

The Real Homeland Security Gaps

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The Real Homeland Security Gaps

ARETO A. IMOUKHUEDE[†]

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I hope this Article helps bring to light the dedicated efforts of the legions of federal employees and Congressional staffers who work tirelessly to provide and improve homeland security. This Article has benefited from helpful comments and suggestions from many scholars, students, and other thinkers. I apologize to anyone I have failed to name here.

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I. INTRODUCTION

America was in shock after the tragic and horrific events of September 11, 2001 (“9/11”).¹ The nation’s leaders, Democrats and Republicans, were united with the shared goal of ensuring that such a devastating attack would never happen again.² With this motivation, Congress passed the Homeland Security Act of 2002, which merged twenty-two existing agencies and services into a single federal department.³ It was envisioned that this new Department of Homeland Security (“the Department” or “DHS”) would strengthen the agencies and services responsible for domestic security by allowing them to more effectively coordinate their efforts through a single, centralized federal department.⁴

Despite the clear bipartisan mandate to bolster and centralize federal homeland security functions, the Department almost immediately became ground zero for an unprecedented experiment in privatization within the federal government.⁵ The Federal Protective Service (“FPS”) is one of the services that merged into DHS.⁶ Even before the creation of the DHS, FPS was primarily responsible for protecting federal facilities across the nation.⁷ Ironically, FPS, a service that has always been essential to homeland security, is now among the most severely reduced and outsourced services since the formation of DHS.⁸ This Article identifies the laws and

1. Joseph I. Liebman, *9-11’s Impact on the Practice of Customs Laws*, 18 SAINT JOHN’S J. LEGAL COMMENT. 125, 126 (2003) (identifying serious fears that surfaced immediately after the tragic events of 9/11).

2. See David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in A Post 9-11 World*, 38 GOLDEN GATE U. L. REV. 195, 206 (2008).

3. Homeland Security Act of 2002, 6 U.S.C.S. § 111 (LexisNexis 2002) (stating the purposes for establishing the Department of Homeland Security); Bennie G. Thompson, *A Legislative Prescription for Confronting 21st-Century Risks to the Homeland*, 47 HARV. J. ON LEGIS. 277, 281 (2010).

4. Homeland Security Act of 2002, 6 U.S.C.S. § 111(b)(1)(D).

5. See Abigail Clark, Note, *Reclaiming the Moral High Ground: U.S. Accountability for Contractor Abuses As A Means to Win Back Hearts and Minds*, 38 PUB. CONT. L. J. 709, 713 (2009) (describing the recent history for wanting to privatize government after the tragic events of 9/11 and the Bush administration’s embrace of this philosophy); Henry S. Kenyon, *Department of Homeland Security Takes Shape*, AFCEA.ORG (Feb. 2003), <http://www.afcea.org/content/?q=department-homeland-security-takes-shape>.

6. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-235T, HOMELAND SECURITY: FEDERAL PROTECTIVE SERVICE CONTINUES TO FACE CHALLENGES WITH CONTRACT GUARDS AND RISK ASSESSMENTS AT FEDERAL FACILITIES (2013) [hereinafter GAO-14-235T].

7. *Id.*; *Department of Homeland Security Appropriations Act of 2010*, 123 Stat. 2142 (2009) (the Appropriations Act moved FPS from ICE to the National Protection and Programs Directorate to receive funds as proscribed by the Act, thus effectively transferring the agency to another umbrella); *Secretary Napolitano Announces Transfer of Federal Protective Service to National Protection and Programs Directorate*, DEP’T HOMELAND SEC. (Oct. 29, 2008), <https://www.dhs.gov/news/2009/10/29/transfer-federal-protective-service-national-protection-and-programs-directorate>.

8. See GAO-14-235T, *supra* note 6, at 2; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-476T, HOMELAND SECURITY: PRELIMINARY OBSERVATION ON THE FEDERAL PROTECTIVE SERVICE’S EFFORTS TO PROTECT FEDERAL PROPERTY 5 (2008) [hereinafter GAO-08-476T] (“FPS’ workforce has decreased

governmental actions that have helped create real gaps in homeland security and suggests that the excessive delegation of FPS's vital security functions to private contractors should be treated as an unconstitutional delegation of an inherently governmental function.⁹

In the wake of the now infamous Blackwater scandal, there is justified concern regarding private security contractors overstepping their authority to violate basic human and civil rights.¹⁰ In the context of FPS privatization, we observe the opposite problem.¹¹ Unlike the Blackwater situation, which involved the overzealous use of government power by private contractors, FPS's private contractors have been investigated for failing to provide adequate security.¹² As the force of highly trained federal police officers and inspectors has decreased, the number of private security guards has more than doubled, and thus effectively replaced the federal officers.¹³ This is not a coincidence but part of an obvious (yet unannounced) policy experiment by the Bush Administration, which was responsible for executing the original formation of the Department.¹⁴ The philosophy behind this policy experiment in privatization ultimately contemplated complete and total outsourcing of the FPS homeland security functions to private contractors.¹⁵

Private security contractors have fallen short of the elite level of security previously provided by the highly trained federal police officers.¹⁶ For example, privately contracted FPS security guards failed to pursue or

by nearly 20 percent from almost 1,400 in fiscal year 2004 to about 1,100 at the end of fiscal year 2007.”); OFFICE OF INSPECTOR GEN., OIG-07-05, THE FEDERAL PROTECTIVE SERVICE NEEDS TO IMPROVE ITS OVERSIGHT OF THE CONTRACT GUARD PROGRAM 1-2 (2006) [hereinafter OIG-07-05] (discussing how FPS guards has been outsourced and many of the problems with such outsourcing of private contractors).

9. See Homeland Security Act of 2002, 6 U.S.C.S. §§ 111-13 (“The primary mission of the Department is to . . . carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning. . . .”); see also Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 697 (2006) (The Homeland Security Act contains “detailed provisions governing a plethora of other agencies transferred to the new Department.”); Thompson, *supra* note 3, at 281-82 (after the attacks of September 11, Congress quickly merged twenty-two disparate agencies to form DHS); Raphael Perl, *The Department of Homeland Security: Background and Challenges*, in TERRORISM: REDUCING VULNERABILITIES AND IMPROVING RESPONSES 176, 177 (2004).

10. See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 133 (2010) (“The contractors ‘opened fire with automatic weapons and grenade launchers on unarmed civilians located in and around Nisur Square in central Baghdad,’” killing, wounding, and assaulting numerous civilians.).

11. GAO-08-467T, *supra* note 8, at 13.

12. *Id.*; *The Federal Protective Service: Time for Reform Hearing Before Sen. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. 1-2 (2009) [hereinafter *The Federal Protective Service: Time for Reform*].

13. See GAO-08-476T, *supra* note 8, at 6.

14. Kenyon, *supra* note 5.

15. *Id.*

16. See GAO-08-476T, *supra* note 8, at 13.

even confront suspects as they fled secured federal facilities with sensitive information and \$500,000 worth of surveillance equipment.¹⁷ This raises serious concerns regarding the efficacy and legality of continuing to delegate this vital homeland security function to private security contractors.¹⁸

This Article reveals the real security gaps in FPS and suggests that the enormous delegation of FPS's vital security functions to private contractors should be treated as an unconstitutional delegation of an inherently governmental function.¹⁹ However, the current constitutional doctrine regarding inherently governmental functions is so weak that even this obvious example of a vital security function that ought to be performed by government fails to satisfy the current constitutional standard for being inherently governmental.²⁰

Part II presents the FPS federal infrastructure mission and the real homeland security gaps created by post 9/11 policies that have undermined FPS security capabilities.²¹ Part II demonstrates that these homeland security gaps outweigh the structural and budgetary concerns that have been used to justify the widespread delegation of federal security to private contractors.²²

Part III analyzes the legal authority for FPS privatization and recognizes that the current excessive privatization and its resulting homeland security gaps is inconsistent with the legislative intent of the DHS Act.²³ Despite

17. *Id.*

18. *Id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-0859T, HOMELAND SECURITY: PRELIMINARY RESULTS SHOW FEDERAL PROTECTIVE SERVICE'S ABILITY TO PROTECT FEDERAL FACILITIES IS HAMPERED BY WEAKNESSES IN ITS CONTRACT SECURITY GUARD PROGRAM 15 (2009) (at site field tests where real bomb parts were being smuggled passed security and security let persons through with bomb parts going unnoticed).

19. *See infra* Part II.

20. *See* Roger A. Fairfax, Jr. *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, U. CHI. LEGAL F. 265, 286-89, 293 (2010).

21. *See infra* Part II. As an example:

DHS transferred emergency supplemental funding, and FPS instituted a number of cost-saving measures to address its budgetary challenges, such as restricting hiring and travel, limiting training and overtime, and suspending employee performance awards. According to FPS officials, these measures have had a negative effect on staff morale, are partially responsible for FPS's high attrition rates, and could reduce the performance and safety of FPS personnel.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-683, HOMELAND SECURITY: THE FEDERAL PROTECTIVE SERVICE FACES SEVERAL CHALLENGES THAT HAMPER ITS ABILITY TO PROTECT FEDERAL FACILITIES 4 (2008) [hereinafter GAO-08-683]; *see also The Federal Protective Service: Time for Reform*, *supra* note 12, at 1-2 (Senator Joseph I. Lieberman's opening statement pointing out that the "Federal Protective Service agency has suffered serious budget shortfalls in recent years which forced it to limit hiring, training, and overtime, and to delay equipment purchases . . .").

22. *See infra* Part II.

23. *See infra* Part III.

Congress's legislative intent, the Department has broad legal authority to privatize under statutory law and this does not violate executive branch policies regarding privatization.²⁴

Part IV considers the constitutional law concerns that excessive privatization raises and suggests that, despite judicial reluctance to enforce a limit on privatization based on the nondelegation doctrine, limitations should bar privatizing the FPS to the point that homeland security is severely undermined.²⁵ The privatization of government—here, through the expansive and broad privatization of the FPS security functions—undermines our core precepts regarding democratic governance and our constitutional structure.²⁶

II. PRIVATIZATION OF FPS HAS CREATED REAL HOMELAND SECURITY GAPS

The FPS federal infrastructure mission is a vital homeland security function.²⁷ The current gaps created by excessive privatization are the result of consistent and longstanding failures to properly train and manage private security guards.²⁸

A. *The Federal Protective Service (FPS) Security Function*

Long before 9/11 and the creation of DHS, the FPS's primary function was to protect important federal facilities.²⁹ FPS was established in 1971 as the uniformed protection force of the General Services Administration ("GSA") for government-occupied facilities.³⁰ FPS's current mission is to protect approximately 9,000 GSA federal facilities including but not limited

24. Fairfax, *supra* note 20, at 286-89, 293.

25. See *infra* Part IV; PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATEN DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 113 (2007).

26. P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 170-71, 213-15 (2008) (arguing that private military and national security firms pose a threat to government's sovereignty and privatization has detrimental implications for democracy). Indeed, this appeals to the proposition argued by some scholars that:

[John] Locke opposed unauthorized law-or rulemaking, that is, lawmaking by an institution not authorized by the people to engage in such lawmaking. He was not merely opposing the power to convey votes in a legislature.

Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1329 (2003).

27. See OFFICE OF INSPECTOR GEN., *OIG-12-100, EFFECTS OF SECURITY LAPSE ON FPS' MICHIGAN GUARD SERVICES CONTRACT (REDACTED) 2* (2012) [hereinafter *OIG-12-100*].

28. GAO-14-235T, *supra* note 6, at 4-8.

29. *Jarecki v. United States*, 590 F.2d 670, 673 (7th Cir. 1979) (Federal officers were put into Federal building to protect it from terrorist attack).

30. *Id.*

to the federal courts, district offices for Members of Congress, and the Social Security Administration Offices.³¹ FPS's protection services focus directly on the interior security of the nation and require close coordination and intelligence-sharing with the investigative functions within DHS.³² FPS is a full service operation with a comprehensive HAZMAT, Weapons of Mass Destruction ("WMD"), canine, and emergency response program as well as state-of-the-art communication and dispatch Mega Centers.³³ These FPS functions are necessary to ensure the safety of federal buildings and are essential to the Department's fundamental homeland security mission and duties.³⁴

The 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City ("Oklahoma City Bombing") inspired Congress to enhance FPS's ability to properly fulfill its federal facility protection mission.³⁵ GSA and Congress determined that FPS needed more federal workers in order to fully protect the nation's federal facilities.³⁶ FPS was required to increase its federal workforce to 1,480 personnel.³⁷ This represented a significant increase from the approximately 980 federal full-time FPS workers (referred to as full-time equivalents ("FTEs")) at the time of the Oklahoma City Bombing.³⁸ After the 9/11 attacks, Congress passed the Homeland Security Act of 2002, under which the Department became responsible for protecting buildings, grounds, and property of the federal

31. OIG-12-100, *supra* note 27, at 2; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-943T, FEDERAL PROTECTIVE SERVICE: PRELIMINARY RESULTS ON EFFORTS TO ASSESS FACILITY RISKS AND OVERSEE CONTRACT GUARDS 1 (2012) [hereinafter GAO-12-943T].

32. GAO-08-476T, *supra* note 8, at 1.

33. See *The Federal Protective Service*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/topic/federal-protective-service> (last visited Feb. 6, 2016).

34. See *id.*

35. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-341, HOMELAND SECURITY: FEDERAL PROTECTIVE SERVICE'S CONTRACT GUARD PROGRAM REQUIRES MORE OVERSIGHT AND REASSESSMENT OF USE OF CONTRACT GUARDS 4 (2010) [hereinafter GAO-10-341]. Starting in 1995:

FPS has relied on a substantial contract guard force to help accomplish its mission of protecting federal facilities. The level of security FPS provides at each of the 9,000 federal facilities varies depending on the building's security level. While the contractor has the primary responsibility for training and ensuring that the guards have met certification requirements, FPS is ultimately responsible for oversight of the guards and relies on about 752 inspectors located in its 11 regions to inspect guard posts and verify that training, certifications, and time cards are accurate. It is also responsible for providing X-ray and magnetometer training to the guards.

Id.

36. *The Direction and Viability of the Federal Protective Service Before the H. Comm. on Homeland Security*, 110 Cong. (2009) (statement of David L. Wright).

37. *Id.*

38. *Id.*

government.³⁹ Effective March 1, 2003, FPS was moved from GSA's Public Building Services to the Department.⁴⁰ By 2004, FPS had substantially decreased its employees to 1,400.⁴¹ Between 2004 and 2007, the FPS employees decreased from 1,400 to only 1,100.⁴²

These decreases in the FPS workforce after 9/11 are inconsistent with the unambiguous congressional mandate to strengthen homeland security—highly trained federal officers were replaced with less competent security personnel.⁴³ Although FPS was moved to DHS to enhance elite federal protection, highly trained federal police have been replaced with what are at times poorly trained, private contractors, who have been pejoratively referred to as toy cops or rent-a-cops.⁴⁴

FPS collects security fees from the agencies that reside in the federal facilities it protects, but the collected fees are insufficient to fully sustain the FPS in its important national security function.⁴⁵ Even before joining the Department, the revenue from the security fees was not sufficient to cover FPS operational costs.⁴⁶ Before FPS joined the Department, GSA made up for the difference between FPS revenues and FPS operational costs by shifting additional funding from the GSA Federal Buildings Fund.⁴⁷ This additional GSA funding has not been available to FPS since 2004, which

39. Homeland Security Act of 2002, 6 U.S.C.S. § 111; 6 U.S.C.S. § 232 (2002 LexisNexis) (“Nothing in this Act may be construed to affect the functions or authorities of the Administrator of General Services with respect to the operation, maintenance, and protection of buildings and grounds owned or occupied by the Federal Government and under the jurisdiction, custody, or control of the Administrator.”).

40. GAO-08-476T, *SUPRA* NOTE 8, AT 1.

41. *Id.* AT 5.

42. *Id.* As explained by Mark Goldstein:

FPS faces several unresolved workforce issues. First, FPS' workforce has decreased by about 20 percent since fiscal year 2004 from almost 1,400 to about 1,100 in fiscal year 2007 During this timeframe, the number of employees in each position also decreased, with the largest decrease occurring in the police officer position. For example, based on FPS reports, the number of police officers decreased from 359 in fiscal year 2004 to 215 in fiscal year 2007 and the number of inspectors (sometimes referred to as physical security specialists) decreased from 600 in fiscal year 2004 to 541 in fiscal year 2007 According to FPS officials, the decreases in FPS' workforce are primarily the result of cost saving measures taken to address its budgetary challenges.

Id. at 5-7.

43. See Thompson, *supra* note 3, at 281; GAO-08-476T, *SUPRA* NOTE 8, AT 5, 13.

44. See GAO-08-476T, *SUPRA* NOTE 8, AT 12-14; Brock N. Meeks, *Are 'rent-a-cops' threatening security?*, NBC NEWS (Mar. 9, 2005, 5:59 PM), http://www.nbcnews.com/id/7092909/ns/us_news-security/t/are-rent-a-cops-threatening-security/#.VrbaqLKDgko.

45. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-492, BUDGET ISSUE: BETTER FEE DESIGN WOULD IMPROVE FEDERAL PROTECTIVE SERVICE'S AND FEDERAL AGENCIES' PLANNING AND BUDGETING FOR SECURITY 1-2 (2011) [hereinafter GAO-11-492].

46. *Id.* at 11.

47. *Id.*

has caused FPS to experience significant budget shortfalls.⁴⁸ During the Bush Administration and throughout the Obama Administration, FPS has continued to experience budget shortfalls.⁴⁹ As cost-saving measures, FPS has restricted training, hiring, and travel, and has limited and eliminated overtime and employee performance awards.⁵⁰ According to one Government Accountability Office (“GAO”) report:

For example, DHS transferred emergency supplemental funding, and FPS instituted a number of cost-saving measures to address its budgetary challenges, such as restricting hiring and travel, limiting training and overtime, and suspending employee performance awards. According to FPS officials, these measures have had a negative effect on staff morale, are partially responsible for FPS’s high attrition rates, and could reduce the performance and safety of FPS personnel.⁵¹

The inadequate funding mechanisms and the resulting cost-savings measures raise serious questions regarding FPS’s continuing ability to perform its important homeland security function.⁵²

To gain additional cost-savings, FPS enacted hiring restrictions that have led FPS to increasingly rely upon private security guards and contractors as ostensibly lower cost alternatives to FPS police officers in deterring security threats in and around federal buildings.⁵³ Ironically, since joining DHS, the FPS workforce reduced from 1,400 employees at the end of 2004 to approximately 1,100 employees at the end of 2007.⁵⁴ Under this approach, FPS eliminated its police officer position and is primarily using about 752 inspectors and special agents.⁵⁵ These inspectors and special agents oversee 15,000 contract guards, provide law enforcement services, conduct building security assessments, and perform other duties as assigned.⁵⁶ As of December 17, 2013, the number of inspectors and special agents modestly increased to approximately 1,200 FTEs, a number that is dwarfed

48. *Id.* (discussing the difficulties that FPS faces due to reduction in workforce, elimination of police officer positions, and reduction of funding).

49. *Id.*

50. GAO-08-683, *supra* note 21, at 4; *The Federal Protective Service: Time for Reform*, *supra* note 12, at 2.

51. GAO-08-683, *supra* note 21, at 4.

52. See GAO-08-476T, *supra* note 8, at 11-12; GAO-09-859T, *supra* note 18, at 2.

53. See SHAWN REESE, THE FEDERAL PROTECTIVE SERVICE AND CONTRACT SECURITY GUARDS: A STATUTORY HISTORY AND CURRENT STATUS 4 (2009).

54. GAO-08-683, *supra* note 21, at 3.

55. GAO-10-341, *supra* note 35, at 22.

56. *Id.*

by the 13,500 private security guards FPS currently has under contract.⁵⁷ Mark Goldstein, GAO Director for Critical Infrastructure Issues, testified to Congress:

To accomplish its facility protection mission, FPS has about 1,200 full-time employees and approximately 13,200 contract security guards. FPS has an annual budget of about \$1 billion and receives its funding from the revenues and collections of security fees charged to tenant agencies for protective services such as facility security assessments (FSA) and providing contract security guard services. Since 2008, we have issued numerous reports that address major challenges FPS faces in protecting federal facilities. For example, in 2009 and 2010 we reported that FPS had problems completing high-quality FSAs in a timely manner and did not provide adequate oversight of its contract guard program.⁵⁸

DHS has jeopardized homeland security in its attempts to replace professional, federally-trained FPS security personnel with private contractors.⁵⁹

Congress has attempted to aid FPS by requiring Homeland Security to maintain a minimum number of full-time equivalents.⁶⁰ However, during the years that the Immigration and Customs Enforcement (“ICE”) housed the FPS,⁶¹ ICE did not allocate sufficient funds to support the FPS mission.⁶² Instead, it engaged in so-called “cost-savings” through privatization and reduction of FPS’s federal workforce;⁶³ however, no long-

57. GAO-14-235T, *supra* note 6, at 1-2; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-705R, FEDERAL PROTECTIVE SERVICE ACTIONS NEEDED TO RESOLVE DELAYS AND INADEQUATE OVERSIGHT ISSUES WITH FPS’S RISK ASSESSMENT AND MANAGEMENT PROGRAM 1 (2011) [hereinafter GAO-11-705R].

58. GAO-11-705R, *supra* note 57, at 1; *see* GAO-14-235T, *supra* note 6, at 1-2.

59. *See Federal Protective Service: Would Federalization of Guards Improve Security at Critical Facilities? Before the Comm. on Homeland Sec.*, 111th Cong. 45 (2010) [hereinafter *Would Federalization of Guards Improve Security at Critical Facilities?*]. “ICE is the largest investigative component of the Department of Homeland Security (DHS) and the second largest investigative agency in the federal government, with more than 20,000 employees and an annual budget of more than \$5.7 billion.” AUSTIN T. FRAGOMEN ET AL., IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK 62 (2012).

60. *See Proposals to Downsize the Federal Protective Service and Effects on the Protection of Federal Buildings Before the Comm. on Transp. and Infrastructure*, 110th Cong. (2007) [hereinafter *Proposals to Downsize*].

61. GAO-08-476T, *supra* note 8, at 1.

62. *See id.* at 11.

63. *See id.* at 1-2; *Federal Protective Service: Will Continuing Challenges Weaken Transition and Impede Progress? Before the Comm. on Homeland Sec.*, 111th Cong. 11 (2009) (statement of Rand Beers, Under Secretary, National Programs Directorate, Department of Homeland Security) (The FPS

term savings have been realized.⁶⁴ As the opinion of the Office of the Inspector General indicates, FPS still encounters budget shortfalls as a result of its initiative to hire more contract guards instead of federally-trained officers.⁶⁵

Nonetheless, this was consistent with an unstated, but structurally implemented, goal of reducing and eventually eliminating the FPS federal workforce by housing FPS within the unrelated agency structure of ICE.⁶⁶ This intentional misplacement of a service responsible for securing federal buildings, within the agency responsible for immigration and customs, created a powerful structural incentive to outsource FPS security functions as much as possible.⁶⁷

Congress went to great lengths to preserve FPS's effectiveness by passing the DHS Appropriations legislation for the 2010 fiscal year.⁶⁸ This legislation transferred FPS out of the ICE Directorate into a newly formed National Protections Programs Directorate, thereby showing that the administration is constantly striving to privatize this entity.⁶⁹ The administration's goal of privatizing FPS undermined its effective management.⁷⁰

GAO, the nonpartisan congressional agency that monitors and investigates the use of federal funds, has been referred to as the "congressional watchdog" because it gathers information on agency effectiveness and evaluates whether government programs and policies are meeting their objectives and providing good public services.⁷¹ GAO also investigates allegations of illegal or improper activities and provides legal

transfer from ICE to NPPD was effectuated with the signing of the Fiscal Year 2010 Department of Homeland Security Act of 2010, which was signed into law on October 28, 2009) [hereinafter *Will Continuing Challenges Weaken Transition and Impede Progress?*].

64. See *Proposals to Downsize*, *supra* note 60, at 2-3; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-694, CHALLENGES WITH OVERSIGHT OF CONTRACT GUARD PROGRAM STILL EXIST, AND ADDITIONAL MANAGEMENT CONTROLS ARE NEEDED 4 (2013) [hereinafter GAO-13-694]; GAO-11-492, *supra* note 45, at 1-2.

65. See OIG-07-05, *supra* note 8, at 2; GAO-11-492, *supra* note 45, at 1-2.

66. See REESE, *supra* note 53, at 1, 4; OIG-07-05, *supra* note 8, at 2.

67. See REESE, *supra* note 53, at 1.

68. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-554, FEDERAL PROTECTIVE SERVICE: PROGRESS MADE BUT IMPROVED SCHEDULE AND COST ESTIMATE NEEDED TO COMPLETE TRANSITION 1-2 (2011).

69. See *id.*; GAO-13-694, *supra* note 64, at 6; see generally Department of Homeland Security Appropriations Act of 2010, H.R. 2892, 111th Cong. (2009).

70. See GAO-14-235T, *supra* note 6, at 1 (Showing how privatization has led to more structural encumbrances and problems to effectively provide security and run FPS); GAO-08-476T, *supra* note 8, at 13.

71. OFFICE OF THE FED. REGISTER NAT'L ARCHIVES AND RECORDS ADMIN., U.S. GOV'T MANUAL 48 (2013) [hereinafter U.S. GOV'T MANUAL]; see Noah B. Bleicher et al., *Accountability in Indefinite-Delivery/Indefinite-Quantity Contracting: The Multifaceted Work of the U.S. Government Accountability Office*, 37 PUB. CONT. L. J. 375, 375-76 (2007).

decisions and opinions.⁷² GAO has released reports and statements describing the Homeland Security failures that resulted from its reliance on private security contractors and contract guards.⁷³

Private security guards and contractors are now almost entirely responsible for screening entrants into critical federal infrastructure and must often operate security-screening devices such as magnetometers and x-ray machines.⁷⁴ Given the budget-based cuts to the FPS workforce and the reduced hours for FPS police operations, private security guards and contractors are now largely responsible for monitoring federal buildings and are deployed at roving and fixed posts.⁷⁵ Private security guards and contractors play highly visible roles and are often the first and only contact employees and visitors have with FPS at a facility.⁷⁶ Despite their vital roles, private security guards and contractors do not have any more law enforcement authority than the power to detain and make an ordinary citizen's arrest.⁷⁷ As has been noted in a study by the GAO, private security guards and contractors have shown a marked reluctance to exercise even this limited authority.⁷⁸

B. Homeland Security Gaps

The earlier listed gaps in management and oversight have led to problematic security consequences.⁷⁹ Both the GAO and the Department's own Inspector General, have investigated and exposed examples of Homeland Security gaps and failures within the FPS contract guard program.⁸⁰ The GAO's report, *Homeland Security: Preliminary Observations in the Federal Protective Service's Efforts to Protect Federal Property*, cites examples of private security guards and contractors neglecting to take action when suspects entered the buildings with illegal weapons, stole valuable federal property, and fled from an FPS inspector.⁸¹

Regarding the theft of a law enforcement surveillance trailer, the GAO reported, "The federal law enforcement agency did not realize [a surveillance] trailer was missing until three days later. Only after the

72. U.S. GOV'T MANUAL, *supra* note 71, at 48.

73. *See, e.g.*, GAO-08-476T, *supra* note 8, at 13; GAO-14-235T, *supra* note 6, at 6; GAO-09-859T, *supra* note 18, at 4-6.

74. GAO-09-859T, *supra* note 18, at 2; GAO-10-341, *supra* note 35, at 4; *Would Federalization of Guards Improve Security at Critical Facilities?*, *supra* note 59, at 5 (statement of Gary W. Schenkel).

75. OIG-07-05, *supra* note 8, at 2.

76. *See Would Federalization of Guards Improve Security at Critical Facilities?*, *supra* note 59, at 9 (statement of Mark L. Goldstein).

77. GAO-08-476T, *supra* note 8, at 4.

78. *Id.* at 13.

79. *See id.*

80. *See id.*; GAO-14-235T, *supra* note 6, at 6; GAO-09-859T, *supra* note 18, at 4-6.

81. GAO-08-476T, *supra* note 8, at 13.

federal law enforcement agency started making inquiries did the guards report the theft to that agency and FPS.⁸² Leaving aside the obvious problems with the failure to stop or deter the theft of sensitive surveillance equipment, the failure to report the problem to law enforcement until questioned by the agency three days later is a far larger problem.

The same GAO report acknowledges that “[d]uring another incident, FPS officials reported contract guards—who were armed—taking no action as a shirtless suspect wearing handcuffs on one arm ran through the lobby of a level IV building while being chased by a FPS inspector.”⁸³ This GAO report further notes:

GAO officials personally witnessed an incident in which an individual attempted to enter a level IV facility with illegal weapons. According to FPS policies, contract guards are required to confiscate illegal weapons, detain and question the individual, and to notify FPS. In this instance, the weapons were not confiscated, the individual was not detained or questioned, FPS was not notified, and the individual was allowed to leave with the weapons.⁸⁴

Another problematic occurrence is noted in a DHS Inspector General’s Report that notes that, “[o]n February 26, 2011, a person placed a bag containing an improvised explosive device [IED] outside the Patrick V. McNamara Federal Building in Detroit, Michigan.”⁸⁵ A private security guard, hired by FPS contractor DECO Inc. to secure the building, brought the bag containing the IED into the facility and placed it under a screening console desk at an entry point to the building.⁸⁶ The bag was held at this vulnerable location inside the federal building until they came to realize that the bag contained an IED on March 18, 2011.⁸⁷ The guards had no knowledge that, for twenty-one days, they were holding a potential bomb at one of the facility’s screening points.⁸⁸ The DHS Inspector General’s investigation of this incident concluded that DECO breached its contract, but also concluded that FPS bears some responsibility for allowing the bag to remain in the building for twenty-one days.⁸⁹

82. *Id.*

83. *Id.*

84. *Id.*

85. OIG-12-100, *supra* note 27, at 1.

86. *Id.*; *Guards Fired After Bomb Goes Unnoticed at Federal Building in Detroit*, NEWKERALA, <http://www.newkerala.com/news/newsplus/worldnews-64665.html#.UF4CKY2PVK1> (last visited Mar. 1, 2016).

87. OIG-12-100, *supra* note 27, at 1, 6.

88. *Id.* at 1, 6-7.

89. *Id.* at 1, 4.

In addition to the breach of its security obligations under its contract with the government, the Inspector General found that DECO lacked sufficient oversight from FPS.⁹⁰ The Inspector General and GAO investigators often find insufficient FPS oversight of its contractors, which exemplifies the FPS security gaps.⁹¹ In fact, this is a common investigative finding in reviews of privatization throughout DHS and in other departments and agencies.⁹² As with many other situations where the Inspector General or GAO finds shared responsibility for the security failures, in this case the private contractor's contract with the government agency continued.⁹³

The Inspector General's report claims that continuing DECO's contract was "advantageous for the government."⁹⁴ This raises the question—how do DHS and FPS define "advantageous?" Given the public security interest involved, "advantageous" should encompass more than short-term economic calculations.⁹⁵ The report indicates that more than mere economic justifications drove the continuation of the contract.⁹⁶ This suggests that while the contractor did all that it could, FPS's training gaps greatly contributed to the problem.⁹⁷ Furthermore, the report suggests that the contractor received high ratings from FPS in the past.⁹⁸

Paul Verkuil has written about failures similar to the DECO bag scenario.⁹⁹ Such failures have led Verkuil to challenge the conventional wisdom that privatization's failures primarily result from administrative oversight.¹⁰⁰ The frequency of such failures across federal agencies and departments suggests that such failures in privatization are the direct and expected result of excessive delegation of public functions.¹⁰¹ The question remains as to whether the delegation of the vital FPS security function violates federal law.

90. *Id.* at 3.

91. See *OIG-07-05*, *supra* note 8, at 1, 4, 14; *GAO-09-859T*, *supra* note 18, at 1, 4-6 (Some examples of these findings were when an armed guard fell asleep at his post after taking Percocet pain killers, a guard was caught using government computers to manage a private for profit adult website, guards did not recognize or properly x-ray a box containing semi-automatic handguns at the loading dock, GAO investigators walked past guards and then assembled IED explosive devices concealed on their persons and walked freely through the facility with an IED in a briefcase, and a guard failed to stop an infant carrier from being put through an x-ray machine).

92. *GAO-12-943T*, *supra* note 31, 1, 4, 8.

93. *OIG-12-100*, *supra* note 27, at 3.

94. *Id.* at 1, 12.

95. *See id.* at 12.

96. *See id.*

97. *See id.* at 1, 12.

98. *See OIG-12-100*, *supra* note 27, at 13.

99. *See generally* VERKUIL, *OUTSOURCING SOVEREIGNTY*, *supra* note 25.

100. *See id.* at 148-50.

101. *See id.* at 108-09.

C. Failures in Training Contract Guards

Security failures such as those described above would have been troubling even before 9/11.¹⁰² In today's world, these security failures are all the more problematic given that improving security was the primary motivation for transferring FPS, along with twenty-two other federal agencies and services, into the Department.¹⁰³

[A]ccording to FPS officials, contract guards generally do not have the training to detect suspicious terrorist or criminal activity. . . . [O]fficials reported instances in which large trucks or suspicious individuals were parked outside federal facilities for long periods of time without being approached by guards.¹⁰⁴

Even under the best of circumstances, private security guards' capabilities are relatively limited.¹⁰⁵ Naturally, requiring private security guards to perform vital security functions that go beyond the scope of their actual abilities undermines security.¹⁰⁶ Federal investigations of the FPS have revealed that private security guards lack the requisite abilities and have not received basic training certifications, let alone specific training regarding screening entry into federal buildings and active-shooters.¹⁰⁷

1. Training Certifications and Fitness Determinations

In an attempt to ensure that the private security guards are properly trained, FPS contracts require that guards obtain specific training certifications and satisfy certain employee fitness determinations.¹⁰⁸ Yet according to Congress's auditor, the GAO:

FPS continues to experience difficulty ensuring that its [contract] guards have the required training and certifications. . . . FPS requires that [contract guards] all undergo employee fitness determinations and complete 120

102. See Thompson, *supra* note 3, at 281-82.

103. *Id.* (after the attacks of September 11, Congress quickly merged twenty-two disparate agencies to form DHS).

104. GAO-08-476T, *supra* note 8, at 14.

105. GAO 10-341, *SUPRA* NOTE 35, AT 5 (this report shows what the guards can do and the fact that there is actually very little power in their jobs, especially with arrest capabilities and detaining).

106. *Id.* at 8.

107. GAO-13-694, *supra* note 64, at 9, 11-12, 15, 21; GAO-14-235T, *supra* note 6, at 2.

108. GAO-10-341, *SUPRA* NOTE 35, at 8.

hours of training provided by the contractor and FPS, including basic training and firearms training.¹⁰⁹

For example, FPS requires that each private security guard complete approximately 120 hours of training “including basic training, firearms training, and screener (X-ray and magnetometer) training.”¹¹⁰ Yet according to a 2013 GAO report, nearly a quarter, 23%, of the private security guard files GAO reviewed did not contain the required training and certification documentation.¹¹¹

2. Screener Training

As mentioned, some FPS contract guards have not received required screener training.¹¹² As part of their 120 hours of training, guards are required to receive: “8 hours of screener training from FPS on how to use x-ray and magnetometer equipment. . . . Screener training is important because many guards control access points at federal facilities and thus must be able to properly operate [these] machines and understand their results.”¹¹³

In 2009 and 2010, GAO reported, “FPS had not provided screener training to 1,500 contract guards in one FPS region.”¹¹⁴ Because of the oversight problems stated earlier, GAO could not determine the extent to which FPS guards are still not receiving screener training.¹¹⁵ However, GAO provided some useful examples:

[A]n official at one contract guard company stated that 133 of its approximately 350 guards (about 38 percent) on three separate contracts . . . have never received their initial x-ray and magnetometer training from FPS. The official stated that some of these guards are working at screening posts. . . . Further, officials at another contract guard company in a different FPS region stated that, according to their records, 78 of 295 (about 26 percent) guards deployed under their contract have never received magnetometer training.¹¹⁶

109. GAO-14-235T, *supra* note 6, at 2.

110. GAO-13-694, *supra* note 64, at 7.

111. *Id.* at 14.

112. *See* GAO-14-235T, *supra* note 6, at 5.

113. *Id.*

114. *Id.*

115. *Id.* at 5-6.

116. *Id.* at 6.

The concern was that some deployed guards do not know how to use the screening equipment and hence are not capable of “properly screen[ing] access control points at federal facilities.”¹¹⁷ This failure in training is significant—conducting proper screening at access points prevents the introduction of weapons, explosives, etc., and provides emergency-situation instruction.¹¹⁸ Case in point: when FPS officers stationed at an access point allowed an individual to enter and exit the facility with illegal weapons.¹¹⁹ They did not detain the individual, confiscate the weapons, or even report the incident—the individual simply left the building.¹²⁰ As described in the 2013 report, the greatest problem in screener training is that while regional FPS management is aware that these contract guards have undertaken little to no training, they still allow such guards to work under contract.¹²¹ Because FPS lacks effective management controls and a comprehensive guard management system, it cannot ensure that these companies have met their contractual requirements.¹²² No actions were taken against the companies in question.¹²³

3. Active-Shooter Training

FPS specifically requires training to prepare security guards to handle a hostile intruder who is firing a weapon at a federal facility—the so-called active-shooter scenario.¹²⁴ The DHS has defined an “active-shooter” as “an individual killing or attempting to kill people in a confined and populated area.”¹²⁵ In its 2013 report, GAO noted that “[s]ince June 2009 there have been several incidents involving active-shooters at government facilities.”¹²⁶

One example of a tragic active-shooter scenario is the January 2010 incident at the Lloyd D. George Federal Courthouse in Las Vegas, Nevada, where a gunman killed a security officer and wounded a deputy U.S. marshal.¹²⁷ Just after 8:00 a.m., a “reckless and callous” gunman opened fire in the lobby of a federal building in downtown Las Vegas, killing a sixty-five-year-old court officer and wounding a forty-eight-year-old deputy marshal before he was eventually shot himself.¹²⁸ A Las Vegas police

117. GAO-14-235T, *supra* note 6, at 5-6.

118. *Id.* at 2, 4-6.

119. GAO-08-476T, *supra* note 8, at 13.

120. *Id.*

121. GAO-14-235T, *supra* note 6, at 5-6.

122. *Id.*

123. GAO-13-694, *supra* note 64, at 10.

124. *Id.* at 11.

125. *Id.*

126. *Id.*

127. *Id.*

128. ASSOCIATED PRESS, *Two killed in shooting at Las Vegas federal building*, THE GUARDIAN (Jan. 4, 2010, 4:39 PM), <http://www.theguardian.com/world/2010/jan/04/las-vegas-shooting>.

spokeswoman stated, “[i]t looks like he went in there and just started unloading.”¹²⁹

GAO’s 2013 report reads: “FPS faces challenges providing active-shooter response training to all of its guards. Without ensuring that all guards receive training on how to respond to active-shooter incidents, FPS has limited assurance that its guards are prepared for this threat.”¹³⁰ According to GAO’s testimony to the U.S. Senate Committee on Homeland Security and Governmental Affairs, “[GAO] was unable to determine the extent to which FPS’ guards have received active-shooter response training, in part, because FPS lacks a comprehensive and reliable system for guard oversight”¹³¹

The GAO accountability reports thus highlight another failure—a failure in management and oversight of contract guards.¹³²

D. Failures in Management and Oversight of Contract Guards

One heading in the 2013 GAO report reads: “FPS Continues to Lack a Comprehensive System to Effectively Manage Guard Training, Certification, and Qualification Data.”¹³³ As an example, in July 2009, GAO reported that sixty-two percent of the contract guards working under seven of FPS’s thirty-eight contractors “had at least one expired certification.”¹³⁴ The report also provides examples of training and certification failures including failures to obtain magnetometer and X-ray screening.¹³⁵ It is bad enough that FPS contractors failed to satisfy the terms of these private contracts, but the fact that FPS took no action against them and still extended their contracts is even worse.¹³⁶

Through its existing contracts, FPS is already capable of taking actions against guards and guard companies that fail to satisfy its standards, but apparently does not do so because it lacks the necessary data to formally

129. ASSOCIATED PRESS, *1 guard, gunman killed in Las Vegas federal building shooting*, GAINESVILLE.COM (Jan. 4, 2010, 11:55 AM), <http://www.gainesville.com/article/20100104/ARTICLES/100109879?Title=1-guard-gunman-killed-in-Las-Vegas-federal-building-shooting>.

130. GAO-14-235T, *supra* note 6, at 4.

131. *Id.* at 5.

132. OIG-12-100, *supra* note 27, at 1, 3.

133. GAO-13-694, *supra* note 64, at 16.

134. GAO-10-341, *supra* note 35, at 9.

135. *Id.* at 14-15; *see* GAO-08-476T, *supra* note 8, at 13 (other failures in training supervision due to privatization of contract guards are: Guard inspections were done over the phone instead of in person, guards were sleeping on duty, inspectors work very limitedly and cannot enforce change, guards failing to act in situations of emergency, FPS guards take no actions after shirtless man in handcuffs is being chased through the building, no action was taken as extremely expensive surveillance is being stolen, and individuals have been allowed to enter and leave the FPS secured areas with illegal weapons).

136. GAO-10-341, *supra* note 35, at 11.

make the determination.¹³⁷ Indeed, according to Mark Goldstein's December 2013 testimony, "FPS is not able to provide reasonable assurance that guards have met training and certification requirements" because of "the lack of management controls."¹³⁸

Notwithstanding the apparent simplicity of the solutions, the consistent failure of the FPS to properly manage its private security contractors indicates a larger problem than an easily correctable issue of government management.¹³⁹ The GAO, as well as the Department's own Inspector General's Office, have written numerous reports and given congressional testimony regarding FPS's broad and specific failures to properly manage its private security contractors.¹⁴⁰

It appears the larger concern driving the failure to properly manage the security contractors is excessive privatization.¹⁴¹ Paul Verkuil has written extensively about the management problems that appear whenever there is excessive privatization of government functions.¹⁴² According to Verkuil, one issue is that "[i]n these circumstances, the number of private contractors doing the work of government will inevitably accelerate to the limits of federal employees available to supervise them; and may be beyond."¹⁴³ Verkuil additionally explains why "[t]his privatized program raises significant issues about the DHS's ability to supervise, oversee, and control."¹⁴⁴

The observed reality is that privatizing FPS has resulted in real homeland security gaps.¹⁴⁵ The constant inability of FPS to correct their

137. GAO-13-694, *supra* note 64, at 20-21.

138. GAO-14-235T, *supra* note 6, at 8.

139. See Verkuil, *OUTSOURCING SOVEREIGNTY*, *supra* note 25, at 26-30, 96, 105 (discussing the detrimental effects of outsourcing public services, which includes FPS, the delegation of traditional military functions to private contractors, the increasing willingness of public officials to outsource traditionally public functions to private firms, that there is due process limits to privatization and that this trend is detrimental to democracy).

140. GAO-13-694, *supra* note 64, at 1, 10 ("For example, an official at one contract guard company stated that 133 of its approximately 350 guards (about 38 percent) on three separate FPS contracts . . . never received their initial x-ray and magnetometer training from EPS."); OIG-12-100, *supra* note 27, at 6-7, 9-10 (this report found deficiencies in post inspections, guard training, and program suitability which contributed a bag containing explosive devices in it attaining access to a FPS building and remaining there for 21 days); GOA-12-943T, *supra* note 31, at 8 (this report expressed that the GAO's investigation at that time indicated that FPS did not have a comprehensive and reliable system to oversee its approximately 12,500 contract guards); GAO-08-476T, *supra* note 8, at 1-2 (reports that due to several management failures FPS' ability to achieve its mission has been hampered and impeded its ability to decrease the risk of criminal and terrorist attacks on federal employees, facilities, and members of the public).

141. Verkuil, *OUTSOURCING SOVEREIGNTY*, *supra* note 25, at 6-7, 35; GAO-08-476T, *supra* note 8, at 1-2.

142. Verkuil, *OUTSOURCING SOVEREIGNTY*, *supra* note 25, at 5-7, 35-37.

143. *Id.* at 6.

144. *Id.* at 35.

145. GAO-08-476T, *supra* note 8, at 1-2, 5, 9.

private contractor's security failures is consistent with Verkuil's research regarding the expected results of excessive privatization.¹⁴⁶

III. LEGAL AUTHORITY FOR PRIVATIZATION

FPS relies on a combination of statutory law, administrative regulations, and executive orders as the legal authority to hire and utilize private contractors and security guards to protect federal facilities.¹⁴⁷ This section analyzes congressional intent regarding the formation of the Department and outsourcing privatization authority under the DHS Act.

A. FPS Privatization Undermines Congressional Intent

The GAO has found that, since FPS's transfer from the GSA to Homeland Security, security at federal facilities has diminished and the risk of crime and terrorist attacks at many federal facilities has increased.¹⁴⁸ Despite the broad privatization authority granted under the DHS Act and related regulations, legislative intent should function as a limit on the scope of the ongoing delegation of FPS's vital security functions to private contractors.¹⁴⁹ As has been discussed, the DHS Act makes clear that the Department's primary mission is to protect the nation from terrorist attacks.¹⁵⁰ This general purpose indicates a legislative intent to generally strengthen the security of our nation and, in particular, America's sensitive federal facilities.¹⁵¹ Privatization and related FPS federal employee workforce reductions should be limited at least to avoid undermining FPS's essential homeland security mission.¹⁵²

146. GAO-13-694, *supra* note 64, at 16-17; Verkuil, *OUTSOURCING SOVEREIGNTY*, *supra* note at 25, at 6-7.

147. See 40 U.S.C.A. § 1315 (West 2015).

148. GAO-08-476T, *supra* note 8, at 1-2.

149. See Lars Noah, *Divining Regulatory Intent: The Place For A "Legislative History" Of Agency Rules*, 51 HASTINGS L. J. 255, 260-61 (2000) (arguing that the court's overemphasis on deferring to agency interpretation of the enacting act, which is post-promulgation of the act is suspect and that the courts should resort more to legislative history, floor debates, and pre-promulgation debates and committee hearings serve guidance as to the legislative intent of how an agency should function); GAO-08-476T, *supra* note 8, at 5; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-897T, *HOMELAND SECURITY: THE FEDERAL PROTECTIVE SERVICE FACES SEVERAL CHALLENGES THAT RAISE CONCERNS ABOUT PROTECTION OF FEDERAL FACILITIES 1* (2008)[hereinafter GAO-08-897T].

150. Homeland Security Act of 2002, 6 U.S.C.S. § 111(b)(1)(A)-(C).

151. See GAO-08-476T, *supra* note 8, at 1; 40 U.S.C.A. § 1315 (a)-(b)(1) (Subsection (a) provides that DHS in general "shall protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government" while subsection (b) allows DHS to delegate the task to FPS.).

152. See VERKUIL, *OUTSOURCING SOVEREIGNTY*, *supra* note 25, at 27-30, 105, 196 (the author discusses the detrimental effects of outsourcing public services, which includes FPS, and how the delegation of traditional military functions to private contractors and the increasing willingness of public officials to outsource traditionally public functions to private firms, that there is due process limits to privatization and that this trend is detrimental to democracy); Fairfax, *supra* note 20, at 267-68, 290-93 (stating that the state privatizes its functions to save costs, for necessity of expertise, and efficiency

In 2002, Tom Ridge, the then Director of the Office of Homeland Security and later the first Secretary of the Department, remarked: “Since day one, the primary mission of the Office of Homeland Security has been to develop a comprehensive national strategy to secure the United States from terrorist attacks and threats.”¹⁵³ This statement acknowledges the Department’s obvious mandate to actually enhance and strengthen security.¹⁵⁴

The legislative intent behind the Homeland Security Act of 2002 militates against the expansive privatization of federal building security that has occurred within the FPS.¹⁵⁵ Subsequent legislation further bolsters the logical argument that there was legislative intent to limit privatization that would undermine FPS’s vital homeland security mission.¹⁵⁶ The DHS Appropriations legislation for fiscal year 2010 transferred FPS out of ICE into a newly formed National Protection and Programs Directorate (“NPPD”).¹⁵⁷ This transfer occurred in direct response to reports regarding ICE’s underfunding and overall neglect of FPS.¹⁵⁸

Janet Napolitano, the Department Secretary, acknowledged the congressional intent to preserve FPS’s viability.¹⁵⁹ In a press release announcing the transfer of the FPS from ICE to NPPD, Secretary Napolitano stated: “Securing government facilities is a vital aspect of DHS’ critical infrastructure protection mission Transferring FPS to NPPD

among other reasons. However, despite delegating governmental functions under the outsourcing scheme, the government remains accountable for the performance of those functions. There are several Government Contracting Law regulations that define inherently governmental activities, including the FAIR Act of 1998, the Federal Acquisitions and Regulations, and Office of Management and Budget, and Circular No. A-76. These norms stand for the general proposition that contracts shall not be used for the performance of inherently governmental functions. The author concludes that is inappropriate to outsource functions closely identified with state sovereignty); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1022-25 (2005) (the author discusses that reliance on private contractors puts democracy in jeopardy because the idea of checks and balances is lacking and thus privatization creates lack of transparency).

153. See Press Release, Governor Tom Ridge, Dir. of Homeland Sec., to the Nat’l Ass’n of Broad. Educ. Found. (Jun. 10, 2002) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/print/text/20020610-7.html>.

154. See *id.*

155. See U.S. STATES GOV’T ACCOUNTABILITY OFFICE, GAO-11-940T, DEPARTMENT OF HOMELAND SECURITY: PROGRESS MADE AND WORK REMAINING IN IMPLEMENTING HOMELAND SECURITY MISSIONS 10 YEARS AFTER 9/11 7 (2011); GAO-08-476T, *supra* note 8, at 1; GAO-08-897T, *supra* note 149, at 1.

156. See 40 U.S.C.A. § 1315(a)-(b)(1).

157. See Department Of Homeland Security Appropriations Act, PUB. L. NO. 111-83, 123 Stat. 2142 (2010); *Secretary Napolitano Announces Transfer*, *supra* note 7.

158. See OFFICE OF INSPECTOR GENERAL, OIG-06-29, FPS RELATED FUNDS TRANSFERRED FROM GSA TO DHS 1 (2006) (stating Chairman James Oberst’s and her concern that the effectiveness of FPS has been compromised since its placement inside ICE); *Secretary Napolitano Announces Transfer*, *supra* note 7.

159. *Secretary Napolitano Announces Transfer*, *supra* note 7.

[would] enhance oversight and efficiency while maximizing the Department's overall effectiveness in protecting federal buildings across the country."¹⁶⁰ She went on to state: "The realignment allows FPS to focus on its primary mission—securing General Services Administration (GSA)-owned and leased federal buildings by performing building security assessments and deploying appropriate countermeasures—while enabling ICE to focus on the smart and effective enforcement of immigration and customs laws."¹⁶¹

Going beyond the language of the relevant laws, the historical context in which the Homeland Security Act was drafted obviates the legislative intent to strengthen national security and enhance the nation's ability to protect against and prevent future terrorist acts domestically.¹⁶² The terrorist attacks of 9/11 are difficult to forget.¹⁶³ The Comptroller General of the United States, who is the head of GAO, said the following in a 2011 statement to Congress:

The terrorist attacks of September 11, 2001, led to profound changes in government agendas, policies and structures to confront homeland security threats facing the nation. Most notably, the Department of Homeland Security (DHS) began operations in 2003 with key missions that included preventing terrorist attacks from occurring in the United States, reducing the country's vulnerability to terrorism, and minimizing the damages from any attacks that may occur.¹⁶⁴

The fear and concern regarding a future attack was not an abstract or irrational fear; rather, it was a near and immediate concern.¹⁶⁵ David Wright of the American Federation of Government Employees, the employee union representing FPS workers, said in his 2010 testimony to Congress:

160. *Id.*

161. *See id.*

162. *See* Sarah T. Zaffina, Note, *For Whom The Bell Tolls: The New Human Resources Management System at The Department Of Homeland Security Sounds The Death Knell For A Uniform Civil Service*, 14 FED. CIR. B. J. 705, 707 (2004) (stating that "[i]n the aftermath of the terrorist attacks on September 11, 2001, Congress created a new executive agency, the Department of Homeland Security (DHS), with a primary mission to protect the United States against future terrorist attacks."); GAO-11-940T, *supra* note 155, AT 1.

163. *See* Zaffina, *supra* note 162, at 707; GAO-11-940T, *supra* note 155, AT 1.

164. GAO-11-940T, *supra* note 155, at *highlights to the report*.

165. *Would Federalization of Guards Improve Security at Critical Facilities?*, *supra* note 59, at 47 (statement of David L. Wright).

In today's dynamic threat environment, our high profile, high risk [f]ederal workplaces demand the investment required to use [f]ederal law-enforcement officers to protect [f]ederal properties. . . . Making the necessary reforms to this agency and increasing the number of [f]ederal police officers on duty are not a matter of responding to vague, unsubstantiated warnings. The threat and immediate danger is quite real. The writing is on the wall.¹⁶⁶

Military Humvees roamed the streets of our nation's capital and were often parked alongside tanks in front of federal buildings.¹⁶⁷ Barricades were hastily set-up all around the Capitol and congressional office buildings.¹⁶⁸ An overwhelming disquiet and sense of disempowerment flowed from a concern that our national security apparatus was ill-equipped to prevent or respond to what appeared to be an imminent threat that gave no warning.¹⁶⁹ The real terror that the events of 9/11 engendered spurred a sense of urgency that even Congress, an institution disinclined towards rapid action, could not ignore.¹⁷⁰ The DHS Act was first proposed in Congress by then President George W. Bush on June 18, 2002,¹⁷¹ and was passed into law on November 25, 2002.¹⁷²

These reports are valuable insights regarding Congress's intentions when passing the DHS Act. Lars Noah suggests that courts make an error when they overemphasize deference to the agency's interpretation of the enabling statute (post-promulgation of the act) and should resort more to

166. *Id.*

167. GAO-08-476T, *supra* note 8, at 2.

In addition, reports issued by multiple government entities acknowledge the importance of proactive patrol in detecting and deterring terrorist surveillance teams, which frequently use information such as the placement of armed guards and proximity to law enforcement agency stations when choosing targets and planning attacks. These sophisticated surveillance and research techniques can potentially be derailed by active law enforcement patrols in and around federal facilities.

Id.

168. See U.S. GOV'T ACCOUNTABILITY, GAO-03-435, RAIL SAFETY AND SECURITY: SOME ACTIONS ALREADY TAKEN TO ENHANCE RAIL SECURITY, BUT RISK-BASED PLAN NEEDED 11 (2003) (discussing the use of barricades in railroad stations after the September 11 attack).

169. GAO-08-476T, *supra* note 8, at 1, 11-12 (stating that FPS faces numerous challenges like inadequate amount of equipment, which could lead to risk to the public and federal buildings).

170. See *Will Continuing Challenges Weaken Transition and Impede Progress*, *supra* note 63, at 60-61 (statement of Stephen D. Amitay stating that slow actions of DHS, Nasco, RAMP, and Congress impede the process of securing safety after the 9/11 attack).

171. See H.R. Doc. No. 107-227, at H3639 (2001) (a message from the President proposing the Department of Homeland Security to organize and protect the nation against terrorism).

172. Homeland Security Act of 2002, 6 U.S.C.S. § 111.

legislative history, floor debates, pre-promulgation debates, and committee hearings as interpretive guidance.¹⁷³

The legislative intent can be seen in the committee reports and records of the debates. In the process of passing the DHS Act, both houses of Congress were unambiguous in their intention to protect the security of federal buildings and facilities.¹⁷⁴ The House Select Committee on Homeland Security was responsible for writing the DHS Act.¹⁷⁵ In its Committee Report, it stated the purpose of the Homeland Security Act of 2002:

[The Act] will create the Department of Homeland Security (DHS) to provide for the security of the American people, territory, and sovereignty within the United States. The Department of Homeland Security will help fulfill the Constitutional responsibility of the [f]ederal government by providing for the common defense by uniting, under a single department those elements within the government whose primary responsibility is to secure the United States homeland. This department will have the mission of preventing terrorist attacks within the United States, reducing the United States' vulnerability to terrorism, minimizing the damages from attacks, and assisting in recovery from any attacks, should they occur.¹⁷⁶

The House Committee Report specifically acknowledged an important constitutional duty for the federal government to protect against terrorism and, therefore, pushed for the creation of the Department in order to help fulfill that responsibility.¹⁷⁷

Likewise, Senator Joseph I. Lieberman of Connecticut, the then Chair of the Committee on Governmental Affairs, issued a Committee Report that also acknowledged 9/11's horrific impression on the American psyche.¹⁷⁸

173. Noah, *supra* note 149, at 282.

174. 40 U.S.C.A. § 1315(a) (pursuant to the Homeland Security Act of 2002, the DHS was responsible for protecting federal "buildings, grounds, and property . . . owned, occupied, or secured by the Federal Government . . .").

175. See H.R. Rep. No. 107-609, pt. 1 at 1, 63 (2002).

176. *Id.* at 63 (statement of Rep. Army, Member, Select Comm. on Homeland Security).

177. See *id.*; Thompson, *supra* note 3, at 281.

178. S. Rep. No. 107-175, at 1-2 (2002).

The terrorist attacks of September 11, 2001 were a horrific wake-up call for the nation Suddenly, U.S. citizens realized that warfare had changed and they were vulnerable as civilians in their home towns, simply going about their daily lives.

The Committee Report went on to explain the intended role for a new DHS, saying, “[t]he new department would provide new leadership on a range of homeland threats, including terrorism, by consolidating a range of federal agencies and programs responsible for border security, critical infrastructure protection, and emergency preparedness and response.”¹⁷⁹ Other Senators similarly testified regarding the need for the nation to unite against terrorism and bolster security with the DHS Act, including former Senator Byron Dorgan from North Dakota¹⁸⁰ and former Senator Joe Lieberman from Connecticut.¹⁸¹

Congress’s endorsement of some privatization of the Department’s responsibilities was conditioned on an expectation that any such privatization would enhance, not hinder, homeland security.¹⁸² As Tom Delay stated:

To be organized effectively and function efficiently, the Homeland Security Department must be consolidated, flexible, and readily accountable to its Secretary. We simply cannot afford to invest this new department with the ponderous inefficiency that hobbles much of the federal bureaucracy. The safety and security of the United States is reason enough to design a Homeland Security Department that is responsive, adaptable, innovative, and aggressively focused on a single defining mission.¹⁸³

Id. at 1.

179. *Id.* at 8-9.

180. 148 CONG. REC. S8185 (daily ed. Sept. 4, 2002) (statement of Sen. Dorgan). Senator Dorgan stated:

We have a lot to do with respect to the needs in this country, and the requirement that we all get together, work together, stay together, to fight terrorism and do what we must as Americans to respond to this threat.

Id.

181. *Id.* at S8186 (statement of Sen. Lieberman). Senator Lieberman stated:

Look at the title of the amendment, the proposed bill: The National Homeland Security and Combating Terrorism Act of 2002. It clearly is the intention of our committee not just to create a Department of Homeland Security, which is, of course critical, but to combat terrorism. Terrorism goes beyond homeland security. It goes beyond the Department of Homeland Security.

Id.

182. *Will Continuing Challenges Weaken Transition and Impede Progress?*, *supra* note 63, at 47 (statement of David Wright).

183. *Transforming the Federal Government to Protect America from Terrorism Before the Select Comm. on Homeland Security House of Representatives*, 107 Cong. (2002) (prepared statement of the Hon. Tom Delay).

Together, these statements demonstrate the legislature's intent to protect the nation's critical infrastructure and to combat terrorism.¹⁸⁴ The language of the congressional Committees that were primarily responsible for writing the DHS Act and the language of the Members of Congress involved in passing the Act, undoubtedly show an intent to enhance our national security and fully protect federal buildings and facilities.¹⁸⁵

The legislative record from the debates underscores a clear purpose.¹⁸⁶ As Senator Dorgan from North Dakota stated, "[T]his is a case where if we make a mistake, the safety of the American people is at stake. So homeland security is critically important."¹⁸⁷ Some Members of Congress specifically stated how important it was that the new Department provide more federal police and investigators than existed before 9/11.¹⁸⁸

The Secretary [of Homeland Security] may designate employees of the Department of Homeland Security, including employees transferred to the Department from the Office of the [FPS] of the [GSA] pursuant to the Homeland Security Act of 2002, as officers and agents for duty in connection with the protection of property owned or occupied by the Federal Government and persons on the property including duty in areas outside the property.¹⁸⁹

Indeed, one of the "Performance Goals and Objectives" of the Homeland Security Act of 2002 was to "create a flexible and inviting environment to recruit, manage, train and retain a world-class work force."¹⁹⁰ This suggests that the responsibility of protecting should be primarily entrusted to federal employees.¹⁹¹

184. 148 CONG. REC. S8352-8367 (Daily ed. Sept. 9, 2002) (statement of Sen. Thompson).

185. *Will Continuing Challenges Weaken Transition and Impede Progress?*, *supra* note 63, at 46 (statement of David L. Wright).

186. *See Would Federalization of Guards Improve Security at Critical Facilities?*, *supra* note 59, 47 (statement of David Wright); *Will Continuing Challenges Weaken Transition and Impede Progress?*, *supra* note 63, at 53-54 (statement of David L. Wright).

Since 2001, while FPS has decreased and the risk of attack on Federal facilities has increased, . . . [t]he sole Federal agency charged with the critical mission of protecting thousands of Federal buildings and millions of Federal employees and visitors from terrorist and criminal attack, the Federal Protective Service is now within NPPD, but still remains an agency in crisis.

Id. at 54.

187. 148 CONG. REC. S9056 (Daily ed. Sept. 24, 2002) (statement of Sen. Dorgan).

188. *See id.* at S9063.

189. H.R. Rep. No. 107-609 pt. I, at 60 (statement of Rep. Arney).

190. *Id.* at 75.

191. *See id.* at 60.

Given that federal building security is central to the demonstrated legislative intent to enhance Homeland Security and the specific intent to fully protect federal facilities, it appears that FPS's ability to privatize is more limited than the earlier discussed DHS Act provisions indicate.¹⁹² The earlier references are but portions of an overall statute, and under the usual canons of statutory interpretation, it is ill advised to interpret a meaning to a particular provision that is repugnant to the overall statute.¹⁹³ Applying the broad and expansive privatization authority found within the Federal Acquisition Regulation ("FAR") in isolation is inconsistent with the legislative intent behind the DHS Act to the extent that expansive FPS workforce reductions and privatization effectively diminish national security in general and federal facility security in particular.¹⁹⁴

For instance, Representative Eleanor Holmes Norton expressed her concern, which she shared with Chairman James Oberstar, that the effectiveness of FPS has been compromised since its placement inside ICE.¹⁹⁵ Senator Joe Lieberman expressed his dismay about budget shortfalls within FPS, which reduced training, hiring, and the purchase of new equipment.¹⁹⁶ As was discussed in Part II, FPS faces numerous challenges, and among those challenges are equipment challenges that could

192. See Homeland Security Act of 2002, 6 U.S.C.S. § 111; 48 C.F.R. § 1.301 (2001):

(a)(1) Subject to the authorities in paragraph (c) below and other statutory authority, an agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its suborganizations, and contractors or prospective contractors.

(2) Subject to the authorities in (c) below and other statutory authority, an agency head may issue or authorize the issuance of internal agency guidance at any organizational level (e.g., designations and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements)

....

(d) Agency acquisition regulations implementing or supplementing the FAR are, for—

(1) The military departments and defense agencies, issued subject to the authority of the Secretary of Defense.

193. See *Nat'l Treasury Emp. Union v. Chertoff*, 452 F.3d 839, 858 (D.C. Cir. 2006).

194. See Homeland Security Act of 2002, 6 U.S.C.S. § 111.

195. See Letter from James Oberstar and Eleanor Holmes Norton, Chairman and Chairwoman, H. Comm. on Transp. and Infrastructure, to members of Comm. On Appropriations (Sept. 9, 2009) (statement of then Sub-committee ranking member Rep. Eleanor Holmes Norton).

196. See *The Federal Protective Service: Time for Reform*, *supra* note 12, at 1 (opening statement of Senator Joseph Lieberman).

lead to increased risks to the public and federal buildings.¹⁹⁷ There were also unresolved workforce issues that led to the decrease of employee numbers and police officer positions with the FPS.¹⁹⁸ According to FPS officials, the decreases in FPS's workforce are primarily the result of cost-saving measures taken to address its budgetary challenges.¹⁹⁹ As the Director of Physical Infrastructure Issues testified before the House of Representatives:

Due to staffing and operational issues, FPS is experiencing difficulties in fully meeting its facility protection mission. According to many FPS officials at regions we visited, these difficulties may expose federal facilities to a greater risk of crime or terrorist attack. . . . One consequence of this change is that, in many federal facilities FPS is not providing proactive patrol in and around federal facilities in order to detect and prevent criminal incidents and terrorism related activities before they occur. . . . FPS continues to face several management challenges that many FPS officials at regions we visited say have hampered its ability to achieve its mission and increased the risk of criminal and terrorist attacks on federal employees, facilities, and members of the public.²⁰⁰

Furthermore, full-time federal workforce reduction undermines the Department's ability to engage in the full-time interdiction and terrorism prevention efforts that motivated the formation of the Department.²⁰¹ Given that Congress, by enacting the Homeland Security Act of 2002, unequivocally intended for the enhancement of homeland security and the inclusive protection of federal buildings and facilities, FPS's discretionary ability to privatize its inherently governmental functions undermines congressional goals and the DHS mandate.²⁰²

197. See GAO-08-476T, *supra* note 8, at 1-3.

198. *Id.* at 3, 5-7.

199. *Id.* at 7.

200. *Id.* at 1-2.

201. See GAO-08-897T, *supra* note 149, at 7.

202. See GAO-08-476T, *supra* note 8, at 1-2. Gary Schenkel, Director of FPS, stated:

[W]e have not ruled out the possibility of expanding our Federal workforce, or Federalizing or partially Federalizing the contract-security-guard workforce. We expect to complete the bottom-up staffing review currently underway, in time to inform the fiscal year 2012 budget request. In the interim, the Department remains committed to ensuring the organization is appropriately staffed, as evidenced by the 2009, 2010, and 2011 budget requests, which were all equal to, or exceeding the 1,200 full-time-equivalent staffing level directed by Congress.

There are no cases that unequivocally state that “any particular governmental service may not be contracted out to private providers” in terms of privatization of administrative functions, and Clayton Gillette and Paul Stephan found that courts have little to say about it.²⁰³ Due to the lack of cases dealing directly with the privatization process, Gillette and Stephan examine three areas where privatization is subject to structural limitations.²⁰⁴ First, courts consider cases where the issue is whether constitutional rules that apply to governmental actors also apply to private actors.²⁰⁵ Then, they address administrative decisions to contract out governmental functions.²⁰⁶ Lastly, they conducted a survey on the “constitutions of several states and how they affect privatization.”²⁰⁷

Other than the legislative and administrative regulations and guidelines set forth by the United States Code (“U.S.C.”), FAR, and the Code of Federal Regulations (“C.F.R.”), there is no unequivocal judicial authority banning the government from contracting with private parties to provide any particular governmental service.²⁰⁸ In fact, a review of Supreme Court decisions demonstrates that the courts have little to say about privatization of public functions and that it is difficult to identify any function that has been categorized as inherently public as a matter of constitutional law.²⁰⁹ Gillette and Stephan found that the constitutional limitations to privatization are procedural rather than substantive, and that even in areas where the government is required to have some role, there is an apparent room for privatization, which is permissible so long as the arrangement between the government and the private actors limit the discretion of the private firms.²¹⁰

Although there is evidence of legislative intent that ought to bar overly expansive privatization efforts within FPS, this does not create a bar that can effectively curtail excessive FPS privatization.²¹¹ This is because courts are generally reluctant to enforce a nonspecific statutory purpose to constrain agency discretion.²¹² This is especially true in regard to

Would Federalization of Guards Improve Security at Critical Facilities?, *supra* note 59, at 5-7 (statement of Gary Schenkel).

203. Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limits on Privatization*, 46 AM. J. COMP. L. 481, 482 (1998).

204. *Id.* at 483.

205. *Id.*

206. *Id.*

207. *Id.*

208. *See* Gillette & Stephan, *supra* note 203, at 482.

209. *Id.*

210. *Id.* at 501.

211. *See* 48 C.F.R. § 7.503(d) (2006).

212. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding that an agency statutory interpretation calls for *Chevron* deference when it is apparent that “Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority.”); *Whitman v. Am.*

procurement of resources that an agency deems necessary to fulfill its functions.²¹³ Here the federal courts typically invoke the political question doctrine, leaving such matters to the two political branches to resolve.²¹⁴ *Skidmore v. Swift*²¹⁵ stands as precedent for federal courts deferring to agency interpretations of law and opinions.²¹⁶ As Jerry L. Mashaw suggests, the *Chevron v. Natural Resources Defense Counsel*²¹⁷ opinion establishes that while agency rulemaking is autonomous in nature, “the combination of law-making and interpretive responsibility in administrative institutions is constitutionally appropriate because it can be directed, checked, and controlled by the political branches.”²¹⁸ Furthermore, federal courts are generally reluctant to enforce a nonspecific statutory purpose as a constraint on agency discretion.²¹⁹

The problem with applying the implicit limitations within the DHS Act is that the Department and FPS are unlikely to define their own actions as undermining federal facility security.²²⁰ However, there remains no effective measure for the limitations and there is no enforcement mechanism in place. Hence, the legislative intent of the DHS Act itself is not a reliable bar to massive and excessive delegations of the FPS security function, which is essential to homeland security.

Trucking Ass’n Inc., 531 U.S. 457, 474-75, 479-80 (2001) (holding that a legislative act, Clean Air Act bars an executive agency Environmental Protection Agency from considering implementation costs but the delegation of authority to EPA “protect public health” was not unconstitutional delegation of legislative power and that final agency action is subject to judicial review); *Chevron v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (ruling that courts, in construing the extent and scope of an agency rulemaking power and discretion, should exercise deference to an administrator’s interpretation of a statute unless Congress has spoken directly to the question at hand. “If the intent of the Congress is clear, that is the end of the matter” If the court has determined that the intent of the legislature is ambiguous, then the reviewing court should defer to the interpretation of the agencies so long as it is permissible and reasonable construction of the statute.); *Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944) (holding that Federal courts may yield to the expertise and capacities of different agencies. Interpretations and opinions of the agency deserve deference so long as the agency has shown body of experience and expertise on the issue at hand).

213. *Skidmore*, 323 U.S. at 139-40; Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U TORONTO L. J. 497, 509-11 (2005) (arguing that although agency rulemaking is autonomous in nature, the power to lawmaking and interpretive responsibility is constitutionally valid so long as agencies can still be directed, checked and controlled by political branches); Jayna Richardson, *Outsourcing & OMB Circular A-76: Sixth Circuit Opens the Door to Federal Employee Challenges of Agency Determinations*, 28 PUB. CONT. L. J. 203, 205-06 (1999) (arguing that the decision to outsource depends whether the agency thinks that the functions to be outsourced must be performed by governmental employees).

214. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (holding that claim challenging Pennsylvania’s congressional redistricting plan as political gerrymander was a non-justiciable political question).

215. 323 U.S. 134.

216. *Id.* at 137-40.

217. 467 U.S. 837.

218. Mashaw, *supra* note 213, at 511.

219. *Chevron*, 467 U.S. at 842-43.

220. *See Skidmore*, 323 U.S. at 139-40.

Absent a regulatory or statutory basis for limiting the executive branch's privatization of vital federal national security functions, the remaining hope is for a broader constitutional limitation that bars the delegation of such an important function, or *inherently governmental function*, to private actors.²²¹

B. Outsourcing and Privatization Authority under the DHS Act

The DHS Act includes sections that specifically authorize the creation of the Department and its agencies.²²² Within the DHS Act are provisions that reference the Department's general authority to outsource or privatize departmental functions.²²³ Section 393 of the DHS Act provides: "The Secretary may use the authorities set forth in this section with respect to any procurement . . . if the Secretary determines in writing that the mission of the Department . . . would be seriously impaired without the use of such authorities."²²⁴ Hence, the DHS Act's purpose is to enhance security—not to decrease or in any way diminish the scope of federal facility security.²²⁵ Minimally, this indicates the legislature's intent not to augment or otherwise reorganize the federal workforce in a manner that diminishes homeland security.²²⁶

The DHS Act further states: "The primary mission of the Department is to (A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; and (C) minimize the damage and assist in the recovery, from terrorist attacks that do occur within the United States."²²⁷ This translates into a mandate to fully and effectively protect the nation from terrorist attacks. However, "Federal, State, and local law enforcement agencies" are vested with the "primary responsibility for investigating and prosecuting" terrorists.²²⁸ Accordingly, the DHS Act also grants the Department the authority to coordinate its security efforts with other federal, state, and local law enforcement agencies.²²⁹ The DHS Act further provides for a Special Assistant to the Secretary "who [is]

221. Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-be-met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 774 (2011).

222. 6 U.S.C.A. § 101 (West 2007); Homeland Security Act of 2002, 6 U.S.C.S. § 111; 48 C.F.R. § 1.302 (West 2016) (the FAR does allow agencies to supplement the FAR, yet these are limited to statutes that implement the FAR while serving the specific needs of the particular agency).

223. See Homeland Security Act of 2002, 6 U.S.C.S. § 111(b); 6 U.S.C.A. § 112 (West 2015) (enumerates and describes the functions of the Secretary of DHS); 6 U.S.C.A. § 113 (West 2015) (describes other officers and their functions).

224. 6 U.S.C.A. § 393 (West 2015).

225. See *id.*

226. See *id.*

227. Homeland Security Act of 2002, 6 U.S.C.S. § 111(b)(1)(A)-(C).

228. *Id.* at (b)(2).

229. 6 U.S.C.A. § 361(a)(b) (West 2015).

responsible for creating and fostering strategic communications with the private sector to enhance the primary mission of the Department to protect the American homeland.²³⁰ This demonstrates a general authority to use private contractors to aid in the Homeland Security mission.²³¹

The FAR governs the acquisition process regarding all government contracts.²³² The FAR includes a list of functions that are “generally not considered to be inherently governmental,” including, “(1) Services that involve or relate to budget preparation . . . (3) Services that involve or relate to analysis, feasibility studies and strategy options to be used by agency personnel in developing policy . . . [and] (4) Services that involve or relate to the development of regulations.”²³³ Notably, this list of non-inherently governmental functions also includes:

(5) Services that involve or relate to the evaluation of another contractor’s performance . . . (7) Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors) . . . (18) Contractors providing legal advice and interpretations of regulations and statutes to Government officials.²³⁴

This provision of the FAR has been interpreted to mean that these rules “broadly outline procurement policies and procedures for the acquisition of goods and services by the government on behalf of the American taxpayer. It grants broad discretion to ‘local procurement officials to take independent actions based on their professional judgment’ so as to obtain the ‘best value product or service.’”²³⁵ Clearly this FAR provision, if taken in isolation, provides expansive authority to privatize and outsource these functions.²³⁶ However, this provision must be placed in the context of a regulated agency. Therefore, in the context of DHS and FPS, the DHS Act will limit the scope of privatization authority.²³⁷

230. 6 U.S.C.A. § 112(f).

231. *See id.* at (b).

232. *See* 48 C.F.R. § 1.101 (West 2016); 48 C.F.R. § 1.102 (West 2016).

233. 48 C.F.R. § 7.503 (d) (1)-(4) (West 2016).

234. *Id.* at (d)(5), (7), (18).

235. *See Wood v. United States*, 290 F.3d 29, 34 (1st Cir. 2002); *see Mead Corp.*, 533 U.S. at 218; *Whitman*, 531 U.S. at 458, 473-75, 479-80; *Skidmore*, 323 U.S. at 137-39.

236. *See Wood*, 290 F.3d at 34; *see Mead Corp.*, 533 U.S. at 226-27; *Whitman*, 531 U.S. at 474-75, 479-80; *Skidmore*, 323 U.S. at 139-40.

237. Homeland Security Act of 2002, 6 U.S.C.S. § 111(b); 6 U.S.C.A. § 203(3) (West 2015); 40 U.S.C.A. § 1315(a).

The DHS Act incorporates and transfers FPS's previous responsibilities into its role in the newly formed DHS.²³⁸ The DHS Act grants FPS authority to retain all functions it previously had in the GSA.²³⁹ Relatedly, 40 U.S.C. § 1315(a) grants that:

To the extent provided for by transfers made pursuant to the Homeland Security Act of 2002, the Secretary of Homeland Security (in this section referred to as the "Secretary") shall protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government (including any agency, instrumentality, or wholly owned or mixed-ownership corporation thereof) and the persons on the property.²⁴⁰

This translates into a broad mandate of authority to use private contractors to perform government functions that are generally authorized under the FAR.²⁴¹

However, the FPS section of the statute requires the Secretary of Homeland Security to protect the buildings and property of the federal government.²⁴² It also allows the Secretary of Homeland Security to designate any employee of the Department as an officer or agent to protect property and persons on the property owned by the federal government.²⁴³ In sum, the DHS Act and related laws and regulations together provide broad privatization authority.²⁴⁴

IV. EXCESSIVE PRIVATIZATION RAISES CONSTITUTIONAL CONCERNS

The congressional mandate to strengthen homeland security, embodied in passages of the DHS Act, is at odds with the broad privatization of vital FPS functions and undermines security.²⁴⁵ Furthermore, excessive privatization raises fundamental constitutional concerns regarding the appropriate role and duties of government and the question of what limit, if any, ought to be placed on delegations of governmental duties to private

238. 6 U.S.C. § 203(3) (2002). By virtue of this Act, the following functions were transferred to the Secretary of the DHS: the US Customs Service and The Federal Law Enforcement Training Center of the Department of the Treasury, the TSA of the Department of Transportation, the FPS of the General Services Administration, and the Office for Domestic Preparedness of the Office of Justice Programs, including the related functions of the Attorney General Office. *Id.*

239. *Id.*

240. 40 U.S.C.A. § 1315(a).

241. *See generally* 48 C.F.R. § 1.102.

242. 40 U.S.C.A. § 1315(a).

243. *Id.* at (b)(1).

244. *See generally* Homeland Security Act of 2002, 6 U.S.C.S. §§ 101-1717.

245. *See generally* GAO-10-341, *supra* note 35.

actors.²⁴⁶ The concern is embodied in the statutory and regulatory policy statements that limit the delegation of inherently governmental functions.²⁴⁷ Doctrines regarding inherently governmental functions and the private delegation doctrine are rooted in a longstanding recognition that privatizing essential public functions or, as Paul Verkuil frames it, “outsourcing sovereignty,” undermines democracy.²⁴⁸

Courts have undermined the constitutional limitations on both public and private delegation in order to fit the needs of an increasingly complex administrative state.²⁴⁹ Despite the legitimate policy concerns with limiting the government’s flexibility to delegate some of its functions in order to enhance efficiency, the original policy concern, that some duties are too inherently governmental and too fundamental to be outsourced, remains salient.²⁵⁰

This Section begins by considering the constitutional law concerns with FPS privatization by presenting the relevant policies and doctrines such as the inherently governmental function and private delegation doctrines. Next, despite the existence of these doctrines, this Section shows how the post-*Lochner* era appreciation for the special needs of the complex administrative state has effectively eliminated the enforcement of private delegation limits. Finally, this Section concludes by distinguishing excessive FPS privatization from the policy driving the post-*Lochner* leniency towards the administrative state. Even where a function—in this context, FPS security—is generally not considered an inherently governmental function, it is not constitutionally permissible to excessively privatize an agency’s core functions to the point that fundamental governmental duties are undermined.²⁵¹

A. *Limitations on Public and Private Delegation*

Limitations on government delegations are typically framed in two contexts.²⁵² Most relevant to this discussion is the private delegation context.²⁵³ Here, delegating government’s fundamental duties to private

246. See JOHN R. LUCKEY ET AL., CONG. RESEARCH SERV., R40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS 2-3 (2009) (section “The Constitutional Grounding for the Public/Private Debate”).

247. See *id.* at 11.

248. VERKUIL, OUTSOURCING SOVEREIGNTY, *supra* note 25, at 4, 102-04.

249. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes & The Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 422 (2008).

250. See Minow, *supra* note 152, at 1014.

251. See LUCKEY ET AL., *supra* note 246, at 27-28 (section “Replacing ‘Inherently Governmental Functions’ with Another Construct”).

252. See *id.* at 20.

253. *Id.*

actors is of concern.²⁵⁴ Today, the private delegation concern is typically framed as a policy rather than a constitutionally-required limitation on delegating inherently governmental functions.²⁵⁵ As a general matter, inherently governmental functions cannot be delegated to private actors.²⁵⁶ The other context is public delegation, where the nondelegation doctrine imposes a constitutional law-based limitation on delegating the powers of one branch of the federal government to another.²⁵⁷ The public delegation concerns are typically based in a separation of powers dilemma.²⁵⁸

Different law and governance concerns animate the nondelegation doctrine and the private delegation-based inherent governmental function doctrine.²⁵⁹ Despite these distinct concerns, the post-Lochner Era legal philosophy of providing deference toward the actions of the political branches of government has influenced the simultaneous demise of both the private and public delegation doctrines.²⁶⁰ As a result, delegation of governmental duties to private entities is nearly as difficult to legally challenge as delegations of governmental duties to different branches of government.²⁶¹ In the context of the FPS, the real homeland security gaps

254. *Id.*

255. *See id.* at 38-40 (section “Focusing on Questions of Contracting Policy”).

256. 31 U.S.C. § 501 (1982); Performance of Commercial Activities, Exec. Order No. 12615, 52 Fed. Reg. 44,853, 44,853 (Nov. 19, 1987) (“Ensure that new Federal Government requirements for commercial activities are provided by private industry, except where statute or national security requires government performance or where private industry costs are unreasonable”); *see* 48 C.F.R. § 2.101 (2016) (stating that the modern definition inherently governmental function is: as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees); *see also* Nat’l Air Traffic Controllers Ass’n MEBA v. Pena, 78 F.3d 585 (6th Cir. 1996) (“Unlike the PES, the legislative history of the OFPPAA evinces an interest in preserving federal employment when that employment involves inherently governmental functions”); *Martin v. Halliburton*, 618 F.3d 476, 480 (5th Cir. 2010) (“The LOGCAP regulations expressly state that ‘[c]ontractors will not be used to perform inherently governmental function’”); *Arrowhead Metals v. United States*, 8 Cl. Ct. 703, 706-07 (1985) (holding that coinage of money is inherently governmental function); *Fairfax*, *supra* note 20, at 291 (“The FAR is clear in its policy stance against contracting out certain core government functions: ‘Contracts shall not be used for the performance of inherently governmental functions.’”); *Minow*, *supra* note 152, at 1014 (“A longstanding executive policy, now expressed in Office of Management and Budget (the ‘OMB’) Circular No. A-76, directs that inherently governmental functions should not be outsourced.”); VERKUIL, *OUTSOURCING SOVEREIGNTY*, *supra* note 25, at 121-22.

257. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2103 (2004) (section “The First Postulate—Nondelegation”).

258. *Id.* at 2103-04.

259. *See* LUCKEY ET AL., *supra* note 246, at 20-22 (section “Judicial Decisions”); *see also* Merrill, *supra* note 257, at 2103-10 (section “The First Postulate—Nondelegation”).

260. *See* LUCKEY ET AL., *supra* note 246, at 20-22 (section “Judicial Decisions”); *see also* Daniel J. Solove, *The Darkest Domain: Defense, Judicial Review, And The Bill of Rights*, 84 IOWA L. REV. 941, 1000 (1999).

261. *See* LUCKEY ET AL., *supra* note 246, at 20-22 (section “Judicial Decisions”); *see also* Merrill, *supra* note 257, at 2103-10 (section “The First Postulate—Nondelegation”).

that result from excessive private delegation are not subject to clear constitutional limits.²⁶²

Federal facility security is the core of the FPS mission.²⁶³ While the FPS federal facility security mission is clearly an important governmental function,²⁶⁴ not every important governmental function is characterized as an “inherently governmental function.”²⁶⁵ An inherently governmental function is “a function that is so intimately related to the public interest as to mandate performance by Government employees.”²⁶⁶ According to the FAR, an inherently governmental function is,

as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. . . . Governmental functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements. (1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to— (i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; (ii) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (iii) Significantly affect the life, liberty, or property of private persons; (iv) Commission, appoint, direct, or control officers or employees of the United States; or; (v) Exert ultimate control over the acquisition, use, or

262. See LUCKEY ET AL., *supra* note 246, at 20-22 (section “Judicial Decisions”).

263. Homeland Security Act of 2002, 6 U.S.C.S. § 111(b)(1); see *Examining the Federal Protective Service: Are Federal Facilities Secure? Before the H. Comm. on Transp. and Infrastructure, Subcomm. on Econ. Dev., Pub. Bldg. and Emergency Mgmt.*, 113th Cong. (2014) (testimony of Director L. Eric Patterson) (The mission of FPS “is charged with protecting and delivering integrated law enforcement and security services to more than 9,000 facilities owned or leased by the General Services Administration [GSA] and safeguarding more than 1.4 million daily occupants and visitors.”).

264. 48 C.F.R. § 2.101; see 40 U.S.C.A. § 1315(a), (b)(1) (subsection (a) provides that DHS in general “shall protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government” while subsection (b) allows DHS to delegate the task to FPS.).

265. See LUCKEY ET AL., *supra* note 246, at 31.

266. 48 C.F.R. § 2.101; see also Minow, *supra* note 152, at 1014 (“A longstanding executive policy, now expressed in Office of Management and Budget (the ‘OMB’) Circular No. A-76, directs that inherently governmental functions should not be outsourced”); LUCKEY ET AL., *supra* note 246, at 55 (One is a statutory definition, enacted as part of the Federal Activities Inventory Reform (FAIR) Act of 1998.31, this definition states that an inherently governmental function is “a function [that is] so intimately related to the public interest as to require performance by Federal Government employees.”).

disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of federal fund.²⁶⁷

Within the current federal law and policy, two main definitions of “inherently governmental functions” currently exist.²⁶⁸ The first is a statutory definition, enacted as part of the Federal Activities Inventory Reform (FAIR) Act of 1997.²⁶⁹ This definition states that an inherently governmental function is “a function that is so intimately related to the public interest as to require performance by Federal Government employees.”²⁷⁰ The second is a policy-oriented definition, contained in OMB Circular A-76.²⁷¹ This definition states that an inherently governmental activity is:

[A]n activity that is so intimately related to the public interest as to mandate performance by government personnel. Other statutes and regulations that define inherently governmental functions do so either by reproducing the language of the FAIR Act or OMB Circular A-76, or by incorporating the definitions of the FAIR Act or OMB Circular A-76 by reference²⁷²

Federal courts determine whether a governmental function is considered to be inherently governmental by deciding if the duty is so intimately related to the public interest that the function mandates performance by Government employees.²⁷³ For example, in the U.S. Court of Claims case of *Arrowhead Metals, LTD v. United States*,²⁷⁴ “coinage production” was deemed to be an inherently governmental function.²⁷⁵ In that case, a private contractor claimed to be the low bidder at bid opening and “challenged legal viability of United States Mint’s cancellation of bid solicitation subsequent to opening of sealed bids.”²⁷⁶ The Court of Claims held that the Department of Treasury’s decision was not baseless and that the decision to cancel the bid was based “upon concern as to whether contracting out such functions

267. 48 C.F.R. § 2.101.

268. LUCKEY ET AL., *supra* note 246, at 26.

269. *Id.* at 8.

270. *Id.* at 9.

271. *Id.* at 12.

272. *Id.* at 7.

273. 48 C.F.R. § 2.101 (stating that the modern definition inherently governmental function is: as a matter of law and policy, must be performed by Federal government employees and cannot be contracted out because it is intimately related to the public interest).

274. 8 Cl. Ct. 703.

275. *Id.* at 717 (holding that coinage of money is inherently governmental function).

276. *Id.* at 703.

to private sector was consistent with United States Mint's responsibility.²⁷⁷ There was also "concern about potential ramifications of national security aspects of coin blanking by the private sector, especially in foreign countries, the government function aspect of blanking took on added significance. The decision to cancel under the circumstances was thus 'compelling,' as well as reasonable and rational."²⁷⁸ Therefore, the decision to cancel the bid was upheld because, *inter alia*, coinage production is an inherently governmental function as there is a national security concern in coin blanking.²⁷⁹

The FPS security function is similar to the one involved in *Arrowhead* because of the vital nature of the federal facilities FPS protects; the protection of FBI facilities and congressional district offices, for instance, is essential to our nation.²⁸⁰ Yet, current statutory and regulatory law does not treat functions like FPS building security as rising to the level of being an inherently governmental function.²⁸¹ According to 48 C.F.R. § 2.101:

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.²⁸²

277. *Id.*

278. *Id.* at 715.

279. *Arrowhead Metals*, 8 Cl. Ct. at 717.

[T]he cancellation served the interests of the government by allowing for further study of the important policy issue of contracting out work that may well involve inherently Governmental functions. Further, such a course of action allows for consideration and refinement of the legislative and executive roles and limitations in the critical national policy areas of coinage and potentially national security (integrity of national coinage, risks in private sector, especially plants in foreign countries, *e.g.*, counterfeiting).

Id.

280. SHAWN REESE, FEDERAL BUILDING AND FACILITY SECURITY: FREQUENTLY ASKED QUESTIONS 4 (2014).

281. See LUCKEY ET AL., *supra* note 246, at 31.

282. 48 C.F.R. § 2.101.

B. *Complex Administrative State*

Over time, the needs of a complex administrative state have become a more frequently cited basis for ignoring concerns regarding inherently governmental functions.²⁸³ For example, the scope of what is considered an inherently governmental function is limited because of a perceived need to grant discretion to the executive broad when addressing the needs of a complex administrative state.²⁸⁴ The executive branch possesses a unique institutional competency that places it in the best position to determine the appropriate and most efficient allocation of resources and responsibilities to fulfill the function.²⁸⁵ John Luckey notes that in this context:

Congress has several options if it is concerned that deficiencies in the existing definitions of inherently governmental functions may lead agencies to improperly contract out such functions. Options include (1) relying upon recent statutory changes and/or the policies of the Obama Administration, which proposes to limit contracting out generally, to effect desired changes in agency contracting; (2) changing the existing definition of “inherently governmental functions”; (3) placing limits on contracting out or use of appropriated funds; (4) addressing structural factors potentially prompting agencies to rely on contractors; (5) providing for more effective oversight of

283. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104-06 (1946) (ruling that delegation of authority to Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders is constitutional); *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989)

The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,’ U.S. Const., Art. I, § 1, and we long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.

Id.; *Marshall Field v. Clark*, 143 U.S. 649, 692 (1892) (stating that “Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”); *Yakus v. United States*, 321 U.S. 414, 425-26 (1944) (“Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.”); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225, (1943) (ruling that delegation to Federal Communications Commission to regulate broadcast licensing “as public interest, convenience, or necessity” required).

284. *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005) (“There is nothing inherently governmental about a hospital[;]” thus, the hospital was not entitled to sovereign immunity).

285. See *Am. Power Light*, 329 U.S. at 105; *Mistretta*, 488 U.S. at 372; *Marshall Field*, 143 U.S. at 692.

executive branch contracting decisions; and (6) focusing more on questions of contracting policy (i.e., what functions should the government perform?) than on contracting law (i.e., what functions must the government perform?). The 111th Congress has enacted or is considering several bills addressing inherently governmental functions, including P.L. 111-8, P.L. 111-84, P.L.111-117, H.R. 1436, H.R. 2142, H.R. 2177, H.R. 2682, H.R. 2736, H.R. 2868, and S. 924.²⁸⁶

Congress can resolve the excessive delegation of inherently governmental functions to private actors through its existing powers.²⁸⁷ The issue then becomes a question of what to do when the executive and legislative branches fail to adequately protect security. The constant invocation of the complexities of the administrative state to shield privatization from constitutional scrutiny provides a dangerously overbroad cover for permitting excessive delegations of governmental functions to private actors.²⁸⁸ According to Harel and Porat:

The Constitution, with its enumerated powers and limits on these powers, is the best and most logical starting point for distinguishing between public and commercial functions. . . . [C]lose scrutiny indicates that, even in these contexts, there are strong convictions against privatization. . . . As many commentators that examine the history of these institutions note, the opposition to these practices is not merely instrumental; it is based on the belief that there are legitimacy-based considerations that preclude the use of private bodies in conducting certain tasks.²⁸⁹

Whether a delegation of lawmaking authority to the executive branch is seen as violating the nondelegation doctrine depends upon constitutional interpretation.²⁹⁰ Despite the continuing and expanding delegation of congressional lawmaking powers to administrative agencies, no such delegation has been found to violate the nondelegation doctrine since

286. LUCKEY ET AL., *supra* note 246, at *Summary*.

287. *See id.* at 22.

288. *See* Minow, *supra* note 152, at 1022-24 (discussing that reliance on private contractors puts democracy in jeopardy because the idea checks and balances is lacking and thus privatization creates lack of transparency); VERKUIL, *OUTSOURCING SOVEREIGNTY*, *supra* note 25, at 26-30, 105, 196 (discussing the detrimental effects of outsourcing public services, which includes FPS).

289. Harel & Porat, *supra* note 221, at 772, 776-77.

290. *See Marshall Field*, 143 U.S. at 692; *Am. Power & Light Co.*, 329 U.S. at 104-06; *Mistretta*, 488 U.S. at 371-72; *Yakus*, 321 U.S. at 425-26; *Nat'l Broad. Co.*, 319 U.S. at 215-17.

1935.²⁹¹ For example, in *American Power & Light Co. v. SEC*,²⁹² the Court held that Congress could delegate its lawmaking authority to the Security and Exchange Commission (SEC).²⁹³ This case broadened the Court's previous, post-Lochner Era holding from *NBC v. U.S.*²⁹⁴ where it similarly upheld Congress's ability to delegate legislative functions to the Federal Communications Commission (FEC).²⁹⁵ The more recent 1989 case, *Mistretta v. United States*²⁹⁶ continues the post-Lochner era jurisprudence of a weakened nondelegation doctrine by holding that the nondelegation doctrine was not violated when the legislature delegated specific lawmaking powers to the federal judiciary.²⁹⁷ Thus, delegation of Congress's lawmaking power to the other branches of the federal government is well-established.²⁹⁸

In *Nat'l Air Traffic Controllers Ass'n v. Secretary of the Dep't of Trans.*,²⁹⁹ air traffic controllers filed action against Secretary of Department of Transportation and Administrator of Federal Aviation Administration regarding privatization of air traffic control towers.³⁰⁰ Despite concerns that "the Office of Management and Budget issued Circular A-76, which governs the privatization of a government function and 'prohibits the federal government from performing an activity that could be performed for less cost by the private sector,'" the court held that this was not an unconstitutional delegation of an inherently governmental function.³⁰¹ Among other things, the court deferred to the executive branch in matters concerning its discretion as well as the needs of a complex administrative state that require the court to show such deference.³⁰²

Similarly, in *American Power & Light Co.*, the Supreme Court addressed whether Congress had improperly delegated legislative power to an executive agency, the Security Exchange Commission.³⁰³ Despite legitimate nondelegation doctrine concerns, the Court held that this was not

291. *Am. Power & Light Co.*, 329 U.S. at 104; *Mistretta*, 488 U.S. at 373; *Lichter v. United States*, 334 U.S. 742, 779-80, 785 (1948) (stating that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes" and upholding Congress's ability to delegate power under broad standards the authority to determine excessive profits).

292. 329 U.S. 90.

293. *Id.* at 104.

294. 319 U.S. 190.

295. *Id.* at 225-27.

296. 488 U.S. 361.

297. *Id.* at 374.

298. *See id.*; *Lichter*, 334 U.S. at 779-80, 785-86; *Am. Power & Light Co.*, 329 U.S. at 104; *Nat'l Broad. Co.*, 319 U.S. at 225-27.

299. 654 F.3d 654 (6th Cir. 2011).

300. *Id.* at 655.

301. *Id.* at 655-56, 659.

302. *See id.* at 657-59.

303. *See Am. Power & Light Co.*, 329 U.S. at 104.

an unconstitutional delegation of the congressional lawmaking function.³⁰⁴ As in *Nat'l Air Traffic Controllers*, the Court relied upon notions of deference to the executive in matters concerning its discretion as well as the needs of a complex administrative state that requires courts to show such deference.³⁰⁵

The Supreme Court initially applied the nondelegation doctrine to bar the delegation of lawmaking functions to the executive branch,³⁰⁶ only to later bow to the argument of delegation as a necessity in a complex administrative state.³⁰⁷ The executive branch needs maximum flexibility and discretion in interpreting the laws that govern it.³⁰⁸ If left unchecked, the inherently governmental function doctrine could slip down the same slippery slope that has all but destroyed the usefulness of the nondelegation doctrine.³⁰⁹

304. *Id.*

305. *Id.* at 104-05.

306. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432-33 (1935) (holding that section of National Industrial Recovery Act authorizing President to prohibit transportation in interstate and foreign commerce of petroleum produced in excess of amount permitted by state is unconstitutional delegation of legislative power, notwithstanding introductory section declaring national emergency and providing in part that policy of Congress is to eliminate unfair competition and to conserve natural resources).

307. See *Whitman*, 531 U.S. at 472-74, 475-76; Jack M. Beermann, *An Inductive Understanding of Separations of Power*, 63 ADMIN. L. REV. 467, 492-93 n. 97, 513, (2011) (describing the ruling in *Whitman* as an example of the Court's forgiving application of nondelegation doctrine citing Justice Scalia opinion in that case that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'").

308. See Paul R Verkuil, *Public Law Limitations On Privatization Of Government Functions*, 84 N.C. L. REV. 397, 420-422 (2006) [hereinafter Verkuil, *Public Law Limitations*]. Verkuil claims:

To decide if privatization has reached its limits, we must know whether 'inherent functions' of government are being delegated. . . . But the constitutional theories that might be employed to secure against this threat, such as the nondelegation doctrine, have been around for a long time. In addition, statutory provisions, such as the Subdelegation Act and judicial review provisions of the APA, can also play a role in controlling delegations to private hands.

Id.; Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 435 (1999). Seidenfeld argues:

Agency rulemaking requires some degree of public notoriety, which fosters executive and legislative oversight of the policy the rule implements, and thereby makes rules more democratically accountable than ad hoc agency decisions. Rulemaking also creates the potential for more meaningful public participation in the policy making process, which again bolsters the democratic foundation of agency rules.

Id.; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 18 (1997) (arguing that "[a]gency discretion should be constrained. Excessive and unchecked agency discretion creates a crisis of legitimacy in the administrative state . . . [and] [t]he best way to constrain discretion is to encourage competition among interest groups in rule making").

309. See Verkuil, *Public Law Limitations*, *supra* note 308, at 420-22.

Despite the legal and constitutional constraints on privatization, neither set of constraints will likely be judicially enforced to bar FPS privatization. The federal courts are reluctant to enforce the sort of implied and nonspecific statutory purpose that limits privatization authority under the DHS Act against an agency.³¹⁰ Likewise, the Supreme Court has demonstrated a reluctance³¹¹ to constrain the executive branch's discretion regarding delegations to private contractors.³¹²

C. *Homeland Security Concerns are Unique*

The similarities between the Court's inherently governmental doctrine jurisprudence and its nondelegation doctrine jurisprudence should not obscure a fundamental difference.³¹³ The inherently governmental doctrine addresses a concern with privatizing government, while the nondelegation doctrine addresses the appropriate allocation of lawmaking powers within the federal government.³¹⁴ At the heart of the nondelegation doctrine is a concern regarding an imperial presidency—a fear that the executive branch will become too powerful.³¹⁵ This concern is rooted in the founding of the United States—in attempt to avoid the monarchy of King George III, the founders sought to provide a leader of limited power who was accountable to the citizens of the United States.³¹⁶

However justified nondelegation doctrine concerns may be, in the end the executive is democratically elected and our most fundamental democratic precepts regarding democratic governance within our

310. See *Nat'l Air Traffic Controllers Ass'n*, 654 F.3d at 658-59; *Takle*, 402 F.3d at 770; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1440-41 (2003) (combining with private immunity from constitutional strictures, such delegations raise the danger that privatization will undermine constitutional accountability by preventing individual enforcement of constitutional constraints on government); Gillette & Stephan, *supra* note 203, at 482 ("In particular, we cannot find any decision that unambiguously declares that any particular governmental service may not be contracted out to private providers.")

311. Metzger, *supra* note 310, at 1415 ("[T]he pervasive thrust of the Court's recent decisions strongly suggests that privatization is likely to result in a denial of state action."); Gillette & Stephan, *supra* note 203, at 482.

312. See *Nat'l Air Traffic Controllers Ass'n*, 654 F.3d at 658-59.

313. See Verkuil, *Public Law Limitations*, *supra* note 308, at 420-22.

314. See *id.*

315. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128 (1940) ("We find nothing . . . indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases.")

316. Eric Slauter, *The Declaration of Independence and the new nation*, in THE CAMBRIDGE COMPANION TO THOMAS JEFFERSON, 12, 20-22 (Frank Shuffelton ed. 2009) (discussing the despotic nature of monarchial reign of King George III as one of the main reasons for the revolution and the declaration of independent).

constitutional structure remain intact.³¹⁷ Conversely, the privatization of government, or rather in our specific instance, the expansive and broad privatization of the FPS security functions could potentially undermine our core democratic precepts.³¹⁸

The Constitution's separation of powers and due process requirements prohibit the government from delegating certain types of powers to private hands; private delegation risks placing government power outside constitutional controls to ultimately bypass constitutional duties and rights.³¹⁹ Private contractors are not part of the constitutional governmental structure of the United States, and are not primarily motivated by the public good.³²⁰ Rather, private contractors are primarily motivated by profit.³²¹ Public policy and, indeed, the U.S. Constitution recognize that the complete privatization of government functions, especially in the context of homeland security, undermines a central tenant of democratic government and, specifically, the Department's primary mission.³²²

V. CONCLUSION

Real homeland security gaps have resulted from the enormous delegation of vital security functions to private contractors.³²³ While structural and budgetary concerns are common justifications for hiring private security guards to do the work of federal police, the resulting homeland security gaps undermine congressional intent and homeland

317. See SINGER, *supra* note 26, at 213-15 (arguing that privatization military and national security firms pose threat to government's sovereignty and privatization has detrimental implications for democracy); Alexander & Prakash, *supra* note 26, at 1329. This appeals to the historical work of John Locke on nondelegation doctrine and democracy, and that "the conventional reading of Locke's nondelegation maxim by suggesting that Locke opposed unauthorized law-or rulemaking, that is, lawmaking by an institution not authorized by the people to engage in such lawmaking. He was not merely opposing the power to convey votes in a legislature." *Id.*

318. See Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 145 (1998) (noting that security companies may have created a greater danger for state sovereignty); Gillette & Stephan, *supra* note 203, at 481-82 (arguing that there is procedural constitutional limitation to privatization).

319. See Verkuil, *Public Law Limitations*, *supra* note 308, at 420-22.

320. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L. J. 377, 393 (2006) (describing private firms as not being infused with the public interest, but rather as functioning as amoral, profit-maximizing actors who decide whether to follow public policy and law by balancing the costs and benefits of doing so); Gillette & Stephan, *supra* note 203, at 482.

321. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (holding that the existence of corporations are merely dependent on the motivation to make profits); Bamberger, *supra* note 320, at 393.

322. See Minow, *supra* note 152, at 1016; Nicholas von Hoffman, *Contract Killers: How Privatizing the U.S. Military Subverts Public Oversight*, HARPER'S MAG., June 2004, at 80 (noting that utilization of private contractors has undermine "the military's accountability with respect to the size of troop deployments overseas").

323. GAO-08-476T, *supra* note 8, at 11.

security.³²⁴ Furthermore, the privatization of government—here, through the expansive and broad privatization of the FPS security functions—undermines core precepts regarding democratic governance and constitutional structure.³²⁵ These real security gaps in FPS indicate a need for a revised private delegation doctrine.³²⁶ Congress and the courts must revise both statutory and constitutional limitations on the delegation of public functions to private parties.

324. *Id.*

325. See SINGER, *supra* note 26, at 213; Alexander & Prakash, *supra* note 26, at 1329.

326. See Verkuil, *Public Law Limitations*, *supra* note 308, at 420-22.