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Feature Comment: The Well-Reasoned Case for Reversing the Outsourcing Trend: A Review Essay of Jon Michaels' Constitutional Coup: Privatization's Threat to the American Republic

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FEATURE COMMENT: The Well-Reasoned Case For Reversing The Outsourcing Trend: A Review Essay Of Jon Michaels' *Constitutional Coup: Privatization's Threat To The American Republic*

To date, few have grasped the depth, breadth, and texture of businesslike government in its variegated forms. (Even a ... simple head count of the number of federal service contractors has proven alarmingly elusive.) And even fewer appreciate what's actually going on.

Jon D. Michaels

Rethinking the Outsourcing Era—Having experienced, professionally, the modern era of Government outsourcing, while knee-deep in Government contracting policy, practice and law, I always welcome, and find it refreshing to read, an outsider's perspective on how we got here, where we lost our bearings and what went wrong. To that end, Jon Michaels' thoughtful and thought-provoking new book, *Constitutional Coup: Privatization's Threat to the American Republic* (Harvard, 2017, \$35.00 in hardcover, \$19.95 in Kindle© format), fully satisfied my expectations. What I wasn't prepared for, and what readers of THE GOVERNMENT CONTRACTOR may find more controversial, is Michaels' cogent, carefully structured, well-defended thesis, nay, his clarion call to arms, which forcefully advocates a full retreat.

Toiling alongside Steve Kelman in the Office of Federal Procurement Policy during the exhilarating, change-oriented frenzy of Vice President Al Gore's "Reinventing Government" initiative in the 1990s, I, like many, got caught up in the moment.

We voraciously consumed, dissected and shared David Osborne and Ted Gaebler's *Reinventing Government* (1993), and followed Don Kettl, John J. DiIulio, Jr., William Eggers and other prophets of the era who preached the gospel of the "new public management." We were *applying the best practices gleaned from the private sector!* We were *change agents*, casting aside formalism, breaking the stranglehold of an increasingly outdated civil service, embracing the marketplace, and freeing procurement professionals from the false economy of low price. Above all, we pounded the drum of value for money. We were making Government *efficient!*

Of course, for all our fascination with businesslike Government, we didn't start the outsourcing fire (more on that later), nor did we extinguish it. (Indeed, as Michaels' book reminds us, the embers still burn bright.) Nor did we anticipate a post-millennial (largely post-9/11) explosion in federal contract (and, of course, grant) spending, or the breathtaking speed in which the service contracting juggernaut would eclipse conventional federal procurement of supplies (goods) and construction (public works), as the Federal Government systematically outsourced space, national security, the use of force, sacrifice and, ultimately, everything.

Two consecutive two-term presidents, Bill Clinton and George W. Bush, favored businesslike Government, fueling and accelerating the Government's reliance on contractor support. Another two-term president, Barack Obama, initially railed against service contracts and promised to reverse the trend, until he quickly deemed such an effort futile and improvident, and instead presided over the inexorable expansion of the General Services Administration's self-serving commercial services outsourcing enterprise. (*Twenty-four years! Tempus fugit! Where did the time go?*)

But the spark predates that handy narrative. In the early 1980s, inspired by Margaret Thatcher's privatization initiative in the United Kingdom and unable to curtail "big federal spending and regulatory

programs,” Ronald Reagan “laid the groundwork for the Privatization Revolution to come.” Michaels at 95–98. “In a generation’s time, we went from JFK’s stirring cry for public service ... to Ronald Reagan’s outright denunciation of the State: ‘Government is not the solution to our problem, government is the problem.’” Id. at 87.

Pundits, legislators, and newly politicized business and religious leaders joined Reagan in railing against ... the Nanny State....

But a funny thing happened on the way to the gallows. The mob got cold feet. The torch and pitchfork crowd realized they really, really liked government programs—at least the ones that benefited them directly.... What they really disliked ... was the government itself—its people, its procedures, and its institutional and organizational architecture.

Id. at 2 (emphasis in original). With that, Reagan pivoted to the private sector, and efficiency über alles, privatization, Government contracting and marketizing the bureaucracy began accumulating steam, rapidly accelerating towards exit velocity.

Thirty-five years later, is it too late to ask if we went too far? If so, is it possible to go back? Should we? How?

These are not idle questions, and *Constitutional Coup* is not a light, summer page-turner. Rather, it is a serious academic meditation, recommending not only that we apply the brakes to the outsourcing train, but that the future of our nation depends on taking a meaningful, substantive, principled, fundamental step back. Although cynics may dismiss Michaels’ cerebral yet heartfelt ode to civil servants (and Government service, generally), that would be a mistake. Michaels’ *Constitutional Coup* cautions us that, particularly at this unique and seemingly anxiety-fraught moment in time, we fail to address these important questions *now* at our own peril.

Pushing Back, from a Different Angle—Michaels paints a dire picture and leaves little to the imagination. Basically he asserts,

Government cannot and ought not be run like a business in any meaningful sense of the word....

Until that message is heard, until government’s intrinsic, albeit idiosyncratic, worth is recognized on its own terms, American public administration will continue to look inadequate—a sickly, inexplicably inefficient enterprise in need of rescuing....

Id. at 231–32. Ouch.

Obviously, that is a tough place to start, and Michaels acknowledges, tracks, describes and explains the breadth and depth of the long-standing privatization debate. On the one hand, “privatization’s enthusiasts have long considered government agencies wasteful and government employees indolent.” Id. at 121. Meanwhile, outsourcing’s most consistent critics complain that, among other things, the wholesale, generational replacement of civil servants and uniformed service members with legions of comparatively invisible contractor personnel failed to deliver the monetary savings promised.

Both parties bemoan the dearth of meaningful data as to “whether market actors and practices are indeed more efficient than their bureaucratic counterparts.” Id. at 121. Another chorus laments “the dangers of wayward contractors,” fully cognizant that “[a]ccounts of contractor fraud, abuse, and venality are catnip to an American public reared on gotcha politics.” Id. Michaels even exposes the internal hypocrisy through which many are “quick to cast blame on the agents (that is, the venal contractors) rather than the goodly government principals who hired them—even though privatization is often premised ... on a profound distrust of government officials and their motives.” Id. at 128 (emphasis in original).

Of course, Michaels is not alone in trying to focus policymakers on the nature of the bureaucracy and who populates it. New York University’s Paul Light, who has chronicled *The True Size of Government* for decades, fundamentally agrees that a focus on “debating the size of government” has caused us to lose track of whether the *right* people are empowered to implement federal policy: “What we need is to devote more time to weighing whether the American people are best served by a federal employee or a contractor in each given function.” “‘True Size’ Of Federal, Contractor Workforces Has Remained Steady Over 30 Years, Report Says,” 59 GC ¶ 312.

Painting with a broader brush, Michaels fears that today’s privatization norm—expansive reliance on at-will and desperate-to-please contractors, rather than tenured civil servants—concentrates too much power in the hands of the executive, specifically politically appointed agency heads. More to the point, Michaels is less worried about “greedy contractors and anemic agency leaders,” and more anxious about “the tandem of compliant contractors and the cagey agency leaders that hire them.” Id. at 120. As a result,

this “marketization ... facilitat[es] more politically (specifically, presidentially) dominated, less expert, and overall less rivalrous administrative governance.” Id. at 136.

In such an outsourced, privatized regime, the Government, as envisioned by the founders, simply cannot function. In other words, the founders injected a protective, defensive rubric into the Constitution for a reason. “Absolute power corrupts, ... [and s]overeign power ... is intentionally and necessarily morally inflected and coercive.... [Conversely,] separation of powers ... prevents tyranny, promotes liberty, and helps enrich public policy.” Id. at 6.

The Status Quo is Not the Natural Order of Things—Presently, we have grown so accustomed to outsourced Government that, today, our military cannot move, fight, communicate, eat or sustain itself without a fully integrated contractor presence. At the same time, private-sector replacement of outdated, often frustrating, practices with flexible vehicles offering end-user-focused innovations generated measurable results. For example, despite the tsunami of criticism and litigation surrounding the Army’s Logistics Civil Augmentation Program contracts, military historians and strategists may yet celebrate that outsourcing initiative. Arguably, never has a nation-state enjoyed such a capacity to deploy so nimbly—and to sustain so thoroughly—its fighting force regardless of size, distance, geography, weather or duration.

Ultimately, Michaels appropriately frets that “what we really have is a very troubled, hollowed out enterprise.” Id. at 201. Contractors are “running prisons and immigration detention facilities; facilitating domestic surveillance and counterterrorism operations; drafting major rules; shaping energy, transportation, health care, and environmental policy; rendering public benefits; collecting taxes; and monitoring and enforcing regulatory compliance across the vast administrative expanse.” Id. at 3. (See also his passage on “New Millennial (Big Tent) Privatization,” at 105–110, describing a dizzying array of privatized governance, including, among others, private standard setting, deputization, crowdsourcing, patriotic philanthropy and state ventriloquism.) Michaels deftly reminds us that this is a “constitutional phenomenon—weighty in its own right and rendered all the more meaningful and fraught” given the founding of the nation and its evolution. Id. at 4. Whether we respect it or, for that matter, think we understand and can control

it, “the Market, at least in its pure, idealized state, is not democratic, deliberative, or judicial.” Id. at 5.

After setting the stage, Michaels cautions that we should not become too distracted by our history. Yes, context matters, and we cannot ignore the nation’s uneven and inconsistent evolution. But over time, “the framers’ initial architecture came to be seen as outdated. [The quaint and limited government of our infant state] was simply not up to the twentieth-century task of nourishing and housing the poor, protecting workers and consumers, busting trusts, steering monetary policy, regulating the financial sector, stabilizing a volatile economy, and readying a nation for war.” Id. at 7–8. Accordingly, Michaels prods the reader to focus less on how we got here, and more on what comes next. (Having said that, Michaels’ rollicking romp through the history of outsourcing is a fresh, thoroughly entertaining alternative to, say, James Nagle’s *A History of Government Contracting* (2d ed. 1999), which GC readers likely would find paints a far more conventional and familiar picture.)

Looking ahead, he poses an admittedly academic, largely aspirational and (not just legal, but) constitutional case for a greater commitment to the civil service. He looks to the courts—he is, after all, a law professor—for judicial custodialism “to promote a well-functioning administrative separation of powers,” and he implores Congress to “provide considerably more support for the currently beleaguered and oft-marginalized civil service; increase the level and quality of public participation in administrative proceedings; and minimize bad-faith obstructionism.” Michaels at 20.

Michaels encourages courts to push back against “marketized bureaucracy,” withholding the broad deference (see generally, *Chevron v. NRDC*, 467 U.S. 837 (1984)) agencies typically enjoy, or “simply reject[ing] any decision, interpretation, or action that arises out of this compromised, marketized administrative process, effectively obligating Congress to reinstate the civil service.” Michaels at 198. Quite simply, he wants Congress and the courts to jam every available finger in the outsourcing dike, then lean in and push back.

An Ode to Civil Servants?—GC readers may find Michaels’ medicine a tough pill to swallow. (And, yes, Michaels is fully cognizant that his work could be dismissed as “a reflexive, nostalgic reversion to the good old days of the New Deal and Great Society.” Id. at 143.) He suggests that “Congress impose[] an immediate moratorium on all new contracts involving

the outsourcing of discretionary sovereign responsibilities.” Michaels pragmatically leaves aside non-state “commercial jobs ... for example, secretarial, catering, gardening, clerical, IT, and janitorial work.” He then calls upon executive “agencies [to] promptly review all existing contracts ... [and] unwind the private sector relationships and build up the necessary in-house capacity.”

All of which requires that “Congress fully finance[], and slightly subsidize[], renationalization” to the tune of “hir[ing] one million new government workers” or more. *Id.* at 207–208. (Yup, *a million new feds!* That’s not a typo.) Brushing aside the pedestrian concerns of a fiscally constrained nation managed (or mismanaged) by a partisan, undisciplined and budget-phobic legislature, Michaels digs in his heels, asserting that “the costs are beside the point. Demarketization isn’t just a good idea, ... [it’s] a constitutional imperative.” *Id.* at 209.

Fortunately, Michaels does not stop there, and many steps along his suggested path toward restoring the civil service resonate. In addition to (modestly) increased pay for feds, Michaels makes a compelling case for a National Government Service Academy, along the lines of the long-accepted and generously funded service academies at Annapolis, Colorado Springs and West Point. (For good measure, he also recommends creation of a civilian Government officer training corps, a GOTC analogue to ROTC). *Id.* at 209–212. He makes a similar case for a mid-career civil service leadership academy akin to the military senior service schools (e.g., the military’s war colleges in Carlisle, Montgomery and Newport). *Id.* at 213–214.

Michaels gets more creative, and embraces the private sector more proactively, to rebuild the civil service’s reputation, by arguing that Congress expend (massive) sums “to make plain [to the public] the constitutional and everyday instrumental value of bureaucratic work.” Pointing to the Department of Defense’s \$667 million annual advertising budget—“the same amount as Taco Bell, Burger King, Starbucks, and Dunkin’ Donuts spend *combined*”—Michaels (to my mind, correctly) frets that the public only “hear[s] about scandals and failure, but never the great success or ... simple, small, and routine things that we take for granted ... that keep people safe and secure.” *Id.* at 215–218 (emphasis in original).

No, Virginia, No One Really Reads the *Federal Register*—Having spent a professional

lifetime following the machinations and work product of the Federal Acquisition Regulatory Council, Civilian Agency Acquisition Council, Defense Acquisition Regulations Council, and Armed Services Procurement Regulation Council, as well as innumerable executive agencies, I was easily persuaded by Michaels’ lament that the Government must also do better—much better—to engage the public, our civil society, in maintaining the administrative aspects of our representative democracy. And that starts by communicating in language and through mediums the public understands and accesses.

[M]any Americans have never heard of the *Federal Register*, and most have never seen it, let alone read it. Yet despite [its] rather limited reach ... and its almost inescapable obscurantism, judges and lawmakers hold true to the conceit that this government publication has a true public audience.

Id. at 220. (Conceit, indeed!) Michaels articulates numerous pragmatic and sensible improvements, from greater use of mainstream and social media, to virtual community outreach (including virtual AMAs or “ask me anything” sessions), to a rejuvenation of basic civics education. He also appreciates the need for agencies to recommit to, and invest in, plain language initiatives. Rather than continue to have public notices “which seem to have been ghostwritten by the clerks staffing *Little Dorrit*’s Circumlocution Office,” agencies should rely on “professional, creative, and dedicated writers.” *Id.* at 224–225 (with a nod to Charles Dickens, and a helpful reminder that this book is liberally sprinkled with sufficient splendid historical and cultural references—what gamers might consider Easter eggs—to maintain the reader’s attention, even where the policy, legal or theoretical thicket is most dense). Good ideas, all, yet—as Michaels concedes—cumulatively, his recommendations entail efforts that would “require a lot of money, moxie, and patience[,] nothing short of an administrative moon shot.” *Id.* at 230.

Musings on Audience, Voice, Reading and Critical Thinking—Despite the already percolating interest in Michaels’ work in administrative law and elite legal academic circles (two admittedly niche communities), it is reasonable to ask what audience Michaels wrote for and, ultimately, who should—and who will—read the book.

Michaels is an incredibly smart guy, his arguments reflect a lifetime of serious study and scholar-

ship, and his writing exhibits not only the breadth of his knowledge, but also his command of a rich, colorful and expansive vocabulary. Frequent flashes of memorable, quotable and sublime prose break up what might otherwise be dense, impenetrable and complex concepts presented in attention-demanding, concentration-challenging, lengthy sentences. (Suffering from the same malady, I couldn't help but notice that the book's concluding paragraph contains two intricate, fifty-word, oxygen-depleting, eye-straining tongue-twisters.)

But do not be too quick to bypass the book, even if you might find it—both at a macro and micro level—a bridge too far, a finely tuned vehicle delivering a theoretical aspiration that might seem somewhat divorced from the hard-won experience of successful, attempted or even failed implementation of a Government program. (Yes, yes, many readers would be more open to Michaels' critique if he demonstrated more obvious or deeper bona fides in public service or as a contractor.) That is not the point.

Constitutional Coup offers a unique opportunity to pause, take a step back, and look more broadly at the fire you fight every day. Might an ounce of prevention outweigh a pound of cure? Is *this* the legacy we want to leave to those who follow in our footsteps? Where does this contract—this task or delivery order—fit into the story arc of accomplishing the Government's mission and serving the public? These questions are as important as they are timely.

Alas, reading the book probably will not make it easier for you to do your job. And I cannot promise that parts won't keep you up at night. But my sense is it would be impossible for an engaged and independent public procurement professional or policy-maker—let alone an administrative law scholar—to navigate Michaels' analysis without questioning any number of things we daily take for granted. That is a good thing. It is important for all of us to think periodically—not only about *what* needs to be done and *how* we do our jobs—but *why* we do what we do.

To fully engage in Michaels' work, most GC readers will have to let go of any number of their most basic (even if typically unstated) assumptions. Fortunately, unlike Yuval Noah Harari, in his splendid work, *Sapiens: A Brief History of Humankind* (2015), Michaels isn't asking you to reconsider your preconceived notions about what it means to be human. Nor does he expect you to come to grips with our all-too-human failings, such as irrationality,

susceptibility to common illusions, overconfidence and flawed decision-making. (You can find plenty of that elsewhere. Consider, among others, the autobiographical *Misbehaving: The Making of Behavioral Economics* (2016), by the most recent Nobel laureate, Richard H. Thaler, or, covering similar ground, the more popular *The Undoing Project: A Friendship That Changed Our Minds* (2016), by Michael Lewis (of *Moneyball*, *Blind Side*, *Big Short* and *Liar's Poker* fame), or even the eye-opening work by Christopher Chabris and Daniel Simons, *The Invisible Gorilla: How Our Intuitions Deceive Us* (2011). Or, if you are inclined towards brevity, consider Timothy Snyder's pint-sized, but powerful and disturbing, *On Tyranny: Twenty Lessons from the Twentieth Century* (2017). But I digress.)

There is no way around it: Michaels will make you *think about outsourced Government* and what the modern era of explosive growth in service contracting means to us as a nation, and to our future.

These Are Not Normal Times—For better or worse, the 2016 election took place while Michaels was putting the finishing touches on the book. A strict publication schedule permitted Michaels to do little more than acknowledge that President Trump “deserves special attention ... because he promises to be a transformative president, one way or another.” Michaels at 14.

Michaels fully acknowledges that “President Trump continues to push a businesslike government agenda ... in ways especially easy to cast as corrupt and denounce as dangerous.” Id. at 205. And he harbors no illusions in recognizing that the primary impediment to his aspirations is the need for “the constitutional actors [to] act ... custodially, rather than opportunistically.” Id. at 144. That seems particularly Pollyanna when the pervasive “cultural malady” we watch play out each day is “a desire on the part of elected officials to no longer work for the public good but instead to subvert the process of governing.” Id. at 149.

But maybe, as Michaels optimistically muses, “Trump's intemperate attacks on bureaucracy, his appointment of glaringly unqualified cabinet officials and presidential aides, and the torrent of conflicts of interest surrounding him ... may prompt even those most dismissive of the [the original administrative state] to give the civil service and civil society a second chance.” Id. at 205. Maybe? Why not?

Whether you agree or disagree, *Constitutional Coup* identifies important issues that shape our

field, our work, our profession, our Government, our markets, our nation and, frankly, our future. We ignore those issues at our peril. At a minimum, Michaels opens the door for us to start a meaningful conversation. Read the book. Then, let's talk.



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