

## Article

# Counting What Matters: Privatization, People with Disabilities, and the Cost of Low-Wage Work

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On March 26, 2007, Representative James Sensenbrenner, Jr., spoke of the need to restore the Americans with Disabilities Act's (ADA)<sup>1</sup> "clear and comprehensive national mandate for the elimination of discrimination on the basis of disability" by legislatively overruling decisions by the Supreme Court that have "chipped away at some of the ADA's broad protections."<sup>2</sup> His thoughts were echoed on August 13, 2007, when Equal Employment Opportunity Commission (EEOC) Chair Naomi Earp stated that "[f]ederal agencies 'are not doing well' in the area of hiring people with targeted disabilities . . . . 'The[] numbers have declined . . . . We have to figure out how to recruit people with disabilities, especially those with mental disabilities.'"<sup>3</sup> Earp saw bias as the reason people with disabilities were not being employed by the federal government.

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

2. Press Release, New York Law School, Congressman Sensenbrenner to Speak on Improving the Americans with Disabilities Act at New York Law School, March 26, <http://www.nyls.edu/pages/5468.asp> (last visited Apr. 18, 2008) (quoting Rep. James Sensenbrenner). The speech may be found at <http://www.nyls.edu/pdfs/SensenbrennerSpeech.pdf>.

3. Tripp Baltz, *Federal Sector 'Not Doing Well' in Hiring People with Disabilities*, *EEOC Chair Says*, Daily Lab. Rep. (BNA) No. 156, at A-7 (Aug.

Representative Sensenbrenner and EEOC Chair Earp are correct that disability should not be a bar to securing a good job. They are also correct that the federal government should be a model employer, continuing its long tradition of employing capable workers who were discriminated against. However, discrimination does not fully explain why the government does not employ more people with disabilities today.

One important factor that has been completely overlooked is privatization. At least some of those federal jobs have been lost because the government has contracted the work out to private companies. That is why no federal employees with disabilities currently work in the mailrooms of the Internal Revenue Service (IRS), though before privatization federal employees with disabilities held roughly thirty-five percent of those jobs.<sup>4</sup> In fact, the Office of Management and Budget (OMB) has targeted for privatization many federal jobs that were or currently are being performed by people with disabilities because it has defined these jobs as not inherently governmental. Defining a job as commercial—and thus not inherently governmental—means the work may be contracted out to the private sector.<sup>5</sup>

The classification of work as either commercial or inherently governmental seems logical, and the conclusion that only commercial activities may be contracted out seems reasonable. The impact on the work performed by people with serious disabilities can be seen only by paying attention to the details within the very long memoranda that govern federal privatization and that assign jobs to one category or another. An inherently governmental function is a “function that is so intimately related to the public interest as to require performance by Federal Government employees.”<sup>6</sup> In a 1992 Policy Letter, the OMB defined inherently governmental functions as “those activities that require either the exercise of discretion in applying

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14, 2007) (quoting Naomi Earp, Chair, Equal Employment Opportunity Commission).

4. *In re* Dep’t of the Treasury Internal Revenue Serv. and Nat’l Treasury Employees Union (*Treasury Employees I*), No. 04 FSIP 35 (July 21, 2004), Fed. Serv. Imp. Pan. Rel. No. 470, at 1 n.1 (Aug. 14, 2004), *available at* 2004 WL 1656548.

5. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB POLICY LETTER NO. 92-1, INHERENTLY GOVERNMENTAL FUNCTIONS (1992) [hereinafter OMB POLICY LETTER NO. 92-1], *available at* [http://www.whitehouse.gov/omb/procurement/policy\\_letters/92-1\\_092392.html](http://www.whitehouse.gov/omb/procurement/policy_letters/92-1_092392.html).

6. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2), 112 Stat. 2382, 2385 (codified at 31 U.S.C. § 501(2) (2000)).

Government authority or the making of value judgments in making decisions for the Government.”<sup>7</sup> Functions defined as not inherently governmental—and thus candidates for privatization—“include [those] 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 and operations, or other routine electrical or mechanical services.”<sup>8</sup>

When the IRS contracted out its mailroom work<sup>9</sup> to ServiceSource, a nonprofit organization that “provides job training and support services to . . . people with disabilities,”<sup>10</sup> the OMB was assisted by two nonprofit organizations, the National Industries for the Severely Handicapped (NISH)<sup>11</sup> and National Industries for the Blind (NIB).<sup>12</sup> The OMB was also assisted by the government agency that works closely with NISH and NIB, now known as “AbilityOne,” but formerly the Committee for Purchase from People Who Are Blind or Severely Disabled.<sup>13</sup> As a result, agencies whose stated purpose is to secure work for people with disabilities actually destroyed jobs held by people with disabilities.

Even though the privatization of the IRS mailroom work affected only a few government jobs, it involved people, organizations, and events that provide a useful context for understanding how privatization functions and for identifying the

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7. OMB POLICY LETTER NO. 92-1, *supra* note 5, ¶ 5.

8. *Id.* (emphasis added).

9. See *infra* Part I.A for a detailed description of this event.

10. ServiceSource Network, Welcome to the ServiceSource Network, <http://www.ourpeoplework.org> (last visited Apr. 18, 2008).

11. National Institute for the Severely Handicapped, Home Page, <http://www.nish.org> (last visited Apr. 18, 2008). NISH describes itself as a nonprofit agency that supports other nonprofit agencies that participate in the AbilityOne Program. *Id.*

12. National Industries for the Blind, About NIB, <http://www.nib.org> (follow “About NIB” hyperlink) (last visited Apr. 18, 2008). NIB is also a nonprofit agency operating under the AbilityOne program, and “work[s] to deliver quality products on time at competitive rates.” *Id.*

13. This agency receives its mandate from the Javits-Wagner-O’Day (JWOD) Act. See 42 U.S.C. §§ 46–48c (2000 & Supp. IV 2006). The AbilityOne (formerly JWOD) Program “provides employment opportunities for nearly 48,000 Americans who are blind or have other severe disabilities by orchestrating government purchases of products and services provided by nonprofit agencies employing such individuals throughout the country.” JWOD, A Brief History of the AbilityOne Program, [http://www.abilityone.gov/jwod/about\\_us/about\\_us.html](http://www.abilityone.gov/jwod/about_us/about_us.html) (last visited Apr. 18, 2008).

true costs of contracting out federal public-sector work. Privatization proponents justify privatization as providing higher quality work at lower cost.<sup>14</sup> Under the Bush administration, the OMB has strongly advocated for privatization in reports projecting cost savings and improvements in service, although follow-up surveys to verify projected savings are notably absent.<sup>15</sup>

In its 2002 report, the General Accounting Office, now the Government Accountability Office (GAO), explained the process of contracting out federal work as involving cost comparisons to guarantee that the public would save money and receive higher quality services. The privatization can proceed either by direct conversion or cost comparison under Circular A-76.<sup>16</sup> Under the direct conversion approach, commercial activities are transferred from the government to private contractors without a cost-comparison study. This process typically applies to small transfers involving ten or fewer civilians. Most job transfers to the private sector, however, require a cost-comparison study. Under the cost-comparison approach, unless the privatization of government work will “save at least \$10 million or 10 percent of the personnel costs of in-house performance (whichever is less),” the jobs remain in the public sector.<sup>17</sup>

The process the GAO has laid out sounds reasonable. However, as in the case of the IRS mailroom, the GAO did not always make meaningful cost and quality comparisons. As a result, there has been no guarantee that the public would receive the promised improvements. In addition, even when there have been competitions, their narrow focus has included costs that are trivial when compared to real costs that are excluded and

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14. See Ellen Dannin, *Red Tape or Accountability: Privatization, Publicization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 117–18 (2005).

15. See, e.g., OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, COMPETITIVE SOURCING: CONDUCTING PUBLIC-PRIVATE COMPETITION IN A REASONED AND RESPONSIBLE MANNER 2 (2003) [hereinafter OMB, COMPETITIVE SOURCING], available at [http://www.whitehouse.gov/omb/procurement/comp\\_sourcing\\_072403.pdf](http://www.whitehouse.gov/omb/procurement/comp_sourcing_072403.pdf); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S MANAGEMENT AGENDA 17–18 (2002), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>. The OMB website refers to the latter as “an aggressive strategy for improving the management of the Federal government.” Office of Management & Budget, President's Management Agenda, [http://www.whitehouse.gov/omb/budintegration/pma\\_index.html](http://www.whitehouse.gov/omb/budintegration/pma_index.html) (last visited Apr. 18, 2008).

16. See COMMERCIAL ACTIVITIES PANEL, U.S. GEN. ACCOUNTING OFFICE, GAO-02-866T, IMPROVING THE SOURCING DECISIONS OF THE FEDERAL GOVERNMENT 2 (2002); *infra* note 51 and accompanying text.

17. See COMMERCIAL ACTIVITIES PANEL, *supra* note 16, at 2–3.

thus ignored. Finally, there is no evidence that post-privatization reviews to assess whether cost and quality projections have been met, are performed. Future policy decisions and decisions to privatize are therefore made based on theory and not fact.

If we are to properly and fairly assess the cost of federal privatization, we must first identify and include all of its costs. We must include all costs related to the privatization process as well as costs arising from the consequences of privatization. Although this may seem obvious if a fair assessment is to be achieved, federal agencies have been directed to exclude important costs, while other costs have been effectively excluded since they are not included in required reporting. For example, the OMB's 2006 memorandum sets out costs that agencies are to report through the Competitive Sourcing Tracking System (CSTS) for the OMB's use in its reports to Congress.<sup>18</sup>

The reports are to exclude costs incurred in fiscal years other than those in which a privatization competition was completed. Certain identified costs used to prepare for privatization can be included only if they were "incurred after public announcement of the competition," such as the "costs of consultants or contractors who participated in the conduct of the competitions"; "costs of travel, training, or other incremental expenses directly attributed to the conduct of the reported competitions"; and the cost of work "incurred as part of conducting the competition (i.e., any staff hired specifically to work on a particular competition or competitions or fill behind employees temporarily working on a competition or overtime costs (where overtime costs are tracked))."<sup>19</sup> Excluded costs included those incurred before the competition was publicly announced by regular employees who worked "on the competition during regular working hours," general competition oversight costs "such as competitive sourcing office staff or general training provided to employees that is not considered a part of the competition," and the cost of full-time equivalent employees or "contract support associated with specific competitions or out-of-pocket (incremental) costs for conducting individual competitions."<sup>20</sup> Per-

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18. Memorandum from Paul A. Denett, Adm'r, Office of Fed. Procurement Policy, Office of Mgmt. & Budget, to Heads of Executive Departments and Agencies, M-07-01, Report to Congress on FY 2006 Competitive Sourcing Efforts (Oct. 5, 2006) [hereinafter Denett Memo], available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-01.pdf>.

19. *Id.* Attachment A, at 5–6.

20. *Id.* Attachment A, at 6, 10.

haps most troubling was the direction not to include “transition costs (e.g., Voluntary Early Retirement Authority or Voluntary Separation Incentive Program costs, moving expenses, etc.).”<sup>21</sup>

Some of these excluded costs may have been intended for inclusion elsewhere under the system set out in the memo and those it incorporates by reference. However, the complex system of segregating costs under the system set out in the OMB memorandum makes it likely that excluded costs will be missed entirely. In addition, with the reporting system changing each year, it is likely that no provisions will be made for fully including all costs. It is also possible that the problems that may lead to an understatement of obviously relevant costs were intentional. Both the covering memorandum and its Attachment A make it clear that the OMB wanted to portray privatization as a success story in its government-wide report to Congress.<sup>22</sup>

To be fair, reporting on all federal privatization undertakings is a daunting task. The level of information is so great that difficult decisions have to be made about what to include and exclude. In addition, while there are similarities among agencies, the nature of their individual missions makes compiling a uniform report difficult. Furthermore, the agencies and the OMB have to respond to commands from Congress and the Executive that are influenced by politics and fluctuating public concerns. The 2006 OMB memorandum bears the hallmarks of those influences. Furthermore, this process has taken place within a government that has declining numbers of employees to manage and then report on the process. In his 2006 study, *The New True Size of Government*, Paul C. Light reported that in 2005 government work was performed by 1,872,000 civil servants, 7,634,000 contract employees, and 2,892,000 employees on grant jobs.<sup>23</sup> In other words, regular employees comprise only about fifteen percent of those performing government work.<sup>24</sup> According to Light, this is “the most significant increase in recent history in the largely hidden workforce of contractors and grantees who work for the federal government.”<sup>25</sup>

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21. *Id.* Attachment A, at 7.

22. *Id.* (encouraging each agency “to provide OMB with one or two brief narrative summaries describing competitions successfully completed in FY 2006 and the practices used to achieve results”).

23. PAUL C. LIGHT, *THE NEW TRUE SIZE OF GOVERNMENT* 11 (2006), available at [http://wagner.nyu.edu/performance/files/True\\_Size.pdf](http://wagner.nyu.edu/performance/files/True_Size.pdf).

24. *Id.* These figures exclude military personnel (1,436,000 employees) and postal service jobs (767,000 employees). *Id.*

25. *Id.* at 1 (stating that the true size of the federal workforce when con-

If we are to understand the process and costs of privatization, we need to examine them on a smaller scale. The IRS mailroom privatization process provides that smaller scale. It offers an opportunity to identify all sources of costs, including excluded or overlooked costs, and at last develop the capacity to assess privatization. The IRS mailroom privatization is ideal for a number of reasons. First, the IRS privatization involves many events and issues that are typical of federal privatization, although it also has unique qualities. It most differs in that not all federal privatization involves a contractor that is a private nonprofit organization. However, although less dramatically visible than private contractors such as military contractors, nonprofit organizations do actively seek federal work, as the existence of NISH, NIB, and AbilityOne attest. Thus, although not all cost factors are present in the privatization of the IRS mailroom, the conditions under which the IRS mailroom was privatized provide a useful means to identify a wide range of overlooked privatization costs. Second, enough time has passed since the IRS mailroom privatization was announced and executed that we can identify relevant forces that affect the process of federal privatization. Third, the small number of employees and jobs involved makes it easier to track costs, benefits, impacts, and other consequences of federal privatization.

This Article begins with a discussion of the privatization of the IRS mailroom and then moves to an examination of the infrastructure that led to its privatization. Next, it explores the movement of nonprofit organizations into the world of privatization. Finally, this Article examines the nonprofit organization that was given the mailroom work. Within each of these perspectives, the question is asked: what are the costs and who bears them?

## I. CONTRACTING OUT THE INTERNAL REVENUE SERVICE'S MAILROOMS

### A. THE SEQUENCE OF EVENTS LEADING TO PRIVATIZATION

On April 15, 2003, the IRS announced its plan to transfer work in IRS mailrooms across the country directly to a private,

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tractors and grantees are counted is 14.6 million employees, an increase over the 12.1 million employees in 2002, and 11 million in 1999). Moreover, in 2005 contract employees accounted for 7.6 million jobs, a 2.5 million increase since 2002 and a 3.2 million increase since 1999. *Id.*

nonprofit contractor named ServiceSource.<sup>26</sup> This “direct conversion” meant that the mailroom workers were given no opportunity to demonstrate they could do higher quality work at lower cost than the private contractor.<sup>27</sup> Under limited circumstances such direct conversions have been permitted in a range of federal privatizations, with the right to do so varying from year to year, depending on changes made to the law and regulations. In fact, whether the IRS had the right to directly convert the mailroom work, rather than engage in a competition to determine whether private or public workers should perform the work, was a central issue in the litigation over privatizing the mailroom work. The IRS argued that a direct conversion was legal under the law at the time it announced it would contract out the work.<sup>28</sup> Ultimately the court decided that the IRS could not legally privatize individual employees’ work without a competition, based on the law in effect in fiscal year 2004 when the jobs were actually contracted out.<sup>29</sup>

While this decision could have required the IRS to bring the work back in-house, that did not happen for a number of reasons that would likely arise in other privatization scenarios. These appear to be considerations that likely affected the parties’ decisions after the case was issued. First, the district court decision was issued in 2006, nearly two years after the work had been transferred to the private sector. As a result, logistical problems arose that would have made it difficult to reestablish the mailrooms and rehire the workers. Many employees had taken early retirement or other offers and were not available or did not return. Second, the decision was a district court decision. The parties could have appealed, but decided it was in their mutual interest to settle the case with small payments to the few employees who had not taken other offers. Factors that probably affected the settlement decision include the time and money already invested, the complexity of the law and facts, and the need to move on. Third, the IRS could have immediately taken the steps necessary to reprivatize the work, or the OMB could have issued changes in the regulatory process for privatizations. Thus, attempting to return the work to the public sector may have been an exercise in futility.

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26. Nat’l Treasury Employees Union v. IRS (*Treasury Employees II*), No. Civ. A. 04-CV-0820, 2006 WL 416161, at \*4 (D.D.C. Feb. 22, 2006) (mem.).

27. See COMMERCIAL ACTIVITIES PANEL, *supra* note 16, at 2.

28. *Treasury Employees II*, 2006 WL 416161, at \*6.

29. *Id.* at \*7.

Thus, three years before Representative Sensenbrenner and EEOC Chair Earp criticized the lack of jobs for people with disabilities, the National Treasury Employees Union (NTEU) strongly objected to the IRS mailroom privatization based on its impact on the current mailroom employees and on job prospects for people with disabilities. In NTEU President Colleen Kelley's words, "this type of action is contributing to the decline in disabled federal workers who often have a harder time finding employment in the private sector. To deny these employees even the opportunity to compete for their jobs is a travesty."<sup>30</sup>

Despite these objections, over the year and one-half following its April 15, 2003 announcement, the IRS gradually shifted mailroom work to ServiceSource while eligible mailroom employees retired or took other buyout offers. Meanwhile, the mailroom employees' union, NTEU, fought before the Federal Service Impasses Panel (FSIP)<sup>31</sup> and in federal district court<sup>32</sup> to keep the jobs. On July 21, 2004, fifteen months after the IRS announced the privatization, the FSIP ruled that the IRS could proceed with a "reduction in force" (RIF) of the mailroom employees.<sup>33</sup> By that time, twenty-seven of the seventy-eight federal employees who had been working in the mailrooms in October 2003, when the IRS finally signed a contract with ServiceSource, had left.<sup>34</sup> By December 10, 2004, no federal employees were left to perform IRS mailroom work.<sup>35</sup>

The IRS has made various claims about the fate of the employees. It is clear that a number lost their jobs as a result of the RIF notices, including through taking early retirement and buyout opportunities. The IRS has given varying numbers, however, so it is not clear how many fell into each category. For example, the IRS has claimed that either two or as many as

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30. Louis C. LaBrecque, *NTEU Files Summary Judgment Motion to Stop IRS Mailroom Job Outsourcing*, 42 Gov't Empl. Rel. Rep. (BNA) No. 2082, at 1053 (Nov. 9, 2004) (relaying NTEU President Kelley's comments on an EEOC study finding "a decline of almost 20 percent in the number of federal employees with disabilities").

31. *In re Dep't of the Treasury Internal Revenue Serv. and Nat'l Treasury Employees Union (Treasury Employees I)*, No. 04 FSIP 35 (July 21, 2004), Fed. Serv. Imp. Pan. Rel. No. 470 (Aug. 14, 2004), available at 2004 WL 1656548.

32. *Treasury Employees II*, 2006 WL 416161.

33. *Treasury Employees I*, at 8.

34. LaBrecque, *supra* note 30.

35. *Treasury Employees II*, 2006 WL 416161, at \*5.

twelve employees were given positions with the contractor, ServiceSource.<sup>36</sup>

#### B. THE COST TO THE IRS WORKERS OF LOSING THE MAILROOM WORK

Across the federal government, privatization has moved jobs from the public sector to the private sector. In the case of the IRS mailroom, ServiceSource, a nonprofit organization who focuses on disability issues, acted as the force to transfer jobs from the public to the private sector. In one sense, contracting out work in the IRS mailrooms merely replaced federal workers with disabilities with other people, at least some of whom were people with disabilities. Although this transfer may seem to be a wash, it was not.

First, as a philosophical and moral matter, people, even those who perform low-skilled jobs, are human beings and not mere fungible items. Second, the federal workers lost jobs that gave them the dignity and autonomy that work provides. They had jobs with benefits, civil service protection, and union representation. Identifying what they had and lost as a result of privatization matters both in terms of personal and social costs. Furthermore, if those who performed the work through the ServiceSource contract lacked these benefits and protections, the private job was of lower worth. It is, therefore, important to identify what these government jobs provided in addition to pay.<sup>37</sup>

At best, these mailroom jobs were nothing but low-paid jobs in either the public or private sector, no matter who held them. But the process of privatization did more than merely transfer jobs from the public to the private sector. It transformed low-wage government jobs with benefits, civil service protections, and union representation into low-wage jobs that not only lack these protections but are often structured in a way that takes away the job holder's ability to be self-supporting.<sup>38</sup> Certainly, the crisis created when the IRS an-

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36. LaBrecque, *supra* note 30.

37. See E-mail from Rob Shriver, Esq., Nat'l Treasury Employees Union, to Ellen Dannin, Professor of Law, Pa. State Univ., The Dickinson Sch. of Law (Sept. 28, 2007, 13:11 EST) (on file with author) (stating that most of the affected mailroom employees were grades four and five on the federal pay scale, and explaining the benefits that such pay grades provide).

38. For example, these jobs were divided among many individuals, and the work was provided as therapy rather than work. See *infra* Part IV.B.

nounced the mailroom privatization demonstrated the value of union representation for these workers, of having someone willing and able to stand by one's side in the fight to retain the job. In other words, the effort to identify the costs of privatization and to better identify who pays these costs must include the people who lose these low-wage jobs and the inventory of what they lose. These personal costs are easy to see once brought to our attention. However, they are not normally included among the costs of privatization.

### C. THE TAXPAYERS' COSTS

Ultimately, the taxpayers have borne a large portion of the costs associated with the immediate contracting process. Our taxes subsidize displaced workers directly and indirectly while they remain unemployed.<sup>39</sup> In addition to unemployment benefits and programs to help displaced workers find new work, we must add public money that supports programs, such as those provided by ServiceSource when people with disabilities or other special needs are involved.

The two lawsuits filed by the NTEU to stop the privatization also generated costs borne by taxpayers. The NTEU is not unique in taking these actions. Indeed, it is not unusual for unions, and certainly federal employee unions, to fight privatization through litigation, lobbying, and public campaigns.<sup>40</sup> In identifying the costs of privatization, we must, therefore, add the costs of litigation expenses incurred by the Treasury Department and the NTEU in their battles over the legality of the decision to privatize these jobs. We, the public, pay for those courtrooms as buildings and for their physical and human infrastructure. Although most people are probably aware that these processes and costs exist, people may not be aware that they might be associated with privatization.

It is even less likely that many people are aware of the huge governmental and legal apparatus in place to contract out

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39. See, e.g., BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 75–78 (1982).

40. Materials, press releases, position papers, and resources to fight privatization may be found at the websites of unions such as the National Treasury Employees Union (NTEU), see NTEU, Press Room, [www.nteu.org/PressKits](http://www.nteu.org/PressKits) (last visited Apr. 18, 2008), the American Federation of State, County, and Municipal Employees (AFSCME), see AFSCME, Privatization, <http://www.afscme.org/issues/76.cfm> (last visited Apr. 18, 2008), and the American Federation of Government Employees (AFGE), see AFGE, Privatization, <http://www.afge.org/Index.cfm?page=Privatization> (last visited Apr. 18, 2008).

federal jobs to the private sector. This apparatus exists in the OMB and in every federal agency. In addition, there are government entities, such as FedBizOpps.gov,<sup>41</sup> that facilitate such transfers to the private sector by soliciting bids, a subject we will be discussing in the next Section.<sup>42</sup>

Less obvious still is the impact that nonprofit organizations, organizations such as ServiceSource, which is heavily subsidized by public money,<sup>43</sup> have in putting wage pressure on public- and private-sector jobs. That funding is discussed below, but it is fair to say that those subsidies are great enough to mean that, even had the IRS mailroom employees been allowed to compete with ServiceSource for their jobs, they would likely have lost. Public subsidies to nonprofit organizations include outright grants and tax deductions taken by their donors, and subsidies and grants.

These subsidies affect more than the public sector and public employment. They make it difficult for private-sector competitors to compete with ServiceSource for work. ServiceSource not only knows that it is able to underbid its private competitors based on price, it explicitly advertises this claim. For example, ServiceSource's magazine, *Our People Work*, included an endorsement from Bruce Wardinski, President and CEO of Barceló Crestline Corporation: "We bid the contract out against another commercial company and ServiceSource provided a more competitive bid. ServiceSource is now doing the document scanning work for us at a very cost efficient price."<sup>44</sup>

While ServiceSource promotes itself as a competitor in the private sector, it does not advertise that public subsidies help give it an edge over its competitors. However, this is certainly the case. For example, since 2001, Fairfax Imaging has donated its Quick Modules Software to ServiceSource's Precision Images Document Scanning Division at no cost. ServiceSource says that this software "has made a drastic change in participants' work abilities and productivity."<sup>45</sup> Private competitors of

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41. Federal Business Opportunities, Home Page, <http://www.fedbizopps.gov/> (last visited Apr. 18, 2008).

42. See *infra* Part II.

43. See *infra* text accompanying notes 46 and 129.

44. *ServiceSource Network Document Management Initiative Moves Forward*, OUR PEOPLE WORK (ServiceSource Network, Alexandria, Va.), Spring 2005, at 13, available at <http://www.ourpeoplework.org/files/ServicesourceSpring05.pdf> (internal quotation marks omitted).

45. *Precision Images Division and Fairfax Imaging Receive Assistive Technology Awards from NISH*, OUR PEOPLE WORK (ServiceSource Network,

Fairfax Imaging would have to pay for that software. The donation Fairfax makes does not go unrewarded. As a donation to a 501(c)(3) nonprofit organization, the Fairfax software entitles it to a tax deduction for each of those years.<sup>46</sup> Thus, ServiceSource's Precision Images Division receives a public subsidy that its competitors cannot get and that allows it to offer lower prices.

When a highly subsidized nonprofit organization like ServiceSource enters the private sector as a competitor, it becomes a force that can depress private-sector wages. As private-sector competitors lose bids, they may try to lower pay and benefits, subject to legal limits. If they are unable to continue in business, their former employees join the ranks of the unemployed, leading to rising unemployment, which will in turn put more pressure on wages. Increased unemployment and wage pressure have effects beyond the workplace and the workers who are immediately affected. Unemployed workers contribute less to the economy and require public subsidies, such as unemployment payments.<sup>47</sup>

Taken together, these are but a few of the nontrivial but invisible costs that, if accounted for, might far outweigh any savings to the public that even the most optimistic proponent would claim for privatization. These are public costs of the system that exist even when it is functioning properly without failures, incompetence, or corruption—problems that continually bedevil privatization.

## II. THE INFRASTRUCTURE THAT FORCED THE IRS TO PRIVATIZE ITS MAILROOM

### A. AN INTRODUCTION TO THE FEDERAL PRIVATIZATION INFRASTRUCTURE

The IRS mailroom privatization needs to be placed in the larger privatization context, including the infrastructure created under the George W. Bush administration and Republican Congresses. The processes behind privatization are unfamiliar to most people, and few know more about privatization

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Alexandria, Va.), Summer 2006, at 8, *available at* <http://www.ourpeoplework.org/files/ServiceSourceSummer06.pdf>.

46. See I.R.C. § 170 (West Supp. 2007).

47. For detailed studies of the impact of unemployment, see BLUESTONE & HARRISON, *supra* note 39, and DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2004).

than that it is supposed to deliver better performance at lower cost. Certainly, few know of the role played by the OMB in overseeing and regulating a process sufficiently powerful to cause the IRS to enter into a contract to privatize the mailroom<sup>48</sup> with such haste that it would take ten more months to agree to the specific terms of the privatization.

The federal privatization infrastructure is sweeping, huge, and Byzantine and must have entailed enormous costs to construct, maintain, administer, and upgrade. Its components embody the sort of tedious detail that most of us would rather avoid. However, it is impossible to understand why the IRS privatized the mailroom work and did so with such haste without a basic sense of the OMB privatization infrastructure and the power of these tedious regulations and circulars. Starting from the OMB's webpage,<sup>49</sup> one can find links to the regulations and circulars that regulate the process of privatization.<sup>50</sup> Circular A-76 governs the federal privatization process and is the most important of these circulars.<sup>51</sup> The OMB's webpage also links to Results.gov,<sup>52</sup> whose function is to aggressively promote privatization.

One Results.gov initiative, begun in 2001, is a "management scorecard" that rates individual agencies with green "stickers" for success, yellow for mixed results, and red for unsatisfactory.<sup>53</sup> As Results.gov explains, the system has evolved since it was developed in 2001; however, the basic structure remains the same. The scorecard ranks agencies on each of a number of detailed standards. "Under each of these standards,

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48. Solicitation, Offer and Award Between the Internal Revenue Service and ServiceSource Inc., Contract No. NO-04-D-00005, Solicitation No. TIRNO-03-R-00001 (Oct. 31, 2003) (on file with author) [hereinafter Solicitation, Offer and Award].

49. Office of Management & Budget, Welcome to OMB, <http://www.whitehouse.gov/omb> (last visited Apr. 18, 2008).

50. Office of Management & Budget, OMB Circulars, <http://www.whitehouse.gov/omb/circulars/index.html> (last visited Apr. 18, 2008).

51. See Office of Mgmt. & Budget, Executive Office of the President, Circular No. A-76 (Revised) (May 29, 2003), *available at* [http://www.whitehouse.gov/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf).

52. Results.gov, Home Page, <http://www.whitehouse.gov/results> (last visited Apr. 18, 2008). The story of the development of the scorecard system promoting privatization may be found in OMB, COMPETITIVE SOURCING, *supra* note 15, at 1.

53. See Executive Branch Management Scorecard: 2001 Baseline Evaluation, [http://www.whitehouse.gov/results/agenda/original\\_scorecard.pdf](http://www.whitehouse.gov/results/agenda/original_scorecard.pdf) (last visited Apr. 18, 2008); see also OMB, COMPETITIVE SOURCING, *supra* note 15, at 7–8 (describing modifications of the scorecard criteria).

an agency is 'green' or 'yellow' if it meets all of the standards for success listed in the respective column, and 'red' if it has any one of a number of serious flaws listed in the 'red' column."<sup>54</sup>

The current scorecard includes green, yellow, or red rankings for performance on Strategic Management of Human Capital, Competitive Sourcing (i.e., privatization), Improved Financial Performance, Expanded Electronic Government, Performance Improvement, Eliminating Improper Payments, Faith-Based and Community Initiative, Federal Real Property Asset Management, Improved Credit Program Management, and Improved Credit Program Management.<sup>55</sup> While it might seem that some of these categories have nothing to do with privatization, some of the historical iterations included privatization within the rubrics under these categories, and there are other ways in which they are integrated to promote the scorecard goals. For example, the rankings under "Strategic Management of Human Capital" require that those in the Senior Executive Service, managers, and "more than 70% of the workforce" face personal rewards for achieving agency goals.<sup>56</sup> One of those requirements is "competitive sourcing." In other words, privatization of federal work is so important that the OMB rates the performance of federal agencies and agency executives on privatizing as one stand-alone category and as a part of another category. The IRS, in conjunction with the President's Management Agenda, as part of Department of the Treasury, was required to meet privatization goals.

Again, most of the public is unaware of this process, but federal agencies know all too well what they must do. To achieve a green on Competitive Sourcing (privatizing) an agency must formulate an OMB-approved plan to compete commercial activities; execute a sufficient number of prompt competitions; encourage private- and public-sector participation; and

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54. Results.gov, The President's Management Agenda: The Scorecard, <http://www.whitehouse.gov/results/agenda/scorecard.html> (last visited Apr. 18, 2008).

55. Scorecard Standards for Success, <http://www.whitehouse.gov/results/agenda/scorecard.html> (follow "scorecard standards for success" hyperlink) (last visited Apr. 18, 2008) (setting forth the standards for success under the President's Management Agenda).

56. *Id.*

regularly track and review its competitions.<sup>57</sup> Agencies receive a red ranking if they fail on one or more of these criteria.<sup>58</sup>

At first blush, this system seems silly, but it has been quite effective in motivating agencies to strive for green ratings. For example, in July 2005, the U.S. Department of Labor bragged, with no irony, that it was the first federal agency to get greens in the five then-existing categories and to be the agency in the forefront of contracting out jobs.<sup>59</sup> Labor Secretary Elaine Chao characterized this as “a tremendous achievement,” and stated that she has “high expectations that [the Department of Labor] will continue to meet [the standards].”<sup>60</sup>

The IRS, along with all other parts of the federal government, felt the same pressures.

#### B. HOW THE PRESIDENT’S MANAGEMENT AGENDA DROVE THE IRS TO CONTRACT OUT THE MAILROOM WORK

From December 2002 through December 2003, the Department of the Treasury was in deep trouble. Results.gov gave it reds on all standards.<sup>61</sup> That changed in March 2004 when the Treasury Department received a yellow for competitive sourcing, or privatization.<sup>62</sup> The General Accounting Office concluded: “The IRS made steady progress on the President’s Management Agenda this year and we still have room for improvement. The IRS adjusted its ‘Getting to green plans’ to reflect the new ‘Proud to be’ criteria and refined its milestones to achieve these goals by July 2004.”<sup>63</sup> The Treasury Department was successful because it had appointed a competitive sourcing director and “[c]ompleted contract negotiations with [the] Na-

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57. *Id.*

58. *Id.*

59. News Release, U.S. Dep’t of Labor, Rel. No. 05-1374-NAT, Labor Department First to Score “All Green” on President’s Management Agenda (July 21, 2005), *available at* <http://www.dol.gov/opa/media/press/opa/OPA20051374.htm> (“As of June 30, DOL was upgraded to ‘green’ in the fifth government-wide [President’s Management Agenda] component, Competitive Sourcing.”).

60. *Id.*

61. See Results.gov, *supra* note 54 (follow “THE SCORECARD” hyperlinks for Dec. 31, 2002, Mar. 31, 2003, June 30, 2003, Sept. 30, 2003, and Dec. 31, 2003) (showing color scores for federal departments in five results categories).

62. Executive Branch Management Scorecard (Mar. 31, 2004), <http://www.whitehouse.gov/results/agenda/20040514scorecard.pdf>.

63. U.S. GEN. ACCOUNTING OFFICE, GAO-04-126, FINANCIAL AUDIT: IRS’S FISCAL YEARS 2003 AND 2002 FINANCIAL STATEMENTS 82 (2003).

tional Industries for Severely Handicapped (NISH) for [the] IRS Mailroom,” for seventy full-time equivalent jobs.<sup>64</sup>

A private contractor hired by the IRS to give advice on privatizing assisted the IRS in achieving this recognition. In other words, the President’s Management Agenda created a new class of private contractors to advise agencies on privatizing. These contractors must also be paid from an agency’s budget. One contractor that assisted in the mailroom privatization was Abacus Technology, which used the mailroom privatization to publicize its services.<sup>65</sup>

The Abacus Technology website describes the company’s recognition for assisting the IRS with the “competitive sourcing effort,” and describes the 2004 Presidential Quality Award for Excellence it received.<sup>66</sup>

This statement, publicizing the awards Abacus and the IRS received for privatizing the mailroom, reveals a culture that supports and promotes privatization. It is a culture of awards, award ceremonies, and photos of presentations in agency and contractor publications. Participants in the privatization process give awards to one another and then use acknowledgement of these awards to self-promote.

A second entity that supported the mailroom privatization was NISH, whose role in securing this contract for ServiceSource and relation to JWOD is discussed below.<sup>67</sup> A third proponent of privatizing the IRS mailroom was Sharon McPherson, an IRS employee. Abacus, NISH, ServiceSource, JWOD, and McPherson have been party to many awards as recipients and awardees for the mailroom privatization. Indeed, the number of awards seems out of proportion with the number of jobs involved, yet they seem to play a key role in the process.

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64. *Id.* at 83.

65. See Abacus Technology Corporation, Competitive Sourcing and Privatization, <http://www.abacustech.com/Solutions/Sourcing/index.html> (last visited Apr. 18, 2008) (“In recognition of our outstanding A-76 consulting partnership with the IRS, we earned the Large Business Partner of the Year Award. Due in part to our contribution to the IRS in developing the PWS/QASP for the Area Distribution Center (ADC) competitive sourcing effort, the IRS was awarded the 2004 Presidential Quality Award for Excellence. Abacus will soon be recognized in a ceremony with the IRS Commissioner.”).

66. See Abacus Technology Awards, [http://www.abacustech.com/about\\_atc/awards.html](http://www.abacustech.com/about_atc/awards.html) (follow “2003 IRS: Nominated for Large Business Partner of The Year” hyperlink) (last visited Apr. 18, 2008).

67. See *infra* text accompanying notes 145–50.

McPherson was honored with the 2006 JWOD Outstanding Contributions Award for developing and awarding “an unprecedented off-site IRS mailroom contract to a JWOD-affiliated nonprofit agency—the first nonprofit-owned and nonprofit-operated mailroom operation in the Federal government.”<sup>68</sup> ServiceSource gave awards to those who assisted in securing this work,<sup>69</sup> and other nonprofit organizations and federal government agencies reciprocated by giving ServiceSource awards in turn.<sup>70</sup> The ServiceSource magazine and website also spotlight this small contract involving the jobs of fewer than eighty IRS workers.<sup>71</sup> In September 2003, OMB honored the mailroom privatization as an example “of Commercial Activities included in Competition Plan.”<sup>72</sup>

The Results.gov pressure may explain why the IRS was in such haste to privatize some parts of its work. Indeed, the privatization was so poorly executed that it must have been done in haste. The IRS announced the decision on April 15, 2003, even though the terms were not agreed to until October 31, 2003.<sup>73</sup> In addition, ServiceSource was incapable of managing the nationwide system of IRS mailrooms until December 10, 2004,<sup>74</sup> twenty months after its relationship with the IRS was

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68. JWOD, 2006 JWOD Outstanding Contributions Award Recipients, [http://www.jwod.gov/JWOD/about\\_us/Halloffame/outstanding\\_2006.htm](http://www.jwod.gov/JWOD/about_us/Halloffame/outstanding_2006.htm) (last visited Apr. 18, 2008) (recognizing Sharon McPherson, Contracting Officer, Office of Business Operations, Internal Revenue Service).

69. *ServiceSource Recognizes Monumental Achievers and Community Partners at Annual Meeting*, OUR PEOPLE WORK (ServiceSource Network, Alexandria, Va.), Winter 2007, at 8, available at [http://www.ourpeoplework.org/files/SS\\_winter07.pdf](http://www.ourpeoplework.org/files/SS_winter07.pdf).

70. *ServiceSource Selected to Serve as NISH Mail Center Operations Center of Excellence*, OUR PEOPLE WORK (ServiceSource Network, Alexandria, Va.), Summer 2006, at 3, available at <http://www.ourpeoplework.org/files/ServiceSourceSummer06.pdf>.

71. *Central Mail Services Facility Opening*, OUR PEOPLE WORK (ServiceSource Network, Alexandria, Va.), Fall 2004, at 3, available at <http://www.ourpeoplework.org/files/ServiceSourceFall04.pdf>.

72. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, COMPETITIVE SOURCING: REASONED AND RESPONSIBLE PUBLIC-PRIVATE COMPETITION 12 (Supp. 2003), [http://www.whitehouse.gov/omb/procurement/comp\\_sourc\\_addendum.pdf](http://www.whitehouse.gov/omb/procurement/comp_sourc_addendum.pdf) [hereinafter OMB, PUBLIC-PRIVATE COMPETITION].

73. See Solicitation, Offer and Award, *supra* note 48, at 1 (showing a contract issue date of April 15, 2003 and a signing date of October 31, 2003).

74. See *Nat'l Treasury Employees Union v. IRS (Treasury Employees II)*, No. 04-CV-0820, 2006 WL 416161, at \*5 (D.D.C. Feb. 22, 2006) (mem.) (“[T]he last IRS mailroom employees lost their jobs on December 10, 2004.”). At the time ServiceSource won this contract, it had only operated in the larger District of Columbia metropolitan area, and the ServiceSource network affiliates

announced. Administration pressures to privatize may also explain why it was worth it to the IRS to refuse to comply with the law that required it to hold a competition to determine whether the IRS mailroom employees could do the work better and at lower cost than the ServiceSource “consumers”<sup>75</sup> (the ServiceSource term for those people with disabilities it provides with employment).<sup>76</sup> As an agency concerned with generating the country’s revenue, the IRS might have been especially concerned with not wasting money by paying more for services. However, required competition and decreased costs appear to have played no part in the decision to privatize. A competition would have further slowed the privatization process, perhaps even derailed it if privatization cost more, and meant that the Treasury Department would have continued to receive a Results.gov rating of all red.

### C. THE BATTLE OVER THE DECISION TO CONTRACT OUT THE MAILROOM WORK

Although failing to comply with the legal requirement to hold a competition meant that the Treasury Department did not incur the costs associated with putting work out to bid and assessing bids, the decision was not cost-free. The IRS faced lit-

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operated mainly along the East Coast. See Welcome to the ServiceSource Network, <http://www.ourpeoplework.org> (last visited Apr. 18, 2008).

Of the employees still working in the IRS mailroom at this time, about thirty-five percent were people with disabilities. *In re Dep’t of the Treasury Internal Revenue Serv. and Nat’l Treasury Employees Union (Treasury Employees I)*, No. 04 FSIP 35 (July 21, 2004), Fed. Serv. Imp. Pan. Rel. No. 470, at 1 n.1 (Aug. 14, 2004), available at 2004 WL 1656548. When the IRS announced its intention to contract out the work on April 15, 2003, there were seventy-eight mailroom employees. Plaintiff’s Memorandum of Points and Authorities Responding to Defendant’s Cross-Motion for Summary Judgment at 6, *Treasury Employees II*, 2006 WL 416161 (No. 04-CV-0820), 2004 WL 3628200.

75. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, tit. VI, § 647(a), 118 Stat. 3, 361; *Treasury Employees II*, 2006 WL 416161, at \*1, \*6–7; see also *NTEU Fights Privatization of IRS Mailrooms*, FED. DAILY, Feb. 27, 2006, <http://federaldaily.com/federaldaily/archive/2006/02/FD022706.htm#27c> (relaying a federal court’s determination that “the IRS violated the law by using appropriated funds to privatize IRS mailroom work without allowing IRS employees to compete”). Apparently, ServiceSource uses far more employees and full-time equivalent jobs to perform this work. See *infra* text accompanying note 150.

76. SERVICE SOURCE, GUIDE TO REHABILITATION & EMPLOYMENT SERVICES 4 (2007), <http://servicesrcsub1.timberlakepublishing.com/files/ServiceSourceRehabGuide07.pdf>.

igation brought by former mailroom employees.<sup>77</sup> The mailroom employees were represented by the NTEU, a union that has been vigilant in taking action against the privatization of the jobs of those it represents,<sup>78</sup> both in court and in the court of public opinion. The NTEU's description of itself emphasizes its activism as an invitation to workers to join and as a warning to the agencies that employ its members and potential members.<sup>79</sup>

The NTEU represents employees in a wide range of agencies and departments.<sup>80</sup> All of them live under the threat of privatization. To protect those it represents, the NTEU must—and does—take an aggressive stand against privatization. In the case of the IRS, the NTEU has established a website with resources for members to join the fight, including press releases, information, flyers, and action alerts, as well as offering assistance to taxpayers.<sup>81</sup>

Thus, the IRS found itself engaged in an expensive lawsuit to defend its decision to contract out its mailrooms. The IRS lost the lawsuit but won the war. By the time the court ruled that the IRS had broken the law, the mailroom workers were so dispersed and dispirited that reinstatement was not an option. Rather than battle on through the court of appeals, the union settled for \$4100 to be paid to each of those few employees still on the payroll (defined as involuntarily separated), and \$45,000 to the NTEU Legal Representation Fund for attorney's fees.<sup>82</sup> Most employees received nothing because they took early re-

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77. See *Treasury Employees II*, 2006 WL 416161. The NTEU filed its lawsuit against the IRS on May 20, 2004, asserting that the "agency's conversion of the mailroom functions to ServiceSource without a public-private job competition violated the ban on 'direct conversions' of federal jobs." LaBrecque, *supra* note 30. The case was later settled. Settlement Agreement at 1, *Treasury Employees II*, 2006 WL 416161 (No. 04-CV-0820) (on file with author).

78. See The National Treasury Employees Union, NTEU Overview, <http://www.nteu.org/NTEU> (last visited Apr. 18, 2008).

79. See *id.* ("NTEU is widely known as a smart, tough organization, well-respected for its knowledge of federal employee issues. And for its determination to work with federal agencies, with Congress, and in the courts to protect, promote and expand the rights of those it represents.")

80. *Id.* (listing agencies, including the departments of Commerce, Agriculture and Homeland Security, represented by the NTEU).

81. nteuIRSwatch.org, Home Page, <http://www.nteuirswatch.org> (last visited Apr. 18, 2008).

82. Settlement Agreement, *supra* note 77, at 3; Stephen Barr, *IRS to Pay Former Workers Whose Jobs Were Outsourced*, WASH. POST, Sept. 22, 2006, at D4.

tirement or other options rather than risk losing their jobs and income.<sup>83</sup>

#### D. THE COSTS TO GOVERNMENT AGENCIES AND THEIR EMPLOYEES OF CONTRACTING OUT WORK

The events and developments discussed in the prior Sections entail costs. This Section discusses the costs related to the President's Management Agenda, the costs of contractor misfeasance and malfeasance, and the costs of errors related to contracting. Federal employees who retain their jobs by demonstrating that they can do the work for less may win only at great cost to themselves.

##### 1. The Costs of Complying with the President's Management Agenda

As mentioned earlier, privatization is popularly regarded as a way to lower the cost of government and improve quality by using the private sector and market competition. However, privatization processes are not always structured to ensure that this is the case, and sometimes no effort is made to take these factors into account. At times private contractors have been allowed to compete by paying workers less and not offering health insurance. While this may achieve a lower price for the contract, it may merely shift costs elsewhere, for example, to welfare, and it does nothing to provide better service. At other times, the government prohibited competition based on lower pay and benefits.<sup>84</sup> In some years, competitions had to take place after allowing the targeted federal employees to reorganize to achieve maximum efficiency, becoming what is called the "most efficient organization" or MEO.<sup>85</sup> The theory was that the

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83. It is impossible to trace these dismissed workers or to identify those who became charges of the state or federal government, but it is likely this was the fate of at least some. The Privacy Act bars access to such personal information. See 5 U.S.C. § 552(a) (2000).

84. A provision signed into law in 2005, for example, is intended to ensure that, in public-private competitions, the private-sector offeror does not gain an advantage over the in-house bid by offering inferior health insurance plans or requiring contract employees to pay a higher percentage for their health insurance than federal employees. Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, § 8014(a)(3), 118 Stat. 951, 972; Melanie I. Dooley, *Members of Congress Express Opposition to Health Insurance Comparability Repeal*, 43 Gov't Empl. Rel. Rep. (BNA) No. 2095, at 155 (Feb. 15, 2005).

85. OMB guidelines require a savings of "at least \$10 million or 10 percent of the personnel costs of the in-house performance (whichever is less)." COMMERCIAL ACTIVITIES PANEL, *supra* note 16, at 3.

winner under a MEO would bring an improvement in quality, as well as in cost. At other times “streamlined” competitions have been allowed.<sup>86</sup> Streamlined competitions allow a competition, but without permitting federal reorganization to achieve maximum efficiency.

By itself and through constant revamping, the federal Circular A-76 process has created a complex infrastructure, which has become the foundation for the Federal Activities Inventory Reform Act (FAIR Act).<sup>87</sup> The FAIR Act requires executive agencies to identify an inventory of work that is not inherently governmental, and thus subject to privatization.<sup>88</sup> The OMB website provides the most tangible way to grasp what this process means. The OMB website contains the construction of Federal Register Notices of the work contractors can bid on and lists of agency websites “from which interested parties may access agency inventories.”<sup>89</sup>

Complying with these complex processes costs money. The OMB webpage alone represents thousands of hours of work in the links to competitive sourcing and documentation requirements, circulars related to contracting work out, agency rankings, documents, and guidelines, all of which must be included in the costs of privatization. This cost is unavoidable if privatization is to take place—there must be some way to administer the decisions to privatize. Although it is obvious that this infrastructure is a necessary part of the process, these costs are never included in the cost of privatization. These documents

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86. See *House, Senate Clear \$416 Billion for DOD; Bill Includes Competitive Sourcing Curbs*, 42 Gov't Empl. Rel. Rep. (BNA) No. 2069, at 723, 724 (Aug. 3, 2004); *New OFPP Study Shows Smaller Number of Federal Job Competitions in FY 2004*, 43 Gov't Empl. Rel. Rep. (BNA) No. 2094, at 129 (Feb. 8, 2005). Other changes involved cost reimbursements. See *Senators Tell OMB Proposed Changes to FAR Would Favor Contractors over Feds*, 42 Gov't Empl. Rel. Rep. (BNA) No. 2069, at 726 (Aug. 3, 2004).

87. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (codified as amended at 31 U.S.C. § 501 (2000 & Supp. IV 2006)); see *New OFPP Study Shows Smaller Number of Federal Job Competitions in FY 2004*, *supra* note 86, at 129. See generally GOV'T ACCOUNTABILITY OFFICE, GAO-04-367, COMPETITIVE SOURCING: GREATER EMPHASIS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE (2004) (reviewing agencies' progress towards establishing competitive sourcing infrastructures).

88. 31 U.S.C. § 501.

89. See Office of Management & Budget, 2005 FAIR Act Inventory Releases, [http://www.whitehouse.gov/omb/procurement/fair/fair\\_releases\\_index2005.html](http://www.whitehouse.gov/omb/procurement/fair/fair_releases_index2005.html) (last visited Apr. 18, 2008); Office of Management & Budget, FAIR Notices of Availability, [http://www.whitehouse.gov/omb/procurement/fair/notices\\_avail.html](http://www.whitehouse.gov/omb/procurement/fair/notices_avail.html) (last visited Apr. 18, 2008).

and processes are the fruit of the expenditure of taxpayer money, and that expenditure must be included in any calculation of the costs of privatization.

The opportunity cost to each agency is also ignored. Consider the IRS. It was created to collect the taxes the government needs to operate. Time taken to comply with requirements for competitive sourcing is time lost from the agency's mission. Each agency must spend time and money engaging in the competition and/or MEO process and finding work that must be offered for competition. The decision to privatize involves, among other steps, case analyses, pre-decisional documents, monthly coordination meetings, and union communication.<sup>90</sup>

In short, the process of preparing agency "inventory" for privatization is not trivial, and the costs can be so great that they affect the operation of core agency functions.

## 2. The Costs of Contractor Misfeasance and Malfeasance

Privatization does not always operate optimally. At times, there are serious problems of contractor nonperformance and, at times, contractor malfeasance. For example, during the long struggle over privatizing IRS debt collection,<sup>91</sup> a pilot experiment led to theft of tax payments by the private debt collectors, some of whom were eventually convicted. In 2007, Mellon Bank "agreed to pay an additional \$16.5 million to settle claims related to the 2001 destruction of tens of thousands of individual tax returns and checks that the bank was supposed to process as an agent for the Treasury Department."<sup>92</sup> This settlement was in addition to \$18 million already paid to reimburse the federal government for the value of the interest lost on the de-

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90. OMB, PUBLIC-PRIVATE COMPETITION, *supra* note 72, at 3.

91. See *IRS Private Debt Collection Program: Hearing Before the H. Comm. on Ways and Means*, 105th Cong. 5–25 (2007) (written statement of Nina E. Olson, National Taxpayer Advocate), available at [http://www.irs.gov/pub/irs-utl/ntatestimony\\_wm\\_pdc\\_052307.pdf](http://www.irs.gov/pub/irs-utl/ntatestimony_wm_pdc_052307.pdf) [hereinafter Olson Statement] (describing many concerns with the efficiency and security of private debt collection programs); TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2006-10-078, THE REVISED PRIVATE DEBT COLLECTION REQUEST FOR QUOTATION ADEQUATELY ADDRESSED PRIOR DEFICIENCIES IN THE SOLICITATION METHODOLOGY (2006), available at <http://www.treas.gov/tigta/auditreports/2006reports/200610078fr.pdf>.

92. Treasury Inspector General for Tax Administration, Mellon Bank Agrees to Pay Additional \$16.5 Million for the Destruction of Tax Returns and Checks (June 29, 2007), [http://www.ustreas.gov/tigta/oi\\_highlights\\_2007.shtml](http://www.ustreas.gov/tigta/oi_highlights_2007.shtml) [hereinafter Mellon Bank Agrees to Pay].

stroyed checks and the costs incurred by the federal government in obtaining replacement checks from the affected taxpayers.<sup>93</sup> Mellon also violated the False Claims Act<sup>94</sup> and its employees destroyed more than seventy thousand taxpayer remittances worth more than \$ 1.2 billion.<sup>95</sup>

A more recent pilot program also had problems. In a 2006 report, the National Taxpayer Advocate found that private debt collectors were not adequately trained to do their work.<sup>96</sup> As a result, it took sixty-five IRS employees to monitor the work of seventy-five private tax collectors.<sup>97</sup> In her written testimony before the Ways and Means Committee, Nina Olson said private debt collection “may be costing the government more than it receives.”<sup>98</sup> Olson also raised concerns about a wide range of problems connected with the private debt collectors.<sup>99</sup>

Perhaps these individuals who broke the law would have done so regardless of whether privatization existed. However, we do know that privatization gave the private debt collectors access and opportunity to take actions that have been costly in terms of their effect on taxpayers’ lives and time and in prosecution of these crimes.

### 3. The Costs of Errors in Contracting

Mathematical errors have led to privatization, even when a private contractor costs more than having public employees perform the work.<sup>100</sup> In one case, the error was the fault of the private contractor hired to analyze other contractor bids for the OMB.<sup>101</sup> This error was difficult to correct, because at the time only a wrongly out-bid private contractor was allowed to chal-

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93. *Id.*

94. *See* 31 U.S.C. § 3729 (2000).

95. U.S. GEN. ACCOUNTING OFFICE, GAO-03-299, IRS LOCKBOX BANKS: MORE EFFECTIVE OVERSIGHT, STRONGER CONTROLS, AND FURTHER STUDY OF COSTS AND BENEFITS ARE NEEDED 2 (2003).

96. *See* THE NATIONAL TAXPAYER ADVOCATE 2006 ANNUAL REPORT TO CONGRESS: EXECUTIVE SUMMARY, at I-2 (2006), *available at* [http://www.irs.gov/pub/irs-utl/arc-exec\\_summary-2006.pdf](http://www.irs.gov/pub/irs-utl/arc-exec_summary-2006.pdf).

97. *Id.*

98. Olson Statement, *supra* note 91, at 1.

99. *Id.*

100. *See DOD IG Finds \$32 Million Error Critical to Source Decision in A-76 Competition*, 41 Gov’t Empl. Rel. Rep. (BNA) No. 2004, at 370 (Apr. 8, 2003).

101. *Id.* (describing a mistake made by Mevatec Corp., a consultant company).

lenge a decision,<sup>102</sup> not the federal employees who were to lose their jobs.<sup>103</sup>

Work improperly contracted out should, of course, be brought back in-house. However, the mailroom case shows this is not necessarily easy to do. As with the IRS mailroom, employees may have retired or taken other jobs or other actions may have been taken that make it difficult or impossible to take the work back in-house. As a result, the cost or impossibility of returning the work may mean that it continues to be performed by a contractor at greater cost and lower quality. Furthermore, when experienced employees leave, institutional memory may be lost, leading to a less efficient operation. Although not part of the normal assessment of privatization, the loss of jobs, their performance at higher cost and with lower quality, and the loss of institutional memory leading to greater inefficiency are costs that need to be taken into account in assessing privatization.

#### 4. The Costs When Federal Employees Win Their Work

In some cases, federal workers have won competitions under the MEO process by reorganizing in order to prove they can perform the work better and for less. However, they may find that they have saved their jobs at great cost to themselves. For example, in August 2005, low-wage IRS workers who handled and stored tax returns, including files supervisors, lead mail clerks, mail clerks, and clerks, won a competition over two private bidders.<sup>104</sup> Before their MEO, that work was performed by “843 employees, including 346 permanent employees, 360 seasonal employees, 55 temporary employees, and 82 intermittent employees at eight service centers.”<sup>105</sup> The price of keeping the work was painful. It required cutting 166 jobs and converting other jobs from full time to jobs with no fixed work schedule and no benefits.<sup>106</sup> Here, the result of just the process of priva-

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102. COMMERCIAL ACTIVITIES PANEL, *supra* note 16, at 3 nn.4 & 5.

103. *Id.*; see also U.S. GEN. ACCOUNTING OFFICE, GAO-03-1022T, COMPETITIVE SOURCING: IMPLEMENTATION WILL BE CHALLENGING FOR FEDERAL AGENCIES 7–8 (2003) (describing federal employee complaints about the lack of an appeal process).

104. Louis C. LaBrecque, *IRS Workers Win Battle over Outsourcing of Tax Return Handlings; 166 Jobs Still Cut*, 43 Gov't Empl. Rel. Rep. (BNA) No. 2121, at 824 (Aug. 23, 2005).

105. *Id.*

106. *Id.*

tization has led to more low-paid employees who lack health benefits and may thus need public support.

In other words, the system that compels federal agencies to privatize—and that led to the loss of the IRS mailroom jobs—is a system that has the power to turn decent jobs into bad jobs, with low pay, job insecurity, and no benefits. It is also one that imposes large costs on the public in the process.

### III. THE INFRASTRUCTURE THAT SUPPORTS THE MOVEMENT OF NONPROFIT ORGANIZATIONS INTO THE WORLD OF PRIVATIZATION

#### A. THE NONPROFIT PRIVATIZATION INDUSTRY AND THE POVERTY JOBS IT CREATES

So far we have examined the privatization of one federal agency's mailroom work as a way to identify and account for the costs of the federal privatization process. The IRS mailroom also provides a window into the growing presence and impact of nonprofit agencies as contractors. Privatizing the IRS mailroom contributed to the revenue of ServiceSource, the contractor who was given the mailroom contract. In fiscal year 2006, ServiceSource had nearly \$70 million in revenues.<sup>107</sup> As ServiceSource and other nonprofit organizations enter the world of privatization, their operations must be included among the full costs of privatization.

ServiceSource may be a nonprofit agency, but with annual revenues of \$69.5 million<sup>108</sup> it is hardly a shoe-string operation. Its federal contract work extends far beyond IRS mailrooms. As of 2006, ServiceSource had contracts to perform mailroom, food service, and warehouse work for many different federal agencies.<sup>109</sup> All or most of this work is certain to be low-wage at

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107. SERVICE SOURCE NETWORK, 2006 ANNUAL REPORT 4 (2006), available at [http://www.ourpeoplework.org/files/Network\\_ar06.pdf](http://www.ourpeoplework.org/files/Network_ar06.pdf).

108. *Id.*

109. As of 2006, ServiceSource had mailroom contracts with, among others, the Environmental Protection Agency, the Departments of Commerce and Transportation, the National Archives I & II, the Centers for Medicare and Medicaid Services, the United States Mint, the Internal Revenue Service, Fort Bragg, and the National Science Foundation. See ServiceSource Network, Publications, <http://www.ourpeoplework.org/content.asp?contentid=357> (last visited Apr. 18, 2008) (follow "Annual Reports" and "Newsletters" hyperlinks). As of 2006, ServiceSource also provided food service for, among others, the Marine Corps, NASA Goddard Space Flight Center, Fort Bragg, the National Institute of Environmental Health Sciences (NIEHS), General Services Administration (GSA), the Naval Surface Warfare Center, Pope Air Force Base,

best. Moreover, providing low-wage work at privatized job sites is a growth industry for ServiceSource. Revenue for fiscal year 2006 was up 13.5% from fiscal year 2005.<sup>110</sup> In 2006, ServiceSource employed 188 workers, or 17% of its workforce, in mail service,<sup>111</sup> and operated in nine states and the District of Columbia.<sup>112</sup> This growth in revenues enabled ServiceSource Network to hire a large executive staff, which, in turn, likely helps ServiceSource further increase revenues.

#### B. THE MANY PIECES OF SERVICESOURCE

The ServiceSource Network is formally composed of four affiliates: the Opportunity Center, Inc., ServiceSource, EmploymentSource, and Abilities of Florida.<sup>113</sup> ServiceSource is a nonprofit organization located in Alexandria, Virginia.<sup>114</sup> These organizations' formal and informal affiliations and cooperative relationships include overlapping officers and employees, with as many as six organizations contributing to an individual's pay. The Network appears to be bound together by its stated purposes of providing work, training, and support services to people with disabilities.<sup>115</sup>

However, ServiceSource has a network of related organizations that extends far beyond its formal affiliates. The number of organizations, the purpose of their relationships, and the way money moves among them is puzzling. That complexity makes it difficult for outsiders to know who the organization is, but it also seems to place an extra burden on ServiceSource. For example, each of these organizations must file a separate income tax form, and the complexity seems to have caused its tax preparer at least minor problems in knowing exactly how much its officers are paid. Each form includes tables with pay for other organizations, but some of these figures vary slightly.

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the VA Medical Center, and the Defense Commissary Agency (DeCA). *See id.* ServiceSource also performed warehouse work at the Departments of Agriculture, Commerce, and Transportation. *See id.*

110. SERVICESOURCE NETWORK, *supra* note 107, at 9.

111. *Id.* at 2.

112. *ServiceSource Network Achieves Unprecedented Year in FY 06*, OUR PEOPLE WORK (ServiceSource Network, Alexandria, Va.), Summer 2006, at 3, available at <http://www.ourpeoplework.org/files/Servicesource/Summer06.pdf>.

113. ServiceSource Network, About Us, <http://www.ourpeoplework.org/content.asp?contentid=354> (last visited Apr. 18, 2008).

114. *Id.*

115. SERVICESOURCE NETWORK, *supra* note 107, at 2.

It is unclear how this complexity promotes ServiceSource's stated mission and whether the costs of complexity outweigh the benefits to those ServiceSource is supposed to serve. The law gives nonprofit organizations certain benefits in exchange for strict limitations on their purposes and behavior that would not apply to a private company.<sup>116</sup> Although there is no evidence of any illegality on the part of ServiceSource, such a complex organizational and pay structure could facilitate the evasion of laws that limit certain behavior by nonprofit organizations, such as prohibitions on lobbying.<sup>117</sup> In exchange for being tax-free, the tax forms of nonprofit organizations are public, and they must reveal meaningful information that can be used to determine whether they are in compliance with the law. A complex organizational structure, for example, would permit one component to state on its Form 990<sup>118</sup> that it engaged in no lobbying while gaining lobbying services through a sister organization.

ServiceSource's operations appear to straddle both the nonprofit world and the world of small business. Its subsidiary division, Precision Images, provides various copying and other document services and employs fifteen people with disabilities.<sup>119</sup> Its operating costs are lowered in several ways. First, section 214(c) of the Fair Labor Standards Act permits paying a sub-minimum wage to "individuals . . . whose earning or productive capacity is impaired by . . . physical or mental deficien-

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116. See, e.g., I.R.C. § 501(a) (2000) (exempting organizations described in I.R.C. § 501(c) from taxation); *id.* § 501(c) (limiting tax-exempt status to not-for-profit entities organized and operated "exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals").

117. See *id.* § 501(c) (prohibiting tax-exempt organizations from lobbying or participating in political campaigns for public offices).

118. See I.R.S. Form 990, Return of Organization Exempt from Income Tax, Pt. IV (asking whether the organization engaged in political lobbying during the previous year). Tax-exempt organizations use Form 990 to provide the IRS with information necessary to maintain their tax-exempt status. See Internal Revenue Service, Instructions for Form 990 and Form 990-EZ, at 1 (2007), available at <http://www.irs.gov/pub/irs-pdf/i990-ez.pdf> (discussing the purpose of the form).

119. Press Release, ServiceSource, ServiceSource, Inc. Precision Images Division and Fairfax Imaging Selected to Receive Assistive Technology Award at 2006 NISH National Conference (Feb. 15, 2006), available at <http://servicesrcsub1.timberlakepublishing.com/files/PrecisionImages.pdf>; see also Meeting Minutes, Mid-Atlantic District, The Association for Work Process Improvement (Oct. 26, 2006), available at <http://www.tawpi.org/documents/MidAtlanticChapterMtg10-26-06.pdf>.

cy.”<sup>120</sup> Second, the tax code promotes donations of goods to non-profit organizations by giving the donor a tax deduction. Since 2001, ServiceSource’s Precision Images has benefited from Fairfax Imaging’s donations of its Quick Modules Software.<sup>121</sup> It also benefits from the array of support services ServiceSource can offer. Indeed, a job at Precision Images is more than just a job—it is training. That training may be provided through donations and grants. While this training can be useful, mixing private-sector activities with training, transportation, and other services to people with disabilities may cause confusion of missions, and undermine market competition.

The operation of the ServiceSource network and its allied organizations may reflect the way nonprofit organizations are run and have little to do with contracting out as an important source of money and support. At least some of the complexity may be inherent in providing the range of services the ServiceSource Network offers to the disabled. It could be a product of a system that operates inefficiently. Perhaps the complexity of the ServiceSource system and its finances is related to its need to fundraise, win grants and government contracts, and persuade governments to facilitate such funding through legislation. Finally, some complexity may be related to and a consequence of ServiceSource’s move into the business of privatization.

While ServiceSource publicizes many of its affiliates, subsidiaries, and related organizations, locating other related organizations and understanding their relationships requires more research. Subsidiaries and closely related organizations include organizations located at the same address as ServiceSource Network and ServiceSource and in some cases, at the same telephone number. These include ServiceSource Foundation, the organizations’ fundraising arm;<sup>122</sup> EmploymentSource,

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120. 29 U.S.C. § 214(c)(1) (2000).

121. *Precision Images Division and Fairfax Imaging Receive Assistive Technology Awards from NISH, OUR PEOPLE WORK* (ServiceSource Network, Alexandria, Va.), Summer 2006, at 8, available at <http://www.ourpeoplework.org/files/ServicesourceSummer06.pdf>.

122. ServiceSource Network, ServiceSource Foundation, <http://servicesrcsub1.timberlakepublishing.com/content.asp?contentid=372> (last visited Apr. 18, 2008). Although not discussed in this Article, fundraising and support for fundraising through devices such as awards and awards banquets is a major focus of the ServiceSource affiliates. These activities provide publicity designed to appeal to donors and other supporters. The IRS mailroom privatization was highly publicized—indeed, to a degree that seems to far exceed the number of jobs created.

which provides employment services and outsourcing options to private and government agencies in North and South Carolina;<sup>123</sup> the Opportunity Center, Inc. (OCI), which provides services in Delaware; Community Thrift, Inc.;<sup>124</sup> the Laurie Mitchell Employment Center, Inc.;<sup>125</sup> and VaACCSES (the Virginia Association of Community Rehabilitation Programs), a lobbying and educational organization.<sup>126</sup> Another formal SSN subsidiary, Abilities, Inc. of Florida, also lists many subsidiary corporations on its IRS 990.<sup>127</sup> These subsidiary corporations are funded by the Department of Housing and Urban Development to help individuals with disabilities find rental properties.<sup>128</sup>

Most of ServiceSource's \$70 million in revenues is generated from public sources. Table 1, *infra*, shows that organizations related to ServiceSource derived between 98.17% and 100% of their support for 2005 from public sources.

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123. ServiceSource Network, Welcome to EmploymentSource, <http://servicesrcsub2.timberlakepublishing.com> (last visited Apr. 18, 2008).

124. Community Thrift, Inc. operates thrift stores that provide work opportunities in Manassas, Virginia and Fayetteville, North Carolina. EmploymentSource, Community Thrift of Fayetteville, <http://servicesrcsub2.timberlakepublishing.com/content.asp?contentid=368> (last visited Apr. 18, 2008); ServiceSource Network, Community Thrift of Manassas, <http://servicesrcsub1.timberlakepublishing.com/content.asp?contentid=373> (last visited Apr. 18, 2008).

125. The Laurie Mitchell Employment Center website lists the ServiceSource main address under its contact information. *Compare* Laurie Mitchell Employment Center, A Brief Intro, <http://www.lmec.org/Home.asp> (last visited Apr. 18, 2008) (listing its address as 6295 Edsall Road, Suite 175, Alexandria, Virginia 22312), *with* ServiceSource Network, Contact Us, <http://servicesrcsub1.timberlakepublishing.com/content.asp?contentid=389> (last visited Apr. 18, 2008) (listing its address as 6295 Edsall Road, Suite 175, Alexandria, Virginia 22312).

126. *See* VaACCSES, Vision Statement/Mission Statement, <http://www.vaaccses.org/html/about.htm> (follow "Vision Statement/Mission Statement" hyperlink) (last visited Apr. 18, 2008) (describing its activities as "develop[ing] effective relationships and influenc[ing] policy makers, funders and advocates through information, advocacy, education and training"); *see also* VaACCSES, Statement of Program Service Accomplishments (I.R.S. Form 990, Pt. III) (2005) (listing its primary exempt purpose as "educational"). VaACCSES claimed on its 2005 IRS filing that it spent \$10,207 on lobbying. VaACCSES, Statements About Activities (I.R.S. Form 990, Schedule A, pt. III, l. 1) (2005).

127. These subsidiaries include a number of separately incorporated organizations, including Homes for Independence, Inc. *See* Abilities, Inc. of Florida, Additional Information, pt. IV, l. 80 (I.R.S. Form 990, Statement 1) (2005).

128. *Id.*

**Table 1. Public Support of ServiceSource-Related Organizations<sup>129</sup>**

Organization	Percentage of Revenues from Public Support
Opportunity Center, Inc.	99.6989%
Abilities, Inc. of Florida	n/a
ServiceSource Employment Services, Inc.	99.973%
EmploymentSource	99.8935%
Homes for Independence, Inc.	n/a
ServiceSource	98.1737%
ServiceSource Foundation	100%
Abilities Rehabilitation Center Foundation	n/a
Community Thrift, Inc.	99.999%
Yesterday's Rose	n/a
VaACCSES	99.71%

The organizational complexity is recapitulated in the pay structure for ServiceSource Network officers and key employees. The data in Table 2, *infra*, show that pay for virtually all these high-level employees came from multiple sources. Half of these employees received pay from six sources. This complexity obviously pays off for the officers and key employees of ServiceSource, but it makes tracking the level and source of pay difficult.

Some may wonder whether the level of pay to the individuals and in total is appropriate. This answer is complicated by issues related to geographic location, size, and the business of the organization. What can be said, however, is that the highest pay (which includes pay, benefits, and expense accounts) was \$263,474 for the CEO, paid through six organizations. For fiscal year 2005, eight of the sixteen individuals listed in Table 2 received over \$150,000.

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129. The data in Table 1 are derived from each organization's I.R.S. Form 990 for 2005.

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**Table 2. Pay Structure for ServiceSource Network Officers and Key Employees<sup>130</sup>**

Officers and Key Employees	FY 2005 pay including benefits and expense accounts	Total Weekly Hours	ServiceSource Affiliates Paid By
Janet Samuelson	\$263,474	42	SS, ES, OCI, Abilities, Homes, SSES
Mark Hall	\$206,552	40	SS, ES, OCI, Abilities, Homes, SSES
David Hodge	\$202,541	37	SS, ES, OCI, Abilities, Homes, SSES
Bruce Patterson	\$186,765	40	SS, OCI
Bertha Ngenge	\$167,575	41	SS, ES, OCI, Abilities, Homes, SSES
William Sandonato	\$205,415	40+	SS, ES, OCI, Abilities, Homes, SSES
Jeff Ring	\$114,648	35	SS, ES, OCI, Abilities, Homes, SSES
Lisa Ward	\$114,895	48	SS, ES, OCI, Abilities, Homes, SSES
Thomas Chang	\$156,819	42	SS, ES, OCI, Abilities, Homes, SSES
Catherine Lloyd	\$121,525	40	OCI
Guy Klenke	\$179,353	40	SS, ES, Abilities, Homes, SSES
Alan Desrosier	\$85,529	40	SSES
Larry Crabtree	\$144,985	40	SS
Thomas Troeschel	\$143,581	40	SS
James Aynes	\$90,332	40	ES
Lori Kreisle	\$68,680	unknown	Homes

SS=ServiceSource; ES=EmploymentSource; OCI=Opportunity Center, Inc.; Abilities=Abilities Inc. of Florida; Homes=Homes for Independence, Inc.; SSES=ServiceSource Employment Services, Inc.

130. The figures are taken from the organizations' 2005 I.R.S. Form 990 for key officers. The Form 990 information does not necessarily disclose all remuneration for these individuals.

In addition to the officers listed on this table, a number of executive individuals also receive pay through the same organizations listed in Table 2. For example, lobbyist Karen Tefelski was paid \$94,178 in 2005 as an associate director of ServiceSource,<sup>131</sup> as well as \$83,475 as executive director of VaACCSES,<sup>132</sup> for a total of \$177,653.<sup>133</sup>

The IRS 990 and other publicly available documents do not explain why ServiceSource uses this complex structure nor whether it is a reasonable way to operate. Only research based on the more detailed accounts of each organization and other internal documents can determine whether this form of operation is an appropriate use of what in large part is funding derived from public sources.

### C. THE PRICE OF PRIVATIZATION AND LOW-WAGE WORK

While the officers and key employees do not receive outrageously high pay by today's private-sector standards, they do receive far greater compensation than many of those who work for the ServiceSource Network-related organizations. Those employees with disabilities, in particular, are certainly among the low paid.

Table 3, *infra*, compares employee and officer pay. The column "Average Pay per Employee" assumes that Officer Pay is not included in Total Employee Pay. If that assumption is in-

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131. See ServiceSource, Inc., Compensation of the Five Highest Paid Employees Other Than Officers, Directors, and Trustees (I.R.S. Form 990, Schedule A, pt. I) (2006) (listing Karen Tefelski as Association Director, compensated at \$94,178).

132. See VaACCSES, List of Current Officers, Directors, Trustees, and Key Employees (I.R.S. Form 990, pt. V-A) (2006) (listing Karen Tefelski as Executive Director, compensated at \$83,475).

133. Tefelski is also listed as a registered lobbyist on behalf of VaACCSES. See Virginia Association of Community Rehabilitation Programs, Donors: Details of Lobbying Relationship, [http://vpap.org/donors/lobby\\_details.cfm?key=ORP000210590&inkey=INP000302912](http://vpap.org/donors/lobby_details.cfm?key=ORP000210590&inkey=INP000302912) (last visited Apr. 18, 2008). The relationship between ServiceSource and VaACCSES apparently predated Tefelski's hire. On its 2005 Form 990, VaACCSES lists the Executive Director as simply "Service Source," compensated at \$93,229. ServiceSource, Inc., List of Current Officers, Directors, Trustees, and Key Employees (I.R.S. Form 990, pt. V) (2005). When asked whether any "officers, directors, trustees or key employees . . . or highest compensated employees . . . or highest compensated professional and other independent contractors . . . receive compensation from any other organizations, whether tax exempt or taxable, that are related to this organization through common supervision or common control," however, VaACCSES answered "no." VaACCSES, Current Officers, Directors, Trustees and Key Employees (I.R.S. Form 990, Part V-A, Line 75(c)) (2006).

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correct, then average pay would be lower. For example, in the case of OCI, average pay would drop by about \$2000 to \$9795. Another way to assess pay levels is to consider total officer pay compared to the total employee pay. In some cases, officer pay exceeds total employee pay (Abilities Rehabilitation Center Foundation), while in others there is either no officer pay (Community Thrift and Yesterday's Rose) or it comprises only five percent of total employee pay (ServiceSource).

**Table 3. Comparison of Employee and Officer Pay<sup>134</sup>**

<b>Employer</b>	<b>Total Employees</b>	<b>Total Employee Pay</b>	<b>Average Pay per Employee</b>	<b>Total Officer Pay</b>
OCI	165	\$1,958,012	\$11,866.73	\$341,786
Abilities	150	\$3,720,288	\$24,801.92	\$303,335
SSES	219	\$3,577,694	\$16,336.50	\$197,309
Employment Source	278	\$3,087,293	\$11,105.37	\$278,249
Homes	5	\$53,387	\$10,677.40	\$99,396
ServiceSource	999	\$19,730,930	\$19,750.68	\$1,053,676
SS Foundation	0	0.00	0.00	0.00
Abilities Rehabilitation Center Foundation	3	\$58,845	\$19,615.00	\$124,235
Community Thrift	10	\$158,076	\$15,807.60	0.00
Yesterday's Rose	12	\$163,042	\$13,586.83	0.00

The average pay per employee does not reveal the range of pay nor what jobs the pay is for. In order for ServiceSource to provide services for its constituents, it must employ people with a wide range of skills. To attract those skilled workers it will

134. As with the officer pay, the information on pay and number of employees in Table 3 is derived from information reported on the organizations' tax returns for 2005, the most recent forms available.

have to pay more than the average pay displayed in Table 3. Recent job postings for the DC Metro Region illustrate the range of jobs ServiceSource hires for: Resource Room Instructor, Assistant Manager I & II, Facilities Engineer, Employment Development Specialist, Compensation & Benefits Manager, IT Network Administrator, Community Integration Specialist I, Community Rehabilitation Specialist I, and Van Drivers.<sup>135</sup>

In the same announcement were job listings for “Set-Aside Positions,” or positions open only to individuals with a documented disability.<sup>136</sup> Those positions include Dining Facility Attendants and Mess Attendants at the FBI Academy in Quantico, Virginia.<sup>137</sup> The mess attendant salary is posted as “[a]round \$9.01 per hour.”<sup>138</sup> For a full-time job, that would be an annual salary of about \$18,000. However, as the next Section shows, in the case of the IRS mailroom work, many of the workers did not have full-time jobs.

In short, working for ServiceSource can pay, but of ServiceSource’s \$70 million in revenues, almost all paid for by the taxpayers, very little seems to provide self-supporting, well-paying jobs for those ServiceSource exists to serve. If that is correct, it is a high price to pay for low-wage work. This is, of course, a preliminary judgment made on the basis only of publicly available documents. An examination of other materials might lead to a different conclusion. However, if it is correct that this money creates low-wage work of such poor quality that those employed cannot be self-supporting, then we need to ask whether this is the best way to promote the interests of people with disabilities. Moreover, if these funds are used to destroy and degrade existing jobs that did allow the workers to be self-supporting, then this does not seem to be an appropriate course of action or use of public money.

#### IV. THE NONPROFIT CONTRACTOR THAT WAS GIVEN THE IRS MAILROOM WORK

A network of nonprofit organizations that provides services to people with disabilities, with \$70 million in annual revenues, should be counted as a success. However, the elements of Ser-

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135. ServiceSource Network, DC Metro Region, <http://www.ourpeoplework.org/content.asp?contentid=383> (last visited Apr. 18, 2008).

136. *Id.*

137. *See id.*

138. *Id.*

viceSource's success are not simply hard work and quality of service. In addition, its achievements include costs.

#### A. AN UNQUALIFIED SUCCESS

ServiceSource describes itself as a small nonprofit organization that employs about one thousand people with disabilities and specializes in “government contracts to operate mail centers, provide food services to our Nation’s military and administrative services.”<sup>139</sup> Of those one thousand people, ServiceSource employs “approximately 100 people with disabilities . . . [to work] at more than 30 IRS mailrooms across the country.”<sup>140</sup> ServiceSource has certainly been successful in getting contracts to perform this work. Champions of privatization, however, usually promise higher quality work at lower cost. If a contractor does not meet both of these criteria, then the public is spending more money than it should. How successful has ServiceSource been in meeting these criteria? ServiceSource needed eighteen months to reach the point where it could manage work done by fewer than eighty IRS employees. This time lag suggests that no money was saved during that period. Despite this, ServiceSource continued to successfully acquire contracts to operate other federal mailrooms.

In June 2007, ServiceSource attributed its success not to its own merits, but rather to the support provided by the JWOD program. “Since 1981, the AbilityOne [JWOD] program has played a vital role in providing ServiceSource Network employees with challenging and rewarding employment opportunities.”<sup>141</sup> In 2006, ServiceSource said that it was thanks to JWOD that it operated seventy mail centers for sixteen federal agencies and employed “over 175 people with disabilities who

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139. *ServiceSource Recognizes Monumental Achievers and Community Partners at Annual Meeting*, OUR PEOPLE WORK (ServiceSource Network, Alexandria, Va.), Winter 2007, at 8, available at [http://www.ourpeoplework.org/files/ss\\_winter07.pdf](http://www.ourpeoplework.org/files/ss_winter07.pdf).

140. *Id.* As of fiscal year 2006, ServiceSource Network employed eighty-eight workers in mail service, that is, seventeen percent of its total workers with disabilities. SERVICESOURCE NETWORK, *supra* note 107, at 2.

141. Press Release, ServiceSource Network, ServiceSource Network Employees Visit Capitol Hill (June 11, 2007), available at [http://servicesrcsub1.timberlakepublishing.com/files/NISH\\_Grassroots07.pdf](http://servicesrcsub1.timberlakepublishing.com/files/NISH_Grassroots07.pdf). As of 2006, ServiceSource workers were employed in government mailrooms at the Environmental Protection Agency’s Research and Distribution Departments and at its Data Acquisition and Handling System (DAHS Mail Center), and the Department of Transportation. SERVICESOURCE, *supra* note 76, at 15.

process over 75 million pieces of mail per year for the federal government.”<sup>142</sup>

As discussed earlier, the JWOD program, now referred to as AbilityOne, is a part of the government, created under the Javits-Wagner-O’Day (JWOD) Act.<sup>143</sup> Its purpose is to “generate employment and training opportunities for people who are blind or have other severe disabilities . . . [by providing] a major and stable source of employment-generating contracts for over 600 nonprofit agencies.”<sup>144</sup> Two nonprofit organizations, NIB and NISH, work with JWOD to distribute “government orders among nonprofit agencies employing persons who are blind or have other severe disabilities . . . , by working closely with government contracting specialists and local nonprofit agencies to match government requirements with the capabilities of the agencies.”<sup>145</sup> NIB and NISH are independent private organizations, not federal entities, but they play a major role in awarding federal contracts. Each of the 626 community rehabilitation programs that participated in the JWOD Program at the end of fiscal year 1997 is affiliated with either NIB or NISH.<sup>146</sup>

Without NISH, NIB, and the JWOD program, a small nonprofit organization operating mainly in the Virginia area and only on the East Coast probably could not have secured a nationwide federal contract to operate something as sensitive and critical to the national interest as the IRS mailrooms. In addition, winning this work required support in order to find subcontractors outside the Washington, D.C. area.<sup>147</sup> According to a NISH report on its operations in fiscal year 2004, ServiceSource directly managed only one IRS Mail Facility—a facility near ServiceSource’s headquarters in Virginia.<sup>148</sup> ServiceSource

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142. *ServiceSource Selected to Serve as NISH Mail Center Operations Center of Excellence*, OUR PEOPLE WORK (ServiceSource Network, Alexandria, Va.), Summer 2006, at 15, available at <http://www.ourpeoplework.org/files/ServiceSourceSummer06.pdf>.

143. See *supra* notes 12–13 and accompanying text.

144. Beverly Milkman, *The Javits-Wagner-O’Day Program*, AM. REHABILITATION, Spring 1998, at 10, 10.

145. *Id.* at 11–12.

146. *Id.* at 13.

147. NATIONAL INDUSTRIES FOR THE SEVERELY HANDICAPPED [NISH], 2004 ANNUAL REPORT 2–3, 19 (2004), available at [http://www.nish.org/NISH/Doc/0/TP23HRVQGP6KJEG2QO4QGRIC71/AR\\_FINAL.pdf](http://www.nish.org/NISH/Doc/0/TP23HRVQGP6KJEG2QO4QGRIC71/AR_FINAL.pdf) (describing NISH’s role in securing IRS mailroom contracts for NISH- and NIB-associated nonprofit agencies).

148. *Id.* at 19.

subcontracted management of the rest of the IRS's thirty-three mailrooms to twenty-eight other nonprofit organizations spread across twenty-four states.<sup>149</sup> These mailroom subcontracts provided ninety-one full-time equivalent jobs for people who were blind or had other severe disabilities. NISH also reported that at the end of the 2004 fiscal year, only thirteen of the thirty-three IRS mailrooms were "operational."<sup>150</sup>

In other words, identifying the costs of contracting out federal work to nonprofit agencies affiliated with NISH or NIB means including the costs of the JWOD program and the public support provided to NISH and NIB.

#### B. THE COSTS OF UNQUALIFIED PRIVATIZATION SUCCESS

The 2004 NISH report implies that the work seventy-eight IRS mailroom employees working in sites across the country had performed before privatization, became ninety-one full-time equivalent jobs following privatization. ServiceSource apparently completed the labor of these ninety-one full-time equivalent jobs using about 197 employees with disabilities, in addition to other workers. At this time, ServiceSource was operating only one mailroom and ServiceSource and its subcontractors were only operating thirteen of the twenty-eight IRS mailrooms.<sup>151</sup> This increase in full-time equivalents and workers employed suggests that the real cost per job to have mailroom work performed by contractors is greater following mailroom privatization. In addition, using 197 people to perform ninety-one full-time equivalent jobs meant that the average worker was working about eighteen hours a week and thus unlikely to be able to be self-supporting.

The costs of subcontracting must also include higher costs of supervision. First, there are more employees to supervise. Second, some ServiceSource workers who perform mailroom work come from its "Group Supported Employment" program which has a supervisor to "consumer" ratio of five to eight.<sup>152</sup> In addition, ServiceSource provided transportation to work sites, as well as counseling, program planning, community integration, and training in using public transportation.<sup>153</sup> and seems likely to have provided at least some of these services to a far

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149. *Id.*

150. *Id.*

151. *Id.* at 2–3, 19.

152. SERVICESOURCE, *supra* note 76, at 12.

153. *Id.*

greater number of workers needed to perform the mailroom jobs. All this information concerning staffing and including the high level of public revenue ServiceSource and its related organizations received are costs that can be translated into taxpayer dollars that ServiceSource has received as grants and other forms of government subsidies.

To the costs identified so far, we must also add the impact of inefficient workflow created by serial outsourcing, the complexity of this new organizational structure, and the problem of ensuring security. It is easy to dismiss the almost invisible work done in an organization's mailroom as low level and unskilled. However, even in the day of electronic communication, mailroom efficiency is critical to the mission of the agency. In the case of the IRS, it is likely to involve the receipt of sensitive taxpayer documents and information which must be kept secure.

Inefficient workflow problems appear to have plagued the post-privatization IRS mailroom. In 2006, NTEU President Colleen Kelly testified that "employees have witnessed abysmal mail service by the contractor. Mail has been misdirected to incorrect PODs, mail is not delivered in a timely fashion, and IRS employees are expected to do the work for which the vendor has a contractual obligation."<sup>154</sup> Kelly contended that these failures deserved investigation and action: "This is certainly an area where the IRS should further explore the true cost to the U.S. taxpayer in using an outside contractor and consider returning the mailroom work to IRS employees."<sup>155</sup>

Inefficiency is not unusual when work is contracted out. The sorts of problems encountered during the privatization of the IRS mailrooms and their attendant costs are the same sorts of problems that regularly arise from contracting out work.<sup>156</sup> A Deloitte Consulting study implies that contracting out the mailroom work places an obligation on the IRS to perform over-

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154. *IRS Oversight Board Public Forum 6* (Feb. 8, 2006) (testimony of Colleen M. Kelley, President, National Treasury Employees Union), available at <http://www.treas.gov/irsob/meetings/2-08-06/statement-NTEU.pdf>.

155. *Id.*

156. See DELOITTE CONSULTING, *CALLING A CHANGE IN THE OUTSOURCING MARKET 2* (2005), available at [http://www.deloitte.com/dtt/cda/doc/content/us\\_outsourcing\\_callingachange.pdf](http://www.deloitte.com/dtt/cda/doc/content/us_outsourcing_callingachange.pdf) ("The world's largest companies have engaged in outsourcing for a variety of reasons . . . . However, contrary to the optimistic portrayal of outsourcing by vendors and the marketplace, outsourcing is an extraordinarily complex process and the anticipated benefits often fail to materialize.").

sight to ensure the contractors have not been shirking their duties. That oversight must be nationwide, and it must now penetrate through multiple levels of contracting. That oversight, too, must be included in an accounting of costs.

### CONCLUSION

The Government Accountability Office recently released two reports that found contractors for the Department of Homeland Security were performing work that, by law, is inherently governmental and only to be performed by federal employees.<sup>157</sup> The increasing use of privatization—a process that was supposed to be concerned with more mundane issues such as improving performance and lowering costs—means that this country is engaged in a shift of government and governance. This transformation has gone on with little public notice paid to it and with no public demand that claims for improved service and cost savings be verified. The time is long past for engaging in a full and fair accounting of the costs involved in privatization. This Article is a first step in identifying many of the costs that are likely to be incurred in connection with federal privatization and to a greater or lesser extent with privatization at the state or local levels. Those previously ignored costs include the expense of a complex system set up to promote the process of privatization and the costs of responding to the consequences of privatization, among many others. For years we have made no effort to find the answer to whether privatization results in savings or whether privatization costs outweigh its benefits.

The privatization of the IRS mailroom casts light on issues often left unexplored because understanding them seems too complex and the connections among them and to us seem unclear. The story of how seventy-eight public employees lost their jobs and its aftermath provides a lens through which to understand the complexities of privatization and its impact on us. The story of the IRS mailroom privatization reveals a very expensive process that seems to have done no more than replace workers with disabilities with other workers with disabil-

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157. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-142T, DEPARTMENT OF HOMELAND SECURITY: RISK ASSESSMENT AND ENHANCED OVERSIGHT NEEDED TO MANAGE RELIANCE ON CONTRACTORS 11 (2007); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-990, DEPARTMENT OF HOMELAND SECURITY: IMPROVED ASSESSMENT AND OVERSIGHT NEEDED TO MANAGE RISK OF CONTRACTING FOR SELECTED SERVICES 3-4 (2007).

ities and, in the process, replace low-wage jobs with benefits and protections with jobs that are far worse.

Privatization was originally intended to promote quality and lower cost by bringing the discipline of competition and market pressure to bear.<sup>158</sup> These forces are absent in the case of a nonprofit organization such as ServiceSource. There was no competition to get the work, and, as a nonprofit organization, ServiceSource is so highly subsidized that it has an unfair advantage when competing with truly private companies. With no market and no real competition, the forces that are supposed to drive accountability and lead to better performance at less cost are absent. As a result, in both the private and public sector, ServiceSource and similar contractors become not a driver for better performance, but a force to drive down wages.

It is important, however, not to lose sight of the fact that nonprofit organizations such as ServiceSource are created in response to real problems. Taking away ServiceSource's public subsidies would leave it not only unable to compete for these jobs, but unable to operate programs intended to address the problems facing people with disabilities.

Replacing the complex and expensive system we now have that gives nonprofit organizations an incentive to become an employer-contractor with a targeted system would also address the perverse incentives nonprofit organizations now have not to find mainstream work for their clients. In its 2005 report, the Senate Committee on Health, Education, Labor & Pensions stated that "[t]here are no financial incentives to mainstream persons with disabilities."<sup>159</sup> Clients of nonprofit organizations such as ServiceSource are better served by being employed in mainstream jobs, jobs such as those in the IRS mailrooms before privatization. While not the focus of this study, it seems worth considering whether government subsidies aimed at moving workers into mainstream jobs might play a positive

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158. See Dannin, *supra* note 14, at 117–18.

159. REPORT OF THE CHAIRMAN ON FEDERAL PROGRAMS FOR EMPLOYMENT OF PERSONS WITH DISABILITIES, S. COMM. ON HEALTH, EDUCATION, LABOR & PENSIONS, OPPORTUNITIES FOR TOO FEW? OVERSIGHT OF FEDERAL EMPLOYMENT PROGRAMS FOR PERSONS WITH DISABILITIES 11 (2005), available at [http://help.senate.gov/Hearings/2005\\_10\\_20/O&I\\_pdf.pdf](http://help.senate.gov/Hearings/2005_10_20/O&I_pdf.pdf). It also found that some nonprofit executives were exploiting JWOD contracts for personal financial gain. It found "numerous examples of excessive executive compensation, lavish perquisites, conflicts of interest and self-dealing." *Id.* The report concluded that JWOD and related programs have failed to achieve their stated missions. See *id.* at 12–13.

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role, but not as they are now structured. Perhaps subsidies would be more effective if they were targeted at encouraging employers—public and private—to hire people with disabilities, and directed towards the costs of providing workplace accommodations. Such targeted subsidies would keep employer labor costs the same whether a worker had disabilities or not, and would allow job candidates to compete on a level playing field.

Each of these issues—privatization, the role of nonprofit organizations, and the need to support the integration of people with disabilities into meaningful work—are complex and too long ignored. It is necessary to take a hard but fair look at each of them, amass meaningful data, and then assess how best we should proceed.