United States Senate
Committee on Governmental Affairs

Who's Doing Work for Government? Monitoring, Accountability and Competition in the Federal and Service Contract Workforce

Testimony of Dan Guttman

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My name is Dan Guttman. Thank you for the opportunity to appear before you today.

I am an attorney in private practice, a Fellow of the National Academy of Public Administration and a Fellow at the Johns Hopkins' Washington Center for the Study of American Government, where I teach courses including "government by third party."

I appear as a citizen whose interest in the performance of public purposes by private actors dates to law school research leading to *The Shadow Government* (Pantheon: 1976). My understanding has been enriched by service as counsel to Senator David Pryor in his inquiries, as Chair of the Federal Services Subcommittee, into "government by contract," service as Executive Director of the President's Advisory Committee on Human Radiation Experiments in its examination of biomedical contract and grant research, service as counsel to nuclear weapons workers, themselves longstanding contractor employees, and exchanges with Johns Hopkins students and an emerging global network of researchers on new forms of governance.

SUMMARY

The Past and the Present: Where We Are and How We Got Here

In 1999 the Brookings Institution reported that the Federal government's "official" workforce of approximately 2 million employees is a fraction of the "shadow of government" -- an estimated 8 million employees who work for the Federal government on grant and contract.[1]

Today's Federal reliance on grant and contractor employees to perform the basic work of government is neither an accident nor a recent development. [2] It is the product of mid-20th century reform that produced profound successes, but left a legacy of fundamental questions that have lain unexamined by Congress and the Executive. September 11 shows us that due diligence on the legacy of past reform is now in order.

Most of this "shadow of government," of course, produces products (computers, food) or provide services (maintenance, electricity) that are commercial staples. However a significant fraction play a daily role in the basic work of government -- drafting rules, plans, policies, and budgets, writing statutorily required reports to Congress, interpreting and enforcing laws, dealing with citizens seeking government assistance and with foreign governments, managing nuclear weapons complex sites and serving in combat zones, providing the workforce for foreign aid "nation building," and selecting and managing other contractors and the official workforce itself.

At the Dawn of the Cold War, reformers deployed contracts and grants to harness private enterprise to public purpose. They knew the private sector would provide expertise and powerful political support for increased federal commitment to national defense and public welfare tasks. They hoped that the private sector would countervail against the dead hand of the official bureaucracy and allay concern that a growing government meant a centralized Big Government. The officials, businessmen, and scholars who forwarded reform saw themselves as engaged in change of Constitutional dimensions (the "diffusion of sovereignty, as Harvard's first Kennedy School Dean Don Price wrote in 1965).

The reformers were aware that the "blurring of the boundaries between public and private" raised troubling questions about the Constitutional premises of our government. The concerns were identified in a 1962 Cabinet report to President

Kennedy. The"Bell Report":

* declared that reliance on contractors and grantees has "blurred the traditional dividing line between the private and the public sectors of the our Nation;"

* deemed it "axiomatic" that government officials (i.e., civil service and appointees) must do the work and have the competence required to account for all work of government;

* warned that, unless corrective action were taken, there would be a brain drain of officials – why shouldn't they prefer working as contract and grant employees, who are not constrained by official pay caps or ethics rules, and are increasingly assigned the interesting work?

The Bell Report backed away from answering the basic questions it raised. The new public/private mix, it found, was essential to Cold War programs, and "philosophical issues" need be deferred to a later date. Now, September 11 suggests, is that later date.

Unresolved Constitutional Questions for Today and Tomorrow

One-half century of federal reliance on contractors and grantees produced remarkable successes – the Manhattan and Apollo projects, victory in the Cold War, advances in biomedical understanding, to name a few. At the same time, the Bell Report's concerns have borne out:

(1) *We have a declared governing principle -- only officials can perform "inherently governmental" work -- that is increasingly a fiction or figleaf.*

Since the Bell Report, third party government has grown on automatic pilot. Driven by the inexorable force of bipartisan limits on the number of officials ("personnel ceilings"), the creation of new programs or agencies has meant that work is necessarily contracted out without due regard to its "inherently governmental" nature (or, indeed, the relative costs involved).

(2) *We have a Government the bulk of whose workforce is invisible to citizens, press, and too often even to Congress and the highest ranking political appointees. Notwithstanding conflict of interest disclosure requirements, the few public reviews of the process indicate that too often contractors are hired without due regard for potentially conflicting interests.*

-- Even as they work side by side with officials in government offices and respond to citizen queries on government hotlines, contractors are not found on government organization charts or in official phone books.

-- Contractor work is often transmitted within agencies as if it were official workproduct. Thus, Senator Pryor found, the Secretary of Energy (and his procurement staff) was unaware that contractors wrote his Congressional testimony.

-- Senator Pryor's review of the conflict of interest clearance process employed by the Department of Energy (a rare agency where such review is statutorily required) found contractors routinely failed to disclose relevant interests and officials ignored publicly available information that should have rang alarms. [3] Most disturbingly, DOE assigned sensitive national security tasks to contractors with no awareness of their work on the same issues for potentially adverse foreign interests. [4]

-- Contractors may work for multiple boxes on an agency organization chart, and for multiple agencies. Officials who call on contractors may be unaware that contractors are reviewing their own work. [5]

-- The dimensions of the contractor workforce remain unclear. Brookings' 1999 report estimated the Army's contract workforce at about 1 million; recent Army estimates put the number in the range of 200,000. [6]

(3) We have two sets of rules to regulate those who perform the work of government. We can no longer presume that those who actually do the work of government are themselves governed by the laws enacted to define the limits of government and to protect ourselves against "official" abuse – the Constitution of the United States, and statutory ethics, openness, and political conduct provisions

The question " what is an inherently governmental function?" is practical, not, as it often now appears, an invitation to scholastic debate. Over the course of two centuries we have crafted laws to empower our government and to protect ourselves against government misconduct -- to whom should these laws and rules be applied?

Key rules governing officials do not govern private actors who perform the work of government, or, as in the case of conflict of interest rules, apply to them in a lesser form. Where third parties are relied upon solely for "commercial" assistance, and accountable to officials, it makes sense to have one set of rules to govern the civil service and another to govern third parties. Where third parties do the work of government, this logic requires review.

(4) We have an official workforce whose ability to account for the government and its private workforce is increasingly problematic.

With the added impetus of personnel ceilings, the dual sets of rules have stimulated, as the Bell Report predicted, a migration of talent from the official workforce into the contractor/grantee workforce.

(5) *In the absence of Congressional and Executive oversight, Rules of Law to govern third parties who perform the work of government are being made by accident and happenstance, often driven by third parties themselves.*

Bipartisan fiction that only officials can and do perform the work of government, has brought stovepiped reviews of "procurement" and "civil service" systems – with no overview of where the two meet. In the vacuum of oversight, the rules to govern third parties are, by default, being made on an case by case basis in which third parties are often the driving force, and in which courts have an increasing role. The result is often rules that may protect the interest of third parties themselves, but not necessarily the interests of the public at large.

(6) In the absence of consistent Rules of Law to govern all who do the work of government, the tools of accountability we deploy are suboptimal.

In lieu of consistent rule(s) of law to govern the new mix of official employees and contractors we employ accountability mechanisms that, it often appears, presume that it does not matter who does the work of government.

Thus, we invoke "performance standards, "performance contracting," "performance based organizations" in hope that if we define and measure performance, accountability will be assured. Similarly, we empanel stakeholders and urge competition in contracting in hopes that these traditional contests of interests will, in the end, keep the system honest.

These modern and traditional accountability mechanisms are of undeniable value. However, the cure-all value of these mechanisms in a world of diminished official oversight capacity is problematic. The Founding Fathers recognized that competition (whether among businesses or stakeholders or other "factions") does not negate the need for government. Similarly, history shows that performance measures are useful, but not a panacea when applied to government -- where performance is difficult to define, results are not always measured, and alternative performers are not always available, or

only available at further cost.

(7) Because we have failed to attend to our own house, we export and import systems of governance based on slogans whose practical meaning we ill understand. We are damaging our own national interest and those of peoples who rely on us in their search for governance models.

-- Thus, the Agency for International Development (AID) turned over to a Harvard institute the administration of funds to "restructure" post Cold War Russia; we know now that we exported corruption, not governance. The Department of Justice has filed a False Claims Act lawsuit to recover $120 million from Harvard.[7]

S Thus, in the mid 1990's DOE, following Margaret Thatcher, declared it would "privatize" nuclear weapons complex cleanup -- with little recognition that DOE cleanup work was always performed by private contractors, and that DOE's problem is controlling contractors, not employing them. The resulting cost overruns were soon the subject of Congressional inquiry.[8]

S Thus, in 1998 we "privatized" the U.S. Enrichment Corporation, again without recognition that work at issue had always been performed by the private sector under contract, and without appreciation that we were not selling a cement plant or hotel, but entrusting a private corporation with key national and energy security missions. In March, 2001 a Federal District Court Judge found the "privatization," the most significant of the Clinton era, a "model" of what not to do.[9]

What Should be Done? Due Diligence on the Legacy of 20th Century Reform is in Order

As we proceed with the post September 11 reexamination of government, it is time to address the difficult questions raised, but not answered, by mid-20th century reform. Components of due diligence include:

Truth in Government: Who's Doing the Work of Government?

- In reviewing and authorizing programs, who is the workforce, and how will we make sure it is visible to citizens and officials?

What Rule(s) of Law Will Apply to Those Who Do the Work of Government?

- Will we continue to have two sets of rules – one applicable to officials and the other to nongovernmental actors who perform the work of government?

- Will nongovernmental actors be subject to some or all Constitutional and statutory provisions we apply to officials?

- Are new principles of law needed to govern nongovernmental actors who perform governmental functions?

What Are Our Accountability Mechanisms and How Well Do They Work?

- Do we still presume that officials must and do have the skills and resources to control government? If so, how do we now this is the case?

S Or, do we believe that alternative accountability mechanisms -- such performance measures and competitor and stakeholder/interest group vigilance are enough to do the job in the absence of

capable official oversight? If so, how do we know this is the case?

S What is our fallback if third party government does not work?

If We Continue to Blur Boundaries Between Officials and Private Workforces, Is There Danger We May Lose The Very Qualities We Most Value in Both?

- Can we constrain nongovernmental actors (be they corporations, universities, or other nonprofits) without diluting the qualities of autonomy and independence for which we relied on them in the first instance?

S By the same token, as we seek to reinvigorate the civil service by making it more entrepreneurial and incentive driven, will we lose the qualities that rendered the civil service of value in the first place?

I. The 20th Century Reconstitution of The Federal Government

B. The Mid-Century Foundations of Reform

The mid-20th century development of government by third party was not an accident, but reflected a bipartisan design by reformers to grow the Federal government while avoiding the perceived perils of enlarging the official bureaucracy.

Today's network of federal grant and contract relationships is based on a template established in the early 20th century, when private philanthropists (such as Robert Brookings and the Rockefeller Foundation) created private research institutions (such as the Institute for Government Research, Brookings' progenitor) to serve as levers for the reform of the Federal government (such as the 1921 passage of the Budgeting and Accounting Act, which created the modern budget bureau and Congressional accounting offices).

The informal network of early 20th century relationships -- among private money and private expertise and public agency -- was mobilized for the World War II effort. The research and development required for the War was, of course, immensely expensive, and private philanthropy could not foot the whole bill. Thus, what had begun as an informal set of relationships in which money flowed from the private sector to private experts, was transformed into a set of relationships defined, in primary part, by the government contract and grant. The success of the wartime grant and contract based relationships among government, industry, and university led to the determination to make them a permanent fixture of post war America. When demobilized government researchers returned to the private sector, they continued to work on the taxpayer dollar, under contract and grant.[10] The post-war network in turn spawned new institutions: "independent nonprofits " (with Rand and Aerospace the prototypes) created to manage Cold War military research and development.

The military's post-war contracting out of weapons R&D and production was not mandated by law; indeed, the seminal text on post war weapons contracting explained that "[t]he preference for private enterprise conduct of U.S. weapons development and production work...is essentially an unwritten law, and, indeed, statutory references seem to contradict it." [11]

The Manhattan Engineer District, precursor to today's Department of Energy (as well as the Nuclear Regulatory Commission and the nuclear weapons component of the Defense Department), established the template for government by third party as the essential means of government, and not a mere adjunct to render services on a "temporary and intermittent basis." Following the core of the Manhattan Project's 1947 reconstitution as the Atomic Energy Commission, the weapons

complex continued to perform its work in fundamental reliance on contractors.

The mid-1950's Bureau of the Budget Circular A-49 was the first effort to address the problems of official control posed by the sweeping delegation to "management and operating ("M&O") contractors" of the management of the "government-owned contractor operated" ("GOCO") nuclear weapons facilities -- such as Oak Ridge, Los Alamos, and Hanford.

In 1980, Senator David Pryor's subcommittee of the Government Affairs Committee (Federal Services) sought to take the measure of decades of contracting out, and found that the Department of Energy's 20,000 Federal employees were a small fraction of the 100-200,000 employed on contract. The subcommittee found that; "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." [12]

In 1989-90 Senator Pryor revisited the Department of Energy (as well as many other agencies) and found, among other things, that: (1) DOE knew that, as a rule of thumb, taxpayers were paying $25,000 per person year more for support service contractors to do the work of government than officials cost – but, because of personnel ceilings, had no other choice; (2) DOE's rules for checking contractors' conflicts of interest were systematically violated; (3) contractor use was so invisible within DOE that the procurement office and the Secretary of Energy did not know that contractors were being employed to write the Secretary's Congressional testimony; (4) DOE was unaware that the contractor it was employing to forward a highly controversial modification to the nuclear nonproliferation treaty before Congress was simultaneously reporting back to the foreign beneficiaries of the modification.[13]

In 1997 S. S. Hecker, Director of the Los Alamos National Laboratory, put the actuality of the weapons complex's fidelity to the "inherently governmental" principle in a nutshell:

> The development, construction, and life-cycle support of the nuclear weapons required during the Cold War were inherently governmental functions. However, the government realized that it could not enlist the necessary talent to do the job with its own civil-service employees. Instead, it enlisted contractors to perform the government's work on government land, in government facilities, using the specialized procurement vehicle of the management and operating (M&O) contract. [14]

If there is a public imprimatur for the new governing principle, it was the creation of NASA. NASA marked the halfway house; the transfer of the military model to a "quasi-civilian" agency. NASA, created overnight through the transformation of a small in-house research agency ("NACA"), was designed to depend on contractors for the bulk of its workforce. A court decision stemming from a reduction in force (RIF) of Federal employees at the Marshall space center captures the transition in amber.[15] The 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." The use of contractors, instead of federal employees, they complained, violated civil service laws, the NASA enabling act, and the union 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 broadly provided 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 research 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 ...

NASA, the court observed, "resorted to support service contracts as the alternative means of overcoming the civil

service personnel ceilings." The court concluded that the enabling act's provision for contractors provided a "separate means, independent of the [the federal employee provision] for performing NASA's functions."

C. The Reformers' Design: Change of Constitutional Dimensions

The writings of the public servants, businessmen, and scholars present at the creation show that the post World War II growth of the contract bureaucracy was the product of design, 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 defense and public welfare tasks. Second, the private bureaucracy would countervail against the dead hand of the official bureaucracy and alleviate concern that a growing government meant a centralized Big Government. The officials, consultants, and scholars, saw themselves as engaged in reforms of profound, even Constitutional dimensions.

In his 1965 *The Scientific Estate*, public policy scholar Don Price, first dean of the Kennedy school, described the transformational import of the "fusion of economic and social power" and the "diffusion of sovereignty":

> ...the general effect of this new system is clear; the fusion of economic and political power has been accompanied by the diffusion of sovereignty. 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.[16]

This basic and benign reconstitution of government, marveled John Corson, a New Deal civil servant who, at mid-century, opened the management consulting firm McKinsey's Washington office, took place with "little awareness." Corson began his 1971 book *Business in the Humane Society:*

> There is 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 conventional pattern of our past.[17]

Post-war contracting, Corson proclaimed, was a "new form of federalism" under which the federal government gets its work done by private enterprise.[18]

It was left to President Eisenhower, in his farewell address, to provide another portrait of the implications of 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 recognize the imperative of this development. Yet we must not fail to comprehend its implications....In the councils of government, we must guard against the acquisition of unwarranted influence ... by the military-industrial complex.[19]

C. The 1962 Bell Report: The Highwater Mark of High Level Understanding and Concern

The highwater mark of the dialogue between those who viewed the basic changes in the structure of government with alarm and those who applauded them lies in the 1962 report of a Cabinet level panel convened by President Kennedy, directed by Budget Bureau Director David Bell. The panel was to consider the contracting out of military research and development.[20]

The "Bell Report" addressed the "highly complex partnership among various kinds of public and private agencies related in large part by contractual arrangements." 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."

The panel put its finger on the two characteristics of the new developments that were most troubling then -- and are even more so today. First, the rules enacted to protect citizens against abuse by public servants did not, in important respects, apply to contractors or their employees. In particular, the Bell report noted that pay caps on Federal employees did not apply to contractors and that conflict of interest rules which governed federal employees did not apply to contractors or their employees.[21] 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.[22]

Second, the panel neatly laid out the seductive psychology which undergirded the new system --- short term rationality, but possibly, long term irrationality. From the vantage 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 programs 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. Because differing rules applied to federal employees and contractors, there would be, over time, a tendency for the intelligence of government to migrate from the official workforce into the third party workforce — thus further eroding the capability of the official workforce to control the third party workforce. Over the long run, the intelligence of government needed to control contractors might only be found within the contractors themselves. The danger was compounded because of the qualitative difference in the interests of contractors, as well as the rules governing those interests.

The report 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." 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."

The Bell panel 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 performance of public functions and for the use of public funds.

The panel emphasized that the test for government control is one of substance, not form. "There must be sufficient technical competence in the Government so that outside technical advice does not become defacto technical decisionmaking."

In the end, however, even as the report described the problematic nature of the "blurring of public and private" with acuity, it begged the "philosophical" questions thereby raised. 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. 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.

Instead, the task was to learn the best uses of the panoply of new institutional tools - profits, independent nonprofits, universities, and in-house research groups - at hand.

D. The 1960's and 1970's: Government By Third Party on Automatic Pilot

Following the Bell Report's go ahead, third party government grew as if on automatic pilot.The contracting out of military, atomic energy, and space programs was, of course, hardly a secret. The growth of third party bureaucracies as appendages to new "civilian agencies" (such as the Departments of Transportation, Housing and Urban Development and the Office of Economic Opportunity, and the U.S. Environmental Protection Agency) was less visible, but no less exorable. Driven by the force of bipartisan limits on the number of Federal employees ("personnel ceilings"), those directing new agencies and programs had no recourse but to call on third parties to do the work of government. [23] As in the case of the Cold War agencies, the promoters of third party government viewed third parties as purveyors of new management techniques, but also as tools in the politics of bureaucratic reform. The reformers claimed that social problems could be solved if "institutional obstacles" to change were overcome. [24]

From another perspective, however, government by third party was not a benign reform effort to control Big Government bureaucracies, but a veneer for politics as usual. The "Nixon Personnel Manual," unearthed by Congress during the Watergate hearings, mused:

> 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 stabilize, 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 the federal employees. The commercial costs, naturally, exceeded the personnel costs they replaced.[25]

E. **1980's and 1990's: Privatizers, Downsizers and Reinventors; Blurring the Boundaries with Abandon**

In the 1980's and 90's, smaller government gained popular support around the globe. Citizens, however, generally wanted no diminution in governmental functions. To address this inconsistency, strategies for the reform of governance took hold: reinventing government, public-private partnerships, devolution, privatization, deregulation, the third way, to name a few. These strategies sought to make government more responsive and efficient by engaging nongovernmental actors in its functions.

At the level of the Federal government of the United States, they were forwarded with passing, if any, regard for the

fact that the reforms proposed had, in fact, long since taken place. Thus, after identifying the “new” mechanisms for delivery of social services that form the core of “Reinventing Government,” Osborne and Gaebler note that “surprisingly” many of these innovations had already been deployed by the Federal government.[26]

Advocates of new governance strategies, acknowledged, even boasted, that application of their regiment would “blur” conventional boundaries. Counseling that officials “steer” and non-governmental actors “row”, the authors of *Reinventing Government* (1992) further counseled that innovation not be held back by "outdated mindsets." "We could do well,"they quote public administration scholar Harlan Cleveland approvingly, " to glory in the blurring of public and private and not keep trying to draw a disappearing line in the water."[27]

Upon taking office, the Clinton Administration brought “REGO” front and center, declaring that the initial commitment of the reinvention effort would be the reduction of the federal workforce by 300,000 employees.

The new Bush Administration’s Faith-Based- Initiative, for its part, may be seen as heir to the reform tradition; the use of nongovernmental actors to perform publicly funded social services. [28]

At the millennium’s start, globalization provides another New Frontier for third party governance -- foreign policy. In 1998, the United States contracted out the administration of the nuclear nonproliferation agreement under which the U.S. purchases Russia’s nuclear weapons grade uranium -- placing national security in the hands of a private entity whose legitimate profitmaking interests are in obvious potential conflict with those declared by the Congress of the United States in providing for the privatization.[29] The Clinton Administration also called on a non-governmental entity (Harvard’s Institute for International Development) to manage U.S. funds for the restructuring of the Russian state and economy.[30] The now well-publicized failings of these efforts showcased the discrepancy between American readiness to deploy third parties as agents of foreign policy and American ability to deploy the means of accounting for them.

II Today’s Federal Government: Actual Principles of Governance

A. Inherently Governmental Function: Fiction and Figleaf

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 Defense/NASA/AEC use of "management" contractors, and Circular A-76, which provided that "commercial" functions should, by contrast, be contracted out.

The policy that only officials can perform “inherently governmental” functions was reasserted in OMB Policy in 1992 (OFPP Policy Letter 92-1) and, for the first time, given express Congressional imprimatur in the FAIR Act.

It is now well appreciated that the principle is not subject to formulaic definition. 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 define." The Supreme Court, as discussed below, has found few examples of “exclusive” public functions.

Moreover, 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: 1) the Department of Energy (DOE) relied on contract hearing examiners to review security clearance determinations; 2) DOE relied on a contractor to prepare congressional testimony (including that given by the Secretary of Energy); and 3) 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." [31]

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 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 figleaf is not overwhelming.

B. Employees and Contractors: Dual Regulatory Systems for the Basic Work of Government

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 (e.g., Title 41 and corresponding regulations).

1. Truth in Government Organization

Employees, but not contractors, are covered by routine practices - such as the publication of agency phone books and organization 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 organization 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 organizational chart boxes.

2. Freedom of Information

The work of the official workforce is, with important limitations, subject to the Freedom of Information Act (FOIA). FOIA, by its terms, applies to “agency” records -- contractors, the courts have found, are not agencies – even where it has been found and admitted that they perform decisional roles. [32]

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. Federal employees are also bound by "Standards of Ethical Conduct for Employees of the Executive Branch." (5 CFR Part 2635). 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.

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, restrictions on political activity, and prohibitions on the right to strike.

C. The Tools of Third Party Accountability: Competitors/ Stakeholders. New Tools of Government, and Third Party Law Enforcement

In the Western tradition, the rule of law is presumed to be the core means of holding government to account. In the absence of coherent rules for the governance of third parties who perform the work of government, we have deployed alternative means of accountability. Prominent among them are:

4. Reliance on Competitors/Stakeholders To Keep the System Honest

The use of competitors and stakeholders (sometimes called interest groups or special interests) to keep the system honest has been a core tool of American government,[33] and remains a key tool of accountability today -- as government is increasingly performed by third parties. Thus, agencies routinely convene "stakeholders" to draft rules and set agendas (with contractors employed to "facilitate" the stakeholder discussions.)[34] Thus, the Bush Management Agenda is premised on competition (between officials and contractors, as well as between contractors) as a key means of making the new system work.

These tools are fundamental, but have limits that have long been recognized; competitors and stakeholders do not have equal access to information and the resources needed to act on it – and, even if where they do, they may not represent the public interest at large.[35] Thus, as the Founding Fathers provided, a structure of government is an essential complement to the interplay of competitors and competing interests.

2. New "Tools of Government"to Manage the New Public/Private Mixes

There is active effort by scholars and practitioners to understand and deploy "new tools" of government to govern public-private mixes -- grants, contracts, public/private partnerships, privatization.[36] These tools are, in turn, undergirded by modern management wisdom concerning – e.g. the role and structuring of performance contracting, performance-based organizations, performance budgeting.

In the best of times (where official oversight capability is strong) these management techniques 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.

3. Third Party Law Enforcement

The growth of third party government has been accompanied by a sea change in the law of standing (the rights of citizens to take court action where the government, or its contractors, have broken the law), 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.

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, particularly those that allegedly violate the basic policies stated in OMB/OFPP circulars - which the Executive Branch strives mightily to render nonreviewable.

In addition, the False Claims Act (which permits citizens to bring suit in the name of the government to recover for fraud against the government) is playing an increasing role in holding third party government to account.[37]

D. The Default Rulemaking Process for the Law of Third Party Government: Third Party Driven Rulemaking

In the absence of considered Congressional and Executive Branch oversight, the rules governing third party performance of government work are, by default, being made on an case by case basis in which third parties themselves are often the driving force. The resulting rules are essential, but, because of the limited interests of the third parties who drive them, may not completely protect the public interest. The rulemaking process is illustrated in the application of conflict of interest and freedom of information rules to nongovernmental actors who perform the work of government.

3. Organizational Conflict of Interest: Rulemaking and Enforcement By Contractors

The concept of "organizational conflict of interest" (the term for the conflict of interest rules applied to contractors) emerged at mid-century when aerospace manufacturers complained that the location of the initial Project Rand contract within a competitor (Douglas Aircraft) was unfair (because Rand might recommend hardware projects that Douglas would bid on). To resolve the conflict of interest concerns, the Rand contract was spun out of Douglas into a new nonprofit organization.[38] Following a similar episode in the management of the ICBM missile program (which resulted in the creation of Aerospace, another nonprofit, to manage the program) the organizational conflict of interest concept crystallized in the notion of the "hardware ban" – "think" contractors could not be affiliated with entities in the running for the lucrative hardware contracts that flowed from their thoughts.[39]

> The essential problem with the organizational conflict of interest concept was that it protected the interests of competing contractors, but did little to protect the interest of the public at large. As the Bell Report noted, the governing boards of the new nonprofits made them intellectual holding companies for the contractor establishment at large. 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 organizational conflict of interest policy. It was not until the late 1970's that the notion of a "public interest" – an interest independent of that of the contractor establishment at large – came into being. [40]

The enforcement of organizational conflict of interest prohibitions is an insiders 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, [41] 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 program officials to alert them to the significance of the information that is disclosed. Meanwhile, the subcommittee reported, "program officials, who depend on contractors to get their work done, assume that procurement officials will adequately apply DOE conflict rules." Third, program officials may see the indicia of conflict as evidence that the contractor should be hired, and not avoided. From the program officer's perspective, valued expertise may be the flip side of what, to the outsider, is a conflict of interest. [42]

4. Freedom of Information: Third Party Autonomy vs. Third Party Accountability

In the case of public access to contractor-maintained data, courts have repeatedly held that the Freedom of Information Act does not apply to (taxpayer funded) records maintained by contractors, because they are not "agencies" (as required by the act). In doing so, the courts acknowledge that nongovernmental entities are, in fact, making governmental decisions.[43] It was not until 1998, following protest by powerful components of American industry that they lacked access to data underlying proposed EPA rules, that FOIA was amended to provide for access to grantee produced data underlying proposed regulations.[44] Even so, the rule applies to some kinds of third parties, but not others.

E. 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. However, given the obscurity of third party government, the Supreme Court's (and lower court) decisionmaking has not benefited from the context needed to test the logic of the judiciary's necessarily case and fact-specific analyses.

1. The Supreme Court Has Found Few Exclusively Governmental 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. v. Brook* (1978), the Court surveyed tradition and precedent to determine whether "binding conflict resolution" was an "exclusive public function." 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." The majority noted that "the Court has never considered the private exercise of police functions."

2. The Supreme Court has Declared Readiness to Look Beyond Form to Substance to Determine if Constitutional Protections Apply

Lebron v. National Railroad Passenger Corporation (1995), is a bookend to *Flagg Brothers*. *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. 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."

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's control," 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."

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."

Lebron evinces the readiness of the Court to serve as active arbiter of "public" status (for purposes of the Constitution). Congress cannot immunize 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."

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.

III. The Legacy of 20th Century Reform: What Should Be Done?

A. The Default Option: Muddling Through

In the absence of Congressional and Executive Branch attention, new rules have, in fact, been evolving to govern the diffusion of sovereignty.[45] The default system has virtues – it works sporadically, and the new rules can be discerned through diligent inquiry. But it is suboptimal – it favors "accident and force" over "reflection and choice."[46]

The salient characteristics of the new rulemaking process are:

(1) third party governance rules are not developed on a systematic, coherent, and considered basis; rather, they develop as third parties with the clout to point out the need for rules do so, with courts playing an important default role in attending to the concerns;

(2) the rules do not preclude private actors from performing governmental functions, but oblige those who do so to follow selected rules of the kind that impose 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 served;

(4) There is a tension inherent in the reliance on third parties; the design to call on private actors, runs the risk of governmentalizing them, and thereby negating the initial logic behind their deployment. Third parties are employed because they are said to qualitatively differ from civil servants (*e.g.*, they are entrepreneurial and flexible while civil servants are risk averse and hidebound). Rules that render private parties accountable to public purposes may alter the qualities that made them desirable . (By the same token, the drive to make the civil service more "entrepreneurial," "customer-responsive," and "businesslike" may dilute or negate the qualities valued in the civil service at the start.

Thus, in denying citizens Freedom of Information Act access to admittedly decisional data maintained by universities and other nonprofits, courts repeatedly cited the Congressional determination that the imposition of such constraints on such

institutions would dilute the autonomous qualities which made them desirable sources of expertise.[47] Following the enactment of the Shelby amendment, hundreds, perhaps thousands, of nonprofits complained to OMB that this would be the effect of the law. The current debate on federal funding of faith based organizations has raised similar concerns about the "governmentalization" of these organizations.

B. The Preferred Option: Truth in Government: Executive and Congressional Review of the Public Workforce as a Whole

The alternative to the current "default" rulemaking process is self-evident; the Executive and Congress should view the federal workforce as a whole. This would require abandonment of the fiction that government equates to the official workforce. While the outcome of this effort cannot, and should not, be predicted, the initial steps seem clear:

(1) Periodic reviews of Federal personnel and procurement policy can no longer be "stovepiped," as if there were no relationship between the integrity of the federal workforce and the utility of the contractor workforce.

(2) The third party workforce must be rendered visible -- to Congress, officials, and the public. Federal budgets, organization charts, and agency directories provide details on the Federal workforce; there is no such detail on the third party workforce, even where it works in Federal buildings and even where it outnumbers officials. Inside agencies, as well as in transmissions to Congress and the public, third party prepared materials are presented as if they were the handiwork of officials.

(3) There must be public review and comparison of the differing rules that apply to Federal employees and to non-governmental actors in the performance of the government's work. The rules to be reviewed would include those governing ethics, pay, political activity, and transparency.

C. An Option in Either Case: A Revived Public Law Tradition

Whether the country continues to muddle through or steps back to look at the Big Picture, the legal fiction of "government regularity" has inhibited the deployment of traditional legal principles to order the performance of public purposes by private actors. If it is assumed that third parties do not exist and/or do not have *de facto* responsibility for public purposes, there is little reason to invoke the tradition.

Our legal tradition has long recognized that private actors may perform public purposes. This, for example, is the common law premise of modern public utility regulation.[48] This tradition includes concepts such as the (non)delegation doctrine, the "government instrumentality", and the "public utility." It also includes experience in translating publically derived obligations to private actors. This tradition remains to be mined. [49]

This concludes my testimony.

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[1] See, Light, *The True Size of Government* (Brookings: 1999), at 1. ("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 under mandates to state and local governments.")

[2] For a fuller story, see Guttman and Willner, *The Shadow Government* (Pantheon: 1976); Guttman, "Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty," *Administrative Law Review*, Summer 2000.

[3] See "Contractors Lied on Conflict of Interest, says DOE," Energy Daily, March 27, 1990, at 3.

[4] In 1980 the Subcommittee found that the contractor DOE deployed to plan for the next OPEC oil embargo was simultaneously boasting to another agency of its role in oil planning for Libya and other OPEC members. In 1989 the Subcommittee found that the contractor DOE deployed to shepherd a controversial nuclear nonproliferation agreement through Congress was simultaneously reporting to the foreign beneficiaries of the treaty – keeping them abreast on, among other things, the "hardheaded" views of this Committee's staff director.

[5] For example, from 1996-2000 the Nuclear Regulatory Commission relied on a contractor to draft rules for the recycling of nuclear waste, unaware that

the same contractor was simultaneously a "teaming partner" on a controversial quarter billion dollar DOE contract to do just this. NRC terminated the contractor for conflict of interest in 2001 – after stakeholders pointed out the conflict. DOE then hired the same contractor to do perform environmental review of the recycling issue – only to terminate the contract when stakeholders again pointed out the conflict. See, Bess, "Nuclear Waste Recyclers Target Consumer Products," Reuters, Sept.3, 2001.

[6] The contract workforce may be smaller –but more expensive. See,Peckenpaugh,"Army has fewer contractors but they cost more, study shows,", *GovExec.com*, July 17, 2001.

[7] *U.S. v. Harvard* (D. Mass; Sept. 2000).

[8] *See e.g., DOE's Fixed Price Cleanup Contracts: Why are Costs Still Out of Control?;* Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Commerce, 106th Cong.

[9] *See*, *Oil, Chemical & Atomic Workers vs. Department of Energy*, District Court of District of Columbia, March 16, 2001 (appeal of attorneys fee award pending).

[10] Under (on leave MIT official) Vannevar Bush's direction, the wartime Office of Scientific Research and Development:

> would contract out most of its programs 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 characterized American research throughout history were undone.

Walter A. McDougall, *The Heavens and the Earth: A Political History of the Space Age* (1985), at 67.

Vannevar Bush's memoirs capture the transformation of wartime expedient into post-war governing structure. FDR called on Bush to advice on post war science. Bush recalled:

> 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.

"I was as anxious," Bush recalled, " to get out of government as were nearly all of those who manned the laboratories." See, Vannevar *Bush, Pieces of the Action* (1970), at 56-64.

[11] See, Merton J.Peck and Frederick Scherer's classic study of weapons contracting; *The Weapons Acquisition Process: An Economic Analysis* (1962), at 97.

[12] See, Staff of Senate Committee on Governmental Affairs, 96th Cong., *Oversight of the Structure and Management of the Department of Energy* (Comm Print, 1980), at 303.

[13] See, "Report to the Chairman of the Federal Services Subcommittee by the Majority Staff," in *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy*; Hearing Before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, 101st Cong. 63 (1989).

[14] S. S. Hecker, "Nuclear Weapons Stewardship in the Post-Cold War Era: Governance and Contractual Relationships," April 15, 1997. Historical scholarship suggests that every likely suspect for a platonic "inherently governmental function" --- law enforcement, war fighting, tax collection -- has been performed by a "private" entity at one time or place. The exception may be nuclear weapons management, the "stewardship" of which has always been an "exclusive" government function (performed in heavy official reliance on contractors, to be sure).

[15] See, *Lodge 1858 American Federation of Government Employees v. Webb*, 580 F. 2d 496 (D.C. Cir.1978).

[16] *The Scientific Estate*, at 75.

[17] *Business in the Humane Society*, at iv. Corson noted that, "[e]ven those readers...familiar with the Washington scene, will be impressed with the magnitude and scope of the subsidy, grant, and regulatory processes as they have evolved." *Id.* Corson explained that his understanding of "the nature of this evolution in the American politico-economic system [was aided] by a stimulating group of approximately fifty business and governmental leaders that has met monthly for five years to examine and discuss the adaptations as they become apparent." *Id*.

[18] *Id*., at 74.

[19] "Farewell Radio and Television Address to the American People", Pub. Papers Par. 421 (Jan. 17, 1961).

[20] "Report to the President on Government Contracting for Research and Development," April 30, 1962, Executive Office of the President, Bureau of the Budget. The report was accompanied by Congressional hearings on "systems development and management" (i.e., the role of Rand, Aerospace and other new nonprofit organizations in the management of Defense activities).

[21] The panel 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 organizations 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.

On this account, as Don Price observed, during the 1950's "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." *Scientific Estate*, at 51.

[22] The rules applicable to employees were under wholly distinct review by another blue ribbon panel. See*, Conflict of Interest and the Federal Service; The Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws*" (1960).

[23] The history of personnel ceilings is cataloged by Paul Light in *The True Size of Government* (Brookings 1999).

[24] *See* Guttman and Willner, *The Shadow Government*, for a description of the third party predicated social reform efforts that ran from Kennedy to Nixon Administrations.

[25] "Federal Political Personnel Manual," in *Presidential Campaign Activities of 1972, Senate Resolution 60: Executive Session Hearings Before the Senate Select Committee on Presidential Campaign Activities*, 93d Congress, 8903, 8976 (1974).

[26] David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, at 30 (1992).

[27] Id., at 39-40.

[28] Significantly, in forwarding the faith-based initiative, the Administration does not suggest that reliance on private parties to perform government service is new; rather, recognizing that we have long done this, it questions the effectiveness of this reliance to date. Thus, an August 2001 White House white paper ("Barriers: A Federal System Inhospitable to Faith-Based and Community Organizations") explains:

> The Federal grants system is intended to put taxpayer dollars to the most effective use by enlisting the best nongovernmental groups to provide various social services....
>
> The Federal Government, however, 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
>
> ...Although Federal program officials monitor nonprofit organizations, 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.

The paper is at: http://www.whitehouse.gov/news/releases/2001/08/unlevelfield3.html

[29] The failure of the privatized U.S. Enrichment Corporation (USEC) to abide by statutory purposes that were a condition of its creation has been well chronicled. See, *e.g.*, Matthew Weinstock, "Meltdown," *Government Executive*, February, 2001. In March, 2001, as noted previously, Federal District Court Judge Gladys Kessler found the USEC privatization to be a "model" of what not to do when privatizing.

[30] The story of this failure of public administration is told by Janine Wedel in, "Tainted Transactions: Harvard, the Chubais Clan and Russia's Ruin*," The National Interest*, Spring 2000. In 2000, the United States Department of Justice brought suit against Harvard to recover monies under the False Claims Act.

[31] See Letter from Charles A. Bowsher, Comptroller General, to the Hon. David Pryor, Chairman, Federal Services Post Office and Civil Service Subcommittee (Dec. 29, 1989).

[32] *See, e.g., Public Citizen Health Research Group v. Dept of Health, Education, & Welfare*, 449 F. Supp. 937 (D.D.C. 1978) where the court found that the nongovernmental agency had decisional authority over medicaid/medicare reimbursements, and "exercises it daily" – but, nonetheless was not subject to FOIA. In finding that FOIA should not apply, the majority explained that its application to the private actors would constrain the unique qualities of expertise and independence the private actors bring to government decisionmaking.

[33] The Madisonian concept of "factions," of course, is at the core of our Constitutional system.

[34] Advances in information technology - which permit public access to governmental activities on an immediate and widespread basis - have provided for quantum leaps in stakeholder oversight capability.

[35] Thus political economist Charles Lindblom's classic "The Science of Muddling Through" (1959) extolled the virtues of interest groups as essential watchdogs for good government, but watchdogs who, by virtue of their own interests, may crucially fail to representation the public interest.

[36] See, Lester M. Salamon ed. *The Tools of Government: A Guide to the New Governance* (Oxford 2002).

[37] The False Claims Act appears at 31 U.S. Code Section 3729. The Constitutionality of the False Claims Act was recently confirmed in a decision that has interesting implications for the law of third party government more generally. In *Vermont Agency of Natural Resources v. United States* (2000), the Court indicated that while only government has the right, under our Constitution, to enforce the public interest, this right may be "assigned," as in the False Claims Act, to nongovernmental actors.

[38] See Bruce L.R. Smith, *The Rand Corporation: Case Study of a Nonprofit Advisory Corporation* (1966).

[39] The "hardware ban" story is told in H. L.Neiburg, *In the Name of Science* (1966).

[40] See Guttman, *Organizational Conflict of Interest and the Growth of Big Government*; Harvard Journal of Legislation (1978).

[41] See "Contractors Lied on Conflict of Interest, says DOE", Energy Daily, March 27, 1990.

[42] See, "Report to the Chairman of the Federal Services Subcommittee by the Majority Staff," in *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy*; Hearing Before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, 101st Cong. 63 (1989).

[43] *See, e.g.*, Court rejection of requests by Public Citizen for access to privately created expert ("PSRO") data even where the data was admittedly "conclusive" to government medicare/medicaid reimbursements. *Public Citizen Health Research Group v. Dept of HEW*, 668 F. 2d 537 (D.C. Cir. 1981).

[44] The Shelby Amendment, enacted as part of the Fiscal Year 1999 Omnibus Appropriations Bill, directed 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).

[45] For a fuller treatment of these developments, see Guttman, *supra*, *Administrative Law Review.*

[46] See *Federalist Paper No. One* (the country must decide "the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their constitutions on accident and force."

[47] See, e.g., *Forsham v. Harris*, 445 U.S. 169.

[48] *See, Munn v. Illinois* (1876).

[49] See, Guttman, *Public Purpose and Private Service*, at 920-923, for further discussion of this tradition.