

ARTICLES

DEBARMENT AND SUSPENSION REVISITED: FEWER EGGS IN THE BASKET?

Brian D. Shannon*

I. INTRODUCTION

The United States Court of Appeals for the Federal Circuit made the following comment during its review of a due process challenge to a company's suspension from obtaining government contracts:

A small business choosing to put nearly all its eggs in one Government contracts basket must be expected to bear some responsibility for the risk that that basket could, as a result of the contractor's misconduct, temporarily or even permanently be snatched away—with the required procedural safeguards here at issue.¹

Debarment and suspension are remedies that the government may utilize to preclude businesses and individuals from obtaining new government contracts, grants, loans, or other benefits for either a temporary or stated period.² Both remedies can be either statutory or administrative in na-

* Professor of Law, Texas Tech University School of Law. B.S., *summa cum laude*, Angelo State University, 1979; J.D., *with high honors*, The University of Texas School of Law, 1982. This Article is the result of a study undertaken by the author on behalf of the Administrative Conference of the United States.

1. *ATL, Inc. v. United States*, 736 F.2d 677, 684 n.31 (Fed. Cir. 1984). The court offered these remarks as part of its analysis that a suspension involves a protected liberty interest, not a life or property interest, and that, in theory, a suspended contractor still can obtain non-government contract work. *Id.* For a detailed discussion of these due process issues, see *infra* notes 105-91 and accompanying text.

2. With respect to government contracts, see Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.4 (1993). These regulations define a "debarment" as the exclusion of "a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period." *Id.* § 9.403. A "suspension" is an agency action "to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting." *Id.* Thus, both of these actions cause a contractor to become ineligible to receive new government contract awards. Generally, an agency may impose a debarment for a period of up to three years (inclusive of any preceding period of suspension). *See id.* § 9.406-4(a). Furthermore, an agency may impose a debarment commensurate with the seriousness of the cause or causes, *id.*, and may extend the length of debarment "to protect

ture.³ More importantly, a debarment or suspension can impact a business that depends significantly on government work. Indeed, contractors and grantees may fear a debarment or suspension far more than criminal or civil sanctions because of the potentially adverse economic effect on their operations.⁴ On the other hand, the federal government must have the ability, when warranted, to exclude entities that are untrustworthy, dishonest, or otherwise lacking in business integrity for at least some reasonable period.

As a result of the tension between the government's interest in protecting itself from irresponsible concerns and private entities' interest in avoiding exclusion from governmental programs, the debarment and suspension process has engendered much litigation, procedural experimentation, and policy debate. For the most part, the federal government has been able to use debarment and suspension effectively to help protect the public fisc. But contractors and other private businesses have been successful in achieving greater procedural protections against abusive or punitive actions. Nonetheless, debarment and suspension remain constant threats when dealing with the federal government.

This Article provides an analysis and assessment of the historical and continuing evolution of the procedures attendant with the debarment and suspension process.⁵ Part II of this Article recounts the early reports

the Government's interest." *Id.* § 9.406-4(b); see *Coccia v. Defense Logistics Agency*, No. 89-6544, 1992 WL 345106, at *6 (E.D. Pa. Nov. 12, 1992) (upholding the agency's imposition of a fifteen-year debarment). An agency may maintain a suspension for up to 18 months (or even longer if legal proceedings have commenced during that period). See 48 C.F.R. § 9.407-4(b). With respect to grants and other nonprocurement government benefits, the regulations include similar definitions for debarment and suspension and their respective durations. See 28 C.F.R. § 67 (1993). These regulations are a representative version of a common rule for nonprocurement debarment and suspension that a number of agencies adopted at the same time. See *infra* notes 53-54 and accompanying text. Subsequent references in this Article to provisions of the common rule generally will be to this particular version.

3. Much of the discussion in this Article will focus on procedural issues relating to administrative debarment and suspension; however, I also have addressed statutory debarment and suspension in Part IX of the Article. See *infra* notes 317-56 and accompanying text.

4. See AMERICAN BAR ASSOCIATION COMM. ON DEBARMENT & SUSPENSION, THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT 5-6 (1994) [hereinafter ABA PRACTITIONER'S GUIDE]. The Debarment and Suspension Committee of the American Bar Association's (ABA) Public Contract Law Section prepared this monograph for initial distribution at the ABA's annual meeting in August 1994. This *ABA Practitioner's Guide* is an excellent compilation of information concerning the debarment and suspension process.

5. As part of my research for preparing this Article, I contacted a number of agency officials involved in the debarment and suspension process. I also sent letters to selected members of the private bar involved in a government contracts practice, including corpo-

commissioned by the Administrative Conference of United States (ACUS). Part III focuses on the evolution of the current procedures for both procurement and nonprocurement debarment and suspension activities. It analyzes the key differences between those procedures and the difficulties in resolving these differences. Part IV reviews significant court decisions that influenced the evolution of government-wide debarment and suspension regulations, such as due process standards and the doctrine of exhaustion of administrative remedies. Part V of this Article questions whether greater process such as post-deprivation hearings for contractors facing debarment or suspension should be provided and concludes that the existing regulations provide adequate due process. Notwithstanding the fundamental fairness of the regulations, Part VI of this Article argues that a lack of uniformity in implementing and applying agency procedures exists. Specifically, Parts VII, VIII, and IX address respectively the lack of uniformity concerning the period of debarment, the mitigating factors agencies consider when imposing debarment or suspension of contractors, and the punitive nature with which agencies are imposing debarments. This Article concludes that although some debarment and suspension regulations are not implemented or applied uniformly, on balance the current regulations are fair and reasonable and do not warrant revision.

rate counsel and members of private firms. I obtained a number of written responses and conducted personal interviews with several of those who responded. Although not a formal survey, many of the comments I received were helpful, and I attempted to incorporate some of these remarks and ideas into my analysis.

Specifically, with respect to agency officials, I received extended comments from representatives of the Air Force, Army, Navy, General Services Administration (GSA), Environmental Protection Agency (EPA), Department of Energy, and the Department of Housing and Urban Development (HUD). Several of these letters were from agency officials who indicated that their comments were based on their personal points of view and did not necessarily reflect the official positions of their respective agencies. I have honored their requests not to attribute statements from these letters to them. I also received written comments from another eight attorneys involved in the process either as corporate counsel or with law firms. In addition, I must express appreciation to Richard Bednar, Chair of the Debarment and Suspension Committee of the ABA's Public Contract Law Section, for allowing me to meet with him and members of his committee and for sharing with me an early draft of the ABA Practitioner's Guide. (Mr. Bednar is also a former debarring official for the Army). I also am grateful to Janet Cook, debarring official for the Air Force, and Alan Heifetz, Chief Administrative Law Judge of HUD, and his colleagues, for taking time to meet with me to discuss issues involving the process.

I have drawn several portions of this Article from selected segments of my earlier research in this area, particularly with regard to certain constitutional due process discussions. See Brian D. Shannon, *The Government-Wide Debarment and Suspension Regulations After a Decade—A Constitutional Framework—Yet, Some Issues Remain in Transition*, 134 MIL. L. REV. 1 (1991), reprinted in 21 PUB. CONT. L.J. 370 (1992). Finally, I wish to thank Tiffani Barnes for her invaluable research assistance.

II. EARLY ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ACTIVITY

In 1961 and 1962, the temporary Administrative Conference of the United States (Temporary Conference) conducted an impressive study of the then-existing practices and procedures for the debarment and suspension of federal contractors.⁶ Cyrus R. Vance, who at that time served as Department of Defense General Counsel, headed the committee responsible for submitting this extensive report.⁷ The report included nine recommendations for action,⁸ all of which the Temporary Conference adopted.⁹ Specifically, the Temporary Conference report expressed concern in four major problem areas in the debarment and suspension process: (1) a lack of procedural safeguards; (2) insufficient rules regarding the grounds and scope of a debarment action; (3) the length and disparity of debarment periods; and (4) the merging of prosecutorial and judicial functions in debarment decision making.¹⁰

6. See 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. INDUS. & COM. L. REV. 89, 90-91 (1963) (explaining that, in 1961, an Executive Order established the Temporary Conference to conduct studies of various aspects of administrative law, including debarment and suspension, until its termination date on December 31, 1962).

7. *Id.* at 90.

8. John M. Steadman, "Banned in Boston—and Birmingham and Boise and . . .": *Due Process in the Debarment and Suspension of Government Contractors*, 27 HASTINGS L.J. 793, 803 (1976). Professor Steadman's article was based upon a report he prepared for the Administrative Conference of the United States (ACUS). *Id.* at 793 n.*.

9. *Id.* at 803. In formulating its recommendations, the study committee obtained the views of a number of federal agencies and a special subcommittee of the ABA. *Id.* For a reprint of the full report and recommendations regarding the debarment and suspension procedures, see SENATE SUBCOMM. ON ADMIN. PRAC. AND PROC., SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 24, 88th Cong., 1st Sess. 265-95 (1963) [hereinafter TEMPORARY CONFERENCE REPORT]. Although the agencies appeared to have mixed views about the proposals, the committee believed that its recommendations were necessary to afford "fair governmental administration." *Id.* at 281.

10. TEMPORARY CONFERENCE REPORT, *supra* note 9, at 276-80. With respect to the lack of procedural safeguards, the committee identified several problems, including: a lack of notice or "opportunity to know the reasons, or the evidence for the suspension"; the rare practice of holding adversary hearings in debarment cases; the fact that agencies would extend other agencies' debarments without notice; widespread use of de facto debarments by contracting officers without affording affected businesses notice or means to challenge the action; and a lack of published regulations for implementing certain statutory debarments. *Id.* at 276-78. In terms of the rules for the grounds and scope of debarments, the committee criticized the use of "vague, generalized criteria" for imposing debarments and the absence of criteria for extending debarments to affiliated businesses or individuals. *Id.* at 278-79. As to the periods of debarment, the committee observed that businesses suspected of criminal conduct had been subject to indefinite suspensions. *Id.* at 279. The regulations did not provide a mechanism for lifting a debarment upon a showing of present

The first and perhaps most important recommendation called for a notice of proposed debarment to precede a debarment, and when factual disputes are relevant to the debarment action, the government would provide an opportunity for "a trial-type hearing" before a neutral agency board or hearing examiner.¹¹ This recommendation contemplated the employment of formal adjudication similar to that of the Administrative Procedure Act (APA).¹² The recommendation specifically limited the hearing opportunity, however, to cases involving disputed factual issues.¹³

The Temporary Conference report also recommended that agencies provide parties subject to potential debarment with a notice of proposed debarment supported by reasons for the proposed action.¹⁴ The Temporary Conference indicated that in certain classes of cases, the notice of proposed debarment also could impose a temporary suspension of the affected concern¹⁵ within suggested time limits.¹⁶ In addition, the Con-

responsibility. *Id.* at 279-80. The committee also noted that the military departments were debarring based on criminal convictions for the maximum five-year period without regard to the duration of the related criminal convictions. *Id.* at 280. Finally, the committee criticized the agencies for not separating the functions of those who proposed debarment and those who made the final decisions. *Id.*

11. *Id.* at 267 (Recommendation 29-1(a)). Professor Steadman described this recommendation as being the report's "central and probably most controversial" suggestion. See Steadman, *supra* note 8, at 804.

12. TEMPORARY CONFERENCE REPORT, *supra* note 9, at 281 (citing the Administrative Procedure Act, § 7(c), 5 U.S.C. § 556(d)).

13. *Id.* at 283 (revealing that the ABA had provided comments suggesting that the opportunity for a hearing was not broad enough because it only applied when there were factual disputes). The ABA believed that in many cases involving undisputed facts, other relevant factors still could militate against the need to debar the affected party. *Id.* In those cases, the ABA wanted contractors to have "an opportunity to explain and to demonstrate present responsibility as a contractor." *Id.* At the same time, however, it acknowledged that this was "not an 'adversary hearing' in the sense of an impartial fact finding." *Id.* Nevertheless, the Temporary Conference committee apparently thought that any such argument could always be made to the debarring official. *Id.*; see also Steadman, *supra* note 8, at 804 n.40.

14. TEMPORARY CONFERENCE REPORT, *supra* note 9, at 267 (Recommendations 29-1(a), (c)). Recommendation 29-6 similarly suggested that debarment decisions should be in writing complete with findings, conclusions, and reasons. *Id.* at 269 (stating that the Temporary Conference also expected these written decisions to be provided to the affected individual or firm).

15. *Id.* at 267 (Recommendation 29-2(a)). This recommendation would apply to cases involving criminal convictions or civil judgments affecting contractor responsibility "or upon probable cause for belief that an individual or firm has committed fraud or has engaged in other conduct showing a substantial lack of present responsibility." *Id.*

16. *Id.* (stating that temporary suspensions should be for a reasonable period of time but should not exceed the time limits set forth in Recommendation 29-2(b)). In cases in which the government indicts the suspended contractor within a year of the notice of proposed action, the committee recommended that the suspension continue through trial and for an additional 120 days. *Id.* at 268 (Recommendation 29-2(b)(1)). If the government did not commence criminal proceedings within one year, then the Temporary Conference

ference called for the publication of agency procedural rules regarding debarments to "be uniform to the extent practicable, and [to] provide for a fair and speedy determination."¹⁷

The Temporary Conference addressed the problems associated with the grounds and scope of debarment by recommending that all agencies explicitly delineate and publish the grounds for debarment in their regulations.¹⁸ In doing so, the agencies again were to strive for uniformity.¹⁹

Finally, in terms of the duration of debarments, the Temporary Conference recommended that regulations be amended to require that debarments be commensurate with the gravity of the underlying conduct and last for a reasonable and clearly stated period of time not to exceed three years.²⁰ Moreover, the Conference suggested that the procedures allow the agency to lift the debarment once a contractor demonstrates present responsibility to perform contracts or subcontracts.²¹ Consistent with these suggestions, the Temporary Conference also asked Congress "to amend the Buy American and Davis-Bacon Acts to remove the absolute

called for the suspension to terminate unless the Attorney General determined that disclosure of the government's case at a debarment proceeding would harm the ongoing law enforcement action. *Id.* In such a situation, the Temporary Conference recommended that the suspension should remain in place for up to 18 months (or for the duration of trial if the government brought a fraud action within the 18 months from the initial notice). *Id.* In cases not involving likely indictments or civil fraud actions, the Temporary Conference recommended a limit of 90 days for any suspension, which could be extended for up to another 90 days upon a written determination by a high ranking agency official. *Id.* (Recommendation 29-2(b)(2)).

17. *Id.* at 269 (Recommendation 29-5).

18. *Id.* (Recommendation 29-7(a)).

19. *Id.* In particular, the recommendations included a charge that these regulations include standards and criteria for identifying and extending debarments to affiliates of debarred concerns, imputing fraud or other improper conduct from an individual to a business, and determining the scope of a debarment in terms of applicability to all or part of a business or to all or some of its contracts. *Id.* (Recommendation 29-7(b)). More specifically, the Temporary Conference indicated that the grounds for debarment should include "fraud incident to obtaining or performing a government contract or subcontract or any other conduct showing a serious and present lack of business integrity or business honesty as a government contractor or subcontractor." *Id.* at 269-70 (Recommendation 29-7(c)). Furthermore, the Temporary Conference recommended that any findings of fraud or misconduct "should be based on substantial evidence." *Id.* at 270.

20. *Id.* at 270 (Recommendation 29-8). The Temporary Conference recommended this three-year period except as provided by statute or Executive Order. *Id.* In response to this recommendation, several branches of the military objected, preferring the five-year period then-existing regulations authorized for some cases. *See Gantt & Panzer, supra* note 6, at 100.

21. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 270 (Recommendation 29-8).

debarment penalties," and to provide agencies with discretion to limit a debarment upon a proper showing.²²

Over a decade after the Temporary Conference issued its report on debarment and suspension, the ACUS commissioned another report on the topic from then Professor John M. Steadman, which he submitted in 1975 (Steadman Report).²³ After reviewing his findings in light of the Temporary Conference report, Professor Steadman concluded that the 1962 recommendation to require trial-type hearings in debarment cases involving disputed facts was "still a sound standard."²⁴ Thereafter, given the findings in the Steadman report, the ACUS made no further recommendations.²⁵

Many regulatory, judicial, and statutory developments in the debarment and suspension field have arisen since the last ACUS review undertaken in the 1975 Steadman report.²⁶ The remainder of this Article will

22. *Id.*

23. See Steadman, *supra* note 8, at 793 n.* (explaining that the law review article was based on this report). The article includes a detailed study of the activity in the debarment and suspension field for the period from 1962 to 1975. *Id.* at 805-23.

24. *Id.* at 822 (noting also the government's reluctance and inertia in carrying out this specific recommendation).

25. Letter from Robert A. Anthony, Chairman, ACUS, to John M. Steadman (Sept. 11, 1975) (on file with author) (commenting that his "only disappointment with [the report] is that it also is quite persuasive in recommending that we not expend further effort on this topic").

26. The law of debarment and suspension also has generated a substantial body of scholarship. Indeed, subsequent to the 1962 Temporary Conference report, a number of scholars and practitioners, including this author, have commented on various aspects of the debarment and suspension process. In addition to the articles noted in conjunction with the discussion above, see John T. Boese, *Suspension and Debarment: A Primer for the 1990s*, 4 ACQUISITION ISSUES, June 1994, at 1; Joseph A. Calamari, *The Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors*, 17 NEW ENG. L. REV. 1137 (1982); George M. Coburn, *Due Process Issues in Debarment and Suspension*, 42 Fed. Cont. Rep. (BNA) 571 (1984); Howard W. Cox, *Due Process Issues in Suspension and Debarment: A Government Perspective*, 43 Fed. Cont. Rep. (BNA) 429 (1985); Paul A. D'Aloisio, *Accusations of Criminal Conduct by Government Contractors: The Remedies, Problems, and Solutions*, 17 PUB. CONT. L.J. 265 (1987); W. Jay DeVecchio & Devon Engel, *EPA Suspension, Debarment, and Listing: What EPA Contractors Can Learn from the Defense Industry (and Vice Versa)*, 22 PUB. CONT. L.J. 55 (1992); William L. England, Jr., *The Fifth Amendment: A Double Edge Sword for Government Contractors*, 18 PUB. CONT. L.J. 601 (1988); Paul L. Friedman, *Debarment and Suspension: The Government's Most Powerful Weapons*, in FRAUD IN GOVERNMENT CONTRACTING 291 (1985); James J. Graham, *Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests*, 14 PUB. CONT. L.J. 216 (1984); Steven Horowitz, *Looking for Mr. Good Bar: In Search of Standards for Federal Debarment*, 14 PUB. CONT. L.J. 58 (1983); Karl W. Kabeiseman, *Contractor Debarment and Suspension—A Government Perspective*, PUB. CONT. NEWSL. (A.B.A. Sec. of Pub. Cont. L.) Spring 1984, at 3; Gerald P. Norton, *The Questionable Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?*, 18 PUB. CONT. L.J. 633 (1988);

highlight the important aspects of these developments and provide a few pertinent recommendations.

III. CURRENT PROCEDURES

Both the ACUS Temporary Conference report and the Steadman Report dealt with issues concerning debarment and suspension of government contractors.²⁷ Indeed, the bulk of the law in this area relates to procurement debarment and suspension. In recent years, however, attention has shifted to nonprocurement debarment and suspension as well.²⁸ This section focuses on the evolution of the current procedures for both procurement and nonprocurement debarment and suspension activities.

A. Procurement

The current regulations governing the debarment and suspension of federal government contractors are set forth in subpart 9.4 of the Federal Acquisition Regulation (FAR).²⁹ These provisions became government-wide regulations in the early 1980s.³⁰ In July of 1981, following the efforts of an interagency task force and congressional hearings, the Senate Subcommittee on Oversight of Government Management recommended that

Shannon, *supra* note 8, at 1; Edwin J. Tomko & Kathy C. Weinberg, *After the Fall: Conviction, Debarment, and Double Jeopardy*, 21 PUB. CONT. L.J. 355 (1992); Robert D. Wallick et al., *Suspension and Debarment*, in FRAUD IN GOVERNMENT CONTRACTING, *supra*, at 157; Donna M. Duvall, Comment, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors*, 36 AM. U. L. REV. 693 (1987); Lisa A. Everhart, Note, "Graylisting" of Federal Contractors: *Transco Security, Inc. of Ohio v. Freeman and Procedural Due Process Under Suspension Procedures*, 31 CATH. U. L. REV. 731 (1982). For related issues, see David A. Churchill & Lawrence J. O'Connell, *New International Consequences of Suspension and Debarment*, 7 INT'L TAX & BUS. LAW. 239 (1989).

For analyses of earlier procedures, see 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); Note, *The Blacklisted Contractor and the Question of Standing to Sue*, 56 NW. U. L. REV. 811 (1962).

27. See *supra* notes 6-26 and accompanying text.

28. See *infra* notes 50-55 and accompanying text (discussing the application of debarment and suspension proceedings to nonprocurement activities).

29. FAR, 48 C.F.R. § 9.4 (1993).

30. Because the procedures began to have government-wide effect in the early 1980s, I have chosen to begin the focus of my discussion as of that time. The 1975 Steadman report provides an excellent analysis of the studies and revisions of the regulations in the early to mid-1970s, which I will not repeat here. See Steadman, *supra* note 8, at 805-14 (discussing a study by the Commission on Government Procurement and the regulatory response to a significant court decision); see also *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972) (discussed *infra* at notes 113-20 and accompanying text); ABA PRACTITIONER'S GUIDE, *supra* note 4, at 25-27 (discussing activity during the same period). There was very little regulatory activity of any moment in this field in the late 1970s.

the federal government issue new debarment and suspension regulations that would have government-wide effect.³¹ Thereafter, through the 1980s and into the 1990s, the federal government has increased greatly its rate of imposing debarments and suspensions against many of the contractors with whom it does business.³² Moreover, agencies throughout the government must honor these actions.³³

Similarly, the Office of Federal Procurement Policy (OFPP) also undertook the task of developing debarment and suspension regulations when it issued Policy Letter 81-3, which set forth proposed government-wide debarment and suspension regulations in the same month that the Senate subcommittee issued its report.³⁴ In June 1982, the OFPP promulgated Policy Letter 82-1 delineating final rules for government-wide debarment and suspension procedures.³⁵ By doing so, the OFPP intended federal

31. See SENATE SUBCOMM. ON OVERSIGHT OF GOV'T MGMT. OF THE COMM. OF GOV'T AFFAIRS, 97TH CONG., 1ST SESS., REFORM OF GOVERNMENT-WIDE DEBARMENT AND SUSPENSION PROCEDURES 18-19 (Comm. Print 1981) [hereinafter SENATE SUBCOMMITTEE REPORT]. Intriguingly, the Senate subcommittee sought greater procedural uniformity, reflecting the recommendations of the ACUS Temporary Conference some 20 years earlier, but for very different reasons. Specifically, the Temporary Conference called for greater uniformity primarily based on concern about perceived unfairness to contractors. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 278, 293 (discussing the inadequate rules regarding the grounds and scope of debarment and suggesting appropriate remedies). In contrast, the Senate subcommittee sought uniform, government-wide procedures because of concerns that agencies did not engage in "effective and aggressive debarment and suspension" activities. SENATE SUBCOMMITTEE REPORT, *supra*, at 20. The Senate subcommittee displayed little interest in the rights of contractors, but was concerned because agencies not only bypassed debarment or suspension action when it was warranted, but also refused to honor the debarments or suspensions of other agencies. *Id.* at 11.

32. See ABA PRACTITIONER'S GUIDE, *supra* note 4, at 6 (reporting that, in 1993, all federal agencies suspended or debarred about 6000 entities, of which approximately 1200 were by the Defense Department alone—up from 57 by that agency in 1975); UNITED STATES GEN. ACCT. OFFICE, BRIEFING REPORT TO THE CHAIRMAN, HOUSE COMM. ON GOV'T OPERATIONS, PROCUREMENT: SUSPENSION AND DEBARMENT PROCEDURES 3 (1987) [hereinafter GAO BRIEFING REPORT] (stating that the Department of Defense had doubled its suspension and debarment actions between 1983 and 1985).

33. See 48 C.F.R. § 9.404(a) (explaining that the GSA shall maintain a list of the names of those whom the federal government debar or suspends entitled, "Parties Excluded from Procurement Programs"). Consequently, if the GSA lists a contractor, it will be excluded from any future contracts with the federal government. *Id.* § 9.405(b). The GSA list also includes parties excluded under the nonprocurement rules, as discussed below. See *infra* notes 50-72 and accompanying text.

34. See Proposed OFPP Policy Letter 81-3, 46 Fed. Reg. 37,832 (1981) (stating that the OFPP issued the Policy Letter in July 1981) [hereinafter Policy Letter 81-3]; see also SENATE SUBCOMMITTEE REPORT, *supra* note 31, at 1 (indicating that the Senate subcommittee also released its report in July 1981). The OFPP later published amendments to Policy Letter 81-3 in September 1981. See 46 Fed. Reg. 45,456 (1981).

35. See OFPP Policy Letter 82-1, 47 Fed. Reg. 28,854 (1982) [hereinafter Policy Letter 82-1].

agencies to adopt the rules stated in Policy Letter 82-1 initially as part of the various agencies' procurement regulations and ultimately to include them in subpart 9.4 of the FAR (upon promulgation of the FAR).³⁶

The government simply did not thrust the suggested rules included in Policy Letter 82-1 onto the contracting community in a unilateral fashion. Instead, an intergovernmental task force comprised of legal and procurement experts from various federal agencies considered over six hundred industry comments regarding the proposed rules.³⁷ Although maintaining that the proposed Policy Letter 81-3 provided "fundamental due process" for contractors, the OFPP responded to the public comments by further refining the procedures.³⁸

The OFPP's rules, as incorporated in the FAR, generally permit an agency to bar, at least temporarily, a contractor from receiving new contract awards from any federal agency prior to an opportunity for a hearing. Specifically, a federal agency may suspend³⁹ a contractor based on an indictment or other adequate evidence of charges relating to a lack of contractor integrity.⁴⁰ An agency also could impose a debarment⁴¹ for

36. See *id.* Policy Letter 82-1 antedated the implementation of the FAR, the unified government-wide regulation controlling procurement matters, which became effective on April 1, 1984.

37. *Id.* at 28,854-55. A number of these comments addressed the contemplated procedures. *Id.* at 28,856. Many other comments related to the government-wide application of the rules. *Id.* at 28,855. As an additional impetus for uniformity, Congress enacted legislation that required the military departments to honor the debarments and suspensions issued by other federal agencies. See 10 U.S.C. § 2393 (1988 & Supp. V 1993). Thus, at the time of OFPP's efforts, Congress already had directed the Department of Defense to honor other agencies' procurement debarments and suspensions, and the Senate subcommittee also was advocating action with government-wide effect. *Id.* The statute specifically states that "[e]xcept as provided in paragraph (2), the Secretary of a military department may not solicit an offer from, award a contract to, . . . approve the award of a subcontract to, an offeror or contractor which to the Secretary's knowledge has been debarred or suspended by another Federal agency." *Id.* § 2393(a)(1). Accordingly, the decision to issue new regulations to require all procurement debarments and suspensions to have effect throughout the federal government did not come as a surprise.

38. See Policy Letter 82-1, 47 Fed. Reg. at 28,856. The OFPP fashioned these procedures in accordance with the language in some of the earlier court decisions that had questioned previous agency debarment and suspension practices. See *infra* notes 105-93 and accompanying text (discussing cases involving due process claims against agency procedures).

39. See *supra* note 2 (defining suspension).

40. See 48 C.F.R. § 9.407 (1993). Specific grounds for suspension include an indictment or other adequate evidence of "fraud or [other] criminal offense[s] in connection with" public contracts, antitrust violations, offenses such as embezzlement, theft, bribery, false statements, or other indicia of a lack of business integrity or honesty, and "for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor." *Id.* § 9.407-2(a)(1), (c).

41. See *supra* note 2 (defining debarment).

roughly similar grounds as those set forth for a suspension,⁴² except that a debarment requires the higher “preponderance of the evidence” standard.⁴³ Furthermore, the procurement regulations provide that the issuance of a notice of proposed debarment also has the immediate effect of barring the contractor from receiving new contract awards from any federal agency.⁴⁴ Thereafter, the hearing requirements vary depending on whether a suspension or proposed debarment is involved and whether the case is based on an indictment, a conviction, or some other evidence.⁴⁵

With respect to a proposed debarment, the contractor has the right to submit opposing arguments and information in person, in writing, or through counsel within thirty days following receipt of the notice.⁴⁶ Unless a conviction or civil judgment is the basis for the action, the contractor is entitled to an additional fact-finding hearing if its initial opposition raises a genuine dispute concerning the facts underlying the proposed debarment.⁴⁷ In the case of a suspension, a contractor similarly is entitled to submit opposing arguments and information within thirty days follow-

42. *Id.* § 9.406-2(a), (c); *see supra* note 40 (listing the grounds for suspension). Other causes for debarment include “[w]illful failure to perform in accordance with the terms of one or more contracts; or . . . [a] history of failure to perform, or of unsatisfactory performance of, one or more contracts.” 48 C.F.R. § 9.406-2(b)(i), (ii).

43. 48 C.F.R. § 9.406-2(b). Alternatively, a conviction or civil judgment on charges similar to those delineated as grounds for suspension will provide a sufficient evidentiary basis for a debarment. *See id.* § 9.406-2(a)(1) to (4). Consequently, many debarments follow on the heels of convictions. In the absence of a conviction (or civil judgment), however, an agency may pursue a debarment when it possesses its own evidentiary basis for action (even though the Department of Justice may not have pursued or completed any criminal or civil proceedings). *See id.* § 9.406-2(b), (c).

44. *Id.* § 9.405. Although suspensions had immediate government-wide effect under the OFPP framework prior to 1989, only final debarments had similar government-wide effect; mere proposals for debarment only barred the contractor from receiving new awards in the agency that had issued the notice. *See* 54 Fed. Reg. 19,812, 19,814-15 (1989) (to be codified at 48 C.F.R. § 9.405). A proposed debarment differs under the nonprocurement rules because it does not have immediate preclusive effect (although the nonprocurement regulations authorize an agency to issue a suspension and a notice of proposed debarment simultaneously). *See infra* notes 76-77 and accompanying text.

45. *See infra* notes 46-49 and accompanying text.

46. 48 C.F.R. § 9.406-3(c)(4). This opportunity to submit information and argument in opposition to the proposed action is consistent with the “‘opportunity to explain and to demonstrate present responsibility as a contractor’” that the ABA sought at the time of the Temporary Conference recommendations. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 283; *see also supra* note 10 (discussing same).

47. 48 C.F.R. § 9.406-3(b)(2). The regulations do not designate which agency official(s) should preside over the initial agency presentation or any other additional fact-finding proceedings. In cases involving a conviction or civil judgment, the regulations do not require any hearing beyond the initial presentation of information in opposition to the proposed action. *See id.* § 9.406-3(b). On the other hand, the regulations caution that “[t]he existence of a cause for debarment [such as a conviction], however, does not necessarily require that the contractor be debarred; the seriousness of the contractor’s acts or

ing receipt of the notice.⁴⁸ Moreover, except in cases in which an indictment serves as the basis for the suspension or in which the Department of Justice (DOJ) advises that additional proceedings would jeopardize substantial governmental interests in pending or contemplated criminal or civil proceedings, the regulations require an agency to conduct additional fact-finding proceedings when the contractor's opposition raises questions of material fact.⁴⁹ Because the regulations provide that a suspension or proposed debarment may precede the opportunity for any form of hearing, contractors long have had concerns about the procedures.

B. Nonprocurement (Grantee)

Prior to the late 1980s, no government-wide regulation comparable to FAR subpart 9.4 existed, although various agencies had debarment and suspension programs in effect for nonprocurement programs. In 1986, however, President Reagan issued Executive Order No. 12,549 to direct federal agencies to promulgate government-wide debarment and suspension procedures for nonprocurement activities.⁵⁰ The Executive Order also called for federal agencies to "[f]ollow government-wide criteria and government-wide minimum due process procedures when they act to debar or suspend participants in affected programs."⁵¹ Thus, similar to the FAR's coverage for procurement programs, Executive Order No. 12,549 directed the use of government-wide procedures with government-wide effect for nonprocurement programs.⁵²

omissions and any remedial measures or mitigating factors should be considered in making any debarment decision." *Id.* § 9.406-1(a) (emphasis added).

48. *Id.* § 9.407-3(c)(5).

49. *Id.* § 9.407-3(c)(6).

50. Exec. Order No. 12,549, 3 C.F.R. 189 (1986). This Executive Order provides, in pertinent part:

to curb fraud, waste, and abuse in Federal programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs, it is hereby ordered that:

SECTION 1. (a) To the extent permitted by law . . .

Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and non-financial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have government-wide effect.

Id. The order specifically covered "grants, cooperative agreements, contracts of assistance, loans, and loan guarantees," but excluded "procurement programs and activities, direct Federal statutory entitlements or mandatory awards, direct awards to foreign governments or public international organizations, benefits to an individual as a personal entitlement, or Federal employment." *Id.*

51. *Id.*

52. *See id.* The order stated that agencies shall "[n]ot allow a party to participate in any affected program if any Executive department or agency has debarred, suspended, or otherwise excluded . . . that party from participation in an affected program." *Id.*

In May 1987, the Office of Management and Budget (OMB) implemented President Reagan's order by issuing regulatory guidelines entitled the "Guidelines for Nonprocurement Debarment and Suspension."⁵³ One year later, twenty-eight agencies, through the leadership of the OMB, simultaneously issued a final common rule to establish uniform debarment and suspension rules for nonprocurement programs.⁵⁴ These rules generally mirrored the approach of FAR subpart 9.4, but contained some important technical differences.⁵⁵

Before addressing these differences, it is important to note that even after President Reagan's order and the subsequent development of government-wide procedures for nonprocurement debarments and suspensions, a problem existed concerning the two separate sets of debarment and suspension regulations for procurement and nonprocurement activities. For example, under the regulations it was clear that a contractor debarred by an agency pursuant to the FAR could not obtain any new contracts throughout the federal government.⁵⁶ Similarly, an entity debarred from nonprocurement activities could not obtain new grants or other benefits throughout the government.⁵⁷ However, the question of whether a contractor debarred under the FAR could still be eligible for nonprocurement grants or awards or whether federal agencies could award new procurement contracts to entities debarred under the nonprocurement regulations remained. Without some additional agency action pursuant to the parallel set of debarment regulations, the answer to both questions was affirmative. Consequently, two different sets of regulations *separately* governed procurement and nonprocurement debarments and suspensions with no reciprocity between the two actions. Thus, a procuring agency did not have to accord comity to a nonprocurement debarment or suspension, and a nonprocurement agency did not have to honor a procurement debarment or suspension.

In response to the gap between procurement and nonprocurement regulations, President Bush promulgated Executive Order No. 12,689 in

Although agency heads could grant exceptions, the President "intend[ed] that exceptions to this policy should be granted only infrequently." *Id.*

53. 52 Fed. Reg. 20,360 (1987).

54. 53 Fed. Reg. 19,160 (1988). Several months later an additional six agencies adopted the common rules. 54 Fed. Reg. 4722 (1989). Although these rules appear in the various agencies' regulations, as a final common rule they are, naturally, quite similar. In future references to the nonprocurement rules, I will provide citations to pertinent sections of one or more representative provisions.

55. See *supra* notes 29-49 and accompanying text (discussing the FAR provisions).

56. See *supra* note 44 and accompanying text.

57. See *supra* notes 50-52 and accompanying text.

1989.⁵⁸ The order stated that the OMB “may assist Federal agencies in resolving differences between the provisions contained in” the two sets of regulations.⁵⁹

Yet, despite this executive mandate, one key flaw in the Executive Order has prevented the federal government from resolving the reciprocity problem. The order did not contain an exact effective date. Instead, the order called for the publication of proposed implementing regulations within six months “of the resolution of differences” between the two sets of provisions.⁶⁰ As of this writing, however, the OMB has been unable to resolve differing agency viewpoints. Accordingly, the order’s implementation schedule has not commenced.

On June 8, 1994, the United States Senate passed its version of the Federal Acquisition Streamlining Act of 1994.⁶¹ The bill included a provision intended as a means of further directing the federal government to require agencies to provide comity between procurement and non-procurement procedures for debarments and suspensions.⁶² This provision called for the issuance of regulations within six months of the effective date of the Act to make the underlying purposes of the earlier

58. Exec. Order No. 12,689, 3 C.F.R. 235 (1989). The presidential order provided the following:

to protect the interest of the Federal Government, to deal only with responsible persons, and to insure proper management and integrity in Federal activities, it is hereby ordered as follows:

....
 (a) To the extent permitted by law and upon resolution of differences and promulgation of final regulations . . . the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to Executive Order No. 12549, shall have governmentwide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded . . . that party from participation in a procurement or nonprocurement activity.

Id.

59. *Id.*

60. *Id.* Final regulations were to follow one year after the proposed regulations and were to become effective after an additional 30 days. *Id.*

61. S. 1587, 103d Cong., 2d Sess. (1994).

62. *Id.* § 9004. The provision arose from an amendment intended to strengthen “the debarment and suspension laws and make them uniform.” 140 CONG. REC. S6590 (daily ed. June 8, 1994) (statement of Sen. Levin). Senator Levin, on behalf of Senator Harkin, also offered an amendment relating to debarment and suspension that required agencies to “resolve or take corrective action on all Office of Inspector General audit report findings within a maximum of six months after their issuance” or within six months after receipt of audit reports by non-government auditors. *Id.* The latter amendment became part of the final legislation. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 355, § 6009, 108 Stat. 3243, 3367 (to be codified at 42 U.S.C. § 251); H.R. CONF. REP. NO. 712, 103d Cong., 2d Sess. § 6009, at 130.

executive orders effective.⁶³ The United States House of Representatives also passed a version of the Act on June 27, 1994, but it did not include this debarment comity section.⁶⁴ Subsequently, a congressional conference committee considered the differences between the two versions and on August 21, 1994, issued a compromise measure.⁶⁵ The final bill largely embraced the debarment and suspension comity provisions that the Senate version originally contained.⁶⁶ President Clinton ultimately signed the bill into law on October 13, 1994.⁶⁷

One likely reason for congressional consideration of this matter as part of the 1994 procurement reform legislation is the media attention directed at the Department of Agriculture in 1993 and 1994. For example, in late 1993, the *New York Times* published a lengthy report criticizing the Department of Agriculture for its general lack of debarment activity and lack of interest in recognizing the debarments of other procuring

63. S. 1587, § 9004. Section 9004, entitled "Uniform Suspension and Debarment," provides the following:

(a) Within six months after the date of enactment of this Act, regulations shall be issued providing that provisions for the debarment, suspension, or other exclusion of a participant in a procurement activity under the [FAR], or in a non-procurement activity under regulations issued pursuant to Executive Order No. 12549, shall have government-wide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded (to the extent specified in the exclusion agreement) that party from participation in a procurement or nonprocurement activity.

(b) The Regulations issued pursuant to subsection (a) shall provide that an agency may grant an exception permitting a debarred, suspended, or otherwise excluded party to participate in procurement activities of that agency to the extent exceptions are authorized under the [FAR], or to participate in nonprocurement activities of that agency to the extent exceptions are authorized under regulations issued pursuant to Executive Order No. 12549.

Id. The bill also included language setting forth definitions for procurement and non-procurement activities. *See id.* § 9004(c).

64. *See* H.R. 2238, 103d Cong., 2d Sess. (1994) (revealing that House Bill 2238 was a complete substitute to the Senate version).

65. *See* H.R. CONF. REP. NO. 712, *supra* note 62, at 88. It should be noted that the provisions of the bill relating to debarment and suspension comprise only a tiny portion of an enactment that provides for sweeping procurement reforms.

66. The substantive portion of the language in the conference committee report tracked the provisions in the Senate bill; however, the final bill deleted the Senate language requiring the new regulations to be published within six months of enactment. *See id.*; *supra* note 63 and accompanying text. On the other hand, the conference bill's general provision regarding effective dates provides that all proposed regulations covered by the bill are to be published for comment within 210 days from the date of enactment and are to be made final within 330 days following enactment. H.R. CONF. REP. NO. 712, *supra* note 62, at 168.

67. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (to be codified at 42 U.S.C. § 251).

agencies.⁶⁸ By suggesting that the Agriculture Department was the only federal agency that steadfastly had refused to comply with President Reagan's Executive Order No. 12,549 regarding nonprocurement debarment and suspension,⁶⁹ the Times article may have prompted the Department to adopt a more aggressive approach to debarment and suspension. Nevertheless, the coverage attracted the interest of Congress,⁷⁰ resulting in Senator Leahy's introduction of a bill to force the Department of Agriculture to comply with Executive Order No. 12,549.⁷¹ In addition, the media attention may have caused a renewed focus on the lack of reciprocity or comity between procurement and nonprocurement debarments and suspensions.⁷² Regardless of the underlying rationale, however, Congress expressly has demanded reciprocity. Yet, despite this legislative command to implement the comity requirements of President Bush's Executive Order No. 12,689, the two sets of regulations continue to contain differences. A consensus as to the best way to achieve the required results has yet to emerge.

C. Key Differences Between the Two Sets of Regulations

Several key differences between the two sets of regulations have caused difficulties in implementing Executive Order No. 12,689. In observing those differences, one should consider the question of how these differences can be resolved and whether the differences need to be resolved to achieve the purposes of the Executive Order and the new legislation. One such difference relates to the scope and impact of a notice of proposed debarment. In the procurement arena, the federal government has expanded the effects of debarments and suspensions during the last several years.⁷³ In particular, the government amended the FAR in 1989

68. See Dean Baquet & Diana B. Henriques, *Agriculture Companies Still Get Federal Business Despite Abuses*, N.Y. TIMES, Oct. 12, 1993, at A1 (highlighting the Agriculture Department's inaction with respect to dairy contractors that were still participating in the agency's school lunch program despite fraud convictions and adverse actions by other procurement agencies).

69. See *id.* at A1, A20.

70. See Dean Baquet, *Agriculture Department, in Shift, Will Punish Corrupt Contractors*, N.Y. TIMES, Nov. 23, 1993, at A1, A1 (reporting that the Agriculture Department had decided to comply with Executive Order No. 12,549 "under pressure from Congress").

71. See S. 1623, 103d Cong., 1st Sess. (1993).

72. An official within the OMB, who asked to remain anonymous, informed me that the intense scrutiny of the practices at the Department of Agriculture had motivated that agency to reach an informal agreement on reciprocity. A number of other agencies had balked at such reciprocity or comity because of the continuing presence of technical differences between the two sets of regulations. Telephone Interview with Anonymous Source, Office of Management and Budget (June 8, 1994).

73. See *supra* notes 29-49 and accompanying text.

to require a proposed debarment to have immediate preclusive effect throughout the federal government.⁷⁴ Thus, under current regulations a proposal for debarment has the same government-wide effect as a suspension.⁷⁵ This approach differs, however, from the rules for non-procurement debarments.⁷⁶ A proposed debarment under the nonprocurement rules does not have the same immediate effect unless the agency also suspends the affected party.⁷⁷

Prior to the 1989 amendment to the FAR, a proposed debarment under the procurement rules only had the effect of barring a contractor from receiving contracts under the authority of the issuing agency pending a final debarment determination.⁷⁸ Hence, the 1989 amendment corrected an anomaly in the former process that had allowed a suspension that could be based merely on an indictment or other adequate evidence of contractor impropriety to have immediate, government-wide effect. But this process had required a proposal for debarment, which ultimately would need to be based on a conviction, civil judgment, or some other significant cause supported by a preponderance of evidence, to have effect only within the issuing agency.⁷⁹

The change in the procurement rules to expand the scope of a proposed debarment should not entitle contractors to any additional process.⁸⁰ Given that the courts generally have upheld suspension procedures from constitutional due process challenges,⁸¹ the debarment procedures, despite the fact that a proposed debarment now has government-wide effect, also must be valid.⁸² Indeed, it is anomalous that the

74. See 54 Fed. Reg. 19,812, 19,814-15 (1989) (to be codified at 48 C.F.R. § 9.405(a)).

75. 48 C.F.R. § 9.405 (1993); see *supra* note 44 and accompanying text.

76. See, e.g., 24 C.F.R. § 24.200(a) (1993) (indicating a similar policy for HUD); 28 C.F.R. § 67.200(a) (1993) (showing that DOJ's nonprocurement regulations only give government-wide effect to final debarments and suspensions).

77. See, e.g., 24 C.F.R. § 24.200(a) (HUD); 28 C.F.R. § 67.200(a) (DOJ).

78. See 52 Fed. Reg. 28,642 (1987) (proposing amendments to 48 C.F.R. § 9.405(a) and stating that without the proposal "a contractor proposed for debarment is ineligible for award, pending a final debarment determination, only within the Federal agency proposing debarment").

79. *Id.* "This enable[d] a seriously nonresponsible contractor to continue to receive contract awards from other Federal agencies until a debarment decision [was] rendered." *Id.* The General Accounting Office (GAO) recommended this change in 1987. See GAO BRIEFING REPORT, *supra* note 32, at 13.

80. See Shannon, *supra* note 5, at 30-31.

81. See *infra* notes 105-93 and accompanying text.

82. See *Electro-Methods, Inc. v. United States*, 728 F.2d 1471, 1475-76 (Fed. Cir. 1984) (rejecting due process attacks on a pre-indictment suspension based solely on adequate evidence consisting of two FBI search warrant affidavits). Although a proposal for debarment under the FAR now has the same practical effect as a suspension (an immediate, government-wide preclusion from obtaining new contract awards), the post-deprivation process for a proposed debarment is more extensive than for a suspension. First, a debar-

nonprocurement rules have not undergone similar reform. On the other hand, the nonprocurement rules do permit agencies to impose a suspension at the same time they issue a notice of proposed debarment, thereby achieving a similar result as a notice of proposed debarment under the FAR.⁸³ Nevertheless, the question as to whether the two sets of regulations should be consistent on the effects of a proposed debarment remains.

Another problem in the current procurement debarment rules is the lack of a minimum required showing for an agency to initiate a proposed debarment. Given a suspension that has government-wide effect must be based on adequate evidence, a proposal for debarment that also has government-wide effect under the FAR similarly should be premised on at least adequate evidence. Because courts have likened the adequate evidence standard to the probable cause showing necessary to support a search warrant under criminal procedure,⁸⁴ the regulations should require a similar probable cause showing to initiate a proposed debarment. This issue is not as significant under the nonprocurement rules because a nonprocurement proposed debarment does not have a government-wide effect.

In 1989, the government also expanded the scope of procurement debarments and suspensions by creating a prohibition against most subcontracting by debarred and suspended contractors.⁸⁵ While prior rules precluded agencies from consenting to subcontracts with debarred or suspended firms, these firms still could enter into subcontracts that did not

ment requires a higher standard of proof (a conviction, a civil judgment, or a preponderance of evidence). 48 C.F.R. § 9.406-2 (1993). Second, unlike the case of a suspension, an agency may not limit a contractor's hearing rights in a debarment action based on advice from the Justice Department. Compare *id.* § 9.406-3(b)(2), (d)(2) (establishing that a contractor facing debarment may obtain a hearing if it raises a genuine dispute of material fact) with *id.* § 9.407-3(b)(2), (d) (providing that an agency may deny a hearing to a contractor who faces suspension if the contractor fails to raise a genuine dispute of material fact or if the DOJ advises that substantial government interests are at stake). Accordingly, if the suspension process generally meets constitutional requirements, then clearly the FAR's more extensive process for processing debarments also must satisfy minimal due process standards.

83. See 28 C.F.R. § 67.405(a)(2) (1993) (authorizing a suspension upon adequate evidence that a cause for debarment may exist).

84. See *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972). In practice, this threshold showing for a proposed debarment should not prove to be an insurmountable hurdle for the government. Since the ultimate burden of proof for a debarment is the preponderance of evidence standard, an agency likely will wish to commence a debarment action with greater evidentiary support than the minimal amount of proof necessary for adequate evidence.

85. See 54 Fed. Reg. 19,812, 19,815 (1989) (to be codified at 48 C.F.R. § 9.405-2).

require government approval.⁸⁶ The current regulations (1) preclude the government from consenting to any subcontracts with a debarred or suspended contractor, in cases in which government consent is required, in the absence of a compelling reason determined by the head of the agency or a designee, and (2) preclude prime contractors from entering into subcontracts in excess of \$25,000 with any debarred or suspended contractor “unless there is a compelling reason to do so” and the prime contractor notifies the agency’s contracting officer.⁸⁷ This amendment to the FAR essentially has excluded almost all subcontracting over the small purchase limitation with contractors who are suspended, debarred, or proposed for debarment at least at the first tier level. Moreover, a prime contractor’s retention of a debarred or suspended subcontractor could have a bearing on the prime’s overall responsibility.⁸⁸

As compared to the FAR, the regulations in the nonprocurement arena are even broader. The nonprocurement regulations require a debarment or suspension to flow through every tier of participation for most governmental programs.⁸⁹ Thus, in most situations, a debarred or suspended

86. See 52 Fed. Reg. 28,642 (1987) (proposing amendments to 48 C.F.R. § 9.405-2).

87. 48 C.F.R. § 9.405-2 (1993). For example, Congress has mandated that Defense Department contractors must require subcontractors to notify them at the time of the award of any subcontracts for amounts greater than the small purchase threshold whether those subcontractors are presently debarred, suspended, or otherwise ineligible. 10 U.S.C. § 2393(d) (Supp. V 1993). The small purchase threshold is currently \$25,000. 10 U.S.C. § 2393(g)(3) (1988). Recent procurement streamlining legislation, however, increases the simplified acquisition threshold to \$100,000 and correspondingly amends section 2393(d). See H.R. CONF. REP. NO. 712, *supra* note 62, at 102.

88. See 48 C.F.R. § 9.104-4(a) (1993) (providing that “[d]eterminations of prospective subcontractor responsibility may affect the Government’s determination of the prospective prime contractor’s responsibility”); see also *Medical Devices of Fall River, Inc. v. United States*, 19 Cl. Ct. 77, 82-83 (1989) (upholding a contracting officer’s finding that a contractor who entered into a subcontract with a debarred contractor for 100% of the contract items was not a responsible offeror).

89. See, e.g., 28 C.F.R. § 67.200(a), (b) (1993) (requiring the exclusion of persons debarred or suspended under the nonprocurement rules from being participants or principals in “primary covered transactions” and “all lower tier covered transactions”). The regulations define a primary covered transaction to include such nonprocurement transactions as “grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies,” and others. *Id.* § 67.110(a)(1)(i). A lower tier covered transaction includes “[a]ny transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.” *Id.* § 67.110(a)(1)(ii)(A). Lower tier covered transactions also include procurement contracts between a participant and a person under a primary covered transaction that are at or above the federal procurement small purchase threshold, *id.* § 67.110(a)(ii)(B), and “[a]ny procurement contract . . . between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over th[e] covered transaction.” *Id.* § 67.110(a)(1)(ii)(C). The regulation defines such persons as “[p]rincipal investigators” and “[p]roviders of federally-required audit services.” *Id.*

firm cannot enter into transactions at any level with another entity that is obtaining government grants or other benefits.

Thus, given Executive Order No. 12,689⁹⁰ and the recent procurement streamlining legislation,⁹¹ one may ask whether consistency between the procurement and nonprocurement debarment and suspension rules on this issue exists and whether the subcontracting and lower tier transaction rules can be reconciled.⁹² Certainly, some political and publicity appeal exists in not allowing federal dollars to flow to any debarred, suspended, or excluded firms or individuals attempting to do business directly with the government, or in a subcontract or other lower tier arrangement. In the procurement arena, however, absent some level of privity between the government and the affected entity, the prohibition of lower tier subcontracting appears punitive in nature. Unless the subcontract requires government approval (some direct contact between the government and the affected concern), the party dealing with the government, rather than the agency itself, should be responsible for the business integrity of any excluded subcontracting party. Once the government has made a determination that an eligible firm is responsible and worthy of obtaining a government contract, no further concern about that firm's lower tier arrangements should remain. At that point, the federal agency has no direct relationship with the tainted party, and arguably the government no longer needs the same level of *protection* that it does when privity exists between the agency and the excluded person or firm.⁹³ If the tainted party plays an excessive role in the overall operation of the contract or program, however, the government should exercise its discretion to decline to enter into the prime contract.

By limiting its primary application to prime contracts and most first-tier subcontracts, the FAR appears to scrutinize more closely situations in which the government needs protection than does the nonprocurement approach. Different issues, however, are arguably at stake in the non-

90. See *supra* note 58 (providing relevant portions of the text of the order).

91. See H.R. CONF. REP. NO. 712, *supra* note 62, at 102.

92. In another forum the author argued that the 1989 FAR amendments represented a seemingly unnecessary expansion of the scope of debarments and suspensions. See Shannon, *supra* note 5, at 31-32. The author acknowledges, however, that "given the ongoing public concerns about procurement fraud, the ban on most subcontracting likely will continue." *Id.* at 32. Arguably, the same criticism applies to the current nonprocurement rules, although there may be some significant differences. *But see* GAO BRIEFING REPORT, *supra* note 32, at 13 (recommending an extension of the regulations to include all subcontractors).

93. See 10 U.S.C. § 2408(a) (Supp. V 1993). Even Congress, in barring individuals convicted of procurement fraud from almost all involvement in defense contracting for at least five years, generally limited that exclusion to prime defense contracts and first tier subcontracts. *Id.*

procurement arena. For example, differences in the business relationships between the government and private parties often arise depending on whether the government is procuring goods or services or is involved in nonprocurement activities, such as a grant, loan, or other benefit programs. In nonprocurement situations, the pertinent government agency often may be several levels removed from the actual transactions. Unlike procurement contract situations, no direct privity "chain" may exist between the agency and the grantee. Thus, while the government often has flexibility to require its approval of certain subcontractors in procurement situations, this safeguard may not be applicable to lower level grantees under nonprocurement programs. Other policy factors may be at stake with regard to lower-tier transactions in the nonprocurement arena as well.⁹⁴ Thus, it may be appropriate to continue the current exclusion of debarred and suspended entities from all covered levels of nonprocurement programs. Additionally, political concerns about allowing *any* federal dollars to flow into the hands of a barred entity may inhibit future intentions to ease restrictions on subcontracting or participation in lower-tier transactions. As a result, reconciling the different flow-down approaches in the FAR and the nonprocurement rules may prove to be both difficult and undesirable.

Because of some of the significant differences between the two sets of regulations, agency officials currently are approaching the problems of implementing the Executive Order and the new legislation in another fashion. An Interagency Coordinating Committee for Suspension and Debarment has determined that uniformity between the FAR and the nonprocurement debarment rules is neither desirable nor necessary.⁹⁵ Rather than attempting to create one set of uniform regulations, this interagency committee, working with OMB officials and others, recently has developed proposed regulations to achieve reciprocity.⁹⁶ These regulations simply would revise the FAR and the nonprocurement rules to

94. In response to an earlier draft of this Article, several government commentators stressed that in some federal assistance programs "critical health and safety functions are often performed" several tiers removed from the primary transaction. Letter from Janet C. Cook, Assistant General Counsel for Contractor Responsibility, United States Air Force, to Nancy Miller, Staff Liaison, ACUS 2 (Oct. 17, 1994) (on file with the ACUS) [hereinafter Cook Letter]; see also Letter from Robert F. Meunier, Director, Suspension and Debarment Division, & David M. Sims, Chief Hearing Officer, Office of Grants and Debarment, EPA, to Nancy Miller, Staff Liaison, ACUS 3 (Oct. 14, 1994) (on file with the ACUS). The government and higher-tier entities may be in a position to provide only limited oversight in such situations; thus, an expansive scope for any debarment or suspension may be necessary to assure the exclusion of dishonest or untrustworthy persons at these lower levels.

95. Cook Letter, *supra* note 94, at 2.

96. *Id.* at 1-2.

provide that a debarment or suspension under one set of rules should have a reciprocal effect in programs governed by the other set of rules.⁹⁷ Implementation of these proposed changes should satisfy the mandates of the earlier executive order and the recent procurement streamlining legislation to ensure that an entity excluded from doing business with one side of the government's house will be excluded from the other side as well.

Even if reciprocity does not produce the desired consistency, other steps to achieve greater uniformity through reciprocity exist. For example, rulemakers could harmonize the effects that the procurement and nonprocurement rules give to a proposed debarment. Furthermore, the addition of a threshold evidentiary showing for a proposed debarment is another achievable reform.⁹⁸

As the integration of procurement and nonprocurement debarment and suspension procedures continues, another problematic question concerns the determination of which agency should take the lead in pursuing and handling a case in which an entity has multiple governmental contracts. Interagency cooperation should be a major goal in such situations. Indeed, the FAR encourages agencies "to establish methods and procedures for coordinating their debarment or suspension actions."⁹⁹ The nonprocurement regulations include this same language.¹⁰⁰ Thus, the basic regulations do not differ here; nonetheless, further implementation has yet to occur. Although formal policies have not evolved, certain agencies do endeavor to cooperate and coordinate activities. For example, in 1992, the Under Secretary within the Department of Defense issued a policy memorandum addressing interagency coordination.¹⁰¹

97. *Id.* at 1.

98. Another key difference in the two sets of regulations relates to the FAR's inclusion of a specific listing of a variety of mitigating factors and remedial measures for the debarring/suspending official to consider when making determinations of responsibility and integrity. 48 C.F.R. §§ 9.406-1(a), 9.407-1(b)(2) (1993). Agencies should give attention to amending the nonprocurement rules to include such factors and measures. For a full discussion of this topic, see *infra* notes 286-316 and accompanying text.

99. 48 C.F.R. § 9.402(c) (providing that when multiple agencies have an interest in a debarment or suspension matter, they shall consider "designating one agency as the lead agency for making the decision").

100. See 28 C.F.R. § 67.115(c) (1993) (providing similar language to that found in the FAR).

101. See Memorandum from Don Yockey, Under Secretary of Defense, to the Secretaries of the Military Departments et al. (Sept. 28, 1992) (on file with author) [hereinafter Yockey Memo]. The Under Secretary did not expand much further beyond the policy that the FAR already identified. On the other hand, he did recognize the potential for concern by observing that

[i]t is essential that all debarring officials coordinate fully within the Department [of Defense] to determine the possible effects of their actions on other organizations and to receive additional information which may affect their decisions.

Similarly, the Department of Defense has engaged in efforts with the EPA to coordinate procurement debarments when defense contractors violate environmental laws.¹⁰² One agency official indicated that periodically debarment officials and staff representatives from interested federal agencies meet on an informal basis to discuss cases of general interest, trends, and other items of mutual interest.¹⁰³ These informal efforts are a welcome start, but do not meet the requirement to establish methods and procedures for coordination of the two sets of regulations. Without additional development of coordination policies, problems could result.¹⁰⁴

Although this is intended to be effective primarily within [the Department of Defense], in certain cases coordination should also be carried out with civilian agencies.

Id. at 1.

102. See DeVecchio & Engel, *supra* note 26, at 75-76 (explaining that the cooperation between the two agencies resulted from “[h]eighted attention to and interest in environmental issues”).

103. Interview with Janet Cook, Debarment Official, Department of the Air Force (May 6, 1994).

104. See, e.g., *Facchiano Constr. Co. v. United States Dep’t of Labor*, 987 F.2d 206, 209 (3d Cir.) (involving a HUD debarment action premised on the same underlying wrongdoing as a prior Department of Labor debarment), *cert. denied*, 114 S. Ct. 80 (1993); DeVecchio & Engel, *supra* note 26, at 66 (describing an EPA case in which the agency initiated a debarment action despite decisions by two other military agencies not to take action). In addition, the Chief Administrative Law Judge for HUD observed that his agency once sought to debar an entity for one year by relying on the same facts that the Defense Department had used to debar the same concern for two months. Letter from Alan W. Heifetz, Chief Administrative Law Judge, HUD, to Brian D. Shannon 1 (Apr. 15, 1994) (on file with author) [hereinafter Heifetz Letter]. He expressed concern that his agency had not undertaken efforts to coordinate procedures with other agencies. *Id.* The General Counsel for HUD believes, however, that his agency does an adequate job of coordinating activities with other federal agencies. Letter from Nelson A. Diaz, General Counsel, HUD, to Brian D. Shannon 2 (Sept. 29, 1994) (on file with author) [hereinafter Diaz Letter]. Mr. Diaz also disputed Judge Heifetz’s assertion that HUD attempted to debar an entity that the Department of Defense previously had debarred. *Id.* Mr. Diaz did acknowledge, however, that his agency’s Baltimore office did issue “one-year Limited Denials of Participation” to two companies that the Army previously had suspended and then debarred. *Id.*

The Department of Defense uses an informal approach that “essentially gives the lead agency assignment to the agency with the predominant financial interest.” See Yockey Memo, *supra* note 101, at 2. This could be problematic when a company traditionally has contracted or otherwise dealt principally with one department or agency, but has a higher dollar amount of contracts or other benefit arrangements with another department or agency in a particular year. Moreover, the wrongdoing giving rise to the action might involve a contract or grant with yet another department or agency. Overall, the overlap of procurement and nonprocurement debarments will only expand the potential for problems and increase the need for coordination. One commentary has suggested that entities facing potential debarment or suspension should act “proactively to raise the matter with the agency . . . most interested in [their] future.” DeVecchio & Engel, *supra* note 26, at 75.

IV. IMPACT OF KEY COURT DECISIONS ON PROCEDURES

The government-wide debarment and suspension regulations did not evolve in a regulatory vacuum. Several significant court decisions over the years have influenced the development of today's procedures. This section discusses the significance of some key cases.

A. Due Process

1. Government-wide Debarment and Suspension Procedures and Due Process

Perhaps the most important early case leading to the federal government's eventual development of due process standards for government-wide debarment and suspension procedures is *Gonzalez v. Freeman*.¹⁰⁵ In *Gonzalez*, the Commodity Credit Corporation first suspended and then debarred a contractor from doing business with the agency for five years.¹⁰⁶ The contractor asserted that the agency violated its due process rights.¹⁰⁷ In assessing the due process claim, the chief concern of the United States Court of Appeals for the District of Columbia Circuit was the lack of agency standards for making debarment determinations.¹⁰⁸ Accordingly, the court held that the agency's lack of regulations and standards had resulted in the imposition of a debarment action outside of the agency's statutory jurisdiction and authority.¹⁰⁹ The court reasoned that debarment determinations should be made according to established standards, rather than on a case-by-case basis.¹¹⁰ Thus, *Gonzalez* served as a

105. 334 F.2d 570 (D.C. Cir. 1964). The future Chief Justice, Warren Burger, wrote the *Gonzalez* opinion. *Id.* at 571.

106. *Id.* at 572. The agency based its initial suspension of the contractor on allegations of possible misuse of official inspection certificates. *Id.* The suspension remained in effect "pending investigation." *Id.*

107. *Id.* at 573. In addressing whether the contractor had a viable due process claim, the District of Columbia Circuit announced that

to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such *right*; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.

Id. at 574. The court reasoned further that even though the government's debarment authority is inherent as part of its general statutory contracting power, "to the debarment power there attaches an obligation to deal with uniform minimum fairness as to all." *Id.* at 577.

108. *Id.* at 580. The court stated that the agency had the statutory authority to impose debarments, but not "without either regulations establishing standards and a procedure which are both fair and uniform." *Id.*

109. *Id.*

110. *Id.* at 578. Specifically, the court suggested that basic fairness dictated the establishment of "standards for debarment and procedures . . . includ[ing] notice of specific

strong impetus for federal agencies to develop debarment and suspension procedures.¹¹¹ In that regard, the *Gonzalez* decision is consistent with the 1962 Temporary Conference recommendations concerning the need for greater procedural protection in the administrative debarment and suspension process.¹¹²

Eight years after *Gonzalez*, the District of Columbia Circuit addressed the procedural requirements for government suspension actions in *Horne Brothers, Inc. v. Laird*.¹¹³ In *Horne Brothers*, the court was extremely critical of the suspension regulations that the Department of Defense had promulgated at that time.¹¹⁴ Just as the 1962 Temporary Conference Report described, the regulations allowed suspensions to extend up to eighteen months or more without an opportunity for confrontation.¹¹⁵ The court announced, however, that it would accept temporary suspensions only for shorter periods, up to one month, without an opportunity for confrontation.¹¹⁶ The court reasoned that the government, upon suspending a contractor, should “insure fundamental fairness” by providing “specific notice” and an “opportunity to rebut [the] charges.”¹¹⁷

The *Horne Brothers* court did not limit its discussion to the suggestion that the government must offer the suspended contractor some opportunity for confrontation within one month of the suspension. Instead, it went on to announce its views as to what constituted “‘adequate evidence’ ” for purposes of imposing suspensions and the circumstances in

charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.” *Id.* The court observed, however, that the government could impose temporary suspensions, with procedures to follow, “for a reasonable period pending investigation.” *Id.* at 579.

111. *See id.* at 579. Of course, some agencies had developed procedures prior to *Gonzalez*. *See Calamari, supra* note 26, at 1145 (explaining that parties were entitled to judicial review if they suffered a wrong resulting from agency actions).

112. *See supra* notes 6-22 and accompanying text (discussing the recommendations of the Temporary Conference).

113. 463 F.2d 1268 (D.C. Cir. 1972). In *Horne Brothers*, a contractor asserted that the Navy had violated the law by issuing a suspension and then refusing to award a ship repair contract to that contractor some three weeks after the date of suspension. *Id.* at 1269, 1272.

114. *Id.* at 1269 (explaining that the court believed that serious questions regarding the fairness of the government’s procedures for suspending contractors existed).

115. *Id.* at 1270 (stating that although the court would accept short term suspensions, it would not accept long term suspensions without the use of fair procedural safeguards for the contractor).

116. *Id.* This discussion of the suspension regulations was largely dicta because the Navy refused to award the repair contract to the suspended contractor only three weeks after it issued the suspension, well within the one-month window the court found to be reasonable. *Id.* at 1272.

117. *Id.* at 1271.

which an agency should be permitted to limit notice and hearing opportunities for the contractor.¹¹⁸

The criteria that the court delineated in *Horne Brothers* eventually became implanted firmly in the government-wide debarment and suspension regulations. For example, FAR 9.407-3(c)(5) now provides that a suspended contractor may submit information in opposition to the suspension within thirty days following receipt of the notice of suspension, a direct incorporation of the one-month period that *Horne Brothers* suggested.¹¹⁹ The FAR also now includes a definition of "adequate evidence" that requires a rather minimal showing similar to that discussed in *Horne Brothers*.¹²⁰

Another case that influenced the development of due process procedures in the present debarment and suspension regulations is *Transco Security, Inc. v. Freeman*.¹²¹ The *Transco* case also is important in regard to notice requirements.¹²² The contractor in *Transco* brought a procedural challenge regarding the suspension regulations that the General Services Administration (GSA) had adopted subsequent to the District of Columbia Circuit's decision in *Horne Brothers*.¹²³

118. *See id.* at 1271-72 (comparing long term suspensions to preliminary injunctions, which, after the agency gives notice, are maintainable only upon a showing of adequate evidence).

119. 48 C.F.R. § 9.407-3(c)(5) (1993). Thus, the drafters of the current debarment and suspension regulations borrowed liberally from the court's "suggestions." Indeed, many agencies quickly modified their regulations after the *Horne Brothers* decision. *See Calamari, supra* note 26, at 1151; *Steadman, supra* note 8, at 807-08.

120. *Compare* 48 C.F.R. § 9.403 (1993) (defining adequate evidence as "information sufficient to support the reasonable belief that a particular act or omission has occurred") with *Horne Brothers*, 463 F.2d at 1271 (describing adequate evidence as "less than must be shown at trial, but . . . more than uncorroborated suspicion or accusation"). In *Horne Brothers*, the District of Columbia Circuit explained:

The "adequate evidence" showing need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at trial, but it must be more than uncorroborated suspicion or accusation.

Horne Brothers, 463 F.2d at 1271.

121. 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981). *Transco* involved a challenge to a GSA suspension of a security guard company. *Id.* at 319.

122. *Id.* at 324 (explaining that under the circumstances of the case, due process required notice). In *Transco*, the suspended contractor challenged both the agency's suspension regulations and the agency's notice of reasons for the suspension. *Id.* at 320.

123. *Id.* at 321; *see supra* notes 113-20 (discussing the *Horne Brothers* decision). The regulations permitted the agency to deny a hearing to the contractor upon advice from the DOJ that a hearing would adversely affect a criminal prosecution. *Transco*, 639 F.2d at 320-21. In such a situation, in lieu of a more extensive fact-finding hearing, the contractor could present only information and arguments in opposition to the suspension. *Id.* at 321-22. This aspect of the regulations evolved directly from the 1962 Temporary Conference

The *Transco* court applied the *Mathews v. Eldridge* balancing test¹²⁴ to the agency process GSA afforded to the company's challenge to the suspension.¹²⁵ Specifically, the court weighed the contractor's liberty interest in avoiding improper denial of the opportunity to seek government contracts against the dual governmental interests of receiving its contracting "money's worth" and protecting an ongoing criminal investigation.¹²⁶ The court denied the contractor's challenge to the regulations after reasoning that the suspended contractor, even in the absence of a more detailed hearing on the facts, still had an opportunity to submit information and argue in opposition to the suspension.¹²⁷ Thus, the *Transco* decision provided the federal government with a judicial imprimatur to retain and further develop regulations creating only limited, post-deprivation process in suspension cases. Despite upholding the procedural aspects of the GSA regulations, however, the *Transco* court nonetheless determined that the agency had provided the contractor with constitutionally inadequate notice.¹²⁸ The court reasoned that due process mandated a specific notice and a "meaningful" opportunity to be heard.¹²⁹

recommendations concerning suspension procedures. The Temporary Conference took the position that the Justice Department should be able to advise against the holding of a fact-finding hearing (for up to 18 months) in the event that the agency hearing might prejudice an ongoing prosecution. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 268, 289 (Recommendation 29-2(b)(1) and related discussion).

124. For a discussion of *Mathews*, see *infra* notes 133-39 and accompanying text.

125. *Transco*, 639 F.2d at 322.

126. *Id.*

127. *Id.* The court also determined that while a high agency official should determine whether adequate evidence exists for a suspension, the GSA had met the standard because the decision maker had been the head of the agency. *Id.* at 324.

128. *Id.* at 323-24. The court found that the GSA had expressed the notice of the contractor's wrongdoing in vague and general terms such as "billing irregularities." *Id.* at 323.

129. *Id.* at 324. The *Transco* court demanded "notice sufficiently specific to enable [the contractor] to marshal evidence in [its] behalf so as to make the subsequent opportunity for an administrative hearing a meaningful one." *Id.* Further, in situations in which the government claims that it cannot give specific notice because it would prejudice an ongoing criminal investigation, the court determined that a trial court's proper employment of an *in camera* inspection of the evidence should be limited to determining whether the government has provided "as specific a notice as is possible under the circumstances." *Id.* at 325. Some years later, the Federal Circuit described these notice requirements in a much more colorful fashion by declaring that the agency's notice must be sufficiently specific to enable the contractor "to get its 'ducks in a row' in preparation for a meaningful response in the next step of the administrative suspension process." *ATL, Inc. v. United States*, 736 F.2d 677, 684 (Fed. Cir. 1984).

2. *The Due Process Framework: Mathews and Paul*

One of the linchpins of the 1962 Temporary Conference recommendations was a focus on requiring formal, trial-like hearings as part of the debarment and suspension process.¹³⁰ Professor Steadman echoed this call for greater process in his 1974 study of the debarment and suspension procedures.¹³¹ As a matter of constitutional due process, these positions certainly were consistent with the approach of the Supreme Court in *Goldberg v. Kelly*.¹³² The perception that due process requires agencies to make debarment and suspension determinations only after full, trial-like hearings changed, however, as a result of the Supreme Court's 1976 decision in *Mathews v. Eldridge*.¹³³ Although not a debarment or suspension case, *Mathews* has had a significant impact in shaping subsequent debarment and suspension law.

In *Mathews*, the Court set forth an analytical framework for examining due process challenges to governmental actions that courts continue to follow.¹³⁴ *Mathews* involved the question of whether due process required an oral hearing prior to the government's termination of an individual's Social Security disability benefits.¹³⁵ The Supreme Court initially

130. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 267, 281-84 (Recommendation 29-1(a) and related discussion). It is important to note, however, that even the Temporary Conference limited its recommendation to the holding of "a trial-type hearing" only "in the event there are disputed questions of fact relevant to the debarment issue." *Id.* at 267 (Recommendation 29-1(a)(ii)). This is because the Temporary Conference recognized that this type of hearing would be necessary only if the facts were in dispute. Indeed, the ABA commented that the Temporary Conference had omitted an important protection for debarment cases when the facts would not be in dispute such as those following civil judgments or when the contractor admitted wrongdoing. *Id.* at 283 (discussing the ABA's reaction to the recommendations). Accordingly, rather than demanding an adversarial hearing in such a situation, the ABA suggested the establishment of some opportunity to demonstrate present responsibility notwithstanding the wrongdoing. *Id.* The Temporary Conference agreed that agencies should afford hearings consistent with its recommendations only in cases involving disputes over the material facts relevant to the debarment, and observed further that "in most debarments based on criminal convictions or civil fraud judgments there would not ordinarily be remaining material issues of fact so that the debarment could proceed without a trial-type hearing." *Id.* The report also indicated that in those types of cases, an additional argument about present responsibility "would be made to the debarment official." *Id.*

131. See Steadman, *supra* note 8, at 822-23 (discussing Recommendation 29-1).

132. 397 U.S. 254, 267-68 (1970) (holding that due process requires notice and an opportunity to be heard).

133. 424 U.S. 319 (1976). Of course, the earlier reports and recommendations, as well as the District of Columbia Circuit's decisions in *Gonzalez* and *Horne Brothers*, preceded *Mathews v. Eldridge*.

134. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 531-32 (4th ed. 1991) (explaining that despite some criticism, the Supreme Court has remained committed to the balancing approach delineated in *Mathews*).

135. *Mathews*, 424 U.S. at 332-49.

explained that before an action implicates due process protections, the aggrieved party first must identify a protected property or liberty interest.¹³⁶ The Court then explained that the reviewing court must be satisfied that a property or liberty interest is at stake before it balances three factors to determine whether due process requires any additional procedures beyond those already in place.¹³⁷

Thus, after *Mathews*, a reviewing court's due process analysis must take into consideration two distinct inquiries: (1) whether the agency action implicates a protected property or liberty interest, and (2) if so, whether any additional procedures are necessary in light of the *Mathews* three-pronged balancing test.¹³⁸ More importantly, the *Mathews* Court emphasized that when a reviewing court reaches the second part of the inquiry and applies the balancing test, broad rules are not necessarily controlling because due process is a matter for a case-by-case determination.¹³⁹

Using an analysis similar to the first prong of the *Mathews* test, the District of Columbia Circuit, in *Gonzalez v. Freeman*, effectively established that no protected property interest is present when an agency debar or suspends a government contractor.¹⁴⁰ Despite the lack of a property interest, however, subsequent lower courts have determined that an agency's debarment or suspension of a government contractor triggers due process protections because the action impacts the contractor's liberty interests.¹⁴¹ Unfortunately, the Supreme Court has never de-

136. *Id.* at 332. In *Mathews*, the government agency did not dispute that a protected property interest was at stake with respect to the disability benefits in question. *Id.*

137. *Id.* at 335. The Court listed these three factors as follows:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

138. *Id.* at 349 (determining that the agency's post-termination hearing procedures were constitutionally adequate).

139. *Id.* at 334. Specifically, the Court stated:

[Past] decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."

Id. (citations omitted).

140. *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (explaining that there is no "right" to be awarded a government contract). Of course, *Gonzalez* preceded the *Mathews* analysis by more than a decade.

141. See, e.g., *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed. Cir. 1984) (observing that "although a citizen has no right to a Government contract, and a bidder has no constitutionally protected property interest in such a contract, a bidder does have a liberty inter-

cided a case specifically involving the constitutionality of debarment and suspension regulations. Even in *Goldberg v. Kelly*,¹⁴² the Supreme Court relied on *Gonzalez v. Freeman*¹⁴³ for the proposition that agencies may terminate government benefits without a pre-termination hearing.¹⁴⁴ In determining that a debarment or suspension implicates a government contractor's protected liberty interests, however, lower courts have relied on the Supreme Court's decision in *Paul v. Davis*¹⁴⁵ and other decisions.¹⁴⁶

In *Paul v. Davis*, the complainant sought damages from a police official after the police distributed a flyer to local merchants identifying Davis as an "active shoplifter."¹⁴⁷ Although the police previously had arrested Davis for shoplifting, he never was convicted.¹⁴⁸ Davis claimed that the flyer distribution and its wrongful assertion that he was an active shoplifter damaged his reputation, created a stigma, and impinged his pro-

est at stake, where the suspension is based on charges of fraud and dishonesty" (footnotes omitted)); *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.) (finding that the deprivation of the right to bid on a government contract is not a property interest, but a liberty interest of the bidder "when that denial is based on charges of fraud and dishonesty"), *cert. denied*, 454 U.S. 820 (1981); *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953, 962-63 (D.C. Cir. 1980) (finding a government contractor had a liberty interest because of the economic impact that governmental defamation would have on the contractor's ability to do business); *Shermco Indus., Inc. v. Secretary of Air Force*, 584 F. Supp. 76, 87 (N.D. Tex. 1984) (finding that when the Air Force suspended a government contractor from contracting for fraud and dishonesty, he had a liberty interest). *But see, e.g., Southeast Kansas Community Action Program, Inc. v. Lyng*, 758 F. Supp. 1430, 1434-35 (D. Kan. 1991) (stating that no liberty interest exists if the government statement merely alleges incompetence as opposed to dishonesty or some other "badge of infamy"), *aff'd*, 967 F.2d 1452 (10th Cir. 1992); *PNM Constr., Inc. v. United States*, 13 Cl. Ct. 745, 749 (1987) (stating that the agency did not implicate a liberty interest when it found the bidder nonresponsible because of a lack of competence rather than a lack of integrity). Of course, even if the government's action implicates a liberty interest, *Mathews* instructs that the courts then must apply a balancing test to determine whether the process that the agency already afforded is sufficient for constitutional purposes. *See supra* notes 138-39 and accompanying text.

142. 397 U.S. 254 (1970).

143. *See supra* notes 105-12 (discussing the *Gonzalez* decision).

144. *Goldberg*, 397 U.S. at 263 (stating "that some governmental benefits may be administratively terminated *without* affording the recipient a pre-termination evidentiary hearing" (emphasis added)).

145. 424 U.S. 693 (1976). Although not a debarment or suspension case, *Paul* involved analysis of an alleged infringement of liberty. *Id.* at 697.

146. *See, e.g., Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953, 964-66 (D.C. Cir. 1980) (referring to and explaining both the facts and legal significance of *Paul*).

147. *Paul*, 424 U.S. at 695. Davis sought damages pursuant to 42 U.S.C. § 1983. *Paul*, 424 U.S. at 696. The flyer included Davis' name and photograph. *Id.* at 695.

148. *Id.* at 696. A local judge dismissed all charges against Davis shortly after city police circulated the flyer. *Id.*

tected liberty interests.¹⁴⁹ The Court rejected the constitutional claim and reasoned that earlier decisions had *not* established that reputation alone implicated due process liberty or property interests.¹⁵⁰

The *Paul* Court distinguished an earlier case, *Wisconsin v. Constantineau*,¹⁵¹ in which the Court had found a liberty interest at stake when a police official caused a notice to be posted in local liquor stores directing the stores not to make sales or gifts of liquor to the plaintiff for one year.¹⁵² The *Paul* Court explained that the stigma resulting from the posting in *Constantineau*, standing alone, did not implicate due process in that case.¹⁵³ Instead, the *Paul* Court emphasized that the governmental action at issue in *Constantineau* had not only produced a stigma, but it also had deprived the affected individual of a right previously held under state law, the right to buy or obtain liquor.¹⁵⁴ By contrast, the state action in *Paul* merely was stigmatizing and did not result in any change in his legal status. Accordingly, the Court denied his liberty interest claims.¹⁵⁵ Thus, *Paul* requires a claimant to demonstrate either a stigma or damage to reputation *plus* some change of legal status to establish a liberty interest claim.¹⁵⁶

It appears that a debarment or suspension generally would satisfy the stigma-plus test that the Court established in *Paul v. Davis*. First, in the usual notice of suspension or proposal for debarment, the government generally questions the business integrity of the contractor or grantee.¹⁵⁷

149. *Id.* at 697. Davis alleged that the stigma and damage to his reputation would seriously impair his future employment opportunities. *Id.*

150. *Id.* at 701. The Court emphasized "that reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.*

151. 400 U.S. 433 (1971).

152. *Id.* at 435, 437. A state statute allowed such actions with respect to persons known to have engaged in " 'excessive drinking.' " *Id.* at 434. Nonetheless, the Court determined that due process required notice and an opportunity to be heard before the state could post such material under its liquor laws. *Id.* at 437. The Court reasoned that " '[p]osting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person." *Id.* The Court declared that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.*

153. *Paul*, 424 U.S. at 709.

154. *Id.* at 708-09.

155. *Id.* at 712.

156. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 702 (2d ed. 1988). Professor Tribe observed that contrary to the Court's contentions in *Paul*, the determination that due process requires a showing of "stigma-plus" was a considerable departure from the reasoning in *Constantineau* and other earlier cases. *Id.*

157. See 48 C.F.R. § 9.406-2 (1993) (delineating the grounds for debarment); 48 C.F.R. § 9.407-2 (1993) (setting out the grounds for suspension); see also 28 C.F.R. §§ 67.305 to .405 (1993) (showing similar provisions in the common rule for nonprocurement actions).

Second, the government must place the affected party's name on a list, which is distributed throughout the government, identifying that party as ineligible to receive new contract awards or other government benefits, as the case may be.¹⁵⁸ Finally, a suspension under either the procurement or nonprocurement regulations or a proposed debarment under the FAR not only may impugn the affected party's reputation, but also limits that entity's ability or liberty to seek new contract awards or government benefits, activities that the party previously had been free to pursue.

3. *Post-Mathews and Paul Decisions: An Expansion of Due Process?*

As mentioned above, lower courts have determined that a debarment or suspension affects a contractor's protected liberty interests.¹⁵⁹ The District of Columbia Circuit's decision in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*¹⁶⁰ was the first post-*Mathews* opinion to expand upon the earlier *Gonzalez v. Freeman* analysis¹⁶¹ and to consider the due process issues in light of both *Mathews*¹⁶² and *Paul*.¹⁶³ Although it was not a legal challenge to an actual debarment,¹⁶⁴ *Old Dominion*

The regulations also permit debarment based on a history of unsatisfactory performance, which is a matter of incompetence rather than integrity. See 48 C.F.R. § 9.406-2(b)(1); 28 C.F.R. § 67.305(b)(2). Therefore, no liberty interest would be at stake in such a debarment. See *Southeast Kansas Community Action Program, Inc. v. Lyng*, 758 F. Supp. 1430, 1434-35 (D. Kan. 1991) (finding no liberty interest if the government statement merely alleges incompetence as opposed to dishonesty or some other "badge of infamy"), *aff'd*, 967 F.2d 1452 (10th Cir. 1992); *PNM Constr., Inc. v. United States*, 13 Cl. Ct. 745, 749 (1987) (stating that the agency did not implicate a liberty interest it found the bidder to be nonresponsible based on a lack of competence rather than a lack of integrity); see also *Coleman Am. Moving Servs., Inc. v. Weinberger*, 716 F. Supp. 1405, 1414 (M.D. Ala. 1989) (finding that the agency did not implicate a liberty interest when it imposed a suspension based on an indictment because "any stigma that might attach flows not from underlying charges advanced by the [procuring agency], but from the existence of the indictment itself").

158. See 28 C.F.R. § 67.500; 48 C.F.R. § 9.404. Proposed debarments, however, do not have immediate preclusive effect under the nonprocurement rules. See *supra* notes 73-77 and accompanying text.

159. See *supra* note 105-29 and accompanying text.

160. 631 F.2d 953 (D.C. Cir. 1980).

161. See *supra* notes 105-12 (setting forth the *Gonzalez* analysis).

162. 424 U.S. 319 (1976).

163. 424 U.S. 693 (1976).

164. See Calamari, *supra* note 26, at 1155. *Old Dominion* was not a direct challenge to an agency debarment or suspension, but involved individual agency refusals to award contracts to Old Dominion based on contract-by-contract determinations of its lack of present responsibility. *Old Dominion*, 631 F.2d at 962-63. Issues concerning a contractor's present responsibility (or lack thereof), however, are closely related to the lack of integrity often at the heart of an agency suspension or debarment. Indeed, successive agency findings of contractor nonresponsibility based on the same facts and circumstances without notice and

involved the United States Air Force denial of individual contract awards to Old Dominion Dairy Products, Inc., based on findings of contractor nonresponsibility relating to the company's alleged lack of a "satisfactory record of integrity."¹⁶⁵ The court determined that the government action implicated a protected liberty interest.¹⁶⁶ Although the government argued that the case involved only an injury to the contractor's reputation, which, according to *Paul*, is not actionable,¹⁶⁷ the court concluded that the combined stigma to the contractor and the accompanying loss of government contract work satisfied the *Paul* stigma-plus test.¹⁶⁸

an opportunity to be heard can give rise to a successful challenge to the agency actions on grounds that the practice amounts to a de facto debarment. See, e.g., *Shermco Indus., Inc. v. Secretary of Air Force*, 584 F. Supp. 76, 87-94 (N.D. Tex. 1984) (ruling that a defense contractor's due process rights were not violated by its suspension without a hearing or notice by the Air Force because the suspension was based on contractor's criminal indictment relating to past performance on government contracts); *Art-Metal-USA, Inc. v. Solomon*, 473 F. Supp. 1, 4-6 (D.D.C. 1978) (holding that due process requires that the government must provide procedural safeguards including notice and opportunity to respond, prior to debarring or suspending a contractor); *Related Indus., Inc. v. United States*, 2 Cl. Ct. 517, 526 (1983) (ruling that a contractor who may be stigmatized by a government finding that it lacks integrity is entitled to notice and opportunity to respond procedures under due process clause). The contractor in *Old Dominion* raised a de facto debarment argument, but the court did not address the issue directly. See *Old Dominion*, 631 F.2d at 961 n.17. For a more detailed discussion of *Old Dominion*, see Lawrence Shire, *Recent Decision*, 50 GEO. WASH. L. REV. 90 (1981). The 1962 ACUS Temporary Conference recommendations raised a concern relating to the problem of de facto debarments. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 269, 291-92 (Recommendation 29-4 and related discussion).

165. *Old Dominion*, 631 F.2d at 958. The contractor challenged the action by claiming a due process right to be given notice and to have an opportunity to be heard before being found nonresponsible on lack of integrity grounds. *Id.* at 961.

166. *Id.* at 966. The contractor did not claim to have any protected property interest. *Id.* at 961. Yet, the *Old Dominion* court observed that, in *Gonzalez*, then-Judge Burger had recognized that receiving a government contract was not a property right, but still determined that the government could not act arbitrarily in causing a contractor to become ineligible to receive government contracts. See *id.* at 962 (citing *Gonzalez v. Freeman*, 324 F.2d 570, 574 (D.C. Cir. 1964)). The court then compared the earlier reasoning from *Gonzalez* to the *Mathews* analysis of whether precluding a contractor from receiving a government contract award based on a lack of integrity raises a cognizable liberty interest claim. *Id.*

167. *Id.* at 964-65; see *supra* notes 145-56 (discussing the *Paul* holding).

168. *Old Dominion*, 631 F.2d at 966. The court also distinguished the facts in *Old Dominion* from the Supreme Court's earlier analysis in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (refusing to find a protected liberty interest in a case where state university refused to reemploy a nontenured instructor). The *Old Dominion* court noted that, in *Roth*, the Supreme Court had suggested that the case may have had a different outcome had the university barred the instructor by virtue of his lack of reemployment from all other public employment in state universities. *Old Dominion*, 631 F.2d at 963 (citing *Roth*, 408 U.S. at 573-74). Similarly, the *Old Dominion* court reasoned that in the case at bar, the agency effectively had barred the government contractor from all further public work. *Id.*

After *Old Dominion*, courts have applied the liberty interest analysis directly to review debarment and suspension challenges. For example, the United States Court of Appeals for the Sixth Circuit in *Transco Security, Inc. v. Freeman*¹⁶⁹ relied on *Old Dominion* for the proposition that a suspension affects a liberty interest "when that denial is based on charges of fraud and dishonesty."¹⁷⁰ Then, in *ATL, Inc. v. United States*,¹⁷¹ the United States Court of Appeals for the Federal Circuit observed that a bidder has a liberty interest at stake when charges are based on fraud and dishonesty; however, a citizen has no right to a government contract, let alone a property interest in such a contract.¹⁷² Following this analysis, lower courts have continued to embrace the notion that a debarment or suspension may impact a government contractor's liberty interests.

Although the *Paul* analysis provides a foundation for lower court determinations that a debarment or suspension may impact a contractor's protected liberty interests, the Supreme Court decision in *Siegert v. Gilley*¹⁷³ calls such analysis into question. In *Siegert*, the Supreme Court appeared to retreat from the analysis it had set forth earlier in *Paul*.¹⁷⁴ *Siegert* involved a claim for money damages by a government psychologist, Siegert, who alleged that Gilley, his former supervisor, had violated Siegert's liberty interests by writing a negative recommendation letter.¹⁷⁵ The Supreme Court affirmed the dismissal of Siegert's claim, holding that

169. 639 F.2d 318 (6th Cir.), cert. denied, 454 U.S. 820 (1981).

170. *Id.* at 321.

171. 736 F.2d 677 (Fed. Cir. 1984).

172. *Id.* at 683. The Federal Circuit specifically stated:

[I]n suspension cases it is recognized that, although a citizen has no right to a Government contract, and a bidder has no constitutionally protected property interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty. Accordingly, the minimum requirements of due process come into play.

Id. (footnotes omitted); see also *Shermco Indus., Inc. v. Secretary of Air Force*, 584 F. Supp. 76, 87 (N.D. Tex. 1984) (finding that a government contractor whom the United States Air Force suspended for fraud and dishonesty had a liberty interest and not a property interest).

173. 500 U.S. 226 (1991).

174. See *supra* notes 145-56 (discussing *Paul*).

175. *Siegert*, 500 U.S. at 226-27. Siegert had been a clinical psychologist at a federal hospital in Washington from 1979 to 1985. *Id.* at 227. Gilley was Siegert's supervisor during Siegert's last several months at the facility. *Id.* Siegert resigned upon receiving a notice that the government intended to terminate his employment. *Id.* at 228. Although Siegert later began working for an Army hospital in Germany, agency "credentialing" requirements forced him to seek a recommendation from Gilley to maintain his job. *Id.* Gilley sent the Army a letter declining to recommend Siegert, stating that he viewed "Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years [at the federal hospital]." *Id.* Not surprisingly, the Army denied credentials to Siegert based on the letter and subsequently terminated him. *Id.*

Siegert had failed to allege a violation of a clearly established constitutional right.¹⁷⁶

The decision in *Siegert* apparently narrows the *Paul* stigma-plus test. Siegert had argued that the combination of the allegedly malicious letter and the resulting impairment of his ability to retain government employment satisfied the *Paul* test.¹⁷⁷ The five-justice majority¹⁷⁸ acknowledged that Gilley's letter "would undoubtedly damage the reputation of one in his position, and impair his future employment prospects," but it declined to find that such an injury raised a constitutional claim.¹⁷⁹ Instead, the Court narrowly interpreted *Paul* and reasoned that reputational injury alone was not a liberty interest protected by the Fourteenth Amendment.¹⁸⁰ The Court also observed that Gilley's alleged defamatory statements regarding Siegert were not made incident to the hospital's termination of Siegert's employment because he wrote the statements several weeks after Siegert's resignation.¹⁸¹ Accordingly, the *Siegert* majority focused its liberty interest analysis on whether the governmental entity had stigmatized an employee in conjunction with an immediate termination from employment or a refusal to rehire,¹⁸² notwithstanding the employee's allegations that the government's actions obstructed his *future* government employment options.¹⁸³

176. *Id.* at 231. The Court's basis for dismissal actually differed from the basis that the lower court rendered, and the parties apparently neither fully briefed nor argued the question of whether Siegert properly had asserted the deprivation of a protected liberty interest. *Id.* at 235 (Kennedy, J., concurring) (reasoning that it was wiser to decide the case by simply resolving the issue of whether the agency deprived him of a liberty interest); *id.* at 236-37 (Marshall, J., dissenting) (declaring that the Court must resolve the liberty interest issue first before deciding the case).

177. *Id.* at 232.

178. Chief Justice Rehnquist wrote for the five-justice majority. *Id.* at 227. Justice Kennedy concurred in the result, but citing the appellate court's decision regarding the former supervisor's qualified immunity, he found it "unwise" to reach the constitutional question without a lower court decision on point and a full briefing and argument before the Court. *Id.* at 235 (Kennedy, J., concurring).

179. *Id.* at 234.

180. *Id.* at 233. The Court specifically stated that:

injury to reputation by itself was not a "liberty" interest protected under the Fourteenth Amendment. We pointed out [in *Paul*] that our reference to a governmental employer stigmatizing an employee in *Board of Regents of State Colleges v. Roth* was made in the context of the employer *discharging or failing to rehire* a plaintiff who claimed a liberty interest under the Fourteenth Amendment.

Id. (emphasis added) (citations omitted).

181. *Id.* at 234.

182. *Id.* at 233-34.

183. *See id.* at 240 (Marshall, J., dissenting). Indeed, Justice Marshall pointed out that Siegert met *Paul's* stigma-plus standard "because the injury to Siegert's reputation [also] caused him to lose the benefit of *eligibility for future government employment.*" *Id.*

Consequently, *Siegert* appears to require a more substantial showing than *Paul*'s stigma-plus test for identifying a protected liberty interest.¹⁸⁴ If the *Siegert* Court indeed determined that a protected liberty interest is at stake only when, for example, an immediate governmental discharge or failure to rehire an employee accompanies stigma, *Siegert* may affect the due process analysis in future debarment and suspension challenges.¹⁸⁵ Specifically, *Siegert* alleged that his former supervisor's letter caused him not to be " 'credentialed,' " thereby precluding him from future government employment.¹⁸⁶ In comparison, a notice of suspension or proposed debarment has the similar immediate effect of preventing a contractor from being eligible to receive new government contract awards.¹⁸⁷ While debarment or suspension usually does not result in the immediate termination of ongoing government contracts, which would be something tantamount to a discharge from ongoing employment, a debarment or suspension generally will prevent the award of any future government employment contracts.¹⁸⁸ Yet despite *Siegert*'s alleged loss of future government work due to a government official's stigmatizing action, the majority determined that no liberty interest was at stake.¹⁸⁹ Accordingly, *Siegert* may cast doubt on lower court opinions that held that a suspension or debarment implicates a contractor's protected liberty interests.¹⁹⁰

184. *Id.* at 232-34.

185. *See infra* note 190 and accompanying text.

186. *Siegert*, 500 U.S. at 240.

187. Under the nonprocurement rules, a suspension also has immediate preclusive effect, but a notice of proposed debarment does not. *See* 28 C.F.R. §§ 67.312, 67.411 (1993).

188. 48 C.F.R. § 9.405-1(a)-(b) (1993) (explaining that, as a general matter, agencies may continue existing contracts, but they may not renew or otherwise extend any current contracts). In contrast, the termination of an existing contract would affect a contractor's property interests. *See Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

189. *Siegert*, 500 U.S. at 233-34. *Contra id.* at 243 (Marshall, J., dissenting) (emphasizing when the government's stigmatizing charges caused the loss of future government employment, it implicated the plaintiff's liberty interest). The only aspect of a debarment or suspension that appears to track the narrow focus that the *Siegert* Court set forth relates to the FAR's prohibition against renewing or otherwise extending *existing* contracts. 48 C.F.R. § 9.405-1(b). In this respect, a debarment or suspension would be akin to the language in *Siegert* where the government's failure to "rehire" an employee, when coupled with a damage to his reputation, amounts to the potential deprivation of a liberty interest. *See Siegert*, 500 U.S. at 233.

190. *See Siegert*, 500 U.S. at 243 (Marshall, J., dissenting) (observing that the majority opinion was inconsistent with the District of Columbia Circuit's frequent espousal of the view that the government deprives a person "of a protected liberty interest when stigmatizing charges 'effectively foreclos[e] [his or her] freedom to take advantage of other Government employment opportunities' " (alteration in original) (quoting *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953, 964 (D.C. Cir. 1980))). *But see* *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) (noting that, in a case arising after *Siegert*, the government did "not deny that some process [was]

Even assuming that the lower courts' finding that a liberty interest is at stake in a debarment or suspension action remains good law, *Mathews v. Eldridge*¹⁹¹ requires the analysis of what additional process is due.¹⁹² Courts that have considered constitutional challenges to debarment and suspension regulations and their failure to require pre-deprivation hearings, generally have upheld the validity of the regulations as applied to various agency actions.¹⁹³

due because Reeve [had] a liberty interest in avoiding the damage to its reputation and business caused by a stigmatizing suspension").

191. 424 U.S. 319 (1976).

192. See *supra* notes 133-39 and accompanying text (discussing the *Mathews* decision).

193. See, e.g., *James A. Merritt & Sons v. Marsh*, 791 F.2d 328, 330-31 (4th Cir. 1986) (upholding the suspension of a contractor from bidding on government contracts because of an indictment for fraud); *Electro-Methods, Inc. v. United States*, 728 F.2d 1471, 1476 (Fed. Cir. 1984) (affirming the suspension of a contractor and denying the contractor's due process claims because the contractor could not "subpoena and examine FBI agents involved in an on-going criminal investigation, as well as other Government and industry officials, to prove its case"); *Textor v. Cheney*, 757 F. Supp. 51, 59 (D.D.C. 1991) (upholding bidder's debarment based on procedures set forth in FAR, 48 C.F.R. 9.406-3(b)); *Mainelli v. United States*, 611 F. Supp. 606, 613-14 (D.R.I. 1985) (allowing the United States Department of Transportation's suspension of a contractor based on an indictment and departmental investigations); *Shermco Indus., Inc. v. Secretary of Air Force*, 584 F. Supp. 76, 87-90 (N.D. Tex. 1984) (stating the Air Force did not violate a contractor's due process rights for suspending the contractor based on a "criminal indictment against [the contractor] and 'additional information' supporting that indictment before [the agency] recommended suspension"); see also *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 247-48 (1988) (unanimously upholding an FDIC suspension of an indicted bank president even though applicable banking statutes did not provide for any pre-suspension hearing); *Robinson v. Cheney*, 876 F.2d 152, 163 (D.C. Cir. 1989) (holding that the standard for a debarment based on a "cause of so serious or compelling a nature that it affects the present responsibility" of the contractor is not unconstitutionally vague as applied) (quoting 48 C.F.R. § 9.406-2(c)); GAO BRIEFING REPORT, *supra* note 32, at 10 (concluding that "the current [debarment and suspension] process maintains an appropriate balance between protecting the government's interests in its contractual relationships, and providing contractors with due process"); ABA PRACTITIONER'S GUIDE, *supra* note 4, at 153 (observing that "only an exceptional suspension or debarment decision will likely contain a constitutional or procedural flaw meriting court review"); cf. *ATL, Inc. v. United States*, 736 F.2d 677, 683, 686 (Fed. Cir. 1984) (upholding the procedures as applied but invalidating the agency's action, in part, with respect to notice issues); *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 322-24 (6th Cir.) (upholding the hearing procedures that the agency used, but reversing the suspension based on insufficient notice of charges), *cert. denied*, 454 U.S. 820 (1981).

In contrast, contractors have enjoyed somewhat greater success challenging debarments and suspensions in cases in which an agency either did not follow the regulations or otherwise acted in an arbitrary and capricious manner subject to reversal under the APA. 5 U.S.C. § 706(2)(A), (D) (1988); see, e.g., *Novicki v. Cook*, 946 F.2d 938, 942-43 (D.C. Cir. 1991) (invalidating an agency decision to debar a corporation's president based on a finding that the agency record was insufficient to show that the official had "reason to know" of misconduct by other corporate officials); *Caiola v. Carroll*, 851 F.2d 395, 399-401 (D.C. Cir. 1988) (finding an agency's decision to debar only select few of the corporate officials in a convicted corporation to be arbitrary and capricious); *Silverman v. United States Dep't*

B. Exhaustion of Administrative Remedies

Although the Supreme Court seldom has considered cases involving debarment or suspension actions, the Court recently had the opportunity to consider a legal question arising in the context of a challenge to a HUD debarment in *Darby v. Cisneros*.¹⁹⁴ The issue at stake, however, involved the application of the doctrine of exhaustion of administrative remedies.¹⁹⁵ In *Darby*, a HUD administrative law judge debarred a real estate developer and several affiliates for violating an agency mortgage insurance rule.¹⁹⁶ Under HUD regulations, either an administrative law judge or a judge from the HUD Board of Contract Appeals conducts the debarment proceedings in an administrative hearing.¹⁹⁷ The administrative law judge's decision to debar a participant or contractor after an administrative hearing is final unless the participant or contractor submits a written request for review of the decision to the Secretary or the Secretary's designee within fifteen days of receipt of the decision.¹⁹⁸

In *Darby*, the debarred real estate developers immediately filed suit challenging the administrative law judge's determination rather than seeking internal agency review as the regulation authorized.¹⁹⁹ The agency moved to dismiss the complaint on the grounds that the challeng-

of Defense, 817 F. Supp. 846, 849 (S.D. Cal. 1993) (finding that the agency abused its discretion in not considering mitigating factors when it debarred a contractor who had been convicted of misdemeanor conversion); *Sterlingwear of Boston, Inc. v. United States*, 11 Cl. Ct. 879, 885 (1987) (determining that the debarring agency violated the regulations by making a decision not to hold a fact-finding proceeding *before* the contractor submitted its information in opposition to the proposed debarment). *But see* *Shane Meat Co. v. United States Dep't of Defense*, 800 F.2d 334, 336-38 (3d Cir. 1986) (overturning the trial court's determination that a three-year debarment was arbitrary and capricious); *Mikulec v. Department of Air Force*, No. 84-2248, slip op. (D.D.C. June 27, 1985) (holding that it was not arbitrary and capricious for an agency to suspend a corporation based on the corporate president's arson indictment for acts allegedly occurring some years earlier).

194. 113 S. Ct. 2539 (1993).

195. *Id.* at 2543-45.

196. *Id.* at 2541.

197. 24 C.F.R. § 26.2 (1994). The current HUD procedures are more formal than those of most agencies. *See id.* § 24.313.

198. *Id.* § 24.314(c). The regulations address the finality of an administrative law judge's decision as follows:

[The] determination shall be final unless . . . the Secretary or the Secretary's designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the [administrative law judge]. The 30 day period for deciding whether to review a determination may be extended upon written notice of such extension by the Secretary or his designee. Any party may request such a review in writing within 15 days of receipt of the [administrative law judge's] determination.

Id.

199. *Darby*, 113 S. Ct. at 2542.

ers had failed to exhaust the available administrative remedies by declining to appeal the administrative law judge's decision within the agency.²⁰⁰

The Court examined whether the APA requires disgruntled parties to exhaust administrative remedies when no statute or agency regulation specifically mandates exhaustion.²⁰¹ By construing the relevant provisions of the APA, the Court ultimately determined that the statute does not require exhaustion in such a case.²⁰² In reaching this result, the Court examined section 10(c) of the APA concerning "actions reviewable."²⁰³ The Court applied a plain meaning analysis to this portion of the APA and determined that in cases in which the APA governs "an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or . . . an agency rule."²⁰⁴ Accordingly, because no statute or HUD rule expressly required the debarred parties in *Darby* to appeal within the agency, they could bypass the agency appeal and proceed directly to judicial review.

Despite *Darby*'s implications, it seems unlikely that *Darby* will have a major impact on the debarment and suspension process. Indeed, as of this writing HUD has not yet revised its debarment regulations concerning internal appeals. Clearly, the agency could alter its debarment provisions to require parties to direct their appeals from administrative law judge decisions to the Secretary or to a designated debarment official.²⁰⁵

200. *Id.* The district court denied the motion by relying on one of the traditional exceptions to the exhaustion doctrine: that resort to the administrative remedy would have been inadequate and futile. *Id.* The Fourth Circuit reversed, reasoning that no evidence to suggest that an administrative appeal would have been futile existed. *Id.*

201. *Id.* at 2543.

202. *Id.* The debarred challengers had sought judicial review of the HUD determination pursuant to the APA on the basis that the agency allegedly "imposed [the debarments] for purposes of punishment, in violation of HUD's own debarment regulations, and therefore were 'not in accordance with law' within the meaning of § 10(e)(B)(1) of the APA, 5 U.S.C. § 706(2)(A)." *Id.* at 2542.

203. 5 U.S.C. § 704 (1988). In particular, the case turned on the Court's interpretation of the last sentence of section 10(c), which provides:

Except as otherwise expressly required by statute, agency action otherwise final is *final* for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, *unless the agency otherwise requires by rule* and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Id. (emphasis added).

204. *Darby*, 113 S. Ct. at 2548. In one portion of the opinion, the Court detailed how the legislative history provided support for their plain meaning analysis. *Id.* at 2545-48.

205. See ABA PRACTITIONER'S GUIDE, *supra* note 4, at 103. The agency apparently intends to change its regulations to mandate internal exhaustion. *Id.* On the other hand, HUD may revise its current procedures altogether. See *infra* note 247. Despite HUD's inaction, other agencies are amending internal appeals rules in response to this decision. See, e.g., 59 Fed. Reg. 23,119, 23,119-20 (1994) (to be codified at 10 C.F.R. pt. 12) (reflect-

On the other hand, the agency might not want to require appeals in all cases as a prerequisite to judicial review.²⁰⁶ Even if the regulations remain unchanged, in some cases the aggrieved parties still might choose to pursue appeals within the agency in the hope of obtaining a more favorable ruling.²⁰⁷

Outside of HUD, the *Darby* decision should not have a great impact on the debarment and suspension process because HUD's procedures are more formal than those of most agencies. In many agencies, an administrative law judge will not serve as the agency official issuing the debarment or suspension decision. Rather, high agency officials will make these determinations, often without the regulatory prospect of internal agency appeals.

V. DEGREES OF FORMALITY

Over the years, commentators have attacked the constitutionality and desirability of debarment and suspension regulations, particularly with re-

ing that the Nuclear Regulatory Commission implemented the Equal Access to Justice Act partly in response to *Darby*).

206. Cf. *Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C. Cir. 1994) (noting that the Secretary designee reversed the administrative law judge's decision, but went on to impose a suspension in an arbitrary and capricious manner). In *Kisser*, HUD first suspended, then debarred, a former officer of a HUD coinsured lender in separate and independent enforcement proceedings. *Id.* at 617-18. *Kisser* successfully challenged both actions in the United States District Court for the District of Columbia. But on appeal, the United States Court of Appeals for the District of Columbia Circuit upheld the agency's debarment while HUD did not appeal the trial court's vacating of the initial suspension. *Id.* at 618, 623. With respect to the vacated suspension, even though the agency administrative law judge (ALJ) had ordered the agency to lift the suspension following a hearing, the HUD Secretary's designee nonetheless ordered the agency to reinstate the suspension upon an internal appeal by the agency. *Id.* at 617. The district court ruled that the reinstated suspension "was arbitrary and capricious because the Secretary's designee, on reviewing the ALJ, had ignored the record before her; asserted her conclusions without evidentiary support; and also violated the relevant regulations, by putting the burden of proof on *Kisser* to show that he should not be suspended." *Id.* at 618 (emphasis added).

207. One administrative law scholar has been extremely critical of the *Darby* decision. See Bernard Schwartz, "Apotheosis of Mediocrity"? *The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 160-62 (1994). Professor Schwartz has suggested that the Court's decision was contrary to the "elementary exhaustion doctrine" and eviscerated compelling reasons for exhaustion such as "administrative autonomy" and "sound judicial administration." *Id.* at 161-62. Professor Schwartz also has warned that *Darby* will result in "a proliferation of [internal] appeals from ALJ decisions by agencies themselves" because losing parties can go directly to court under *Darby*. *Id.* at 162. This, in turn, would cause "the ALJ's [to become] the final arbiters—making it difficult for the agency heads to ensure conformity with their policies in the agency decision process." *Id.* Although outside the general scope of this report, both the *Darby* decision and Professor Schwartz's analysis suggest that further research may be warranted regarding whether Congress should amend the APA to permit courts to employ the exhaustion doctrine more broadly in APA cases.

spect to the provisions for post-deprivation hearings.²⁰⁸ In view of the many judicial decisions upholding the process, however, arguments that due process requires additional procedures within the debarment and suspension regulations are largely unfounded. Given the significant governmental interests at stake, even though a debarment or suspension may implicate some modicum of protected liberty, adequate notice combined with the post-deprivation process set forth in the regulations generally will provide the affected entity with a constitutionally sufficient opportunity to respond to the charge. Even if the current procedures comport with constitutional mandates, however, minimal due process requirements generally represent a floor rather than a ceiling, which reformulates the question of whether additional procedures should be added.

Over the years, the ABA's Public Contract Law Section has been actively engaged in seeking greater process for contractors facing debarment or suspension. For example, at roughly the same time that the OFPP developed government-wide debarment and suspension procedures, the ABA adopted certain "principles" relating to debarment and suspension that would have afforded contractors far more process than that set forth in the OFPP policy letters.²⁰⁹ As another means to provide more protection, Congressman Sam Hall introduced a bill in 1984 that would have created a government-wide board staffed by administrative law judges to handle procurement debarments and suspensions.²¹⁰ The bill was based largely on a series of measures that the ABA's House of Delegates recommended in 1982,²¹¹ and it would have gone far beyond

208. See, e.g., Calamari, *supra* note 26, at 1169-74 (acknowledging the constitutionality of the hearing procedures but recommending that agencies use administrative law judges and more formal hearings); Coburn, *supra* note 26, at 576 (acknowledging that contractors should have a debarment or suspension hearing so they can confront and comprehend the evidence against them); Norton, *supra* note 26, at 652 (questioning the validity of the lack of pre-suspension hearing opportunities); Duvall, *supra* note 26, at 711-13 (criticizing procedures not including standards for agencies to assess "public interest"); Patrick J. DeSouza, Note, *Regulating Fraud in Military Procurement: A Legal Process Model*, 95 YALE L.J. 390, 407 (1985) (recommending pre-suspension and pre-debarment hearings to allow "courts to assume a more active role in addressing fraud"); Everhart, *supra* note 26, at 756-66 (criticizing the GSA's suspension of a contractor without due process).

209. See Coburn, *supra* note 26, at 577-79 (asserting that the ABA principles provide broader due process protection for contractors through application of the *Mathews* factors); Graham, *supra* note 26, at 236-37 (noting that the ABA guidelines arose in response to the perceived lack of due process protections for contractors during the suspension and debarment process).

210. See *Rep. Hall Introduces Bill to Create Gov't-Wide Debarment/Suspension Board*, 41 Fed. Cont. Rep. (BNA) 240, 240 (Feb. 13, 1984).

211. *Id.*

the OFPP efforts. The proposed legislation died, however, in committee.²¹²

Congressman Hall's bill, House Bill 4798, would have created an independent "Debarment and Suspension Board" comprised of at least three administrative law judges to consider all procurement debarment and suspension cases.²¹³ The bill would have limited the imposition of debarment only upon a showing of "a substantial and continuing risk that the person [would] not substantially perform all of the material, legal and contractual obligations and requirements" of federal contracts or the obtaining of government contracts.²¹⁴ Moreover, the bill called for hearings before the "super board" with a requirement that the government prove the grounds for debarment upon a showing of clear and convincing evidence.²¹⁵

In a similar context, the bill would have permitted suspensions only when a strong likelihood that a debarment would follow and upon a showing of exceptional circumstances.²¹⁶ The bill also would have required a hearing prior to any suspension unless the initiating agency could demonstrate, by affidavit, the likelihood of "immediate and irreparable injury, loss, or damage."²¹⁷ Clearly, House Bill 4798 would have changed the debarment and suspension process substantially and would have created a judicialized forum for consideration of these matters. The bill never gained momentum, however, and consequently, the ABA's efforts to establish a single government-wide board replete with trial-like proceedings generally came to an end as well.²¹⁸

212. See Friedman, *supra* note 26, at 308 (noting that "[t]he bill was referred to the Committee on the Judiciary, but was not acted upon in the 98th Congress").

213. See H.R. 4798, 98th Cong., 2d Sess. § 201, at 24-25 (1985).

214. *Id.* § 102(a), at 4.

215. *Id.* at 6.

216. *Id.* at 5. The bill would have limited suspensions to 60 days, but would have allowed extensions upon the initiating agency's showing of further exceptional circumstances. *Id.*

217. *Id.* at 12.

218. See Cox, *supra* note 26, at 437 n.79 (observing that "no hearings were ever held, no co-sponsors were ever obtained, and the bill died at the end of the 98th Congress"). A few years later the ABA Section on Public Contract Law somewhat more narrowly called for a single board within the Department of Defense to handle all debarment and suspension cases for that agency. Letter from James J. Myers, Section Chairman, ABA Section of Public Contract Law, to the Honorable David Packard, Chairman, President's Blue Ribbon Commission on Defense Management (Jan. 24, 1986), reprinted in *THE FAR SYSTEM: ITS CRITICAL FORMATIVE YEARS 1984-1986*, at C-71.1, -71.3 (1988) [hereinafter Myers Letter]. Even as it called for a single Defense Department board to decide these matters, the proposal recommended that the appropriate procuring agencies retain responsibility for initiating all debarment and suspension actions. *Id.*

Little interest appears to exist in considering further the creation of a single board to hear all government debarment and suspension cases. In response to inquiries posed to various agency officials and private counsel, both groups generally were opposed to the creation of a single government-wide board. Several agency officials stressed that debarment and suspension determinations are primarily the business decisions of the affected agencies. Accordingly, it would be cumbersome to divorce the administrative decision-making process from an agency's business judgment.²¹⁹ Others oppose a centralized system because of their concern that such a board could become unduly formal and bureaucratic.²²⁰ Corporate counsel for a large defense contractor also objected to a single-government board on comparable grounds. He reasoned that because the law charges procuring agency's contracting officers with making determinations of responsibility prior to the award of contracts, the agency also should have a stake in making global decisions about present responsibility through debarment or suspension actions.²²¹ In contrast, one gov-

In 1991, one more brief effort to consolidate the debarment and suspension responsibilities in the Department of Defense arose. See H.R. 2521, 102d Cong., 1st Sess. § 8110, at 103 (1991). The 1992 Department of Defense Appropriations Bill, which the House of Representatives passed on June 7, 1991, included a provision that no funds could "be used to pay the salaries of debarment/suspension officials [within the Department of Defense] unless such personnel [were] assigned to a consolidated office of Debarment and Suspension within the Office of the Inspector General." *Id.* The final bill excluded this ill-conceived plan. The House of Representatives apparently considered creating a single debarment and suspension authority for the agency because the House Appropriations Committee was troubled that at least one Defense agency had been too aggressive in imposing the suspension remedy. See H.R. REP. NO. 95, 102d Cong., 1st Sess. 238 (1991). There was some degree of irony in the bill's choice of the Department's Office of Inspector General as the proposed debarment and suspension authority given that office's long-standing aggressive attitude toward the liberal imposition of debarment and suspension against government contractors. See OFFICE OF INSPECTOR GEN., DEP'T OF DEFENSE, REPORT ON SUSPENSION AND DEBARMENT ACTIVITY WITHIN THE AIR FORCE 11-13 (1988); OFFICE OF INSPECTOR GEN., DEP'T OF DEFENSE, REVIEW OF SUSPENSION AND DEBARMENT ACTIVITIES WITHIN THE DEPARTMENT OF DEFENSE 45, 49-50, 74-75 (1984) (listing examples of problems with a liberal imposition of debarments and suspensions against government contractors). For further criticism of this proposal, see Shannon, *supra* note 5, at 33-43.

219. Many of the persons who responded asked that I would not directly attribute their comments to them. I am honoring their requests through respect for their stated wishes and in appreciation for their candor. I have retained their letters on file.

220. As a result, a more rigid structure would be less responsive to both the particular needs of various agencies and to new developments. Furthermore, processing delays could pose a problem. A more formalized system also could be detrimental to a smaller business in terms of the resources that might be necessary to participate in the forum.

221. Correspondingly, the agency debarring official should have sufficient expertise concerning the agency's standards and practices to assist in making objective and fair decisions.

ernment contracts attorney in private practice commented that a single large board would enhance consistency and rationality.²²²

Several reasons explain why neither the agencies nor many private counsel support the idea of one "super board" to handle all debarment and suspension matters for the federal government. First, such an entity would enlist a body of decision makers with no direct involvement in the business decisions of the various agencies. Second, the board could be cumbersome and have limited flexibility. It also is questionable whether the change would produce any cost savings, particularly given the initiating agencies still would need to be involved in the process and numerous officials would likely be necessary to staff the board. Finally, the implementation of government-wide regulations already has helped achieve greater uniformity and has reduced the disparity in treatment.

Counsel for various contractors subject to debarment actions also have endeavored to generate procedural change by judicially challenging pending debarments and suspensions rather than using the regulatory process. In addition to the due process challenges addressed above,²²³ other cases during the last few years have involved contractors who assert that certain aspects of the APA's formal adjudicatory procedures should apply to debarment and suspension matters. For example, in *Leitman v. McAusland*,²²⁴ the contractors challenged their three-year debarments from purchasing surplus personal property from the federal government.²²⁵ As one of their grounds for challenging the Defense Logistics Agency's (DLA) debarment decision, the contractors contended that a DLA official had violated section 554(d) of the APA "by acting as both prosecutor and debarring official at the hearing."²²⁶ The contractors urged that the DLA agency official who had presided as the hearing of-

222. Similarly, but on a narrower scale, the report by the 1962 ACUS Temporary Conference review committee called for a single board or independent examiner for the entire Defense Department to "achieve greater uniformity of decision." TEMPORARY CONFERENCE REPORT, *supra* note 9, at 283. On the other hand, the corporate counsel who provided comments in opposition to a single board expressed the view that the employment of a "super board" would lead to a lack of reality in decision making. Several members of the Debarment and Suspension Committee of the ABA's Public Contract Law Section also opposed the idea of a single board and favored maintaining an ability to deal with agencies with which contractors may be most familiar. Interview with Richard Bednar, Chair, & Various Members, Debarment & Suspension Committee, ABA Public Contracts Section, in Washington, D.C. (May 6, 1994).

223. See *supra* notes 105-93 and accompanying text.

224. 934 F.2d 46 (4th Cir. 1991).

225. *Id.* at 47-48.

226. *Id.* at 49. The contractors also urged, *inter alia*, that the DLA agency official presiding over the debarment hearing had initiated improper ex parte contacts. *Id.* The court rejected this latter claim. *Id.* at 50.

ficer in the debarment proceedings improperly had assumed the role of prosecuting officer at the hearing by questioning the witnesses.²²⁷ Despite acknowledging that the parties had raised a “thorny issue” regarding whether the APA’s formal adjudicative procedures applied to debarment proceedings, the court avoided deciding the question.²²⁸ Instead, the court simply assumed that the APA’s provisions for formal adjudication applied to the case and decided that the agency had not violated the APA’s limits on combining prosecutorial and decision-making functions.²²⁹ The court reasoned that merely because the official conducting the hearing posed questions to some of the witnesses, he had not placed himself in the position of prosecutor.²³⁰ Thus, even if the debarred contractors could have established a constitutional basis for applying the APA’s formal adjudicatory procedures to the debarment process, their claims still would have failed.

The United States Court of Appeals of the Ninth Circuit has addressed more directly whether any of the APA’s formal adjudicative procedures apply to the debarment and suspension process. In *Girard v. Klopfenstein*,²³¹ two contractors challenged their debarments by urging that the agency’s procedures were invalid because they did not require an administrative law judge to preside over the debarment proceedings.²³² In determining that the APA did not apply to the case, the Ninth Circuit reasoned that because no statute required that a debarment proceeding receive an evidentiary hearing, then no enabling legislation existed to require an “on the record” proceeding for purposes of section 554(a) of the

227. *Id.* at 48-49. A different employee represented the agency at the hearing and served as the prosecuting official. *Id.* at 49.

228. *Id.* at 44. The court correctly observed that no statute required debarment proceedings to be “on the record” for purposes of section 554(a) of the APA, but also observed that “a judicial gloss has found that these provisions [of the APA] also apply to certain hearings required by the Constitution, rather than a statute.” *Id.*

229. *Id.*

230. *See id.* The court analogized the agency official’s questions to those that a trial judge generally is allowed to ask and observed that most of the questions were attempts to clarify matters or to move the proceedings along. *Id.*

231. 930 F.2d 738 (9th Cir.), *cert. denied*, 112 S. Ct. 173 (1991). In *Klopfenstein*, the Agricultural Stabilization and Conservation Service (ASCS) debarred two contractors for improperly selling cheese that was ineligible for a particular government cheese-buying program. *Id.* at 739.

232. *Id.* If an agency enabling statute requires a matter to be resolved “on the record,” thereby triggering formal adjudication under section 554(a) of the APA, then one of the elements of the formal adjudicative proceeding is the opportunity for a hearing before an administrative law judge. *See* 5 U.S.C. §§ 554(c)(2), 556, 557 (1988).

APA.²³³ Accordingly, the court concluded that the express terms of the APA do not require the presence of an administrative law judge in a debarment proceeding.²³⁴

The debarred contractors also attacked the constitutionality of the debarment regulations by claiming that they lacked a guarantee that a contractor facing debarment would have an unbiased decision maker presiding over a fair hearing.²³⁵ The debarred contractors argued that the Supreme Court's holding in *Wong Yang Sung v. McGrath*²³⁶ mandated that administrative law judges must conduct agency debarment proceedings.²³⁷ The *Klopfenstein* court, however, determined that *Wong Yang Sung* was inapplicable to the debarment proceedings in question.²³⁸ The *Klopfenstein* court reasoned that, unlike the regulations in *Wong Yang Sung*, which required the hearing officer to engage in investigative, prosecutorial, and adjudicative duties in deportation proceedings, the debarment regulations at bar did not require the debarring officer to investigate on behalf of the agency.²³⁹ Moreover, the regulations at issue did not expressly combine the roles of prosecutor and decision maker.²⁴⁰ The

233. *Klopfenstein*, 930 F.2d at 741. The court relied on *Gonzalez v. Freeman*, 334 F.2d 570, 576 (D.C. Cir. 1964), for the proposition that debarment is not a creature of statute, but part of the inherent authority of contracting agencies. *Klopfenstein*, 930 F.2d at 741.

234. *Klopfenstein*, 930 F.2d at 742. In contrast, administrative law judges from HUD believe that the law should be changed to make debarment and suspension actions subject to the formal adjudication requirements of the APA. Heifetz, Letter, *supra* note 104, at 2. HUD debarment proceedings already are conducted in front of an administrative law judge or a judge from that agency's Board of Contract Appeals. See 24 C.F.R. § 24.313 (1993); *infra* note 247 and accompanying text (discussing HUD's procedures in more detail). Most officials involved in the process from other agencies, however, neither prefer that level of formality nor favor a change to require debarment matters to be conducted on the record for purposes of the APA's rules for formal adjudication.

235. *Klopfenstein*, 930 F.2d at 742. The contractors asserted that the regulations did not provide sufficient procedural safeguards "to protect [their] property and liberty interests against unwarranted infringement." *Id.* (alteration in original).

236. 339 U.S. 33 (1950). In *Wong Yang Sung*, United States Immigration Service regulations required that members of the agency's investigative branch conduct the agency's deportation hearings. *Id.* at 45. In addition, the regulations charged the hearing officer who presided over the case to interrogate both the person to be deported and his witnesses. *Id.* at 46. Thus, the decision maker in a deportation case served as both an investigator for the agency and a prosecutor during the proceedings. Although no statute required the agency to provide any kind of hearing, due process required one. *Id.* at 49-50. With respect to the type of hearing required, the Supreme Court held that the APA provisions should apply. *Id.* at 51. Specifically, the Court determined that notwithstanding the lack of any statutory language triggering the formal adjudicative aspects of the APA, Congress intended the words "required by statute" set forth in section 554(a) of the APA to cover hearings required by either statute or constitutional due process. *Id.* at 50.

237. *Klopfenstein*, 930 F.2d at 743.

238. *Id.*

239. *Id.*

240. *Id.*

court concluded that the FAR's debarment procedures had "comport[ed] with the fundamental fairness requirements of due process" under the *Mathews v. Eldridge* balancing test,²⁴¹ and consequently, "the rationale of *Wong Yang Sung* ha[d] no application to the . . . debarment regulations."²⁴²

VI. VARIATIONS ON UNIFORMITY

Notwithstanding the promulgation of government-wide debarment and suspension regulations, some lack of uniformity remains among agencies regarding the implementation and application of the procedures. For example, the military departments and other agencies within the Department of Defense allow affected contractors to present the decision maker with information and arguments in opposition to a suspension or proposed debarment in an informal setting.²⁴³ If the information in opposition to the proposed action raises a genuine dispute over the facts, the agency will proceed to a somewhat more formal fact-finding hearing.²⁴⁴ The GSA also follows informal procedures similar to those within the Department of Defense.²⁴⁵ In contrast, the Environmental Protection Agency (EPA) has more formal regulations that require petitioners to argue cases before hearing officers, who subsequently make recommendations to the debarring official.²⁴⁶ At the extreme, HUD provides even

241. See *supra* notes 133-39 and accompanying text.

242. *Klopfenstein*, 930 F.2d at 743. The court concluded that fundamental fairness "guarantees a fair hearing before an impartial trier of fact to persons facing . . . debarment proceedings." *Id.* The court also found that the impartial party need not be an administrative law judge as the APA contemplated. *Id.* at 742; see ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 114 (1989) (discussing the Court's holding in *Wong Yang Sung*, but questioning whether *Wong Yang Sung* is consistent with today's more "variable" due process determinations given the Supreme Court's decision in *Mathews v. Eldridge*).

243. See 59 Fed. Reg. 27,662, 27,700-01 (1994) (to be codified at 48 C.F.R. ch. 209, app. H-103). The agency's new hearing procedure describes the in-person presentation as "an informal meeting, nonadversarial in nature." *Id.* at 27,701 (app. H-103(b)). The proceeding appears to resemble a conference more than a hearing.

244. *Id.* (app. H-104). Although more adversarial, the fact-finding proceeding is not subject to the Federal Rules of Evidence or the Federal Rules of Civil Procedure. *Id.* (app. H-104(d)). The Defense Department's fact-finding procedures are described in more detail below. See *infra* notes 254-57 and accompanying text.

245. See 48 C.F.R. §§ 509.406-3, 509.407-3 (1993) (requiring an oral presentation before a hearing officer but not a transcript).

246. See David M. Sims, *Suspension and Debarment: Potent Government Tools*, 25 SONREEL NEWS (ABA Sec. of Nat. Resources, Energy and Env'tl. Law), Jan./Feb. 1994, at 1, 14 (Mr. Sims is the Chief Hearing Officer for the agency); see also ABA PRACTITIONER'S GUIDE, *supra* note 4, at 92-93 (observing that the EPA conducts hearings before hearing officers even in cases in which no material facts in dispute exist).

more formal procedures.²⁴⁷ Furthermore, despite the presence of a basic framework of uniformity, a great deal of variation also exists between agencies with respect to the officials employed to serve as debarring or suspending officials.²⁴⁸ On the other hand, notwithstanding some differences in the nature of these individuals' job positions, they all tend to be high agency officials.²⁴⁹

Whether greater uniformity should be a goal is a debatable question. Although formerly more disparate, the major procuring agencies within the Department of Defense²⁵⁰ have endeavored to achieve greater uniformity in their debarment and suspension practices over the last several

247. See 24 C.F.R. §§ 26.1 to .25 (1993). The recent ABA monograph described the HUD procedures as "markedly different" from those of any other agency. ABA PRACTITIONER'S GUIDE, *supra* note 4, at 96. The agency has relatively formal rules of procedure. HUD requires hearings before members of the agency's Board of Contract Appeals or other agency administrative law judges whose decisions are final unless the agency or affected person pursues discretionary internal appeal. See 24 C.F.R. §§ 24.313, 24.314(c). For a discussion of constitutional issues that have arisen in light of this discretionary review, see *supra* notes 194-207 and accompanying text.

It is interesting to note that of all the agency officials who responded to the author's request for comments, only administrative law judges from within HUD sought the adoption of more formal procedures. Heifetz Letter, *supra* note 104, at 2. The HUD administrative law judges adopted the view that the law should require "on the record" proceedings for debarments and suspensions, thereby triggering formal adjudication under the APA. See 5 U.S.C. § 554(a) (1988). Of course, this recommendation comes as no surprise given that administrative law judges may feel more comfortable with trial-like procedures. The General Counsel of HUD, however, has indicated that his agency may revise its suspension and debarment regulations to make HUD's process more comparable to other federal agencies. Diaz Letter, *supra* note 104, at 2-3.

248. See ABA PRACTITIONER'S GUIDE, *supra* note 4, at app. F (listing the debarment/suspension officials for federal agencies).

249. See *id.* Due process may require a decision by a high-level administrator anyway. See, e.g., *ATL, Inc. v. United States*, 736 F.2d 677, 687 (Fed. Cir. 1984) (indicating that a four-star admiral clearly suffices). The regulations also do not define who should act as the agency's presiding official during a contractor's presentation of information and arguments in opposition to the action. Cf. 24 C.F.R. § 300.1 to .13 (1993). In most agencies, however, the contractor can make a presentation to the debarring/suspending official in an in-person meeting. See ABA PRACTITIONER'S GUIDE, *supra* note 4, at 80. Nevertheless, other issues arise regarding the designation of an agency's decision maker that may require further scrutiny. Should, for example, a debarring official charged with carrying out procurement debarments under the FAR also serve in the chain of command for the agency's procurement decisions? The Air Force recently answered this question by replacing the Deputy Assistant Secretary for Acquisition with a newly created Assistant General Counsel position as its debarring official. See 59 Fed. Reg. 27,622, 27,668-69 (1994) (to be codified at 48 C.F.R. § 209.403(1)). The agency made this decision, in part, to move the debarment/suspension power out of the direct chain of procurement decision making. Yet, such a dual role appears acceptable if one views a debarment or suspension decision strictly as one of many procurement or grant-making determinations that an agency regularly makes. Although unlikely to reach the level of a due process concern, issues of basic fairness may mandate some level of separation of these functions.

250. These include the Air Force, Army, Navy, and DLA.

years. For example, the Air Force and Navy had processed debarment and suspension cases through review boards comprised primarily of procurement officials who would then make recommendations for action to a higher official in each agency.²⁵¹ In an effort to emulate the procedures of the Army and the Defense Logistics Agency (DLA), the Air Force and Navy have eliminated their boards and have installed debarring officials in high-level legal positions.²⁵² Additionally, in early 1992 the Under Secretary of Defense issued guidelines to encourage the defense agencies to follow more uniform procedures in their debarment and suspension activities.²⁵³ Consistent with these 1992 guidelines, the Department of Defense recently added an appendix to the agency's FAR (DFARS) supplement setting forth uniform procedures for all of its debarring and suspending officials.²⁵⁴ This new appendix generally addresses notice

251. See Memorandum from Anthony H. Gamboa, Deputy General Counsel (Acquisition) of the Army, to the Under Secretary of Defense (Acquisition) (Nov. 18, 1991), reprinted in 57 Fed. Cont. Rep. (BNA) 417-18 (Mar. 9, 1992) [hereinafter Gamboa Memo] (finding that, generally, the procedures were fairly uniform, but some differences in the approaches of the three military branches and the DLA did exist).

252. *Id.* at 418-19. Now, the Navy's General Counsel serves as the debarring official, see 48 C.F.R. § 209.403(1) (1993), and in the Air Force, the Assistant General Counsel for Contractor Responsibility is the debarring official. See 59 Fed. Reg. at 27,668-69. Having a single official solely responsible for considering debarment and suspension matters may have advantages over the previous board structure. As a former counsel to the Air Force Debarment and Suspension Review Board (from 1983 to 1986), the author can attest to the scheduling difficulties that often arose. With a board comprised of two senior procurement officials and a senior procurement attorney (all of whom had many different responsibilities), scheduling delays regularly occurred while the board attempted to process cases or conduct meetings or hearings with affected contractors. In addition to enhanced efficiency, the changes should make the services' debarring officials more accessible to affected contractors.

253. See *Yockey Approves Guidelines for Uniform Suspension and Debarment Procedures*, 57 Fed. Cont. Rep. (BNA) 377, 377 (Mar. 9, 1992) (discussing guidelines to provide more consistency between the agency's various debarment and suspension authorities).

254. See 59 Fed. Reg. app. H, at 27,700-01 (to be codified at 48 C.F.R. ch. 2, app. H). Appendix H also would apply to the array of other debarring and suspending officials in assorted defense agencies and overseas military commands in addition to those for the Air Force, Army, Navy and DLA. See *id.* app. H-100, at 27,700 (stating that the "appendix provides uniform debarment and suspension procedures to be followed by all debarring and suspending officials").

requirements²⁵⁵ and procedures for conducting fact-finding hearings.²⁵⁶ Although it calls for somewhat less formal procedures, this DFARS appendix sets forth a process generally consistent with the 1962 ACUS Temporary Conference recommendations.²⁵⁷

255. *Id.* at 27,700-01. Section H-101 provides that, in general, “[a] copy of the record which formed the basis for the decision by the debarring and suspending official will be made available to the contractor.” *Id.* app. H-101, at 27,700-01. Furthermore, if the agency withholds a portion of the record, it must inform the contractor “of what [was] withheld and the reasons for such withholding.” *Id.* at 27,701. Prior to this regulation, the agencies had provided different types of information to contractors as part of a notice of action. *See* Gamboa Memo, *supra* note 251, at 418; *see also* ATL, Inc. v. United States, 736 F.2d 677, 684-85 (Fed. Cir. 1984) (contrasting the Navy’s conduct in providing a suspended contractor with only portions of the record serving as the basis for the suspension with that of the Air Force in an earlier case in which the Air Force had provided a suspended contractor with all of the evidence available at the time of the suspension).

256. *See* 59 Fed. Reg. app. H-104, at 27,701. The FAR requires a fact-finding hearing to be held in any case in which a contractor’s submission of information and argument in opposition to a proposed debarment raises a genuine dispute over material facts. *See* 48 C.F.R. § 9.406-3(b)(2) (1993) (limiting this section’s scope to debarments not based on a conviction or civil judgment). Similarly, assuming the contractor’s initial submission in opposition generates a factual dispute, the FAR generally calls for a fact-finding hearing in suspension cases that are not premised on an indictment. *See* 48 C.F.R. § 9.407-3(b)(2). Additionally, in a suspension case the agency may defer to the DOJ’s advice to forego a hearing if substantial government interests involving pending or future “legal proceedings based on the same facts as the suspension would be prejudiced.” *Id.* Other than provisions listing a few basic hearing requirements, such as the right to appear with counsel, submit documents, present witnesses, confront any person the agency might present, and receive a transcribed record, the FAR does not provide much information regarding these fact-finding hearings. *See id.* § 9.406-3(b)(2)(i)-(ii) (for debarments); *id.* § 9.407-3(b)(2)(i)-(ii) (for suspensions). Instead, the FAR instructs agencies to establish the necessary procedures “as informal as is practicable, consistent with principles of fundamental fairness.” *Id.* § 9.406-3(b) (for debarments); *id.* § 9.407-3(b) (for suspensions).

Although the various defense agencies previously had procedures in place for fact-finding proceedings, Appendix H represents an effort to create uniformity within the agency. Under the new rules, the debarring and suspending official will designate a fact-finder to conduct a hearing upon determining that a genuine dispute over material facts exists (in debarment cases not involving convictions or civil judgments and suspension cases not based on indictments). 59 Fed. Reg. app. H-104(a), at 27,701. The designated fact-finder will then conduct a hearing and generate written findings of fact by a preponderance of the evidence. *Id.* app. H-106(b), at 27,101. Finally, the debarring and suspending official will use these findings to make a decision regarding whether to impose a debarment or continue a suspension. *Id.* app. H-106(b)-(c), at 27,101.

257. The Temporary Conference recommended that affected parties be afforded “a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact relevant to the debarment issue.” TEMPORARY CONFERENCE REPORT, *supra* note 9, at 267 (Recommendations 29-1(a)). The FAR and implementing regulations such as Appendix H echo the Temporary Conference’s call for conducting separate fact-finding hearings only in those cases in which there are genuine issues of material fact. In addition, Appendix H requires an independent fact-finder. 59 Fed. Reg. app. H-104, at 27,701. The Temporary Conference, however, contemplated a more formal hearing consistent with the requirements for formal adjudication under the APA. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 281. For example, the

Before addressing the question of whether all government agencies should pursue further efforts, like those of the Department of Defense, to make debarment and suspension procedures more uniform, one should note that implementing procedures may vary in degree from one agency to another. This variation does not necessarily make one agency's program more fair or responsive than others. From a constitutional perspective, the *Mathews v. Eldridge* analysis²⁵⁸ requires consideration of due process challenges on a case-by-case basis.²⁵⁹ Indeed, courts largely have upheld constitutional challenges to the procedures that Department of Defense agencies follow,²⁶⁰ which are perhaps as informal as any agency procedures. Due process does not require more formal procedures, and existing regulations allow agencies flexibility to develop and employ procedures to meet their own respective needs. Hence, it appears that further uniformity generally is not required.²⁶¹

Despite the lack of a general need for greater uniformity, one additional topic is pertinent with regard to the nature of the decision makers involved in the process. The pertinent regulations for debarment and suspension contemplate two basic types of in-person hearings between an

provisions for formal adjudication under the APA place strict limits on ex parte contacts. See 5 U.S.C. § 557(d) (1988). In contrast, Appendix H does not mention the potential problem of ex parte contacts. Yet, despite its relative informality, Appendix H does provide procedures that are far more trial-like than the FAR procedures for debarment and suspension concerning matters without disputed facts. Indeed, Appendix H should provide a fair framework for resolving disputed facts in those cases in which it applies.

Appendix H also differs from the Temporary Conference Report with regard to section H-106's limitation on the fact-finder to determine only disputed facts, thus leaving the ultimate decision to debar or maintain a suspension in the discretion of the debarring official. 59 Fed. Reg. app. H-106(6)-(c), at 27,701. Conversely, the Temporary Conference Report concluded, "we think one who decides should hear." TEMPORARY CONFERENCE REPORT, *supra* note 9, at 283. By leaving the ultimate decision regarding whether to continue a pending action to the discretion of a single high-level official, however, the limitation on the fact-finder under Appendix H appears sensible because of the potential for greater consistency in decision making.

258. See *supra* notes 133-39 (discussing *Mathews*).

259. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (describing due process as flexible and not subject to fixed rules).

260. See *supra* note 193.

261. One scenario, however, is worth noting. If an entity has contracts or grants with multiple agencies and faces a possible debarment or suspension action, the decision as to which agency will pursue the matter is likely to be significant to that entity. The affected entity probably will seek to be subject to the jurisdiction of an agency that affords the greatest procedural protections or, alternatively, to be before an agency that is more flexible and less formal. Of course, the affected entity may not have any control over the outcome of this matter. On the other hand, these considerations may encourage the entity to take the initiative in approaching a more favorable forum before one of the interested agencies commences action. See DeVecchio & Engel, *supra* note 26, at 75.

agency and an affected concern.²⁶² In the procurement arena, for example, an affected contractor has the opportunity to make an in-person presentation to the agency within thirty days following receipt of the notice of action for either a suspension or a proposed debarment.²⁶³ If the agency premises its action on an indictment (for a suspension) or a conviction or civil judgment (for a proposed debarment), the regulations do not provide for any further hearing procedures.²⁶⁴ Similarly, if the contractor's submission of information in opposition to the action does not raise any material dispute over the facts, no further hearing procedures are warranted.²⁶⁵ Hence, a contractor is entitled to a further fact-finding proceeding only when the initial presentation raises a genuine dispute over the facts.²⁶⁶

The regulations, however, do not identify the type of official who should preside over a fact-finding hearing. Consequently, it would seem reasonable for the federal government to amend the regulations to identify which official(s) should preside over such fact-finding proceedings.²⁶⁷ In confronting this issue, the ACUS previously has suggested that administrative law judges should hear cases involving "imposition of sanctions with substantial economic effect."²⁶⁸ That same standard also may be ap-

262. 48 C.F.R. 9.407-3(c)(5) (1993).

263. *Id.* § 9.406-3(c)(4).

264. *Id.* §§ 9.406-3(b)(2), 9.407-3(b)(2).

265. *Id.* §§ 9.406-3(b)(2), 9.407-3(c)(5)-(6).

266. In the case of a suspension, the DOJ may advise the agency that additional proceedings would jeopardize pending or contemplated criminal or civil proceedings. *Id.* § 9.407-3(c)(6). This could block further fact-finding proceedings even though there might be a genuine factual dispute. *Id.*

267. This assumes that the designated fact-finder is someone other than the debarring and suspending official. Even the new DFARS appendix, which delineates the rules for conducting such fact-finding hearings, does not identify the type of official who will serve as the adjudicator. See 59 Fed. Reg. 27,662, app. H-104, at 27,701 (to be codified at 48 C.F.R. app. H-104); see also *supra* notes 254-57 and accompanying text (comparing the DFARS appendix to the recommendations set forth by the ACUS Temporary Conference). Sensibly, Appendix H-104 also limits the designated fact-finder to determining the facts in dispute while the debarring and suspending official retains sole jurisdiction to determine ultimately whether the facts support a basis to continue the action. 59 Fed. Reg. at app. H-106(b)-(c), at 27,701.

Some agencies have designated fact-finders under their own rules. For example, the Department of Energy's subpart to the FAR designates a three-member panel to conduct any fact-finding conferences. See 10 C.F.R. § 1035.8(a) (1994). The EPA uses hearing officers for both initial proceedings and fact-finding hearings. See ABA PRACTITIONER'S GUIDE, *supra* note 4, at 92. The Department of Agriculture has an additional twist because its regulations permit a debarred or suspended entity to appeal that determination to the agency's Office of Administrative Law Judges for review. See 7 C.F.R. § 3017.515 (1994).

268. 1 ACUS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS 38 (1992).

propriate with respect to actual fact-finding proceedings under the debarment and suspension rules.²⁶⁹

VII. PERIOD OF DEBARMENT

FAR 9.406-4(a) broadly provides that a debarment "shall be for a period commensurate with the seriousness of the cause(s)."²⁷⁰ The regulation further states that, in general, a debarment "should not exceed 3 years."²⁷¹ A contractor also is entitled to receive credit for any period of suspension that precedes a debarment.²⁷²

The three-year period originated from ACUS Recommendation 29-8 as part of the 1962 Temporary Conference proceedings and recommenda-

269. Although the regulations do not address this point directly, the problem may be more theoretical than real. Very few debarment or suspension cases actually involve disputes over material facts. Indictments or convictions that, under the regulations, do not require an additional hearing on the facts serve as the basis for the majority of cases. Even in those cases in which the agency has developed the factual basis for proceeding, very few actions have resulted in fact-finding hearings. For example, in fiscal year 1994, indictments served as the basis for 96% of the Air Force's suspensions. See Cook Letter, *supra* note 94, at 4. Additionally, in the five-year period between 1989 and 1994, NASA processed 11 cases (involving 38 parties) all of which were based on indictments or convictions. Facsimile Transmission from Thomas J. Whelan, NASA Procurement Policy Division, to Brian D. Shannon (Sept. 14, 1994) (on file with author). On the other hand, although a majority of the Army's 851 suspensions and debarments between fiscal year 1992 and 1993 were based on indictments or convictions, the Army also used evidence that it developed on its own to impose over 300 debarments during those two years. Facsimile Transmission from Lt. Col. Thomas W. Rau, Procurement Fraud Division, Department of the Army, to Brian D. Shannon (Sept. 13, 1994) (on file with author). Nevertheless, among the 300 evidentiary debarments, none of contractors' presentations of information in opposition to the proposed action generated any dispute over the material facts. Similarly, in 1993, of the total 449 debarments and suspensions that the DLA imposed, 356 were based on convictions or indictments. Facsimile Transmission from Cherie Taylor, Office of the General Counsel, DLA, to Brian D. Shannon (Sept. 14, 1994) (on file with author). Yet, the agency conducted no fact-finding proceedings in the other cases. *Id.* Even HUD, where the current procedures are more formal than in other agencies, has indicated that indictments or convictions serve as the basis in 59% of its cases (beginning in 1990). Letter from Georjan D. Overman, Trial Attorney, Office of General Counsel, HUD, to Brian D. Shannon (Oct. 6, 1994) (on file with author). Finally, the EPA uses hearing officers for both initial proceedings and fact-finding hearings and has conducted approximately six to ten fact-finding hearings per year over the last several years. Telephone Interview with Robert F. Meunier, Director, Suspension & Debarment Division, EPA (Sept. 16, 1994).

270. 48 C.F.R. § 9.406-4(a) (1993).

271. *Id.* The subsection does provide an exception to the three-year limit for violations of "the Drug-Free Workplace Act of 1988 . . . [which] may be for a period not to exceed 5 years." *Id.* (citation omitted). The nonprocurement regulations similarly require that debarments generally should not exceed three years. See 24 C.F.R. § 24.320(a)(1) (1994) (HUD); 28 C.F.R. § 67.320(a)(1) (1994) (DOJ).

272. 48 C.F.R. § 9.406-4(a).

tions.²⁷³ Prior to that time, the military departments generally pursued five-year debarments for fraud and other convictions.²⁷⁴ The Temporary Conference recommended three years primarily because it was the maximum period Congress had employed for several statutory debarments and because it was the period that most contracting agencies used at that time.²⁷⁵ Balancing “notions of fairness” and “the public interest” in maximizing government contracts competition, the Temporary Conference’s review committee concluded that after a reasonable debarment period, which should not exceed three years, agencies should give contractors a second chance.²⁷⁶

Although three years currently is the presumptive period, the regulations are flexible and allow shorter or longer debarments depending on the severity of the contractor’s actions.²⁷⁷ The debarring official can extend a debarment for an additional period if it “is necessary to protect the Government’s interest.”²⁷⁸ An agency, however, cannot extend a debar-

273. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 293-94. Recommendation 29-8 provided that “except as provided by statute or executive order, debarments should be for a reasonable, definitely stated period of time commensurate with the seriousness of the cause therefor, but not to exceed three years.” *Id.* FAR 9.406-4(a) and the parallel provision in the nonprocurement rules closely mirror the language contained in this recommendation. See *supra* notes 270-71 and accompanying text.

274. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 279-80, 294. The report observed that the five-year military debarments “at times appear[ed] to be motivated by punitive considerations.” *Id.* at 294. The Defense Supply Agency even had sought to impose indefinite debarment periods in certain cases (with periodic reconsideration). *Id.*

275. *Id.*

276. *Id.*

277. 48 C.F.R. § 9.406-4(a) (1993). The nonprocurement regulations afford the debarring officials similar flexibility. See 28 C.F.R. § 67.320(a) (1994).

278. 48 C.F.R. § 9.406-4(b) (1993); *cf.* *Facchiano Constr. Co. v. United States Dep’t of Labor*, 987 F.2d 206, 212-13 (3d Cir.) (holding that *res judicata* did not preclude present DOJ debarment proceedings against a contractor for violations of labor standard, even though HUD previously debarred the contractor), *cert. denied*, 114 S. Ct. 80 (1993). In *Facchiano Construction*, the Department of Labor (DOL) debarred the company and certain individuals for three years throughout the federal government “for willful and aggravated violations of Davis-Bacon Related Acts.” *Id.* at 213. The company challenged the debarment because HUD previously had debarred the contractor from participation in HUD programs for 18 months based on the same underlying conduct. *Id.* at 209. It argued that *res judicata* principles precluded the DOL from pursuing the government-wide debarment given the prior 18-month debarment from HUD programs. *Id.* at 211. Although HUD now has the authority to issue debarments with government-wide effect, see 24 C.F.R. § 24.200(a) (1994), the court rejected the company’s arguments, reasoning that HUD did not have the authority to bar the company on a government-wide basis at the time in question. *Facchiano*, 987 F.2d at 211-12. The court also determined that although the underlying wrongful conduct that had been the subject of the HUD proceeding was at issue in the DOL case, “the two debarment proceedings arose from different statutes and different evidence.” *Id.* at 212-13.

ment based solely on the same facts and circumstances that formed the basis of the initial debarment.²⁷⁹

Conversely, an agency also has the flexibility to reduce the period or extent of a debarment.²⁸⁰ Indeed, the ACUS Temporary Conference recommendations in 1962 suggested “that debarments should be removed upon a showing of current responsibility.”²⁸¹ Therefore, if a contractor no longer lacks present responsibility, there may not be a need for a full three-year debarment. To that end, the FAR allows the debarring official to reduce a debarment if the contractor demonstrates a basis for doing

279. *Facchiano*, 987 F.2d at 212-13; cf. *Wellham v. Cheney*, 934 F.2d 305, 309 (11th Cir. 1991) (holding as a matter of law that a later conviction for matters giving rise to an initial debarment constitutes “a new fact or circumstance” under FAR 9.406-4(b), thereby supporting an extension of that debarment). In *Wellham*, the court strained to reason that because a conviction for fraud or false statements is a separate and distinct cause for debarment, an agency could consider the fact of the conviction as a new fact or circumstance justifying an extension of the debarment period. *Wellham*, 934 F.2d at 309. Although a bit dubious and reluctant, the court acknowledged that while “the accuracy of the DLA’s conclusions are debatable, . . . they are clearly not arbitrary or capricious.” *Id.* at 310 n.3.

As a general proposition, if an agency debar a company for three years based on contracting improprieties that bear on the present responsibility of the firm, and then extends the debarment based solely on a conviction arising out of the exact same wrongdoing, the agency’s conduct would appear to be highly punitive in nature. In fairness to the agency in *Wellham*, however, the extension of the debarment was for only one additional year and was not based solely on the eventual conviction. *Id.* at 308-09. Instead, the agency extended the debarment, in part, because the contractor had submitted false certificates of conformance in connection with two contracts that had not been the subject of the initial debarment. *Id.* The court reasoned that “[w]hatever the precise meaning of [FAR] 9.406-4(b), the DLA certainly acted reasonably in finding that” the improprieties concerning the two additional contracts were not the same facts or circumstances underlying the initial debarment. *Id.* at 309.

Another issue concerning the duration of a contractor’s exclusion from government programs arises under HUD’s regulations. HUD has authorized certain lower level agency officials to impose suspension-like “limited denial[s] of participation” that result in exclusions from specific HUD programs within a defined area for up to one year. See 24 C.F.R. § 24.700 to .713 (1994). These agency officials can impose a limited denial of participation for some of the same reasons that could constitute grounds for debarment. See *id.* § 24.705. Furthermore, the regulations state that “[t]he imposition of a limited denial of participation shall not affect the right” of the agency to take subsequent suspension or debarment action. *Id.* § 24.710(b). Moreover, nothing in the regulations indicates that a later debarment action should take into account the duration of any such limited denial of participation. The Chief Administrative Law Judge for HUD has questioned the fairness of this process. See Heifetz Letter, *supra* note 104, at 2. Although the scope of a limited denial of participation is much narrower than that of a suspension or debarment, the regulations appear duplicative and could result in cumulative exclusions (at least in some programs) for longer than the presumptive three-year period.

280. 48 C.F.R. § 9.406-4(c).

281. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 294. The rationale for this part of the recommendation was that “[i]f new facts develop which show the original judgment was incorrect when made or is without continuing validity, there is probably no authority to continue the debarment.” *Id.*

so.²⁸² In addition to limiting the duration of a debarment, the debarring official also can narrow the extent of a debarment to particular divisions, organizational elements, or products.²⁸³

While the pertinent regulations create a presumptive three-year limit on debarments, debarring officials may impose longer initial debarments when the facts warrant such action.²⁸⁴ Of course, the danger exists that if the debarment period exceeds three years, the agency may have crossed

282. 48 C.F.R. § 9.406-4(c). That section allows a contractor to provide "reasons such as—(1) Newly discovered material evidence; (2) Reversal of the conviction or civil judgment upon which the debarment was based; (3) Bona fide change in ownership or management; (4) Elimination of other causes for which the debarment was imposed; or (5) Other reasons the debarring official deems appropriate." *Id.*; see also 28 C.F.R. § 67.320(c) (1994) (containing the nonprocurement version). A contractor also could attempt to have the debarring official lift or limit a debarment by demonstrating satisfactory achievement of certain mitigating factors or remedial measures identified in FAR 9.406-1(a) even if those steps were not in place at the time of the initial debarment determination. 48 C.F.R. §§ 9.406-1(a), 9.406-4(c).

283. 48 C.F.R. § 9.406-1(b); see also 28 C.F.R. § 67.325(a) (1994) (stating the scope of nonprocurement debarment). The imputation of liability from individuals to corporations and vice versa and the extension of a debarment or suspension to affiliated persons or businesses also have produced litigation relating to the scope of extent of debarments and suspensions. The FAR regulations define "affiliates" in terms of direct or indirect control and provides that "[b]usiness concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both." 48 C.F.R. § 9.403 (1993). The nonprocurement regulations contain similar language. See 28 C.F.R. § 67.105(b) (1994). Both sets of regulations include certain indicia of control such as "interlocking management or ownership, identity of interests among family members, [and] shared facilities and equipment." *Id.* (listing these and other indicia of control). Consequently, agencies must provide separate notices to any affiliate subject to action. See, e.g., 48 C.F.R. § 9.406-1(b). But the agencies also may impute the wrongdoing of employees to corporate entities and vice versa. See *id.* § 9.406-5 (setting forth standards for imputing "fraudulent, criminal, or other seriously improper conduct").

The inclusion of standards for affiliate status and imputation of responsibility is responsive to concerns that the 1962 Temporary Conference raised. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 279 (expressing concern that the regulations failed to specify criteria for determining affiliate status and when to extend debarments to affiliates). Nonetheless, litigation continues to arise concerning the scope and breadth of these regulatory standards for affiliation and imputation. See, e.g., *Novicki v. Cook*, 946 F.2d 938, 942-43 (D.C. Cir. 1991) (invalidating an agency decision to debar a corporation's president upon finding that the agency record was insufficient to show that the president had "reason to know" of misconduct by other corporate officials); *Robinson v. Cheney*, 876 F.2d 152, 160-61 (D.C. Cir. 1989) (upholding a debarment of a corporation despite the individual wrongdoer's transfer of certain ownership interests to a trust because the individual maintained some level of control); *Caiola v. Carroll*, 851 F.2d 395, 396 (D.C. Cir. 1988) (holding that an agency's decision to debar certain corporate officials of a convicted corporation and not others was arbitrary and capricious). The litigation primarily relates to the contours of the existing regulations, however. The present standards, as construed by the courts, provide a workable framework for addressing these matters.

284. See 48 C.F.R. § 9.406-4(a) (providing that debarments generally should not exceed three years); see also 28 C.F.R. § 67.320 (a)(1) (providing same, but adding that agencies

the line from trying to protect the government to administering punishment. Nonetheless, debarments in excess of three years are not unknown.²⁸⁵ To avoid arbitrary application of the debarment weapon and the perception that agencies are employing the sanction in a punitive manner, agencies should be very hesitant to go beyond the three-year period unless the case is exceptional. To do otherwise would mock the requirement that agencies refrain from using debarment as punishment.

VIII. MITIGATING FACTORS

The debarment regulations in the FAR are permissive and not mandatory. The debarment official has discretion to impose a debarment and may debar a contractor for any cause set forth in the regulations.²⁸⁶

may impose a longer period for nonprocurement debarments “[w]here circumstances warrant”).

285. See, e.g., *Coccia v. Defense Logistics Agency*, No. 89-6544, 1992 WL 345106 (E.D. Pa. Nov. 12, 1992). In *Coccia*, the court declined to overturn a 15-year debarment although it originally had set aside the agency's debarment order based on a lack of support in the administrative record to justify the length of the debarment. *Id.* at *1. The court initially had remanded the case to the agency for a more detailed explanation of its rationale for imposing the 15-year debarment. *Id.* at *2. On remand, the agency reaffirmed its earlier decision to debar for 15 years, concluding that Coccia had corrupted the “system for a ten year period by interfering with the confidentiality of the bid process and giving secret price information to the contractors who bribed him.” *Id.* at *4. In addition, Coccia, who apparently did not understand or appreciate the impact his conduct had on the procurement system, instead blamed the system for his wrongdoing. *Id.* Indeed, even the court found Coccia's corruption of the system to be “reprehensible,” *id.* at *6, and “characterized by repeated abuse of the Government procurement system which spanned a period of at least ten (10) years up until the time” of detection. *Id.* at *5. Accordingly, the court found the agency's decision to debar for 15 years to be rational and “based on relevant factors.” *Id.* at *6.

In her debarring decision, the debarring official had recognized that “[a]lthough a debarment generally is imposed for three years, there is no maximum period. The Government thus is free to impose longer periods in egregious circumstances that present an unusual threat to the Government's business interests. This is such a case.” *Id.* at *5. The facts in *Coccia* reveal that the situation leading to the lengthy debarment in that case was exceptional. To avoid eviscerating the three-year standard, however, agencies should endeavor not to allow exceptions to encompass the rule. Obviously, even Mr. Coccia can take advantage of the FAR to present additional facts or new mitigating factors and remedial measures during the term of his debarment in an effort to have the debarment period shortened. See 48 C.F.R. § 9.406-4(c).

286. 48 C.F.R. § 9.406-1(a). The FAR specifically provides that “[t]he existence of a cause for debarment . . . does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.” *Id.* The suspension regulations contain similar language. See *id.* § 9.407-1(b)(2). One attorney who responded to my request for comments identified the lack of criteria addressing when an agency should, or should not, suspend medium to large corporations based on potential violations of the law by employees as his “most pressing area of concern.” Letter from Marshall J. Doke, Jr., to Brian D. Shannon 1 (Mar. 10, 1994) (on file with author) [hereinafter Doke Letter].

This aspect of the FAR is consistent with the general policy that agencies should impose debarments and suspensions only to protect the government's interests and not as punishment.²⁸⁷ Mitigating factors and remedial measures are highly pertinent to ensure that such actions fall within this policy. Accordingly, the FAR now requires that debarring officials should consider relevant mitigating factors and remedial measures, and since 1992, it even lists ten such factors.²⁸⁸ In contrast to the FAR, the rules for nonprocurement debarments require debarring officials to take mitigating factors into account, but do not include a comparable list of

287. 48 C.F.R. § 9.402(b) (1993); *see also* *Roemer v. Hoffmann*, 419 F. Supp. 130, 131-32 (D.D.C. 1976) (observing that, notwithstanding a conviction, an agency should consider mitigating factors concerning present business risks).

288. 48 C.F.R. § 9.406-1(a)(1) to (10). The listed factors include the following:

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

Id. The ten mitigating factors became effective in early 1992. *See* 56 Fed. Reg. 67,129, 67,129-30 (1991). Furthermore, although debarring officials must consider these factors, "[t]he existence or nonexistence of any mitigating factors or remedial measures . . . is not necessarily determinative of a contractor's present responsibility." *Id.* at 67,130. The contractor also has the burden of disproving the need for debarment "to the satisfaction of the debarring official." *Id.*

factors.²⁸⁹ An agency's failure to consider pertinent mitigating factors or remedial measures could be grounds for a successful judicial challenge.²⁹⁰

The mitigating factors described in the procurement debarment rules have had an intriguing evolution over the last decade. The development began in 1984 when then-Deputy Secretary of Defense Taft ordered interim changes to the agency's DFARS to require generally that contractors be debarred for more than a year in the case of any felony conviction.²⁹¹ In addition, these "Taft" rules provided that the agency could use mitigating factors only to determine the length of the debarment period.²⁹² These changes in the rules provoked much criticism,²⁹³ which prompted the Defense Department to ameliorate the severity of the Taft rules by amendment in July 1985.²⁹⁴ The amendment provided that the period for debarments based on felony convictions normally should be longer than one year, but that an agency could consider mitigating factors in making the debarment decision.²⁹⁵ The revised rules cautioned, however, that the mitigating factors must demonstrate clearly that the contractor had eliminated the circumstances leading to the conviction and implemented remedial measures for the debarring official to be able to decide not to debar or to debar for less than one year.²⁹⁶

289. See 28 C.F.R. § 67.300 (1994).

290. See, e.g., *Silverman v. United States Dep't of Defense*, 817 F. Supp. 846, 849 (S.D. Cal. 1993) (finding that the agency abused its discretion by not considering mitigating factors in debarring a contractor who had been convicted of misdemeanor conversion); *Sellers v. Kemp*, 749 F. Supp. 1001, 1009-10 (W.D. Mo. 1990) (reversing debarment by finding that the agency Secretary's designee abused her discretion by ignoring mitigating factors and imposing a three-year debarment period). Notwithstanding *Silverman*, a conviction of various offenses can justify a three-year debarment whether felonies or misdemeanors. See 48 C.F.R. § 9.406-2(a)(1) to (4). *The Robinson Co. v. Department of the Army*, No. W-91-CA-387, slip op. at 11-12 (W.D. Tex., Sept. 25, 1992) (holding that it was not arbitrary for the agency to issue a debarment when the sole offender was the company's president and owner who had not cooperated in the investigation and denied full responsibility despite alleged mitigating factors); cf. *Shane Meat Co. v. United States Dep't of Defense*, 800 F.2d 334, 338-39 (3d Cir. 1986) (reversing a district court order that had reduced a debarment based on a conviction from three years to a year and finding that an agency debarment official had considered all relevant mitigating factors); *Agan v. Pierce*, 576 F. Supp. 257, 261-62 (N.D. Ga. 1983) (upholding a debarment based on a guilty plea after rejecting a contention that the agency had not considered mitigating factors sufficiently).

291. See 50 Fed. Reg. 8121 (1985) (to be codified at 48 C.F.R. § 209.406-4). Only the Secretary of Defense (or an Under Secretary) could approve a decision to debar for a year or less. *Id.* The Secretary of Defense was not the usual debarring official for the military services or other defense agencies.

292. *Id.* (amending 48 C.F.R. § 209.406-1(d)).

293. See Wallick, *supra* note 26, at 170.

294. See 50 Fed. Reg. 28,209 (1985) (amending 48 C.F.R. §§ 209.406-1, 209.406-4).

295. *Id.*

296. *Id.*

In 1986, the Final Report of the President's Blue Ribbon Commission on Defense Management (known as the Packard Commission) discussed the problems regarding suspension and debarment practices within the Department of Defense.²⁹⁷ In particular, the Packard Commission's final report suggested that the Defense Department may have departed from the FAR's policy goal that agencies use suspension and debarment strictly as protection for the government against contractors lacking present responsibility.²⁹⁸ Additionally, the fact that the Defense Department had been treating indictments as requiring automatic suspensions "without sufficient regard for corrective actions already taken" troubled the Packard Commission.²⁹⁹ As a possible response to these concerns, the Packard Commission observed that the process could be improved "in crucial respects" if the agencies amended the regulations to include criteria for ascertaining when a contractor is presently responsible.³⁰⁰ Accordingly, the Packard Commission offered potential criteria in the report.³⁰¹ Soon

297. THE PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE 101-11 (1986) [hereinafter PACKARD COMMISSION REPORT].

298. *Id.* at 102. Although the Packard Commission Report recognized that "suspension and debarment are indispensable tools in assuring that [the Department of Defense] not contract with those lacking present responsibility, they nevertheless are severe remedies that should be applied only in accordance with their stated purpose and legal standards." *Id.* In a letter that included various recommendations, the ABA Section on Public Contract Law had emphasized the need for the Packard Commission to focus on the issue of present responsibility. See Myers Letter, *supra* note 218, at C-71.1 to -71.2. Indeed, the Packard Commission appeared to address specific concerns that the ABA Section on Public Contract Law expressed, such as its statement that "the potential effects of suspension and debarment are so severe that this power must be properly circumscribed. The government should impose suspension and debarment only on contractors who are *not presently responsible*." *Id.* at C-71.1. On the other hand, the Packard Commission did not appear to embrace another proposal by the ABA Section on Public Contract Law to establish a centralized authority within the Defense Department to consider all suspension and debarment cases. *Id.* at C-71.3. Instead, the Packard Commission recommended greater uniformity in the various departments' procedures. See PACKARD COMMISSION REPORT, *supra* note 297, at 109.

299. See PACKARD COMMISSION REPORT, *supra* note 297, at 102.

300. *Id.* at 105.

301. *Id.* at 106. The recommended criteria included:

- The nature of integrity programs, if any, currently being implemented by the contractor. The debarring/suspending authority should be particularly interested in the extent of the contractor's affirmative efforts to implement ethical standards of conduct that address contract performance and systems of internal controls to monitor compliance with those standards.
- The contractor's reputation for probity on recent procurements with [the Department of Defense] and other federal agencies.
- The reputation of the contractor's management and directors in recent circumstances as persons of good character and integrity.
- The extent to which misconduct is symptomatic of basic systemic problems within the corporation as opposed to isolated, aberrational corporate behavior.

after the completion of the Packard Commission study, the Defense Department departed from the original Taft rules and delineated certain standards for mitigating factors and remedial measures.³⁰²

The Defense Department's earlier insistence on a presumptive one-year debarment under the Taft rules clearly contradicted the FAR's directive that agencies impose debarment only to protect the government "and not for purposes of punishment."³⁰³ Therefore, the agency's retreat from automatic debarments with presumptive "sentencing" to the acceptance of consideration and analysis of published mitigating factors was an appropriate step. These mitigating factors also should extend to the non-procurement debarment and suspension rules.

Similarly, the FAR's suspension regulations direct that the existence of a cause for suspension does not mean that an agency must suspend the contractor. Instead, the suspending official should "consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures or mitigating factors" such as those set forth in the debarment rules.³⁰⁴ The suspension regulations also place the burden on the contractor to bring evidence of any remedial measures or mitigating factors promptly to the agency's attention when the contractor has reason to believe that a cause for suspension may exist.³⁰⁵

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- The nature and extent of voluntary disclosure and cooperation offered by the contractor in identifying and investigating the misconduct.
 - The sufficiency of remedial measures taken to eliminate the causes of the misconduct.

Id.

302. See 52 Fed. Reg. 34,386, 34,387 (1987) (to be codified at 48 C.F.R. § 209.406-1(d) (repealed)). Mitigating factors became a part of the FAR in 1992. See *supra* note 288 and accompanying text. At about the same time, the Defense Department repealed its own list of mitigating factors. See 56 Fed. Reg. 36,280 (1991) (deleting the Defense Department mitigation factors because of the shift to the FAR). The Defense Department finally removed the last vestiges of the Taft rules in 1992. See 57 Fed. Reg. 14,988, 14,992 (1992). Congress forbidding any further implementation of the original Taft rules largely prompted this final change. See Department of Defense Appropriations Act of 1992, Pub. L. No. 102-172, § 8110, 105 Stat. 1150, 1200 (1991).

303. 48 C.F.R. § 9.402(b) (1993); see PACKARD COMMISSION REPORT, *supra* note 297, at 102; Wallick, *supra* note 26, at 172-73. Others also have expressed general doubt about whether agencies actually have followed the spirit of the distinction between protection and punishment in practice. See, e.g., Robert S. Bennett & Alan Kriegel, *Negotiating Global Settlements of Procurement Fraud Cases*, 16 PUB. CONT. L.J. 30, 33-34 (1986) (commenting on former Secretary of Defense Weinberger's remarks in a television interview that an indictment of a government contractor requires an "automatic suspension"). While punishment of high-profile contractors may have political appeal for appointed agency officials, it still does not comport with the applicable regulations and policies underlying debarment action. See Shannon, *supra* note 5, at 30 n.144.

304. 48 C.F.R. § 9.407-1(b)(2) (1993).

305. See *id.* Moreover, the newly added Appendix H to the DFARS specifically adds that "[a] contractor who becomes aware of a pending indictment or allegations of wrong-

Unlike in the case for a debarment, however, if an agency is considering suspension, the agency need not provide prior notice to the contractor. Nonetheless, a contractor may well be aware of the existence of causes that could precipitate a suspension (such as an ongoing criminal investigation or the return of an indictment). In that situation, it may be incumbent upon the contractor to take immediate remedial measures and promptly approach the procuring agency in an effort to prevent a suspension.³⁰⁶ As in debarment proceedings, courts also could intervene in a suspension case on behalf of a contractor if an agency fails to consider mitigating factors or remedial measures.³⁰⁷

doing that the contractor believes may lead to suspension or debarment action may contact the debarring and suspending official or designee to provide information as to the contractor's present responsibility." 59 Fed. Reg. 27,662, 27,701 (1994) (to be codified at 48 C.F.R. ch. 209, app. H-102(a)).

306. Cf. Benjamin B. Klubes, *The Department of Defense Voluntary Disclosure Program*, 19 PUB. CONT. L.J. 504, 521-32 (1990) (describing possible benefits of the agency's voluntary disclosure program whereby a contractor comes forward to address activities that may give rise to debarment or suspension before an agency begins an investigation).

307. See, e.g., *Resource Applications Inc. v. EPA*, No. 93-2525 (D.D.C. Jan. 11, 1994), cited in *EPA Contractor Wins Preliminary Injunction Enjoining Suspension Imposed After Indictment*, 61 Fed. Cont. Rep. (BNA) 115, 115 (Jan. 24, 1994) (granting a preliminary injunction against an EPA suspension, which was based on an indictment where the agency did not consider remedial measures and mitigating factors prior to issuing the suspension). The case later became moot when the United States District Court for the Middle District of North Carolina acquitted the contractor on the underlying criminal charges. See *EPA Firm Acquitted on False Claims Charges, Continues Effort to Have Suspension Lifted*, 61 Fed. Cont. Rep. (BNA) 310, 310 (Mar. 7, 1994); see also ABA PRACTITIONER'S GUIDE, *supra* note 4, at 156 (describing the company's various remedial measures, the relatively small dollar value of the wrongdoing, and the lack of management knowledge of wrongdoing as reasons to find that the EPA was arbitrary and capricious in imposing the suspension).

One attorney from private practice who provided comments suggested that some general criteria should be set out discussing the circumstances in which there should or should not be a suspension even in light of an indictment or other reasonable certainty that a crime may have been committed. Doke Letter, *supra* note 286, at 1. Specifically, Mr. Doke suggested that the regulations be amended to add procedures that would encourage agencies not to impose suspensions in return for the affected concern's commitment of cooperation. *Id.* at 3. It does not seem that the FAR needs additional changes in this area at this time, however. The addition of the list of mitigating factors to both versions of the debarment and suspension procedures should provide a helpful baseline of consideration for debarment and suspension officials. See *supra* note 288 and accompanying text (listing the mitigating factors). Existing voluntary disclosure programs also play a role in limiting cooperating entities' exposure. See ABA PRACTITIONER'S GUIDE, *supra* note 4, at 108-30 (describing various voluntary disclosure programs); Boese, *supra* note 26, at 12 (observing that as of January 1, 1993, only one out of 118 defense contractors who had come forward under the agency's voluntary disclosure program had been debarred). Moreover, an agency's complete disregard for the types of mitigating factors and remedial measures that the FAR identifies can result in judicial correction. See *supra* note 289 and accompanying text (noting the absence of a list of mitigating factors in the nonprocurement regulations). Nevertheless, for purposes of both consistency and fairness, amendments to the non-

In 1992, the former Under Secretary of Defense for Acquisition stated that he was "concerned that contractors may not be aware that they are being considered for suspension."³⁰⁸ Although recognizing that the FAR does not require any pre-suspension notice to contractors, the Under Secretary instructed:

When appropriate prior to the suspension, I want companies to be informed that we have extremely serious concerns with their conduct, that their suspension is imminent and that they may contact the suspension official, or . . . designee, if they have any information to offer on their behalf.³⁰⁹

This suggestion, or requirement, that the Defense Department agencies employ some form of "shock and alarm" or "show cause" letter is an interesting development and certainly exceeds the constitutionally mandated process.³¹⁰ Given that the regulations do not require an automatic suspension even when grounds for suspension exist, agencies certainly have the flexibility to take such a preliminary step. However, exactly what the Under Secretary meant by "[w]hen appropriate"³¹¹ remains to be seen.³¹² Ironically, the Packard Commission had suggested that the government should use a shock and alarm practice in suspension cases several years earlier.³¹³

procurement rules should add a similar list of mitigating factors and remedial measures. Additionally, those agencies that do not have voluntary disclosure programs in place should endeavor to do so.

308. See Yockey Memo, *supra* note 101, at 1.

309. *Id.*

310. Intriguingly, the memorandum also suggests that "[t]his is not a change to existing policy or an expansion of contractors' rights, but merely an enhanced opportunity for [Department of Defense] to consider all available information before making a decision which will affect a company's future business dealings with the government." *Id.*

311. See *supra* note 309 and accompanying text.

312. One official who is familiar with the debarment and suspension process within the Department of Defense indicated privately that the defense agencies had construed the Under Secretary's term "when appropriate" as being fairly narrow. Moreover, in cases of indictments or prolonged criminal investigations, the affected contractors should not be surprised by the prospect of impending suspension actions.

313. See PACKARD COMMISSION REPORT, *supra* note 297, at 107 (suggesting that the "practice of 'automatic' suspension of contractors following indictment on contract fraud . . . be reconsidered by [the Department of Defense] with a view that it be more discriminating and take into account all circumstances of a particular situation"). Although the Packard Commission Report spoke approvingly of the use of shock and alarm letters instead of immediate suspensions, the Packard Commission offered no other concrete recommendations in this regard. In contrast, the ABA Section on Public Contract Law had proposed a rules change to the Packard Commission that would have precluded the issuance of a suspension in the absence of a prior agency hearing except upon a showing by the government of irreparable harm. See Myers Letter, *supra* note 218, at C-71.4. The Under Secretary's memorandum certainly does not go that far, but it is consistent with the suggestion that the Packard Commission Report contains.

The presence or absence of mitigating factors also relates to concerns about disparities in treatment by government agencies among large and small contractors. Small contractors have complained that they are the subject of debarment and suspension actions more often than are larger entities. Of course, larger concerns may be in a better position to incorporate the mitigating factors that the regulations identify. For example, a company with many employees in multiple divisions may be much better situated to "prune" away wrongdoers, incorporate mitigating factors, and implement remedial measures than would a very small business.³¹⁴ Alternatively, in the case of a small contractor, those persons involved in fraud or other grounds underlying the debarment or suspension also may be key individuals in the operation of the concern; yet even the small contractor can engage in remedial measures and can attempt to mitigate the impact of prior problems.³¹⁵

In sum, the addition of a specific list of mitigating factors and remedial measures to the FAR has been a positive step in ensuring that agencies impose debarment and suspension only to protect the government's interests and not for punishment. A similar list should be added to the non-procurement rules. One other possibility for positive change with respect to both sets of debarment and suspension procedures could be the development of a list of "aggravating" factors. Such factors could offer guidance to both agency officials and affected concerns regarding either (1) the need for suspension or debarment or (2) the duration of a debarment.³¹⁶

IX. STATUTORY DEBARMENTS

In contrast to the administrative efforts to provide flexible limits on debarment periods with a general maximum of three years, recent statutory enactments either provide for mandatory, fixed periods of debar-

314. See Boese, *supra* note 26, at 11 (discussing the impact of company size on the use of mitigating factors and remedial measures).

315. For example, an official of the DLA once stated that "[c]ontractors must recognize that no one individual is indispensable. Even owners and chief operators of a small business can be replaced by a soundly constructed trust agreement and competent trustee." Karl W. Kabeseman, *Fraud in Defense Contracting: Debarment and Suspension as Administrative Remedies*, in *FRAUD IN GOVERNMENT CONTRACTING* 121, 131 (1985); cf. *Robinson v. Cheney*, 876 F.2d 152, 161 (D.C. Cir. 1989) (holding that a business owner's transfer of ownership to a trust did not protect the government's interests adequately because the owner had retained both the right to receive income and a reversionary interest).

316. The debarring official for the Air Force has suggested the use of such a list of aggravating factors to serve as a balance to the current mitigating factors. See Cook Letter, *supra* note 94, at 3 (reflecting Ms. Cook's own views and not necessarily the official position of the Air Force).

ment or call for debarments in excess of three years. These mandatory or extended debarment statutes, however, are inconsistent with the general policy of imposing debarment or suspension primarily to protect the government and are more akin to additional penal sanctions.³¹⁷

Yet, Congress undoubtedly has the constitutional authority to authorize the imposition of debarments as a form of punishment. Indeed, the Supreme Court has upheld Congress' delegation of power to the agencies to assess administrative civil penalties.³¹⁸ Congress, however, generally has not enacted debarment statutes that are purely punitive in nature.³¹⁹ Nevertheless, congressional activity in this area over the last several years reflects a trend toward more mandatory types of debarments and debarment periods that exceed three years. If not expressly punitive, the legislation suggests a trend toward de facto punishment.

A. Early Examples

Several statutes enacted decades ago have long mandated debarment for particular contractual improprieties. Congress' first such effort was the Buy American Act,³²⁰ which generally requires federal construction contractors to use only products and materials manufactured in the United States.³²¹ Although the statute mandates debarment for a three-year period from certain construction contracts, a conviction for violating the statute also could constitute grounds for debarment from all federal contracting as "a criminal offense in connection with . . . performing a public contract or subcontract."³²² In theory then, if a contractor violates the Act, an agency can limit a debarment to the specific types of contracts identified in the statute, but only to the extent that the debarring agency is satisfied with the mitigating factors and remedial measures present.³²³

317. See 48 C.F.R. § 9.402(b) (1993); see also *supra* notes 286-87 and accompanying text.

318. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977) (upholding a statute authorizing an agency to impose administrative civil penalties).

319. *But see infra* notes 320-43 (discussing certain statutes in which Congress has prescribed automatic or extended debarments for violations of the terms of those statutes).

320. 41 U.S.C. §§ 10a-10d (1988 & Supp. V 1993).

321. *Id.* § 10b(a). The statute, which was first enacted in 1933, specifically precludes the award of any new "contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere" to a violator of the Act for a three-year period. *Id.* § 10b(b).

322. 48 C.F.R. § 9.406-2(a)(1) (1993). A prior procurement regulation redundantly included a willful violation of the Buy American Act as a specific cause for debarment. See *ABA PRACTITIONER'S GUIDE*, *supra* note 4, at 8 & n.9.

323. See *supra* notes 286-316 and accompanying text (discussing mitigating factors).

Other early statutes also contain specific debarment provisions. For example, several labor standards acts, such as the Davis-Bacon Act (and related acts),³²⁴ the Walsh-Healey Act,³²⁵ the Contract Work Hours and Safety Standards Act,³²⁶ and the Service Contract Act of 1965,³²⁷ contain debarment requirements. In addition to these labor statutes, certain environmental protection acts, such as the Clean Air Act³²⁸ and the Clean Water Act,³²⁹ include debarment provisions covering persons convicted of statutory violations regarding contracts to be performed at the facilities at which the improprieties arose.³³⁰

324. 40 U.S.C. §§ 276a to a-7 (1988). The statute requires federal construction contractors to pay certain wage rates set by the Secretary of Labor. *Id.* § 276a. The debarment provision of the Davis-Bacon Act is set forth in section 276a-2(a), and it mandates a three-year debarment for violators. *Id.* § 276a-2(a). The Secretary of Labor also is responsible for setting wage rates with respect to some 60 other statutes. *See* 29 C.F.R. § 5.1 (1993). Correspondingly, the Labor Department regulations provide for a three-year period of ineligibility for any contractor that the agency finds to have violated the wage standards of these statutes. *See id.* § 5.12. For cases arising under the Davis-Bacon Act, itself, the agency refers its findings to the Comptroller General. *Id.* § 5.12(a)(2).

325. 41 U.S.C. §§ 35-45 (1988). The debarment provision is set forth in section 37, and it requires a three-year debarment for violations of the provisions of the Act relating to certain wage and hour requirements and certain working conditions, “[u]nless the Secretary of Labor otherwise recommends.” *Id.* § 37.

326. 40 U.S.C. §§ 327-33 (1988 & Supp. V 1993). This Act includes a debarment provision that requires the Secretary of Labor to impose a three-year debarment on contractors engaged in “repeated wilful or grossly negligent violations of [the Act]” by allowing employees in federal construction projects to work in unsanitary, hazardous, or dangerous work surroundings. *Id.* § 333(d)(1)-(2). The Act does authorize the Secretary to lift a debarment prior to the end of the three-year period upon being “satisfied that a contractor or subcontractor whose name he has transmitted to the Comptroller General [as being debarred] will thereafter comply responsibly with the requirements” of the pertinent portions of the Act. *Id.* § 333(d)(2).

327. 41 U.S.C. §§ 351-58 (1988). This statute covers wages, fringe benefits, and working conditions for most federal service contracts. *See id.* § 351(a). Section 354 directs the Secretary of Labor to debar violators of the Act on a government-wide basis for three years “[u]nless the Secretary otherwise recommends because of unusual circumstances.” *Id.* § 354(a).

328. Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 1857-1857I (1988)).

329. Pub. L. No. 95-217, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

330. *See* 33 U.S.C. § 1368 (1988); 42 U.S.C. § 7606 (1988 & Supp. V 1993). A listing under these statutes would not necessarily be as broad as a debarment from all federal contracting given that the statutes apply only to the sites of the violations. This program has been implemented further through Executive Order No. 11,738, 38 Fed. Reg. 25,161 (1973), and EPA regulations. 40 C.F.R. § 15 (1993). For a detailed discussion of the EPA’s contractor listing program under these statutes, see ABA PRACTITIONER’S GUIDE, *supra* note 4, at 90, 94-96; DeVecchio & Engel, *supra* note 26, at 57-65.

B. Recent Enactments

In more recent years, Congress has added new statutory debarment provisions in an aggressive fashion. For example, with respect to defense procurement fraud, Congress now has barred individuals convicted of fraud or other felonies arising out of Department of Defense contracts from working on most defense contracts for at least five years.³³¹ This exclusionary period is mandatory unless the Secretary of Defense determines that a waiver is necessary "in the interests of national security."³³² This exclusion appears both redundant and unduly punitive, however, because the FAR already authorizes debarment of an individual who has been convicted of fraud or other offenses related to procurement contracts.³³³ Moreover, under the FAR, any such debarment would be permissive, generally limited to three years, and theoretically susceptible to limitation based on a satisfactory showing of mitigating factors.³³⁴

331. 10 U.S.C. § 2408 (1988 & Supp. V. 1993). Specifically, any such individual is barred from the following:

(A) Working in a management or supervisory capacity on any defense contract or any first tier subcontract of a defense contract.

(B) Serving on the board of directors of any defense contractor or any subcontractor awarded a contract directly by a defense contractor.

(C) Serving as a consultant to any defense contractor or any subcontractor awarded a contract directly by a defense contractor.

(D) Being involved in any other way, as determined under regulations prescribed by the Secretary of Defense, with a defense contract or first tier subcontract of a defense contract.

Id. § 2408(a)(1) (Supp. V 1993). The statute also includes a criminal sanction subjecting any defense contractor or subcontractor to a criminal penalty of up to \$500,000 if convicted of knowingly (1) employing an individual under this prohibition, or (2) allowing the barred individual to be a member of the contractor's board of directors. *Id.* § 2408(b).

332. *Id.* § 2408(a)(3). This subsection also mandates that the Secretary provide a report to Congress justifying any such waiver. *Id.*

333. *See* 48 C.F.R. § 9.406-2(a) (1993). In addition, because of concerns about an agency considering a contractor to be an "affiliate" of a debarred individual or having that individual's lack of responsibility taint a firm's perceived responsibility, most responsible contractors would be reluctant to employ a debarred individual in one of the capacities that the statute identifies, even in the absence of the criminal sanctions contained therein. *See id.* §§ 9.403, 9.406-5(a) (defining affiliate and describing the possible imputation of an individual's conduct to a company).

334. *See id.* §§ 9.406-1(a), 9.406-4. Of course, an individual who is convicted of procurement fraud may be unable to satisfy many of the mitigating factors and remedial measures that the FAR identifies. Nonetheless, the virtually absolute five-year prohibitions set forth in 10 U.S.C. § 2408 are clearly punitive and inconsistent with more flexible efforts to assure a contractor's present responsibility. *See supra* notes 286-316 and accompanying text (discussing the FAR's mitigating factors). A section of the recent procurement streamlining legislation removes the application of 10 U.S.C. § 2408 to contracts under the revised simplified acquisition threshold (\$100,000). *See* H.R. CONF. REP. NO. 712, *supra* note 62, at 102.

Other recent congressional enactments have included specific debarment provisions. For example, the Drug-Free Workplace Act of 1988 requires most federal contractors and grantees to maintain drug-free workplaces.³³⁵ The statute includes a presumptive five-year period of debarment from obtaining contracts and grants for violations of the statute.³³⁶ Similarly, the Customs and Trade Act of 1990³³⁷ permits the heads of appropriate agencies to debar violators from obtaining new contracts for purchasing unprocessed timber from federal lands for up to five years.³³⁸ Another statute requires the Secretary of Defense to make a debarment determination within ninety days following a person's conviction "of intentionally affixing a label bearing a 'Made in America' inscription to any product sold in or shipped to the United States that is not made in America."³³⁹ Although this statute does not mandate a debarment, if the Secretary decides not to debar, he or she must provide a report to Congress.³⁴⁰ This reporting requirement no doubt creates strong pressure on the Secretary to take debarment action.

With respect to nonprocurement programs, a section of the current Social Security laws provides an extensive debarment requirement.³⁴¹ That provision includes both mandatory and permissive "exclusions" from participation as a provider in the Medicare program or state health care programs because of a conviction for certain offenses or other delineated causes.³⁴² Moreover, in addition to the enactments delineated above,

335. 41 U.S.C. §§ 701-17 (1988).

336. *Id.* §§ 701(b), 702(b)(3). Although the statute does not mandate a five-year period, that is the maximum period set forth.

337. 16 U.S.C. §§ 620-620j (Supp. V 1993). The statute generally forbids individuals and organizations from exporting timber that originates from federal lands. *Id.* § 620a(a).

338. *Id.* § 620d(d). The statute also permits the pertinent agencies to cancel pending contracts with violators of the statute. *Id.*

339. 10 U.S.C. § 2410f(a) (Supp. V 1993); *see also* Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 202, 106 Stat. 4220, 4220 (requiring an amendment to the FAR to identify a violation of the "Made in America" label rules as a specific ground for debarment). Section 201 of this Act also requires an amendment to the FAR to identify the commission of certain unfair trade practices as another basis for debarment. Defense Production Act Amendments of 1992, § 201, 106 Stat. at 4220.

340. 10 U.S.C. § 2410f(a). The Defense Department recently deleted a DFARS regulation that specified a period of debarment for violators of the "Made in America" label statute "because the statutory mandate to specify the period of debarment was not continued in the Fiscal Year 1994 Defense Appropriations Act." 59 Fed. Reg. 27,662, 27,663 (1994) (repealing the regulation formerly codified at DFARS 9.406-4, 48 C.F.R. § 209.406-4).

341. *See* 42 U.S.C. § 1320a-7 (1988 & Supp. V 1993).

342. *Id.* The mandatory exclusions are for convictions of program-related crimes or patient abuse and must last for at least five years. *See id.* § 1320a-7(a), (c)(3)(B). The permissive exclusions relate to a variety of convictions or other specified causes. *Id.* § 1320a-7(b). With regard to certain violations, Congress has required the agency to con-

Congress recently has enacted still more statutory debarment provisions.³⁴³

C. Punishment or Protection?

In addition to recommending a cap of three years for debarments, the ACUS Temporary Conference counseled against nondiscretionary statutory debarments over three decades ago. After examining the then-existing statutory debarments, the Temporary Conference recommended that Congress amend the absolute debarment penalties of statutes such as the Buy American Act and the Davis-Bacon Acts to permit discretionary imposition of the scope and period of statutory debarments.³⁴⁴ The Temporary Conference also spoke approvingly of the presence of such discretion under the Walsh-Healey Act.³⁴⁵

In his mid-1970s review of the debarment and suspension process for the ACUS, Professor Steadman noted the general lack of congressional activity in the debarment and suspension field at that time.³⁴⁶ He expressed "wonder . . . that Congress ha[d] not enacted more statutes expressly authorizing debarment to further desired social or economic goals."³⁴⁷ With decided insight, Mr. Steadman also observed that

duct a hearing before an administrative law judge prior to the imposition of a permissive exclusion. *See id.* § 1320a-7(f)(2).

343. *See, e.g.*, 21 U.S.C. § 335a(a)-(c) (Supp. V 1993) (providing for mandatory and permissive debarments from submitting certain drug applications for violations relating to the drug approval process, where the debarment periods range from one to ten years, but can be permanent in the case of repeat violations); *cf.* 12 U.S.C. § 93(c) (Supp. V 1993) (providing for the forfeiture of bank franchises for violations of certain money laundering offenses (in a process similar to debarment including mitigating factors comparable to those which the FAR sets forth)); 20 U.S.C. § 954(l) (Supp. IV 1992) (precluding artists from receiving further grants from the National Endowment for the Arts if they use agency financial assistance for projects that the agency determines to be obscene; the agency may not issue further grants until the amount of the "violating" grant is repaid). For a more detailed discussion of these statutes, see ABA PRACTITIONER'S GUIDE, *supra* note 4, at 44-51.

344. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 295 (Recommendation 29-9).

345. *Id.* The Report stated that "Congress . . . conferred such discretion on the Secretary of Labor with regard to debarments under the Walsh-Healey Act, and the Committee believes the same considerations support amendment of the Buy American and Davis-Bacon Acts." *Id.* Interestingly, the Report observed that the review committee had received no objections to this particular recommendation. *Id.* As a historical note, notwithstanding the recommendation, the Buy American Act and the Davis-Bacon Act still include mandatory debarment language. *See* 40 U.S.C. § 276a-2(a) (1988); 41 U.S.C. § 10b(b) (1988 & Supp. V 1993).

346. *See* Steadman, *supra* note 8, at 801-02. His report identified the then-existing debarment statutes as included in the various labor standards acts described above, the Buy American Act and the early 1970s environmental statutes. *Id.* at 801.

347. *Id.* at 802.

“[g]iven the potential of the leverage, the Clean Air and Water Pollution Control Act amendments may presage things to come.”³⁴⁸

As discussed above, Congress certainly has become more active in passing legislation to sanction or require debarments or exclusions from government programs in a variety of contexts. There is little doubt that Congress has the authority to pursue social or economic goals through penal debarment enactments.³⁴⁹ On the other hand, mandatory debarments for stated periods clearly depart from the pure protection of governmental interests and become a form of punishment that should warrant greater procedural protection.³⁵⁰ Mandatory debarment statutes eliminate an agency's ability to be flexible with regard to limiting or lifting a debarment upon satisfactory proof of mitigating factors or remedial measures. Certainly, some of the statutes identified above neither mandate debarment nor eliminate administrative discretion.

Conversely, many of these same statutes provide for debarments for specific violations to be as long as five years or longer. If a statutory debarment is intended to be a forecast of a period of presumed nonresponsibility because of past wrongdoing, there does not appear to be any reason for more recent statutes to mandate a debarment period of five years as opposed to the traditional administrative presumption of three years for other convictions and improprieties.³⁵¹ Moreover, congressional identification of particular statutory violations as constituting grounds for debarment appears both overtly political and redundant in nature. Under the regulations, an agency already may debar a contractor

348. *Id.*

349. The former chair of the ABA's Section on Public Contract Law summarized this issue several years ago in explaining why suspension and debarment should involve a focus on present responsibility, not punishment:

If Congress desires to create such a penalty, namely, a period of time during which a contractor is to be precluded from doing business with the government as a punishment for past offenses, it may do so; however, any such punishment must be circumscribed with the same kind of protections which are traditionally available when the government seeks punishment for *past* offenses.

Myers Letter, *supra* note 218, at C-71.2.

350. *But see* *Manocchio v. Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1992) (holding that a five-year mandatory exclusion under the Medicare statutes resulting from a \$62.40 fraudulent claim was not punishment for purposes of the Double Jeopardy or Ex Post Facto clauses of the Constitution). In finding that the exclusion was not punitive, the court distinguished *United States v. Halper*, 490 U.S. 435, 448-49 (1989), which had held that the Double Jeopardy Clause is implicated when a criminal defendant, who is punished following a prosecution, also is the subject of a later punitive civil sanction. *Manocchio*, 961 F.2d at 1542.

351. *See* TEMPORARY CONFERENCE REPORT, *supra* note 9, at 294 (describing a debarment as “essentially a presumption or forecast of continuing nonresponsibility as a government contractor based on past misconduct”).

based on broad grounds, such as a conviction for fraud or a criminal offense in connection with a federal contract; commission of an offense such as theft, bribery, or making false statements; other offenses indicating a lack of business integrity or honesty, which seriously impact upon the contractor's present responsibility; or any other serious cause impugning the contractor's present responsibility.³⁵² Consequently, it appears that there is no need for separate statutes to list, as causes for debarment, violations of matters such as "Made in America" rules or Drug-Free Workplace limitations.

As the Temporary Conference recommended in 1962, Congress should act to remove statutory provisions that impose mandatory debarments and authorize administrative discretion with respect to imposing any such statutory debarments.³⁵³ Similarly, Congress should permit agencies to act with discretion concerning the period of any statutory debarments.³⁵⁴ It also should employ a general limit of three years as the administrative arena provides.³⁵⁵ By employing these prophylactic measures and refraining from enacting a panoply of quasi-punitive sanctions, Congress can achieve comparable social and economic goals.³⁵⁶

X. CONCLUSION

The 1962 ACUS Temporary Conference report on debarment and suspension identified many procedural flaws and weaknesses in the then-existing practices concerning the debarment and suspension of federal contractors. Now, over three decades later, many of the changes recommended in 1962 have come to pass. Although these changes have evolved slowly at times, the general procedural protections afforded to contractors have improved. Moreover, the applicability of these sanctions has expanded into the nonprocurement arena through the development of generally similar procedures. Undoubtedly, a certain level of

352. See 48 C.F.R. §§ 9.406-2(a)(1), (3), (4), -2(c) (1993).

353. See TEMPORARY CONFERENCE REPORT, *supra* note 9, at 295 (Recommendations 29-9).

354. See *supra* note 270 and accompanying text (explaining the FAR's broad grant of discretion).

355. See *supra* note 271 and accompanying text. Of course, agencies may exceed the regulatory presumptive period of three years in an exceptional case or extend a debarment based on new facts. See 48 C.F.R. §§ 9.406-4(a)-(b).

356. In a meeting conducted as part of the research for this project with several members of the Debarment and Suspension Committee of the ABA Public Contract Law Section (including the Chair), those present expressed strong concerns about the nature of the congressional activity in this area over the last several years. Interview with Richard Bednar, Chair, & Various Members, Debarment & Suspension Committee, ABA Public Contract Law Section, in Washington, D.C. (May 6, 1994).

tension always will exist between the government's efforts to ensure that it contracts or enters into other business relationships only with responsible concerns and the private sector's attempts to demonstrate present responsibility despite alleged or actual prior wrongdoing. The procedural protections now in place represent a fair and reasonable framework for balancing these competing interests and, beyond the specific recommendations discussed above, major changes probably are not warranted at this time. On the other hand, agency officials should bear in mind the significant duties that the debarment and suspension regulations entrust to them, and they should use sound judgment in exercising their substantial discretion.

XI. ADDENDUM

On January 19, 1995, members of the Administrative Conference of the United States (ACUS) met in plenary session to consider Professor Shannon's Article and various ACUS Committee recommendations. As a result, the ACUS adopted Recommendation 95-2 relating to debarment and suspension from federal programs.³⁵⁷

357. Office of the Chairman, Administrative Conference of the United States, Recommendation 95-2: Debarment and Suspension from Federal Programs (adopted Jan. 19, 1995). Recommendation 95-2 states:

I. Entities coordinating the Federal Acquisition Regulation (FAR) and the Common Rule for nonprocurement debarment, and individual agencies in their procurement and nonprocurement debarment and suspension regulations, should promptly ensure that the applicable regulations provide that suspensions or debarments from either federal procurement activities or federal nonprocurement activities have the effect of suspension or debarment from both, subject to waiver and exception procedures.

II. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should ensure that:

A. cases involving disputed issues of material fact are referred to administrative law judges, military judges, administrative judges of boards of contract appeals, or other hearing officers who are guaranteed similar levels of independence for hearing and for preparation of (1) findings of fact certified to the debarring official; (2) a recommended decision to the debarring official; or (3) an initial decision, subject to any appropriate appeal within the agency.

B. debarring officials in each agency should:

1. be senior agency officials;
2. be guaranteed sufficient independence to provide due process; and
3. in cases where the agency action is disputed, ensure that any information on which a decision to debar or suspend is based appears in the record of the decision

III. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should provide that each regulatory scheme for suspension and debarment includes:

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- A. a list of mitigating and aggravating factors that an agency should consider in determining (1) whether to debar or suspend and (2) the term for any debarment;
 - B. a process for determining a single agency to act as the lead agency on behalf of the government in pursuing and handling a case against a person or entity that has transactions with multiple agencies;
 - C. (with respect to procurement debarment only) a minimum evidentiary threshold of at least "adequate evidence of a cause to debar" to issue a notice of proposed debarment;
 - D. a requirement that all respondents be given notice of the potential government-wide impact of a suspension or debarment, as well as the applicability of any such action to both procurement and nonprocurement programs; and
 - E. encouragement for the use of "show cause" letters in appropriate cases.
- IV. All federal agencies in the executive branch (broadly construed to include "independent" agencies) should implement the "Common rule" and FAR rules on suspension and debarment.
- V. Congress should ordinarily refrain from limiting agencies' discretion by mandating suspensions, debarments, or fixed periods of suspension or debarment. Congress should also review existing laws that mandate suspensions, debarments, and fixed periods, to determine whether to amend the provisions to permit agency discretion to make such determinations.
- Id.* at 7-8 (footnotes omitted).

