

1. Key Groups

Washington, the nation's capital is also the home of acronyms. Repeat after me: GAP, POGO, PEER! Despite the importance of these three organizations, many people would have to think hard to explain what GAP, POGO, and PEER are. Let me provide a brief tutorial:

GAP

The Government Accountability Project's mission is to protect the public interest by promoting government and corporate accountability through advancing occupational free speech and ethical conduct, defending whistleblowers, and empowering citizen activists. Founded in 1977, GAP is a non-profit, public interest organization that receives funding from foundations, individuals, and legal fees.

GAP is the nation's leading whistleblower organization. GAP promotes accountability by advocating occupational free speech, litigating whistleblower cases, publicizing whistleblower concerns, and developing policy and legal reforms of whistleblower laws. <http://www.whistleblower.org>

POGO

The Project On Government Oversight (POGO) follows a rich tradition of assuring that the government continues to work for the people it represents. Our nation was founded on the very principle that representation and accountability are fundamental to maintaining a strong and functioning democracy. Today, these principles espoused by our founding fathers are under attack as our federal government is more vulnerable than ever to the influence of money in politics and powerful special interests.

In the beginning, POGO (which was then known as Project on Military Procurement) worked to expose outrageously overpriced military spending such as the \$7,600 coffee maker and the \$436 hammer. After many successes reforming the military, POGO expanded its mandate to investigate systemic waste, fraud, and abuse in all federal agencies. <http://www.pogo.org>

PEER

PEER is a national non-profit alliance of local, state and federal scientists, law enforcement officers, land managers and other professionals dedicated to upholding environmental laws and values.

Public Employees for Environmental Responsibility (PEER) is a national alliance of local state and federal resource professionals. PEER's environmental work is solely directed by the needs of its members. As a consequence, we have the distinct honor of serving resource professionals who daily cast profiles in courage in cubicles across the country. <http://www.peer.org/>

These groups, together with our much maligned civil servants, play a vital role protecting our

health and environment and in resisting attempts by unscrupulous corporate lobbyists wanting to loot the treasury and waste taxpayer dollars.

Our civil service has been stereotyped terribly as a bunch of worthless bureaucrats. There are many intelligent people in the Civil Service, yet they're not allowed to take their conscience to work or apply their ethics to the important work of our government.

2. CODE OF ETHICS FOR GOVERNMENT SERVICE

Our civil servants, however, operate within an ethical framework embodied in the "CODE OF ETHICS FOR GOVERNMENT SERVICE" which states:

Any person in Government service should:

1. Put loyalty to the highest moral principals and to country above loyalty to Government persons, party, or department.
 2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
 3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.
 4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
 5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.
 6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
 7. Engage in no business with the Government, either directly or indirectly which is inconsistent with the conscientious performance of his governmental duties.
 8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.
 9. Expose corruption wherever discovered.
 10. Uphold these principles, ever conscious that public office is a public trust.
- (Passed July 11, 1958.)

There are, unfortunately a variety of efforts to limit ethical government employces from doing their jobs. Whistleblowers are often punished by superiors or even co-workers for doing their jobs. And, while the protections for government whistleblowers are better than they were – there is still room for improvement.

3. Important efforts on behalf of Civil Servants:

In 2003, with my associate Alan Hirsch, I wrote a law review article titled:
A Proposed Right of Conscience for Government Attorneys, Hastings Law Journal December, 2003 – 55 Hastings L.J. 311

This Article argues for enactment of a statute or ethical canon protecting a government attorney's right of conscience. As the United States Supreme Court famously explained:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a [*314] case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer... It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States*, 295 U.S. 78, 88 (1935)

We concluded this article saying:

Our society has shown sensitivity to the call of individual conscience. We respect the conscience of draftees who oppose war, physicians who oppose abortion, employees who oppose their superiors' misconduct, and citizens who oppose government dogma (c.g., on license plates and in the classroom). It is time to respect the conscience of those officers of the court in the forefront of the fight to protect the rights of the rest of us.

Under President Jimmy Carter we pushed for legal protections for whistleblowers in the Civil Service Reform Act of 1978. This overhaul of the federal civil service system was in part sparked by our book, *The Spoiled System*, by Robert Vaughn (1975). This law established a special counsel at federal agencies to investigate whistleblowers' claims and protect them from retribution.

A former associate of ours, Maryland law professor Kenneth Lasson wrote a book titled "*The Private Lives of Public Servants*" (Indiana University Press, Bloomington, Ind. 1975). This compelling work takes readers through a day in the lives of six civil servants. Interspersed between the day's unfolding events or non-events are the thoughts and observations of these federal employees.

Conference on Professional Responsibility, January 30, 1971. This conference brought together the leading exponents of whistleblowing. The proceedings of this conference were published in book form in 1972. *Whistle Blowing*, Viking Compass Books/ Grossman Publishing.

The book, *Whistleblowing and Organizational Social Responsibility: A Global*, by Wim Vandekerckhove (2006 - Business & Economics - 344 pages) states:

[A]ll literature on whistleblowing traces whistleblowing in an organizational context to 1972 [conference was actually in 1971] when, at a conference on professional responsibility, consumer advocate Ralph Nader defined whistleblowing as:

an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that organization is involved in corrupt, illegal, fraudulent or harmful activity

4. State of Civil Service No Cause for Celebration

By Joe Davidson

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This week marks the 30th anniversary of the Civil Service Reform Act of 1978, but don't expect any gala celebrations.

The Coalition for Effective Change, an organization of current and retired federal managers and professionals, did hold a forum to mark the occasion yesterday, but it was hardly a festive affair.

In fact, featured speaker Paul C. Light, a professor of public service at New York University, began the day by announcing: "The state of the federal service is not good."

A little later, Robert M. Tobias, director of public sector executive education at American University, was no less critical.

Citing the portion of the law that deals with labor-management relations, Tobias said if its vision and purpose was to achieve " 'the highest standards of employee performance,' we have failed."

Not everyone at the forum delivered such bad news, but no one was in a merrymaking mood.

"I think it's fitting to note there is no anniversary party for civil service reform . . ." Light said, "or at least that I've been invited to."

His problems with the civil service are many.

"I see significant morale problems, problems with ratings of leadership of agencies, the quality of appointments, staffing shortages just about everywhere on the front lines," he said in an interview after this talk.

"I'm very concerned that we are not investing in actual delivery of service."

For examples, he cited the length of time it takes to review claims for Social Security disability and veterans benefits, or problems with food safety inspections and in the air traffic control system.

And, of course, the federal hiring process has become a cliché for broken government despite many attempts to fix it.

For those who have been hired by the government, Light is concerned that too many of them display too little enthusiasm for the work they do.

"We really need people who are committed to the mission and being called by the mission . . ." he said. "I want federal employees to come to work in the morning motivated by the chance to do something worthwhile."

But that motivation can be seriously injured by such things as the scandal involving partisan politics in hiring and firing at the Justice Department. Before he was run out of office, former attorney general Alberto R. Gonzales "did as much to destroy interest in federal careers in public service than we've done over the last few years to create it," Light said.

He also was critical of good-government groups -- and many were represented in the audience -- for being too quiet during the Gonzales scandal. "I don't think there was very much outrage," he said. "I didn't see too many people angered about it."

For Tobias, good government was hampered by negative relations between labor and management, particularly before the Clinton administration changed the atmosphere.

"Managers believed that union leaders only wanted to get in their way of doing what is right," he said. "Union leaders believed that managers are only interested in doing what they want to do no matter what kind of an adverse impact it has on the workforce."

He took a swing at President Bush's policies, saying they "have begun the inexorable slide back to the pre-1992 hostile labor-management relations atmosphere."

Among those with a more positive assessment, but certainly not unbridled praise, was John Palguta, vice president for policy at the Partnership for Public Service. Where Light sees the government's financial rescue plan, which farms out much of the work, as an "indictment of the federal government's ability to deliver the goods," Palguta believes the financial crisis has reinforced the value of government and the need to have highly talented people running it.

He pointed to a variety of Civil Service Reform Act accomplishments: the creation of the Office of Personnel Management, the Merit Systems Protection Board, the Federal Labor Relations Authority, the Senior Executive Service, and collective bargaining rights for unions.

The act also defined nine merit system principles and prohibited 12 personnel practices.

"We're better off for having the Civil Service Reform Act of '78 than if we didn't," Palguta said. The law hasn't done everything it was suppose to, he added, "but the values of the merit system were put into law. . . . it's a job that's incomplete."

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5. Privatization Of Federal Services

AFGE on privatization of civil service

The Bush Administration is determined to hand over to private, for-profit contractors roughly one-half of all services performed by the federal government. From providing health care to our nation's veterans to guarding dangerous prisoners to supervising housing contractors to safeguarding the borders to processing Social Security checks to repairing the planes, ships, and tanks necessary to defend our homeland, it will all be given to private, for-profit contractors, most of them very politically-connected, if Bush Administration officials have their way.

The Office of Management and Budget (OMB) has told agencies to review for privatization, either with or without public-private competition, the jobs of at least 850,000 federal employees. As a result of pressure from OMB, agencies are increasing their privatization targets, so the number of federal employees under attack will soon approach 1,000,000. At the same time, OMB is completing a controversial rewrite of OMB Circular A-76, which establishes rules for public-private competition, in order to make the process even more biased in favor of contractors because of complaints from contractors that they could only win 40% of the competitions conducted under the existing privatization process.

Clearly, the Bush Administration is at war with the working and middle class Americans who make up the federal civil service. As evidenced by the debate over legislation to establish a Department of Homeland Security, if the Bush Administration can't bust their unions, or eliminate their civil service protections, then they'll privatize their jobs. The ultimate goal of the Bush Administration is to transform the civil service into a "spoils system", which would consist of a largely union-free workforce of poorly-compensated contractor employees with no protections against politically-inspired dismissals and discipline. Last year, almost 40 percent of government workers were unionized, compared with 9 percent of private-sector employees. Moreover, according to the Economic Policy Institute (EPI), "The federal government saves money by contracting work to employers who pay less than a living wage."

Observers have noted the political calculations that inspired the Bush Administration's privatization initiative. Paul Krugman in *The New York Times* wrote of the Bush Administration's privatization scheme, "So am I saying that we are going back to the days of Boss Tweed and Mark Hanna? Gosh, no - those guys were pikers. One-party control of today's government offers opportunities to reward friends and punish enemies that the old machine politicians never dreamed of. How far can the new spoils system be pushed? To what extent will it be used to lock in a permanent political advantage for the ruling party? Stay tuned; I'm sure we'll soon find out."

Failing To Account For The Cost Of Contractors: Federal agencies already contract out in excess of \$125 billion annually for services. Although the Administration is poised to transfer additional billions and billions of taxpayer dollars to contractors through an accelerated privatization process, undoubtedly the largest transfer ever of taxpayer-financed public sector services, assets,

and employees to private sector interests, federal agencies have no systems in place to track the costs and quality of service contracting. In fact, some agencies don't even know which services are being provided by contractors.

The most recent examination of service contracting by the Department of Defense (DoD), the agency that spends the most taxpayer dollars on service contracting, left the Inspector General "startled" because his office "found problems with every one of the 105" contract surveyed. "In nearly 10 years of managing the audit office of the IG, DoD, I do not ever recall finding problems on every item..."

According to the General Accounting Office, "In fiscal year 1999, DoD reportedly spent \$96.5 billion for contract services-more than it spent on supplies and equipment. Nevertheless there have been longstanding concerns regarding the accuracy and reliability of DoD's reporting on the costs related to contract services-particularly that expenditures were being improperly justified and classified and accounting systems used to track expenditures were inadequate...DoD has not developed a proposal to revise and improve the accuracy of the reporting of contract service costs. DoD officials told us that various internal options were under consideration; however, these officials did not provide any details of these options. DoD officials stated that the momentum to develop a proposal to improve the reporting of contract services costs had subsided. Without improving this situation, DoD's report on the costs of contract services will still be inaccurate and likely understate what DoD is paying for certain types of services."

Federal employees and their work are already meticulously tracked and documented in extraordinary detail through the budget, appropriations and Federal Activities Inventory Reform Act inventories processes. The new OMB rewrite of OMB Circular A-76 imposes additional accountability provisions on federal employees-but, significantly, none on contractors.

Exacerbating The "Human Capital Crisis": The federal government is experiencing a "human capital crisis", shortages of federal employees in occupational category after occupational category, caused in large part by indiscriminate downsizing and privatization over the last dozen years, which, with little if any foresight or planning, has slashed the federal workforce by more than 400,000.

The Bush Administration's attempt to eliminate more than one-half of the remaining workforce will only exacerbate the "human capital crisis." Indeed, the extraordinarily aggressive nature of the Administration's privatization effort will surely make it more difficult for agencies to recruit and retain the best possible federal employees. While most see the "human capital crisis" as a challenge that must be met by gradually rebuilding the federal civil service, Bush Administration officials see it as an opportunity to accelerate its effort to use privatization of federal services to benefit campaign contributors. Moreover, while acknowledging that agencies have already contracted out inherently governmental services, OMB officials have told agencies to consider any job as suitable for privatization.

Giving Work To Contractors Without Any Public-Private Competition: Despite much talk about public-private competition, agencies are directly converting work performed by federal employees to private sector performance without any public-private competition. In fact, the Bush Administration's privatization quotas explicitly encourage agencies to do so. The Department of Defense (DoD), the agency that has the most experience with public-private competition, admits that contractors had to compete against federal employees for only 2% of its contracts.

Some agencies, the Department of the Army in particular, intend to privatize tens of thousands of jobs without any public-private competition, using a corporate welfare-style method called "divestiture," which turns out to be nothing less than the transfer to politically well-connected contractors of services performed by federal employees, the actual federal employees who perform those services, and the equipment used by the federal employees who perform those services. Significantly, considering how they have touted public-private competition, at least in public, especially in the context of the rewritten privatization process, OMB officials have refused to repudiate the Army's manifestly anti-competitive privatization initiative.

Using Public-Private Competition Inequitably: Public-private competition is exclusively a one-way street. Federal employees are almost never allowed to compete for new work and contractor work. This failure is a particular disservice to taxpayers because there is often little competition between contractors for work. The DoD IG has reported that in excess of three-fifths of the contracts he and his staff surveyed suffered from "inadequate competition." Regardless of the level of public-private competition, 77% of the surveyed contracts had "inadequate cost estimates" that, according to the DOD IG, "clearly left the government vulnerable-and sometimes at the mercy of the contractor to define the cost."

Allowing federal employees opportunities to compete for new government work and government work already contracted out would ensure that taxpayers are no longer at the mercy of sole-source contractors. Insourcing, bringing work in-house, where it can be performed by reliable and experienced public sector employees on a not-for-profit basis, is common at local levels of government. According to Cornell University, "there is significant incidence of reverse privatization or contracting back in previously privatized services...From 1992-1997, 88 percent of governments had contracted back in at least one service and 65 percent had contracted back in more than three services. On average across all places, 5 services were contracted back in from 1992 to 1997."

Despite much talk about using the new circular to insource as well as outsource, the fact remains that OMB has imposed quotas only to privatize work performed by federal employees, not to ensure that agencies finally start subjecting new work and work performed by contractors to public-private competition. In fact, by refusing to establish systems to track work performed by contractors, the new circular makes it impossible for agencies to systematically review work performed by contractors for possible taxpayer dollar-saving insourcing.

>Further Corrupting The Privatization Process: Although the Bush Administration has claimed repeatedly that its policy of reviewing as many as 1,000,000 federal employee jobs for privatization is motivated by a desire to save taxpayer dollars, the new public-private competition process emphasizes the use of subjective factors at the expense of objective, cost-based criteria. Cost and quality are both important. Using a process that is ultimately cost-based ensures that agencies can acquire the services they want, at the quality they need, for the lowest possible prices.

Historically, allowing feelings and hearsay to take precedence over the bottom line of what's best for taxpayers has consistently led to higher costs. It has also worsened long-standing, "revolving door" problems of bias and conflict of interest in federal procurement, no small matter considering the Bush Administration's pronounced favoritism towards federal service contractors, most of whom will be expected to contribute generously to the President's re-election campaign.

Moreover, while making the privatization process more subjective and vulnerable to bias and corruption, the Bush Administration has done nothing to rectify an obvious and longstanding inequity: contractors-only contractors-have the right to contest agencies' procurement decisions before the General Accounting Office and the Court of Federal Claims.

Privatizing To Undercut Workers On Their Wages And Benefits: The new privatization process crafted by the Bush Administration does nothing to eliminate perverse incentives to privatize work in order to provide those who perform government work with inferior compensation packages. As EPI has reported, "Even the federal government jobs at the low end of the pay scale have historically paid better and have had more generous benefits than comparable private sector jobs. As a result, workers who work directly for the federal government through contracts with private industry are not likely to receive wages and benefits comparable to federal workers."

Privatization can sometimes save money. However, federal agencies should not privatize in order to lower the living standards of those who perform the work of government. However, the Bush Administration's rewrite of the privatization process actually increases the emphasis on wages and benefits in award decisions.

Conclusion: "After abuses too infamous to ignore," as AFL-CIO President John Sweeney noted in testimony last year, "the nation as a matter of law and policy rejected a 'spoils system' allowing new presidents to replace their predecessors' workforces with cronies and political supporters. We adopted, instead, a civil service system to ensure that the American people would always be served by women and men who chose to devote their lives to the public good rather than private gain. Rank-and-file federal employees provide the continuity, attention to details, and institutional memory necessary to ensure that the American people continue to be the best governed in the world. Because they are not political appointees, these civil servants can do their job of serving the public without fear or favor. And because civil servants are part of the enduring fabric of government, the American people can always count on them for service,

regardless of a President's political affiliation or ideological bent...

"(The Bush privatization scheme) raises grave concerns that, under the banner of 'efficiency,' the nation could well return to a latter day 'spoils system.' The real possibility exists that in the future, lucrative service contracts paid for by taxpayers will be doled out in ways the civil service system was created to prevent. While some would undoubtedly win under such a scheme, most of us would be losers."

Here's how lawmakers can oppose the Bush Administration's wholesale privatization scheme:

1. Cosponsor the Truthfulness, Responsibility, and Accountability in Contracting (TRAC) Act. In the 107th Congress, H.R. 721 and S. 1156 claimed 190 and 26 cosponsors, respectively. Both bills will be introduced in the 108th Congress.

2. Support TRAC-like amendments to specific authorization bills. Last year, an amendment that would have ensured real cost-based public-private competition for work performed by federal employees, new work, and contractor work failed by just a single vote on the Senate floor.

3. Support efforts to free agencies from privatization quotas, whether self-imposed or imposed by OMB. Although the 107th Congress did not finish work on the Treasury Appropriations Bill, both the House and Senate versions of that legislation included provisions freeing agencies from the OMB numerical privatization quotas.