



Benjamin N. Cardozo School of Law
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Outsourcing and the Duty to Govern

Paul R. Verkuil
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY 10003
United States
(212) 790-0334 (Phone)
(212) 790-0205 (Fax)
verkuil@yu.edu

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Paul R. Verkuil*

I. Introduction

This Chapter complements Gillian Metzger's chapter in this Volume on the relationship of privatization to the nondelegation doctrine.¹ Professor Metzger argues for a nondelegation rule that requires government to structure authority transferred to the private sector. The nondelegation doctrine postulated here argues not just that transfers of power to private hands must be accompanied by procedural standards, but that in some settings the transfer of governmental power should not occur at all. If the President cannot transfer the executive power to the Vice President, then the Secretary of Defense cannot transfer his authority to RAND, nor can the Assistant Secretary at the Environmental Protection Agency transfer her power to make reasoned decisions to contractors. The nondelegable duty doctrine is both a harder and easier argument to sustain under the traditional theory; harder because it potentially forbids delegations; easier because it does not require a search for ascertainable standards.² This nondelegation theory poses prudential limits like standing and justiciability³ which may limit the role of the courts. But the judiciary does not have the last word. All political officials take oaths to uphold the Constitution. The delegation and rule of law theories postulated here are responsibilities shared among the branches.

The chapter also explores statutory and administrative requirements that are clearly enforceable and reinforce the constitutional arguments. It then considers as a case study recent developments in airport security and analyzes the public and private

dimensions of the services there provided. From that experience, a definition of nondelegable duties emerges.

II. Downsizing and Governance

The federal government is in the midst of a long-term downsizing of its civilian workforce.⁴ This has been a bipartisan effort, beginning in the Reagan and Bush I Administrations, spurred on by the “reinventing government” movement in the Clinton administration, and firmly embraced by the Bush II Administration’s commitment to further reduce civilian payrolls.⁵ If President Bush achieves his personnel goals the federal civilian workforce will be reduced to about one million non-postal⁶ employees. While the civilian workforce is not always reduced in favor of private service provision—the Transportation Security Agency (TSA) recently added over 60,000 government employees to airport security, a function that was previously privatized—downsizing is clearly the trend.

This trend can adversely affect the provision of government services by targeting some essential (policy) jobs for outsourcing, and by leaving inadequate numbers of staff to oversee those whose jobs have been outsourced. It is difficult to know how many government officials are needed for oversight purposes, but when the number of private contractors grows to more than twelve times the number of government employees,⁷ control issues arise. When policy positions are outsourced or those in policy positions are stripped of adequate staff, essential government functions may be neglected. And when the number of service contracts grows exponentially⁸ the government’s ability both to govern and to oversee outsourced service providers can be severely tested.

A. Defining Policy Officials

To some extent all government officials, down to the cop on the beat or the private in Iraq, engage in acts of judgment and discretion that define the policymaking function. But policy level officials of government hold others accountable; they have been selected, in John Rohr's phrase, to "run a Constitution."⁹ At the federal level, these officials are appointed as Officers of the United States or selected as members of the Senior Executive Service ("SES"). The number of Presidential appointments has been estimated at around 3,300 and the SES at about 7,700 members.¹⁰ These roughly 11,000 officials have the primary responsibility for managing one million government employees and over 12 million contractors. Their responsibilities have grown dramatically with a downsizing government.

In addition, the ratio of political appointees to career officials has grown during this period of downsizing.¹¹ Political officials have the confidence of the party in power. However, there is evidence that political appointees are less effective managers than the career officials they replace.¹² For example, FEMA's inability to manage Hurricane Katrina is partially attributable to the number of political appointees in its senior leadership.¹³ The increase in presidential appointees, the added responsibilities of all policy officials due to downsizing, and the resulting reliance upon contractors left FEMA in an untenable position.¹⁴ Most studies have concluded that the hurricane disaster relief effort suffered acutely from inadequate public management, preparation and control.¹⁵

In the military setting, operations in Iraq have exposed serious leadership deficiencies that can also be partially attributed to outsourcing and downsizing.¹⁶ The creation of what amounts to a "privatized military"¹⁷ as a sophisticated provider of

security services to the United States shows how shorthanded the military is in these critical theaters of operation. While private contractors have existed for a long time,¹⁸ their responsibilities have been vastly expanded. Private services are now performed on the battlefield¹⁹ where they are involved in military functions as interrogators²⁰ and security guards. In fact, the recent investigation of Blackwater's activities, as a contractor for the State Department, reveals how much lethal force their employees have exercised since the Iraq war has begun.²¹ But, given the difficulty in meeting recruitment goals during the war in Iraq,²² this unprecedented level of military outsourcing will be hard to reign in.

Downsizing of the civilian workforce affects the military independently of the size of our "public" armed forces. The military is subject to civilian control through the President as Commander in Chief, so civilian policy makers ultimately are responsible for military policy. The Pentagon has been hard hit by civilian retirements and personnel cutbacks, even as the defense budget has expanded. The growing shortage of civilian contracting officers at the Pentagon, noted by the Government Accountability Office (GAO),²³ is one consequence.

This shortage comes precisely when contractual oversight is most needed as private contractors operate in Iraq largely under single-sourced, noncompetitively bid, multi-billion dollar contracts.²⁴ Deficiencies in contract performance have been embarrassing, costly, and pervasive.²⁵ Fixing this problem, or even stemming it, rests on experienced public officials who are increasingly in short supply. Thus, government has started to outsource the duty to oversee those outsourced activities.²⁶ When the

contractor oversight function is outsourced, policymakers are further compromised and accountability of the government is frustrated.

B. Oversight and Policymaking

When the response to GAO's report on inadequate oversight²⁷ is to delegate that function to private contractors, DOD exacerbates the accountability problem rather than solving it. If government does not have adequate personnel to oversee its outsourcing, it does not have adequate personnel to read the reports on outsourcing submitted by its private overseers. Moreover, when the Vice President is the former CEO of a primary contractor in Iraq (Halliburton),²⁸ the oversight role is essential. DOD should ensure that the lack of adequate personnel at the policy level does not hinder the government's ability to decide objectively whether to outsource in the first place.

All firms, including government, confront the classic choice of whether to perform functions directly (in-house) or indirectly (through contractors).²⁹ In government, to properly exercise the "make or buy choice," however, both the function and the choice must be objectively examined. If the function involves policymaking there is no choice to make—government officials must perform it. David Walker, the Comptroller General of the Government Accountability Office, puts it: "War fighting, judicial, enforcement, regulatory, and *policy-making* functions should never be privatized."³⁰ Yet these functions are increasingly delegated to private hands.

In the disaster relief and military settings, "tactical privatization"³¹ now gives private contractors the authority to perform enforcement and policymaking functions. Private contractors can now be seen not only on the streets of Baghdad, but also in New Orleans. It has long been thought by conservatives and liberals alike that the public

provision of security and the protection against disasters are public goods.³² Actions to protect the commons often require a “special public trust.”³³ When public duties are outsourced in this setting, that trust is compromised. Thus, delegating the oversight function both diminishes the public role and raises constitutional concerns.

III. The Case for Constitutional Governance

Policymaking is reserved to the political branches of government through the separation of powers doctrine. Inevitably, the structural Constitution is about governance or, more precisely, democratic governance.³⁴ Separation of powers helps to ensure democratic governance in two ways: it assigns governing duties to separate branches, and it prevents those branches from transferring or reassigning those duties to others. Much of the duty to govern is assigned to the Executive under Article II, where the Executive power combines with the Commander in Chief power.³⁵ But all three branches are crucial players.

A. Structural Controls on Administration

Executive control over the administrative branch, that branch not mentioned in the Constitution,³⁶ is assured in several ways. The President works through a network of constitutionally defined deputies designated “Officers of the United States.”³⁷ Presidential control of these officers is ensured through the ability to require “the Opinion, in writing, of the principal Officer in each of the executive Departments”;³⁸ and by the President’s responsibility to “take Care that the Laws be faithfully executed . . .”³⁹

But it is another clause—the Appointments Clause⁴⁰—that does the most to protect against improper delegations of policymaking authority to private parties. The President appoints Officers of the United States. Congress, through the Senate, advises

and consents to those appointments. This Clause provides several significant protections: it protects the Executive against Congress; it protects both branches against the “administrative” branch, and it also protects against the delegation of authority to private parties. The Justice Department’s Office of Legal Counsel (OLC) usefully defines these protections as the horizontal and vertical dimensions of the Appointments Clause.⁴¹ The horizontal protections prevent the branches from aggrandizing power by exerting control over the appointment and removal of executive officials outside the limits of the Appointments Clause.⁴² The vertical effect is triggered when the Executive delegates power to outsiders. It is this dimension of the Appointments Clause that is least well understood and will be elaborated upon in Section III.C.

In sum, the President or a cabinet Secretary were to assign duties to private contractors that are normally performed by either principal or “inferior”⁴³ officers, they would be delegating duties to those not covered by the Appointments Clause. Officers of the United States are said to exert “significant authority,” which is inherent in, and exclusive to, the executive function.⁴⁴ When the President appoints military officers, for example, their duties fall within the constraints of this requirement.⁴⁵ Even junior officers (e.g., 2d lieutenants, ensigns) are subject to this requirement, though their command authority is limited.⁴⁶ When they exercise command authority in conflict situations or assert force (including, for example, the interrogation of prisoners in Iraq) they perform significant duties in the sense required by *Buckley v. Valeo*.

When these duties devolve to private contractors, constitutional responsibilities have been transferred without congressional approval. Combat military actions, “warfighting,” by Comptroller General Walker’s description,⁴⁷ are thus nondelegable

actions and the phrase “private military”⁴⁸ describes a function offensive to the Constitution. If Constitutional duties of this dimension are viewed as nondelegable, Congress may not provide the executive power to hire "private" officers of the United States. But such a stringent rule may not be necessary. If one mediates between the formalist and functionalist views of cases like Myers and Humphreys Executor,⁴⁹ a middle ground emerges where Congress can expressly exercise delegating authority.

In this way, the executive branch’s private delegations can be given legitimating effect. Through congressional authorization, the branch participation goals of the Appointments Clause can be satisfied. Just as Congress cannot add restrictions to the Appointments Clause (by applying it to removal of officials), the President cannot frustrate Congress’s power under the Appointments Clause by delegating officers’ duties to private contractors without congressional concurrence. Congress’s interests under the appointments process are two fold: they include the power to oversee and, if necessary, to impeach the officers involved.⁵⁰ The power to impeach is lost if the power is exercised by private contractors. But if Congress consents to a transfer of public power to private hands, i.e., if it approves contracting out certain functions, it effectively accepts the loss of control such transfers imply. Of course, this argument sidesteps the question whether Congress can effectively waive its appointments powers. A strong view of the nondelegation doctrine stands as a barrier to such waivers. But since Congress has not specifically authorized private military activities at this stage, the approval of such activities remains a central issue.

Moreover, another constitutional provision appears to contemplate private military action under some circumstances, providing that Congress gives its approval. At

one time, the Marque and Reprisal Clause⁵¹ anticipated private military activities through the employment of privateers. But the executive could employ these contractors only *if* Congress approved. Thus, even this clause provided a constitutional safeguard against the unilateral use of military power by the executive branch.

On the civilian side, the OLC Memorandum cites only two “vertical” cases, neither of which is directly applicable to the contractor situation.⁵² The paucity of case law is not surprising. It may be due to several factors: the absence of any instances of policy delegations to private hands; the assumption that such delegations are within the executive power; or, more likely, procedural limitations like justiciability and standing⁵³ that limit the prospects of such cases.

As a result, a constitutional principle requiring public responsibility for public acts has not been adequately developed. Such a principle would depend on the courts embracing a corollary to the horizontal “anti-aggrandizement” principle that limits one branch’s ability to usurp the authority of the other.⁵⁴ An “anti-devolution principle” would prevent the President from aggrandizing power at the expense of Congress by privatizing executive functions subject to the Appointments Clause. To illustrate, consider that, in overseeing delegations of military authority to private hands, President Bush sometimes acts with, and sometimes without, congressional authorization. On occasion, he may even be acting in the face of congressional restrictions (such as those posed by the Subdelegation Act, which limits delegations to officers of the United States). When he does so, according to the principle just described, his authority would be at its “lowest ebb.”⁵⁵

The executive branch's delegation of public power to private hands also occurs frequently in the domestic context. Privatized actions are often not transparent in that setting, due to the vagaries of the contracting process and the inapplicability of the Federal Advisory Committee Act (FACA)⁵⁶ and the Freedom of Information Act (FOIA)⁵⁷ which publicize meetings and documents submitted to government. If applicable, these statutes would help condition the President's transfer of civilian policymaking authority to private hands and also protect Congress and the public from loss of democratic responsibility.

But there are other constitutional provisions that can potentially challenge private delegations.

B. Due Process Limits on Private Delegations

The nondelegation doctrine has been largely unenforced by courts since the New Deal period. However, the principle still attracts loyal adherents who would like to see it revitalized.⁵⁸ If the doctrine were to reemerge, it could be reformulated to limit executive as well as congressional delegations. At first glance, it might seem inappropriate to extend the traditional nondelegation doctrine to the contracting context. As Professor Vikram Amar has suggested,⁵⁹ delegations become more problematic when they are harder to reclaim. Outsourced power can always, in theory, be reclaimed through contractual restrictions. The contracts themselves can become instruments for structuring the delegated power. Of course when contracts are open-ended, single-sourced, and long-term, as they have been in Iraq, delegated power is not so easily retrievable. Thus, nondelegation theory alone may not be a sufficient instrument for constraining pervasive outsourcing. Other constitutional provisions are available, however.

The Due Process clause may be invoked to constrain privatization. One of the most famous nondelegation cases, *Carter v. Carter Coal*,⁶⁰ raised both nondelegation and due process concerns.⁶¹ Under the Bituminous Coal Conservation Act,⁶² district boards elected by coal operators and unions set wages binding on all coal producers. The Court set aside this grant of decisionmaking power to private parties on both grounds. So even if use of the nondelegation doctrine remains problematic when applied to contracting, due process considerations might lead courts to limit such delegations.⁶³ What offended the *Carter Coal* Court was that the public interest was nowhere represented in a delegation that authorized private lawmaking. As Professor Tribe has noted, “[t]he judicial hostility to private lawmaking . . . represents a persistent theme in American constitutional law.”⁶⁴ Of course, privatization is not exactly private lawmaking—the vertical delegations of governmental power to private contractors usually involve policymaking, not private decisionmaking in the *Carter Coal* sense. But when due process requires a decisionmaker, it usually requires a public actor.⁶⁵ To this extent, when the grant of power has a public dimension, it can be viewed as “publicized” for due process purposes.⁶⁶

C. Appointments Clause Limits on Private Delegations

As noted above, the Appointments Clause could also serve as a deterrent to private delegations of significant government authority. The Clause identifies those public officials who must conduct the policymaking business of government: Officers of the United States. The Constitution divides those who work for the government into three categories: principal officers, inferior officers, and employees.⁶⁷ The first two categories ought to be subject to Appointments Clause limitations on the outsourcing of

authority,⁶⁸ whereas the jobs of employees are of lesser constitutional importance, and may be outsourced.

Officers of the United States exercise “significant authority”⁶⁹ under the Supreme Court’s decision in *Buckley*, which established three criteria for officer status: exercise of significant authority, duration of employment, and the permanent nature of the duties assigned.⁷⁰ Since the case itself involved members of the Federal Election Commission, all three criteria were clearly satisfied. The question for Appointments Clause purposes is whether these criteria are independent or alternative.

This led to a debate between two presidential administrations. The administration of George H. W. Bush adopted the “alternative criteria” view⁷¹ in arguing for the unconstitutionality of *qui tam* actions (private law enforcement).⁷² By asserting that significant authority under the Appointments Clause was both necessary and sufficient, the Bush I Office of Legal Counsel concluded that the private relator who initiated an action on behalf of the government would be exercising authority constitutionally reserved to the Attorney General.⁷³

Adopting this strict reading would make it more likely that outsourcing decisions could be held to violate the Appointments Clause. That is, if the exercise of significant authority were the sole *Buckley* criterion, many contractors would fall within its terms. The Appointments Clause question would become simply whether private contractors exercised significant authority, or “insignificant” authority, i.e., whether they performed duties of officers rather than employees. Private contractors delegated “significant authority” would, like *qui tam* relators, *ipso facto* become unconstitutional actors.⁷⁴

To illustrate, consider the extensive government contracting undertaken by the administration of George W. Bush in the context of the Iraq war. If all devolution of “significant authority” is forbidden, much of this contracting is constitutionally suspect: the private military cannot engage in warfighting on the battlefield, nor can contractors make policy for agencies.

This argument, based on the OLC interpretation of *Buckley* embraced by the Bush I administration has weaknesses which were revealed in the competing interpretation embraced by the Clinton administration. President Clinton’s Office of Legal Counsel expressly disavowed the earlier Bush OLC opinion and argued instead for the independent status of each of the three Appointments Clause criteria considered by *Buckley*.⁷⁵ In so doing, the opinion primarily sought to preserve *qui tam* actions,⁷⁶ not to opine on private delegations.⁷⁷ Yet its conclusions are instructive for our inquiry here. Because *qui tam* actions would not fail the second and third *Buckley* criteria, they would be constitutional under the Appointments Clause, so long as Congress expressly consents (as it did in the False Claims Act). This consent is vital as a normative matter because it protects Congress’s role in the appointments process. But if Congress has expressly not acted, in for example, the private contractor context or if it can be shown that Congress has acted to restrict delegations, then the Appointments clause can still operate.

Moreover, the Appointments Clause not only requires significant authority to be exercised by officials, but it also requires these officials to take oaths to uphold the Constitution.⁷⁸ The oath requirement is no mere formality: it is the way the Constitution separates public from private actors.⁷⁹ Government officials, like Supreme Court Justices, the President and Members of Congress, take oaths to uphold the Constitution.⁸⁰

While not all oath takers may exercise significant authority, the Constitution assures that no one who exercises significant authority is not an oath taker. Moreover, these officers, once confirmed, are also subject to the impeachment power, a power Congress uses to oversee the executive branch. If duties of executive branch officials are transferred to private hands, these delegates become “unimpeachable” and Congress loses a constitutionally designed accountability mechanism.

It is interesting to ask whether the unitary theory of the executive⁸¹ would accept this view of the Appointments Clause. Recent commentary by Professor Sai Prakash, a well known unitarian, reinforces the Clinton OLC position in the *qui tam* context.⁸² As a matter of original constitutional intent, if Congressionally authorized *qui tam* actions survive, the Appointments Clause retains its controlling power absent that delegation.

For those concerned about pervasive outsourcing, of course, the single criterion view staked out by the first Bush Administration would make it easier to sustain a constitutional claim. All the President (or a Head of Department) would have to do to run afoul of the Constitution under this approach is delegate the duties of an officer of the United States to a private contractor.⁸³ In the military setting, such delegations occur with regularity, because “officers” includes those who carry out battlefield assignments frequently delegated to security contractors. Yet because *qui tam* actions have survived constitutional review,⁸⁴ the Bush I “single criterion” view is less convincing. This makes private contractor delegations less vulnerable since the other two criteria established by *Buckley* (duration and established roles) are rarely satisfied by delegations to private contractors.⁸⁵

Still, even if delegations to contractors were to pass constitutional muster under *Buckley*'s nondelegation test, they might nevertheless run afoul of the Appointments Clause if Congress has not authorized them. Statutes that authorize delegations of significant authority, such as the False Claims Act, are hard to find, arguably because Congress values its oversight prerogatives. In the absence of authorizing statutes,⁸⁶ delegations should be subject to challenge under the Appointments Clause.

This leaves principal officers, if not the President, at risk when they delegate significant authority to private hands. In the civilian setting, consultants to agencies who do policymaking work may fall into this category. For example, consultants who advise FEMA officials to contract for services actually make payments in disaster relief situations and prepare hurricane evacuation plans.⁸⁷ Contractors may also conduct peer review processes for agencies and review, summarize, and prepare agency responses to submissions in rulemaking. These seem like policymaking roles. If so, the work these contractors do is potentially significant in the constitutional sense, and subject to Appointments Clause challenges.

To be sure, government officials employ these contractors. But these arrangements still raise some difficult questions: When contractors exercise "authority" is it "significant" or even "governmental" when it is submitted for formal approval to an official of government? The official who approves is presumably exercising governmental authority. Yet if the contractor does all the substantive work, e.g., prepares a policy letter and a government official signs it without change, can we be confident that he or she has exercised the constitutionally requisite authority?⁸⁸ In other words, does a rubber stamp satisfy the Constitution?

D. The Distinction Between “Significant” and “Authority”

Even if we show that private contractors do “significant” work, do we have to show that they exercise the constitutionally requisite “authority”? The decisions made by contractors cannot usually take effect until a public official, who has sworn an oath of office, approves them. It is the government official who makes the decision governmental. Yet what precisely is required of such an official? Surely the exercise of meaningful authority by Officers of the United States must involve more than simply endorsing the work of private contractors, and in many cases it does. But some actions of officials in agencies like FEMA and others suggest that public officials are not always in charge. The question is whether such failures are simply poor oversight and execution, or whether they rise to the level of unconstitutionally delegated authority. Bad management may or may not be unconstitutional governance.

At one time the Supreme Court said that to *exercise* significant authority the government official must actually do the work. By calling the Secretary of Agriculture to account when significant work was delegated to a lesser government official, the Court in *Morgan v. United States*⁸⁹ (*Morgan I*) created a formidable legal accountability standard. The Court’s reasoning in *Morgan I* could be extended to private contractors since the case established a legal principle that he (or she) who decides must hear “the evidence.”⁹⁰ Of course, the Secretary’s delegates in *Morgan I* were public officials—either employees or “inferior” officers⁹¹—not private contractors. Had the Secretary delegated power instead to a private actor, the Court surely would have disapproved.⁹² Moreover, the Secretary was acting in a judicial capacity when he delegated decisionmaking power to a

hearing officer. Had he let a private decisionmaker exercise that power, the delegation might have also raised the due process concerns expressed in *Carter Coal*.⁹³

Although the requirement from *Morgan I* that those who decide must hear was later abandoned by the Court,⁹⁴ the principle it established has inherent appeal in situations where decisions are delegated not to subordinates but to private parties. It is one thing to use consultants to help set priorities or provide analysis. It is another to recommend management changes that are implemented uncritically. Moreover, in some decision contexts like rulemaking, record and analysis requirements place on the agency official an enhanced duty to decide.⁹⁵

The Court imposes a “hard look” requirement on agency decisionmakers in this context.⁹⁶ Perhaps delegations to private contractors of the record compilation and analysis functions may be permissible, but delegations of additional authority—for example, analysis and drafting of the concise statement of basis and purpose—seem to outsource decisional authority. Transfers of intellectual and decisional powers to private hands, even if the final signature remains with the government official, offend the Appointments power and frustrate principles underlying hard look review (which assume that the *agency* has an obligation to take a hard look before deciding). It is hard to see how these actions do not cross the significant authority requirement of *Buckley*.

For separation of powers reasons, the courts may be reluctant to call the agency to account. The Supreme Court is not anxious to embarrass the Executive, and it uses the “rule of regularity” to presume decisionmaker good faith.⁹⁷ Yet the presumption of regularity, which can allow broad subdelegations to subordinates, only makes sense if it is limited to government officials. Under the Subdelegation Act, “[t]here is no such

presumption covering subdelegations to outside parties.”⁹⁸ A federal agency may turn to outside entities “provided the agency makes the final decision itself.”⁹⁹ And in no event may an agency “merely ‘rubber-stamp’ decisions made by others under the guise of seeking their ‘advice’”¹⁰⁰ In *U.S. Telecom Association v. FCC*, the District of Columbia Circuit limited the use of outside advice because it saw “the risk of policy drift inherent in any principal agent relationship”¹⁰¹ as incompatible with its role on judicial review. The judicial review function is pointless unless it contemplates agency officials who themselves consider alternatives before deciding to take significant actions like promulgating rules.¹⁰²

In addition, the *Chenery* principle,¹⁰³ which requires that courts uphold agency actions based solely on the reasons given, connects the validity of agency action to the reasoning process.¹⁰⁴ Agencies, unlike Congress, are bound on judicial review by the reasons they assert.¹⁰⁵ And, of course, insistence upon a reasons requirement justifies the deference accorded agency actions under *Chevron*.¹⁰⁶ When agencies choose among reasonable statutory interpretations under step two of *Chevron*, reviewing courts must defer to their expertise. If the expertise is a function not of agency insights but of outsiders’ views uncritically adopted by the agency, the deference principle is frustrated and should not apply.

Of course, it may be difficult to detect the influence of contractors on an agency decision, in part because not all agency contracts are easily accessible to the public, or to courts. But where such agency contracts become known, and where the contracts authorize private actors to provide significant analysis, the decisions that result are surely

deserving of judicial skepticism rather than deference. Deference is earned by agencies who engage in thorough analysis.

The delegation of significant authority may have become an inevitable consequence of the privatization movement. As argued above, the sole criterion Bush I view of *Buckley* is more hospitable to nondelegation challenges than are the independent Clinton OLC requirements of duration and scope of appointment.¹⁰⁷ In situations where agencies employ private contractors on a regular basis to prepare, draft and reason out decisions, the contractors ought to be viewed as presumptively exercising significant authority. The Appointments Clause, which forbids delegations of significant authority without congressional authorization, and the Court's role in judicial review both demand that reasoned decisionmaking remain a nondelegable duty of agency governance.

IV. Control of Privatization by Statutory and Regulatory Means

From the early years of the Republic, the necessity for the President to act through subordinates in the exercise of statutory powers was judicially accepted.¹⁰⁸ The Court was reluctant even to determine whether the actions taken were themselves legal.¹⁰⁹ While the Court had more difficulty with the executive delegation of adjudicatory powers, that too has come to be accepted practice.¹¹⁰ Responsibility for adjudicatory actions has now largely been placed in the hands of administrative delegates who are not under direct presidential control.¹¹¹

Congress has an interest in controlling how the President delegates executive power to subordinates. Conflicts between the political branches over how to control subordinate executive actors have long existed.¹¹² Dean Elena Kagan has articulated a broad constitutional role for executive administration and management that reads statutes

as giving the President ultimate control.¹¹³ But Congress regularly places statutory responsibility in subordinates, in particular Heads of Departments, rather than in the President directly. According to Professor Kevin Stack, however, this creates both a constitutional and a “statutory” executive.¹¹⁴ In the latter case, Congress retains a significant role in assigning decision responsibility that can rein in expansive notions of executive control over subordinates.

But Congress also supports delegations directly to the Executive. Congress has, for example, vindicated presidential acts that were initially taken without statutory authority.¹¹⁵ And, in general, Congress has cooperated with the President in permitting subdelegations of executive power to subordinates. Through reorganization acts, Congress has recognized the realities of the modern administrative state by accommodating the President through express grants of subdelegation power.¹¹⁶ These subdelegations, however, were to executive officials rather than private contractors, who under *Carter Coal* were not thought to be appropriate delegates.

Convincing rationales for limiting delegations to private contractors in the policymaking arena can also be drawn from both the Subdelegation Act and OMB’s practice under Circular A-76.¹¹⁷

A. The Subdelegation Act and Private Contracting

The Subdelegation Act¹¹⁸ makes delegations to the President’s subordinates presumptively valid. The Act reflects the pragmatic understanding of presidential management that the Hoover Commission endorsed.¹¹⁹ The Commission’s goal was to make government management flexible by allowing agencies to behave more like private employers.¹²⁰ The Subdelegation Act supports that goal by granting to the President

presumptive power to transfer duties to officials. It was designed to aid presidential management, not to limit the President's powers.¹²¹ The Act does not address delegations to private contractors, even though the Hoover Commission sought to give government more of the powers of a private employer.¹²² In fact, by limiting delegations to officers or high government officials, it implied limits on outside delegations, rather than encouragement of them.¹²³

It made sense for Congress to limit delegations to Officers of the United States. These are officials the Senate has in most cases pre-approved under the Appointments Clause and over which it retains some control through the impeachment process. Delegations by the President to those outside this category are forbidden by the Act unless they are expressly provided for by statute. This approach ensures Congress's continuing oversight of the delegation process consistent with the flexibility granted the executive under the Hoover Commission.¹²⁴

But the Act also helps set constitutional limits. If no statute grants the President or a Head of Department the power to subdelegate policymaking authority to private contractors, the Subdelegation Act stands as an implicit bar. If the President acts in the face of the statute, his power, while still perhaps constitutionally exercised, is greatly weakened.¹²⁵ Administration interpretations have been consistent with this view. Even where a delegating statute exists,¹²⁶ it is not used to justify the delegation of inherent government functions. Thus when Attorney General Ashcroft sought to contract out forty-eight program analyst and program manager positions responsible for grant activities, the OLC had to decide whether the delegation of those activities was statutorily and constitutionally permissible. In determining that employees, not officers, held these

positions, the OLC reviewed *Buckley*'s "significant authority" requirements.¹²⁷ The Attorney General concluded that these were not policymaking positions and permitted them to be contracted out.¹²⁸

This exercise in responsible administration makes two essential points. First, the executive branch honors the Subdelegation Act in its decisions to privatize. Second, the executive branch assumes the duty to police the significant authority requirements of *Buckley*. In exercising this responsibility, the President is fulfilling his oath to uphold the Constitution. Were he to privatize policy positions he could violate that oath. Additionally, if the executive violated the Subdelegation Act by delegating significant duties to private parties without statutory authority, that decision could be reviewed by the courts.¹²⁹ Assuming a proper plaintiff,¹³⁰ the Subdelegation Act would support judicial review. In fact, when read as both limiting and granting authority for presidential delegations, the Act assumes a central role in supervising the devolution of public power to private hands.

B. OMB's Circular A-76 Process

The outsourcing process established by Congress is actively pursued by the executive branch. The President controls the contracting out of policymaking functions through the OMB. OMB's Circular A-76 process¹³¹ establishes a framework for evaluating contracting decisions, which Mathew Blum explains in detail in this volume.¹³² Under the Federal Activities Inventory Reform Act (FAIR Act),¹³³ agencies submit bi-annual inventories of jobs that can be competitively sourced to private contractors. Circular A-76 sets up the process for determining whether jobs may be competitively sourced.¹³⁴ Government officials whose jobs are listed for outsourcing can

challenge the agency decision by establishing the superiority of their services, but judicial review has been restricted by standing arguments.¹³⁵ This competitive contest between the private and public sectors has been encouraged and expanded by the Bush Administration.¹³⁶

The A-76 process has clear limits which reflect the constraints of the Appointments Clause and Subdelegation Act: competitive sourcing excludes “inherently government activities.” Though rarely connected, the phrase invites comparison to the exercise of “significant authority” under the *Buckley* case: The definition of “inherently governmental activities” gives concrete dimensions to the concept of “significant authority.” Circular A-76 defines these activities as:

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) 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;
- (3) Significantly affecting the life, liberty, or property of private persons; or
- (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.¹³⁷

The use of private military contractors, such as Blackwater, clearly fails this test since their activities involve actions “significantly affecting life, liberty,” etc. The *Buckley* requirement is worth comparing to this definition. The two criteria that the Clinton Administration felt were independent in the Officer of the United States designation (duration and permanent position) do not appear in the A-76 definition. Both the Clinton and Bush I OLC Opinions recognized this discrepancy and sought to resolve it by agreeing that the “inherently government activities” requirement may be broader than the *Buckley* requirements.¹³⁸ That the executive branch (through OMB) has in place

a process limiting delegations to private hands that can be more strict than the significant authority requirement is itself significant. It reflects a willingness to protect significant government functions, such as policymaking, from being contracted out. And it shows that the requirement can be made operational from a management perspective.

The following example helps show how the process works.

The Seafood Inspector Challenge

While government employees often prevail in A-76 contests,¹³⁹ they usually do so by showing they are more competitive than the private alternative. Thus, the focus is on the competitive outsourcing side of the ledger, not the initial inherently governmental activities determination. Sometimes, however, affected individuals successfully challenge the agency's initial decision to designate a function for competitive sourcing rather than preserving it as an inherent function. When the National Oceanic and Atmospheric Administration (NOAA) decided to list the position of seafood inspector for competitive challenge rather than exempt it as an inherent function, the government inspectors whose jobs were at stake challenged the agency's competitive sourcing designation.¹⁴⁰ NOAA denied their objections.

However, on appeal to the Department of Commerce (which oversees NOAA), the employees successfully asserted the inherently governmental status of their positions.¹⁴¹ The Department accepted their argument that inspectors were public officials who wielded discretionary authority under A-76 and not just employees. Interestingly, its position also garnered the support of the private fishing industry, which might usually be expected to favor privatization. The industry, which paid for the inspection process, feared that private inspectors might not have the same credibility with

customers in the European Union and China where they exported much of their product.¹⁴² In their view, inspector credibility and wearing the badge of a public official go “hand in hand.”¹⁴³ Thus, inherently governmental functions were equated with those government must perform not only to be legal, but also to be credible.

This credibility argument has resonance. It helped lead Congress to change airport security personnel into public officials under the Transportation Security Act. This change is an important counterexample to the trend toward privatization. It shows that sometimes public solutions are widely seen, by the public and Congress, as both more reliable and more credible.

V. Case Study: The Role of Government in Airline Security

Before September 11, 2001, private airlines operating under FAA oversight screened passengers and baggage at airports as part of their overall service responsibility which included ticket agents, pilots, flight attendants, and maintenance personnel.¹⁴⁴ The airlines did not actually employ the screeners as they did flight and maintenance staff; instead they entered into contracts with private security firms.¹⁴⁵ Not surprisingly, these contracts went to the lowest bidders who often provided personnel lacking language skills and other qualifications (some were even convicted felons).¹⁴⁶ The Department of Transportation Inspector General found that in the years prior to 2001 undercover agents could readily penetrate security at most airports.¹⁴⁷ Indeed, just days after September 11, seven of twenty people carrying knives passed through security at Dulles Airport.¹⁴⁸

It was against this background that Congress confronted the need to improve airport security. Senators John McCain and Ernest Hollings introduced a bill to federalize the airport security workforce, which passed the Senate unanimously.¹⁴⁹ The

bill required public employee screeners and also reformed the way law enforcement personnel were stationed at airport checkpoints.¹⁵⁰ After initially supporting the Senate bill, President Bush shifted to an alternative House bill designed to limit the federal role.¹⁵¹ This bill would have installed federal supervisors at baggage and passenger screening checkpoints, but left the security workforce itself—the inspectors of passengers and baggage—in private hands.¹⁵² Ultimately, support for complete federalization was so overwhelming¹⁵³ that the President relented.

A. The New Consensus

The Aviation and Transportation Security Act (ATSA) was passed by Congress and signed by the President on November 19, 2001.¹⁵⁴ ATSA created a new department, the Transportation Security Administration (TSA), within the Department of Transportation, and gave the TSA responsibility for aviation security.¹⁵⁵ The TSA was to federalize airport security screeners within one year. Screeners were required to speak and read English, be U.S. citizens, have no criminal records, and be high school graduates.¹⁵⁶ Screeners were also required to complete 40 hours of classroom instruction and 60 hours of on-the-job instruction.¹⁵⁷ The act also provided for a pilot program to test private security personnel in up to five airports across the country.¹⁵⁸ In addition, airports were to be allowed to apply to reprivatize (as part of the Security Screening Opt-out Program) after November 19, 2004.¹⁵⁹

The public employment status of airline security personnel counters trends towards privatization of government functions discussed above. It is a prominent counterexample in a world of outsourced services. Democrats and Republicans realized the need for some changes in the status of airport security personnel, but the scope of that

change led to contentious debate. The Senate Democrats pushed for full federal employment.¹⁶⁰ The House Republicans responded by proposing a bill that only partially publicized the security personnel.¹⁶¹ The White House sought to avoid what it saw as a needless increase in bureaucracy.¹⁶² Given the Bush Administration's commitment to privatization,¹⁶³ and opposition to unions,¹⁶⁴ it is not surprising that they disfavored full federal employment.

But that is what it got—in passing a public employment bill which added 64,000 new federal employees,¹⁶⁵ Congress was swayed by arguments that U.S. airports, like borders, should be patrolled by federal personnel. The notion of private contractors conducting safety inspections struck both legislators and the public as a distortion of government responsibilities. By equating airport security officials with custom officials, Congress in effect endorsed the values of oath taking, badges, and public service itself.¹⁶⁶ But the public status of TSA's employees not only ran counter to the privatization trend in the United States, but to that in other countries with seemingly greater commitments to public sector solutions.¹⁶⁷

B. The Values of Public Employment

The preference for public security officials at airports reflects unease about private contractors. Some members of Congress even raised questions about the loyalty of those employed by private firms to perform the inspection task.¹⁶⁸ The statutory requirements of no criminal records and higher educational and training levels were meant to assure more reliable employees, and the requirement for U.S. citizenship was presumably meant to enhance loyalty.¹⁶⁹

Yet these requirements could have been required of contract employees.¹⁷⁰ Since the privatization trend has already encompassed prison guards, military contractors and others who are as much a part of the security network as TSA employees,¹⁷¹ why curtail privatization in this instance? Something more was at work. President Bush, in his signing message, noted that “[f]or the first time, airport security will become a direct federal responsibility, overseen by [a] new undersecretary of transportation for security.”¹⁷² This uncharacteristic support for public solutions by a President committed to outsourcing can only be explained by the need to assure the public that airlines were secure. A similar phenomenon was at work in the Seafood Inspector setting described earlier.¹⁷³

But public status itself does not assure superior performance. And carefully supervised private employees can be capable of effective inspections.¹⁷⁴ The government might have approached the issue differently. A careful analysis might have examined the nature of the jobs involved to determine whether they were “inherently governmental” or eligible for “competitive sourcing.”¹⁷⁵ The OMB A-76 competitive sourcing process could have been employed to designate those jobs that were necessarily governmental and those that were eligible to be contracted out.¹⁷⁶ The airport security function could have been divided into separate components that would isolate jobs appropriate for private contractors. Inspectors with limited and nondiscretionary roles, such as those who check passenger baggage, would likely have been eligible for outsourcing. Those who supervised (and exercised judgment and discretion) would have retained governmental status.

Yet, without requiring these “competitive” functions to be governmental, the goal of public reassurance might not have been achieved. Public status enhances credibility. The presence of an inspector with government authority calmed the public and achieved the overall goal of the program.¹⁷⁷ Government status reflects values that transcend the individual nature of the jobs being analyzed. There is something in our democratic system that puts symbolic as well as practical value on public service. It is what John Donahue calls “fidelity to the public’s values.”¹⁷⁸

C. Privatization and Airport Screeners in Europe

During the debate over the airport security bill it was observed that European countries used private inspectors at airports.¹⁷⁹ European countries are known to be more public sector oriented and comfortable with statist solutions than the United States.¹⁸⁰ Yet, privatization of government jobs is a significant development in Europe. Under the European Union (EU), the choice to employ public or private airport security personnel varies by state and the EU limits its role to setting common standards for airport security.¹⁸¹ These standards require public oversight but permit the employment of private contractors in the airport security setting.

The standards cover use of airport security equipment, the requirement of background checks for security personnel, and provision for unannounced inspections of individual airport security arrangements.¹⁸² The choice between public or private providers of security is not dictated by those standards. Thus, the function of baggage and passenger inspections can be delegated to private actors. German law, for example, embraces a concept of “functional privatization” which allows entities to receive assistance from private parties.¹⁸³ This delegation to private hands is not absolute

however. Under German law, for example, the delegation must be supervised by a public official, administrative procedures necessary to protect individuals must remain in place, and decisions that affect individuals must be made by public officials.¹⁸⁴

These procedural protections assure public oversight of the airport inspection process, but they also permit employment of private screeners at many European airports. Member state and EU common control standards help determine when public officials should be required to perform “public” functions. They are reminiscent of the OMB’s A-76 inherent government activities standards.¹⁸⁵

D. Reconciling the Use of Public and Private Officials in Airport Security

The United States has set limits in the kind of government jobs that can be privatized, not the kind that can be “publicized.”¹⁸⁶ Functions that are “inherently governmental” are explicitly excluded from outsourcing. The distinction between competitive and inherent functions is not easy to apply, however. Indeed, the A-76 process shares some of the ambiguities surrounding public service jobs under European Union law.¹⁸⁷

Suppose TSA were to put public inspectors up for competitive sourcing under A-76, as it might do if more airports sought exemptions from the current rules. TSA employees would likely argue that they performed inherently governmental functions, but would they prevail?

Security is a core role of government yet government still delegates aspects of that function to private hands, as the use of private security in Iraq dramatically demonstrates. It is the level and degree of the delegation that must be analyzed. The act of screening passengers or baggage is a limited assignment; properly supervised, it does

not seem to require a government presence.¹⁸⁸ Certainly it does not in Europe. And Congress could have voted the other way on TSA officials here—at least as to the inspection function performed by those officials.¹⁸⁹ So the inspection function itself seems not to be inherently governmental.

However, placing public oversight and control in private hands (outsourcing the entire process) is a different matter. The Undersecretary of Homeland Security is required to perform these functions. They are inherently governmental and thus nondelegable. This would be true under A-76 and also under statutory and constitutional principles.

The need for supervision and control are indicators of inherent functions. While the actual inspections are relatively limited and discrete assignments that may be delegated,¹⁹⁰ the responsibility to ensure proper performance by those officials remains a governmental one. European countries permit private airport inspectors but only if they are controlled, trained, and overseen by public officials. We seem to have reached the same conclusion. In the limited opt out context for five airports that were exempted from the Act, the Undersecretary of Homeland Security still must oversee the private contractors.¹⁹¹ In this context, expanding the number of airport opt outs would not be problematic from a public-private responsibility perspective.

1. Establishing Public Requirements for Airport Security

If one were doing a simple make-or-buy choice,¹⁹² outsourcing airport security could be competitively bid to determine which provider would perform better and at what cost. So long as the elements of the service could be measured and priced in advance, the case for privatization could be made. Indeed, in terms of inspector quality, airport

security studies do not confer a performance edge on government over private inspectors.¹⁹³

The private advantage, if there is one, is confined to the actual inspection process, however. Determining how privatized employees are supervised and trained remains a governmental function. In the United States and Europe these jobs are placed in government hands in order to protect the public. Public officials perform oversight duties that involve matters of judgment, control, and responsibility. The harder their jobs are to describe in contractual terms, the harder they are to privatize. At some level, they may even be nondelegable.

Consider the earlier argument about the nondelegability of significant authority by officers of the United States. In the military setting, those officers (lieutenants and above) perform functions that cannot be delegated but their subordinates (privates and non-commissioned officers) may, like airport inspectors, have their duties delegated to private contractors.

The European Union's airport security directives addressed these issues¹⁹⁴ and Congress did as well in establishing the TSA. Should decisions be made to privatize the airport security function, oversight remains the function of government. Whether or not public oversight is effective can still be debated, but there is no doubt where the responsibility lies.

2. Applying Theories of Public Control

Assuming that airport screeners perform delegable duties, how far up the chain of command can the public role be delegated without abandoning the government's responsibility to govern? John Donahue views this question from the dual perspective of

efficiency and public management.¹⁹⁵ He argues for government to choose the best structure (public or private) necessary to assure accountability.¹⁹⁶ In so doing, he grants the accountability criterion priority over efficiency in public decisionmaking.¹⁹⁷

Accountability, in the form of process and oversight, has long been recognized as the necessary condition for effective privatization.¹⁹⁸ Delegations to private hands that ignore the accountability criterion are inherently suspect, whatever their efficiency advantage. But that broad proposition must be focused on the tasks at hand. Since security is an essential public function, privatization must be integrated into that framework, not the other way around. In terms of airport security, this requires a careful analysis of the various functions performed by the officials involved. The crucial accountability/efficiency question is not whether specific arrangements are outsourced, but whether those performing the inspection functions are properly supervised. As long as the delegated assignments are clearly defined and limited by contract,¹⁹⁹ and the oversight function is publicly performed, the private delegation can be accommodated.

VI. Conclusion

This chapter has addressed questions about the threat privatization poses to democratic governance. The examples provided raise concerns about a practice that sometimes ignores limits set by statute, administrative rules, and even the Constitution. The constitutional case reminds us that the government service is built into our democratic system. The courts are involved because of the significant authority requirement *Buckley* placed upon Officers of the United States. Across the last three administrations the executive branch has interpreted significant authority and related criteria of duration and permanency to be constitutional necessities.

Congress has a constitutional stake in this determination as well, since it participates in the process that creates Officers of the United States. The Appointments Clause is the relevant constitutional requirement. And Congress's role is also seen in terms of the Subdelegation Act which tracks by statute the constitutional arguments. The Act can be interpreted as a limitation on the power of the executive to delegate. It supports a constitutional theory of nondelegation of inherently governmental functions to private hands.

Privatization is also constrained under OMB's Circular A-76. That process not only fosters competitive sourcing, but also addresses the inherent nature of government activities. Properly applied, the process can help restore balance to the private delegation movement. Competitive sourcing surely adds a valuable dimension to government, and outsourced services are often in the interests of efficient public management. But the limits upon competitive sourcing are constitutionally based—*Buckley's* significant authority requirement is connected to the concept of inherently governmental functions. The challenge for government is to judge these delegations from the perspective that preserves the duty to govern in public hands.

The story is not only about erroneous delegations of significant authority as may be happening, for example, with the use of private security firms in Iraq or contractors employed by FEMA or other agencies. Sometimes the public solution is chosen when it need not be. The airport security experience cuts in the other direction. After September 11, 2001, Congress and the President created over 60,000 governmental positions. The reasons for doing so are important to understand as a political matter. But they may have represented an overreaction to legitimate needs for public oversight and control. The

TSA stands as a reminder that our political leaders sometimes see public solutions as more reliable and defensible in times of stress.

Still, the pressures are more in the direction of excessive outsourcing of government functions. Ultimately, government cannot function effectively if it fails to retain and adequately staff those positions that assure public control of public functions. The burden of this Chapter is to alert us to these changes and restore more balance in the public provision of services. And it concludes that some duties are nondelegable or are delegable only with Congress's participation. In sum, governance is too important to be left to the private sector.

* Professor of Law, Cardozo School of Law, Yeshiva University. Some of the ideas presented here are explored in Paul R. Verkuil, *Outsourcing Sovereignty* (Cambridge: Cambridge University Press 2007).

¹ See Chapter ___ in this volume; see also Gillian Metzger, "Privatization as Delegation," 103 *Columbia Law Review* 1441-1443 (2003).

² See Thomas W. Merrill, "Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation," 104 *Columbia Law Review* 2109-2112 (2004) (asking of the delegation doctrine only whether Congress has delegated, not whether it has accompanied the delegation with ascertainable standards).

³ The standing issues are particularly difficult in the military or foreign affairs settings. See, e.g., *United States v. Richardson*, 418 U.S. 166 (1975).

⁴ There are fewer than 1.95 million civilian federal employees (excluding the post office). In 1990 there were over 2.25 million. At the Department of Defense, civilian employment was cut in half during this period. See Office of Personnel Management, *Federal Civilian Workforce Statistics: The Fact Book*, (2004), pp. 8-9.

⁵ In 2002, President Bush announced that the White House intended to let the private sector compete for 850,000 of the less than 2 million civilian federal jobs. See "Government May Make Private Nearly Half of its Civilian Jobs," *New York Times*, Nov. 15, 2002, p. A1.

⁶ The percentage of postal employees has grown in proportion to total federal civilian employment. See *Federal Civilian Workforce Statistics*, p. 7. The Postal Service, which

could be a legitimate candidate for privatization represents an increasingly larger percentage of the civilian government workforce.

⁷ Consider Paul C. Light, *The True Size of Government* (Washington, D.C.:Brookings Institution Press, 1999), p. 1 (private contractors provided 12.7 million full-time-equivalent government jobs in 1996).

⁸ See United States House of Representatives, Commission on Government Reform, Minority Staff Special Investigations Division, *Dollars, Not Sense: Government Contracting Under the Bush Administration—New Findings* (Prepared for Henry A. Waxman) (June 2006) (reporting that the value of sole source and other noncompetitive contracts awarded by the Bush Administration has increased by 115% from \$67.5 billion in 2000 to \$145 billion in 2005. As a result, 38% of contract dollars were awarded without full and open competition.).

⁹ See John A. Rohr, *To Run a Constitution* (Lawrence, KS: University Press of Kansas, 1986), pp. 180-185 (Rohr uses the phrase, attributed to Woodrow Wilson, to describe those government officials—officers and SES members—whose job is to manage the government).

¹⁰ From 1987 to 2003 the number of Senior Executive Service (SES) positions has remained largely constant at about 7,800. From 1993 to 2003 the total work years of executive branch agencies has gone down from 2.18 million to 1.97 million as downsizing occurred. See *Federal Civilian Workforce Statistics*, pp. 64, 73.

¹¹ Paul Volcker notes that in 1960 President Kennedy had 286 political appointments to fill; President Clinton had 914 such positions by the end of his administration and President George W. Bush now has 3,361 political appointees. See National Commission on the Public Service (Volcker Commission), “Urgent Business for America: Revitalizing the Federal Government for the 21st Century,” in Robert Klitgaard and Paul C. Light, eds., *High Performance Government* (Washington, DC: Rand Corporation, 2005), p. 36.

¹² See generally David E. Lewis, “Staffing Alone: Unilateral Action and the Politicization of the Executive Office of the President, 1988-2004,” 35 *Presidential Studies Quarterly* 496 (2005) (discussing presidents’ decisions to politicize and their consequences). Professor Lewis also found that “politically appointed bureau chiefs get systematically lower management grades than bureau chiefs drawn from the civil service.” David E. Lewis, “Political Appointments and Federal Management Performance,” Policy Brief, (Sep. 2005), www.wws.princeton.edu/policybriefs/lewis_performance.pdf.

¹³ Weak political leadership at FEMA left many crucial policy decisions, such as the preparation of hurricane evacuation plans, to the private sector. See “FEMA, Slow to the Rescue, Now Stumbles in Aid Effort,” *New York Times*, Sep. 17, 2006, p. A1 (documenting FEMA’s inability to get more people out of shelters, provide services, or coordinate private efforts).

¹⁴ See “A Major Test for FEMA and its Contracting Crew,” *Washington Post*, Sep. 13, 2005, p. A1 (describing the loss of high-level talent at the agency, particularly in its acquisition personnel).

¹⁵ FEMA insiders and some who have worked with the agency say it has grown increasingly reliant on contractors in recent years not just for help in responding to disasters, but for planning and policymaking as well. It is a trend that has been augmented, they say, by the departure of FEMA’s top civil servants and the arrival of political appointees with little disaster management experience. See generally Vicki Bier, “Hurricane Katrina as a Bureaucratic Nightmare,” in Ronald J. Daniels, Donald F. Kettl, and Howard Kunreuther, eds., *On Risk and Disaster – Lessons from Hurricane Katrina*, (Philadelphia: University of Pennsylvania Press, 2006), pp. 243-254.

¹⁶ The war in Iraq has been understaffed from the outset, as several in the military tried to warn the Secretary of Defense. See Thomas E. Ricks, *Fiasco* (New York: Penguin Books, 2006), pp. 41-43.

¹⁷ See P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2003) (citing in addition to Afghanistan and Iraq the use of military contractors in Africa, Eastern Europe and Latin America).

¹⁸ See *ibid.* at pp. 115-136 (documenting examples and showing how the end of the Cold War provided opportunities for private contractors).

¹⁹ RAND has provided advice on when and how the Army should use private contractors on the battlefield. Frank Camm and Victoria A. Greenfield, “How Should the Army Use Contractors on the Battlefield?: Assessing Comparative Risk in Sourcing Decisions,” (2005), www.rand.org/pubs/monographs/2005/RAND_MG296.sum.pdf (accessed 11/17/06). Similarly, the Transportation Security Agency recently commissioned Lockheed Martin to determine whether public or private officials performed better security services at airports, a function Lockheed could itself perform if it were contracted out. See Chris Strohm, “TSA Examines Conflict of Interest Charges Against Contractor,” *GovExec.com*, May 23, 2005, www.govexec.com/dailyfed/0505/052305c1.htm.

²⁰ The use of private contractors for interrogation at Abu Ghraib prison near Baghdad in addition to military officers has been noted. See Final Report of the Independent Panel to Review Department of Defense Detention Operations, summarized in “Findings on Abu Ghraib Prison: Sadism, ‘Deviant Behavior’ and a Failure of Leadership,” *New York Times*, Aug. 25, 2004, pp. A1, A10. See generally Steven L. Schooner, “Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government,” 16 *Stanford Law & Policy Review* 549 (2005). The most dramatic use of private contractors in the civilian setting involves the use of Blackwater security personnel by FEMA after Hurricane Katrina. See Jeremy Scahill & Daniela Crespo, “Blackwater Mercenaries Deploy in New Orleans,” *Truthout Report*, (Sep. 10, 2005) www.truthout.org (accessed 11/17/06).

²¹ See “Report Says Firm Sought to Cover Up Iraq Shootings,” *New York Times*, Oct. 2, 2007, p.A1.

²² See Editorial, “America’s Army on the Edge,” *New York Times*, Oct. 1, 2006, p. 9 (discussing shortfalls in active duty troops and the necessity to expand the use of National Guard units in Iraq).

²³ Government Accountability Office (GAO), *Contract Management: Opportunities to Improve Surveillance on Department of Defense Service Contracts*, GAO-05-274, March 2005, p. 1 (noting that there contract surveillance is not a priority, there is no evaluation of surveillance personnel, and officers believe they do not have enough time to carry out their surveillance duties).

²⁴ See, e.g., Dan Briody, *The Halliburton Agenda: The Politics of Oil and Money* (Indianapolis: Wiley, 2004) (Kellogg Brown & Root’s contracts to restore Iraq oil fields exceed \$7 billion).

²⁵ See, e.g., “The Conflict in Iraq: Corruption Accusations; Memos Warned of Billing Fraud By Firm in Iraq,” *New York Times*, Oct. 23, 2004, p. A1 (describing Air Force contract fraud action against Custer Battles); “Judge Limits Statute’s Ability to Curb Iraq Contractor Fraud,” *New York Times*, July 12, 2005, p. A6 (discussing district court ruling that False Claims Act does not apply to Coalition Provisional Authority).

²⁶ See Dan Guttman, “Governance by Contract: Constitutional Visions; Time for Reflection and Choice,” 33 *Public Contract Law Journal* 321 (2004) (describing deficiencies in oversight by contracting officials).

²⁷ See GAO, *Contract Management*.

²⁸ The Vice President’s relationship to his former employer Halliburton and its former subsidiary Kellogg, Brown & Root is well documented. See Briody, *The Halliburton Agenda*. It reflects a mindset that sees private providers as a preferable alternative to public ones.

²⁹ See Oliver E. Williamson, “Public and Private Bureaucracies: A Transaction Cost Economics Perspective,” 15 *Journal of Law, Economics, & Organization* 308-26 (1999) (favoring outsourcing if transaction costs are reduced).

³⁰ See David M. Walker, “The Future of Competitive Sourcing,” 33 *Public Contract Law Journal* 299, 304 (2004) (emphasis added).

³¹ See Jon D. Michaels, “Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War,” 82 *Washington University Law Quarterly* 1008-1010 (2004) (labeling as “tactical privatization” the trend toward making military policy outside the democratic constraints of governance).

³² F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), pp. 133-134 (“Nor is there any reason why the state should not assist the individuals in providing for those common hazards of life... [including] such ‘acts of God’ as earthquakes and floods. Whenever communal action can mitigate disasters against which the individual can neither attempt to guard himself nor make provision for these consequences, such communal action should undoubtedly be taken.”)

³³ See Michael J. Lippitz, Sean O’Keefe, and John P. White, “Advancing the Revolution in Business Affairs,” in Ashton Carter and John White, eds., *Keeping the Edge* (Cambridge: The MIT Press, 2001), p. 176 (comparing DoD functions that do and do not require “special public trust”).

³⁴ See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005), pp. 3-4 (public liberty means more than freedom from despotic governments; it means active participation in our governing institutions).

³⁵ See U.S. Const. art. II, § 2.

³⁶ See Jerry L. Mashaw, “Recovering American Administrative Law: Federalist Foundations, 1787-1801,” 115 *Yale Law Journal* 1269-1270 (2006) (describing the Constitution’s “missing” administrative branch).

³⁷ See *Myers v. United States*, 272 U.S. 52 (1926) (defining executive officials); *Williams v. United States*, 42 U.S. (1 How.) 290, 296-97 (1843) (settled usage that Secretary of the Treasury may act for the President).

³⁸ U.S. Const. art. II, § 2, cl. 1.

³⁹ *Ibid.*, at § 3.

⁴⁰ *Ibid.*, at § 2, cl. 2.

⁴¹ See William P. Barr, Ass’t. A.G., Office of Legal Counsel (OLC), *Constitutional Limits on “Contracting Out” Department of Justice Functions under OMB Circular A-76*, 14 Op. O.L.C. 94, 98 (April 27, 1990) (describing horizontal and vertical effects of Appointments Clause).

⁴² See *Buckley v. Valeo*, 424 U.S. 1 (1976) (limiting Congress’s power to appoint officers); *Myers v. United States*, 272 U.S. 52 (1926) (limiting Senate’s power to participate in removal of officers); see also *Weiss v. United States*, 510 U.S. 163 (1994) (deciding whether congressional addition of duties for military judges are within Appointments Clause); *Humphrey’s Executor v. United States*, 292 U.S. 602 (1935) (approving congressional limit on presidential for cause removal of independent agency commissioners).

⁴³ See U.S. Const. art. I, § 2, cl. 1 (permitting Congress to vest the appointment of inferior officers “in the President alone, the Courts of Law, or in the Heads of Departments”). It

is under this power that Congress placed some officials under the protection of the Civil Service. See *United States v. Perkins*, 116 U.S. 483 (1886) (civil service law constitutional); *Myers v. United States*, 272 U.S. 52, 162 (1926) (explaining inferior officer limitations under civil service). See also *Freytag v. C. I. R.*, 501 U.S. 868, 884 (1991) (defining Heads of Departments).

⁴⁴ See *Buckley*, 424 U.S. at 125-126. Admittedly, “significant authority” is not a self-defining phrase. One way to give it meaning is to analogize it to OMB’s “inherently governmental activities” requirement. See discussion at Part IV.B.

⁴⁵ The President appoints all military officers including second lieutenants and the Senate confirms them. See *Weiss*, 510 U.S. at 169 (1994) (all military officers are Officers of the United States). Such officers are required to be appointed by the president. See *Perkins*, 116 U.S. at 484 (1886) (cadet engineer appointed by Secretary of the Navy).

⁴⁶ Of course, junior officers, in battlefield conditions, can be asked to assume policymaking duties normally performed by their superiors.

⁴⁷ See Walker, “The Future of Competitive Sourcing.”

⁴⁸ See Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005) pp. 38-40 (describing various private military contracts).

⁴⁹ See note 42.

⁵¹ U.S. Const. art. I, § 8, cl. 11. The clause, which has not been used as a policy option since the presidency of Andrew Jackson, permits Congress, not the President, to “privatize” war to some limited degree. It does not allow the President to do so directly and it does not contemplate the payment of federal funds since, historically, privateering was a business financed by the privateers. See generally C. Kevin Marshall, “Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars,” 64 *University of Chicago Law Review* 963-964 (1997).

⁵² See OLC, *Constitutional Limits on “Contracting Out,”* citing as examples of forbidden verticality *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) and *A.L.A. Schechter Poultry v. United States*, 292 U.S. 495 (1935). Since *Northern Pipeline* involved forbidden delegations of Article III power to magistrate judges (who are, if not Article III judges, at least federal employees) and since *Schechter* involved forbidden delegation by Congress to the President, neither example directly addresses private parties or contractors. A better case than *Schechter* would have been *Carter v. Carter Coal*, 298 U.S. 238 (1936) (delegation to private groups).

⁵³ Compare *Flast v. Cohen*, 392 U.S. 83, 105-106 (1968) (taxpayer standing to challenge expenditures to parochial schools) with *Lujan v. Defenders of Wildlife*, 504 U.S. 555

(1992) (raising separation of powers objections to delegation of private authority to sue under the Endangered Species Act).

⁵⁴ The anti-aggrandizement principle emerges from the Framers' concern with congressional hegemony (then the most dangerous branch). See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment); *Buckley*, 424 U.S. at 122-123 (1976) (per curiam) (same); compare *Mistretta v. United States*, 488 U.S. 361, 411 n. 35 (1989) (holding that Presidential removal power over members of Sentencing Commission does not pose a special danger because, unlike in *Bowsher*, the President does not retain control over the “constitutionally assigned mission of another Branch”).

⁵⁵ See *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 635-637 (1952) (Jackson, J., concurring)(if the President has congressional authorization for his actions judicial deference is granted). Attorney General Gonzales's memo justifying the President's national security intercept program also relies on *Youngstown*. See Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, (Washington, DC, 2006), pp. 19-20.

⁵⁶ 5 U.S.C.App. § 2 (2000). See *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), on remand, *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005) (en banc) (strictly construing FACA because of separation of powers considerations and holding that a presidentially convened committee consists of federal officials and private industry members are exempt from the Act if only the public officials have voting power). Of course, failure to include the private sector in policymaking has also been criticized. See *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (holding that the First Lady is a de facto employee of government and exempting the Health Care Task Force, which contained no private industry members, from FACA). The FACA's application to advice given to the President raises sensitive inter-branch issues. See *Public Citizen v. Department of Justice*, 491 U.S. 440, 467-468 (1989) (FACA does not apply to advice on judicial appointments given to the President by the ABA; three judges concurred in the proposition that the statute was unconstitutional in this regard). But the narrow reading of FACA leaves it less effective to constrain or (after *In re Cheney*) even to provide information about influence of the private sector, as long as private contractors do not participate in collective judgment under the Act. For a thorough analysis of the FACA's scope and purpose, see Steven P. Croley & William F. Funk, “The Federal Advisory Committee Act and Good Government,” 14 *Yale Journal on Regulation* 452 (1997).

⁵⁷ 5 U.S.C. § 552 (2000).

⁵⁸ See, e.g., Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, (2006) pp. 15-22 (applying nondelegation theory to Articles II, III, and IV), ssrn.com/abstract=921743.

⁵⁹ See Vikram David Amar, “Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment,” 49 *Vanderbilt Law Review* 1378-1379 (1996); see also George W. Liebmann, “Delegation to Private Parties in American Constitutional Law,” 50 *Indiana Law Journal* 650, 659 (1975) (issue is whether delegation “calls into question the future operation of the political process”).

⁶⁰ 298 U.S. 238 (1936).

⁶¹ Professor Jaffe, writing at the time of *Carter Coal*, thought the nondelegation aspect was unnecessary to the decision and would have relied on due process alone. See Louis L. Jaffe, “Law Making by Private Groups,” 51 *Harvard Law Review* 248 (1937).

⁶² 49 Stat. 991 (1935), 15 U.S.C. §§ 801 et seq.(1935).

⁶³ The coal company and union representatives were not only private adjudicators, but they were also private parties with an interest in the outcome. See *Dr. Bonham’s Case*, 8 *Coke Rep.* 107 (1610) (defining natural justice as including interest in the outcome).

⁶⁴ Laurence H. Tribe, *American Constitutional Law*, 3d ed., (New York: Foundation Press, 2000), p. 993.

⁶⁵ But see *Thomas v. Union Carbide Agricultural Products Company*, 473 U.S. 568 (1985) (no Appointments Clause problem with the government’s use of private panel of arbitrators). Also due process challenges to biased tribunals are made on an as applied, rather than direct, basis. Compare *Gibson v. Berryhill*, 411 U.S. 564 (1973) (optometrists biased against new competitors) with *Friedman v. Rogers*, 440 U.S. 1 (1979) (no direct challenge to a state board of independent optometrists).

⁶⁶ This is the intent of Gillian Metzger’s use of the nondelegation doctrine as a process control over private contractors. See Gillian Metzger, “Privatization as Delegation.” See also Jody Freeman, “Extending Public Law Norms Through Privatization,” 116 *Harvard Law Review* 1285 (2003) (urging a “publicization” view of privatized activities).

⁶⁷ Chief Justice Marshall observed that “[a]lthough an office is ‘an employment,’ it does not follow that every employment is an office.” *United States v. Maurice*, 26 Fed. Cas. 1211, 1214 (C.C.D.Va 1823) (No. 15,747). The distinction between officers and employees has been the subject of numerous cases. See, e.g., *Burnap v. United States*, 252 U.S. 512, 516-519 (1920) (landscape architect was an employee, not an officer).

⁶⁸ See *Morrison v. Olson*, 487 U.S. 654, 671-672 (1988) (describing the difference between principal and inferior officers and labeling the independent counsel “inferior”).

⁶⁹ See *Buckley*, 424 U.S. at 125-126. In contrast, “[e]mployees are lesser functionaries subordinate to Officers of the United States.” *Ibid.*, p. 160 n. 162.

⁷⁰ *Buckley* cites with favor decisions that have excepted employees with intermittent and temporary duties from the definition of “officer.” See *Auffmordt v. Hedden*, 137 U.S.

310 (1890) (merchant appraiser hired for special case); *United States v. Germaine*, 99 U.S. 508 (1878) (surgeon appointed to examine applicants for pensions in special cases not an officer).

⁷¹ See William Barr, Ass't. A.G., Office of Legal Counsel, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 249 (July 18, 1989).

⁷² See *False Claims Act*, 31 U.S.C. §§ 3729 et seq (2000). *Qui tam* actions permit private relators to bring actions on behalf of the government for fraud unless the Department of Justice intervenes. A relator resembles a private contractor “hired” to help bring those committing fraud against the government to justice.

⁷³ This argument created a split within the Administration: OLC argued that this criterion rendered the *qui tam* provision unconstitutional; this position was contested by the Solicitor General's office. OLC, *Constitutionality of the Qui Tam Provisions*. The opinion also argued that the *qui tam* actions violated Article III standing requirements and the separation of powers doctrine.

⁷⁴ The Supreme Court has largely upheld the constitutionality of *qui tam* actions, relying on the long tradition of such actions, and Congress's express acceptance of them under the False Claims Act. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (discussing the Article III challenges to the *qui tam* inquiry but reserving the question as to its Article II dimensions).

⁷⁵ See Walter Dellinger, Acting Ass't. A.G., Office of Legal Counsel, *Memorandum for the General Counsels of the Federal Government: The Constitutional Separation of Powers Between the President and Congress* (May 7, 1996), p. 15 n. 66, www.usdoj.gov/olc/delly.htm (“We now disapprove the Appointments Clause analysis and conclusion of an earlier opinion of this Office.”).

⁷⁶ The debate, which arose in the context of the independent counsel, was over whether prosecution is an inherently executive function. Compare Lawrence Lessig & Cass Sunstein, “The President and the Administration,” 94 *Columbia Law Review* 15-16 (1994); with Stephen L. Carter, “The Independent Counsel Mess,” 102 *Harvard Law Review* 105 (1988). See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the constitutionality of independent counsel statute).

⁷⁷ Indeed, the Clinton OLC Memorandum, while denying the Appointments power is implicated in private contractor situations, expressly reserves challenges to those actions under “the non-delegation doctrine and the general separation of powers principle.” OLC, *The Constitutional Separation of Powers*, p. 15 and n. 61-63.

⁷⁸ See U.S. Const. art. II, § 1.

⁷⁹ Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (emphasizing importance of public officials, and the oath requirement, in the enforcement of public law).

⁸⁰ See U.S. Const. art. 6; Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005): pp. 62-63 (describing the importance the Constitution places on oaths and affirmations).

⁸¹ See, e.g., Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," 90 *Iowa Law Review* 601 (2005); Steven G. Calabresi & Saikrishna B. Prakash, "The President's Power to Execute the Laws," 104 *Yale Law Journal* 541 (1994) (President must control prosecutions). Those who believe in the unitary nature of executive power could be potential allies against the delegation of policymaking to private hands. If the executive power resides in the President, then he who must exercise it, not congressionally assigned officials, and certainly not privately contracted ones.

⁸² See Saikrishna Prakash, "The Chief Prosecutor," 73 *George Washington Law Review* 575-577, 590-591 (2005) (arguing that, even though the President must exercise the prosecutorial power, *qui tam* and other private prosecution schemes (e.g., special prosecutors) can be constitutional so long as the President has the power to terminate these actions, even if by exercising the pardon power over those subject to private suits).

⁸³ One way to avoid the Appointments Clause limitations on private contractors is to designate such delegates as employees rather than officers. Under the independent three criteria view urged by the Clinton Administration this would pass muster easily. See OLC, *Constitutional Separation of Powers*, at p. 15, n. 61, for further inquiry into the "significant authority" dimension of the delegation.

⁸⁴ See *Vermont Agency*, 529 U.S. at 778.

⁸⁵ The contract process provides limits on scope and duration of delegations that would satisfy these criteria and negate the excessive delegation implication.

⁸⁶ A possible "authorizing" statute might be the FAIR Act, Pub. L. No. 105-70, 112 Stat. 2382, §2(a) (1998), but that Act incorporates OMB's A-76 process, which forbids the contracting out of inherent government functions. If no statute can be found to authorize the delegation, the executive's delegation is at a low ebb in *Youngstown Steel* terms.

⁸⁷ See "A Major Test for FEMA"; see also Press Release, IEM Inc., "IEM Team to Develop Catastrophic Hurricane Disaster Plan for New Orleans and Southeast Louisiana," (June 3, 2004), available at www.ieminc.com/Whats_New/Press_Releases/pressrelease060304_Catastrophic.htm; "Homeland Security Chief Outlines FEMA Overhaul," *New York Times*, Oct. 20, 2005, p. A22 (describing FEMA's failures to respond to the Katrina disaster and proposing more public controls).

⁸⁸ See Dan Guttman, "Inherently Governmental Functions and the New Millennium: The Legacy of Twentieth-Century Reform," in Thomas H. Stanton and Benjamin Ginsberg, eds., *Making Government Manageable* (Baltimore, Maryland: Johns Hopkins University

Press, 2004), p. 54 (describing situations where a government official signs off on a contractor-drafted rule).

⁸⁹ 298 U.S. 468 (1936).

⁹⁰ *Morgan I*, 298 U.S. at 481.

⁹¹ The line between employees and inferior officers is not easily drawn. See *Freytag v. Commissioner*, 501 U.S. 868 (1991) (determining that a “special trial judge” is an inferior officer appointed by the Tax Court which the majority found to be a “court of law” under the Appointments Clause). See also *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (determining Administrative Law Judges at Federal Deposit Insurance Corporation to be employees rather than inferior officers).

⁹² The decision in *Carter v. Carter Coal*, 298 U.S. 238 (1936), which objected strenuously to delegating powers to private parties, appeared in the same volume as *Morgan I*.

⁹³ See notes 60-61.

⁹⁴ *United States v. Morgan (Morgan IV)*, 313 U.S. 409 (1941).

⁹⁵ See Richard J. Pierce, Sidney A. Shapiro & Paul R. Verkuil, eds., *Administrative Law and Process*, 4th ed. (New York: Foundation Press, 2004), § 6.4.6; see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

⁹⁶ See *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (describing hard look review).

⁹⁷ See Daniel J. Gifford, “The Morgan Cases: A Retrospective View,” 30 *Administrative Law Review* 237, 238 (1978) (*Morgan IV* “places a veil of secrecy over the ‘mental processes’ of the decisionmakers”); see, e.g., *U. S. Postal Service v. Gregory*, 534 U.S. 1 (2001) (describing presumption of regularity).

⁹⁸ See *U.S. Telecom Ass’n. v. FCC*, 359 F.3d 554, 566 (D.C. Cir.), *cert denied*, 125 S. Ct. 345 (2004) (holding a state commission to be a private party (contractor) in relationships to a federal agency).

⁹⁹ *Ibid.*, p. 568; see also *Shook v. District of Columbia Fin. Resp. & Mgmt. Assistance Auth.*, 132 F.3d 775, 783-784 (D.C. Cir. 1998) (same).

¹⁰⁰ See *Assiniboine & Sioux Tribes v. Bd. of Oil and Gas*, 792 F.2d 782, 795 (9th Cir. 1986) (same).

¹⁰¹ *U.S. Telecom*, 359 F.3d at 566.

¹⁰² One function of judicial review is to ensure that the agency officials who decide on a policy have actually reviewed the record before them. See, e.g., *Motor Vehicle Manuf.*

Ass'n, 463 U.S. at 43 (1983) (agency required to consider alternatives to proposed rule). Indeed “hard look” review makes no sense unless it assumes that the “look” must be the agency’s.

¹⁰³ See *SEC v. Chenery* (*Chenery I*), 318 U.S. 80, 95 (1943).

¹⁰⁴ Professor Stack has characterized the reasons requirement of *Chenery* as a fundamental principle rising to constitutional levels. See Kevin M. Stack, “The Constitutional Foundations of *Chenery*,” 116 *Yale Law Journal* 952, 958 (2007).

¹⁰⁵ See *ibid.* at 967.

¹⁰⁶ See *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-844 (1984). “*Chevron* deference” leaves policy questions to the agencies, not the courts. It ensures political accountability by deferring to agency expertise, not “contractor expertise.” See Stack, “Constitutional Foundations,” 1007.

¹⁰⁷ The Opinion also notes the requirement of oath taking by executive branch officials, which further distinguished them from private contractors. See OLC, *Constitutional Separation of Powers*, p. 5, n. 10.

¹⁰⁸ See *Williams v. United States*, 42 U.S. (1 How.) 290, 296-297 (1843) (Court unanimously rejected argument that President was personally required to dispense all monies from the treasury).

¹⁰⁹ In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 112 (1804), Justice Chase was reluctant to read President Jefferson’s instructions, since “if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.”

¹¹⁰ See *Runkle v. U.S.*, 122 U.S. 543, 557 (1887) (as Commander in Chief he has the duty to review courts martial; requires it to be “his own judgment, and not that of another”). Compare *U.S. v. Page*, 137 U.S. 673, 680 (1891) (orders issued by President are presumed to be his).

¹¹¹ See *Morgan v. United States*, 298 U.S. 468 (1936); 304 U.S. 1 (1938).

¹¹² See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (for cause removal provision held constitutional).

¹¹³ Elena Kagan, “Presidential Administration,” 114 *Harvard Law Review* 2245 (2001); See *Myers v. United States*, 272 U.S. 52, 133 (1926) (heads of departments are the President’s “alter ego”). Dean Kagan’s view that statutory delegations to subordinates should be interpreted as channeling, but not limiting presidential control has to be squared with the mixed statutory delegations where Congress clearly gives the President and his subordinates separate duties. See Kevin M. Stack, “The Statutory President,” 90 *Iowa Law Review* 539 (2005).

¹¹⁴ See Stack, “The Statutory President” (describing the president’s exercise of statutory powers); see also Kevin M. Stack, “The President’s Statutory Powers to Administer the Laws,” 106 *Columbia Law Review* 263 (2006) (arguing that the “President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name”).

¹¹⁵ See Glendon A. Schubert, Jr., “Judicial Review of the Subdelegation of Presidential Power,” 12 *Journal of Politics* 684-687 (1950) (discussing Congress’s subsequent legislative approval of President Roosevelt’s 1942 order interdicting Japanese Americans and citing other examples of this practice).

¹¹⁶ Congress had long made statutory grants of subdelegation power to the President in specific situations. In the aftermath of *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), for example, Congress in the Conally Act of February 22, 1935, 49 Stat. 33 (1935) (codified at 15 U.S.C. 715j), granted the President or any agency officer or employee the power to interdict “hot oil” under the Act. See Schubert, “Judicial Review of the Subdelegation of Presidential Power,” 682.

¹¹⁷ OMB, Circular A-76, Attachment A, Part B.

¹¹⁸ See Pub. L. No. 82-248, 65 Stat. 710, 713 (1951), (codified at 3 U.S.C. §§ 301-303 (2000)). Under § 301, the President has the broad power to delegate authority to “the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate.”

¹¹⁹ The Commission on Organization of the Executive Branch of the Government, *General Management of the Executive Branch* (Washington, D.C.: GPO, 1949). See Kenneth Culp Davis, *Administrative Law* (St. Paul, Minn.: West Pub. Co. 1951), pp. 79-80.

¹²⁰ The Commission on Organization of the Executive Branch of the Government, *Task Force Report on Federal Personnel* (Washington, D.C.: GPO, 1949), p. viii.

[T]he Government can no longer be treated as a single employer; but . . . to the extent consistent with the economy and the protection of the merit system, the individual agencies must be allowed to serve themselves as does a private employer, subject to supervision and guidance from a strong, progressive central personnel agency.

¹²¹ See S. Rep. No. 81-1867, as reprinted in 1950 U.S.C.C.A.N. 2931, 2932. Specifically, the Senate report stated, “The President now performs functions which have no reasonable claim upon his time or attention.” *Ibid.* p. 2932. On its face, the 1950 Act related only to delegations by the President to appointed subordinates:

This bill will enable the President to direct the head of any department or agency in the Executive Branch of the Government, or any official thereof, appointed by and with the advice and consent of the Senate, to perform and exercise any function including any duty, power, responsibility, authority, or discretion vested in the President.

Ibid., p. 2931. The language of the report made clear that the bill did not seek to proscribe any delegation power inherent in the Presidency: “It does not limit any existing right of the President to delegate functions.” Ibid. Under the theory of this bill, unilateral executive delegations of significant authority to contractors could only be excepted from the Subdelegation Act if such delegations were shown to be inherent, a proposition that the Appointments clause itself contradicts.

¹²² See supra note 120.

¹²³ See *U.S. Telecom*, 359 F.3d at 565 (preventing an agency delegation of power to a state agency and equating state entities with “outside parties”); see also *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 367 (1942) (holding that the Administrator of the Wage and Hour Division of the Department of Labor did not have authority to delegate his statutory power to sign and issue a subpoena duces tecum to regional director).

¹²⁴ See Commission on Organization of the Executive Branch, *Task Force Report on Federal Personnel*.

¹²⁵ *Youngstown Steel*, 343 U.S. at 646 (Jackson, J., concurring).

¹²⁶ One such statute is 5 U.S.C. § 301, which allows each head of department to prescribe regulations for “the general conduct of its employees....” This provision has been interpreted to grant the Attorney General the power to contract out. See OLC, *Constitutional Limits on “Contracting Out.”* See also *Touby v. United States*, 500 U.S. 160 (1991) (upholding delegation by the Attorney General to Drug Enforcement Agency).

¹²⁷ See OLC, *Constitutional Limits on “Contracting Out,”* pp. 95-96 (citing *Buckley*).

¹²⁸ Ibid., p. 96 (“private individuals may not determine the policy of the United States”). Under the Debt Collection Act Amendments of 1986, 31 U.S.C. §3718(b), the DOJ must supervise and approve all the work of private counsel. In the course of this opinion, OLC also noted that the retention by the Attorney General of private counsel to assist in the collection of non-tax debts owed the United States did not violate the Constitution. See *ibid.*

¹²⁹ See *Youngstown Steel*, 343 U.S. at 646.

¹³⁰ A government employee whose job is lost would be in a position to challenge the delegations under a relevant statute, such as 5 U.S.C. § 301. However, the Federal Circuit, which has exclusive jurisdiction over bid protests, has not been hospitable to employee appeals. See *AFGE v. U. S.*, 258 F.3d 1294 (Fed. Cir. 2001) (denying employee standing under relevant statutes).

¹³¹ OMB, *Circular A-76*, Attachment A, Part B.

¹³² See Blum, Chapter X???, this Volume.

¹³³ Pub. L. No. 105-270, 112 Stat. 2382, §2(a) (1998).

¹³⁴ The circular applies when a competitive challenge is permitted to a contracting out process. The vast majority of outsourcing is outside the scope of A-76 since competitive sourcing is not involved.

¹³⁵ See *Am. Fed'n of Gov't Employees v. Babbitt*, 46 Fed App'x 254, 256-57 (6th Cir. 2002) (per curiam) (civilian employees who lost jobs at Air Force bases lacked standing under the APA).

¹³⁶ In May 2004, OMB issued a report on competitive sourcing for the prior year which indicated that agencies had completed 662 “competitive assessments” with a net estimated savings of \$1.1 billion (over 3 to 5 years) or about \$12,000 per FTE competed with a total cost avoidance of about 15 percent. See generally OMB, *The President's Management Agenda* (2002), pp. 17-18, available at www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf (discussing intention to outsource government jobs).

¹³⁷ OMB, *Circular A-76*, Attachment A, Part B, Section 1(a).

¹³⁸ See OLC, *Constitutional Limits on “Contracting Out,”* p. 99 n. 5 (describing A-76 as broader than *Buckley*).

¹³⁹ See GAO, Commercial Activities Panel, *Improving the Sourcing Decisions of the Federal Government: Final Report* (2002), pp. 19-20 (government employees prevailed in 50% of 22 challenges).

¹⁴⁰ See James McCullough, et al., “Feature Comment, Year 2003 OMB Circular A-76 Decisions and Developments,” 46 *Gov't Contractor* (West) ¶ 27 at 259 (Jan. 21, 2004).

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ 14 C.F.R. § 108.9 (2001) (specifying airlines' security responsibilities).

¹⁴⁵ See Paul Stephen Dempsey, “Aviation Security: The Role of Law in the War Against Terrorism,” 41 *Columbia Journal of Transnational Law* 649, 721 (2003).

¹⁴⁶ See Andrew Hessick, “The Federalization of Airport Security: Privacy Implications,” 24 *Whittier Law Review* 43, 46 (2002).

¹⁴⁷ *Ibid.* (referring to a 1999 Department of Transportation, Inspector General report).

¹⁴⁸ See Dempsey, “Aviation Security,” 721.

¹⁴⁹ See Aviation and Transportation Security Act, S. 1447, 107th Cong. (2001).

¹⁵⁰ Airport Security Federalization Act of 2001, H.R. 3150, 107th Cong. (2001) The House bill did permit private screeners but section 3 stated that “all screeners must be supervised by uniformed federal employees of the TSA.” 147 Cong. Rec. H7631-01 (Nov. 1 2001), p. 2 (remarks of Rep. Young of Alaska).

¹⁵¹ See “Bush Offers Compromise on Aviation Security Bill; It Stalls on Provision to Make All Screeners Federal Employees,” *St. Louis Post-Dispatch*, Oct. 4, 2001, p. A7.

¹⁵² *Ibid.*

¹⁵³ A *Washington Post* poll found 82 percent of Americans in favor, along with the U.S. Conference of Mayors and the entire U.S. Senate. See Hessick, “The Federalization of Airport Security: Privacy Implications,” 51.

¹⁵⁴ Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C.A. § 114).

¹⁵⁵ See Tara Branum and Susanna Dokupil, “Security Takeovers and Bailouts: Aviation and the Return of Big Government,” 6 *Texas Review of Law and Politics* 431, 459 (2002).

¹⁵⁶ See Hessick, “The Federalization of Airport Security: Privacy Implications,” 53. The U.S. citizen requirement essentially disqualified rehiring of former airport security personnel, many of whom were immigrants. And it imposed a hiring requirement that does not even apply to the U.S. military. See Michael Hayes, “Improving Security through Reducing Employee Rights,” 10 *IUS Gentium* 55, 60-61 (2004) (viewing the TSA as an anti-labor bill).

¹⁵⁷ Baggage screeners were subjected to extensive background checks by TSA, which it had difficulty implementing. See Department of Homeland Security, Office of Inspector General, *A Review of Background Checks for Federal Passenger and Baggage Screeners at Airports*, OIG 04-08 (Jan. 2004).

¹⁵⁸ The public employment requirement permitted five airports to opt out: San Francisco, Kansas City, Rochester, Jackson Hole, WY, and Tupelo, MS. See Department of Homeland Security, Transportation Security Administration (TSA), “Background on PP5 Airports,” www.tsa.gov/what_we_do/optout/editorial_1719.shtm (accessed 11/27/06).

¹⁵⁹ Branum and Dokupil, “Security Takeovers and Bailouts,” 461.

¹⁶⁰ See Aviation Security Act, S. 1447, 107th Cong. (2001).

¹⁶¹ See Airport Security Federalization Act of 2001, H.R. 3150.

¹⁶² See Press Release, White House Office of Communications, Congressional Debate on Federalizing Airport Security Personnel (Nov. 6, 2001) *available at*

www.whitehouse.gov/news/releases/2001/11/20011106-8.html (“the best system is a mix of public and private screeners, so long as the federal government plays a very vigorous role in enforcing standards and setting much higher standards”).

¹⁶³ See note 136.

¹⁶⁴ See National Public Radio (NPR), “Federalizing Airport Security Personnel,” *Talk of the Nation* (Oct. 25, 2001) 2001 WLNR 11940177 (Senator McCain justifies full federal employment under the TSA by the President’s right to fire the federal employees at will).

¹⁶⁵ See Hayes, “Improving Security,” 61 (noting that 64,000 new TSA employees were hired).

¹⁶⁶ See Paul R. Verkuil, “Public Law Limitations on Privatization of Governmental Functions,” 84 *North Carolina Law Review* 397, 428-431 (2006) (discussing the historical importance of oath requirements). A third symbolic requirement, U.S. citizenship, was also added. See discussion at note 156

¹⁶⁷ The Administration initially sought to counter the full public employment requirement by referring to the use of private contractors at European airports. See NPR, “Federalizing Airport Security Personnel,” (comments by Representative Roy Blunt (R-Mo)).

¹⁶⁸ *Ibid.*

¹⁶⁹ See Clifford J. Rosky, “Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States,” 36 *Connecticut Law Review* 879, 979-981 (2004) (connecting the problem of loyalty to the choice between the public and the private use of force).

¹⁷⁰ Indeed, in the private opt out program which is part of the Act, qualified private screening companies are defined as those that employ the same contractual requirements for screeners as are applied to public employees. See 49 U.S.C.A. §§ 44919-44920. Qualified companies must also be owned and controlled by U.S. citizens. §44920(d)(2).

¹⁷¹ See generally, Rosky, “Force Inc.,” (describing the private use of force and comparing it to public use, including airport security).

¹⁷² See “George W. Bush signs the Aviation Security Bill,” Federal Document Clearing House (Nov. 19, 2001) 2001 WL 1458372.

¹⁷³ See note 140.

¹⁷⁴ The TSA employees do not always meet expectations. See “El Al Asks U.S. to Let it Do Extra Screenings at Newark,” *The New York Times*, May 12, 2006, p. B2 (Israeli airline El Al inspectors received permission from TSA to do a second screening of baggage entering its planes).

¹⁷⁵ OMB, *Circular A-76*, at A-2. See Part IV.B. See also Verkuil, “Public Law Limitations,” 436-439 (describing OMB’s A-76 process in detail).

¹⁷⁶ This decision is close to what the House bill imposed. See Airport Security Federalization Act, H.R. 3150.

¹⁷⁷ We cannot discount the consequences of September 11 on the public’s opinion of public servants. In New York City, for example, police and fire officials have enjoyed the unlikely status of heroes. See The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington, D.C.: GPO, 2004), § 9 “Heroism and Horror.”

¹⁷⁸ See note 195.

¹⁷⁹ See note 167.

¹⁸⁰ See Mark Freedland, “Law, Public Services, and Citizenship—New Domains, New Regimes?,” in Mark Freedland and Silvana Sciarra, eds., *Public Services and Citizenship in European Law* (Oxford: Clarendon Press, 1998), pp. 2-10 (describing the privatization and third way (public/private) movements in Europe).

¹⁸¹ See European Parliament and Council Regulation (EC) 2320/2002 establishing Common Rules in the Field of Civil Aviation Security, 2002 O.J. (L 355) 1-21.(Dec. 16, 2002).

¹⁸² See *ibid.*, arts. 7-9.

¹⁸³ See Emanuel Metz, “Government Perspective: Simplification of the Public Administration: The ‘Lean State’ as a Long-Term Task,” 4 *Columbia Journal of European Law* 647, 651-654 (1998) (describing the role of privatization in Germany’s Lean State program).

¹⁸⁴ *Ibid.* These requirements also apply to a variety of other privatized activities, such as motor vehicle inspections, individual safety inspections, and traffic control. See Freedland and Sciarra, *Public Services and Citizenship*.

¹⁸⁵ See OMB, *Circular A-76*, at A-2.

¹⁸⁶ See generally Freeman, “Extending Public Law Norms.”

¹⁸⁷ Of course, in the U.S., inherent government functions may not be delegated to private contractors, whereas European Union law would seem to permit jobs designated as public service to be delegated to private contractors if the member state prefers.

¹⁸⁸ It does not, for example, involve the search or restraint of passengers; that function is still performed by public officials.

¹⁸⁹ Indeed, Congress did approve of private inspectors at five airports. See TSA, “Background on PP5 Airports.”

¹⁹⁰ Searches are intrusive and privacy-depriving. We ordinarily expect police officials to do searches and seizures. But these are criminal contexts, whereas most airport searches are not. Nevertheless, when drugs are found during an airport search, it can become a criminal matter. See, e.g., *United States v. Ramsey*, 81 Fed. Appx. 547 (6th Cir. 2003).

¹⁹¹ See TSA, “Background on PP5 Airports.”

¹⁹² See Williamson, “Public and Private Bureaucracies” 308-326.

¹⁹³ See Verkuil, “Public Law Limitations,” 439 n. 233 (discussing study of comparative performance at airports including opt outs and finding no discernible differences in inspection quality).

¹⁹⁴ See Freedland and Sciarra, *Public Services and Citizenship*; Regulation (EC) No. 2320/2002; Metz, “Government Perspective.”

¹⁹⁵ John D. Donahue, *The Privatization Decision: Public Ends, Private Means* (New York: Basic Books, 1989), pp. 79-81 (limiting private solutions to those that can be effectively contracted for and describing the need for accountability by public officials).

¹⁹⁶ *Ibid.*, p. 38.

¹⁹⁷ Donahue describes accountability as “fidelity to the public’s values.” Efficiency is defined so as to incorporate these values. *Ibid.*, p. 12. Donahue’s premise is that privatization decisions are not made simply by comparing private and public forms’ behavior, but by recognizing that “[p]ublic tasks are different, and mostly harder.” *Ibid.*, p. 215.

¹⁹⁸ See Verkuil, “Public Law Limitations”; Metzger, “Privatization as Delegation,” 103 (requiring procedures to accompany private delegations).

¹⁹⁹ See Donahue, *The Privatization Decision*, 78 (“[A] well specified contract in a competitive context can enforce accountability . . .”).