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The Private Performing The Public: Delimiting Delegations To Private Parties

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I. INTRODUCTION

Private parties discharge critical roles in the Obama Administration, as they have in administrations past.[1] Examples from the Obama

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1. *See, e.g.*, PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 9–10 (2007) (tracing privatization decisions back to the Reagan Administration); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 552 (2000) (explaining that the privatization of government-financed human services has been ongoing for the past half-century); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1380–94 (2003) (discussing privatization in the fields of Medicare and Medicaid, welfare, public education, and private prisons).

Administration include defending Congress's determination to use a quasi-private entity, the Public Company Accounting Oversight Board (PCAOB), to regulate those providing accounting services to publicly traded firms;[2] appointing an attorney in private practice, Kenneth Feinberg, to set executive compensation rates;[3] directing a private advisory group to investigate and report potential civil liberties violations by governmental authorities;[4] and advocating that a private entity—the National Academy of Sciences—play a determinative role in setting global warming policy.[5] In addition, the Administration acquiesced to a proposal creating a private Cybersecurity Advisory Panel that could have vetoed action by the Department of Commerce.[6] As with its predecessors, the Obama Administration also has contracted out a wide variety of services and duties to the private sector,[7] in contexts ranging from

2. In 2002, Congress established the PCAOB "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports . . . ." 15 U.S.C. § 7211 (2006). In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138, 3149 (2010), the Supreme Court upheld the constitutionality of the PCAOB, with the exception of the double layer of removal provisions protecting members of the PCAOB from discharge except for cause.

3. *See* Press Release, White House Office of the Press Secretary, Press Briefing by Press Secretary Robert Gibbs and Secretary of Commerce Gary Locke (June 10, 2009), *available at* http://www.whitehouse.gov/the-press-office/briefing-secretary-commerce-gary-locke-and-press-secretary-robert-gibbs-6-10-09 ("Ken Feinberg is going to assume the role of special master that will allow him to review . . . compensation packages for those companies that are either receiving extraordinary assistance or might in the future"); *see also* Stephen Labaton, *Treasury To Set Executives' Pay at 7 Ailing Firms*, N.Y. TIMES, June 10, 2009, http://www.nytimes.com/2009/06/11/business/11pay.html; Deborah Solomon, *White House Set To Appoint a Pay Czar*, WALL ST. J., June 5, 2009, http://online.wsj.com/article/SB124416737421887739.html; FINANCIAL STABILITY OVERSIGHT BOARD, MINUTES OF THE FINANCIAL STABILITY OVERSIGHT BOARD MEETING JUNE 25, 2009 (2009), *available at* http://www.financialstability.gov/docs/FSOB/FINSOB-Minutes-062509.pdf.

4. Exec. Order No. 13,516, 74 Fed. Reg. 56,521 (Nov. 2, 2009) (enhancing the authority of an oversight board created for the purpose of monitoring unlawful intelligence activities).

5. For example, the President stated in a press statement in June 2009 that he commended Congressman Waxman on his commitment and felt that this bill was a "historic" piece of legislation. *See* Press Release, White House Office of the Press Secretary, Statement by the President on Committee Passage of the American Clean Energy and Security Act (May 21, 2009), *available at* http://www.whitehouse.gov/the-press-office/statement-president-committee-passage-american-clean-energy-and-security-act.

6. Cybersecurity Act of 2009, S. 773, 111th Cong. § 8(a)(1)–(3) (2009) ("No action by the Assistant Secretary of Commerce for Communications and Information . . . shall be final until the Advisory Panel (1) has reviewed the action; (2) considered the commercial and national security implications of the action; and (3) approved the action").

7. In Fiscal Year 2007, for example, the government contracted out $268 billion of services. Kathleen Clark, Ethics for an Outsourced Government 26–32 (Oct. 6, 2010), http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics/ (unpublished manuscript) (on file with author).

national security[8] to claims adjudication.[9] Such use of private parties to help implement federal law raises profound questions of constitutional propriety and democracy[10]—private parties help set governmental policy largely outside the conflict of interest and transparency rules[11] typified by statutes such as the Hatch Act,[12] Ethics in Government Act,[13] Freedom of Information Act (FOIA),[14] the Sunshine Act,[15] and the Administrative Procedure Act.[16]

This article will reexamine whether there should be constitutional constraints on congressional and presidential delegations to private parties and what those constraints might consist of. Although the propriety of the private exercise of public powers rarely has been litigated, the Supreme Court struggled with that question during the New Deal when Congress created a number of innovative governance structures combining public and private entities in an effort to end the Great Depression. Indeed, on several occasions, such as in *Carter v. Carter Coal Co.*[17] and

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8. *See, e.g.*, James Rosen, *Obama Administration Steers Lucrative No-Bid Contract for Afghan Work to Democratic Donor*, FOXNEWS.COM (Jan. 25, 2010), http://www.foxnews.com/politics/2010/01/25/obama-administration-steers-lucrative-bid-conract-afghan-work-dem-donor.

9. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-621T, DEFENSE ACQUISITIONS: DOD'S INCREASED RELIANCE ON SERVICE CONTRACTORS EXACERBATES LONG-STANDING CHALLENGES 1, 4 (2008). Commentators increasingly acknowledge the rich ways in which private parties can contribute to public governance, whether through negotiated rulemaking, advising governmental regulators, or helping to deliver governmental goods and services. For example, envoys are often dispatched to negotiate treaties, secure the release of prisoners, and pursue similar objectives. For a discussion of these envoys, see, for example, Aaron Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. (forthcoming 2011); John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 436–39 (2008). For further discussions on privatization of government services, see, for example, Michael Glanzer, *Union Strategies in Privatization: Shakespeare—Inspired Alternatives*, 64 ALB. L. REV. 437, 440–458 (2000). For further discussions of private influence on public laws, see, for example, Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 389–96 (2006); Freeman, *supra* note 1, at 551–56.

10. *See* VERKUIL, *supra* note 1; Metzger, *supra* note 1; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 427–36 (2009).

11. Congress generally has imposed such constraints only on "agencies," defined, for example, as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ." 5 U.S.C. § 551(1) (2006).

12. Hatch Act Reform Amendments of 1993 (Hatch Act), Pub. L. No. 103-94, 107 Stat. 1001 (codified in 5 U.S.C. § 732 et seq.).

13. Pub. L. No. 95–521, 92 Stat. 824 (codified as amended in scattered sections of 5 U.S.C.).

14. 5 U.S.C. § 552 (2006).

15. Government in the Sunshine Act (Open Meetings Act), 5 U.S.C. § 552b (2006). For a more complete listing of the ethics rules constraining government employees, see *infra* notes 266–77.

16. 5 U.S.C. §§ 551–559, 701–706 (2006).

17. 298 U.S. 238, 311 (1936) (invalidating delegation to a private party under the Bituminous Coal Conservation Act).

in *A.L.A. Schechter Poultry Corp. v. United States*,[18] the Court invalidated delegations in part because of the role accorded private parties. When Congress delegates to private entities, the evils of massive delegations to independent agencies seem magnified—private entities are less electorally accountable, less subject to bureaucratic constraints, and may be less motivated to serve the public good than are independent administrative agencies. Moreover, private decisionmaking may escape both judicial review and constitutional restraints.[19] Even after the repudiation of much 1930s era jurisprudence, the Supreme Court on occasion has continued to warn of the special vices of the exercise of public power by private individuals,[20] and lower courts as well at times have decried the particular evils of delegations to private parties.[21]

The few courts to address the issue over the past eighty years have used three doctrinal lenses. First, courts looked to the Due Process Clause as a protection against self-interested involvement by private parties in implementation of federal law.[22] Second, courts used the nondelegation doctrine, particularly during the New Deal, to invalidate a number of delegations to private producer groups.[23] Third, and more recently,

18. 295 U.S. 495, 537 (1935) (criticizing delegation to a private party under the National Recovery Act).

19. The state action doctrine at times imposes constitutional restraints on private actors. *See, e.g.*, West v. Atkins, 487 U.S. 42, 57 (1988) (finding that a physician contracted to provide services to a prison is performing a state action because states otherwise could evade constitutional responsibilities by subcontracting services).

20. *See, e.g.*, Robertson v. United States *ex rel.* Watson, 130 S. Ct. 2184, 2190 (2010) (Roberts, J., dissenting) ("A basic step in organizing a civilized society is to take that sword out of private hands and turn it over to the organized government, acting on behalf of all the people."); Nike, Inc. v. Kasky, 539 U.S. 654, 680–81 (2003) (Breyer, J., dissenting) (noting that California's system of false-advertising regulation delegates excessive power to private parties that burdens speech); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 804–810 (1987) (addressing problems of self-interested prosecution by a private party); Fuentes v. Shevin, 407 U.S. 67, 93 (1972) (holding that a state scheme permitting a creditor to obtain a writ based on ex parte allegations delegates too much authority to a private party).

21. *See, e.g.*, Hays v. Sebelius, 589 F.3d 1279, 1283 (D.C. Cir. 2009) (Randolph, J., concurring) (questioning whether Congress could delegate lawmaking functions to private contractors); City of Dallas v. FCC, 165 F.3d 341, 357–58 (5th Cir. 1999) (invalidating a rule permitting video-system providers to discriminate among cable operators on the ground that such a rule constitutes "a delegation of regulatory authority to impose a cost on another regulatory entity"); Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1459 (2d Cir. 1991) (holding that New York's prevailing wage law would be an unconstitutional private delegation if the State did not investigate whether certain collective bargaining agreements were collusive); Geo-Tech Reclamation Indus. v. Hamrick, 886 F. 2d 662, 664–66 (4th Cir. 1989) (noting, in dicta, that a statute authorizing the denial of a landfill permit based upon community opposition may constitute an impermissible private delegation).

22. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–65 (2009); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

23. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311–312 (1936); St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 287–88 (1908).

academics have suggested that judges turn to the President's appointment and removal authorities to safeguard the public exercise of governmental authority. Individuals appointed by the President and subject to his removal authority presumptively implement the law in a public regarding way, minimizing concern for self dealing.[24]

None of the three doctrinal formulations, however, specifically addresses the problem of delegation to private parties. The Due Process Clause traditionally has not been relied upon to prevent delegations to private firms, at least as long as property and liberty rights are not directly involved. The nondelegation doctrine is indifferent to the identity of the individual exercising the power—if legislative standards exist, the individual's private status does not come into play. And, only appointments to "offices" trigger the Appointments Clause—appointment of individuals and groups to exercise discrete or episodic functions escapes Article II scrutiny.[25] The lack of fit between the three doctrines and delegation to private parties has obscured the unique status of private party governance.

Accordingly, this Article first argues (as have others) that the exercise of private power at times violates the constitutional principle of accountability.[26] The Constitution does not authorize either Congress or the President to outsource what I term decisional authority to private parties—authority that binds other private parties in the government's name. Private parties are not subject to presidential appointment or removal; nor are they subject to impeachment. Exercise of authority by private parties may escape the checks and balances woven into the Constitution. As a result, individual liberty may be compromised.

The Article then asks whether a doctrine more tailored than those used by the Supreme Court in prior cases can be fashioned. There often is no clear demarcation between the public and private exercise of governmental authority, as many examples from the Obama Administration indicate, from the directors of the majority-owned General Motors[27] to private members of the Federal Open Market Committee,[28] and from Kenneth Feinberg as compensation czar[29] to the plethora of security

24. Morrison v. Olson, 487 U.S. 654, 692–93 (1988).

25. *Compare* Auffmordt v. Hedden, 137 U.S. 310, 324–28 (1890), *and* United States v. Germaine, 99 U.S. 508, 511–12 (1879), *with* U.S. v. Hartwell, 73 U.S. 385, 393–96 (1867).

26. *See infra* Part III.

27. *See* Neil King, Jr. & Sharon Terlep, *GM Collapses into Government's Arms*, WALL ST. J., June 2, 2009, http://online.wsj.com/article/SB124385428627671889.html.

28. *See* 12 U.S.C. § 263 (2006) (establishing a "Federal Open Market Committee" consisting of "five members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks").

29. *See supra* note 3.

functions contracted out by the Department of Homeland Security.[30] The recent bailouts of AIG,[31] the banks, and GM have blurred the lines between the public and private sectors further.[32] The public/private distinction has long bedeviled courts and commentators.

Nonetheless, the Article argues that a doctrine can be fashioned to check untoward delegations of power to private parties. The first doctrinal step should focus on what type or level of authority exercised by private entities is constitutionally problematic. Neither the scope nor subject matter of duties should be determinative. Rather, the nature of the duties delegated should control. As the Supreme Court has held in an analogous context,[33] private parties and entities should not be able to determine the rights of other private parties in the name of the United States, which I referred to earlier as decisional authority.

The second step in a refashioned doctrine should focus on whether the actor should be treated as public or private. The issue is noncontroversial if the individual is appointed in conformance with Article II or receives a federal governmental salary. Such governmental status ensures public accountability and oversight. A label of "private," however, by itself is not necessarily damning. Indeed, as the prior examples attest, it is not always clear whether the entity is public or private, because attributes of both are present. In such cases, the key in determining the propriety of the delegation of decisional authority lies in the applicability of government-wide rules and regulations designed to ensure that public officials discharge tasks in a public regarding way. Those rules and regulations, whether FOIA or the Ethics in Government Act, reflect what we expect from public servants, and so decisions to exempt actors from such constraints make it more likely that the delegation of decisional authority is impermissible.

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30. *See, e.g.*, Thomas A. Coulter, *An Overview of the Current Government Contracts Climate*, *in* THE IMPACT OF RECENT CHANGES IN GOVERNMENT CONTRACTS: LEADING LAWYERS ON UNDERSTANDING THE EFFECTS OF THE STIMULUS PROGRAM, ADDRESSING COMPLIANCE CONCERNS, AND ANALYZING THE LATEST REGULATIONS (INSIDE THE MINDS) 73 (2010), *available at* 2010 WL 1616852.

31. The federal government may own over 90% of AIG's common shares after it converts its preferred shares. *See* Erik Holm, *UBS Sees Buying Opportunity on AIG Shares as U.S. Exit Looms*, WALL ST. J., Oct. 18, 2010, http://online.wsj.com/article/BT-CO-20101018-709152.html.

32. For news perspectives on the AIG Bailout, banks, and GM, and how these incidents have blurred the private and public lines, see, for example, Carter Dougherty, *Stopping a Financial Crisis, the Swedish Way*, N.Y. TIMES, Sept. 22, 2008, http://www.nytimes.com/2008/09/23/business/worldbusiness/23krona.html; King, Jr. & Terlep, *supra* note 27; Editorial, *The Never-Ending Bailout*, N.Y. TIMES, Mar. 2, 2009, http://www.nytimes.com/2009/03/03/opinion/03tue1.html.

33. *Cf.* INS v. Chadha, 462 U.S. 919, 952 (1983) (considering the extent to which Congress can vest executive type functions or significant authority in its own agents).

In short, private parties' exercise of unchecked decisional governmental authority cannot be squared with the constitutional structure. If a challenge arises, courts should not invoke the Due Process, nondelegation, or Article II tests. Rather, they should inquire more straightforwardly whether the authority is decisional and whether the entity exercising such authority is sufficiently removed from governmental checks to be considered private. From that perspective, at least some of the developments in the Obama Administration appear constitutionally problematic.

II. DELEGATIONS TO PRIVATE PARTIES

A. *Examples from the Obama Administration*

Although it is difficult to assess presidential trends after just two years, the Obama Administration seems as willing (and perhaps more) as its predecessors to invite private parties into the government. His administration has been open to utilization of private entities in a variety of areas.

1. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

In the wake of the Enron debacle, Congress created the PCAOB as part of the Sarbanes-Oxley Act of 2002[34] to regulate accounting methods and procedures for publicly traded companies.[35] Accounting firms must register with the Board and comply with the regulatory standards issued by the Board.[36] In addition, the PCAOB conducts inspections of registered accounting firms, both on a regular basis and in response to allegations of noncompliance with its standards.[37]

The PCAOB is unique in that its members are appointed by the Securities and Exchange Commission to five-year terms[38] and subject to removal by the Commission for good cause shown.[39] The President can remove members of the SEC for cause,[40] which in turn can remove members of the PCAOB only for cause, thus insulating members of the PCAOB more than many other governmental officers from presidential

34. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

35. 15 U.S.C. §§ 7211–19, *invalidated in part by* Free Enterp. Fund v. Pub. Accounting Oversight Bd., 130 S. Ct. 3138, 3151–56 (2010).

36. *Id.* §§ 7212–13.

37. *Id.* § 7214.

38. *Id.* § 7211(e)(5)(a).

39. *Id.* § 7211(e)(6).

40. Although the statute is ambiguous, the parties stipulated to that restriction on the President's removal authority. *Free Enterp. Fund*, 130 S. Ct. at 3148–49; *id.* at 3182 (Breyer, J., dissenting).

removal.[41] In establishing the Board's appointment and removal provisions, Congress precluded any direct role for the President. The Obama Administration before the Supreme Court nonetheless defended the constitutionality of the Board against arguments that the appointment and removal provisions violate Article II.[42]

In defending Congress's scheme, the Administration circumvented one of the most interesting issues implicated in the case, and one with potentially the greatest impact—Congress ostensibly created the Oversight Board as a private entity outside the federal government, providing that its members were not to be considered "officers[s] . . . or agent[s] for the Federal Government,"[43] and that the Board itself "shall not be an agency or establishment of the United States Government."[44] Indeed, Congress legislated that the salary of the Board members be set in accordance with the private market.[45] Moreover, Congress exempted the Board from FOIA.[46] Congress by its own terms had attempted to delegate critical policymaking to a private group. The executive branch as well as petitioner ducked the issue by agreeing that Congress's labeling was immaterial; instead, all that mattered was that the Board members exercised "significant authority pursuant to the laws of the United States" within the meaning of *Buckley v. Valeo*,[47] and therefore must be considered officers of the United States subject to Article II limitations.[48]

In *Buckley*, the Court chose "significant authority" as a threshold for triggering the Appointments Clause, and explained that the term encompassed "broad administrative powers: rulemaking, advisory opinions, and eligibility for funds . . . ."[49] By the same token, the Court continued that investigation and information gathering did not rise to the significant authority level.[50] Hence, by relying on *Buckley*, the administration stressed that the PCAOB is a public entity, and that the only critical questions to resolve were the propriety of the appointments and removal provisions. The Supreme Court apparently agreed.[51]

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41. 15 U.S.C. § 7217(d).

42. Brief for the United States at 29 n.8, Free Enter. Fund v. Pub. Accounting Co. Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 3290435 at *29 n.8.

43. 15 U.S.C. § 7211(b).

44. *Id.*

45. *Id.* § 7219(b)–(g).

46. *Id.* § 7215(b)(5)(A).

47. 424 U.S. 1, 126 (1976).

48. Brief for the United States, *supra* note 42, at 29 n.8; Brief for Petitioners at 9 n.1, Free Enter. Fund v. Pub. Accounting Co. Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 2247130 at *9 n.1.

49. *Buckley*, 424 U.S. at 140.

50. *Id.* at 109–10.

51. Free Enter. Fund v. Public Accounting Co. Oversight Bd., 130 S. Ct. 3138, 3147 (2010).

2. CYBERSECURITY ADVISORY PANEL

Senators Rockefeller, Snowe, and Nelson introduced a bill that would create a Cybersecurity Advisory Panel to advise the President on a variety of cybersecurity issues and thereby protect the flow of e-commerce and safeguard increased utilization of the Internet.[52] Section three would create a Cybersecurity Advisory Panel, which would include "representatives of industry, academic, non-profit organizations, interest groups and advocacy organizations, and State and local governments . . . ." The President was to appoint members of the panel from those constituencies.[53] The Panel would convene to assess trends, help formulate U.S. policy, suggest implementation for that strategy, and consider civil liberty impacts.[54] The open meetings provisions of the Federal Advisory Committee Act would not apply.[55]

In addition to the advisory role, the bill delegates to the Advisory Panel a more specific function with respect to operation of the Internet Corporation for Assigned Names and Numbers (ICAAN).[56] Section 8 invests in the Panel a veto over any changes to the current status of the contract that the Secretary of Commerce would wish to make, including modifications and renewal. Thus, the Panel would have exerted legal authority over the future of the ICAAN contract. To date, the Obama Administration has not addressed the Panel's proposed Section 8 powers.

3. GLOBAL WARMING BILL

The Administration is supporting the Waxman-Markey bill,[57] which prods the country toward a path to reduce global warming.[58] Section 705 would require the Environmental Protection Agency (EPA) to report to Congress at regular intervals the progress made by the United States to meet its domestic green house gas emission reduction requirements as well as international obligations.[59] Each section 705 report must be reviewed by the National Academy of Sciences (NAS), which may issue its own recommendations.[60] Under the bill, an NAS finding that additional reductions are required automatically triggers a presiden-

52. Cybersecurity Act of 2009, S. 773, 111th Cong. (2009).
53. *Id.* § 3(a)(1).
54. *Id.* § 3(c).
55. *Id.* § 3(f).
56. *Id.* § 8(a).
57. American Clean Energy and Security Act of 2009 (Waxman-Markey bill), H.R. 2454, 111th Cong. (2009).
58. *See* Press Release, *supra* note 5.
59. *Id.* § 705(a).
60. *Id.* § 706(a).

tial directive to agencies requiring a plan to attain the new target.[61] No presidential assessment of the weight of the NAS recommendations is permitted other than that he is to direct agencies to take remedial steps as "appropriate."[62]

4. INTELLIGENCE OVERSIGHT BOARD

President Obama, via executive order,[63] enhanced the authority of the Intelligence Oversight Board (IOB) that previously had been established to counsel the executive branch about possible violations of civil liberties.[64] The IOB is a subset of the President's Intelligence Advisory Board (PIAB), which was created to advise the President on a range of security issues.[65] Members of the PIAB are to be drawn "from among individuals who are not employed by the Federal Government"[66] and receive no compensation for their work.[67] The PIAB is to "assess the quality, quantity, and adequacy of intelligence collection . . . ."[68]

For its part, the IOB also is to investigate and determine whether any executive branch individual has broken the law through its intelligence gathering efforts.[69] President Obama's order directed relevant executive branch agencies, headed by officials confirmed by the Senate, to comply with any request for information from the IOB,[70] and also directed the IOB to "forward to the Attorney General information concerning intelligence activities that involve possible violations of Federal criminal laws or otherwise implicate the authority of the Attorney General . . . ."[71] The IOB acts akin to an inspector general, although its

61. *Id.* § 707(b).

62. *Id.* § 707(a).

63. Exec. Order No. 13,516, 74 Fed. Reg. 56,521, (Nov. 2, 2009) [hereinafter Obama Executive Order].

64. The IOB initially was established under the Bush II administration. *See* Exec. Order No. 13462, 3 C.F.R. 184, 185–86 (2008) [hereinafter Bush Executive Order] (establishing the creation of the IOB and setting out its functions). The Obama Executive Order expanded the authority of the IOB. *Compare* Bush Executive Order, 3 C.F.R. 184 at 187 ("To the extent permitted by law, the [Director of National Intelligence] and the heads of departments concerned shall provide such information and assistance as the . . . IOB *may* need to perform functions under this order") (emphasis added), *with* Obama Executive Order, 74 Fed. Reg. at 56,521 ("To the extent permitted by law, the [Director of National Intelligence] and the heads of departments concerned shall provide such information and assistance as the . . . IOB *determine[s] is needed* to perform their functions under this order) (emphasis added).

65. *See* Bush Executive Order, 3 C.F.R. at 184–85.

66. *Id.*

67. *Id.*

68. *Id.* at 185.

69. *See id.*

70. *See* Obama Executive Order, *supra* note 63, at 56,521.

71. *Id.*

members apparently need not comply with many government-wide ethics and conflict of interest restrictions.

5. Compensation Czar

The Obama Administration, like its predecessor, has appointed so-termed czars to aid in executive branch initiatives.[72] The most high profile of these has been Kenneth Feinberg, a New York attorney, who also served as a "czar" under President Bush in compensating the victims of 9/11.[73] More recently, Feinberg has set the compensation that executives of entities receiving TARP funds can earn.[74] The rules are binding.[75] The Obama Administration, however, did not submit Feinberg's name to the Senate for confirmation, so he cannot be considered a principal officer. In addition, because Congress had not authorized the Secretary of the Treasury to appoint anyone to discharge the compensation setting duties, Feinberg cannot be considered an inferior officer. Interestingly, although it was widely reported that Feinberg received no salary for his work,[76] a recent FOIA request unearthed the fact that Feinberg in fact received a salary.[77]

Presidents, of course, have long appointed individuals in the private sector to serve as "czars" or envoys for particular purposes.[78] Presidents have sent various statesmen abroad as envoys in efforts to avoid political standoffs,[79] such as Jesse Jackson traveling to Iran to free prisoners or former President Carter's trip to North Korea.[80] Such use of envoys

72. *See, e.g.*, TARP Standards for Compensation and Corporate Governance, 74 Fed. Reg. 28,294 (June 15, 2009) [hereinafter TARP Standards] (setting forth the standards applicable to recipients of the Troubled Asset Relief Program, which purchases "troubles assets from financial institution[s]," and establishing a special master to oversee the program); September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104 (2009) (creating a compensation fund for victims of 9/11 and granting a Special Master considerable authority over the fund).

73. On November 26, 2001, the Attorney General appointed Kenneth R. Feinberg as Special Master to the 9/11 Victim's Relief Fund. *See* Louise Story & Stephen Labaton, *Overseer of Big Pay Is Seasoned Arbitrator*, N.Y. Times, June 10, 2009, http://www.nytimes.com/2009/06/11/business/11feinberg.html.

74. For information regarding the establishment of the office of Special Master, commonly called "pay czar" under TARP by the Secretary of the Department of Treasury, *see* TARP Standards, 74 Fed. Reg. at 28,394.

75. *Id.* at 28,423.

76. *See* Story & Labaton, *supra* note 73.

77. *Obama's Executive "Pay Czar" Feinberg Received Six-Figure Salary According to Documents Uncovered by Judicial Watch*, Judicial Watch (Sept. 9, 2010), http://www.judicialwatch.org/news/2010/sep/obama-s-executive-pay-czar-feinberg-received-six-figure-salary-according-documents-unc.

78. *See* discussion of use of envoys in past *supra* note 9.

79. For a discussion of the use of private entities for diplomatic purposes, see Dickinson, *supra* note 9, at 393; Anna Spain, *Using International Dispute Resolution To Address the Compliance Question in International Law*, 40 Geo. J. Int'l L. 807, 839 (2009).

80. Robert Pear, *Jackson Is Seeking Talk with Iranian To Free Hostages*, N.Y. Times, July

potentially circumvents senatorial consent and may conflict with Congress's choice of which delegate is to perform particular functions.

6. CONTRACTING OUT

President Obama has continued his predecessors' practice of outsourcing a multitude of tasks to the private sector. As with prior administrations, the current administration has outsourced broadly, including the authority to collect delinquent taxes and the responsibility to modernize the Coast Guard's fleet.[81] Moreover, many key aspects of Homeland Security have been outsourced to private entities,[82] including strategy and implementation of efforts to police the border with Mexico.[83] Agencies such as the EPA have relied upon private entities to prepare proposed rules and respond to congressional inquiries.[84]

As a whole, President Obama's Administration therefore has followed its predecessors in using private parties where politically feasible. In a variety of ways, Obama's Administration has welcomed the exercise of governmental power by private parties.

B. *Brief History of Challenges to Private Delegations*

Challenges to the private exercise of governmental power under our federal system have been scant. Most have focused on power exercised by congressional delegates, although increased criticisms have been leveled at the President for outsourcing decisions.

The canonical case is *Carter v. Carter Coal Co.*[85] There, the Supreme Court considered a statutory scheme in which a majority of miners and producers of two-thirds of the annual tonnage of coal established working conditions that would bind the entire group.[86] The maximum hours of work could be set, as well as the minimum wage.[87] The Court explained that "[t]he effect, in respect to wages and hours, is to subject the dissentient minority . . . to the will of the stated majority . . . ."[88] In other words, "[t]he power conferred upon the majority is, in

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28, 1998, http://www.nytimes.com/1988/07/28/world/jackson-is-seeking-talk-with-iranian-to-free-hostages.html; Choe Sang-Hun, *Jimmy Carter Tries To Free American in North Korea*, N.Y. TIMES, Aug. 25, 2010, http://www.nytimes.com/2010/08/26/world/asia/26korea.html.

81. Verkuil, *supra* note 1, at 58.

82. *Id.* at 5.

83. *Id.* at 35–36.

84. *Id.* at 45–46; *see also* Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective, in* GOVERNMENT BY CONTRACT 153, 177 (Jody Freeman & Martha Minow eds., 2009).

85. 298 U.S. 238 (1936).

86. *Id.* at 283–84

87. *Id.*

88. *Id.* at 311.

effect, the power to regulate the affairs of an unwilling minority."[89] The Court concluded that "[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[90] To the Court, the private status of the decisionmakers rendered the delegation more suspect.

Less well remembered, the Court earlier in *A.L.A. Schechter Poultry Corp. v. United States* questioned Congress's reliance on private parties in establishing codes of fair competition under the National Industrial Recovery Act.[91] Under the Act, trade groups proposed codes of fair competition for ultimate approval by the President.[92] The Court struck down those sections of the NIRA on both nondelegation and Commerce Clause grounds.[93]

In so doing, the Court noted the sweeping power exercised by private entities, even though the proposed codes were subject to presidential authorization.[94] The Court asked, "would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries?"[95] After acknowledging that Congress understandably might wish to delegate to private parties "because such associations or groups are familiar with the problems of their enterprises,"[96] the Court emphatically stated that "[s]uch a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[97]

Nonetheless, courts subsequently have upheld significant decisional powers delegated to producer groups under the Agricultural Marketing Agreement Act of 1937[98] and similar statutes.[99] With respect to milk, for instance, the Secretary of Agriculture issues marketing orders setting minimum prices that handlers, who process dairy products, must pay to

89. *Id.*
90. *Id.*
91. 295 U.S. 495, 521–24, 529–30 (1935).
92. *Id.* at 537.
93. *Id.* at 551.
94. *Id.* at 537.
95. *Id.*
96. *Id.*
97. *Id.*
98. Pub. L. No. 111-202, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).
99. *See, e.g.*, 7 U.S.C. § 2101–18 (2006) (cotton); 7 U.S.C. §§ 2901–2911 (2006) (beef); 7 U.S.C. § 4501–4538 (2006) (dairy).

dairy farmers for milk products.[100] Prior to setting the prices, the Secretary must conduct rulemaking but, before any order can go into effect, the rule must be approved by the handlers of at least fifty percent of the milk covered by the proposed order and at least two-thirds of the affected dairy farmers.[101] Dairy farmers and, to some extent, handlers, can veto any proposed milk marketing order, and the threat of a veto affords those groups some say in the formulation of the order.[102] The Supreme Court has upheld this and similar delegations because the exercise of governmental power by such private groups is subordinate to the authority of Agricultural Department officials.[103] The Supreme Court has reasoned, therefore, that no untoward delegation of private authority exists if some type of oversight has been exercised by federal governmental officials.

Congressional delegations to private parties have, on occasion, been more direct.[104] In 1893, Congress delegated authority to the American Railway Association to establish a mandatory height for drawbars on railroad cars, and legislated that failure to comply with the height requirement subjected the railroad companies to civil penalties.[105] The Supreme Court upheld the delegation with little discussion.[106] Congress also has encouraged standard setting by private organizations, subjecting such standards to minimal oversight.[107] More directly, Congress has delegated the power to private accreditation organizations to determine hospitals' eligibility for federal funding.[108] Further, private parties have served on governmental agencies such as the Federal Open Market Committee (FOMC), which operates as part of the Federal Reserve Sys-

100. 7 U.S.C. § 608c(5)(A) (2006).

101. *Id.* § 608(c)(8).

102. *Id.*

103. H.P. Hood & Sons v. United States, 307 U.S. 588, 595 (1939) (milk); United States v. Rock Royal Coop., 307 U.S. 533, 577–78 (1939); Currin v. Wallace, 306 U.S. 1, 15–18 (1939) (tobacco growing areas); United States v. Frame, 885 F.2d 1119, 1127–29 (3d Cir. 1989) (beef program); United States v. MacMullen, 262 F.2d 499, 500–01 (2d Cir. 1958) (wheat quotas).

104. *See, e.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 286 (1908).

105. *Id.*

106. *Id.* at 287. According to the Court, a near identical delegation previously had been upheld in *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). *Taylor*, 210 U.S. at 287. *Buttfield*, however, did not include delegation to a private party. *Buttfield*, 192 U.S. at 495–96. *See also Auffmordt v. Hedden*, 137 U.S. 310, 326–28 (1890) (upholding the government's use of a private appraiser where an importer disagreed with the government's value determination).

107. Freeman, *supra* note 1, at 640.

108. *See* 42 C.F.R. § 488.5 (2010) (deeming institutions accredited as hospitals by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) to meet all of the Medicare conditions of participation); 42 C.F.R. § 409.3(e) (2010) (requiring foreign hospitals be accredited by JCAHO to be a qualified hospital under Medicare); 32 C.F.R. § 199.6 (requiring certain providers seeking payment for services through Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) to be accredited by JCAH and maintain medical records according to JCAHO standards).

tem.[109] The private members are elected annually by the boards of directors of the twelve regional Federal Reserve Banks, which are privately owned.[110] The FOMC as a whole discharges the critical policymaking function of determining sales and purchases of government securities in the open market.[111] Its private members draw no compensation from the United States and are not subject to many government-wide ethics and conflict of interest restrictions.

In less obvious ways, private parties have played fundamental roles in shaping federal policy—Congress has authorized presidents to contract out functions to the private sector, whether in running prisons,[112] setting Medicare eligibility,[113] and even in collecting taxes.[114] Presidents on their own have contracted out similar functions.[115] Courts rarely have become involved.[116]

This abbreviated history suggests that the examples from the Obama Administration are not unique. Courts have struggled to identify just what it is about the role of private parties in governance that is troubling, while recognizing the substantial benefits that can be attained by incorporating private partners into the government. Congress as well as presidents have utilized private parties to fashion and implement governmental policy.

C. *Rationales for Delegation to Private Parties*

The examples of private delegations in the Obama Administration and before exemplify the myriad reasons why utilization of private parties in governance is politically attractive. Sharing power with private entities can further goals of tapping private sector expertise, discharging public functions more efficiently, and attaining more legitimacy for the exercise of public power.

Consider Congress's creation of the PCAOB and delegation of authority to the National Academy of Sciences. Both reflect efforts to utilize private expertise in the private sector to help bring relief to press-

109. 12 U.S.C. § 263(a)–(b) (2006).

110. *Id.* § 263(a).

111. *Id.* § 263(b) ("The Committee shall consider, adopt, and transmit to the several Federal Reserve banks regulations, regulations relating to the open-market transactions of such banks").

112. Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, *in* GOVERNMENT BY CONTRACT, *supra* note 84, at 128, 129; Ira Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 925 (1988).

113. Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, *in* GOVERNMENT BY CONTRACT, *supra* note 84, at 291, 300–03.

114. Verkuil, *supra* note 1, at 43 n.52.

115. *Id.* at 42–43.

116. *See* Robbins, *supra* note 112, at 919–20 (noting that "the Supreme Court has not invalidated a private delegation since the New Deal era case of *Carter v. Carter Coal Co.*").

ing public problems—in the first instance regulation of publicly traded firms and, in the second case, that of global warming. Congress authorized PCAOB members to draw salaries akin to those in the private sector specifically to enlist those individuals to help ensure that there be no repetitions of the Enron debacle. The proposed delegation to eminent members of the NAS reflects an effort to ensure that such scientific knowledge be deployed to help the government attain global warming targets.

At the same time, involving such respected members of the private sector lends more legitimacy to governmental actions. The government can point to resulting regulation and defend it on the basis that it had been reached only through the efforts of private experts, who presumably were among the most knowledgeable in the field. Similarly, enlisting heads of private banks to serve on the FOMC ensures that the Committee can be guided by those with the greatest private sector experience, and that the private banking community will have greater faith in its actions.

Congress's delegations to producer groups during the New Deal embody the same two dynamics. Producer groups presumably know more than the government about their own needs, so it is more sensible for the government to rely upon those groups in determining marketing orders or acreage allotments. Disaffected members of those producer groups may be more accepting of any marketing order if their peers helped formulate the order. A democratic process was open for the members to voice any concerns.

Relying on producer groups arguably is also more efficient. Instead of having to learn the particular detailed conditions in the dairy or meat industries, Congress and the Secretary of Agriculture can rely on those with the most intimate knowledge of those conditions. Similarly, if industry standards are set by those in the industry, as under the National Industrial Recovery Act or in the American Railway Association example, efficiency can be served.

Historical examples of delegations to private parties highlight the many reasons that can lead presidents and congresses to enlist their participation in governance. Private parties can help the government with their expertise and, at times, permit greater efficiency in governmental provision of goods and services. And, such delegations provide political cover for potentially controversial decisions.

III. The Constitutionality of Delegations to Private Entities

A. *The Constitutional Structure*

To some, the exercise of public power by private individuals and groups is not constitutionally problematic. Nothing in the Constitution specifically prohibits Congress or the President from delegating authority to private individuals. Whether through congressional delegation or executive branch outsourcing, many governmental type responsibilities routinely are exercised by private entities and individuals. Medicare claims are assessed, security measures for the military are pursued, and tax deficiencies determined. Moreover, as a policy matter, many have applauded the efficiencies that can arise from shifting services from the public to private sector.

The silence in the Constitution, however, should not be construed as authorization for unlimited delegations to private entities. The Framers' failure to address the exercise of government power by private parties may well have stemmed from their assumption that many such delegations would be unthinkable. Congress can no more delegate its power to private groups to determine tax rates than the President can turn to the same groups to appoint tax commissioners.

Although there has been little analysis about what the Framers may have anticipated with respect to delegations to private parties, the underlying constitutional concern for accountable governance suggests caution. The division of the Constitution into Articles I, II, and III evidences an intent to limit governmental authority to those three headings, all of which provide a chain of command. Delegations outside the federal government threaten to dilute accountability and obscure that reporting structure.

Moreover, the entire system of checks and balances, so evident in the constitutional structure, argues strongly against some congressional delegation of authority to private parties. The checks of the Appointments and Impeachment Clauses cannot easily be reconciled with delegations to private parties.[117] Congressional delegations evade the President's appointment and Senate's consent powers. In addition, for both congressional and presidential delegations, the private parties or groups would not be subject to impeachment. The fact that private parties take no oath pledging fidelity to the Constitution highlights that such individuals and groups act outside the government. The Constitution

117. As Justice Souter asserted in *Weiss v. United States*, the Appointments Clause "ensure[s] accountability and 'precludes[s] the exercise of arbitrary power.'" 510 U.S. 163, 186 (1994) (Souter, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 293 (1926) (Brandies, J., dissenting)).

seemingly contemplates that some level of governmental authority be exercised only by those subject to the accountability mechanisms woven within. Thus, the system of separated powers implicitly restricts congressional and presidential delegations to private entities. As Justice Scalia warned decades ago:

> I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its law-making responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that was set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government.[118]

To be sure, the Constitution recognizes that Congress can issue Letters of Marque and Reprisal to private parties,[119] but that possibility more closely resembles an authorization for a private cause of action rather than a delegation of decisional authority. Indeed, that Clause can be read as an exception to the implied ban on the exercise of governmental power by private parties. There is no affirmative constitutional authorization for either Congress or the President to share decisional authority with non-governmental actors.

Without teasing out an elaborate theory, suffice it to say that delegations of decisional authority to private individuals and entities are not easily reconcilable with the focus on accountability in the constitutional structure. We expect, or at least hope, that government entities act for the greater good instead of for private gain. And, there are many checks, including those of the Appointments and Impeachment Clauses, that attempt to make that goal a reality. As the Supreme Court recently warned, "The diffusion of power carries with it a diffusion of accountability . . . . Without a clear and effective chain of command, the public cannot 'determine on whom the blame or punishment of a pernicious measure or series of pernicious measures ought really to fall.'"[120] Delegation to private entities masks that chain of command. Indeed, the very notion of private exercise of governmental power contradicts our supposition of what is meant by "government": "One can have a government . . . that benefits from expertise without being ruled by experts."[121]

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118. Mistretta v. United States, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting).

119. U.S. CONST. art. I, § 8, cl. 10.

120. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010) (quoting THE FEDERALIST No. 70, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

121. *Id.* at 3156.

Scholars across a wide spectrum of ideologies agree that the Constitution does not empower governmental officials to offload governmental powers to private entities that could in turn exercise those powers outside the constraints faced by public actors.[122] Indeed, in the criminal law context, Chief Justice Roberts recently commented that delegations to private parties should be prohibited because "[a] basic step in organizing a civilized society is to take that sword out of private hands and turn it over to an organized government, acting on behalf of all the people."[123] The constitutional framework does not countenance delegation of at least some type of governmental authority to private individuals and groups.

The doctrine should limit presidential as well as congressional delegations to private entities. Courts seldom have examined the limits of presidential delegation to private parties. Given that Congress cannot delegate to Kenneth Feinberg directly to determine executive compensation, may the President or Secretary of Treasury so delegate? If Congress cannot vest in coal organizations the power to fashion workplace rules as in *Carter Coal*, can the Secretary of Labor recruit coal organizations to fulfill that same role?

Congress under the Subdelegation Act[124] has authorized the President to subdelegate functions that Congress delegates to him. But, does general congressional authorization for subdelegation permit a greater role for private parties than if Congress designates the private parties directly? The potential for congressional aggrandizement is less with presidential delegation, but the concern for a lack of accountability remains. Independent contractors are far less accountable to the President and the public than are government officials. The executive branch does not directly manage contractors' discharge of functions. Contractors' actions are subject to fewer checks, less in the limelight, and the reporting structure is more attenuated.

In light of the discussion previously, the Constitution should be indifferent as to whether the exercise of governmental power by private parties stems from Congressional or presidential design.[125] The Consti-

122. Verkuil, *supra* note 1, at 106; Thomas Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2167–68 (2004).

123. Robertson v. United States *ex rel.* Watson, 130 S. Ct. 2184, 2190 (2010) (Roberts, J., dissenting).

124. 3 U.S.C. §§ 301–303 (2006). The Act, however, limits delegations only to "any official . . . who is required to be appointed by and with the advice and consent of the Senate . . ." *Id.* § 301.

125. Of course, if Congress forbids the President from delegating authority to private parties, then the President's authority stands at even a lower ebb. No theory of inherent executive authority to delegate to private parties has been raised and, in any event, would be difficult to square with the constitutional design.

tution prohibits private parties from exercising certain type of governmental power in both contexts. Thus, presidential determinations to contract out functions should be subject to the same analysis as for congressional delegations. In both contexts, the Constitution reserves for public officials the power to bind private entities.

Dangers from vesting governmental authority in private producer groups are not merely theoretical. To use one example, under various provisions of the Agricultural Marketing Agreement Act of 1937,[126] Congress has enlisted producer groups to set the rules that govern the respective producer communities. Marketing orders bind producers of mushrooms, beef, milk and other commodities.[127] Large producers of oranges such as Sunkist successfully pushed for orders limiting the amount of oranges that could be shipped for consumption within the country.[128] The quota increases growers' revenues at the expense of consumers and, perhaps as importantly, created a new demand for citrus byproducts for the oranges that could no longer be shipped for marketing.[129] Not coincidentally, Sunkist dominated the market for juice and other orange byproducts.[130] Large growers obtained a rule that benefitted themselves at the expense of the smaller growers.[131]

To provide another example, consider the all too common factual context of the Supreme Court's decision in *Gibson v. Berryhill*.[132] There, Alabama's legislature had delegated to a Board of *independent* optometrists the power to investigate and adjudicate allegations of wrongdoing leveled against optometrists, including those employed by retail organizations.[133] To make matters worse, members of the Board previously had filed charges against the employed optometrists for the same conduct that they, pursuant to delegated authority, were to judge.[134] The Supreme Court found that the potential for bias due to the competition between independent and employed optometrists was too great.[135] Private parties when implementing delegated responsibilities do not lose their "private" incentives.

Thus, delegation to private entities cannot readily be accommodated with the constitutional principle of accountability. And, the consti-

126. 7 U.S.C. § 608c(8) (2006).
127. *Id.* §§ 608c(2), 612.
128. DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 5–8 (1993).
129. *Id.* at 6–7.
130. *Id.* at 6.
131. *Id.* at 5.
132. 411 U.S. 564 (1973)
133. *Id.* at 567.
134. *Id.* at 567, 569–70, 570 n.7.
135. *Id.* at 579.

tutional limitation on delegations to private entities is grounded in plausible policy considerations.

In considering potential doctrine, many nonetheless may doubt that the benefits of judicial enforcement outweigh the costs. Other constitutional doctrines, including the nondelegation doctrine,[136] are underenforced. The Supreme Court accordingly has stayed its hand in such contexts because it is too difficult to formulate a workable doctrine without needlessly trammeling the choices of the democratically elected Congress or, as in this case, the President as well. Thus, even if the Constitution may cabin delegations to private individuals, the enforcement costs may be too steep, whether because of the linedrawing problems, or because of the need to second guess institutional priorities of Congress. The question, therefore, is whether the Court can fashion a workable doctrine.

B. *The Doctrinal Problem*

To date, the Supreme Court has assessed the constitutional propriety of the private exercise of governmental authority through three doctrinal lenses. Although analysis under the three doctrinal heads overlap, all fail to tackle the specific problem arising from the private exercise of governmental power.

1. Due Process Clause

At times, the Court has considered whether private individuals' exercise of governmental authority violates the Due Process Clause. Governmental decisions can only be considered fair or impartial if undertaken by officials who are not self-interested.

In *Carter v. Carter Coal Co.*, the Supreme Court cited the Due Process Clause as well as the nondelegation doctrine in invalidating the Bituminous Coal Act.[137] According to the Court, Congress's decision to invest private parties with the power to control peers heightened the chance of arbitrary conduct.[138] The Court explained that a statute that attempts to confer the power to regulate upon a competitor "undertakes

136. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law") (internal quotations and citations omitted). For a discussion of the Tenth Amendment as underenforced, see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 555–57 (1985) (rejecting application of the Tenth Amendment as a means of restricting Congress's power under the Commerce Clause). For an argument that the Due Process Clause also is underenforced, see Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 Wash. Lee L. Rev. 1149, 1161–64 (1998).

137. 298 U.S. 238, 310–11 (1936).

138. *Id.* at 311.

an intolerable and unconstitutional interference with personal liberty and private property . . . ." and continued that the "delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question."[139]

The Due Process analysis in *Carter Coal* appears to be an outgrowth of the conflict of interest rationales deployed in other Due Process cases questioning the impartiality of government decisionmakers, as was later expressed in *Gibson v. Berryhill*.[140] In such cases, courts have reasoned that the potential for bias on the part of the government decisionmaker was too great. Conceivably, under that reasoning, delegations of authority to private entities creating a substantial conflict of interest might be invalidated.

Subsequent courts, however, have not followed the *Carter v. Carter Coal* due process line of reasoning when confronting a challenge to the private exercise of power. Indeed, many courts have upheld decisions by producer groups to limit choices by their peers, even when the possibility of economic advantage exists.[141] Nor have courts utilized the Due Process Clause to assess other problems of majoritarian governance, whether stemming from the independence of agency decisionmaking[142] or the inappropriateness of legislative redistricting.[143]

In *Schweiker v. McClure*, the Court considered a Due Process challenge to private adjudication under the Medicare Part B program.[144] Under the Part B Program, Congress authorized the Secretary of Health and Human Services to contract with private insurance carriers to review and pay out deserving claims.[145] Carrier determinations are subject to a limited right to review by hearing officers who are also appointed by the

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139. *Id.*.

140. 411 U.S. 564, 579 (1973); *see also* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264–65 (2009) (holding that impartial judging requires that judges recuse themselves when the issue to resolve involves an entity from which the judge received substantial campaign contributions); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that judicial decisionmakers cannot preside over cases in which they receive any portion of the fines levied).

141. Sunshine Anthracite Coal v. Adkins, 310 U.S. 381, 387–88, 398 (1940) (upholding the delegation of authority to a private coal commission); United States v. Rock Royal Coop., 307 U.S. 533, 574, 576–78 (1939) (upholding the delegation of authority to milk producers to formulate milk-marketing orders); United States v. Frame, 885 F.2d 1119, 1127 (3d Cir. 1989) (sustaining the delegation of authority to private beef producers under the Beef Promotion and Research Act).

142. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151–64 (2010); Morrison v. Olson, 487 U.S. 654, 671–80 (1988); Bowsher v. Synar, 478 U.S. 714, 727–34 (1986).

143. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Brown v. Thompson, 462 U.S. 835 (1983).

144. 456 U.S. 188, 189 (1982).

145. *Id.* at 190.

carrier.[146] The lower court invalidated the system of private adjudication, reasoning that due process required additional procedural safeguards.[147] Accordingly, it ordered *de novo* hearings before an administrative judge of the Social Security Administration.[148]

The Supreme Court reversed, holding that, as long as the Secretary directs the carriers to appoint only "an attorney or other *qualified* individual with the ability to conduct formal hearings and with a general understanding of medical matters and terminology," no risk of erroneous deprivation existed.[149] The fact that the hearing officers were private did not create any untoward risk of self-dealing, particularly because the funds used to satisfy the judgments came from the United States Treasury as opposed to the carriers (and hearing officers) themselves.[150] The Court did not address whether the delegation to the private party—aside from the procedural due process issue—was problematic.

Moreover, law implementation by private parties does not necessarily impact the property or liberty interests of private citizens. The interest rate calculations made by the FOMC do not affect property and liberty interests of citizens directly. Nor would the determinations of the National Academy of Sciences on global warming necessarily affect property rights, and the finding with respect to law violations by the Intelligence Advisory Board would not affect individuals' liberty interests directly, because any further investigation would rest in the Attorney General's hands. The problem of delegations to private parties does not simply turn on whether the potential conflict of interest is too great, as in *Gibson v. Berryhill*, but rather on the accountability enshrined by the Constitution.

The Due Process Clause is certainly capacious enough to address the private exercise of governmental power, but it represents a blunt instrument.[151] Courts have not utilized the Due Process Clause in other contexts in which the status of the delegate is in question, such as in the closely related context of independent agencies.[152] Assessing the private

146. *Id.* at 191.

147. *Id.* at 192–93.

148. *Id.* at 195.

149. *Id.* at 199 (internal quotations and citations omitted).

150. *Id.* at 196–200.

151. Gillian Metzger has argued for revitalizing the Due Process Clause as a means to limit delegation to private parties. Metzger, *supra* note 1, at 1460–61. Her analysis focuses principally on the need for procedural regularity. *Id.* at 1460; *see also* Metzger, *supra* note 113, at 299–300. The same is true for David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986).

152. Morrison v. Olson, 487 U.S. 654, 671–80 (1988); Bowsher v. Synar, 478 U.S. 714, 727–34 (1986).

exercise of governmental authority under the Due Process Clause likely would result in invalidating only the most sweeping of delegations.

2. NONDELEGATION DOCTRINE

During the New Deal in particular, the Court considered whether Congress's decision to vest governmental authority in private individuals and groups violated the nondelegation doctrine, and the *Carter v. Carter Coal* majority utilized the nondelegation doctrine as well as the Due Process Clause to strike down the role of private parties under the National Industrial Recovery Act. The rule that principles of social policy should be traced to Congress and not delegates in the executive branch arguably is of particular salience when considering delegations to private parties.

Congress, however, doctrinally satisfies its constitutional responsibility to retain its "legislative [p]owers" when it legislates sufficient guidelines to confine its delegate's discretion in implementing the congressional mandate.[153] Requiring articulation of broad guidelines will do little to protect against private lawmaking. Indeed, in *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, as discussed previously, the Court applied the nondelegation doctrine in assessing a challenge to a delegation to a private party—the American Railway Association—exactly in the same manner as it had to a delegation to a governmental entity.[154] Given the extensive delegations upheld to the Federal Communications Commission (FCC) to protect the public interest,[155] or to the Federal Power Commission[156] to set the "just and reasonable rate" to charge for natural gas,[157] such agencies exercise considerable discretion in fashioning the subsidiary rules that govern so much of the country. The nondelegation doctrine has not prevented a vast transfer of power from the legislative to executive branch.

Moreover, the issue raised by the private exercise of governmental power is not merely articulation of broad social goals. We are worried as well about whether private parties can fashion policy binding on others,

153. U.S. CONST., art. I, § 1.

154. 210 U.S. 281, 287 (1908). Specifically, the Court held that its prior analysis of the delegation issue in *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), which involved delegation to a governmental entity, was controlling in the private delegation context. *Taylor*, 210 U.S. at 281.

155. Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (upholding delegation to award broadcast licenses according to the "public interest").

156. Congress originally established the Federal Power Commission in 1920, *see* Federal Water Power Act, ch. 285, § 1, 41 Stat. 1063 (1920), but subsequently replaced it with the Federal Energy Regulatory Commission. *See* Pub. L. No. 95-91, § 401, 91 Stat. 582 (1977).

157. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 611 (1944) (upholding the Federal Power Commission's "broad powers of regulation" in fixing "just and reasonable [gas] rates").

irrespective of whether a social goal has already been formulated.[158] Even if Congress creates the FCC and directs the FCC to take particular steps, we would presumably not be comfortable if the heads of the FCC were all private. Congress's articulation of broad social policy does not ensure accountability for the subsequent implementation of those principles. The nondelegation doctrine as currently interpreted, therefore, would not confine the exercise of power by private entities sufficiently.[159]

3. ARTICLE II CONCERNS

Finally, private delegations might also be reviewed under the President's Article II appointment and removal powers. Delegations to private parties arguably threaten the Constitution in part by circumventing the executive branch control that was designed to protect all individuals from governmental overreaching. From this perspective, the problem is not principally one of standards articulation, as with the nondelegation doctrine,[160] but rather one of preserving the political accountability that arises from the Founders' decision to vest centralized control over law enforcement in one chief executive through the appointment and removal authorities. In the absence of such control, governmental authority might be exercised for private, self-interested ends. Article II addresses the concerns of private delegations more than the prior two formulations.

Under the Appointments Clause, presidents enjoy the power to appoint all superior officers of the United States.[161] Through the appointment power, presidents can ensure that only officers they approve of are enforcing the law. Article II provides that the President must appoint all superior officers, and that Congress can decide whether to vest appointment authority over inferior officers in the President,

158. Paul Verkuil situated his concern about untoward involvement of private parties in governance in the non-delegation doctrine. *See* Paul R. Verkuil, *Outsourcing and the Duty to Govern*, *in* GOVERNMENT BY CONTRACT, *supra* note 84, 310, 310.

159. The Office of Legal Counsel, however, has analyzed delegations to private parties principally under the nondelegation doctrine. *See* Memorandum on Constitutional Limitations on Federal Government Participation in Binding Arbitration from Walter Dellinger, Assistant Attorney General, to John Schmidt, Associate Attorney General (Sept. 7, 1995), *available at* http://www.justice.gov/olc/arbitn.fin.htm.

160. Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218–219 (1989) ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could "'ascertain whether the will of Congress has been obeyed,'" no delegation of legislative authority trenching on the principle of separation of powers has occurred") (quoting Mistretta v. United States, 488 U.S. 361, 379 (1989)); Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (explaining that it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority").

161. U.S. CONST. art. II, § 2, cl. 2.

heads of departments, or courts of law.[162] There have been disagreements over line-drawing, particularly between superior and inferior officers,[163] but consensus exists over the role that the Appointments Clause plays under the Constitution.[164] The President's choice of officer influences the exercise of delegated authority. To some extent, presidents therefore stand accountable for the exercise of all authority delegated by Congress.[165]

In addition, all officers of the United States must take an oath of office to uphold the Constitution. That oath signifies a more profound obligation to the public trust than a mere contractual duty. For serious malfeasance in office, officers can be impeached. Delegations to private parties, as with contractual relations, can be rescinded, but only public officials face the very public removal from office via impeachment. Conformance with Article II defines in part what it means to be a public official.

Congressional delegations of authority to private parties—whether to a union, producer group, or single individual—bypass the presidential appointment authority. If Congress vested authority in the National Academy of Sciences, the resulting execution of the law could not be as readily traced to the President, and his appointment authority would be circumvented. Congress as a whole also would thereby preclude a role for senatorial consent.

Moreover, the Supreme Court has insisted that Congress play no direct role in the appointment of officers. In *Buckley* the Court considered a congressional measure empowering the Speaker of the House and the president pro tempore of the Senate to appoint four members of the newly created electoral commission under the Federal Election Campaign Act of 1971.[166] The Court held that Congress could not participate in the appointment process, either directly or indirectly,[167] and noted that the "debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other

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162. *Id.*

163. *See, e.g.*, Edmond v. United States, 520 U.S. 651, 658–666 (1997); Morrison v. Olson, 487 U.S. 654, 670–73 (1988).

164. *Edmond*, 520 U.S. at 660 ("[T]he Appointments Clause . . . is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches") (quoting Buckley v. Valeo, 424 U.S. 1, 125 (1975)).

165. *Buckley*, 424 U.S. at 118–41; Myers v. United States, 272 U.S. 52, 117, 163–64 (1926).

166. *Buckley*, 424 U.S. at 6.

167. *Id.* at 130.

two branches."[168] Respecting the President's appointment authority was critical to ensuring that Congress take no part in execution of the law through appointment of officers. If Congress retained close supervision of the private delegate, then Congress would in essence oversee execution of its own laws, a role that the Supreme Court has held would conflict with the Constitution.[169]

Similarly, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, the Court considered whether Congress, in establishing a compact to oversee administration of D.C. area airports, could subject major decisions of that compact to a board of review, consisting of nine members of Congress in their individual capacities as users of the airports.[170] The Court held that the board of review, through its veto power, exercised significant authority under the laws of the United States and hence invalidated the continuing role of members of Congress on the Board.[171] In the eyes of the Court, the Board was "a blueprint for extensive expansion of the legislative power . . . ."[172] Congressional delegation of power to private individuals cannot easily be reconciled with Article II.

The Supreme Court also has recognized under Article II the President's inherent right to remove any officer subject to his appointment power. Although there has been much litigation over whether that removal authority should be plenary,[173] the Court repeatedly has held that the removal power follows the appointment authority.[174] In *Myers*, the Supreme Court stated that "Article II grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ."[175] The

168. *Id.* at 129.

169. *Cf.* Bowsher v. Synar, 478 U.S 714, 733–34 ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only . . . by passing new legislation"); *Buckley*, 424 U.S. at 132 ("The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause").

170. 501 U.S. 252, 255 (1991).

171. *Id.* at 277.

172. *Id.*

173. Morrison v. Olson, 487 U.S. 654, 673 (1988) (questioning the adequacy of the President's authority over an independent counsel); Bowsher v. Synar, 478 U.S. 714, 717–21 (1986) (questioning the adequacy of the President's removal authority over the Comptroller General).

174. *Morrison*, 487 U.S. at 686; *Bowsher*, 478 U.S. 714, 722–23; Weiner v. U.S., 357 U.S. 349, 353 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602, 626–27 (1935); Myers v. U.S., 272 U.S. 52, 118 (1926) ("[T]he association of removal with appointment of executive officers is not incompatible with our republican form of government").

175. 272 U.S. at 163–64.

President must be able to remove a superior officer "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[176] Presidents cannot superintend administration of the laws effectively if they cannot, as a last resort, threaten to discharge officials, at least if they are neglectful of their duties. Again, in *Morrison v. Olson*, the Court stressed the importance of the removal provision in permitting the President "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[177]Although the Court concluded in the independent counsel case that the removal authority need not be plenary,[178] some form of removal authority was constitutionally required and, together with other control mechanisms, must ensure that the President retain sufficient control to exercise his constitutionally assigned duties.[179]

The removal authority reflects the President's here and now power to affect policy—if he is aghast at what the Attorney General has done, he can remove him or her. And, President Nixon so proceeded in the famed Saturday night massacre by removing from office both Attorney General Elliot Richardson and interim Attorney General William Ruckelshaus in the same night for their refusal to fire Archibald Cox, the special Watergate counsel, from office.[180] This is not to suggest that we should applaud President Nixon's conduct, but rather recognize the practical importance of the removal authority. In the interests of keeping their jobs, officeholders will hew to the policies and procedures favored by the President. Indeed, in the recent *Free Enterprise Fund* case, the Court focused almost exclusively on the removal authority in holding invalid PCAOB's structure.[181] The fact that neither the President nor the SEC could remove members of the PCAOB at will, while members of the SEC were themselves protected from at will dismissal, was determinative.[182] To the Court, exercise of close removal authority was critical to ensuring presidential supervision under Article II.[183] Otherwise, the President's "ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."[184]

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176. *Id.* at 135.

177. 487 U.S. at 696.

178. *Id.* at 692–93.

179. *Id.*

180. See Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1004 (2001).

181. Free Enter. Fund v. Pub. Accounting Co. Oversight Bd., 130 S. Ct. 3138, 3151–62.

182. *Id.* at 3153 ("The result is a Board that is not accountable to the President, and a President who is not responsible for the Board").

183. *Id.* at 3154.

184. *Id.*

Congressional delegations to private parties may deprive presidents of the removal power. If Congress lodges the power to set standards in a private group, for example, the President cannot remove members of that group from office.[185] Under the global warming bill,[186] the President could not remove members of the National Academy of Science even if he believed they engaged in misconduct.[187] Similarly, if Congress designates a particular individual to safeguard security at airports, the President would not be able to remove the individual even if he determined that the individual's conduct jeopardized national security.

More problematically, a congressional threat to withdraw delegation to a particular person or entity may be tantamount to congressional exercise of a removal authority. The officeholder would look only to Congress for direction. The Supreme Court categorically has determined that Congress itself can play no role in the removal of individuals exercising significant authority under the laws of the United States.

The Supreme Court's decision in *Bowsher v. Synar* is illustrative.[188] In invalidating the Comptroller General's role under the Gramm-Rudman-Hollings Act, the Court focused on the critical importance of the removal authority.[189] Although the President appoints the Comptroller General to a fifteen-year term of office, Congress made the Comptroller General removable at the initiative of Congress for any one of several causes.[190] The Court held that "Congress cannot reserve for itself the power of removal of an officer charged with execution of the laws except by impeachment."[191] The Court explained that "once Congress makes its choice in enacting legislation, its participation ends."[192] Otherwise, Congress would be able both to exercise a de facto appointment authority and a removal authority, permitting it to influence the exercise of delegated authority.[193] Indeed, in *Myers* the Court invalidated Congress's participation in removal of the postmaster.[194]

Viewed with an Article II lens, congressional determinations to delegate decisional authority outside the President's control are suspect.

185. Contrast to Mistretta v. United States, 488 U.S. 361, 409 (1989), in which the President could exercise a removal authority over the Article III judges on the Commission, but just to the extent of their participation in that role.

186. American Clean Energy and Security Act of 2009 (Waxman-Markey bill), H.R. 2454, 111th Cong. (2009).

187. *Id.* § 186(c)(3).

188. 478 U.S. 714 (1986).

189. *Id.* at 721–27.

190. *Id.* at 728–29.

191. *Id.* at 726.

192. *Id.* at 733.

193. *Id.* at 734.

194. 272 U.S. 52, 177 (1926).

The President's Article II powers of appointment and removal are designed not merely to augment executive power, but to protect individual liberty.[195] To ensure that public power is exercised in a responsible way, the President should stand formally accountable for the exercise of authority delegated by Congress. Congressional delegations to trade groups and others can rob the President of his power to coordinate law implementation efforts and, at the same time, permit Congress too much influence in the execution of law.

Nonetheless, the Article II perspective is underinclusive for at least two reasons. First, Congress may delegate governmental authority in a way that does not trigger the President's appointment and removal authorities. Only the appointment of an individual to an "office" triggers the appointment power. The Supreme Court stated in *United States v. Hartwell* that the "term embraces the ideas of tenure, duration, emolument and duties,"[196] and later contrasted the full-time clerk position in *Hartwell* with a civil surgeon's duties in *United States v. Germaine*,[197] which were "occasional and intermittent."[198] The Court followed that definition in *Auffmordt v. Hedden*,[199] concluding that a private appraiser evaluating the worth of imported goods at the behest of the government did not hold an office—the appraiser worked for the government only infrequently on an as-needed basis.[200] The Court later in *Buckley* reiterated that "office" required the exercise of governmental authority over a period of time.[201] Under the "occasional and intermittent" standard, private parties could wield substantial authority without triggering Article II. Congressional delegation to a private group of the power to set standards, for instance, likely would be considered "occasional" and not transform the private group into federal officers.[202]

Nor would revising the Buckley formulation be cost free. Congress long has delegated enforcement authority to state governmental officials that evade any strictures of the Appointments Clause. For instance, Congress has approved state compacts[203] and authorized state officers to

195. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty'") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952)) (Jackson, J., concurring).

196. 73 U.S. (6 Wall.) 385, 393 (1867).

197. 99 U.S. 508 (1878).

198. *Id.* at 512.

199. 137 U.S. 310 (1890).

200. *Id.* at 326–28.

201. 424 U.S. 1, 125–26 (1975). As the Office of Legal Counsel has asserted, "An officer's duties are permanent, continuing, and based upon responsibilities created through a chain of command rather than by contract. The Office of Legal Counsel, *supra* note 159.

202. *See* Fairfax, *supra* note 10, at 448.

203. *See, e.g.*, Cuyler v. Adams, 449 U.S. 433, 443 (1981) (analyzing a congressionally

enforce federal laws through the power of arrest and criminal prosecution.[204] The recent flap over the Arizona immigration statute highlights the role that state officials can play (or not play) in implementing the federal immigration scheme.[205] States share responsibility with the federal government for implementing Medicaid, Medicare, and other social welfare programs.[206] No one could claim that such state officers, in light of their duties, should be considered to occupy federal offices, even though they may all be exercising "significant authority pursuant to the laws of the United States."[207]

Moreover, the Appointments Clause lens might be underinclusive for a separate reason. Arguably, the President's appointment authority would not be violated if executive branch officials in turn delegate their authority to private individuals and groups. The President appointed the officials in conformance with the Appointments Clause and the officials remain subject to removal for their decisions to delegate, among other actions. Yet, individuals affected by contractors' actions cannot directly hold the government accountable for such conduct, whether through tort or APA review. Contractors are considered "independent" principally because they are not subject to direct supervision of government officials. The *Buckley* test, therefore, would not prevent executive branch officials from delegating decisional authority to private individuals, much as happened with Kenneth Feinberg.

Some of the examples from the Obama Administration, therefore, may not involve offices. The proposed delegation of authority to the National Academy of Sciences, for instance, is so discrete that no office thereby is created. Similarly, the obligation of the Cybersecurity Panel to review the ICAAN contract would not transform that advisory body into an office. Historically, the delegations to producer groups do not cir-

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sanctioned interstate compact regarding procedures for the transfer of a prisoner in one jurisdiction to the temporary custody of another jurisdiction); Beebe v. Washington Metro. Area Transit Auth., 129 F.3d 1283, 1285–86 (D.C. Cir. 1997) (examining a congressionally approved interstate compact including Maryland, Virginia, and the District of Columbia regarding the creation of a public transportation system).

204. Congress, through the Judiciary Act of 1789, authorized state justices of the peace to arrest those suspected of violating federal criminal provisions. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789). *See also* United States v. Bowdach, 561 F.2d 1160, 1167–68 (5th Cir. 1977) (noting that Congress has authorized state law enforcement officers to conduct arrests for federal crimes).

205. For a discussion of the Arizona immigration law and the challenges to its constitutionality, see United States v. Arizona, 703 F. Supp. 2d 980, 985–992 (D. Ariz. 2010).

206. Freeman, *supra* note 1, at 592–94 (discussing the concept of shared governmental authority between states and federal agencies).

207. The Office of Legal Counsel, *supra* note 159. Indeed, the Office of Legal Counsel has summarized that the "Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors." *Id.*

cumvent the President's appointment power because the groups' duties are not pervasive. The Obama Administration's selection of Feinberg as compensation czar may not have created an office. Indeed, other contracting out decisions might bypass Article II constraints as well.

Thus, strict application of the Article II appointment and removal powers would limit congressional delegations to private parties but not remove all concerns for the private discharge of governmental authority. The Article II perspective would permit private parties in some contexts to exercise binding authority over other private parties. As currently constituted, therefore, Article II does not fully capture the array of delegations that are problematic.[208]

No doctrine specifically addresses the precise problem raised by private parties' exercise of governmental powers.[209] The Due Process, nondelegation and Article II lenses have distorted the problems posed by private parties' participation in governance. Moreover, those doctrines even if applied consistently by courts would not cover many problematic instances of delegations to private parties.

C. *Toward a New Doctrine*

If a new doctrine is to be formulated, the first determinant is the quantum of authority exercised by private parties that is constitutionally problematic. Not all involvement by private parties should be constitutionally prohibited—private groups and individuals can provide advice or build roads without transgressing the constitutional scheme. The second question, which perhaps is the thorniest, is the extent to which government constraints sufficiently check the individual or entity receiving the delegation. In essence, determining whether the actor is "public" or "private" should not be dispositive given the wide panoply of hybrid governmental structures that exist today. Rather, in any case in which doubt exists as to the "public" status of the entities, the key should be whether the actors in question are subject to enough governmental checks to guard against arbitrary or self-serving conduct. If workable

208. Revising Article II to encompass such delegations would be inefficient. Requiring formalized appointment procedures for state and private parties who have limited, though important, roles under federal law would be cumbersome, to say the least.

209. Courts at times, while not preventing delegations, have held that constitutional restrictions attach despite the delegation. In *West v. Atkins*, 487 U.S. 42, 54 (1988), the Court held that the Eighth Amendment bound a private physician attending a prisoner. The Court, however, has restricted the holding to functions "that are 'traditionally the exclusive prerogative of the State.'" Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)). Given the interchangeability of so many functions between the government and the private market, few functions performed by private parties will be subjected to constitutional constraints.

tests can be fashioned to generate answers for these two questions, then an enforceable doctrine is plausible.

1. Requisite Quantum of Authority

Private individuals and entities wield tremendous influence on the administration, whether through lobbying or advice. To the extent that the Constitution limits the ability of private parties to participate in governance, judicial doctrine must ascertain what type of power and influence is permissible. Advice obviously is compatible with the accountability demanded in the Constitution, but when are actions by private parties inconsistent with that accountability principle?

a. *Scope*

One possibility is to examine the extent of duties. What if individuals and groups only work on a very part-time basis for the government, irrespective of whether they are affecting the rights and duties of outsiders? Members of the National Academy of Sciences and Kenneth Feinberg presumably hold full-time jobs in addition to their work for the federal government. Indeed, the Supreme Court in *Buckley* intimated that one marker of an "office" under the laws of the United States lay in the extent of duties performed.

Focusing on the extent of duties, however, ignores that private individuals can have a profound effect on others even if only acting in a discrete sphere, as the National Academy of Sciences and Cybersecurity Panel examples suggest. As discussed in analyzing the drawbacks to an Article II approach to delimiting delegations to private parties, what should count is whether outsiders are bound by the determinations of the private delegate. Our concern is whether the private party binds others through that delegation, backed by the coercive force of the government, even if that governmental function is not extensive enough to be characterized as an office.

b. *Importance of Area*

Another possibility is to vary the test depending upon how key the area is in which the private individual or group works. Perhaps *no* authority should be delegated in areas that are considered "core" or "inherent."

Indeed, in elaborating the state action doctrine, the Supreme Court has held that some constitutional guarantees attach to core governmental functions, even when they are contracted out. In rare contexts as with the provision of health care in prisons, the Supreme Court has held that constitutional guarantees must attach, no matter whether the actor is consid-

ered public or private.[210] Under the state action doctrine, there is a small set of actions that must be subject to constitutional constraints.

The core government functions analysis as used in state action cases does not limit the power of the President or Congress to utilize private parties to enforce federal law or implement federal programs. Rather it holds that, when Congress or the President chooses to use private parties, then such private parties must be bound by certain core constitutional restraints. The core government functions test has not been used to prevent delegation ad ab initio.

Focusing on the importance or historical character of the function provided, moreover, seems hopeless. Consider the trend in the local governmental sphere to contract out or privatize toll roads, parking meters, and water supplies—functions most had thought to be governmental.[211] On the federal level, prisons have been privatized,[212] and contractors such as Blackwater have been hired to aid in international security.[213] Much of our wars overseas have depended on private contractors.

We have not reached any consensus on what functions are so "core" that they cannot be contracted out by the executive branch or delegated by Congress. Education once was supplied by private parties, then became the province of the government, and now has become in part privatized once again.[214] Reliance on private parties in military contexts has ebbed and flowed throughout our history.[215] Judicial decisionmaking may appear to be a core function, and yet the Supreme Court has held that quasi-judicial decisionmaking is appropriate for delegation to private parties.[216] Public and private officials largely exercise functions that are indistinguishable.

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210. *West*, 487 U.S. at 56–57. For a later decision narrowing the scope of *West*, see *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 57–58 (1999) (holding that private insurers implementing a state workmen's compensation scheme were not state actors); United States v. Day, 591 F.3d 679, 685–89 (4th Cir. 2010) (holding that a private security force hired by a State need not conform to Fourth Amendment constraints).

211. *See* Glanzer, *supra* note 9, at 443 n.3; Robert A. Poole, Jr., *Privatization: A New Transportation Paradigm*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 94, 96–97 (1997).

212. Lucas Anderson, Comment, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CON. L. J. 113, 115–120 (2009).

213. For a discussion of Blackwater and its role in National Security, see Andes Healy, *The Constitutionality of Amended* 10 U.S.C. § 802(A)(10)*: Does the Military Need a Formal Invitation to Reign in "Cowboy" Civilian Contractors*, 62 FLA. L. REV. 519 (2010). *See also Am. Mfrs.*, 526 U.S. at 44–49 (addressing the cycling of insurance functions under workmen's compensation statutes).

214. For a discussion of the cycling of education of private to public and back to private, see Martha F. Davis, *Learning To Work: A Functional Approach to Welfare and Higher Education*, 147 BUFF. L. REV. 147 (2010); Kamina A. Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1 (2010).

215. *See supra* notes 202, 204.

216. Schweiker v. McClure, 456 U.S. 188 (1982).

c. *Nature of Duties Discharged*

The key should be the type of authority delegated, not the area or extent. Congress in the Federal Activities Inventory Reform Act of 1998 (FAIR Act),[217] for example, defined an inherently government function not with reference to areas long thought central to the executive branch such as law enforcement but rather by activities that require "either the exercise of discretion in applying Federal Governmental authority or the making of value judgments in making decisions for the Federal Government . . . ."[218] Similarly, OMB in Circular A-76 has directed that some governmental actions can never be contracted out.[219] For instance, the executive branch cannot delegate power that "[b]ind[s] the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise" or "[s]ignificantly affect[s] the life, liberty, or property of private persons."[220]

Those rules persuasively focus on the nature of the power granted to the private individual or group. Courts should focus on the power of private individuals and entities to bind others. Of course, private individuals via federal contracts affect others in a wide variety of contexts, whether as security personnel in Iraq or through construction projects domestically. Viewed at its simplest, the question is not whether the entity makes an impact on another through discharge of functions under a federal contract, but whether its action binds others through policymaking delegated by the government. The situation to avoid is not delegated power *per se,* as with a mercenary army or private engineer, but rather empowering private entities with the power to bind others through the exercise of policy discretion.[221]

The suggested approach to define the limits of delegation to private parties follows a line of Supreme Court cases assessing the analogous question of when Congress can delegate to one of its constituent parts. In both contexts, the issue is whether entities other than Congress can,

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217. 31 U.S.C. § 501 (2006).

218. *Id.* § 5(2)(B).

219. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR. NO. A-76 A-2 (2003).

220. *Id.* In addition, agencies under FAIR also must classify whether employees exercise inherently governmental functions or not, and Congress at times has stepped in to "reorder" agency priorities, usually at the behest of public employee unions. Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It, in* GOVERNMENT BY CONTRACT, *supra* note 84, at 192, 221.

221. The discretionary function exception under the Federal Tort Claims Act provides a close analogy. Congress determined to preserve the exercise of policymaking from secondguessing in court, but opened judicial review to governmental actions with substantial impacts that were situation specific. *See generally* Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871 (1991).

consistent with the constitutional framework, bind others through the exercise of policymaking authority.[222] As discussed previously, decisional authority refers to the power of individuals to bind others through setting standards, formulating policy, enforcing the law, and approving or vetoing executive branch proposals.

In *INS v. Chadha*,[223] the Court held that Congress cannot reserve for one house or a committee the power to bind those outside the branch: Congress may not take "action that ha[s] the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch."[224] Similarly, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*,[225] the Court echoed the *Chadha* analysis in evaluating the role of congressional members of a Board of Review established to review major decisions with respect to operation of DC area airports. Given that a veto by the Board was binding and reflected a type of policy decision, the Court concluded that the innovative Board of Review structure violated the Constitution.[226] Committees of Congress could affect the rights of private parties through advice and influence, but the Court drew the line at any action that more formally has a legal affect on the parties.

The *Chadha* focus on "altering the legal rights, duties and relations" of others has salience in the private delegate context. Private individuals and entities can provide advice, work as initial factfinders, and implement details of federal governmental programs under governmental supervision, but the Constitution does not countenance delegation of the power to make binding decisions.

Unquestionably, a focus on "altering the legal rights, duties and relations" of others eschews any weighing of the functional importance of the private party's role. The suggested approach refers not to any pragmatic evaluation of how influential an individual or group may be, but rather on the formal authority to bind others.

The Supreme Court previously has pursued a similar approach in attempting to determine whether the private delegate possessed the authority to bind others. For instance, in the marketing order cases, if private producer groups cannot impose changes on member producers without the official imprimatur of a government official, then no private

222. Metzger labels such authority as quintessentially "governmental." Metzger, *supra* note 1. The terminology is different, yet the focus on the need to keep decisional authority in governmental hands is similar.

223. 462 U.S. 919 (1983).

224. *Id.* at 952.

225. 501 U.S. 252 (1991).

226. *Id.* at 274–77.

delegation infirmity exists.[227] In *Sunshine Anthracite Coal Co. v. Adkins*,[228] the Supreme Court held that the advisory role private producers played in recommending coal prices did not constitute an unlawful delegation of executive power to private individuals because the private members "function[ed] subordinately to the [public] Commission. It, not the [private producers], determines the prices."[229] Other courts have adopted the same approach when assessing the legitimacy of a delegation to a private party from an entity within the executive branch.[230]

Although the Supreme Court in the *Schechter* case adopted a more functionalist line and stated that the massive power in fact exercised by private trade groups under the NIRA doomed the delegation, more recent courts have hewed the formalist line.[231] As Justice Cardozo stated in concurrence in the earlier case, "it is the imprimatur of the President that begets the quality of law" and not the plans forwarded for approval by the trade groups.[232] In other words, private groups do not exercise decisional authority if the executive branch holds the formal power to approve whatever is forwarded by the private entity.[233] Even though the private groups in effect make law, the required governmental approval makes the delegation acceptable.

Similarly, if Congress provided that private groups prospectively could set standards binding on the industry, a serious private delegation issue would arise, but not if the private group merely suggested the standards to the Department of Agriculture. Discipline meted through the self-regulatory authority of the New York Stock Exchange must be sub-

227. H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939); United States v. Rock Royal Coop., 307 U.S. 533, 577–78 (1939); Currin v. Wallace, 306 U.S. 1, 6 (1939) (designation of tobacco growing areas); United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) (beef program); United States v. MacMullen, 262 F.2d 499 (2d Cir. 1958) (wheat quotas).

228. 310 U.S. 381 (1940); *see also* Cospito v. Heckler, 742 F.2d 72, 86–87 (3d Cir. 1984); Chiglades Farm, Ltd. v. Butz, 485 F.2d 1125 (5th Cir. 1973); *cf.* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

229. *Sunshine Anthracite Coal*, 310 U.S. at 399.

230. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (upholding statutorily mandated private arbitration of compensation claims); Todd & Co., Inc. v. SEC, 557 F.2d 1008 (3d Cir. 1977); R.H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir. 1952); *see also* Metzger, *supra* note 1 (arguing for the need for closer oversight when the impact of private actions on private parties is greater).

231. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

232. *Id.* at 552 (Cardozo, J., concurring).

233. Mandatory arbitration before private arbitrators poses a ticklish example. For generations, the federal government opposed arbitration, but began to relent in the late twentieth century as the movement toward alternative dispute resolution gained steam. Tapping private parties to resolve claims involving the United States cuts close to the principles discussed in the paper. In *Union Carbide*, the Court noted that the arbitrators were "civilian," 473 U.S. at 590, but did not articulate or raise any particular concern. Nor was any concern raised by the parties on that issue.

ject to SEC review.[234] This is not to suggest that reliance on private entities as initial government policymakers reflects wise policy. Government officials' utilization of the private sector may resemble abdication more than a constructive partnership. Yet, courts likely will not scrutinize executive branch practice to ascertain when supervision is too lax. Indeed, even if so inclined, courts likely could not distinguish occasions when private parties wield excessive de facto authority from those in which the advice is appropriate. The formal line of decisional authority is easier to police.

Some corroboration for the focus on decisional authority can be gleaned from the approach pursued by the Office of Legal Counsel in considering the "constitutional limitations on employing private contractors or individuals to perform certain tasks now performed by Department of Justice employees."[235] The first set of tasks included program analyst and manager positions responsible for grant activities. The functions included "the development, monitoring and promotion of criminal justice (including drug prevention) . . . and related programs administered by State and local government agencies" as well as "provision of technical assistance to State/local agencies in the form of short-term training on technical matters" and the "dissemination of information . . . ."[236]

To resolve the issue, OLC first explained that the Appointments Clause in large part guided the decision as to the type of duties that could only be exercised by officers of the United States—those that involved the exercise of "significant authority" within the meaning of *Buckley*.[237] The OLC continued that:

> information gathering, investigative, and advisory functions that do not involve final actions affecting third party rights may be performed by private parties or "independent" contractors. Similarly, purely ministerial and internal functions, such as building security, mail operations, and physical plant maintenance, which neither affect the legal rights of third parties outside the Government nor involve the exercise of significant policymaking authority may be performed by [private] persons . . . .[238]

In applying those distinctions, OLC reiterated that "private individuals may not determine the policy of the United States, or interpret and apply federal law in any way that binds the United States or affects the

234. *See, e.g., Todd & Co.*, 557 F.2d at 1012.

235. Constitutional Limits on "Contracting Out" Department of Justice Functions Under OMB Circular A-76, 14 Op. O.L.C. 94, 94 (1990).

236. *Id.* at 94–95.

237. *Id.* at 96–97.

238. *Id.* at 99.

legal rights of third parties. Nor can any private individuals make funding decisions."[239] The program analysts and monitors "simply study and make recommendations concerning the compliance of various state and local programs," and while they assisted in policy formation, they did not "determine the final policy of the Department of Justice. Nor can these employees take any independent action on behalf of the United States affecting the rights of grantees."[240]

OLC then analyzed the duties performed by another group of DOJ officials, those who occupied historical research support positions in the Office of Special Investigations. Although "the investigation of criminal activity is an inherently governmental function . . . the historical research support personnel at issue here conduct background research and translation under the direction of . . . properly appointed federal officers."[241] OLC concluded that the private individuals acted more like consultants than FBI officials or prosecutors.[242]

In the private contractor setting as well, the executive branch cannot delegate decisional authority to private parties. Private prison officials, for instance, cannot make binding decisions on disciplinary matters that result in lengthening confinement. Consider the Eleventh Circuit's recent decision in *Hilario-Paulino v. Pugh*.[243] A federal prisoner challenged imposition of discipline in a privately operated prison that resulted in extending his stay behind bars.[244] The Bureau of Prisons (BOP) had contracted with a private group to administer discipline, and it directed the private group to follow BOP policy in making such decisions.[245] Of critical importance, the BOP permitted every adversely affected prisoner to appeal the discipline to government decisionmakers.[246] As the court stated, "the fact that the BOP provides a final layer of *de novo* review allays any concerns regarding the delegation of the initial stages of disciplinary proceedings . . . ."[247] Contracting out decisions in the prison context otherwise could readily fall afoul of the reconstituted doctrine.

Moreover, Congress, through the Debt Collection Act Amendments of 1986,[248] authorized the Attorney General to retain private counsel to

239. *Id.*
240. *Id.*
241. *Id.* at 100.
242. *Id.*
243. 194 F. App'x 900 (11th Cir. 2006).
244. *Id.* at 901.
245. *Id.*
246. *Id.*
247. *Id.*
248. 31 U.S.C. § 3718(b)(1)(A) (2006).

assist in the collection of non-tax debts owed to the United States. In signing the legislation, President Reagan had counseled:

> I am approving [the amendments] knowing that the Attorney General will take all steps necessary to ensure that any contract entered into with private counsel contains provisions requiring ongoing supervision of the private counsel so that all fundamental decisions, including whether to initiate litigation and whether to settle or compromise a claim, are executed by an officer of the United States, as required by the Constitution.[249]

The OLC analysis and presidential signing statement conform closely to the test advocated in this article. The Constitution indeed limits both presidential and congressional delegations to private individuals and entities. Private parties under our Constitution cannot be empowered in the name of the United States to bind other private parties. Delegations proposed under President Obama's watch, as under those of his predecessors, have transgressed that constitutional principle by vesting in private parties decisional authority to bind others.

2. Sufficiency of Governmental Checks

In the vast majority of cases, determining whether the private group exercises decisional authority is determinative. But, an increasing number of cases exist in which it is not possible to conclude whether the group in fact is public or private. The constitutionality of such delegations, therefore, would hinge on the label affixed to the group. Individuals who are appointed by the President, take an oath of office, and draw salary are subject to executive branch controls as well as pan-government restrictions such as the Ethics in Government and Hatch Acts. Indeed, officers also are subject to impeachment. We are confident that, for such individuals, adequate accountability is maintained.

The difficulty is that lines between government and non-governmental entities and individuals have become so blurred. The potential arrays of public and private attributes seem limitless. After the first year of the Obama Administration, the federal government owned sixty-one percent of General Motors[250]—should that make General Motors' Board of Directors public or private? Indeed, the Obama Administration pressured the CEO of General Motors to resign.[251] President Obama's

249. Statement on Signing S. 209 into Law, 22 Weekly Comp. Pres. Doc. 1424 (Oct. 28, 1996).

250. David Welch & Michael Tsang, *GM Files for IPO That Will Reduce Treasury's Stake*, Bloomberg, Aug. 18, 2010, http://www.bloomberg.com/news/2010-08-18/general-motors-files-for-ipo-that-will-reduce-treasury-s-stake.html.

251. Mike Allen & Josh Gerstein, *GM CEO Resigns at Obama's Behest*, Politico, Mar. 29, 2009, http://www.politico.com/news/stories/0309/20625.html.

Administration recently supported a critical role for the National Academy of Sciences in the global warming debate, even though Academy members are neither appointed by the President nor subject to his removal authority. Would the Academy's involvement be considered public because it is working pursuant to a congressional scheme to reduce global warming even if the vast majority of its responsibilities had nothing to do with implementation of federal law? Members of the PCAOB, NAS, and Kenneth Feinberg all boast some attributes of public authority, and yet lack others. Feinberg did not enjoy a full-time government job and may not have been subject to government-wide ethics and conflict of interest restrictions.[252] On the other hand, the PCAOB's members were appointed by the SEC and work full-time, though the group is exempt from FOIA and its budget is drawn from a "tax" on the accountants it regulates.[253] Private contractors, in turn, are paid from taxpayer dollars, yet not directly through the government. They are employed by private entities even when working full time on government projects.

There are any number of ways to ascertain when the entity or individual exercising power should be considered a part of our government structure and thus capable constitutionally of exercising decisional authority. Courts could focus on the formal trappings of office such as salary and oath of office, the intent of the delegator, or on whether the individual or group is bound by the principal bureaucratic checks operating on the vast majority of federal governmental employees. This section considers the salience of each factor by itself, and concludes that individuals and groups should be able to exercise decisional authority when they are formally "public," or when the individual or group acts within the vortex of governmental checks and balances. Conventionally understood labels should not be dispositive.

a. *Salary*

As an initial matter, consider the question of salary. Those individuals paid by the federal government should be treated as public employees, and are. The commitment of salary reflects a link between the individual and the government, and broadcasts that tasks accomplished pursuant to that salary further governmental goals.

Yet, the opposite is not true. Individuals and groups have worked to implement federal law without a salary. Members of the National Academy of Sciences would not receive compensation for their involvement

252. *See supra* note 3 for a discussion of Feinberg's appointment.

253. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

in global warming. Numerous individuals have served as envoys overseas without pay, bargaining over treaty conditions and seeking the release of citizens imprisoned abroad.[254] The mining groups in *Carter v. Carter Coal Co.* drew no salary for their efforts in setting working conditions. Salary as an indicator of public status is underinclusive. Individuals and groups long have wielded substantial authority under the laws of the United States without pay.

Moreover, there is something circular about the salary issue. When the government pays an individual through an intermediary, as under a contract or grant, the fact that the pay and specifications come from the federal government does not transform that individual from a private to a public actor. The origin of the salary, in other words, is not dispositive in determining which actors should be considered public.

b. *Congressional or Presidential Labeling*

Furthermore, there seems little reason to defer in full to the label affixed by either Congress or the President. If we are distrustful of delegations to private entities by the heads of Article I and II, then courts should be able to probe beneath whatever title Congress or the President chooses. The Supreme Court in *Lebron v. National Railroad Passenger Corp.*[255] held that congressional labels should be jettisoned: a congressional label of "corporation does not alter [the entity's] characteristics so as to make something other than what it actually is . . . ."[256] The Court concluded that, "[i]f Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment."[257]

In the PCAOB example itself, Congress determined that the PCAOB should be considered private. Neither the executive branch nor the Court deferred to that assessment. Congress presumably cannot be trusted to determine which of its delegates should be considered private, because it otherwise could too readily circumvent constitutional constraints on its action.

Closely connected to the labeling is the question of presidential or congressional selection. To some, the very fact of presidential selection transforms a private individual into a public servant. The designation of an individual or group by the President or Congress arguably signals that

254. For an example of envoys dispersed to negotiate treaties, see Yoo, *supra* note 9.
255. 513 U.S. 374 (1995).
256. *Id.* at 393.
257. *Id.* at 392.

the individual or entity is to be considered public, and all that the actor does in that capacity should similarly be subject to public scrutiny. If the Appointments Clause is followed, that surely is the case. Every individual appointed pursuant to the Appointments Clause should be considered public and can exercise authority delegated from Congress. And, given that the power to remove flows from the power to appoint, potential exercise of the removal authority adds a check on the duties exercised by the presidential delegate. Public appointment and the potential for removal ensure some accountability for the delegate's exercise of responsibility. Presidential appointment and removal (whether direct or indirect as in the PCAOB case itself), therefore, can determine public status.

But the fact of presidential involvement in the selection of an individual should not automatically ensure that the individual or group designated can exercise decisional authority. Congress, after all, discharges an analogous function when it delegates to private parties as would be the case under the global warming bill. A congressional direction to the Cato Institute to exercise a particular function should be no more talismanic than the Obama Administration's direction to Kenneth Feinberg to perform certain functions. By his actions, President Obama has manifested his intent that Feinberg's nomination (via the Secretary of the Treasury) need not be presented to the Senate for its approval. Whether the administration decided that Feinberg retained his private status, or that the duties exercised were not "significant" under *Buckley v. Valeo* (or, for that matter, whether Congress implicitly had sanctioned the appointment), is beside the point. If courts are to police delegations to preserve individual liberty, the fact of presidential selection should not be determinative. That designation may not sufficiently link the delegate's actions in the public eye to the designating entity. Indeed, all contracting out determinations reflect the executive branch's designation of particular individuals (or, more likely, firms) to perform specified functions. Neither presidential nor congressional involvement in the designation of the individual or entity implementing federal law suffices to confer public status.

Consider, as well, Congress's creation of the United States Railway Association to monitor CONRAIL and issue bonds, among other duties.[258] In so doing, Congress provided that a majority of the entity's members were to be drawn from lists of private individuals supplied by the AFL-CIO and Association of American Railroads.[259] Again, no sal-

258. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (codified as amended in scattered sections of 45 U.S.C.).

259. *Id.* § 201(d), 45 U.S.C. § 711(d).

ary was to be paid, and the private members were not to be subject to the regulations circumscribing the conduct of most government officials. Both Congress and the President shared in the process to appoint the officials, but that selection should not, without more, transform the designee into a public official.

Moreover, despite the selection, a private group may wield the removal authority, solely or concurrently with the President. For instance, consider a congressional bill that would have set up an IRS Oversight Board, under which the President was to appoint to the multimember Board a representative of the Internal Revenue Service employees. Once a representative of the Internal Revenue Service employees was terminated from "membership, or other affiliation with the organization" he or she would be removed from the Board.[260] The existence of the removal authority wielded by the private entity raises the question of the representative's status—he or she would be beholden both to the President and the private employee group. Thus, although presidential selection combined with removal strongly signals public status, selection by itself may not be sufficient.

Finally, the appointment and removal powers of the President at times are not at issue. Some individuals or groups may implement federal law and yet hold no federal office. As mentioned previously, *Buckley* suggests that "offices" are reserved for individuals who implement federal law over a sustained period of time. Members of the National Academy of Sciences might be implementing federal authority even if they do not hold federal office, and the same would have been true for the miners in *Carter Coal*. The key, therefore, is to consider whether other indicia of public status exist even when there is no formal presidential appointment and removal.

c. *Public Accountability System*

One powerful indicator of public status exists in the individual or entity's conformance to the welter of rules and regulations that are designed to make governmental actors' decisions public regarding. Although these government-wide restraints do not rise to a constitutional level, their applicability has salience in ascertaining whether the individuals or groups involved may, consistent with the Constitution, exercise decisional authority.

For instance, nearly all governmental entities must comply with the

260. Internal Revenue Service Restructuring and Reform Act of 1997, H.R. 2676, 105th Cong. § 7802(b)(4)(C) (1997). The structure of the FOMC is similar, permitting changes in committee composition based on removals initiated by private parties.

disclosure requirement of the Freedom of Information Act (FOIA).[261] Records generated by the entity, whether communicated in writing or electronically, must be subject to perusal by the public, with limited exceptions. Indeed, it was not until the Obama Administration responded to a FOIA request that it came to light that Feinberg, despite press reports to the contrary, received a salary for his role as Compensation Czar.[262] The Sunshine Act as well ensures that meetings of governmental officials are open to the public, and in that way furthers transparency.[263] Moreover, the Ethics in Government Act[264] and Hatch Act[265] impose conflict of interest rules on senior governmental officials, including limitations on self dealing.

More particularly, there are prohibitions to prevent governmental employees from using their positions to enhance their personal finances, including restrictions on receiving gifts.[266] Additionally, government employees are prohibited from using their public office to advance private interests beyond the purely financial, such as political, familial, or other private purposes.[267]

Governmental employees also face restrictions on their non-work activities, including outside activities and post-government employment. For example, outside of work, employees may not represent[268] or serve as an expert witness for third parties[269] in disputes involving the government, be awarded a government contract,[270] or be compensated for teaching, speaking, or writing.[271] After leaving the government, executive branch and certain other agency employees are prohibited from communicating with current officials about particular matters. This prohibition is permanent if the employee personally and substantially worked on the matter and lasts for two years if the matter was only pending when the employee worked for the government.[272]

Depending on the employee's level of employment, the restrictions

261. 5 U.S.C. § 552 (2006).

262. *Supra* note 77.

263. Government in the Sunshine Act (Open Meetings Act), 5 U.S.C § 552b (2006).

264. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.).

265. 5 U.S.C. § 7321–26 (2006).

266. *Id.* § 7342 (gifts from foreign governments); *Id.* § 7353 (gifts from subordinates). I am indebted to Kathleen Clark for her excellent summary of the restrictions on federal governmental employees. Clark, *supra* note 7, 27–28.

267. *See* 5 U.S.C. § 7323(a)(1) (2006) (prohibiting using government position to influence an election); *Id.* § 3110 (hiring relatives); 5 C.F.R. § 2635.702 (2010) (other private purposes).

268. 18 U.S.C. §§ 203, 205 (2006).

269. 5 C.F.R. § 2635.805 (2010).

270. 48 C.F.R. § 3.601 (2010).

271. 5 C.F.R. § 2635.807 (2010).

272. 18 U.S.C. § 207 (2006).

imposed vary in complexity and severity. For example, high-level officials are subject to additional restrictions on compensation for outside activities,[273] outside income,[274] and post-employment activities, enforced by the possibility of criminal penalties.[275] While still subject to some of the restrictions that apply to other government employees, temporary employees are not subject to other restrictions[276] or are subject to them in a narrower range of circumstances.[277] Taken as a whole, these government-wide restrictions define what it means to be a public employee.

No similar constraints operate on private parties.[278] Private parties need not respond to requests for information, need not comply with the conflict of interest rules specified under the Ethics in Government Act and, depending on contract, can leave their employment and work for a competitor at any time. Thus, when Congress or the President delegates authority to individuals who are not subject to these limitations, those delegates are acting akin to private parties.

By contract or grant, the executive branch at times imposes similar constraints upon private contractors. If contractors must disclose information in their possession upon the request of any citizen, must conduct meetings in the open, cannot lobby on certain issues, and work only via government specification, then they more likely should be treated as public entities for purposes of exercising delegated authority. Imposition of the contractual requirements—like those stemming from government-wide regulations—may lead to a finding of public status.

For instance, consider contracting out by the Bureau of Prisons for management personnel. Solicitations require that "[a]ll services and programs shall comply with . . . the U.S. Constitution; all applicable federal, state and local laws and regulations; applicable Presidential

273. *See* Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009) (prohibiting appointees from accepting lobbyist gifts).

274. 5 C.F.R. 2635.804(a) (2010) (prohibiting presidential appointees from receiving "outside earned income for outside employment, or for any other outside activity.")

275. 18 U.S.C. § 207 (2006) (imposing criminal liability on former executive and legislative branch officers and employees who participate in trade negotiations or attempt to influence officers or employees in the department or agency where he or she works within a one or two-year period).

276. *See, e.g.*, 5 C.F.R. § 2635.807(a)(2)(i)(E)(4) (2010) (exempting temporary employees from the prohibition on compensation for teaching, as long as they serve for less than sixty days or the subject is general or concerns ongoing policy or programs.)

277. For example, the criminal statute on salary supplementation only applies if the temporary employee is paid by the government. 18 U.S.C. § 209(c) (2006).

278. Some states have made the decision to contract out itself subject to notice and comment rulemaking (or other oversight), but not the subsequent decisions and policymaking carried out by the private parties. *See* Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law, in* GOVERNMENT BY CONTRACT, *supra* note 84, at 261, 280–83.

Executive Orders (E.O.); all applicable case law; and Court Orders."[279] By contract, therefore, the Bureau of Prisons arguably has transformed private contractors into public employees, at least for purposes of the delegation inquiry.[280]

Similarly, when contracting out for debt collection, the Department of Education (among others) requires that the private contractors must obey the Privacy Act and follow the Federal Claims Collections Standards and the Department's debt collection regulation.[281] In addition, the Department must approve debt collection letters.[282] Again, via contract, the Department of Education in part changed the character of its agents—they were no longer exempt from certain government-wide regulations.[283] Such constraints in a close case should legitimate the contracting out decision, even if decisional authority is included.[284]

Justification for this approach stems from the key constitutional criterion of accountability. Delegation of decisional authority should be permitted to entities that are publicly accountable. Although the chain of command may still be blurred, the presence of such government-wide constraints serves as a proxy. For example, we are more assured that private contractors implement the will of executive branch officials when they must respond to FOIA, comply with the Hatch Act, and so forth. Contractors who must adhere to government-wide controls are, at least on the margin, subject to greater oversight and their conduct can be traced by the public more readily to the executive branch officials delegating the authority.

In sum, determining when Congress or the President impermissibly has delegated decisional authority to a private actor can be complex. There should be no dispute in the vast majority of circumstances. Receipt of salary indicates public status, permitting the delegation, although the converse is not true. Moreover, congressional or presidential labeling should not be determinative. If the public status is not clear, the key to upholding a delegation of decisional authority should turn on

279. Kelman, *supra* note 84, at 183, 435 n.104 (quoting "boilerplate language" from a Bureau of Prisons management contract with a general contractor).

280. In the wake of the spate of bank bailouts in the early 1990s, Congress provided that any FDIC contract employee should be deemed a government employee for purposes of government ethics statutes and regulations. 12 U.S.C. § 1822(f) (2006).

281. Kelman, *supra* note 84, at 184.

282. *Id.*

283. A select number of ethics statutes currently apply to government employees and contracts alike, such as criminal prohibition on disclosure of sensitive procurement information. 41 U.S.C. § 423 (2006).

284. In a sense, the Supreme Court has followed an analogous route in holding that constitutional guarantees should attach at times no matter whether the actor is private or public. Some type of public accountability must attach to the discharge of certain functions, irrespective of form or label.

whether the individual or entity must comply with the unique sets of constraints, such as FOIA and the Ethics in Government Act, that help define what it means to work in the public sector.[285] Distinguishing public from private status in the abstract is not critical.

Courts therefore can formulate doctrine distinguishing those exercises of governmental powers by private entities and individuals that violate the Constitution. By articulating a test to determine what level of authority exercised by private groups is constitutionally problematic, and by determining when individuals and groups are sufficiently constrained by government checks, a workable test can be devised. Unlike in the nondelegation context, a doctrinal test can be applied without intruding too far into the prerogatives of the coordinate branch of government. That test can demarcate permissible from impermissible delegations of authority to private parties and serve as a continual reminder of the limits in the Constitution on the exercise of power by private entities.

IV. CONCLUSION

The Obama Administration likely will continue to rely upon private individuals and entities in governing the country. Integrating the private sector into government can ensure greater expertise and efficiency in managing the public sector and, at the same time, garner support from regulated entities. Nonetheless, the Constitution does not authorize private parties to exercise decisional authority over their peers. The interest in accountability presupposes that only publicly responsible entities affect the legal rights of private parties. Although the Supreme Court's prior doctrinal lenses—Due Process, nondelegation doctrine, and Article II—reflect a first step, they have distorted the constitutional principle at stake. Courts instead should scrutinize such delegations more directly to prevent private parties from exercising decisional authority over others. They should ask first whether the quantum of authority exercised rises to the level of decisional authority and, if so, whether the entity exercising that authority should be considered private, in part due to the absence of government-wide constraints imposed on public employees such as FOIA and the Ethics in Government Act. Recognizing this constitutional limitation on delegations to private parties will ensure that "[o]ne can have a government . . . that benefits from expertise without being ruled by experts."[286]

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285. Viewed with another lens, the focus on compliance with government-wide rules and regulations dovetails with other academics' stress on the need to ensure that private parties remain accountable for their exercise of delegated authority. *See* Metzger, *supra* note 1; Aman, *supra* note 278.

286. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010).