

OUTLINE OF TESTIMONY BEFORE THE COMMERCIAL ACTIVITIES PANEL

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I. Brief History of A-76

- A. Designed to protect the private sector against encroachment
- B. Increasingly used to disguise the true size of government

II. Why A-76 Should Be Abolished

- A. Key terms are no longer definable
- B. Burden of conducting studies is no longer defensible
- C. Usefulness as a device for sorting jobs is no longer responsible

III. Why the FAIR Act Should be Amended

- A. Dependence on A-76 weakens usefulness as a device for workforce planning
- B. FAIR inventories encourage the use of arbitrary targets for downsizing or outsourcing

IV. Advice for the Commercial Activities Panel

- A. Be bold--most important moment in recent history to think creatively about the mechanisms for sorting jobs
- B. Focus on capacities, not headcount--best sorting tool would be headcount-neutral; no purpose but to assure that government has capacity it needs without encroaching on the private sector
- C. Focus on mission

Attachments: Paul C. Light, "All's Not Fair," May 1, 1999, *Government Executive*
Paul C. Light, "FAIR's Still Not Fair," December 1, 2000, *Government Executive*

May 1, 1999

All's Not Always FAIR

Just when federal departments and agencies thought they had learned all the important acronyms that rule their lives— GPRA, NPR and the like— the Office of Management and Budget released its rules for implementing FAIR on March 1. The letters stand for Federal Activities Inventory Reform. Passed with minimal debate in Congress and signed into law by President Clinton between spin sessions on the Lewinsky scandal, FAIR represents the most important crowbar for opening the federal government to competition in two decades.

FAIR is deceptively simple. It merely requires agencies to publish annual lists of their commercial activities and the number of full-time-equivalent employees required to perform them. Under FAIR's definition, drawn from OMB Circular A-76, a commercial activity is just about anything that could be purchased from the private sector, from ice cubes to cost-benefit analysis, trash hauling to management studies. Interested parties, whether inside government (federal labor unions) or outside (contractors), can appeal to the agency head the inclusion or exclusion of individual items on the list.

In theory, every item on the FAIR list must be reviewed for possible contracting out. Although Rep. Dennis Kucinich, D-Ohio, let his rhetoric get the best of him in declaring FAIR part of the "piecemeal dismantling of our republic," he was right on target in concluding that "contractors would like the government to help them identify new business opportunities."

That is why staying *off* the FAIR list may become the most interesting game in town. Some agencies will simply ignore the OMB rules and hope no one notices. After all, they have gotten away with avoiding A-76 for the better part of this decade. Between 1993 and 1997, when Sen. Craig Thomas, R-Wyo., began drafting the "Freedom from Government Competition Act" that eventually morphed into FAIR, the federal government conducted A-76 studies on just 34,688 federal jobs, of which all but 420 were in Defense. If non-Defense agencies want to know who created FAIR, they need look no further than themselves.

Agencies are bound to use the only FAIR exemption available by declaring their commercial activities inherently governmental. FAIR defines an inherently governmental function as one that is so "intimately related to the public interest as to mandate performance by government employees." No one knows quite what that means, which is exactly why some agencies will use it. But agencies should think twice about evading FAIR. The fact is that it could have been much tougher. Thomas' original proposal would have given the courts the power to review the annual lists and would have prohibited agencies from obtaining commercially available goods or services from other federal departments and agencies— hence, the title "Freedom from Government Competition." FAIR is just about the fairest thing that could have happened given the growing anger on Capitol Hill about agency foot-dragging on A-76.

The problem with FAIR is that it uses the wrong cross hairs in forcing government to compete. The critical issue is not whether an activity is commercial or inherently governmental, but whether it is essential to the core mission of the agency. Core activities should always remain in house; non-core activities should always be pushed out.

Why switch from FAIR to a core-activities approach? One answer is that it is the best way for the federal workforce to shrink. And the workforce is sure to shrink. The word around Washington these days is that Vice President Al Gore may soon propose to cut another 300,000 federal jobs, taking the total federal workforce below 1.5 million employees to pre-Korean War levels. If he does not make the proposal, Texas governor and presidential hopeful George W. Bush or one of his Republican competitors almost certainly will. Unlike attrition and voluntary buy-outs, which work through mostly random means, a core-activities approach would force agencies to inflict the pain where it will hurt core missions the least, not just where it is easiest.

Another answer is that core activities are infinitely easier to identify than inherently governmental activities. The definitional skeleton is already in place under the Government Performance and Results Act. Agencies could easily adapt their GPRA strategic plans to build an inventory of core activities, which in turn could be used to push non-core activities out and pull core activities back in.

A core-activities inventory would produce many of the same items as FAIR, but also some surprises. NASA would probably keep at least some satellite-making capacity in house to ensure core competency in overseeing contractors; the Environmental Protection Agency would probably pull back some of its Superfund community relations work; the Housing and Urban Development Department might push out more of its housing inspections. But at least the debate would be about the right question: What do agencies need to be doing to achieve their core missions? It is a debate that is well worth having.

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The Last Word

The FAIR Act is Still Unfair

Two years after enactment, the 1998 Federal Activities Inventory Reform (FAIR) Act continues to wreak chaos throughout the federal government. Designed to identify jobs that are not inherently governmental and that are therefore eligible for contracting out, FAIR has produced unnecessary work and confusion as agencies struggle to define a term that no longer has meaning. Almost nothing is "inherently governmental" these days— not battlefield support, citizenship training, toll-free phone service or prison management. Except for a handful of law enforcement positions, virtually everything the federal government does is commercially available.

FAIR started with a simple question: Just how many federal jobs can be contracted out to the private sector? But the answers have

been anything but simple, if only because they depend on definitions embedded in an obscure federal budget order that dates back to the Eisenhower administration. The original purpose of the order was to discourage the federal government from producing goods or services already commercially available. The Eisenhower administration was particularly worried that a growing federal government would steal jobs from the private sector. Over the years, however, the order has actually become a tool for taking jobs from government. During the Reagan administration, for example, the process for deciding when to contract out federal jobs was redesigned. Not only was the federal government prohibited from producing goods or services that were commercially available, but it had to review work that could be done by private firms, given the chance to compete. Under what appeared to be a slight semantic revision, the burden of proof shifted from proving that a service is not commercially available to proving that a service could never be available. The FAIR act took this burden of proof one step further by ordering the federal government to cough up a list of every job not deemed inherently governmental. Unfortunately, the law never defined "inherently governmental" in terms of this fast-growing economy. Instead, it relies on a 10-year-old budget document that defines the term as "a function so intimately related to the public interest as to mandate performance by government employees." Although the definition comes with a list of examples, no one can be sure just what the phrase "intimately related to the public interest" means. Commanding military forces is an example of inherently governmental activity, but planning a military operation apparently is not. A federal criminal investigation is protected from being contracted out, but not the imprisonment of an illegal immigrant. Even if we could untangle this definition, it is unclear whether the executive order's basic concepts are still relevant. The question no longer is whether a product or service is inherently governmental or commercially available, but whether its production by a federal employee is core to government's mission. Agencies could easily contract out inherently governmental functions that are only tangentially related to mission performance, while delivering core functions that are commercially available. Consider the map makers at NASA. The Management Association for Private Photogrammetric Surveyors, which represents private map makers, challenged NASA's decision to leave its map makers off its 1999 FAIR inventory, thereby declaring map-making an inherently governmental activity. Lots of private companies make maps and surveys, albeit few with the access needed to map the lunar surface. Under the FAIR Act, NASA had little choice but to use a procedural loophole to keep its map-making work in-house. Map making may be commercially available, but it is essential to NASA's twin missions of mapping both the heavens and the Earth. How can the agency's Mission to Planet Earth monitor the effects of manmade and natural changes on the earth's environment without an internal mapping capacity? In its 2000 FAIR Act inventory, NASA provided an airtight defense for protecting core

competencies. Agency officials say seven kinds of commercially available activities should never be contracted out:

- Mission-related studies, technical analyses and evaluations.
- Agency-specific research and development to meet long-term needs.
- Testing and evaluation.
- Writing of statements of work, evaluations of contractor proposals and reviews of contractor performance.
- Corporate memory of NASA research and development.
- Emergency response and trouble-shooting.
- Assignments mandated by Congress.

Private firms might challenge the decision to keep certain jobs under each category in-house, but NASA recognizes that contractors have important roles to play— not the least of which is to manage the space shuttle. The agency spends more than 80 percent of its discretionary budget on procurement, and much of that is for labor.

But NASA also recognizes that its employees must be able to build the occasional satellite. Its definitions of such core competencies are fuel for the debate on how to make better use of the FAIR Act.