

# LETTING FEDERAL UNIONS PROTEST IMPROPER CONTRACTING-OUT

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## INTRODUCTION

In recent years, the federal government aggressively moved to contract out work previously performed by its own employees.<sup>1</sup> Although an elaborate set of substantive rules governs whether to contract out,<sup>2</sup> when violations of these rules allegedly occur,<sup>3</sup> a set of outdated procedural doctrines have often insulated<sup>4</sup> potential violations from challenge

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<sup>1</sup> Federal civil service employment shrank from 2.17 million in 1990 to 1.80 million in 1999, with contracting out a significant reason. *A Decade of Shrinking* (table), in Cathy Newman, *Expecting a Government Expansion*, WASH. POST, Sept. 28, 2000, at A29. "By FY 2002, DOD plans to have studied 150,000 more positions and predicts that competing these positions will save \$6,000,000,000 by FY 2002." Stephen Sorett & David R. White, *The Problem of the Level Playing Field and Idle Facilities And Labor in A-76 Competitions*, 34 *PROCUREMENT LAW*, 10, 10 (Spring 1999).

<sup>2</sup> See discussion *infra* Part II.

<sup>3</sup> A particularly interesting academic treatment is by Professor Render, who concludes about one combination base closing and contracting-out "that high ranking Navy officials are perfectly willing to deal behind the backs of lower level employees and to violate the law to reach a desired result." Edwin R. Render, *The Privatization of a Military Installation: A Misapplication of the Base Closure and Realignment Act*, 44 *NAVAL L. REV.* 245, 280 (1997).

<sup>4</sup> See, e.g., *Nat'l Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989). For a comment on an important, but unpublished case which did allow a union challenge, see Jayna Richardson, Comment, *Outsourcing & OMB Circular A-76: Sixth Circuit Opens the*

by the natural protesters, the federal employee labor unions.<sup>5</sup> In 2000-2001, a pair of judicial and General Accounting Office (GAO) rulings blocked the latest litigation efforts by an employee union to protest improper contracting-out.<sup>6</sup> This issue takes on special importance, as the Bush Administration accelerates the contracting-out practices of the recent past following the comparative lull of the election year.<sup>7</sup>

The intrinsic merit of contracting-out has become increasingly controversial. As some of the early enthusiasm for the outsourcing “revolution”<sup>8</sup> has worn off, critics argue that “the ostensible cost-savings achieved by privatization turn out to be merely cost-shifting.”<sup>9</sup> Better results may come from enterprise, innovation, and introduction of technological advances within government rather than simply allowing private contractors to juggle the books and reduce employee wages and benefits. As this debate continues to influence the substantive rules regarding contracting-out, the point of particular legal interest is whether procedural barriers will prevent, or allow, effective invocation of those rules.

In the process of authoring the current casebook on government contract law, I was initially surprised to find what seemed to be this outdated standing barrier.<sup>10</sup> However, beneath the abstract analysis, in this as in other contexts of standing, the divisions among the judges reflect broad ideological visions — with some judges keen to bar the

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*Door to Federal Employee Challenges of Agency Determinations*, 28 PUB. CONT. L.J. 203 (1999).

<sup>5</sup> For background about federal employee labor unions, see Richard T. Dawson & W. Kirk Underwood, *Overview of Labor-Management Relations in the Air Force*, 35 A.F. L. REV. 1 (1991); Michael R. McMillion, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled*, 127 MIL. L. REV. 169 (1990).

<sup>6</sup> *American Federation of Government Employees v. United States*, 46 Fed. Cl. 586 (May 10, 2000), *aff'd*, 2001 WL 826617 (Fed. Cir. July 23, 2001); *Matter of American Federation of Government Employees*, B-282904.2 (June 7, 2000).

<sup>7</sup> *Contracting Out: OMB Says Bush Budget Will Emphasize A-76, Improved Government Performance*, Fed. Cont. Rep. (BNA), Feb. 27, 2001, at 228. For the author’s treatment of the range of new developments, see Charles Tiefer, *Giving Away the Store: How Much More Can the New Administration Surrender to Contractors?*, LEGAL TIMES, Mar. 5, 2001, at 36. See Newman, *supra* note 1 (both presidential campaigns in 2000 made promises about future policies for holding down the size of the federal work force).

<sup>8</sup> Mary E. Harney, *The Quiet Revolution: Downsizing, Outsourcing, and Best Value*, 158 MIL. L. REV. 48 (1998).

<sup>9</sup> See, e.g., ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 358 (1999 ed.) (and sources cited). A series of GAO reports has cast doubt about the savings from contracting-out. See, e.g., GENERAL ACCOUNTING OFFICE, *OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BY DEFENSE SCIENCE BOARD’S PROJECTIONS ARE OVERSTATED*, REPORT NO. GAO/NSIAD-98-48 (1997).

<sup>10</sup> For a general treatment of the procedures for protesting decisions by the government in the course of procurement, see CHARLES TIEFER & WILLIAM A. SHOOK, *GOVERNMENT CONTRACT LAW* 496-524 (1999), see also CHARLES TIEFER & WILLIAM A. SHOOK, *GOVERNMENT CONTRACT LAW* 7-58 (Supp. 2000).

courthouse doors to federal unions however meritorious their substantive contentions, and others more willing to open those doors.<sup>11</sup> They recognize a fundamental issue about the legal nature of government procurement: whether the tribunals that are open to contractors' protests will hear the other side, or whether this approach to marginalizing federal unions will stand.<sup>12</sup>

This article summarizes the contracting-out laws and precedents, focusing on the recent 2000-2001 rulings. It then suggests approaches by which each of the three branches — the Executive, Congress, or the courts — could advance beyond outdated procedural barriers and allow employee union protests.

## I. THE BACKGROUND OF THE 2000-2001 RULINGS

Federal procuring agencies historically follow a number of systematic rules to decide whether and how to contract out for activities previously performed "in-house," i.e., by government employees. The Bureau of the Budget published Circular A-76 in 1966 to distinguish which activities might be contracted-out without violating the national interest, and, as to those, to require cost comparisons for determining whether contracting-out would generate savings.<sup>13</sup> Since then, Congress has enacted various provisions, often as part of annual defense authorization acts, regarding contracting-out, and the Office of Management and Budget (OMB) has extensively revised or supplemented A-76 in 1979, 1983, and 1996.<sup>14</sup>

Of particular interest to lawyers, both the courts and the GAO often rule, in protests by disappointed bidders, about alleged violations of rules during the contracting-out process.<sup>15</sup> The statutory restrictions and the cost comparisons for whether to contract out can be complex and contro-

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<sup>11</sup> See generally Richard J. Pierce, Jr., *Is Standing Law or Politics*, 77 N.C. L. REV. 1741 (1999) (discussing political use of standing doctrine).

<sup>12</sup> See generally *Dep't of the Treasury v. Fed. Labor Relations Auth.*, 494 U.S. 922, 937 (1990) (Brennan and Marshall, JJ., dissenting from majority decision that contracting out was not a mandatory subject of bargaining) ("I take issue with the Court's expansive view of the management rights provision as abrogating any union rights vis-à-vis decisions such as contracting out.")

<sup>13</sup> The history of A-76 is discussed in *Diebold v. United States*, 947 F.2d 787, 798-99 n.8 (6th Cir. 1992).

<sup>14</sup> See *id.* at 800-01; Gregory E. Lang, *Best Value Source Selection in the A-76 Process*, 43 A.F.L. REV. 239 (1997).

<sup>15</sup> As to the General Accounting Office, see, e.g., *Matter of BMAR & Assoc.*, B-281,664, 1999 WL 170133 (Comp. Gen. 1999); *Matter of DZS/Baker LLC*, B-281,224 et al., 1999 WL 46706 (Comp. Gen. 1999); *Matter of Omni Corp.*, B-281,082, 1998 WL 911968 (Comp. Gen. 1998). As to courts, compare *CC Distributors v. United States*, 883 F.2d 146 (D.C. Cir. 1989) (standing) with *Techniarts Engineering v. United States*, 51 F.3d 301, 303 n.1 (D.C. Cir. 1995) (assuming that claims grounded in A-76 are subject to review while noting doubts, and rejecting the protest on the merits).

versial to apply, and alleged violations of them provide grist for protests. Pursuant to the relevant statutes, Circular A-76 and its Supplemental Handbook the government conducts a public-private competition, to see whether the performance of the activity by public employees is more cost-effective than performance by private contractors. Under current procedure, the heart of the public-private competition consists of the procuring agency estimating what a "Most Efficient Organization" would cost to perform the activity in-house.<sup>16</sup>

In other words, the public side of the competition consists not so much of measuring just what the activity costs now, but rather what it would cost with reforms.<sup>17</sup> Many of these reforms may well involve a proposal by a federal employee union for what its members could, and would, do more efficiently or cheaply in order to preserve their in-house jobs. The procuring agency then evaluates the union proposal in comparison with contractor proposals. From this comparison the procuring agency determines which proposal will provide the "best value" to the government.<sup>18</sup>

Both sides — the contractors, and the federal employee union — often complain of disputable points in that cost comparison. The contractors often contend that the agency fails, in making that comparison, properly to weigh how costly it is to continue the activity with federal employees.<sup>19</sup> By the same token, however, federal employee unions demonstrating that the work can more efficiently continue being done in-house often dispute the contractors' inflated claims of the potential savings from contracting-out.<sup>20</sup> This is particularly so in recent years, as the Defense Department has contracted-out vigorously the activities of the department's civilian employees, such as depot maintenance and equipment repair. Employees and their unions contend that the upper-level managers in the procuring agency have multiple reasons to accept contractors' inflated over-estimates of the benefits of contracting-out the lower-level jobs because (1) the upper-level managers themselves expect after leaving the government to work for such contractors, (2) union-economizing proposals can involve streamlining at the upper levels that creates conflict within the procuring agency, and (3) they need to meet

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<sup>16</sup> See OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76 REVISED SUPPLEMENTAL HANDBOOK (March 1996).

<sup>17</sup> "Agencies are encouraged to seek their Most Efficient Organization (MEO), without penalty of historical inefficiencies." CIRCULAR No. A-76, *supra* note 16, chapter 2, section A.4.

<sup>18</sup> "Unions play a major role in the cost comparisons." Harney, *supra* note 8, at 91-92.

<sup>19</sup> William A. Roberts III, Phillip H. Harrington, William S. Lieth, & Janet L. Eichers, *Unlevel Playing Field: Contracting Competition Against the Government Might Not Be Fully Fair*, LEGAL TIMES, March 5, 2001, at 32.

<sup>20</sup> *Federal Managers Urge Moratorium on Downsizing, Contracting Out*, Fed Cont. Rep. (BNA), Feb. 15, 2000.

the Administration's ambitious goals for shrinking the federal government's official in-house personnel numbers regardless of whether this involves actual cost savings.<sup>21</sup>

Procedurally, when it comes to presenting the legal contentions to a neutral tribunal after the agency finishes its comparison, contractors have had little difficulty in getting into protest tribunals such as the GAO.<sup>22</sup> Additionally, contractors have often successfully raised their contentions in federal court.<sup>23</sup> By contrast, two major rulings in 2000 continue to frustrate federal employee unions.

#### A. THE FEDERAL COURT DECISIONS

The federal courts split on whether federal employee unions have standing to sue to protest contracting-out decisions. Opposing decisions from the D.C. Circuit in 1989, and the Sixth Circuit in 1991, illustrate the primary division as it persists into the new millennium, along with some other notable decisions.<sup>24</sup> Under a divided panel ruling by the D.C. Circuit of *National Federation of Federal Employees v. Cheney*,<sup>25</sup> a federal employee union was kept from protesting an award to a private contractor.<sup>26</sup> In deciding that the NFFE lacked standing, the majority stressed the prudential "zone of interest" requirement.<sup>27</sup> The court noted that to have standing under the Administrative Procedure Act (APA)<sup>28</sup> the interests of aggrieved parties must fall within the "zone of interest" of an applicable statute.<sup>29</sup> Since OMB Circular A-76 itself is not a statute, it could not provide the relevant zone of interest.<sup>30</sup> Looking to the two statutes that authorized A-76, the majority concluded that the federal em-

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<sup>21</sup> For an example of these charges in a particular context, see Render, *supra* note 3. For a discussion of the contention that the Administration's thrust is to shrink the official personnel size regardless of the ultimate lack of true savings from contracting-out, see Newman, *supra* note 1.

<sup>22</sup> See, e.g., Matter of Aberdeen Technical Serv., 2000 WL 239067 (Comp.Gen. Feb. 22, 2000), and GAO decisions cited therein.

<sup>23</sup> See *supra* notes 8-14.

<sup>24</sup> Nat'l Fed'n of Gov't Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989); Diebold v. United States, 947 F.2d 787 (6th Cir. 1991). Other notable examples of this split include: Am. Fed'n of Gov't Employees, Local 2017 v. Brown, 680 F.2d 722 (11th Cir. 1982) (holding a contracting-out not subject to judicial review); Int'l Ass'n. of Firefighters, Local 5-0100 v. United States Dep't of Navy, 536 F.Supp. 1254 (D.R.I. 1982) (court had jurisdiction over union challenge to contracting-out bid resolicitation).

<sup>25</sup> Nat'l Fed. of Fed. Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989).

<sup>26</sup> See *Cheney*, 883 F.2d at 1039.

<sup>27</sup> See *id.* at 1042.

<sup>28</sup> 5 U.S.C. § 701 et seq.

<sup>29</sup> See *id.* (Congress gave only those within the "zone of interest," not to the public at large, the right to invoke the statute for purposes of standing.)

<sup>30</sup> See *id.* at 1043.

ployee union did not have standing because its interest was adverse to the purposes of the acts.<sup>31</sup>

This case had a strong dissenting opinion by Judge Mikva, however, which pointed out that the section of the APA upon which the union attempted to rely, section 702, was intended to broaden the field of plaintiffs who had standing to bring claims against administrative agencies.<sup>32</sup> Thus, this was the first instance in which the D. C. Circuit had denied standing under that section, so that the majority was not so much preserving old barriers to suit, as reviving them after their 1970s statutory repeal.<sup>33</sup> Judge Mikva argued that the majority's opinion contradicts Congress's intent by removing an entire class of important cases from judicial review, even though the statutory violations inflict direct economic injury on the would-be plaintiffs.<sup>34</sup>

By contrast, the Sixth Circuit in the 1991 decision, *Diebold v. United States*,<sup>35</sup> held that the government decision to contract out the operation of dining halls at Fort Knox was subject to review upon protest by the federal employees who lost the work.<sup>36</sup> The court held that there is sufficient law in OMB Circular A-76 and its Supplement to justify standing to sue.<sup>37</sup> Further, the court found that the provisions of OMB Circular A-76 are incorporated by reference into the Defense Department's own regulations.<sup>38</sup> The court reasoned that the standards for de-

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<sup>31</sup> *See id.* The court considers the Budget and Accounting Act of 1921 and finds that nowhere in the statute or its legislative history did Congress contemplate federal employees or their unions as parties that would challenge agencies that disregard the law. *See id.* at 1044. The court concluded that, in fact, the Budget and Accounting Act assumed that some federal employees would lose their government jobs in fulfillment of the Act's purpose. *See id.* at 1046. The court also looked at the Office of Federal Procurement Policy Act Amendments of 1979 and found "nothing to suggest a Congressional purpose more than marginally related to the interests of federal employees *vis-à-vis* procurement policy." *Id.* at 1049.

<sup>32</sup> *See id.* at 1054 (Mikva, C.J., dissenting).

<sup>33</sup> *See id.* at 1054-55. The Supreme Court, according to Judge Mikva, disapproved of a stringent standing test in *Clarke v. Securities Industry Association*, 479 U.S. 388, 400 n. 15 (1987). *See id.* at 1054. Additionally, Judge Mikva finds that the Supreme Court has continually explained that "courts are to welcome those pursuing grievances under the APA." *Id.*

<sup>34</sup> *See id.*

<sup>35</sup> 947 F.2d 787 (6th Cir. 1991).

<sup>36</sup> *See Diebold*, 947 F.2d at 789.

<sup>37</sup> *See id.* at 790. According to the Sixth Circuit, the General Accounting Office (GAO) and Congress have both approved disappointed bidder cases founded on OMB Circular A-76. *See id.* Additionally, since the promulgation of Circular A-76, supplements were added making the cost comparison process in the Circular mandatory. *See id.*

<sup>38</sup> *See id.* at 794.

termining what constitutes a sufficient source of law to allow standing have been broadening<sup>39</sup> over the last two decades.<sup>40</sup>

In an unpublished 1996 decision, the Sixth Circuit reiterated this view in *National Air Traffic Controllers Association v. Pena*.<sup>41</sup> It maintained that employee unions could challenge contracting-out decisions, provided the challenge was based on statutory grounds.<sup>42</sup> On remand the employees argued that the loss of their government jobs was a sufficient injury to establish standing, and the trial court agreed.<sup>43</sup> Since the individual employees met the constitutional minimum of injury-in-fact, and the prudential requirement of coming within the statutory “zone of interests,” the trial court granted standing to the union.<sup>44</sup> The Seventh Circuit decision in *American Federation of Government Employees v. Cohen*<sup>45</sup> reflected some of the complexity of the division. The court held that a federal employee union had standing to raise one procurement act but not others in a protest as to contracting out of work at Air Force bases, splitting the difference between the Sixth and D.C. Circuit decisions.

## B. THE GAO DECISIONS

Historically, the GAO has consistently heard cases by disappointed bidders about contracting-out legal violations. An example was *In re RCA Service Company*<sup>46</sup>, where a private contractor sued because the Department of the Army canceled a request for proposals (RFP) and kept RCA from seeking the contract.<sup>47</sup> When the Competition in Contracting

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<sup>39</sup> The court noted that prior precedents reached the opposite conclusion, but explained that they were decided under a previous version of A-76 with much narrower application. *See id.* at 807-09.

<sup>40</sup> *See id.* at 799-801. Like the D. C. Circuit panel, this panel also split, this time with the dissenter echoing the majority in the D.C. Circuit, saying unions lack standing. *See id.* at 811 (Wellford, Senior Circuit Judge, dissenting).

<sup>41</sup> 1996 WL 102421 (6th Cir. 1996).

<sup>42</sup> *See id.* at \*3. Although the court finds that “Circular A-76 is not a statute and cannot form the basis for standing,” other relevant statutes may be considered to determine overall congressional intent. *Id.* Given that, the court considers the OFPPAA. *See id.*

<sup>43</sup> *See id.* at 1342-43.

<sup>44</sup> *See id.* at 1346. The three requirements for union standing are that the individual members have standing, the interests at issue are germane to the organization’s purpose, and the participation of individual members is unnecessary. *See id.* The government argued unsuccessfully that participation of individual members would also be required. *See id.*

<sup>45</sup> 171 F.3d 460 (7th Cir. 1999). *See id.* at 400.

<sup>46</sup> B-208204.2, 83-1 CPD P 435 (1983), WL 26759. The challenged contract pertained to certain custodial and security guard services at the United State Military Academy at West Point. *See id.* RCA protested because the government did not re-solicit outside bids after a change to the RFP. *See id.* Ordinarily, an agency decision to perform work in-house is not subject to review. According to the GAO, however, because the agency decided to use the procurement process, the decisions were subject to review. *See id.* at \*1-2. This is the general view held by the GAO regarding review of A-76 actions. *See id.*

<sup>47</sup> *See RCA*, 1983 WL 26759 at \*1.

Act (CICA) of 1984 was adopted, the GAO was statutorily granted jurisdiction over these types of cases.<sup>48</sup>

The GAO has not, however, interpreted the CICA to allow protests by employees or their unions.<sup>49</sup> Thus, while the GAO will address contractor protests of A-76 decisions, it will not address those brought by federal employees or their unions. Its denial of union protests lies in its interpretation of “interested party.”<sup>50</sup> According to the GAO definition of interested parties, regardless of whether the employee union systematically submits proposals that should win the A-76 cost competition, what it submits is not technically a “bid” and therefore the union is not an interested party.<sup>51</sup> As a result, one of the most popular neutral forums for protesting solicitations and contract awards is completely closed to federal employees and their unions.

### C. THE DECISIONS IN 2000-2001: *AFGE v. U.S.*, AND *MATTER OF AFGE*

The Federal Circuit decision, *American Federation of Government Employees v. United States*,<sup>52</sup> was a major showdown for federal employee unions. Congress had broadened the jurisdiction of the Court of Federal Claims with a 1996 statute, providing the unions a solid basis for requesting that the court look beyond the debatable precedents binding courts in the past on this issue. Moreover, the political in-fighting of the late 1990s over contracting-out had produced a significant substantive Congressional enactment, the Federal Activities Inventory Reform Act of 1998 (“FAIR”).<sup>53</sup> Therefore, there was new substantive as well as procedural statutory law for Judge Firestone of the Court of Federal Claims to consider, and her opinion reflects alertness to the case’s importance and implications.

In this case, federal employees and their union claimed that there were defects in the final cost comparison performed by the government.<sup>54</sup> The government filed a motion to dismiss in response claiming

<sup>48</sup> See 31 U.S.C. §3551(2) (2000).

<sup>49</sup> See *In re Panama DOD Employees Coalition*, B-245,185, 91-2 CPD P 158 (1991), WL 165244, \*1 (noting the Competition in Contracting Act only allows protests by actual or prospective bidders, which does not include the federal employees); *In re Nat’l Fed’n of Fed. Employees (NFFE) Local 2049*, B-220,838, 85-2 CPD P 454 (1985), WL 53480, \*1 (stating that only actual or prospective bidders have the right to protest, and that the employees and their union are not actual or prospective bidders).

<sup>50</sup> See, e.g., *In re Roach*, B-227553.2, 87-2 CPD P 59 (1987) (“federal government employees simply are not actual or prospective offerors within the meaning of the statute and our regulations”).

<sup>51</sup> See GAO opinions cited in the preceding two footnotes.

<sup>52</sup> 2001 WL 826617 (Fed. Cir. July 23, 2001).

<sup>53</sup> Pub. L. No. 105-270, 112 Stat. 2382 (1998).

<sup>54</sup> See *AFGE*, 46 Fed. Cl. at 588.

the federal employees and their union lacked standing to sue.<sup>55</sup> To determine if the federal employees and their union did in fact have standing, the court conducted the classic three-pronged standing test.<sup>56</sup>

The first requirement is that the plaintiffs demonstrate they have suffered an “injury in fact.”<sup>57</sup> Interestingly, the court agreed<sup>58</sup> with the union that the employees had suffered an “injury in fact” because, if the work is contracted out, the government employees will lose their jobs.<sup>59</sup> After finding sufficient injury, the second requirement is that the plaintiffs show the injury is “fairly traceable” to the agency’s action and that a finding in the plaintiffs’ favor will redress the injury.<sup>60</sup> The union argued such traceability<sup>61</sup> and redressability.<sup>62</sup> Citing *Pena*, Judge Firestone again agreed with the plaintiffs regarding this prong of the test.<sup>63</sup> The courts have largely gotten beyond the most extreme of the outdated standing barriers and have recognized that whatever disputes exist over employee union standing, they are not Article III constitutional disputes over whether the employees can ever get into the courthouse for any issue, i.e., disputes that they lack injury-in-fact, traceability, or redressability. Rather, they are merely disputes over interpreting Congress’ intent in the statutes relating to contracting-out.<sup>64</sup>

The third, nonconstitutional or “prudential” prong requires the plaintiffs to show that their interests are within the “zone of interests” of the statute at issue.<sup>65</sup> While the plaintiffs argued they were within the zone of interest of the relevant violated statutes,<sup>66</sup> Judge Firestone disagreed with the union, and consequently denied standing.<sup>67</sup> Even here, interestingly, the court recognized that in ADRA Congress intended a broad jurisdiction for the Court of Federal Claims, and Judge Firestone took a hard look at the new substantive law, the FAIR Act. She could not have come closer to finding that the union had standing - without so finding.

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<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 595 (listing the three requirements for standing under the APA, which are the same requirements as under ADRA).

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* at 597 n.26 (“these plaintiffs satisfy the injury-in-fact test”).

<sup>59</sup> *See id.*

<sup>60</sup> *See id.* at 595.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 597 n.26 (“Their job loss is reasonably traced to the alleged errors in the cost comparison and would be redressed if they were to prevail.”).

<sup>64</sup> *See id.* at 595

<sup>65</sup> *See id.* at 595.

<sup>66</sup> *See id.* at 595 (alleging section 2(e) of FAIR and 10 U.S.C. § 2462(b) had been violated during the procurement).

<sup>67</sup> *See id.* at 597.

Judge Firestone looked at the 1990s Supreme Court *Air Courier*<sup>68</sup> and *NCUA*<sup>69</sup> rulings on the “zone of interest” test, and read them to require that Congress expressly grant federal employee standing. The court reasoned that Congress specifically granted standing for federal employees and their unions only as to certain aspects of the procurement process, so the legislature must have intended to deny standing in all other situations.<sup>70</sup> Further, the court stated that the legislature is assumed to have enacted the legislation with knowledge of the previous precedents, such as the D.C. Circuit’s position that unions cannot protest A-76 decisions.<sup>71</sup>

On appeal, a Federal Circuit panel unanimously affirmed, with Judge Schall writing a shorter, simpler opinion than Judge Firestone’s. Judge Schall found that the question of standing focused upon whether the union and the federal employees met the definition of “interested parties” in the 1996 ADRA, and that “the plain language of the statute does not resolve this issue.”<sup>72</sup> From the ADRA’s legislative history, he readily found that Congress intended to confer the full jurisdiction previously exercised by federal district courts pursuant to *Scanwell Labs., Inc. v. Shaffer*,<sup>73</sup> the only issue being whether federal employee unions could bring protests pursuant to *Scanwell*. Judge Schall treated this as a question that could go easily either way, evidently not seeing anything problematic in union standing to protest contracting-out.<sup>74</sup>

To resolve the question, he noted that the vast majority of cases brought pursuant to *Scanwell* were brought by disappointed bidders, and that the *Scanwell* opinions and the legislative history made references to the standing of “disappointed bidders” or “contractors.”<sup>75</sup> While Judge Schall described ADRA’s language as “not unambiguous,” he observed ADRA used the term “interested party,” this being a formulation a little

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<sup>68</sup> *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991).

<sup>69</sup> *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998).

<sup>70</sup> See *AFGE*, 46 Fed. Cl. at 598.

<sup>71</sup> See *id.* at 600 (citing *Cheney* and noting that Congress is presumed to have had knowledge of the interpretation given the provisions at issue in that case).

<sup>72</sup> 2001 WL 826617 at \*4.

<sup>73</sup> 424 F.2d 859 (D.C. Cir. 1970).

<sup>74</sup> He noted that the breadth of the Administrative Procedure Act’s wording, the fount of *Scanwell*, suggests that “parties other than actual or prospective bidders might be able to bring suit.” 2001 WL 826617 at \*6. On the other hand, the Court of Federal Claims’ jurisdictional statute, as a waiver of sovereign immunity, is to be construed narrowly. *Id.*

<sup>75</sup> 2001 WL 826617 at \*6. That only means disappointed bidders were the most prominent examples of parties with standing. It is interesting that Judge Schall did not present any strong reason why the opinions or legislative history references to “disappointed bidders” or “contractors” would have intended to rule out less prominent functional equivalents of disappointed bidders, namely, in the A-76 process, employee unions presenting proposals for performing the work in-house.

narrower than the Administrative Procedure Act's "aggrieved" party, and this also being a term used in CICA and defined there as limited to bidders.<sup>76</sup> The opinion admitted it had to resolve an ambiguously worded statute without strong indications, cited no policy arguments against federal employee union standing, and seemed perfectly ready to welcome union standing if only there were a little bit more of a green light. Like Judge Firestone's, Judge Schall's opinion thus broke with the somewhat anti-union door-closing tone of the divided D.C. Circuit panel in *National Federation of Federal Employees v. Cheney* in 1989. Because Judge Firestone's opinion engaged more intensely with the issues, it is more the subject of the analysis later in this article.

As for the other 2000 ruling, the GAO's June 2000 ruling in *Matter of American Federation of Government Employees*,<sup>77</sup> federal employees and their union protested the award of a contract to a private company.<sup>78</sup> The GAO held that the employees and their union could not protest the award because they had not submitted a "bid" as a contractor for the work and so were not "interested parties" as defined by the CICA.<sup>79</sup> One or more contractors might submit their offer, or "bid," for the contract they would make with the federal government to do the work, but the GAO would not consider the federal union's counter-proposal a "bid" because, even if it led the government to continue to perform the work in-house in a different way, such a proposal becomes a guide internal to the government, not an external contract between the government and a private entity. It cited Judge Firestone's ruling in May, the month before, in holding that federal employees and their unions have no standing to protest under the FAIR Act. Consequently, the GAO dismissed the protest for lack of standing.<sup>80</sup>

## II. AVENUES FOR REFORM

The 2000-2001 rulings have not opened the tribunal doors to federal employee unions protesting violations of the contracting-out rules, but neither have those rulings welded the doors shut. As for the federal courts, the question should remain subject to future reconsideration, if an opportunity arises, considering the reaffirmed favorable stance of the Sixth Circuit in *NATCA v. Pena*, the many elements recognized as important and favorable (although not ultimately decisive) by Judge Firestone, and the absence of strongly antagonistic statements in Judge

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<sup>76</sup> *Id.* at \*7.

<sup>77</sup> 2000 WL 732884, B-282904.2 (2000).

<sup>78</sup> *See id.* at \*1.

<sup>79</sup> *See id.* at \*3 (stating "interested parties" are "actual or prospective bidders" under the CICA).

<sup>80</sup> *See id.* at \*4-6.

Schall's Federal Circuit decision. There is now a problem in getting an opportunity for a fresh judicial look at the matter,<sup>81</sup> such as either the Supreme Court taking a case or some fresh development presenting the matter to the courts anew. With the GAO, by contrast, since its rulings are not subject to judicial review, there is no likelihood of change if the same basic question is presented again.

For both judicial and GAO tribunals, opening the doors is possible two other ways. The Executive Branch could reconsider its resistance to employee union protests, particularly as part of some broader reconsideration by Executive Order of relations with employee unions; this would immediately allow GAO rulings on these protests by the little-known "nonstatutory" method. Alternatively, Congress could help open the doors either by new enactment supporting union protest suits, or by certain kinds of nonstatutory signals. In other words, contracting-out presents the unusual situation in which any one of the three branches of government can overthrow an outdated procedural barrier, and the nuances of the mechanisms for doing so warrant attention.

#### A. COURTS SHOULD VIEW UNIONS AS WITHIN THE ACTUAL "ZONE OF INTERESTS"

The opinion for the Federal Circuit by Judge Schall affirming the fuller opinion below of Judge Firestone should actually enable any courts freshly considering the matter to view federal employee unions which protest contracting-out as within the "zone of interest" for, and within the meaning of "interested parties" in, the relevant statutes. With that focus, several lines of reasoning show why the courts should rule, if they have an opportunity<sup>82</sup> for further judicial consideration, to allow union protests.

First, Congress' intent continues even more clearly after the enactment of the FAIR Act that the administrative and judicial system should accord standing on a "provider-neutral" basis to ensure the most cost-effective method (contracting-out or in-house) for performance of activities. Without going through all the enactments from the 1921 Budget Act

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<sup>81</sup> For protests brought only in the Court of Federal Claims, the *AFGE* decision is *stare decisis* until there is a new development. The problem is that Congress did not act to postpone the ADRA provision that sunsetted concurrent federal district court bid protest jurisdiction as of January 1, 2001. *Scanwell* bid protests do not seem to be brought in the district courts now, notwithstanding the theoretical argument that they can still be brought there. See Christopher M. Chaisson, Michael Heyman, Alexandra Hill & Jonathan Neerman, *The Sunset of Scanwell Jurisdiction*, 30 PUB. CONT. L.J. 65 (2000)(briefs on this issue published after a moot court competition).

<sup>82</sup> Examples of fresh opportunities would be if new federal legislation either revived the sunsetted district court jurisdiction or made some generic change in the jurisdiction of the Court of Federal Claims. Admittedly, neither of these is in immediate prospect.

and the Office of Federal Procurement Policy Act Amendments of 1979, to the annual DOD authorization provisions of recent years, Congress maintained one consistent intent: that the government should contract out when, but only when, it is most cost-effective.<sup>83</sup> The FAIR Act of 1998 renewed this consistent intent.<sup>84</sup> There is no Congressional decision to contract-out either to shrink the federal government's size arbitrarily or to accomplish any other goals, when doing so by contracting-out would be more expensive than by in-house performance. For every pro-contractor Senator or Congressman from 1921 to the present who extolled the virtues of contracting-out during the debates on these statutes, there has been another Senator or Congressman reminding that Congress' interest is the most economical result for the taxpayers, and that lining the pockets of contractors by mistaken money-losing decisions to contract out does not follow Congress' intent.

FAIR itself reflects how this Congressional intent persisted even during the ascension of the pro-contractor Republican majority in Congress in the 1994 election. As originally proposed by pro-contractor Members, the "Freedom from Government Competition Act" would indeed have tilted toward the contracting-out of procurement.<sup>85</sup> However, as Judge Firestone soundly traced, the final FAIR "contained very different language"<sup>86</sup> from the original bills, dropping the mandate of a pro-contracting-out stance which disregarded the cost-effectiveness of in-house work. The original version faced not only intense union opposition but a probable Presidential veto; the compromise version went to the safer, less controversial, and stronger ground of continuing the traditional intent to find the most cost-efficient method of obtaining performance without tilting either way.

With that statutory intent of finding the provider-neutral cost-effective method, it is senseless to structure the procedures for protests as though the contractors fall within the "zone of interest" of these statutes, but the unions do not. Both contractors and employee unions want the work. Contractors fall within the "zone of interest" of these statutes, not necessarily because Congress has affirmatively intended to give them the work, but because Congress wants a fair and accurate public-private cost competition to determine whether contracting-out will bring savings. Contractors come within the "zone of interest" to protest failure to provide that fair competition. Employee unions are in exactly the same position: they fall within the "zone of interest" of these statutes, not

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<sup>83</sup> Lang, *supra* note 14, at 240 (A-76 decision is to be made on the basis of "best value" to the government).

<sup>84</sup> Section 2(e) of the FAIR, 112 Stat. 2382, requires the cost comparison between public and private performance to be "realistic and fair."

<sup>85</sup> *See id.* at 597.

<sup>86</sup> *See id.* at 597.

necessarily because Congress has affirmatively intended for them to keep the work, but because they have a symmetric interest to that of the contractors in protesting whenever the procuring agency fails to conduct a legally sustainable public-private cost competition to determine whether contracting-out will bring savings — as unions have argued in *AFGE*,<sup>87</sup> *Cheney*,<sup>88</sup> and (successfully) in *Diebold*.<sup>89</sup>

Typically, in a contracting-out decision, the agency evaluates a union proposal for keeping the work in-house, and a private contractor proposal to perform the work. If the agency commits violations of law in miscalculating the former as better, the contractor's protest vindicates Congressional intent. But, if it commits such violations of law in miscalculating the latter as better, the union's protest symmetrically vindicates Congressional intent. In fact, the A-76 Administrative Appeals process renders contractors and employees equally eligible to appeal administratively.<sup>90</sup> As Judge Mikva said in 1989: "an action brought by [the federal employee union] to assure that the Army chooses to obtain needed services by the least expensive means is wholly consistent with Congress' purposes."<sup>91</sup>

A different line of reasoning looks at the process of enacting the statutes relating to contracting-out. Judge Firestone cited the two main Supreme Court cases of the 1990s regarding the "zone of interests" test—*Air Courier Conference of America v. American Postal Workers Union*<sup>92</sup> and *National Credit Union Administration v. First National Bank and Trust Co.*<sup>93</sup> But, Judge Firestone did not explore these cases much or apply them with care to the contracting-out statutes.<sup>94</sup> The first case, *Air Courier*, held that with respect to the provision that historically had given the Postal Service a monopoly over private express courier services, nothing involving postal jobs was within the "zone of interest" of the statute.<sup>95</sup> According to Justice Rehnquist's opinion, the purpose of the postal monopoly statute was to ensure that the appropriate postal charges were collected to support the federal government postal effort; in effect, the statute served as revenue-protection for the government mo-

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<sup>87</sup> See *id.* at 599 (stating the federal employees claim they are within the zone of interests of the statutes at issue because they are ensuring the most economical organization is found, which comports with Congress' intent).

<sup>88</sup> See *Cheney*, 883 F.2d at 1044-52 (D.C. Cir. 1989) (discussing Congress' intent to find the most economical organization when enacting the relevant statutes).

<sup>89</sup> See *Diebold*, 947 F.2d 787, 810 (stating the purposes of the statute were best served by allowing protests by federal employees).

<sup>90</sup> CIRCULAR No. A-76, *supra* note 16, at 7(c)(8).

<sup>91</sup> 883 F.2d at 1059.

<sup>92</sup> 498 U.S. 517 (1991).

<sup>93</sup> 522 U.S. 479 (1998).

<sup>94</sup> See *AFGE*, 46 Fed. Cl. at 600 n.27.

<sup>95</sup> See *Air Courier*, 498 U.S. at 525-26.

nopoly.<sup>96</sup> Since Justice Rehnquist showed that the postal monopoly statute was enacted prior to employing the postal workers at a time when postal service really was contracted-out in an old-fashioned sense, Congress could not possibly have been considering any interests of the not-yet-in-existence postal workers in enacting the statute.

*National Credit Union*, the more recent decision, moderated the intensity of *Air Courier*, for the Court found that banks came within the “zone of interests” of the credit union statute’s limitation provisions.<sup>97</sup> The Court’s majority did so despite strong evidence Congress had no concern whatsoever for the bank’s competitive interests vis-à-vis credit unions.<sup>98</sup> The *Air Courier* decision did distinguish federal union suits (in that case, the postal unions) from business competitor suits, but it hardly amounted to a general prohibition of federal union standing — for the Court has entertained many a case by federal employee unions. Rather, Justice Rehnquist’s careful opinion traced the entire history of the postal monopoly statute in the 1800s to show Congress had not thought of employees in enacting the statute. As Justice Rehnquist showed, Congress quite clearly did not intend any comparison rule or process by which relaxation of the postal monopoly would be weighed by comparing in-house services with those of private contractors. In contrast with the postal monopoly statutes in *Air Courier*, Congress has thought about savings-comparisons of federal employee performance versus contracted-out performance every step of the way in constructing and overseeing the modern system known as A-76. This is seen most recently in the FAIR Act, but is similarly seen in the other statutes. The legislative record overwhelming shows that the federal unions actively participated in the drafting of the statutes, raising these comparisons high in Congress’ awareness.<sup>99</sup>

To understand that federal employee unions today, in contrast to the non-existent postal employees at the start of the postal service, play an active part in the Congress’ consideration of contracting-out, let us focus our review on just a sampling from the past couple of years. We will find federal employee unions testifying about contracting-out before the following: in 1997, the House Committee on Government Reform and

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<sup>96</sup> See *id.* at 525.

<sup>97</sup> 522 U.S. at 498-99.

<sup>98</sup> In *National Credit Union* the Court noted again that the statute in the previous decision was enacted solely for the purpose of protecting the revenues of the post office, and thus was not at all concerned with the postal employees. See *Nat’l Credit Union*, 522 U.S. at 498-99.

<sup>99</sup> See *AFGE*, 46 Fed. Cl. at 600 (citing 144 Cong. Rec. S9104 as evidence that the unions participated in the drafting of the relevant legislation).

Oversight,<sup>100</sup> and the House Committee on National Security;<sup>101</sup> in 1998, the Senate Committee on Governmental Affairs, and the Senate Appropriations Committee;<sup>102</sup> and in 1999, the House Appropriations Committee,<sup>103</sup> and the Senate Appropriations Committee.<sup>104</sup> In other words, the statutory provisions regarding contracting-out, such as the annual DOD authorization act provisions, are not statutes written, like the postal monopoly statute, without unions in mind. Instead, their subtle balance matches Congressional attention to the competing messages of contractors and unions.

Accordingly, Congress' awareness of the unions' important role in contracting-out cost-comparisons not only far exceeds the blank opposite record in *Air Courier*, it considerably exceeds the record that supported a zone-of-interest determination in the *National Credit Union Association* case. We do not have a Supreme Court that has created some super-restrictive zone-of-interest standard. *NCUA*, like other late 1990s cases, shows that the Court has no fears (and appropriately so) of any flood of administrative appeals or other misuse of the judiciary from a reasonable view of Congress' intent in this regard. *NCUA* supports allowing union protests of violations of law in contracting-out. Based on it, the courts should entertain such protests.

## B. EXECUTIVE ACTIONS

Another approach would be for an executive order to be issued allowing "non-statutory" protests by federal employees in the GAO. "Statutory" protests occur under the terms of the Competition in Contracting Act (CICA); a non-statutory protest is a GAO protest not under the terms of CICA, such as all protests were before CICA,<sup>105</sup> as long as the agency involved has agreed to have protests decided in that forum. Section 21.13 of the GAO Bid Protest Regulations authorizes protests in an array of situations that are ruled out by the GAO as CICA-based statutory protests. It provides that the "GAO will consider protests concerning awards of subcontracts by or for a Federal agency, sales by a Federal agency, or procurements by agencies of the government other than Fed-

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<sup>100</sup> 1997 WL 606280 (F.D.C.H.) (testimony of NFFE president) (Oct. 1, 1997); 1997 WL 606281 (F.D.C.H.) (testimony of NTEU president) (Oct. 1, 1997).

<sup>101</sup> 1997 WL 331912, at 142 (F.D.C.H.) (hearing transcript of testimony by AFGE president) (June 17, 1997).

<sup>102</sup> 1998 WL 17545 (F.D.C.H.) (testimony of AFGE president) (March 24, 1998); 1998 WL 156271 (F.D.C.H.) (testimony of NTEU president) (March 24, 1998).

<sup>103</sup> 1999 WL 166694 (F.D.C.H.) (testimony of former AFGE president) (March 25, 1999).

<sup>104</sup> 1999 WL 307409 (F.D.C.H.) (testimony of AFGE national vice president) (May 14, 1999).

<sup>105</sup> See, e.g., *In re RCA Service Company*, 1983 WL 26759, B-208204.2, 83-1 CPD P 435 (1983).

eral agencies” — in other words, an array of categories of protests not under CICA — “if the agency involved has agreed in writing to have protests decided by GAO.”<sup>106</sup> GAO itself invited, in its June 2000 decision, a resort by unions to non-statutory protests, as long as the procuring agencies agree.<sup>107</sup>

Taking up this GAO invitation, an Executive Order could be issued which allows the GAO to hear protests, thus giving the federal employees a place to bring their symmetric counter-arguments to those the GAO entertains from contractors in the contracting-out process. This would result in a logical step forward in the partnership process of the government and the federal employee unions.

Another possible solution is to supplement Circular A-76 and allow a selective litigation policy. The Administration as a whole, or particular agencies, could establish a policy where agencies selectively allowed the GAO to hear union protests to contracting out — for example, whenever the contracting out was not pursuant to an affirmative command from the departmental head, but involved genuine higher-level openness of mind and a genuine willingness to have a legally valid cost-comparison process between the proposals of unions and contractors. It would be ironic indeed, for example, if a supposed sympathizer for labor rights such as the Labor Department refused permission for union contentions to be heard, if, say, the Department proposed that some of its work be contracted out.<sup>108</sup> More speculatively, a selective litigation policy could come from the Department of Justice, which does reconsider from time to time how “hard” a line to take in court against litigants with standing issues.<sup>109</sup> Particularly when new statutory provisions and new regulations are adopted, if the Department of Justice does not reflexively deny union standing every time a contracting-out rule is the basis of a protest, then courts would have an opportunity to better recognize the arguments on the unions’ side. In doing so, the courts would likely discover that the

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<sup>106</sup> 4 C.F.R. § 21.13(a).

<sup>107</sup> See *Matter of AFGE*, 2000 WL 732884, at \*6 n.2 (“we consider non-statutory protests if the agency involved has agreed in writing to have the protests decided by the GAO . . .”).

<sup>108</sup> For the Labor Department to deny the right of unions and contractors to have a legal contest recalls the comment in the movie *DR. STRANGELOVE* (Columbia Tri-Star 1964) about a brawl in the Pentagon, “Gentlemen, you can’t fight in here - this is the War Room.”

<sup>109</sup> For example, the Bush Administration took a hard line against standing in some contexts, see CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENT* 52-53 (1994); while it did not defend the constitutionality of standing pursuant to the 1986 statutory amendments for the *qui tam* statute, the Clinton Administration did defend the constitutionality of such standing, and was ultimately vindicated by the Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858 (2000).

federal employees do fall within the zone of interest of the evolving statutes and rules.<sup>110</sup>

### C. CONGRESSIONAL ACTION OR SIGNALING

A final possibility, if necessary, is Congressional action. In theory, this could take the form of legislation. Federal employees were granted the right through legislation to administratively protest the list of “inherent governmental functions.”<sup>111</sup> So, similarly, in theory, the other branches could await Congress doing the same for union protesting in GAO or court; but in practice, this may be unrealistic. The history of standing doctrine has been that with rare exceptions, Congress keeps its attention focused on the substantive issues, and leaves it to the tribunals to develop the standing rules. Neither of the Supreme Court opinions discussed before, the *Air Courier* or *NCUA* opinion, involved an express Congressional decision about “zone of interests” in standing. It is asking a great deal to expect the employee unions to accomplish the heavy lifting involved in moving through Congress a special express provision for their standing, when the contractors bidding for contracting-out, to take the symmetric example, never have to move any such express provision for their right to file protests. The courts inferred contractor standing; they should infer union standing.

What legislators in Congress might do, rather than move an express statutory provision all the way through Congress, would be to signal their support, either as individuals or as committees, for the entertaining of employee union protests. It is well established in Congress that an individual chair or ranking minority member can task GAO to conduct a GAO inquiry into waste or abuse. It might be that similar tasking or encouragement could occur for something quite similar to a GAO inquiry into waste, namely, a GAO legal inquiry into union allegations that contracting-out was occurring in a situation of legally invalid cost-comparisons and legally challengeable inflation of alleged cost-savings. In other words, a senior Member or a committee could ask the GAO for something similar to a non-statutory protest decision. This would be particularly appropriate considering that the GAO already, on its own, has conducted a series of inquiries and produced reports regarding the inflated estimates by contractors of the savings from contracting-out.<sup>112</sup>

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<sup>110</sup> See, e.g., *Diebold*, 947 F.2d at 801-10 (discussing the recent developments in the law and finding that under these developments the employees do fall under the zone of interest).

<sup>111</sup> See Section 3(b) of FAIR, *supra* note 53 (giving federal employees and their unions the right to protest the inclusion or exclusion of a certain activity from the list of inherent governmental functions).

<sup>112</sup> See *supra*.

### III. CONCLUSION

The 2000-2001 decisions have denied federal employee unions a forum to protest when the work of their members is contracted-out in violation of laws and regulations. This disserves the public interest, the intent behind those laws and regulations, and the sense of fair play between the contractors and the federal unions that compete for that work. It is unsound as a matter of law. One way or another, the courts, the Executive, or the Members of Congress can and should let union protests of improper contracting-out be heard.

