OUTSOURCING THE CONSTITUTION AND ADMINISTRATIVE LAW NORMS

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In the United States, the constitutional constraints and administrative law requirements imposed on government agencies generally have no applicability to private entities performing outsourced public administrative activities. In this article, the authors broadly explore the issues associated with outsourcing constitutional and administrative law norms along with government work by imposing them on private contractors. The authors seek to help frame these issues more cogently for the public administration community in an effort to promote more comprehensive and thoughtful discussion of outsourcing and a greater role for public administrative expertise in determining when and how to apply constitutional and administrative law norms to government contractors.

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The literature on privatization in public administration pays only limited attention to the stark reality that when government activities are privatized or outsourced, democratic norms embodied in constitutional and administrative law are apt to be lost. Notable exceptions include Moe (1987, 2001), Moe and Gilmour (1995), Gilmour and Jensen (1998), and Roberts (2000).[1] However, much more space has been devoted to this result of so-called third-party government in law reviews (Bass & Hammitt, 2002; Feiser, 1999; Freeman, 2003; Gillette & Stephan, 1998; Guttman, 2000a; Mays, 1995). Failure to more fully address the effect of privatization on constitutional and administrative law rights and protections in public administration promotes discussion and analysis that focus overwhelmingly on cost-effectiveness, techniques for privatizing and outsourcing, contract management, and performance monitoring. The field's instrumental and pragmatic approaches often give short shrift to constitutional contractarianism (Piotrowski & Rosenbloom, 2002; Rosenbloom, 2003, pp. 172-176; Rosenbloom & O'Leary, 1997, pp. 17-22). Public administrative scholars and practitioners, anxious to improve administrative practice, often jump from accurate diagnosis of complex problems to the prescription of untested, flawed, or ill-conceived reforms—many of which fail largely because they emphasize managerial values over political and constitutional ones (Caiden, 1991, pp. 1-33, 296-298). This is often manifested in proposals for

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third-party accountability that largely ignore law, relying instead almost entirely on nested hierarchical managerial relationships reaching through the top levels of agencies and potentially culminating in oversight by elected officials (Posner, 2002). In focusing on management, contemporary public administration tends to neglect the broader issues of democratic governance, which were historically at the core of the field's concerns (Lynn, 2001).

In this article, we illustrate some of the costs of privatization and outsourcing in terms of constitutional and administrative law norms as well as why competitive sourcing equations are incomplete without their full consideration. We explore the prospects for outsourcing constitutional and administrative law norms along with government activities by subjecting contractors to some of the requirements these norms impose on public agencies. For instance, should private contractors' employees have rights to whistle-blowing, privacy, and liberty that more or less match those guaranteed to government employees by constitutional law? Should freedom of information, open records, and open meetings laws be applied to private contractors? Should the public have the same constitutional and administrative law protections when they deal with private contractors doing outsourced government work as when they interact directly with government agencies? Our wider purpose is to bring such questions to the forefront of public policy discussion and decision making regarding competitive sourcing and outsourcing. We hope to frame the issues cogently for the public administration community in the interests of promoting a more comprehensive and thoughtful assessment of privatizing, one that brings public administrative expertise to the forefront of determining when and how to apply constitutional and administrative law norms to government contractors.

THE ABSENCE OF CONSTITUTIONAL AND ADMINISTRATIVE LAW NORMS IN THE PRIVATE SECTOR: SOME ILLUSTRATIONS

Apart from the Thirteenth Amendment's prohibition of slavery and involuntary servitude other than as criminal punishment, the U.S. Constitution does not apply to purely private relationships. As the Supreme Court reiterated in 1988, "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state [governmental] action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be" (*National Collegiate Athletic Association v. Tarkanian*, 1988, p. 191). A relatively narrow breach of this dichotomy, analyzed infra, occurs when a private entity becomes a state (i.e., governmental) actor for constitutional purposes and is therefore subject to constitutional constraints. Under federal constitutional law, five general types of public-private involvement are most likely to transform a private party into a state actor: (a) private engagement in a public function, as defined by the courts; (b) government control of an ostensibly private party; (c) coordinated joint public-private participation in an activity; (d) entwinement of governmental and private actors to the extent that they function as a single organization; and (e) empowering private entities to use government's coercive power such as the power to seize assets. State-level constitutional law draws similar distinctions between governmental and private action, although variation in specific applications is to be expected.

For the most part, administrative law also incorporates a dichotomy between governmental and nongovernmental activity. Except with respect to formally constituted advisory committees and negotiated rulemaking committees, federal administrative law—including its provisions for freedom of information, open meetings, enforcement proceedings, and public

participation—places few, if any, constraints on private parties regardless of their relationship with government agencies. State administrative law varies considerably and is not readily summarized (see Asimow, Bonfield, & Levin, 1998). However, in terms of transparency, which is of particular importance to third-party government (Roberts, 2000), administrative law has broader applicability to contractors in most of the states than at the national level, as we explain later in this article.

The following examples illustrate how the legal dichotomy between governmental and nongovernmental action can apply both in the context of outsourcing public administrative functions and more generally. They demonstrate that constitutional rights and administrative transparency, taken for granted when dealing with government, may be wholly irrelevant in the private sphere.

Alicia Pedreira worked for the Kentucky Baptist Homes for Children, a religious organization under state contract to provide services to at-risk youth. By all accounts she was an excellent employee. She became an ex-employee in 1998 after an amateur photographer's picture of her at an AIDS walk appeared in an art exhibition at the Kentucky state fair. The photo showed Pedreira with another woman's arms around her waist. Leaving nothing to guesswork, Pedreira was wearing a tank top bearing a map motif that included an arrow pointing to the Isle of Lesbos in the Aegean Sea. As soon as she heard about the picture, which later made the rounds in her office, Pedreira knew she would be fired. The president of Baptist Homes explained why she could no longer work there: "To employ a person who is openly homosexual . . . does not represent the Judeo-Christian values which are intrinsic to our mission," which is "to provide Christian support to every child, staff member and foster parent" (Press, 2003, pp. 187, 188).

If Pedreira had worked for a state or local governmental agency, doing exactly the same job, a dismissal for failing to adhere to "Judeo-Christian values" clearly would have violated her First and Fourteenth Amendment religious freedom. If she were covered by civil-service law, Pedreira undoubtedly would have been entitled to a hearing guided by state or local regulations and constitutional due process. The government agency trying to fire her probably would have borne the burden of persuasion in showing a nexus between her homosexuality and some significant detrimental effect on its administrative operations.[2] If the case went far enough, she might even have won a court decision protecting her liberty to engage in homosexual activity. In *Lawrence v. Texas* (2003), the U.S. Supreme Court recognized that

> when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. (*Lawrence v. Texas*, 2003, slip op. at 6)

It concluded that individuals' "right to liberty under the Due Process Clause gives them the full right to engage in their [homosexual] conduct without intervention of the government" (*Lawrence v. Texas*, 2003, slip op. at 18). Although individuals' constitutional rights in the context of public employment are far from identical to those held by citizens generally, a government agency firing someone in Pedreira's circumstances generally must justify its infringement on constitutionally protected liberty by showing that the dismissal serves an important or compelling governmental interest in a narrowly tailored fashion (Shafritz, Rosenbloom, Riccucci, Naff, & Hyde, 2001, chap. 3).

Stephen Downs bought a "No War With Iraq/Give Peace A Chance" T-shirt in a shop at the Crossgates Mall in Guilderland, New York. He put it on and went to the mall's food court

where he was told by two security guards to remove the shirt or leave the mall. A lawyer, he refused and was arrested for trespass, which is punishable by up to a year in prison (CNN.com/U.S., 2003). If Downs had been sitting on the National Mall in Washington, D.C., at a table in a public park or on a public bench on the sidewalk of one of Guilderland's main streets, his right to wear the T-shirt and stay put would have been protected by the First and Fourteenth Amendments' guarantee of freedom of speech. However, when privately owned malls become the functional equivalents of public spaces and main streets—that is, when public space and main streets are effectively privatized—those amendments do not apply. Constitutional law can constrain private parties in this context only when they own an entire town, and maybe not even then (see *Hudgens v. National Labor Relations Board*, 1976; *Lloyd Corp. v. Tanner*, 1972; *Marsh v. Alabama*, 1946).

Similar issues arise when private homeowner associations develop the equivalent of public zoning regulations. Such associations have

> enforced rules that prohibited the distribution of newspapers, prevented homeowners from entering and leaving their condominium through the back door, and interfered with the marital relationship of a newlywed couple [by determining that the woman was too young to live in the residence]. (Mays, 1995, p. 58)

Owners of private dwellings regulated by municipalities are free to post antiwar and political campaign signs in their windows or on their lawns (*City of Ladue v. Gilleo*, 1994). In the absence of a curfew, they can surely invite their grandchildren to visit whenever they want. Such freedoms can be wrested from those living under the private rule of homeowner associations (Mays, 1995, pp. 58-59).

After the Columbia Space Shuttle tragedy in 2003, the media obtained a number of e-mails from NASA that revealed some engineers' concerns for a worst-case scenario caused by damage to the shuttle during its launch. Some of the e-mails were obtained through requests under the federal Freedom of Information Act (FOIA). NASA was generally quite responsive and garnered praise for being much more open than it had been after the Challenger Space Shuttle exploded in 1986. NASA even facilitated the flow of information by putting up a Web page for "Freedom of Information Act (FOIA): Summary of Requests Currently Being Processed Related to STS-107 Columbia" (NASA, 2003).

Nonetheless, transparency regarding the Columbia was far from complete because a great deal of the launch work and operation of the shuttle fleet is done by a contractor, United Space Alliance. A NASA official explained that United Space Alliance was involved in "'nearly every aspect of NASA's decision-making processes [and an] integral member' of the team that 'reached flawed conclusions about the relative safety of Columbia and crew before and during flight'" (Reinert, 2004). Like other private entities, United Space Alliance, which was formed by the Boeing and Lockheed-Martin corporations, is not covered by the federal FOIA. Although it provided summaries of some information requested by the media, it was not nearly as forthcoming as NASA. Yet, in terms of public debate regarding the accident and the future of manned space flight and the shuttle program, information about United Space Alliance's decision making and assessment of the risks to the Columbia and its crew is as vital as that held by NASA. The FOIA's "central purpose of opening agency action to public scrutiny" (*U.S. Department of Defense v. Federal Labor Relations Authority*, 1994, p. 491) is frustrated when a federal agency outsources its activity to a private entity. It was due only to extraordinary measures—inquiry by the Columbia Accident Investigation Board and release

of its voluminous *Final Report*—that a fuller accounting of United Space Alliance's activity became public (Columbia Accident Investigation Board, 2003).

INHERENT AND NONINHERENT GOVERNMENTAL FUNCTIONS

These examples were chosen to illustrate that constitutional and administrative law norms have potential application even when private activity does not involve inherently governmental functions. Outsourcing inherently governmental activities raises additional problems for accountability and popular sovereignty. In 1989, well before the Clinton-Gore administration advanced outsourcing as a basic tenet of good public administration (Gore, 1993, chap. 1; National Performance Review, 1995, p. 7), Paul Light (1999) noted that the EPA's private

> consultants were analyzing proposed legislation, drafting EPA's budget documents, overseeing the agency's field investigation teams, preparing work statements for other EPA contracts, writing draft preambles to formal rules, responding to public comments on those rules as part of the formal rulemaking process, developing guidelines for monitoring other contractors, organizing and conducting public hearings, and advising senior officials on legislative reauthorizations.[3] (p. 14)

Similarly, the Department of Energy, relied

> on a private workforce to perform virtually all basic governmental functions. It relie[d] 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 relie[d] 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. (U.S. Congress, 1989, p. 63, as cited in Guttman, 2000a, p. 873)

Senator David Pryor (D-AR) denounced such arrangements as creating "a very large, invisible, unelected bureaucracy of consultants who perform an enormous portion of the basic work of and set the policy for the Government" (Light, 1999, p. 13).

Proponents of outsourcing would generally agree with Pryor that governments should retain control of inherently governmental functions. However, they differ on whether governments should be required to perform these functions in house. For instance, in *Privatization: The Key to Better Government*, E. S. Savas (1987) contends that "false alarms are raised about privatizing services that are said to be 'inherently governmental'; the responsibility for providing the service can be retained by government, but the government does not have to continue producing it" (p. 62). In his view, "the role of government is to steer, not to man the oars. Privatization helps restore government to its fundamental purpose" (Savas, 1987, p. 290) Consequently, he sees no rational barrier to outsourcing adoption, airport operation, child protection, crime laboratory work, crime prevention and patrol, economic development, election administration, housing inspection and code enforcement, housing management, criminal justice probation, property acquisition, public relations and information services, and records maintenance, among many other functions (Savas, 1987, p. 73).

The federal government's policy, by contrast, requires inherently governmental activities to be performed in house by federal agencies. The Federal Activities Inventory Reform (FAIR) Act (1998) requires agencies to provide an annual inventory of all their activities that

are commercial as opposed to inherently governmental. Inherently governmental activities are shielded from "competitive sourcing" and should not be outsourced (U.S. Office of Management and Budget [OMB], 1998, p. 2). The OMB defines "inherently governmental" as an

> activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. (OMB, 2003a, section B.1.a)

Examples include:

- "Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise";
- "Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise";
- "Significantly affecting the life, liberty, or property of private persons"; and
- "Exerting ultimate control over the acquisition, use, or disposition of United States property." (OMB, 2003a, section B.1.a, pp. 1-4).

Problems of definition and scope aside, both ways of dealing with inherently governmental functions rely on a familiar politics-administration distinction that is apt to be untenable in practice. Contractors engaged in some activities will inevitably exercise discretion and frame policy options. Whereas Savas (1987) discounts or ignores the potential for policymaking by contractors, OMB recognizes it and seeks to confine it to relatively narrow limits. OMB's key document on outsourcing, *Circular A-76*, defines "the use of discretion" as

> inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and the decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials. (OMB, 2003a, section B.1.b)

In other words, "not every exercise of discretion is evidence that an activity is inherently governmental" (OMB, 2003a, section B.1.b). Contractors may use discretion within a fixed range and be "tasked to develop options or implement a course of action, with agency oversight" (OMB, 2003a, section B.1.c).

OMB's approach, although more realistic than Savas', may, nevertheless, be too formalistic in anticipating bright lines between agency personnel and contractors and assuming that influence will always be exerted unidirectionally by the former over the latter. Lines may be blurred, if not eradicated altogether, by the mutual dependence and interpersonal relationships between agency personnel and contractors, as was the case with NASA and United Space Alliance and the consultants at EPA. As Paul Posner of the U.S. Government Accountability Office notes, agency management of contractors is "best characterized as bargaining relationships in which the third-party partners often have the upper hand in both policy formulation and implementation" (Posner, 2002, p. 525).

Agencies may also be overwhelmed by their contract workforce. For example, Daniel Guttman, an expert on the "evolving law of diffused sovereignty," noted that

> Congress and the Executive Branch have long recognized 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 more than 100,000 contractor employees. (Guttman, 2000b, p. 3)

Overall, OMB estimates that of 1,609,000 federal positions being tracked under President George W. Bush's President's Management Agenda (OMB, 2001), 751,000 are inherently governmental and 858,000 are commercial (OMB, 2003b, p. 3). For various reasons, only 416,000 of the commercial positions are deemed suitable for outsourcing (OMB, 2003b, p. 3).

OMB may also be understating the policymaking inevitably made by street-level bureaucrats. As every student of street-level administration knows,

> Providers (whether public or private) enjoy considerable discretion when implementing the policy choices of elected officials. This discretion affords them an opportunity to redefine policy choices or to specify them at a level of detail unanticipated by policymakers. Decisions at the ground level of policy implementation can be as consequential as decisions, such as eligibility standards or general program directives, set directly by a centralized public authority. Even the power simply to provide the most carefully specified services creates a principal-agent problem in which a contractor may, without violating any technical contractual terms, enjoy substantial room to maneuver. (Freeman, 2003, p. 1309)

Some of the potential problems with OMB's definitions of inherently governmental functions and permissible discretion came to light in the wake of the Abu Ghraib prison scandal in 2004. Interrogators employed by CACI International, a private company under contract with the Army, participated in the abuse of Iraqi detainees (Crawley & Adelsberger, 2004). Whether Army personnel at Abu Ghraib knew what they were supposed to be getting from CACI is a moot point. The Army has been unable or unwilling to develop centralized information on its contract employees and the firms they work for, including those supporting military operations (Peckenpaugh, 2004, p. 1). In part, this may be because the Army sometimes outsources its contracting functions to other federal agencies. Its contract with CACI was awarded through the Department of the Interior's National Business Center, which used a professional engineering services schedule to procure the interrogators (Harris, 2004a, pp. 1-2). This occurred despite an earlier decision by the General Services Administration to cancel a similar contract with Affiliated Computer Services, Inc. for interrogators at Guantanamo Bay, Cuba, on the basis that it is "inappropriate to use [a] technology contract for interrogation work" (Harris, 2004a, p. 1). As for who influenced whom on the ground at Abu Ghraib, the Army captain in charge of the interrogators said that military personnel were "supervised" by a CACI employee and that there was no "contracting officer representative to oversee the performance of the contract interrogators," which can make it difficult or impossible to administer a contract effectively (Crawley & Adelsberger, 2004).

Abu Ghraib is clearly an outlier. However, it illustrates that relationships among government agencies, government personnel, and contractors can become attenuated and far more complicated than anticipated by OMB's directives and instructions. It is inevitable that at least some of the time some contractors will be in a position to define individual rights, withhold information that government agencies would be required to release, frame policy options, set public policy through their street-level interactions, and exercise influence—or even supervision—over public employees. Consequently, some of the value of constitutional and administrative law norms will be lost in outsourcing, whether the functions are

inherently governmental or otherwise. Limiting outsourcing to noninherently governmental functions does not eliminate the potential benefits of imposing constitutional and administrative law norms on contractors.

CALCULATING WHETHER TO OUTSOURCE

It is somewhat surprising that constitutional and administrative law norms are not necessarily taken into account in calculating when to privatize and outsource governmental functions. The federal courts and Congress have invested considerable effort to developing and applying constitutional and administrative law constraints to public administration, especially since 1946 (Rosenbloom, 2000a, 2000b; Rosenbloom & O'Leary, 1997). This is barely recognized in OMB's *Circular A-76*, which contains 63 pages of detailed instructions on competitive sourcing (OMB, 2003a). Its basic instructions on implementing the FAIR act consume another 31 pages. Competitive sourcing involves the following personnel: agency tender officials, contracting officers, competitive sourcing officials, performance work statement team leaders, human resources advisors, most efficient organization teams, source selection authorities, and source selection evaluation boards.[4] There is a streamlined competition process for agencies with 65 or fewer full-time equivalent employees; those with more than 65 engage in a standard competition. Decisions in both types of competitions are based overwhelmingly on cost-effectiveness. Costing factors include pay, benefits, insurance, contract administration, overhead, retirement, and related considerations. Nowhere are there instructions on—or even mention of—factoring in the cost—or for that matter, value—of agency compliance with constitutional or administrative law requirements such as procedural due process and freedom of information.

Constitutional and administrative law norms simply do not enter into the competitive sourcing decision. Ironically, given the results orientation of the President's Management Agenda,[5] they do have some visibility in the competitive sourcing process. For instance, agencies must make their annual inventories of commercial and inherently governmental inventories available to Congress and the public. Interested parties can challenge these inventories and appeal adverse decisions. Agencies are also required to take a number of steps in dealing with their adversely affected employees. Openness, fair decision making, and protective procedures for employees are important in government but not mandated for contractors.

JUDICIAL GUIDANCE ON OUTSOURCING CONSTITUTIONAL AND ADMINISTRATIVE LAW NORMS

Public officials and administrators have largely ceded the process of outsourcing constitutional and administrative law norms to the federal and state judiciaries. The courts have responded in at least two ways that demonstrate the potential for bringing contractors under these norms. The U.S. Supreme Court is adjusting the historic constitutional doctrine of state action to the contemporary realities of privatizing, outsourcing, public-private partnerships, and hybrid administrative arrangements such as quasigovernmental corporations. The state courts are applying transparency requirements to contractors under state FOIAs and related statutes. These responses are intended to strengthen individual rights and promote open government, not to thrust prohibitive costs on contractors. They are balanced and offer important

baselines for thinking about outsourcing constitutional and administrative law norms along with government functions.

State Action Doctrine

As noted earlier, constitutional law draws a sharp distinction between governmental and nongovernmental action. Following this approach, individuals such as Pedreira, Downs, and those aggrieved by homeowner associations cannot assert any constitutional protections against interference with their freedoms by private parties. The Thirteenth Amendment aside, it is only when private individuals and organizations become state actors that their behavior is subject to constitutional constraints. This occurs when their activity "may be fairly treated as that of the State [i.e., a government] itself" (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001, p. 295). "Fairly" is the key concept and underlying value.

State action doctrine seeks to balance three concerns. First, it protects the autonomy of the private sphere by not subjecting private conduct to constitutional constraints just because the private entity is paid, subsidized, licensed or regulated by, or otherwise connected to government. Second, it protects individual rights from abuse by private individuals and organizations that act as surrogates for government or are empowered by it. Third, it prevents government from evading "the most solemn obligations imposed by the Constitution" by privatizing and outsourcing (*Lebron v. National Railroad Passenger Corporation*, 1995, p. 397).

Within this framework, "what is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity" (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001, p. 295). The judiciary's inquiry is "necessarily fact-bound" (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001, p. 298), and "cases deciding when private action might be deemed that of the state have not been a model of consistency" (*Lebron v. National Railroad Passenger Corporation*, 1995, p. 378). The main categories of state action, noted earlier, are neither exhaustive nor mutually exclusive. Nevertheless, they provide useful guidance.

A private party may be a state actor when it engages in a public function. To date, Supreme Court decisions characterize the following as public functions: incarceration (*Correctional Services Corporation v. Malesko*, 2001; *Richardson v. McKnight*, 1997), providing medical care in public or private prisons (*West v. Atkins*, 1988), administering elections (*Terry v. Adams*, 1953), and managing privately owned towns (*Marsh v. Alabama*, 1946), although not homeowner associations (Mays, 1995, pp. 56-59). A few lower court decisions have held that private organizations performing mandated governmental functions, including health care, are state actors (Freeman, 2003, p. 1334). As this list makes clear, the concepts of public function and inherently governmental activity are not identical. The "operation of prison or detention facilities" is clearly a public function under state action doctrine. However, OMB's *Circular A-76* does not prohibit contracting it out on the grounds that it is an inherently governmental activity (OMB, 2003a, section B.1.c.4).

The Supreme Court emphasizes that it is the judiciary's call—not that of legislatures and elected or appointed executives—to determine what is or is not a public function. For instance, in a state action case involving Amtrak, the Court reasoned that

> 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.

> If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment. (*Lebron v. National Railroad Passenger Corporation*, 1995, p. 392).

Amtrak is illustrative of a second way in which an ostensibly private party may become a state actor. This occurs when the private entity is controlled by government or, whatever its formal status, is considered a government agency for constitutional purposes. Amtrak's authorizing statute states that it "will not be an agency or establishment of the United States Government" (*Lebron v. National Railroad Passenger Corporation*, 1995, p. 375). Two Supreme Court decisions seemed to agree that for commercial purposes, Amtrak is "not an agency or instrumentality of the United States Government" (*Lebron v. National Railroad Passenger Corporation*, 1995, p. 393). However, the Court held that Amtrak is subject to First Amendment constraints in renting out its billboards because it is a creature of the federal government. It was created by Congress to further governmental goals, and six of its eight externally named directors are appointed directly or indirectly by the president, four with the advise and consent of the Senate. Moreover, Congress retained the "right to repeal, alter, or amend" the statutory independence of Amtrak's directors "at any time" (*Lebron v. National Railroad Passenger Corporation*, 1995, p. 398).[6]

A third category of state actors are joint participants with government in an activity that trenches on individuals' constitutional rights. This category prevents the government from deliberately circumventing the Constitution by enlisting private parties to accomplish unconstitutional ends. For instance, the murders of civil rights workers Michael Schwerner, James Chaney, and Andrew Goodman near Philadelphia, Mississippi, in 1964 gave rise to federal criminal litigation against three Mississippi law enforcement agents and 15 private individuals who were charged with conspiring to deprive the three victims of their constitutional rights under color of state law (*United States v. Price*, 1966).[7] Joint participation is potentially relevant to activities such as the on-again, off-again efforts by the federal Transportation Security Administration (TSA) to develop a passenger prescreening system based on data supplied by private sources. If the collection of personal information by the TSA itself would violate Fourth Amendment privacy rights, then the private actors gathering it for the agency could become state actors, and their personnel could be subject to constitutional tort suits.[8]

Some forms of joint participation shade into what would now be considered a fourth category of state action, entwinement. In an early example, a private coffee shop that discriminated based on race was considered a state actor because it was physically and economically part of a publicly owned building and parking lot (*Burton v. Wilmington Parking Authority*, 1961). More recently, the Tennessee Secondary School Athletic Association (TSSAA), formally a private organization, was challenged by a private school for violating its First and Fourteenth Amendment rights to contact potential athletic recruits. By a 5:4 margin, the Supreme Court held that the TSSAA was a state actor because 84% of its members were public schools, its governing council and board were selected by the participating schools, the public schools tended to dominate its decision making, and its staff was eligible to participate in the state retirement system. In the Court's words,

> The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character

> and judged by constitutional standards; entwinement to the degree shown here requires it.[9] (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001, p. 302)

Entwinement has obvious importance for public-private partnerships and some outsourcing arrangements.

A fifth category of state action pertains to private entities that are empowered to use government's coercive power. This category may overlap others, as in the public function of managing prisons, but it can also stand alone in actions involving assets such as garnishment, prejudgment attachment, and replevin. For instance, a private party who uses governmental power such as a writ of replevin[10] to seize property held by another may become a state actor who is liable in a constitutional tort suit for violations of due process of law (*Wyatt v. Cole*, 1992). This category of state action probably has the most relevance to outsourcing the collection of delinquent taxes, which is done in 40 states and currently of interest to the Internal Revenue Service (Friel, 2003; Gruber, 2004).

Nonjudicial Application of State Action Doctrine: Some Examples

In the hands of the courts, state action decisions are often technical, precedent parsing, and based on subtle (or flimsy) distinctions (Chemerinsky, 2002; Gillette & Stephan, 1998; Guttman, 2000a; Mays, 1995). However, the fundamental balance that state action doctrine seeks to secure among the competing interests of private autonomy, protection of individual rights, and constitutional government can be applied by legislators and executive officials as well as judges. It can also be advanced by the public administration community and private organizations.

Acting by executive order in 1941, President Franklin D. Roosevelt prohibited defense contractors from engaging in employment discrimination based on race, color, creed, or national origin.[11] Recalling Pedreira's case, contractors could also be prohibited from discriminating based on sexual orientation or at least required to provide an equivalent of due process when curtailing their employees' liberty to engage in homosexual relationships. Contracts could also protect whistle-blowing—a First and Fourteenth Amendment right in the public sector—and promote other constitutional values. Beyond the employment relationship, outsourcing contracts can include any number of provisions to protect the public in their dealings with contractors. Such protections are common when outsourcing incarceration and youth services. They can be applied to the outsourcing of public education as well. The Cleveland school-voucher program requires participating private schools, both parochial and secular, "not to discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion'" (*Zelman v. Simmons-Harris*, 2002, p. 645).[12] The commercial nature of privately owned shopping malls, stadiums, and similar facilities, as well as the tax and zoning concessions governments sometimes make to their developers, may provide leverage for protecting the free speech and other rights of those who frequent these private yet functionally public spaces. However, private property rights, which include the right to exclude others from one's property, also command great respect (*Dolan v. City of Tigard*, 1994). Regulating homeowner associations may present a similar conflict among constitutional values.

Private accrediting organizations can also include constitutional values in their requirements. The American Correctional Association, founded in 1870, is a leading example. It sets standards for prisons, jails, and juvenile detention facilities. These involve such matters

as personnel, telecommunications devices for the deaf, inventory control of firearms and chemical agents, shelter in place for life-threatening airborne hazardous releases, noise levels, standards for cells (including square footage, natural light, air circulation, and temperature), external defibrillators, writing surfaces, contraband mail, guard training, and the certification of chaplains (American Correctional Association, 2004). The American Association of University Professors and the National Collegiate Athletic Association are similarly in a position to promote free speech, procedural due process, equal protection, and other constitutional values in private universities and colleges.

State Courts and Transparency

As Guttman (2000a) notes, the federal

> courts have long held that contractors (and other third parties) are generally not subject to the Freedom of Information Act . . . because they are not "government agencies." The [judicial] analysis reflects the view that the qualities private actors bring to the public service will be compromised if constrained by FOIA. (p. 901)

No matter how valuable contractors' records developed with public funds may potentially be to informed public debate, the federal courts are unlikely to rule that they are covered by FOIA unless they are in the physical possession of a federal agency.[13] Guttman (2000a) cited growing pressures to resolve "the tension between third party accountability and autonomy" (pp. 901-905). Although the tension is still with us, the state courts have mapped out some instructive approaches in considering when to outsource transparency along with governmental functions.

Craig Feiser (2000) found that 34 state court systems have explicitly dealt with the application of freedom of information and related statutes to private entities. The courts in 22 states use a so-called flexible approach that can take three forms:

1. A "Totality of Factors Approach" (Connecticut, Florida, Maryland, North Carolina, Oregon, and Kansas) considers at least four factors, in combination: (a) whether the private entity performs a governmental function, (b) the level of government funding, (c) the extent of governmental involvement or regulation, and (d) whether the entity was created by the government (Feiser, 2000, p. 837).

The approach is flexible because no single dimension is wholly determinative.

Florida's approach went beyond these factors to include whether the private entity is "acting on behalf of any public agency," "commingling . . . funds," conducting the activity on public property, and whether the government has a "substantial financial interest in the private entity" (Feiser, 2000, p. 839). Additional concerns are the nature of the relationship of the privately performed activity to the agency's decision making and "for whose benefit" the private organization works (Feiser, 2000, p. 839).

2. A "Public Function Approach" (Georgia, New York, Ohio, California, Louisiana, Missouri, Utah, Kentucky, Delaware, and New Hampshire) looks at whether the private entity is performing a public function. Definitions vary among these 10 states. Public functions include performing personnel activities and financial analysis for public agencies, maintaining a booklist for a state university, operating a private firefighting company, and operating a university alumni foundation and an industrial advisory committee (Feiser, 2000, pp. 845-850).

3. A "Nature of Records Approach" (Colorado, Maine, Minnesota, Montana, Washington, and Wisconsin) focuses on the nature of the information sought rather than the composition of the entity that holds it or the functions involved. For example, documents used by "a public stadium district" were considered public records even though they were held by a private party as was information held by a private investigator under government contract (Feiser, 2000, pp. 850-852).

By contrast, 12 states take "restrictive approaches limiting access" (Feiser, 2000, p. 853). These look at whether public funds are involved (Arkansas, Michigan, North Dakota, Indiana, South Carolina, and Texas); whether "the private entity was created by the legislature or . . . previously determined by law to be subject to" transparency statutes (Pennsylvania, Tennessee, New Jersey, West Virginia); and whether information is held by a public entity (Iowa) or the entity holding it is under public control (Illinois; Feiser, 2000, pp. 853-860).

Outsourcing Transparency

Feiser (2000, p. 863) is inclined to rank the states from most to least open. The public administration community can use his analysis more proactively—perhaps even to build a theory of transparency for outsourced functions. When should transparency be outsourced along with governmental functions and why? The state courts have identified several criteria—legislators can endorse or reject them in drafting and amending statutes, and public managers can decide whether to apply them in writing contracts when they have the discretion to do so. For example, in 2001, Connecticut amended its FOIA to incorporate, clarify, and extend state court decisions regarding the act's application to "contractors performing child care and disability eligibility decisions on behalf of state social service agencies, entities running public assistance employment service programs for the state, and the like" (Bass & Hammitt, 2002, pp. 613-614). It is clear, however, that to outsource or competitively source without considering these criteria at all is a default position that abdicates responsibility to the courts and endorses private autonomy and the secrecy it protects over public sector transparency. If arrived at by reasoned analysis, these may be sensible courses of action; otherwise, they are likely to yield suboptimal balances.

FEDERAL CONTRACTING IN PRACTICE: TAKING LIMITED STEPS TOWARD OUTSOURCING THE CONSTITUTION AND ADMINISTRATIVE LAW NORMS[14]

Federal regulations treat the decision whether to outsource an activity separately from the question of the conditions that should be imposed on contractors. As noted earlier, one consequence of this division is that calculating when to contract out does not address whether to outsource constitutional and administrative law norms along with noninherently governmental functions. Much of the specific content of federal contracts for outsourcing is dictated by the Federal Acquisition Regulation (FAR): "The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies" (FAR, 2004, section 1.101). In practice, FAR is an extensive and evolving system of regulations covering an extremely wide range of topics surrounding federal acquisitions, including general administrative matters, competition and acquisition planning, contracting methods and contract types, socioeconomic programs,

general contracting requirements, special categories of contracting, and contract management. In June 2004, the General Services Administration established a new office to help ensure compliance with these and other federal contracting rules and regulations (Harris, 2004b). A small component of the FAR and related regulations deals with important elements of democratic governance: individual rights, including protection of whistle-blowers and personal privacy, and transparency.

Whistle-blower Protection

Federal employees who release information highlighting the potential wrongdoings of their agencies are afforded some protections against on-the-job retaliation. Subchapter A, Part 3 of FAR addresses similar issues for contract employees: "Improper Business Practices and Personal Conflicts of Interest." This section includes the following provision regarding whistle-blower protections for contract employees:

> Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract). (FAR, 2004, section 3.903)

This provision exemplifies how rights enjoyed by federal employees can be extended to private employees through outsourcing.

Personal Privacy

FAR (2004) also contains a Privacy Act Notification clause specifying that

> if a contract specifically provides for the design, development, or operation of a system of records on individuals on behalf of an agency to accomplish an agency function, the agency must apply the requirements of the [Privacy] Act to the contractor and its employees working on the contract. (section 24.102.c)

The Privacy Act guards against disclosure of personal information and affords individuals opportunities to contest the accuracy of information in records on them. FAR requires contractors to accept potential criminal penalties for violations of the act.

Transparency

The final products produced by contractors are in many cases documents or electronic files that are turned over to the agency. Once a record is in an agency's possession, it usually becomes an agency record subject to FOIA. Information that is not considered an agency record is not subject to release through FOIA. The case law on the topic is extensive, but, basically, if a record is in the control of a federal agency, it is most likely an agency record. The FAR includes a section (section 4.700) on the document retention schedule of contractors. It focuses primarily on how long a contractor must keep documents to satisfy auditing requirements. It does not address the wider purposes of freedom of information. With this in mind, the Department of Energy (DOE) includes a clause regarding ownership of records and access in its Department of Energy Acquisition Regulation (DEAR):

> Government-owned records. Except [records on personnel, confidential financial matters, operations not related to DOE, legal matters, and some aspects of technology, intellectual property, and procurement], . . . all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract. (U.S. Department of Energy, 2004)

Unlike the DOE's requirement, FAR does not include a general access and ownership of records clause. DEAR offers exact language that can be placed in contracts to specify which documents will become property of the federal government. Flexibly applied, some contracts could include extensive ownership of records and access clauses, whereas others would have few or none. The greater number of contractor records that are turned over to federal government the more accessible they are to the media and general public through FOIA. Alternatively, rather than leave discretion with the agencies, Congress could follow Connecticut's lead and amend the federal FOIA to cover certain classes of contractor records across the board.

Next Steps

These provisions of FAR and DEAR outsource constitutional and administrative law norms on a very limited scale. However, they illustrate that such outsourcing is feasible and salient to federal acquisitions professionals. Contractors can be asked to tolerate whistleblowers, accept potential criminal punishment for violation of the Privacy Act, and supply their records to federal agencies for possible public release. A long historical view of how federal administrative agencies were subjected to constitutional constraints and administrative law regulations during the 20th century (Rosenbloom, 2000a, 2000b) suggests that further outsourcing of constitutional and administrative law norms to contractors is likely to be inevitable. A half-century struggle by judges and legislators to promote democratic-constitutional values over deep-seated interests in administrative economy, efficiency, effectiveness, and independence strongly suggests that, as the Supreme Court first held in 1880 and reiterated in 1995, ultimately "the Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken'" (*Lebron v. National Railroad Passenger Corporation*, 1995, p. 392, quoting *Ex Parte Virginia*, 1880, pp. 346-347). The question is less whether some constitutional and administrative law norms will be outsourced to contractors than when, how, and what role public administrative expertise will play in the process.

CONCLUSION: DEVELOPING A CALCULUS FOR DEMOCRATIC-CONSTITUTIONAL THIRD-PARTY GOVERNMENT

The scope of contemporary privatization and outsourcing is huge. As of 1996, Light (1999) estimated that the federal government had about 4.2 million civilian and military personnel and employed another 12.7 million workers on contracts, grants, and mandates (p. 37). Today, the federal government is spending almost $28 billion annually on professional services contracts—a 57% jump from 5 years earlier (Adelsberger, 2004, p. 1). As large as these numbers are, they are undoubtedly dwarfed by contracting at the state- and

local-government levels. Third-party government is clearly attractive to policy makers, but so are individual rights, governmental transparency, and other democratic-constitutional values.

Despite its expertise, the public administration community has not concertedly engaged the issues associated with outsourcing constitutional and administrative law norms. It may often be assumed that such outsourcing would be prohibitively expensive or otherwise impede third-party government. Yet, outsourcing the Constitution in incarceration, as the Supreme Court did in 1988 (*West v. Atkins*, 1988), has not been a barrier to privatizing prisons. In fact, it may well have facilitated privatization by making privately managed prisons safer for prisoners and more palatable to legislators. Similarly, outsourcing these norms would not necessarily thrust burdensome red tape and litigation costs on to contractors. Following the DOE's approach, much of the third-party transparency issue could be resolved with minimal effort, litigation, and expense by the simple step of requiring contractors to supply specified documents to the agencies whose functions they perform. If necessary, liability could be capped in return.

Outsourcing constitutional and administrative law norms is necessarily selective. Except with regard to treatment of their own employees (which is regulated by employment law), these norms are probably irrelevant to the overwhelming number of contractors, who neither deal directly with the public nor possess significant information that would be available from public agencies under freedom of information and other transparency statutes. U.S. democratic constitutionalism rests on a duality that protects private autonomy. Constitutional and administrative law norms need not be applied across the board to all contractors or to none at all. Their value and application should be systematically calculated when deciding which government functions to privatize and outsource. Largely by default, the guidelines available to the public administration community are being supplied by the courts: Is the contractor engaged in a public function, acting as a surrogate or adjunct for an agency in an area were constitutional rights are at risk, or so entwined with an agency as to be public in character? Are the funds involved so large that the endeavor would be of interest to taxpayers or to suggest that a contractor's employees ought to have whistle-blower protections? Is the contractor gathering or producing information that threatens personal privacy or speaks to the core purposes of freedom of information and other open government requirements? Is outsourcing a way of circumventing constitutional and administrative law constraints?

Such questions can be left to the judiciary. However, with observation, analysis, and thought, the public administration community should be able to bring its expertise to bear in refining, augmenting, and answering them. In the process, it could do what Savas (1987) explicitly and *Circular A-76* implicitly seek: to provide a "key to better government."

NOTES

1. Kettl (2002, pp. 507-508) lists "a commitment to public values" under a section entitled, "Lessons for Managing Indirect Government." He suggests that "rotation of government employees through nongovernmental partners" (p. 508) might alert contractors to "public-sector norms" such as "responsiveness to citizens" and "equity" (p. 507). Perhaps because he focuses on public administration's service rather than regulatory activities, Kettl does not mention the constitutional and administrative law constraints that largely define—and enforce—"public-sector norms" in the public sector itself.

2. Since 1969, dismissals of federal employees covered by civil service protections against adverse actions have been guided by the principle that "a finding that an employee has done something immoral or indecent

could support a dismissal without further inquiry only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service" (*Norton v. Macy*, 1969, p. 1165).

3. Light's (1999) use of the term *formal rulemaking* is probably technically incorrect. Most federal rulemaking, including that of the EPA, is in accordance with the Administrative Procedure Act's procedures for informal (*notice and comment*) rulemaking as opposed to those for formal (*on the record*) rulemaking.

4. U.S. Office of Management and Budget (OMB, 2003a). A list appears in the section on "Acronyms and Definitions"; the terms are used throughout the document.

5. OMB (2001), *The President's Management Agenda*, reports "The President's vision for government reform is guided by three principles. Government should be: Citizen-centered . . .; Results-oriented; Market-based" (p. 4).

6. See also *Pennsylvania v. Board of Directors of City Trusts of Philadelphia* (1957).

7. After releasing them from jail, a deputy sheriff tailed their vehicle, stopped it, put the three in the sheriff's car, and took them to a place on an unpaved road where they were assaulted and killed by three law enforcement agents and the 15 private individuals.

8. See New (2004) and Strohm (2004). With the approval of the Transportation Security Administration (TSA), JetBlue transferred passenger data to the Department of Defense. The TSA's Computer-Assisted Passenger Pre-screening System (known as CAPPS II) envisioned relying on commercial databases to identify passengers who present security threats. The Fourth Amendment question would begin with consideration of whether individuals have a reasonable expectation of privacy in the information in these databases, which they may not. At the federal level, private organizations engaged in state action cannot be sued for constitutional torts, whereas their employees are subject to such suits (see *Correctional Services Corporation v. Malesko*, 2001).

9. In dissent, Justice Clarence Thomas, joined by Chief Justice William Rehnquist and Justices Anthony Kennedy and Antonin Scalia, argued that "we have never found state action based upon mere 'entwinement'" (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001, p. 305).

10. Defined in *Black's Law Dictionary* (Black, 1979) as "an action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels" (p. 1168).

11. Executive Order 8802 (1941).

12. The program does not prohibit discrimination or the teaching of hatred based on sex or sexual orientation.

13. Under the 1998 "Shelby Amendment" (Public Law 105-277), data gathered pursuant to federal grants (although not contracts) are subject to the Freedom of Information Act. According to OMB's guidance, the amendment applies only to data used as a basis for federal regulation (see Bass & Hammitt, 2002, p. 608).

14. To learn more about federal contracting practices, we e-mailed all 34 members, alternate members, and liaisons of the Federal Acquisitions Council seeking information about compelling contractors to turn over records to the agencies, discrepancies between Federal Acquisition Regulation's (FAR) language and actual practice, and how FAR might be improved. Although we received only five responses, these were factual and helped inform our discussion in this section.

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