PRINCIPLED OR PRACTICAL RESPONSIBILITY: SIXTY YEARS OF DISCUSSION

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I. INTRODUCTION

The U.S. Government purchases a vast array of equipment and services from contractors, and in many cases contractor and government employees work side-by-side. Because the Government relies on contractor-supplied goods, services, and employees, the Government seeks to hold contractors to high standards.[1] Accordingly, the Federal Acquisition Regulation (FAR) mandates that "[n]o purchase or award shall be made unless the [C]ontracting [O]fficer makes an affirmative determination of responsibility."[2] The Government not only excludes nonresponsible contractors from immediate

1. FAR 9.103(b) (stating that Contracting Officers must make a responsibility determination).
2. *Id.*

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opportunities, but also may preemptively exclude them from future opportunities.[3] The FAR provides that "agencies shall . . . award contracts to . . . responsible contractors only. Debarment and suspension are discretionary actions that . . . are appropriate means to effectuate this policy."[4]

Federal agencies rightly aspire to deal only with responsible contractors. Determining which contractors are nonresponsible, however, can be a challenge. Not surprisingly, many, if not most, large contractors do not have unblemished records because they have thousands of employees to supervise, and they often take on ambitious and risky contracts.[5] Many large contractors have been fined for infractions, penalized for poor performance, and punished for crimes, yet have somehow continued to win lucrative contracts.[6] Even when suspended or debarred, their exclusion from government contracting is brief, and often waived.[7]

In contrast, smaller contractors are often debarred for years and for comparatively minor offenses.[8] In addition, responsibility has long been a less-than-precise prerequisite.[9] The Court of Appeals for the Federal Circuit has described the concept of responsibility as "cryptic."[10] The responsibility requirement became part of the U.S. procurement system over sixty years ago, beginning with the Armed Services Procurement Act[11] and the Federal Property and Administrative Services Act.[12] Notwithstanding the importance of responsibility, the FAR provides scant guidance.[13]

Moreover, officials need comprehensive and up-to-date information to assess contractor responsibility. A primary purpose of the Federal Awardee Performance and Integrity Information System (FAPIIS), initiated in 2009, is to establish a consolidated source for contractor responsibility information.[14] However, increasing the flow of information through FAPIIS will not inevitably improve officials' responsibility-related decisions. A dearth

3. FAR 9.103(c).
4. FAR 9.402(a).
5. *See infra* Part IV.A–B.
6. *Id.*
7. *Id.*
8. *Id.*
9. *See* JOHN CIBINIC JR. & RALPH C. NASH JR., FORMATION OF GOVERNMENT CONTRACTS 404–05 (3d ed. 1998); O'Brien v. Carney, 6 F. Supp. 761, 762 (D. Mass. 1934) ("The necessity of selecting a responsible bidder imports into the ministerial act an element of discretion to determine whether the lowest bidder is qualified to carry out his contract . . . . '[T]he term "responsible" means something more than pecuniary ability; it includes also judgment, skill, ability, capacity and integrity.'" (quoting Williams v. Topeka, 118 P. 864, 866 (Kan. 1911))).
10. Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1335 (Fed. Cir. 2001).
11. Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (1948).
12. Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended at 41 U.S.C. § 3105 (2006 & Supp. IV 2010)).
13. *See infra* Part IV.
14. *See* U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 75 Fed. Reg. 14,059 (Mar. 23, 2010) ("FAPIIS [Federal Awardee Performance and Integrity Information System] is intended to significantly enhance the scope of information

of information makes informed decision-making impossible, but a flood of information without an adequate analytical framework can be disorienting and easy to misinterpret. Therefore, the current challenge is to identify and prioritize the information Contracting Officers and debarring officials should consider when evaluating responsibility. However, developing decision-making guidelines that are definite enough to ensure consistent outcomes, yet flexible enough to allow discretion where appropriate, also remains a challenge.

The public can view a record of contractors' missteps in FAPIIS.[15] Members of Congress and public interest groups may leverage information from FAPIIS to justify an aggressive, principled responsibility and debarment policy to exclude contractors that have been convicted of crimes or assessed civil penalties.[16] In a strictly principled view, the Government must only contract with law-abiding, good corporate citizens.[17] Mr. Steven Shaw, an Air Force debarring official, has articulated a principled approach to debarment, stating, "I have always been empowered to do the right thing, regardless of the impact that a debarment would have on the ability to obtain specific goods or services."[18] On the opposite end of the spectrum, an unprincipled approach to debarment would be unbearable.[19] After all, no citizen wants to hear that the Government is partnered with scofflaws. But somewhere between principled and unprincipled, there is a practical, pragmatic approach to responsibility, an approach that protects the public while accepting the reality that mere mortals operate the Government and its contractors.[20] Since the U.S. Government relies heavily on a handful of large contractors for the most sophisticated goods and services, the Government arguably cannot afford a strictly principled responsibility policy.[21] That is why the FAR suggests a pragmatic, risk-avoidance approach instead.[22]

available to [C]ontracting [O]fficers as they evaluate the integrity and performance of prospective contractors.").

15. U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2010-016, Public Access to the Federal Awardee Performance and Integrity Information System, 77 Fed. Reg. 197 (Jan. 3, 2012).

16. *See* Federal Awardee Performance and Integrity Information System, 75 Fed. Reg. at 14,059.

17. Senator Susan Collins, R-ME, an advocate for the suspension of MCI WorldCom, articulated the principled view, "To do business with the federal government, a company must uphold satisfactory ethical standards, not only with the government itself, but also in its business activities generally." Susan M. Collins, *What the MCI Case Teaches About the Current State of Suspension and Debarment*, 5 PUB. PROCUREMENT L. REV. 218, 218 (2004).

18. Ron Nixon, *Size Protects Government Contractors That Stray*, N.Y. TIMES, Dec. 18, 2010, at A12.

19. *See id.*

20. THE FEDERALIST NO. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987) ("If men were angels, no government would be necessary.").

21. *See* Jennifer S. Zucker, *The Boeing Suspension: Has Consolidation Tied the Defense Department's Hands?*, 5 PUB. PROCUREMENT L. REV. 260, 273 (2004) (arguing, "[t]he military currently needs mega-defense contractors just as much as these contractors need the military. The relationship in the Boeing context has been likened to a 'long-married couple keen to save their union, if only for the sake of their children.'").

22. *See* FAR 9.105.

The evolution of U.S. suspension and debarment procedures has been thoroughly detailed in academic literature.[23] However, comparatively little has been written about substantive guidance on responsibility determinations for Contracting Officers and debarring officials.[24] Existing substantive guidance on responsibility does not definitively endorse either a principled or practical philosophy.[25] Rather, the choice between the two approaches is left to an agency official's discretion.[26] As a result, tension has existed during the last sixty years between those who favor the principled or the practical approach to responsibility.[27] It is time to clarify the goal of the Government's responsibility policy by definitively establishing practical objectives while rejecting an uncompromising, principled responsibility philosophy.

At least three factors influence officials' responsibility-related decisions: (1) the political environment, (2) the scope of Contracting Officers' discretion checked by oversight, and (3) decision-making guidance. This Article discusses the interplay between the three factors and suggests adjustments to firmly establish practical objectives for the Government's responsibility policy.

II. POLITICAL ENVIRONMENT

When agency leaders are under political pressure to solve a procurement problem, the pressure can quickly squeeze their entire organization.[28] Especially in the current political environment, procurement missteps can end

23. *See, e.g.*, Arthur S. Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 MICH. L. REV. 781 (1955); Paul H. Gantt & Irving R.M. Panzer, *The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts*, 25 GEO. WASH. L. REV. 175 (1956) [hereinafter *The Government Blacklist*]; Paul H. Gantt & Irving R.M. Panzer, *Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United States*, 5 B.C. L. REV. 89 (1963) [hereinafter *Debarment and Suspension*]; John Montage Steadman, *"Banned in Boston—and Birmingham and Boise . . . ": Due Process in the Debarment and Suspension of Government Contractors*, 27 HASTINGS L.J. 793 (1976); Gerald P. Norton, *The Questionable Constitutionality of Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?*, 18 PUB. CONT. L.J. 633 (1989); Brian D. Shannon, *The Government-wide Debarment and Suspension Regulations After a Decade—A Constitutional Framework—Yet Some Issues Remain in Transition*, 21 PUB. CONT. L.J. 370 (1992); Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 CATH. U. L. REV. 363 (1995); Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547 (2009).

24. *But see* Donna Morris Duvall, Comment, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contracts*, 36 AM. U. L. REV. 693, 700 (1987) ("Although [the] FAR includes notions of public interest and present responsibility, the regulations lack substantive criteria for defining these important concepts.").

25. *See* FAR 9.104.

26. *See infra* Part III.A.

27. *See infra* Part IV.A.

28. For an example of congressional political pressure, see *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 534 F. Supp. 1139, 1143–44 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 163 (D.C. Cir. 1983) (noting that denial of a contract to the low bidder resulted "from a sequence of events beginning with criticism of the Corps of Engineers from Congressional sources . . . .").

government careers.[29] Ballooning defense budgets, press-reported scandals, and economic malaise have all fomented discontent and triggered increased congressional scrutiny in procurement matters.[30]

In the last decade, procurement reform advocates began to question the efficacy of suspensions and debarments.[31] As Professor Schooner has explained, "[t]he time is ripe for a thoughtful examination of the present regime. An entire generation of public procurement professionals learned that the suspension and debarment remedies were paper tigers—pretty to look at, but not to fear."[32] Years later there remains disagreement among advocates on how to reform debarment policy and practice.[33]

The recent recession and rancorous federal tax and budget debates have further generated dissatisfaction and may ultimately steer federal agencies toward a principled approach to responsibility decisions.[34] Calls for stricter responsibility evaluations and aggressive debarment are intermingled with the clamor for restraint and accountability in government spending, which has put contractors at the epicenter of the fiscal debate.[35] For example, ac-

29. For example, a probe requested by Senator Claire McCaskill, D-MO, chair of the Senate Subcommittee on Contracting Oversight, into questionable contracts at the Department of Labor resulted in the resignation of a senior agency official in July 2011. *See Probe Requested by McCaskill Results in Resignation of Senior Administration Official*, SENATE.GOV (July 28, 2009), http://mccaskill.senate.gov/?p=subcommittee_on_contracting_oversight_entry&id=1319.

30. *See infra* Part II.B.

31. *See, e.g.*, Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 5 PUB. PROCUREMENT L. REV. 211, 215 (2004) [hereinafter *The Paper Tiger Stirs*].

32. *Id.* at 216.

33. In 2004, The George Washington University Law School (GW Law) hosted a discussion on suspension and debarment. Contributions were compiled in *The Public Procurement Law Review*. The contributions highlight disagreement. For example, GW Law Professor Christopher Yukins suggests that the causes for debarment should be limited to acts or omissions related to government contracting. *See* Christopher R. Yukins, *Suspension and Debarment: Reexamining the Process*, 5 PUB. PROCUREMENT L. REV. 255, 259 (2004). Mr. Steven Shaw, U.S. Air Force debarring official, disagrees. *See* Steven A. Shaw, *Access to Information: The Key Challenge to a Credible Suspension and Debarment Programme*, 5 PUB. PROCUREMENT L. REV. 230, 232 (2004).

34. Mr. Steven Shaw opines, "[t]he pendulum is swinging strongly in the direction of zero tolerance for unethical behavior . . . . [N]o contractor is so big or so important that it can't be debarred." *Zero Tolerance: Ethical Misconduct Adds up to Big Issue for Customers*, LM TODAY, *available at* http://www.safgc.hq.af.mil/shared/media/document/AFD-071102-015.pdf (last visited June 1, 2012).

35. Senator McCaskill testified before the House Committee on Oversight and Government Reform, "One thing I can tell you for sure is that we can't have an honest conversation about restoring sanity to government spending without talking about government contracting." *McCaskill Testifies Before House Oversight Committee*, SENATE.GOV (Feb 17, 2011), http://mccaskill.senate.gov/?p=press_release&id=1196. Speaking of the Government Accountability Office's (GAO) High Risk List, Senator McCaskill stated, "In total, at least half of the most wasteful, most mismanaged, most inefficient areas of the government today involve contracting." *Id.* However, some in Congress view contracting as a solution. Senator John Thune, R-SD, introduced a bill to codify the "Yellow Pages" rule, i.e., if the Government needs goods and services found in the Yellow Pages, the purchases should be subject to market competition. *Bill Would Codify "Yellow Pages" Test for Deciding When to Use Contractors*, 95 Fed. Cont. Rep. (BNA) 416 (Apr. 19, 2011). Senator Thune reasons, "[w]ith our nation's debt well over $14 trillion and our national unemployment hovering near 9 percent, it is important now more than ever that the federal government's policies not only save tax dollars but also foster job creation in the private sector." *Id.*

cusations of contractor profiteering and other misdeeds have caught the attention of the Commission on Wartime Contracting (CWC), the Special Inspector General for Iraq Reconstruction, and the Special Inspector General for Afghanistan Reconstruction.[36] In addition, several offices of inspectors general and the U.S. Government Accountability Office (GAO) also have recently reported on responsibility- and debarment-related matters.[37]

The CWC issued a harsh indictment, asserting that the U.S. Government has mismanaged contingency contracting:

> Although no estimate captures the full cost associated with this waste, fraud, and abuse, it clearly runs into the billions of dollars . . . . Regrettably, our [G]overnment has been slow to make the changes that could limit the dollars wasted. After extensive deliberation, the Commission has determined that only sweeping reforms can bring about the changes that must be made.[38]

The CWC recommended, among other reforms, aggressive and, in some cases, mandatory suspension or debarment.[39] Additionally, the CWC recommended that agencies should be required to justify with a written rationale a decision to not impose a proposed suspension or debarment.[40] The CWC recommendations could influence reform government-wide.[41]

The House Committee on Oversight and Government Reform also has expressed concern that agencies do not aggressively debar contractors.[42]

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36. Dana Liebelson, *Prosecutions for Corruption in Iraq and Afghanistan Reconstruction Skyrocket*, PROJECT ON GOV'T OVERSIGHT (Oct. 31, 2001), http://pogoblog.typepad.com/pogo/sigar/.

37. *See* OFFICE OF THE INSPECTOR GEN., U.S. AGENCY FOR INT'L DEV., AUDIT OF USAID'S PROCESS FOR SUSPENSION AND DEBARMENT, AUDIT REPORT NO. 9-000-10-001-P (2009), *available at* http://www.usaid.gov/oig/public/fy10rpts/9-000-10-001-p.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-174, EXCLUDED PARTIES LIST SYSTEM SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS (2009) [hereinafter EXCLUDED PARTIES LIST SYSTEM]; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-10-50, DHS' USE OF SUSPENSION AND DEBARMENT ACTIONS FOR POORLY PERFORMING CONTRACTORS (2010); U.S. DEP'T OF TRANSP., ZA-2010-034, DOT'S SUSPENSION AND DEBARMENT PROGRAM DOES NOT SAFEGUARD AGAINST AWARDS TO IMPROPER PARTIES (2010); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., D-2011-083, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS (2011).

38. COMM'N ON WARTIME CONTRACTING [CWC] IN IRAQ AND AFGHANISTAN, AT WHAT RISK: CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS (2011).

39. *Id.* at 51.

40. *Id.*

41. *See* Marcia G. Madsen, David F. Dowd & Luke Levasseur, *Past Performance/Suspension and Debarment: How Should Performance Data Be Obtained and Used?*, 95 Fed. Cont. Rep. (BNA) 423, 423 (Apr. 19, 2011) ("Although the CWC's mandate only extends to consideration of changes to contracting rules in the contingency theaters, there is a substantial concern that changes it suggests could bleed over into and affect contracting government-wide . . ."); *see also* Scott Amey, *Is the Federal Suspension and Debarment System Broken?*, PROJECT ON GOV'T OVERSIGHT (Nov. 17, 2011), http://pogoblog.typepad.com/pogo/2011/11/is-the-federal-suspension-and-debarment-system-broken.html ("Although the CWC looked at the unique situation of contractor responsibility in contingency operations, POGO believes its conclusions apply throughout the government.").

42. *How Convicts and Con Artists Receive New Federal Contracts: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2009); *Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2010).

Likewise, the Senate Committee on the Judiciary held hearings related to fraud and expressed concern that firms found guilty of fraud have escaped debarment.[43] The GAO also has recently reported that many agencies need to improve their suspension and debarment programs.[44]

Of course, this is not the first time government contractors have been under scrutiny. During World War II the U.S. Senate empowered the Special Committee to Investigate the National Defense Program, headed by Senator Harry Truman, to investigate "excessive profits, fraud, corruption, waste, extravagance, mismanagement, incompetence, and inefficiency in expenditures, connected with World War II."[45] Fighting fraud, waste, and abuse has long been a way for politicians to win supporters, and government contractors have been a regular focus of congressional scrutiny.

A. *Ill Wind*

Today's environment is reminiscent of the 1980s, when an enormous defense budget, procurement scandals, and economic distress were accelerants for reform.[46] In 1986, the President's Blue Ribbon Commission on Defense Management (the Packard Commission) reported that "a lack of confidence in defense contractors may affect public support for important defense programs, and thus weaken our national security. Restoring public confidence in our acquisition system is essential if we are to ensure our defense."[47] In the 1980s, the American public viewed the defense industry as grossly corrupt and the Federal Government as equally ineffective in counterbalancing the industry's perceived single-minded pursuit of profit.[48] The Packard Commission's report gauged the scope of the problem, stating that nearly half of the 100 largest defense contractors were under investiga-

43. *Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011).

44. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-739, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011).

45. DONALD H. RIDDLE, THE TRUMAN COMMITTEE 16 (1964).

46. In 1981, Senator William Cohen, R-ME, expressed the concerns of the era:

> In this time of *economic crisis and huge Government deficits*, when both Congress and the administration are looking for equitable ways to *reduce Government spending*, we certainly welcome this opportunity to evaluate and propose mechanisms by which the Government can protect itself from dealing with proven irresponsible firms. . . . We have to [ensure] that the Government's investment in hundreds of millions of dollars in Federal contracts is not jeopardized because of the failure to debar undesirable contractors.

Weeding out Bad Contractors: Does the Government Have the Right Tools?: Hearing Before the S. Comm. on Homeland Sec. and Govt'l Affairs, 112th Cong. 30 (2011) (statement of Joseph I. Lieberman, U.S. Sen.).

47. PRESIDENT'S BLUE RIBBON COMM'N ON DEF. MGMT., CONDUCT AND ACCOUNTABILITY: A REPORT TO THE PRESIDENT 77 (1986) [hereinafter CONDUCT AND ACCOUNTABILITY].

48. A January 1986 opinion poll found that many Americans believed nearly half the defense budget was lost to waste and fraud. *Id.* at 76. "[T]he national opinion survey represents a striking vote of no confidence in defense contractors generally." *Id.* at 77.

tion for wrongdoing such as defective pricing, cost and labor mischarging, product substitution, subcontractor kickbacks, and false claims.[49] The Commission also found that "[w]idely publicized investigations and prosecutions of large defense contractors have fostered an impression of widespread lawlessness, fueling popular mistrust of the integrity of the defense industry."[50]

Operation Ill Wind, one of the largest fraud investigations in U.S. history, lanced the boil at the end of the 1980s. Ill Wind culminated in the convictions of ninety individuals and companies for crimes including bribery, illegal gratuities, misuse of procurement information, conversion of government documents, and false claims.[51] Ill Wind was a low point for modern U.S. public procurement and the U.S. defense industry.

While Ill Wind began to churn, the Packard Commission offered recommendations for procurement reform, concluding that "no conceivable number of additional federal auditors, inspectors, investigators, and prosecutors can police [government procurement] fully, much less make it work more effectively. Nor have criminal sanctions historically proved to be a reliable tool for ensuring contractor compliance."[52] Instead, the Commission advocated self-governance, with increased cooperation between the Government and contractors:

> We are convinced that significant improvements in corporate self-governance can redress shortcomings in the procurement system and create a more productive working relationship between [G]overnment and industry . . . . Systems that ensure compliance with pertinent regulations and contract requirements must be put in place so that violations do not occur. When they do occur, contractors have responsibilities not only to take immediate corrective action but also to make disclosures to [the] DoD.[53]

The approach reflected the Commission's concern that the "current adversarial atmosphere will harm our industrial base. It is important that innovative companies find it desirable to contract with [the] DoD. In current circumstances, important companies could decide to forgo this opportunity."[54]

The Commission made several pragmatic recommendations related to responsibility and debarment.[55] First, the Commission recommended a FAR amendment to explicitly state that only presently nonresponsible contractors will be debarred.[56] Second, the Commission proposed that the FAR should contain criteria for evaluating present responsibility.[57] Third, officials

49. *Id.* at 75 n.2.
50. *Id.* at 76.
51. *See* ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 34–38 (1995); *see also* Brigadier General (Ret.) Richard J. Bednar, *The Fourteenth Major Frank B. Creekmore Lecture*, 175 MIL. L. REV. 286, 289–90 (2003).
52. CONDUCT AND ACCOUNTABILITY, *supra* note 47, at 77–78.
53. *Id.* at 79.
54. *Id.* at 77.
55. *See id.* at 105–10.
56. *Id.* at 105.
57. *Id.*

should consider the public interests at stake before debarring, including "the effect a proposed suspension/debarment might have on the ability of [the] DoD and other government agencies to obtain needed goods or services."[58] Fourth, the Commission recommended against "automatic" suspension.[59] Fifth, the Commission recommended insulating DoD debarring officials from "untoward" internal and external pressure.[60] Finally, the Commission recommended aggressive enforcement of civil laws, in some cases in lieu of suspension or debarment.[61] Overall then, the Commission refrained from endorsing a dramatic increase in debarment or a strictly principled approach to responsibility decisions.

B. *A New Ill Wind Blowing?*

In the early 21st Century, the United States faces challenges similar to those it faced in the 1980s: a recent, deep recession; high unemployment rates; budget deficits; an enormous defense budget; and a public demanding fiscal restraint.[62] Government contractors are again under scrutiny. In 2002, Richard J. Bednar, director of the Defense Industry Initiative on Business Ethics and Conduct (DII), reflecting on his experience as an Army debarring official during the Ill Wind era, forecasted that he "personally fear[ed] that we are on the edge of the mire again, and [that] there is a real danger that we are about to slide into that slop in short order."[63] The DII was formed around the time the Packard Commission issued its final report.[64] The DII promotes "creat[ing] an environment in which compliance with federal procurement laws and free, open, and timely reporting of violations become the felt responsibility of every employee in the defense industry."[65] In the current political environment, contractors will not be left to police themselves.

Fraud and corruption investigations and procurement scandals in the last decade have demonstrated that Mr. Bednar's fears were not unfounded.[66]

58. *Id.* at 106.

59. *Id.* at 107.

60. *Id.* at 108.

61. *Id.* at 109–10.

62. *See, e.g.*, Tiffany Hsu, *Federal Deficit for First Half of 2012: $777 Billion*, L.A. TIMES (Apr. 6, 2012), http://www.latimes.com/business/money/la-fi-mo-federal-deficit-20120406,0,1776418.story?track=rss.

63. Bednar, *supra* note 51, at 291.

64. *See About Us*, DEF. INDUS. INITIATIVE, http://www.dii.org/about-us (last visited June 1, 2012) (noting that the DII was formed in 1986).

65. DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, 1996 ANNUAL REPORT TO THE PUBLIC AND THE DEFENSE INDUSTRY (Feb. 1997), *available at* http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/defence.htm.

66. The Defense Criminal Investigative Service (DCIS) had ninety-four public corruption cases and eighty-eight procurement fraud cases open as of December 1, 2009. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF DEF., D-2010-059, CONTINGENCY CONTRACTING: A FRAMEWORK FOR REFORM 43 (2010). In a CWC hearing to assess the effectiveness of the U.S. system for combating fraud, waste, and abuse, co-chairman Christopher Shays cited the International Contract Corruption Task Force stating, in May 2010, that U.S. government employees or military per-

To remedy this recent trend in contractor misconduct, Congress has required contractors to disclose unlawful conduct and significant overpayments related to government contracts.[67] In addition, the Duncan Hunter National Defense Authorization Act of 2009 created FAPIIS as a means to catalog contractor convictions, civil judgments, and poor performance.[68] Contracting Officers must review the information in FAPIIS before determining a contractor is responsible, and they must alert debarring officials if they find derogatory data in FAPIIS that "appears appropriate for the official's consideration."[69] The Consolidated Appropriations Act of 2012 further prohibited agencies from entering into contracts with

> . . . any corporation that was convicted . . . of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless the agency has considered suspension or debarment of the corporation . . . and made a determination that this further action is not necessary to protect the interests of the Government.[70]

Agencies are therefore under pressure to take aggressive action against contractors with less-than-pristine records.[71] In response to alleged profiteering and corruption, lawmakers and public interest groups have proposed new laws and regulations to increase the use of suspension and

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sonnel accounted for more than one-third of 477 subjects of fraud investigations. *How Good Is Our System for Curbing Contract Waste, Fraud, and Abuse?: Hearing Before the S. Comm. on Wartime Contracting*, 111th Cong. 2–3 (2010) (joint statement of Christopher Shays & Michael Thibault, Co-Chairs, Comm'n on Wartime Contracting). Similarly, in the Ill Wind era, government employees were a significant part of the problem, passing classified information to defense contractors in exchange for bribes and gratuities. In 1991, Melvyn Paisley, assistant secretary of the Navy (Research, Engineering and Systems) admitted to taking bribes while in office, and he was sentenced to four years in prison. *See* Pasztor, *supra* note 51, at 361–63.

67. Supplemental Appropriations Act of 2008, Pub. L. No. 110-252, § 6102, 122 Stat. 2323, 2386 (2008) (requiring mandatory disclosure); FAR 3.1003(a)(1) and (2) (incorporating mandatory disclosure).

68. Duncan Hunter National Defense Authorization Act of 2009, Pub. L. No. 110-417, § 872, 122 Stat. 4355, 4555–58 (establishing FAPIIS); Supplemental Appropriations Act of 2010, Pub. L. No. 111-212, § 3010, 124 Stat. 2303, 2340 (establishing public access to information in FAPIIS).

69. FAR 9.104-6.

70. Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 528, 125 Stat. 786, 928 (2011).

71. For example, during a CWC hearing Mr. Grant Green commented to Richard Ginman, deputy director, Defense Procurement and Acquisition Policy:

> [From] '07 to '09, hundreds of contractors have been found to have committed fraud in connection with DoD contracts. During the same period . . . DoD awarded almost $300 billion to these same companies. Despite this, DoD stated in a report to Congress in January of 2011 that [DoD] "believes that existing remedies with respect to contractor wrongdoing are sufficient." I don't follow that.

Ensuring Contractor Accountability: Past Performance and Suspension & Debarment: Hearing Before Comm. on Wartime Contracting, 112th Cong. 123 (2011) (statement of Grant Green, Comm'r). The DoD reissued the report to Congress in October 2011, replacing the statement that the DoD "believes the existing remedies . . . are sufficient" with the opposite: "It is not clear, however, that these remedies are sufficient." DEP'T OF DEF., D-315854E, REPORT TO CONGRESS ON CONTRACTING FRAUD 10 (Oct. 2011).

debarment.[72] And politicians are now directly pressing agency heads to cut ties with specific contractors.[73] For example, Congress recently required the DoD to report

> . . . the total value of DoD contracts entered into with contractors that have been indicted for, settled charges of, been fined by any Federal department or agency for, or been convicted of fraud in connection with any contract or other transaction entered into with the Federal Government over the past ten years.[74]

Under the same mandate, the DoD was called upon to "recommend penalties for contractors who are repeatedly involved in contract fraud allegations."[75]

As a result of these developments, government procurement lawyers and their clients have noted an increasingly adversarial environment during the last decade: "[T]he line between punishment of contractors and protection of the [G]overnment's interest is in serious danger of erosion, and the current trend picks up the thread of previous efforts to punish government contractors for past infractions, without regard to remedial steps the contractor may have taken."[76] In this increasingly adversarial environment, contracting officials exercise their considerable discretion to permit or prohibit entrance into the lucrative government procurement marketplace.[77]

III. BUSINESSLIKE PROCUREMENT AND DISCRETION

Even though fraud and corruption in DoD procurement was an impetus for reform in the 1980s, the Packard Commission focused on inefficiency as well.[78] The Commission concluded:

> The nation's defense programs lose far more to inefficient procedures than to fraud and dishonesty. . . . Chances for meaningful improvement will come not from more regulation but only with major institutional change. Common sense must be made to prevail alike in the enactments of Congress and the operations of the Department. We must give acquisition personnel more authority to do

72. *See, e.g., POGO's Scott Amey Testifies on Hill About Suspension and Debarment System Failures*, PROJECT ON GOV'T OVERSIGHT (Feb. 26, 2009), http://www.pogo.org/pogo-files/testimony/contract-oversight/co-ca-20090226.html#8 (making a number of recommendations to improve the suspension and debarment system).

73. For example, Congresswoman Jan Schakowsky, D-IL, describes her efforts: "[I] [s]ent letters to Secretary Clinton and Secretary Gates urging them to terminate their relationship with Blackwater. . . . I urged both Secretaries to not enter into any further contracts with the company and to immediately review any existing contracts with Blackwater." Jan Schakowsky, *Contracting*, HOUSE.GOV, http://schakowsky.house.gov/index.php?option=com_content&view=article&id=2738&Itemid=64 (last visited June 1, 2012).

74. REPORT TO CONGRESS ON CONTRACTING FRAUD, *supra* note 71, at 2.

75. *Id.*

76. John S. Pachter, *The New Era of Corporate Governance and Ethics: The Extreme Sport of Government Contracting*, 5 PUB. PROCUREMENT L. REV. 247, 248 (2004).

77. *See id.* at 251.

78. *See* PRESIDENT'S BLUE RIBBON COMM'N ON DEF. MGMT., AN INTERIM REPORT TO THE PRESIDENT 15 (1986).

> their jobs. If we make it possible for people to do the right thing the first time and allow them to use their common sense, then we believe that the Department can get by with far fewer people.[79]

The Commission recommended that the DoD emulate the procurement practices of private companies like The Boeing Company, AT&T, and IBM.[80]

The Commission's conclusion that inefficiency was a more serious problem than dishonesty presaged change. Efficient, businesslike acquisition became the reformers' goal in the 1990s.[81] The seeds of reform were sown in the Federal Acquisition Streamlining Act of 1994[82] and the Clinger-Cohen Act of 1996.[83] In the aftermath of Ill Wind, one might have expected lawmakers to crack down on acquisition officials and contractors, but reformers in the 1990s entrusted officials with greater discretion.

A. *Should We Fear Discretion?*

A key tenet of businesslike procurement holds that government officials must have discretion to consider the kind of information and experiences their commercial counterparts use to choose the best contractors.[84] In the book *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*, Dr. Steven Kelman advocated increased discretion for Contracting Officers, especially with regards to evaluating contractors' past performance.[85] Dr. Kelman continued to champion discretion as the administrator of the Office of Federal Procurement Policy (OFPP) in the Clinton administration.[86] Professor Steven Schooner, who worked with Dr. Kelman in the mid-1990s, critiqued the consequences of increased discretion in his article "Fear of Oversight: The Fundamental Failure of Businesslike Government."[87] In their writings, Dr. Kelman and Professor Schooner weighed the benefits and risks of discretion.[88] Although they both focused on officials' discretion in evaluating past performance, their observations about the power and peril of discretion also can apply to responsibility-related decisions.

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79. *Id.*

80. PRESIDENT'S BLUE RIBBON COMM'N ON DEF. MGMT., FORMULA FOR ACTION: A REPORT TO THE PRESIDENT ON DEFENSE ACQUISITION 11 (1986) ("It is clear that major savings are possible in the development of weapon systems if DoD broadly emulates the acquisition procedures used in outstanding commercial programs.").

81. *See, e.g.*, STEVEN KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE 1 (1990).

82. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

83. Clinger-Cohen Act of 1996, Pub. L. No. 104-106, 110 Stat. 188.

84. *See* KELMAN, *supra* note 81, at 10.

85. *Id.*

86. Dr. Kelman served from 1993–1997. *Id.*

87. *See generally* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. Rev. 627 (2001).

88. *See id.*; KELMAN, *supra* note 81.

Both agreed that well-trained officials with broad discretion are empowered to promote the Government's interests.[89] However, Professor Schooner wrestled with the balance between discretion and oversight.[90] Ultimately, he predicted that increased discretion, decreased oversight, and a shrinking procurement workforce could lead to scandal because expansive discretion may sacrifice equity, integrity, and transparency, while also weakening oversight.[91]

In Dr. Kelman's view, discretion to reward or penalize contractors' past performance is essential to better procurement.[92] As a result of his leadership, the FAR was amended to encourage Contracting Officers to consider aspects of performance that are difficult to quantify or qualify, such as standards of good workmanship, the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction, the contractor's record of integrity and business ethics, and the contractor's businesslike concern for the interest of the customer.[93] Because these intangibles cannot be objectively valued, Dr. Kelman concluded that government officials should be liberated from a "straightjacket" of rigid rules that prohibit consideration of subjective factors.[94] His argument for discretion and flexibility in public procurement is based on the idea that "a mediocre level of organizational performance results when people mechanically apply rules to situations that call for more than mechanical behavior and when rule-boundedness stifles creativity and the striving for excellence."[95]

Nonetheless, Dr. Kelman conceded that discretion has its drawbacks.[96] He wrote that "[t]o allow officials to pick and choose among an endless stream of facts and impressions creates the clear potential for whim, arbitrariness, or prejudice."[97] In fact, he asserted that distrust of Government is the root of regulation and causes fear of discretion:

> Laws are rules, and men are individuals exercising judgment in particular cases. When we seek a [G]overnment of laws rather than men, we express both an ideal of fair and impartial treatment, and a fear that such treatment will not be forthcoming if we leave it to the judgment of the individuals who actually make up the [G]overnment.[98]

Dr. Kelman therefore concluded that "[a]ny loosening of the procurement regulatory straightjacket should be accompanied by, and linked to, increased

89. Schooner, *supra* note 87, at 630–31; KELMAN, *supra* note 81, at 1.
90. *See* Schooner, *supra* note 87, at 706–15.
91. *See id.*
92. KELMAN, *supra* note 81, at 10.
93. *See* Steven Kelman, *Remaking Federal Procurement* 3–5 (John F. Kennedy School of Gov't, Visions of Gov't in the 21st Century, Working Paper No. 3), *available at* http://www.hks.harvard.edu/fs/skelman/Remaking%20Federal%20Procurement%20Visions%20paper.pdf; *see also* Schooner, *supra* note 87, at 636 n.28.
94. *See* KELMAN, *supra* note 81, at 56, 98.
95. *Id.* at 27.
96. *Id.* at 44.
97. *Id.*
98. *Id.* at 14.

resources for public corruption investigations to investigate units both outside the line agencies responsible for procurement and within those agencies."[99]

Although rigid rules can stymie pragmatism, unrestrained discretion can lead to profound inequities. Justice William Douglas articulated the dangers of unreviewable discretion in procurement activities in *United States v. Wunderlich*[100]:

> [T]he rule we announce has wide application and a devastating effect. It makes a tyrant out of every [C]ontracting [O]fficer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.[101]

Like Justice Douglas, others have voiced a similar concern that the reforms of the 1990s, while increasing discretion, have resulted in a corresponding decrease in meaningful oversight. Not everyone shares Dr. Kelman's self-described "Pollyannaish optimism" about unchecked discretion.[102] For example, within a few years after the reforms were implemented, Professor Schooner noted a precipitous drop in the number of protests taken to the GAO and a similar decline in appeals to the boards of contract appeals.[103]

Professor Schooner hypothesized that the increase in Contracting Officer discretion played a part in the decrease in protests and appeals because "[i]n an era of seemingly unfettered [C]ontracting [O]fficer discretion, and faced with what they perceive as a dismal likelihood of prevailing on the merits, prospective litigants are discouraged from initiating litigation to challenge agencies' source selection decisions."[104] As discretion grows, there is less opportunity for adjudicative bodies to conduct meaningful oversight, since discretionary guidelines cannot be enforced in the same manner as rules.[105] Broad discretion entrusted to a single official, coupled with vaguely defined decision-making guidelines, can lead to ad hoc, end-justifies-the-means decisions. Thus, a healthy fear of discretion is warranted.

Decisions regarding a contractor's responsibility, like past performance, require careful consideration of a variety of facts and circumstances not easily summarized in an exhaustive list, and broad discretion in responsibility-related decisions creates the potential for whim, arbitrariness, and prejudice.

99. *Id.* at 98.

100. 342 U.S. 98 (1951).

101. *Id.* Ultimately Justice Douglas's position prevailed in the enactment of the Wunderlich Act, which established that government officials' contract decisions would be reviewable under an arbitrary, capricious, or grossly erroneous standard. *See* Wunderlich Act, Pub. L. No. 357, 69 Stat. 356 (1954).

102. *See* KELMAN, *supra* note 81, at 103.

103. Schooner, *supra* note 87, at 644–47.

104. *Id.* at 663.

105. *Cf. id.* at 663–64 (noting that the conclusion that discretion leads to less arbitrary and capricious procurement decisions may be based only on anecdotal evidence).

Oversight can be a useful defense against inequity, but finding the optimal balance of rules, discretion, and oversight in a dynamic environment is challenging.

B. *Fear of Oversight*

Like discretion, oversight can be abused. Discretion rarely means independence. Rather, officials with even broad discretion may still be exposed to "untoward" internal and external pressure, emanating from such sources as supervisors, customers, the press, the public, and even Congress.[106] A rule-based system offers some protection from internal and external pressures.[107] Professor Schooner expressed concern that loosened rules would lead to less oversight.[108] But loosened rules could likewise lead to unrestrained oversight, leaving officials with broad discretion exposed to unmitigated pressures and second-guessing.

As long as Contracting Officers follow proper procedure, they are, for the most part, sheltered from adjudicative reversal.[109] However, proper procedure provides little protection from aggressive congressional oversight. While Congress has the power of the purse and therefore must oversee the expenditure of funds,[110] aggressive congressional oversight can be problematic to successful procurement policy. Professor Christopher Yukins explains:

> Political input is, of course, a natural part of any governmental review. The concern, though, is that political involvement may distort a process that already has too few signposts to guide government officials' discretion. Because contractors may be proposed for debarment for almost any wrongdoing, political pressure can, it is feared, distort an already fragile process.[111]

In addition, aggressive oversight can have a long-term impact on the acquisition workforce. Dr. Kelman noted the extent to which government procurement professionals adopt practices that regulations do not explicitly require.[112] He described Contracting Officers as agency "leash-holders" who

106. *See* CONDUCT AND ACCOUNTABILITY, *supra* note 47, at 109–10 (suggesting debarring officials should be sheltered from "untoward" internal and external influences).

107. *See* KELMAN, *supra* note 81, at 99.

108. Schooner, *supra* note 87, at 685.

109. *See id.* at 664 ("The GAO and the courts grant or recommend relief only in a small number of protests.").

110. U.S. CONST. art. I, § 8.

111. Yukins, *supra* note 33, at 258–59.

112. KELMAN, *supra* note 81, at 25 ("Indeed, I was repeatedly surprised how many common procurement practices are not mandated by the procurement regulations, but come from a procurement culture that has developed in contracting offices."). Two decades later, in February 2011, Dan Gordon, administrator for Federal Procurement Policy, issued the memorandum "Myth-Busting": Addressing Misconceptions to Improve Communication with Industry During the Acquisition Process. Memorandum from Daniel I. Gordon, Adm'r for Fed. Procurement Policy, to Chief Acquisition Officers, Senior Procurement Execs, & Chief Info. Officers (Feb. 2, 2011). The memorandum asserts that government acquisition officials and industry have been too cautious in not communicating enough with each other. *Id.* An overly cautious

pointed out to him, "with a flair for drama and perhaps hyperbole, [that] it is they who 'will go to jail' if the rules have been violated."[113] Dr. Kelman conducted a study of government computer procurement in the late 1980s, during a time of increased scrutiny.[114] Given the circumstances, procurement professionals of that era took an especially cautious approach to their duties.[115] Dr. Kelman concluded that Contracting Officers "are evaluated by how few regulatory violations they allow or how few 'waves' the procurement causes. Because exercise of discretion generates the congressional investigations and media stories, [C]ontracting [O]fficers tend to be safe rather than sorry."[116]

In the context of responsibility-related decisions, a cautious official with considerable discretion might err on the side of excluding a contractor if a less aggressive policy resulted in criticism of his or her agency. That was precisely the outcome alleged by some procurement lawyers during the 1980s.[117] Because of the "highly politicized atmosphere in which decisions by debarring officials are made," government contract lawyers of the era believed that "[a] debarring official who recommend[ed] leniency [would have been] tossing his service or agency a 'political hot potato' in light of the close scrutiny of this issue by the Office of Secretary of Defense, Congress, and the media."[118]

The level of risk aversion of acquisition officials is evidence of the extent to which internal and external pressures, including congressional oversight, shape government procurement practices and norms. In 2004, Dr. Kelman urged the Committee on Government Reform to temper its oversight of procurement in Iraq:

> [E]xperienced contracting people remember the old days when their job consisted mostly of policing government program officials and contractors to make sure nobody did anything wrong. Given this history, it would be very easy for our procurement workforce to get the message from the headlines that we want them to go back to that focus . . . . Conducting contracting oversight of such a high-visibility effort is a duty of this Committee . . . . But I wish to call the attention of members of the Committee to potentially unintended consequences of your efforts. I believe that the various headlines about Iraqi contracting have demoralized and even terrorized many in our government contracting workforce. Though you don't intend it, they are getting the message that you want them to spend all their

acquisition workforce may forgo opportunities or withhold information that would generate value for the Government, industry, and the public. *Id.*

113. KELMAN, *supra* note 81, at 24–25.

114. *Id.* at 1.

115. Professor Yukins makes the same point as Dr. Kelman that contracting officials may seek to avoid scrutiny and criticism by making overly cautious decisions. Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principle-Agent Model*, 40 PUB. CONT. L.J. 63, 77 (2010) [hereinafter *A Versatile Prism*].

116. KELMAN, *supra* note 81, at 27.

117. Robert S. Bennett & Alan Kriegel, *Negotiating Global Settlements of Procurement Fraud Cases*, 16 PUB. CONT. L.J. 30, 35 (1986).

118. *Id.* at 34–35.

> time preventing every last ounce of wrongdoing. . . . They are getting the message that you want them to go back to the old days.[119]

It seems Congress's continuing focus is on fraud and corruption, not efficiency and best procurement practices, and members of Congress have recently criticized agencies for not aggressively exercising their authority to debar contractors.[120]

This is not the first time that agencies have been criticized for not using their discretionary debarment authority. For example, in 1981, the Senate Subcommittee on Oversight of Government Management held hearings on government-wide suspension and debarment procedures.[121] Brigadier General Richard Bednar, at the time an Army debarring official, testified that the Army had an "aggressive" debarment program with twelve contractors debarred in 1980.[122] Mr. Bednar recalled the intense congressional pressure at the time:

> They really pushed us hard, all of us—Army, Navy, Air Force, Defense Logistics Agency—to pull up our socks and use the protective measure of suspension and debarment to an extent that was unprecedented. It took these two courageous lawmakers, [Senators] Cohen and Levin, to dig in and find out that this remedy was not being used. They put some heat on us to actually begin using the remedy to a greater extent than we ever had before.[123]

Statistics show that the Army did "pull up its socks."[124] In 1981, the number of Army debarments increased to an annual total of sixty debarments.[125] In 1985, the Senate urged agencies to seek indictments against contractors believed to have defrauded the United States and to "more aggressively use suspension or debarment of contractors convicted of crimes as appropriate supplemental penalty for such conviction."[126] Perhaps as a result, Army

119. *Unprecedented Challenges: The Complex Task of Coordinating Contracts Amid the Chaos and the Rebuilding of Iraq: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 580 (2004) (statement of Dr. Steven Kelman).

120. "Suspension and debarment can be an effective tool for Federal agencies to ensure contractor performance. Unfortunately, as we will hear today, the suspension and debarment tool often goes unused—quietly rusting away in the procurement tool box." *Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 1 (2010) (statement of Chairman Edolphus Towns).

121. *Government-wide Suspension and Debarment Procedures: Hearing Before the S. Subcomm. on Oversight of Gov't Mgmt.*, 97th Cong. (1981).

122. *Id.* at 128, 165 (statement of Brigadier General Richard J. Bednar).

123. Bednar, *supra* note 51, at 293.

124. *See generally id.*

125. COMM. ON GOV'T OPERATIONS, H.R. REP. NO. 102-1061, DEBARMENT AND REINSTATEMENT OF FEDERAL CONTRACTORS: AN INTERIM REPORT 7 (1992) (Conf. Rep.). DoD debarments increased from 57 in 1975 to 1,455 in 1990. *Id.* DoD had approximately 30,000 contractors in 1990. *Id.* at 5. The Packard Commission acknowledged the steep increase in suspension and debarment: "In recent years there has been a marked increase in the number of actions taken to suspend or debar individual or corporate contractors. . . . This increase is due in part to a more determined and aggressive enforcement stance by DoD and a greater willingness to apply the sanctions." CONDUCT AND ACCOUNTABILITY, *supra* note 47, at 103.

126. Bennett & Kriegel, *supra* note 117, at 34 (quoting 131 CONG. REC. S17326 (daily ed. Dec. 10, 1985)). "Although plainly at odds with the provision in the FAR that debarment

debarments peaked at 296 in 1990.[127] The increase is arguably attributable to congressional pressure.[128] After all, given that Brigadier General Bednar described twelve debarments as an "aggressive" debarment program, it seems unlikely that the Army would have debarred 296 contractors in a year but for congressional pressure.[129]

In the recent past, congressional and media influence have led to high-profile suspensions, such as the suspension of GTSI Corp. in October 2010.[130] In addition, pressure has been brought to bear in an attempt to persuade the State Department and DoD to sever ties with Xe, formerly known as Blackwater.[131] There is a concern that suspension and debarment have become politicized.[132] As Dan Gordon, former head of the OFPP and now associate dean for Government Procurement Law at The George Washington University Law School, explained about his OFPP experience:

> One of the most politically charged areas we dealt with was suspension and debarment. I view suspension and debarment as important tools to protect the Government's interests going forward, and talking about them should be constructive. Yet time and again, I found myself having to respond to politically charged efforts to promote automatic ineligibility for firms with one or another strike against them.[133]

Currently, some members of Congress appear eager to use FAPIIS as a means to aggressively monitor contractor responsibility and suspension and debarment decisions.[134] FAPIIS consolidates access to information sources, such as the Excluded Parties List System, Past Performance Information Retrieval System, and Contractor Performance Assessment Reporting System.[135] FAPIIS also will contain information regarding criminal,

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may not be used 'for purposes of punishment,' [FAR] 9.402(b), this resolution reflects the political climate in which the issue of debarment must be addressed." *Id.* at 35.

127. DEBARMENT AND REINSTATEMENT OF FEDERAL CONTRACTORS, *supra* note 125, at 7.

128. *Id.* at 3.

129. *See* Bednar, *supra* note 51, at 293.

130. Lars E. Anderson et al., *GTSI's Suspension Shows That Contractors Should Ensure Accurate Representations Concerning Small Business Matters*, 94 Fed. Cont. Rep. (BNA) No. 15, at 2 (Oct. 26, 2010) ("The SBA decision to suspend GTSI is remarkable because the government rarely moves directly to suspend or debar an entire company as large as GTSI . . . . This case has drawn wide publicity and has been compared to the Environmental Protection Agency's 2008 debarment of IBM.").

131. *See supra* note 73 and accompanying text.

132. Professor Schooner has expressed concern about "the purpose of the [debarment] policy, its effectiveness, the fairness of its application, recent activity which suggests the politicisation of the process, and the potential ramifications in terms of credibility and public trust." *The Paper Tiger Stirs*, *supra* note 31, at 211. *See generally* Yukins, *supra* note 33.

133. Daniel I. Gordon, *Reflections on the Government Procurement Landscape*, 54 GOV'T CONTRACTOR ¶ 51, Feb. 22, 2012, at 7.

134. *See Bill Would Strengthen Contractor Oversight*, 52 GOV'T CONTRACTOR ¶ 175, May 19, 2010.

135. Duncan Hunter National Defense Authorization Act of 2009, Pub. L. No. 110-417, § 872, 122 Stat. 4355, 4555–58 (2008) (establishing FAPIIS); U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 74 Fed. Reg. 45,579 (Sept. 3, 2009) (proposed rule).

civil, and administrative proceedings related to government contracts.[136] FAPIIS was originally envisioned as a one-stop source of information for Contracting Officers.[137] However, FAPIIS also may become an oversight tool.

Almost as soon as FAPIIS was conceived, members of Congress sought access to it.[138] Senators Russ Feingold and Tom Coburn introduced legislation in May 2010 that would have expanded access to members of Congress.[139] Additionally, the legislation would have required an annual audit to ensure federal contracting officials consulted FAPIIS and an annual report to track contracts awarded to suspended or debarred contractors.[140] Senator Coburn urged that "Congress should act quickly to enact this legislation and aggressively conduct oversight of federal agencies to ensure compliance."[141]

The public was ultimately given access to FAPIIS.[142] Senator Bernie Sanders explained how "every contractor's history of illegal behavior will be posted on a publicly accessible online database" and "that this new public awareness will put an end to handing out taxpayer-financed contracts to corporations with a history of fraud."[143] However, opening FAPIIS to the public did not generate universal acclaim. The Professional Services Council stated:

> While firms are accountable for their past performance, opening portions of the database that are not now already publicly available elsewhere could risk improperly influencing the evaluation and selection of otherwise qualified bidders because of public pressure to "blacklist" certain vendors.[144]

In addition, several commentators have noted that FAPIIS "has caused concern in the contractor community because some believe this could result in the [G]overnment: (i) making it nearly impossible to work with certain contractors due to public pressure to influence the bid review process, or (ii) improperly blacklisting certain contractors."[145]

There are at least three problems with FAPIIS-based oversight. First, although the information in FAPIIS is intended for evaluating business

136. FAR 9.104-7(b) (requiring FAPIIS clause at FAR 52.209-7, Information Regarding Responsibility Matters).

137. *See* U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 75 Fed. Reg. 14,059–60 (Mar. 23, 2010).

138. *See Bill Would Strengthen Contractor Oversight*, *supra* note 134.

139. *Id.*

140. *Id.*

141. *Id.*

142. Supplemental Appropriations Act of 2010, Pub. L. No. 111-212, § 3010, 124 Stat. 2303, 2340.

143. Robert Brodsky, *Industry Group Fears Publicizing Contractor Database Could Backfire*, GOV'T EXEC. (Aug. 6, 2010), http://www.govexec.com/dailyfed/0810/080610rb1.htm.

144. Tom Spoth, *Contract Performance Data to Become Public*, FED. TIMES (Aug. 6, 2010), http://www.federaltimes.com/article/20100806/ACQUISITION03/8060301.

145. Mike Schaengold & Rebecca Soll, *Statutes & Regulations—Part 1: Statutes Update*, *in* WEST GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE, CONFERENCE BRIEFS, 1-1, 1-1 (2011).

integrity and ethics, the FAR does not contain well-defined business integrity criteria from which adequate evaluation can be made.[146] Campaign contributions by government contractors further jeopardize the use of FAPIIS information for integrity evaluations, as members of Congress could use FAPIIS information in launching offensives against their campaign contributors' competitors.[147] Second, effective oversight requires that the overseer consider all relevant information. However, FAPIIS provides information on misconduct and poor performance, which is only part of the information required for an intelligent responsibility or debarment decision.[148] Third, public access to FAPIIS may aid and abet contractor attacks aimed at hobbling the competition.[149] Contractor attacks on competitors, cloaked in claims of promoting the public interest, could reduce competition for the benefit of a few powerful contractors.[150]

IV. BETTER-DEFINED CRITERIA TO GUIDE DISCRETION

Officials must have discretion to make responsibility-related decisions. At the same time, they need guidelines and appropriate oversight to ensure consistency in their decisions. Refined guidelines can steer discretion without hijacking the decision-making process. Three concepts underlie almost all responsibility-related decisions, yet they are conspicuously undefined in the FAR.[151] These concepts are (1) "satisfactory" record of integrity and business ethics, (2) the purposes of punishment, and (3) the public interest.[152] If better guidance is to be provided to ensure that responsibility-related decisions are made in a consistent, predictable, and intellectually

146. *See generally* FAR 9.104, 42.15.

147. *See* Emily N. Seymour, Note, *Refining the Source of the Risk: Suspension and Debarment in the Post-Andersen Era*, 34 PUB. CONT. L.J. 357, 374–75 (2005) (suggesting campaign contributions from Verizon Communications to Senator Susan Collins created the perception of a conflict of interest when Senator Collins advocated strict enforcement of MCI WorldCom's suspension). The Obama administration considered a policy to require contractors to reveal their political contributions and expenditures. Perry Bacon Jr. & T.W. Farnam, *Obama Looks at Contractors' Donations*, WASH. POST, Apr. 21, 2011, at A4.

148. "The decision that suspension or debarment will serve the public interest requires a careful balancing of public needs against any potential harm that might occur from continued dealings with the contractor." CONDUCT AND ACCOUNTABILITY, *supra* note 47, at 106–07.

149. Pachter, *supra* note 76, at 248 ("Indeed, the suspension and debarment arena has become a virtual bid protest forum for companies seeking to eliminate competition . . . . No longer will aggressive competitors be content to challenge a single award if they sense the opportunity to chill competition in a pending procurement, or even knock the opponent out of the game for several years by demanding suspension or debarment. Combine this with calls from opportunistic politicians for punitive measures against government contractors, and you have—to put it mildly—an intensely challenging business environment.").

150. There is precedent for protests aimed at contesting competitors' responsibility. *See* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1328–29 (Fed. Cir. 2001) (unsuccessful bidder alleged awardee had ties to organized crime).

151. *See* FAR 9.104-1(d).

152. *See* FAR 9.402.

honest manner, then these concepts must be anchored to more than an official's subjective interpretation of what they mean.

A. *A More Satisfactory Concept of a "Satisfactory Record of Integrity"*

To mitigate risk, the Government excludes nonresponsible contractors from procurement activities.[153] The long-standing legal definition of responsibility is "something more than pecuniary ability; it includes also judgment, skill, ability, capacity and integrity."[154] Thus, a responsible contractor has a "satisfactory record of integrity and business ethics."[155] The Government should shun contractors that lack integrity and business ethics to avoid risk, rather than to avoid the appearance of impropriety or to ensure that only good corporate citizens receive government contracts.[156]

Integrity is a key consideration in debarment decisions and responsibility evaluations because whether a contractor should be debarred depends upon whether the contractor is presently responsible.[157] The link between present responsibility and debarment was not always clear. In 1983, the D.C. Circuit suggested that present responsibility was irrelevant in a debarment decision:

> [A] finding of present responsibility for performance of a particular contract does not preclude a contemporaneous finding that a contractor should be debarred . . . . [Present responsibility] is a practical, not a legal determination, based primarily on the contractor's suitability for a particular job. By contrast, debarment decisions are made by legal personnel and bind the entire Department of Defense. . . . Clearly, differences in focus, criteria, scope, and decisionmaking personnel make the present responsibility and debarment decisions entirely independent of each other.[158]

The court's rationale distinguishes between "practical" responsibility determinations and "legal" debarment decisions.[159]

It is now the rule that presently responsible contractors should not be debarred.[160] As early as 1962, the Administrative Conference of the United States took the position that "debarments should be removed upon a show-

153. FAR 9.103(c); *see* Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988) (stating debarment is a means to protect the Government by excluding nonresponsible contractors).

154. Arthur S. Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 MICH. L. REV. 781, 788 (1955) (quoting O'Brien v. Carney, 6 F. Supp. 761, 762 (D. Mass. 1934)).

155. FAR 9.104-1(d).

156. *See* Art-Metal-USA, Inc. v. Solomon, 473 F. Supp. 1, 8 (D.D.C. 1978). An agency suspended a contractor because of negative publicity. *Id.* The court held, "[t]he public interest is not served . . . by official blacklisting based not on evidence but on the premise that to do otherwise 'wouldn't look very good.'" *Id.*

157. FAR 9.104-6(b).

158. Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163, 167 n.18 (D.C. Cir. 1983) (disagreeing with the lower court's holding that "[d]efendants have shown no threat to the interests of the United States that might result from award of the Barbers Point contract to Kiewit, the low bidder; absent such a showing, denial of the award constitutes an unlawful punishment" (quoting Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 534 F. Supp. 1139, 1154–55 (D.D.C. 1982))).

159. *Id.* at 167.

160. FAR 9.406-1(a).

ing of current responsibility."[161] In 1986, the Packard Commission similarly recommended that "[t]he [FAR] should be amended to state more clearly that a contractor may not be suspended or debarred except when it is established that the contractor is not 'presently responsible,' and that suspension or debarment is in the 'public interest.'"[162] By 1989, the D.C. Circuit had changed its view that responsibility and debarment decisions are entirely independent of each other.[163] Finally, in 1992 a list of mitigating factors debarring officials should consider was added to the FAR, which cemented the link between present responsibility and debarment.[164]

Notwithstanding the critical links between present responsibility, integrity, and debarment, however, the meaning of "satisfactory" integrity, a key factor of responsibility, remains hazy. Debarment officials have broad discretion to debar for any offense "indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[165] The FAR does not define "integrity," but the term has been interpreted to mean probity, honesty, and uprightness,[166] as well as "moral soundness, freedom from corrupting influence or practice."[167] In the last decade, the FAR Council proposed to amend the FAR to clarify "satisfactory integrity and business ethics."[168] The Council acknowledged that "the FAR has not elaborated upon what it means to have 'a satisfactory record of integrity and business ethics,' nor has the FAR provided [C]ontracting [O]fficers with a framework to guide their analysis and assist them in making this statutorily-required determination."[169] The Council claimed that this lack of guidance has led to the "unfortunate" consequence of Contracting Officers rarely excluding contractors on integrity grounds.[170]

It has been suggested that Vice President Gore's political aspirations were the impetus for the proposal to clarify the meaning of "satisfactory integrity and business ethics."[171] Vice President Gore delivered speeches to the AFL-CIO in 1997 stating "that the Clinton Administration [would] seek

161. SENATE SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 24, at 294 (1st Sess. 1963).

162. CONDUCT AND ACCOUNTABILITY, *supra* note 47, at 111.

163. *See* Robinson v. Cheney, 876 F.2d 152, 160 (D.C. Cir. 1989) (considering a contractor's present responsibility in a debarment case).

164. FAR 9.406-1(a) ("[I]f a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.").

165. FAR 9.406-2(a)(5).

166. CIBINIC & NASH, *supra* note 9, at 420.

167. Domco Chem. Corp., 48 Comp. Gen. 769, at 769 (1969).

168. *See generally* U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80,256 (Dec. 20, 2000).

169. *Id.*

170. *Id.*

171. *See* Kelly Sherrill & Kate McQueen, Note, *The High Price of Campaign Promises: Ill-Conceived Labor Responsibility Policy*, 30 PUB. CONT. L.J. 267, 274 (2001).

to bar companies with poor labor records from receiving federal contracts."[172] He also said that the administration would propose a FAR amendment requiring Contracting Officers to evaluate a firm's labor practices as part of their responsibility evaluations.[173] The resulting rule, commonly called the "blacklisting rule," was published on December 20, 2000, in the final days of the Clinton administration.[174] The rule provided that a contractor's integrity should be evaluated by examining the contractor's compliance with a variety of laws unrelated to government procurement, for example, labor and consumer-protection laws.[175] According to the Council, while a sole violation of the law does not necessarily indicate that a contractor is nonresponsible, "evidence of repeated, pervasive, or significant violations of the law may indicate an unsatisfactory record of integrity and business ethics."[176]

As of 2001, the blacklisting rule was one of the most controversial the FAR Council ever published, generating over 1,800 comments.[177] The Bush administration ultimately canceled the rule.[178] The FAR Council explained the cancellation:

> Contactors may be unwilling to spend money to submit offers unless they can ascertain the basis by which responsibility determinations will be made with some degree of exactness and objectivity . . . . [T]he December final rule's wording is unclear and provides insufficient guidance for [C]ontracting [O]fficers.[179]

By withdrawing the rule, the Council left Contracting Officers in the position they were in before the rule was proposed—without guidance to evaluate integrity with "exactness and objectivity."[180] The Council emphasized that withdrawing the rule was "not intended to be a statement that violations of the additional laws discussed in the December 20, 2000, rule could not have been considered in the past, or could not be considered in the future, by [C]ontracting [O]fficers or agency debarring officials."[181]

172. Dan Balz & Frank Swoboda, *Gore, Gephardt Court Organized Labor in Precursor of 2000 Campaign*, WASH. POST, Feb. 19, 1997, at A14.

173. *The Administration's Proposed Contracting Regulations: Good Government or Blacklisting: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Educ. and the Workforce*, 105th Cong. 78 (1998) (statement of Rand L. Allen, Partner, Wiley, Rein & Fielding LLP).

174. U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80,256, 80,256 (Dec. 20, 2000); *see also id.* (calling this proposed rule "blacklisting").

175. *Id.* at 80,265.

176. *Id.*

177. U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2001-014, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. 66,986, 66,987 (Dec. 27, 2001).

178. *Id.*

179. *Id.* at 66,989.

180. *Id.*

181. U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 1999-010, Contractor Responsibility, Labor Relations

However, the Council suggested that debarment officials, instead of Contracting Officers, should ensure that the Government does business with good corporate citizens:

> The FAR Council agrees that the Government should not do business with lawbreakers. The problem lies in the means to ensure that the entities with which the Government conducts business are good corporate citizens and adhere to the myriad of regulations and laws. The FAR Council has determined that the suspension and debarment process is the proper vehicle to accomplish this goal. The suspension and debarment rules contain well-established and defined decision-making criteria and due process safeguards, which have evolved through case law precedent and agency practices.[182]

The Council's commentary suggests a strictly principled approach to responsibility.[183] In contrast, the FAR arguably suggests a more practical approach, explaining that "[t]he award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs . . . . A prospective contractor must affirmatively demonstrate its responsibility . . . ."[184] If a business violates one or more regulations and laws, it may still be able to reliably satisfy its contractual obligations to the Government. If the Government seeks to exclude "lawbreakers" and to contract only with "good corporate citizens," without considering the extent of the nature of risks in the respective contracts, it would appear that principle trumps protection and, potentially, best value.

Contrary to the Council's commentary, the suspension and debarment rules do not contain "well-established and defined decision-making criteria" for evaluating integrity and business ethics.[185] FAR 9.406-2(a)(5) states that a contractor may be debarred for "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a [g]overnment contractor or subcontractor."[186] Mr. Steven Shaw notes that this is simply an unclear "catch-all" category, which grants agency debarring officials substantial discretion with minimal guidance from case law.[187]

In any case, a contractor's record of integrity in the abstract is not a very useful guideline. Few, if any, large contractors have pristine records.[188]

Costs, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 17,754, 17,755 (Apr. 3, 2001).

182. Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. at 66,989.

183. *See id.*

184. FAR 9.103(c). The FAR does not suggest responsibility is a matter of good corporate citizenship.

185. Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. at 66,989.

186. FAR 9.406-2(a)(5).

187. Shaw, *supra* note 33, at 232.

188. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1033, ASSESSMENTS AND CITATIONS OF FEDERAL LABOR LAW VIOLATIONS BY SELECTED FEDERAL CONTRACTORS 9–16 (2010)

Consequently, a "satisfactory record of integrity" should mean sufficient integrity, not necessarily a perfect record.[189] Because the FAR does not clearly define integrity and business ethics, a contractor's record cannot be compared to an objective standard. In practice, whether a contractor has "satisfactory" integrity may depend less on the contractor's past infractions and more on the contractor's current and future transactions with the Government. After all, the Government rarely debars contractors with which it will almost certainly deal in the future, for example, large defense contractors.[190] In contrast, the Government debars smaller contractors for integrity lapses if the contractors provide nothing more than readily available goods and services in a competitive market.[191] In the case of smaller contractors then, the Government seems to hold them to a standard of absolute integrity. However, debarring a contractor that the DoD relies on for major weapons systems or goods and services in Iraq and Afghanistan is more complex and difficult.[192] In such a case, the Government's incentive seems to shift towards being pragmatic and the Government seems to search for solutions short of suspension or debarment.[193]

Moreover, when an agency waives a debarment or otherwise continues to employ a contractor after an integrity lapse, the agency impliedly determines that the contractor does not pose a threat serious enough to outweigh the benefits the agency derives from a continuing relationship.[194] Therefore, integrity is often evaluated through risk analysis. Some courts have forced the Government to employ risk analysis, rather than a principled approach,

[hereinafter ASSESSMENTS AND CITATIONS] (describing labor law violations by fifteen federal contractors).

189. *See* FAR 9.104-1(d).

190. In a recent audit, the GAO analyzed fifteen major federal contractors, many of which contracted with the Department of Defense. The GAO determined that these contractors had all been cited for labor law violations between 2005 and 2009 but still received around $6 billion in federal contracts in 2009. ASSESSMENTS AND CITATIONS, *supra* note 188, at 9–16.

191. *See, e.g.*, Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 847–48 (S.D. Cal. 2001) (reversing on other grounds the debarment of a contractor who supplied cleaning supplies when the contractor had been debarred for failing to properly identify the goods and services it provided).

192. Consider former CIA director, now secretary of defense, Leon Panetta's remarks: "[I]n the war zone, we continue to have needs for security. You've got a lot of forward bases. We've got a lot of attacks on some of these bases. We've got to have security. Unfortunately, there are a few companies that provide that kind of security . . . . So we bid out some of those contracts. [Blackwater] provided a bid that was [sic] underbid everyone else by about $26 million. And a panel that [sic] we had said that they can do the job, that they have shaped up their act. So there really was not much choice but to accept that contract." Jeremy Scahill, *Blackwater's New Sugar Daddy: The Obama Administration*, THE NATION (June 28, 2010, 11:19 AM), http://www.thenation.com/blog/36756/blackwaters-new-sugar-daddy-obama-administration.

193. *See, e.g., id.*

194. Richard Bednar makes the point: "Debarment (in theory) is not punishment; the acquisition official may find that the government acquisition process is adequately protected by other factors, and that it is simply good business for an agency to award new contract work to a debarred contractor." Richard J. Bednar, *Emerging Issues in Suspension & Debarment: Some Observations from an Experienced Head*, 5 PUB. PROCUREMENT L. REV. 223, 228 (2004) [hereinafter *Emerging Issues in Suspension & Debarment*].

to responsibility-related decisions.[195] For example, in the pre-FAR case *Roemer v. Hoffman*,[196] the court held that the debarring official must consider mitigating factors.[197] The court concluded that the debarring official "simply inferred from the nature of the particular offense that it [was] not presently a good risk for the [G]overnment to do business with [the contractor at issue]"[198] and remanded the case for a better explanation as to why debarment was necessary to protect the Government.[199] In *Silverman v. U.S. Department of Defense*,[200] the court overturned a similar debarment and required the debarring agency to instead "carefully consider any favorable evidence of responsibility to ensure that all findings of responsibility are based on the presence of a realistic and articulable threat of harm to the government's proprietary interest."[201] Decisions like *Roemer* and *Silverman* therefore support a risk analysis approach to determining whether a record of integrity is "satisfactory."

Under a risk analysis approach, past infractions do not establish an unsatisfactory record unless the infractions demonstrate a particular, current threat to specific government interests.[202] As a result, a contractor's alleged infractions should be categorized as risks in practical, rather than value-based,[203] terms and a contractor's record of integrity should be determined satisfactory or unsatisfactory based on the particular contract or type of procurement.[204] There should be a nexus between a contractor's offense and an

195. *See, e.g.*, Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976).

196. *Id.*

197. *Id.* at 132.

198. *Id.* at 131–32.

199. *Id.* at 132.

200. 817 F. Supp. 846 (S.D. Cal. 2001).

201. *Id.* at 849; *see also* Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 534 F. Supp. 1139, 1148 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 163 (D.C. Cir. 1983) ("To sustain a debarment, there must be found some threat to Government interests arising from contracting with the debarred contractor.").

202. *See Silverman*, 817 F. Supp. at 848–49 (citing Robinson v. Cheney, 876 F.2d 152, 159–60 (D.C. Cir. 1989)).

203. The GAO has provided an example of principled exclusion. In a 2009 report the GAO discussed a German company found to have violated German law by attempting to ship aluminum tubes suitable for nuclear use to North Korea. EXCLUDED PARTIES LIST SYSTEM, *supra* note 37, at 15. In that case the U.S. Army contracted with the company to provide "civilian on the battlefield" actors to participate in training exercises. *Id.* The actors required no specialized skills, other than speaking English. *Id.* Upon discovering the president of the company had been convicted of attempting to ship the tubes to North Korea, an Army debarring official debarred the company, reasoning that the company "sold potential nuclear bomb making materials to a well-known enemy of the United States" and the United States has "a compelling interest to discontinue any business with this *morally bankrupt* individual." *Id.* (emphasis added). It is not clear that the debarring official determined the conviction represented risk to the contract to provide actors to the Army for training exercises.

204. The Packard Commission suggested it may be in the public interest to refrain from debarring a contractor "[e]xcept where a contractor's misconduct endangers life or property, in which case the [G]overnment's interest is clearly indicated . . . ." CONDUCT AND ACCOUNTABILITY, *supra* note 47, at 106.

articulated threat to the Government's interests before the contractor's record of integrity is declared unsatisfactory.[205]

It has been suggested that only debarring officials should evaluate integrity and business ethics.[206] For example, the American Bar Association's Section of Public Contract Law has advocated in a draft report that debarring officials issue responsibility determinations that would be binding on Contracting Officers.[207] Such a reform proposes a more principled approach to responsibility since it presumes that debarring officials can establish an abstract threshold level of integrity for all procurements. In contrast, a practical approach would allow Contracting Officers to consider on a case-by-case basis whether a contractor presents an unacceptable risk.

A strict principled approach to responsibility is problematic, however. As discussed above, it is easy to debar a small contractor on principle, without considering whether the contractor poses a real threat to the Government's interests, but it is ill advised to debar a large defense contractor on principle alone.[208] Some large contractors are so enmeshed with the Government that they cannot be cast off any easier than a poorly performing or scandal-plagued federal agency can be sloughed off.[209] Debarring such contractors on principle alone might be like "cutting off one's nose to spite one's face."[210] Even aggressive debarment advocates, such as the Project on Government Oversight (POGO), concede that it is not feasible to debar some

205. Professor Yukins proposes that the bases for suspension and debarment be narrowed so that suspension or debarment is imposed only for offenses that relate directly to government contracting. *See* Yukins, *supra* note 33, at 258–59) ("Requiring that suspensions and debarments be based on bad actions that relate directly to the company's soundness as a government contractor would decrease the risk of political witchhunts against unpopular contractors, for only failures that directly threatened government contracting could be used to suspend or debar companies."). *See also* Seymour, *supra* note 147, at 377. A risk-based approach categorizes integrity lapses by the nature of the risk they pose (cost or performance). Firms should not be debarred merely because they lack a prerequisite, minimum level of integrity. *Id.*

206. *See Debarment and Suspension*, *supra* note 23, at 99–100 (suggesting that questions of integrity should be answered through suspension and debarment proceedings).

207. COMM. ON DEBARMENT & SUSPENSION, ABA Pub. Contract Law Sec., Report on the Study of Federal Debarment and Suspension Process 1, 3, *available at* http://meetings.abanet.org/webupload/commupload/PC403500/newsletterpubs/ABAREPORT.PDF (last visited June 1, 2012).

208. *See* Scahill, *supra* note 192.

209. Some contractors are so important the Government would struggle to debar them. In some situations, the Government is actually obliged to protect the contractor. Consider the recent cyber attack against Lockheed Martin Corporation. Reuters reported:

> Lockheed Martin Corp . . . the world's biggest aerospace company and the Pentagon's No. 1 supplier by sales, has been hit by an unspecified cyber incident . . . . The Department of Homeland Security said it and the [DoD] had offered to help gauge the scope of a "cyber incident impacting LMCO," as the maker of fighter jets, ships and other major weapons systems is known. . . . A person with direct knowledge of the matter told Reuters . . . that unknown attackers had broken into sensitive networks of Lockheed Martin and several other U.S. military contractors.

Lockheed Martin Hit by Cyber Incident, U.S. Says, REUTERS (May 28, 2011), http://www.reuters.com/assets/print?aid=USN2817795320110529.

210. *The Paper Tiger Stirs*, *supra* note 31, at 214.

contractors.[211] For example, the Government has come to rely on large contractors for high-tech research and development projects and heavily bundled contracts to such a degree that only enormous and unavoidable risks could justify severing ties for any significant period of time.[212]

Debarring small contractors for lack of integrity while sparing large contractors that have demonstrated an equal or greater lack of integrity delegitimizes the suspension and debarment system and exposes agencies to criticism that they favor large contractors. For the same reasons, debarment waivers are troublesome. For example, when the Department of Justice waived an integrity-based debarment to contract with MCI WorldCom, the damage to a principle-based debarment regime was severe.[213] In short, such a waiver is "unprincipled."[214]

Not all agree that responsibility-related decisions should be practical rather than principled. For example, the FAR Council and the Office of Management and Budget have considered broadening the scope of FAPIIS to include violations of law outside the context of federal contracts for the purpose of evaluating responsibility.[215] The proposal to include violations of law unrelated to federal procurement is reminiscent of the December 2000 blacklisting rule.[216] It remains to be seen whether the Council will propose such a rule, and, if so, how the Council will guide Contracting Officers

211. The Project on Government Oversight (POGO) advocates applying the FAR in a fair and equal manner to small, mid-sized, and large contractors and recommends amendments to the FAR to require that "a suspension or debarment is mandatory for a contractor who is criminally convicted or has had civil judgments rendered against [it] more than once in a three year period." *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, PROJECT ON GOV'T OVERSIGHT (May 10, 2002), http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html. However, the POGO executive director, Danielle Brian, acknowledges that debarring certain contractors is impractical and recommends instead that the Government simply do less business with large contractors that violate the law by unbundling large contracts. Danielle Brian, *Contractor Debarment and Suspension: A Broken System*, 13 PUB. PROCUREMENT L. REV. 235, 237 (2004) ("POGO recommends that large business firms be subject to contract 'unbundling' when their ethics and business integrity are in question. Debarring or suspending these sole source suppliers, of course, is not always possible.").

212. *See* Brian, *supra* note 211, at 237. *See, generally*, OFFICE OF FED. PROCUREMENT POLICY, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CONTRACT BUNDLING: A STRATEGY FOR INCREASING FEDERAL CONTRACTING OPPORTUNITIES FOR SMALL BUSINESS (Oct. 2002) (discussing the drastic increase in bundled contracts and the resulting lack of competition due to the size and complexity of the contracts awarded).

213. At least four agencies waived the MCI WorldCom suspension, including the Social Security Administration, the Department of Defense, the Armed Forces Retirement Home, and the Department of Justice. Collins, *supra* note 17, at 222.

214. *See* Canni, *supra* note 23, at 606–07 ("Such waivers contradict the premise underlying the system and send a confusing message to the public.").

215. U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation, FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, 75 Fed. Reg. 14,060 (Mar. 23, 2010).

216. *See generally* U.S. Dep't of Def., Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2001-014, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. 66,986, 66,987 (Dec. 27, 2001).

to ensure "some degree of exactness and objectivity."[217] However, with regards to the recommended expansion of FAPIIS, the Council of Defense and Space Industry Associations has warned that "[e]xtraneous information on matters irrelevant to the performance of [f]ederal government contracts . . . [is] likely to cloud the important matter of relevance to [undertaking responsible] procurement and . . . [could] result in unnecessary litigation."[218] As such, any proposed extension of FAPIIS would likely generate the same degree of criticism that doomed the December 2000 blacklisting rule.[219]

B. *The Purposes of Punishment*

The FAR states that the purpose of suspension and debarment is government protection, not contractor punishment.[220] The FAR prohibits suspensions and debarments for the "purposes of punishment" but does very little in terms of clarifying what this means.[221]

Debarment is not punitive merely because it feels like punishment. The court in *United States v. Glymph*[222] explained that it is irrelevant that a contractor suffers due to a debarment because, as stated by the Supreme Court, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.'"[223] Similarly, debarment is not punitive merely because it happens to collaterally serve some of the purposes of punishment.[224] Courts have identified at least four purposes of punishment: (1) retribution, (2) deterrence, (3) rehabilitation, and (4) incapacitation.[225] The FAR should explicitly proscribe these commonly identified purposes of punishment.

However, some commentators favor debarments that serve the purposes of punishment. For example, Danielle Brian analogizes debarment to parental discipline: "As a parent, this author recognises [sic] that you give one warning, but then you must punish the child for breaking the rules. In the case of government/contractor relations, the [G]overnment has lost all credibility in this regard."[226] Ms. Brian advocates debarment as deterrence:

217. *Id.* at 66,989.

218. *Developments in Brief*, 52 GOV'T CONTRACTOR ¶ 150, Apr. 28, 2010.

219. *See* Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. at 66,987.

220. FAR 9.402(b).

221. *Id.*

222. 96 F.3d 722 (4th Cir. 1996).

223. *Id.* at 725 (quoting Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 777 n.14 (1994)).

224. *See, e.g.*, United States v. Ursery, 518 U.S. 267, 267 (1996) (noting that civil forfeiture is not punishment for double jeopardy purposes even though civil forfeiture serves a deterrent purpose).

225. *See, e.g.*, Ewing v. United States, 538 U.S. 11, 25 (2003) (enumerating retribution, deterrence, rehabilitation, and incapacitation as various justifications for a sentence); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (determining whether an action is punitive requires the court to consider, among other factors, whether the action serves the "traditional aims of punishment—retribution and deterrence").

226. Brian, *supra* note 211, at 237.

> POGO would be satisfied if the [G]overnment demonstrated any willingness to suspend or debar large contractors more frequently simply for misconduct directly related to government contracting. That would go a long way to providing a meaningful deterrent to future poor practices.[227]

Ms. Brian's view presumes that a debarring official should send a message to deter future poor practices, rather than protect the Government from current and articulated risks.

Debarment certainly provides collateral benefits. For example, as Professor Schooner explained, "[e]ven when the Government imposes neither suspension nor debarment, the threat of a corporate death penalty provides sufficient incentive for firms to enter into less draconian compliance agreements, and then comply with the terms of those agreements."[228] Other commentators have suggested that debarment should be used not only to deter contractors from violating the Foreign Corrupt Practices Act and the False Claims Act, but also to incapacitate those that violate either act.[229]

Although the Government may appreciate these collateral benefits, debarment should not be imposed for the primary purpose of deterring contractor misconduct, incapacitating contractors, or forcing contractors to rehabilitate themselves under threat of onerous compliance agreements with the Government. Rather, officials should debar to protect the Government from current risks, taking into account a contractor's mitigating and remedial actions to determine whether the contractor poses a true threat to the Government that outweighs any benefit the Government derives from a continuing business relationship.[230] The D.C. Circuit noted that "[a]ffording the contractor this opportunity to overcome a blemished past assures that the [Government] will impose debarment only in order to protect [its] proprietary interest and not for the purpose of punishment."[231] The idea that Contracting Officers should consider mitigating circumstances is long-standing.[232] If a

227. *Id.* at 236. Ms. Brian noted the problem in the context of the Boeing suspension, stating, "the government quickly diluted the *intended message*. Within days of imposing the Boeing suspension, Government buyers twice lifted (or waived) it. This, of course, allowed Boeing to receive new, lucrative government contracts. Accordingly, any *deterrent effect* was seriously eroded." *Id.* (emphasis added).

228. *The Paper Tiger Stirs*, *supra* note 31, at 214.

229. *See, e.g.*, Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 776 (2011) ("Debarment would deter potential wrongdoers and incapacitate actual offenders. The deterrent would induce more firms to comply with the law, which would allow the 'too big to debar' problem to diminish over time."); *see also* Bradley J. Sauer, Note, *Deterring False Claims in Government Contracting: Making Consistent Use of 18 U.S.C. § 287*, 39 PUB. CONT. L.J. 897, 911 (2010) ("[D]ebarment . . . may accomplish the goal of *incapacitation* . . . in lieu of imprisonment . . . . Thus, § 287 need not function to *incapacitate* government contractors from committing the same crimes in the future.") (emphasis added).

230. *See* Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 534 F. Supp. 1139, 1154–55 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 163 (D.C. Cir. 1983) ("Defendants have shown no threat to the interests of the United States that might result from award of the Barbers Point contract to Kiewit, the low bidder; absent such a showing, denial of the award constitutes an unlawful punishment."); FAR 9.406-1(a).

231. Robinson v. Cheney, 876 F.2d 152, 160 (D.C. Cir. 1989).

232. *See The Government Blacklist*, *supra* note 23, at 197.

contractor has taken mitigating steps, the contractor may not pose a threat to the Government and debarment may be inappropriate.[233]

Debarment therefore protects the Government from verifiable, current threats. Of course, it also may deter future misconduct, encourage contractors to rehabilitate themselves, and incapacitate those that do not reform.[234] However, if the FAR's admonition that debarment should not be used for punishment has any meaning,[235] then whether a debarment will ultimately deter, rehabilitate, or incapacitate is irrelevant, as protection is the paramount objective. Amending the FAR to explicitly state the proscribed purposes of punishment may temper oversight and lead to more uniform decisions.

There are compelling reasons for not imposing punitive debarment. First, while the Government has "unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases," the Government does not have unrestricted power to punish.[236] As discussed above, small contractors accused of even minor infractions are in real danger of debarment.[237] On the other hand, large contractors are rarely debarred,[238] and if they are excluded at all, it is typically for a very short period of time.[239] Though some government officials deny that contractors can become too big to debar,[240] even aggressive debarment advocates such as POGO concede that the Government practically cannot debar some contractors.[241] As further evidence of this reality, the DoD recently released a report showing that between 2007 and 2009, the DoD awarded almost $270 billion in contracts to ninety-one contractors found liable in civil fraud cases and $682 million to thirty contractors con-

233. *See id.*

234. Stevenson & Wagoner, *supra* note 229, at 776.

235. FAR 9.402(b).

236. Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

237. *See* Silverman v. U.S. Dep't of Def., 817 F. Supp. 846 (S.D. Cal. 2001) (rev'd for failure to consider mitigating circumstances). Silverman supplied cleaning products to the Navy as the sole employee of a proprietorship. *Id.* at 847. The Defense Logistics Agency (DLA) alleged that Silverman falsely represented that his company was a manufacturer, rather than a dealer, of cleaning supplies. *Id.* at 848. He was convicted of a misdemeanor, fined $250, and sentenced to unsupervised probation for a year. The DLA debarred Silverman for three years, approximately six years after the alleged false statement. *Id.* at 848. The example of General Electric Company (GE) stands in stark contrast. According to statistics compiled by POGO, GE racked up $982,859,555 in fines, penalties, and restitution between 1990 and 2002 without being debarred. *Federal Contractor Misconduct, supra* note 211.

238. *See* Stevenson & Wagoner, *supra* note 229, at 775.

239. *See id.*

240. Steven A. Shaw, U.S. Air Force Deputy General Counsel (Contractor Responsibility), has opined, "I am frequently asked whether debarment . . . is still a viable option for addressing contractor misconduct in the defense industry. With consolidations increasing, are any of these large defense contractors 'too big to be debarred' regardless of the misconduct? The short answer to the question is 'no.'" Steven A. Shaw, *Suspension & Debarment: Emerging Issues in Law and Policy*, FRAUD FACTS (U.S. Air Force), Fall 2009, at 3.

241. *See* Brian, *supra* note 211, at 237.

victed of fraud.[242] In many cases, the Government may find it necessary or advantageous to contract with contractors despite their imperfect records. Regardless, punishment should be justly meted out in proportion to the seriousness of the offense, not the status of the offender or the offender's relationship with the Government.

Second, punitive debarment may injure the innocent. GE, for example, has nearly 300,000 employees.[243] If GE is debarred, which some reformers have advocated for because of the company's less-than-perfect history in government contracts,[244] innocent employees may suffer for the misdeeds of a few key employees. Additionally, many large government contractors are publically traded companies.[245] If they are debarred, thousands of shareholders and retirement plans could suffer harm. And, with unemployment rates as high as they currently are,[246] it is undesirable for a major employer to shed jobs.

Third, when large contractors are excluded, the Government loses competition for its procurement dollars, resulting in higher prices, less innovation, and less value.[247] Punitive debarment may create an adversarial environment and dissuade contractors from entering the government market.[248] The Government cannot function as it does now without the human and intellectual capital provided by contractors.[249] Federal agencies cannot

242. *See Ensuring Contractor Accountability*, *supra* note 71, at 9 (citing REPORT TO CONGRESS ON CONTRACTING FRAUD, *supra* note 71, at 4).

243. *Our People*, GE.COM, http://www.gecitizenship.com/our-commitment-areas/our-people/ (last visited June 1, 2012). The American Bar Association notes that discretionary debarment allows debarment officials to spare contractor employees that had no part in the wrongdoing. COMM. ON DEBARMENT & SUSPENSION, *supra* note 207, at 1; *see also* Canni, *supra* note 23, at 599. And in the event that employees commit offenses, principled, punitive debarment may create a disincentive for contractors to implement ethics programs and take remedial action. As Mr. Bednar noted, "Absolute corporate liability can lessen the incentive for a corporation to devote the energy and resources required to sustain an effective program to prevent and detect violations of law. If the existence of a program did not make any difference to the debarring official, why spend the effort? That simply is not good public policy." *Emerging Issues in Suspension & Debarment*, *supra* note 194, at 226.

244. *See Federal Contractor Misconduct*, *supra* note 237.

245. For example, all of the top three largest government contractors in 2010—Lockheed Martin Corporation, Northrup Grumman Corporation, and The Boeing Company—are publicly traded companies. *See 2011 Washington Technology Top 100: 18th Annual Rankings Track the Largest Government Contractors*, WASH. TECH., http://washingtontechnology.com/toplists/top-100-lists/2011.aspx?Sort=Rank (last visited June 1, 2012).

246. As of May 2012, the unemployment rate was 8.2%. *See Employment Situation Summary*, U.S. BUREAU OF LABOR STATISTICS (May 2012), http://www.bls.gov/news.release/empsit.nr0.htm.

247. For example, Paul D'Aloisio explained how agencies often enter into settlement agreements with large contractors, rather than pursuing suspension and debarment, to encourage them to continue to do business with the Government. *See* Paul D'Aloisio, *Accusations of Criminal Conduct by Government Contractors: The Remedies, Problems, and Solutions*, 17 PUB. CONT. L.J. 265, 292–93, 299–303 (1987).

248. *See id.*

249. *See* Nancy O. Dix et al., *Fear and Loathing of Federal Contracting: Are Commercial Companies* Really *Afraid to Do Business with the Federal Government? Should They Be?*, 33 PUB. CONT. L.J. 5, 7 (2003).

afford to debar their way out of high-technology markets.[250] Long gone are the days when the Federal Government funded the majority of technological research and development in the United States.[251]

C. *Public versus Agency Interests*

The public interest is a key component in debarment decisions.[252] The FAR instructs that "[t]he debarring official may, in the public interest, debar a contractor for any of the causes in [FAR] 9.406-2, using the procedures in [FAR] 9.406-3."[253] The FAR also notes that a contractor need not be debarred despite the existence of a cause.[254] Inquiry, beyond the bare cause for debarment, therefore, is required to determine whether debarment serves the public interest.

The FAR gives little definition to the public interest, perhaps because it is impossible to succinctly and comprehensively state all the public or government interests at stake in any conceivable procurement. The Government's interests vary too greatly from procurement to procurement.[255] From janitorial services to weapons systems to intelligence, the public interest is more than a single, overriding concern such as integrity in the procurement system, but rather a sum of various priorities.

Professor Yukins describes the government procurement system using a principal-agent model with multiple principals, including Congress, taxpayers, agencies, and contractors.[256] These principals attempt to influence the agent, the Contracting Officer, to varying degrees.[257] Professor Yukins' "shattered principle" suggests that the public interest is a composite not just of various principals, but also of various interests.[258] Some of the competing interests include competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity.[259] It is impossible to simultaneously satisfy all of these competing interests to the same degree.[260] Therefore, the public interest is a question of priorities and compromises.[261] For example, in a weapon-system procurement, the public interest in acquiring the best technology and keeping the

250. *Id.* (arguing that the Government needs state-of-the-art technology the private sector provides because the Government is no longer the primary source of innovation in the United States).

251. *Id.*

252. FAR 9.406-1(a).

253. *Id.* The FAR appears to use "public interest" and "Government's interests" interchangeably. Logically, the Government's interests and the public interest should overlap. The Government's interests might be a subset of the public interest.

254. *Id.*

255. Duvall, *supra* note 24, at 701–02.

256. *A Versatile Prism*, *supra* note 115, at 67.

257. *Id.* at 64.

258. *Id.* at 76.

259. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103, 103 (2002) [hereinafter *Desiderata*].

260. *Id.* at 110.

261. *Id.*

technology from adversaries may trump transparency, and in urgent circumstances, expediency may even trump competition. Thus, the public interest is best defined in a specific context, rather than in the abstract.

Agency interests are a subset of government and public interests.[262] While all federal agencies serve the public, each agency has unique competencies, purposes, and interests apart from the rest of the Government.[263] Different agencies may not define the public interest in the same way because each agency is most concerned with successfully accomplishing its particular mission.[264] Agencies also may prioritize their satisfaction and efficiency above other interests, such as transparency and competition in the procurement system.[265]

The differences between agency interests and wider government interests suggest that conflicts will arise when an agency is called upon to make a responsibility decision that pits agency interests against broader government interests. Likewise, because federal agencies' interests do not perfectly align with each other, there can be disagreements between them.[266] Waivers of suspension and debarment are proof that agency interests and needs differ.[267] If the Air Force imposes a debarment, for example, but the Army finds it necessary to waive it, then the debarment was arguably not in the entire Government's interest.

Although the FAR may not be able to precisely define the public interest, the FAR could instruct agency officials to make decisions that protect agency-specific interests. As the Packard Commission recommended, "[t]he decision that suspension or debarment will serve the public interest requires a careful balancing of public needs against any potential harm that might occur from continued dealings with the contractor."[268] Agency needs could serve as effective proxies for public needs, but agencies may not always be in the best position to evaluate other agencies' needs and wider government interests. Therefore, each agency should debar only to protect its narrow interests, and each agency should decide whether business with a particular contractor is in its agency-specific interests. Government-wide debarment is punitive debarment to the extent that it disregards agencies' individual requirements and abilities to mitigate procurement risks.

To ensure that debarment is not used to further certain public interests unrelated to "the Government's protection," the FAR should provide a

262. *A Versatile Prism*, *supra* note 115, at 79.

263. Agency interests do not always align with broader government interests. For example, procurement preferences can be a source of conflict. Professor Yukins asserts, "[P]rocurement preferences that favor domestic vendors are routinely resisted (or outright ignored) by contracting officials." *Id.*

264. *Id.*

265. *Id.* at 72–73.

266. Each agency head may waive a suspension or debarment for a "compelling reason," which may be specific to that agency's needs. *See* FAR 9.405(a).

267. *See id.*

268. CONDUCT AND ACCOUNTABILITY, *supra* note 47, at 34.

more clear definition of "purposes of punishment."[269] For example, the public surely has an interest in deterring, rehabilitating, or incapacitating unscrupulous contractors and an equal interest in combating fraud and corruption.[270] But if responsibility evaluations and debarment are not to be used for purposes of punishment, then Contracting Officers and debarring officials should not consider these categories of public interests. Penal codes, other punitive statutes, and civil remedies such as the False Claims Act[271] and the Program Fraud Civil Remedies Act[272] are the appropriate tools for deterring wrongdoing.

The current focus in responsibility-related decisions is on the appearance of injustice that results when contractors continue to receive government contracts after convictions or civil judgments, rather than on the risks these contractors pose weighed against the benefits the Government receives for taxpayers' money. Congress wants agencies to be enforcers and to do justice rather than look after discrete agency interests. But most agencies are ill suited for the enforcer role because they are not neutral, disinterested parties. Instead, the greater public interest is in the success of each agency's mission, and debarment should not be used to prevent any agency from achieving its specific goals.

V. CONCLUSION

Over the last sixty years the Government has struggled to implement a consistent responsibility policy. Great strides have been made in improving the process for evaluating responsibility in the suspension and debarment context. The time has come to improve the substantive responsibility guidelines. Rigid rules are unworkable, and agency officials require discretion to evaluate a variety of factors related to contractors' responsibility and the risks that nonresponsible contractors may pose to the Government. While oversight of agency officials is important, it is often difficult to conduct oversight in responsibility matters because the substantive criteria are vaguely defined. With FAPIIS, Congress and the public are poised to increase their input and influence in responsibility matters, and they are pushing for more principled, as opposed to practical, responsibility evaluations.

The Government's responsibility policy should be refocused and grounded in practicality. The Government needs the technology and innovation that contractors can supply and should only exclude contractors from competition for government contracts when necessary to protect the

269. FAR 9.402(b) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for *the Government's protection* and not for *purposes of punishment.*" (emphasis added)).

270. These interests are part of the public interest in integrity and competition. *See Desiderata*, *supra* note 259, at 3–4.

271. 31 U.S.C. §§ 3729–3733 (2006 & Supp. IV 2010).

272. *Id.* § 3801 (2006).

Government from specific risks. Of course, it is inevitable that some contractors, and their employees, will take advantage of the system to unjustly enrich themselves. However, the Government has means to punish and deter fraud, waste, and abuse without resorting to debarment. Despite the weaknesses in the U.S. public procurement system, and the less-than-perfect records of the largest contractors, policymakers ought not to lose sight of the innovations, services, and value that government contractors provide.