

## THE CONGRESSIONAL WAR ON CONTRACTORS

JESSICA TILLIPMAN\*

*What about mandatory suspension for criminal activity[?] . . . [S]hould we not, just as a matter of character of our Nation, say if you are indicted—like Halliburton was for bribery in Africa—for criminal activity in connection with your government contracting activities, that you are done with us?<sup>1</sup>*

This comment by Senator Claire McCaskill, which is typical of the congressional attitude towards government contractors, demonstrates a fundamental misunderstanding of the suspension and debarment<sup>2</sup> regime, located in Part 9.4 of the Federal Acquisition Regulations (FAR). While inflammatory anti-contractor rhetoric is not a new congressional phenomenon, it is no longer limited to stump speeches, press releases, or politicized hearings. Recent congressional initiatives demonstrate many legislators' desire to transform debarment into a tool of punishment by banishing contractors from the procurement system without regard to contractor due process rights and "with little consideration of whether such action is needed or fair."<sup>3</sup>

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\* Assistant Dean for Field Placement and Professorial Lecturer in Law at The George Washington University Law School. Member of the District of Columbia, Virginia, and U.S. Court of Federal Claims bars. J.D. 2003, with honors, The George Washington University Law School; B.S. 2000, *cum laude*, Miami University (Oxford, OH). Ms. Tillipman teaches an Anti-Corruption seminar that focuses on corruption control issues in government procurement. She is also a Senior Editor of the FCPA Blog and a member of the ABA Committee on Debarment & Suspension. She would like to thank Chris Davis for his excellent research and assistance.

1. *Weeding Out Bad Contractors: Does the Government Have the Right Tools? Hearing Before the Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 14 (2011) [hereinafter *Weeding Out Bad Contractors*] (statement of Sen. Claire McCaskill).

2. For purposes of brevity, the use of the term "debarment" will hereinafter signify both "debarment" and "suspension," unless otherwise indicated. Suspension is a temporary exclusion, typically imposed pending the completion of the government investigation or legal proceedings related to the conduct for which the contractor was suspended. *Id.* In contrast, debarment lasts for a period commensurate with the seriousness of the misconduct, though typically not exceeding three years. See Jessica Tillipman, *Suspension and Debarment Part III: Mechanics and Mitigating Factors*, FCPA BLOG (June 25, 2012), <http://www.fcpablog.com/blog/2012/6/25/suspension-debarment-part-iii-mechanics-and-mitigating-facto.html>.

3. Steven Shaw, *Don't Go Overboard Banning Military Contractors*, REUTERS (Aug. 8, 2012), <http://blogs.reuters.com/great-debate/2012/08/08/dont-go-overboard-banning-military-contractors>.

As FAR 9.4 clearly states, “The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and *not for purposes of punishment*.”<sup>4</sup> Contrary to statements often made by certain members of Congress, the FAR prohibits Suspension & Debarment Officials (SDOs) from using debarment for the purpose of punishing past misconduct. Yet, despite the plain language of the FAR, the punishment/protection distinction is often misunderstood or simply ignored.<sup>5</sup> Some critics of the U.S. system, and quite a few members of Congress, see debarment primarily as a punitive measure without regard to a contractor’s present responsibility.<sup>6</sup> Indeed, immediately following BP’s recent suspension from the procurement system, Representative Ed Markey issued a press release that stated: “BP Suspension of Government Contracts Proper *Punishment*.”<sup>7</sup> This stunning mischaracterization of the FAR 9.4 debarment regime not only contradicts the plain language of the regulation, but contributes to the propagation of misinformation to a public that is largely under-informed about this process.

#### I. FAR 9.4: PRESENT RESPONSIBILITY—NOT PUNISHMENT

The FAR 9.4 regime is designed to ensure that the federal government does business only with “responsible” partners.<sup>8</sup> Debarment reinforces this policy by precluding the award of new contracts to companies whose misconduct indicates they are no longer responsible enough to do business with the U.S. govern-

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4. See Federal Acquisition Regulations, 48 C.F.R. § 9.402(b) (2012) (emphasis added) (“Agencies shall impose debarment or suspension to protect the Government’s interest and only for the causes and in accordance with the procedures set forth in this subpart.”).

5. Jessica Tillipman, *A House of Cards Falls: Why “Too Big to Debar” Is All Slogan and Little Substance*, 80 FORDHAM L. REV. RES GESTAE 49, 50–51 (2012) (describing the distinction between punishment and protection).

6. See, e.g., Edolphus Towns, *To Protect Taxpayer Dollars, Agencies Must Suspend and Debar Bad Government Contractors*, HUFFINGTON POST (Mar. 19, 2010), [http://www.huffingtonpost.com/chairman-ed-towns/to-protect-taxpayer-dolla\\_b\\_505705.html](http://www.huffingtonpost.com/chairman-ed-towns/to-protect-taxpayer-dolla_b_505705.html) (“With billions of tax dollars on the line, it is far past time for agencies to suspend and debar bad actors and for agency managers to aggressively enforce this process. Failure to enforce the law against bad actors is unfair to responsible companies and unfair to taxpayers.”).

7. Press Release, Ed Markey, Markey: BP Suspension of Government Contracts Proper Punishment (Nov. 28, 2012), available at <http://markey.house.gov/press-release/markey-bp-suspension-government-contracts-proper-punishment> (emphasis added).

8. See 48 C.F.R. § 9.103 (“Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.”); see also 48 C.F.R. § 9.104-1 (providing a list of the factors that define a presently responsible contractor).

ment.<sup>9</sup> Debarment is government-wide and precludes contractors from obtaining any new government contracts or subcontracts.<sup>10</sup> It is a discretionary, administrative remedy that enables agencies to exclude contractors from the federal procurement system only to protect the government from the imminent harm that may result from doing business with a non-responsible contractor.<sup>11</sup> “Debarment may last for up to three years, and may be as broad or as limited as the government deems necessary to protect its interests, ranging from the debarment of the entire company to the debarment of a division, facility, or even a single individual.”<sup>12</sup> While it is always reasonable to expect ethical conduct from companies that receive taxpayer dollars, the debarment regime must be used appropriately—to protect the government, and not to punish contractors that do not pose a threat to government interests.

What critics of the FAR debarment system often fail to understand is that debarment is a business decision<sup>13</sup>—it is not designed to punish past misconduct or put companies out of business. Fines and incarceration are prosecutors’ tools designed solely for the purpose of punishing past misconduct. In contrast, the FAR 9.4 regime protects the government’s diverse interests by requiring SDOs to consider a multitude of factors that help the SDO determine whether a contractor is a “presently responsible” business partner.<sup>14</sup> The system is not intended to be used as a sledgehammer, sentencing companies to the corporate death penalty without regard for the protection of the government’s nuanced best interests. Given the severity of the consequences that may result from debarment, “the system is designed not only to protect the government, but the rights of contractors as well.”<sup>15</sup>

Contrary to recent statements made by certain members of Congress, the regime does not demand a contractor’s exclusion if

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9. Jessica Tillipman, *Suspension & Debarment Part I: An Introduction*, FCPA BLOG (June 5, 2012), <http://www.fcpablog.com/blog/2012/6/5/suspension-debarment-part-i-an-introduction.html>.

10. See 48 C.F.R. § 9.405(a). In addition, debarment may also preclude the award of state and local government contracts, as well as procurement opportunities with international organizations, such as the World Bank or United Nations. The extraordinary reputational damage associated with a company’s debarment often negatively impacts a contractor’s commercial relationships as well. See Tillipman, *supra* note 5.

11. Tillipman, *supra* note 5.

12. *Id.*

13. See Jolie Lee, *Suspension, Debarment a “Business Decision” for Agencies*, FED. NEWS RADIO (June 14, 2012), <http://www.federalnewsradio.com/486/2903438/Suspension-debarment-a-business-decision-for-agencies>.

14. 48 C.F.R. § 9.406-1(a).

15. Tillipman, *supra* note 5.

there is a basis for debarment. The FAR expressly states that “[t]he existence of a cause for debarment . . . does not necessarily require that the contractor be debarred.”<sup>16</sup> In order to determine whether the government’s interests need protection through debarment, an SDO looks beyond the misconduct to the contractor’s present responsibility. When considering the potential exclusion of a contractor, the SDO first determines whether there are grounds for the suspension or debarment of the contractor.<sup>17</sup> If a basis exists, the SDO should then consider whether there are any mitigating factors establishing the contractor as “presently responsible” despite the past misconduct.<sup>18</sup> Factors that suggest “the contractor is unlikely to repeat past misconduct—such as changes in personnel or procedures, restitution, or cooperation in a government investigation—can incline an agency’s decision against debarment.”<sup>19</sup> Indeed, if the contractor is “presently responsible despite past misconduct, it presents no threat to the government’s interests, making debarment inappropriate.”<sup>20</sup>

Unfortunately, because of the congressional focus on punishment rather than protection, any SDO decision against suspending or debarring a contractor is often viewed as inappropriate or evidence of a broken debarment system. This fixation on debarment renders critics willfully blind to the efficacy of other procurement fraud remedies. Indeed, debarment is but one tool among many that enables agencies to combat fraud and poor contractor performance.<sup>21</sup> For example, when appropriate, SDOs may enter into administrative compliance agreements with contractors that require companies to undergo a significant ethical transformation—such as revising and enhancing their internal compliance

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16. 48 C.F.R. § 9.406-1(a).

17. 48 C.F.R. §§ 9.406-2, 9.407-2 list the causes for debarment and suspension (respectively).

18. 48 C.F.R. § 9.406-1(a) (providing a list of mitigating factors that a debarment official must consider in making a debarment determination).

19. KATE M. MANUEL, CONG. RESEARCH SERV., RL 34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 9 (2012).

20. Todd J. Canni & Steven A. Shaw, *Comments on the Wartime Contracting Commission’s Recommendations on Suspension and Debarment*, SERVICE CONTRACTOR, Sept. 2011, at 13, 14.

21. Prepared Remarks, Stephen Shaw, Deputy Gen. Counsel, Dep’t of Air Force, Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions? 4 (Oct. 6, 2011) [hereinafter Protecting Taxpayer Dollars], available at [http://oversight.house.gov/wp-content/uploads/2012/01/10-6-11\\_Tech-IP\\_Suspension-Debarment\\_Sanctions\\_Steven\\_Shaw\\_Testimony.pdf](http://oversight.house.gov/wp-content/uploads/2012/01/10-6-11_Tech-IP_Suspension-Debarment_Sanctions_Steven_Shaw_Testimony.pdf) (explaining that Suspension & Debarment Officials (SDOs) “already have all the tools [they] need to protect the Government and effect meaningful change”).

systems, retaining an independent compliance monitor, conducting ethics and compliance training for employees, and continued cooperation with the government. While debarment is appropriate in some instances, “[i]n most cases, the government is not threatened by continuing to deal with a contractor whose employees engaged in isolated misconduct but whose management corrected the problem and is now acting responsibly.”<sup>22</sup> The discretion afforded to SDOs enables them to determine not only whether debarment is appropriate, but to select and implement the best possible solution to enhance contractor compliance and improve corporate governance.

Given the wide range of tools at an SDOs’ disposal, Congress’s fixation on the overall number of suspensions and debarments is misplaced. Indeed, increasing the number of exclusions does not mean that the system has been improved or that contractors have become more compliant.<sup>23</sup> Instead of focusing on the government’s nuanced best interests, congressional pressure is creating a system in which agencies believe they must remove contractors in order to increase their debarment statistics—rather than truly weighing the best interests of the government.<sup>24</sup> This unfortunate “submission to perceived political pressure” will have a devastating and long-term impact on the procurement system.<sup>25</sup>

## II. THE MYTH OF “TOO BIG TO DEBAR”

Recent statements by critics have shamefully perpetuated misinformation about the debarment regime and helped fuel increasing congressional ire towards the system. Critics contend that large contractors evade debarment because they are simply too big to be excluded. For example, after several high-profile violations of the Foreign Corrupt Practices Act (FCPA), there were numerous calls

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22. Shaw, *supra* note 3.

23. Protecting Taxpayer Dollars, *supra* note 21, at 2 (“The number of actions taken—which appears to be the focus of some people—is not the best metric to assess the effectiveness of a suspension and debarment program.”).

24. Neil Gordon, *Report Shows Suspensions and Debarments on the Rise*, PROJECT ON GOV’T OVERSIGHT (Sept. 21, 2012), <http://pogoblog.typepad.com/pogo/2012/09/report-shows-suspensions-and-debarments-on-the-rise.html> (“Twenty-seven federal agencies and departments (accounting for 98 percent of all federal contract spending) reported a total of 5,838 suspensions, proposed debarments, and debarments in fiscal year 2011. This is a 39 percent increase over FY 2010 and a 119 percent increase over FY 2009.”).

25. Shaw, *supra* note 3 (“Given that S&D decisions cannot be appealed within the executive branch and can be overruled by a court only where there is an abuse of discretion, it is incumbent upon agency officials to exercise their authority more thoughtfully and responsibly.”).

for debarment to be used to punish companies' overseas misconduct. Following large FCPA settlements with U.S. enforcement authorities, such as those with Siemens<sup>26</sup> and BAE,<sup>27</sup> individuals raised concerns about the ability of these contractors to continue obtaining large contracts from the U.S. government.<sup>28</sup>

Framed as a concern for taxpayer dollars, critics have argued that it was outrageous for these contractors to continue participating in the U.S. procurement system following their FCPA-related settlements with the government.<sup>29</sup> They have demanded that these contractors be "punished" by being banished from the procurement system.<sup>30</sup> Given the populist appeal of this argument, it has gained significant traction. Even though the FCPA impacts companies across many different sectors, critics have repeatedly singled out government contractors and called for their removal from the procurement system. Critics of the regime do not argue that debarment is needed to protect the government from imminent harm. Instead, they argue that contractors need to be punished to deter other contractors from engaging in the same behavior.<sup>31</sup> They contend that if companies are bribing officials abroad, they are most likely bribing officials here.<sup>32</sup> Some critics also argue that debarment is the proper course of action, even if it harms the government's best interests, simply to ensure that the United States is not sending mixed messages about overseas corruption.<sup>33</sup>

The focus on utilizing debarment as a form of punishment is not only illegal, it ignores the substantial penalties these companies

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26. Press Release, Dep't Just., Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008) [hereinafter Siemens AG and Three Subsidiaries Plead Guilty], *available at* <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

27. Press Release, Dep't Just., BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010) [hereinafter BAE Systems PLC Pleads Guilty], *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

28. See Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 *FORDHAM L. REV.* 775, 776, 801 (2011).

29. See *id.* at 801.

30. *Id.* ("In categorically refusing to seriously consider suspending or debarring companies that undermine confidence in free markets overseas, our nation risks eroding the public's trust in government institutions at home.")

31. *Id.* at 778.

32. *Id.* at 781.

33. *Id.* at 813 (stating that SDOs should "regularly consult with the DOJ, Congress, and other policy makers to determine whether avoiding the collateral consequences that may result from debarring contractors . . . justifies the mixed messages and toxic side effects that result from the United States' complacency in preventing the spread of corruption").

have paid for their misconduct and fails to consider the best interests of the government. BAE and Siemens paid two of the largest fines ever levied under the FCPA regime—\$400 million for BAE<sup>34</sup> and \$800 million for Siemens<sup>35</sup> (on top of \$856 million in fines levied in Germany). Moreover, despite the critics' misleading claims to the contrary, in both the BAE and Siemens enforcement actions, SDOs conducted a review of the companies' present responsibility and found that they did not need to be excluded in order to protect the government's interests. The SDOs properly looked at the required mitigating factors and found that despite the companies' misconduct, they posed no imminent threat to the government.

In the case of Siemens, the Defense Logistics Agency (DLA) issued a formal determination that Siemens was a responsible contractor.<sup>36</sup> DLA did so for the very same reasons that Siemens received a reduced fine/penalty in its settlement with the U.S. Department of Justice (DOJ). Among numerous other initiatives, Siemens cooperated extensively with the government and completely overhauled its compliance program.<sup>37</sup> Moreover, in addition to terminating management that engaged in the misconduct, the company now has hundreds of compliance personnel.<sup>38</sup> Indeed, Siemens's compliance program is now viewed as the gold standard in anti-bribery compliance.<sup>39</sup>

In the BAE matter, despite *vocal* claims to the contrary, the Air Force did consider debarring BAE. The Air Force, concerned with BAE's lack of cooperation with the DOJ's bribery investigation, sent the company a "Show Cause"<sup>40</sup> letter—placing the onus on BAE to demonstrate its present responsibility.<sup>41</sup> After receiving the letter from the Air Force, BAE immediately began cooperating

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34. BAE Systems PLC Pleads Guilty, *supra* note 27.

35. Siemens AG and Three Subsidiaries Plead Guilty, *supra* note 26.

36. Legal Proceedings – First Six Months of Fiscal 2009, SIEMENS (Apr. 29, 2009), available at [http://secfilings.nyse.com/filing.php?ipage=6287828&DSEQ=&SEQ=29&SQDESC=SECTION\\_PAGE](http://secfilings.nyse.com/filing.php?ipage=6287828&DSEQ=&SEQ=29&SQDESC=SECTION_PAGE).

37. See Department's Sentencing Memorandum at 22, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008).

38. See *id.* at 22.

39. See *id.* at 24.

40. A "show cause" letter is sent to the contractor detailing instances of suspected misconduct, and provides the contractor with an opportunity to submit evidence to show that it is a responsible contractor. See *FAQ Topic*, DEP'T AIR FORCE GEN. COUNSEL, <http://www.safgc.hq.af.mil/questions/topic.asp?id=1643> (last visited Mar. 4, 2013).

41. See Letter from Steven Shaw, Deputy Gen. Counsel, Dep't of the Air Force, to Ian King, Chief Exec. Officer, BAE Sys. (July 19, 2011), available at <http://www.safgc.hq.af.mil/shared/media/document/AFD-110801-026.pdf>.

with the DOJ, eventually agreeing to pay a \$400 million fine and allowing the Air Force to investigate BAE's processes, procedures, and culture.<sup>42</sup> Following an extensive review, the Air Force determined that BAE was presently responsible and that debarment was not necessary to protect the government's interests.<sup>43</sup>

Given that the FAR 9.4 discretionary debarment regime is designed to protect the government's interests and not punish past misconduct, the agencies properly decided not to debar the presently responsible companies. Moreover, in both cases, the threat of eliminating the contractors' government revenue streams provided the SDOs with significant leverage to facilitate ethical transformations in the companies. Indeed, this leverage can be used as a "carrot and stick" to encourage ethical conduct and punish failure with debarment.<sup>44</sup> By focusing only on the past misconduct, rather than those factors relating to the companies' remediation and cooperation, critics (including legislators<sup>45</sup>) have drawn uninformed and, in some instances, provably false conclusions.<sup>46</sup>

The "too big to debar" myth has been perpetuated outside the FCPA context as well. Most recently, commentators heavily criticized the government for its failure to debar BP following the Deepwater Horizon oil spill in 2010.<sup>47</sup> Immediately after the spill, critics demanded BP's immediate exclusion from the U.S. procurement system, arguing that BP should be "punished" for the unprecedented environmental and economic disaster.<sup>48</sup> When BP was not immediately excluded, the situation was considered proof that certain companies are simply "too big to fail."<sup>49</sup> Complaints regarding

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42. See Protecting Taxpayer Dollars, *supra* note 21, at 3.

43. *Id.* at 4.

44. Canni & Shaw, *supra* note 20, at 15.

45. Indeed, one member of Congress even proposed a bill that would make debarment mandatory for violations of the FCPA. See Overseas Contractor Reform Act, H.R. 5366, 111th Cong. (2010) (passed the House but never passed the Senate).

46. See Tillipman, *supra* note 5, for a discussion of how ignoring BAE's remedial efforts can lead to an inaccurate conclusion.

47. See, e.g., Rena Steinzor & Anne Havemann, *Too Big to Obey: Why BP Should Be Debarred*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 81, 83 (2011); Neil Gordon, *Debarment for BP? Don't Be Fuelish!*, PROJECT ON GOV'T OVERSIGHT (July 7, 2010), <http://pogoblog.typepad.com/pogo/2010/07/debarment-for-bp-dont-be-fuelish.html>.

48. Steinzor & Havemann, *supra* note 47, at 83; Gordon, *supra* note 47; see also *Rumors of BP Debarment*, DAILY KOS (May 23, 2010), <http://www.dailykos.com/story/2010/05/23/869234/-Rumors-of-debarment-for-BP> ("In what would be the most fitting *punishment* for BP's many crimes, there are rumors that the Environmental Protection Agency (EPA) is considering debarment for the company.") (emphasis added).

49. Ron Nixon, *Size Protects Government Contractors That Stray*, N.Y. TIMES (Dec. 17, 2010), <http://www.nytimes.com/2010/12/18/us/politics/18contractor.html> ("While small companies are often debarred, the biggest ones, like BP, have become the equivalent



BP's continued ability to receive government contracts reached a fever pitch following the company's historic \$4.5 billion settlement with the U.S. government in November 2012.<sup>50</sup> The critics were proven wrong soon thereafter when the Environmental Protection Agency (EPA) suspended BP, noting that the Deepwater Horizon incident and response demonstrated a "lack of business integrity."<sup>51</sup> One would expect the critics to be pleased with the EPA's actions, yet soon after the EPA's announcement, some managed to find a new reason to criticize the government for not "punishing" the company with an even longer exclusion from the procurement system.<sup>52</sup>

While the conduct prompting BP's settlement and suspension was undeniably egregious, the conversation surrounding BP's exclusion was a prime example of the flawed, misguided, and sometimes even shockingly false information that is often spread about the FAR 9.4 procurement regime. Proponents of the "too big to debar" myth fundamentally fail to grasp the purpose of the system—a perspective which appears to convince them that anything short of debarment is evidence of a failed regime. One critic noted as follows:

A more general form of debarment is explicitly designed to "protect the public interest" and cannot be used to "punish" contractors. Because government officials use this language to avoid debarment whenever it seems inconvenient, the nuclear

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of 'too big to fail,' Senator Russ Feingold, Democrat of Wisconsin, said at a Congressional hearing this year."); Justin M. Davidson, *Polluting Without Consequence: How BP and Other Large Government Contractors Evade Suspension and Debarment for Environmental Crime and Misconduct*, 29 PACE ENVTL. L. REV. 257, 279 (2011) ("Quite simply, some companies are too big to ban, providing these companies with the ability to essentially circumvent the threat of company-wide debarment when faced with the choice of whether to conduct themselves properly or whether to follow 'business as usual' methods.").

50. Danielle Ivory, *BP Seen Escaping U.S. Contracting Ban After Oil Spill Settlement*, BLOOMBERG BUSINESSWEEK (Nov. 15, 2012), <http://www.businessweek.com/news/2012-11-15/bp-seen-escaping-u-dot-s-dot-contracting-ban-after-oil-spill-settlement> ("'[I]t looks like there will be little if any suspension or debarment for BP,' said Charles Tiefer, a law professor at the University of Baltimore.").

51. Press Release, Env'tl. Prot. Agency, BP Temporarily Suspended from New Contracts with the Federal Government (Nov. 28, 2012), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/0/2AAF1C1DC80C969885257ABF006DAFB0>.

52. See Letter from Robert Weissman, President, Pub. Citizen, and Tyson Slocum, Energy Program Dir., Pub. Citizen, to Lisa P. Jackson, Adm'r, Env'tl. Prot. Agency (Dec. 4, 2012), *available at* <http://www.citizen.org/documents/Letter-EPA-Debar-BP-2012-12-04.pdf>. Indeed, Public Citizen's call for a 5-year debarment, the length of BP's probation, ignores the purpose of the debarment regime. By linking debarment with a punitive probationary period, the organization has demonstrated that it is less concerned about protecting the government's interests than it is with adding an additional layer of punishment to BP's panoply of sanctions. *Id.*

option does not seem to worry the Fortune 500 corporations that dominate Department of Defense (DOD) purchase orders.<sup>53</sup>

Sadly, statements like this pay lip service to text of FAR 9.4, while simultaneously condemning the debarment regime for not being wielded as a “nuclear” form of punishment. Moreover, the suggestion that DOD’s largest contractors do not take the threat of debarment seriously is not only baseless, but laughable, particularly given the sharp increase in suspension and debarment activity in recent years.<sup>54</sup>

If critics would actually look behind the statistics, they would realize that large contractors do not “escape” the system because SDOs are too afraid to exclude them. Rather, they are more likely to have the resources to eliminate the problem and demonstrate present responsibility. For instance, in large multinational corporations, the misconduct is typically limited to a certain division of the company, enabling the SDO to exclude that division while permitting the remainder of the company to continue contracting with the government.<sup>55</sup> Similarly, large contractors often possess a greater ability to correct the misconduct, fire the responsible employees, implement robust compliance programs, and demonstrate present responsibility.<sup>56</sup> Conversely, in small companies “the person responsible for the misconduct might be the company leader who is also critical to making or providing what the government needs. ‘If you remove or isolate him, you isolate the expertise, and the company can’t really provide a service to the government.’”<sup>57</sup>

Furthermore, the baseless, yet oft repeated claim that the government refuses to debar its favorite contractors<sup>58</sup> does not com-

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53. Rena Steinzor, *The Nuclear Option: Debar BP, End \$2 Billion Fuel Sales Now*, CPR BLOG (Nov. 15, 2012), <http://progressivereform.org/CPRBlog.cfm?idBlog=0619824F-07FA-9E6B-44CA4D5D66B6651C>.

54. See INTERAGENCY SUSPENSION & DEBARMENT COMM., FEDERAL AGENCY SUSPENSION AND DEBARMENT ACTIVITIES 6 (2012), available at [http://www.epa.gov/isdc/pdf/isdc\\_section\\_873\\_fy\\_2011\\_report\\_to\\_congress\\_lieberman.pdf](http://www.epa.gov/isdc/pdf/isdc_section_873_fy_2011_report_to_congress_lieberman.pdf).

55. For example, in February 2012, the Air Force suspended the San Antonio office of Booz Allen. See OFFICE OF THE DEPUTY GEN. COUNSEL, DEP’T OF THE AIR FORCE, MEMORANDUM IN SUPPORT OF THE PROPOSED DEBARMENTS OF BOOZ ALLEN HAMILTON, INC. 1 (2012), available at [http://www.federalnewsradio.com/pdfs/BAH\\_Notice\\_and\\_Memo.pdf](http://www.federalnewsradio.com/pdfs/BAH_Notice_and_Memo.pdf).

56. Tillipman, *supra* note 5.

57. Nixon, *supra* note 49 (statement of Alan Chvotkin, executive vice president and counsel of the Professional Services Council).

58. Stevenson & Wagoner, *supra* note 28, at 775 (“Enforcement officials shy away from debarring entities that violate the FCPA due to the short-term inconvenience of an agency’s inability to transact business with its favorite contractor . . .”).

port with reality: in recent years, SDOs have excluded some of the country's largest contractors, such as BP, Booz Allen,<sup>59</sup> Enron,<sup>60</sup> Arthur Anderson,<sup>61</sup> MCI Worldcom,<sup>62</sup> several Boeing Launch Systems divisions,<sup>63</sup> an L-3 Communications' Special Support Programs Division,<sup>64</sup> IBM,<sup>65</sup> GTSI,<sup>66</sup> and AED.<sup>67</sup> By perpetuating misinformation about the debarment regime, critics create a narrative that often influences members of Congress to create "solutions" in search of a problem. While the debarment regime is not flawless, the critics' hyperbolic claims reveal themselves as catchy slogans with little substance.

### III. LEGISLATIVE CONTRACTOR-BASHING

Criticism from the media, various commentators, and watchdog groups often negatively influences a public that is largely uninformed about the debarment process, creating public pressure to rid the government of "bad" contractors. Certain members of Congress have been eagerly receptive to this anti-contractor rhetoric and have pursued legislative "remedies" designed to "fix" a purportedly broken debarment regime. While the debarment regime is not perfect, these legislative "solutions" never truly address the perceived deficiencies in the system.

Recent government audits of the debarment regime demonstrate that while some agencies need to improve their use of existing suspension and debarment tools, others have robust programs that adequately protect the government.<sup>68</sup> Any weaknesses

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59. See OFFICE OF THE DEPUTY GEN. COUNSEL, *supra* note 55, at 1.

60. Dorn McGrath, *Misconduct Unrelated to Federal Contracts Could Lead to Suspension or Debarment*, NAT'L DEF. (May 2005), [http://www.nationaldefensemagazine.org/archive/2005/May/Pages/ethics\\_corner5770.aspx](http://www.nationaldefensemagazine.org/archive/2005/May/Pages/ethics_corner5770.aspx).

61. *Id.*

62. *Id.*

63. Protecting Taxpayer Dollars, *supra* note 21, at 2.

64. *Id.*

65. Jill Aitofu, *IBM Suspended from New Federal Contracts*, GOV'T EXEC. (Mar. 31, 2008), <http://www.govexec.com/dailyfed/0308/033108j1.htm>.

66. Nick Wakeman, *GTSI Suspended but Vows to Fight*, WASH. TECH. (Oct. 1, 2010), <http://washingtontechnology.com/articles/2010/10/01/gtsi-fights-sba-charge.aspx>.

67. Dana Hedgpeth & Josh Boak, *USAID Suspends District-Based Nonprofit AED from Contracts Amid Investigation*, WASH. POST (Dec. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/08/AR2010120807665.html>.

68. Compare U.S. GOV'T ACCOUNTABILITY OFFICE, *SUSPENSION & DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED 2-5* (2011), and INSPECTOR GEN., DEP'T OF DEF., *ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DoD SUSPENSION & DEBARMENT PROCESS* (2011), with INTERAGENCY SUSPENSION & DEBARMENT COMM., *supra* note 54, at 6, and U.S. GOV'T ACCOUNTABILITY OFFICE, *SUSPENSION AND DEBARMENT: DOD HAS ACTIVE REFERRAL PROCESSES BUT ACTION NEEDED TO*

identified by auditors have typically involved certain agencies underutilizing their suspension and debarment tools.<sup>69</sup> The deficiencies are not the result of an absence of appropriate tools or legislation. Yet, despite the findings of independent auditors, members of Congress continue to propose unnecessary, and in many instances counterproductive, legislation designed to fundamentally overhaul the debarment regime, often undermining contractor due process rights in the process.

Given the populist appeal of anti-contractor rhetoric, debarment legislation has become a staple of congressional initiatives.<sup>70</sup> Some members of Congress are unrivaled in their determination to use the debarment system to “weed out”<sup>71</sup> bad contractors with little or no regard for other procurement fraud remedies. They have made clear that they believe the debarment system is broken, that unscrupulous contractors are stealing taxpayer dollars, and that increasing the use of debarment is the only means available to protect government interests.<sup>72</sup>

In recent years, there has been a significant effort by members of Congress to strip SDOs of their discretion and transform debarment into a tool of punishment through legislation designed to automatically debar contractors.<sup>73</sup> Congress does not appear to care about present responsibility, mitigation, or remediation—it seems to only care about sending a message and ridding the system of those it deems “bad contractors.”<sup>74</sup> Certain members appear to give little weight to the fact that SDOs have often carefully considered whether the government’s interests need to be protected. To many members, it is a numbers game—if debarment is not used

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PROMOTE TRANSPARENCY 2 (2012) [hereinafter GAO, DOD HAS ACTIVE REFERRAL PROCESSES], available at <http://www.gao.gov/products/GAO-12-932>.

69. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 11.

70. A brief search of [opencongress.gov](http://opencongress.gov) shows that since 2006, the following bills have proposed debarment of federal contractors for various offences: H.R. 5366; H.R. 3588, 112th Cong. (2011); H.R. 1555, 111th Cong. (2009); H.R. 2825, 111th Cong. (2009); H.R. 1668, 111th Cong. (2009); H.R. 2904, 110th Cong. (2007); H.R. 3033, 110th Cong. (2007); H.R. 3496, 110th Cong. (2007); H.R. 6243, 109th Cong. (2006); H.R. 5505, 109th Cong. (2006).

71. See generally *Weeding Out Bad Contractors*, *supra* note 1, at 1 (addressing what Congress has deemed the “unacceptable and costly” problem of bad contractors).

72. See *id.* at 3. See generally Jared Serbu, *Suspension and Debarments Rise Amid Pressure from Congress*, FED. NEWS RADIO (June 14, 2012) <http://www.federalnewsradio.com/406/2903240/Suspension-and-debarments-rise-amid-pressure-from-Congress> (noting Congress’s pressure on agencies to suspend and debar irresponsible contractors).

73. See, e.g., H.R. 5366, 111th Cong. (2010).

74. See *Weeding Out Bad Contractors*, *supra* note 1, at 1 (stating how debarment “is used all too rarely”).

extensively, then agencies have not done their job and Congress must do it for them.<sup>75</sup> Congress has made it abundantly clear that they are unhappy when contractors continue to receive government contracts, even in instances where an SDO has determined that a contractor's corrective actions are adequate and the company is deemed presently responsible.

Recently, there has been a flurry of legislative activity designed to "fix" the debarment regime, including proposals for mandatory debarment—an initiative that demonstrates no regard for a contractor's present responsibility. Moreover, these initiatives often ignore the due process protections afforded to contractors, such as notice and an opportunity for a hearing.<sup>76</sup> These critical due process protections stand in recognition of the harsh consequences of exclusion, which "stigmatize" the contractor and act "immediately to deprive a contractor of the ability to seek business and generate revenue for a significant period of time."<sup>77</sup>

Sadly, despite a well-established body of case law and the plain language of FAR 9.4, many critics of the debarment regime, including certain members of Congress, view due process protections as a burden—precluding the quick and efficient execution of "bad contractors." Frustrated by contractors' due process protections, which have been described by Senator McCaskill as "bureaucratic handcuffs,"<sup>78</sup> she and other members have proposed (and in some instances, passed) legislation that bypasses discretion and eliminates due process in order to rid the system of "bad contractors" as quickly and thoughtlessly as possible. Alas, not only have Congress's recent initiatives failed to address perceived deficiencies in the system, they have actively harmed it. For example, in a move that has left most of the procurement community bewildered, Congress inserted provisions into the 2012 Consolidated Appropria-

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75. See, e.g., *id.* at 3 (statement of Sen. Joseph Lieberman) (stating that suspension and debarment are used too rarely).

76. See MANUEL, *supra* note 19, at 12. In contrast with debarment, contractors may be "suspended without prior notice or an opportunity to be heard so long as they are 'immediately advised' of the suspension and allowed to offer information in opposition to the suspension within 30 days." *Id.*

77. Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 550 (2009).

78. Jared Serbu, *Bill Aims to Overhaul Wartime Contracting*, FED. NEWS RADIO (Mar. 2, 2012), <http://www.federalnewsradio.com/526/2769631/Bill-aims-to-overhaul-wartime-contracting> (quoting Sen. McCaskill as stating "the weight of those processes was weighing down the ability to hold contractors accountable").

tions Act that requires SDOs to affirmatively consider suspension or debarment before awarding a contract to a corporation that has either been convicted of a felony in the past twenty-four months or has unpaid tax delinquencies.<sup>79</sup> In other words, corporations (and in some instances, individuals) are automatically excluded from receiving contracts if they have been convicted of a felony criminal offense in the preceding two years, unless an SDO affirmatively considers debarment and determines it is not warranted.<sup>80</sup>

While it is not surprising that Congress slipped language into an Appropriations Act that is akin to a mandatory exclusion, procurement attorneys were stunned by its utterly confusing, inconsistent, and illogical provisions.<sup>81</sup> First, Congress only included the provisions in five of the nine appropriations bills,<sup>82</sup> subjecting some agencies to this legislative debacle, while leaving others to continue without restriction. It is unclear how or why Congress selected the covered agencies or if this selection process was even intentional.

In addition to the bewildering and selective coverage of certain agencies, Congress also decided to impose different debarment “triggers” in each of the bills with no apparent rationale for the blatant inconsistencies. While some of the clauses require the exclusion of corporations convicted of a federal felony offense,<sup>83</sup> others require exclusion for the conviction of a corporation’s

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79. *E.g.*, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 504, 125 Stat. 852, 883 (“None of the funds . . . may be used to enter into a contract . . . with . . . any corporation that was convicted . . . of a felony criminal violation . . . within the preceding [twenty-four] months . . . unless the agency has considered suspension or debarment of the corporation.”) (reauthorized by H.J. Res. 117, § 101(a)(10) (2012)).

80. Consolidated Appropriations Act § 8125.

81. *See, e.g.*, Bob Wagman, *Suspension and Debarment: What Have They Done Now?*, GOV'T CONT. LEGAL F. (Jan. 18, 2012), <http://www.governmentcontractslegalforum.com/2012/01/articles/suspension-debarment/suspension-and-debarment-what-have-they-done-now> (“Guaranteed to create uncertainty, the Consolidated Appropriations Act of 2012 . . . included several little-noticed provisions generally excluding the use of federal funds for any corporation convicted of a felony within the past 24 months.”); *Suspension and Debarment: New Trends and Continuing Due Process Debate*, VENABLE LLP (July 13, 2012), <http://www.venable.com/suspension—debarment-new-trends-and-the-continuing-due-process-debate-07-13-2012> (“A particularly disturbing facet of Congress’s recent push for increased debarments is the recent uptick in attempts to impose automatic debarment provisions — the latest effort being an automatic ineligibility for federal contracts and grants for felony convictions contained in appropriations measures.”).

82. The appropriations including the language are: Department of Defense (DOD); Energy and Water Development; Financial Services and General Government; Departments of Labor, Health and Human Services, and Education; and Military Construction and Veterans Affairs. Wagman, *supra* note 81.

83. *See, e.g.*, Consolidated Appropriations Act § 8125 (providing for restrictions on appropriations for DOD).

officers and agents as well.<sup>84</sup> The astounding inconsistencies do not stop there—in some provisions, exclusion is applicable to federal felony convictions, while in others, it is applicable to federal *and* state felony convictions.<sup>85</sup> These inexplicable discrepancies are not only confusing, but are completely void of logic. In its haste to expel contractors from the procurement system, Congress has created a system that is a blatant affront to reason.

Not surprisingly, these provisions caused significant panic and chaos within the procurement community who had to quickly determine how to navigate around the confusing and inconsistent language. Moreover, because the requirements were tied to an Appropriations Act, a failure to follow the requirements could cause an agency to violate the Anti-Deficiency Act.<sup>86</sup> While agencies have adapted slightly to this provision, the Appropriations language has caused serious issues.<sup>87</sup> For example, it requires each individual awarding agency to make an affirmative debarment determination before awarding a contract—a requirement which has forced contractors to go agency-to-agency obtaining debarment determinations. This approach fundamentally undermines the “lead agency” process, which was designed to maximize efficiency when more than one agency may have an interest in the debarment of a contractor.<sup>88</sup> In its attempt to banish “bad” contractors, Congress has created an inefficient, duplicative, and wasteful mess. In light of all of the problems that this legislative quagmire has created, Congress should ask itself—is this really in the taxpayers’ best interest? Is the government significantly more protected with these provisions in place? Or is this just another example of legislative contractor-bashing?

Other recent initiatives highlight Congress’s propensity towards discretion-depriving, legislative quick fixes. Not only do they rob contractors of their economic liberty, but they also undermine the integrity and effectiveness of the entire debarment system. For

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84. *See, e.g., id.* § 504, 125 Stat. at 883 (providing for restrictions on appropriations for Energy and Water Development).

85. *See, e.g., id.* § 514.

86. Anti-Deficiency Act, 31 U.S.C. § 1341 (2006).

87. *See, e.g.,* Memorandum from Richard Ginman, Dir., Def. Procurement & Acquisition Policy, to Commander, U.S. Special Operations, et al. 2 (Jan. 23, 2012), *available at* <http://www.acq.osd.mil/dpap/policy/policyvault/USA007336-11-DPAP.pdf> (creating Deviation 252.209-7999); *see also* Memorandum from Joseph A. Neurauter, Senior Procurement Exec., GSA Office of Governmentwide Policy, to All GSA Contracting Activities 5 (2012), *available at* <http://www.gsa.gov/graphics/fas/MAS-GSA-agency-deviation-2012-06.pdf>.

88. *See* 48 C.F.R. § 9.402(d).

example, the Comprehensive Contingency Contracting Reform Act of 2012, proposed by Senator McCaskill, was another punitive initiative designed to erode SDO discretion. In its initial form, it required the automatic suspension of contractors in several situations, including, among other things, when the federal government alleges fraud against a contractor in a civil or criminal proceeding relating to a federal contract.<sup>89</sup> By robbing SDOs of their discretion and stripping contractors of their fundamental due process rights, the legislation proposed to purge the government's business partners in a quick and thoughtless manner.<sup>90</sup> Notably, after receiving significant negative feedback from the procurement community<sup>91</sup> regarding the automatic suspension provisions, the bill was reintroduced with automatic referrals to SDOs in lieu of the suspensions.<sup>92</sup> Sections of Senator McCaskill's bill were eventually incorporated into the National Defense Authorization Act for Fiscal Year 2013, though the provision requiring automatic referrals was removed.<sup>93</sup>

These recent legislative initiatives are merely two examples of frequent congressional attempts to use debarment as a means to punish contractors for their past misconduct. These congressional "armchair" SDOs repeatedly demonstrate that they either do not understand how the debarment regime works or simply do not care. While members of Congress claim that they are not trying to bash contractors and that they respect the government's important business partners, their legislative initiatives indicate otherwise.<sup>94</sup> Members of Congress often view the companies as criminal organizations that should be expelled from the procurement system.

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89. Comprehensive Contingency Contracting Reform Act, S. 2139, 112th Cong. § 113 (2012); Comprehensive Contingency Contracting Reform Act, S. 3286, 112th Cong. (2012).

90. The Comprehensive Contingency Contracting Reform Act of 2012: Hearing on S.2139 Before the Subcomm. on Contracting Oversight, 112th Cong. (2012) (statement of Patrick Kennedy, U.S. Dep't of State), *available at* <http://www.hsgac.senate.gov/subcommittees/contracting-oversight/hearings/the-comprehensive-contingency-contracting-reform-act-of-2012-s2139> (provisions imposing "automatic suspension and debarment . . . will likely lead to due process challenges by the affected contractor community").

91. *See, e.g.*, ACQUISITION REFORM WORKING GRP., 2012 LEGISLATIVE RECOMMENDATIONS 32 (2012), *available at* [http://www.ndia.org/Advocacy/Resources/Documents/ARWG%20FY-2012\\_House\\_Senate%20Package\\_April%202012.pdf](http://www.ndia.org/Advocacy/Resources/Documents/ARWG%20FY-2012_House_Senate%20Package_April%202012.pdf) ("Congress must refrain from passing laws that require the automatic suspension or debarment of contractors.").

92. *Compare* S. 3286, 112th Cong. § 113 (2012), *with* S. 2139, 112th Cong. § 113 (2012).

93. *See* National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. § 861 (2013). Notably, the Act's debarment-related provisions are significantly scaled-back when compared to Senator McCaskill's original bill.

94. Serbu, *supra* note 78.



They seek to punish contractors for improper activity that is often caused by rogue employees (ignoring the fact that the companies are often the victim of the rogue employees as well).<sup>95</sup> The failure to distinguish between rogue employees and their contractor-employers is troubling—particularly when many contractors employ hundreds (if not, thousands) of innocent and hard-working employees.

While the debarment regime is far from perfect, recent reports from the Interagency Suspension and Debarment Committee and General Accountability Office indicate that the debarment system continues to improve and grow more active each year.<sup>96</sup> Agencies have responded to the intense congressional scrutiny and pressure by strengthening their programs, sharing best practices and (in addition to increasing the number of suspensions and debarments), increasing their use of other tools, such as administrative compliance agreements, show-cause letters and voluntary exclusions.<sup>97</sup> While there is always room for continued improvement in the system, stripping SDOs of their discretion is neither a thoughtful nor productive solution. Moreover, mandatory exclusions significantly hinder the government's ability to craft proactive and creative solutions to enhance corporate ethics and compliance. While publicly bashing contractors may score some political brownie points, debarring firms that pose no imminent threat to the government is not only short-sighted, but self-defeating. These initiatives are void of the nuance required to craft balanced and effective solutions to procurement fraud. Holding hearings titled "Weeding Out Bad Contractors: Does the Government Have the Right Tools?"<sup>98</sup> may be good politics, but it certainly is not good for the government and its constituents.

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95. See, e.g., ACQUISITION REFORM WORKING GRP., *supra* note 91, at 30.

96. See INTERAGENCY SUSPENSION & DEBARMENT COMM., *supra* note 53, at 6–7; see, e.g., GAO, DOD HAS ACTIVE REFERRAL PROCESSES, *supra* note 68 (providing a positive review of the DOD's suspension and debarment regime, while identifying a few areas that could be strengthened further).

97. See, e.g., GAO, DOD HAS ACTIVE REFERRAL PROCESSES, *supra* note 68, at 12 (describing the DOD's use of suspension and debarment tools).

98. *Weeding Out Bad Contractors*, *supra* note 1.

