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Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers

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INHERENTLY GOVERNMENTAL: A LEGAL ARGUMENT FOR ENDING PRIVATE FEDERAL PRISONS AND DETENTION CENTERS[†]

ABSTRACT

Under the Federal Activities Inventory Reform (FAIR) Act of 1998, the federal government’s “inherently governmental functions” must be performed by government actors, while its “commercial activities” may be performed by private contractors. This statute has important implications for the legality of privately operated federal prisons and immigration detention centers. If operating prisons and detention centers is an inherently governmental function within the meaning of the FAIR Act, then these facilities cannot be operated by private contractors. This Comment provides a comprehensive legal analysis of whether the operation of prison and detention facilities is an inherently governmental function.

Federal government policy recognizes two tests for identifying inherently governmental functions. First, under the “exercise of discretion” test, a function is inherently governmental if it involves exercising discretion in applying government authority. Second, under the “nature of the function” test, a function is inherently governmental if it involves exercising the sovereign powers of the United States. This Comment argues that operating prison and detention facilities is an inherently governmental function under either test. It is inherently governmental under the exercise of discretion test because private prison contractors, in applying the government’s authority to incarcerate people, exercise discretion with significant consequences for prison conditions and inmates’ liberties. Further, imprisonment is also an inherently governmental function under the nature of the function test because its legitimacy rests on the sovereign power to deprive a person of liberty in the name of law enforcement, public safety, or border control. Thus, the operation of prison and detention facilities is an inherently governmental function that cannot legally be contracted out to the private sector.

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INTRODUCTION

In February 2017, Attorney General Jefferson Sessions reversed the Obama Administration’s plan to phase out federal government contracting with private prison companies.¹ Under President Obama, the U.S. Department of Justice (DOJ) decided to phase out private prison contracts because it found that private prisons are less safe, less secure, and roughly equal in cost as compared to government facilities.² The Trump Administration, by contrast, maintains that private prisons are effective and will be necessary “to meet the future needs of the federal correctional system.”³ Both administrations have framed the issue of prison privatization in empirical terms—focusing on costs, prison conditions, or the size of the prison population—rather than in legal or moral terms.

Independent of the Obama Administration’s contested empirical conclusions about private prisons,⁴ this Comment argues there is a *legal* reason to end private prison contracting at the federal level. Under the Federal Activities Inventory Reform (FAIR) Act of 1998, the federal government cannot contract out “inherently governmental functions” for performance by the private sector.⁵ The FAIR Act defines inherently governmental function as “a function that is so intimately related to the public interest as to require performance by Federal Government employees.”⁶ If prison operation is an

¹ Eric Lichtblau, *Justice Department Keeps For-Profit Prisons, Scrapping an Obama Plan*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/politics/justice-department-private-prisons.html>; see Memorandum from Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, to the Acting Dir., Fed. Bureau of Prisons (Aug. 18, 2016), <https://www.justice.gov/archives/opa/file/886311/download> [hereinafter Yates Memorandum].

² See Yates Memorandum, *supra* note 1.

³ Memorandum from Jefferson B. Sessions III, Attorney Gen., U.S. Dep’t of Justice, to the Acting Dir., Fed. Bureau of Prisons (Feb. 21, 2017), https://www.bop.gov/resources/news/pdfs/20170224_doj_memo.pdf; see also John Burnett, *Will the Private Prison Business See a Trump Bump?*, NPR (Jan. 4, 2017, 4:58 PM), <http://www.npr.org/2017/01/04/508048666/will-the-private-prison-business-see-a-trump-bump> (quoting President Trump’s statement that privatization of prisons “seems to work a lot better”).

⁴ Cost comparison studies and data on the quality of confinement in public and private prisons have provoked debate among policymakers and scholars alike. See DOUGLAS McDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 33–46 (1998); Brad W. Lundahl et al., *Prison Privatization: A Meta-Analysis of Cost and Quality of Confinement Indicators*, 19 RES. ON SOC. WORK PRAC. 383, 392–93 (2009); Matthew D. Makarios & Jeff Maahs, *Is Private Time Quality Time? A National Private-Public Comparison of Prison Quality*, 92 PRISON J. 336, 337 (2012); Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 144 (2012) (“It is . . . not surprising to find that many of these [anti-privatization] arguments are deeply contested, because they depend on messy data and contingent facts.”).

⁵ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

⁶ *Id.*

inherently governmental function, then prison privatization violates the FAIR Act.

Whether the operation of prison and detention facilities is an inherently governmental function within the meaning of the FAIR Act is an important, but neglected, question. The administrative designation of this function matters because recognizing prison and detention services as an inherently governmental function would require the DOJ to reverse its current policy and put an end to contracting for these services at the federal level.⁷ Furthermore, reclassifying this function would bar private contracting for detention services not only by the Federal Bureau of Prisons (BOP), but also by other federal agencies such as Immigration and Customs Enforcement (ICE). Although the civil detention of immigrants based on their citizenship status can be distinguished conceptually from corrections, this distinction has become blurred: unauthorized immigration is increasingly prosecuted as a criminal act,⁸ and immigration detainees are treated like prisoners.⁹ Because criminal incarceration and immigration detention both manifest the government's power to deprive a person of liberty in the name of law enforcement, raise overlapping concerns, and are treated as a single category for purposes of federal procurement policy,¹⁰ this Comment's argument applies to both prisons and immigration detention centers.

Neither scholars nor courts have provided a comprehensive legal analysis of whether imprisonment is an inherently governmental function under the FAIR Act. Some scholars have argued that prison management cannot legitimately be delegated to the private sector because of its inherently governmental nature, but they have generally framed this argument in philosophical or moral, rather than legal, terms.¹¹ A few scholars have noted

⁷ The DOJ under President Obama proposed to do this by "directing that, as each contract reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law and the overall decline of the Bureau's inmate population." Yates Memorandum, *supra* note 1.

⁸ See *Investigation into Private Prisons Reveals Crowding, Under-Staffing and Inmate Deaths*, NPR (Aug. 25, 2016, 3:03 PM), <http://www.npr.org/2016/08/25/491340335/investigation-into-private-prisons-reveals-crowding-under-staffing-and-inmate-de>.

⁹ Subhash Kateel & Aarti Shahani, *Families for Freedom: Against Deportation and Delegalization*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 258, 263–64 (David C. Brotherton & Philip Kretsedemas eds., 2008).

¹⁰ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76 REVISED, *PERFORMANCE OF COMMERCIAL ACTIVITIES* (2003) (clarifying that the Circular does not prevent contracting out for "the operation of prison or detention facilities").

¹¹ See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 446 n.19 (2005) (examining prison privatization from the perspective of liberal legitimacy in contrast to the inherent-

that the FAIR Act can be interpreted to bar private federal prisons, but have not developed this argument fully.¹² Courts have not had occasion to consider whether the operation of prison and detention facilities is an inherently governmental function under the FAIR Act, as the ability to challenge an agency's designation is limited by the statute's "interested party" standing requirements.¹³ This Comment seeks to provide a comprehensive legal analysis of whether the operation of prison and detention facilities is an inherently governmental function within the meaning of the FAIR Act.

Whether the FAIR Act bars private prison and detention facilities hinges on an ambiguous term. The statutory definition of the term inherently governmental function—a "function that is so intimately related to the public interest as to require performance by Federal Government employees"¹⁴—is far from self-explanatory. It raises fundamental questions about the proper roles of government and the private sector in American society.¹⁵

To clarify the federal government's outsourcing policy, the Office of Management and Budget (OMB) established two tests for identifying inherently governmental functions: (1) the "exercise of discretion" test, which (as its name suggests) focuses on whether a function requires discretion in applying government authority, and (2) the "nature of the function" test, which focuses on whether a function involves the "exercise of sovereign powers."¹⁶ If a function is inherently governmental under *either* test, it should be designated as an inherently governmental function that is ineligible for federal contracting.¹⁷

public-function approach, which is "motivated by the idea that prison administration must be guided solely by public values"; Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 VAND. L. REV. 489, 495 (1999); Stephanie Frazier Stacy, Comment, *Capitalist Punishment: The Wisdom and Propriety of Private Prisons*, 70 NEB. L. REV. 900, 913 (1991).

¹² See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 460 (2006); Volokh, *supra* note 4, at 157; Lucas Anderson, Note, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113 (2009).

¹³ See *infra* Section I.B.1.

¹⁴ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

¹⁵ JOHN R. LUCKEY ET AL., CONG. RESEARCH SERV., R40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS (2009); see also Lisa Vecoli, *The Politics of Privatization*, 15 HAMLIN J. PUB. L. & POL'Y, 243, 243-45 (1994).

¹⁶ Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,237 (Sept. 12, 2011) [hereinafter Policy Letter 11-01].

¹⁷ *Id.*

The exercise of discretion test and the nature of the function test provide a useful structure for analyzing the propriety of prison privatization because the tests encapsulate two fundamentally different approaches to the issue. The exercise of discretion test reflects an approach to the prison privatization debate that focuses on the real-world effects of privatization. This test, which prohibits private contractors from performing functions involving the exercise of discretion in applying government authority, reflects the value of democratic accountability and seeks to guard against potential abuses of discretion by the private sector.¹⁸ Looking to the degree of discretion associated with a function makes sense for critics of prison privatization who are concerned with behavior, accountability mechanisms, and outcomes rather than with philosophical ideas about the nature of imprisonment.¹⁹

In contrast, the nature of the function test reflects the view that it is wrong to privatize certain functions because of *inherent* differences between the public and private sectors.²⁰ The inherent view underlies “the fundamental moral criticism that imprisonment is an intrinsic or core state function that . . . cannot legitimately be delegated” to a non-state actor.²¹ Contingent empirical claims about privatization are irrelevant under this approach, which instead draws “on high-level political or moral theory, the purposes of criminal punishment, liberal legitimacy, liberty and dignity, symbolism and social meaning.”²²

This Comment proceeds in four Parts. Part I provides background to the privatization of detention services in the United States and discusses the legal and regulatory framework governing the designation of functions as inherently governmental or “commercial.” Part II applies the exercise of discretion test to the operation of prison and detention facilities. Part III analyzes whether the operation of prison and detention facilities is an inherently governmental function under the nature of the function test. Finally, Part IV discusses the implications of designating the operation of these facilities an inherently governmental function and why the inherently governmental function provision of the FAIR Act is a desirable law. This Comment concludes that the operation of prison and detention facilities is an inherently governmental

¹⁸ See Policy Letter 11-01, *supra* note 16, at 56,237–38.

¹⁹ See, e.g., Volokh, *supra* note 4.

²⁰ See, e.g., JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 11 (1989) (“Are there not some values inherent in publicness or privateness *per se*, beyond the purely instrumental?”).

²¹ See Richard Harding, *Private Prisons*, 28 CRIME & JUST.: REV. RES. 265, 266 (2001).

²² Volokh, *supra* note 4, at 135.

function under either of the two tests. Accordingly, the practice of contracting with private companies to operate federal prison and detention facilities violates the FAIR Act and should be discontinued.

I. PRISON PRIVATIZATION AND THE LAW OF FEDERAL CONTRACTING

This Part introduces the issue of prison privatization by providing, in section A, a brief history of its implementation in the United States and current prison population statistics. Second, in section B, this Part explains the legal and regulatory framework governing how federal agencies classify functions for procurement purposes.

A. *Overview of Prison Privatization in the United States*

In the 1980s and 1990s, the American corrections system faced a crisis of overcrowding.²³ Increased public demand for imprisonment of criminals and harsher sentencing policies produced dramatic growth in the prison population.²⁴ Rising prison violence, out-of-date government facilities, and the unpopularity of early-release policies put pressure on governments to find a solution.²⁵

Struggling to provide adequate facilities for a growing population of inmates, state and local governments turned to private corrections companies in the 1980s.²⁶ This response accorded with the political values that defined the Reagan era, such as limited government and faith in the private sector.²⁷ Free market advocates promoted prison privatization as a means of achieving greater efficiency and reducing government bureaucracy.²⁸ But it was not until 1996—shortly after President Clinton declared, “The era of big Government is

²³ Samuel Jan Brakel, *Private Corrections*, in *PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR* 254, 254 (Gary W. Bowman et al. eds., 1992).

²⁴ JUDY S. GRANT & DIANE CAROL BAST, *CORRECTIONS AND THE PRIVATE SECTOR: A GUIDE FOR PUBLIC OFFICIALS* 2 (1987); DAVID F. LINOWES ET AL., *PRESIDENT’S COMM’N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT* 146 (1988) (“From 1979 to 1986, state and federal prison populations increased by approximately 74 percent . . .”); PHILIP MATTERA ET AL., *GOOD JOBS FIRST, JAIL BREAKS: ECONOMIC DEVELOPMENT SUBSIDIES GIVEN TO PRIVATE PRISONS* 2 (2001).

²⁵ See Brakel, *supra* note 23; GRANT & BAST, *supra* note 24, at 2.

²⁶ See Makarios & Maahs, *supra* note 4, at 338; MATTERA ET AL., *supra* note 24, at 1–2.

²⁷ See Makarios & Maahs, *supra* note 4, at 338.

²⁸ See Charles H. Logan & Sharla P. Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 *JUST. Q.* 303, 306–07 (1985).

over”²⁹—that Congress expressly authorized the BOP to contract with the private sector for the operation of prisons.³⁰

In 1997, the BOP began contracting with private correctional institutions to respond to this mandate and alleviate overcrowding in its facilities.³¹ Since then, the BOP has contracted with the Corrections Corporation of America, GEO Group, Inc., and the Management and Training Corporation to confine a portion of the federal inmate population, primarily low-security men.³² The federal prison population reached its peak in 2013 and has since been declining.³³ Recent estimations of the proportion of BOP inmates housed in contract prisons range from 12%–15% of the total of about 195,000.³⁴

Privatization has also played an increasingly important role in immigration detention as the population of detainees has swelled.³⁵ As of 2016, approximately 65% of ICE detainees are housed in facilities operated by private, for-profit contractors.³⁶ Roughly speaking, the numbers of inmates in private facilities are comparable for the BOP and ICE, although ICE has a much higher *proportion* in private facilities.³⁷ ICE contracts for detention services with the same private companies that operate prison facilities under contracts with the BOP, such as CoreCivic (formerly the Corrections Corporation of America).³⁸

Existing procurement regulations and policies place prison and detention facilities in a nebulous intermediate category lying between inherently governmental function and commercial activity.³⁹ The operation of prison and

²⁹ William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), in 1996 PUB. PAPERS 79 (1996).

³⁰ See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, div. A, tit. I, § 101(a), 110 Stat. 3009, 3009-11 (1996).

³¹ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS 1 (2016).

³² *Id.*; see also Brakel, *supra* note 23, at 269.

³³ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *supra* note 31, at 1.

³⁴ *Id.*; HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 7 (2016).

³⁵ See Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL’Y REV. 429, 433–34 (2011) (discussing dramatic growth in the detainee population since the 1990s).

³⁶ HOMELAND SEC. ADVISORY COUNCIL, *supra* note 34, at 6 tbl.1.

³⁷ See *id.* at 7.

³⁸ See, e.g., *Stewart Detention Center*, CCA, <http://www.cca.com/facilities/stewart-detention-center> (last visited Feb. 8, 2017); *supra* note 32 and accompanying text.

³⁹ See Federal Acquisition Regulation, 48 C.F.R. § 7.503(d) (2016) (listing prisoner detention as an example of functions “generally not considered to be inherently governmental functions” but that “may approach being in that category because of the nature of the function, the manner in which the contractor

detention facilities is designated as a function “closely associated” with inherently governmental functions.⁴⁰ As the next section explains, this designation allows private contractors to operate prisons subject to federal government oversight.⁴¹ The federal government currently fails to recognize prisoner detention as an inherently governmental function that is off-limits to contracting.

B. The Legal and Regulatory Framework Governing Privatization

Under the FAIR Act, the designation of a function as either commercial or inherently governmental determines whether that function is eligible for federal contracting.⁴² This section explains the legal and regulatory framework that governs an agency’s function designations by discussing three key sources: (1) the FAIR Act, (2) the Federal Acquisition Regulation (FAR), and (3) the OMB Circular A-76 (Circular). These sources—respectively, a statute, a regulation, and a policy document—govern the classification of functions for procurement purposes.⁴³ This section discusses how the FAR and the Circular both implement and diverge from the controlling statute, the FAIR Act.

1. The FAIR Act

Congress enacted the FAIR Act in 1998 to provide a competitive sourcing process that would maximize government reliance on the private sector.⁴⁴ Congress intended to reduce government costs, harness the benefits of competition, and “do a favor for every U.S. taxpayer.”⁴⁵ The FAIR Act tasked agencies to identify their commercial activities capable of being performed by the private sector and to submit annual inventories of these activities to the OMB.⁴⁶ The Act codified a distinction between commercial activities, which

performs the contract, or the manner in which the Government administers contractor performance”); 48 C.F.R. § 7.503(d)(19); DEP’T OF JUSTICE, No. 4100.05, BUREAU OF PRISONS ACQUISITION POLICY 40 (2016) (describing which contracts are reported as “Closely Associated Functions”).

⁴⁰ DEP’T OF JUSTICE, *supra* note 39, at 40.

⁴¹ See Policy Letter 11-01, *supra* note 16, at 56, 241–42.

⁴² See 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

⁴³ For a discussion of whether the Circular, a self-described policy document, is legally binding, see KATE M. MANUEL, CONG. RESEARCH SERV., R42325, DEFINITIONS OF “INHERENTLY GOVERNMENTAL FUNCTION” IN FEDERAL PROCUREMENT LAW AND GUIDANCE 9–10 (2014).

⁴⁴ Am. Fed’n of Gov’t Emps. v. United States, 46 Fed. Cl. 586, 597 (2000) (noting that the Act’s principal sponsor stated that “Congress intended [the FAIR Act] to ‘codif[y] a process to assure government reliance on the private sector to the maximum extent feasible’” (second alteration in original) (quoting 144 CONG. REC. S9105 (daily ed. July 28, 1998) (statement of Sen. Thomas))).

⁴⁵ 144 CONG. REC. 23,477 (1998) (statement of Rep. Sessions).

⁴⁶ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

may be performed by private contractors, and inherently governmental functions, which are off-limits to contracting.⁴⁷ This section discusses the FAIR Act's definition of inherently governmental function and explains the obstacles to challenging prison privatization under this statute.

The FAIR Act defines an inherently governmental function as a function that must be performed by federal government employees because it is "so intimately related to the public interest."⁴⁸ The Act characterizes inherently governmental functions as "activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government."⁴⁹ The Act lists several types of inherently governmental functions, including the "execution of the laws of the United States so as . . . to significantly affect the life, liberty, or property of private persons."⁵⁰ It also describes what is *not* an inherently governmental function: providing information or advice to the federal government, and "any function that is primarily ministerial and internal in nature," such as cafeteria food service, cleaning, and routine mechanical tasks.⁵¹

The FAIR Act's definition of inherently governmental function requires some interpretation by the agencies that must implement it.⁵² How can an agency determine when a function is so "intimately related to the public interest" that it requires performance by government employees? What does it mean to "significantly affect" the life, liberty, or property of private persons? The statutory definition offers broad principles rather than concrete criteria.

Nevertheless, the potential implications of the FAIR Act's definition of inherently governmental function for prison privatization are apparent. What more significantly and directly affects "the life, liberty, or property of private persons" than carrying out the confinement of prisoners?⁵³ Furthermore, the FAIR Act's "inherently governmental function" language aligns closely with a common argument against prison privatization.⁵⁴ As criminologist Dr. Charles

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Volokh, *supra* note 4, at 157 (observing that the FAIR Act's definition of inherently governmental function "obviously is not a model of clarity").

⁵³ See Dolovich, *supra* note 11, at 441 ("Incarceration is among the most severe and intrusive manifestations of power the state exercises against its own citizens.").

⁵⁴ See, e.g., Charles H. Logan, *The Propriety of Proprietary Prisons*, 51 FED. PROB., Sept. 1987, at 35, 35.

Logan argues, “The most principled objection to the propriety of commercial prisons is the claim that imprisonment is an inherently and exclusively governmental function and therefore should not be performed by the private sector at all”⁵⁵

Given the congruence between this line of anti-privatization argument and the language of the FAIR Act, it may seem puzzling that there has been no lawsuit challenging prison privatization under the FAIR Act. Although a few scholars have argued that the prison system is or may be an inherently governmental function within the meaning of the FAIR Act,⁵⁶ the statute’s practical usefulness for litigants is limited. As explained below, the FAIR Act’s “interested party” standing requirements and courts’ restrictive notions of the Act’s “zone of interests” effectively preclude prisoners from bringing suit under the Act.⁵⁷

The FAIR Act establishes an administrative appeals process under which an interested party may challenge the designation of a particular activity on an agency’s inventory.⁵⁸ It provides: “An interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list for which a notice of public availability has been published”⁵⁹ The Act defines interested party to include the following individuals and entities:

- (1) A private sector source that—
 - (A) is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and
 - (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.
- (2) A representative of any business or professional association that includes within its membership private sector sources referred to in paragraph (1).

⁵⁵ *Id.*

⁵⁶ *See, e.g.,* Volokh, *supra* note 4, at 157; Anderson, *supra* note 12, at 123–24.

⁵⁷ A statutory cause of action is presumed to extend only to plaintiffs whose interests “fall within the zone of interests protected by the law invoked.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). *See generally* Lindsay Windsor, Note, *James Bond, Inc.: Private Contractors and Covert Action*, 101 GEO. L. REV. 1427, 1437–40 (2013) (discussing the standing issues that have resulted in a lack of case law clarifying the inherently governmental function designation).

⁵⁸ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

⁵⁹ *Id.*

- (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.
- (4) The head of any labor organization . . . that includes within its membership officers or employees of an organization referred to in paragraph (3).⁶⁰

The text of the statute does not contemplate challenges by private parties who are not suffering a direct economic harm as a result of a contracting decision. By the *expressio unius* maxim of statutory construction, the statute's explicit list implies that whoever is not listed cannot challenge an agency designation.⁶¹ Thus, the FAIR Act appears to preclude a challenge to an agency designation by a prisoner or detainee. Furthermore, a prisoner or detainee would face a constitutional standing hurdle as well; he or she would have to show an injury caused by the privatization.⁶²

The only type of interested party that could challenge the current commercial designation of prison operation is a federal employee or union whose employment is threatened by privatization.⁶³ However, this is an unlikely avenue for effecting a change in the designation of the function from commercial to inherently governmental. Even if federal employees brought this challenge, judicial review has not yet been granted under the FAIR Act to these claims.⁶⁴ Courts have narrowly circumscribed the standing of federal employees to challenge agency decisions on the basis that federal employees do not fall within the FAIR Act's zone of interests, at least with respect to cost

⁶⁰ *Id.* This provision of the FAIR Act was amended by the Consolidated Appropriations Act, 2008, div. D § 739, Pub. L. 110-161, 121 Stat. 1844, 2029-31 (2007), as amended by Omnibus Appropriations Act, 2009, div. D § 735, 736, Pub. L. 111-8, 123 Stat. 524, 689-91 (2009). However, the amended provision effectively maintains the same parameters on eligibility to protest under the statute.

⁶¹ *Expressio unius est exclusio alterius* is a canon of construction meaning that the inclusion of one thing implies the exclusion of another. See generally Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQUETTE L. REV. 191 (1931).

⁶² See Nat'l Air Traffic Controllers Ass'n v. Sec'y of the Dep't of Transp., 654 F.3d 654, 659 (6th Cir. 2011) (holding that the plaintiffs lacked standing because they failed to show they were harmed by the privatization of a federal facility).

⁶³ For example, federal seafood inspectors successfully challenged the decision of the National Oceanic and Atmospheric Administration to reclassify the function of seafood inspector as a commercial function. See James J. McCullough et al., *Feature Comment: Year 2003 OMB Circular A-76 Decisions and Developments*, GOV'T CONTRACTOR, Jan. 21, 2004, ¶ 27, at 1, 2-3. In agreeing this function is inherently governmental, the Department of Commerce found that contracting it out could decrease public trust in the safety of seafood products. *Id.*

⁶⁴ Verkuil, *supra* note 12, at 452-53; see Courtney v. Smith, 297 F.3d 455 (6th Cir. 2002); Am. Fed'n of Gov't Emps. v. United States, 46 Fed. Cl. 586 (2000).

comparison decisions.⁶⁵ Courts have reasoned that the legislative history of the FAIR Act indicates that it was enacted to protect the interests of taxpayers and the private sector, not the jobs of federal employees.⁶⁶

Thus, although the FAIR Act provides a potential basis for challenging the privatization of prison and detention facilities, its limitations on who may bring this challenge in court have effectively precluded judicial review of the designation of this function.

2. *The Federal Acquisition Regulation*

The FAR is another source of federal law and policy on inherently governmental functions.⁶⁷ Issued to promote the development of a uniform procurement system, this regulation implements the FAIR Act and other procurement statutes.⁶⁸ The FAR affirms that “[c]ontracts shall not be used for the performance of inherently governmental functions.”⁶⁹ In addition, however, the FAR recognizes an intermediate category between inherently governmental functions and commercial functions—functions closely associated with inherently governmental functions⁷⁰—and places “prisoner detention or transport” in this category.⁷¹

Functions in the closely associated category are not considered inherently governmental but “may approach being in that category because of the nature of the function” or the way the contract is performed or administered.⁷² Closely associated functions can be performed by a contractor, but agencies that contract out this type of function must “limit or guide a contractor’s exercise of

⁶⁵ See, e.g., *Courtney*, 297 F.3d at 465 (concluding that the federal employee plaintiffs lacked prudential standing to bring a cost comparison challenge because they were not within the “zone of interests” of the FAIR Act and other procurement statutes, but suggesting that federal employees contending their work was inherently governmental would have standing); *Am. Fed’n of Gov’t Emps.*, 46 Fed. Cl. at 600 (concluding that “Congress did not intend to include federal employees and their unions within the zone of interests protected by section 2(e) of FAIR”).

⁶⁶ *Courtney*, 297 F.3d at 466 (“[T]he plaintiffs’ interest in maintaining their federal employment is at best marginally related to, and more likely inconsistent with, the purpose of the [FAIR Act].”).

⁶⁷ LUCKEY ET AL., *supra* note 15, at 16.

⁶⁸ KATE M. MANUEL ET AL., CONG. RESEARCH SERV., R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 16 (2015).

⁶⁹ Federal Acquisition Regulation, 48 C.F.R. § 7.503(a) (2016).

⁷⁰ 48 C.F.R. § 7.503(d).

⁷¹ 48 C.F.R. § 7.503(d)(19). Accordingly, the BOP categorizes privatized corrections contracts as a “Closely Associated Function” in its acquisition policy. See DEP’T OF JUSTICE, *supra* note 39, at 40.

⁷² 48 C.F.R. § 7.503(d).

discretion” and provide “meaningful oversight.”⁷³ Congress provided that agencies must give “special consideration to . . . using Federal employees to perform” a function that falls into the closely associated with inherently governmental functions category of the FAR.⁷⁴

In the context of military contracting, Congress explicitly provided that “acquisition functions closely associated with inherently governmental functions” may be performed by a private contractor “only if the contracting officer” ensures that “appropriate military or civilian personnel of the Department of Defense cannot reasonably be made available to perform the functions.”⁷⁵ There is no comparable statute establishing such a requirement for the prison context. If such a standard were applied in the prison context, it would be difficult to satisfy because the government would have to show that appropriate government personnel “cannot reasonably be made available” to operate a prison.⁷⁶

Under the existing procurement designation, prisoner detention is a function closely associated with inherently governmental functions⁷⁷ and the BOP is required by statute to give “special consideration . . . to using Federal employees to perform” this function.⁷⁸ It is unclear how the BOP could give “special consideration . . . to using Federal employees to perform” the function of prisoner detention without phasing out contract prisons.⁷⁹ Thus, the FAR’s designation of prisoner detention as a function closely associated with inherently governmental functions is misguided not only because it fails to recognize the function as inherently governmental, but also because it introduces further ambiguity into the procurement decision making process.

⁷³ Policy Letter 11-01, *supra* note 16, at 56,241–42. The BOP’s approach to contract prisons appears to have been consistent with the oversight requirement for managing closely associated functions. *See Contract Prisons*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/facilities/contract_facilities.jsp (last visited Oct. 29, 2017) (BOP onsite monitors oversee the contractor’s compliance with various functions).

⁷⁴ 31 U.S.C. § 501 note (2012) (Public-Private Competition).

⁷⁵ 10 U.S.C. § 2383(a)(1) (2012).

⁷⁶ *Id.* This standard would be easier to satisfy in the military context than in the prison context because of the special nature of military functions, which require more expertise and training. Additionally, the military may have to mobilize high numbers of personnel quickly, while the staffing requirements of the prison system are more predictable.

⁷⁷ 48 C.F.R. § 7.503(d)(19).

⁷⁸ 31 U.S.C. § 501 note (Public-Private Competition).

⁷⁹ *Id.*

3. OMB Circular A-76

OMB Circular A-76 and its attachments have long been key resources for determining whether an activity is inherently governmental because they provide guidelines for determining whether an activity should be contracted out.⁸⁰ In accordance with the FAIR Act,⁸¹ the current version of the Circular requires the government to contract out commercial activities that can be performed more cheaply by the private sector, but prohibits the government from outsourcing inherently governmental functions.⁸²

In 2003, the Bush administration revised the Circular to promote greater reliance on competitive sourcing.⁸³ In addition, the revision included two important changes relevant to the designation of prison privatization. First, the revision modified the level of discretion that makes a function inherently governmental by requiring that there be an exercise of substantial discretion.⁸⁴ Although the FAIR Act characterizes inherently governmental functions as activities that require the exercise of discretion, the revised Circular states that inherently governmental functions “require the exercise of *substantial* discretion.”⁸⁵ Because the Circular requires the exercise of discretion to be substantial for a function to qualify as inherently governmental, OMB’s policy on inherently governmental functions is effectively less strict than the statutory prohibition on privatizing such functions. The policy choice to restrict the definition of inherently governmental by requiring the exercise of substantial discretion was controversial at the time of the revision.⁸⁶

⁸⁰ LUCKEY ET AL., *supra* note 15, at 5. OMB and its predecessor, the Bureau of the Budget, recognized a distinction between governmental responsibilities and commercial activities in procurement policy decades before passage of the FAIR Act. See BUREAU OF THE BUDGET, EXEC. OFFICE OF THE PRESIDENT, BULL. NO. 55-4, COMMERCIAL-INDUSTRIAL ACTIVITIES OF THE GOVERNMENT PROVIDING PRODUCTS OR SERVICES FOR GOVERNMENTAL USE (1955).

⁸¹ The Circular was revised to implement the FAIR Act in 1999. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1999).

⁸² See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10.

⁸³ See Performance of Commercial Activities: Proposed Revision to Office of Management and Budget Circular No. A-76, 67 Fed. Reg. 69,769, 69,772 (Nov. 19, 2002).

⁸⁴ See Performance of Commercial Activities: Revision to Office of Management and Budget Circular No. A-76, 68 Fed. Reg. 32,134, 32,138 (May 29, 2003) (“This guidance expressly states that ‘inherently governmental functions necessarily involve the exercise of *substantial* discretion.’”).

⁸⁵ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10, at Attachment A (emphasis added).

⁸⁶ In response to some commenters’ objections, OMB justified the change by stating that it was merely providing additional guidance on the meaning of the phrase exercise of discretion. See Performance of Commercial Activities: Revision to Office of Management and Budget Circular No. A-76, 68 Fed. Reg. at 32,138.

Second, the Circular was revised to include an express exemption of prison and detention facilities from the inherently governmental function category.⁸⁷ The Circular directs agencies to avoid transferring inherently governmental authority to a contractor by considering factors such as “[t]he provider’s authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider’s need to resort to force,” but specifies that this guidance should not be taken to prohibit contracting for “the operation of prison or detention facilities.”⁸⁸ Prior to the 2003 revision, the Circular did not expressly indicate the designation of prison or detention facilities.⁸⁹

It appears that OMB included the express exemption for prisons in the revised Circular in response to concerns raised by corrections companies in the notice-and-comment process. When the proposed revised Circular was published for public comment in 2002, it did not include the express reference to the operation of prison or detention facilities.⁹⁰ Several companies expressed concern that the revised Circular could be interpreted as prohibiting contracts for privately run prisons.⁹¹ For instance, Wackenhut Corrections Corporation was troubled by the proposed Circular’s reframing of the part of the definition of inherently governmental function relating to the “life, liberty, or property of private persons.”⁹² The corporation stated that the proposed Circular could “cause confusion as to whether prison and detention services are now inherently governmental activities” because prison and detention services “arguably do ‘significantly affect the life, liberty, or property of private persons.’”⁹³ OMB chose to retain its proposed definition of inherently governmental function, but added the express affirmation that the Circular permits contracting for the operation of prisons and detention facilities.

As the following two Parts will argue, the policy choice not to designate the operation of prison and detention facilities as an inherently governmental

⁸⁷ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10, at Attachment A.

⁸⁸ *Id.*

⁸⁹ See OFFICE OF MGMT. & BUDGET, OFFICE OF THE PRESIDENT, *supra* note 81.

⁹⁰ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-76 REVISED DRAFT, PERFORMANCE OF COMMERCIAL ACTIVITIES (2002).

⁹¹ See, e.g., Letter from G.A. Puryear, Gen. Counsel, Corr. Corp. of America, to David. C. Childs, Office of Fed. Procurement Policy (Dec. 16, 2002), <https://georgewbush-whitehouse.archives.gov/omb/circulars/a076/comments/a76-126.pdf>.

⁹² Letter from Louis V. Carrillo, Vice President, Wackenhut Corr. Corp., to David. C. Childs, Office of Fed. Procurement Policy (Dec. 18, 2002), <https://georgewbush-whitehouse.archives.gov/omb/circulars/a076/comments/a76-126.pdf>.

⁹³ *Id.*

function is an unreasonable interpretation of the FAIR Act under either test for inherently governmental function.

II. THE EXERCISE OF DISCRETION TEST

Part I demonstrated the complexity and ambiguity of the legal and regulatory framework governing the designation of functions as inherently governmental or commercial. This ambiguity led the Obama Administration to conclude that “the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined.”⁹⁴ In 2009, concerned that contractors might be performing inherently governmental functions, President Obama tasked OMB to develop guidance clarifying when governmental outsourcing of services is, and is not, appropriate.⁹⁵

In response, OMB’s Office of Federal Procurement Policy (OFPP) issued Policy Letter 11-01 to provide guidance for agencies on identifying and managing inherently governmental functions.⁹⁶ Policy Letter 11-01 established two tests for identifying inherently governmental functions: (1) the exercise of discretion test and (2) the nature of the function test.⁹⁷

This Part applies the exercise of discretion test to the issue of private prison and detention facilities. Under this test,

A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that:

- (I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and
- (II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.⁹⁸

⁹⁴ Government Contracting: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 9,755, 9,755–56 (Mar. 6, 2009).

⁹⁵ *Id.* at 9,756.

⁹⁶ Policy Letter 11-01, *supra* note 16, at 56,236.

⁹⁷ *Id.* at 56,237.

⁹⁸ *Id.*

The exercise of discretion test is consistent with the Circular, which focuses on “the exercise of substantial discretion,”⁹⁹ and with a key aspect of the FAIR Act’s definition of inherently governmental function.¹⁰⁰ The FAIR Act provides that inherently governmental functions include activities that require “the exercise of discretion in applying Federal Government authority.”¹⁰¹ The statute states that such functions may involve, among other things, the power to bind the United States, to advance the United States’ interests by diplomatic actions or judicial proceedings, or “to significantly affect the life, liberty, or property of private persons.”¹⁰² In addition, the statute’s specification of what is *not* an inherently governmental function suggests that a degree of discretion is an important aspect of the meaning of the term. Under the FAIR Act, “[t]he term does not normally include . . . any function that is primarily ministerial and internal in nature” such as “mail operations, operation of cafeterias, housekeeping, . . . [and] other routine electrical or mechanical services.”¹⁰³

In terms of the exercise of discretion, the operation of a prison evidently falls somewhere between judicial or diplomatic decision making and purely ministerial functions like housekeeping. Whether imprisonment is an inherently governmental function can plausibly be argued both ways under the exercise of discretion test as formulated in Policy Letter 11-01. In this respect, the exercise of discretion test provides weaker support for the argument that imprisonment is an inherently governmental function than the nature of the function test.¹⁰⁴

Nevertheless, the best conclusion is that imprisonment is an inherently governmental function under the exercise of discretion test because this outcome is most consistent with the controlling statute. The FAIR Act emphasizes the potential effect of a discretionary function on the public interest and the “life, liberty, or property of private persons.”¹⁰⁵ As the following section shows, the administration and guarding of prisons requires the exercise of discretion. The gravity of decisions made in this context is such that any exercise of discretion is “intimately related to the public interest.”¹⁰⁶ The imprisonment of citizens epitomizes the government’s power to affect the

⁹⁹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10, at Attachment A.

¹⁰⁰ *See* 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See infra* Part III.

¹⁰⁵ 31 U.S.C. § 501 note (Federal Activities Inventory Reform).

¹⁰⁶ *Id.*

life, liberty, and property of private persons in the name of the public interest.¹⁰⁷

This Part proceeds in three sections. Section A discusses how the government limits the discretion of private prison corporations and argues that private prison employees nevertheless exercise some discretion within a highly regulated environment. Section B explains why the exercise of discretion is problematic in the private-prison context. Section C analyzes whether prison operation is an inherently governmental function under the exercise of discretion test and the language of the FAIR Act.

A. *The Role of Discretion in Prison Administration and Guarding*

On one hand, government regulations and contracts with private prison corporations do much to minimize the level of discretion exercised by the corporations and their employees. Private-prison rules tend to replicate the rules that apply in public-sector prisons; where private facilities develop different rules, the rules must be approved by state authorities or conform with state standards.¹⁰⁸ Professor Alexander Volokh observes that private prison “contracts have often reproduced the entire public-sector rulebook in excruciating detail,” which leaves private prisons “limited scope for experimentation.”¹⁰⁹ For example, Arizona goes so far as to require that private prisons follow the same daily menus as state facilities.¹¹⁰ Federal private prisons operate according to a Statement of Work or Performance Work Statement, which specifies the requirements for contractors.¹¹¹ Contractors are required to adhere to some BOP policies such as inmate discipline, use of force, sentence computation, and inmate classification.¹¹² At each contract

¹⁰⁷ See Dolovich, *supra* note 11, at 441.

¹⁰⁸ Harding, *supra* note 21, at 276; see, e.g., *Operations and Management Service Contract, LAKE CITY CORRECTIONAL FACILITY 16* (2009), http://www.dms.myflorida.com/content/download/83173/475828/REDACTED_-_Lake_City_2009_O&M_Contract.pdf (“CCA will develop a policy implementing a system of inmate rules and disciplinary procedures in compliance with the ACA Standards and penalties consistent with those imposed by the [Florida Department of Corrections].”).

¹⁰⁹ Sasha Volokh, *Don’t End Federal Private Prisons*, WASH. POST: VOLOKH CONSPIRACY (Aug. 19, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/19/dont-end-federal-private-prisons/?utm_term=.8a3dde6c5c4b.

¹¹⁰ DEBRA K. DAVENPORT, OFFICE OF THE AUDITOR GEN., NO. 01-13, PERFORMANCE AUDIT: ARIZONA DEPARTMENT OF CORRECTIONS PRIVATE PRISONS 9 (2001) (“In order to maintain uniform standards for state and private prisons, the Department requires contractors to follow Department Orders, Director’s Instructions, Technical Manuals, Institution Orders, and Post Orders. These requirements extend to specific details, such as following the same daily menus as state-operated facilities.”).

¹¹¹ *Contract Prisons*, *supra* note 73.

¹¹² *Id.*

prison, two BOP onsite monitors and a BOP Contracting Officer oversee the contractor's compliance with functions ranging from correctional programs to health services.¹¹³

Contractual requirements may be created in response to specific problems. For example, at Reeves County Detention Center, an immigration detention facility operated by the GEO Group, there were no minimum staffing requirements for several years in an effort to reduce costs.¹¹⁴ Following inmate riots in 2008 and 2009—where over 2,000 inmates engaged in the fighting, three inmates were hospitalized, two workers were taken hostage, and the recreation area was set on fire¹¹⁵—the BOP decided to establish a minimum staffing requirement in the contract.¹¹⁶ This example illustrates the risk posed by excessive discretion in the hands of private actors and suggests the reason why private prisons are regulated so extensively.¹¹⁷ It also suggests that reactive regulation is insufficient to prevent adverse effects that may flow from the exercise of discretion by private prison companies.

Despite the highly regulated nature of private prisons, the duties of private prison employees necessarily involve the exercise of discretion. To maintain order and safety, those operating a prison must be able to discipline and impose sanctions on prisoners such as segregation, limitations on visiting rights, and suspension of privileges.¹¹⁸ In most states, wardens are authorized to draft institutional rules relating to discipline.¹¹⁹ The enforcement of these rules is left to the discretion of prison staff.¹²⁰ Prison employees must decide whether to administer punishment in response to inmate misconduct, and guards are often called upon to decide appropriate punishments.¹²¹ If a prison guard decides to write up an inmate for violating regulations, the inmate will be called to a hearing where it will often come down to the inmate's word

¹¹³ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *supra* note 31, at i.

¹¹⁴ *Id.* at 2–3, 5.

¹¹⁵ *Inmates Riot for a Second Time at Texas Prison*, CNN (Feb. 1, 2009, 5:10 AM), http://www.cnn.com/2009/CRIME/02/01/texas.prison.riot/index.html?eref=ib_us.

¹¹⁶ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *supra* note 31, at 2–3.

¹¹⁷ See David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253, 282 (2003) (identifying riots and abuse of inmates “as indicative of the risks of contracting” because “with for-profit operators, a prison can quickly degenerate when its management is determined to save money by cutting corners and the government does not intervene”).

¹¹⁸ Harding, *supra* note 21, at 276.

¹¹⁹ David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 821 (1987).

¹²⁰ *Id.*

¹²¹ Anderson, *supra* note 12, at 122.

against that of the guard who noted the infraction, since inmates do not have a right to counsel at this proceeding.¹²²

Penalties may include revocation of “good time” credits.¹²³ Good time is credited against an inmate’s total sentence (up to a limited number of days) for the purpose of incentivizing good behavior and promoting rehabilitation.¹²⁴ Prison wardens may exercise discretion in influencing the award of good time credits and imposing good time sanctions that affect the date of release.¹²⁵

Another form of discretion in the prison context is that which prison guards exercise in their daily encounters with inmates.¹²⁶ Guards operate in an unpredictable, coercive environment where they must routinely make decisions about how to respond to inmates and whether to use force.¹²⁷ Guards and other prison personnel exercise wide discretion affecting inmates’ liberty interests with respect to intrusions on inmates’ privacy.¹²⁸

A certain amount of discretion in the operation of a prison is desirable as well as necessary, notably in the area of internal prison disciplinary processes. For example, the 2016 report by the Office of the Inspector General (OIG) criticizes private prisons on the basis of their “failure to initiate discipline in over 50 percent of incidents reviewed by the onsite monitors during a 6-month period.”¹²⁹ As Professor Volokh points out, “whether you should initiate discipline in any given case is a matter of judgment” and it would obviously not be desirable to have “a bright-line insistence on initiating discipline 100% of the time.”¹³⁰ Whether or not it is true that the private prisons studied by the OIG should have initiated discipline more often, their authority to make this decision is a clear example of the role of discretion in prisons. The role of discretion in prison administration and guarding is a double-edged sword. On one hand, prison administrators and guards need some discretion to be able to

¹²² Dolovich, *supra* note 11, at 519–20.

¹²³ Bruce R. Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 227, 231 (1970).

¹²⁴ *Id.*

¹²⁵ LINOWES ET AL., *supra* note 24, at 148–49; Logan, *supra* note 54, at 37.

¹²⁶ See Wecht, *supra* note 119, at 819 (explaining that “in areas profoundly affecting the Fourteenth Amendment liberty interests and process rights of prison inmates, the courts have continued to accord broad deference to the judgment of prison personnel”).

¹²⁷ See generally Mother Jones, *My Four Months as a Private Prison Guard: Part One*, YOUTUBE (June 23, 2016), <https://www.youtube.com/watch?v=cBiqRGXog4w> (providing a firsthand account of a journalist’s experience working as a private prison guard in a chaotic, violent environment).

¹²⁸ Wecht, *supra* note 119, at 822.

¹²⁹ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *supra* note 31, at 28.

¹³⁰ Volokh, *supra* note 109.

do their jobs effectively and impose discipline. However, this level of discretion also gives administrators and guards the opportunity to abuse it.

B. Why the Exercise of Discretion Is Problematic in the Private Prison Context

Based on the forms of discretion described above, critics of prison privatization argue that private prison corporations and their employees may use their discretion in ways that harm the public interest. Critics argue that the profit motive leads private prison corporations to cut corners in areas such as staffing and health care.¹³¹ The riots that occurred at Reeves County Detention Center vividly illustrate how efforts to cut costs may impact security and prisoners' welfare.¹³²

Another reason why the exercise of discretion is problematic in the private prison context is that it undermines the notion that prison merely represents the administration of punishment. Some supporters of prison privatization draw a distinction between the allocation and the administration of punishment.¹³³ They acknowledge that the *allocation* of punishment—the function of the criminal justice system—is nondelegable, but argue that the *administration* of punishment may be delegated to private entities because it is “a technical and morally neutral process to ensure that the allocated punishment is carried out according to law and due process.”¹³⁴

Some of the discretionary aspects of prison administration described in the above section have a quasi-judicial character that blurs the line between the allocation and the administration of punishment.¹³⁵ Contrary to the binary allocation-administration theory, the administration of punishment is not a purely technical, neutral process in practice.¹³⁶ Australian law professor and prison consultant Richard Harding argues that some tasks delegated to private prison operators involve the *allocation* of punishment, notably disciplinary matters and prisoner classification.¹³⁷ Harding writes: “New deprivations of liberty such as . . . restrictions upon privileges or stricter levels of

¹³¹ See, e.g., *Investigation into Private Prisons Reveals Crowding, Under-Staffing and Inmate Deaths*, *supra* note 8.

¹³² See *supra* notes 115–17.

¹³³ Elaine Genders, *Accountability*, in *DICTIONARY OF PRISONS AND PUNISHMENT* 2, 2–3 (Yvonne Jewkes & Jamie Bennett eds., 2007); Harding, *supra* note 21, at 275.

¹³⁴ Harding, *supra* note 21, at 275 (summarizing the allocation-administration argument).

¹³⁵ See Logan, *supra* note 54, at 37.

¹³⁶ See Harding, *supra* note 21.

¹³⁷ *Id.* at 275–78.

incarceration, are tantamount to the allocation of punishment”¹³⁸ Because prison operators must maintain order through imposing disciplinary actions and sanctions on prisoners, the *administration* of punishment in the form of imprisonment necessarily involves decisions about *allocating* punishment to some degree.¹³⁹ As a general matter, judges are selected for their ability to be impartial in allocating punishment. The same cannot be said for private prison employees.

Professor Sharon Dolovich contends that decisions of disciplinary hearings and parole boards may be skewed against inmates because prison guards are employed by companies “with a direct financial stake . . . in maintaining a high occupancy rate.”¹⁴⁰ Some privatization critics have even argued that private prisons have “perverse incentive[s] . . . to create demand for [their] own product[s], . . . by fomenting violence among current inmates in order to scuttle parole chances, [or] arbitrarily reducing good time.”¹⁴¹ This argument may seem implausible. However, even the *perception* of this conflict of interests is a problem because the perceived possibility of unjust treatment by self-interested private prisons undermines public trust.

The danger of abuse of discretion is compounded by the fact that private prison corporations and their employees are less transparent and less accountable to the public than federal agencies are.¹⁴² Notably, the records of private prisons are not subject to the Freedom of Information Act to the same extent as the records maintained by a federal agency operating a prison or detention facility.¹⁴³ The possibility of abuse of discretion is one of the chief objections to prison privatization.

¹³⁸ *Id.* at 275.

¹³⁹ In response to the problematic power of private prison employees over decisions affecting duration of confinement, legislators in some states have reserved to government officials final authority over determinations bearing on length of sentence, such as parole decisions and reduction of good-time credit. Dolovich, *supra* note 11, at 518–19.

¹⁴⁰ Dolovich, *supra* note 11, at 520.

¹⁴¹ James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 363 (1986).

¹⁴² See Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 670 (1987). *But cf.* Brian Gran & William Henry, *Holding Private Prisons Accountable: A Socio-Legal Analysis of “Contracting Out” Prisons*, 34 SOC. JUST., nos. 3–4, 2007–2008, at 173, 173–74 (arguing that private prisons can be held accountable through proper contract formation, maintenance, and liability).

¹⁴³ See Private Prison Information Act of 2015, H.R. 2470, 114th Cong. (2015) (a bill not ultimately enacted that proposed to subject federal private prison records to the Freedom of Information Act in the same way as records maintained by a government operator of a federal prison or detention facility).

C. *Application of the FAIR Act's Discretion-Based Definition of Inherently Governmental Function*

The exercise of discretion test is designed to prevent discretionary functions from falling into the hands of private contractors applying government authority.¹⁴⁴ The type of discretionary functions inherent in prison operation fall squarely within that category of function the FAIR Act seeks to make off-limits to contracting. Prison operation requires the exercise of discretion in ways that are “intimately related to the public interest.”¹⁴⁵ Decisions like which type of disciplinary action to take and whether to cite an inmate for misbehavior are quasi-judicial decisions that “significantly affect the life, liberty, or property of private persons.”¹⁴⁶ Judgments about good time credits and disciplinary action affect the duration and the conditions of confinement.¹⁴⁷ An inmate’s disciplinary record while in prison carries great weight in a parole board’s decision making.¹⁴⁸ Clearly, private prison contractors exercise discretion with significant consequences for inmates’ liberties and the public interest.¹⁴⁹

This reality is the basis for constitutional concerns about private prisons.¹⁵⁰ A common constitutional objection is that the inherently discretionary controls exercised by prison employees “cannot be influenced by the pecuniary aims of the operator without offending prisoner due process rights.”¹⁵¹ Although constitutional arguments are not the subject of this Comment, it is worth noting that the FAIR Act incorporates constitutional considerations in its definition of inherently governmental function, notably in its “life, liberty, or property” provision.¹⁵²

The FAIR Act and procurement policies seek to avoid the potential for private abuses of discretion that could adversely affect the public interest in several ways. The FAIR Act places the public interest and the exercise of

¹⁴⁴ See Policy Letter 11-01 *supra* note 16, at 56,237.

¹⁴⁵ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

¹⁴⁶ *Id.*; Anderson, *supra* note 12, at 124.

¹⁴⁷ See *supra* Section II.A.

¹⁴⁸ Dolovich, *supra* note 11, at 520.

¹⁴⁹ See Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997).

¹⁵⁰ See *id.* at 373 (“[M]ost of the statutes that now authorize private prisons are constitutionally inadequate, because they allow private contractors to exercise inappropriate discretion concerning inmates’ liberties.”).

¹⁵¹ Anderson, *supra* note 12, at 122.

¹⁵² 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

discretion at the center of the definition of inherently governmental function.¹⁵³ It seeks to prevent the privatization of discretionary functions that “significantly affect the life, liberty, or property of private persons.”¹⁵⁴ Additionally, policy documents such as the Circular recognize that the potential for use of force is a factor that weighs on the side of finding a function inherently governmental.¹⁵⁵ The Circular directs agencies to consider the likelihood of the provider’s need to resort to force in performing the contract to avoid transferring inherently governmental authority to a contractor.¹⁵⁶ The level of discretion associated with a function determines the possible consequences of private sector performance and the extent to which it may affect the public interest. Thus, it is consistent with the purposes of the FAIR Act and procurement policies to conclude that the detention of prisoners is an inherently governmental function under the exercise of discretion test.

On the other hand, one could argue that the level of discretion involved in operating a prison is not substantial enough to warrant the inherently governmental function designation under the exercise of discretion test. The Circular characterizes inherently governmental functions as activities that require the exercise of “*substantial* discretion.”¹⁵⁷ Similarly, Policy Letter 11-01 interprets the exercise of discretion provision narrowly. To qualify as inherently governmental under the test in the Policy Letter, a function must involve decision making that “is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that: (I) identify specified ranges of acceptable decisions or conduct . . . and (II) subject the discretionary decisions or conduct to meaningful oversight.”¹⁵⁸ As discussed above, the decision making of private prison corporations and employees are “limited or guided by” regulations and contractual requirements.¹⁵⁹ Furthermore, the discretionary decisions of federal prison contractors are arguably subject to meaningful oversight by agency officials.¹⁶⁰ Policy Letter 11-01 states that “contractors routinely, and properly, exercise discretion in performing functions for the Federal Government when[] providing advice, opinions, or recommended actions.”¹⁶¹ Accordingly, it is plausible to argue that

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10, at Attachment A.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ Policy Letter 11-01, *supra* note 16, at 56,237.

¹⁵⁹ *Id.*; *see supra* Section II.A.

¹⁶⁰ *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *supra* note 31, at i.

¹⁶¹ Policy Letter 11-01, *supra* note 16, at 56,237.

prison operation is *not* an inherently governmental function under the exercise of discretion test as federal policy has developed the test.

However, this argument is flawed for three reasons. First, the operation of a prison does involve substantial discretion, in that it requires prison operators to exercise discretion regularly and with respect to matters that have grave consequences for the life and liberty of prisoners. Some decisions, such as whether to write up an inmate for an infraction, simply cannot be subjected to meaningful oversight by agency officials. Second, although oversight of contract prisons is thorough in principle, it has been found lacking in practice.¹⁶² Third, prison operation can be distinguished from the stated examples of discretionary functions appropriately performed by contractors because the examples involve contractors providing information or advice to the government, not applying government authority to private individuals in a coercive context.¹⁶³ As the Circular indicates, the potential for use of force is a special factor that weighs against contracting out.¹⁶⁴

Even if the discretion exercised in operating a prison is not sufficiently substantial to require classification as an inherently governmental function under existing policies, the discretion is sufficient to satisfy the *statutory* definition of inherently governmental function. The Circular states that inherently governmental functions “require the exercise of *substantial* discretion,”¹⁶⁵ but the FAIR Act characterizes inherently governmental functions merely as “activities that require . . . the exercise of discretion.”¹⁶⁶ The FAIR Act does not require that the discretion be substantial, unlimited, or free from oversight.¹⁶⁷ Because the Circular requires the exercise of discretion to be substantial for a function to qualify as inherently governmental, OMB’s policy on inherently governmental functions is less strict than the statutory prohibition on privatizing such functions. This is not a valid interpretation of the statute.¹⁶⁸ The revised Circular illegitimately diverges from the FAIR Act’s

¹⁶² See, e.g., *Investigation into Private Prisons Reveals Crowding, Under-Staffing and Inmate Deaths*, *supra* note 8.

¹⁶³ See Policy Letter 11-01, *supra* note 16, at 56,237–38.

¹⁶⁴ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10, at Attachment A.

¹⁶⁵ *Id.* (emphasis added); see *supra* notes 84–86.

¹⁶⁶ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

¹⁶⁷ See *id.*

¹⁶⁸ Even if the Circular is entitled to *Chevron* deference, the Circular’s heightened discretion requirement could be invalidated either on the ground that the FAIR Act unambiguously defines the requisite level of deference, or on the ground that OMB failed to provide reasons for its policy choice to heighten the deference requirement. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

definition of inherently governmental function to the extent that it heightens the discretion requirement for inherently governmental functions.¹⁶⁹

Ultimately, the statute controls. The FAIR Act situates the exercise of discretion test in relation to the centrality of a function to the public interest and to the potential effect of discretion on the “life, liberty, or property of private persons.”¹⁷⁰ Failing to designate the operation of prisons as an inherently governmental function is inconsistent with the FAIR Act.

III. THE NATURE OF THE FUNCTION TEST

The second test for determining whether a function is inherently governmental is the nature of the function test.¹⁷¹ It provides as follows:

Functions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.¹⁷²

This Part analyzes whether operating prison and detention facilities constitutes an inherently governmental function under the nature of the function test. Section A addresses the language of the test itself, focusing on the arrest and sentencing examples. Section B explains how liberal ideas about state power, individual liberty, and symbolic meaning support the conclusion that imprisonment is an inherently governmental function. It specifically addresses immigration detention facilities to the extent that they require a different analysis. Section C discusses how courts have applied similar tests to various functions, including prison-related functions.

A. *Arrest, Sentencing, and Incarceration*

The nature of the function test elaborates on the inherently governmental concept and concretizes the “life, liberty, or property” provision of the FAIR Act. Two of the three given examples of functions that are “by their nature”

¹⁶⁹ *See id.*

¹⁷⁰ 31 U.S.C. § 501 note (Federal Activities Inventory Reform).

¹⁷¹ Policy Letter 11-01, *supra* note 16, at 56,237.

¹⁷² *Id.*

inherently governmental are arrest and sentencing.¹⁷³ Arrest and sentencing are clear examples of the third form of inherently governmental function listed in the FAIR Act: the “execution of the laws of the United States so as . . . to significantly affect the life, liberty, or property of private persons.”¹⁷⁴

Both arrest and sentencing involve the legitimate use of government power to restrict a person’s liberty. Both are carried out by actors who wear the badge of state authority: police officers and judges.¹⁷⁵ The moral legitimacy of arresting and sentencing people rests on the traditional justifications of criminal punishment including public safety, deterrence, retribution, and incapacitation.¹⁷⁶

The arrest and sentencing examples lend themselves to analogy with imprisonment. Imprisonment is the logical continuation of the list of examples after arrest and sentencing because it is the ultimate deprivation of a private person’s liberty.¹⁷⁷ It carries out the prison sentence and completes the law enforcement process that began with arrest. Scholars have grouped arrest, judgment, and incarceration together to illustrate the inherently governmental nature of criminal justice. For example, criminologist John DiIulio writes: “The badge of the arresting policeman, the robes of the judge, and the state patch on the uniform of the corrections officer are symbols of the inherently public nature of crime and punishment.”¹⁷⁸ Imprisonment executes the laws and serves the public interest in the same way that arrest and sentencing do.

All three examples given in the nature of the function test are activities that would be illegitimate or impossible but for the badge of state authority. The “uniquely governmental” language suggests that this test is concerned with those activities that are not done except with government involvement or authorization. Federal, state, and local governments are involved in myriad aspects of American life and society: law enforcement, health care, education, protection of natural resources, and so on. But not all of these activities are inherently governmental such that they cannot legitimately be engaged in without state authority. A private person without government authority may tutor another or organize a river clean-up, but may not make arrests, sentence

¹⁷³ *Id.*

¹⁷⁴ 31 U.S.C. § 501 note (Federal Activities Inventory Reform).

¹⁷⁵ See John J. DiIulio, Jr., *What’s Wrong with Private Prisons*, PUB. INT., Summer 1988, at 66, 79.

¹⁷⁶ See generally Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69–74 (providing an overview of utilitarian and nonutilitarian sentencing purposes).

¹⁷⁷ See Dolovich, *supra* note 11, at 441.

¹⁷⁸ DiIulio, *supra* note 175, at 79.

others to prison, or imprison others.¹⁷⁹ The uniquely governmental aspect of the nature of the function test corresponds to the basic logic of the “traditionally exclusive governmental function” test that courts have applied in the context of constitutional rights, which is discussed below.¹⁸⁰

B. Liberal Legitimacy: The Philosophical Case Against Prison Privatization

The moral argument that imprisonment is too inherently governmental to be performed by private contractors animated the privatization debate long before Policy Letter 11-01 and the FAIR Act.¹⁸¹ The starting point for this line of argument is the fundamental liberal principle that the state may limit liberty to the extent that it is justified by the public interest.¹⁸²

1. State Power and Individual Liberty

Rooted in liberal principles as well as the statutory definition of inherently governmental function, the nature of the function test explicitly incorporates the concept of sovereign power. This concept is central for critics of privatization who build upon the social contract theory of Thomas Hobbes and John Locke—the theory that individuals in a state of nature gave up rights to a sovereign government, which in turn provided security and protected every citizen.¹⁸³ The state’s authority to punish is granted to it by the public.¹⁸⁴ By incorporating the sovereign powers language into the nature of the function test, Policy Letter 11-01 invokes this fundamental principle of political philosophy and affirms its relevance for governmental outsourcing policy.

The principle that the state has the exclusive authority to punish or otherwise use force against a private individual flows from the Hobbesian

¹⁷⁹ See generally MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds., 1946) (arguing that the modern state has a monopoly on the legitimate use of force).

¹⁸⁰ See *infra* Section III.C.

¹⁸¹ See, e.g., *Privatization of Corrections: Hearings on Privatization of Prisons Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. 16 (1985) (statement of Clifford Steenhoff, Legislative Chair, American Federation of Government Employees’ National Council of Bureau of Prison Locals).

¹⁸² See DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 48 (1995).

¹⁸³ See *id.* at 46–47.

¹⁸⁴ Interestingly, Dr. Charles Logan applies the social contract theory to come to the opposite conclusion regarding prison privatization: “Since all legitimate powers of government are originally, and continuously, delegated to it by citizens, those same citizens if they wish can specify that certain powers be further delegated by the state, in turn, to private agencies. Because the authority does not originate with the state, it does not attach inherently or uniquely to it, and can be passed along.” Logan, *supra* note 54, at 36.

social contract theory.¹⁸⁵ German sociologist Max Weber asserted that “the monopoly of the legitimate use of physical force within a given territory” is the defining characteristic of the state in modern times.¹⁸⁶ This conception of legitimate government force justifies the government’s power to arrest private citizens, sentence them to prison, and keep them in prison. As British criminologist Phil Scraton and others have argued, “All forms of incarceration imply the use of force. . . . [F]ew people taken into custody would accept their loss of liberty so willingly if the full potential of state coercion was not handcuffed to their wrists.”¹⁸⁷ Based on this interpretation of the social contract theory, only the state has the authority to incarcerate an individual.¹⁸⁸

According to liberal critics of prison privatization, imprisonment cannot ethically be delegated to the private sector because of the inherently public nature of criminal punishment.¹⁸⁹ As DiIulio writes: “[T]o remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities.”¹⁹⁰ Convicted individuals are punished in the name of the public good, and their imprisonment expresses the will of the public.¹⁹¹

Recently, this liberal line of argument found expression in an opinion by the Supreme Court of Israel striking down as unconstitutional a law establishing Israel’s first privately operated prison.¹⁹² The court reasoned that the denial of personal liberty is justified only if it is done to further an essential public interest and, therefore, the party denying the personal liberty must be acting in the public interest rather than in the interest of a private, profit-making enterprise.¹⁹³ Additionally, the Israeli Supreme Court concluded that the transfer of power to operate a prison from the state to a private

¹⁸⁵ See SHICHOR, *supra* note 182, at 46–47.

¹⁸⁶ WEBER, *supra* note 179, at 78 (emphasis omitted).

¹⁸⁷ PHIL SCRATON ET AL., PRISONS UNDER PROTEST 61 (1991).

¹⁸⁸ See Yijia Jing, *The U.S. Experience in Prison Privatization*, in 1 PRISON PRIVATIZATION: THE MANY FACETS OF A CONTROVERSIAL INDUSTRY 55, 73 (Byron Eugene Price & John Charles Morris eds., 2012).

¹⁸⁹ See, e.g., Morris, *supra* note 11, at 495; Stacy, *supra* note 11, at 908–13.

¹⁹⁰ DiIulio, *supra* note 175, at 79.

¹⁹¹ For a discussion on the communal character of punishments, compare NILS CHRISTIE, CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE 145–46 (3d ed. 2000) (“[W]here the state exists, the prison officer is my man. I would hold a hand on his key, or on the switch for the electric chair.”).

¹⁹² HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin. [2009] (Isr.), English translation, <http://elyon1.court.gov.il/files/05/050/026/n39/05026050.n39.pdf>. The Israeli Supreme Court, in this case, was sitting as the High Court of Justice. See *The Judiciary: The Court System*, ISR. MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx>.

¹⁹³ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 22.

concessionaire “violates the human dignity of the inmates” of the privately managed prison because “the public purposes that underlie their imprisonment and give it legitimacy are undermined” when “their imprisonment becomes a means for a private corporation to make a profit.”¹⁹⁴ Unconcerned with empirical arguments—indeed, assuming that real-world conditions of imprisonment were identical as between public and private prisons¹⁹⁵—the Israeli Supreme Court insisted that a dignitary harm would result from privatization as a result of the private interests involved.¹⁹⁶ In the court’s view, those who carry out imprisonment must be acting in the public interest.

2. *State Agents and Symbolic Meaning*

To be legitimate, must a prison be exclusively operated by government employees? The inherent critics of privatization answer, like the Israeli Supreme Court, with an emphatic yes. As Norwegian scholar Nils Christie has argued, the badge of government authority on a prison guard’s uniform symbolizes the idea that the official stands in for the public and performs a communal responsibility.¹⁹⁷ Thus, the identity of the agent carrying out the function of incarceration—and the perception of her identity—matters. According to DiIulio, the key message that an abuse of liberty results in deprivation of liberty “ought to be conveyed by the offended community of law-abiding citizens, through its public agents, to the incarcerated individual.”¹⁹⁸ Professors Alon Harel and Ariel Porat write that the importance of this social meaning “is grounded in foundational intuitions concerning political legitimacy.”¹⁹⁹ The need for public officials to carry out punishment is a matter of intuition for some critics of privatization due to deeply rooted values and ideas about liberal legitimacy and criminal punishment.

Scholars such as Professor Alexander Volokh critique the view that prisons must be run by public employees to be legitimate. Professor Volokh challenges the assumption that private and public employees are inherently different when it comes to performing tasks for the government.²⁰⁰ He highlights a

¹⁹⁴ *Id.* at ¶ 39.

¹⁹⁵ *Id.* at ¶ 33.

¹⁹⁶ *Id.* at ¶ 39.

¹⁹⁷ CHRISTIE, *supra* note 191, at 145 (“The guard was [the public’s] guard, their responsibility, not an employee of a branch of General Motors, or Volvo for that matter. The communal character of punishments evaporates in the proposals for private prisons.”).

¹⁹⁸ DiIulio, *supra* note 175, at 79.

¹⁹⁹ Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 769 (2011).

²⁰⁰ Volokh, *supra* note 4, at 139–40.

fundamental similarity between employees and contractors: “[B]oth are people who do the state’s bidding for money.”²⁰¹ Volokh’s insight is—given that the government can only act by entering contracts with private citizens to be its agents—the agents have a market relationship with the state and work for the private purpose of a salary, regardless of whether the government’s agents are government employees or contractors.²⁰² Ultimately, Volokh’s argument is a rejection of the inherent approach to the issue of prison privatization—effectively a rejection of the nature of the function test—not an argument about how the test should come out with respect to prisons.²⁰³

Volokh’s argument underestimates the power a private contractor has over its internal policies and culture and the importance of symbolic meaning. Employees of private contractors do the bidding of the state, but indirectly; first and foremost, they do the bidding of the private company that pays them. Their identity, and the perception of their identity, is different from that of public officials even if their motivation is the same.²⁰⁴ The state is “a network of relationships among people,” as Volokh observes,²⁰⁵ but it is also an idea, a symbol of the collective will. The nature of the function test is appropriate where symbolism matters. Incarceration is the exclusive prerogative of the state and represents the ultimate deprivation of fundamental rights.²⁰⁶ Given the gravity of imprisoning an individual in the name of the public interest, the identity of the agent who carries it out is of profound symbolic importance.²⁰⁷

It is significant that OFPP chose to preserve a role for abstract considerations of the nature of a function, including aspects such as sovereign powers, rather than confining the inherently governmental function standard to a discretion-based inquiry. This choice was consistent with the FAIR Act. The inherent view of privatization issues is, after all, written into the statute in the concept of an “*inherently* governmental function.”²⁰⁸ The liberal critique of

²⁰¹ *Id.* at 147.

²⁰² *See id.* at 139–40.

²⁰³ *See id.*

²⁰⁴ *See* Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 826 (1987) (suggesting that it weakens the authority of the sentencing court and the integrity of the justice system “when an inmate looks at his keeper’s uniform and, instead of encountering an emblem that reads ‘Federal Bureau of Prisons’ or ‘State Department of Corrections,’ he faces one that says ‘Acme Corrections Company’”).

²⁰⁵ Volokh, *supra* note 4, at 138.

²⁰⁶ *See* Dolovich, *supra* note 11, at 441.

²⁰⁷ *See* Harel & Porat, *supra* note 199, at 769.

²⁰⁸ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform) (emphasis added).

privatization further manifests itself in the “life, liberty, or property” aspect of the statutory definition of inherently governmental function.²⁰⁹

Under the nature of the function test, it is reasonable to conclude that most but not all jobs required for running a prison are inherently governmental functions.²¹⁰ The test is concerned with sovereign power, a fundamental characteristic of which is the use of legitimate force to deprive individuals of their right to liberty. Under this view, any position that involves decisions that implicate prisoners’ liberty or may require the use of force or threat of force against a prisoner must be performed by a public official to be legitimate. Making parole recommendations, working as a prison guard, and flipping the electric switch in an execution are meaningful exercises of sovereign power; preparing lunch for prisoners is not.²¹¹ Thus, it would be consistent with the nature of the function test for the government to contract with a private food service company to provide meals for its prisons, but not to contract out the operation of a prison facility in its entirety. Each act that manifests the coercive power of the state over a prisoner is a quintessential expression of sovereign power, as that power has traditionally been understood in the liberal tradition.

3. *Detention by Immigration Authorities*

Immigration detention requires a slightly different analysis under the nature of the function test. Although unauthorized immigration is increasingly prosecuted as a criminal act,²¹² the detention of immigrants based on their citizenship status is a civil or administrative detention and can be distinguished conceptually from corrections.²¹³ Incarceration is an expression of the state’s power to punish criminals, while immigration detention is primarily rooted in the sovereign power to control borders.²¹⁴ The federal government’s power to exclude foreigners whenever the public interest requires it is, in the words of

²⁰⁹ *Id.*

²¹⁰ See *Bonner v. Coughlin*, 545 F.2d 565, 575 (7th Cir. 1976) (arguing that “a distinction must be made between those activities of prison personnel which partake of the governmental role of a prison system and those remaining activities which flow inexorably from the fact of confinement,” such as providing food and “other incidentals”).

²¹¹ Professor Sharon Dolovich draws a distinction between these types of prison-related functions, noting that virtually every corrections facility in the country contracts out to for-profit providers for some services, such as food service and dental care, and acknowledges that services like garbage collection can be carried out without having an impact on prisoners. See Dolovich, *supra* note 11, at 507–08.

²¹² See *Investigation into Private Prisons Reveals Crowding, Under-Staffing and Inmate Deaths*, *supra* note 8.

²¹³ See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44 (2010).

²¹⁴ See MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 9 (2004); Travis Silva, Note, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL’Y REV. 227 (2012).

Justice Field, “an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution.”²¹⁵

Ultimately, however, the system for detaining immigrants awaiting deportation or immigration proceedings is strikingly similar to the imprisonment of criminals.²¹⁶ The detention of both immigrants and criminals manifests the power of the state to deprive a person of liberty in the name of law enforcement.²¹⁷ Border control sovereignty considerations have been folded into criminal law as the line between criminal enforcement and immigration control has become blurred in law, practice, and public discourse.²¹⁸ As a matter of real-world experience, life as a detainee is a lot like life as a prison inmate.²¹⁹ Most of the facilities that ICE uses to house immigrant detainees “were built, and operate, as jails and prisons to confine pre-trial and sentenced felons.”²²⁰ Federal sourcing policy recognizes the similarity of these functions by treating them as a single category.²²¹

The power to imprison criminals and the power to detain immigrants are both rooted in sovereignty.²²² To the extent that immigration detention is conceptually different from the imprisonment of criminals, it is still an inherently governmental function under the nature of the function test because it is based on the sovereign authority to deprive individuals of liberty.

C. Nature of the Function Analysis in Case Law

The conclusion that operating prison and detention facilities is an inherently governmental function by its nature is supported by case law. Case law provides a rich source of analysis with respect to the concept of inherently

²¹⁵ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

²¹⁶ *See DOW*, *supra* note 214, at 17.

²¹⁷ The “life, liberty, or property” provision of the FAIR Act applies to all private persons, not only to U.S. citizens. 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

²¹⁸ Scholars have coined the term “crimmigration” to draw attention to this trend. *See Bosworth & Kaufman*, *supra* note 35, at 440; Kalhan, *supra* note 213, at 42.

²¹⁹ Kateel & Shahani, *supra* note 9, at 263–64 (stating that detainees “are treated no differently than prisoners”).

²²⁰ DORA SCHRIRO, HOMELAND SEC.: IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009).

²²¹ The Circular specifies that it does not prevent contracting out for “the operation of prison or detention facilities.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10.

²²² *See Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 607 (1889) (“The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested.”).

governmental functions and the nature of prisons. Courts have wrestled with the question of whether functions are inherently or essentially governmental in contexts such as the state action doctrine and municipal immunity. Despite the lack of coherence in this line of cases regarding what makes a function governmental, several themes emerge, including a consideration of the degree to which an activity is necessary for the public good and a reliance on history and tradition. Under most of the tests courts have developed to determine whether a function is governmental, operating a prison or detention facility is deemed inherently governmental. Courts have consistently characterized prison and detention facilities as “traditionally,” “inherently,” or “prototypically” governmental when they have had occasion to consider these functions.²²³

Disputes involving the inherently governmental function standard of the Circular have produced a handful of published cases.²²⁴ For example, in *Arrowhead Metals, Ltd. v. United States*, a prospective offeror challenged the U.S. Mint’s cancellation of the solicitation of bids for a contract relating to coin production.²²⁵ The court held that the cancellation was valid because the coinage of money is an inherently governmental function that cannot be delegated to the private sector.²²⁶ The court identified the coinage of money as an inherently governmental function based on the constitutional provision that gives “Congress the power ‘To coin money.’”²²⁷ Constitutional grants of power constitute one basis courts have relied on to identify inherently governmental functions. Although there is no explicit constitutional grant of the power to imprison individuals, it seems reasonable to conclude that if *coinage* is an inherently governmental function, then prisons are also, given that law enforcement is a more significant exercise of sovereignty under current liberal assumptions.

A second context in which courts have addressed the inherently governmental nature of certain functions is litigation involving public functions under the state action doctrine. The state action doctrine is the principle that the Fourteenth Amendment restricts only state and local

²²³ See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 416 (1997) (Scalia, J., dissenting) (enforcing state-imposed confinement is a “prototypically governmental function”); *Bonner v. Coughlin*, 545 F.2d 565, 575 (7th Cir. 1976) (stating matters involving discipline and security of inmates are “inherently governmental”); *Jordan v. Mills*, 473 F. Supp. 13, 18 (E.D. Mich. 1979) (stating prison administration is an “unambiguous example[] of a traditional governmental function”).

²²⁴ See LUCKEY ET AL., *supra* note 15, at 20–21, 21 n.19.

²²⁵ *Arrowhead Metals, Ltd. v. United States*, 8 Cl. Ct. 703 (1985).

²²⁶ *Id.* at 717.

²²⁷ *Id.* at 706 (quoting U.S. CONST. art. I, § 8, cl. 5).

governments, not private conduct.²²⁸ The state action doctrine places no constraints on privatization; rather, “it ‘constitutionalizes’ after-the-fact delegations that amount to the exercise of public authority.”²²⁹ When a private party performs a traditionally exclusive public function, its performance of this function is treated as state action.²³⁰ The public function test ensures that when a private party exercises powers traditionally exclusively reserved to the state, it is subject to the Constitution to the same extent as the government.²³¹ Because the public function test is used similarly to the nature of the function test for inherently governmental functions, it is useful to consider these state action cases to identify what functions the FAIR Act removes from federal contracting.

The private prison context has proved an important application of the traditionally exclusive public function test. Circuit courts have held that private prisons and the wardens and guards who work there are state actors for the purposes of constitutional rights because operating a prison is a traditionally exclusively governmental function. In *Street v. Corrections Corporation of America*, an inmate brought a § 1983 action against a private detention facility, a warden, and a corrections officer.²³² The Sixth Circuit applied the public function test to determine whether the private conduct was fairly attributable to the state.²³³ The court concluded that because the defendants were exercising “powers which [were] traditionally exclusively reserved to the state,”²³⁴ they were “acting under color of state law” and liable for violating the constitutional rights of inmates just as government employees would be.²³⁵

As Justice Scalia stated in *Richardson v. McKnight*—dissenting on a different point²³⁶—employees of private prison management firms “perform a

²²⁸ See Civil Rights Cases, 109 U.S. 3, 17–18 (1883).

²²⁹ Verkuil, *supra* note 12, at 431.

²³⁰ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (citing examples of traditionally exclusive public functions such as elections).

²³¹ See *Marsh v. Alabama*, 326 U.S. 501, 506–510 (1946) (concluding that a private company, in owning and operating a town, fell into the category of “performing a public function,” and was therefore subject to constitutional limits).

²³² *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996).

²³³ *Id.* at 814.

²³⁴ *Id.* (quoting *Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir. 1995)).

²³⁵ *Id.* (quoting *Hicks v. Frey*, 992 F.2d 1450, 1458 (6th Cir. 1993)).

²³⁶ The issue in *Richardson v. McKnight* was whether guards employed by private prison companies are entitled to the same qualified immunity from § 1983 liability that is available to their public counterparts. *Richardson v. McKnight*, 521 U.S. 399, 402 (1997). The majority held that they were not. *Id.* Justice Scalia’s dissent argued that they should be. *Id.* at 414 (Scalia, J., dissenting). Justice Scalia’s argument was based on his view—not disputed by the majority—that prison guards, whether public or private, were performing a public function and exercising a sovereign power. *Id.* at 416.

prototypically governmental function”: the deprivation of liberty by the state.²³⁷ Justice Scalia based this conclusion on the exercise of sovereign power:

The duty of punishing criminals is inherent in the Sovereign power. It may be committed to agencies selected for that purpose, but such agencies, while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity.²³⁸

Justice Scalia’s reasoning shows that the public function test has prompted inherent-type analysis as well as historical analysis. It emphasizes the governmental nature of the function of operating a prison rather than the historical fact of privately operated prisons in the eighteenth and nineteenth centuries.

In *Giron v. Corrections Corporation of America*, a district court acknowledged that correctional functions have never been exclusively public, citing *Richardson v. McKnight*, but concluded that this fact did not mean “that the extent of the governmental nature of the function is any less.”²³⁹ Because only the government is empowered to incarcerate a citizen and the corrections officer was performing a traditional state function when he checked on an inmate in her cell, the court found the corrections officer was a state actor.²⁴⁰ The court focused on the officer’s exercise of his “coercive authority,” which allowed him to gain access to the inmate and sexually abuse her.²⁴¹ The public function doctrine protects constitutional rights by holding private parties accountable when they are exercising powers that have traditionally been exclusively reserved to the state, such as the powers involved in managing prisoners.

Municipal immunity is a third context involving a governmental function inquiry. Historically, the doctrine of municipal immunity protected cities from tort liability when they were engaged in a “governmental” function, while leaving cities liable for injuries caused in furtherance of “proprietary” functions.²⁴² This distinction proved difficult for courts to apply.²⁴³ Attempts to

²³⁷ *Id.*

²³⁸ *Id.* at 417 (quoting *Alamango v. Bd. of Supervisors of Albany Cty.*, 32 N.Y. Sup. Ct. 551, 552 (1881)).

²³⁹ *Giron v. Corr. Corp. of Am.*, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1251.

²⁴² *See Owen v. City of Independence*, 445 U.S. 622, 644–45 (1980).

apply the governmental-proprietary distinction resulted in inconsistent conclusions regarding functions such as education, provision of electricity, sewers, and the maintenance of streets.²⁴⁴ Although tests differed by jurisdiction, one common approach was to identify a function as governmental if it was either “(1) essential or necessary for the government to perform, or (2) traditional for the government to perform.”²⁴⁵ For example, the Supreme Court of Massachusetts reasoned that a municipality should be answerable for acts that are not necessary and are “voluntarily undertaken for its own profit and commercial in character,” including in the proprietary category the maintenance of highways and street lighting because such acts protected the municipality’s “pecuniary interest growing out of statutory liability for defects” in these municipal systems.²⁴⁶ By contrast, the Supreme Court of Vermont found that bike paths are governmental, resulting in municipal immunity.²⁴⁷ Typically, in the absence of a satisfactory test, courts analogize the function at issue to a function that had already been deemed to be either governmental or proprietary.²⁴⁸ Examples of activities consistently held to be governmental functions in the municipal liability context include fire departments and jails.²⁴⁹

Lastly, litigation under the Federal Tort Claims Act (FTCA) has involved identifying uniquely governmental functions. The FTCA waives sovereign immunity for claims against the United States “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”²⁵⁰ In other words, the government’s liability depends on whether it would have been liable if it were a private person. Where there is no private analogue, liability does not arise under the FTCA.²⁵¹ In a case in which a federal prisoner brought an action against the federal government under the FTCA, the Second Circuit found that the tort of wrongful confinement lacks a private analogue.²⁵² The

²⁴³ This distinction has been almost universally condemned because of the lack of satisfactory test. *Spencer v. Gen. Hosp. of D.C.*, 425 F.2d 479, 485 (D.C. Cir. 1969).

²⁴⁴ *Id.*

²⁴⁵ *Nw. Nat. Gas Co. v. City of Portland*, 711 P.2d 119, 125 (Or. 1985) (in banc).

²⁴⁶ *Bolster v. City of Lawrence*, 114 N.E. 722, 723–24 (Mass. 1917).

²⁴⁷ *Gretkowski v. City of Burlington*, 50 F. Supp. 2d 292, 296 (D. Vt. 1998).

²⁴⁸ *See id.* (concluding that bike paths are like public parks and highways).

²⁴⁹ *See, e.g., Shaw v. City of Charleston*, 50 S.E. 527 (W. Va. 1905) (discussing jails); *Mendel & Co. v. City of Wheeling*, 28 W. Va. 233, 246–48 (1886) (discussing fire departments).

²⁵⁰ Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2012).

²⁵¹ *See McGowan v. United States*, 825 F.3d 118, 127–28 (2nd Cir. 2016). Notwithstanding the lack of private analogue, the Supreme Court has concluded that prisoners may sue under the FTCA on the basis of Congressional intent as revealed by legislative history. *United States v. Muniz*, 374 U.S. 150, 153–58 (1963).

²⁵² *McGowan*, 825 F.3d at 126.

court rejected the plaintiff's contention that private contractors operating detention facilities could provide the private analogue because "[p]rivate persons cannot establish facilities to detain other persons—only the government can, either on its own or through a governmental contractor."²⁵³ Additionally, lower courts have found that there is no private analogue to prison rules and regulations.²⁵⁴

These areas of case law illustrate that the distinction between governmental functions and non-governmental functions has long proved a thorny issue across various contexts. There is no unifying, coherent test for identifying what is a governmental function and what is not. Courts have looked to constitutional grants of power, history, tradition, the nature of a function, and the degree to which a function is necessary for the public good. However, it is safe to say that under most, if not all, of the judicial tests for governmental functions, the operation of prisons qualifies. Courts have consistently found that imprisoning private individuals is inherently governmental.

IV. IMPLICATIONS

The legality of private federal prisons and detention facilities is particularly important to reconsider at the current historical moment. The Trump Administration's aggressive approach to law enforcement, its favorable attitude toward privatization, and the projected increase in the federal prison and detention populations make the proper administrative designation of prison and detention services an urgent question.²⁵⁵

Recognizing the detention of prisoners and immigrants as an inherently governmental function that is off-limits to contracting—as this Comment argues the law requires—would have significant implications for the fate of facilities operated by private, for-profit contractors. This designation would require the federal government to recommit to the DOJ's 2016 decision to phase out the federal government's practice of contracting with private prison

²⁵³ *Id.* at 127.

²⁵⁴ *See, e.g.,* *Fiore v. Medina*, No. 11 Civ. 2264 RJS, 2012 WL 4767143, at *8 (S.D.N.Y. Sept. 27, 2012).

²⁵⁵ *See* AMES C. GRAWERT & NATASHA CAMHI, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE IN PRESIDENT TRUMP'S FIRST 100 DAYS* (describing the Trump Administration's revival of the "tough on crime" approach to criminal justice); Memorandum from Jefferson B. Sessions III, *supra* note 3; *ICE ERO Immigration Arrests Climb Nearly 40%*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/features/100-days> (last visited Sept. 26, 2017); Burnett, *supra* note 3 (quoting President Trump's statement that privatization of prisons "seems to work a lot better").

companies.²⁵⁶ Perhaps even more importantly, this designation would prohibit private contractors from operating federal immigration detention facilities. Given the dramatic growth in the number of individuals detained by immigration authorities in recent decades,²⁵⁷ the high proportion of ICE detainees in privately operated facilities,²⁵⁸ and the likelihood of further growth in the population of immigrant detainees under the Trump Administration,²⁵⁹ a prohibition on contracting with private companies for detention services would impede the government's current immigration enforcement operations and create an urgent need to reform the system of immigration detention.

Ensuring that the federal government's procurement decisions are consistent with the law is a desirable end in itself, especially at a moment when the rule of law appears threatened.²⁶⁰ But a legality-based argument that the FAIR Act requires the federal government to end the practice of private prison contracting does not address the merits of the statute or provide arguments against repealing it.²⁶¹ In response to the argument that the operation of prison and detention facilities is an inherently governmental function that cannot be contracted out to the private sector, Congress could simply choose to repeal or modify the FAIR Act's prohibition on contracting out inherently governmental functions.

However, in arguing that prison and immigration detention is inherently governmental under both the exercise of discretion test and the nature of the function test, this Comment has suggested why the inherently governmental function law is valuable from a social and policy perspective. The exercise of discretion test for inherently governmental functions is designed to prevent private contractors from performing functions that involve substantial discretion in applying government authority. This accomplishes desirable policy goals such as maintaining democratic accountability and preventing

²⁵⁶ See Yates Memorandum, *supra* note 1.

²⁵⁷ The number of people annually detained by immigration authorities increased fivefold between 1995 and 2013. Donald Kerwin, *Detention of Newcomers: Constitutional Standards and New Legislation: Part One*, IMMIGR. BRIEFINGS, Nov. 1996, at 1, 1 (stating that there were roughly 85,000 detainees in 1995); JOHN F. SIMANSKI, OFFICE OF IMMIGRATION STATISTICS, HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 5 (2014) (showing 440,557 detainees in 2013).

²⁵⁸ See HOMELAND SEC. ADVISORY COUNCIL, *supra* note 34, at 5.

²⁵⁹ See James Surowiecki, *Trump Sets Private Prisons Free*, NEW YORKER (Dec. 5, 2016), <http://www.newyorker.com/magazine/2016/12/05/trump-sets-private-prisons-free>.

²⁶⁰ See Joan Biskupic, *Trump's Disdain for the Rule of Law*, CNN (July 26, 2017, 8:33 AM), <http://www.cnn.com/2017/07/26/politics/trump-rule-of-law/index.html>.

²⁶¹ See Volokh, *supra* note 4, at 158–59 (“A legality-based argument of this sort obviously says nothing about whether the law at issue is a good idea. Therefore, it doesn't provide us with any arguments against repealing the law.”).

abuses of discretion. As Columbia law professor David Pozen has observed, riots and the abuse of inmates are “indicative of the risks of contracting” because “with for-profit operators, a prison can quickly degenerate when its management is determined to save money by cutting corners and the government does not intervene.”²⁶² The inmate riots at Reeves County Detention Center stand as a vivid reminder that private companies do cut corners to reduce costs (in that case, by doing away with minimum staffing requirements) and that excessive discretion to cut costs can have especially disastrous consequences in the prison context.²⁶³ Because a private prison contractor exercises discretion with significant consequences for the conditions and duration of an inmate’s confinement, the operation of prison and detention facilities is an inherently governmental function under the exercise of discretion test.

Furthermore, the nature of the function test for inherently governmental functions is valuable because it tends to bring federal procurement policy into alignment with widely held, deeply rooted beliefs about state power.²⁶⁴ The FAIR Act reflects the intuitive view that it is inappropriate to treat certain core government functions—notably those significantly affecting the life, liberty, or property of individuals—as commercial activities to be performed for profit.²⁶⁵ The statute’s prohibition on contracting out inherently governmental functions is a well-established principle upheld by four administrations, both Republican and Democratic.²⁶⁶ To the extent that American society is committed to a liberal vision of sovereign power, individual liberty, and the functions of government, this theory implies that there are some functions that would be inappropriate for non-state actors to perform.

Thus, the federal government should end the practice of contracting with private companies to operate prison and detention facilities not only because compliance with the law is desirable as a general matter, but also because the

²⁶² Pozen, *supra* note 117, at 282.

²⁶³ *See supra* notes 114–16.

²⁶⁴ *See supra* Section III.B.1.

²⁶⁵ *See Harel & Porat, supra* note 199.

²⁶⁶ *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76 REVISED, PERFORMANCE OF COMMERCIAL ACTIVITIES (1983); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76 REVISED, POLICIES FOR ACQUIRING COMMERCIAL OR INDUSTRIAL PRODUCTS AND SERVICES NEEDED BY THE GOVERNMENT (1979); BUREAU OF THE BUDGET, EXEC. OFFICE OF THE PRESIDENT, BULL. NO. 55-4, COMMERCIAL-INDUSTRIAL ACTIVITIES OF THE GOVERNMENT PROVIDING PRODUCTS OR SERVICES FOR GOVERNMENTAL USE (1955) (distinguishing between commercial activities and noncommercial “management responsibilities of a Government agency”).

FAIR Act's prohibition on contracting out inherently governmental functions is a desirable law. The FAIR Act and the tests the OMB has developed to identify inherently governmental functions should inform the nation's ongoing debate about the privatization of various functions and the proper role of the government.²⁶⁷

CONCLUSION

The legality of privately operated federal prison and detention facilities hinges on whether the operation of these facilities is an inherently governmental function that is off-limits to contracting under the FAIR Act.²⁶⁸ The operation of prison and detention facilities is an inherently governmental function if it meets either the exercise of discretion test or the nature of the function test.²⁶⁹

This Comment argued that operating prison and detention facilities is an inherently governmental function, and therefore cannot be performed by private contractors. It showed that prison and detention facilities are an inherently governmental function under *either* of the two tests the federal government developed to guide its outsourcing decisions. A function could be off-limits to contracting based on the exercise of discretion test alone, or the nature of the function test alone. That the operation of prison and detention facilities fails *both* tests underscores the urgent need to end the practice of contracting out for these services. Phasing out private prisons as the Obama Administration proposed would bring the federal government's practice into conformance with its own policies and, more importantly, the law.

The FAIR Act embodies values as well as dry rules of federal procurement, including the belief that executing the laws to significantly affect the life, liberty, or property of private individuals is the exclusive province of the

²⁶⁷ See, e.g., Kirk Johnson, *Down the Mighty Columbia River, Where a Power Struggle Looms*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/interactive/2017/07/28/us/columbia-river-privatization.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news>.

²⁶⁸ 31 U.S.C. § 501 note (2012) (Federal Activities Inventory Reform).

²⁶⁹ Policy Letter 11-01 *supra* note 16, at 56,237–38.

government. Ending the federal government's reliance on private prison and detention facilities accords not only with a legal distinction in the FAIR Act but also with the values that animate it.

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