, facilities, and travel necessary to assist ASDP task manager’s in the following areas and as delineated in specific task orders to be issued:

1. Strategic Planning and Analyses
   Provide recommendations for structure of and methods for conducting the process of issue identification, study, review, disposition, tracking, and coordination. Participate in task force meetings, as appropriate, develop technical materials and papers, identify and recommend analytical techniques for use in issue analysis. Provide recommendations for briefing topics, observations on draft issue papers and advice on special problems. Develop forecasts, trend analyses and assessments of potential impact of such considerations as the extension of state and local regulations and ordinances to federal activities, implications of the federal debt, cycles in defence spending, international trade and national security.... Develop, propose and maintain schedules of task force and study activities.

2. Programme Planning and Analyses
   Conduct analyses of the planning process and provide recommendations for improvement. Analyse programme analysis reports and provide observations and recommendations. Develop and propose technical sections for final reports and issue papers.
3. Policy Assessment and Analyses
Conduct analyses and/or studies and provide recommendations as to response, actions to be taken and/or impact on DP operations of policy issues such as technology transfer, patent review process and environment, safety and health. Provide recommendations on briefing topics and methods of presentation for and to senior DP management. Review and provide observations and recommendations on technical aspects of proposed/draft legislative issues and papers. Propose and maintain tracking systems for use in providing status on legislative activities.

4. Technical Assessment and Analyses
Assist in development and maintenance of DP’s environment, safety and health long-range plans... Consolidate data from Operations Offices and Headquarters for DP review in order to meet the requirements of the environment, safety, and health crosscut budget requirement. Conduct analyses of draft and final environment, safety, and health requirements and provide assessments as to impact on DP missions and recommendations. Assess DP environment, safety, and health line item projects and provide prioritisation recommendations.

5. Personnel Management Analyses and Management Support Services
Services include assisting in the preparation in drafting [of federal employee] position descriptions and performance standards for DOE review and approval; maintaining correspondence control; and preparation in draft form of technical documents and other written materials. Typically, such written materials will involve, but are not limited to, strategic planning and analysis reports; draft programme plans; ES&H long-range plans and reports; and technical, personnel, and managerial reports. The contractor will provide word processing services as required...

....

The work described herein illustrates the various types of work or general types of tasks anticipated to be performed under this contract.

Id. at 153-54.


46. See Guttman and Willner, supra note 7, at 13 and Part IV.

47. See Janine R. Wedel, Collision and Collusion: The Strange Case of Western Aid to Eastern Europe 1989-1998, Ch. 4 (1998) (chronicling the Agency for International Development’s (AID) de facto delegation of administration of Russian restructuring dollars to contractors).


51. See, e.g. Programming Budgeting for Police Departments, 76 Yale L.J. 822, 832 (1967) (predicting that programme budgeting and systems analysis would be more efficient in allocating scarce police resources). See also Thomas C. Schelling, “PPBS and Foreign Affairs”, Pub. Interest, Spring 1968, at 36 (admitting difficulty of applying PPBS to unwieldy quality of foreign affairs, but projecting its significant role in future); Planning-Programming- Budgeting: Hearings Before the Subcommittee on National Security and International Operations of the Senate Committee on Government Operations, 90th Congress 67, 76 (1967) (statement of Dr. Alain Enthoven, Assistant Secretary of Defence) (fielding criticism of PPBS’ overemphasis on cost, reiterating that Vietnam taught lesson that “cost is relevant for no other reason than that it affects popular support for the war effort”).

52. See Guttman and Willner, supra note 7, at Chs. IV-V. Rand itself went to work on problems of poverty and education (and even opened a Rand Institute in New York City to deal with urban problems). The Urban Institute was created on the Rand model to service the new Department of Housing and Urban Development. The Office of Education, under the guidance of former Carnegie Foundation head John Gardner, created a network of regional “educational research centres” to bring modern management techniques (such as computerised learning) to bear on education. Sidney Marland, President Nixon’s Commissioner of Education, explained that the Federal Office of Education (the department had yet to be created) would test “educational products” and products “stamped OE” would become staples throughout the nation’s local schools.

53. See Guttman and Willner, supra note 7, at Chs. III-IV. The reformers saw themselves as battling against “institutional obstacles to change” – entrenched bureaucracies, such as local school boards and teachers unions. With the aid of innovative contractors these obstacles could be surmounted, and the contractors could then deploy modern “systems” techniques to social problems, such as “performance contracting” to education, and “systems management” to urban housing and inner city transportation. To induce contractors to enter these “backward” areas of the economy, the reformers created “pilot projects” to
“aggregate markets” sufficiently attractive to the progressive contractors. Thus HUD’s “Operation Breakthrough” sought to aggregate housing markets throughout the country in order to attract companies like Boeing to the business of building modular housing for the poor.

In retrospect, the deployment of third parties in the 1960s is a precursor to current proposals to reform “entrenched” local governmental educational bureaucracies, through use of charter schools and vouchers. At the same time, both efforts had precedent in progressive application of management techniques to “public education”. See Raymond E. Callahan, Education and the Cult of Efficiency: A Study of the Social Forces That Have Shaped the Administration of the Public Schools Chs. 2-5 (1964).


55. See Daniel Yergin and Joseph Stanislaw, The Commanding Heights at 122-23 (1998) (summarising birth of privatisation in Britain with rise of Margaret Thatcher, stating that “it would turn out that Margaret Thatcher had established the new economic agenda around the world”).

56. See General Accounting Office, GAO/GGD-97-48, Privatisation: Lessons Learned by State and Local Governments, 22-23 (1997). The GAO found that “contracting out” was the means for “privatisation” in 78% of the cases surveyed, grants were employed in 8.4% of cases, and vouchers in 4%. See id. Remarkably, though not surprisingly, “asset sales” – the more conventionally assumed meaning for “privatisation” – represented just 0.17% of cases. See id.


60. In contrast to an unequivocal sale of assets, the “privatisation” of USEC is substantially less than meets the eye. USEC’s production facilities in Kentucky and Ohio are operated on lease from the United States; the power supply for these facilities is obtained under a contract in the United States’ name; and the United States remains liable for contracts assumed by USEC, including contracts to supply enriched uranium to utilities. See id. 49 USC § 2297h-6 (Supp. III 1997).

61. Section 1502(a) of the 1992 Energy Policy Act [42 USC § 2297d- 1 (1994) (repealed 1997)] provided that privatisation cannot proceed unless “the Corporation” determines that privatisation will, among other things:

1) result in a return to the United States at least equal to the net present value of the Corporation

... 3) not be inimical to the health and safety of the public or the common defence and security.

The USEC Privatisation Act provides for the following:

The Board of Directors ... shall transfer the interest of the United States in the United
States Enrichment Corporation to the private sector in a manner that provides for the long-term viability of the Corporation, provides for the continuation by the Corporation of the operation of the gaseous ... diffusion plants, provides for the protection of the public interest in maintaining a reliable and economical domestic source of uranium mining, enrichment and conversion services, and, to the extent not inconsistent with such purposes, secures the maximum proceeds to the United States.
§ 3103(a), 42 USC § 2297h-1(a) (Supp. III 1997).

62. As national security scholar Richard Falkenrath, one of many independent experts who raised questions about the transfer of national security responsibility, put it in 1996, “one should ask why the government would ever want to vest executive authority for implementing a foreign policy initiative as important as the HEU [highly-enriched uranium] deal in a privately owned company whose commercial interests run directly against the success of that initiative ...” Richard A. Falkenrath, “Viewpoint: The HEU Deal and the US Enrichment Corporation”, Nonproliferation Rev., Winter 1996, at 62, 65 (criticizing Clinton Administration’s implementation of HEU deal, citing failure to anticipate conflict of nationally security interests with commercial interests).


65. USEC privatisation had further notable characteristics. For example, the USEC Privatisation Act contained a broad bar against suits related to privatisation. See 42 USC § 2297h-7(a)(4) (Supp. III 1998) (precluding any claim “arising from any action taken by any agent or officer of the United States in connection with the privatisation”).
66. In light of congressional mandates, the administration entered into Letters of Agreement with the privatised entity regarding the continued operation of the domestic facilities and formed a committee to oversee the US/Russia deal. However, these mechanisms did not serve to prevent USEC’s prompt decline, and their role in its rehabilitation remains to be seen.


68. Id. at 63-64.

69. Id. at 21.

70. Id. at 49. The federal government, Price went so far as to remark, “has learned, in short, how to socialise without assuming ownership”. Id. at 43.

71. Id. at 75.

72. See Price, supra note 67, at 81.


74. When the Republicans assumed power in 1952, Corson recalled that Republican Party official Harold Talbott called on the firm to assist in staffing the Executive branch. Talbott received a series of folders (for individual departments) which explained that two million people worked for the federal government, “through staffing a maximum of 610 executive positions ... the new President can make the will of the people effective”. Each folder discretely explained that McKinsey would be “pleased to answer questions about any of the positions ... and otherwise to assist any user of the report in making it of greatest value.” Corson recalled that when President Kennedy was elected, Clark Clifford asked McKinsey to perform a similar study for the Kennedy Administration. See Guttman and Willner, supra note 7, at 99 (1976).

75. Corson, supra note 73, at iv.

76. Id. “I have been helped to see the nature of this evolution in the American politico-economic system by a stimulating group of approximately 50 business and governmental leaders that has met monthly for five years to examine and discuss the adaptations as they have become apparent.” Id. at iv.

77. See id. at 74.

78. Id. at 18.


80. Corson, supra note 73, at 17.

81. Id.

82. Id.


85. See, e.g. Elkins and McKitrick, supra note 84, at Ch. 2.

86. See, to the contrary, Henry Adams’ view that Jefferson’s Administration contradicted all that his philosophy proclaimed. He had undertaken to create a government which should interfere in no way with private action, and he had created one which interfered directly with the concerns of every private citizen in the land. He had come into power as a champion of states’ rights and had driven states to the verge of armed resistance. He had begun by claiming credit for stern economy, and ended by exceeding the expenditure of his predecessors. He had invented a policy of peace, and his invention resulted in the necessity of fighting at once the two greatest Powers in the world. Henry Adams, 2 History of the United States During the Administrations of Thomas Jefferson, 444-45 (1893).


89. For an itemisation of congressional and Executive “head count ceilings, freezes and thaws 1940-97”, see Light, supra note 3, at app. C.


91. The hearings focused on government-spawned “federal contract research centres”, such as Rand and Aerospace. A subject of attention was the competitive threat these entities posed to profit-making contractors who sought to do similar work. See id.

92. Id. at 209. The panel noted that the most significant aspect of the “newer industries” was their reliance “almost entirely on government sales for their business”. Id. at 205.
93. Id. at 209.

94. Id. at 208. The report also noted concerns from the private sector that the new not for profit contractors, such as Rand and Aerospace, unduly intruded on “traditional functions performed by competitive industry”. Bell Report, supra note 90, at 208.

95. Thus, the report declared that “one of the most serious obstacles to acquiring and maintaining the managerial competence which the government needs ... is the discrepancy between governmental and private compensation for comparable work.” id. at 217.

96. The report delicately observed the interlocking relationships within the contract bureaucracy: [T]here is a significant tendency to have on the boards of trustees and directors of the major universities, not-for-profit and profit establishments engaged in federal research and development work, representatives of other institutions involved in such work... Certainly it is in the public interest that organisations on whom so much reliance is placed for accomplishing public purposes, should be controlled by the most responsible, mature, and knowledgeable men available in the nation. However, we see the clear possibility of conflict-of-interest situations developing ... that might be harmful to the public interest.
Id. at 224.

97. The Panel explained:
We have not, however, in the course of the present review attempted to treat the fundamental philosophical issues [discussed earlier in the report]. We accept as desirable the present high degree of interdependence and collaboration between government and private institutions. We believe the present intermingling of the public and private sectors is in the national interest because it affords the largest opportunity for initiative and the competition of ideas from all elements of the technical community. Consequently, it is our judgment that the present complex partnership between government and private institutions should continue.
Id.

98. 580 F.2d 496 (D.C. Cir. 1978).

99. Id. at 499.

100. Id. at 502 (alteration in original) (citation omitted).

101. Id.

102. Id. at 510.

103. Id. at 502. The remaining question, the court explained, was whether civil service laws were violated because NASA was treating contractor employees as if they were direct employees. Here, the test was whether contractor employees were supervised directly not NASA officials. “These contracts”, the court found, “required the companies to exercise their independent judgment. This is the classic independent contractor relationship”. Webb, 580 F.2d at 505. Thus, reliance on contractor employees in the performance of NASA’s statutory functions was acceptable so long as these employees were not directly under official supervision.


105. See The President’s Radio Address, 2 Pub. Papers 1468 (11 September 1993) (discussing administrations plans to reduce costs and improve efficiency); see

106. See Light, supra note 3, at 1.

107. Id. at vii.

108. See the White House website at www.whitehouse.gov/government/fbci/

109. See e.g. the website of a coalition opposed to the Initiative www.au.org/press/pr22001.htm

110. See footnote 54, regarding similar views expressed by the Nixon White House about earlier Democratic contracting out.

111. In a summer 2001 White Paper in support of the Initiative, the White House explained:

The federal government... has little idea of the actual effect of the billions of social service dollars it spends directly or sends to state and local governments. Billions of Federal Dollars Spent, Little Evidence of Results. The federal government spends billions of dollars annually to assist needy families, individuals, and communities, often using the funds to support services provided by non-governmental organisations. Although federal programme officials monitor non-profit organisations, state and local governments, and other groups that receive the funds to ensure that they spend federal money for designated purposes and without fraud, federal officials have accumulated little evidence that the grants make a significant difference on the ground. Routinized Granting Without Performance Monitoring. In some federal discretionary programs, a small number of organisations perennially win large grants, even though there is little empirical evidence substantiating the success of their services. Moreover, virtually none of the programs has ever been subjected to a systematic evaluation of their performance that meets rigorous (or, in most cases, even rudimentary) evaluation research standards. See, “Barriers: A Federal System Inhospitable to Faith-Based and Community Organisations.” The report appears at www.whitehouse.gov/news/releases/2001/08/unlevelfield3.html


113. The 1998 Federal Activities Reform Act, 31 USC Section 501(2)(a) requires agencies to review their workforces and identify those jobs that are “inherently governmental”, with the remaining jobs subject to outsourcing. The fulcrum of the outsourcing requirement of the Bush Management Agenda is the provision that agencies will be graded on the percentage of such jobs that they put up for competition each year.


115. See the report of the “Commercial Activities Panel”, a congressionally created panel to study “commercial activities” that continue to be performed by public agencies, and that are capable of outsourcing. www.gao.gov/a76panel/dcap0201.pdf


117. Memorandum for Under Secretary of Defence (Acquisition, Technology and Logistics), Under Secretary of Defence (Comptroller/Chief Financial Officer), Under Secretary of Defence (Preparedness and Readiness), from Thomas E. White, Secretary of the Army; Subject: Accounting for the Total Force: Contractor Workforce, 8 March 2002. In April 2002 the Army told Congress that it lacked basic
information about the sheer size of the contractor “support service” workforce – with its estimates ranging from 100-600 000. See, 12 April 2002 letter from Reginal J. Brown, Assistant Secretary of the Army (Manpower and Reserve Affairs) to Honorable Ted Stevens, Ranking member, Committee on Appropriations, Ranking member, Subcommittee on Defence, United States Senate.

118. Bell Report, supra note 90, at 8.

119. Id. at 9 (emphasis added).

120. Professor Harold Seidman, who was involved in the conception of the policy, and oversaw the Circulars as Assistant Director of the Bureau of the Budget for Management in the Kennedy-Johnson years, recalled that the policy embodied the principle there is a “public interest” which can only be ultimately entrusted to officials, and not those with “private” interests (e.g. contractors). Interview with Professor Harold Seidman Professor Emeritus, Political Science, Johns Hopkins University (4 April 2000).


123. 31 USC § 501(2)(a) (1994). The FAIR Act directs agencies to develop inventories of their commercial activities and to conduct cost comparisons to determine whether a commercial activity that is performed by a governmental source should instead be performed by a private-sector source. The OFPP Policy Letter provides guidance on inherently governmental activities which are not subject to the FAIR Act.

124. Osborne and Gaebler, supra note 1, at 35. The authors note that difficulties with line drawing should not impede change. Those who still believe government and business should be separate tend to oppose these innovations ... But the world has changed too much to allow an outdated mind-set to stifle us in this way. “We would do well”, Harland Cleveland writes ... “to glory in the blurring of public and private and not keep trying to draw a disappearing line in the water.” Id. at 43.


127. The GAO found that the DOE contracts did involve inherently governmental functions, as did the EPA hotline to the extent that the contractor interprets official regulations to hotline callers.


129. See OFPP Policy Letter, supra note 112, at 45 096. As the Policy Letter explains, “Inherently governmental functions do not normally include gathering
information for or providing advice, opinions, recommendations, or ideas to
government officials.” *Id.* at 45 100. The role of contractors in drafting
congressional testimony and responses to congressional correspondence
received special attention. Even here, the OFPP states that while embarrassing,
contractor drafting is not impermissible. “While the approval of a government
document is an inherently governmental function, drafting is not necessarily
such a function ... in most situations the drafting of a document ... may be
contracted ...” *Id.* at 45 101.

130. The procurement rules are generally stated in Title 41
of the US Code, Federal
Acquisition Regulations (FARs) [*which apply generally throughout the Executive
branch and are found at Title 48 of the Code of Federal Regulations (C.F.R.)*] and
agency-specific supplements to the FARs.

131. See Light, supra note 3.

132. The act provides for exemptions (*e.g.* national security, business secrets, pre-
decisional deliberation) whose practical effects on limiting public access to
agency decision making may be quite substantial. See generally Office of
Information and Privacy, Department of Justice, *Freedom of Information Act Guide

133. See *infra*, pt. V.B.

134. See 18 US.C. § 208 (1994). In United States vs. Mississippi Valley Generating Co.,
364 US 520 (1961), the court explained that the statute is “preventive”. *Id.* at
550 n.14. The court, examining a precursor to the current statutory provision,
further explained:

> [T]he statute does not specify as elements of the crime that there be actual corruption or
> that there be any actual loss suffered by the government as a result of the defendant's
> conflict of interest... The statute is thus directed not only at dishonesty, but also at conduct
> that tempts dishonesty. This broad proscription embodies a recognition that an impairment
> of impartial judgment can occur in even the most well-meaning men when their personal
> economic interests are affected by the business they transact on behalf of the government.
> To this extent, therefore, the statute is more concerned with what might have happened in
> a given situation than with what actually happened. It attempts to prevent honest
government agents from succumbing to temptation by making it illegal for them to enter
into relationships which are fraught with temptation.

*Id.* at 549-50.

In Mississippi Valley, the court rejected the argument that the statute was not
violated because the interest possessed by the individual in the case at hand
(advancing the cause of private electric utilities) coincided with the
administration's goal. *Id.* at 560. The court further explained, “[i]n fact, the more
evidence an agent gives of agreement with the policies of the administration, the
more responsibility he is likely to be given, and in case of conflict of interest, the
greater is the possible injury to the government.” *Id.*

135. 5 CFR pt. 2635 (1999). They are also bound by agency specific supplements.

136. Thus, in 1998, private attorneys employed under contract by the US Enrichment
Corporation (a government agency) were paid at rates as high as $435/hour – well
above the amount paid the highest paid government attorneys (including the
Attorney General). See *e.g.* Legal Services Support Contract between United States
Enrichment Corporation, and Skadden, Arps, Slate, Meagher and Flom C-4,
Contract No. USECHQ-95-C-0018, Modification No. 005 (as amended 15 May 1996)
(on file with author) (noting $435/hour senior partner rate). While comparative
data on the pay received by contractor employees is not publicly available, it is likely that they do not uniformly earn more than their official counterparts.

137. Thus, President Reagan fired the striking air traffic controllers who were employed by the FAA. By contrast, at the nation’s nuclear weapons facilities, which are operated under contract, workers can strike, and have done so.


139. See id.

140. Price, supra note 67, at 51.

141. The consultants, Dean Wooldridge and Simon Ramo, merged with the Thompson corporation, becoming Thompson-Ramo-Wooldridge or TRW.

142. The story of Ramo-Wooldridge’s activities, told through a blow by blow recount of congressional hearings, appears in H.L. Nieburg, In the Name of Science (1966).

143. Allegations that Rand’s service for the Secretary of Defence conflicted with its service to the Air Force were reported in Fiscal Year 1973 Authorization for Military, Procurement, Research and Dev., Construction Authorization for the Safeguard ABM, and Active Duty and Selective Reserve Strengths: Hearings on S. 3108 Before the Senate Committee on Armed Services, 92nd Congress pt. 5, at 3283, 3284 (1972).

144. In the late 1980s, EPA realised that contractors relied on by its headquarters to develop and review cleanup policies were also at work for its regional offices in their implementation. EPA acted to preclude contractors from serving in oversight and implementation roles. See “Conflicts of Interest – EPA Guidance on Contractor-Polluter Relationships”, Superfund Rep’t, 31 January 1990, at 8. Conflicts posed by simultaneous contractor employment by agencies that are independent of one another may still go for years without detection. For example, in November 1999, public participants in the US Nuclear Regulatory Commission (NRC) proceedings pointed out that the official regulatory document provided by the NRC to support a rulemaking on the controversial recycling of nuclear waste had been prepared by a contractor that was simultaneously part of a DOE team which hoped to profit by recycling DOE nuclear waste. In December 1999, the NRC issued a stop work order to its contractor and informed the company that it was in breach of organisational conflict of interest requirements. In March 2000, the NRC terminated the contract. See Nuclear Regulatory Commission, SECY 00-0070 (Policy Issue/Notation Vote; Control of Solid Materials), 23 March 2000, at 4.

145. Congress learned that the Department of the Interior had employed a contractor to study alternatives for transporting Western coal to market, where an affiliate of the contractor had announced plans to build one of the competing alternatives. The contract sparked recognition that the concept of conflict of interest should embody a concern for the “public interest”, as well as the interest of contractors and their agency employers. See also “Organisational Conflict of Interest and the Growth of Big Government”, 15 Harv. J. on Legis., 297 (1978).


147. Where a citizen knows a contractor is on the job in the first place, he or she will find that the contractor’s disclosure statements are withheld under Freedom of Information Act exemption – (business information).

148. See “Contractors Lied on Conflict of Interest, Says DOE”, Energy Daily, 27 March 1990, at 3. The department’s own review of the contracts reviewed by the Senate staff confirmed that:
1) Firms represented that they had no relevant interests when, in fact, they appeared to have interests that should have been disclosed;
2) The firm’s technical proposals touted work that was not disclosed in the conflict disclosure form, and there was no indication that procurement officials undertook to compare the two. Id.

149. For example, in its 1980 review, the subcommittee found that a DOE contractor employed to assist the DOE in planning for a future OPEC oil embargo, failed to disclose that it also did any work for oil companies. Meanwhile, the contractors “business” proposal urged the department to employ it because, among other things, it worked for major oil companies. Even so, unknown to the department, the firm was simultaneously boasting to the Department of Transportation (in a proposal to provide transportation assistance in the Middle East) that it provided instrumental advice to a number of OPEC country oil programs. See Federal Consulting Services: Joint Hearings Before the Subcommittee on Civil Service and General Services of the Senate Committee on Governmental Affairs and the Subcommittee on Human Resources of the House Committee on Post Office and Civil Service, 96th Congress 322-23, 347-52 (1980) (statements of Sen. Pryor and Eric Fygi, Deputy General Counsel, DOE). Similarly, in the 1989 review, the subcommittee found that a contractor employed to support congressional and administration review of a controversial proposal to ship plutonium to Japan, was, according to its own public report, simultaneously advising Japanese utility beneficiaries of the arrangement. Moreover, unbeknownst to the public and the DOE, the contractor was actually employed to report back to Japanese clients on the internal United States debate on the plutonium shipment issue. (Its reports contained a pithy critique of congressional staff, and opined that the contractor headed off one Congressman’s efforts to obtain General Accounting Office review of the controversy.) See John J. Fialka, “Consultant Doubled as Adviser to Japanese Firms and to the US, Playing its Dual Roles with Ease”, Wall Street Journal, 27 March 1990, at A22.

150. See DOE’s Reliance on Contractors, supra note 39, at 62-64.

151. Id. at 69. The department itself observed that, “there is an indication that very often, in spite of a process designed to encourage conscious consideration of the subject, the participants used boilerplate language, did not see or overlooked important facts, did not recognise inconsistencies, and neglected to exercise full and complete consideration of [conflict] matters.” Letter from Honorable Donna R. Fitzpatrick, Assistant Secretary Management and Administration, DOE, to Honorable David Pryor, United States Senate 6 (12 February 1990) (on file with author).

152. The very circumstances that are indicia of conflict – service to many clients – may also be indicia of expertise. Thus, a client list that presents itself to an outsider as a source of apparent conflict may present itself to the programme officer as a source of substantial value.


154. To complicate matters further, contractor employees assigned to government work may have little of this experience. It is hard to know whether the appearance of conflict represents a conspiracy or chaos.

155. See 48 CFR § 9.503 (providing for waiver upon agency determination that the application of conflict rules would not be in government’s interest).

156. See 18 USC § 208 (1994) (establishing basis for conflict of interest). 18 USC §208(b) provides for waiver only upon determination, in the case of a fulltime employee,
that “the interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee.” Id.

By contrast, the Atomic Energy Act, one of the few statutory provisions for contractor conflicts, provides that when a potential contractor has an unavoidable conflict, “the Commission may enter into such contract ... if the Commission determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract ... to mitigate such conflict.” 42 USC § 2210a(b)(2) (1994).

157. As it developed, secret transcripts of the Board of Directors meetings, made public following Sunshine Act litigation revealed that the US official had played a substantial role in the board’s decision to privatise through the method – a public stock offering – proposed by incumbent official management, rather than privatise through sale to a third party (e.g. Lockheed). See Richard Miller, Congressional Testimony as Representative of the Paper, Allied-Industrial, Chemical and Energy Workers Union (PACE) 13-22 (Apr. 13, 2000) (testimony before the Subcommittee on Oversight and Investigations of the House Committee on Commerce) (on file with PACE).

158. Following a complaint (regarding which the author provided counsel), the Justice Department stated, “[p]rosecution of [the individual] would inevitably fail because he sought and obtained a waiver of the conflict of interest.” Letter from Mr. John C. Keeney, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, to Mr. James K. Phillips, Vice President, PACE (29 September 1999) (on file with author). The Justice Department declined to provide statutory or precedential basis for the legitimacy of the waiver ab initio. See id.; see also Letter from James K. Phillips, Vice President, PACE, to Hon. Janet Reno, Attorney General, Department of Justice (8 October 1999) (on file with author).

159. 504 F.2d 238 (D.C. Cir. 1974).
160. Id. at 243.
161. Id. at 248.
162. Id. at 246.
165. Id. at 176.
166. Id.
167. Id. at 171.
168. Id. at 180.
169. Id. at 181.
170. Forsham, 445 US at 170. The majority employed a technical analysis of the language of public records laws to conclude that agency records, and the limits of FOIA, includes only documents created by officials and/or actually in official possession. Id. at 181-83.
171. The dissent stated:

Where the nexus between the agency and the requested information is close, and where the importance of the information to the public understanding of the decisions or the
operation of the agency is great ... congressional purposes require us to hold that the information sought is an "agency record" ... Admittedly, this test does not establish a bright line, but the evaluation of a calculus of relevant factors is nothing new to the law. id. at 188-89.


173. Id. at 539.

174. Id. at 540.

175. Public Citizen Health Research Group vs. Department of Health, Education, and Welfare, 449 F. Supp. 937, 941 (DDC 1978). The district court noted that the grantee in Forsham did not have formal decisional authority and was not subject to "day-to-day federal control". Id.

176. Public Citizen Health Research Group, 668 F.2d at 542-43.

177. Id. at 543.

178. Id. at 544. In dissent, Judge Mikva, following Justices Brennan and Marshall, came down on the side of accountability: Bodies with the delegated authority to make significant decisions are agencies in their own right. They act in the place of a pre-existing government body in the exercise of a central function. They are subject to FOIA because of congressional intent to reach entities that "perform governmental functions and control information of interest to the public". (internal citation omitted). id. at 546 (Mikva, J., dissenting).

179. The Shelby Amendment, enacted as part of the FY 1999 Omnibus Appropriations Bill, directs OMB to "require federal awarding agencies to ensure that all data produced under an award will be made available to the public ... under the Freedom of Information Act". Pub. L. No. 105-277, 112 Stat. 2681 (1998).


181. The non-profits also pointed out that the amendment did not provide open access where similar work was performed by profit-making entities.

182. In a surprising but illustrative turn on this fear, President Clinton's Advisory Committee on Human Radiation Experiments found that, as late as 1960, the Harvard Medical School successfully resisted the Department of the Army's efforts to require Harvard's contract researchers abide by the Nuremberg Code in Harvard's human subject research. Harvard claimed that the government was improperly interfering with the researchers' autonomy. See Final Report of the Advisory Committee on Human Radiation Experiments 89-91.

183. Price, supra note 67, at 37.

184. 310 US 113 (1940).

185. Id. at 127-28.

186. No doubt the Perkins decision also reflected global mobilization. The injunction ordered by the Court of Appeals, Justice Black noted, had negated the application of the law to “a vital industry” that was providing “imperatively needed supplies for the War and Navy Departments”.

187. Id.
188. 424 F.2d 859 (D.C. Cir. 1970).
189. 734 F.2d 1570 (D.C. Cir. 1984).

192. West Virginia, 734 F.2d at 1576. The West Virginia principle has been elaborated on in further contexts. For example, in Stellacom, Inc. vs. United States of America, 783 F. Supp. 647 (DDC 1992), the court found that “the loss of the opportunity to self-certify itself as a small business for purposes of small business set-aside contracts, satisfies the constitutional requirements for standing”.

Id. at 653.

To a similar effect is the judicial extension of the rights of contractors. In CC Distributors, Inc. vs. United States, 883 F.2d 146 (DC Cir. 1989), the government claimed contractors lacked standing to challenge a decision to bring work in-house. The court rejected the government’s argument that since the procurement process never began, there was no lost opportunity to compete:

“This argument, although perhaps relevant to the merits, carries no force against plaintiffs’ allegation of injury.... To note that “no procurement process was ever invoked” begs the question of whether the relevant statutes and regulations require the Air Force to undertake the recompetition and cost comparison procedures of that procurement process i.e. whenever they create a conditional right to compete.”

Id. at 150-51.

193. Case law and commentary suggest that private parties may claim third party beneficiary status under government contracts where the intent of the contracting parties (express or implied) is sufficiently particular. See, e.g. Bossier Parish Sch. Bd. vs. Lemon, 370 F.2d 847, 850 (5th Cir. 1967) (finding that federally funded school board in federal military enclave could not refuse to integrate schools; “Defendants by their contractual assurances have afforded rights to these federal children as third party beneficiaries”); Schuerman vs. United States, 30 F. Cl. 420 (1994) (finding that borrower under FMHA guarantee programme to be beneficiary of FMHA Contract of Guarantee with the lending institution directly responsible for providing the borrower credit); Holbrook vs Pitt, 643 F.2d 1261 (7th Cir. 1981) (stating that tenants under federal housing programs are third party beneficiaries of contracts between HUD (or any agent) and developers); see also Oil, Chemical & Atomic Workers Int’l Union vs. Richardson, 214 F.3d 1379 (DC Cir. 2000) (holding that plaintiff union lacks standing to make claim under statute providing for employment preference, but court notes the decision “says nothing about the possible ability to sue as third party beneficiaries” of government contract in which the preference is embedded); Restatement (Second) of Contracts § 313.

194. See e.g. OFPP Policy Letter, supra note 112. “This Policy Letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction ...” id. at 45,102. Indeed, the Policy Letter contains the broad disclaimer of any intent “to specify which functions are, as a legal matter, inherently governmental, or to define the factors used in making such legal determination”. id. at 45,100.

195. For example, the challenge might be based on agency failure to perform cost comparisons required by the circular. Such challenges were denied, in e.g. National Federation of Federal Employees vs. Cheney, 883 F.2d 1038 (DC Cir.
1992); Local 2855 AFGE (AFL-CIO) vs. Brown, 680 F.2nd 722 (11th Cir. 1982); Local 2855 AFGE (AFL-CIO) vs. United States, 602 F.2d 574 (3d Cir. 1979).


198. Id. at 576.

199. Id. at 573.

200. The comments refer to the work discussed here; not, for example, to the purchase of staples (e.g. office supplies or ketchup) or routine services.

201. See e.g. DOE Contract Mgmt. Hearings, supra note 43, at 111 (statement of Hon. Hazel R. O’Leary, Secretary, DOE).


203. See Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance, 15 (1990). Kelman, the Clinton Administration’s first director of the Office of Federal Procurement Policy, has noted that formal competitive requirements may engender red tape and sacrifice beneficial communications between contractor and customer. Thus, in their classic study of defence weapons contracting, Peck and Scherer observed that what appears to be inefficient “cost overruns” may be the necessary costs of keeping a cadre of contractors healthy in order to maintain competitive alternatives.

204. For example, see the DOE website located at www.ig.doe.gov. Similarly, those with an interest in DOE weapons complex contracting have internet access to websites of local news media and community groups, and contractor websites.


207. Id. at 158-59.

208. Id. at 163. Even so, in retrospect, the court’s meagre findings are even less than meets the eye. The election law precedent relied on by the court involved all white primaries. As Ross Perot’s unsuccessful quest for access to the privately managed 1996 Presidential debates shows, it is not clear that the principle of exclusivity applies outside of its historic context of racial discrimination.

209. Id. at 171.

210. Id. at 176 (Stevens, J., dissenting).
211. At the same time, the inability of the court to provide timeless, specific content to the nature of governmental functions should be placed in the context of the declaration by the court, through Justice Scalia in Lujan that the protection of the “public interest” is the role of “Congress and the Executive”, and not private parties. See id. at 576. The correlative, as discussed infra in regard to the False Claims Act, is that this protection can be assigned to third parties where the assignment is coupled with a concrete interest.

214. 45 USC § 541 (1994).
216. Id.
217. Id. at 394.
218. Id. at 397.
220. Id. at 505.
221. Id. at 507.
222. Id. at 510.
223. Id. at 512.
224. The dissent also noted with irony that, in the absence of express congressional mandate, Justice Scalia had invoked federal common law to trump the vindication of state police power. See Boyle, 487 US at 515. Whatever the application of federal common law where the United States itself is a party, it should not apply to suits between two private litigants.
225. Id. at 521. The dissent stated:

The historical narrowness of the federal interest and the immunity is hardly accidental. A federal officer exercises statutory authority, which not only provides the necessary basis for the immunity in positive law, but also permits us confidently to presume that interference with the exercise of discretion undermines congressional will. In contrast, a government contractor acts independently of any congressional enactment. Thus, immunity for a contractor lacks both the positive law basis and the presumption that it furthers congressional will.
Id. at 523 (Brennan, J., dissenting).

227. See id. at 672.
228. See Umbehr, 840 F. Supp. at 839.
229. See id.
230. Umbehr, 44 F.3d at 879. Pickering did not provide full First Amendment rights to official employees, but for a balancing between employee and governmental interests. Id.
231. 518 US at 676.
232. Id. at 684.
233. Id. at 679 (citation omitted).

234. Id. at 679.

235. Id. at 688 (Scalia, J., dissenting). Justice Scalia, of course, did not condone the seamier side of the patronage tradition. He pointed out that to the extent that the patronage tradition invites bribery and other forms of corruption, governments enact procurement integrity laws. See id.

236. Umbehr, 518 US at 694. For this proposition, Justice Scalia cited Judge Posner, in LaFalce vs. Houston, 712 F.2d 292, 294 (7th Cir. 1983). Although some business firms sell just to governments, most government contractors also have private customers ... If the contractor does not get the particular contract on which he bids ... it is not the end of the world for him; there are other government entities to bid to, and private ones as well. id. at 685.

237. Justice Scalia also asserted that the result of the majority’s decision would be to increase litigation. See discussion supra Part V.C.


240. Richardson, 521 US at 408.

241. Id. at 404. Justice Breyer’s historical review concluded that “there was ample precedent for private prisons, but no evidence that the law gave purely private companies or their employees any special immunity ...”. Id. at 405.

242. Id. at 408.

243. Id.

244. Id. at 409-10.

245. Richardson, 521 US at 410-11.

246. Justice Scalia touched on, but did not appear to draw conclusive inferences from, the notion of inherently governmental function. Justice Scalia noted that, “[t]he parties concede that petitioners perform a prototypically governmental function.” Id. at 415. Moreover, Justice Scalia’s historical analysis noted that private citizens – such as grand jurors – have been accorded immunity when they perform a government function that qualifies for it. Id. at 417.

247. Id. at 417.

248. Id. at 421.

249. 31 USC § 3729 (1994).


251. For a summary of these efforts, see Helmer, supra note 239, at Ch. 4.

252. See Vermont Agency of Natural Resources vs. United States, 120 S. Ct. 1858 (2000). On the issue directly before it, the court found that states are not “persons” subject to the act.

253. Id.

254. To be sure, the test is a balancing test, which, as the majority notes, permits for consideration of factors distinct to the contracting context.
255. Indeed, in Richardson, while Justice Scalia urged the functional equivalence of private and public prison work, the majority explained that functional equivalency test does not cut muster.

256. For example, in Forsham, as noted, the majority ignored the tension, finding that the integrity of the special character or university research would be impaired if constrained by the Freedom of Information Act. The majority elided over the claim that the non-profits were playing an important de facto decisional role. See Forsham vs. Harris, 445 US 169 (1980).

257. Alternatively, what should be required in any case to dispel the presumption of regularity?

258. Lebron, 513 US at 394.


260. See Munn vs. Illinois, 94 US 113 (1876), regarding the common law origins of the police power that, having been imparted into our Constitution, underlies the regulation of “businesses affected with a public interest” – i.e. public utility regulation.

261. See e.g. the discussion of the Blackstone-codified concept of the legislature’s inability to permanently alienate sovereign power in United States vs. Winstar Corp., 518 US 839 (1996).

262. In addition to the cases cited supra, see the survey of delegation cases in Validity of Proposal for Board to Assist in Dairy Income Maintenance Programme, American Law Division, congressional Research Service, 19 July 1991.

263. For example, courts may view evidence that a contractor is possessed of a conflict as evidence of unlawful delegation. Sierra Club vs. Sigler, 695 F.2d 957, 962 n.3 (5th Cir. 1983), which involved review of an Army Corps of Engineers’ environmental impact statement prepared in reliance on a consultant employed by the project applicant, provides dicta on the relation between conflict of interest and impermissible delegation:

Although the conflict of interest itself may not have been illegal ... Corps rubberstamping of a consultant prepared FEIS is ... We realise that the preparation of an FEIS is a mammoth task and that CEQ and Corps regulations permit the participation of private consultants... Nonetheless, an agency may not delegate its public duties to private entities ... particularly private entities whose objectivity may be questioned on grounds of conflict of interest. Id. (internal citation omitted). The Sigler court, however, “expressed no legal opinion on whether the Corps improperly rubberstamped an FEIS prepared by someone else” id. In Schweiker vs. McClure, 456 US 188 (1982), the Supreme Court found no due process violation in an insurance carriers’ adjudication of Medicare claims where it found no showing of disqualifying conflict of interest on the part of the private hearing examiner.

264. For example, in City of Paris, Kentucky vs. Federal Power Commission, 399 F.2d 983 (D.C. Cir. 1968), the court found that an REA Coop was not a government instrumentality in the context of Section 201 of the Federal Power Act.

265. See the seminal case of McCulloch vs. Maryland, 17 US 316 (1819).

266. See e.g. Alabama Power Co. vs. Alabama Elec. Cooperative, Inc., 394 F.2d 672 (5th Cir. 1968). Notwithstanding City of Paris, supra, the court in Alabama Power found an REA co-op to be, at least for Sherman Act purposes, a government instrumentality: “The Power Company would treat REA simply as a rival public utility. We agree with the recent decision of the Federal Power Commission ... that
rural electric cooperatives are something more than public utilities; they are instrumentalities of the United States.” *Id.* at 677.

267. See Lebron, 513 US at 379.

268. See *e.g.* Corporacion Venezuela de Fomento vs. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980) (“The basic purpose of the Foreign Service Immunities Act (‘FSIA’) is to give the district courts jurisdiction to hear civil cases involving claims against foreign states, and their instrumentalities, which have waived their immunity from suit with regard to the transactions involved”).

269. In the lead case, Alabama vs. King and Boozer, 314 US 1 (1941), the Supreme Court established that a cost-plus government contractor was not immune from state taxation because the government, in essence, was the purchaser.

270. 94 US 113 (1876). Both majority and minority in dissent, looked to the common law tradition that monopolies chartered by the King were subject to public service obligations. The question in Munn was whether or not a private entity could be constrained by the government where, as in the case of Munn’s grain warehouse, it did not attain its market dominance based upon state charter.

271. 214 F.3d 1379 (D.C. Cir. 2000).

272. Justice White’s historical review of the origins of antitrust law in *Standard Oil vs. United States*, 221 US 1, 54-60 (1911), suggests the capacity of the law to translate between the form and substance of public right and obligation. As Justice White explains it, “monopoly” law was initially directed at the conduct of entities chartered by the King, but there came to be recognition that the injurious consequences of monopoly could arise no less where monopoly developed absent state charter. “In other words”, White observed, “practical commonsense caused attention to be concentrated not upon the theoretically correct name to be given the condition or acts which gave rise to the harmful result, but to the result itself, and to the remedying of the evils which it produced.” *Id.* at 56.

273. These premises, the evidence recounted here indicates, may be artefacts of their time, and are in flux. Most importantly, assumptions about the inherent qualities of institutions (and the appropriate balance among them) need to be revisited as their qualities change by dint of the very developments at issue. Thus, as the Bell Report noted, the effect of third party government on the quality of official bureaucracy appears to be, in fact, cumulative. Similarly, as the discussion above explains, the need to render third parties accountable in the performance of public purposes may constrain them in ways that frustrate the qualities for which they are valued.

274. See Jeff Weintraub, “The Theory and Politics of the Public/Private Distinction”, in *Public and Private in Thought and Practice* (Weintraub and Kumar eds., 1997). Weintraub also points out that the public/private distinction assumed by contemporary political and legal convention aligns public with state administration and private with the market economy. Weintraub points out that the equation between public and government is by no means essential; thus, from the vantage of the republican-virtue approach the public realm is distinct from both the state and the market, and from a further perspective (*e.g.* Jane Jacobs) the public realm is that of sociability (*e.g.* street life), without immediate regard to government (or politics).

275. The ongoing “deregulation” (or “restructuring”) of the hitherto highly regulated “public utility” business is predicated on government creation of the market mechanisms on which competition will be predicated. Thus, seminal California
restructuring legislation “direct[s] the creation of [a] proposed new market structure featuring two state chartered non-profit market institutions”. See Cal. Pub. Util. Code § 365 (West 1999) (creating an “independent system operator” to maintain the interconnected transmission grid and a central power exchange). Similarly, at the federal level (both within the Federal Energy Regulatory Commission and in debate on proposed restructuring legislation) a central question is the definition of the new market mechanisms that will govern and maintain electric transmission lines that, absent regulation, are ready tools of monopoly.

276. See e.g. Lawrence Lessig, Code and Other Laws of Cyberspace, 8 (1999) (opining that cyberspace must be governed by public choice of the appropriate “architecture”, even as “we trust no institution of government to make such choices”).


278. The National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 783, provides that, save where unlawful or impractical, “Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.” Professor Gilmore provides a highly engaging depiction of the public/private network that, centred around the founders of the American Law Institute, sought to codify the law and give their codification – notably including the Uniform Commercial Code – the official imprimatur. See Grant Gilmore, The Ages of American Law, Ch. 4 (1977). Gilmore explains the public/private mixture of money, ideas, and people that led to official adoption of the code. See id. at 83:

The code was jointly sponsored by the National Conference of Commissioners on Uniform State Laws (which had acquired a de facto monopoly of commercial law codification) and the American Law Institute (which had completed the Restatement project but was, like any organisation, reluctant to go out of business. The Conference had access to the state legislatures; the Institute had access to money; at the relevant times William Schnader, a Philadelphia lawyer, held high office in both organisations and is credited with having arranged their unlikely collaboration.

279. See Wolfgang G. Reinicke, Global Public Policy: Governing Without Government, 66 (1998). Thus, Reinicke’s analysis might be said to presume a relaxation of the congruence of de facto and de jure sovereignty: It is important to recall the ... distinction between legal and operational sovereignty.... [G]lobalisation does not and cannot in any way challenge legal internal sovereignty of a government. Globalisation challenges internal operational sovereignty, and it is important for the subsequent discussion to keep this distinction in mind.

Id.
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