

## REINVENTING PUBLIC ADMINISTRATION WHILE "DE-INVENTING" ADMINISTRATIVE LAW: IS IT TIME FOR AN "APA" FOR REGULATING OUTSOURCED GOVERNMENT WORK?

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### INTRODUCTION

On June 23, 2005 the *Washington Post* reported that the U.S. Department of Defense (DOD) planned to use a database on 16-18 year old high school and college students as an aid in military recruitment. The database contains birth dates, Social Security numbers, ethnicity, grade-point averages, and the students' curricula and e-mail addresses.<sup>1</sup> Using state-of-the art "reinvented" public administration, which emphasizes steering rather rowing,<sup>2</sup> the DOD outsourced creation of the database to a private firm, BeNow, Inc. After all, the DOD's mission and expertise do not lie in constructing such databases. Presumably firms that specialize in database development can do so more cost-effectively than government agencies whose work focuses on other matters. However, privacy advocates suggested that the DOD's primary motive in contracting out was not to save the taxpayers money but rather "to circumvent laws that restrict the government's right to collect or hold citizen information by turning to private firms to do the work."<sup>3</sup> Technically, these advocates are probably wrong. The Privacy Act of 1974,<sup>4</sup> which directly regulates the DOD, should be applicable indirectly to its contractors through the Federal Acquisition Regulation.<sup>5</sup> Nevertheless, these critics of the DOD's outsourcing are on to something fundamental: when government work is outsourced, the

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1. Jonathan Krim, *Pentagon Creating Student Database: Recruiting Tool For Military Raises Privacy Concerns*, WASH. POST, June 23, 2005, at A01.

2. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* (1992); Al Gore, *Creating a Government that Works Better and Costs Less 7* (U.S Government Printing Office, 1993).

3. Krim, *supra* note 1, at A01.

4. Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896, 2177, 2194.

5. Federal Acquisition Regulation, <http://www.arnet.gov/far> (section 24.102(c)); *see infra* note 72.

administrative law values and constraints that apply to government are apt to be lost.

As developed since the mid-1940s, administrative law includes regulations for transparency, checks on administrative abuse and intrusiveness, fair adjudication, stakeholder representation, and public participation in administrative decision-making.<sup>6</sup> Broadly construed, administrative law also extends to the constitutional law that regulates agencies' interaction with clients, customers, their own employees, persons confined to prisons and public mental health facilities, contractors, and individuals encountered in street-level administration.<sup>7</sup> High profile examples of circumvention or obviation of federal administrative law through outsourcing include United Space Alliance's launch work on the space shuttle *Columbia*, which substantially reduced the media's ability to use the Freedom of Information Act (FOIA)<sup>8</sup> to gain information on the decision-making and risk analyses associated with the tragic loss of the crew and shuttle.<sup>9</sup> Contracted for the DOD by the Department of the Interior's National Business Center to interrogate Iraqi prisoners, CACI, a private company, was deeply involved in the shocking abuse of human rights at Abu Ghraib prison in Iraq.<sup>10</sup> The ensuing damage to the U.S.'s self-image, national reputation, and international standing cannot be mitigated by the fact that CACI is non-governmental and neither U.S. administrative law nor, apparently, constitutional law applied to its actions.

In the process of reinventing its public administration the U.S. is "de-inventing" administrative law. More importantly, perhaps, it is doing so by default, that is, without serious and substantial public discussion and political debate on whether cost-effectiveness and other values associated with reinvented public administration should trump the norms embodied in administrative law. The readiness to accept the reinventers' vision of "a government that works better and costs less" is all the more striking in view of the nation's epic post-World War II

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6. P. STRAUSS, T. RAKOFF, R. SCHOTLAN, & C. FARINA, *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* (9th ed. 1995); DAVID H. ROSENBLUM, *ADMINISTRATIVE LAW FOR PUBLIC MANAGERS* (2003).

7. DAVID H. ROSENBLUM & R. O'LEARY, *PUBLIC ADMINISTRATION AND LAW* (1997); David H. Rosenbloom, *Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth-Century Progress*, 60 PUB. ADMIN. REV. 39, 39-46 (2000).

8. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

9. A full record of pertinent information was obtained only through extraordinary means. See Columbia Accident Investigation Board—Final Report, <http://caib.nasa.gov/news/report/volume1/default.html> (last visited Dec. 30, 2005).

10. David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. PUB. ADMIN. 103, 109 (2005).

struggle to "tame" the federal bureaucracy.<sup>11</sup>

### I. DEMOCRATIZING FEDERAL ADMINISTRATIVE PRACTICES

Whether bureaucracy and democracy can ever be fully compatible is a moot question.<sup>12</sup> Yet is it incontestable that, whatever their imperfections, federal administrative law, including constitutional doctrine, has gone a long way toward forcing democratic and constitutional values into public administrative practice. The 1946 federal Administrative Procedure Act (APA)<sup>13</sup> was intended to be "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government."<sup>14</sup> As amended, it has fulfilled much of that promise, though undoubtedly at the cost of encumbering administrative flexibility and efficiency.<sup>15</sup> Much constitutional law since the 1950s has had a similar impact by putting public bureaucracy in the "harness of procedural due process"<sup>16</sup> and other constitutional rights.<sup>17</sup> These developments have been discussed at length elsewhere and need not be reviewed here.<sup>18</sup> The point bearing emphasis is that the developments encountered substantial resistance, continue to do so, and are being eroded by the scale of contemporary outsourcing of government work to private entities.

It took six years to enact the APA after its forerunner the Walter-Logan Act of 1940 was successfully vetoed by President Franklin D. Roosevelt. Even in 1946, there was some opposition from the agencies including the view that congressional regulation of administrative

11. W. GORMLEY, JR., *TAMING THE BUREAUCRACY* (1989).

12. *See generally* CHARLES S. HYNEMAN, *BUREAUCRACY IN A DEMOCRACY* (1950); DAVID NACHMIAS & DAVID H. ROSENBLUM, *BUREAUCRATIC GOVERNMENT USA* (1980); RALPH P. HUMMEL, *THE BUREAUCRATIC EXPERIENCE* (4th ed. 1994); B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS* (1994); WILLIAM GORMLEY, JR., & S. BALLA, *BUREAUCRACY AND DEMOCRACY* (2004).

13. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 1946 (1946).

14. 79 CONG. REC. 92, 2150 (1946) (statement of Sen. McCarran).

15. This trade-off was deliberate. The Senate Judiciary Committee took "... the position that the [APA] bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to, or change in, present administrative operations." 79 CONG. REC. 92, 2150 (1946) (statement of Sen. McCarran).

16. *Spady v. Mount Vernon Hous. Auth.*, 419 U.S. 983, 985 (1974) (Douglas, J., dissenting).

17. ROSENBLUM, *supra* note 7, at 102.

18. DAVID H. ROSENBLUM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE 1946-1999* (2000); ROSENBLUM & O'LEARY, *supra* note 7, at 102.

procedures was a “retrograde step.”<sup>19</sup> Efforts to strengthen the APA’s ineffective provisions for transparency, beginning in the mid-1950s, met with no success until the enactment of FOIA in 1966. President Lyndon Baines Johnson signed the act only after complaining that the “goddam bill will screw the Johnson administration!”<sup>20</sup> Apparently every agency that testified on the bill was opposed to it.<sup>21</sup> President Gerald Ford unsuccessfully vetoed the 1974 FOIA amendments that substantially facilitated access to government records.<sup>22</sup> In 2001, President George W. Bush issued an executive order<sup>23</sup> that could drastically reduce access to information under the Presidential Records Act of 1978.<sup>24</sup> The Federal Advisory Committee Act (FACA) (1972)<sup>25</sup> was an anathema to President Richard M. Nixon and his appointees. As the bill made its way through Congress, Nixon unsuccessfully tried to stifle its enactment by issuing an executive order regulating advisory committees.<sup>26</sup> The 1978 Government in the Sunshine Act has long been criticized for encumbering and weakening administrative decision-making.<sup>27</sup> Defining an appropriate role for the President and the Office of Management and Budget (OMB) in APA prescribed rulemaking has been a source of political contention since the 1970s.<sup>28</sup>

Likewise, the judicial effort to force constitutional rights and values into public administrative decision-making and other activity has been widely criticized for both its intended and unintended consequences. Opposition has been over both doctrine and implementation. For example, if any single case were emblematic of the “rights revolution” in public administration, it might be *Goldberg v.*

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19. Testimony of Clyde Aitchison, Comm’r of the Interstate Commerce Comm’n before the U.S. Senate Judiciary Comm., *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944-1946, at 97 (1946).

20. KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM 180 (1982).

21. ROSENBLOOM, *supra* note 18, at 50.

22. Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (amending 4 U.S.C. § 552 (1967)) (codified as amended at 5 U.S.C. § 552).

23. Exec. Order No. 13,233, 3 C.F.R. 815 (2001), *reprinted in* 44 U.S.C.A. § 2204 (2001).

24. Presidential Records Act of 1978, 44 U.S.C. § 2201-2207 (1978).

25. Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770 (1972).

26. *See* CONGRESSIONAL RESEARCH SERVICE, FEDERAL ADVISORY COMMITTEE ACT 19 (Pub. L. No. 92-463) (1978).

27. Randolph May, *Recent Development: Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415 (1997).

28. CORNELIUS KERWIN, RULEMAKING 121-26 (2nd ed. 1999); DAVID H. ROSENBLOOM, ADMINISTRATIVE LAW FOR PUBLIC MANAGERS 75-79 (2003).

*Kelly* (1970).<sup>29</sup> There, it will be recalled, the Supreme Court held that constitutional procedural due process entitles welfare recipients to a hearing prior to the termination of their benefits.<sup>30</sup> Long forgotten, perhaps, is Justice Hugo Black's incredulousness at the Court's embrace of "new property" theory:<sup>31</sup>

The Court. . . relies upon the Fourteenth Amendment and in effect says that the failure of the government to pay a promised charitable installment to an individual deprives that individual of *his own property*, in violation of the Due Process Clause. . . . It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.<sup>32</sup>

The constitutionalization of public administration has been especially criticized in the areas of public school desegregation,<sup>33</sup> prison administration,<sup>34</sup> and public mental health care.<sup>35</sup>

## II. REINVENTION AND ADMINISTRATIVE LAW

The connection between reinventing government and de-inventing administrative law is not happenstance. The National Performance Review (NPR) considered administrative law and other procedural requirements to be impediments to effective administration, that is, to achieving "results": "Our path is clear: We must shift from systems that hold people accountable for process to systems that hold them accountable for results."<sup>36</sup> Accordingly, the NPR called for dramatic internal deregulation of federal administration: "The President should

29. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

30. *Id.* at 261.

31. See Charles Reich, *The New Property*, 73 *YALE L. J.* 733 (1964).

32. *Golberg*, 397 U.S. at 275 (emphasis in the original).

33. GERELD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 38-172 (Benjamin I. Page ed., 1991); DONALD L. HORROWITZ, *THE COURTS AND SOCIAL POLICY* 106-70 (1977).

34. *COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* (John J. DiIulio, Jr. ed., 1990).

35. JOHN Q. LA FOND & MARY L. DURHAM, *BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES* (1992); Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 *YALE L.J.* 1338 (1975); CHRISTOPHER JENCKS, *THE HOMELESS* (1994).

36. AL GORE, *FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS* 13 (1993).

issue a directive requiring all federal agencies to review internal government regulations over the next three years, with a goal of eliminating fifty percent of those regulations.”<sup>37</sup> To say the NPR disliked rules would be an understatement. It subscribed to the belief that, “The perverse effect of ‘rule by rules’ is that instead of reducing arbitrariness it appears to increase it; instead of fostering cooperation it destroys it; instead of solving problems it worsens them.”<sup>38</sup> By 1999, the NPR claimed to have eliminated 16,000 pages from the *Code of Federal Regulations* and 640,000 pages of internal agency regulations.<sup>39</sup>

The NPR called for legal reforms of the federal personnel systems, much reduced mandated reporting to Congress, reorientation of the inspectors general, as well as better rulemaking processes and decisions. However, it never tackled the APA or administrative law directly.<sup>40</sup> Neither did it necessarily respect the letter of the law when the APA might pose obstacles to reform. Perhaps the most outstanding (and embarrassing) example was the NPR’s promotion of the Occupational Safety and Health Administration’s Cooperative Compliance Program. The program offered firms relief from “wall-to-wall” inspections if they complied with a checklist of voluntary standards established by OSHA. The NPR gave the program’s pilot version a much coveted Hammer Award and touted it as a model of commonsensical reform.<sup>41</sup> The pilot seemed to work well in Maine, but when OSHA implemented it nationally firms complained that it was “more like coercion than cooperation” and amounted to “ambush rulemaking.”<sup>42</sup> The Court of Appeals for the D.C. Circuit agreed that the “voluntary” checklist amounted to an illegal circumvention of the APA’s requirements for rulemaking.<sup>43</sup>

As noted earlier, administrative law can also be legally circumvented by outsourcing government work. However, eluding

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37. *Id.* at 33.

38. AL GORE, COMMON SENSE GOVERNMENT WORKS BETTER AND COSTS LESS 19 (1995).

39. PRICEWATERHOUSECOOPERS ENDOWMENT FOR THE BUS. OF THE GOV’T, THE BUSINESS OF GOVERNMENT 7 (Ian Littman ed., 1999), available at <http://www.businessofgovernment.org/pdfs?BusofGovtFall99.pdf> (last visited Dec. 30, 2005).

40. See generally GORE, *supra* note 38, at 20-34; Exec. Order 12,866, 3 C.F.R. 638 (1993).

41. GORE, *supra* note 2, at 25-27.

42. Christy Harris, *Lack of Procedure Kills OSHA Reinvention Program*, FEDERAL TIMES, April 26, 1999, at 3, 18 (quoting Jennifer Krese, Nat’l Ass’n of Mfr. Employment Policy Director).

43. U.S. Chamber of Commerce v. U.S. Dep’t of Labor, Occupational Safety and Health Admin., 174 F.3d 206, 210 (D.C. Cir. 1999).

administrative law requirements was not the prime reason—if a reason at all—that the NPR promoted outsourcing. Its main concerns were reducing the number of full time equivalent federal employees and saving money.<sup>44</sup> It also noted that reinvention reforms did not require the nation to “jettison the traditional values that underlie democratic governance—values such as equal opportunity, justice, diversity, and democracy.”<sup>45</sup> That said, the NPR did not overtly place any value on public participation and transparency. It tended to triangulate the public into citizens, customers, and stakeholders. It paid less attention to citizens *qua* citizens because “When we are not trusted, when nothing we say or do seems to make a difference, we feel powerless. Elections alone do not restore that power. The power that matters in a self-governing democracy is the power we can exercise ‘over-the-counter,’ on a daily basis, whenever we interact with our government, whenever we seek to make our needs known.”<sup>46</sup>

The NPR’s primary focus on results, customer standards and satisfaction,<sup>47</sup> and stakeholder involvement in decision-making<sup>48</sup> tended to eclipse the values of administrative law. For example, a study of agency performance plans at the close of the Clinton administration revealed that seventeen of twenty-four major federal agencies completely ignored performance targets for handling FOIA requests. Four other agencies included such targets—proving they are relevant—and an additional three referenced FOIA in some way.<sup>49</sup> Being a non-mission based concern for all the agencies except the National Archives and Records Administration (which did set a performance target), FOIA was not particularly salient to the NPR.

Reinvention simply did not speak to FOIA and other democratizing provisions of administrative law. NPR proponents devoted little concerted thought and effort to determining how their prescriptions for management reforms might affect the administration of FOIA in practice. An empirical study found that FOIA implementation was in fact in “the path of reform,”<sup>50</sup> though the NPR rarely mentioned it. In

44. AL GORE, *supra* note 36, at i-iv.

45. *Id.* at 8.

46. AL GORE, *supra* note 38, at 93.

47. BILL CLINTON & AL GORE, PUTTING CUSTOMERS FIRST ‘95: STANDARDS FOR SERVING THE AMERICAN PEOPLE (1995).

48. *See* GORE, *supra* note 38, at 33-34.

49. Suzanne J. Piotrowski & David H. Rosenbloom, *Nonmission-Based Values in Results-Oriented Public Management: The Case of Freedom of Information*, 62 PUB. ADMIN. REV. 643, 651-53 (2002).

50. S. PIOTROWSKI, IN THE PATH OF REFORM: THE UNFORESEEN OUTCOMES OF PUBLIC

unplanned fashion, some NPR initiatives strengthened FOIA implementation, and thus governmental transparency, while others weakened it. The net effect of omitting FOIA from agency performance plans, as might be imagined, was to decrease organizational emphasis on FOIA functions.

Conversely, the NPR initiatives of customer service and employee empowerment led, in some cases, to greater access to documents, thus strengthening governmental transparency. Customer service initiatives pre-dated the NPR, but the renewed emphasis did lead to some concrete changes in the way FOIA was implemented. FOIA offices became much more accessible. Many offices for the first time started to put phone numbers on their response letters to FOIA requesters so that individuals had someone to call when they had questions.

The outsourcing of governmental functions and FOIA intersected in multiple ways. The use of contractors obfuscates transparency as it relates to the functions outsourced. However, in keeping with NPR initiatives, federal contractors are being used creatively within the document release process associated with FOIA implementation. Companies are hired by federal agencies to help process FOIA requests and identify documents. While this practice is controversial, it has shown some promise in reducing the number of unfilled FOIA requests the agencies have backlogged.<sup>51</sup> In other words, reinvention is relevant to FOIA even though reinventers give little thought to it. The same is true of the relationship of reinvention to administrative law more generally, apparently without regard to who is in the White House.

President Bush's program for reforming federal administration, the President's Management Agenda,<sup>52</sup> adheres to the main tenets of reinvention.<sup>53</sup> Before taking office, Bush emphasized that his "policies and . . . vision of government reform are guided by three principles: government should be citizen-centered, results-oriented, and wherever possible, market based."<sup>54</sup> The President's Management Agenda, issued

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MANAGEMENT REFORM ON GOVERNMENTAL TRANSPARENCY (State University of New York Press) (forthcoming).

51. The decision to withhold or release documents requested pursuant to FOIA is inherently governmental and cannot legally be outsourced.

52. U.S. OFFICE OF MGMT. AND BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA: FISCAL YEAR 2002 (2001).

53. The main difference is that the Bush administration emphasizes centralized direction of federal agencies by the President, his closest aides, and OMB. Concomitantly, the Bush administration does not embrace employee empowerment. See Alexis Simendinger, *Results-Oriented President Uses Levers of Power*, Jan. 25, 2002, <http://www.goexec.com/dailyfed/0102/012502nj2.htm> (last visited Dec. 30, 2005).

54. George W. Bush, *Building a Responsive, Innovative Government*, FEDERAL TIMES,

in August 2001, places strong emphasis on "competitive sourcing,"<sup>55</sup> which OMB treats as a focal point for implementation.<sup>56</sup> In 2003, OMB concluded that of the 1,609,000 federal positions being tracked under the President's Management Agenda, 858,000 are potentially subject to outsourcing.<sup>57</sup> Like outsourcing under the NPR, competitive sourcing places limited, if any, importance on administrative law values.

### III. COMPETITIVE SOURCING: DECIDING WHAT AND WHEN TO OUTSOURCE

Outsourcing within the framework of competitive sourcing requires three-stage decision-making. First, it must be determined whether the function involved is "inherently governmental." Inherently governmental functions cannot be legally outsourced. OMB's *Circular A-76*, the "rulebook" for competitive sourcing, defines inherently governmental as any

activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.<sup>58</sup>

Examples include policymaking, contracting, "[d]etermining, protecting, and advancing" national interests through military or diplomatic action, judicial proceedings, contract management, matters "significantly affecting the life, liberty, or property of private persons," and acquiring, controlling, and disposing of U.S. property.<sup>59</sup> Discretion is considered

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June 26, 2000, at 15 (reprinting excerpts of a June 9, 2000 address given by then Gov. George W. Bush in Philadelphia).

55. U.S. OFFICE OF MGMT. & BUDGET, *supra* note 52, at 17-18 (emphasis added).

56. *See* U.S. OFFICE OF MGMT. & BUDGET, AGENCY SCORECARDS (2003), [http://www.whitehouse.gov/omb/budintegration/scorecards/agency\\_scorecards.html](http://www.whitehouse.gov/omb/budintegration/scorecards/agency_scorecards.html) (last visited Dec. 30, 2005).

57. U.S. OFFICE OF MGMT. & BUDGET, COMPETITIVE SOURCING: CONDUCTING PRIVATE-PUBLIC COMPETITION IN A REASONED AND RESPONSIBLE MANNER 3 (2003).

58. U.S. OFFICE OF MGMT. & BUDGET, OMB CIRCULAR NO. A-76, Attachment A, § B(1)(a) (2003).

59. *Id.*

inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and the decision-making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.<sup>60</sup>

Following these guidelines, there is nothing inherently governmental about launching space shuttles, building databases for military recruiters, and, probably, interrogating prisoners held in Abu Ghraib and in similar circumstances elsewhere.

Second, the decision to competitively source requires a determination of whether a “commercial” function (i.e., one that is not inherently governmentally) should be retained by the government. Retention can be based on the impracticality of subjecting specific commercial functions to competitive sourcing exercises or the likelihood that outsourcing would not yield the best value in return for government spending.<sup>61</sup>

Third, positions suitable for outsourcing are subjected to one of two types of competitive sourcing competitions. A standard competition is used when more than sixty-five positions are involved; a streamlined competition when there are sixty-five or fewer. *Circular A-76* contains 63 pages of detailed instructions on how to conduct these competitions and to reach decisions regarding the retention or outsourcing of functions. The chief decision criterion by far is cost-effectiveness. *The competitive sourcing decision places no value whatsoever on transparency, stakeholder representation, public participation, and protection of employees’ and others’ constitutional rights that are legally guaranteed when functions are retained by the government—and very much likely to be lost when those functions are outsourced.* In this sense, *Circular A-76* ignores the development of administrative law, including relevant constitutional law, over the past six decades.

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60. *Id.* at B.1.b.

61. Tichakorn Hill, *More Fighting Ahead Over Competitive Sourcing Goals*, FEDERAL TIMES, Jan. 3, 2005, available at <http://federaltimes.com/index.php?S=577704> (last visited Dec. 30, 2005). The Federal Activities Inventory Reform Act requires agencies annually to list all their non-inherently governmental positions. Such positions are considered ‘commercial.’ Pub. L. No. 105-270, 112 Stat. 2382 (Oct. 19, 1998).

## IV. AN APA FOR OUTSOURCED GOVERNMENT WORK?

At first blush, an APA for outsourced government work may sound like an encumbering, self-defeating, unnecessary, and terribly bad idea. Such a statute would no doubt make private entities all the more disinclined to deal with government.<sup>62</sup> Certainly, the vast majority of for-profits and many not-for-profits would be reluctant to subject their records to FOIA requests, hold open meetings, meet with advisory committees, and extend First Amendment-like whistleblower rights to their employees.<sup>63</sup> Anything that drives up the cost of outsourcing also detracts from its attractiveness as a strategy for accomplishing government objectives. Conversely, applying constitutional constraints to some outsourced functions, such as incarceration, may be a de facto prerequisite for privatization. Theory aside, the reality is that administrative law controls on outsourced functions are already evolving in several forums. Arguably, it might be better to appoint a committee of experts to analyze the issues comprehensively, much like the Attorney General's Committee on Administrative Procedure did in the early 1940s with respect to the APA.<sup>64</sup>

To date, the following are among the major applications of administrative law-like controls to outsourced functions.

■ *State action doctrine.* Since the late 1980s, the Supreme Court has unequivocally placed privatized health care in prisons under the ambit of constitutional law.<sup>65</sup> The Court also made it clear that “[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”<sup>66</sup> According to the dissenters in *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001), the Court took a major step toward applying constitutional constraints to private entities by creating a *new* category of state action, “entwinement.”<sup>67</sup> Depending on how it is defined, entwining has the potential to cover a very wide variety of outsourced activities.<sup>68</sup>

62. Susan A. MacManus, *Why Businesses are Reluctant to Sell to Governments*, 51 PUB. ADMIN. REV. 328-44 (1991).

63. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

64. U.S. ATT'Y GEN. COMM. ON ADM. PROCEDURE, FINAL REPORT (U.S. GOV'T PRINTING OFFICE, 1941).

65. *West v. Atkins*, 487 U.S. 42 (1988).

66. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995).

67. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 305 (2001) (Thomas, J., dissenting).

68. Federal agencies have called on contractors to analyze proposed legislation; draft

■ *State Courts and Transparency.* As of 2000, twenty-two states applied freedom of information or related transparency statutes to outsourced functions based on one or more of the following factors: performance “of a governmental function . . . level of government funding, . . . extent of governmental involvement or regulation, and . . . whether the entity was created by the government.”<sup>69</sup>

■ *The Federal Acquisition Regulation (FAR).* FAR is a “codification and publication of uniform policies and procedures for acquisitions by all [federal] executive agencies.”<sup>70</sup> It places the following two administrative law-like requirements on contractors performing outsourced governmental functions:

1. *Whistle blower protection.* “Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).”<sup>71</sup>

2. *Privacy Act notifications.* “[I]f a contract specifically provides for the design, development, or operation of a system of records on individuals on behalf of an agency to accomplish an agency function, the agency must apply the requirements of the [Privacy] Act to the contractor and its employees working on the contract.”<sup>72</sup> This

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budget requirements, reports to Congress and preambles to rules; conduct public hearings; monitor arms control negotiations; participate on decisions regarding the export of nuclear technology; and provide services to an inspector general. Rosenbloom & Piotrowski, *supra* note 10.

69. Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information under State Law*, 27 FLA. ST. U. L. REV. 825, 836-53 (2000).

70. Federal Acquisition Regulation, 48 C.F.R. § 1.101 (2004), available at <http://www.acqnet.gov/far/01-26/html/FARtoHTML.htm> (last visited Dec. 30, 2005).

71. *Id.* § 3.903.

72. *Id.* § 24.102(c). See also *id.* §§ 52.224-1, 52.224-2.

As prescribed in [Federal Acquisition Regulation] 24.104, insert the following clause in solicitations and contracts, when the design, development, or operation of a system of records on individuals is required to accomplish an agency function:

Privacy Act Notification (Apr 1984)

The Contractor will be required to design, develop, or operate a system of records on individuals, to accomplish an agency function subject to the Privacy Act of 1974, Public Law 93-579, December 31, 1974 (5 U.S.C. 552a) and applicable agency regulations. Violation of the Act may involve the imposition of criminal penalties.

(End of clause), and 52.224-2

provision clearly protects individuals against the disclosure of their personal information by contractors, other than for "routine use," defined as "for a purpose which is compatible with the purpose for which it was collected."<sup>73</sup> As a practical matter however, it may not prevent agencies from contracting private entities to collect information that the agencies could not legally collect on their own.

Privacy Act:

As prescribed in [Federal Acquisition Regulation] 24.104, insert the following clause in solicitations and contracts, when the design, development or operation of a system of records on individuals is required to accomplish agency function:

Privacy Act (Apr 1984)

- (a) The Contractor agrees to-
- (1) Comply with the Privacy Act of 1974 (the Act) and the agency rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals to accomplish an agency function when the contract specifically identifies -
    - (i) The systems of records; and
    - (ii) The design, development, or operation work that the contractor is to perform;
  - (2) Include the Privacy Act notification contained in this contract in every solicitation and resulting subcontract and in every subcontract awarded without a solicitation, when the work statement in the proposed subcontract requires the redesign, development, or operation of a system of records on individuals that is subject to the Act; and
  - (3) Include this clause, including this paragraph (3), in all subcontracts awarded under this contract which requires the design, development, or operation of such a system of records.
- (b) In the event of violations of the Act, a civil action may be brought against the agency involved when the violation concerns the design, development, or operation of a system of records on individuals to accomplish an agency function, and criminal penalties may be imposed upon the officers or employees of the agency when the violation concerns the operation of a system of records on individuals to accomplish an agency function. For purposes of the Act, when the contract is for the operation of a system of records on individuals to accomplish an agency function, the Contractor is considered to be an employee of the agency.
- (c)(1) "Operation of a system of records," as used in this clause, means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.
- (2) "Record," as used in this clause, means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and that contains the person's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.
- (3) "System of records on individuals," as used in this clause, means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

(End of clause),

available at [http://www.arnet.gov/far/current/html/52\\_223\\_226.html](http://www.arnet.gov/far/current/html/52_223_226.html) (last visited Dec. 30, 2005).

73. Privacy Act, 5 U.S.C. § 552a (b)(1-12); (a)(7).

■ *Transparency.* FOIA does not apply to the records of private entities. However, if the ownership of records is transferred to a government agency, such records are likely to be “agency records” subject to disclosure through FOIA. The Department of Energy Acquisition Regulation provides:

Except [records on personnel, confidential financial matters, operations not related to (the Department of Energy), legal matters, and some aspects of technology, intellectual property, and procurement], . . . all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.<sup>74</sup>

These are important steps to apply administrative law norms and constraints to the performance of outsourced government work. But they are limited in scope. Contemporary public administrative doctrine’s emphasis on competitive sourcing and outsourcing clearly threatens the administrative law regime that, beginning in 1946, has done a great deal to make public bureaucracies in the United States more compatible with the nation’s democratic-constitutional political institutions.

#### CONCLUSION: AN “APA” FOR OUTSOURCED GOVERNMENT WORK?

In 1987, an early advocate of outsourcing government functions, E.S. Savas, called privatization “the key to better government.”<sup>75</sup> A few years later, outsourcing became a core tenet of the reinventing government movement’s promise to make governments “work better and cost less.” In 2001, the President’s Management Agenda promoted competitive sourcing to raise the level of sophistication in deciding whether to outsource. Reformers from Savas to former Vice President Al Gore to President George W. Bush have put much emphasis on

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74. Department of Energy Acquisition Regulation: Access to and Ownership of Records, 48 C.F.R. §9.970.5204-3 (2004) available at <http://professionals.pr.doc.gov/ma5/MA-5Web.nsf/b9a5371a6387d5bf85256a5d0058e259/f6ec030ffe98d7a905256b450045904c?Op enDocument> (last visited Dec. 30, 2005).

75. E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* (1987).

“improving the way government does business.”<sup>76</sup>

But do outsourcing and competitive sourcing improve the way *government does government*? This question can only be answered by entering the value of administrative law requirements into the equation when government considers outsourcing or competitive sourcing its functions. The federal and state courts as well as federal acquisition professionals are incrementally putting individual rights and transparency into such equations. However, the scope of outsourcing is now so vast that a more comprehensive and systematic approach may be warranted. Perhaps the time has come to join experts in administrative law with administrative reformers in an effort to determine whether the equivalent of an APA for outsourced government functions is warranted, and if so, to draft a model statute for federal, state, and local government.

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76. GORE, *supra* note 38, at iv.