

# Privatization's Pretensions

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*For decades, policymakers have been privatizing government responsibilities for the customary, and ostensibly exclusive, objective of providing the public with the same goods and services more efficiently. It is becoming increasingly apparent that these policymakers are also doing something different: they are using that purportedly technocratic process to substantively alter the very policies they are supposed to be neutrally administering. And, it is working: these privatization “workarounds” can directly change the content of public education, health, and social welfare programs, the outcome of regulatory enforcement and rulemaking proceedings, and the trajectory of police and national security operations.*

*Workarounds provide outsourcing agencies with the means of accomplishing distinct policy goals that—but for the pretext of technocratic privatization—would either be legally unattainable or much more difficult to realize. In short, they are executive aggrandizing. They enable Presidents, governors, and mayors to exercise greater unilateral policy discretion—at the expense of legislators, courts, successor administrations, and the people.*

*Although lively privatization debates abound in the academy and inside the Beltway, both communities have given insufficient attention to this transformative and potentially transgressive practice. This Article tackles workarounds head-on. Specifically, this Article locates the structural process failures in government contracting that enable workarounds; develops an overarching conceptual framework and typology of workarounds; and prescribes a protocol for analytical and regulatory intervention.*

## INTRODUCTION

Privatization has its fans and its foes. It deserves both. But the fans and the foes need to be clear about what they are cheering or jeering. The case for privatization—understood herein as the contracting out of government services to the private sector<sup>1</sup>—has centered on its techno-

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<sup>1</sup> Although privatization is a term used to describe a variety of practices, including the selling of state assets, see Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 Marq L Rev 449, 456–62 (1988), in this Article, I take privatization to mean “contracting out,” where “the

cratic promise of efficiency and cost savings: “reinventing government”<sup>2</sup> as leaner and meaner.<sup>3</sup> The case against has, in turn, rested largely on accountability concerns—the excessive delegation of sovereign authority paving the way for private contractors to abuse their discretion, evade oversight, and generate unanticipated cost overruns.<sup>4</sup>

Notwithstanding the current and long-dominant debate in privatization circles focusing on efficiency versus accountability, government outsourcing appears to have more subtle applications that do not map onto this conventional terrain. Indeed, policymakers turn to

government purchases goods or services from another party,” see *id.* at 458 (quotation marks omitted). See also Kevin R. Kosar, *Privatization and the Federal Government: An Introduction* 4 (Congressional Research Service, Dec 28, 2006), online at <http://www.fas.org/sgp/crs/misc/RL33777.pdf> (visited Dec 27, 2009); Jody Freeman, *The Contracting State*, 28 Fla St U L Rev 155, 161 (2000). Moreover, I use the terms privatization, contracting out, and outsourcing interchangeably.

<sup>2</sup> See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 NC L Rev 397, 400 (2006); Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 Pub Cont L J 321, 323, 329–30 (2004); Al Gore, *From Red Tape to Results: Creating a Government that Works Better & Costs Less* i–iv (GPO 1993); David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* xv–xxii (William Patrick 1992).

<sup>3</sup> See David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 Cal L Rev 393, 400 (2008) (describing “economic efficiency” as privatization’s “own measure of success”); Jody Freeman, *Extending Public Law Norms through Privatization*, 116 Harv L Rev 1285, 1296 (2003) (noting that from a “pragmatic perspective, privatization is a means of improving productive efficiency: obtaining high-quality services at the lowest possible cost”); Donald G. Featherstun, D. Whitney Thornton, II, and J. Gregory Correnti, *State and Local Privatization: An Evolving Process*, 30 Pub Cont L J 643, 651 (2001) (“The decision to contract out or conduct a managed competition hinges on the expectation that cost savings and/or enhanced quality will result.”); Harvey B. Feigenbaum and Jeffrey R. Henig, *The Political Underpinnings of Privatization: A Typology*, 46 World Polit 185, 191–202 (1994); John D. Donahue, *The Privatization Decision: Public Ends, Private Means* 57 (Basic Books 1989) (“Except for a handful of ideologues, few people would be very interested in privatization unless private suppliers promised superior efficiency.”). See also Kosar, *Privatization and the Federal Government* at 6 (cited in note 1); Commercial Activities Panel, *Improving the Sourcing Decisions of the Government: Final Report* 108–09 (Apr 2002), online at <http://archive.gao.gov/f0502/a03209.pdf> (visited Dec 27, 2009) (describing the congressionally convened panel’s understanding of efficiency and cost-savings as the dominant motivations for contracting out at all levels of government); Stuart Butler, *Privatization for Public Purposes*, in William T. Gormley, Jr, ed, *Privatization and Its Alternatives* 17, 22 (Wisconsin 1991) (observing that proponents of contracting out argue that it leads to “greater opportunity of finding a more innovative or less expensive service”); Osborne and Gaebler, *Reinventing Government* at 76–107 (cited in note 2) (surveying the advantages of competition in the service sector including greater efficiency); E.S. Savas, *Privatization: The Key to Better Government* 4–6, 119–230 (Chatham House 1987) (noting “that privatization, properly carried out, generally leads to large increases in efficiency while improving or at least maintaining the level and quality of public services”).

<sup>4</sup> See Jody Freeman and Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in Jody Freeman and Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* 1, 2–6 (Harvard 2009).

privatization for more than the customary, and ostensibly exclusive, objective of providing the public with the *same* goods and services more efficiently than the government bureaucracy can. They use government contracting in a way that substantively alters (or temporally ossifies) the very policies they are supposed to be neutrally administering. The act of privatization can thus directly change the outcome of regulatory rulemaking and enforcement proceedings, the programmatic content of government-sponsored educational, public health, and social welfare programs, and the trajectory of national security investigatory and military operations.

These practices—what this Article calls “workarounds”—are executive aggrandizing. Specifically, workarounds are government contracts, or provisions within government contracts, that provide the outsourcing agency with the means of achieving distinct public policy goals that—but for the pretext of technocratic outsourcing—would be impossible or much more difficult to attain in the ordinary course of nonprivatized public administration. In short, workarounds enable the executive to exercise greater unilateral discretion—at the expense of the legislature, the judiciary, the people, and successor administrations.

To care about workarounds, we need not be skeptical of executive authority, nor need we be hostile to privatization. We must simply appreciate that this powerful, potentially transformative phenomenon (1) raises novel questions that sound in separation of powers, intergenerational sovereignty, and democratic theory, and (2) has been overshadowed by the dominant, but analytically orthogonal, efficiency versus accountability debate. Because workarounds are undertheorized as well as underdeveloped as a regulatory matter, we currently lack the vocabulary, the data, and the tools to make thoughtful analytical and legal interventions. This Article seeks to change that.

Consider the following scenarios:

*Exploiting Legal-Status Differentials.* The Department of Homeland Security (DHS) would like to establish a data mining operation to gather intelligence on potential terrorist threats.<sup>5</sup> Bristling under stringent federal privacy laws imposed on government officials—laws that

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<sup>5</sup> See Ira S. Rubinstein, Ronald D. Lee, and Paul M. Schwartz, *Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U Chi L Rev 261, 262–63 (2008) (explaining various forms of “subject-based” and “pattern-based” data mining searches). Because some privacy laws, including the Privacy Act of 1974, Pub L No 93-579, 88 Stat 1896, codified at 5 USC § 552(a), are not likely to apply to pattern-based data analysis of the sort that does not use the names of suspects as investigatory starting points, Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 Harv CR–CL L Rev 435, 466 (2008), I use data mining in this Article to refer only to subject-based data searches of pre-identified targets.

inhibit DHS's ability to collect and analyze personal information without court authorization—policymakers turn to private contractors. Contractors, like most other private individuals, are largely beyond the scope of these federal laws.<sup>6</sup> For the most part, these laws were enacted well before contractors were hired with great regularity to assist with law enforcement and counterterrorism initiatives.<sup>7</sup> Now, in an era where outsourcing is the norm, DHS may use the statutes' narrowness to its advantage and award government contracts to the unencumbered private data brokers. The contractors can then acquire the information more liberally on their own and submit raw data or synthesized intelligence to the government.<sup>8</sup> DHS thus gets the benefit of more sweeping, intrusive searches than would otherwise be permitted of government officials, short of their first obtaining warrants or securing legislative change.

*Binding Future Administrations.* A mayor who staked his candidacy on environmental consciousness loses his bid for reelection to an opponent hostile to Green governance. Days after losing the election, he directs his sanitation commissioner to enter into a long-term contract with a recycling company to conduct daily pickups throughout the city. This places the successor mayor in a bind: pay for services she

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<sup>6</sup> See Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S Cal L Rev 241, 255 (2007):

To date, the private sector's collection of sensitive personal information remains largely unregulated by federal law. While federal legislation governs the security of personal data stored by federal agencies, similar federal restrictions apply only to a narrow set of private entities, such as financial institutions, credit agencies, and health care providers.

See also notes 76–80 and accompanying text.

<sup>7</sup> See Intelligence Authorization Act for Fiscal Year 2009, S Rep No 110-333, 110th Cong, 2d Sess 6 (2008) (“[A] concern of the Committee is the Intelligence Community’s increasing reliance upon contractors to meet mission requirements.”). See also James McCain, Note, *Applying the Privacy Act of 1974 to Data Brokers Contracting with the Government*, 38 Pub Cont L J 935, 936 (2009) (noting that the Privacy Act was passed “before the advent” of a vibrant commercial data broker market); Patrick Radden Keefe, *Don't Privatize Our Spies*, NY Times A19 (June 25, 2007) (noting a sharp uptick in the use of intelligence contractors after 9/11); Greg Miller, *27% of U.S. Spy Work Is Outsourced; Agencies' Reliance on Contractors, Which Surged after Sept. 11, Has Raised Questions about Trustworthiness*, LA Times A26 (Aug 28, 2008) (same); Walter Pincus, *Lawmakers Want More Data on Contracting out Intelligence*, Wash Post A7 (May 7, 2006) (same).

<sup>8</sup> Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 Cal L Rev 901, 908–09 & n 23 (2008) (describing the constitutional and statutory restrictions that might possibly be bypassed when private industry voluntarily provides the government with data); Daniel J. Solove and Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U Ill L Rev 357, 359.

inherited but deems unnecessary, or incur penalties in the form of damages to extricate the municipality from the recycling contract.<sup>9</sup>

*Sidelining the Civil Service.* The Secretary of Health and Human Services (HHS) is entrusted to carry out the President's family planning regulatory agenda. Rank-and-file staff opposition to the President's agenda has effectively impeded the secretary's mission.<sup>10</sup> Frustrated by the civil servants' resistance, the secretary does an end run around the bureaucracy and directs the contracting out of the next round of family planning research and regulatory rule drafting to a private think tank.<sup>11</sup> Perhaps already ideologically aligned with the President, or simply eager to be seen as a go-to resource (for purposes of receiving follow-up contracts), the think tank supports the administration's position more readily than the politically insulated, de facto-tenured members of the civil service.<sup>12</sup> Ultimately, the research and recommendations of these contractors, not the newly sidelined bureaucrats, shape the administrative record and provide support for the administration's promulgation of sweeping new rules.<sup>13</sup>

*Baiting and Switching.* For a military engagement of waning popularity, the Pentagon needs 400,000 troops; realistically, it has less than half that number available.<sup>14</sup> But, the Pentagon is able to work around

<sup>9</sup> See notes 81–98 and accompanying text.

<sup>10</sup> See notes 105–13 and accompanying text.

<sup>11</sup> See notes 114–20 and accompanying text.

<sup>12</sup> See, for example, *Doe v DOJ*, 753 F.2d 1092, 1107 n.14 (DC Cir 1985) (noting that civil service laws insulate government employees from “supervisory whim”). See also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *Yale L J* 2314, 2333–35 (2005) (noting the importance of civil-service job security and lamenting legislative efforts to exempt DHS personnel from these protections insofar as it will deter bureaucrats from challenging their politically appointed superiors); Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 *U Pa L Rev* 942, 945 (1976) (“The civil service system has provided the equivalent of life tenure (at least until retirement) once a brief probation period is passed, absent what the government considers a serious act of misconduct.”).

<sup>13</sup> See note 120. See also *Massachusetts v EPA*, 549 US 497, 532–34 (2007) (emphasizing the importance of scientific reasoning in support of agency action or inaction); *Motor Vehicle Manufacturers Association of the United States, Inc v State Farm Mutual Automobile Insurance Co*, 463 US 29, 43, 51–57 (1983) (stressing that agency rules must reflect the evidence found in the administrative record). In these cases, the Court rejected heavy-handed political interference in rule-making processes, giving priority to expertise over politics. See Jody Freeman and Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 S Ct Rev 51, 87–91. Given the Court's willingness to challenge transparently politicized administrative policy decisions dictated by the White House, see *id.* at 54, contractors—experts, albeit potentially hand-chosen ones—may provide the political leadership with some cover in bolstering the record in support of political policy preferences.

<sup>14</sup> See, for example, James A. Baker, III, et al., *The Iraq Study Group Report* 73 (Vintage 2006) (rejecting a proposed increase of 100,000 to 200,000 US troops in Iraq due to insufficient troop

the shortfall by calling forth a phalanx of private contractors.<sup>15</sup> As a result of the private recruitment, these contractors, who are far less visible to the American public, serve at a roughly 1-to-1 ratio with US military personnel.<sup>16</sup> Their presence dilutes body counts (as contractor fatalities are not officially tallied or publicly announced)<sup>17</sup> and thus obscures the full extent of the human costs of war. Their presence also allows the government to avoid politically difficult policy decisions regarding whether to withdraw, scale back the engagement, reinstitute a civilian draft, or seek outside support from a broader coalition of willing international partners.<sup>18</sup>

All of these scenarios capture something scholars and government regulators have largely overlooked: outsourcing can be executive aggrandizing.<sup>19</sup> Notwithstanding their potential to rearrange policy landscapes and to affect underlying distributions of power among democratic actors and institutions, workarounds have not readily been called into question by the prevailing, efficiency-focused regulatory regimes employed in the United States.<sup>20</sup> Nor have they figured prom-

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levels); Congressional Budget Office, *An Analysis of the U.S. Military's Ability to Sustain an Occupation in Iraq* 3–7 (Sept 3, 2003), online at <http://www.cbo.gov/ftpdocs/45xx/doc4515/09-03-Iraq.pdf> (visited Dec 27, 2009) (examining ways to increase the Army's ground presence in Iraq and finding that even if two new divisions were created, the sustainable force would only be 85,000 to 129,000 personnel).

<sup>15</sup> See Mary Cooper, *Private Affair: New Reliance on America's Other Army*, 62 Cong Q Wkly Rep 2186, 2186 (2004); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 Wash U L Q 1001, 1004 & n 4 (2004); P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* 63–64 (Cornell 2003).

<sup>16</sup> T. Christian Miller, *Contractors Outnumber Troops in Iraq; The Figure Higher than Reported Earlier, Doesn't Include Security Firms. Critics Say the Issue Is Accountability*, LA Times A1 (July 4, 2007) (reporting the presence of 180,000 civilian contractors and only 160,000 soldiers supporting US efforts in Iraq). See also Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis* 13 (Congressional Research Service, Aug 13, 2009), online at <http://www.fas.org/sgp/crs/natsec/R40764.pdf> (visited Dec 27, 2009) (noting that contractors make up 57 percent of the Pentagon workforce in Afghanistan).

<sup>17</sup> Steven Schooner, *Why Contractor Fatalities Matter*, Parameters 78, 78 (Autumn 2008).

<sup>18</sup> See notes 140–64 and accompanying text.

<sup>19</sup> For other possible contexts in which the workaround label might also apply, see *Lebron v National Railway Passenger Corp.*, 513 US 374, 383–86 (1995) (describing Congress's attempt to enable Amtrak to avoid constitutional liability by statutorily designating Amtrak as a private entity); *Buono v Kempthorne*, 502 F3d 1069, 1081–85 (9th Cir 2007), cert granted as *Salazar v Buono*, 129 S Ct 1313 (2009). See also generally Mark Tushnet, *Constitutional Workarounds*, 87 Tex L Rev 1499 (2009).

<sup>20</sup> The most comprehensive paradigm, as described in fuller detail in Part III.A, is guided by the Competition in Contracting Act of 1984 (CICA) § 2711, Pub L No 98-369, 98 Stat 1175, 1175–81, codified at 41 USC § 253 (detailing the competition requirements for government procurement procedures); the Federal Activities Inventory Reform Act of 1998 (FAIR Act) § 2(a), Pub L No 105-270, 112 Stat 2382, 2382 (1998), codified at 31 USC § 501(2)(a) (requiring the annual disclosure by agency heads of those activities that “are not inherently governmental functions”); and the

inently in the legal scholarship. To date, legal scholarship has instead tended to focus on privatization in terms of the Executive's ceding of sovereignty, rather than its amassing of it; and relatedly, on contractor waste, abuse, and fraud, and the inadequate government oversight that invites it.<sup>21</sup>

Problems of inefficient or rogue contractors taking liberties with the discretion afforded to them as government proxies are analytically distinct, however, from the phenomenon of government officials orchestrating workarounds through private proxies. In the case of contractor manipulations, we have private agents cutting corners—at the government's expense—to maximize profits or minimize their effort. In the case of workarounds, we often have perfectly dutiful, law-abiding contractors contributing (at times unwittingly) to policy alterations. Indeed, contractor accountability is the wrong concept to invoke with respect to workarounds. If anything, the concern with workarounds is the converse. Contractors become *too accountable*—too attentive to the principals that hired them—while the Executive, in

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Office of Budget and Management, Circular A-76 (Revised), *Performance of Commercial Activities* 1–3 (May 29, 2003), online at [http://www.whitehouse.gov/omb/circulars/a076/a76\\_rev2003.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf) (visited Dec 27, 2009) (“OMB A-76”) (summarizing the purpose and scope of the revised circular). For FY 2009, OMB A-76 competitions were suspended. See 2009 Omnibus Appropriations Act, Pub L No 111-8, 123 Stat 524, 691.

<sup>21</sup> Concerned primarily with excessive delegations of government sovereignty to contractors and the government's inability to manage those delegations, scholars have sought to ensure contractor accountability by, among other things, extending public laws and public norms into the private sector. Indeed, our understanding has been enriched by their arguments for increasing private sector transparency, see Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting out and the Evolving Law of Diffused Sovereignty*, 52 Admin L Rev 859, 909–10 (2000); strengthening procedural protocols for contractors to abide by, see Alfred C. Aman, Jr., *The Democracy Deficit: Taming Globalization through Law Reform* 8 (NYU 2004); extending constitutional and statutory limitations on impermissible state action to contractors performing public functions, see Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Function Threatens Democracy and What We Can Do about It* 102–14 (Cambridge 2007); Verkuil, 84 NC L Rev at 449–54 (cited in note 2); Gillian E. Metzger, *Privatization as Delegation*, 103 Colum L Rev 1367, 1400–06 (2003); Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 Syracuse L Rev 1169, 1182 (1994); and, expanding the availability of private law remedies, see Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 Ohio St L J 175, 178 (1997). For additional treatments calling for the inclusion of public law obligations in government contracts, see Nina A. Mendleson, *Six Simple Steps to Increase Contractor Accountability*, in Freeman and Minow, eds, *Government by Contract*, 241, 258–59 (cited in note 4); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv L Rev 1229, 1267 (2003); Freeman, 116 Harv L Rev at 1315–16 (cited in note 3); for greater investment in government resources to carry out effective oversight, see Steven L. Schooner, *Competitive Sourcing Policy: More Sail than Rudder?*, 33 Pub Cont L J 263, 285–89 (2004); and, for the promotion of a public conversation about privatization, see Minow, 116 Harv L Rev at 1234–36, have further strengthened the contractor-accountability reform paradigm.

turn, may be acting as an unfaithful agent to the rest of the government. That is, workarounds require us to examine a heretofore underappreciated *principal-principal-agent* relationship, with particular focus on the relationship between the Executive, charged with the responsibility for directing public administration, and the various other *principals* both within government and among the electorate to which the Executive then owes duties of fidelity.

In recent years, I, along with several others, have started down the path of identifying nontechnocratic, policy altering dynamics incident to privatization that amount to what I now call workarounds.<sup>22</sup> This Article—the first to put workarounds squarely on the map—stands on that foundation. Specifically, this Article introduces the concept of workarounds as a multilayered, durable, and trans-substantive phenomenon capable of surfacing in mundane as well as radical outsourcing contexts. In the following parts, this Article: (1) defines and locates the government-contracting process failure that enables workarounds, namely the Executive qua unfaithful agent; (2) develops an overarching typology for workarounds organized around the Executive's (arguably breached) duties to four distinct subsets of governmental principals; (3) demonstrates that the traditional efficiency-accountability debate, and the normative and legal framing of that debate, is at best tangential to the problem posed by workarounds; and (4) prescribes a protocol for analytical and regulatory interventions keyed to that typology. Ultimately, this Article makes the case why privatization workarounds warrant immediate inclusion in the lexicon of legal scholars, and immediate inclusion on the checklist of every government official engaged in or overseeing the trillion-dollar phenomenon that is American privatization.<sup>23</sup>

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<sup>22</sup> See Super, 96 Cal L Rev (cited in note 3); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 BC L Rev 989 (2005); Michaels, 82 Wash U L Q at 1062–77 (cited in note 15); Minow, 116 Harv L Rev at 1240–42 (cited in note 21); Freeman, 116 Harv L Rev at 1290 (cited in note 3); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L Rev 1739, 1746–51 (2002); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 NYU L Rev 1121, 1166–72, 1182–83 (2000).

<sup>23</sup> See Jeffrey L. Dunoff, *Linking International Markets and Global Justice*, 107 Mich L Rev 1039, 1041 & nn 5–6 (2009).



## I. THE WORKAROUND PARADIGM

Architects of the modern privatization revolution have spent the past several decades remaking the American regulatory landscape.<sup>24</sup> From humdrum clerical and sanitation services to military, policing, and even regulation-writing and enforcement responsibilities, private contractors are assuming ever larger and ever more sensitive roles in carrying out public functions,<sup>25</sup> all ostensibly in the name of efficiency and good governance.<sup>26</sup> The principal lure of contracting is the lure of market competition—and the concomitant belief “that private firms can provide goods and services ‘better, faster, and cheaper’ than the government.”<sup>27</sup>

For this reason, privatization in the United States tends to be thought of as a technocratic process:<sup>28</sup> contractors are hired to build a better mousetrap, not to change the rules of the hunt.<sup>29</sup> Succinctly put,

<sup>24</sup> See Metzger, 103 Colum L Rev at 1369 (cited in note 21) (calling it a “national obsession”); Savas, *Privatization: The Key to Better Government* at 119–230 (cited in note 3). See generally Philip E. Fixler and Robert W. Poole, Jr., *The Privatization Revolution: What Washington Can Learn from State and Local Government*, 37 Pol Rev 68 (1986).

<sup>25</sup> See Freeman and Minow, *Introduction: Reframing the Outsourcing Debates* at 7–8 (cited in note 4); Michaels, 82 Wash U L Q at 1013–20 (cited in note 15). See also Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 Duke L J 389, 389 (2003) (“The government has increasingly relied on private means to achieve public ends, not only involving services to the public, but the origination and implementation of regulatory policy as well.”); id at 414 (noting the government “can hire private actors to enforce its regulatory standards in lieu of relying on government employees”).

<sup>26</sup> Freeman, 116 Harv L Rev at 1299 (cited in note 3) (“[I]t is fair to say that pragmatic arguments [for privatization] typically draw on economic conceptions of the advantages of private over public service provision and not on other normative frameworks.”).

<sup>27</sup> Kosar, *Privatization and the Federal Government* at 6 (cited in note 1). See note 3 and accompanying text.

<sup>28</sup> Mark Moore, *Introduction, Symposium, Public Values in an Era of Privatization*, 116 Harv L Rev 1212, 1218 (2003) (“Much of the appeal of privatization is based on claims that some form of privatization will increase the efficiency and effectiveness of government.”); Cass, 71 Marq L Rev at 466 (cited in note 1) (“Many of the contracting proposals provide no significant change in the government’s mission, but posit that the mission can be accomplished better at lower cost—that is, more efficiently—under a different structure.”).

<sup>29</sup> An entirely apolitical characterization would be overly stylized. First, even within a truly technocratic rubric, invariably all sorts of value-laden choices are made. See Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in Freeman and Minow, eds, *Government by Contract* 128, 135–38 (cited in note 4); Donahue, *The Privatization Decision* at 136–39 (cited in note 3). But, as discussed below, what distinguishes workarounds is not the absence of technocratic effects; it is the fact that privatization is the vehicle that uniquely allows for substantive policy alterations. Second, it is not necessarily the case that so-called “streamlining” efforts, wherein privatization is used to bypass various types of bureaucratic red tape to save money and time, constitute workarounds. Privatization predicated on streamlining is obviously a deviation from the technocratic archetype; and streamlining may well have substantial collateral effects on government transparency, procedural regularity, and public commitments to socioeconomic policies. See Ellen Danning, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 Cornell J L & Pub Pol 111, 120–23 (2006); Diller, 49 UCLA L Rev at 1749–51 (cited in note 22); Diller, 75 NYU

to date the “American experience in privatizing public services suggests an apolitical conception . . . offer[ing] an administrative solution to a functional problem, that is, a change in the organization to achieve goals for which private firms are deemed better suited.”<sup>30</sup>

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L Rev at 1125–28 (cited in note 22). But it does not follow that streamlining is invariably about engineering workarounds, or that workarounds necessarily turn on streamlining techniques.

<sup>30</sup> Feigenbaum and Henig, 46 World Polit at 194 (cited in note 3). See also Dolovich, *How Privatization Thinks* at 133 (cited in note 29) (describing the “hallmark question” of privatization decisions in terms of “comparative efficiency—whether private providers ‘can do it cheaper than the state’”). Private firms are often assumed to be more efficient because they operate in competitive, profit-driven contexts that reward success and penalize failure more harshly than is typically true within government bureaucracies. See Kosar, *Privatization and the Federal Government* at 4 (cited in note 1):

Free market theory . . . argues that markets—not governments—are the most efficient means for the production of goods and services. In arguing for markets and against government provision of goods and services, free market advocates argue that government . . . is inefficient, inattentive to public wants, and slow to reform and innovate.

Diller, 49 UCLA L Rev at 1744 (cited in note 22) (“Contracting out has been promoted within government for the same reasons that outsourcing has been encouraged in the private sector: as a means of enabling organizations to benefit from competition among suppliers and of keeping them focused on their core functions.”); Osborne and Gaebler, *Reinventing Government* at 83–84 (cited in note 2) (“Those who deliver poor service at high prices are gradually eliminated, while those who deliver quality service at reasonable prices grow larger.”); Donahue, *The Privatization Decision* at 140–42 (cited in note 3) (noting the private sector’s investments in innovation, superior technologies, and economies of scale as providing bases for efficiency gains); Cass, 71 Marq L Rev at 466–68 (cited in note 1) (describing institutional reasons why government bureaucracies may be understood as comparatively inefficient); Savas, *Privatization: The Key to Better Government* at 288 (cited in note 3). Note that to the extent there is not much competition among would-be government contractors, the likelihood of efficiency gains is greatly diminished. See Joel F. Handler, *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* 87, 89 (Princeton 1996) (observing that in practice there is very little competition for government contracts because increasing specialization by contractors results in the creation of virtual monopolies within certain sectors, like social services); Donahue, *The Privatization Decision* at 147 (cited in note 3) (“[T]he absence of competition can just as dramatically stifle any benefits that privatization would otherwise offer.”).

The ostensible private sector advantages operate not only at the macro-institutional level of competitive markets but also within each organizational outfit. In large part because of the structure of the civil service and the nature of public employment, many public sector outfits neither reward exceptionally diligent work nor punish particularly unsatisfactory performance. Sean Gailmard and John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 Am J Pol Sci 873, 873 (2007) (suggesting that civil service protections “seem to weaken public sector employees’ extrinsic incentives to be responsive and energetic in pursuing their duties”); Cass, 71 Marq L Rev at 467 (cited in note 1). Put more bluntly, the conventional account views bureaucracy in largely pejorative terms. See Donahue, *The Privatization Decision* at 46–47 (cited in note 3). Private organizations, on the other hand, are seen as dynamic—rapidly promoting the bright young go-getter from the mailroom and just as quickly firing deadweight middle managers addicted to Minesweeper. Donahue, *The Privatization Decision* at 143 (cited in note 3). See *Richardson v McKnight*, 521 US 399, 421 (1997) (Scalia dissenting) (indicating that privatization advocates may be motivated to avoid “civil service salary and tenure encrustations”). Although government work may yield efficiencies in terms of professional satisfaction and a public service esprit de corps, and may in any case prove more competent or efficient than outside contractors, the private sector is

Using privatization to change the substance or duration of the programs and functions being privatized might well signal outsourcing's maturation as a policy tool and its initiation into the larger political fray—akin, perhaps, to the current uses of the federal income tax code to address far-flung policy objectives<sup>31</sup> or of public pension funds to further social and political goals unrelated to pure investment strategy.<sup>32</sup> That said and irrespective of the merits of tax or public investing policy, neither the scholarly literature on privatization nor positive law has kept pace with the ambitions and ingenuity of this workarounds agenda.

This initial Part of the Article has two objectives. First, it defines and describes workarounds. Second, it identifies and examines the structural failures in the government-contracting process that enable workarounds.

### A. Understanding Workarounds

Where there is greater authority for the Executive to unilaterally orchestrate substantive policy changes *because* of privatization, we have moved outside of the technocratic rubric of government contracting and into the domain of workarounds. As defined in the Introduction, workarounds are government contracts, or provisions in those contracts, that provide the outsourcing agency with the means of achieving distinct public policy goals more readily than would be possible in the ordinary course of nonprivatized public administration. Thus, unlike traditional government-contracting accountability concerns, where we worry about a lack of fidelity to government objectives,<sup>33</sup> workarounds are a means for the Executive to gain greater control over government objectives, at the expense of coordinate branches, future administrations, the civil service, and the electorate.

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viewed as more productive based on its greater discretion in hiring, promotion, and salary decisions, and its profit motive. See Savas, *Privatization: The Key to Better Government* at 112 (cited in note 3); Michael J. Trebilcock and Edward M. Iacobucci, *Privatization and Accountability*, 116 *Harv L Rev* 1422, 1424–30 (2003).

<sup>31</sup> See, for example, Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 *Yale L J* 261, 274 & n 64 (2002). See also Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 *Harv L Rev* 705, 705 (1970) (“Suggestions are constantly being made that many of our pressing social problems can be solved, or partially met, through the use of income tax incentives.”).

<sup>32</sup> See, for example, David Hess, *Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices*, 39 *UC Davis L Rev* 187, 205–06 (2005); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 *Colum L Rev* 795, 801–20 (1993) (describing the range of ways public pensions funds may engage in “social” investing potentially at odds with investing strategies that promise higher rates of return).

<sup>33</sup> See notes 43–53 and accompanying text.

Workarounds rest on the following understandings, characterizations, and conditions.<sup>34</sup> First, privatization is not the customary or expected mechanism through which the executive is to express (let alone engineer) its programmatic policy preferences;<sup>35</sup> public legislative and administrative channels are, instead, the customary and expected policymaking conduits.<sup>36</sup> Second, workarounds change the expected outcome, as a substantive or temporal matter, of the policies or programs being outsourced.<sup>37</sup> Third, the executive's control over policy using workarounds is greater than it would be without workarounds. Fourth, just because workarounds are not expressly prohibited does not mean they are currently countenanced or endorsed; given how little we know about workarounds—coupled with our sense that privatization is a technocratic undertaking<sup>38</sup>—we should hesitate to infer constructive knowledge or tacit consent. Fifth, workarounds do not presuppose intent. Though workarounds are often purposive, intent is not a necessary condition. Workarounds may occur accidentally, incidentally, or even because the legislature forces the agency's hand.<sup>39</sup>

Workarounds are thus a deviation from the status quo—and, often, a stealthy one at that. Accordingly, workarounds are viewed here-

<sup>34</sup> It is beyond the scope of this initial foray to stake out nuanced normative positions regarding the interplay of workarounds and procedural due process, the private-public boundary, separation of powers, democratic legitimacy, and intergenerational sovereignty. It is beyond the scope in no small part because the aim of this project is to introduce a concept, describe it in reference to some familiar and readily defensible normative baseline assumptions, and invite conversation and contestation—which, I hope, will inform the theoretical exegeses and empirical inquiries left for another day.

<sup>35</sup> Though it takes no position on the merits of what I call traditional or technocratic privatization, this Article does start from the default position that the modern American welfare state typically develops and implements its public functions using in-house personnel. It thus views contracting out as *privatization* and not, say, *de-publicization* of services historically provided through private means. Compare *Richardson*, 521 US at 405 (discussing the historical resonance of private prisons); Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* 14 (Basic Books 1996) (describing the tradition of private social service programs). See also Chris Sagers, *The Myth of "Privatization,"* 59 Admin L Rev 37, 38 (2007).

<sup>36</sup> See, for example, Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 547–48 (2000); Stephen Breyer, *Regulation and Its Reform* 6 (Harvard 1982) (describing public administration as orchestrated through the bureaucracy); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1667, 1689–93 (1975).

<sup>37</sup> In some instances, we can directly chart a policy's trajectory and pinpoint the course shift that coincided with privatization (and even assess the magnitude of the policy alteration). In other instances, because outsourcing is introduced into the policy process at an early stage when the outcome—even without privatization—is uncertain, we cannot definitively determine that contracting altered the policy landscape. Context and circumstantial evidence may provide clues in cases marked by that uncertainty. See Part IV.

<sup>38</sup> See notes 28–30, 36, and accompanying text.

<sup>39</sup> See Part II.D.1.

in with concern and skepticism, although not to the point that this Article is foreclosed to the possibility of salutary workarounds. We will, and rightly should, continue to develop and debate workarounds' normative contours, their definitional boundaries, and how these policy alterations and acts of executive aggrandizement fit within legal or regulatory frameworks. But first we need to get a basic handle on the phenomenon.

## B. Workarounds and Process Failure

The dominant worries about government contracting today are threefold: whether the responsibilities being outsourced are inherently governmental (and thus unsuitable for delegation to private actors),<sup>40</sup> whether contractors are more efficient than their government counterparts, and whether contractors are accountable agents. As is discussed in greater detail in Part III, these concerns shape our regulatory design,<sup>41</sup> and animate much of our legal scholarship.<sup>42</sup> What needs to be underscored here is that these three concerns all turn on the traditional principal-agent problems associated with contracting out<sup>43</sup>—that contractor greed, coupled with too much delegated discretion and not enough supervision, will lead to acts of waste, fraud, and abuse.<sup>44</sup>

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<sup>40</sup> See notes 171–80 and accompanying text.

<sup>41</sup> See note 20 and accompanying text; Part III.A.

<sup>42</sup> See note 21 and accompanying text; Part III.B.

<sup>43</sup> See Freeman, 28 Fla St U L Rev at 175 (cited in note 1); David E.M. Sappington, *Incentives in Principal-Agent Relationships*, 5 J Econ Persp 45, 46–61 (1991); Shapiro, 53 Duke L J at 393–95 (cited in note 25).

<sup>44</sup> For studies providing support for these concerns, see Ronald O'Rourke, *Coast Guard Deepwater Acquisition Programs: Background, Oversight Issues, and Options for Congress* 37 (Congressional Research Service, July 22, 2009), online at <http://www.fas.org/sgp/crs/weapons/RL33753.pdf> (visited Dec 27, 2009); Government Accountability Office, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funding*, GAO-09-174, 8–9 (Feb 2009), online at <http://www.gao.gov/new.items/d09174.pdf> (visited Dec 27, 2009); Government Accountability Office, *Contract Management: DOD Vulnerabilities to Contracting Fraud, Waste, and Abuse*, GAO-06-838R, 2 (July 7, 2006), online at <http://www.gao.gov/new.items/d06838r.pdf> (visited Dec 27, 2009) (“DOD faces vulnerabilities to contracting fraud, waste, and abuse due to weaknesses in five key areas: sustained senior leadership, capable acquisition workforce, adequate pricing, appropriate contracting approaches and techniques, and sufficient contract surveillance.”); US House of Representatives, Committee of Government Reform, Minority Staff, *Halliburton's Questioned and Unsupported Costs in Iraq Exceed \$1.4 Billion* (June 27, 2005), online at <http://oversight.house.gov/images/stories/documents/20060328143627-51409.pdf> (visited Dec 27, 2009); David M. Walker, Government Accountability Office, *Department of Defense: Further Actions Are Needed to Effectively Address Business Management Problems and Overcome Key Business Challenges*, GAO-05-140T, 8–12 (Nov 18, 2004), online at <http://www.gao.gov/new.items/d05140t.pdf> (visited Dec 27, 2009); General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service*, GAO/GGD-96-158, 3 (Aug 1996), online at <http://www.gao.gov/archive/1996/gg96158.pdf> (visited Dec 27, 2009); General Accounting Office, *Navy Maintenance: Cost Growth and Schedule*

This conventional principal-agent story<sup>45</sup> depicts the contractor qua agent as the guileful, straying party; and the government qua principal as—at worst—the befuddled cuckold.<sup>46</sup> Responding to this story's unhappy ending, scholars have sought to rein in wayward contractors by promoting better contract drafting<sup>47</sup> and agency oversight,<sup>48</sup> the imposition of public law obligations (including administrative procedures, transparency requirements, and state-actor liability) on contractors,<sup>49</sup> and the extension of private law remedies available to injured parties.<sup>50</sup> Moreover, to curb excessive delegations of sovereign functions, they have proposed using existing laws and constitutional doctrines to expand the range of responsibilities that categorically cannot be outsourced.<sup>51</sup> So long as that is the story, we remain focused on difficult-to-control frolics and detours.<sup>52</sup>

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*Overrun Problems Continue at the Shipyards*, GAO/NSIAD-90-144, 3 (July 1990), online at <http://archive.gao.gov/d23t8/141867.pdf> (visited Dec 27, 2009). See also Dana Hedgpeth, *Congress Says DHS Oversaw \$15 Billion in Failed Contracts*, Wash Post D2 (Sept 17, 2008); Editorial, *FAA Failings in Swissair Crash Follow a Too-Familiar Pattern*, USA Today A12 (Feb 26, 2003) (noting that poor agency oversight over private inspectors of airplane safety contributed to several catastrophic accidents involving commercial airplanes).

<sup>45</sup> For foundational readings on principal-agent issues, see Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J Fin Econ 305, 312–30, 333–43 (1976); Armen A. Alchian and Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am Econ Rev 777, 785–90 (1972).

<sup>46</sup> See note 21 and accompanying text.

<sup>47</sup> Minow, 116 Harv L Rev at 1246–48 (cited in note 21).

<sup>48</sup> Schooner, 33 Pub Cont L J at 283–96 (cited in note 21) (observing that there is a need for trained procurement officers to better “manage [ ] sophisticated long-term service contracts”).

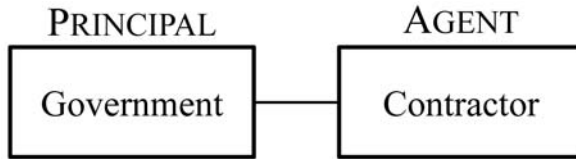
<sup>49</sup> See Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in Freeman and Minow, eds, *Government by Contract*, 291, 295–97 (cited in note 4); Aman, *The Democracy Deficit* at 115 (cited in note 21); Metzger, 103 Colum L Rev at 1461–86 (cited in note 21); Freeman, 116 Harv L Rev at 1315–29 (cited in note 3) (describing the legislative and judicial means of extending public law to private actors); Guttman, 52 Admin L Rev at 920–23 (cited in note 21) (suggesting the use of “(non)delegation” doctrine to constrain private contractors).

<sup>50</sup> See Dannin, 15 Cornell J L & Pub Pol at 139–40 (cited in note 29); Guttman, 33 Pub Cont L J at 348 (cited in note 2); Jack M. Beermann, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 UCLA L Rev 1717, 1721–24 (2002); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 Cal L Rev 569, 635–39 (2001) (describing the potential benefits of subjecting private social service providers to contract liability in suits brought by the public as third-party beneficiaries).

<sup>51</sup> See Verkuil, *Outsourcing Sovereignty* at 102–04, 121–32 (cited in note 21) (advocating a variety of constitutional, statutory, and administrative limitations on private delegations); Verkuil, 84 NC L Rev at 401–02, 426–27 (cited in note 2) (same); Metzger, 103 Colum L Rev at 1441–44 (cited in note 21); id at 1456 (“Under a private delegation approach, the key issue becomes not whether private entities wield government power, but rather whether grants of government power to private entities are adequately structured to preserve constitutional accountability.”).

<sup>52</sup> See, for example, Elliot D. Sclar, *You Don't Always Get What You Pay For: The Economics of Privatization* 103–07 (Cornell 2000); George R. Fay, Department of the Army, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 47–52 (2004), online at <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf> (visited Dec 27, 2009) (“Fay

FIGURE 1  
TRADITIONAL PRINCIPAL-AGENT MODEL  
KEYED TO CONTRACTOR MANIPULATIONS



Workarounds, however, do not fit into this narrative and instead compel us to tell a different tale. In this new story about executive-orchestrated policy alterations, we are concerned about unfaithful government actors, not rogue contractors. But their unfaithfulness is not to the contractors—that is, they are not unreliable principals neglecting to pay their proxies. Their unfaithfulness is directed internally. The principal in Figure 1 is at war with itself.

What this means is “the government” qua principal cannot be looked at monolithically. There are many co-principals with potentially divergent institutional interests. Their interests typically do not diverge vis-à-vis the importance of monitoring contractors to ensure efficiency and accountability in technocratic privatization. But their interests might when it comes to workarounds.<sup>53</sup> From its position as overseer of the administrative state,<sup>54</sup> the executive is both the contractor’s principal and also an agent to the rest of the government. We can call this the principal-principal-agent relationship, with the executive at the center and thus capable of orchestrating workarounds that redound to its own benefit. This relationship, specifically the aspect involving the executive’s agency ties to *its* principals—that is, to the

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Report”) (exposing transgressions by private contractors serving as translators and interrogators in the detention facility); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 *Stan L & Pol Rev* 549, 555–57 (2005). See generally Jeremy Scahill, *Blackwater: The Rise of the World’s Most Powerful Mercenary Army* (Nation Books 2008).

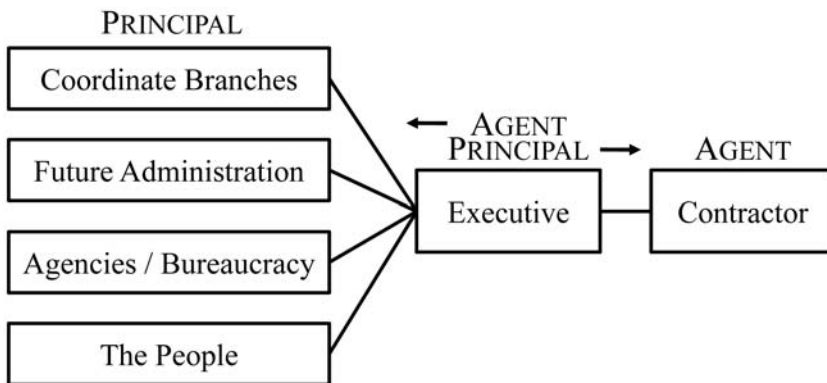
<sup>53</sup> See Part III.B.2.

<sup>54</sup> See Shapiro, 53 *Duke L J* at 397–98 (cited in note 25); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *Colum L Rev* 1, 24 (1998); Kathleen Bawn, *Political Control versus Expertise: Congressional Choices about Administrative Procedures*, 89 *Am Polit Sci Rev* 62, 62 (1995). See also Elena Kagan, *Presidential Administration*, 114 *Harv L Rev* 2245, 2346–63 (2000); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J L, Econ, & Org* 81, 95 (1985); *Morrison v Olson*, 487 US 654, 706–11 (1988) (Scalia dissenting) (emphasizing the constitutional imperative that the President exercise exclusive authority over executive activity); *Chevron U.S.A. Inc v NRDC*, 467 US 837, 865–66 (1984) (acknowledging the executive’s central role in directing the administrative state).

“rest” of the government (and the voters)—is thus the key not only to understanding workarounds as a phenomenon, but also the key to understanding the weighty normative and legal implications of workarounds that sound in separation of powers, intergenerational sovereignty, and democratic theory.

The executive qua agent does not work for the rest of the government as an undifferentiated whole. Instead, at times, its agency obligations run more directly to certain entities over others within the co-principal community. We see this in workarounds, where the executive may in any particular instance strain only one or two of the four distinct subsets of agency obligations shown in Figure 2.

FIGURE 2  
PRINCIPAL-PRINCIPAL-AGENT MODEL  
KEYED TO EXECUTIVE WORKAROUNDS



First, there is a *Coordinate-Principal* relationship phenomenon, in which the executive’s interests diverge from those of its coordinate branches, and government contracting circumvents otherwise inviolable constitutional or statutory prerogatives—through means not traditionally understood to admit that variance.<sup>55</sup> The data mining workaround described in the Introduction is one such example. Second, there is an *Intergenerational-Principal* relationship phenomenon, in which the executive’s interests are at odds with those of its successor administrations and where government contracts bind future govern-

<sup>55</sup> See Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L, Econ, & Org 243, 244 (1987).



ments to a given policy trajectory.<sup>56</sup> The recycling workaround described in the Introduction is one such example. Third, there is an *Intra-Principal* relationship phenomenon, in which the executive is at odds with its own administration, and outsourcing serves to sideline the politically insulated civil servants. The HHS family planning contract described in the Introduction is one such example. Fourth, there is a *Voter-Principal* relationship phenomenon, in which the contracts have the effect of hiding executive decisions and concealing vital information from the public, which might otherwise be in a position to oppose the decisions or punish the executive at the ballot box. The military services contract described in the Introduction is one such example. Needless to add, tensions among these principals manifest themselves all the time with or without the availability of workarounds,<sup>57</sup> and clearly the executive plays the lead role in administrative governance irrespective of privatization.<sup>58</sup> The point of this Part—and one of the points of this Article—is to understand the workaround phenomenon as an underappreciated and potentially quite powerful avenue for greater unilateral executive control.

## II. A WORKAROUND TYPOLOGY

To date, we lack empirical evidence to assess the magnitude of the workaround phenomenon. We do, however, have anecdotal data points; and we may further extrapolate from some related trends. For instance, there has been a dramatic increase in the pace of privatization over the past decade.<sup>59</sup> There has also been an unmistakable backlash

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<sup>56</sup> See *Frew v Hawkins*, 540 US 431, 441 (2004) (noting concern that “state officeholders may improperly deprive future officials of their designated legislative and executive powers”); *United States Trust Co v New Jersey*, 431 US 1, 45 (1977) (Brennan dissenting); *Reichelderfer v Quinn*, 287 US 315, 318 (1932) (holding that just because Congress declares one use for a given parcel of land does not mean that it cannot later change that use); *Newton v Commissioners*, 100 US 548, 559 (1879).

<sup>57</sup> See, for example, Lisa Schultz Bressman, *Chevron's Mistake*, 58 Duke L J 549, 569–70 (2009); Murray J. Horn and Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 Va L Rev 499, 501–04 (1989).

<sup>58</sup> See note 54 and accompanying text.

<sup>59</sup> See Steven L. Schooner and Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J Cont Mgmt 9, 12 (2008):

Today, for the first time in modern U.S. history, the federal government spends nearly 50 cents of every discretionary dollar of the federal budget on contracts with private firms. Procurement spending has nearly doubled from \$219 billion in 2000 to more than \$415 billion in 2006, and continues to rise, while the rest of the discretionary budget has increased only 6.7 percent per year.

against more transparent forms of executive power grabs.<sup>60</sup> When we consider those two trends together, we have good reason to believe that the opportunity and incentives to employ workarounds are on the upswing.

But even absent strong indicia of an impending deluge of workarounds, workarounds' durability and their analytical and legal salience make them worthy of study. In what follows, I employ a combination of familiar examples, obscure case studies, and stylized illustrations to develop a typology of workarounds. The typology is mapped out along the following four dimensions, representing the distinct tensions created by the contractual circumventions: exploiting legal-status differentials (*Coordinate-Principal* phenomena), binding future administrations (*Intergenerational-Principal* phenomena), sidelining independent-minded bureaucrats (*Intra-Principal* phenomena), and baiting and switching the public (*Voter-Principal* phenomena).

#### A. Coordinate-Principal Phenomena: Workarounds That Exploit Legal-Constitutional Status Differentials

Agency leaders may find themselves frustrated by the constitutional and statutory limitations placed on their own personnel. They may prefer to design more aggressive investigatory search protocols or run more religiously infused education or social welfare programs. But they are constrained by what the Constitution or statutory code permits. Rather than attempt to amend the Constitution or repeal legislation, agencies may, at times, view privatization as a more expedient path forward. So long as the limitations on the agencies' preferred programming are tied to legal restrictions placed primarily on government personnel, it may be advantageous to hire private contrac-

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In light of the budgetary crises in the wake of the 2008 global financial meltdown, the enticement to seek out cost-savings measures—including outsourcing—may further accelerate the pace of privatization. See Jennifer Steinhauer, *Budget Deal Sealed at Last in California; Billions Cut*, NY Times A10 (July 21, 2009) (reporting the budget cuts and other financial maneuvers required for California to eliminate a \$21 billion budget gap); Peter Applebome, *In Budget Straits, Three States Are in Same Boat*, NY Times A25 (Jan 8, 2009) (detailing the continuing financial difficulties for the state governments in Connecticut, New Jersey, and New York); Jeff Zeleny and Edmund L. Andrews, *Obama Warns of Prospect for Trillion-Dollar Deficit*, NY Times A1 (Jan 7, 2009) (“Still, the deficit now seems likely to be so large that it will inevitably constrain Mr. Obama’s administration to some degree.”). But see note 258 (noting that although the privatization agenda is hurtling forward it has recently come under presidential and congressional scrutiny).

<sup>60</sup> See Carrie Johnson and Anne E. Kornblut, *Holder’s Decision to Probe CIA Hints at New Dynamic; Official Winning Many Battles*, Wash Post A1 (Aug 28, 2009); Charlie Savage and Neil A. Lewis, *Release of Memos Fuels Push for Inquiry into Bush’s Terror-Fighting Policies*, NY Times A18 (Mar 4, 2009); Scott Shane, *To Investigate or Not: Four Ways to Look Back at Bush*, NY Times WK3 (Feb 22, 2009); Jack M. Balkin, *A Body of Inquiries*, NY Times WK11 (Jan 11, 2009). See also note 260.

tors.<sup>61</sup> Here, privatization yields more than just efficiency gains in terms of cost savings and business-minded innovations to public service delivery—it enables the executive to carry out distinct public policy objectives comparatively free from the encumbrances imposed by the courts and the legislature. In this Part, I first describe welfare contracts that advance constitutional workarounds. Then, I turn to intelligence gathering contracts that facilitate statutory workarounds.

### 1. Constitutional differentials.

Many of the rights guaranteed in the Constitution are protections against state action, and have no currency vis-à-vis private infringements.<sup>62</sup> When it comes to private actors serving the government, sometimes courts impute state action, and sometimes they do not. As the Supreme Court has stated, “It is fair to say that our cases deciding when private action might be deemed that of the state have not been a model of consistency.”<sup>63</sup> When courts do not impute state action, opportunities abound for engineering workarounds. One particularly illustrative context where this type of constitutional workaround may occur is in the outsourcing of welfare services to private, faith-based entities.<sup>64</sup>

Although, as elsewhere, for-profit firms play a large role in privatized social services,<sup>65</sup> a sizable percentage of outsourced social welfare

<sup>61</sup> 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: Executive Organization and Management in the Twenty-first Century* 40, 41 (Johns Hopkins 2004) (“[T]he state is subject to a different body of law than that applicable to private individuals and, in a democratic society, held to different standards of behavior.”), quoting Harold Seidman, *Notes on Privatization* (unpublished manuscript, 1987).

<sup>62</sup> See, for example, *National Collegiate Athletic Association v Tarkanian*, 488 US 179, 191 (1988) (“Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to strict scrutiny . . . and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.”); *Hudgens v NLRB*, 424 US 507, 513 (1976) (“It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.”). See also note 228.

<sup>63</sup> *Lebron v National Railway Passenger Corp*, 513 US 374, 378 (1995) (quotation marks omitted). See also generally *Blum v Yaretsky*, 457 US 991 (1982); *Jackson v Metropolitan Edison Co*, 419 US 345 (1974).

<sup>64</sup> For resonance in other contexts, see David A. Sklansky, *The Private Police*, 46 UCLA L Rev 1165, 1183–87 (1999) (describing private policing and the lack of attendant constitutional liabilities). See also Michaels, 96 Cal L Rev at 929 & nn 123, 127 (cited in note 8) (noting possible gaps in constitutional liability where private actors assist the government in its counterterrorism investigations).

<sup>65</sup> See M. Bryna Sanger, *The Welfare Marketplace: Privatization and Welfare Reform* 72–97 (Brookings 2003) (noting the private industry’s dominance over government and nonprofits in home health and day care and the substantial growth of for-profit companies in the employment

programs are administered by faith-based organizations, authorized pursuant to the 1996 federal welfare overhaul to compete for government contracts on equal footing with their secular counterparts.<sup>66</sup> Proponents of faith-based services claim that religious organizations are especially efficient insofar as their employees are following a spiritual calling that directs them to go the extra mile for their clients.<sup>67</sup>

Extra enthusiasm is not, however, the entire reason. The purported advantages also turn on faith-based providers' infusion of religion into the rendered services.<sup>68</sup> As Marci Hamilton notes: "We need

and training sectors); Barbara Ehrenreich, *How Corporations Seek to Profit from Welfare Reform*, Harper's 44, 44-45 (Aug 1997) (describing the vibrant market for corporations seeking government contracts to provide welfare services).

<sup>66</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) § 104, Pub L No 104-193, 110 Stat 2105, 2161-63 (1996), codified at 42 USC § 604(a); Executive Order 13279, 3 CFR § 258 (2003) ("[A]ll eligible organizations, including faith-based and other community organizations, are able to compete on an equal footing for Federal financial assistance.").

Though faith-based privatization has the support of Congress, in the form of its Charitable Choice amendment to PRWORA, it is nevertheless a workaround vis-à-vis the courts. That is to say, congressional approval does not detract from workaround status. Consider *Lebron*, 513 US at 392:

[I]t is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions. If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.

See also Guttman, 52 Admin L Rev at 911 (cited in note 21). For another example of Congress dissociating itself from practices that are unconstitutional when carried out by government actors, see *Buono v Kempthorne*, 527 F3d 758, 759 (9th Cir 2008) (en banc), cert granted as *Salazar v Buono*, 129 S Ct 1313 (2009). *Buono* involved Congress deeding government land to a private organization to avoid Establishment Clause challenges arising out of the existence of a Christian memorial, which Congress previously deemed a national monument (on federal land). The Ninth Circuit rejected the argument that deeding the land to the Veterans of Foreign Wars extinguished the governmental nexus.

<sup>67</sup> See, for example, Linda McClain, *Unleashing or Harnessing "Armies of Compassion?,"* 39 Loyola U Chi L J 361, 397-99 (2008) (describing the dominant argument about faith-based proficiency); Robert Wuthnow, *Saving America? Faith-Based Services and the Future of Civil Society* 123-32, 217-85 (Princeton 2004) (suggesting that faith-based volunteers are likely to be connected to the client populations, personally invested in improving their lives, and potentially more likely to be appreciated by them); Martin Davis, *Faith, Hope, and Charity*, 33 Natl J 1228, 1234 (2001) (characterizing the spiritual passion motivating faith-based workers as making them comparatively more efficient); Charles Glenn, *The Ambiguous Embrace* 186-89 (Princeton 2000) (describing the faith-based providers as likely to employ motivated and energized workers). This claim may be made in broader terms, that nonprofits in general are more likely to foster personal connections and marshal the degree of care necessary to treat disadvantaged clients. See, for example, Handler, *Down from Bureaucracy* at 94 (cited in note 30).

<sup>68</sup> See Wuthnow, *Saving America?* at 160 (cited in note 67) ("[F]aith-based organizations work best at producing change in individuals and communities" when they ground "religious teachings about hope and redemption . . . in social relationships that resemble those that occur in

to be absolutely clear here: the but-for reason proffered for the success of these religious welfare service programs is the presence of God, or religion, in the program. They claim they work better because God is integrally incorporated throughout the program.”<sup>69</sup> For Hamilton, the apparent efficiency is inescapably tied to religious providers employing programmatic messaging—messaging that the First Amendment prevents the government from itself directly conveying through its own offerings.<sup>70</sup> Indeed, what we have here is a work-around, with the executive’s fidelity to its co-principal (here, the courts) in question.

While the courts have taken some steps to constrain faith-based contractors’ sectarian content on First Amendment grounds,<sup>71</sup> they have often been limited by procedural hurdles, albeit of their own creation.<sup>72</sup> Moreover, because the courts have tended to draw the line at invalidat-

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congregations.”); Minow, 116 Harv L Rev at 1241 (cited in note 21); Ira C. Lupu and Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill L Rev 37, 77–78 (2002) (suggesting that results-oriented efficiency goals may tolerate or even encourage religious messaging if it better serves the ultimate substantive goals). Of course, not all faith-based contractors mix religion with social services. See McClain, 39 Loyola U Chi L J at 399 (cited in note 67); Wuthnow, *Saving America?* at 142–49 (cited in note 67).

<sup>69</sup> Marci A. Hamilton, *Free? Exercise*, 42 Wm & Mary L Rev 823, 871 (2001).

<sup>70</sup> Caroline Mala Corbin, *Mixed Speech*, 83 NYU L Rev 605, 615–16 (2008). See also *Nelson v Miller*, 570 F3d 868, 878–81 (7th Cir 2009) (holding that state prison requirements that disfavor Catholic inmates impermissible under the First Amendment); *Inouye v Kemna*, 504 F3d 705, 712–13 (9th Cir 2007) (holding that a state parole officer’s order that a parolee attends religion-based treatment programs is a violation of the Establishment Clause).

<sup>71</sup> *Americans United for Separation of Church and State v Prison Fellowship Ministries*, 432 F Supp 2d 862, 875, 920–30 (SD Iowa 2006) (invalidating a sectarian prison program geared toward personal and religious transformation rather than therapeutic rehabilitation where the program was procured through government contract, there was no secular alternative, and there were indisputable benefits in terms of favorable prison treatment given only to participants of the spiritual program), *affd* in relevant part, 509 F3d 406, 424–27 (8th Cir 2007); *Moeller v Bradford*, 444 F Supp 2d 316, 333 (MD Pa 2006) (rejecting motion to dismiss claims alleging that a prison contract with a sectarian religious organization to provide programming was effectively coercive insofar as there were no secular alternatives); *Freedom from Religion Foundation, Inc v McCallum*, 179 F Supp 2d 950, 969–76 (WD Wis 2002), reconsidered on factual grounds, 214 F Supp 2d 905 (WD Wis 2002) (holding that direct funding by a state of faith-based treatment program represented governmental indoctrination of religion in violation of the Establishment Clause). Whether Establishment Clause suits would be upheld in less coercive settings than prisons (or schools) is less clear. See, for example, *DeStefano v Emergency Housing Group, Inc*, 247 F3d 397, 402 (2d Cir 2001) (finding that a government-funded alcohol-treatment center’s inclusion of Alcoholics Anonymous sessions—which is “religious in nature”—not to run afoul of the Establishment Clause provided there is no coercion to attend the AA classes).

<sup>72</sup> See *Hein v Freedom from Religion Foundation*, 551 US 587, 593 (2007) (plurality) (refusing to permit Establishment Clause challenges brought by taxpayers against executive branch programs); *Valley Forge Christian College v Americans United for Separation of Church and State*, 454 US 464, 482 (1982) (rejecting the standing for taxpayers trying to challenge the sale of a hospital to a religious group).

ing *coercively* sectarian programming, there still remains substantial, lawful discretion among contractors to impart noncoercive religious messaging, discretion that government agencies of course lack.<sup>73</sup> Indeed, a vast amount of room remains between what neutral services the government—acting on its own, through its civil servants—can provide and what religiously infused services contractors are likely to offer short of triggering an Establishment Clause violation.<sup>74</sup>

## 2. Statutory differentials.

Statutory workarounds are also potentially fruitful avenues for agencies looking to change policy programming in ways otherwise currently disallowed. As suggested in the data-gathering example discussed in the Introduction,<sup>75</sup> a story could be told about contracting out data collection and data analysis, as preferable to in-house information gathering and synthesis. Indeed, this is a story privacy scholars Daniel Solove and Chris Hoofnagle tell, and it is one seemingly unrelated to the private sector’s comparative expertise or efficiency. Solove and Hoofnagle describe the federal government “navigating around the protections of [among other things] the Privacy Act of 1974” by “relying on data-broker companies to supply personal data for intelli-

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<sup>73</sup> See *DeStefano*, 247 F3d at 402; Minow, 116 Harv L Rev at 1247 (cited in note 21). Minow states that religious providers

may demand the freedom to preserve religious elements of their programs . . . . A religious provider of job counseling, for example, could demand enough latitude to include prayer or Bible study in its programs if the government is not directly contracting for the services—and perhaps even if it is.

Id. She sees the constitutional tensions regarding government endorsement of religious practices but suggests that a First Amendment challenge would not be an easy case.

<sup>74</sup> See *Freedom from Religion Foundation, Inc v McCallum*, 324 F3d 880, 882–83 (7th Cir 2003) (holding that a state funded faith-based treatment program is not unconstitutional provided there are secular alternatives); *DeStefano*, 247 F3d at 402. See also *Zelman v Simmons-Harris*, 536 US 639, 662 (2002) (holding that a program providing money to attend a religious or nonreligious school of the parents’ choosing was neutral toward religion and thus did not violate the Establishment Clause); *Mitchell v Helms*, 530 US 793, 801 (2000) (holding that a program providing government aid to public and private schools was neutral on the issue of religion); *Lamb’s Chapel v Center Moriches School District*, 508 US 384, 395 (1993) (permitting the screening of a series of films about Christian values on school grounds, after school hours); *Bowen v Kendrick*, 487 US 589, 622 (1988) (permitting a religious organization’s involvement in a federally funded adolescent sexuality and pregnancy program). This is not to say privatization is uniquely capable of carrying out these goals. Other less opaque (and arguably less constitutionally suspect) ways to do so include greater tax benefits for charitable giving. See David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 Harv L Rev 1353, 1361 & n 21 (2002).

<sup>75</sup> See notes 5–8 and accompanying text.

gence and law enforcement purposes.”<sup>76</sup> Thus, private data collection enables the agency to obtain information otherwise beyond its own officials’ reach.<sup>77</sup> This enabling has a *Coordinate-Principal* component, with the executive aggrandizing authority at the expense of the legislature, which happened to write some of the foundational privacy laws at a time when private contractors working in national security intelligence gathering were far less pervasive.<sup>78</sup>

As with the other categories of workarounds, how frequently this private-public loophole is exploited is an empirical question beyond the scope of this survey. But given Congress’s recently expressed concerns with the intrusiveness of government-run data mining initiatives—indeed, in 2003 it expressly shut down the Pentagon’s most ambitious domestic data mining operation for privacy-related reasons<sup>79</sup>—agencies no doubt will continue to consider contracting with private proxies for reasons other than the contractors’ innovative business models or their guarantees of cost savings.<sup>80</sup>

## B. Intergenerational-Principal Phenomena: Workarounds That Bind Future Administrations

Because government contracts can run for extended periods of time, privatization decisions may bind the decisionmaking discretion of future administrations that inherit those agreements. The workaround is thus not of the immediate, policy altering variety. Rather, it exacts its toll down the road—when a future government wants to change direction and cannot do so as readily as it could, had the contracts expired at the end of the outgoing administration’s tenure, had

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<sup>76</sup> Solove and Hoofnagle, 2006 U Ill L Rev at 359 (cited in note 8). See also Privacy Act of 1974 § 3, Pub L No 93-579, 88 Stat 1896, 1898–99, codified at 5 USC § 552a(d).

<sup>77</sup> See Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 Minn L Rev 1, 4 (2008); Michaels, 96 Cal L Rev at 908 & n 23, 918–19, 963 & n 271 (cited in note 8); Citron, 80 S Cal L Rev at 255 (cited in note 6); Solove and Hoofnagle, 2006 U Ill L Rev at 364–69 (cited in note 8); Dannin, 15 Cornell J L & Pub Pol at 115 (cited in note 29). See also generally Jon D. Michaels, *Deputizing Homeland Security*, 88 Tex L Rev 1435 (2010). But see McCain, 38 Pub Cont L J at 939 & n 25, 946–52 (cited in note 7) (arguing for a broad statutory reading that would include many government contractors within the Privacy Act’s ambit); James X. Dempsey and Lara M. Flint, *Commercial Data and National Security*, 72 Geo Wash L Rev 1459, 1471–72 (2004) (suggesting the comparatively greater restrictions on government data searches are overstated).

<sup>78</sup> See note 7 and accompanying text.

<sup>79</sup> See Department of Defense Appropriations Act of 2004 § 8131, Pub L No 108-87, 117 Stat 1054, 1102 (2003) (defunding Terrorism Information Awareness data mining project). See also Michael J. Sniffen, *Homeland Security Drops Data-Mining Tool*, Wash Post D3 (Sept 6, 2007) (terminating a Homeland Security data mining project due to inadequate attention to privacy protocols).

<sup>80</sup> See Michaels, 96 Cal L Rev at 910–19 (cited in note 8) (describing other private-public intelligence gathering partnerships entered into by national security and law enforcement agencies).

the responsibilities never been outsourced in the first place, or had there been a no-penalty, termination-for-convenience clause,<sup>81</sup> which many federal contracts require.<sup>82</sup> Thus, the issue is whether the current executive is a faithful agent with respect to whatever intergenerational duties (if any) it might owe to successor governments.

It is of course true that administrations bind their successors in all sorts of ways without the use of long-term contracting.<sup>83</sup> First, they can engage in what scholars have called “burrowing.”<sup>84</sup> Defeated in his reelection bid, lame-duck President John Adams made a series of Midnight Appointments locking in political loyalists to career posts, with the intention of perpetuating Federalist objectives or, at the very least, of slowing down the Jeffersonians’ alternative agenda.<sup>85</sup> Similarly, right before leaving office, President George W. Bush—like Bill Clinton before him—redesignated some political positions atop the administrative state as senior civil-service posts. These moves had the effect of grandfathering political appointees into de facto tenured jobs in the highest echelons of the bureaucracy, keeping them in place long

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<sup>81</sup> See, for example, *United States v Winstar*, 518 US 839, 843 (1996) (plurality). See also Freeman, 28 Fla St U L Rev at 206, 208 (cited in note 1); Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S Cal Interdisc L J 467, 492 (1999); 48 CFR § 52.249-2 (setting out the rule for termination for convenience). Daniel Fischel and Alan Sykes describe the

effect of “termination for convenience” [as] reduc[ing] the government’s liability to the contractor relative to what the government would owe if the termination were treated as a breach (which would entitle the contractor to expectation damages). Roughly speaking, after a termination for convenience, the contractor is entitled to an action for the price on work completed, actual costs incurred plus a reasonable allowance for profit on partially completed work, and nothing whatsoever on work not yet begun (thus, no lost profits on such work).

Daniel R. Fischel and Alan O. Sykes, *Government Liability and Breach of Contract*, 1 Am L & Econ Rev 313, 354 (1999) (explaining that the purpose of the “termination for convenience” clause is to limit the government’s liability in the event of a breach). See also Abraham L. Wickelgren, *Damages for Breach of K: Should the Government Get Special Treatment?*, 17 J L, Econ, & Org 121, 134 (2001) (referring to termination-for-convenience damages as tantamount to “reliance damages”).

<sup>82</sup> See 48 CFR § 49.502; 48 CFR § 52.249-2.

<sup>83</sup> I separate out service contracts from, say, construction contracts on the grounds that there typically is no credible “make or buy” decision with regard to major infrastructure projects, such as the Big Dig. See note 87. Both a welfare-services contract and a bridge-building contract may bind future administrations, but assuming the public bureaucracy does have welfare caseworkers and policy analysts but not a legion of bridge builders; in truth only the latter contract is necessary.

<sup>84</sup> See, for example, Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel before a New President Arrives*, 78 NYU L Rev 557, 561 (2003).

<sup>85</sup> Id at 560. See also *Marbury v Madison*, 5 US (1 Cranch) 137, 155 (1803) (considering the commission of a presidential appointment made by John Adams immediately prior to the end of his term of office).



after Bush's term-of-office expired.<sup>86</sup> Second, administrations can—and sometimes must—undertake long-term projects that require decades to complete. Because of sunk costs and sunk public expectations, successors often find themselves essentially obligated to see these projects through to completion.<sup>87</sup> For good or ill, and for purposes of political expedience or public necessity, these practices limit the discretion of future governments to chart new policy courses.

Notwithstanding the availability of public tools to bind future administrations, outsourcing may be an especially effective approach to engender “policy paralysis.”<sup>88</sup> Consider, as an example, a welfare-services contract that expressly pays the contractor for every beneficiary who is transitioned off the welfare rolls. These are not unusual arrangements; and given the incentive structure, contractors typically and not unexpectedly engage in a practice called churning, an “effort to reduce welfare rolls through burdensome or repetitive administrative eligibility procedures.”<sup>89</sup> Presumably, a welfare agency writing a contract that rewards the dissuasion of benefit seekers is not an agency committed to supporting a generous social-safety net. Otherwise, its contracts would contain terms that compensate the contractor for offering a broad array of support programs, such as child care, transportation vouchers, and job training.

A contract that encourages churning may well be an efficient contract; and it may well be awarded to a model contractor that does

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<sup>86</sup> Juliet Eilperin and Carol D. Leonnig, *Administration Moves to Protect Key Appointees*, Wash Post A1 (Nov 18, 2008) (noting that twenty political appointee positions were converted into high-level career civil service posts, with the current occupants being grandfathered into the civil service, and indicating that President Clinton took a similar approach prior to his leaving office).

<sup>87</sup> See, for example, Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U Chi L Rev 703, 713–20 (1984). Perhaps the most prominent recent example is Boston's “Big Dig,” its massive restructuring of the interstate highways through the city. Developed in the 1970s under Governor Michael Dukakis, it took approximately thirty years and \$15 billion to complete—and affected, and, at times, saddled, numerous succeeding gubernatorial and mayoral administrations. See Dan McNichol, *Big Dig Nearing Light of Costly Tunnel's End*, NY Times sec 15 at 6 (July 25, 2004).

<sup>88</sup> See Super, 96 Cal L Rev at 455 (cited in note 3); David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 Cal L Rev 1051, 1128 (2005) (“[O]nce discretionary functions are contracted out, government may feel that it is effectively tied to the same set of policies for the term of the contract, which may run several years.”). See also Fischel and Sykes, 1 Am L & Econ Rev at 338 (cited in note 81) (arguing that officials in power could make changes benefiting certain interest groups that would be very expensive for their successors to undo); Hadfield, 8 S Cal Interdisc L J at 467 (cited in note 81) (acknowledging the tension between the government's power to bind itself to contracts and the freedom of democratically elected legislatures to override prior acts).

<sup>89</sup> See David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 Brooklyn L Rev 231, 241–42 (1998).

not try to cut corners, cheat the government, or abuse the served population. Nevertheless, if, during the life of the contract, elections are held and the sitting governor is drummed out of office—by a bleeding heart, no less—the new administration may want to end the welfare-churning agenda for reasons unrelated to the contractor’s incompetence or avarice. It cannot simply call up the contractor and, say (as it might to the civil servants if the program were run in house): “Change of plans; stop churning and start providing a fuller basket of support services to all who show up at your office.” Even if the contractor is ideologically agnostic on the question of welfare services,<sup>90</sup> as a business matter it might balk at the new governor’s request—as the contract under which it is operating does not reward providing broader support services. And, as a legal matter it has the leverage to do so—at least when the new government is bound by the terms of its predecessor’s contracts.<sup>91</sup>

At the very least, the contractor could demand the new governor rewrite the contract to include financial compensation for the provision of the additionally requested services, reimbursement for the retooling that needs to be done to make the transition from a benefits-discouraging outfit to a benefits-rich provider, and some risk premium in case the retooling does not go smoothly.<sup>92</sup> Alternatively, the contractor could simply refuse. Its expertise might be in churning; its ability to turn a profit (in this state and also elsewhere) may depend on its overall economies of scale, which is a function of it handling many similar churning-oriented contracts across the country.<sup>93</sup>

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<sup>90</sup> See Ehrenreich, *How Corporations Seek to Profit*, Harper’s at 52 (cited in note 65) (“[I]t’s not hard to see how the profit motive alone could seduce the private vendors of welfare-related services into becoming a permanent constituency for continued government spending on the poor.”).

<sup>91</sup> *Winstar*, 518 US at 858; Super, 96 Cal L Rev at 419 (cited in note 3) (“[M]onopoly conditions exist during the life of those contracts.”); Hadfield, 8 S Cal Interdisc L J at 535 (cited in note 81) (“[W]hen ‘ordinary’ contract obligations are combined with the Contracts Clause, the result is quite amazing: government’s contractual obligations are even more constraining than private obligations, for they can give rise to the ultimate injunction, a restraint on an otherwise valid exercise of legislative power.”).

<sup>92</sup> See Super, 96 Cal L Rev at 456 (cited in note 3) (“Contractors can demand a huge premium to change requirements during the term of the contract.”); Diller, 75 NYU L Rev at 1165 (cited in note 22); Donahue, *The Privatization Decision* at 47 (cited in note 3) (describing contractor holdup costs as an impediment to an agency’s ability to “order[] last-minute changes without haggling”). See also Handler, *Down from Bureaucracy* at 87 (cited in note 30) (“For governments to try to change course” and regain public control of certain services “would require not only a large increase in financial investments, but also a potential battle with the current suppliers.”).

<sup>93</sup> See Donahue, *The Privatization Decision* at 77, 160–61 (cited in note 3) (describing the importance of economies of scale to the contractors’ promise of cost savings). See also Super, 96 Cal L Rev at 456 (cited in note 3) (“Policymakers may lose further flexibility as private contrac-

This is not to say that long-term contracts necessarily bind future administrations, forcing the new teams to continue the old policies or pay penalties to extricate themselves. First, a firm may forgo a hard-line stance and agree to adapt to the new administration's priorities. This is particularly likely with firms that do a lot of business with the government and would like to keep their long-term customer happy.<sup>94</sup> Or, a firm may agree to walk away from the remaining years on the agreement, perhaps because it was not making any profits in the first place. The ease of redirecting contractors and the likelihood of their being agreeable are empirical questions. But absent evidence that contractors tend to be especially magnanimous, we have to assume that long-term contracts might put successor administrations in a bind. Second, a contract could be written to permit termination for convenience, thus leaving it to the successor administration to decide whether to walk away from the arrangement. Many contracts have those provisions. But termination clauses raise the price of the contract, particularly with respect to contracts for complex services (such as prison or welfare programs) that require substantial initial investments of resources, training, and capital outlays.<sup>95</sup> If such contracts could be can-

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tors become active lobbyists on public benefit policy."); Kosar, *Privatization and the Federal Government* at 8 (cited in note 1) (noting financial incentives for contractors to maintain contracting status); Handler, *Down from Bureaucracy* at 88 (cited in note 30) (characterizing the private provider industry as a "major special-interest group").

Whereas the welfare contract provides at least realistic opportunities for renegotiation, some contracts are for unique or esoteric services. In those cases, it might be more difficult to reassign contractors during the length of their retainer. Consider the recycling agreement discussed in the Introduction. We might be hard-pressed to think of what the recycling firm could do to earn its keep in a way more consistent with the policy objectives of the new mayor, who we posited as being hostile to Green programs. Maybe the recycling team is willing to help with regular trash collection (assuming the city has a need for additional sanitation workers), or perhaps it would stretch further and agree to provide "odds-and-ends" services for the city. More plausibly, the contractors would simply insist that the government adhere to the original terms of the contract or buy them out.

<sup>94</sup> In some cases, even repeat players are not worried about competition. See Super, 96 Cal L Rev at 418–19 (cited in note 3) (discussing the lack of a natural market for public benefits services). Consider Nicholas Parrillo, *How the New Deal Lawyers Reshaped the Common Law to Challenge the Defense Industry in WWII*, 57 Hastings L J 93, 103–04 (2005) (noting contractor bargaining power during wartime). But see Michaels, 96 Cal L Rev at 913 (cited in note 8) (noting the leverage government has over contractors in repeat-player scenarios).

<sup>95</sup> See, for example, Super, 96 Cal L Rev at 419–22 (cited in note 3) (describing the high costs for new contractors in terms of building an infrastructure); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 Seton Hall L Rev 549, 635–36 (2004) (noting the government contractors' upfront expenditures). Consider Susan Rose-Ackerman and Jim Rossi, *Disentangling Deregulatory Takings*, 86 Va L Rev 1435, 1438 (2000) (indicating in the takings context the dangers borne by private infrastructure industries that must commit considerable resources at the outset of a

celed at any time, the contractor will likely demand an upfront risk premium, one that may undermine any chance of cost savings to the government.<sup>96</sup> Thus, either an intent to bind or simply cost consciousness could be behind any long-term contract that has the effect of limiting successor governments' ability to chart their own agendas. Third, as discussed below, not all long-term contracts involve the limiting of policy discretion. Where the function is a nondiscretionary one, the inheriting administration may object to the efficiency of the contractual arrangements, or quibble with terms of service entered into by its predecessor. But, it cannot credibly protest on the ground it has been programmatically encumbered as a matter of substantive policy.<sup>97</sup>

This is also not to say that in the absence of long-term contracts, policy shifts between outgoing and incoming administrations are costless. If, for example, the welfare program's responsibilities were never outsourced, it is nonetheless the case that a change in administrations—and a concomitant shift in policy emphases—would generate stickiness. But the public retooling would likely involve lower transaction costs than if the original policy were ossified by government contract. This is so for the simple reason that the public holdup costs tend to be smaller—the difference between bureaucrats possibly dragging their feet and contractors likely exercising their legal right to refuse to budge.<sup>98</sup>

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project and then weather “not only ordinary commercial risk, but also risks that flow from the actions of the state itself”).

<sup>96</sup> See Dannin, 15 Cornell J L & Pub Pol at 145 (cited in note 29) (describing government contractors as tough negotiators); id at 146 (“Contracting with the government is voluntary, so a government that wants accountability may find itself with few bidders or agreeing to contract prices that will guarantee profits.”).

<sup>97</sup> See Part IV.B.

<sup>98</sup> See *Winstar*, 518 US at 858; David A. Super, *Fiscal Federalism*, 118 Harv L Rev 2544, 2624 (2005) (describing long-term contracting as effectively giving ordinary policy decisions constitutional status insofar as those decisions become very difficult to alter during the length of the contract). See also 5 USC §§ 801–08 (providing a streamlined process for disapproving agency rules); Ergonomics Rule Disapproval, Pub L No 107-5, 115 Stat 7, 7 (2001) (rescinding the Labor Department rule promulgated in the final days of the Clinton administration); Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, NY Times A10 (Jan 12, 2009); Shapiro, 53 Duke L J at 405–06, 418 (cited in note 25) (noting that government employees have less incentive to act opportunistically than do private contractors); Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J L, Econ, & Org 306, 330–32 (1999).

Bureaucrats, of course, may be resistant to change, with inertia or ideology replacing profits as the motivating factor. But even if civil service opposition were to occur with some frequency, see Part II.C, in any given context inertia against the change and civil servants' policy preferences in favor of the change may cancel each other out. And, in other contexts, the comfort of inertia is outweighed by the comparative ease (or higher prestige) of the newly assigned tasks. These considerations militate against any conclusion that bureaucratic holdup is as substantial as contractual holdup.

### C. Intra-Principal Phenomena: Workarounds That Sideline Independent-Minded Bureaucrats

At times—especially when they must rely on professional civil servants—Presidents, governors, and mayors may find themselves statutorily and constitutionally limited in their ability to control regulatory policy.<sup>99</sup> In such situations, privatization may enable a more muscular strain of unitary executive administration<sup>100</sup> precisely because decisionmaking input can be transferred from the politically insulated bureaucrats to potentially more responsive contractors.<sup>101</sup> While there is no shortage of innovative measures unrelated to privatization that could be undertaken to marginalize the bureaucracy (vis-à-vis the po-

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<sup>99</sup> At the federal level, see *Massachusetts v EPA*, 549 US 497, 532–35 (2007) (holding that EPA had a statutory responsibility to regulate greenhouse gas emissions upon finding them to endanger public health or welfare); *Hamdan v Rumsfeld*, 548 US 557, 567 (2006) (concluding that the Bush administration lacked authority to establish military commissions inconsistent with the Uniform Code of Military Justice and the Geneva Conventions); *FDA v Brown & Williamson Tobacco Corp*, 529 US 120, 126 (2000) (holding that Congress had “clearly precluded the FDA from asserting jurisdiction to regulate tobacco products”); *Morrison v Olson*, 487 US 654, 676 (1988) (upholding an appointment pursuant to the Ethics in Government Act notwithstanding the President’s limited authority over appointed independent counsel); *Motor Vehicle Manufacturers Association of the United States, Inc v State Farm Mutual Automobile Insurance Co*, 463 US 29, 43, 56–57 (1983) (holding that reasoned analysis, and not just policy preferences, must underlie a change in agency rules); *Portland Audubon Society v Endangered Species Committee*, 984 F2d 1534, 1545 (9th Cir 1993) (upholding a legislative scheme that limits presidential involvement in agency adjudications). At the state level, see, for example, Michael Libonati, *The Legislative Branch*, in G. Alan Tarr and Robert Williams, eds, 3 *State Constitutions for the Twenty-first Century* 37, 38–40 (SUNY 2006).

For purposes of this analysis, I take no position on the relative merits of a presidentially focused model of administration. Compare Kagan, 114 Harv L Rev at 2252 (cited in note 54) with Peter Strauss, *Presidential Rulemaking*, 72 Chi Kent L Rev 965, 968 (1997). Instead, I am analyzing only the question of resources used to acquire greater unitary control over the bureaucracy.

<sup>100</sup> See Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L J 541, 546 (1994) (expounding the unitary executive theory); 1 Op Off Legal Counsel 16, 17 (1977) (“Article II vests the executive power of the United States in the president. This includes general administrative control over those executing the laws. The president’s power of control extends to the entire executive branch.”).

<sup>101</sup> For a discussion of the relative intensity of various theories of unitary executive governance, see generally Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U Pa J Const L 313 (2010). See also Verkuil, *Outsourcing Sovereignty* at 166–67 (cited in note 21) (noting that political appointees “are often selected to challenge the bureaucracy, especially when a change in administration occurs. In this situation, the temptation is to rely on outsiders, not insiders.”). For example, Stephen Labaton recently described a politically appointed OSHA director at odds with his staff in part for having “a history of opposing regulations produced by the agency he now leads,” and that prior to his government service he led successful efforts to weaken OSHA’s regulatory and enforcement authority. Stephen Labaton, *OSHA Leaves Worker Safety Largely in Hands of Industry*, NY Times A1 (Apr 25, 2007).

litical leadership),<sup>102</sup> the effects are nevertheless potentially magnified with contracting as the chosen vehicle.<sup>103</sup> These workarounds implicate *Intra-Principal* dynamics, with the executive at odds with its own personnel (and frustrated with the degree to which it lacks absolute control over its own personnel<sup>104</sup>) and likely to use contractors to bypass the civil service.

The enticement to dragoon the privatization agenda for these executive-aggrandizing, policy-altering purposes may be particularly strong where (1) bureaucrats are expected to develop, implement, or make investigatory or enforcement decisions regarding substantive public policy;<sup>105</sup> and (2) bureaucrats—insulated from politics through statutory civil service protections—are apt to disagree with the politi-

<sup>102</sup> See Kagan, 114 Harv L Rev at 2253–72 (cited in note 54); Richard Revesz and Nicholas Bagley, *Centralized Oversight of the Regulatory State*, 106 Colum L Rev 1260, 1263 (2006); Bruce Ackerman, *The New Separation of Powers*, 113 Harv L Rev 633, 698–702 (2000).

There may also be reasons to operate outside of congressionally created or overseen executive positions, if, for instance, the confirmation process would interfere with the President's ability to staff her administration. Broad use of so-called White House "czars" as well as special governmental employees may have the effect of limiting congressional interference. See, for example, Letter from Senator Robert Byrd to President Barack Obama (Feb 23, 2009), online at [http://www.nationaljournal.com/img/pdfs/090313\\_byrd\\_letter.pdf](http://www.nationaljournal.com/img/pdfs/090313_byrd_letter.pdf) (visited Dec 28, 2009) (decrying the use of White House czars who "threaten the constitutional system of checks and balances"). See also Tim Johnson and Andres Oppenheimer, *Reich Getting New Role as Bush's Americas Envoy*, Miami Herald A1 (Jan 8, 2003) (describing the effort to give political ally Otto Reich sensitive foreign affairs responsibilities as an appointed special envoy after Reich failed to win Senate confirmation for the post as an Assistant Secretary of State); Brendan I. Koerner, *Do Special Envoys Get Paid?*, Slate (Dec 18, 2003), online at <http://www.slate.com/id/2092902> (visited Dec 28, 2009) (discussing the "malleability" of the special envoy position and providing examples).

<sup>103</sup> See Shapiro, 53 Duke L J at 399 (cited in note 25); Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J L, Econ, & Org 536, 537–38 (2002); Terry Moe, *The Politicized Presidency*, in John Chubb and Paul Peterson, eds, *The New Direction in American Politics* 235, 245 (Brookings 1985) ("Congress tends to oppose [formal] presidential attempts to politicize the bureaucracy."); Richard Nathan, *The Administrative Presidency* 8 (John Wiley & Sons 1983) (suggesting that bureaucratic reorganization is arduous and not entirely effective in terms of politicizing the agencies).

<sup>104</sup> There is thus also an underlying *Coordinate-Principal* question here, given that the bureaucrats' independence is a function of, among other things, civil-service protections enacted by the legislature. See *Doe v DOJ*, 753 F2d 1092, 1107 & n 14 (DC Cir 1985).

<sup>105</sup> See, for example, Michele Estrin Gilman, *The President as Scientist-in-Chief*, 45 Willamette L Rev 565, 565–66 (2009) (discussing examples of unusual political pressures placed on scientists in the Bush administration); Verkuil, 84 NC L Rev at 419–20 (cited in note 2) (noting that political appointees have the large share of government authority but still need to rely on nonpolitical appointees for additional help in carrying out agency responsibilities); Katyal, 115 Yale L J at 2334–35 (cited in note 12); Kagan, 114 Harv L Rev at 2248 (cited in note 54) ("Faced for most of his time in office with a hostile Congress but eager to show progress on domestic issues, Clinton and his White House staff turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals.").

cal leadership over policy goals and tactics.<sup>106</sup> Recent events highlight such tensions as durable features of American administrative law and suggest contexts for the future use of strategic contracting to avoid similar conflicts down the road.<sup>107</sup> For example, this past decade, the Justice Department has been roiled by claims of overly politicized hirings,<sup>108</sup> firings,<sup>109</sup> and resignations.<sup>110</sup> There have also been allegations of heavy-handed pressure from the White House regarding legal opinions and policy decisions.<sup>111</sup> Similar turmoil within the Environmental

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<sup>106</sup> See David Lewis, *The Politics of Presidential Appointments 2* (Princeton 2008) (noting that the most politicized agencies are those that have the “largest percentage and deepest penetration of [presidential] appointees”); Kagan, 114 Harv L Rev at 2272 (cited in note 54) (“Since the dawn of the modern administrative state, presidents have tried to control the bureaucracy only to discover the difficulty of the endeavor.”); Nathan, *The Administrative Presidency at 7–12* (cited in note 103) (discussing the tension between appointed political officials and the bureaucracy in the Reagan and Nixon administrations); Daniel Guttman and Barry Willner, *The Shadow Government* 28, 65, 151–52 (Pantheon 1976) (describing government contractors as having a different mindset from those of the bureaucrats they replaced). See also Gailmard and Patty, 51 Am J Polit Sci at 874 (cited in note 30) (“We do not expect bureaucrats in an occupational safety or environmental protection office (etc.) to be a random cross-section of the population in terms of their concern for those matters; that is part of why they get work in these bureaucracies at all.”); Joel Aberbach and Bert Rockman, *In the Web of Politics* 168 (Brookings 2000) (describing the civil service as significantly more liberal than its political leaders, Democrats and Republicans alike).

<sup>107</sup> See *Massachusetts v EPA*, 549 US at 532; *State Farm*, 463 US at 57. See also Kagan, 114 Harv L Rev at 2270 (cited in note 54) (“The courts . . . have promoted vigorously the control of administrative policy by bureaucratic experts, not only by enabling them to fill the space that Congress might have occupied but also by requiring that agency action bear the indicia of essentially apolitical, ‘expert’ process and judgment.”).

<sup>108</sup> DOJ, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* 1–2 (2008), online at <http://www.usdoj.gov/oig/special/s0807/final.pdf> (visited Dec 28, 2009).

<sup>109</sup> DOJ, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* 325 (Sept 2008), online at <http://www.usdoj.gov/oig/special/s0809a/final.pdf> (visited Dec 28, 2009). Although US Attorneys are political appointees, id at 7, there has been a strong tradition of post-appointment independence for the duration of the appointing President’s tenure in office, id. See also DOJ, *U.S. Attorney’s Manual* § 3-2.120 (stating that US Attorneys are appointed for a four-year term, and continue to serve upon the expiration of that term until a successor is confirmed).

<sup>110</sup> See Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice; Veterans Exit Division as Traditional Cases Decline*, Wash Post A1 (Nov 13, 2005) (discussing the significant resignations among top career civil rights lawyers in the Justice Department). See also Jeffrey Rosen, *Conscience of a Conservative*, NY Times F40 (Sept 9, 2007) (noting that “Goldsmith, Comey, Mueller and other Justice Department officials were prepared to resign en masse” over the NSA warrantless eavesdropping program).

<sup>111</sup> See Jack Goldsmith, *The Terror Presidency* 76–90 (Norton 2008) (describing the influence that Dick Cheney had over legal memoranda); *Preserving the Rule of Law in the Fight against Terrorism*, Hearing before the Senate Committee on the Judiciary, 110th Cong, 1st Sess 5–7 (Oct 2, 2007) (statement of Jack Goldsmith, Harvard Law School); *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?*, Hearing before the Senate Committee on the Judiciary, 110th Cong, 1st Sess 221–23 (May 15, 2007) (testimony of James Comey). See also Philip Zelikow, *The OLC “Torture Memos”*:

Protection Agency centered on allegations by civil servants that the presidentially appointed administrator downplayed (or was ordered by the White House to downplay) the significance of the agency's scientific conclusions regarding global warming and greenhouse gases.<sup>112</sup> And, substantive policy disagreements between civil servants and the political leadership in the Food and Drug Administration have devolved into ugly infighting, inhibiting the work and marring the reputation of the agency.<sup>113</sup>

Notwithstanding the assumption held by many critics of privatization that contractors are unaccountable and typically stray from agency missions,<sup>114</sup> tighter executive control over contractors—compared with control over bureaucrats—is certainly possible. For these purposes, it can take one of two forms: the control can be a function of personal or professional ties, or a function of how the contract is written. First, regarding closer ties, we need not assume contractors are ideologically predisposed to the political administration they are serving;<sup>115</sup> nor need we assume cronyism. Enticements of remuneration or prestige may be enough to influence even apolitical contractors, leading them to tell the agency chiefs what they want to hear. That is, the con-

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*Thoughts from a Dissenter*, Foreign Policy (Apr 21, 2009), online at [http://shadow.foreignpolicy.com/posts/2009/04/21/the\\_olc\\_torture\\_memos\\_thoughts\\_from\\_a\\_dissenter](http://shadow.foreignpolicy.com/posts/2009/04/21/the_olc_torture_memos_thoughts_from_a_dissenter) (visited Dec 28, 2009) (“The White House attempted to collect and destroy all copies of my memo [challenging the OLC torture memos].”).

<sup>112</sup> See Janet Wilson, *EPA Chief Is Said to Have Ignored Staff*, LA Times A30 (Dec 21, 2007) (noting that the EPA Administrator “rejected written findings” by his staff in the course of denying California’s greenhouse gas proposal). See also Richard Simon and Janet Wilson, *EPA Staff Turned to Former Chief on Warming*, LA Times A11 (Feb 27, 2008) (noting documents suggesting that the EPA Administrator “acted against the advice of his legal and scientific advisors”); Freeman and Vermeule, 2007 S Ct Rev at 52 (cited in note 13) (arguing that the Court’s decision in *Massachusetts v EPA* reflects increasing worry about the politicization of agency expertise).

<sup>113</sup> See Government Accountability Office, *FDA: Decision Process to Deny Initial Application for OTC Marketing of the Emergency Contraceptive Drug Plan B Was Unusual*, GAO-06-109, 5–6 (Nov 2005), online at <http://www.gao.gov/new.items/d06109.pdf> (visited Dec 28, 2009) (documenting the politicized decisionmaking in overruling staff recommendations); Gardiner Harris, *Official Quits on Pill Delay at the F.D.A.*, NY Times A12 (Sept 1, 2005) (noting a high-ranking official’s resignation and quoting her as saying she could no longer serve at the agency “when scientific and clinical evidence, fully evaluated and recommended for approval by the professional staff here, has been overruled”); Gardiner Harris, *U.S. Again Delays Decision on Sale of Next-Day Pill*, NY Times A1 (Aug 27, 2005) (noting two rounds of the presidentially appointed FDA chief overriding overwhelming staff support in favor of approving the morning-after drug for over-the-counter sales).

<sup>114</sup> See notes 42–52 and accompanying text.

<sup>115</sup> See Guttman, 52 Admin L Rev at 878 (cited in note 21) (describing administrations as often hiring former colleagues and friendly outside advisors).



tractors' advice is colored by their desire to be "go-to" contractors on other, or continuing, programs.<sup>116</sup>

An oft-voiced concern is that contractors provide self-serving advice to the government to the tune of encouraging the government to buy more of their products.<sup>117</sup> Sometimes the extra products being peddled are weapons or software.<sup>118</sup> Sometimes, it is more advice. This practice is all too familiar in the private sector, where corporations routinely receive congratulatory rather than critical advice from their outside counsel and auditors under the theory that veritable "yes men"<sup>119</sup> are more popular to have on hand.<sup>120</sup>

<sup>116</sup> Consider Peter Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo Wash L Rev 696, 714 (2007) (noting that many political administrations prefer "yes-men" and those loyal out of fear of removal to those who simply are ideologically aligned).

<sup>117</sup> See Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub Cont L J 25, 31 (2005):

Where, for example, a contractor's employee is asked to provide advice to the Government, and the employee's company stands to gain or lose additional contracts depending on what advice the employee provides to the Government, there is an [organized conflict of interest] calling into question the employee's ability to render impartial advice.

Guttman, 52 Admin L Rev at 896–98 (cited in note 21) (describing organizational conflicts of interest arising when contractors give the government self-serving advice).

<sup>118</sup> See Spencer S. Hsu and Renae Merle, *Coast Guard's Purchasing Raises Conflict-of-Interest Flags*, Wash Post A1 (Mar 25, 2007); Dan Baum, *Nation Builders for Hire*, NY Times F32 (June 22, 2003) ("KBR got the Iraqi oil-field contract without having to compete for it because, according to the Army's classified contingency plan for repairing Iraq's infrastructure, KBR was the only company . . . to do the job on short notice. Who wrote the Army's contingency plan? KBR.")

<sup>119</sup> See Canice Prendergast, *A Theory of "Yes Men,"* 83 Am Econ Rev 757, 759 (1993) (arguing that subordinates have incentives to conform to the opinions of their supervisors). See also Sung Hui Kim, *Gatekeepers Inside Out*, 21 Georgetown J Legal Ethics 411, 439–46 (2008); Amy Shapiro, *Who Pays the Auditor Calls the Tune?: Auditing Regulation and Clients' Incentives*, 35 Seton Hall L Rev 1029, 1031 (2005); William Lerach, *The Rise of the New Corporate Kleptocracy*, 8 Stan J L, Bus & Fin 69, 108–18 (2002); Joseph Menn, *Law Firm for Global Crossing Questioned*, Chi Trib N1 (Feb 23, 2002); Bruce Nussbaum, *Can You Trust Anybody Anymore?*, Bus Wk 30 (Jan 28, 2002) (describing lawyers, bankers, and accountants as "tempted by a piece of the equity action" and willing to "compromise[] their integrity"); Jonathan Weil and Jeffrey Tannebaum, *Big Companies Pay Audit Firms More for Other Services*, Wall St J C1 (Jan 18, 2001).

<sup>120</sup> Recall the HHS family planning contract discussed in the Introduction. Workarounds are not necessarily silver bullets. Contractors sympathetic to the President's agenda could not simply implement family planning protocols on their own, but contractors' responsibilities allow them to control the trajectory of the rulemaking proceedings. They can provide the foundational research sources, set the rulemaking agenda and timetable, build and shape the administrative record, and thus help direct the outcome in a way that keeps dissenting voices (from within the bureaucracy) on the periphery. See William H. Rodgers, 4 *Environmental Law* § 8.9 & n 139 (West 2009), quoting Letter from Senator David Pryor to William Reilly, Administrator, EPA (Feb 13, 1990) ("Dozens of critical EPA activities have been turned over to contractors . . . . [Among those activities, contractors] prepare options, draft rules, review public comments, prepare the final drafts . . . and provide interpretive guidance to the public once those regulations are published."); Office of Technology Assessment, *Assessing Contractor Use in Superfund*,

Second, as to contract writing, workarounds of these sorts need not depend on a meeting of the minds between sympathetic contractors and the political leadership. Contract drafting can dictate the regulatory posture taken by contractors. For example, depending on how an administration feels about regulatory enforcement matters, it could write contracts to encourage<sup>121</sup> particularly aggressive or particularly thorough (read: slow and plodding) investigations and implementation in ways that run counter to what may be expected of the bureaucracy.<sup>122</sup> Of course, legislatures do this regularly. They establish regulatory programs and, at the same time, hamstring those programs with technical or procedural burdens that undermine the programs' efficacy,<sup>123</sup> impose difficult-to-meet deadlines, and control regulatory timelines.<sup>124</sup> Legislatures are also known to stymie regulatory objectives by intentionally underfunding the initiatives they create.<sup>125</sup> The difference here, as with other workarounds, is the degree to which the distortions introduced by the legislatures tend to be viewed as legitimate precisely because they are a product of the legislature and not contractual machinations.

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OTA-BP-ITE-51, 2 (Jan 1989) ("Superfund's contractors do much more than detailed, engineering work. In a multitude of various work assignments, they play a major role in conceiving, analyzing, and structuring the policies and tasks which make up the Superfund program."). See also Miriam Seifter, *Rent-A-Regulator*, 33 *Ecology L Q* 1091, 1095 (2006); David Rosenbloom, *Outsourcing the Constitution and Administrative Law Norms*, 35 *Am Rev Pub Admin* 103, 109 (2005); David M. Lawrence, *Private Exercise of Governmental Power*, 61 *Ind L J* 647, 647-48 (1986). Without contractors, it likely would be those dissenting voices within the bureaucracy shaping the agenda. See Guttman, 52 *Admin L Rev* at 878 (cited in note 21). For more recent examples, see Verkuil, *Outsourcing Sovereignty* at 166 & n 52 (cited in note 21).

<sup>121</sup> Consider notes 88-89 and accompanying text.

<sup>122</sup> There is some overlap here with *Intergenerational-Principal* workarounds that bind future administrations, see Part II.B, but the agreements to sideline bureaucrats need not extend into a future administration's term of office.

<sup>123</sup> See Ronald A. Cass, Colin S. Diver, and Jack M. Beermann, *Administrative Law* 188 (Aspen 5th ed 2006) (noting procedural burdens that have hamstrung efforts by OSHA to establish occupational health standards); Terry M. Moe, *The Politics of Bureaucratic Structure*, in John Chubb and Paul Peterson, eds, *Can the Government Govern?* 267, 274-77 (Brookings 1989) (discussing congressionally imposed procedural requirements that burden agencies and limit their ability to carry out their substantive missions).

<sup>124</sup> See generally Jacob E. Gersen and Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 *U Pa L Rev* 923 (2008).

<sup>125</sup> See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 *Admin L Rev* 429, 443-44 (1999); Richard Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 *L & Contemp Probs* 327, 328-29 (1991) (noting the congressional committees' practice of under-appropriating to limit the effectiveness of substantive regulatory programs they oppose on the merits).

#### D. Voter-Principal Phenomena: Workarounds That Bait and Switch

Another potential workaround type involves the use of contractors to conceal substantive policy decisions from the electorate. Contracting here highlights a *Voter-Principal* tension, with the executive's fidelity to the people in doubt. Because of workaround contracts, the people do not have the same access to information that they are accustomed to receiving when policy is directed through customarily more transparent public administrative channels; they thus are less capable of challenging the executive's preferred agenda.<sup>126</sup> Though there are numerous examples from which to draw, in what follows I discuss contracts that obscure policy determinations by concealing the size and scope of civilian and military programmatic commitments.

Before commencing, two points are worth underscoring. First, as elsewhere, privatization's workarounds are not the only means through which policy sleights of hand can be orchestrated.<sup>127</sup> Indeed, there is an entire literature devoted to public policy and "engineered ignorance"<sup>128</sup> or "fiscal illusions."<sup>129</sup> But, privatization can be a particularly effective cover.

Second, lest one assumes that the public is too alert to fall for these deceptions, information costs regarding government programs tend to be quite high,<sup>130</sup> and staying informed is especially difficult

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<sup>126</sup> See, for example, *Federal Election Commission v Akins*, 524 US 11, 13–14 (1998). See also Alfred Aman, Jr., *Privatization, Prisons, Democracy, and Human Rights*, 12 Ind J Global Legal Stud 511, 518 (2005).

<sup>127</sup> See Donahue, *The Privatization Decision* at 32–34 (cited in note 3) (citing other measures taken); James M. Buchanan, *Public Finance in Democratic Process* 137–41 (North Carolina 1987) (discussing the relevance of traditional works on fiscal illusions to contemporary liberal democratic settings).

<sup>128</sup> See Donahue, *The Privatization Decision* at 32 (cited in note 3) (defining the term as "the result of deliberate deception by political subgroups, public officials, or by organizations assigned responsibility for public business"). See also Buchanan, *Public Finance* at 129–41 (cited in note 127); Herman Leonard, *Checks Unbalanced: The Quiet Side of Public Spending* 6 (Basic Books 1986). Consider Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 Stan L Rev 971, 973–74 (2009) (noting that "legal jurisdiction trades on a deception" in part to avoid congressional interference and to ensure judicial restraint).

<sup>129</sup> Michael Schill describes the term "fiscal illusion" as "the methods utilized by governments to disguise the level of taxation in order to minimize taxpayer resistance." Michael H. Schill, *Intergovernmental Takings and Just Compensation*, 137 U Pa L Rev 829, 859 & n 115 (1989). See also Buchanan, *Public Finance* at 129–41 (cited in note 127).

<sup>130</sup> John Donahue rejects the neoclassical economic account that information is "cheaply acquired, readily verified, and widely shared." Donahue, *The Privatization Decision* at 31 (cited in note 3). Instead he sees "[i]nformation on citizen priorities and the pattern and consequence of collective spending [as] generally costly to collect, confirm and transmit." Id. To Donahue, the American system "falls well short of the ideal of well-informed citizens served by fully candid officials who oversee transparently comprehensible spending programs." Id. See Paul C. Light,

when government officials are trying to deceive the public or are simply inattentive to the opacity of government contracts. Needless to say, the difference between policy that is developed and implemented through public channels and policy engineered through privatization is never the difference between perfect information and zero information.<sup>131</sup> But, so long as the incremental differences in information availability and accessibility are significant (in terms of keeping the people in the dark), there are opportunities for workarounds. Of course, when these incremental differences flatten out—that is, when the public starts seeing through the illusions—the workarounds lose their potency.

### 1. Civilian personnel ceilings.

For years, agencies at all levels of government have confronted personnel ceilings—legislative caps on new hires, with the expectation that over time and with attrition employment levels will decrease.<sup>132</sup> With the smaller workforce, it was expected that government programs and services would be correspondingly downscaled.

In this era of rapidly increasing privatization,<sup>133</sup> personnel ceilings have become meaningless.<sup>134</sup> Normal attrition coupled with hiring caps has indeed translated into a smaller official workforce. But, during this period, government responsibilities have only risen—fueled by a cognitively dissonant public's demand for more and more services while still insisting on paying less and less in taxes.<sup>135</sup> Enter contractors, who are

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*The True Size of Government* 2–6 (Brookings 1999) (describing the difficulties of calculating the size and scope of the contracting workforce).

<sup>131</sup> For an extreme example, see note 255.

<sup>132</sup> Guttman, 33 Pub Cont L J at 323, 326 (cited in note 2); General Accounting Office, *Civil Servants and Contract Employees: Who Should Do What for the Federal Government?*, FPCD-81-43, i–iv (June 19, 1981), online at <http://archive.gao.gov/f0102/115604.pdf> (visited Dec 28, 2009); Guttman, 52 Admin L Rev at 889 (cited in note 21).

<sup>133</sup> See note 59 and accompanying text.

<sup>134</sup> Verkuil, 84 NC L Rev at 400 (cited in note 2) (“In the United States, at least, privatization . . . is concerned less with the amount of government expenditures than with where to place responsibility for the activity. The size of government, viewed as a percentage of the Gross Domestic Product, could well grow in a privatized environment.”); General Accounting Office, *Improving the Credibility and Management of the Federal Work Force through Better Planning and Budgetary Controls*, FPCD-81-54, 5 (July 17, 1981) (“The use of personnel ceilings reinforces the misconception that containing the staffing level of the direct Federal work force controls the cost of Government.”).

<sup>135</sup> Donahue, *The Privatization Decision* at 31–32 (cited in note 3).

hired to provide services where the government workforce is short-staffed—and thus perpetuate the fiction of a leaner government.<sup>136</sup>

Paul Light notes that the government uses contracts “to hide its true size, thereby creating the illusion that it [is] smaller than it actually is . . . encourag[ing] the public into believing that it truly can get more for less.”<sup>137</sup> Torn between the conflicting imperatives to slash personnel and, at the same time, expand programs, executive agencies may see themselves in a no-win situation. Accordingly, their use of contracting to navigate between the proverbial rock and a hard place may well be a function of what Steven Schooner calls a resource-mandate mismatch.<sup>138</sup>

Whatever normative valence one ascribes to this mismatch and however much responsibility lies with the legislature, mitigating the mismatch through hiring contractors is, as a descriptive matter, a workaround. Without the contracting option (and the legislature's tacit involvement insofar as it is directing and funding the expansion of government programs while prohibiting new government hiring), the agency administrators would have to advise the legislature and the public that something has to give. Doing so is not likely to endear the administrators to either crowd. But with outsourcing serving to cover up the policy dissonance, the public is made to think (at least for the moment) that it is having its cake and eating it too.<sup>139</sup>

## 2. Personnel and casualty numbers in combat situations.

Though concerns about military contracting typically sound in terms of oversight difficulties, cost overruns, and encroachments on inherently governmental responsibilities,<sup>140</sup> increasing attention is being paid to an additional concern. As noted in the Introduction, out-

<sup>136</sup> See Guttman, *Inherently Governmental Functions* at 41 (cited in note 61) (“Since World War II bipartisan limits on the numbers of federal employees have, like a hydraulic force, caused the government to fuel its growth through reliance on third parties.”); Paul C. Light, *Outsourcing and the True Size of Government*, 33 Pub Cont L J 311, 311–12 (2004) (noting that promises of reducing the size of the federal workforce “were only true using the narrowest definition of Government as being composed solely of full-time equivalent civil servants”).

<sup>137</sup> Paul C. Light, *The New True Size of Government* \*2 (Organizational Performance Initiative Research Brief, Aug 2006), online at [http://wagner.nyu.edu/performance/files/True\\_Size.pdf](http://wagner.nyu.edu/performance/files/True_Size.pdf) (visited Dec 28, 2009); Schooner, 33 Pub Cont L J at 265 (cited in note 21).

<sup>138</sup> Emails from Steven L. Schooner, Professor at George Washington University Law School, to author, July 2009 and September 2009 (on file with author).

<sup>139</sup> Guttman, *Inherently Governmental Functions* at 41 (cited in note 61) (noting the “bipartisan belief that the polity would indulge in the fiction that Big Government does not grow if the civil service does not”).

<sup>140</sup> Singer, *Corporate Warriors* at 151–68 (cited in note 15). See note 52 and accompanying text.

sourcing conceals the true scope and human costs of war efforts by understating the size of deployments and diluting casualty counts.<sup>141</sup>

A large percentage of our troop commitment in Iraq and Afghanistan is comprised of contractors. For example, a 2007 estimate had 180,000 contractors supporting roughly 160,000 troops in Iraq; to the extent official numbers list just the 160,000 military personnel, the government can give the impression that our footprint is only half its actual size.<sup>142</sup> As Charles Tiefer has written, the Pentagon “ardently desired . . . to keep the illusion of a low number of troops.”<sup>143</sup> The illusion was certainly enhanced by efforts, intentional or not, to conceal military contracts by routing them through civilian agencies,<sup>144</sup> to refer to contract services in official documents in generic and arguably misleading terms (such as “information technology” specialists rather than as “interrogators”),<sup>145</sup> and to complicate the contracting processes such that the federal government still has trouble providing an accurate contractor headcount.<sup>146</sup>

Private contractors are politically valuable insofar as they neither enter into official head<sup>147</sup> or body<sup>148</sup> counts—nor, it appears, into our

<sup>141</sup> See Minow, 46 BC L Rev at 1024 (cited in note 22); Michaels, 82 Wash U L Q at 1043–47 (cited in note 15).

<sup>142</sup> Miller, *Contractors Outnumber Troops*, LA Times at A1 (cited in note 16).

<sup>143</sup> Charles Tiefer, *The Iraq Debacle*, 29 U Pa J Intl L 1, 28 (2007).

<sup>144</sup> Cooper, 62 Cong Q Wkly Rep at 2194 (cited in note 15) (stating that some private contractors performing services for the US military in Iraq do not appear on the Defense Department’s list of contractors because they were hired through the Interior Department).

<sup>145</sup> Ellen McCarthy, *Interrogators Hired under Army IT Deal*, Wash Post E1 (May 28, 2004) (noting that individuals hired under an “information technology” contract for the US Department of Interior and were then dispatched to the Army for purposes of providing “interrogation services”). See note 255.

<sup>146</sup> See Jen DiMascio, *Feds: No True Count of Iraq Contractors*, Politico (Nov 3, 2009), online at <http://www.politico.com/news/stories/1109/29052.html> (visited Dec 28, 2009) (“[T]he three agencies employing the most contractors in the Middle East [] can’t agree on how many contract employees they have.”); Renae Merle, *Census Counts 100,000 Contractors in Iraq*, Wash Post D1 (Dec 5, 2006) (noting that it took over three years for the federal government to tally the primary contractors in Iraq—and that there was still no accounting of the subcontractors); Meeting of the Senate and House Committees on Armed Services to Receive Testimony on Allegations of Mistreatment of Iraqi Prisoners, 108th Cong, 2d Sess (May 7, 2004) (testimony of Secretary of Defense Donald H. Rumsfeld), online at <http://armed-services.senate.gov/statemnt/2004/May/Rumsfeld.pdf> (visited Dec 28, 2009) (indicating that top Pentagon officials could not respond to a senator’s request for the names of the military firms under contract to work at Abu Ghraib).

<sup>147</sup> See Renae Merle, *Contract Workers Are War’s Forgotten: Iraq Deaths Create Subculture of Loss*, Wash Post A1 (July 31, 2004) (“The Pentagon does not keep an official count, and many companies do not announce when their employees in Iraq are killed.”).

<sup>148</sup> Steven Schooner, *Don’t Contractors Count When We Calculate the Costs of War?*, Wash Post A21 (May 25, 2009) (noting that contractor casualties are not tallied and disclosed to the public in the same fashion that military casualties are); Merle, *Contract Workers Are War’s Forgotten*, Wash Post at A1 (cited in note 147).

hearts.<sup>149</sup> That is to say, the nation identifies with its troops to a far greater extent than its contractors:<sup>150</sup> “Americans are accustomed to hearing the military death toll . . . . But largely absent from the public consciousness are the thousands of civilians putting their lives on the line as contractors in Iraq.”<sup>151</sup> Combining US military personnel and contractors in combat zones<sup>152</sup> thus allows for contractors to lighten the troops’ share of long tours, injuries, and other physical and emotional hardships.<sup>153</sup> But even more importantly, the aggregate loss of life (and quality of life) is discounted by the fact that we neither hear as much about nor, evidently, care as much about homesick or fallen contractors.<sup>154</sup>

This misperception of the war effort generates tangible effects that redound specifically to the executive’s benefit. Concealing these costs, the people are less sensitive to the President’s handling (or mishandling) of the military campaign.<sup>155</sup> In turn, the executive has more political capital and thus more maneuverability in conducting the war.<sup>156</sup> Indeed, without contractors: (1) the military engagement would

<sup>149</sup> Schooner, 38 *Parameters* at 78 (cited in note 17); Laura Dickinson, *Privatizing Foreign Affairs and the Problem of Accountability in International Law*, 47 *Wm & Mary L Rev* 135, 191–92 (2005); Michaels, 82 *Wash U L Q* at 1045 (cited in note 15) (“If the narcotraffickers shot American soldiers down, you could see the headlines: ‘U.S. Troops Killed in Colombia.’ But when three Dyn-Corp employees were shot down during an anti-drug mission in Peru, their deaths ‘merited exactly 113 words in the New York Times.’”).

<sup>150</sup> John M. Broder and James Risen, *Death Toll for Contractors Reaches New High in Iraq*, *NY Times* A1 (May 19, 2007) (quoting the family member of a slain contractor: “If anything happens to the military people, you hear about it right away . . . . Flags get lowered, they get their respect. You don’t hear anything about the contractors.”); T. Christian Miller, *The Battle Scars of a Private War*, *LA Times* A1 (Feb 12, 2007); Merle, *Contract Workers*, *Wash Post* at A1 (cited in note 147); Editorial, *Soldiers Honored, Soldiers Dishonored*, *NY Times* A14 (May 1, 2004) (describing America’s “yearning to give military casualties the honor of an individual remembrance [that] is ingrained in the modern national fabric”); Kevin Myers, *Mercenaries Are Much Misunderstood Men*, *Daily Telegraph* 26 (Feb 17, 2002) (noting that the death of contractors does not lead to public “hand-wringing” in the same way as we worry “about our brave boys perishing on a foreign field”).

<sup>151</sup> Marego Athans, *To Make a Living, Driver Risked It All*, *Balt Sun* A1 (Feb 8, 2004).

<sup>152</sup> See Ariana Eunjung Cha and Renae Merle, *Line Increasingly Blurred between Soldiers and Civilian Contractors*, *Wash Post* A1 (May 13, 2004).

<sup>153</sup> Broder and Risen, *Death Toll*, *NY Times* at A1 (cited in note 150).

<sup>154</sup> Howard Witt, *America’s Hidden War Dead*, *Chi Trib* A1 (Mar 27, 2007); Merle, *Contract Workers*, *Wash Post* at A1 (cited in note 147).

<sup>155</sup> See Broder and Risen, *Death Toll*, *NY Times* at A1 (cited in note 150) (reporting previously undisclosed statistics regarding 917 dead and more than 12,000 wounded contractors in Iraq).

<sup>156</sup> Michaels, 82 *Wash U L Q* at 1039 (cited in note 15) (indicating that a government’s desire “to avoid instituting a draft, to lessen public awareness, to dilute casualty counts, to bypass congressional troop limitations, and/or to evade international arms embargoes, [may] entice policymakers to outsource”).

have had to be smaller—a strategically problematic alternative;<sup>157</sup> (2) the United States would have had to deploy its finite number of active personnel for even longer tours of duty<sup>158</sup>—a politically dicey and short-sighted option;<sup>159</sup> (3) the United States would have had to consider a civilian draft or boost retention and recruitment by raising military pay significantly—two politically untenable options;<sup>160</sup> or (4) the need for greater commitments from other nations would have arisen and with it, the United States would have had to make more concessions to build and sustain a truly multinational effort.<sup>161</sup> Thus, the tangible differences in the type of war waged, the effect on military personnel, and the need for coalition partners are greatly magnified when the government has the option to supplement its troops with contractors.<sup>162</sup>

Note, too, that the public may well catch on. As contractors become fixtures on the national security landscape and as the public starts demanding numerical accountings,<sup>163</sup> will workarounds diminish in strategic value? And, if so, does that mean the executive as an agent of the people will be on a tighter leash? Obviously, one cannot draw any causal connection between growing calls for reducing America's military presence in Iraq and greater awareness of contractors. But

<sup>157</sup> See, for example, Thom Shanker, *New Strategy Vindicates Ex-Army Chief Shinseki*, NY Times A1 (Jan 12, 2007); Baker, et al, *Iraq Study Group* at xxvi (cited in note 14).

<sup>158</sup> Cooper, 62 Cong Q Wkly Rep at 2194 (cited in note 15) (describing America's servicemen and women as overworked and suggesting that the United States will likely need additional troops); Paul Krugman, *Feeling the Draft*, NY Times A27 (Oct 19, 2004) (citing a Pentagon study that said the United States has an inadequate number of troops to sustain the current scope of operations into the future and challenging President Bush's claim "that we don't need any expansion in our military [as] patently unrealistic").

<sup>159</sup> Singer, *Corporate Warriors* at 211 (cited in note 15) (noting that using privatization to circumvent congressional troop caps can help avoid the domestic uproar associated with calling up the National Guard or reservists); Anthony Bianco and Stephanie Anderson Forest, *Outsourcing War*, Bus Wk 68, 78 (Sept 15, 2003) ("Why take the heat of calling up reservists when you can summon civilians-for-hire?").

<sup>160</sup> Thom Shanker, *Need for Draft Is Dismissed by Officials at Pentagon*, NY Times A22 (Oct 31, 2004); James Dao, *The Option Nobody's Pushing. Yet.*, NY Times D1 (Oct 3, 2004) (describing the US military as in desperate need of fresh soldiers and reporting that the Bush administration nevertheless rejected the idea of reintroducing the draft).

<sup>161</sup> Elizabeth Kolbert, *Solo Act*, New Yorker 43, 43–44 (Oct 6, 2003); *Dealing with Iraq: Very Well, Alone*, Economist 25, 25 (Mar 15, 2003) (noting how the US-UK invasion of Iraq lacked widespread support elsewhere in the world); Michael Gordon, *Serving Notice of a New U.S., Poised to Hit First and Alone*, NY Times A1 (Jan 27, 2003) (noting President Bush's willingness to invade Iraq without the assistance or support of the international community).

<sup>162</sup> Of course, if contractors were viewed as if they were soldiers and if the Pentagon had to include contractor statistics among the information about troop deployment and casualties that they shared with the public, the political advantages of using contractors would greatly diminish.

<sup>163</sup> See National Defense Authorization Act for Fiscal Year 2008 (NDAA 08) §§ 806–08, Pub L No 110-181, 122 Stat 3, 213–16 (requiring agencies to publicize military contractors in Iraq).



given how much we now know about contractors—compared to how little was known before the invasion and occupation of Iraq—one might query whether contractors will ever be used for such politically strategic purposes in future engagements.<sup>164</sup>

### III. OVERLOOKING WORKAROUNDS

Having conducted an initial survey of workarounds, located the structural processes that enable them, and sketched out a typology keyed to the various subsets of “principal-principal-agent” problems, I turn here to examine whether our existing legal and academic tools are capable of addressing workarounds. As it turns out, they are not. Part III.A addresses regulation’s shortcomings with respect to workarounds. Part III.B explores how scholars’ approach to privatization and even their efforts to repair or supplement the existing regulatory framework have been orthogonal to the task of capturing workarounds. The lack of overlap is largely a function of the differences between executive-orchestrated workarounds and contractor manipulations. These discussions set the stage for Part IV, where I consider new approaches to addressing workarounds on their own terms.

#### A. The Regulatory Framework’s Insensitivity to Workarounds

Privatization’s most comprehensive regulatory paradigm is anchored by the Office of Management and Budget’s Circular A-76 (the “A-76 Framework”).<sup>165</sup> The A-76 Framework directs federal agencies to contract out where—and only where—(1) outsourcing does not lead to the delegation of inherently governmental responsibilities to the private sector, and (2) it is efficient to do so.<sup>166</sup> Practitioners in par-

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<sup>164</sup> Contractor misconduct is yet another reason why contractors might be used less frequently in future engagements. See, for example, *Fay Report* at 47 (cited in note 52) (“Contracting-related issues contributed to the problems at Abu Ghraib prison.”); Ginger Thompson, *Misconduct Claimed at U.S. Embassy in Kabul*, *NY Times* A10 (Sept 2, 2009); Scahill, *Blackwater* at xx–xxi (cited in note 52) (discussing Blackwater’s attempts to avoid jurisdiction under the Uniform Code of Military Justice while simultaneously claiming immunity from civil litigation); Bruce Falconer, *Contractors Gone Wild*, *Mother Jones* (May 2, 2008) online at <http://www.motherjones.com/politics/2008/05/contractors-gone-wild> (visited Dec 29, 2009); Michaels, 82 *Wash U L Q* at 1029 & n 83 (cited in note 15) (noting the accusations against DynCorp contractors operating in the Balkans of simultaneously running a sex-slave operation); Schooner, 16 *Stan L & Pol Rev* at 555–57 (cited in note 52); Craig S. Smith, *The Intimidating Face of America*, *NY Times* A4 (Oct 13, 2004).

<sup>165</sup> See OMB A-76 at 1 (cited in note 20). See also note 20 and accompanying text.

<sup>166</sup> 48 *CFR* §§ 14–15; OMB A-76 at 1 (cited in note 20). Among others, Jody Freeman and Martha Minow describe how the best-case scenario is for agencies not to assume that the private sector is more efficient, and instead engage in competitive sourcing where the comparative efficien-

ticular will note that federal agencies often take pains to bypass the A-76 Framework, in no small part because of the procedural rigor it imposes on the contracting out process.<sup>167</sup> And, that is precisely the reason it is invoked herein—because of its comprehensiveness and rigor rather than its universal applicability.<sup>168</sup>

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cy of the private sector must be established. Freeman and Minow, *Introduction: Reframing the Outsourcing Debates* at 8 (cited in note 4). See also Matthew Blum, *The Federal Framework for Competing Commercial Work between the Public and Private Sectors*, in Freeman and Minow, eds, *Government by Contract* 63, 63–64 (cited in note 4); Verkuil, *Outsourcing Sovereignty* at 125–26 (cited in note 21).

<sup>167</sup> See Laura A. Dickinson, *Public Values/Private Contract*, in Freeman and Minow, eds, *Government by Contract* 335, 337 (cited in note 4) (noting many national security contracts “are negotiated in secret, without competition, on a ‘no-bid basis’”); Freeman and Minow, *Introduction: Reframing the Outsourcing Debates* at 3 (cited in note 4) (“Some of the most controversial contracts are literally off the books.”); Dannin, 15 Cornell J L & Pub Pol at 114 & n 10 (cited in note 29) (quoting critics’ concerns that the recent practice of “direct conversion” bypasses competitions for government contracts and “reward[s] contractor cronies with sole-source contracts”); Verkuil, 84 NC L Rev at 437 (cited in note 2); Valerie Grasso, *Defense Outsourcing: The OMB Circular A-76 Process* 8 (Congressional Research Service, June 30, 2005), online at <http://fas.org/sgp/crs/natsec/RL30392.pdf> (visited Dec 29, 2009); Alison Maxwell, *Agencies Avoid Contracting Studies*, Government Executive (June 5, 1998), online at [http://www.govexec.com/story\\_page.cfm?filepath=/dailyfed/0698/060598a1.htm](http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0698/060598a1.htm) (visited Dec 29, 2009).

<sup>168</sup> State-level government contracting law tends to be less comprehensive. See Dannin, 15 Cornell J L & Pub Pol at 114 (cited in note 29); Ellen Dannin, *Legislating on Privatization and Subcontracting*, 60 Md L Rev 249, 251 (2001); Featherstun, Thornton, and Correnti, 30 Pub Cont L J at 644–46 (cited in note 3). Some states do, however, require at the very least a showing of comparative efficiency. See Cal Gov Code § 19130(a)(1) (West) (“The contracting agency clearly demonstrates that the proposed contract will result in actual overall cost savings to the state”); Conn Gen Stat § 4d-45(c) (West):

[A]uditors (1) shall conduct an independent evaluation of the contract or amendment to determine whether the provisions of the contract or amendment serve the best interests of the state, including, but not limited to, (A) efficiency, (B) economy, (C) contractor qualifications, including, but not limited to, capacity for performance and accountability, and (D) effective delivery of services.

Md State Personnel & Pensions Code Ann § 13-405(c)(1) (Michie/Law Co-op) (“(1) The unit shall submit calculations that: (i) compare the cost of the service contract with the cost of using State employees; and (ii) show savings to this State, over the duration of the service contract, of 20% of the contract or \$200,000, whichever is less.”); Mass Ann Laws ch 7, § 7 (Michie/Law Co-op) (providing for the promotion of “economy and efficiency and avoiding useless labor and expense in the business affairs of the commonwealth”). I thus give the A-76 Framework priority, and refer to it as the most comprehensive, insofar as it has the virtues both of categorically eliminating core governmental responsibilities from consideration and of actually comparing governmental and private sector efficiency rather than reflexively assuming contracting out is per se preferable. See Blum, *The Federal Framework* at 63 (cited in note 166). While the A-76 Framework is far from ideal, see Mohab Khattab, *Revised Circular A-76: Embracing Flawed Methodologies*, 34 Pub Cont L J 469, 470 (2005) (noting that the A-76 process has been broadly criticized by federal managers, government employees, labor unions, and the private sector alike); Schooner, 33 Pub Cont L J at 265 (cited in note 21); Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* at 4 (cited in note 3), and is often itself circumvented, it is a more thorough framework for contracting out decisions than is provided in the baseline Federal Acquisi-

Under the A-76 Framework, agencies are instructed to make an inventory of their responsibilities, distinguishing inherently governmental activities from those that are commercial in nature. Activities designated inherently governmental are kept in-house, irrespective of efficiency considerations.<sup>169</sup> For those activities classified as commercial, agencies run a “competition” to determine whether a private contractor can outperform government personnel in administering the relevant responsibilities.<sup>170</sup> Contracts containing workarounds are not necessarily inefficient arrangements, nor do they attach only to inherently governmental activities. As a result, the regulatory paradigm we have is an ineffective filter for catching workarounds. There may be coincidental overlap, but we cannot rely on the serendipity of a workaround contract also being either inefficient or of an inherently governmental nature.

To underscore the distinctiveness of workarounds and show how our regulatory protocols can be insensitive to them, it is worth briefly revisiting two case studies—the municipal recycling contract and the DHS contract for data mining services. I use these examples to illustrate the objections to privatization that can be raised along the currently legally cognizable axes of “efficiency” and “inherently governmental” as well as along a proposed new “workaround” axis.

### 1. Inherently governmental.

As long defined in the A-76 Circular,<sup>171</sup> and now also codified by Congress,<sup>172</sup> an “inherently governmental function means a function that is so intimately related to the public interest as to require performance by . . . Governmental employees.”<sup>173</sup> Where the agency determines that one of its functions is inherently governmental, the agency must, as noted above, retain the function in-house.<sup>174</sup> Interested

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tion Regulation (FAR), 48 CFR parts 1–53 (2009). See generally, for example, David M. Walker, *Competitive Sourcing*, 33 Pub Cont L J 299 (2004).

<sup>169</sup> See OMB A-76 at A-1–4 (cited in note 20).

<sup>170</sup> See *id.* at A-1–C-27.

<sup>171</sup> The A-76 Circular was last revised in 2003, but dates back to 1966. For a description of earlier iterations of the A-76 directive, see L. Elaine Halchin, *The Federal Activities Inventory Reform Act and Circular A-76 2–4* (Congressional Research Service, Apr 6, 2007), online at [http://assets.opencrs.com/rpts/RL31024\\_20070406.pdf](http://assets.opencrs.com/rpts/RL31024_20070406.pdf) (visited Dec 29, 2009).

<sup>172</sup> FAIR Act §§ 2–5, 112 Stat at 2382–85.

<sup>173</sup> FAIR Act § 5(2)(A), 112 Stat at 2384. See also OMB A-76 at A-2 (cited in note 20) (“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>174</sup> See OMB A-76 at A-1 (cited in note 20); FAIR Act § 2(d), 112 Stat at 2383; Allan V. Burman, *Policy Letter 92-1* (OMB, Sept 23, 1992), online at <http://www.whitehouse.gov/>

parties may challenge the agency's classification<sup>175</sup> through agency appeals<sup>176</sup> and petitions to the US Government Accountability Office.<sup>177</sup>

Claims regarding the prohibition against outsourcing inherently governmental functions could take the following shape: recycling and data mining are each core governmental functions that need to be carried out exclusively by public servants.<sup>178</sup> This argument may have some traction with respect to contracting out intelligence gathering work, given its connection to sensitive national security operations.<sup>179</sup> It will, however, have no traction vis-à-vis recycling, which strikes most observers as unquestionably commercial.<sup>180</sup> Thus, both activities will survive this step; or at most, one might not. Either way, the existence of workarounds—common to both the recycling and the data mining scenarios—is not at all relevant to the regulatory weeding-out process.

omb/rewrite/procurement/policy\_letters/92-1\_092392.html (visited Dec 29, 2009) (stating that executive branch policy is to attempt to avoid “an unacceptable transfer of official responsibility to Government contractors.”).

<sup>175</sup> For instance, they may argue that the agency erred in categorizing a function as “inherently governmental”—and thus in *not* subjecting it to private sector competition. Or, they may claim agency error in labeling a function commercial—and thus in subjecting it to market competition.

<sup>176</sup> See OMB A-76 at A-4 (cited in note 20); Grasso, *Defense Outsourcing* at 26–27 (cited in note 167).

<sup>177</sup> See 4 CFR § 2l; Government Accountability Office, *Bid Protests at GAO: A Descriptive Guide*, GAO-09-471SP, 5 (9th ed 2009), online at <http://www.gao.gov/decisions/bidpro/bid/d09417sp.pdf> (visited Dec 29, 2009).

<sup>178</sup> Guttman, *Inherently Governmental Functions* at 54 (cited in note 61).

<sup>179</sup> See Government Accountability Office, *Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services*, GAO-07-990, 6–7 (Sept 2007), online at <http://www.gao.gov/new.items/d07990.pdf> (visited Dec 29, 2009) (noting the risk of assigning intelligence contractors to inherently governmental activities); David M. Walker, *Intelligence Reform: GAO Can Assist the Congress and the Intelligence Community on Management Reform Initiatives*, GAO-08-413T, 12–14 (Feb 29, 2008), online at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=97cda3fd-8fae-4817-a282-467ebba98580](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=97cda3fd-8fae-4817-a282-467ebba98580) (visited Dec 29, 2009) (raising concerns that intelligence contractors may be performing “inherently governmental activities”); Simon Chesterman, “*We Can’t Spy . . . If We Can’t Buy!*”: *The Privatization of Intelligence and the Limits of Outsourcing “Inherently Governmental Functions,”* 19 Eur J Intl L 1055, 1056 (2008). Consider E.S. Savas, *Privatization and Public-Private Partnerships* 303 (Chatham House 2000) (referring to national security as “the last refuge of antiprivatization forces”). See also note 7 and accompanying text.

<sup>180</sup> See Freeman, 116 Harv L Rev at 1346 (cited in note 3) (including waste collection in a list of routine cases that “do not generally implicate our most cherished freedoms and aspirations”); Freeman, 28 Fla St U L Rev at 173 (cited in note 1) (“An individual who cares little about whether her household garbage is collected by the city of New York or Acme Waste Corporation may feel quite differently about the identity of a prison guard or a police officer.”). See also Freeman and Minow, *Introduction: Reframing the Outsourcing Debate* at 2 (cited in note 4) (calling general commercial services “routine” and suggesting they “pose few problems”); Michaels, 82 Wash U L Q at 1016–17 (cited in note 15).

## 2. Comparative efficiency.

Non-inherently governmental—that is, commercial<sup>181</sup>—functions are eligible for privatization and thus subject to competition between in-house governmental units and private contractors.<sup>182</sup> How agencies define what Sharon Dolovich calls “comparative efficiency”<sup>183</sup> and how they assess the risks and rewards of selecting likely more efficient contractors varies in interesting and contested ways.<sup>184</sup> Likewise, whether agencies are actually successful at predicting which functions will be performed more efficiently by the private sector is also open to debate.<sup>185</sup> But for our purposes, we can assume *arguendo* that the agencies are good predictors of comparative efficiency. Indeed, it suffices to note the broad contours of efficiency analysis and to mention that decisions to contract out based on comparative efficiency, too, may be subject to challenge by interested parties.<sup>186</sup>

Efficiency challenges turn on whether the winning competitor is giving the taxpayers greater or lesser value (defined as some combination of quality and cost) than what the runner-up could provide.<sup>187</sup> In

<sup>181</sup> See OMB A-76 at A-3 (cited in note 20):

A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.

<sup>182</sup> See *id.* at B-1–20 (cited in note 20).

<sup>183</sup> See Dolovich, *How Privatization Thinks* at 133 (cited in note 29).

<sup>184</sup> See Khattab, 34 Pub Cont L J at 477 (cited in note 168); Schooner, 33 Pub Cont L J at 265 (cited in note 21); Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* at 14–23 (cited in note 3).

<sup>185</sup> Compare House Committee on Oversight and Government Reform, *Waste, Fraud, and Abuse*, online at [http://oversight.house.gov/index.php?option=com\\_content&view=article&id=4522&catid=43](http://oversight.house.gov/index.php?option=com_content&view=article&id=4522&catid=43) (visited Dec 29, 2009) with Leonard C. Gilroy, ed., *2008 Annual Privatization Report 4* (Reason Foundation 2008), online at <http://reason.org/files/b15b25f6bb40427e193e799628a1ea1b.pdf> (visited Dec 29, 2009) (reporting that privatization has saved the federal government billions of dollars).

<sup>186</sup> Agency protests can be lodged about particular decisions. See OMB A-76 at B-20 (cited in note 20). See also 48 CFR § 33.103. GAO protests are raised pursuant to 4 CFR § 21.

<sup>187</sup> More broadly, what makes economic sense in the short run is not always the most prudent course—and a longer perspective would reveal that, over time, the competitive market that existed at the time of the initial solicitation has dried up and whatever firsthand experience the government had in performing the services in-house is now woefully outdated. See *Use of Consultants and Contractors by the EPA and DOE*, Hearing before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, 101st Cong, 1st Sess 62–64 (Nov 6, 1989) (noting that procurement officials did not know much about the substance of the contracts they oversaw); Gilman, 89 Cal L Rev at 599–600 (cited in note 50); Guttman, 52 Admin L Rev at 889–90 (cited in note 21); Handler, *Down from Bureaucracy* at 87

general, efficiency is easier to establish in the case of the private recycling contract than with respect to outsourcing intelligence gathering. Data mining is complicated, sophisticated work, and difficult to define in terms of utility.<sup>188</sup> What is a successful day of data mining and what expenses are necessary in contributing to that success are far more involved inquiries than those relating to the relatively easy-to-specify and monitor arrangements for the private, door-to-door pickup of recyclable goods.<sup>189</sup> Of course, both, either, or neither of the recycling or data mining contracts could be comparatively efficient. And, it does not matter: efficiency tells us nothing about the existence or absence of workarounds.

### 3. Workarounds.

Finally, how are these contracts potentially generative of executive-enhancing, policy-altering workarounds? With regard to the recycling and binding future administrations examples, the concern is some combination of the timing and circumstances under which the contract was entered into as well as the length of the contract and whether a new administration would incur penalties for no-fault, early termination of the agreement.<sup>190</sup> From an efficiency perspective, the contract entered into by an environmentalist mayor on the day *before* his (surprising) electoral defeat at the hands of his anti-environmental rival is analytically indistinguishable from a contract of the same length entered into by the now-lame-duck administration the day *after* he is voted out in an upset. The same is true as a matter of determining whether recycling is an inherently governmental or commercial activity—the political calendar is irrelevant. But, as a matter of workarounds, that two-day difference may mean everything. Indeed, politi-

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(cited in note 30) (noting that agencies fear becoming “captives of the private providers without whom they cannot run their programs” and that loss of “in-house capacities” is one of the reasons why agencies resist contracting out in the first place). The 1962 Bell Report—a federal study of contracting out—posited that the “cumulative” effects of outsourcing could leave the government worse off than if it had never embarked on privatization in the first place, and that “outside technical advice [may] become de facto technical decisionmaking.” Bureau of the Budget, Report to the President on Government Contracting for Research and Development, S Doc No 94, 87th Cong, 2d Sess 9 (May 17, 1962) (“Bell Report”).

<sup>188</sup> See generally Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (Rowman & Littlefield 2005) (describing the difficulties in measuring successful counterterrorism and other preventative operations).

<sup>189</sup> See Shapiro, 53 Duke L J at 417 (cited in note 25) (noting that “it is easier for the government to contract for garbage pickup” than for more complicated services because garbage pickup “does not require discretionary judgments by private employees in circumstances in which it is difficult to specify in advance how the employees should act”).

<sup>190</sup> See Part II.B.

cal time may have little overlap with economic time, the latter being the bargained-for duration of a contract's terms (leaving politics aside) given the government's needs and what the private sector is willing to offer.<sup>191</sup>

Workarounds in the data mining contract turn on the exploitation of a private-public legal-status differential.<sup>192</sup> As with the recycling contract, these workaround concerns are independent of efficiency and inherently governmental considerations. It may be that privatization would be inefficient.<sup>193</sup> Or, it may be that privatization is impermissible because the functions being outsourced are inherently governmental. In those cases, the A-76 Framework would just so happen to filter out the workaround-containing contracts. But the overlap is far from complete or guaranteed: the workaround, or its effectuation, turns neither on inefficiency nor on the fact that the underlying activities are inherently governmental. For these reasons, this relatively rigorous regulatory framework is inadequate to the challenge this Article presents.

## B. Legal Scholarship's Insensitivity to Workarounds

For its part, the academic community has largely zeroed in on the government delegating sovereign authority to contractors—and those contractors' frolics and detours.<sup>194</sup> Concerned that the regulatory framework does not do enough to deter rogue contractors, or to bolster agencies' efforts to limit contractor manipulations,<sup>195</sup> scholars have sought to introduce, among other things, constitutional and administrative law norms into the privatization paradigm, and to have the contractors treated as state actors for legal purposes.<sup>196</sup> However effec-

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<sup>191</sup> See Dannin, 15 *Cornell J L & Pub Pol* at 145 (cited in note 29) (noting that contractors will insist on terms that make the arrangements profitable).

<sup>192</sup> See Part II.A.2.

<sup>193</sup> More likely, given the greater discretion the contractor has to operate in the interstices of the law, the contracts will be highly cost effective. Consider note 29 (discussing privatization initiatives that bypass administrative red tape as typically cost saving).

<sup>194</sup> See notes 42–52 and accompanying text.

<sup>195</sup> See, for example, Freeman, 28 *Fla St U L Rev* at 165 (cited in note 1) (“[T]raditional procurement models . . . may be somewhat amenable to controlling the excesses of commercial procurement, but it may be too limited to address the much more substantial issues that arise when government contracts out social services and traditionally governmental functions.”).

<sup>196</sup> Making the contractors behave like state actors is presumed to increase accountability for a number of reasons. The closer contractors are to state actors, the more likely it will be that they internalize the ethos and norms of public service, the commitments of due process, and, most significantly, the legal liability for injurious activities. See Freeman, 116 *Harv L Rev* at 1304 (cited in note 3); Minow, 116 *Harv L Rev* at 1246–55 (cited in note 21); Guttman, 52 *Admin L Rev* at 862 (cited in note 21); Barak-Erez, 45 *Syracuse L Rev* at 1182 (cited in note 21).

tive these approaches might be in reining in wayward contractors, there are important differences between (1) contractors who exploit the discretion afforded to them as proxies of the government and (2) agency officials directing workarounds through these proxies. With contractor abuse, the concern is unaccountability—a breakdown in the traditional principal-agent relationship. With workarounds, the contractors are not necessarily disloyal; indeed, they may be *too accountable* to their governmental counterparts—too willing to facilitate their policy altering agendas.<sup>197</sup> Instead, it is the executive as unaccountable agent that changes the substance or the temporal duration of a policy in a manner potentially inconsistent with the expectations of its co-principals (namely, the coordinate branches, future administrations, the bureaucracy, and the people).

The differences between workarounds and contractor manipulations are not apples and oranges. But, as this Part shows, the differences are enough that an agenda focusing on contractor manipulations will often miss workarounds.

1. Workarounds as analytically distinct from contractor manipulations.

In some cases, there is clear overlap between contractor manipulations and workarounds in terms of the effects they achieve. These are the easy cases. A faith-based social-service provider may be just as eager as the sponsoring government to test the waters of sectarian programming.<sup>198</sup> A private prison company that finds it cheaper and more effective to employ excessive force (and can get away with it)<sup>199</sup> may report to a state corrections agency happy to look the other way, especially if doing so causes a policy transformation in inmate discipline that the government officials favor but could not, on their own, promulgate for political or legal reasons.

But the convergence between workarounds and contractor manipulations is hardly complete, and the legal scholars' basket of antidotes to contractor manipulations—the additional imposition of ad-

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<sup>197</sup> See notes 115–20 and accompanying text.

<sup>198</sup> See Saperstein, 116 Harv L Rev at 1362–65 (cited in note 74); David Kuo, *Tempting Faith: An Inside Story of Political Seduction* xiii (Free Press 2006).

<sup>199</sup> See *Holly v Scott*, 434 F3d 287, 296 (4th Cir 2006) (disallowing constitutional tort suits against private prison guards); *Peoples v CCA Detention Centers*, 422 F3d 1090, 1093–94 (10th Cir 2005), *affd en banc*, 449 F3d 1097, 1099 (10th Cir 2006) (same). But see *Bender v GSA*, 539 F Supp 2d 702, 708–12 (SDNY 2008) (finding the availability of a constitutional tort suit against private security guards); *Sarro v Cornell Corrections, Inc.*, 248 F Supp 2d 52, 54 (D RI 2003) (same).



ministrative procedures, the expansion of private law remedies, and the insistence on contractor transparency<sup>200</sup>—are not necessarily helpful in counteracting, for example, unfailingly responsible, law-abiding contractors who nevertheless facilitate workarounds. Recall the recycling contract entered into during the lame-duck period following the incumbent mayor's electoral defeat. Imagine more careful monitoring of the principal-agent relationship between the executive and the contractor; private rights of action to remedy poor or abusive customer service; treating the contractor as a state actor for purposes of constitutional liability; or greater transparency regarding the contractor's business plan. None of these measures does anything to prevent the paralysis being visited upon the incoming mayor's agenda.

There is also little overlap between workarounds and contractor manipulations in the case of the contractor tasked with family planning regulatory work for HHS. To carry out the workaround, the private consultant need not overstep any boundaries vis-à-vis the public it is serving or the agency that solicited its assistance. If anything, the problem is that, unlike the independent-minded bureaucrat, the contractor is excessively dependent on and thus devoted to the agency leadership. Accordingly, the weak link in these government-contracting dynamics is not a lazy or greedy contractor, but instead the executive opting for experts whose compliance might be a function of their lack of civil service protections.

Similarly, consider an executive agency operating under a personnel-cap mandate.<sup>201</sup> To cover its ever-increasing programmatic responsibilities, the agency needs to hire contractors. There is no reason to assume these contractors will act abusively, cut corners for extra profits, or otherwise deviate from the agency's mission in a way that would trigger accountability concerns of the contractor-manipulation variety. Of course, the contractors *could* act abusively. Or, the outsourcing *could* implicate inherently governmental activities. But what matters is that the workaround is not at all dependent on contractors abusing their discretion.

## 2. Workarounds as institutionally distinct from contractor manipulations.

The lack of overlap between contractor manipulations and workarounds has an institutional component as well. Institutionally, one

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<sup>200</sup> See notes 21, 45–51, and accompanying text.

<sup>201</sup> See notes 132–38 and accompanying text.

of the first lines of defense against rogue (as well as simply inefficient) contractors is the government officials within the executive branch charged with drafting and overseeing privatization initiatives. Tighter drafting by the government (through the executive) reduces room for slack or abuse;<sup>202</sup> and, closer supervision and monitoring deters wayward contractors and reduces the need for the agency or adversely affected individuals to resort to formal legal remediation to address problems after the fact.<sup>203</sup>

But what makes perfect sense for policing greedy or slacking contractors begins, in the workaround context, to look like a case of the fox guarding the henhouse. That is to say, when the issue is a manipulative contractor, more important than the capacity for an affected individual to sue *ex post* (under common law causes of action, third-party beneficiary suits, or constitutional tort claims) is the ability to prevent or constrain the abusive behavior in the first place. To the extent contractor manipulations are costly to the executive (and, by extension, the rest of the government),<sup>204</sup> the agency has every reason to be on guard. Although agencies have not always been effective in ensuring contractual efficiency or in reducing principal-agent problems, where they have fallen short it appears to be largely a function of limited resources rather than lack of interest.<sup>205</sup>

By contrast, because executive agencies often view workarounds as salutary, they are unlikely to guard against workarounds in the same manner that they try to guard against contractor manipulations. The executive stands to benefit *vis-à-vis* the other principals from outsourcing arrangements that expand executive authority and enhance unilateral policy discretion. Moreover, some such workarounds may translate into additional efficiency gains, on top of whatever “pure” cost savings may be realized by innovative contractors with smart business models and favorable economies of scale.<sup>206</sup> In those instances, even procurement officials otherwise indifferent to or una-

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<sup>202</sup> See Minow, 116 Harv L Rev at 1246–48 (cited in note 21).

<sup>203</sup> See *Bell Report* at 10, 15 (cited in note 187); Schooner, 33 Pub Cont L J at 283–96 (cited in note 21).

<sup>204</sup> See CICA § 2711, 98 Stat at 1175–81. See also note 44 (describing the significant cost overruns in government-contracting initiatives).

<sup>205</sup> See, for example, Schooner, 33 Pub Cont L J at 283–96 (cited in note 21) (describing understaffed agencies as overwhelmed in their efforts to oversee their government contracts). See also Guttman, *Inherently Governmental Functions* at 51–52 (cited in note 61) (describing contract managers as unable to keep up with the multitude of government contracts for which they are responsible).

<sup>206</sup> See notes 30, 193, and accompanying text.

ware of the policy alterations may nevertheless tolerate, if not celebrate, workarounds insofar as they happen to contribute to privatization's ostensible goal of cost savings.<sup>207</sup> This institutional mismatch thus places even more pressure on the already ill-fitting, non-agency-centered accountability tools to try to capture workarounds.

#### IV. ADDRESSING WORKAROUNDS ON THEIR OWN TERMS

To date, our encounters with workarounds have been ad hoc affairs. At times, we have viewed and treated them as isolated, one-off incidents. Constitutional litigation challenging faith-based welfare contracts<sup>208</sup> and legislative proposals to close loopholes in federal privacy laws fall into this category.<sup>209</sup> At other times, we have uncovered workarounds in the course of exploring contractor manipulations. There, we have tended to conflate the two phenomena, using the more developed regulatory and anti-contractor-manipulation tools to try to understand—and possibly take down—the contract (workaround and all). The scholarship on military contracting is testament to that technique, and its limitations.<sup>210</sup> These piecemeal and bootstrapping approaches to addressing workarounds are unsustainable. They rely on happenstance—that something else about the contract is legally objectionable.

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<sup>207</sup> Even if the agency doing the outsourcing is concerned about the implications of workaround contracts circumventing the coordinate branches, the bureaucracy, or the people, because the effects of those circumventions are diffusely felt, agency officials will likely internalize only a fraction of the harms. They thus will underinvest in strategies to mitigate or altogether eliminate workarounds. The best comparison here would be to a manufacturer that in an unregulated jurisdiction discounts the true social costs of pollution and takes remedial steps only in proportion to how much the pollution directly affects its own private interests. See Hal R. Varian, *Intermediate Microeconomics* 563–68 (Norton 4th ed 1996).

<sup>208</sup> See *Americans United for Separation of Church and State v Prison Fellowship Ministries*, 432 F Supp 2d 862, 875, 920–30 (SD Iowa 2006) (enjoining a prison pre-release program that was based on evangelical Christianity), rev'd on other grounds, 509 F3d 406 (8th Cir 2007); *Moeller v Bradford County*, 444 F Supp 2d 316, 318, 332 (MD Pa 2006) (allowing taxpayers to challenge government funding of a privately run program that in addition to providing inmates with vocational rehabilitation services also included religious programming and proselytizing).

<sup>209</sup> See Citron, 80 S Cal L Rev at 256–61 (cited in note 6) (discussing efforts to flatten the status differentials in privacy laws). See also notes 221–24 and accompanying text.

<sup>210</sup> See Michaels, 82 Wash U L Q at 1010 (cited in note 15); Schooner, 33 Pub Cont L J at 266–67 (cited in note 21); Minow, 116 Harv L Rev at 1237 (cited in note 21). See also Verkuil, 84 NC L Rev at 443–44 (cited in note 2) (challenging military privatization as violating the restrictions on outsourcing inherently governmental activities).

There is some overlap between these approaches. Legislation has been introduced to ban military contractors. See Stop Outsourcing Security Act of 2008 (SOSA), HR 4102, 110th Cong, 1st Sess, in 153 Cong Rec H 13295 (Nov 7, 2007) (phasing out the use of private contractors in zones of conflict where Congress has authorized the use of force). And, contractor-accountability tools have been marshaled against apparent workarounds in the welfare privatization context. See Michaels, 34 Seton Hall L Rev at 579–80 (cited in note 95).

And, they depend on the ability to piggyback workarounds onto more established tools, such as the A-76 Framework, constitutional law, or the antidotes prescribed to counteract contractor manipulations.<sup>211</sup>

There is no apparent magic bullet solution to all workarounds. There may never be one. But right now, what we do have is a way of thinking about workarounds that calls for—and lends itself to—durable, transsubstantive interventions. What we have is the distinctive, underappreciated principal-principal-agent phenomenon characterized by a divergence of interests between the executive qua agent administering the contracts and one or more of the following entities qua principal: coordinate branches, successor administrations, the bureaucracy, or the people. In short, the way to understand workarounds is by unpacking the contractor’s “principal”; then, we can see how it—the executive, that is—too is a vulnerable link in the government-contracting chain for reasons other than its incompetence in overseeing contractors.<sup>212</sup> Doing so reveals that workarounds’ underlying structural problem is a corollary (but only a corollary) to the one we ascribe to lapses in contractor accountability.<sup>213</sup> Doing so also reveals a path forward in terms of fashioning regulatory protocols: giving the executive’s cuckolded principals the necessary information and the necessary opportunity to respond (directly or through more closely aligned proxies) to the contract, reassert their interests, and potentially mitigate the policy alterations in the process.

As this is the first academic foray into workarounds, and there has yet to be opportunity for robust debate or empirical inquiry, institutional prescriptions regarding the scope and mechanics of legal or regulatory intervention are better left for another day. That said, in anticipating—and helping to structure—those debates and studies, it is helpful to have a general idea of institutional design, and what intervention might look like. With that in mind, I offer up some basics.

### A. *Coordinate-Principal* Workarounds

A fitting place to begin is with *Coordinate-Principal* workarounds, which themselves warrant subclassification, as the constitutional and statutory workarounds tend to impose tolls on different coordinate branches. That is, the statutory workarounds are visited

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<sup>211</sup> See Part III (describing contemporary tools’ insensitivity); *Hein v Freedom from Religion Foundation*, 551 US 587, 593 (2007) (plurality); *Valley Forge Christian College v Americans United for Separation of Church and State*, 454 US 464, 489 (1981).

<sup>212</sup> See note 21.

<sup>213</sup> See notes 43–51 and accompanying text.

principally upon the legislature, and the constitutional workarounds encroach mainly on judicial prerogatives.

### 1. Statutory workarounds.

The goal in addressing statutory workarounds is to get the ball—or, more concretely, the *contract*—back in the legislature's court: to give the legislature the opportunity to respond, either by effectively endorsing the privatization initiative (through inaction) or by challenging the initiative by applying varying degrees of pressure on the executive. A political solution, as opposed to rule-based or adjudicative responses, makes sense for the following three reasons: (1) the legislature is capable of defending itself through political means; (2) a rule-based response would require extraordinary comprehensiveness to establish generally applicable laws responsive to each and every contractual wrinkle; and (3) there is not much law to apply, and thus not much of a role for adjudication. I discuss each in turn.

First, the legislature is capable of fighting back in the political arena.<sup>214</sup> Going forward, based on this and follow-up inquiries, there promises to be greater sensitivity to workarounds; thus there will be a range of opportunities for legislators to stay abreast of potential workarounds.<sup>215</sup> Once aware of workarounds, legislators can respond along any of the following lines: formal legislative review processes, whereby contracts are sent to city councils, state assemblies,<sup>216</sup> or Congress<sup>217</sup> for scrutiny prior to their execution; informal meetings with agency officials to voice concerns about a contract and to seek assurances that workarounds will be avoided or mitigated; threats to withhold agency funding for the relevant programs unless the contracts are rewritten; public grandstanding to shame the agency into crafting a new deal (or

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<sup>214</sup> Eric Biber, *How To Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 *Harv Envir L Rev* 1, 48–49 (2009).

<sup>215</sup> See Jack M. Beermann, *Congressional Administration*, 43 *San Diego L Rev* 61, 69–71 (2006); Matthew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 *Am J Pol Sci* 165, 165–67 (1984).

<sup>216</sup> Some jurisdictions have formal legislative review of certain classes of contracts. See, for example, DC Code § 2-301.05a (West); Kan Stat Ann § 12-5504(a).

<sup>217</sup> Nonbinding, but widely accepted review by the Government Accountability Office, a congressional entity, has withstood constitutional scrutiny notwithstanding *INS v Chadha*, 462 US 919, 959 (1983) (invalidating the legislative veto provision). See *Lear Siegler v Lehman*, 842 F2d 1102, 1104 (9th Cir 1988); *Ameron v Army Corps of Engineers*, 809 F2d 979, 982 (3d Cir 1986) (upholding the constitutionality of the powers granted to the Comptroller General under the CICA). See also Beermann, 43 *San Diego L Rev* at 118 & n 265. Consider *City of Alexandria v United States*, 737 F2d 1022, 1023 (Fed Cir 1984) (upholding a procedure under which the disposal of surplus government property was, in effect, subject to disapproval by a congressional committee).

simply to mitigate the workaround alteration);<sup>218</sup> or, with contracts “too important” to undo, gentle reminders to the agency that the legislators are keeping watch.<sup>219</sup>

What is especially useful about the array of tools is its diversity. The legislators can apply resistance in proportion to the perceived encroachment on their prerogatives. Clearly, context matters and not all workarounds will be viewed as equally problematic. Legislators may ask themselves: How dramatic is the legal gap being exploited? Is this a repeat offense? Is the policy disagreement minor or is this a program that was established over the executive’s veto, and now the executive is trying to circumvent that which it could not destroy upon presentment? The worst may warrant the withholding of agency funds; minor workarounds, a slap on the wrist.

This is not to say that the political solution is a perfect one. Far from it. Political input by legislators may generate new distortions in the course of their purportedly correcting the alleged workarounds. Indeed, powerful legislators may hijack oversight of the contracts such that parochial interests prevail. This appears to be an ironic twist on the executive’s practice of using technocratic privatization to orchestrate workarounds. Here, the legislators may invoke the specter of workarounds as an excuse to undo contracts for reasons entirely unrelated to workarounds. Moreover, this political solution depends on legislators identifying with their institution, rather than their political party. Undoubtedly party loyalties will complicate this process, sometimes provoking an unwarranted fight with the executive, and sometimes endorsing executive practices notwithstanding that they encroach on legislative power.<sup>220</sup>

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<sup>218</sup> See, for example, Renae Merle, *For Sikorsky, Loss of Contract Also Symbolizes Slip in Prestige*, Wash Post E1 (Jan 29, 2005) (citing congressional opposition to the award of a military contract to a foreign aeronautics firm); Jeffrey Birnbaum, *House Speaker Throws His Clout behind Controversial Air Force Tanker Deal*, Wash Post A10 (July 18, 2004); Philip Dine, *Probe Continues on Boeing Lease: Pentagon Official Says Investigation Could Hold Up Tanker Deal*, St. Louis Post-Dispatch B3 (Feb 12, 2004).

<sup>219</sup> Indeed, often when contractors fail to live up to contractual terms (on efficiency or competency grounds), government agencies nevertheless choose to continue the relationship because the alternative—starting the process over or insourcing the responsibilities—is prohibitively expensive (especially in terms of the lack of operational capacity during the transition stage). See Super, 96 Cal L Rev at 414–21 (cited in note 3) (describing the difficulties of replacing failed contractors).

<sup>220</sup> See, for example, Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2311, 2314 (2006) (arguing that constitutional theories based on Madisonian notions of separation of powers overlook the reality that competition between political parties, not among the branches, often prevails).

Second, in the course of this Article, many a reader may have come across an example of a workaround and said to herself, "That's easily corrected through legislative or regulatory fiat." Indeed, we have no shortage of examples of legislatures doing exactly that. Federal, state, and local governments have banned (or attempted to ban) contracts for certain types of services<sup>221</sup> and certain types of multiyear contracts.<sup>222</sup> Moreover, legislatures have attempted to close legal-status loopholes between contractors and government personnel,<sup>223</sup> and have required agencies to publish listings of hired contractors and imposed other mandatory terms on contracts that would, in effect, limit the potential for workarounds.<sup>224</sup>

Privatization's perceived value is in no small part a product of its comparative flexibility.<sup>225</sup> Thus, a comprehensive set of rules to fill in all of the remaining gaps would be practically difficult and yield limited benefits. Imposing sets of rules on contractors in anticipation of all sorts of workarounds (and their infinite permutations) would be a monumental undertaking. If successful, it would likely end up inhibiting many technocratic contracting relationships newly burdened by the weight of these generally applicable rules.<sup>226</sup> And, if comprehen-

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<sup>221</sup> See, for example, SOSA § 4 (proposing the phasing out of private security firms in combat zones); 730 ILCS Ann 140/2 (prohibiting the privatization of management or the operation of state prison facilities); Aviation and Transportation Security Act § 110(2)(a), Pub L No 107-71, 115 Stat 597, 614 (2001), codified at 49 USC § 44901(a) (limiting the privatization of airport security personnel).

<sup>222</sup> See, for example, Minn Stat § 16C.08(3)(5). See also James Harley, *Multiyear Contracts: Pitfalls and Quandaries*, 27 Pub Cont L J 555, 557-59 (1998); Raymond Saunders, *Competition in Multiyear Contracts*, 20 Pub Cont L J 210, 220-23 (1991).

<sup>223</sup> See, for example, John Warner National Defense Authorization Act for FY 2007 (Warner NDAA 07) § 552, Pub L No 109-364, 120 Stat 2083, 2217 (2006), codified at 10 USC § 802(a)(1) (eliminating some legal-status differentials between military contractors and soldiers); Military Extraterritorial Jurisdiction Act of 2000 § 2, Pub L No 106-523, 114 Stat 2488, 2489, codified at 18 USC §§ 3261-67 (extending criminal jurisdiction to contractors working for the Defense Department in overseas military engagements). See also Citron, 80 S Cal L Rev at 256-57 (cited in note 6) (describing state government proposals to close privacy law gaps).

<sup>224</sup> See NDAA 08 §§ 806-08, 122 Stat at 213-16; 48 CFR § 49.502; 48 CFR § 52.249-2.

<sup>225</sup> See Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in Freeman and Minow, eds, *Government by Contract* 153, 155 (cited in note 4) (describing the benefits of hiring contractors to perform services outside of an agency's "core competencies"); Freeman, 116 Harv L Rev at 1297 (cited in note 3) (noting that civil servant protections limit an employer's ability to reward and punish performance); Michaels, 82 Wash U L Q at 1063-64 (cited in note 15).

<sup>226</sup> Kelman, *Achieving Contracting Goals* at 162-64 (cited in note 225) (viewing additional rules as undermining privatization's efficiency goals); Richard J. Pierce, Jr, *Outsourcing Is Not Our Only Problem*, 76 Geo Wash L Rev 1216, 1219 (2008) (citing proposed legal remedies to privatization as overly burdensome on unproblematic contracts).

siveness remains elusive, the rules would obviously fall flat of the targeted regulatory goals. Furthermore, the entire premise of workarounds is finding and exploiting loopholes. Thus, innovative contract drafters would likely keep legislatures engaged in a never-ending game of catch-up.<sup>227</sup>

Third, it is not clear that there is any law to apply, thus an adjudicative process does not seem promising. These activities, when spearheaded by contractors, are technically legal; that is often why they are orchestrated in the first place.

As stated above, this discussion reflects initial considerations. In terms of thinking ahead, what would be helpful in assessing the propriety of the political approach would be our capacity to evaluate whether relevant information is actually making its way to the legislators, and whether legislators have the opportunity and discipline to make responsible interventions.

## 2. Constitutional workarounds.

Courts appear to be an appropriate venue for addressing constitutional workarounds. Courts are already open to these claims. Perhaps with greater sensitivity to the workaround phenomenon—based on inquiries such as the instant one—courts will begin looking more closely and with greater appreciation at the executive’s role in micro-managing the behavior of nominally private actors;<sup>228</sup> perhaps the

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Generally applicable rules prophylactically addressing potential workarounds might be especially burdensome in the national security context, where domestic legal concerns must often be balanced against geostrategic interests in a way that simply is unnecessary in ordinary regulatory contexts. See Jon D. Michaels, *Executive Authority in a Post-Westphalian World: How Global Trends Influence U.S. Separation of Powers*, Balkinization (Oct 1, 2009), online at <http://balkin.blogspot.com/2009/10/executive-authority-in-post-westphalian.html> (visited Dec 29, 2009) (citing the Coalition Provisional Authority, foreign interrogators and interrogations, domestic eavesdropping, black sites, and Guantanamo as examples of the executive trying to “conduct national security policy in less regulated space”).

<sup>227</sup> Consider Lawrence Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, and Other Ills*, 29 J Corp L 267, 335 (2004) (describing the ongoing battle for regulators to keep up with innovative, illicit financial schemes); Anita S. Krishnakumar, *Towards a Madisonian Approach to Lobbying Regulation*, 58 Ala L Rev 513, 573 (2007) (describing the same with respect to lobbying).

<sup>228</sup> The Fourth Amendment context is one in which the courts seem sensitive to the role the government might play in directing private proxies. See *United States v Robinson*, 390 F3d 853, 872 (6th Cir 2004) (“[T]o trigger Fourth Amendment protection under an agency theory, the police must have instigated, encouraged, or participated in the search, and the individual must have engaged in the search with the intent of assisting the police in their investigative efforts.”); *United States v Smith*, 383 F3d 700, 705 (8th Cir 2004) (same). Consider Mark Tushnet, *State Action in 2020*, in Jack M. Balkin and Reva B. Siegel, eds, *The Constitution in 2020* 69, 69–77 (Oxford 2009) (considering state action as attaching to government duties, regardless who carries



courts will also relax some of their procedural requirements to ensure that, at least as a threshold matter, they are able to hear claims against private contractors.<sup>229</sup> Either way, there is no reason to reinvent the wheel simply because the courts are an obvious choice, or because they have not been as assertive in resisting executive encroachments as some might like.<sup>230</sup> Indeed, courts' indifference may be the most accurate signal that the encroachment is an unproblematic one.<sup>231</sup>

### B. *Intergenerational-Principal Workarounds*

The issue with binding future administrations is a question of intergenerational sovereignty.<sup>232</sup> This workaround is unique among the four principal-principal-agent phenomena insofar as there is no physical manifestation of the successor administration's interests—no entity that can use politics or law to challenge the executive's workaround. Nor do we know what those interests are, other than, presumably, a preference for maximum flexibility to implement its own agenda.

Courts may be best positioned as a matter of institutional disposition to protect these interests.<sup>233</sup> But as a constitutional matter they tend to resist efforts by successor governments to change or cancel

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them out, rather than only to government actions); Barak-Erez, 45 *Syracuse L Rev* at 1171 (cited in note 21) (addressing the need for constitutional protection of rights stemming from delegation of services to private parties and suggesting a new test for "state action").

<sup>229</sup> See *Hein*, 551 US at 592–93 (refusing a taxpayer suit challenging the use of federal funds on the Faith-Based and Community Initiatives program); *Valley Forge*, 454 US at 489 (rejecting on standing grounds a taxpayer challenge to the government's conveyance of public property to church group). See also *Lujan v Defenders of Wildlife*, 504 US 555, 559–62 (1992) (denying standing to challenge federal funding of overseas programs because plaintiffs' injury was viewed as too speculative); *Schlesinger v Reservists*, 418 US 208, 209, 212 (1974) (denying citizen and taxpayer standing to anti-war group raising Incompatibility Clause claims vis-à-vis members of Congress serving in the military Reserves).

<sup>230</sup> See notes 72–73 and accompanying text.

<sup>231</sup> Consider *Commodity Futures Trading Commission v Schor*, 478 US 833, 848 (1986) (noting the central role courts play in protecting their own prerogatives "within the constitutional scheme of tripartite government" and the importance of the courts' safeguarding those prerogatives to ensure they are "free from potential domination by other branches of government" when they adjudicate individual claims).

<sup>232</sup> See, for example, David Dana and Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 *U Pa L Rev* 473, 526–36 (1999) (questioning whether Congress should be able to restrict future congressional action); Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 *Hastings Const L Q* 185, 186 (1986) (arguing that congressional attempts to restrict the actions of a future Congress raise some serious constitutional concerns not addressed by either nondelegation nor separation of powers doctrines).

<sup>233</sup> Compare note 56 and accompanying text with Eric A. Posner, *Agencies Should Ignore Distant-Future Generations*, 74 *U Chi L Rev* 139, 143 (2007); Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment*, 111 *Yale L J* 1665, 1066 (2002).

existing government contracts that they have inherited.<sup>234</sup> With that in mind, it seems as if two options are worth exploring: a default presumption against allowing contracts that extend into a subsequent administration, or generally applicable laws effectively prohibiting such contracts.

First, a default assumption against contracting imposed on procurement officials could be added—perhaps as a third criterion to the A-76 Framework: before a contract is executed, it must be found to be not *unnecessarily binding* on the policy discretion of future administrations. That is to say, there must be either an overriding interest that justifies the binding effects, or a determination that there is no policy discretion being constrained. For example, to justify an “overriding interest,” officials might have to show the necessity of the contract in terms that cannot boil down exclusively to cost savings. Instead, perhaps, there must be (1) some urgency for services, (2) some nonmonetary reason why the government cannot perform those services on its own, and (3) no market participant willing to provide the services for a shorter period of time without insisting on an untenable risk premium.

Alternatively, to support a conclusion that there is “no policy discretion being constrained,” the officials would have to find that there is nothing about the contract that reflects substantive policy choices—that is, that there is no workaround afoot. Thus, if the municipality has always had once-a-week trash collection, and every other town in the region has always had once-a-week trash collection, there is likely little future policy discretion being constrained by a long-term contract calling for a private firm to provide once-a-week trash collection. A new administration inheriting the contract may object to the finances and the logistics of the arrangement. But the new administration is not constrained in terms of substantive policy flexibility in the same way it would have been had the arrangement provided for, say, daily recycling—an unprecedented practice that for argument’s sake has no analogue in any other town or county in the region (and would not otherwise be offered). To keep the administrators honest,<sup>235</sup> the decision, like the inherently governmental and efficiency determinations, could be subject to agency or judicial challenge. In such cases, interested parties (for example, those who are adversely affected by the contract) could adequately represent the future administration’s interest in not being bound.<sup>236</sup>

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<sup>234</sup> See *United States v Winstar*, 518 US 839, 843 (1996) (plurality).

<sup>235</sup> See notes 204–05 and accompanying text.

<sup>236</sup> See notes 175–77, 186, and accompanying text.

Second, we could rely on ex ante rules, either forbidding contracts that survive the incumbent's tenure or requiring such contracts to include termination-for-convenience provisions.<sup>237</sup> While having the benefit of clarity and consistency that agency default presumptions lack, we might, however, worry that certain agreements—such as those for which there is an “overriding interest”—would no longer be possible.<sup>238</sup> The tradeoff between the two regimes is thus an application of the rules versus standards consideration:<sup>239</sup> how often do overriding interests occur such that we would want only a presumption against long-term contracts as opposed to a categorical rule? Again, further inquiry and data would be helpful here in providing support for preferring one regime to the other.

### C. *Intra-Principal* Workarounds

*Intra-Principal* workarounds turn on the executive at war with its staff. The legislature may be the most effective forum to address allegations of these workarounds for two reasons. First, these allegations are highly political and contextual and thus do not lend themselves to neutral adjudication. The line dividing ordinary government contracts (that invariably replace civil servants with contractors) from workarounds is not one that judges are well equipped to patrol. Sometimes the differences are glaring and admit to easy detection. For example, outsourcing tollbooth collection jobs will likely never alter programmatic policy because neither government toll collectors nor their private counterparts play any role in making substantive decisions. Of course, if tollbooth outsourcing were part of a ten-year contract, it might limit future administrations' ability to change course with respect to transportation-planning initiatives.<sup>240</sup> But if the outsourcing

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<sup>237</sup> See note 222 and accompanying text. See also 48 CFR §§ 17.104, 17.202, 17.207, 37.106 (restricting government contracting by setting forth requirements such as contracting for only the near future, the presence of a government need for such a contract, and the need for funds to be currently available for the contract).

<sup>238</sup> See note 96 and accompanying text. Moreover generally applicable rules that work for *Intergenerational-Principal* problems might exacerbate *Intra-Principal* problems. For those cases, we would want a very different rule—perhaps the opposite rule. Specifically, in *Intra-Principal* scenarios, we might prefer long-term contracts coupled with “termination for cause only” requirements. This, after all, would make the contractors more like the independent bureaucrats who we fear are being replaced precisely on account of their independence. See Part IV.C.

<sup>239</sup> See Pierre Schlag, *Rules and Standards*, 33 UCLA L Rev 379, 429–30 (1985); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L J 65, 66 (1983).

<sup>240</sup> Consider Noah Bierman, *Leasing Pike May Pay Off, but at Cost*, Boston Globe B1 (Dec 3, 2008) (describing the concerns about long-term contracting out of toll roads and tun-

were long term, we would have other tools in place, such as those discussed immediately above,<sup>241</sup> to address that potential intergenerational workaround problem.

What about a state environmental agency that hires scientists as private contractors? The agency may simply be securing the best talent available as the agency prepares to enact a rule for emissions standards.<sup>242</sup> Or, it may be shopping for like-minded experts to marginalize the contrarian claims put forward by the professional staff.<sup>243</sup> Context—such as the preparation for a new rule—might or might not make the contract look suspicious. More digging would have to be done to gauge whether policy is likely to be altered via privatization. We would have to assess a given bureaucratic culture and determine whether the civil servants are particularly assertive or docile; whether they are at odds with the leadership;<sup>244</sup> whether the responsibilities in question are regularly outsourced;<sup>245</sup> whether what is being outsourced is sufficiently politically salient to merit the trouble of orchestrating a workaround; and whether the policy outcome is likely to turn in any way on professional-staff level input.<sup>246</sup> This calls for political evaluation of the sort better entrusted to elected officials.<sup>247</sup>

Second, the legislature has an institutional interest in challenging the executive on these issues. Insofar as civil service protections exist as a matter of legislative grace,<sup>248</sup> legislators are a decent proxy for the bureaucrats;<sup>249</sup> the same is true with respect to the role legislators play in insulating certain agency functions and responsibilities from the

nels); Tom Barnes, *U.S. Says No to I-80 Tolls; Rendell: Privatize Turnpike or Face Crisis*, Pittsburgh Post-Gazette A1 (Sept 14, 2008).

<sup>241</sup> See Part IV.B.

<sup>242</sup> See Guttman, 52 Admin L Rev at 883–89 (cited in note 21) (describing the agencies that rely on specialized, high-tech contractors).

<sup>243</sup> See Guttman and Willner, *The Shadow Government* at 63–78, 151–52 (cited in note 106).

<sup>244</sup> See Aberbach and Rockman, *In the Web of Politics* at 10 (cited in note 106).

<sup>245</sup> Guttman, 52 Admin L Rev at 868–75 (cited in note 21) (describing the frequency with which the Air Force and the Department of Energy contract out important governmental responsibilities).

<sup>246</sup> See notes 99–106 and accompanying text.

<sup>247</sup> For some difficulties associated with generally applicable rules and workarounds, see notes 240 and 255.

<sup>248</sup> See note 12 and accompanying text.

<sup>249</sup> They are not perfect proxies. Legislative majorities may, on the one hand, believe that an independent, strong civil service protected from political hectoring makes sense in the aggregate while, on the other, endorse the subordination of the civil service in specific contexts where the subordination advances particular policy preferences. See Levinson and Pildes, 119 Harv L Rev at 2313–14 (cited in note 220).

political predilections of the executive.<sup>250</sup> Indeed, for these reasons, *Intra-Principal* workarounds are structurally similar to the *Coordinate-Principal* phenomena discussed above—and likewise are a matter for the popular branches to fight over.<sup>251</sup>

#### D. Voter-Principal Workarounds

*Voter-Principal* workarounds turn entirely on the executive successfully concealing its policy moves from the people; recall that the executive does so by entering into difficult-to-comprehend contracts.<sup>252</sup> No law is broken or even circumvented in these contracts; further, there is no reason to assume the legislature would, on these issues, be significantly more accountable—or responsible—to the people than the executive.<sup>253</sup> This is especially true given the legislature's complicity in the resource-mandate mismatch.<sup>254</sup>

Instead, what is needed is greater transparency in privatization decisionmaking, and what we should strive for is a level informational playing field. That would make the people whole. Needless to say, a “level informational playing field” does not guarantee that the information provided will be particularly elucidating; nor does it mean that the now better-informed public will express outrage, or even subtly constrain the executive's policy preferences in ways it could not do when those policies were occluded via contract. It simply ensures that whatever consent and political capital the people give the executive has not been made *less knowing* by privatization.

Notwithstanding the problems associated with generally applicable rules for each and every contract permutation,<sup>255</sup> an across-the-

<sup>250</sup> See, for example, *Massachusetts v EPA*, 549 US 497, 532–35 (2007); *Morrison v Olson*, 487 US 654, 676 (1988); *Portland Audubon Society v Endangered Species Committee*, 984 F2d 1534, 1545 (9th Cir 1993).

<sup>251</sup> Consider *Baker v Carr*, 369 US 186, 217 (1962) (holding that “political questions” are not the province of the courts); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L J 1457, 1465–69 (2005) (suggesting that the courts have a role to play in deciding questions of individual rights but should largely abstain from deciding questions concerning separation of powers between the political branches).

<sup>252</sup> See Part II.D.

<sup>253</sup> See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark L Rev 23, 58–70 (1995); Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 102–03 (1994); Mashaw, 1 J L, Econ, & Org at 87 (cited in note 54).

<sup>254</sup> See note 138 and accompanying text.

<sup>255</sup> For example, the infamous Abu Ghraib private interrogators were essentially loaned to the Army by the US Department of the Interior. See Article 15-6 Investigation of the 800th Military Police Brigade (“Taguba Report”), online at [http://www.humanrightsfirst.org/us\\_law/800th\\_MP\\_Brigade\\_MASTER14\\_Mar\\_04-dc.pdf](http://www.humanrightsfirst.org/us_law/800th_MP_Brigade_MASTER14_Mar_04-dc.pdf) (visited Dec 30, 2009); *Fay Report* at 48–49 (cited in note 52) (noting that it was “not clear” why the interrogators were hired through

board law requiring agencies to complete and publish, say, Information Impact Statements might do the trick.<sup>256</sup> Part “executive summary” to explain the terms of the contract in plain language and part “legend” to help citizens orient themselves if they choose to delve deeper into the nuances of the contract, the statements would help create a regime of *transparency neutrality* between public and private arrangements. Penalties for failure to disclose or for providing misleading information could be added to ensure compliance.<sup>257</sup> Besides such penalties, there would be no other remediation. It would be up to the people, as now better informed principals, to proceed as they see fit.

### CONCLUSION

This Article has advanced three principal missions. It has identified and described workarounds as a distinct and undertheorized phenomenon with significant legal and policy implications. It has explained how our current stock of regulatory and conceptual tools are insensitive to workarounds. And, it has suggested workaround-specific approaches to confront the phenomenon on its own terms.

By way of conclusion, this Article invites further consideration of the state of the privatization agenda and how it may progress, regress, or itself change course in light of our newfound sensitivity to worka-

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the Interior Department and that “[p]erforming the interrogation function in-house has several benefits for the Army”). The *interrogators*’ contracts with Interior said nothing about giving the third-degree to fish and wildlife. Rather, the statements of work indicated that these contractors would provide computer and other IT services. See *Fay Report* at 49. See also Cooper, 62 Cong Q Wkly Rep at 2194 (cited in note 15). See also note 145. Though an extreme case to say the least, the complexity and opacity of this contract suggests ways in which rules are inevitably going to miss those contracts that policy entrepreneurs want to conceal. The rules will thus be underinclusive insofar as no one would think to use legislation to extend, say, the Uniform Code of Military Justice to contractors we assume are working in our national parks. Alternatively, if all contractors working, say, at Yosemite National Park were expected to comply with military law—just in case, for example, a Custer Battles private-security contract happened to be routed through that agency, the rules would be unmanageably and likely unconstitutionally overbroad. Consider Diane H. Mazur, *Constitutional Separatism and the Stealth Advance of Martial Law*, 77 Ind L J 701, 734–48 (2002); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 Suffolk Univ L Rev 441, 443–49 (1999).

<sup>256</sup> Consider Executive Order 12866, 3 CFR § 638 (1993) (instructing agencies to report on “qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider” and to prioritize “approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity”). See Serge Taylor, *Making Bureaucracies Think* 251, 295 (Stanford 1984) (noting the wide range of impact statement requirements imposed on agencies).

<sup>257</sup> See, for example, Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 Colum L Rev 903, 914 & n 41 (2002); Peter Raven-Hansen, *Making Agencies Follow Orders*, 1983 Duke L J 285, 291.

rounds. How will public consciousness of workarounds affect our understanding of the tradeoffs between bureaucracy and the market, what we want and expect from the contractor-government relationship, and what we want and expect from the executive-“rest-of-the-government” relationships?

These questions are raised to suggest that any thinking about workarounds or about a workaround regulatory scheme must be placed into the broader context of privatization. They must also be connected to other executive-aggrandizing practices that do not rely on contracting out but nonetheless alter policy outcomes in similar ways. Though the need to address workarounds is pressing irrespective of the prevailing mood about government contracting writ large, or about executive authority, it is nevertheless worth mentioning that the timing of this inquiry is particularly opportune. This Article takes up the project of workarounds at a moment of perhaps unprecedented government receptiveness to structural reform<sup>258</sup> after decades of unbridled and bipartisan privatization wanderlust.<sup>259</sup> And, it takes place at a moment marked by a concerted effort to rethink executive authority in light of recent allegations of presidential overreaching in areas of domestic surveillance, coercive interrogations, government secrecy, and the politicization of the federal bureaucracy.<sup>260</sup>

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<sup>258</sup> Indeed, in 2008, Congress established a bipartisan Commission on Wartime Contracting, see NDAA 08 § 841, 122 Stat at 230–34, modeled in part on the Truman Commission and its work in ferreting out profiteering during World War II. See generally Parrillo, 57 *Hastings L J* at 98–99 (cited in note 94); Donald Riddle, *The Truman Committee: A Study in Congressional Responsibility* (Rutgers 1964). And, in its 2009 Omnibus Appropriations Act, Congress suspended OMB A-76 competitions for the fiscal year ending in September 2009. See 123 Stat 524, 691.

Moreover, upon assuming office, President Barack Obama issued a memorandum calling for greater fiscal and legal “accountability” over government contracts. See Barack Obama, Memorandum from President Barack Obama for the Heads of the Executive Agencies, Government Contracting, 74 *Fed Reg* 9755, 9755 (Mar 4, 2009). And, the Pentagon recently announced its intention to scale back reliance on contractors and engage in “insourcing,” effectively reversing the trend toward privatization. See Memorandum from Deputy Secretary of Defense William Lynn, In-Sourcing Contracted Services—Implementation Guidance 7 (May 28, 2009), online at [http://www.defenselink.mil/prhome/docs/DepSecDef%20Memo%20In-sourcing%20Contracted%20Services-Implementation%20Guidance%20\(28%20May%202009\).pdf](http://www.defenselink.mil/prhome/docs/DepSecDef%20Memo%20In-sourcing%20Contracted%20Services-Implementation%20Guidance%20(28%20May%202009).pdf) (visited Dec 30, 2009) (stating that currently outsourced services should be insourced if insourcing is more cost effective).

<sup>259</sup> Freeman and Minow, *Introduction: Reframing the Outsourcing Debates* at 7–8 (cited in note 4); Grasso, *Defense Outsourcing* at 1 (cited in note 167); Michaels, 34 *Seton Hall L Rev* at 579–80 (cited in note 95); Freeman, 116 *Harv L Rev* at 1292–94 (cited in note 3); Jerry Mashaw, *Reason and Legitimacy in the Administrative State*, 70 *Fordham L Rev* 17, 27 (2001).

<sup>260</sup> See, for example, Arlen Specter, *The Need to Roll Back Presidential Power Grabs*, NY *Rev Books* 48, 50 (May 14, 2009) (arguing for the need for reform that provides further legislative checks on executive power); Neil Lewis, *Justice Dept. under Obama Is Preparing for Doctrinal Shift in Policies of Bush Years*, NY *Times* A14 (Feb 2, 2009) (describing a “sea change” in DOJ policy, including the creation of a new policy for detention of terrorism suspects); Andrew

Thus, regardless of our normative conclusions—on privatization, separation of powers, and institutional design—it is nevertheless incumbent on us to continue to explore the world of workarounds, understand it, and develop tools to identify workarounds and, when necessary, to intervene. Ideally, as we push these inquiries further, we do so now more cognizant of the connections between workarounds and other government-contracting concerns, as well as between workarounds and other separation of powers concerns.

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Ward, *Ethics Rules Mark "Clean Break" from Past*, *Fin Times* 6 (Jan 22, 2009) (noting a pay freeze on senior White House staff positions, new ethics rules, and the signing of an executive order curbing lobbying, all meant to increase government transparency). But see Editorial, *Obama Channels Cheney*, *Wall St J* A10 (Mar 7, 2009) (claiming that the Obama administration's invocation of the state secrets doctrine, effectively preventing courts from reviewing allegations of illegal wiretapping, is "identical to, if not more aggressive than" President Bush's position).