

UGA International Law Colloquium
February 10, 2006

Democracy and Trust

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This Essay considers the threat to democratic accountability posed by governments' (and international organizations') increasing privatization of a wide array of foreign affairs functions. Domestic administrative law scholars have long studied the growing trend of U.S. federal and state authorities to outsource governmental activities, and have debated, in particular, the impact of this trend on democratic accountability. But these scholars have not squarely addressed the phenomenon of foreign affairs privatization. At the same time, international law scholars have not, for the most part, directly confronted the problem of privatization at all. While some scholars have examined the growing influence of various types of non-state actors generally, they have not addressed the issues raised by governments' (and international organizations') growing use of agreements with private for-profit and non-profit entities to provide military services, foreign aid, and diplomacy. In two earlier articles, I examined the extent to which foreign affairs privatization may on the one hand threaten important public law values reflected in international law, but, on the other, offer significant tools of accountability, including legal, contractual, and internal institutional remedies. This Essay focuses on the particular problems that foreign affairs privatization poses to processes of democratic accountability, and some distinct solutions that the privatization relationship itself may, paradoxically, offer. Specifically, drawing on insights from the domestic privatization literature, I discuss ways in which the contractual arrangements between governments and private entities might themselves be used to incorporate responsive democratic feedback loops between these private entities and those affected by their activities. Further, I suggest that to the extent that these contractual arrangements might incorporate a three-way relationship between governments (or international organizations), private entities, and beneficiaries of privatized services, these arrangements might benefit from being conceived as, and legally structured to consist of, trust agreements. While the framework of trust suffers from some significant disabilities, most notably its paternalistic and colonial overtones, at the same time it offers significant possibilities. Most importantly, the trust relationship includes beneficiaries as rights-bearers and obligates the trustee to abide by limited fiduciary duties toward those beneficiaries. Thus, I argue that trust can help us to see ways in which privatized foreign affairs functions may provide a useful avenue of democratic accountability in an increasingly privatized world.