



GW Law Faculty Publications & Other Works

Faculty Scholarship

2001

Fear of Oversight: The Fundamental Failure of Businesslike Government

Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

Follow this and additional works at: http://scholarship.law.gwu.edu/faculty_publications

 Part of the [Government Contracts Commons](#)

Recommended Citation

50 Am. U. L. Rev. 627 (2001)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

ARTICLE

FEAR OF OVERSIGHT: THE
FUNDAMENTAL FAILURE OF
BUSINESSLIKE GOVERNMENT

STEVEN L. SCHOONER*

[A] hypothetical system in which nobody looked and nobody cared might indeed display levels of corruption higher than the current one.¹

TABLE OF CONTENTS

Introduction: Harbinger of Businesslike Government?	628
I. Understanding the Microcosm: Examining the Reduced Litigation Phenomenon.....	631
A. Defining the Stakes: A Snapshot of the Procurement Pie.....	631
1. \$200 billion worth, including the kitchen sink	631
2. A complex regime and a decade of reform.....	634
B. An Empirical Summary of Reduced External Monitoring.....	638
1. Dominant fora: The General Accounting Office and the Agency Boards of Contract Appeals.....	640
2. Quantifying the decrease.....	643

* Associate Professor of Law, *George Washington University Law School*. I thank William W. Bratton, David A. Hyman, Frederick J. Lees, William P. Marshall, Richard J. Pierce, Jr., Heidi M. Schooner, Peter P. Swire, Robert Tuttle, William G. T. Tuttle, Jr., and, particularly, Joshua I. Schwartz, for their thoughts and helpful suggestions. This Article was improved by comments received during presentations at the *George Washington University* and *Catholic University Schools of Law*. Further, I benefited from having the opportunity to work closely with Steven Kelman toward the end of his time at the White House. I gratefully acknowledge the institutional support of Dean Michael Young and the *George Washington University Law School*, as well as Andrew P. Baldock and Colleen F. Dowd, for their diligent research assistance.

1. See STEVEN KELMAN, *PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE* 97 (1990).

a.	Protests at the General Accounting Office	644
b.	Disputes at the administrative boards	646
C.	Searching for Explanations: A Provisional List.....	649
1.	Optimistic accounts of the litigation downturn	649
2.	By-products of reform: Systemic changes, externalities and evolving norms	655
a.	The chilling effect of contractor performance evaluations	656
b.	Task and delivery vehicles: End user enthusiasm for anti-competitive behavior.....	658
c.	Commercial buying practices: Flexibility at the expense of oversight.....	660
d.	Increased discretion suggests less arbitrary and capricious behavior	663
e.	Unsatisfying forum shopping?	664
f.	The False Claims Act: Proliferation of compliance pitfalls	666
III.	The Toll of Reduced External Oversight.....	671
A.	Reduced External Oversight: The Unintended Consequence of Acquisition Reform.....	677
1.	Litigation as oversight: Kelman's bete noir	679
2.	Watching the watchmen: Defending private attorneys general.....	681
a.	A robust litigation regime offers potent deterrence.....	682
b.	Lauding interested parties, not bounty hunters....	686
c.	Protests police the contract formation process	691
d.	Disputes: Unheralded accidental private attorneys general	693
i.	Breaching the contingency promise.....	695
ii.	Avoiding another certification externality	698
3.	Diluted contract interpretation: Diminished litigation's externality	702
4.	Diminished oversight threatens public trust	705
a.	Change management and brinkmanship	707
b.	What price efficiency?	707
c.	Measuring accountability?	712
B.	The Limits of Businesslike Government	715
1.	Government is different: Failure of the private sector model.....	715
2.	Reflections on the National Performance Review.....	718
	Conclusion	721

INTRODUCTION: HARBINGER OF BUSINESSLIKE GOVERNMENT?

Vice President Al Gore's most visible contribution to the Clinton Administration has been the National Performance Review (NPR), a broad-reaching effort to reinvent government by making it more

businesslike. This endeavor's flagship and most visible success has been the effort to reform the government's purchasing process.² The reformed procurement regime was conceived and orchestrated by Harvard professor and Clinton Administration procurement czar Steven Kelman. Professor Kelman re-shaped the public purchasing process to conform to the vision he first articulated in *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*.³ True to his book's title, Professor Kelman's legacy is defined by his assessment of the government's need to overcome its fear of buyer discretion.

Although purchasing may seem mundane in light of the government's myriad responsibilities, Uncle Sam shops incessantly, annually spending more than \$200 billion on a veritable cornucopia of goods and services procured from most every sector of the economy.⁴ Because these sums represent a significant portion of the public's taxes, Congress and the public⁵ historically have scrutinized the government's purchasing practices. Yet, over the last decade, as a by-product of aggressive reform of the federal procurement process, oversight of government spending—both internal and external—has plummeted. This oversight diminution resulted in a reformed buying regime lacking meaningful oversight and rapidly propagating a culture defined by lawlessness. Just as prosperity can breed complacency, reduced oversight in an era of increased government employee discretion should cause alarm.

Yet seasoned observers of the procurement process had good reason to temper their concern regarding the government's reduction of *internal* oversight. Historically, the government has externalized much of its procurement oversight by relying upon litigation initiated by contractors and potential contractors to police the buying process. During the 1990s, however, much of this *external*

2. See Stephen Barr, *After 5 Years, Gore's Reinvention Gets a 'B'; Brookings Analyst Says Results Vary Widely*, WASH. POST, Sept. 4, 1998, at A23 ("Kettl gave the vice president high marks for helping the government improve the way it buys goods and services from vendors . . ."). The procurement system, which "operates more efficiently[.]" received the only "A" other than "effort" (citing DONALD F. KETTL, REINVENTING GOVERNMENT: A FIFTH-YEAR REPORT CARD (Brookings Inst. Report CPM 98-1, 1998)); see also VICE PRESIDENT AL GORE, THE BEST KEPT SECRETS IN GOVERNMENT: A REPORT TO PRESIDENT BILL CLINTON, NATIONAL PERFORMANCE REVIEW 15 (1996) (procurement reform was the first substantive topic addressed).

3. See KELMAN, *supra* note 1.

4. See *infra* text accompanying note 8 (addressing the federal government's spending practices in recent years).

5. As discussed at length *infra* at text accompanying note 170, in the absence of meaningful or effective internal oversight, the Federal government frequently enlists the resources of the private sector, in the guise of the private attorney general, to perform its oversight.

monitoring also dropped as the volume of litigation in government contracts plummeted. Although, congressional and executive policy makers bear responsibility for the drift towards *laissez-fair* internal oversight, the causes for the reduction in external oversight are less clear. It is clear, however, that the current system couples greatly increased buyer discretion with dramatically reduced oversight. This combination erodes the public's confidence in the procurement system, violates established norms, and is antithetical to a host of congressional mandates and policies. Accordingly, a backlash is inevitable.

Because procurement reform is the jewel in the crown of the efforts to reinvent government, the issues implicated are far larger than the government's buying habits and peccadillos. Studies of the 1990s procurement reforms offer a cautionary tale of legal reform and raise disturbing public policy questions. If procurement is to be a harbinger of the future of public law, the time has come to weigh the consequences of the course set by the NPR.

This Article begins with a brief introduction to the federal procurement process, which is intended to establish a context for the 1990s reforms. It then provides empirical evidence of the dramatic, sustained reduction in government contract-related litigation during the 1990s.⁶ Rather than celebrate this trend, the Article expresses concern because the trend coincided with two significant changes: (1) a large-scale congressionally-mandated reduction in acquisition personnel, which materially reduced internal oversight, and (2) the sweeping NPR reinvention initiatives, which considerably increased purchaser discretion. The Article next offers a provisional list of explanations for the decrease in litigation phenomenon. It then makes the counter-intuitive assertion that, in this context, litigation—a form of external monitoring initiated by private attorneys general—is a public good. Reduced litigation relating to the award and performance of the government's contracts threatens the public's trust in the reinvention agenda. Litigants, in this context, serve the public's interests while pursuing their own self-interest. Moreover, the need for the private sector to provide this service increases as internal oversight decreases.

The main argument demonstrates that, despite the success of procurement reform and its well-intentioned goals, the current paradigm elevates its facially attractive norms—efficiency and discretion—at the expense of other established, yet apparently

6. As suggested *infra* at table accompanying note 57, this decline is particularly intriguing as civil litigation, at a macro level, continues to increase in this country.

undervalued, norms necessary to guide the procurement system, e.g., transparency, integrity, and competition. This Article cautions that businesslike government—at least as envisioned by Professor Kelman and implemented by the Clinton Administration—has diluted existing internal and external oversight mechanisms and threatened public confidence in the procurement system. Finally, to the extent that this successful reform initiative has devalued and diminished oversight, the Article suggests a critical assessment of the reinvention agenda.

I. UNDERSTANDING THE MICROCOSM: EXAMINING THE REDUCED LITIGATION PHENOMENON

A. *Defining the Stakes: A Snapshot of the Procurement Pie*

1. *\$200 billion worth, including the kitchen sink*

The current federal procurement system—the reinvented, businesslike microcosm discussed herein—exists because, in performing its myriad functions, the Federal Government spends approximately \$200 billion each year through the procurement process.⁷ While the Defense agencies such as the Air Force, Army, and Navy spend over half of that sum, at least ten civilian agencies

7. In this regard, the government relies heavily upon the private sector. Whenever possible, the government aspires to *buy* what it needs rather than attempt to *make or manufacture* goods to fulfill its needs. *See, e.g.*, 48 C.F.R. § 7.301 (1999) (“[I]t is the policy of the Government to . . . rely generally on private commercial sources for supplies and services” except with regard to inherently governmental functions). This spending translates into the government buying \$200 billion dollars worth of goods and services separate and apart from civil service or military personnel salaries, grants, foreign aid, etc. *See* Federal Procurement Data System (FPDS), *Federal Procurement Report*, at <http://fdps.gsa.gov/fdps/fpr.html> (last visited Aug. 1, 2000) [hereinafter *Federal Procurement Report*]. The FPDS, created by Public Law 98-100, resides within the General Services Administration.

Although the most accurate assessment of the government’s spending habits derives from the FPDS, numerous flaws limit the utility of these annual reports. For example: (1) the data reflect the price of contracts at the time of award and, although the data capture most contract modifications, they do not reflect final prices paid; (2) on a fiscal year basis, the report more accurately reflects contracts awarded (or deals made) than money spent; the government almost never pays in advance, and large construction projects, extensive research and development undertakings, or complex weapons purchases often take years to complete; (3) the report excludes a staggering volume of foreign military sales, transactions covered by the Arms Export Control Act, 22 U.S.C. §§ 2551-2595, which makes some sense because foreign governments (in this case, end users) are expected to reimburse the government for these purchases; and (4) the report does not concatenate spending through the government’s 500,000 purchase cards—the report separately details these 20.6 million transactions, worth more than \$10.1 billion during Fiscal Year 1999. *See id.* at 13; *see also infra* text accompanying note 113 (discussing the impact of the Government’s burgeoning use of purchase cards).

each purchase more than \$1 billion in goods, services, and construction each year.⁸ The government's voracious purchasing habits impact most every sector of the economy through the purchase of services and construction (\$94.3 billion), supplies and equipment (\$64.2 billion), and research and development (\$24.5 billion).⁹ The

8. For Fiscal Year 1999, the Department of Defense's procurement spending exceeded \$123 billion. The major defense agencies include the Navy (\$37.4 billion), the Air Force (\$35.4 billion), and the Army (\$30.6 billion). The highest spending civilian agencies were the Department of Energy (\$15.6 billion); the National Aeronautics and Space Administration (\$10.9 billion); the General Services Administration (\$6.9 billion); Health and Human Services (\$4.1 billion); Department of the Treasury (\$3.3 billion); Department of Justice (\$3.2 billion); Department of Agriculture (\$3.2 billion); Department of Transportation (\$2.7 billion); Department of Veterans Affairs (\$2.6 billion); and the Commerce Department (\$1.1 billion). See *Federal Procurement Report*, *supra* note 7, at 5.

9. These figures are derived from the *Federal Procurement Report*, at 7-9. *Federal procurement*, of course, represents only a small proportion of *total government spending*. In addition to what it buys, the Federal Government spends money on civil service and military salaries and benefits, grant programs, foreign aid, etc. *Total government spending*, which includes *Federal, State, and local governments*, accounts for about one-third of the national economy. Federal spending is about two-thirds of this amount, or twenty percent of the Gross Domestic Product (GDP). GDP is the standard measurement of the size of the U.S. economy—its total production of goods and services. Government purchasing represents only a small share of the GDP. Moreover, as the chart below indicates, that proportion of GDP absorbed by Federal procurement decreases as the economy expands and ongoing efforts continue to either reduce, or at very least, constrain, the size of the Federal Government.

[INSERT TABLE 1]

[INSERT TABLE 2]

uninformed perception of a small cabal of entrenched defense contractors capturing agency buyers and dictating the government's buying decisions is contradicted by empirical evidence.¹⁰ Although, it is true that the government procures certain products such as fighter aircraft, nuclear submarines, and tanks from a limited pool of suppliers, these suppliers do not exert pervasive influence throughout the purchasing system. The government's purchasing at both the prime contract and subcontract levels involves a constantly changing and broad-based staple of large and small corporations, health care providers, financial institutions, individuals, and not-for-profit organizations.¹¹ Further, although "problems of government

The Government's fiscal year runs from October 1 through September 30 (for example, FY97 ran from October 1, 1996, though September 30, 1997). The procurement figures, derived from the *Federal Procurement Report*, are in billions of U.S. dollars. The GDP figures, derived from the 2000 ECONOMIC REPORT OF THE PRESIDENT, H. Doc. 106-161 (Feb. 2000) at 306 (Table B-1), are in billions of dollars. In October of 1999, the Commerce Department released its benchmark revision of GDP statistics, raising the annual rate of growth of real GDP by an average of 0.4 percentage points for the eleven-year period from 1987-1998. *Id.* at 81. For other tables displaying this evolving data set in, for example, current year dollars, see the *Department of Commerce, Bureau of Economic Analysis's website* (visited Aug. 1, 2000), at <http://www.bea.doc.gov/>. For the sake of comparison to the \$200 billion U.S. procurement budget, the GDPs of Belgium, Sweden, Switzerland, and Turkey, each hover between \$200 and \$250 billion (through 1998). See the *U.S. Department of Energy, Energy Information Administration, table summarizing World Gross Domestic Product at Market Exchange Rates, 1989-1998*, at <http://www.eia.doe.gov/emeu/iea/tableb2.html> (visited Aug. 1, 2000).

10. See *supra* notes 8-9 (providing empirical evidence of the procurement process).

11. See *Top 200 Federal Contractors*, GOV'T EXEC., Aug. 1999, at 16-22 [hereinafter *Top 200 Federal Contractors 1999*] (noting that in Fiscal Year 1998, the 150 largest federal contractors included at least twelve of the current thirty Dow Jones Industrials: Boeing (2); United Technologies (7); General Electric Co. (13); AT&T (25); IBM (34); General Motors (73); Proctor & Gamble (91); Honeywell (94); Exxon (100); DuPont (112); Hewlett-Packard (138); and Phillip Morris (142)); *Top 200 Federal Contractors*, GOV'T EXEC., Aug. 2000, at 42-48 [hereinafter *Top 200 Federal Contractors 2000*] (stating that in Fiscal Year 1999, nine of those twelve firms remained in the top 150: Boeing (2); United Technologies (7); General Electric Co. (14); AT&T (25); IBM (31); General Motors (73); Proctor & Gamble (99); Honeywell (17); Exxon (57); and Phillip Morris (137)); see also *Federal Procurement Report*, *supra* note 7, at vii (indicating that in Fiscal Year 1999, small businesses received approximately twenty-three percent of Federal procurement dollars—more than \$40 billion); *infra* text accompanying note 184 (discussing small business contracting policies). See, e.g., *Top 200 Federal Contractors 1999*, *supra*, at 16-18 (stating that the presence of health care providers continues to grow—in Fiscal Year 1998, the 100 largest Federal contractors included: Humana (23); Triwest Healthcare Alliance Co. (40); and Health Maintenance of Indiana (92)); see also *Top 200 Federal Contractors 2000*, *supra*, at 42-44 (determining that in Fiscal Year 1999, two different health care providers broke the top fifty: Chattanooga Hospital and Medical Corp. (34) and Anthem, Inc. (38), while Occupational Health Services surfaced at number fifty-one); *Top 200 Federal Contractors 1999*, *supra*, at 16-22 (listing examples of financial institutions among the largest federal contractors in Fiscal Year 1998, including Goldman Sachs & Co. (82); Morgan Guaranty Trust of New York (134); Price Waterhouse Coopers LLP (144); and Berkshire Hathaway (175)). Many are surprised to learn that in Fiscal Year 1998 the 100 largest federal contractors

procurement are usually presented in the framework of government relations to the 'defense industry'[,] . . . there is no defense industry in the sense there is a steel industry, a copper industry, or an automobile industry."¹² The government buys most of what it requires from the same firms that serve everyday consumers and the business community. Only a limited number of firms exist and thrive solely from the Federal Government's business; most government contractors also heavily rely upon the commercial marketplace.

2. *A complex regime and a decade of reform*

The laws, regulations, and policies controlling the award and performance of government contracts present a dense thicket reflective of a large, complex bureaucracy.¹³ This highly regulated regime specifies which individuals have authority to bind the government,¹⁴ articulates a systematic process for planning acquisitions,¹⁵ provides a limited array of schemes for selecting

included numerous institutions of higher education: University of California System (6), California Institute of Technology (17), Johns Hopkins University (35), University of Chicago (38), Massachusetts Institute of Technology (43), and Stanford University (78). *Id.* at 16-18. Nor are the players' relative positions entrenched. For example, in tracking the largest Federal contractors, it was recently observed that "Dell Computer . . . climbed 55 places . . . this year (from 124 to 69)[.]" *Editor's Notebook, GOV'T EXEC.*, Aug. 1999, at 3. The following year, Dell had climbed to number forty-eight on the list. *Top 200 Federal Contractors 2000, supra*, at 42.

12. Frederick T. Moore, *Efficiency and Public Policy in Defense Procurement*, 29 LAW & CONTEMP. PROBS. 3, 4 (1964). Conversely, the very nature of the Government's buying practices discourages analogies to a true market. See generally Steven L. Schooner, *Impossibility of Performance in Public Contracts: An Economic Analysis*, 16 PUB. CONT. L.J. 229, 262-63 (1986). Nor are defense contractors guaranteed lasting success—for an anecdotal tragedy set in the military industrial complex, see Eugene Gholz, *The Curtiss-Wright Corporation and Cold War-Era Defense Procurement: A Challenge to the Military-Industrial Complex Theory*, 2 J. OF COLD WAR STUD. 35 (2000) ("once the second-largest manufacturer in the United States, . . . it is now just a small subcontractor"). Nonetheless, "[u]nnecessary production contracts in inefficient, oversized facilities [continue to] waste U.S. resources." Eugene Gholz & Harvey M. Sapolsky, *Restructuring the Defense Industry*, 24 INT'L SECURITY 5, 15-16 (Winter 1999/2000).

13. Accordingly, the legal discipline embraces, *inter alia*, administrative law, contracts, commercial law, corporations, and remedies as pedagogical and curricular bedfellows, while others treat the field as a specialty. See generally Richard E. Speidel, *What Should the Law Schools Do About Federal Government Contracts?*, 18 J. LEGAL EDUC. 371, 372 (1966); J.W. Whelan & J.T. Phillips, *Government Contracts: Emphasis on Government*, 29 LAW & CONTEMP. PROBS. 315 (1964) (suggesting that "most of these subjects also reflect somewhat broader areas of concern: *i.e.*, in so far as they reveal the operations of government generally, not only government contracts but also in other fields, they are susceptible of use for the purpose of analyzing government operations as a whole"). See also John W. Whelan, *Reflections on Government Contracts and Government Policy on the Occasion of the Twenty-fifth Anniversary of the Public Contract Law Section*, 20 PUB. CONT. L.J. 1 (1990).

14. See 48 C.F.R. § 1.6 (1999) (discussing contracting officers as officials with authority to bind the government in contract).

15. See *id.* § 7 (discussing acquisition planning).

contractors,¹⁶ establishes parameters for managing contractual performance,¹⁷ defines the process for terminating contractual relationships,¹⁸ and presents numerous standard provisions and clauses addressing every conceivable contingency that could arise under the various types of permissible contract vehicles.¹⁹ Familiar procurement statutes and regulations ensure that the purchasing system appears transparent, that integrity permeates the behavior of government and contractor personnel,²⁰ that the government obtains full and open competition,²¹ and that the procurement system furthers a broad range of social policies.²² The most visible manifestation of the breadth of extant controls on the procurement process is Title 48 of the Code of Federal Regulations, the Federal Acquisition Regulation (FAR) system, which spans across nine inches of bookshelf space.²³ Some firms perceive this regulatory maze as a barrier to entry, and critics suggest that those same barriers historically insulated a coddled class of less-than-competitive suppliers that had adapted to the non-commercial rules of the game.²⁴

16. *See id.* §§ 13-15 (detailing simplified acquisitions, sealed bidding, and contracting by negotiation); *id.* § 16 (describing types of contracts).

17. *See id.* §§ 42-43 (explaining contract administration and modifications).

18. *See id.* § 49 (discussing terminations).

19. *See id.* § 16 (discussing types of contracts); *id.* § 52 (containing standard and optional provisions and clauses); *see also* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 357 (1989) (“[A]lmost every large firm that has done business with the government complains of the amount of detail that is part of the contract and the intrusiveness of the scrutiny that is part of the audit.”).

20. *See* 48 C.F.R. § 3 (1999) (detailing improper business practices); *id.* § 9.4 (describing debarment, suspension, and ineligibility); *id.* § 4.6 (explaining contract reporting) *id.* § 24 (discussing protection of privacy and freedom of information); *id.* § 33 (describing protests, disputes, and appeals).

21. *See id.* § 5 (discussing publicizing requirements for contract actions); *id.* § 6 (detailing competition requirements).

22. *See id.* § 19 (addressing small business programs); *id.* § 22 (outlining labor law compliance); *id.* § 23 (explaining environment, conservation, occupational safety, and drug-free workplace requirements); *id.* § 25 (highlighting domestic preferences).

23. *See generally* JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 503-17 (1992) (discussing the evolution of the uniform regulation system, culminating with the Federal Acquisition Regulation, which first became effective on April 1, 1984).

24. *See* Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CONT. L.J. 249, 250-51 (1998) (“Unfortunately, a variety of special standards, government-unique certifications, terms and conditions, and record-keeping and reporting requirements imposed by statute and regulation discouraged many successful commercial companies from offering their products to Government.”); Amanda Ripley, *Contract Killer*, CORP. COUNS., Apr. 2000, at 48 (noting that Professor Kelman described the companies that have suffered as a result of the 1990s procurement reforms as “firms that sell uniquely to the government, have no commercial presence, and have been working under dysfunctional government standards . . . [whose] comparative advantage was mastery of the bizarre government procurement system”); *see also* GORE, *supra* note 2, at 14 (discussing, *inter alia*, a letter stating that previously Jockey International “declined to bid on government

The mid-1990s witnessed a tsunami of procurement reforms heralded as the most successful aspect of Gore's reinventing government initiative, which were intended to make the procurement system less bureaucratic and more businesslike. The Federal Acquisition Streamlining Act of 1994 (FASA)²⁵ and the 1996 Clinger-Cohen Act,²⁶ two wide-reaching reform statutes implemented by numerous new and revised regulations, dramatically altered the federal procurement landscape.²⁷ The resulting regime reflects the vision of the acquisition reform movement's catalyst, Professor Kelman, whose bravura performance re-shaped the public purchasing process.²⁸ As Professor Kelman promised, at a macro level, the

business . . . because the solicitations asked them to manufacture a T-shirt to unique specifications . . . and provide sensitive pricing data")

25. Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified as amended in scattered sections of 10, 40, and 41 U.S.C.).

26. Pub. L. No. 104-106, §§ 4001-4002, 110 Stat. 642 (1996) (codified in scattered sections of 10, 40 and 41 U.S.C.); §§ 5001-5703, 110 Stat. 679 (renamed the "Clinger-Cohen Act" by the Omnibus Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996)).

27. See *infra* text accompanying notes 92-93 (addressing major changes that have recently occurred in the procurement community); see also Steven L. Schooner, *Change, Change Leadership, and Acquisition Reform*, 26 PUB. CONT. L.J. 467 (1997).

28. Kelman is the Albert J. Weatherhead III and Richard W. Weatherhead Professor of Public Management at Harvard University's John F. Kennedy School of Government. Kelman served as the White House's procurement point person—the Administrator of the Office of Federal Procurement Policy (OFPP)—from 1993 until 1997. Congress tasked the Office of Federal Procurement Policy "to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government." 41 U.S.C. § 404(a). The Administrator "shall be appointed by the President, by and with the advice and consent of the Senate." 41 U.S.C. § 404(b). In that capacity, he vigorously toiled to effectuate the policies articulated in his book, *PROCUREMENT AND PUBLIC MANAGEMENT*, *supra* note 1. Kelman deserves great credit for spear-heading a wave of acquisition reforms. For a retrospective of Kelman's efforts at OFPP and his perspectives on Acquisition Reform, see the cover story, Ripley, *Contract Killer*, *supra* note 24, at 45 (Apr. 2000). See also Stephen Barr, *Outgoing Chief Leaves His Mark on Procurement Process*, WASH. POST, Sept. 12, 1997, at A23 ("His departure represents a substantial loss for Vice President Gore, who repeatedly pointed to Kelman's procurement changes as examples of how 'reinventing government' can improve government performance."); Rorie Sherman, *Editor's Note*, CORP. COUNS. 11 (Apr. 2000) ("Remember the Clinton administration's campaign to 'reinvent government?' Harvard University professor Steven Kelman took it seriously, went to Washington, and helped make the government procurement system behave more like private business."). For additional comment on Ripley's assessment of the Kelman regime, see Steven Kelman, *Defending His Reforms*, CORP. COUNS. 13 (June 2000); Marcus Corbin, *Disagreeing With Kelman*, CORP. COUNS. 12 (July 2000); John S. Pachter, *Procurement Concerns Justified*, CORP. COUNS. 12 (Aug. 2000). On his last day in office, September 12, 1997, I had the opportunity to accompany Kelman as he reflected on his tenure at the Council for Excellence in Government in Washington, D.C. Kelman discussed his perception of the biggest pending issues (past performance, performance based service contracting, leveraging of the government's buying power, and acting more commercial, many of which are discussed below); his major accomplishments (streamlining, culture change, the rewrite of Federal Acquisition Regulation Part 15 and oral presentations, plus multiple

reinvented procurement system is (1) defined by greater purchaser discretion,²⁹ (2) less encumbered by bureaucratic constraint and internal oversight,³⁰ and (3) more businesslike.³¹

award task order contracts); his lessons learned (the need for vision, focusing upon the people that do the work, the reality that there are two sides to every change); and future challenges (keeping the reform message alive, not trying to change everyone, and accepting the process of continuous improvement). Although Kelman has authored numerous books, it often seems that, outside of the procurement community, he is better known for his student account of events at Harvard, *WHEN PUSH COMES TO SHOVE: THE ESCALATION OF STUDENT PROTEST* (1970). Now that he has returned to Harvard, he is re-united with some of his most influential political allies, Elaine Kamarck (creator and manager of the Clinton Administration's National Performance Review (NPR), also known as the Reinventing Government project) and Christopher Edley.

29. The use of the term "discretion" in this context merits further clarification. Administrative discretion, and the control of that discretion, defines much of the body of administrative law. See PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* 154 (1994) ("If legislation is the skeleton of the administrative state, discretion—the official's freedom, within the limits of her power, to make a choice among possible courses of action or inaction—is its musculature. Discretion vitalizes agencies, infusing them with energy, direction, mobility, and the capacity for change."). Yet, the type of discretion discussed here, although exercised by government employees, differs from the broad decision, policy and rule-making issues most frequently addressed in administrative law and public policy scholarship. See Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 589 (1989) ("Discretion consists of the departure of agency decisions from the positions agreed upon by the executive and legislature at the time of delegation and appointment."). Rather, the exercise of discretion at issue is not in determining the amount of leeway that Congress delegated to the regulation drafters to promulgate purchasing rules. This examination focuses upon the amount of flexibility individual buyers enjoy in selecting individual contractors and managing the performance of those contracts. The concern here involves how and from whom the government buys. Kelman, whose work focused primarily upon purchasing computers, suggests that "[t]he three major limitations on discretion in procurement by competitive proposals are [1] the rules and practices for establishing the government's requirements, [2] the criteria by which proposals from vendors are evaluated, and [3] the information that may be used in evaluating proposals against those criteria." KELMAN, *PROCUREMENT AND PUBLIC MANAGEMENT*, *supra* note 1, at 19. These limitations are the tip of the iceberg. The statutory and regulatory regime also: (1) mandates the use of scores of standard solicitation provisions and contract clauses, (2) limits the type of contracts that may be used, (3) indemnifies numerous required sources of supplies and services, (4) constrains the government's ability to reimburse contractors for a host of commonly incurred costs of doing business, such as advertising and selling costs, entertainment expenses, lobbying costs, etc., (5) limits the amount of profit that can be paid on certain contracts, and (6) limits the extent to which the contracting officer can negotiate a change to an existing contract. See 48 C.F.R. § 52; 48 C.F.R. § 16; 10 U.S.C. § 2306(a); 41 U.S.C. § 254(b); 48 C.F.R. § 16.102(c); 48 C.F.R. § 8; 48 C.F.R. § 31.205; 10 U.S.C. § 2306(e); 41 U.S.C. § 254(b); 48 C.F.R. § 15.404-4(c)(4)(i); 48 C.F.R. § 52.243-1(a).

30. See *infra* note 146 (noting that during the 1990s, Congress slashed the acquisition workforce, eliminating approximately half of the auditors and quality assurance personnel that provided internal oversight of the procurement process).

31. While it is difficult to summarize the reforms of the 1990s, the most significant changes contributing to a more businesslike approach would include, *inter alia*, (1) a movement towards more commercial purchasing; (2) the change in high-volume, low-dollar purchasing associated with the micro-purchase threshold and the burgeoning use of government purchase cards; (3) introducing the evaluation of contractor past performance as an evaluation criteria for contractor selection;

B. *An Empirical Summary of Reduced External Monitoring*

The commotion and bustle of reinvention masked a slow and steady, but now unmistakable, decrease in government contract litigation.³² This phenomenon—particularly the speed and depth of the decline—came as a surprise to the procurement community.³³ The decrease contradicts the widely-held belief that our procurement system is unduly burdened by a systemic deference to the principle of due process and a historically litigious constituency. Nonetheless, the magnitude of the decline in litigation was matched by its consistency.

The extraordinary drop in litigation activity is evident at both the procurement process's front-end (described as bid *protests* or disappointed offeror litigation) and the back-end (which encompasses contract *disputes*).³⁴ For the purposes of the discussion that follows, the distinction between protests and disputes is significant. Protests are challenges concerning the formation or award of government contracts.³⁵ The putative plaintiff in a protest

(4) the proliferation of flexible umbrella contract vehicles (such as multiple award task order and delivery contracts); (5) the balkanization of the uniform procurement system (e.g., exempting the Federal Aviation Administration from the federal procurement regulations and permitting the use of "other transactions authority"); (6) encouragement of the use of performance-based service contracting; (7) increased privatization and outsourcing; (8) enhanced purchaser flexibility and discretion; and (9) elimination of certifications not required by statute. Many of these changes benefit from recent technological advances and the correspondingly rapid development of electronic commerce.

32. As becomes clear in my empirical discussion, *infra* at text accompanying notes 55 et seq., the barometer I use for assessing the volume of litigation is the commencement of proceedings, specifically the *filing* of a lawsuit. For my purposes here, whether the parties try the case, settle, or permit the adjudicator to render a decision, is irrelevant. For discussion of a similar usage, see David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 n.4 (1995) [hereinafter Luban, *Settlements*].

33. On this point, I must distinguish Kelman's goals, efforts, and knowledge from the larger effort to re-invent government, in this case the NPR. Kelman unequivocally desired less litigation and was pleasantly surprised when that result was achieved. It is less clear whether Kelman's desires, in this regard, are reflective of the NPR's principles and, more importantly, it is difficult to demonstrate that Congress was cognizant of any potential cause and effect along those lines.

34. See generally RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 197-98, 423 (2d ed. 1998) [hereinafter NASH ET AL., REFERENCE BOOK] (distinguishing disputes from protests). Pedagogically, the body of government contract law neatly divides into two basic disciplines along similar lines. See generally JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS (3d ed. 1998) [hereinafter CIBINIC & NASH, FORMATION]; JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS (3d ed. 1995) [hereinafter CIBINIC & NASH, ADMINISTRATION].

35. The Federal Acquisition Regulation defines "protest" as:

a written objection by an interested party to any of the following: (a) A solicitation or other request by an agency for offers for a contract for the procurement of property or services. (b) The cancellation of the solicitation or other request. (c) An award or proposed award of the contract. (d) A termination or cancellation of an award of the contract, if the written

matter is often termed a disappointed offeror.³⁶ By contrast, contract disputes involve controversies or claims³⁷ arising during the performance of a contract. In a dispute, the putative plaintiff is a contractor with an existing contractual relationship with the government, otherwise known as the putative defendant. Although it may seem counter-intuitive, these two regimes have little in common. For example, protests and disputes rely upon entirely separate waivers of the government's sovereign immunity,³⁸ entail distinct remedial schemes,³⁹ and, for the most part, proceed in different fora.⁴⁰

objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

48 C.F.R. § 33.101 (1999).

36. The term "disappointed offeror" is somewhat of a misnomer. Some protests, such as an allegation that the government's solicitation is ambiguous or defective, are sufficiently proactive that the potential offeror has not yet become disappointed at the time the matter is commenced. See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L. J. AM. U. 461 (1995) [hereinafter Kovacic, Procurement Reform].

37. A contract claim is a jurisdictional prerequisite to a dispute. See generally 41 U.S.C. §§ 605, 606, 609; 48 C.F.R. §§ 33.201, 52.233-1.

38. Protestor or disappointed offerors utilize different sovereign immunity waivers, depending upon the forum they choose. Generally, disappointed offerors have commenced suit in Federal Court pursuant to 28 U.S.C. § 1491(b), or based upon *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970). Protestors may challenge agency actions at the General Accounting Office pursuant to 31 U.S.C. §§ 3551-3556; 4 C.F.R. § 21; 48 C.F.R. § 33.104. Protestors also may commence agency protests pursuant to Executive Order 12979 (Oct. 25, 1995), 60 Fed. Reg. 55,171 (Oct. 27, 1995); 48 C.F.R. § 33.103. Conversely, contract disputes are governed by the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, which is implemented through the standard Disputes clause, 48 C.F.R. § 52.233-1, found in individual contracts with Executive agencies; see also 48 C.F.R. Subpart 33.2.

39. Common remedies sought by *protestors* include: suspension of the procurement (including automatic stays, temporary restraining orders, preliminary injunctions, or permanent injunctions), re-solicitation of the Government's requirements, award of bid or proposal preparation costs. The key point here is demonstrated by GAO's list of issues that it will not consider, found at 4 C.F.R. § 21.5. The first issue listed is "contract administration." GAO explains that: "The administration of an existing contract is within the discretion of the contracting agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 601-613." 4 C.F.R. § 21.5(c). By contrast, common remedies sought by *contractors* through the *disputes* process include: contract extensions, contract adjustments (payment for additional incurred costs); equitable adjustments (payment for additional incurred costs plus an allowance for profit); conversion of a termination for default to a termination for the convenience of the Government.

40. Protestors typically choose three potential adjudicators: (1) the contracting officer or his/her supervisor (these are called "agency protests"), 48 C.F.R. § 33.103; (2) the Comptroller General, typically referred to more broadly as the General Accounting Office, 4 C.F.R. § 21, 48 C.F.R. § 33.104; and (3) the Federal Courts—either the District Courts or U.S. Court of Federal Claims, 28 U.S.C. § 1491(b). In disputes, contractors elect between the appropriate agency board of contract appeals, 41 U.S.C. §§ 606, 607; or the U.S. Court of Federal Claims. 41 U.S.C. § 609; 48 C.F.R. § 33.211(a)(4)(v); Thomas C. Wheeler, *Let's Make the Choice of Forum Meaningful*, 28 PUB. CONT. L.J. 655 (1999); Michael J. Schaengold et al., *Choice of Forum for Contract Claims: Court v. Board*, 92-12 BRIEFING PAPERS (Nov. 1992).

Conversely, the protest and dispute systems have long shared in their efforts to deputize the private sector, specifically the contractor community, to regulate government behavior. More recently, protests and disputes have commonly experienced a precipitous decline in activity.

1. *Dominant fora: The General Accounting Office and the Agency Boards of Contract Appeals*

For the purposes of the empirical portion of this discussion, I focus upon the most heavily trafficked administrative (non-judicial) tribunals that confront issues related to government contracts: the General Accounting Office (GAO) for bid protests and the Armed Service Board of Contract Appeals (ASBCA) for contract disputes.⁴¹ Both of these administrative, quasi-judicial fora exercise statutory jurisdiction largely concurrent with judicial fora.⁴² Although other

41. For these reasons, I am not the first to attempt to mine this area. See generally Gary P. Quigley & Catherine S. Drost, *Defense Contractor Use of Preaward and Postaward Dispute Forums*, 20 PUB. CONT. L.J. 188, 189 (1991) (discussing results from a 1981-86 study period of GAO and ASBCA appeals). The contrast between the early 1980s data—which reflected “sharp [in the number of contractor protests] increases shown by the military departments” and a fairly level number of protests for the GAO—and the 1990s data presented here, which chronicles a sustained government-wide downturn, is startling.

42. The concurrent jurisdiction lies with the U.S. Court of Federal Claims and, at times, the U.S. District Courts. More recently, Congress has altered the disappointed offeror jurisdiction of the federal courts. Congress expanded the protest jurisdiction of the Court of Federal Claims (CFC) with the Administrative Disputes Resolution Act of 1996 (ADRA). Section 12, Pub. L. No. 104-320, 110 Stat. 3870 (Oct. 19, 1996), which amended the Tucker Act, 28 U.S.C. § 1491, to permit the CFC to provide protestors injunctive relief *before and after* award of the contract and broadened the kinds of protests that the court could hear. During a multi-year study period, completed in January, 2001, the CFC and the Federal District Courts shared concurrent jurisdiction over these matters. Pursuant to Pub. L. No. 104-320, § 12(c), GAO conducted “a study regarding the concurrent jurisdiction of the district courts . . . and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary.” For a summary of arguments in support of concurrent disappointed offeror (or protest) litigation jurisdiction in the CFC and the district courts, see Michael S. Mason, *Bid Protests and the U.S. District Courts—Why Congress Should Not Allow the Sun to Set on This Effective Relationship*, 26 PUB. CONT. L.J. 567 (1997); Kovacic, *Procurement Reform*, *supra* note 36, at 461. While the statutory machinations attract interest, they are not statistically significant here, because historically, only a few dozen of these actions commence in Federal court each year. Similarly, each forum’s nuances are not significant here. For those interested in the differences, a rich body of literature chronicles the evolution of the current regime. See, e.g., JOHN CIBINIC, JR. & RALPH C. NASH, JR., *GOVERNMENT CONTRACT CLAIMS* 175-79, 291-317 (1981); Dorn C. McGrath, III, *The Transfer and Consolidation of the Contract Disputes Act*, 15 PUB. CONT. L.J. 256 (1985); Alan I. Saltman, “Breach” of Contract: *The Comptroller General, the Boards, the Courts and the All-Disputes Clause*, 7 PUB. CONT. L.J. 123 (1974); David V. Anthony, *Recommendations Concerning Legal and Administrative Remedies for Contract Claims: A Workable Remedies Package*, 42 GEO. WASH. L. REV. 300 (1974); Gilbert A. Cuneo & Eldon H. Crowell, *Parallel Jurisdiction: If the Court of Claims Can, Why Not the Administrative Boards?*, 33 FORDHAM L. REV. 137 (1964); Richard E. Speidel, *Exhaustion of Administrative Remedies in Government Contracts*, 38 N.Y.U. L. REV.

judicial and administrative fora exercise jurisdiction over matters impacting government contracts,⁴³ for the last two decades the GAO and the ASBCA have confronted the lion's share of litigation in their respective spheres of influence—the GAO is the most heavily utilized protest forum; the ASBCA handles the greatest volume of contract disputes.⁴⁴ In addition, both maintain and make publicly available (at

621 (1963). Those unfamiliar with the Court of Federal Claims may not recognize that, after a lengthy tenure, the U.S. Court of Claims was bifurcated by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (Apr. 2, 1982), 28 U.S.C. §§ 171 et seq., creating the U.S. Claims Court and the U.S. Court of Appeals for the Federal Circuit. A decade later, with the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (Oct. 29, 1992), the Claims Court morphed into its current form, the U.S. Court of Federal Claims.

43. For this task, I detail neither the protests nor the contract disputes activity at the U.S. Court of Federal Claims (CFC), or its predecessors, the Claims Court and the Court of Claims. Although the judicial forum merits attention, it proves less helpful for a host of reasons. First, the volume of protest activity before the GAO dwarfs the court's protest activity—these cases are numbered in the dozens. Second, the volume of disputes activity before the agency boards dwarfs the court's disputes activity. Third, Congress has repeatedly altered the Federal Courts' disappointed offeror jurisdiction (particularly in 1982 and 1996), which has injected unnecessary uncertainty into the process. *See generally* Frederick W. Claybrook, Jr., *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protests—Learning Lessons All Over Again*, 29 PUB. CONT. L.J. 1, 3 (1999) (noting that Congress gave the Court of Federal Claims jurisdiction over protest bids in 1982 and later granted concurrent bid protest jurisdiction to the Court of Federal Claims and the district courts); Frederick W. Claybrook, Jr., *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment*, 21 PUB. CONT. L.J. 1, 3 (1991) (critiquing the expansion of Court of Claims jurisdiction over causes of action seeking principally injunctive and declarative relief); Gregg A. Day, *The Bid Protest Jurisdiction of the United States Claims Court: A Proposal for Resolving Ambiguities*, 15 PUB. CONT. L.J. 325, 341 (1985) (describing how the Federal Courts Improvement Act of 1982 gave the U.S. Court of Appeals for the Federal Circuit appellate jurisdiction over claims court decisions); Joel Feidelman & Josephine L. Ursini, *Contract Formation Jurisdiction of the United States Claims Court*, 32 CLEV. ST. L. REV. 41 (1983) (noting that the Federal Courts Improvement Act of 1982 created the U.S. Claims Court, which replaced the former Court of Claims trial division); Steven L. Schooner, *Feature Comment—Watching the Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*, 42 GOV'T CONTRACTOR 108 (2000) [hereinafter Schooner, *Watching the Sunset*]. Fourth, the court tends to group "contracts" cases broadly, including in its statistics more than just CDA disputes. Fifth, the fluctuations in the court's contract docket do not appear consistent or statistically significant. For example, the court docketed over 250 "contract" cases in Fiscal Year (FY) 1992, 247 cases in FY 1993, 299 in FY 1994, 279 in FY 1995, 285 cases in FY 1996, and 280 cases in FY 1997. *See generally* CONFERENCE BRIEFS: THE FEDERAL PUBLICATIONS GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE, COVERING 1993, 1994, 1995, 1996, 1997, 1998 sess. 6; Steven L. Schooner & Keith D. Coleman, *The CDA at Twenty: A Brief Assessment of BCA Activity*, 34 PROCUREMENT LAW 10, 16-17 n.2 (1999). Other sources give broader insight into this court's evolving role. *See, e.g.*, Eric Bruggink, *A Modest Proposal*, 28 PUB. CONT. L.J. 529, 531-32 (1999) (arguing for more coherence and completeness in the Court of Federal Claim's jurisdiction); Loren Smith, *Alan E. Peterson Lecture: The Role of the Courts What Would Sherlock Holmes Say?*, 34 PROCUREMENT LAW 1, 28 (1999).

44. For the most part, the judicial and administrative fora enjoy concurrent jurisdiction. *See* 41 U.S.C. § 607(a) (1994) (creating concurrent jurisdiction between the Court of Federal Claims and agency boards of contract appeals). These two administrative fora routinely handle between ten and twenty times the volume of

least somewhat) useful data chronicling their activity.⁴⁵

The Comptroller General, through the GAO, is the most popular forum in which prospective contractors raise challenges to government activity relating to the award of contracts.⁴⁶ The GAO, an arm of Congress, exercises statutory authority to hear bid protests.⁴⁷ Despite its home in the legislative branch, the GAO functions and is perceived as an administrative dispute resolution forum.⁴⁸ Over many decades, GAO has established an intricate web of precedent addressing every conceivable nuance implicated in the process of acquisition planning, bid or proposal solicitation, vendor competition, source selection, and contract award.⁴⁹ Moreover, GAO practice has evolved dramatically to, in the more extreme cases, resemble federal court litigation.⁵⁰

There has also been a litigation decline at the ASBCA, the largest of the agency boards of contract appeals. Agency boards hear appeals from contractor claims arising under or relating to government contracts pursuant to the Contract Disputes Act of 1978

related matters filed in the federal courts. *See supra* note 43 and accompanying text.

45. *See* Schooner & Coleman, *supra* note 43, at 10-16. Although this earlier work did not address the cause of the decline, it chronicles the decrease and (1) describes the data available; (2) focuses upon the workloads of the largest administrative boards, which compiled the most complete statistical data sets; (3) discloses the limited data available at the smaller boards; (4) contemplates the volume of published board decisions; and (5) encourages the administrative boards to provide the public with better insight into their workloads. *Id.*

46. *See generally* Alexander J. Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 22 PUB. CONT. L.J. 636, 636-91 (1993) (describing the evolution of the GAO's systematic involvement in adjudicating bid protests to its statutorily authorized role as adjudicator under the Competition in Contracting Act of 1984).

47. *See* Kovacic, *Procurement Reform*, *supra* note 36, at 470-74 (outlining how the General Accounting Office fits into the maze of administrative and judicial fora).

48. *See generally* General Accounting Office, *Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts*, 4 C.F.R. § 21.1 (1999); OFFICE OF GENERAL COUNSEL, GOV'T ACCOUNTING OFFICE, GAO/OGC-96-24, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* (6th ed. 1996), available at <http://www.gao.gov/special.pubs/og96024.htm>.

49. *See* Gov't Accounting Office, *Bid Protest Decisions*, at <http://www.gao.gov/decisions/bidpro/bidpro.htm> (last modified Apr. 13, 2001) (displaying recent GAO bid protests and decisions). Between 1921 and 1994, select GAO decisions were published in the official reporter, DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES (Comp. Gen.). Since 1958, commercial publishers, including West (parent of Federal Publications), CCH, and LEXIS, have reproduced, distributed, and indexed all Comptroller General protest decisions.

50. Although the extent of this evolution is outside the scope of this discussion, the two most dramatic turning points have been GAO's willingness to conduct hearings and, more recently, broaden the potential for parties to engage in limited discovery. *See* 4 C.F.R. § 21.3(g) (1999) ("The protester may request additional documents"); *id.* § 21.7 ("At the request of a party or on its own initiative, GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.").

(CDA).⁵¹ Although agency boards have long provided contractors a forum for the pursuit of their claims, since 1978 these boards have been empowered by Congress to resolve matters arising under or relating to contracts (once awarded) in much the same manner as the U.S. Court of Federal Claims.⁵² The ASBCA provides adjudicatory services to the major defense agencies which, as discussed above, spend over half of the government's procurement budget. Moreover, pursuant to the CDA,⁵³ the ASBCA provides its services to less litigious agencies, such as the National Aeronautics and Space Administration (NASA), which have deemed it not cost effective to maintain independent boards.⁵⁴

2. *Quantifying the decrease*

Statistics regarding the activity of the General Accounting Office and the Armed Services Board of Contract Appeals paint similar pictures. Both exhibit a dramatic reduction in new filings of protests and disputes respectively. Each institution's docket has more than halved in less than a decade.⁵⁵ More striking is that both boards experienced uninterrupted, straight-line decreases. This should be contrasted with the general increase, or at the very least stability, in the volume of civil litigation in the Federal Courts.⁵⁶ As data from the

51. Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 601-613 (1994 & Supp. IV 1998)) (outlining the definitions, judicial process, and other roles of government contract dispute mechanisms).

52. See 41 U.S.C. § 609 (1994) (outlining process for judicial review of board decisions).

53. See *id.* § 607(c) (providing for dispute resolution where the volume of claims is not sufficient to justify an agency board).

54. See generally Paul Williams, *A Brief Look at the Armed Services Board of Contract Appeals*, 22 PUB. CONT. NEWSLETTER 3 (1986).

55. See *GAO Bid Protest Annual Report to Congress for Fiscal Year 1999* at <http://www.gao.gov/>. To navigate this site select "other publications," then select "complete listing." Reports are then presented alphabetically. Reports for prior fiscal years are on file with the author. The author thanks GAO's Dan Gordon and Jerold D. Cohen for their assistance in obtaining this data. See also Melanie I. Dooley, *Contract Appeals: ASBCA, Engineers Board Likely to Be Merged*, 73 Fed. Cont. Rep. (BNA) 149 (Feb. 8, 2000) (noting the Board's docket decreased from 2,503 in 1987 to 663 in 1999).

56. It is not my intent here to join the debate regarding the public's perception of a "litigation explosion." For those seeking insight into this conversation, see, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Criminal Justice System*, 40 ARIZ. L. REV. 717, 721 & n.14 (1998) (providing an extensive list of literature refuting the jaundiced view of legal legends, such as the litigation explosion); Samuel Jan Brakel, *Using What We Know About Our Civil Litigation System: A Critique of "Base Rate" Analysis and Other Apologist Diversions*, 31 GA. L. REV. 77, 136 (1996) (explaining that after filings declined during the late 1980s, data from 1991 to 1995 indicate that filings "are in an upward direction again, and the rates of increase are substantial"); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—Much Ado About Nothing*, 46 HASTINGS L.J. 679, 681 (1995) (referencing "[t]he widespread public and professional perception of a litigation

Administrative Office of the United States Courts demonstrate, although the consistent trend of increases was interrupted in the late 1990s, the volume of civil litigation still exceeds that of the early to mid-1990s.

Civil Cases Filed in the United States District Courts⁵⁷

a. Protests at the General Accounting Office

Although it is premature to chronicle the death of protests, ample evidence of hemorrhaging exists. The volume of protests before the GAO—long the primary forum for disappointed offerors to seek relief⁵⁸—continues to plummet. As the chart below indicates, after a

explosion”); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN’S L. REV. 85, 107 (1994) (“The public perceives that lawyers file every conceivable type of case, regardless of merit. As a result, the quantity of cases . . . has burdened court dockets and threatens the quality of justice.”); Matthew Scott Morris, *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990: By Keeping up With the Joneses, the SEC’s Enforcement Arsenal is Modernized*, 7 ADMIN. L.J. AM. U. 151, 186 n.169 (1993) (offering “[e]vidence of a trend towards increased litigation”); Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 277 n.8 (1992) (“Claims of a litigation explosion have not gone without a serious challenge based on close examination of available evidence.”); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 37-38 (1986) (challenging the litigation explosion myth); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69 (1983) (asserting that conclusions about a litigation explosion are based on casual scholarship).

57. See LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999: THE 1999 ANNUAL REPORT OF THE DIRECTOR 53 tbl. S-7 (1999), available at <http://www.uscourts.gov/judbus1999/content.html>; LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1997: THE 1997 ANNUAL REPORT OF THE DIRECTOR 44 tbl. S-7 (1997), available at http://www.uscourts.gov/judicial_business/content.html. These numbers reflect “original filings.” The report also contains data on total filings, which adds cases removed from State courts to the number of original filings.

58. Although GAO annual protest filings long have numbered in the thousands, disappointed offeror cases in the federal courts typically are counted in the dozens.

2001]

FAILURE OF BUSINESSLIKE GOVERNMENT

645

period of slowly growing dockets in the early 1990s, GAO protests have decreased for six consecutive years. In 1993, GAO received 3,377 cases; by 1999, GAO received just under 1,400.⁵⁹ In addition to the consistency of this decline, the severity—a decrease of nearly 60 percent—is breath-taking.

[INSERT TABLE 4]

GAO PROTEST FILINGS⁶⁰

Cases Filed⁶¹

1,852⁶²

[INSERT TABLE 5]

See, e.g., Schooner, *Watching the Sunset*, *supra* note 43, at 8; *Bid Protests: Characteristics of Cases Filed in the Federal Courts*, GAO/GGD/OGC-00-72, B-282743, Apr. 17, 2000.

59. *See supra* note 55 (explaining the GAO contracts and the decrease in bid protests).

60. *Id.* (citing GAO protest filing information from 1990-99).

61. *Id.* (including both protests and requests for reconsideration under the category of “cases filed” in GAO reports).

62. *Id.* (showing that beginning in Fiscal Year 1997, GAO began identifying the number of cost claims received as a subset of protests). To the extent that the volume of cost claims fluctuated between twenty-two and twenty-nine from 1997 to 1999, this does not appear to be statistically significant for these purposes.

This slump is particularly striking because despite the long-term trend, observers had every reason to expect an increase in 1996 or 1997. In 1996, Congress eliminated the authority of the General Services Board of Contract Appeals (GSBCA) to resolve protests involving information technology (IT) procurements.⁶³ During its short-lived existence, the Board's IT protest jurisdiction had proven quite popular with the protest bar.⁶⁴ Accordingly, if the GAO's docket increased by 150 or 200 filings in 1996 or 1997, the increase would likely have been attributed to forum substitution. Yet, the increase never materialized. If either the GAO or the courts captured the GSBCA's lost protest business, any forum substitution was swamped by the decline in other protests.

b. Disputes at the administrative boards

The contract dispute arena, which entails contract performance and administration issues, experienced a decline in activity similar to GAO's, yet the decline spanned a longer time frame. ASBCA is by far the largest of the agency boards of contracts appeals (BCAs). The ASBCA employs between two and three dozen judges, while the GSA board, the second largest, currently employs eight.⁶⁵ Many of the agency boards have the statutorily mandated minimum of three administrative judges. The ASBCA alone has historically received as many as ten times the number of contract disputes handled by the U.S. Court of Federal Claims.⁶⁶

63. See National Defense Authorization for Fiscal Year 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680 (repealing 40 U.S.C. § 759, known as the Brooks Automatic Data Processing Act). The Brooks Act initially addressed automated data processing equipment or ADPE, but subsequently adopted the more familiar IT label.

64. In 1995, the last full year before its elimination, the GSBCA docketed 178 protests. 64 Fed. Cont. Rep. (BNA) 393, 405 (Nov. 6, 1995) (explaining that the protest level remained the same as the previous year). During 1994, the board docketed an almost identical 179 protests. 62 Fed. Cont. Rep. (BNA) 477, 491 (Nov. 7, 1994) (finding a decrease of thirty percent in bid protests). In 1993, the GSBCA docketed 287 protests. 60 Fed. Cont. Rep. (BNA) 467, 485 (Nov. 1, 1993) (finding a decrease in bid protests for Fiscal Year 1993). In the less-than-one-year-period preceding its elimination in 1996, the GSBCA docketed eighty-three protests. 66 Fed. Cont. Rep. (BNA) 563, 565 (Dec. 9, 1996).

65. See *GSA Board of Contract Appeals*, available at <http://www.gsbcg.gsa.gov/> (visited Apr. 15, 2001). Comparing the relative size of the foras' benches masks the full breadth of the size difference. Unlike the ASBCA, where the administrative judges address only CDA matters, the GSBCA administrative judges, in addition to CDA matters, resolve federal employee claims for expenses incurred while on temporary duty travel or relocation, carrier or freight forwarder rate determination claims, and claims for the proceeds of the sale of property of dead, ill, or missing federal civilian employees. *Id.*, citing 31 U.S.C. §§ 3702, 3726(g)(1), and 5 U.S.C. § 5564.

66. Under the Contract Disputes Act of 1978, a contractor, upon receipt of a contracting officer's decision, may elect to challenge that decision *either* before an agency board of contract appeals, 41 U.S.C. § 607 (1994), or before the U.S. Court of

With the passage of the Contract Disputes Act of 1978 (CDA),⁶⁷ the number of filings at the ASBCA, referred to as appeals, increased consistently for a decade, peaking near the end of the 1980s.⁶⁸ In 1990, the ASBCA docketed 2,218 appeals, but during the 1990s the bottom fell out. By 1999, the Board had docketed only 663 appeals⁶⁹—more than a two-thirds decrease. During the same period in which the board shouldered the work of the now-defunct NASA BCA—the ASBCA experienced a decrease in administrative judges. The total number fell from a peak of thirty-seven to a post-CDA low in the mid-twenties. While other agency BCAs have not exhibited similar straight-line decreases, the cumulative effects are similar.⁷⁰ Compare the five largest boards' volume of new appeals:

[INSERT TABLE 6]

Corps of Engineers ⁷¹

[INSERT TABLE 7]

Federal Claims, 41 U.S.C. § 609(a)(1) (1994).

67. 41 U.S.C. §§ 601-613 (1994 & Supp. IV 1998) (detailing the review process for private contractors' disputes with the Federal Government).

68. Schooner & Coleman, *supra* note 43, at 11. Our research supports the widely held belief that the 1980s were the boom years of government contracts disputes litigation. Conversely, by almost any objective measure, the 1990s were an era of declining dispute litigation.

69. See Dooley, *infra* note 71, at 149 (noting the Board's decreased docket).

70. See generally Schooner & Coleman, *supra* note 43. Unfortunately, the smaller boards provide the public little or no insight into their workload, and some appear incapable of generating meaningful historical statistics. *Id.* We noted one peculiar and troubling trend—the three small boards that provided the most limited data were also the *only* boards to report docket increases in recent years. *Id.* at 13.

71. As a reflection of the continued reduction in BCA dockets, the ASBCA recently absorbed the Corps of Engineers BCA. See Melanie I. Dooley, *Engineers Board Being Merged With ASBCA; Judge Thomas Named New Vice-Chairman*, 74 Fed. Cont. Rep. (BNA) 54 (July 18, 2000). To the extent that previously “[t]he Defense Department [was] the only federal agency that [had] two separate entities to hear contract appeals[, t]he rationale for merging the two boards is that there is no justification, either in terms of caseload (which has declined significantly at the ASBCA over the past decade) or subject matter, to maintain two separate boards.” *Id.*

These statistics demonstrate the diminished volume of trial-level activity in the BCAs. Not surprisingly, there has been a corresponding, albeit somewhat delayed, decrease in appeals to the U.S. Court of Appeals for the Federal Circuit from the BCAs.

Appeals from the Boards of Contract Appeals
(to the U.S. Court of Appeals for the Federal Circuit)⁷²

[INSERT TABLE 8]

[INSERT TABLE 9]

72. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 125 tbl. B-8 (1999) (U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending), *available at* <http://www.fedcir.gov/pdf/b08sep99.pdf>; JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 131 tbl. B-8 (1998) (U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending), *available at* <http://www.fedcir.gov/pdf/b08sep98.pdf>; JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 117 tbl. B-8 (1997) (U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending), *available at* <http://www.fedcir.gov/pdf/b08sep97.pdf>. Prior year data comes from Table B-8 of the annual JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

Compared to the early 1990s, the latter half of the decade shows marked decline. The 1999 low point—when only forty appeals derived from the boards of contract appeals—represents less than half the annual volume generated between 1991 and 1994.

C. Searching for Explanations: A Provisional List

It is difficult to determine authoritatively what caused these dramatic declines, and I doubt that a definitive explanation will emerge. Numerous rosy rationales could explain the reduced litigation phenomenon, while a host of pessimistic theories likewise abound. The 1990s provide us with a diverse palette of potential causes, implicating variables involving economic events, government and contractor behavioral changes, and wide-reaching statutory, regulatory, and policy mutations. At this early point, it appears that further empirical research, focused on each individual variable, could validate a number of potentially synergistic or, for that matter, contradictory explanations.⁷³ Lacking an unequivocally accurate diagnosis, I offer a provisional list of potential causes. I present the explanations on a continuum, progressing from the most sanguine to the most bleak.

1. Optimistic accounts of the litigation downturn

The most cheering explanation for the decrease in litigation activity is the one least related to the Government's procurement market or practices. Entering the new millennium, the 1990s witnessed a prodigious, enduring economic boom, which produced the lowest unemployment rate in three decades.⁷⁴ With the nation's economic engine running at maximum efficiency, disappointed

73. In the text that follows, I posit no less than ten putative causes for the litigation downturn. Few, if any, of the individual events discussed below could explain *both* the decline in protests *and* disputes (particularly because there a three-year lag between the decline in disputes and protests). From a temporal standpoint, no potential cause aligns nicely with the actual commencement of the descents in disputes or protests. Conversely, I am confident that further research could demonstrate a strong correlation between each individual cause and the decline in either protests or disputes. The inability to explain precisely the phenomenon, however, should not dissuade further investigation. See Mark J. Roe, *Commentary: Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 667 (1996) ("Right now, none of the three paradigms—chaos, evolution to the local hilltop, or path dependence—is developed enough to enable us to make explanatory predictions. They do not tell us that if this happens, then that will happen. These paradigms are not even very good at letting us classify past paths . . . because we rarely have the bases to compare what might have happened if events in the deep past had taken another turn.") (citation omitted).

74. See 2000 ECONOMIC REPORT OF THE PRESIDENT, H.R. DOC. NO. 106-161, at 3, 21, 278, 354 (discussing how the lowest levels of unemployment since 1969 is fueling an expanding economic growth in 2000).

offerors (e.g., potential contractors frustrated over a failed bid, proposal, or opportunity) might cry less over their spilt milk. Similarly, a disgruntled contractor (e.g., a firm dissatisfied with its profit margin or facing potential losses on an existing contract) reasonably could conclude that it was inefficient to pursue, through litigation with an agency, the marginal dollars in dispute. This suggests that the plethora of available business opportunities elsewhere decreases firms' incentives to litigate issues involving any individual piece of work.⁷⁵ While this hypothesis seems reasonable, it is difficult to reconcile with the lack of any corresponding trend depicting a drastic reduction in civil, or more specifically, commercial, litigation.

A second, similarly rosy thesis is one of the most fanciful. The Clinton Administration frequently posits that, as a result of their acquisition reforms, contracting officers (CO's),⁷⁶ program managers, government attorneys, and senior decision-makers are better avoiding the practices that prompt lawsuits.⁷⁷ Proponents point to better

75. At a certain level, it seems to me an oversimplification to suggest that, from a management perspective, the existence of plentiful business opportunities diminishes, in a relative sense, the value of each marginal dollar sought through litigation. Because litigation rarely is the contractor's primary line of business, or purpose, a business's production capacity (or ability to pursue or perform an additional service contract or construction project) is not necessarily constrained by the firm's ability to obtain counsel and engage in litigation. Accordingly, it seems a stretch to suggest that a strong economy alters the *actual* opportunity cost of litigation—a fully-employed assembly line does not, unto itself, consume litigation resources. Of course, litigation does consume other key resources—e.g., it may distract management or key employees that must assist counsel in marshaling facts. The calculus may shift, however, if the consideration is framed in terms of the relative rate of return on a hypothetical marginal dollar invested. Arguably, a litigation risk analysis—evaluating the facts, law and past performance of the adjudicator—does not depend upon the strength of the economy. Conversely, in assessing alternative investment opportunities, whether a potential investment in additional plant, labor, or research, the decision may depend in large part upon the economy's current and potential performance. Thus, a booming economy and plentiful business opportunities may lead a firm to decrease the perceived *relative* rate of return on an investment in litigation. Furthermore, from the perspective of an individual contractor or contractor manager/stakeholder, this approach will depend in large part upon its corporate practice of allocating litigation costs and/or recoveries either (a) to division or corporate operating or overhead accounts or (b) final cost objectives such as individual contracts.

76. In Federal procurement, contracts may be entered into and signed on behalf of the Government only by duly appointed contracting officers (CO's). 48 C.F.R. § 1.601 (1999). By virtue of their selection and appointment in writing, CO's have authority to enter into, administer, or terminate contracts and make related determinations and findings. *See id.* §§ 1.602-1(a), 1.603-2, 1.603-3(a) (noting that Congress established the Federal Acquisition Regulations System for the codification and publication of uniform policies and procedures for acquisition by all executive agencies); *see also Federal Acquisition Regulation Home Page*, at <http://www.arnet.gov/far/index.html> (last visited Apr. 15, 2001) (detailing the Federal Acquisition Regulations System).

77. The most frequently identified government purchasing practice that may

training,⁷⁸ more pro-active and businesslike attitudes, and increased efforts to “partner” between government and industry. It is indisputable that, over time, more precise solicitations and crystal clear contracts *should* decrease protests and disputes. Unfortunately, this hypothesis seems a stretch because scarce empirical evidence supports claims of improved quality work by the federal procurement workforce. Rather, the data suggests that Congress’ relentless campaign to reduce the size of the acquisition workforce has unduly burdened, over-extended, and exhausted the government’s buyers.⁷⁹

Another hypothesis comes from devotees of alternative dispute resolution (ADR), who suggest that their on-going initiatives, whether prompted or encouraged by statute, high-level policy guidance, or grass roots agency initiatives, deserve credit for less formal adjudication.⁸⁰ Without doubt, ADR has become an integral part of

have led to a decrease in protest activity is the debriefing process, the requirements for which were upgraded during Kelman’s tenure. *See* 48 C.F.R. §§ 15.505, 15.506. In negotiated government procurements, excluded offerors are entitled to prompt debriefings. 10 U.S.C. § 2305(b)(6)(A); 41 U.S.C. § 253b(f)-(h). The revised regulations appear to have resulted in agencies providing more useful information to disappointed offerors on a more expeditious basis. Conventional wisdom suggests that quality debriefings reduce contractors’ incentive to file exploratory protests. Along the same lines, broadened exchanges between government and industry before receipt of proposals, particularly the increased circulation of draft requests for proposals, logically reduce the volume of award-related controversies. *See* 48 C.F.R. § 15.201. Similarly, to the extent that the government now buys more commercial-off-the-shelf commodities rather than drafting detailed specifications for government-unique products (e.g., the dreaded fruitcake specification that resulted in a dense, tasteless product deemed inedible by legions of service members), fewer potential offerors may complain about ambiguous, defective, or overly restrictive specifications.

78. *See* Office of Federal Procurement Policy Act, Pub. L. No. 104-106, 110 Stat. 666 (codified at 41 U.S.C. § 433 (Supp. IV 1998)) (known as Clinger-Cohen Act) (authorizing appropriations for the Department of Defense, reforming acquisition laws and information technology for the Federal Government); Acquisition Management Improvement Act, Pub. L. No. 102-484, 106 Stat. 2450 (1992) (amending 10 U.S.C. §§ 1701-1764 (1994 & Supp. V 1999) (requiring Secretary of Defense to develop fulfillment standards for training purposes).

79. *See* OFFICE OF THE INSPECTOR GENERAL, DEP’T OF DEFENSE, DOD ACQUISITION WORKFORCE REDUCTION TRENDS AND IMPACT 17-20 (2000) [hereinafter DEP’T OF DEFENSE, ACQUISITION WORKFORCE], *available at* <http://dodig.osd.mil/audit/reports/00-088.pdf> (identifying, among many others, the following effects of the personnel reductions: (1) increased backlog in closing out completed contracts; (2) insufficient staff to manage requirements; (3) reduced scrutiny and timeliness in reviewing acquisition actions; (4) difficulties retaining personnel; and (5) insufficient contract surveillance). In the absence of an empirical study, one can reasonably conclude that reduced oversight contributed far more to the decreased litigation trend than any efforts to upgrade personnel training.

80. *See generally* David P. Metzger & Christopher R. Yukins, *Using Alternative Dispute Resolution to Streamline Contract Claims*, *CONT. MGMT.*, Jan. 1999, at 4, 5 (suggesting the ease of ADR allows parties to find common ground and use more remedies than litigation); Joseph McDade, *Resolving Contract Disputes Through the Use of ADR: Filling the Information Void*, *PROCUREMENT LAW.*, Winter 1998, at 7 (“[I]t appears the emphasis on ADR use... may be leading to a quiet reinvention of

the procurement process⁸¹ and, conceptually, reflects an improvement in the way the Government interacts with its current and prospective contractors.⁸² The statistical significance of increased ADR usage is difficult to measure in this context. Because the data discussed above tracks docketed matters, once a matter is docketed, it is not relevant whether that matter subsequently is resolved through

dispute resolution procedures.”); Frank Carr et al., *The Untapped Potential of ADR in the Construction Industry*, 42 FED. LAW. 32, 34 (1995) (“[A construction dispute] lends itself to resolution by an experienced arbitrator or mediator, who can help the parties cut through and resolve such issues of interpretation and allocation.”).

As a general rule, I strongly support most of the agencies’ initiatives in this regard. As discussed *infra* note 82, however, I harbor at least two reservations regarding the lionization of alternative dispute resolution and the demonization of litigation. (1) With ADR, public access to and scrutiny of settlements is greatly diminished. I find this particularly troubling given the number of experienced agency counsel that express their belief that their agencies today willingly pay out larger settlements to comply with the “spirit” of ADR. (2) As more matters are resolved outside of established adjudicatory settings, tribunals decide—and in so doing, publish—fewer decisions. The value of precedent generally, and specifically in a highly regulated system, cannot be overstated. In a regime where hordes of buyers, sellers, and counsel utilize standard solicitation provisions and contract clauses, the published, precedential interpretation of those provisions and clauses by the boards of contract appeals and the Court of Federal Claims serve to modulate behavior. Sealed settlement agreements, conversely, fail to inform other buyers, sellers, or counsel of lessons learned.

81. See generally 5 U.S.C. §§ 571-81 (1994 & Supp. V 1999) (permitting an agency to use a dispute resolution proceeding for the resolution of an issue in controversy that relates to administrative program); 41 U.S.C. § 605(d) (1994 & Supp. IV 1998) (allowing a CO and contractor to use ADR for resolving claims); 48 C.F.R. § 33.201 (1999) (defining ADR as “any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation”); *id.* § 33.204 (“Agencies are encouraged to use ADR procedures to the maximum extent practicable.”); *id.* § 33.214 (1999) (explaining ADR objectives and procedures); INTERAGENCY ADR WORKING GROUP, CONTRACT AND PROCUREMENT SECTION, ELECTRONIC GUIDE TO FEDERAL PROCUREMENT ADR (1999), at <http://www.adr.af.mil/iadrwg>.

82. As I suggest *supra* at note 80, one of my primary reservations with ADR is that it typically permits dispute resolution insulated from the public’s—and similarly, congressional—scrutiny. Further, as discussed at length below, the increase in alternative dispute resolution dilutes the pool of matters that result in published opinions that provide useful precedent which informs the procurement community of vital information regarding standard contract clauses and provisions, practices, and policies. Also, in the context of the discussion of private attorneys general, *infra* text accompanying notes 254-64, I suggest that the ADR movement—in the context of federal purchasing and, more broadly, the business of governing—creates externalities in terms of oversight. It is not my purpose here to divine the golden mean between ADR and litigation, although that debate already has commenced and, in my opinion, merits further examination. See generally Owen M. Fiss, *Comment: Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (“To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying.”). Similarly, I recognize the contractors, first and foremost, are businesses, and I generally find that non-governmental disputes (whether business-related or involving domestic relations) pose the more compelling case for ADR. Accordingly, I would expect that individual businesses would be less enamored with a third-party oversight mechanism than similarly situated good-government advocates.

settlements prompted by formal or informal ADR efforts, decisions by the adjudicator, voluntary withdrawal, or other means. Because some matters resolved through ADR are included in these statistics, it is less likely that ADR accounts for the bulk of measured decline. Nonetheless, it seems fair to conclude that the government's investment in ADR initiatives has paid some dividends.

The end of the Cold War, which stymied and then reversed the Reagan-era defense buildup, leads to at least two potential explanations for the decline in contract-related litigation. First, to the extent that the defense agencies spend more than sixty percent of the government's procurement dollars,⁸³ it seems reasonable to conclude that, as the defense agencies buy less, there should be fewer contract-related protests and disputes. Conventional wisdom suggests that this theory might lead to different results between the protest and disputes regimes. For example, fewer new contracting opportunities might *increase* the number of protests, as contractors more vigorously pursue their piece of an ever-shrinking pie. At the same time, if there are fewer contracts, there should be fewer legal problems arising from those contracts. Although some have suggested that the available data supports this latter hypothesis, that claim does not withstand close examination.⁸⁴

83. See generally *Federal Procurement Report*, *supra* note 7.

84. Statistics provided by a telephone interview and email exchange with Richard L. Hanson, Deputy Chief Trial Attorney for the Air Force, in December, 1999, demonstrate that there existed a direct correlation, from 1978 to 1998, between (1) procurement appropriations in dollars and (2) the number of CDA disputes pending at the end of the fiscal year). Hanson's most compelling chart depicts two lines moving in tandem—annual Air Force procurement appropriations (in billions of dollars) and the number of Air Force disputes pending at the ASBCA. This correlation is unpersuasive for a number of reasons. First, Hanson's data is correlated to *pending* cases. The docket of *pending* cases, as compared to new docketings, is an inapt measure of litigation volume, particularly at the ASBCA. Since the mid-1980s, the number of administrative judges at the ASBCA has fluctuated dramatically, beginning with thirty-three administrative judges, and rising to thirty-seven in the late 1980s. Since the early 1990s, however, even having absorbed the now-defunct NASA board, the bench's population declined steadily due to retirements and deaths without new appointments. The Board currently has only twenty-five administrative judges, and a number of those have amassed near-mythical reputations based upon their lack of productivity. Unlike new docketings, the impact of individual and collective judge productivity upon the pending docket cannot be overstated. See generally John A. Howell, *The Role of the Office of Federal Procurement Policy in the Management of the Boards of Contract Appeals: From Great Expectations to Paradise Lost*, 28 PUB. CONT. L.J. 559, 566 (1999) (discovering seven administrative judges that published no decisions during a one-year period). Second, Hanson's data has not been adjusted into constant year dollars. This badly skews any suggested correlation, particularly because the number of filings—as opposed to the amount sought in those suits—would not require adjustment. For example, Hanson suggests that Congress appropriated approximately \$13 billion for Air Force procurement in 1979, compared to approximately \$37 billion in 1990 and only \$17 billion in 1998. Yet, the figures look very different when grossly adjusted

Second, the end of the Cold War led the government to encourage, and at times subsidize, a restructuring of the defense industry.⁸⁵ This industry consolidation may have taken a toll on the amount of litigation, particularly in the protest arena. With fewer firms competing for certain work and former competitors now allies, teammates, or subsidiaries, there may be fewer disappointed offerors to challenge source selection decisions. For example, despite the Government's recent decision not to approve General Dynamics's attempted acquisition of Newport News Shipbuilding,⁸⁶ these firms already share the contractual work for the Navy's new attack submarine.⁸⁷ Less than a decade ago, these companies bitterly contested the award of the early Seawolf submarine contracts.⁸⁸ Today, the absence of competition for scarce, yet lucrative, multi-billion dollar nuclear submarine production contracts eliminates the potential for lawsuits related to the Navy's selection of its primary submarine contractor(s). Accordingly, this hypothesis can be

into constant 1998 dollars (e.g., \$31.7 billion in 1979, \$47.5 billion in 1990, and \$17 billion in 1998). Third, through active management, the Board's chairman can dramatically impact the pending docket. It is more difficult for an adjudicator to manipulate the contractor community's initiation of suits. This does not suggest that the administrative boards have never engaged in docketing hijinks, particularly with regard to consolidated matters or multiple claims arising out of large, complex contracts. For example, the chairman can alter the pending docket by prioritizing an individual judge's workloads to either (1) address dispositive motions that appear likely to prevail or promptly resolve the greatest number of simple, often low-dollar matters or, conversely (2) eschew easy cases and grind through larger, more complex matters (often involving quantum rather than entitlement issues), some of which may have been languishing on the docket for years, if not decades. Finally, the correlation between procurement appropriations and CDA disputes is questionable because throughout the 1990s, the Air Force has been one of the most aggressive (and successful) agencies at adopting and implementing alternative dispute resolution initiatives.

85. See Eugene Gholz & Harvey M. Sapolsky, *Restructuring the Defense Industry*, INT'L SECURITY, Winter 1999/2000, at 5, 23, available at <http://mitpress.mit.edu/journals/ISEC/is24-3a.pdf> ("[I]n the post-Cold-War era, the face of the defense industry has changed dramatically[, nonetheless, the authors assert that,] despite the changes in corporate nameplates, the mergers have not led to a true defense industry restructuring."); William E. Kovacic & Dennis E. Smallwood, *Competition Policy, Rivalries, and Defense Industry Consolidation*, J. ECON. PERSPECTIVES, Autumn 1994, at 91, 94 ("The policy challenge is to balance the necessity of industry consolidation with the advantages of competition.").

86. See *DOD'S Opposition Squashes General Dynamics' Bid for Newport News Shipbuilding*, 71 Fed. Cont. Rep. (BNA) 549 (Apr. 19, 1999) (noting that if DOD approved General Dynamics Corp.'s \$1.4 billion bid for Newport News Shipbuilding Inc. it would have consolidated the Navy's nuclear vessel construction industry into one corporation).

87. See *General Dynamics, Newport News To Split New Attack Submarine Contract*, 70 Fed. Cont. Rep. (BNA) 335 (Oct. 5, 1998).

88. See *Newport News Shipbuilding & Dry Dock Co. v. Gen. Dynamics Corp.*, 960 F.2d 386, 388 (4th Cir. 1992) (explaining that the State of Connecticut and the Commonwealth of Virginia filed amicus curiae briefs supporting their respective home state contractors).

supported by this, and possibly a few additional, high-profile anecdote(s). It is less certain whether the sum of these anecdotes could become statistically significant.

2. *By-products of reform: Systemic changes, externalities and evolving norms*

Procurement re-invention acolytes assert that many of Steven Kelman's mid-1990s' reforms *individually* deserve credit for the diminished litigation phenomenon.⁸⁹ Without question, numerous specific policies that increased buyer discretion in the spirit of enhancing customer satisfaction and obtaining "best value"⁹⁰ for agencies and taxpayers may have reduced litigation. Accordingly, a cluster of the most relevant hypotheses follows. Further evaluation of each potential cause takes place in the context of the particular reform initiatives.⁹¹ Throughout this discussion, it is important to bear in mind that, although each hypothesis has a surface plausibility, it may be belied by the statistical evidence that the litigation atrophy began *before* passage and implementation of the most significant reform legislation.⁹² Yet, to the extent that we cannot distinguish the

89. The most vocal has been Kelman. "The idea of trying to win customers through litigation, to force customers into doing business with you, is . . . somewhere between anomalous and absurd." Ripley, *supra* note 24, at 45, 49. "He thought lawyers were a detriment to the system, that all we were interested in was gumming up the works." (quoting John Pachter discussing Kelman). *Id.* at 47.

90. 48 C.F.R. § 2.101 (1999) ("Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.").

91. It is significant that so many of the reform initiatives are implicated as causes of the litigation decline. In a period of aggressive statutory and regulatory change, it would be reasonable to expect the opposite—that new laws and rules would cause an *increase* in litigation.

Suppose . . . that a completely new statute has just been enacted. There are no precedents indicating how the statute is to be applied to a variety of disputes. . . . Initially, therefore, there will be great uncertainty as to the practical meaning of the statute. The uncertainty will increase the private costs of negotiating out-of-court settlements of disputes resulting from attempts to apply the statute because the outcome of the litigation over the meaning of the statute will be difficult to predict. Hence a good deal of litigation can be expected. . . .

William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 273 (1976) [hereinafter Landes & Posner, *Legal Precedent*].

92. As discussed above, the decline in disputes activity had begun by 1991, and protest activity reached its peak in 1993. Yet Congress did not pass the two primary statutory procurement reform bills until late 1994 and 1996. The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (signed by the President on October 16, 1994); the Federal Acquisition Reform Act of 1996 (FARA), Pub. L. No. 104-106, Division D, §§ 4001-4402, 110 Stat. 642, and the Information Technology Management Reform Act of 1995 (ITMRA), Pub. L. No. 104-106, Division E, §§ 5001-5703, 110 Stat. 679 (1996), are now jointly known as the Clinger-Cohen Act. Moreover, implementing regulations, subjected to notice-and-

causes for the initial reduction from the causes that sustain the trend, each hypothesis merits discussion.

a. The chilling effect of contractor performance evaluations

One of Professor Kelman's most important initiatives, and most controversial policies in implementation, entailed the use of contractor past performance information as an evaluation factor in negotiated procurements.⁹³ Professor Kelman argues that, prior to the 1990s' reforms, the Government viewed prospective contractors in its vendor selections as a blank slate regardless of agencies' prior contractual dealings.⁹⁴ In selecting contractors, agencies failed to reward their best contractors with a competitive advantage in subsequent buys. Similarly, the Government rarely sanctioned contractors for inadequate work regardless of whether costs were overrun, delivery schedules missed, or technical requirements degraded; poor performers were not penalized in subsequent competitions. Professor Kelman deemed this approach dysfunctional, preferring the thought process utilized by consumers and businesspeople, which was to give preferential consideration to those businesses, and others, that performed well in the past and avoid firms that previously disappointed the agency.

Today, as a result of Professor Kelman's efforts, extensive regulation and guidance⁹⁵ requires agencies to formally evaluate

comment rule-making, rarely are promulgated sooner than six months after laws take effect, and often require more than a year to become final rules. *See generally* 48 C.F.R. §§ 1.2 (administration), 1.5 (agency and public participation).

93.

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes . . . the contractor's record of conforming to contract requirements . . . ; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules . . . ; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's businesslike concern for the interest of the customer.

48 C.F.R. § 42.1501. One feature that distinguishes negotiated procurements from sealed bid transactions is the use of evaluation factors other than price. A contract "award decision is based on evaluation factors . . . that are tailored to the acquisition. . . . Evaluation factors . . . must—(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and (2) Support meaningful comparison and discrimination between and among competing proposals." 48 C.F.R. § 15.304(a), (b).

94. *See* KELMAN, *supra* note 1, at 38, 47, 63, 93 (suggesting that during vendor selection of newly established firms agencies could not rely on past performance, good or bad).

95. *See, e.g.*, OFFICE OF FED. PROCUREMENT POL'Y, OFFICE OF MANAGEMENT AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, BEST PRACTICES FOR COLLECTING AND USING CURRENT AND PAST PERFORMANCE INFORMATION ch. 2, at 9 (2000), *available at* <http://www.arnet.gov/Library/OFPP/BestPractices/pastpeformguide.html> [herein-

contractor performance on existing contracts, collect and organize these “report cards,” and then utilize the data in evaluating firms for future work.⁹⁶ Although the logic underpinning the use of past performance evaluation in public procurement is widely accepted, implementation has proven error-prone and controversial.⁹⁷ Most importantly for present purposes, critics of Professor Kelman’s past performance policies assert that the risk of adversely affecting their own past performance ratings intimidates contractors obsessed with pleasing government evaluators.⁹⁸ As a result, the private bar suggests that the collection and evaluation of contractor past performance data discourages contractors from pressing legitimate contract disputes.⁹⁹ The prospects of a negative, or less than stellar, past performance report card increase contractors’ litigation opportunity costs and chill contractors’ willingness to exercise due process rights, whether competing for new contracts or facing efforts to resolve disputes on existing work. The GAO has warned agencies of the chilling effect upon contractors prompted by the Government’s

after BEST PRACTICES].

96. See 41 U.S.C. § 405(j) (1994); 48 C.F.R. § 15.304(c)(3)(ii) (1999) (“past performance shall be evaluated in all source selections for negotiated competitive acquisitions issued on or after January 1, 1999, for acquisitions expected to exceed \$100,000”); *id.* § 42.1502(a) (“agencies shall prepare an evaluation of contractor performance for each contract . . . in excess of \$100,000 . . . at the time the work under the contract is completed. In addition, interim evaluations should be prepared . . . to provide current information for source selection purposes, for contracts with a period of performance . . . exceeding one year. . . . The content and format of the performance evaluations . . . should be tailored to the size, content, and complexity of the contractual requirements.”).

97. Proponents laud increased use of past performance information, because (1) contractors appear more focused upon customer satisfaction; and (2) source selection officials have stronger tools to avoid awarding contracts to mediocre contractors. See generally Steven Kelman & Mathew Blum, *Past Performance As An Evaluation Factor—Strengthening the Government’s Best Value Decisions*, 38 GOV’T CONTRACTOR ¶ 463, at 3 (Oct. 2, 1996) (defending the Office of Federal Procurement Policy’s position on past performance); Timothy P. Malishenko, *Using Past Performance Results in Better Value and Improved Performance*, CONT. MGMT., Dec. 1996, at 23 (explaining the primary goal of past performance); David Muzio, *Past Performance: What We Thought We Said and What We Need to Say*, CONT. MGMT., June 1995, at 27 (arguing that selecting a contractor based on an elaborate proposal to achieve good performance does not ensure good performance, but settles for mediocrity).

98. See John Cibinic, *Customer Relations: Valid Procurement Tool, Means for Extortion, Or Open Door To Cronyism?*, 10 NASH & CIBINIC REP. ¶ 37, at 109 (July 1996) (discussing improper uses of customer satisfaction in past performance); John S. Pachter & Jonathan D. Shaffer, *Past Performance as an Evaluation Factor—Opening Pandora’s Box*, 38 GOV’T CONTRACTOR ¶ 280, at 3 (June 12, 1996) (criticizing the exclusive use of past performance).

99. See generally 41 U.S.C. § 405(j) (1994 & Supp. IV 1998) (requiring the administrator of an agency to establish past performance guidelines); 48 C.F.R. § 15.304(c) & 42.15 (1999) (requiring past performance to be an evaluation factor in source selections).

broadened use of past performance evaluations,¹⁰⁰ and recent guidance has attempted to constrain improper behavior.¹⁰¹ Nonetheless, contractors have legitimate cause to be wary of the ramifications of suing the Government in this regard.¹⁰² Enough practitioners and executives have voiced this concern to convince me that past performance evaluation has chilled litigation, although it is unclear to what extent.

b. Task and delivery vehicles: End user enthusiasm for anti-competitive behavior

Another likely explanation for the decline in litigation is the burgeoning use of new contracting vehicles,¹⁰³ spawned by the 1990s' procurement reforms that specifically limit contractors' protest rights. Surely the most dramatic example has been the proliferation of multiple award indefinite-delivery, indefinite-quantity contracts,¹⁰⁴ known in the trade as ID/IQ's, and at times referred to as umbrella contracts. These vehicles facilitate the Government's purchase of varying amounts of supplies or services during a fixed period, within specified limits that are expressed in terms of numbers of units or as dollar values.¹⁰⁵ Deliveries or performance of the above contracts are

100. See, e.g., AmClyde Engineered Prods. Co., Comp. Gen. B-282271, June 21, 1999, 99-2 CPD ¶ 5, at 6 n.5 ("[A]bsent some evidence of abuse of process, agencies should not lower a firm's past performance evaluation solely on its having filed claims. Contract claims, like bid protests, constitute remedies established by statute and regulation, and firms should not be prejudiced in competing for contracts because of their reasonable pursuit of such remedies in the past."); Nova Group, Comp. Gen. B-282947, Sept. 15, 1999, 99-2 CPD ¶ 56, at 9 ("We think that it would be improper for contracting agencies to impose evaluation penalties merely for an offeror's having availed itself of the contract claims process, such as occurred here; imposing such penalties would create barriers to legal remedies created by Congress.").

101. See BEST PRACTICES, *supra* note 95, at 22-23 ("The source selection team should be cautious not to downgrade or penalize offerors for the judicious use of the contract claims process.").

102. This is analogous to performance under award-fee type contracts, where "the contractor's fee will be determined largely by an award given periodically by a high-ranking official in the procuring agency." CIBINIC & NASH, FORMATION, *supra* note 34, at 1148-49. One downside to such a subjective incentive scheme "is the potential for the [award-fee] contractor to follow Government directions without challenge." *Id.*

103. See John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 PUB. CONT. L.J. 395, 427 (1998) ("[F]ederal buyers today face a bewildering array of choices in determining which contractual vehicles will best meet agency requirements.").

104. See 48 C.F.R. § 16.504(c) (1999) (providing administrative preferences for multiple award indefinite delivery, indefinite quantity contracts).

105. See *id.* § 16.501-2. This explains that:

There are three types of indefinite-delivery contracts: Definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times and/or exact quantities of

scheduled by placing orders directly with the contractor.

The Government's use of indefinite-quantity contracts is not new. Now, however, the congressional preference is for making *multiple awards* of indefinite-quantity contracts that use a single solicitation for the same or similar supplies or services to two or more previously identified sources.¹⁰⁶ Less than a decade ago, the goods and services obtained through these individual task or delivery orders represented hotly contested individual procurements. Today, part and parcel of the multiple award, indefinite-quantity contract, is the ability to bypass time consuming "full and open competition,"¹⁰⁷ which, for more than fifteen years, has set the defining standard for award of most government contracts.

Because Congress expected that there would be robust competition under this regime, its legislative mandate bars contractors from protesting award decisions for individual task or delivery orders; the theory was that protests would be superfluous in the anticipated hyper-competitive environment.¹⁰⁸ As a result, despite the fact that competition proved to be chimerical,¹⁰⁹ the contract

future deliveries are not known at the time of contract award. . . .
[R]equirements contracts and indefinite-quantity contracts are also known as
delivery order contracts or task order contracts.

Id.

106. *See id.* § 16.504(c).

107. Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2701, 98 Stat. 494, 1175 (1984) [hereinafter CICA].

108. *See* 48 C.F.R. § 16.505(a)(7) (1999) ("No protest under [FAR] Subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task order contract or delivery order contract except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract.").

109. In principle, up-front competition is conducted for the initial multiple-award contracts; contractors were supposed to compete to become part of an umbrella contract, which offers them little more than the opportunity to compete for individual task or delivery orders. Unfortunately, this anticipated competition rarely materializes at this stage and agencies frequently include all comers on the contract vehicle. This should not surprise, to the extent that inclusion on the contract is no more than an opportunity to compete, akin to a "hunting license." But real competition does not take place at the task-order stage either. Because all "contract holders" are permitted to market their services directly to individual agencies, those agencies—affected by considerations including speed, convenience, personal preference, and human nature—frequently obtain those services on a sole source or non-competitive basis from those possessing these hunting licenses. As a result, legitimate competition infrequently occurs. *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/NSIAD-00-56, CONTRACT MANAGEMENT: FEW COMPETING PROPOSALS FOR LARGE DOD INFORMATION TECHNOLOGY ORDERS 4 (2000) ("Most of the 22 large orders we reviewed were awarded without competing proposals having been received . . . Only one proposal was received in 16 of the 22 cases—the 16 cases all involved incumbent contractors and represented about \$444 million . . ."); *see also* 48 C.F.R. § 6.003 (1999) ("Sole source acquisition means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source."). As a result, this popular, time-saving purchasing methodology proliferates despite its failure to

vehicles insulate an ever increasing piece of the procurement pie from meaningful competition and, of equal significance, denies the Government, contractors, and the public of third-party oversight of this spending. Accordingly, this proliferation of contract vehicles appears to be a credible explanation for at least some portion of the protest decline.

c. Commercial buying practices: Flexibility at the expense of oversight

Other reforms, which have expanded the use of flexible, commercial-like purchases, permit large classes of transactions to escape scrutiny and avoid competition and oversight.¹¹⁰ The most dramatic example entails the widespread use of the Government's purchase card.¹¹¹ The streamlined procedures available under the simplified acquisition threshold also merit examination in this context.¹¹²

It may seem strange that the Government only began widespread use of conventional credit cards for purchasing in the last decade.¹¹³

comply with congressional intent. Professor John Cibinic described the current situation as "virtual anarchy." See John Cibinic, Jr., *Task and Delivery Order Contracting: Congress Speaks, GAO Reports, and the FAR Does a Fan Dance*, 14 NASH & CIBINIC REP. ¶ 32 (June 2000) ("It is obvious that Congress smells something fishy but doesn't quite know what to do about it."). See also John Cibinic, *Task and Delivery Order Contracts: The Pot is Boiling*, 13 NASH & CIBINIC REP. ¶ 18 (Mar. 1999) (criticizing the FAR for failing to provide guidance on the use of task and delivery order contracts). Congress took an unimpressive stab at tightening the reins on these vehicles in the National Defense Authorization Act for Fiscal Year 2000, directing that the Federal Acquisition Regulation "be revised to provide guidance to agencies on the appropriate use of task order and delivery order contracts . . ." Pub. L. No. 106-65, § 804, 113 Stat. 512, 704 (1999). Unfortunately, the revised rule fails to cure what ails the process. See generally 65 Fed. Reg. 24,317 (Apr. 25, 2000) (to be codified, *inter alia*, at 48 C.F.R. pt. 16) (providing the text of the final rule amending the FAR).

110. This is not true of all commercial purchases, many of which remain subject to scrutiny both by government auditors and by private attorneys general. See Ron R. Hutchinson, *The Government's Audit and Investigative Powers over Commercial Item Contracts and Subcontracts*, 27 PUB. CONT. L.J. 263, 264 (1998) (arguing that the government's "potent arsenal of audit and investigative powers . . . have frustrated the commercial item reform efforts"); Linda S. Lebowitz, *Bid Protest Issues Arising in Commercial Item Acquisition*, 27 PUB. CONT. L.J. 429 (1998).

111. See generally 48 C.F.R. § 13.301 (1999).

112. See generally Pub. L. No. 103-355, §§ 4001, 4201, 108 Stat. 3243, 3338, 3342 (1994) (defining and describing the simplified acquisition procedures); 48 C.F.R. § 13.301 (1999) (delineating the simplified acquisition protocol). "*Simplified acquisition threshold* means \$100,000, except that in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation . . . or a humanitarian or peacekeeping operation . . . , the term means \$200,000." *Id.* § 2.101 (citations omitted) (emphasis in original). Simplified acquisition procedures are intended to: "(a) Reduce administrative costs; (b) Improve opportunities for small, small disadvantaged, and women-owned small business concerns to obtain a fair proportion of Government contracts; (c) Promote efficiency and economy in contracting; and (d) Avoid unnecessary burdens for agencies and contractors." *Id.* § 13.002.

113. The Government has long used plastic purchase or charge cards for

Once Congress authorized government employees to harness the convenience of consumer-type buying, however, the practice spread like wildfire. The congressionally created \$2,500 micro-purchase authority¹¹⁴ is the real catalyst credited with accelerating government purchase card usage.¹¹⁵ Below that threshold, buyers may ignore the Government's normal procurement rules and procedures, which mandate transparency and competition. In Fiscal Year 1999, more than 500,000 government employees spent in excess of five percent of all Federal procurement dollars (more than \$10 billion)¹¹⁶ without: (1) risk of protest; (2) full and open competition for the business; (3) use of standard solicitation provisions and contract clauses; and (4) visibility¹¹⁷ in the Federal Procurement Data System (FPDS).¹¹⁸

employee travel and fleet use (e.g., gasoline purchases), but has not permitted use of charge cards for the general procurement function. Instead, for small purchases the Government primarily relied upon purchase orders or its equivalent of petty cash, known as the "imprest fund." *Id.* § 13.001. The imprest fund is a "cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts." *Id.*

114. *See id.* § 2.101 ("Micro-purchase means an acquisition of supplies or services (except construction), the aggregate amount of which does not exceed \$2,500, except that in the case of construction, the limit is \$2,000. Micro-purchase threshold means \$2,500.") (emphasis in original). *See generally* 41 U.S.C. § 428 (1994 & Supp. IV 1998) (describing procedures applicable to purchases below the micro-purchase threshold); 48 C.F.R. §§ 13.201, 13.202 (1999) (providing general information and purchasing guidelines for purchases at or below the micro-purchase threshold); Pub. L. No. 103-355, § 1054, 108 Stat. 3243, 3261 (1994) (codified at 41 U.S.C. § 253h (1994)).

115. *See* 48 C.F.R. § 13.001 (1999) (defining "Government-wide commercial purchase card" as "a purchase card, similar in nature to a commercial credit card, issued to authorized agency personnel to use to acquire and to pay for supplies and services."). *See generally* 48 C.F.R. § 13.301(a) & (c) (1999) (describing the nature and uses of government purchase cards). The card is also known as the international merchant purchase authorization card (IMPAC).

116. This entails more than twenty million transactions per year. *See generally* Steven L. Schooner & Neil Whiteman, *Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency*, 9 PUB. PROCUREMENT L. REV. 148 (2000) (offering an extensive examination of the proliferation of purchase card activity).

117. Readers may find this surprising given the reasoned perception that financial institutions possess powerful information technology tools, such as the now ubiquitous point-of-sale terminals connected to inventory systems, capable of tracking, organizing, and capitalizing upon data related to purchase card transactions. In 1998, agencies had the opportunity to select from a number of card vendors—financial institutions vying for the opportunity to provide cards to tens of thousands of deputized buyers within each agency. *See* OFFICE OF MANAGEMENT AND BUDGET & OFFICE OF FEDERAL PROCUREMENT POLICY REPORT, AN ASSESSMENT OF CURRENT ELECTRONIC COMMERCE ACTIVITY IN PROCUREMENT (1998), available at <http://policyworks.gov/org/main/me/epic/assessment.html>.

In February 1998, GSA awarded a government-wide multiple award task order contract for the next generation of purchase cards. This contract (which takes effect in November 1998) will allow agencies to select a service provider to help reengineer and integrate business practices related to

Purchases *above* the micro-purchase threshold, but *below* the separate simplified acquisition threshold of \$100,000, are not free from all government procurement rules and procedures.¹¹⁹ Yet, they still offer substantial insulation from the normal time-consuming competition and transparency-related requirements. Accordingly, these streamlined procedures also increase efficiency at the expense of public notice and, as a result, competition and oversight.

The defining characteristics of many of these actions is that the contracting officer: (1) need only “promote competition to the maximum extent practicable”;¹²⁰ (2) can limit the competition to as few as three vendors “within the local trade area”;¹²¹ (3) may “solicit quotations orally to the maximum extent practicable”;¹²² and (4) in certain circumstances, solicit from a single source.¹²³ Contrasted with the Government’s typical policy of broadly advertising its procurements,¹²⁴ fewer firms are aware of, or realize they missed the

purchase, travel-related payment services, and fleet services. These program enhancements will give agencies access to *multi-functional ‘smart’ cards*, as opposed to single purpose ‘charge’ cards. These *increased capabilities will lead to better management through greater and easier access to information*, continued cost savings, additional flexibility, *increased accountability*, and more streamlined operations.

Id. (emphasis added).

Not surprisingly, these decisions turned less on the reputation of the individual financial institution and more on the package of card-related services and benefits offered. In this context, the key choice for agencies typically was between higher rebates or smart-card technological features. Despite the potential benefits of smart-card technology in terms of oversight, accountability, and management, agencies overwhelmingly eschewed these high technology options for marginally higher rebates. Short-term cash trumped investment in long-term command and control-type technology solutions. This seems penny-wise and pound foolish.

118. The FPDS provides statistical data at the time of contract award or inception about Federal Executive Branch procurement contract transactions. Contrasted with the extensive information provided for most procurements, the FPDS provides only summary data on purchase card transactions—no more than the number of transactions and dollars spent by individual agencies. *See* 41 U.S.C. §§ 405(d)(4)(A), 417 (1994) (mandating the establishment of an automated system for collecting, evaluating, and disseminating information about Federal procurement contracts). *See generally* Federal Procurement Data Systems, *U.S. Government Acquisition Statistics*, at <http://fpds.gsa.gov/fpds/fpds.htm> (last visited Apr. 15, 2001) (providing on-line access to FPDS statistics from 1979-2000). It appears that the Defense Department is moving in the direction of at least attempting to remedy this situation. *See generally* 65 Fed. Reg. 39,707 (June 27, 2000) (to be codified at 48 C.F.R. pt. 204) (including, for the first time, “[p]urchases made using the Governmentwide commercial purchase card” in the definition of “contracting action”).

119. *See supra* note 112 (delineating and citing statutory requirements for government contracts with values falling between the micro-purchase threshold and simplified acquisition threshold).

120. 48 C.F.R. § 13.104 (1999).

121. *Id.* § 13.104(b).

122. *Id.* § 13.106-1(c).

123. *Id.* § 13.106-1(b) (conditioning single-source solicitation on a determination that only one source is reasonably available).

124. For other purchases, the Government publicizes its pending requirements in

opportunity to compete for, the large number of Federal purchases under the \$100,000 simplified acquisition threshold. Absent notice of the purchasing action, contractors—even if they could offer a superior product or price—lack the opportunity to compete or subsequently challenge the Government's actions. There is little doubt that expanded, simplified purchasing leads to less litigation—both in terms of protests and disputes. It remains difficult, however, to quantify that impact.

d. Increased discretion suggests less arbitrary and capricious behavior

At a more macro level, critics of the acquisition reform movement condemn the increase in contracting officer discretion that served as the reform movement's rallying cry.¹²⁵ Acquisition reform proponents hail this broadened discretion, asserting that the Government's anticipated efficiency gains from the recent reforms depend upon contracting officers' abilities to exercise business judgment rather than blindly follow rules. As the statutory and regulatory scheme more loosely prescribes the breadth of permissible activities, potential litigants face greater hurdles in proving that buyers' actions were arbitrary, capricious, or outside the scope of their duties. In an era of seemingly unfettered contracting officer discretion, and faced with what they perceive as a dismal likelihood of prevailing on the merits, prospective litigants are discouraged from initiating litigation to challenge agencies' source selection decisions.¹²⁶ For example, experience suggests that it was reasonable to expect increased protest activity following the high-profile rewrite of Federal Acquisition Regulation (FAR) Part 15, which prescribed the rules for negotiated procurements.¹²⁷ The FAR Part 15 revisions

print and on the Internet through the CBD. *See generally id.* § 5.101(a)(1) (requiring dissemination of contracts exceeding \$25,000 in value in the Commerce Business Daily); United States Department of Commerce, *Commerce Business Daily*, at <http://cbdnet.gpo.gov> (last visited Apr. 15, 2001) (providing on-line access to the CBD).

125. As discussed above, the title of his book indicates that increasing buyers' discretion was the keystone of Steve Kelman's rhetorical message. *See generally* KELMAN, *supra* note 1 (discussing Kelman's reform of the public procurement process).

126. I can only offer anecdotal evidence on this point. A number of experienced, respected members of the protest bar have suggested to me that, in light of the above-referenced reforms and the perception that the source selection officials enjoy greater discretion, they have revised their assessment of the likelihood of prevailing upon the merits of specific matters and, accordingly, more frequently counsel their clients to forego filing protests.

127. *See* Federal Acquisition Circular (FAC) 97-02, 62 Fed. Reg. 51,224 (Sept. 30, 1997) (providing the text of the FAR Part 15 re-write). The revised rule became effective on October 10, 1997. *See id.* Many agencies, however, delayed its implementation until January 1, 1998. FACs are the formal amendments to the FAR

represent the most significant revamping of the competition rules in more than a decade. But the wave of protests never materialized, most likely because the revised regulation's hallmark was increased contracting officer discretion. Contractors and litigators continue to perceive that increased discretion in purchasing reduces the likelihood that protests will succeed. Still, at this point, only anecdotal evidence, primarily obtained by word of mouth, supports this hypothesis.

e. Unsatisfying forum shopping?

The most pessimistic rationalizations are rarely voiced for attribution. Some contractors, and the counsel that represent them, confess that they have lost faith in the adjudicative forums' ability to enforce the fundamental precepts of the procurement system. The GAO and the courts grant or recommend relief only in a small number of protests.¹²⁸ Without the GSBCA, a more protestor-friendly forum, enthusiasm for protests may have waned. In the disputes arena, as we enter the third decade of CDA practice, experienced practitioners bemoan that the boards no longer offer an inexpensive,

System and can be accessed via the FAR web site. See *Federal Acquisition Regulation Home Page*, at <http://www.arnet.gov/far/index.html> (last visited Apr. 15, 2001).

For additional discussion of the FAR Part 15 revisions, see John Cibinic & Ralph C. Nash, *Award Without Discussion: The Flexibility in the New FAR*, 12 NASH & CIBINIC REP. ¶ 13 (Mar. 1998); John S. Pachter et al., *Feature Comment: Source Selection Provisions of the FAR Part 15 Rewrite—A Train Wreck Avoided*, 39 GOV'T CONTRACTOR ¶ 578 (Dec. 1997); Ralph C. Nash, Jr., *The FAR Part 15 Rewrite: A Final Scorecard*, 11 NASH & CIBINIC REP. ¶ 63 (Dec. 1997) (identifying three improvements in the rewrite: (1) "[b]etter guidance on the types of communications permitted during acquisition planning"; (2) "[b]etter guidance on the evaluation process"; and (3) an "[i]mproved statement of the 'discussions' rule").

128. Historically, the GAO recommends relief in fewer than 10% of the protests filed. During the late 1990s, the protest bar was surprised to see their success (or "sustain") rate begin to climb to 12% in Fiscal Year 1997, then 16% in Fiscal Year 1998. When, in Fiscal Year 1999, the GAO protest sustain rate exceeded 20% for the first time in recent memory, the GAO struggled to explain—and attempted to downplay—its rising sustain rate. See generally *Bid Protests: GAO Protests Continue Downward; ADR Use, Success Increase*, 72 Fed. Cont. Rep. (BNA) 562 (Nov. 15, 1999). The rising sustain rate, particularly when superimposed against reduced protest activity, could suggest better self-censorship on the part of the protest bar. More cynical observers posit that the rising sustain rate reflects the GAO's perception that better results may spur new business. The GAO's self-preservation instinct might be stimulated by fears associated with the prolonged downturn in protest activity and concerns regarding the future viability of the forum. In any event, these numbers seem inconsistent with the "50% trial hypothesis," which suggests that plaintiffs should prevail approximately half of the time regardless of the adjudicator or the substantive legal standard. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5 (1984), discussed in Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1007 n.195 (1998).

efficient, and expedited dispute resolution option.¹²⁹ An almost inexplicable chasm exists between the boards' current role, as a parallel, quasi-judicial, and at times, indistinguishable, alternative to the Court of Federal Claims, and their original purpose, which was to resolve contract matters on behalf of the agency head.¹³⁰ As discussed at length below, the protest and disputes systems were designed to ensure that litigants could pursue matters with minimal costs of entry, invest reasonable amounts of resources, and expect prompt and fair results. As the bar and contractor community doubt these premises, their inclination to commence litigation wanes.¹³¹

129. See generally, e.g., C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time to Roll Back Sovereign Immunity?*, 28 PUB. CONT. L.J. 545 (1999) (discussing the impact of sovereign immunity under the CDA as giving the government an unfair advantage that more remedies should be available to private contractors against the government); John A. Howell, *The Role of the Office of Federal Procurement Policy in the Management of the Boards of Contract Appeals: From Great Expectations to Paradise Lost?*, 28 PUB. CONT. L.J. 559 (1999) (asserting that the Office of Federal Procurement Policy has failed in its obligation to monitor the boards in their duty to provide an informal and expeditious forum for the resolution of contract disputes); Steven L. Schooner, *What Next? A Heuristic Approach to Revitalizing the Contract Disputes Act of 1978*, 28 PUB. CONT. L.J. 635 (1999) (purporting that the current dissatisfaction with the system under the CDA, as evidenced by the decrease in litigation, compels a new discussion as to what changes must be made to improve efficiency). But see generally, e.g., Clarence Kipps et al., *The Contract Disputes Act: Solid Foundation, Magnificent System*, 28 PUB. CONT. L.J. 585 (1999) (applauding the success of the system established under the CDA and the Federal Courts Administration Act and commending the fair and reasonable forum that was created for resolving disputes); Nicholas "Chip" P. Retson & Craig S. Clarke, *Overjudicialization of the Contract Disputes Process: Fact or Fiction*, 28 PUB. CONT. L.J. 613 (1999) (offering a qualitative analysis of the system established under the CDA and concluding that assertions of complexity and inefficiency are inaccurate).

130. See generally 2 RALPH C. NASH, JR. & JOHN CIBINIC, JR., FEDERAL PROCUREMENT LAW 2037 (3d ed. 1980) (citing Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROBS. 39 (1964) (setting forth a discussion of the purposes, procedures and jurisdiction of the Armed Services Board of Contract Appeals)). Shedd, then a member of the Armed Services Board of Contract Appeals, articulated purposes such as: (1) ensuring that "accomplishment of the military mission will not be frustrated by a dispute with [a] contractor"; (2) providing "a means of settling disputes fairly and expeditiously without the expense of an action at law[.]" and (3) furthering "harmonious relations with its contractors." Shedd, *supra*, at 39-40. The Senate Report accompanying the CDA was prescient in identifying a paradox. "The aim of any remedial system is to give the parties what is due them as determined by a thorough, impartial, speedy, and economical adjudication. However, it is difficult to be economical, yet thorough; thorough, yet speedy." S. REP. NO. 95-1118, at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5247.

131. John Janacek, the Air Force's leading civilian contracts attorney, suggests a more cheerful scenario. Janacek correctly identifies the massive volume of jurisdictional litigation that followed the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 601-613 (1994 & Supp. IV 1998)). Janacek has suggested to me that after twelve years of aggressively testing the parameters of the government's waiver of sovereign immunity, there simply are fewer issues remaining to be decided. Although I concede that the Boards of Contract Appeals confront fewer jurisdictional issues today, I am not persuaded that this phenomenon is reflected in a drop in new filings. This is not to say that greater

f. The False Claims Act: Proliferation of compliance pitfalls

Finally, a small but vocal cadre asserts that, during the 1980s, the Federal procurement system became so criminalized, and the associated penalties so severe, that the risks inherent in the mere exercise of due process rights became too great, and, accordingly, contractors are discouraged from pursuing otherwise valid claims.¹³² The most frequently cited example of the criminalization trend is the False Claims Act,¹³³ which is frequently ridiculed as a bounty hunter

jurisdictional clarity does not reduce the boards' workload; it does. Rather, it suggests that given their nature, few of the jurisdictional issues alter the number of disputes that the boards actually docket. *See, e.g., infra* note 237. For example, the most successful certification challenges resulted in matters being dismissed without prejudice, thus delaying, rather than foreclosing, the eventual adjudication of the matter.

132. The private attorneys general concept has been vilified by certain segments of the contractor community in light of the qui tam provisions of the False Claims Act Amendments of 1986. A wealth of literature suggests that the False Claims Act, 31 U.S.C. §§ 3729-3733 (1994), coupled with burdensome statutory and regulatory compliance requirements, deters commercial firms from participating in government procurement. *See, e.g.,* William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 205 (1998) [hereinafter Kovacic, *Deterrent to Participation*] (suggesting that "CFCA contractors regard this "oversight as a costly, substantial burden of doing business with the government").

133. 31 U.S.C. §§ 3729-3733 (1994). The False Claims Act gives "the government remedies against parties that process false claims, . . . and is commonly used to address fraudulent conduct by contractors." NASH ET AL., REFERENCE BOOK, *supra* note 34, at 231; *see also* Neal v. Honeywell, Inc., 826 F. Supp. 266, 269 (N.D. Ill. 1993) (stating that, "[t]he purpose of the False Claims Act is . . . to discourage fraud against the government."). The False Claims Act Amendments of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-3730 (1994)), affected all aspects of the False Claims Act. The amendments decreased the level of intent required to knowingly defraud the government, decreased the burden of proof to "preponderance of evidence" rather than "clear and convincing," expanded the role of the relator and the class of relators that may file a qui tam proceeding, increased the damages and penalties for filing a false claim, increased the percentage that a relator receives upon a successful false claims allegation, gave relators protection from retaliation by employers for their whistleblower activity, and expanded the statute of limitations to file a qui tam suit. *See* Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 27 (1998). These reforms were intended "to cure two perceived agency problems: that contractors exploit private information to shirk their commitments to government customers, and that government law enforcement bodies fail to attack fraud as aggressively as taxpayers would prefer." William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1806 (1996) [hereinafter Kovacic, *Whistleblower Bounty Lawsuits*]; *see also* United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1511 (8th Cir. 1994) (defining the purpose of the False Claims Act: "to promote private citizen involvement in exposing fraud against the government, while at the same time prevent[ing] parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud"). The qui tam provision grants a person, subject to the limitations in section 3730(e), to "bring a civil action for a violation of section 3729 of . . . [T]itle [31] for the person and for the United States Government." 31 U.S.C. § 3730(b)(1) (1994). This provision was intended to help the government uncover fraudulent activity. *See* Virginia C. Theis, Note, *Government Employees as Qui Tam*

statute.¹³⁴ For contractors, one of the most intimidating features of the False Claims Act is the rapidly multiplying monetary remedies.¹³⁵ A broad range of critics deride the False Claims Act as a disgruntled employee's retirement subsidization act or simply a vehicle for parasitic actions.¹³⁶ Although the False Claims Act originally sought to

Plaintiffs: Subverting the Purposes of the False Claims Act, 28 PUB. CONT. L.J. 225, 227 (1999) (discussing the history of the False Claims Act and asserting that the qui tam provision was intended to aid the government in stopping fraud by providing the incentive of half the damages collected to relators). The Department of Justice (DOJ), representing the United States, has the option to prosecute the claim themselves or allow the relator to continue the suit. See NASH ET AL., REFERENCE BOOK, *supra* note 34, at 430. In return for the relator's disclosure, the relator is granted a "monetary recovery" consisting of a percentage of the successful damage award ranging from ten to thirty percent, dependent upon the relator's involvement in the case. See 31 U.S.C. § 3730(d) (1994 & Supp. 2000) (establishing the circumstances under which a person originally bringing an action under § 3730(b) of the Act will be awarded a percentage of the settlement of the claim); NASH ET AL., REFERENCE BOOK, *supra* note 34, at 430. Additionally, qui tam relators enjoy whistleblower protection from retaliation by the employer. See 31 U.S.C. § 3730(h) (1994); NASH ET AL., REFERENCE BOOK, *supra* note 34, at 430; see also Raspanti & Laigaie, *supra*, at 45, 47 (explaining that industries feel threatened by the qui tam provision because it serves as an incentive for any employee to become a whistleblower and act against the interests of the employer).

134. See generally Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 133, at 1821-41 (describing the False Claims Act qui tam suits as "bounty-hunter" lawsuits; discussing the potential advantages and disadvantages of the Act to government procurement; and criticizing qui tam relators as motivated by the cash award following a successful qui tam action). But see Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 325-26 (1992) (suggesting that the fear of meritless claims motivated by greed are unfounded for a host of reasons).

135. See Pub. L. No. 99-562, § 2(7), 100 Stat. 3153, 3153 (1986) (codified at 31 U.S.C. § 3729(a) (1994 & Supp. IV 1998)) (establishing that the penalties under the False Claim Act consist of: (1) fines ranging from \$5,000 to \$10,000 per false claim; (2) a fine of three times the amount of damages sustained by the government from the false claim; and (3) the relator's attorney's fees and expenses); see also Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 133, at 1818-19 (reiterating the penalties for violating the False Claims Act). Because contractors may submit routine invoices for payment, they are exposed to potentially staggering penalties. See Frederick M. Morgan, Jr. & Julie Webster Popham, *The Last Privateers Encounter Sloppy Seas: Inconsistent Original Source Jurisprudence Under the Federal False Claims Act*, 24 OHIO N.U. L. REV. 163, 167 & n.29 (1998) (expanding on the notion that penalties for false claims under the Act are severe by demonstrating that when contractors must submit multiple claims, such as a Medicare provider, such penalties are substantially greater); Francis E. Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935, 944-46 (1993) (discussing how the 1986 Amendments resulted in an increase in the penalties for false claims as well as an increase in the recovery to a relator bringing a valid claim); Carl L. Vacketta & Dorn C. McGrath, III, *Procurement Reforms of the 99th Congress: False Claims Amendments Act*, BRIEFING PAPERS 86-13 (Dec. 1986).

136. Parasitic actions typically refer to suits filed based on publicly available information, where the relator lacks first hand knowledge of the fraud. The 1986 Amendments sought to limit parasitic actions by disqualifying any suit when information has already been subject to public disclosure, with an exception for "original sources." See Morgan & Popham, *supra* note 135, at 168-69 (defining "original sources" as those who have direct or independent knowledge of the information); Purcell, *supra* note 135, at 941-43 (noting that the original source

minimize fraud within the government, over time opponents have hypothesized that the Act chilled contractors' willingness to pursue otherwise valid claims.¹³⁷ Despite significant investments in enhanced internal compliance programs during the late 1980s and throughout the 1990s,¹³⁸ firms fear that filing claims, and later, litigating disputes, may expose them to Government counter-claims for potentially minor, yet undetected, accounting or reporting errors.¹³⁹ Contractors

doctrine in the 1986 Amendments prohibits suits based on publicly disclosed information unless the party bringing the suit had independent knowledge of the information). Contractors fear an army of potential whistle-blowers within their ranks, keeping a close watch for lucrative windfall at the company's expense. See Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 133, at 1819 (describing a group of employees who may have great incentive to bring a qui tam suit as those who have been laid off or who see little room for advancement in their current employment); Raspanti & Laigaie, *supra* note 133, at 45 (outlining efforts by industry groups to eliminate the qui tam suit out of concern for its effect on those industries that rely on government contracts).

137. See, e.g., Theis, *supra* note 133, at 225; see also *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994); *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 269 (N.D. Ill. 1993). I believe that, to some extent, the False Claims Act chills the pursuit of contractor claims and, accordingly, reduces the volume of disputes litigation. The private bar suggests that the False Claims Act chills *disputes* litigation, rather than protest litigation. Yet, as Kovacic and I have discussed, I do not accept the contractor community's broader assertions regarding the apocalyptic impact of the qui tam provisions. Specifically, I do not perceive the False Claims Act as a significant barrier to entry with regard to firms' willingness to do any business at all with the Federal Government. I am not persuaded that any significant number of commercial firms refuse to do business with the government based solely upon fear of the False Claims Act. In a number of instances in which anecdotal evidence has been put forward on this issue, further examination has found the facts wanting. For example, a popular myth described the refusal of Microsoft to do business with the Government based upon fears of False Claims Act and compliance pitfalls. To the extent that legions of government employees use Microsoft products daily, something apparently was missing from the story. Minimal research uncovered that Microsoft does not sell directly to anyone (except for distributors and retailers). Thus, it makes perfect sense that Microsoft would not sell directly to the Federal Government. In the larger context, despite the False Claims Act, innumerable firms continue to aggressively pursue the Federal Government's procurement dollars. As Kovacic concedes, "it would be an exaggeration to say that . . . oversight, standing alone, commonly induces firms to deal solely in the commercial arena. *It is doubtful that any single attribute of the procurement regulatory system has that discouraging effect.*" Kovacic, *Deterrent to Participation*, *supra* note 132, at 239 (emphasis added).

138. See, e.g., Kenneth Penska & Khi V. Thai, *Regulation vs. Self-Governed Compliance in Government Procurement: The Perceived Impact of DII*, 12 J. PUB. BUDGETING, ACCT. & FIN. MGT. 462, 467-69 (2000) (discussing the impact of the "Defense Industry Initiative on Business Ethics and Conduct" on the management of the defense industry).

139. See Kovacic, *Deterrent to Participation*, *supra* note 132, at 211.

The [False Claims Act's] impact on contractor behavior depends crucially on what conduct constitutes a false claim. Implementation of the 1986 . . . amendments has coincided with a major expansion of the types of conduct that may be regarded as fraudulent. . . . [F]irst is a large increase . . . of contractor duties under existing statutes such as the Truth in Negotiations Act [Second] . . . is the creation of new regulatory requirements whose infraction may constitute a false claim. . . . [M]any public procurement commands . . . compel contractors to certify [compliance]. . . . [E]ach

performing fixed-price contracts may perceive potential pitfalls inherent in claim preparation, particularly disclosure requirements mandated by the Truth In Negotiations Act (TINA).¹⁴⁰ Contractors “perceive that the [False Claims Act] enables the government to convert what in the commercial world would be simple contract disputes into fraud allegations and to use the threat or prosecution of fraud-based claims to obtain settlements that could not be attained in commercial practice.”¹⁴¹ Accordingly, these contractors may abandon or settle claims rather than risk the audit, examination, and scrutiny associated with litigating those claims.¹⁴²

Anecdotal evidence lends credibility to this hypothesis, and like many of the others discussed above, limited empirical evidence bolsters the support. From a temporal standpoint, however, this hypothesis is appealing because it nicely correlates with the dispute volume trend line. Unlike the mid-1990s reforms discussed above, the key legislation here precedes the drop in litigation. The decline in disputes begins in the 1990s, which would give the relevant parties a few years of experience following the 1986 False Claims Amendments before beginning to change their behavior.

As this discussion demonstrates, numerous potential causes could explain the decrease in external monitoring performed by prospective vendors and contractors through protest and dispute litigation. I welcome efforts to quantify the impact of the issues discussed above or others. Regardless of the reasons for the litigation

request for payment under a contract for which a false [or incorrect] certificate is signed might be attacked as a false claim.

Id.; see also Thomas P. Barletta & Barbara A. Pollack, *Civil Litigation of Allegations of Fraud in Connection with Government Contract Claims*, 18 PUB. CONT. L.J. 235, 241 (1988) (asserting failure to meet certification requirements as one of the many acts for which a contractor may be penalized).

140. See 10 U.S.C. § 2306a (1994); 41 U.S.C. § 254(b) (1994). Kovacic’s contractor survey respondents:

used the interplay between the [False Claims Act] and the Truth in Negotiations Act (TINA) to illustrate the possibilities for procurement agency opportunism. . . . The likelihood that an audit can discover a TINA[] violation for any single contract is substantial. . . . For complex programs . . . disclosure omissions are virtually inevitable. Perfect TINA compliance may be infeasible. . . .

Kovacic, *Deterrent to Participation*, *supra* note 132, at 227-29.

141. Kovacic, *Deterrent to Participation*, *supra* note 132, at 227.

142. Arguably, this phenomenon is analogous to lawyers’ unwillingness to pursue fee disputes due to fear that their clients will respond with malpractice allegations. See, e.g., Alan Scott Rau, *Resolving Disputes Over Attorneys’ Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2017 (1993) (“The lawyer contemplating an action to recover an unpaid fee must realize that such a suit virtually guarantees a counterclaim for malpractice—which might take any form from the relatively commonplace allegation that the underlying services were negligently performed, to more dramatic accusations of misbehavior.”).

decline, however, several issues remain clear. At least in the short term, nothing will reverse the trend of reduced internal and external oversight. Although the decrease in internal oversight has caused ongoing consternation, only recently has the depth of the decreased litigation trend been acknowledged, with mixed reactions. Individual practice groups and boutique firms mourn the evaporation of a business staple. Some scholars and policy makers herald a new era. Although emeritus Professors Ralph Nash and John Cibinic opined that they “don’t yet see any danger signs in these statistics[,]”¹⁴³ I cannot share their sanguinity.¹⁴⁴ Second, Professor Kelman’s

143. Ralph C. Nash & John Cibinic, *Dateline January 1999*, 13 NASH & CIBINIC REP. at 1 (Jan. 1999) (discussing the decline in the number of cases heard by the ASBCA between 1990 and 1998). Professor Cibinic and I have discussed this issue at length and he recently responded to my earlier work regarding the role of the federal courts in disappointed offeror litigation. See John Cibinic, *Court Jurisdiction over Award Protests: A Difference of Opinion*, 14 NASH & CIBINIC REP. ¶ 38 (July 2000) [hereinafter Cibinic, *Court Jurisdiction*] (addressing the role of protests in promoting integrity in the procurement process and concluding that protests do not ensure compliance with procurement regulations); see generally Schooner, *Watching the Sunset*, *supra* note 43. Cibinic concedes that he and Nash “are not fans of the protest process.” Cibinic, *Court Jurisdiction*, *supra*, at 112. He argues that the resources invested in the protest “process could be put to better use in increased auditing of procurement activities.” *Id.* I differ with Cibinic’s perception that GAO possesses either the ability or means to meaningfully provide procurement oversight through audit. Yet, while Cibinic and I disagree as to what potential improvements could make the protest regime more effective, he joins with me in opposing either an expanded Inspector General presence or “any new organization to police the procurement system.” *Id.* Cibinic, however, does not oppose the presence of litigation. He merely opposes the existing protest mechanism and its potential injunctive remedies. Accordingly, he “favor[s] permitting disappointed offerors to sue for lost profits as well as other damages if they are injured by agencies violating procurement rules.” *Id.* Cibinic would prefer to “take the lawyers and courts out of the procurement process and put them where they belong—dealing with money claims.” *Id.* I agree that this suggestion has a certain appeal, yet I find it inconsistent with the procurement system’s long-standing norms. Even with the regime’s obvious efficiencies, I prefer the problem-solving aspect of injunctive protest remedies to expenditures from the public fisc derived from the highly-speculative remedies that grant lost profits.

144. I fear that John Pachter was as prescient as he was cynical when he remarked: “The pendulum swings back and forth. . . . What’s going to happen now is that there will be some abuses, and then there will be some hearings, and then congressmen will say they’re shocked—and then there will be a new wave of legislation.” Ripley, *supra* note 24, at 50. The pendulum theme—the more things change, the more they stay the same—pervades procurement literature. “You come to the realization that, although items have become more expensive and complicated, the procurement process itself—with all its successes and scandals—has remained remarkably the same.” NAGLE, *supra* note 23, at 517. As my colleague, Joshua Schwartz, has observed:

As the Gore [NPR] Report illustrates, from time to time reformers in Congress, the Executive Branch or the public at large will recognize the high price that we pay for creating a procurement system that is so tightly governed by rigid rules. . . . [A] counter-movement is almost inevitable. . . . If . . . procedures are de-regulated to a sufficient degree to allow capable procurement officials to exercise sound discretion . . . , there will also be enough discretion so that some less capable or less honest officials will be

fingerprints are found on many of the potential explanations for the litigation decline.¹⁴⁵ Accordingly, his writings and efforts bear further examination.

III. THE TOLL OF REDUCED EXTERNAL OVERSIGHT

I do not disagree with Professor Kelman's primary policy aspirations, and I applaud his efforts to encourage more businesslike behavior by government buyers. My concern lies with the *implementation* of Professor Kelman's policies in two related areas. First, I am disappointed that Professor Kelman was a willing accomplice to the dramatic reductions in acquisition personnel concurrent with the implementation of his reforms, as depicted in the figure below.¹⁴⁶

able to abuse their discretion in many different ways. When such abuses inevitably emerge, they are likely to be spotlighted by the press and . . . Congress, and a new cry for a different kind of reform will arise. Congress will then impose new constraints and safeguards to regulate the abuses[. . .] recreat[ing] the environment decried by . . . Gore. . . . The cycle will . . . repeat itself. . . . *This . . . is why the public and Congress will always be dissatisfied with the corpus of government contract law and procedure, and why change will be perpetual.*

Joshua Schwartz, *Cases and Materials for a Survey of Government Procurement Law*, Vol. I, at 11 (Fall 1999) (unpublished manuscript, copy on file with author) (emphasis in original). Using this metaphor, the question becomes whether the pendulum has swung too far. I suggest that, unless some effort is undertaken to re-conceptualize the Kelman vision, the system, sooner rather than later, is doomed to repeat the scandals that permeated the public's perception of the Government's buying practices in the 1980s.

145. As I suggested above, further empirical research might validate a number of potentially synergistic or contradictory explanations. Until that research evolves, it would be naïve to conclude that the litigation decline was caused by circumstances unrelated to the NPR initiative and the Kelman reform agenda. Rather, it seems reasonable to conclude that much of the litigation decrease derives either from (a) foreseeable or intended consequences of specific Kelman-era initiatives (such as the expansion of multiple-award task order and delivery contracts and expanded use of the purchase card for micro-purchases) or (b) unforeseen side-effects of the Kelman agenda (such as the evaluation of past performance information, broadened commercial product purchasing, and increased purchaser discretion).

146. For example, between 1990 and 1999, the number of "accounting and budget" personnel within the acquisition workforce fell from 17,504 to 6,432, a decrease of 63%. See DEP'T OF DEFENSE, ACQUISITION WORKFORCE, *supra* note 79, at 7. The cumulative reduction in these specialties is more dramatic, because these figures exclude "the Defense Contract Audit Agency[, whose] staffing decreased from 7,030 work years in FY 1990 to 3,958 in FY 1999, a reduction of about 44 percent." *Id.* Further, during the same period, the number of "quality assurance, inspection, and grading" personnel fell from 12,117 to 5,191, a decrease of 57%. *Id.* See also *infra* notes 221, 224 (setting forth the policies of the Defense Contract Management Agency).

[INSERT TABLE 10]

Granted, both executive and legislative branch pressures prompted the reduction in the size of the federal bureaucracy, but this effort, particularly in this context, was penny-wise and pound-foolish. Specifically, these across-the-board cuts diminished internal oversight, and nothing suggests a reversal of the trend toward continued downsizing of the acquisition workforce.

Second, and on this point Professor Kelman and I share no middle ground, Professor Kelman denies any value in external monitoring by private attorneys general.¹⁴⁷ The troubling result is that the 1990s witnessed a dramatic increase in government purchasing discretion, coupled with a corresponding reduction in both internal and external oversight of the process through which the government purchases \$200 billion in goods and services.

Consistent with Professor Kelman's writings, the government today acts more businesslike,¹⁴⁸ generally *favoring* businesslike concepts,

147. Kelman's position never surprised me because he does not respect the legal profession, and he abhors the inefficiencies associated with litigation. As the reduction of the acquisition personnel continued to diminish internal oversight, I naively expected him to embrace the private attorneys general as a substitute for internal oversight or a privatization of the oversight function. But Kelman's resistance to litigation in the procurement process remained.

148. "The National Performance Review (NPR) and its regulatory reinvention initiatives feature a preference for both market-based regulatory mechanisms and flexible, negotiation-based processes. The NPR also adopts private sector measures for monitoring productivity and ensuring accountability. . . ." Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 555 (2000). Freeman's thoughtful work challenges the distinction between the public and private realms

such as customer satisfaction and efficiency. As implemented, however, the Kelman reforms provided buyers discretion to act in a businesslike fashion *at the expense of* oversight and bureaucratic control.¹⁴⁹ This substitution in implementation highlights my philosophical difference with Professor Kelman. The government can become more businesslike without jettisoning oversight and, in so doing, sacrificing important goals of the procurement process. I have little quarrel with Professor Kelman's previously articulated vision of the procurement regulatory system, which is premised upon three goals: equity (providing bidders fair access to compete); integrity (reducing the likelihood of corruption); and economy and efficiency (buying the quality goods or services desired at the lowest possible price).¹⁵⁰ These are neither startling nor radical, and they correlate nicely with my preferred desiderata, the shorthand triumvirate of transparency, integrity, and competition, discussed at length below.¹⁵¹

That the Government's public procurement regime is perceived as more efficient today, is no surprise. Even the most harsh critics of Professor Kelman and the acquisition reform movement should concede that progress was made in this regard. Professor Kelman's

and argues for an "alternative conception of administration as a set of negotiated relationships" between public and private parties. *Id.* at 548.

149. In this regard, I find the writing of Kelman's colleague, Malcolm Sparrow, informative:

The nature and quality of regulatory practice hinges on which laws regulators choose to enforce, and when; on how they focus their efforts and structure their uses of discretion; on their choice of methods for procuring compliance. Yet *the vogue prescriptions for the reinvention or reform of government . . . say little about these issues and sometimes seem to ignore them altogether*. The popular prescriptions for reform focus on service, customers, quality, and process improvement, not on compliance management, risk control, or structuring the application of enforcement discretion. *They rely heavily on management tools and methods imported from the private sector, which has few comparable challenges*.

MALCOLM K. SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* 2 (2000) (emphasis added).

150. See KELMAN, *supra* note 1, at 11.

151. See generally James J. Myers, *The New UNCITRAL Model Law on Procurement*, 23 PUB. CONT. L.J. 267, 268 (1994). Myers describes the model law's preamble, stating that it:

establishes the key policies and objectives of maximizing economy and efficiency . . . ; encouraging participation by and promoting competition among contractors . . . ; providing for fair and equitable treatment of contractors . . . ; achieving transparency; and promoting integrity, fairness, and public confidence in the procurement process.

Id. My colleague William Kovacic offers a similar articulation of the taxonomies utilized to classify the goals of the procurement process—efficiency, fairness, wealth distribution, and integrity. See Kovacic, *Deterrent to Participation*, *supra* note 132, at 205-10 (evaluating the history of the procurement process and its reforms through the 1980s and 1990s, as well as describing the goals of modern procurement policy).

broad-based 1990s governmental reforms increased purchasing officer discretion with the intent of enhancing administrative efficiency and saving money.¹⁵² Much of our disagreement lies in the use of the term “efficiency.” If the aspiration is for buyers to purchase quality at good prices, as Professor Kelman’s writings suggest, I conclude that compliance with the congressional *competition* mandates achieves that purpose. In implementing his policies, however, Professor Kelman did not stand by this definition of efficiency. Rather, his reforms focused on enhancing *administrative* efficiency, which permitted fewer buyers to conduct more purchases in a timely fashion. Professor Kelman views less litigation as a public good because it enhances transaction efficiency. Here we part company, because public purchasing—obtaining resources to perform the business of government utilizing the public’s funds—is about more than administrative efficiency.¹⁵³ Quite simply, I expect

152. In the end, these reforms disregard the historic rationales for limiting discretion.

Discretion enables and even invites officials to overreach, to discriminate invidiously, to subordinate public interests to private ones. . . . In the United States . . . fear [of abuse of discretion] is so chronic and pervasive that it constitutes a defining element of our political and legal cultures, accounting for much that is admirable—and much that is pathological—about American government.

FOUNDATIONS OF ADMINISTRATIVE LAW 155 (Peter H. Schuck ed., 1994). Moreover, [t]he reasons for limiting discretion are obvious. Bureaucrats might use discretion to further personal goals such as career enhancement, minimizing their own workload, or personal enrichment. . . . [In addition,] even if all bureaucrats were good-faith agents of the social will, it may be necessary to limit discretion if the DoD is to make a credible commitment to follow certain types of behavior. . . .

William P. Rogerson, *Economic Incentives and the Defense Procurement Process*, 8 J. ECON. PERSPECTIVES 65, 86 (1994). Rogerson also notes that Kelman favors “allowing more discretion. Of course, contracting officers might also abuse additional discretion.” *Id.* (citations omitted); see also William F. West, *Structuring Administrative Discretion: The Pursuit of Rationality and Responsiveness*, 28 AM. J. POL. SCI. 340, 340 (1984) (“The most significant problem presented by bureaucratic discretion is that it conflicts with our fundamental beliefs about institutional limitations and responsibilities.”).

153. I find Kelman’s and Kovacic’s use of efficiency as a goal an appropriate analog to Kovacic’s suggestion that wealth distribution is a fundamental purpose of the process. For example, I do not believe that wealth distribution is one of the procurement system’s primary goals. This does not suggest that Congress does not use the procurement system to attempt to redistribute wealth. But those efforts are transitory for the same reasons they are controversial. Two examples demonstrate the never-ending turbulence affecting social policies. First, in the same year that Congress increased the government-wide goal for small business participation in federal procurement from twenty to twenty-three percent, it extended the Small Business Competitiveness Demonstration (Comp-Demo) Program. See Steven L. Schooner, *Mixed Messages: Heightened Complexity In Social Policies Favouring Small Business Interests*, 8 PUB. PROCUREMENT L. REV. CS78, CS82 (1999) [hereinafter Schooner, *Mixed Messages*]. The Comp-Demo favors *big* business by stopping agencies from setting aside contracts for small business in four selected industries in which small business have proven themselves competitive. Second, Congress effectively gutted its affirmative action contracting program by mandating that the Defense

Congress to provide sufficient resources for agencies to achieve their missions and goals. Further, despite the NPR initiative, I am unpersuaded that Congress embraced administrative efficiency as a fundamental goal of the procurement process.¹⁵⁴ Unfortunately, no biblical stone tablets proclaim the desiderata of the Federal procurement system. In this regard, the constantly changing patchwork of statutes defies efforts to identify broad Congressional aims, and the literature is strangely silent with regard to efforts to define the system's fundamental values.¹⁵⁵

I do not deny that Professor Kelman was effective in obtaining Congressional authority to make the process *more* efficient. For example, Professor Kelman bootstrapped his concept of administrative efficiency onto the regulatory scheme, or at least onto the conscience of the government's purchasing corps, by publishing a statement of guiding principles.¹⁵⁶ These guiding principles, which

Department (representing sixty percent of government buying) suspend use of price preferences for disadvantaged firms following any year in which the statutory five-percent participation goal is met. *See id.* at CS83. Moreover, wealth distribution is merely a subset of the larger phenomenon of burdening the procurement process (or, for that matter, the process of governing) with efforts to promote social policies. These social policies, in addition to those that potentially distribute wealth to domestic manufacturers, essential military suppliers, and small (and small disadvantaged and women-owned) businesses, also mandate drug-free workplaces, occupational safety standards, compliance with labor laws, preferences for environmentally friendly purchasing practices, etc. Accordingly, although I concede that congressional manipulation of the procurement process to promote social goals is a significant *aspect* or *feature* of the system, I cannot agree that wealth distribution is a fundamental purpose of the procurement regime.

154. In fact, there is at least one instance where Congress has legislated that administrative efficiency is not an absolute priority. "The *reduction of administrative or personnel costs alone shall not be a justification* for bundling of contract requirements unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated." 15 U.S.C.A. § 644(e)(2)(C) (Supp. 2000) (emphasis added).

155. "The Federal Government has been making contracts for as long as it has existed, yet little attempt has been made to rationalize this phase of governmental activity in its relation to the functions of government and to the persons and firms with whom contracts are made." John Wm. Whelan & Edwin C. Pearson, *Underlying Values in Government Contracts*, 10 J. PUB. L. 298, 298 (1962) (suggesting the need for such an "explanation and rationalization" and providing a general overview of the subject). Professor Whelan notes that "[g]overnment contracts obviously fulfill one prime function: they are vehicles for the acquisition or disposal of property, performance of services or such other governmental ends as may involve the use of promissory obligations." *Id.* at 302. He then catalogs four subsidiary functions: "(1) expressions of general public policy, (2) policies for the safeguard of government integrity, (3) imposition of government controls on contract performance and (4) reflections of certain intragovernmental relations." *Id.* at 303.

156. *See* Federal Acquisition Regulations System, 48 C.F.R. § 1.102(a) (2000). This language was added to the regulations without following the typical notice-and-comment procedures for amending the Federal Acquisition Regulation. The Federal Register notices concede that this effort was Kelman's response to the National Performance Review report. *See* Federal Acquisition Regulation (FAR) Rewrite, 60 Fed. Reg. 4205 (Jan. 20, 1995). The regulatory action was not subject to Office of

lead with customer satisfaction, more closely mirror the NPR's aspirational themes than the existing statutory framework underlying the procurement system.

Accordingly, I suggest that, despite the benefits of more businesslike purchasing practices, reduced oversight is the fly stuck in the ointment of the reinvented procurement regime. Below, I discuss the general reduction in oversight manifested by the erosion of third-party monitoring system, which dilutes competition and threatens the system's integrity and transparency.¹⁵⁷ I address the breach of what I call the contingency promise, a subtle yet corrosive trend that, in the long run, may prove costly to the public fisc and detrimental to the policies effectuated by the Government's well-established regime of standard contract clauses. I suggest that less litigation cannot be a public good unless the procurement system's traditionally robust third-party monitoring is replaced with increased internal government oversight.¹⁵⁸ Unfortunately, because such a substitution is sufficiently unlikely in the present political climate of Executive and Legislative obsession with reducing the size of the Federal

Management and Budget Review under Exec. Order 12,866 (Sept. 30, 1993), nor was it subjected to scrutiny under the Regulatory Flexibility Act. 60 Fed. Reg. 34,732, 34,733 (July 3, 1995). Small entities were permitted to submit comments, but only after the final rule was published in the Federal Register. *Id.*

157. As I discuss throughout, I do not suggest the need for oversight because the government or the contractor community is fundamentally corrupt or incompetent. Rather, I believe that, particularly given its size and scope of endeavor, our government, more often than not, is a model of integrity. Yet, unlike Kelman, I acknowledge that the implementation of policies must recognize that governments are populated by humans and, accordingly, remain fallible. James Madison artfully articulated that "[a]ll Governments, even the best, as I trust ours will prove itself to be, have their infirmities. Power, wherever lodged, is liable, more or less, to abuse." Unsent letter from James Madison to Thomas Lehre (Aug. 2, 1828), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES, 1816-1828, at 635 (J.B. Lippincott & Co. 1865); "The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse." James Madison, Speech in the Virginia State Convention of 1829-1830 (Dec. 2, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES, 1829-1836, at 51 (J.B. Lippincott & Co. 1865) [hereinafter Madison, Speech in the Virginia State Convention].

158. I do not mean to suggest that Steve Kelman desired the outcome of an across-the-board reduction in oversight, nor do I believe that he accepts it. Rather, one of Kelman's most endearing traits and, in this case, his greatest failing, is his deeply rooted, seemingly boundless optimism regarding the institution of government, the nature of government employees, and the attention span of the public. See KELMAN, *supra* note 1, at 103 (Kelman willingly acknowledges his "predisposition to Pollyannish optimism"). In this regard, it is striking that the following sentence appears twice in Kelman's book: "I am happy there remains enough pride in our institutions of government to hold them to especially high standards of probity." *Id.* at 95-96. Unfortunately, I cannot share Kelman's uncompromisingly rosy outlook. Rather, I agree with the sentiment: "It is tempting to offer strategies for fundamental reforms, for no one can embrace waste, fraud, abuse, or mismanagement." KETTL, *supra* note 2, at 57.

workforce,¹⁵⁹ hotly debated priorities for utilizing potential budget surpluses¹⁶⁰ and highly partisan pre-election gridlock,¹⁶¹ we cannot expect progress in that regard.¹⁶² It would be unfair to suggest that we stand at a cross-roads because inertia propels us along our current course. Rather, affirmative action is required to restore, or at least reinvigorate controls to maintain important norms in federal purchasing.

A. Reduced External Oversight: The Unintended Consequence of Acquisition Reform

Looking back at the NPR's¹⁶³ acquisition reform efforts, and

159. See GORE, *supra* note 2, at 207 (reflecting that the Executive Branch, excluding the independent Postal Service, has "the smallest workforce in 30 years"). One of the related by-products of this effort is increasing pressure to contract out traditional government services. Without addressing the risks associated with contracting out or privatizing inherently governmental functions, this pressure results in increased costs.

DoD acquisition organizations stated that reductions in in-house . . . support personnel required the[m] to contract for additional services, such as engineering and logistical analysis, that the Government once would have provided. As a result, technical support costs increased because . . . obtaining contract support was more expensive than obtaining in-house . . . support. . . . [C]ontract labor rates are significantly higher [\$20,000 to \$180,000] per staff year than rates . . . charged for the same service performed by Government employees.

DEPT OF DEFENSE, ACQUISITION WORKFORCE, *supra* note 79, at 18; see also RICHARD STILLMAN II, THE AMERICAN BUREAUCRACY: THE CORE OF MODERN GOVERNMENT 307 (2d ed. 1996) (suggesting that the growth of contracting out has "tended to accelerate numerous problems and dilemmas of managerial efficiency, oversight, and accountability."). As discussed elsewhere, the procurement workforce has borne the brunt of the downsizing frenzy. Congress incrementally mandated a fifty-five percent reduction of the federal acquisition workforce between 1989 and 2001. See generally National Defense Authorization Act for 2000, Pub. L. No. 106-65, § 922, 113 Stat. 512, 724 (1999).

160. Although the 2000 presidential candidates' proposals focused upon utilizing surpluses to, *inter alia*, reduce taxes, shore up the Social Security system, enhance and broaden health care benefits, reduce the existing debt burden, increase military readiness, and invest in education, neither party's platform prominently advocated investment in increased oversight resources of existing government programs.

161. See Eric Pianin, *In Congress, GOP Leaders Take On Oversight*, WASH. POST, July 28, 2000, at A23 (discussing diminished Congressional oversight during the 1990s caused by, *inter alia*, Republican efforts to reduce the size of the congressional bureaucracy and shifting of remaining oversight resources from programmatic issue towards partisan aims).

162. See KETTL, *supra* note 2, at 32 (discussing GAO's list of twelve high risk government programs):

Thus, the fraud, waste, and abuse risks to the government, indeed, are as large as critics and policymakers have suggested. Eliminating them, however, is not like eliminating a simple line item. Managing the risks required, instead, sustained investment in management and careful oversight of the programs. The latter proved administratively difficult; the former often politically impossible.

163. The NPR was subsequently re-named, becoming the National Partnership for Reinventing Government. See NPR, at <http://www.npr.gov/> (last visited Feb. 11,

painted in the most optimistic light, the phenomenon of drastically reduced litigation in the Federal procurement arena could be perceived as an inadvertent outcome. Neither the elimination of oversight, nor the imposition of constraints upon private attorneys general, emerged as an argument supporting individual reforms.¹⁶⁴ Neither the legislative history nor the chaotic nature of the statutory drafting process evince an intent to reduce oversight.¹⁶⁵ Rather, I suggest that the result was unintended by Congress and, at the very least, unacknowledged by executive branch policy-makers. As discussed at length below, Professor Kelman opined that: “Any loosening of the procurement regulatory straightjacket should be accompanied by, and linked to, *increased* resources for public corruption investigations. . . .”¹⁶⁶ Nonetheless, there is little doubt that the 1990s reforms, intentionally or unintentionally, reduced oversight by both the government and contractors who were acting in

2001). For insight into the roots and outcomes of the NPR effort, see generally Donald F. Kettl, *Public Administration at the Millennium: The State of the Field*, 10 J. PUB. ADMIN. 7, 25-27 (2000) [hereinafter Kettl, *Public Administration*] (suggesting that the NPR utilized “traditional top-down, Wilsonian/Hamiltonian-style reforms[,]” and included “Jeffersonian-style bottom-up reforms[,]” thus raising the ire of “Modern Madisonians”); STILLMAN, *supra* note 159, at 360-94 (distinguishing the Hamiltonian, Jeffersonian, and Madisonian normative models). Stillman concedes:

Americans have never made up their minds . . . as to which of the three models they prefer. . . . From time to time, the stress has been placed on promoting the values of administrative efficacy. . . . at other times, accountability to the general public has predominated; and at still other times, responding to diverse interest group demands has been clearly an overriding priority. Yet within any single historic period where one value has held sway over the other two, *the others have never been entirely neglected or ignored.*

Id. at 366 (emphasis added).

164. The NPR did aspire to “amend protest rules,” but that initiative was aimed primarily at reigning in the General Services Administration Board of Contract Appeals, which was eventually eliminated. See AL GORE, FROM RED TAPE TO RESULTS; CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS; REINVENTING FEDERAL PROCUREMENT 39 (1993). None of the twenty recommendations for reinventing federal procurement suggest reduced oversight. *Id.* at 111-13. Although recommendation PROC11 calls for an effort to “improve procurement ethics laws,” the nature of the recommendation involves creating consistency across agencies; nothing suggests paring back ethics standards.

165. For example, the Senate Report accompanying the Federal Acquisition Streamlining Act stated:

[This] comprehensive overhaul of the federal acquisition laws . . . would increase the government’s access to products developed in the commercial sector; . . . streamline hundreds of other acquisition laws[,] . . . address chronic management problems[, and] . . . provide incentives for saving time and money. . . . Moreover, *these objectives would be accomplished without undermining the key features of the current procurement statutes, such as full and open competition and an effective bid protest process, that have been established over the years to safeguard the acquisition system and prevent abuse.*

S. REP. NO. 103-258, at 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2563 (emphasis added).

166. KELMAN, *supra* note 1, at 98 (emphasis added).

their capacity as private attorney generals. Although this issue has not captured the attention of either scholars or policy makers, I suggest that, in retrospect, this reduced oversight may prove the single most significant aspect of the 1990s reform effort.

1. *Litigation as oversight: Kelman's bete noir*

Most vocal amongst those celebrating the death of litigation is Professor Kelman. As one commenter quipped: "If the Government's trains are running on time at the expense of oversight, due process, and access to litigation, it would not be at all surprising. After all, the system was remodeled by a man who is known to detest lawyers."¹⁶⁷ Professor Kelman believes reduced litigation manifests an evolution in the relationship between contractors and the Government.¹⁶⁸ Moreover, he applauds those contractors that choose to voluntarily relinquish their due process rights.

Professor Kelman, and other opponents of litigation, offer a visceral, and at times, compelling parade of horrors associated with litigation in Federal procurement. Other than the observation that the public procurement litigation regime differs from the private sector, Professor Kelman's primary complaints are that: (1) protests and disputes are expensive and time-consuming; (2) in contractual litigation, individual civil servants may twist in the wind, subjected to zealous advocates, soiling the well of government-industry partnership; and (3) protests and disputes undoubtedly prompt risk-averse, and potentially time consuming, behavior amongst agency procurement personnel, such as increased (and at times excessive) documentation of source selection or contract administration decisions.¹⁶⁹

167. Ripley, *supra* note 24, at 46. "In what Kelman views as a huge victory for human-kind, reforms have made it dramatically more difficult to protest government contracts through litigation." *Id.* at 49. Kelman can be excused for his exasperation with the involvement of attorneys in almost every facet of the contracting function. As John Whelan observed: "[T]he practices and procedures of Government contracts are characterized by extensive legalism. . . . Whether such legalism is produced by the fact that we idealize the constitutional goal of government under the 'law' so that our psychology is to proliferate regulations governing government officials (rather than simply trusting wide areas of activity to the judgment of individual officials) or whether such legalism is produced by the extensive utilization in the government of law school graduates . . . is hard to say." JOHN W. WHELAN & ROBERT S. PASLEY, CASES AND MATERIALS ON FEDERAL GOVERNMENT CONTRACTS 1-2 (1975).

168. Although my disagreement with Kelman on this issue is longstanding, the issue was recently aired in the trade press. See Steven L. Schooner, *Protests Serve Public as Watchdog*, FED. COMPUTER WK., Mar. 8, 1999, at 17; see also Steven Kelman, *Silence of Protesters' Bark Signals New Era*, FED. COMPUTER WK., Feb. 22, 1999, at 21.

169. See Kelman, *supra* note 168, at 21 (alleging that bid protests are inherently inefficient); KELMAN, *supra* note 1.

For these reasons, Professor Kelman never accepted the private attorney general¹⁷⁰ as a familiar fixture in the procurement process. Yet, those that do business with the Government, and the counsel that represent them, long have played the role of private attorneys general¹⁷¹ both as conventional interested parties and, more recently, as bounty hunters.¹⁷² In the public procurement regime, Congress implicitly deputized as private attorneys general (1) prospective contractors¹⁷³—those firms that desire to sell to the Government or firms from which the Government desires to purchase; (2) contractors—those firms from which the Government buys; and

170. Judge Jerome Frank is commonly credited with first penning the phrase “private attorney general.” *Assoc. Indus. of N.Y., Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) (finding that Congress could empower individuals to bring suits “to vindicate the public interest”). The term generally refers to “[n]ongovernmental actors . . . [who] help implement, monitor, and enforce compliance with regulations.” Freeman, *supra* note 148, at 547.

171. “Third party oversight has long been a feature of securities regulation, antitrust, and *even government procurement*.” Freeman, *supra* note 148, at 661 (emphasis added) (citing Robert C. Marshall et al., *The Private Attorney General Meets Public Contract Law: Procurement Oversight By Protest*, 20 HOFSTRA L. REV. 1 (1991)) [hereinafter Marshall et al., *Oversight by Protest*] (arguing that “protests are an effective means of deterring and connecting” procurement problems). For an extensive (although now somewhat outdated) examination of role of adjudication in the Canadian government procurement regime, see SUE LOUISE ARROWSMITH, *JUDICIAL REVIEW OF GOVERNMENT PROCUREMENT: A STUDY OF CONTRACT AS A PUBLIC FUNCTION* (1988). Professor Arrowsmith suggests, and to some extent debunks, the general assumption that “procurement . . . is substantially immune from judicial review” and advocates the expansion of judicial review in procurement, while remaining cognizant of the hardships associated with greater judicial involvement or interference. *Id.* at 9-11. Professor Arrowsmith’s work highlights, among other things, “[a]n evolution of the law . . . consistent with the view . . . that there is no reason in principle to exclude the procurement function from [the operation of] administrative law principles. . . .” *Id.* at 34.

172. The bounty hunter role most prominently arises under the 1986 amendments to the False Claims Act, discussed *supra* text accompanying notes 133-37.

173. More explicitly, for three decades, courts have used the term private attorneys general to describe protestors, and others, who keep our government honest by pursuing their own self-interest through “citizen suits.” See *Bennett v. Spear*, 520 U.S. 154, 164-65 (1997) (describing a private attorney general provision through which a citizen may bring suit to enjoin governmental action which allegedly violates a certain law). More specifically, in its landmark 1970 decision, *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), the D.C. Circuit Court of Appeals explained that prospective contractors, injured by arbitrary and capricious government actions, should be able to sue or protest to “vindicate their very real interests, while at the same time furthering the public interest.” *Id.* at 864; see also Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON L. REV. 237, 248 (1999) (“[W]here Congress has conferred standing on a plaintiff to initiate judicial review of federal agency action, the prudential zone-of-interest test should not be applied to that plaintiff”); 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 16.16, at 95 (3d ed. 1994) (“Once Congress issues a command to agencies and calls on courts to enforce that command, a judicial refusal to enforce the command . . . is . . . accurately characterized as abdication of judicial responsibility to enforce the policy of a politically accountable Branch.”).

(3) contractor employees.¹⁷⁴

Professor Kelman bristled that, over time, the Government, albeit unconsciously, increased its reliance on the contractor community to fulfill its duty and, in some contexts, seemed comfortable with the concept of third-party monitoring.¹⁷⁵ Accordingly, Professor Kelman was pleased that the 1990s witnessed a profound, systematic decline in the activity of the accidental private attorneys general¹⁷⁶ who monitored Federal purchasing. In a procurement regime where sporadic oversight has devolved toward seemingly nonexistent monitoring, the reduction in third-party oversight prompts concern if not alarm.

2. *Watching the watchmen: Defending private attorneys general*

I cannot reconcile Professor Kelman's rejection of the private attorney general as a monitoring mechanism with his articulated recognition of the compelling need for meaningful oversight of the procurement system. From a policy standpoint, Professor Kelman should welcome private attorneys general. In economic terms, the protest and dispute regimes are a bargain. Whether a handful of law firms thrive on the practice is irrelevant. Opponents of litigation are hard pressed to demonstrate a more cost effective, less intrusive compliance regime. An increased Inspector General presence, or other labor-intensive oversight mechanisms, would please no one.¹⁷⁷

174. As discussed below, the role of the contractor as private attorney general is the least acknowledged and, arguably, has been ignored in the past.

175. See Kovacic, *Procurement Reform*, *supra* note 36, at 486 (citing Julie Research Lab., Inc., GSBGA No. 8070-P-R, 86-02 BCA 18,881 (1986)) (“[T]he intent of Congress . . . was to encourage private enforcement of the law and regulations mandating the acquisition of [information technology] through full and open competition.”).

176. I coin this phrase because, in treating all private attorneys general alike, the most valuable and cherished private attorneys general (the unintended or “accidental” private attorneys general) are lumped together—nay, smeared—with their less respected cousins, e.g., bounty hunters. Arguably the latter group primarily seeks a windfall or personal profit *from the litigation* rather than resolution of the underlying ill. As bounty hunters have become more prevalent, the popularity of private attorneys general has waned. This is problematic because, although there are many types of potential private attorneys general exhibiting widely varying motives, the literature tends to obfuscate these distinctions. “It is revealing that there is still no legal definition, nor any well-established pattern of usage, which precisely identifies a litigant as a ‘private attorney general.’” Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 194-95 (1998). Rabkin draws from this that the increasing skepticism of private attorneys general derives from “the notion that unelected advocates speak for the public—whatever their motives.” *Id.* at 195.

177. On this, Cibinic and I agree. “Like Steve, we do not favor increasing the Inspector General presence. Nor do we call for any new organization to police the procurement system.” John Cibinic, *Court Jurisdiction over Award Protests: A Difference of Opinion*, 14 NASH & CIBINIC REP. ¶ 38 (July 2000).

a. *A robust litigation regime offers potent deterrence*

It is easy to forget that protests and disputes—challenges to the contract award process and agency decision-making—help reinforce the impartiality that defines our procurement system. Historically and currently, the U.S. Government boasts that its procurement system allows all responsible firms to compete for work based upon stated government requirements.¹⁷⁸ Government officials take pride that source selection officials evaluate offers on their merits, using stated criteria, without regard to irrelevant considerations. The public expects that contracting officers fairly award and administer contracts.¹⁷⁹

Similarly, Congress expects that government buyers “faithfully execute their duties,” and, in so doing, fulfill a broad range of statutory mandates imposed upon the procurement system.¹⁸⁰ The breadth of these considerations, and the incentives for contracting

178. Many foreign governments, particularly in developing countries, marvel at the integrity of our procurement process. At the same time, they deride our burdensome protest, dispute, and litigation regimes. In doing so, they fail to recognize a nexus between the two.

179. See Harold C. Petrowitz, *Conflict of Interest in Federal Procurement*, 29 LAW & CONTEMP. PROBS. 196, 196 (1964) (suggesting that “[o]pen corruption in the Federal Government has never been condoned . . . but the ethics of individual officials has not always been scrutinized as closely as they are today”).

180. The need for oversight of the procurement system implicates issues far broader than minimizing the frequency of collusion or incidence of fraud. This is not to suggest that elimination of fraud and collusion is not important—it is. Rather, it reflects the existence of an over-arching compliance regime, predicated upon an intricate web of statutory and regulatory requirements that define the procurement system. Our rule-bound regime reflects thoroughly western values and judgments regarding ethics, and many nations would argue that we cast our net too broadly in describing corruption. See, e.g., Kenneth U. Surjadinata, Comment, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT’L L. REV. 1021, 1026 (1998) (arguing that developing states see the Foreign Corrupt Practices Act “as a culturally arrogant encroachment on their ability to govern activities exclusively within their borders, in accordance with international law principles on territorial sovereignty”). In procurement, compliance implicates not just high standards of integrity, but also the maintenance of system transparency, the maximization of competition, and the furtherance of a host of congressionally mandated social policies. Any one of these issues opens the door to a host of pitfalls. For example, integrity in public procurement implicates issues related to, *inter alia*, personal and organizational conflicts of interest, gratuities, bribes, handling and disclosure of proprietary source selection information, contractor certification of compliance with numerous social programs (such as contractor size status, disclosure of cost or pricing data, or origin of end products delivered), contractor maintenance of a drug-free workplace, contractor allocation of specified unallowable costs to specific pools, appropriate supervision and cooperation by government employees, proper use by contractors of mandated supplies or raw materials, faithful execution by contractors of inspection and testing provisions, etc. Despite the complexity of the federal procurement system and the reality that this complexity subjects the system to criticism, the statutory and regulatory regime is intended to hold contractors or government personnel accountable for compliance with congressional mandates.

officers to ignore them, may not be readily apparent.¹⁸¹ In addition to the most basic requirements of transparency, competition, and integrity, a host of congressionally mandated social and economic policies burden the procurement process.¹⁸² No one debates that, were government buyers permitted to ignore or bypass the existing regulatory regime, government end users could obtain needed goods and services more quickly and, most likely, more frequently utilize the brands and service providers they prefer.¹⁸³ Critics rightly identify

181. Consistent with his focus on efficiency and his preference for purchaser discretion, Kelman was quietly dismissive of most congressionally mandated social programs. Some of his most contentious experiences in the White House involved his lack of interest—real or perceived—in maintaining or promoting social programs. *See, e.g.*, Stephen Barr, *Small Firms Want More U.S. Contracts*, WASH. POST, Aug. 6, 1997, at A17 (discussing a leaked Kelman memo to White House Chief of Staff Erskine Bowles via OMB Director Frank Raines, which “underscored a seemingly never-ending policy battle that has grown out of recent procurement reforms . . . and increased competition by large and small companies to hang onto their share of the federal procurement pie”). The Kelman memo drew “heavy criticism from lobbyists representing small business interests, who contend it essentially acknowledges that the administration’s procurement practices are increasingly excluding small companies.” *Id.*; *see also* Dawn Kopecki, *White House Memo Irks Small Business*, WASH. TIMES, Aug. 2, 1997, at C1 (noting criticism of the administration’s policies as “anti-small business”).

182. For a taste of these ever-evolving mandates, *see, e.g.*, 48 C.F.R. Part 19 (Small Business Programs, including preferences for disadvantaged businesses and women-owned businesses); *id.* Part 22 (Application of Labor Laws to Government Acquisitions); *id.* Part 23 (Environment, Conservation, Occupational Safety, and Drug-Free Workplace); *id.* Part 25 (Foreign Acquisitions (or domestic preferences)); *id.* Subpart 26.1 (Indian Incentive Program); *id.* Subpart 26.3 (Historically Black Colleges and Universities and Minority Institutions); *see also* Federal Acquisition Regulations, 65 Fed. Reg. 36016, 36,016-20 (June 6, 2000) (implementing Exec. Order 13101 and amending 48 C.F.R. §§ 4.3, 11.0, 11.3, 23.4, 23.7). These amendments include affirmative programs to procure environmentally preferable products or services, i.e., products or services “that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose” and mandating the use of paper with a minimum recycled content, etc. *Id.* at 36,017.

183. Nor should we be surprised that government buyers have every motive to please their customers. (Customers, of course, could include high ranking government officials, peers or co-workers, as well as the more ephemeral end users, such as astronauts, soldiers, sailors, pilots, park rangers, meat inspectors, agents, auditors and, of course, the public.) These “customers” rarely appreciate the value of congressionally mandated social policies that delay their ability to obtain needed supplies or services. Accordingly, it seems almost natural that government buyers might disregard the rules to achieve greater customer satisfaction; such is human nature.

We all know that conscience is not a sufficient safeguard; and besides, that conscience itself may be deluded; may be mislead, by an unconscious bias, into acts which an enlightened conscience would forbid. . . . [I]n the proverbial maxim, that honesty is the best policy, present temptation is too often found to be an over-match for those considerations. These favourable attributes of the human character are all valuable, as auxiliaries; but they will not serve as a substitute for the coercive provisions belonging to Government and Law.

Madison Speech in the Virginia State Convention, *supra* note 157, at 52.

the policy inconsistencies inherent in these programs and the increased costs and diminished efficiencies prompted by these policies, while advocates bemoan failed efforts to implement the same policies.¹⁸⁴ Nonetheless, these policies remain the law and failure to execute the policies violates the law.¹⁸⁵

In such an environment, protests and disputes serve to correct hopefully rare incidents of (at best) inadvertent or (at worst) illegal, arbitrary, or capricious agency action. Protests and disputes provide a public good¹⁸⁶ where the annual stakes are \$200 billion in taxpayer money. In a government of the people, where the governed share responsibility with those who govern, public trust is key. For centuries, people have asked “who watches the watchmen?”¹⁸⁷ and

184. See generally Schooner, *Mixed Messages*, *supra* note 153; Jennifer McCadney, *Note: The Green Society? Leveraging the Government's Buying Powers to Create Markets for Recycled Products*, 29 PUB. CONT. L.J. 135 (1999); Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998); David A. Wallace & Steven L. Schooner, *Affirmative Action in Procurement: A Preview of the Post-Adarand Regulations in the Context of an Uncertain Judicial Landscape*, ARMY LAW. 3 (Sept. 1997); Gilbert J. Ginsberg & Janine S. Benton, *One Year Later: Affirmative Action in Federal Government Contracting After Adarand*, 45 AM. U. L. REV. 1903 (1996); Steven L. Schooner, *The Davis-Bacon Act: Controversial Implementation of the 50% Rule*, 5 CONSTRUCTION LAW. 9 (No. 3, 1985); Julius Rothlein & Steven L. Schooner, *The Trade Agreements Act—Installation Procurement and International Government Acquisition Law*, ARMY LAW. 1 (Sept. 1983); Thomas E. Reynolds & Cyrus E. Phillips IV, *Evaluation Procedures under the Buy American Act and Executive Order*, 3 PUB. CONT. L.J. 219 (1970); Arthur S. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955).

185. See, e.g., Mark Cancian, *Acquisition Reform: It's Not as Easy as it Seems*, ACQUISITION REV. Q., Summer 1995, at 189, 191, clarifying that:

These goals are often regarded as illegitimate by people inside the system because they have no direct bearing on national security or on acquisition. Indeed, they look like the workings of powerful special interests trying to bend society's rules in their favor. However, democracy is a messy form of government. One person's selfish special interest is another's vital national priority.

Id.

186. Although this discussion falls outside of my purpose here, I agree with those who suggest that litigation itself is a public good.

[The less controversial and more familiar] arguments do not commend adjudication as a good in itself, but rather as a necessary condition for fulfilling other values that our culture accepts. The . . . less familiar and more controversial [argument] considers adjudication an intrinsic good, a process that is as much a sign of a healthy society as free elections.

Luban, *supra* note 32, at 2621. See generally Fiss, *supra* note 82 (advocating litigation as an effective dispute resolution system); Landes & Posner, *Legal Precedent*, *supra* note 91 (suggesting that precedent is a public good).

187. From the Latin, “quis custodiet ipsos custodes.” JUVENAL, SATIRES VI 347, available at <http://patriot.net/~lillard/cp/juvenal.html> (last visited Jan. 25, 2001). Today, however, many associate the phrase with the ground-breaking comic book series, later converted into a best-selling graphic novel. See ALAN MOORE & DAVE GIBBONS, *WATCHMEN* (1987). For those who have had the privilege of enjoying this rich, dense, and thought-provoking work, I highly recommend Professor Stuart Moulthrop's *Watching the Detectives: An Internet Companion for Readers of Watchmen*, at <http://raven.ubalt.edu/staff/moulthrop/hypertexts/wm/> (last updated Nov. 2000);

the question remains vital today. The Government's contractors long have played a vital role in monitoring most aspects of the procurement cycle. Today, they appear strangely quiet. Over time, if contractors continue to abdicate their responsibility to ensure the system's integrity, and the policy makers implicitly or explicitly encourage this complacency, the procurement system will suffer.

Recognizing that litigation remains an unwieldy, inefficient means to resolve most problems that arise in the marketplace, I do not assert that increased litigation is the optimal solution to the government's pressing, ongoing need for oversight. Nor do I attempt here to divine the optimal balance between internal and external oversight. I am confident, however, that the recent phenomenon of concurrent reduction in internal and external oversight is cause for concern. Accordingly, I suggest that, in the absence of perfect control over the exercise of the buying community's discretion, a robust private attorney general regime serves as a utilitarian substitute for a yet-to-be-discovered optimal oversight mechanism, if not a competent second-best alternative.¹⁸⁸

By this point, I hope to have demonstrated that the dramatic reduction of litigation in government contracting fora merits attention. Further, reduced oversight is the most significant concern prompted by the litigation atrophy, which is exacerbated by the corresponding congressional trend toward thinning the acquisition workforce.¹⁸⁹ Reduced oversight, with regard to massive outlays of public funds, should raise our antenna, but even more so when the putative causes may be related to increased discretion among the government's purchasing officials. My concern is heightened by (1) the consistency and depth of the litigation decline; and (2) the

see also Doug Atkinson, *The Annotated Watchmen*, at <http://www.msu.edu/userwhitero2/watchmen.html> (last visited Jan. 25, 2001); Martin Rowson, *Watchmen*, at <http://users.fast.co.za/~stuartm/rave/cypunx/comix/watch.html> (last visited Jan. 25, 2001).

188. Looking ahead, I applaud the perception that "good policy analysis is not about choosing between the free market and government regulation. . . . [B]y working more creatively with the interplay between private and public regulation, government and citizens can design better policy solutions." IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 3-4 (1992). Further, as I hope this article demonstrates, I agree with Ayres and Braithwaite's assertion that: "[r]egulatory tasks might usefully be delegated: (1) [t]o public interest groups (2) [t]o the firms themselves or to their industry associations, and (3) [t]o the firm's competitors[.]" *Id.* at 158.

189. That Congress permitted these two declines to occur in tandem is surprising. Rather, it seems commonly accepted wisdom that private attorneys general "can . . . be enormously helpful to understaffed and overburdened regulators . . . [by] helping to shoulder the agency's enforcement burden, . . ." Freeman, *supra* note 148, at 663. Similarly, "[b]y relying on third-party enforcement, an agency spreads the cost of ensuring compliance . . ." *Id.* at 662.

absence of initiatives to invest meaningful resources in oversight mechanisms, either to replace the oversight lost by reduced third-party monitoring *or* to recognize the risks associated with the increased discretion granted to buyers in the 1990s reforms.

b. Lauding interested parties, not bounty hunters

Because there is little hope for increased governmental or internal oversight, I suggest a need for an increased private attorneys general presence.¹⁹⁰ Numerous rationales have been suggested to justify such an oversight regime.¹⁹¹ In the last decade, Congress appears to have toiled mightily to ensure that procurement officials were understaffed and overworked.¹⁹² Compared to the private sector, some suggest that government buyers are not as well informed about what they are buying.¹⁹³ Similarly, “government purchasing officials have weaker incentives to make optimal procurement choices than

190. A less sanguine assessment of the private attorney generals’ prospects is presented by Rabkin, *supra* note 176, at 203 (“The private attorney general . . . can often be a considerable convenience for Congress, a device to delegate policy initiative without taking full responsibility for the consequences.”).

191. *See, e.g.*, Marshall et al., *Oversight by Protest*, *supra* note 171, at 20-22 (noting that the private attorney generals’ detached perspectives makes them more likely to prosecute government acts that are contrary to the public interest); *see also* Kovacic, *Procurement Reform*, *supra* note 36, at 486-87 (suggesting that private attorney generals have more incentive than government actors to prosecute inappropriate procurement selections).

192. *See generally* DEP’T OF DEFENSE, ACQUISITION WORKFORCE, *supra* note 79.

193. *See* Marshall et al., *Oversight by Protest*, *supra* note 171, at 7-8. I reject this broad proposition for which, not surprisingly, the authors offer no support. By way of explanation, the authors suggest that the alleged information deficiency occurs “because government personnel are less experienced and because many government purchases involve idiosyncratic goods that are infrequently purchased.” *Id.* Surely, amongst the tens of thousands of government procurement professionals, you can find examples of inexperience (and even incompetence), but no empirical studies demonstrate that those individuals outnumber the cadre of experienced, highly qualified buyers. If anything, recent data might suggest the exact opposite. With regard to the current composition of the Defense Department’s acquisition workforce: the workforce averages more than eighteen years of service; the average age exceeds forty-six; over 12% are retirement eligible (and that figure will exceed 18% by 2005); and only about 4% are under the age of thirty-one. *See, e.g.*, DEP’T OF DEFENSE, ACQUISITION WORKFORCE, *supra* note 79, at 24-27 fig. 9-12; Stephen Barr, *Federal Diary: Graying Defense Department’s Mission: To Recruit Acquisition Experts*, WASH. POST, Aug. 23, 2000, at B2 (“[B]y 2005, half of the acquisition staff . . . will be eligible to retire or take an early out.”). Nor do the authors point to research suggesting that the private sector better equips its purchasing personnel. Moreover, the government continues to mandate minimum standards with regard to education, training, experience, and career development, through the Defense Acquisition Workforce Improvement Act (DAWIA), 10 U.S.C. §§ 1701-1763 (1994), and Clinger-Cohen Act, Pub. L. No. 104-106, § 4307, 110 Stat. 186, 666 (1996) (codified at 41 U.S.C. § 433 (Supp. IV 1998)). For a discussion of the professionalization of the acquisition workforce, and its tendency to become expert, yet insular and careerist, *see* Keith F. Snider, *DAWIA and the Price of Professionalism*, ACQUISITION REV. Q., Fall 1996, at 97, 103 (bemoaning the “concomitant focus on the trappings of professionalism”).

their private sector counterparts.”¹⁹⁴ Those same officials may “place inordinate weight on product quality[,]”¹⁹⁵ skewing the expected quality-price tradeoffs. Similarly, government personnel remain susceptible to temptation, whether prompted by illicit marketing efforts, improper suggestions regarding future employment, or even blatantly illegal bribery.¹⁹⁶ These temptations may induce government employees to draft restrictive specifications in an effort to limit competition and steer awards toward a favored vendor.¹⁹⁷ Advocates for such a system assert that third-party enforcement “both deters and corrects” improper agency activity.¹⁹⁸

In the procurement regime, the most frequently discussed third-party oversight mechanisms are the *qui tam* provisions of the False Claims Act,¹⁹⁹ discussed above, and disappointed offeror litigation or protests.²⁰⁰ I do not suggest here a need for additional bounty hunters, akin to the oft-maligned *qui tam* relators (deputized by the False Claims Act amendments of 1996),²⁰¹ class action litigants, and citizen-suit plaintiffs generally.²⁰² Instead, I prefer the term “accidental private attorneys general” to denote those interested

194. Kovacic, *Procurement Reform*, *supra* note 36, at 486-87 (citing Marshall et al., *Oversight by Protest*, *supra* note 171, at 7-8).

195. *Id.* at 487 (citing Shane M. Greenstein, *Did Installed Base Give an Incumbent Any Measurable Advantages in Federal Computer Procurement?*, 24 RAND J. ECON. 19 (1993)); see also William P. Rogerson, *Quality Versus Quantity in Military Procurement*, 80 AM. ECON. REV. 83 (1990).

196. See Marshall et al., *Oversight by Protest*, *supra* note 171, at 22.

197. See Kovacic, *Procurement Reform*, *supra* note 36, at 488 (examining “close monitoring” as a means of ensuring a fair procurement process”).

198. Marshall et al., *Oversight by Protest*, *supra* note 171, at 21 (discussing the regulatory effects of protest litigation).

199. See *supra* text accompanying notes 132-37 (discussing whistleblower lawsuits brought under the False Claims Act).

200. See *supra* text accompanying notes 34-40 (distinguishing protests from disputes).

201. For a broader theory on an oversight scheme intended to replace the *qui tam* regime, see Michael Abramowicz, *Market-Based Administrative Enforcement*, 15 YALE J. ON REG. 197, 197 (1998) (arguing that the market can serve as an alternative to *qui tam* litigation).

202. See Freeman, *supra* note 148, at 551-52 (suggesting the view that public interest groups and professional organizations primarily fill the private attorneys generals’ ranks); see also Richard Thornburgh, *Introduction*, in JAMES T. BLANCH ET AL., *CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY* 3, 3 (Roger Clegg & James L.J. Nuzzo eds., 1996). In the introduction, Dick Thornburgh criticizes citizen suits initiated by private attorneys general: “Unfortunately, but not surprisingly, the citizens bringing such actions frequently have been special-interest organizations with priorities of their own, often not consistent with those delineated by Congress. . . . [A] healthy skepticism about their motives and Congress’s pro-litigation regime is appropriate.” *Id.* He also finds “troubling . . . the assignment of the executive branch’s law-enforcement responsibility to private parties—parties who are given quasi-governmental authority to pursue their own interests . . . at the expense of other private parties.” *Id.* at 5.

parties,²⁰³ discussed at length below, who serve the oversight function by prosecuting protests and disputes in the course of conducting their routine business transactions.²⁰⁴ In this regard, it troubles me that some scholars have stereotyped the private attorney general so badly so as to *exclude* from consideration those plaintiffs that meet conventional standing requirements, but also serve the public interest in litigating.²⁰⁵ For example, it has been suggested that:

203. This seems congruous with Rabkin, *supra* note 176, at 202 (“The law . . . seems to be returning to more traditional patterns, where courts focus on defending individual rights rather than vindicating environmental entitlements.”).

204. But note that this type of activity has little in common with bounty hunting. Bounty hunters, although they stand to reap potential windfalls, often, by necessity, take significant risks. Pursuing one’s contractual rights through the administrative or judicial disputes process or challenging an agency’s exercise of discretion in awarding a contract may entail certain business risks, but it is neither dangerous nor life-threatening. *See, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (“The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to eliminating racketeering activity. . . . The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity, an object pursued the sooner the better.”) (citations omitted). Similarly,

Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees. Both statutes bring to bear the pressure of “private attorneys general” on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury “in his business or property by reason of” a violation. *Agency Holding Co. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987). The same principles apply to qui tam relators, who typically risk their current jobs and, in many industries, future job prospects. These risks remain despite the clear congressional mandate of whistleblower protections. *See, e.g.*, 10 U.S.C. § 2409 (1994); 41 U.S.C. § 251 (1994); 48 C.F.R. § 3.903 (1999) (“Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).”).

205. Much of the existing literature is lawyer-centric, focused upon the ambulance-chaser mentality, assuming that fee-shifting or windfall generation motivates attorneys to initiate lawsuits. Garth, Nagel and Plager summarize that:

Liberals remain enthusiastic about the potential for private law enforcement of certain regulatory policies; likewise, conservatives hold to the belief that the private attorney general market can obviate the need for government underwriting of legal advocates. But both liberals and conservatives now define and promote their views almost exclusively in terms of whether there is enough or too much of a *market incentive for individual attorneys to take particular lawsuits*.

Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 366 (1988) (emphasis added). Here, I do not desire attorney-initiated litigation, but contractor-initiated litigation. For the *accidental* private attorney general, bringing suit must make business sense (from the business’s standpoint, not from outside counsel’s) in light of the pending dispute and not based upon a prospective windfall. The approach I seek to avoid is suggested by Rabkin, where he posits that “[f]or lawyers today, it is far

A first step toward understanding the private attorney general is to think of the concept as referring to two separable phenomena: the ‘mercenary law enforcer,’ whose chase for attorney fees depends in substantial measure on the regulatory bureaucracy, which is typically federal, and the ‘social advocate,’ for whom litigation is a form of pressure group activity.²⁰⁶

In that regard, I embrace neither of these phenomena. Rather, I am more interested in encouraging litigation by a class of potential plaintiffs that already enjoy standing because, for them, the government has already waived sovereign immunity and endeavored to provide a meaningful remedy for their redress.²⁰⁷

The current pool of potential litigants, already deputized with existing waivers of sovereign immunity, are sufficient to carry out the bulk of the oversight function.²⁰⁸

less inviting to play the role of ‘private attorney general’ than it was in the 1970s.” Rabkin, *supra* note 176, at 180; *see also* David Shub, Note, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney’s Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 725 (1992) (suggesting that, if the prevailing party standard for attorneys fee recovery remains high, “[a]ttorneys would become increasingly hesitant to take on [civil rights] clients [with little or no means].”). Similarly, I reject efforts to paint the Independent Counsel as a private attorney general. *See generally* Rabkin, *supra* note 176, at 180-82 (suggesting that the “Independent Counsel is, almost literally, an alternate Attorney General”). I have less difficulty with the “alternate” label in this context, but I see nothing “private” about the Independent Counsel other than the happenstance that the appointed Independent Counsel typically is hired from the private sector.

206. Garth et al., *supra* note 205, at 356.

207. For this reason, I leave to others the issue of how broadly to define standing. *See* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1276 (1989) (“[I]n the context of statutory standing cases, a liberal standing doctrine provides an important vehicle for enhancing the political accountability of agency policymaking.”). As discussed above, I generally agree with Professor Pierce’s assessment of the “politically accountable administrative state,” *id.* at 1285, particularly that the “opportunity for judicial review initiated by a ‘private attorney general’ harmed by an agency action remains an important means of enforcing the agency relationship between the people and the agencies putatively accountable to them.” *Id.* at 1282. My concern here, however, is not that factions of affected parties are excluded from the process, but rather that the affected parties could sue but are choosing not to. Thus, there is a less pressing need for broadening the standing doctrine in this context. For a consistent and elegantly clean approach to standing, *see* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 426 (1974) (“There are no better or worse plaintiffs, only those with or without a claim.”). For an additional extensive and thoughtful examination, *see* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

208. Nonetheless, I welcome an examination of fee-shifting regimes. Some commentators have suggested that Kelman’s success in amending the cost principles to disallow the costs related to protests was one factor leading to reduced protest activity, particularly among small organizations. *See* 48 C.F.R. § 31.205-47(f)(8) (2000) (prohibiting costs if incurred in connection with protests of Federal Government solicitations or contract awards). “The most common device for encouraging lawsuits is to shift the usual ‘American Rule’ on fees so that a party with a meritorious lawsuit can recover legal fees.” Rabkin, *supra* note 176, at 195; *see also*

These contractors and prospective contractors, not a hungry plaintiff's bar, need to be motivated to more aggressively protect their rights.²⁰⁹ For that reason, I turn my attention first to protests, which have generated significant debate regarding private attorneys general in the past,²¹⁰ and then to disputes.

Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1994 & Supp. IV 1998) (providing the primary fee-shifting device in government contracting for courts); 5 U.S.C. § 504 (1994 & Supp. V 1999) (granting the primary fee-shifting device in government contracting for the administrative boards). A wealth of literature addresses the EAJA experience, now spanning almost twenty years. See generally Louise L. Hill, *Equal Access to Justice Act—Paving the Way for Legislative Change*, 36 CASE W. RES. L. REV. 50, 51 (1985) (discussing foiled efforts to expand the scope of the law); Donald J. Kinlin, *Equal Access to Justice Act*, 16 PUB. CONT. L.J. 266 (1986) (examining the EAJA experience in government contract disputes); Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 461 (1993) (supporting, *inter alia*, automatic fee shifting and other efforts to reduce litigation involving recovery of fees); Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Conduct (Part Two)*, 56 LA. L. REV. 1, 5 (1995) (noting that most of the EAJA's litigation concerns the provision for a mandatory award of attorney's fees unless the United States' position is substantially justified); Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Conduct (Part One)*, 55 LA. L. REV. 217, 220 (1994) (describing the EAJA as an expansion of the federal government's liability for and broad waiver the United States' sovereign immunity from the payment of attorney's fees in civil actions where the federal government's position is without substantial justification); John Sullivan, Note, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089, 1089-90 (1984) (criticizing how federal courts have failed to develop uniform interpretations of the three substantive EAJA phrases: "prevailing party," "the position of the United States," and "substantially justified"). This approach is not without problems. For example, in existing statutory regimes where attorney's fee awards are intended to facilitate litigation, critics bemoan the restrictive interpretation of the term "prevailing party." See, e.g., Shub, *supra* note 205, at 709-12 (discussing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)). For example, it might prove effective to broaden the existing procurement related fee-shifting mechanism to include other-than-small contractors and prospective contractors, without any requirement that the fee-shifting be a two-way street. Imposing upon the contractor community the risk of fee shifting would chill lawsuits, not facilitate them, and such a result would defeat the purpose. Further, with the exception of unusual cases (primarily related to fraud), the government is never the plaintiff in government contract litigation. Thus the government does not initiate litigation in government contracts matters—the government merely defends itself. See Harold J. Krent, *The Fee-Shifting Remedy: Panacea or Placebo?*, 71 CHI.-KENT L. REV. 415 (1995) (introducing a symposium on fee-shifting and providing a more broad-based discussion of fee-shifting).

209. As Garth, Nagel, and Plager have suggested: "[T]he question now is whether the incentives are adequate to motivate an attorney to take the case but not such as to constitute 'windfall' fees. It is assumed that law enforcement will take place if the incentives to litigate a particular case are established at the proper level." Garth et al., *supra* note 205, at 353, 362. Conversely, Rabkin concludes that "[d]isputes about attorneys' fees . . . are probably a secondary matter. . . ." Rabkin, *supra* note 176, at 196. He suggests that "more is needed than the promise of fees far down the road." *Id.* Yet, neither Rabkin's examples, neither the opportunity to recover punitive damages nor the qui tam relator's recovery share, is apt here. To the extent that contractors and prospective contractors are *accidental* private attorneys general, initiating litigation is a business decision related solely to the contract and typically made without regard to any potential public good that may result. See *id.* at 194-95.

210. This phenomenon has been examined through the law and economics lens,

c. *Protests police the contract formation process*

Without agreeing with Professor Kelman's overall conclusion, my colleague William Kovacic previously summarized "five basic criticisms of [a] robust decentralized private monitoring" regime in the context of protests.²¹¹ First, protests interfere with the business of governing. Disappointed offeror litigation, particularly when it entails injunctive relief, delays agencies' abilities to obtain goods, services, and construction. At times, these delays adversely affect government efficiency and mission accomplishment. Second, litigation consumes valuable resources. Both the contractors and the government expend attorney's fees. Discovery demands, and in some matters, hearings or trials, distract both the government's and the contractors' executives and key employees from other duties. Third, given the competitive business context, "the protest process may be

albeit in a limited, and now obsolete, context. *See generally* Robert Marshall et al., *Multiple Litigants With a Public Good Remedy*, 16 RES. IN L. & ECON. 151 (1994) [hereinafter Marshall et al., *Multiple Litigants*]; Robert C. Marshall et al., *Curbing Agency Problems in the Procurement Process By Protest Oversight*, 25 RAND J. ECON. 297 (1994) [hereinafter Marshall et al., *Curbing Agency Problems*] (examining the phenomena of the protest process via deterrence, litigation, revision of solicitations, and settlements); Marshall et al., *Oversight by Protest*, *supra* note 171, at 2 (examining the phenomena[ON?] of private attorneys general through a legal and economic perspective). Professor Marshall and his colleagues, all economists, focused upon the protest regime here. Unfortunately (in retrospect), they devoted most of their attention to "the particular question of the efficacy of the General Services Administration Board of Contract Appeals ("GSBCA") bid protest process, as applied to federal computer and telecommunications procurements." *Id.* at 3. The GSBCA, alternatively loved and reviled during its tumultuous tenure, represents a failed experiment—Congress repealed the GSBCA's jurisdiction in 1996, a mere decade after unleashing it upon the Government's information technology marketplace. *See generally* Brook Act, 40 U.S.C. § 759(f) (1994), *repealed by* Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680 (1996). The forum's high sustain rate (i.e., protestors frequently overturned agency procurement actions and awards); permissive discovery; liberal use of protective orders (which, in effect, barred in-house corporate counsel from involvement in the litigation); and brutally compressed scheduling imposed by a congressional mandate that decisions be rendered within forty-five working days of the action's commencement, led to a lucrative practice niche for the Washington, D.C.-area protest bar, while causing debilitating delays in agency information technology procurements and deep-seeded animosity amongst agency counsel and procurement professionals. *See generally* Michael A. Hordell & Eric L. Lipman, *The Rise and Use of Protective Orders at the General Services Board of Contract Appeals*, 20 PUB. CONT. L.J. 22, 28-36 (1990) (describing the protective order as a balance between competing policy interests and examining the public policies such orders serve); Frank K. Peterson, *In-House Counsel and Protective Orders in Bid Protests*, 21 PUB. CONT. L.J. 53, 54-55 (1991) (commenting on the lack of consistency in granting or denying access to information to in-house counsel under such protective orders); Richard J. Webber, *Bid Protests and Agency Discretion: Where and Why Do the GSBCA and GAO Part Company?*, 18 PUB. CONT. L.J. 1, 2 (1988) (answering why the GSBCA has been a more favorable venue than the GAO in hearing bid protests).

211. *See* Kovacic, *Procurement Reform*, *supra* note 36, at 489-91 (listing the five criticisms and explaining each one).

prone to strategic misuse. . . .”²¹² An incumbent service contractor or supplier may benefit if litigation delays contract awards to a competitor, or even better, if litigation results in a re-solicitation (or new competition).²¹³ Fourth, consistent with Professor Kelman’s primary thesis, protests chill government buyers’ creativity and initiative and discourage exercise of discretion.²¹⁴ Finally, absent scrutiny of settlements, which occur frequently, competitors might collude to increase prices paid by agency buyers.²¹⁵

Although these criticisms are not without merit, they neither justify reduced oversight, nor do they address *alternative* oversight tools. Further, protest proponents advocate that, while pursuing their own interests, protestors serve the public as private attorneys general.²¹⁶

When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests, while at the same time furthering the public interest.²¹⁷

212. *Id.* at 489 (noting that a disappointed offeror may initiate litigation merely to financially burden a less well capitalized competitor).

213. It is common practice during protest litigation for the buying agency to utilize a “bridge” contract to maintain existing services or sustain a flow of needed supplies. The most efficient method for accomplishing this is to change or modify the incumbent’s contract to mandate additional performance. *See generally* 48 C.F.R. pt. 43 (2000). “The Contracting Officer may at any time . . . make changes within the scope of this contract. . . .” *Id.* § 52.243-1(a), (b).

214. *See* Kovacic, *Procurement Reform*, *supra* note 36, at 489-90 & n.126 (citing, *inter alia*, KELMAN, *supra* note 1).

215. *See id.* at 490-91 & nn.129 & 131 (citing, *inter alia*, Marshall et al., *Oversight by Protest*, *supra* note 171, and William E. Kovacic, *Illegal Agreements with Competitors*, 57 ANTITRUST L.J. 517 (1988)).

216. It is not my goal here merely to rehash fields already plowed. Kovacic and Marshall have plowed that field. *See, e.g.*, Kovacic, *Procurement Reform*, *supra* note 36, at 488 (advocating that these “private attorneys general” are more likely to have better information than auditors about deviations from procurement statutes); Marshall et al., *Oversight by Protest*, *supra* note 171, at 3 (offering the suggestion that oversight protesters induce procurement officials to make more consistent decisions regarding contract awards).

217. *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (following Judge Frank’s analysis in *Assoc. of Indus. of N.Y., Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943)). The court further articulated that “[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a “private attorney general.” *Id.* The court adopts the view . . . that government officers were making contracts on behalf of the government, that Congress is also a participant in the exercise of the government’s proprietary functions, and that the most practicable way to keep the government’s contracting officers within their statutory powers is by letting complainants . . . obtain judicial review of the officers’ action. *Id.* at 866 & n.9. Finally, the court summarized that:

If there is arbitrary or capricious action on the part of any contracting

Third-party monitoring takes on added significance in a system in which previously loose oversight was diluted dramatically during the 1990s. In a robust protest regime, the threat of protests spurs risk-averse behavior, causing many within the procurement community to comply more faithfully with the relevant statutes, regulations, and policies. A broad range of protests produce precedent that interprets evolving standard solicitation provisions and contract clauses, and clarifies proper agency procurement practices.²¹⁸ In turn, this precedent increases certainty, which reduces the government's and the private sector's transaction costs (or, in other words, increases systemic efficiency). By enhancing compliance and generating precedent, protest activity increases the system's transparency. Protests also enhance competition by giving potential offerors confidence in the level nature of the playing field.

d. Disputes: Unheralded accidental private attorneys general

Unlike the protest regime, little attention has been paid to the role of the private attorneys general in the contract disputes arena. It has always struck me as somewhat odd that Kovacic, Marshall, and other scholars willingly portray protestors as third-party monitors, but fail to cast contractors in the same light.²¹⁹ This may result because protestors policed a remarkably pristine contract *formation* system without the cadre of resident auditors,²²⁰ inspectors, and others²²¹

official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits . . . as a watchdog of government activity. . . .

Id. at 866-67.

218. Because of the widespread dependence upon standard solicitation provisions, the value of precedent created by an individual protest likely provides greater value added than a typical case in the commercial marketplace. *See infra* note 254 and accompanying text.

219. Granted, in terms of vocabulary, to the extent that contractors are parties to government contracts, it may be more appropriate to label these litigants as private attorneys generals or "external monitors," rather than *third-party* monitors.

220. For example, the government frequently establishes a "resident office" within a contractor's plant or facility. *See, e.g.*, 48 C.F.R. § 42.602 (2000) (discussing resident administrative contracting officers ("ACOs") and their assignments and locations); DEFENSE CONTRACT AUDIT AGENCY, DCAA CONTRACT AUDIT MANUAL I-502.3 (2001) (discussing resident auditors), *available at* <http://web.deskbook.osd.mil/reflib/DDCAA/0018M/001/0018M001doc.htm#T14>.

221. The most visible manifestation of this machinery is the Defense Contract Management Agency ("DCMA"), formerly the Defense Contract Management Command ("DCMC") and, before that, the Defense Contract Administration Service ("DCAS"). *See Defense Contract Management Agency Home Page*, at <http://www.dcmc.hq.dla.mil/> (last visited Aug. 5, 2000). Although the agency has a limited role before the award of certain contracts ("perform[ing] a variety of Early Contract Administration Services (CAS) functions to evaluate the competence, capability, and reliability of new or existing contractors"), its primary purpose is the administration

historically present in the contract *administration or performance* processes.²²² It may also derive from the perception that competition for business is the key ingredient that spurs third-party monitoring of the contract formation process.

Nevertheless, contractors who litigate disputes to enforce the government's compliance with its bargains improve the integrity of the procurement process and enhance the transparency of the system. These contractor-litigants benefit the system by generating precedent that provides public interpretation of widely used standardized contract clauses. Moreover, in a more indirect manner, they increase competition for future government purchases, and ensure that government pays market (or better) rates for the goods and services it purchases.²²³

of contracts during performance. *Id.*

After contract award, during the life of a contract, we administer the contract through final product delivery by providing product and manufacturing assurance, delivery surveillance, and program integration services. After the final product is delivered, our contract closeout services continue until all business, technical, and financial matters are reconciled. We ensure that our customers receive the right item, at the right time, for the right price.

FY 00 DCMA Business Plan, Part B—DCMA Long-Range Plan, 1. Comprehensive Mission and Vision Statements, at <http://www.dcmc.hq.dla.mil/Teaminfo/AQBD/2000pln/00partb.pdf> (visited Aug. 5, 2000). In 1999, the Defense Contract Audit Agency employed more than 3,300 auditors. *Id.* Although this number may seem large, it represents a huge decrease. Consistent with the across the board reductions in acquisition personnel, "the Defense Contract Audit Agency staffing decreased from 7,030 workers in FY 1990 to 3,958 in FY 1999, a reduction of about 44 percent." DEP'T OF DEFENSE, ACQUISITION WORKFORCE, *supra* note 79, at 7.

222. The contracting officer normally delegates authority to a Contract Administration Office ("CAO") to perform contract administration functions. The CAO may, among other things, review the contractor's compensation structure and insurance plans; conduct post-award orientation conferences; determine the allowability of costs incurred; attempt to resolve issues in controversy; review and approve contractor's requests for progress payments; make payments; ensure timely notification by the contractor of any anticipated cost or schedule overrun; monitor the contractor's financial condition; approve contractor acquisition of special test equipment; perform production support, surveillance, and status reporting; monitor contractor industrial labor relations; ensure contractor compliance with contractual quality assurance requirements and contractual safety requirements; perform engineering surveillance; maintain surveillance of the contractor's purchasing system; consent to the placement of subcontracts; evaluate and monitor compliance with small business subcontracting plans; ensure timely submission of required reports; accomplish administrative closeout procedures; confirm that the contractor has a drug-free workplace program; evaluate the contractor's environmental practices; administer commercial financing provisions; and deobligate excess funds after final price determination. See 48 C.F.R. § 42.302(a)(1)-(69) (2000) (identifying sixty-nine discrete contract administration functions).

223. By publicly holding the government to its bargain, these contractor litigants demonstrate the system's integrity and transparency, in effect advertising the existence of a level playing field.

i. Breaching the contingency promise

In the same manner as reduced protests, reduced external monitoring of contractual performance through disputes threatens compliance and confidence in the government's buying regime. This merits particular attention as Congress reduces the ranks of acquisition personnel. Agencies must apply their limited resources to meet their most pressing needs. When faced with applying limited resources, agencies focus first on *awarding* contracts and less on *administering* those contracts once awarded.²²⁴

As the volume of disputes decreases, the harm appears subtle, but is nonetheless insignificant. Particularly for reform advocates focused on efficiencies, reduced disputes activity may prove more harmful because the inefficiencies, particularly in terms of long-term costs, are more latent. Reduced disputes activity slowly and subtly, but inexorably changes the fundamental bargain between purchasing agencies and the contracting community, which eventually leads to the government paying more for what it buys.

Most government contracts, and specifically large, complicated, and long-term agreements, are defined by their ability to address anticipated and unanticipated contingencies. Accordingly, the most cited standard Federal procurement contract clauses allocate, between the parties, the risk of frequently anticipated contingencies.²²⁵ The hallmark of these standard government

224. For example, "[f]our of the 14 DoD acquisition organizations believed that less oversight will be placed on contracts for administrative review as the organizations experience more workforce reductions." DEP'T OF DEFENSE, ACQUISITION WORKFORCE, *supra* note 79, at 31. Further:

In this regard, DCMC commented that some contractors stated that when DCMC stopped performing inspections of all products, so did the contractors. As a result of the lack of inspections and recent failures with hardware in the Space Program, DCMC is concerned that it may have reduced its quality assurance program too much. Also, [the Defense Logistics Agency] stated that customer complaints about the quality of material received ha[ve] increased; however, it has placed less emphasis on responding to the customer complaints because of acquisition workforce reductions.

Id. at 77; *see supra* note 146 and accompanying text (quantifying the decrease in internal oversight).

225. The cost principles define a contingency as: "[A] possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time." 48 C.F.R. § 31.205-7(a) (2000). Contingencies "that may arise from presently known or unknown conditions, the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government . . . are to be excluded from cost estimates . . . but should be disclosed separately . . . to facilitate the negotiation of appropriate contractual coverage." *Id.* § 31.205-7(c)(2); *see also* Foster Constr. C.A. & Williams Bros. Co. v. United States, 435 F.2d 873, 887 (Ct. Cl. 1970) (stating that "long-standing, deliberately adopted procurement policy" that bidders "need not consider how large a contingency should be added to the bid to cover the risk"); Differing Site

contract clauses is their methodical endeavor to control contingencies²²⁶ by: (1) demanding that contractors not pad their bids/offers when competing for government business; and (2) re-assuring those contractors that the government will equitably adjust contracts to reimburse for unforeseen contingencies.²²⁷ I refer to this as the contingency promise. *In exchange for the contractor's willingness not to inflate its contract price to insulate itself against certain contingencies, the government agrees to make the contractor whole if such contingencies occur.* The effectiveness of this promise plays a key role in the government's ability to obtain goods and services at prices at or below the commercial market.

During the performance of government contracts, if an unanticipated contingency arises that requires the contractor to incur additional costs, the parties have a number of options.²²⁸ For example: (1) The contracting officer and the contractor may agree on compensation and enter into a bilateral modification of the contract;²²⁹ (2) the contracting officer can unilaterally determine the

Conditions Clause, 48 C.F.R. § 52.236-2 (2000) (anticipating subsurface or latent physical conditions that differ from the contract or unknown and unusual physical site conditions); Changes Clause, *id.* § 52.243-1 (anticipating potential changes within the scope of the contract); Government Furnished Property Clause, *id.* § 52.245-2(a)(3)-(4) (anticipating potentially defective, or late delivery of, government furnished property); Termination for Convenience Clause, *id.* § 52.249-2 (anticipating the Government's need to end contracts for a host of non-contractual reasons); Richard J. Kendall, *Changed Conditions As Misrepresentations in Government Construction Contracts*, 35 GEO. WASH. L. REV. 978, 979-82 (1967) (discussing the common law doctrine of misrepresentation and the Changed Conditions Clause). All of the aforementioned clauses include a similar remedy—reimbursement of all allowable costs, plus an allowance for profit.

226. See Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 695-97 (1996) (discussing the use of standardized clauses to anticipate unforeseeable contingencies in government contracts). For additional discussion of the Winstar litigation, see Joshua I. Schwartz, *Assembling Winstar: Triumph of Congruence in Government Contracts Law?*, 26 PUB. CONT. L.J. 481 (1997).

227. Contingency planning strikes at the core of Federal procurement policy. See generally Ralph C. Nash, Jr., *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693, 698-99 (1966) (“[T]erms and conditions . . . are an attempt . . . to define the remedies of the parties for most foreseeable contingencies that may occur. . . . Little is left to the workings of the common law of contracts since these standard terms and conditions represent a relatively thorough statement of intended risk allocation.”).

228. In addition to these options, the contractor may choose simply to absorb the additional costs and continue performance. As discussed below, the contractor may forego the claim if its assessment of the 1990s reforms—such as the evaluation of past performance—persuades it that the opportunity cost of pursuing the claim outweighs the value of the claim. Furthermore, stopping work is a far less attractive option for a government contractor than it would be for a contractor in the commercial marketplace. See *infra* note 246 and accompanying text.

229. See 48 C.F.R. § 43.103(a) (2000) (allowing the parties to make negotiated equitable adjustments, definitive letter contracts, and reflect the parties' other agreements).

additional compensation to be paid;²³⁰ and (3) the contracting officer can deny additional compensation, which likely prompts the contractor to file a claim, commencing the disputes process.²³¹ The long-standing contingency promise is premised on the assumption that the contractor can and will utilize the disputes mechanism to pursue these claims.²³²

In the eyes of the contractor community, however, the Kelman regime discourages contractors from pursuing their claims, which as some suggest, stigmatizes those that do pursue their contractual rights through litigation. For example, contractors fear that they will receive degraded past performance ratings if their government customer perceives them as litigious.²³³ Although this may not be the reason, it is unmistakable that the volume of dispute litigation has decreased by more than two-thirds in less than a decade. It is fanciful to assume that the frequency of unanticipated events plummeted during the 1990s or that government officials promptly and unhesitatingly paid contractors appropriate sums for unanticipated work. Accordingly, it is reasonable to conclude that contractors, for whatever reason, have chosen to rely less frequently on the disputes process to make themselves whole in their contractual relationships with the government.²³⁴

It makes no difference whether reinvented government explicitly or implicitly dissuaded contractors from aggressively pursuing their rightful entitlement to hold the government to its bargain. In the

230. *See id.* §§ 43.103(b), 43.201 (describing various unilateral changes that the parties can make under clauses other than a changes clause).

231. *See id.* §§ 33.206, 52.233-1 (discussing the initiation of a claim and the clause governing such disputes).

232. The contingency promise also depends upon the existence of an accessible, reasonably inexpensive, expeditious, and fair process for the resolution of claims and disputes. *See, e.g.*, 41 U.S.C. § 607(e) (1994) (“An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes. . . .”); *see also supra* note 129 and accompanying text (discussing whether the current fora provide such a process).

233. Although the contractor community has expressed this concern vociferously, it has been unable to obtain statutory or regulatory protection from retaliatory downgrading of performance based upon the pursuit of valid claims. The Office of Federal Procurement Policy recently addressed the issue in a non-binding policy document, articulating that “[t]he source selection team should be cautious not to downgrade or penalize offerors for the judicious use of the contract claims process.” BEST PRACTICES, *supra* note 95, ch. 3. Although this general statement represents a step in the right direction, the contractor community’s anxiety remains justified.

234. I would welcome any empirical evidence demonstrating (1) that the frequency with which unanticipated problems arise in federal procurement has decreased steadily for a decade; (2) the existence of a culture change in which free-spending contracting officers disburse government funds freely to maintain positive relations with their contracting partners; or (3) that contractors willingly volunteer to absorb additional costs incurred in the performance of individual contracts without adjusting their pricing practices for prospective work.

future, contractors will have little choice but to pad their bids/offers, thereby inflating the prices the government pays for what it buys.²³⁵ In the long run, this diluting of the deal will require that the government—and, accordingly, the taxpayers—pay significantly more for what the government buys. Moreover, as discussed below, this concern is exacerbated by statutory requirements relating to the certification of claims, a predicate to engaging in government contract dispute litigation.

ii. Avoiding another certification externality

To the extent that the Kelman regime's chilling of contractors' willingness to litigate has violated the contingency promise, a related issue merits brief examination. Since 1978, the Contract Disputes Act²³⁶ intentionally tilted the playing field to discourage frivolous claims.²³⁷ The CDA requires that, in pursuing recovery of increased

235. Additional empirical research could lead to an actuarial comparison of the risks (the perceived contingencies or the "unknown unknowns") and premiums (bid or proposal price increases) involved. Whether the government's total costs increase depends, in large part, upon contractors' ability to accurately predict the frequency with which contingencies actually arise. If, based upon the imperfect information available to them, contractors perceive a likelihood of confronting contingencies that exceeds the government's actual experience, violation of the contingency promise will increase the government's total expenditures.

236. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 601-613 (1994 & Supp. IV 1998)).

237. For well over a decade, the intense focus upon the jurisdictional ramifications of the certification masked this externality. Courts and administrative boards struggled with the issue of whether certification was a jurisdictional prerequisite to the commencement of litigation. Congress finally resolved the matter and specified that the certification requirement "shall not deprive a court or [BCA] of jurisdiction . . ." 41 U.S.C. § 605(c)(6) (1994); *see also* 48 C.F.R. § 33.207(f) (2000) (noting that a defective certification must be corrected prior to the entry of a final judgment by a court or decision by an agency BCA). Literature exists discussing the prolonged, expensive, inefficient, and often bitter litigation concerning certification in the context of a jurisdictional prerequisite. *See generally* Frank Baltz, *A Checklist for Negotiating the Dawco Minefield*, 30 *PROCUREMENT L.* 4 (1995); C. Stanley Dees & Stephen D. Knight, *Certification Requirements and Problems of Contract Claims and Requests for Relief*, 12 *PUB. CONT. L.J.* 162 (1982) (outlining the certification requirements of the CDA and the DoD Appropriation Authorization Act of 1979); Robert H. Koehler, *Certifying Claims under the Contract Disputes Act of 1978—The Ghost of Rickover Past*, 21 *PUB. CONT. L.J.* 25 (1991) (analyzing the debate surrounding who qualifies as a proper corporate officer under the Federal Acquisition Regulation); Jeffrey A. Lovitky, *Frequently Encountered Problems with Certification of Claims Under the Contract Disputes Act*, 16 *PUB. CONT. L.J.* 511 (1987) (discussing the merits of the arguments in the debate regarding the problems arising out of certification of government contract claims); Val S. McWhorter & Carl T. Hahn, *Virtual Final Decisions on Government Claims*, 26 *PUB. CONT. L.J.* 157 (1997) (discussing the statutory and historical foundations of final decision requirements for government contract claims and analyzing the subsequent treatment of these requirements); Val S. McWhorter & Carl T. Hahn, *Disputing the Meaning of a Claim: The Fallout from Dawco Construction*, 23 *PUB. CONT. L.J.* 451 (1994) (concluding that the *Dawco* decision has complicated the claims filing process and has done little to foster the negotiation of claims); Val S. McWhorter & Carl T. Hahn, *Dawco's Dispute Requirement is Bad Law and*

costs under government contracts, contractors must certify their claims.²³⁸ The certification specifies that, with regard to the contractor's claims, *inter alia*, the "amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable"²³⁹ This certification requirement prompts two relevant outcomes. First, as Congress intended, the certification requirement prompts risk-averse behavior, and in so doing, chills contractor willingness to submit frivolous or even marginal claims.²⁴⁰ Second, it restrains contractors from inflating their initial demands or prayers for relief in anticipation of settlement bargaining, or in an effort to cover their costs of claim preparation or litigation.

The legislative history of the CDA reflects that Congress accepted Admiral Hyman Rickover's²⁴¹ assertions that "contractors often submitted unsupported and inflated claims . . . ,” and that certification was necessary "to insure that complete[,] clear and honest claims are presented to Federal contracting officers. . . ."²⁴² To

Bad Policy, 30 PROCUREMENT L. 21 (1994); Mary Mitchelson, *Dawco's Dispute Requirement Is a Sound Element of the Dispute Resolution Process*, 30 PROCUREMENT L. 20 (1994); Henry J. Schweiter, *Post-Award Declaratory Judgment Jurisdiction of the Claims Court and the BCA over Non-monetary Claims: Faithful Statutory Construction or the Abdication of Judicial Responsibility*, 18 PUB. CONT. L.J. 277 (1989) (concluding that jurisdictional disparity between available forums makes future jurisdictional litigation virtually inevitable); V.J. Zupa, *When Is a Claim Not a Claim?*, 22 PUB. CONT. L.J. 654 (1993) (discussing the new procedural roadblock created by the *Dawco* decision). I have suggested previously that, to the extent that the current certification requirement no longer has jurisdictional significance, and to the extent that neither contractors nor advocates believe that the certification requirement encourages settlement, the certification requirement has outlived its usefulness. See Steven L. Schooner, *What Next? A Heuristic Approach to Revitalizing the Contract Disputes Act of 1978*, 28 PUB. CONT. L.J. 635, 649-50 (1999).

238. See Pub. L. No. 95-563, § 6(c)(1), 92 Stat. 2383, 2385 (1978) (codified as amended at 41 U.S.C. § 605(c)(1) (1994)) (requiring certification for claims over \$50,000).

239. 41 U.S.C. § 605(c)(1) (1994). The statute requires a four-part certification for claims exceeding \$100,000. In addition to the non-inflation statement, contractors must also certify that: (1) the claim is made in good faith; (2) that the supporting data are accurate and complete; and (3) that the certifier is authorized to certify on the contractor's behalf. See *id.*; see also 48 C.F.R. § 33.207(c), (e) (2000) (specifying the certification's text and that it may be executed by "any person duly authorized to bind the contractor with respect to the claim").

240. See, e.g., *supra* notes 128 & 137 and accompanying text (discussing the reasons contractors are discouraged from pursuing claims).

241. See Koehler, *supra* note 237, at 35-37 (discussing the content of Admiral Rickover's testimony regarding the certification requirement). Admiral Rickover's familiar moniker, the "Father of the Nuclear Navy," is inscribed on his tombstone at Arlington National Cemetery. See *Arlington National Cemetery Website*, at <http://www.arlingtoncemetery.com/hymangeo.htm> (last visited Aug. 1, 2000).

242. S. REP. NO. 95-1118, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5242; H.R. REP. NO. 102-1006, pt. 1, at 28 (1992), reprinted in 1992 U.S.C.C.A.N. 3921, 3937; *Skelly & Loy v. United States*, 685 F.2d 414, 418 (Ct. Cl. 1982) (discussing the certification requirements of the Contract Disputes Act of 1978). Mark Roe's description of path dependence as "the history of problems that had to be solved in

ensure compliance with this non-inflation requirement, Congress made contractors liable “for an amount equal to such unsupported part of the claim. . . .”²⁴³ Today, it is reasonable to conclude that the requirement survived either through inertia or because it is advantageous to “trigger[] a contractor’s potential liability for a fraudulent claim. . . .”²⁴⁴ In any event, the certification requirement continues to meet Admiral Rickover’s aim of sanctioning frivolous claims, and more broadly, chilling contractors’ demands for reimbursement.

More troubling is that, despite its best intentions, the non-inflation element of the certification²⁴⁵ constructs a scenario in which, regardless of the merit of a contractor’s claim, the contractor can never be made entirely whole.²⁴⁶ Through its application, the certification requirement limits contractors’ claims²⁴⁷ to the amount

the past but that may be irrelevant today” seems apt. See *Roe*, *supra* note 73, at 668.

243. 41 U.S.C. § 604 (1994) states:

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.

Id.

244. *Skelly & Loy*, 685 F.2d at 418 & n.11; see also S. REP. NO. 95-1118, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5242; H.R. REP. NO. 102-1006, pt. 1, at 28 (1992), reprinted in 1992 U.S.C.C.A.N. 3921, 3937.

245. What is so surprising is that the pervasive certification requirement was created by the Contract Disputes Act, the statute that eliminated an equally ill-conceived edifice—the arguably pointless distinction between judicial and administrative fora jurisdiction to consider breach matters. Under the CDA, both the Court of Federal Claims and the agency boards of contract appeals enjoy jurisdiction to resolve matters not only *arising under*, but also *relating to* a contract. See 41 U.S.C. §§ 605, 607(d) (1994). The pre-1978 distinction between matters involving remedy—granting clauses—which were covered by the Disputes Clause, and breach matters, proved unnecessarily problematic. See, e.g., Joseph Sachter, *Resolution of Disputes Under United States Government Contracts: Problems and Proposals*, 2 PUB. CONT. L.J. 363, 366 (1969) (suggesting that “[t]he distinction is perhaps better understood in the context of . . . court decisions which speak of disputes over rights *given by the contract* and disputes over *violations of the contracts*”) (emphasis in original). The latter of these, by arising *outside* of the contract, permits immediate access to the courts. *Id.* See also David V. Anthony, *Recommendations Concerning Legal and Administrative Remedies for Contract Claims: A Workable Remedies Package*, 42 GEO. WASH. L. REV. 300, 301-04 (1974) (citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 401 (1966)) (discussing the pre-CDA “rules that give boards of contract appeals jurisdiction over one kind of contract claim, claims arising ‘under the contract,’ and the Court of Claims jurisdiction over another kind of claim, ‘breach of contract’”).

246. For example, “The cost of preparation and presentation of claims against the United States is not includable in . . . [a] damages award.” CIBINIC & NASH, ADMINISTRATION, *supra* note 34, at 770; see also 48 C.F.R. § 31.205-47 (2000) (specifying when costs incurred in connection with proceedings are recoverable). The exception is that small businesses have a better chance of achieving something akin to complete cost recovery due to the Equal Access to Justice Act. See *supra* note 208.

247. The contractor’s claim can be analogized to a prayer for relief. Eight

of the incurred costs they can demonstrate.²⁴⁸ Contractors cannot recover the costs associated with claim preparation.²⁴⁹ Further, with the exception of some small business contractors,²⁵⁰ contractors can neither recover their attorney's fees incurred in litigation against the Federal Government, nor can contractors include these costs in their overhead pools.²⁵¹ As a result, if a contractor is forced to litigate²⁵²

commonly articulated elements of a claim in this context include: (1) a demand; (2) in writing; (3) for a sum certain of money; and (4) submission to the contracting officer for a decision. *See* 41 U.S.C. § 605(a) (1994); 48 C.F.R. §§ 33.201, 52.233-1(c) (2000). For claims exceeding \$100,000, the remaining four elements of a claim are accurate and complete supporting data, representations relating to good faith, non-inflation of the claim, and authority to certify. *See* 41 U.S.C. § 605(c)(5)-(8) (1994); 48 C.F.R. §§ 33.207, 52.233-1(d)(2) (2000).

248. Government contractors cannot avail themselves of many remedies available in the conventional contract disputes. *See, e.g.*, *Bruce Constr. Corp. v. United States*, 324 F.2d 516, 519-20 (Ct. Cl. 1963) (rejecting a fair market approach, and explaining that contractors are only entitled to recover their *costs incurred*, not the *value* of the services provided); CIBINIC & NASH, ADMINISTRATION, *supra* note 34, at 684-86 (explaining "value measures" and discussing cases pertaining to that concept). Further, "[t]here has been almost no recovery against the Government for consequential damages." *Id.* at 732. Similarly, specific performance is not a remedy available to government contractors, because it "would unduly interfere with government operations." Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 155 (1998); *see also* 48 C.F.R. §§ 43.205(f), 52.243-6 (2000) (discussing the government's right to require change order accounting).

249. *See supra* note 248 and accompanying text (discussing the remedies available to contractors in contract disputes). Further, given the statutory and regulatory requirements for disclosure of incurred costs, the expenses associated with government contract claim preparation dwarf the costs of preparing a similar demand in the commercial marketplace.

250. Pursuant to the Equal Access to Justice Act, small contractors may recover their attorneys fees in disputes if they are a prevailing party, the government's position is not substantially justified, and no special circumstances would make award of attorney's fees unjust. *See* 28 U.S.C. § 2412 (1994 & Supp. IV 1998). There are no similar fee-shifting devices available to large contractors.

251. "Costs . . . are unallowable if incurred in connection with . . . the prosecution of claims or appeals against the Federal Government. . . ." 48 C.F.R. § 31.205-47(f)(1) (2000) (referencing 48 C.F.R. § 33.201 (2000), which deals with claims and disputes). These unallowable costs include, *inter alia*,

administrative and clerical expenses; the costs of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others . . . ; costs of employees . . . ; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bears a direct relationship to the proceedings.

Id. § 31.205-47(a).

252. Bear in mind that a government contractor is *not* entitled to simply perform to the letter of the contract and avoid potential disputes with the government. The government enjoys broad bilateral or unilateral rights to modify its contracts. *See* 48 C.F.R. § 43.103(a)-(b) (2000). "The Contracting Officer may at any time, by written order . . . make changes within the general scope of this contract[.]" *Id.* (2000); *see also id.* § 52.243-4(a), 52.243-5(a). This powerful tool implicates one of the most unique aspects of government contract disputes regime—the "procedure to prevent disputes from disrupting performance by giving the government the contractual right to require the contractor to continue performance in the manner directed by the government." Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of*

against the government to recover money to which it is entitled as a matter of law, the *maximum recovery* to which the contractor is entitled is the amount of the contractor's actual loss *less the cost of pursuing its valid claims*. Any effort to pad a claim so that the recovery would include the costs of litigating against the government would be considered fraudulent behavior.²⁵³

The certification requirement, therefore, exacerbates the government's subtle breach of the contingency promise. Contractors may no longer rely on the expectation that, in exchange for their willingness not to inflate their contract prices to insulate themselves against certain contingencies, they can rely on the disputes procedures to make themselves whole if contingencies occur. First, contractors perceive that the opportunity costs associated with pursuing valid claims have risen. Second, contractors recognize that, even if they elect to pursue their valid claims through litigation, they cannot be made whole. Accordingly, as reasonable business people, they have no choice but to insulate themselves against contingencies *before* entering into government contracts by raising the prices they demand for goods and services. Specifically, the breach of the contingency promise and the effect of the certification requirement erodes the government's right to expect that contractors will sell to the government at prices at or below the commercial market. Acquisition reform advocates have yet to acknowledge these costs.

3. *Diluted contract interpretation: Diminished litigation's externality*

Oversight is not the only value that third-party monitoring brings. For good or ill, litigation provides the primary vehicle for clarifying procurement regulations and standard clauses on which the

Contract Appeals, 29 LAW & CONTEMP. PROBS. 39, 40 (1964); see also Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 877 (1978) (approvingly recognizing the government contract regime in the context of non-disruptive dispute settlement, because "it often behooves contract planners to plan for continuing relations in the face of conflict"); Carl L. Vacketta & Thomas C. Wheeler, *A Government Contractor's Right to Abandon Performance*, 65 GEO. L.J. 27, 28 (1976) ("[T]he Government has determined as a matter of procurement policy that it is always in its best interest to obtain timely performance[, and] . . . that it must receive prompt and diligent performance from a contractor even when the common law would not entitle the Government to receive such performance because of the Government's misfeasance.").

253. See generally 41 U.S.C. § 604 (1994) (discussing liability stemming from fraudulent claims); see also 48 C.F.R. § 33.209 (2000) ("If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.").

government's contractual obligations are based.²⁵⁴ The value of precedent generally,²⁵⁵ and specifically in a highly regulated system subject to frequent congressional modification, cannot be overstated.²⁵⁶ In the procurement regime, buyers, sellers, and counsel routinely utilize standard solicitation provisions and contract clauses.²⁵⁷ Accordingly, the published, precedential interpretation of those provisions and clauses by the GAO, the boards of contract appeals, and the Court of Federal Claims serve to inform buyers and sellers, and in so doing, modulate behavior.²⁵⁸ If, when faced with

254. The literature suggests a broad range of opinion on this issue. See, e.g., Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 256 (1999) ("Settlement and precedent conflict because the former necessarily precludes the later."); Luban, *Settlements*, *supra* note 32, at 2622-23 ("Rules and precedents . . . have obvious importance for guiding future behavior and imposing order and certainty on a transactional world that would otherwise be in flux and chaos."); Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2678-82 (1995); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 262, 280-84 (1978); Landes & Posner, *Legal Precedent*, *supra* note 91 ("In a legal system such as ours, in which legislative bodies confine themselves for the most part to prescribing general norms of conduct rather than highly specific rules, the published decisions of courts and administrative agencies interpreting and applying the legislative enactments are important sources of the specific rules of law.").

255. See generally *supra* notes 80-82 and accompanying text (discussing ADR and its effect on formal adjudication). Further, James Madison recognized that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961); see also DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 287-93 (1977) (reflecting on literature in the field of political science addressing the consequences of court decisions and criticizing, *inter alia*, "the unfortunate assumption that how a party implements a court order is no part of judicial business").

256. "Precedents can be expected to depreciate more rapidly in areas of law in which there is considerable statutory activity, since a change in statutory law will tend to make precedents based on earlier statutory language obsolete." Landes & Posner, *Legal Precedent*, *supra* note 91, at 269. Moreover, frequent, broad-based judicial review of agency decision-making serves the public interest. See generally Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 703-04 (1988) (discussing various positions in the debate over agency discretion, and arguing for active judicial review).

257. The Federal Acquisition Regulation distinguishes between: (1) solicitation provisions, which identify terms or conditions used only in solicitations (e.g., request for proposal, invitation for bid) and applying only *before contract award*; and (2) contract clauses, which include terms or conditions used in contracts, and applying *after contract award* or both before and after award. See 48 C.F.R. § 52.101 (2000) (explaining the use of provision and clause numbers, prescriptions, prefaces, and the matrix). For an informative table identifying all of the required or optional government-wide provisions and clauses, organized by the numerous contract types utilized by the government (e.g., fixed-price supply, cost-reimbursement supply, fixed-price research and development, cost-reimbursement construction, time and materials, commercial item, etc.), see 48 C.F.R. § 52.301 (2000).

258. See generally *supra* note 82 (noting that ADR deprives the procurement

erroneous or improper government action, parties fail to exercise their due process rights (or, having exercised those rights, resolve their differences with sealed settlement agreements),²⁵⁹ their mistakes serve no greater good. The reduction in precedent fails to apprise other buyers, sellers, or counsel of valuable lessons learned.

The existing regulatory regime places an enormous pedagogical value on precedential decisions in interpreting commonly used contractual terms and conditions.²⁶⁰ The drafters of the government's procurement rule book, the Federal Acquisition Regulation, avoid inserting extensive guidance into the published regulations.²⁶¹ As a result, just as a robust litigation regime tests the validity of regulations implementing a constantly-evolving congressional scheme,²⁶² the reported protest and dispute precedent provides necessary interpretation and guidance to counsel and the procurement professionals they advise.²⁶³ Further, as suggested above

community of vital information regarding contract clauses and provisions, practices, and policies).

259. One of my primary reservations with regard to the ADR movement is the public's diminished access to and scrutiny of settlements. I find this particularly troubling given the number of experienced agency counsel that express their belief that their agencies today willingly pay out larger settlements to comply with the "spirit" of their agency's ADR initiatives and mandates.

260. For an analogous examination of commonly used terms in corporate contracts, see Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "the Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997). The authors suggest that commonly used terms offer potential learning benefits, including: "(a) drafting efficiency; (b) reduced uncertainty over the meaning and validity of a term due to prior judicial rulings; and (c) familiarity with a term among lawyers[] [and] other professionals. . . ." *Id.* at 719-20 (emphasis added).

261. Given the daunting size of the regulation, 48 C.F.R. ch. 1, this may come as a surprise. Nonetheless, "[t]he Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies." 48 C.F.R. § 1.101 (2000) (emphasis added). The drafters historically have refrained from including extensive *guidance* in the Federal Acquisition Regulation. Principle 1(b) of the drafting guide directs drafters to: "Limit FAR requirements (including provisions and clauses) to the minimum necessary to—(1) Implement statutes and Executive branch policy; (2) Correct a critical problem or deficiency; or (3) Otherwise add value to the overall procurement process." *Federal Acquisition Regulation Drafting Guide*, at <http://www.arnet.gov/far/draftingguide.htm#chapter1> (last visited Apr. 15, 2001) (emphasis added).

262. Directly affected contractors—interested parties, knowingly or unknowingly serving as private attorneys general—are in the best position to probe and prod new laws and regulations to ensure their validity, accuracy, and effectiveness.

The political power which the Americans have entrusted to their courts of justice is therefore immense, but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. . . . The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (Phillips Bradley ed., 1972).

263. "Judicial opinions can reduce uncertainty regarding the validity and meaning of a term and the interaction of the term with relevant legal requirements. . . . This reduction in uncertainty reduces the expected costs of corporate planning and of

and discussed further below, I perceive that the norms of the purchasing regime are threatened not only by diminished protest volume, but also by the anemic pace of new contract disputes.²⁶⁴

4. *Diminished oversight threatens public trust*

It is striking that Professor Kelman, the Clinton Administration's architect of acquisition reinvention, anticipated and warned against reduced oversight as a by-product of procurement reform. Even to the extent that he perceived that the 1980s regulatory framework burdened the process with an "enormous toll on the quality of performance, . . . [he conceded that] we are obliged to seek other ways of reaching the goal of keeping corruption down."²⁶⁵ Specifically, Professor Kelman cautioned that:

Any loosening of the procurement regulatory straightjacket should be accompanied by, and linked to, increased resources for public corruption investigations to investigate units both outside the line agencies responsible for procurement and within those agencies. . . . Deregulation of the procurement system should also be accompanied by an increase in criminal penalties for procurement corruption. . . . A public announcement of increased resources devoted to investigation and of increased penalties would allow elected officials who might otherwise be worried that

litigating disputes regarding a contract term." Kahan & Klausner, *supra* note 260, at 722. For a more cynical assessment of the use of case law to broadly communicate the rule of law, see K. N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1243-44 (1938) ("Where we have a statute, we know at least what its words are. . . . But in the field of case-law . . . even the sureness about what the precise authoritative words are . . . is almost wholly lacking."). Kahan & Klausner also suggest that "widespread use of a term can offer . . . network benefits[,] . . . [which] include higher quality and lower cost legal and professional services in the future, as lawyers and accountants gain (and retain) expertise by encountering questions or disputes regarding a particular contract term." Kahan & Klausner, *supra* note 260, at 726.

264. See *supra* notes 35-40 and accompanying text (distinguishing protests and the disputes).

265. KELMAN, *supra* note 1, at 96. The current trend of reduced oversight is particularly startling when juxtaposed against the aggressive 1980s reforms intended to eliminate, or at least reduce, fraud, waste, and abuse in government contracting. Many of the 1980s reforms, such as increased contractor certifications and representations, with correspondingly increased penalties for non-compliance, derived from highly publicized scandals within the Department of Defense, such as the Ill-Wind Investigation. See generally, e.g., ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE (1995); JAMES G. BURTON, THE PENTAGON WARS: REFORMERS CHALLENGE THE OLD GUARD (1993) (discussing the fraud and corruption regarding Pentagon procurements during the 1980s). Nor was the 1980s trend Congress' first attempt to ratchet up contracting officials' ethical and behavioral standards. See generally Harold C. Petrowitz, *Conflict of Interest in Federal Procurement*, 29 LAW & CONTEMP. PROBS. 196, 196 (1964) ("As government has grown more and more pervasive, standards of conduct for public officials have been pushed ever upward until they now stand at an all time high.").

procurement deregulation signaled a withering of concern over public integrity, to display a visible signal of continuing concern. . . .²⁶⁶

Professor Kelman anticipated, and willingly conceded, that broad procurement reforms would be accompanied by new or increased monitoring tools to ensure that agency buyers and contractors complied with the revised rules. Thus, Professor Kelman and I agree that, whether or not trade-offs are required, there is a symbiotic relationship between procurement reform and the need for meaningful oversight.²⁶⁷ Accordingly, I readily concede that many, if not most, of Professor Kelman's reforms permit the government to procure high quality goods and services more quickly, expending less money, and potentially resulting in higher end user (e.g., agency) satisfaction. I part company with Professor Kelman because his implementation efforts failed to recognize that oversight generally, and third-party monitoring specifically, could add significant value to this flexible, discretionary, and rapidly evolving buying regime.²⁶⁸

266. KELMAN, *supra* note 1, at 98-99. Kelman also suggests "[d]eregulation of the procurement system should . . . be accompanied by an increase in the criminal penalties for procurement corruption." *Id.* at 98.

267. In this regard, I reject "the essential claim[] of formal legalism . . . that bureaucrats should have no discretion in either making or implementing policy." JOHN P. BURKE, BUREAUCRATIC RESPONSIBILITY 11 (1986). Instead, I concede that bureaucrats, particularly public purchasers, require a great deal of discretion to make business judgments, and, in that manner, those bureaucrats may resemble their private sector counterparts. But, the comparison ends by adding the lens of transparency. The public purchaser's discretionary actions must remain subject to scrutiny, not only to ensure the buyer's legal compliance, but to demonstrate to the public that confidence in that compliance is warranted. Having herein broached formal legalism, I concede that in my effort to frame my disagreement with Kelman, I have found the most commonly utilized rubrics for analyzing issues involving bureaucratic authority and discretion wanting. *See generally, e.g.*, Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (detailing the formalist model (which captures the nondelegation doctrine), the expertise model, the judicial review model, and the market/pluralist, or interest-group model); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 (discussing the rule of law ideal, the public purpose ideal, and the democratic process ideal); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992) ("[G]overnment's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good.").

268. I concede that "[t]he fact that government cannot be run just like a business does not mean it cannot become more *entrepreneurial* . . ." DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 22 (1992) (emphasis in original). Similarly, I agree that "[f]ew Americans would really want government to act just like a business—making quick decisions behind closed doors for a private profit." *Id.* It is on this latter point that I perceive that Kelman's compass has lost its course. As one commentator remarked, "Kelman's zeal for the private sector's way of doing business is matched only by his disgust for the government's traditional approach." Ripley, *supra* note 24, at 46.

a. Change management and brinkmanship

I remain perplexed by Professor Kelman's relentless determination to pursue something akin to a pure form of entrepreneurial government, rather than accepting a compromise that may entail a more businesslike system that features adequate monitoring.²⁶⁹ In my view, this raises a curious possibility. Professor Kelman is an articulate champion of the change management discipline.²⁷⁰ Professor Kelman rejects incrementalism. Rather, he believes that *dramatic change* is necessary to counter inertia and change behavior. Professor Kelman felt strongly that dramatic change was a key ingredient in convincing seasoned procurement personnel that, despite their career training and experience in rule adherence, their new mandate required them to exercise discretion, and more importantly, constantly innovate. Accordingly, I am inclined to reconcile Professor Kelman's disregard of the need for controls and deterrence—which his writings support—as goal-oriented behavior. During his time in Washington, D.C., Professor Kelman focused his energy on swinging the pendulum as far toward the corporate model as possible.²⁷¹ In so doing, it was safe for Professor Kelman to assume that others, driven by more traditional values, eventually would burden the procurement system with appropriate oversight mechanisms.

b. What price efficiency?

It may seem unfair to fault Professor Kelman for neglecting oversight while he was swept into the frenzy surrounding the acquisition reform bandwagon. The Clinton Administration, private industry, and the trade press showered Professor Kelman with praise for leading the government reinvention movement. At the same time, no one expected the Vice President to present “hammer awards” for increasing investment in oversight, auditing, or compliance.²⁷² Maintaining, and more specifically, funding an

269. This is not to say that striking a happy medium would be easy. “The difficulty of striking a reasonable balance between rules and discretion is an age-old problem for which there is no ‘objective’ solution any more than there is to the tension between other competing human values such as freedom and order, love and discipline, or change and stability.” WILSON, *supra* note 19, at 342.

270. See generally Steven Kelman, *Making Change: Why Change Occurs in Federal Organization—and Why its Pace is Likely to Increase in the New Millenium*, GOV'T EXEC., Jan. 2000, at 28 (discussing the evolution of a more businesslike approach to Federal Government procurement programs). Kelman's recommended readings along these lines led to my review. See generally Schooner, *supra* note 27.

271. For additional discussion of the frequent use of the “pendulum” analogy in descriptions of acquisition reform, see *supra* note 144.

272. The NPR's most visible manifestation of success in reinventing government

oversight regime, is difficult; however, during the 1990s, it may have seemed nearly impossible.²⁷³ In the absence of a pending scandal, little credit is assigned for investing in oversight to avoid *future* scandals.²⁷⁴ Driven to make the procurement system more businesslike, Professor Kelman appears disinclined to support such investment, discarding what he previously perceived as a clear mandate.

I take very seriously the goal of keeping the level of corruption in government low. The costs of government corruption are far greater than the monetary or performance losses to the government that result from corrupt bargains. Public corruption can devastate the ethical tone of society as a whole and decrease the inclination of citizens to behave ethically in their everyday lives. . . . Thus, even the economist Arthur Okun has written that government 'should spend \$20 to prevent the theft of \$1 of public funds.'²⁷⁵

is a blatant criticism of the pre-reform procurement system. "The Award is the Vice President's answer to yesterday's government and its \$400 hammer. Fittingly, the award consists of a \$6.00 hammer, a ribbon, and a note from Vice President Gore, all in an aluminum frame." National Performance Review, *Hammer Awards Web Page*, at <http://www.npr.gov/library/awards/hammer/> (last visited Aug. 18, 2000). "Nominations must show real innovation in at least one of the following areas of reinvention: Putting customers first; Empowering employees; Cutting red tape; Cutting back to basics (stop doing things not in core mission); Achieving results Americans care about." National Performance Review, *Criteria for Vice President Gore's Hammer Awards*, at <http://www.npr.gov/library/awards/hammer/criteria.html> (last visited Aug. 18, 2000).

273. Moreover, it has also been suggested that congressional oversight diminished during the 1990s because: (1) then-Speaker of the House of Representatives, Newt Gingrich, shifted committee resources from programmatic oversight towards a partisan effort to expose alleged corruption in the Clinton administration; and (2) Republican efforts to reduce the size of the congressional bureaucracy limited traditional oversight resources. See Eric Pianin, *In Congress, GOP Leaders Take On Oversight*, WASH. POST, July 28, 2000, at A23. Conversely, these criticisms are not a recent phenomenon. See, e.g., James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277 (1975) (arguing that Congress appears to be content with reacting to administrative decision-making problems on an emergency basis rather than conducting effective oversight of congressionally authorized programs and their administrative implications).

274. Rooting out fraud, waste, and abuse "depends upon management improvements that are difficult, thankless, and often expensive. . . . A gross imbalance in the time horizon of the waste, fraud, and abuse issue makes such a sustained attack difficult." KETTL, *supra* note 2, at 32; see also SPARROW, *supra* note 149, at 12 (describing a hypothetical "dream" of contemporary regulatory practitioners).

[S]ometime within the last seven years, and quite unexpectedly, enforcement numbers or judicial referrals dropped precipitously. You do not remember anyone actually saying "we don't do enforcement anymore."

In fact, you are pretty sure no one would ever have said that. But apparently, that is what everybody thought they heard.

Id.

275. KELMAN, *supra* note 1, at 96 (emphasis in original) (citing ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 60 (1975)). Okun elaborates on this

It is telling that Professor Kelman attributes the concept of the marginal investment in oversight to another, rather than embracing it as his own.²⁷⁶ Professor Kelman appears more comfortable advocating the opposite position, asserting that we should not invest too much to police the buying process.

I am suggesting that *too much weight is currently placed on equity and integrity* at the expense of other values, such as the substantive quality of procurement performance. . . . My critique might be seen as a variant of the economist's concept of an optimal level of corruption, in which not more than a dollar in detection costs is spent to uncover a dollar's worth of fraud.²⁷⁷

Yet, Professor Kelman promptly retreats from this extreme when he states, "*one need not sacrifice equity and integrity* to obtain better substantive procurement performance."²⁷⁸ If Professor Kelman stopped there, or if the policies he implemented mirrored this sentiment, he and I would have no quarrel.

Professor Kelman, an accomplished public policy scholar, knows well that reduced oversight threatens fundamental norms that define the procurement process. For example, the buying process is

point:

Because the government gets its funds from taxpayers by mandatory, not voluntary, decisions, there is no room for the principle of caveat emptor. . . . The government must be accountable to the citizens, and accountability is as costly in resources as it is precious to the integrity of the political process. *Bureaucratic red tape is neither an accident nor a reflection of bad rules . . . : it is the result of the obligation of political decision-makers to be cautious . . . and to guard against any misuse of taxpayers' money.* Public officials follow the Ten Commandments of their profession, which proclaim that thou shalt not be experimental or venturesome or flexible.

Id. (emphasis added).

276. It is also telling that Kelman advocates for "an increase in criminal penalties for procurement corruption." KELMAN, *supra* note 1, at 98. Increasing penalties, of course, requires less investment than maintaining or increasing oversight. But even Kelman is not persuaded by his own argument, conceding that "criminology research suggests that the *likelihood of punishment is a more important deterrent than the severity of the punishment*, so the increase in penalties is no substitute for keeping up the investigative pressure." *Id.* (emphasis added) (citation omitted).

277. *Id.* at 95 (emphasis added).

278. *Id.* With regard to another key norm, maximizing competition, I harbor no doubt that Kelman would acknowledge his willingness to increase efficiency at the expense of competition. The most stark manifestation of this was Kelman's success in permitting reduction of the competitive range in negotiated procurements solely for the purposes of efficiency. See 10 U.S.C. § 2305(b)(4) (1994); 41 U.S.C. § 253b(d) (1994); 48 C.F.R. §§ 15.306(c)(2), 52.215-1(f)(4) (2000) ("If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals."); see also *supra* notes 104-09 and accompanying text (noting that multiple award task order and delivery contracts have provided increased efficiency in exchange for greatly reduced competition).

premised on: (1) robust competition; (2) high standards of individual and institutional integrity; and (3) system transparency—all of which are key to maintaining public trust. When, in good faith, contractors actively exercise their statutorily-granted due process rights, they, intentionally or inadvertently, support all three policies.

Less external oversight also erodes the competitive underpinnings of the procurement system. The existing buying scheme system demands, and is premised on the existence of, meaningful competition.²⁷⁹ Without robust competition in the marketplace, assumptions about the price and quality of goods and services are misplaced. Agency contracting professionals, however, faced with unrelenting pressure to fill vital agency needs, are insufficiently motivated to maximize competition. Recent procurement reforms, compounded with the arbitrary culling of the purchasing workforce, exacerbate this concern by tilting the balance from full and open competition to increased efficiency. This balance is a precarious one.

Surely, the Government saves agency resources (*e.g.*, time, energy, and money) when fewer competitors vie for specific contracts. Yet, in a less crowded market, it is more difficult to ensure that competitive pressure guarantees that the government receives the best value, in terms of price, quality, and contractual terms and conditions. Striking this balance—finding the golden mean between competition and efficiency—is the ultimate hurdle facing acquisition reform.

Procurement reformers trumpet reduced barriers to entry into the Federal procurement marketplace. This is a laudable achievement. Historically, however, a level playing field for new entrants, regardless of any particular disincentive inherent in the government's contracts, proved one of the most attractive features of our procurement system. Potential vendors enjoyed access to impartial adjudicators if they believed agencies failed to administer fair procurements. Absent such a perception, certain firms' willingness to compete decreased.

When the public loses insight into how the government spends its money, when contracts are awarded or administered based upon friendships rather than the rules, or when competing firms lack confidence that they stand on equal footing with incumbent contractors, the system suffers. Similarly, if contractors find themselves unable to enforce their contracts and unwilling to

279. See generally Competition in Contracting Act of 1984 ("CICA"), Pub. L. No. 98-369, Div. B, tit. VII, 99 Stat. 494, 1175 (codified as amended in various sections of 31 U.S.C. and 41 U.S.C.). CICA imposed upon the procurement system the now well accepted standard of "full and open competition," which "when used with respect to a contract action, means that all responsible sources are permitted to compete." 48 C.F.R. § 6.003 (2000).

aggressively pursue the benefit of their bargain, they will view prospective government purchases through a more jaunted, if not jaundiced, lens, and, accordingly, inflate the price of their goods and services.

This returns us to the overarching theme of public trust. Even Professor Kelman acknowledges the role that public perception plays in this calculus.

It is important to note the perception gap between a general public that perceives corruption to be a major problem in government procurement . . . and government officials who generally perceive it to be of only minute proportions. . . . I believe the public tends to exaggerate the problem more than practitioners within the government tend to underestimate it. Nonetheless, the recurrent corruption in municipal procurement, the occasional scandals at the federal level, and the anecdotal evidence suggesting that payoffs are an endemic problem in private-sector purchasing all reinforce concerns about the possibilities of corruption in government procurement.²⁸⁰

Yet, colored by his deep-seeded distaste for the role of attorneys and enamored with the private sector governance model, Professor Kelman cannot see that reduced litigation threatens the defining norms of the process.²⁸¹ For example, Professor Kelman's work largely ignores the transparency issue, and remaining true to form, his reform initiatives frequently came at the expense of transparency.²⁸² Moreover, to the extent that transparent procurement systems are "characterized by *clear rules* and by means to verify that those rules are followed[.]"²⁸³ the dramatic trend toward

280. KELMAN, *supra* note 1, at 96.

281. *See supra* note 167 and accompanying text (explaining Kelman's views on litigation and the role of attorneys in the government contracts process).

282. Just to highlight a few examples: (1) the micro-purchase threshold and the purchase card removed twenty million transactions and \$10 billion dollars in purchases from the public's eye; (2) the simplified acquisition procedures, and many of the associated test programs, reduced the number of procurements synopsisized in the Commerce Business Daily; and (3) multiple-award task order and delivery contracts removed billions of dollars worth of task orders from open marketplace and, in suppressing protests on individual task orders, reduced potential challenges to improprieties and correspondingly diminished the potential for protest precedent to provide guidance to the procurement community.

283. Sue Arrowsmith, *Towards a Multilateral Agreement on Transparency in Government Procurement*, 47 INT'L & COMP. L.Q. 793, 796 (1998) (emphasis added). Arrowsmith suggests that two generally accepted features of a transparent system are "(i) the rules to be applied in conducting procurements and (ii) information on specific procurement opportunities are made clearly known to affected parties." *Id.* Further, transparency

ensure[s] that procurement decisions are based only on considerations regarded as 'legitimate' within the system . . . [It also] supports the goals of procurement systems by encouraging and facilitating participation by

increased discretion for procurement professionals could be considered antithetical to certain perceptions of transparency. This does not trouble Professor Kelman because, in large part, his models and analogs are derived from the private sector. In the private sector, transparency is not considered, let alone valued at a premium.²⁸⁴

c. Measuring accountability?

It is reasonable to ask how it can be that, with all of this flexibility,²⁸⁵ we survived the late 1990s without at least one headline-grabbing procurement scandal. Although it seems disingenuous to suggest that the current laissez-faire regime, with its diminished oversight tools, is scandal resistant, this ideal offers a certain appeal.²⁸⁶ More likely, however, diminished oversight correspondingly uncovers less illegality, less non-compliance, fewer errors in judgment, and less sloppiness,²⁸⁷ resulting in a culture seemingly defined by lawlessness.²⁸⁸

suppliers. Publicity for procurement opportunities, the application of clear and accessible rules, and the assurance that these rules will be adhered to all mean that suppliers are more willing and able to bid. There is less risk that their participation will prove wasteful. . . .

Id. at 796-97.

284. “Numerous laws designed to ensure transparency, rationality, and accountability in decision making, including the Administrative Procedure Act (APA) and the Freedom of Information Act, apply to agencies, and not to private actors.” Freeman, *supra* note 148, at 586-87 (citations omitted).

285. Surely, added flexibility may tempt personnel to stretch the limits of proper behavior. Yet, the expanded discretion is not as insidious as the broader reform message that customer service—e.g. saving money, more quickly obtaining products, or purchasing from a preferred vendor—is far more important than longstanding norms such as integrity, competition, or transparency. Along those lines, one of Kelman’s prized legacies was the insertion of the following statement into the Federal Acquisition Regulation: “If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government *members of the Team should not assume it is prohibited.*” 48 C.F.R. § 1.102-4(e) (2000) (emphasis added). Although this phrase is tempered by vague references to “sound business judgment, . . . consisten[cy] with law, and . . . limits of . . . authority[.]” the message is clear. *See id.* Customer service first, compliance second. Unfortunately, in the long term, human nature suggests that disrespect for compliance obligations becomes epidemic. *See, e.g.,* Alan Sipress & Josh White, *Guilty, but Feeling Guilt-Free: More Drivers Disregard Traffic Laws and Blame Congestion*, WASH. POST, July 16, 2000, at A1 (discussing Americans’ increasingly pervasive disregard for traffic laws).

286. The absence of a high-profile scandal does not suggest that the public is not exposed periodically to discouraging news regarding the procurement system, merely that the individual stories fail to gain traction. *See, e.g.,* John Solomon & Katherine Pfleger, *Avoiding Federal Debarment: Some Firms Keep Getting Contracts Despite History of Fraud*, WASH. POST, Aug. 21, 2000, at A19 (discussing an Associated Press survey finding that 737 of 1,020 companies sued or prosecuted for fraud within the last five years remain eligible for future government contracts). “The review suggests that the debarment program catches many smaller companies on their first offense while larger companies preserve eligibility despite multiple lawsuits and criminal charges.” *Id.*

287. *See, e.g.,* Cancian, *supra* note 185, at 194 (“The most important tradeoff . . . is

One of the key principles of the government reinvention effort embraces this concern. David Osborne and Ted Gaebler, the prophets of entrepreneurial government, focused heavily on performance measurement to determine the success of governmental endeavors.²⁸⁹ At the same time, they concede that one of the greatest difficulties of performance measurement is identifying what to measure and how to quantify success.²⁹⁰ For the Federal Government, these issues evolved from theory to practice with the passage of the Government Performance and Results Act of 1993 (“GPRA”).²⁹¹ The

between the risk of abuse and the level of oversight. Reductions in oversight . . . mean that more things will go wrong and that they will remain unseen longer.”). In the future, it may be elucidating to pursue a line of inquiry suggested by my colleague Joshua Schwartz. He suggests that the relationship between monitoring resources and the reported incidence of scandal is particularly complex due to the blurring of deterrence effects and detection effects, both of which are reduced by diminished oversight. This may prove fertile ground at a micro level (i.e., with regard to specific government programs), but I am not optimistic regarding data at a macro level. “Indeed, good estimates of the real levels of fraud, waste, and abuse in the Federal Government simply are unavailable. The government’s enterprise is huge, the opportunities for taking advantage of the system are legion, and the government’s investment in fighting fraud has been modest.” KETTL, *supra* note 2, at 29; *see also* Penska & Thai, *supra* note 138, at 490 (“all surveyed groups believed in the importance of compliance enforcement, rather than self-governed compliance.”).

288. *See* SPARROW, *supra* note 149, at 12 (reflecting the perception that “everybody thought they heard” someone say “we don’t do enforcement and more”).

289. *See* OSBORNE & GAEBLER, *supra* note 268, ch. 5, app. B.

290.

To determine *program efficiency*, an organization would simply measure the cost per mile swept. But to determine *policy efficiency*, it would have to measure the cost to achieve a desired level of street cleanliness, by whatever method—street sweeping, prevention, community self-help. Finally, to measure *program effectiveness*, a city might measure citizen satisfaction with the level of street cleanliness. But to measure *policy effectiveness*, it might ask citizens whether they wanted their money spent keeping the streets clean, or whether alternative uses, such as construction or repaving, would be preferable.

Id. at 354 (emphasis in original); *see also* HERBERT A. SIMON ET AL., PUBLIC ADMINISTRATION 488-512 (1991) (discussing the meaning of efficiency and suggesting that the term is vague and ambiguous).

Because of the ethical views that prevail . . . because efficiency is generally regarded as something desirable, the word is a political symbol of considerable potency. It has the power of organizing sentiment behind the proposals to which it is attached. Most people feel they *ought* to be efficient, and that they ought to want efficient government.

It is not surprising, therefore, that many debates in our political scene about “efficiency” are really debates about what values government should implement.

Id. at 510-11 (emphasis in original).

291. Pub. L. No. 103-62, 107 Stat. 285 (codified in scattered sections of 5 U.S.C., 31 U.S.C., and 39 U.S.C.). As the General Accounting Office (“GAO”) explained: every major federal agency must now ask itself some basic questions: What is our mission? What are our goals and how will we achieve them? How can we measure our performance? How will we use that information to make improvements? . . . GPRA requires agencies to set goals, measure performance, and report on their accomplishments.

GPRA requires agencies to create strategic plans, publish annual performance objectives, and report their progress against those objectives.

One of Professor Kelman's most vexing challenges before his return to academia was leading the effort to define performance objectives for procurement professionals.²⁹² For better or for worse, this effort was never formally scrutinized, in large part because buying is rarely perceived as a core purpose or mission of executive agencies.²⁹³ Today, the articulated vision of the procurement professionals, laden with corporate-speak, mirrors Professor Kelman's businesslike model.²⁹⁴ Fundamental principles that define the nature of government procurement and distinguish it from corporate practice,²⁹⁵ such as maximizing competition, maintaining

GOV'T ACCOUNTING OFFICE, GAO/GGD-96-118, EXEC. GUIDE-EFFECTIVELY IMPLEMENTING THE GOVERNMENT PERFORMANCE AND RESULTS ACT 1 (1996). See generally Paul R. Verkuil, Comment, *Is Efficient Government an Oxymoron?*, 43 DUKE L.J. 1221, 1231 (1994) [hereinafter Verkuil]; Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 517 (1995).

292. "The problem in government is not lack of accountability, . . . but the nature of the accountability. Government people . . . are indeed held accountable . . . if they violate rules. . . . What is missing is demand for accountability for the *quality* of the government's performance." KELMAN, *supra* note 1, at 15 (emphasis added).

293. In discussing the implementation of the GPRA, the Senate Report conceded that "[n]ot all governmental programs lend themselves easily to measurable goals. For some it will be very difficult, and for a few, perhaps impracticable altogether." SEN. REP. NO. 103-58, at 16 (1993), reprinted in 1993 U.S.C.C.A.N. 327, 342 (discussing the necessary means and practicality of effectuating efficient government programs). Moreover,

[p]ublic management—or at least good public management—is not so relentlessly utilitarian as to think that only results matter. One reason for this is that every public agency produces many kinds of outcomes—not just progress toward the primary goal of the agency, but also *conformity to the contextual goals and constraints in which the agency is enmeshed*.

WILSON, *supra* note 19, at 168 (emphasis added).

294.

VISION FOR THE FEDERAL ACQUISITION WORKFORCE.

The federal acquisition workforce are the government's business leaders. As the government's business leaders, we: Provide strategic business advice to agency leaders for spending and managing billions of the taxpayers dollars annually; apply the most effective business practices from the public and private sectors; join industry in a mission-oriented business partnership; obtain the best value goods and services for the taxpayer; provide responsive, creative, solution oriented service to support the Program mission.

PROCUREMENT EXEC.S COUNCIL, STRATEGIC PLAN, FISCAL YEAR 2000 (2000), available at <http://www.arnet.gov/CommCouncil/PEC/pecstpl2.html> [hereinafter PROCUREMENT EXEC.S].

295.

The standard of performance of private business . . . is regulated by market competition and the rate of profit. . . . Government administration is subject to . . . scrutiny. . . . What is at issue in such scrutiny is not merely the cost-efficiency of public provision, but whether money is spent for the purpose

transparency, or ensuring integrity, no longer dominate the government buyer's radar screen.²⁹⁶

B. *The Limits of Businesslike Government*

1. *Government is different: Failure of the private sector model*

It is not hyperbole to suggest that the NPR represents one of the largest efforts to reinvent government²⁹⁷ since the New Deal. Although it is too early to assess whether the NPR will permanently change the public's expectations of government or the way government operates, it is not premature to begin an examination of what the future holds if the NPR movement maintains its momentum.

Quite simply, the government is different.²⁹⁸ First and foremost,

and on the terms for which it was voted, and administration conducted in accordance with legally defined powers, and the legally established rights of the citizen.

DAVID BEETHAM, BUREAUCRACY 33 (2d ed. 1996) [hereinafter BEETHAM].

296. Fortunately, some of these principles are not completely forgotten, but merely suppressed. For example, the "Vision for the Federal Acquisition System" concedes that the business model "[b]uilds on a foundation of integrity, fairness, and openness." PROCUREMENT EXEC.S, *supra* note 294 (emphasis added). Competition, however, receives no recognition.

297. This now common term "reinvent government" derives from OSBORNE & GAEBLER, *supra* note 268. Unaware that their work would soon become ingrained in the lexicon of the Clinton Administration brain trust, the authors began by acknowledging that they had "chosen an audacious title for this book." *Id.* at xv. Reflective of their perception that government should be more businesslike, the authors "use the phrase *entrepreneurial government* to describe the new model [they] see emerging. . . ." *Id.* at xix (emphasis in original).

298. Congress bears little resemblance to a corporate board in purpose, policy, or practice. The role of partisan politics in the annual appropriations process renders analogy to corporate capital accumulation inapt. "Given [the] political realities, it is probably pointless to push the corporate governance analogy too far. It might work better with a different constitutional framework." Verkuil, *supra* note 291, at 1230 (acknowledging that "extreme [congressional] micromanagement would make most corporate boards blush").

I agree with the sentiment that:

the Federal government has been and always will be different from the commercial sector. Thus, while striving to make the Federal acquisition system more like its commercial counterpart, [we] continue[] to recognize the unique constraints that are imposed on public-sector organizations. No matter how commercial, competitive, or cost-effective the Federal acquisition system becomes, it ultimately will still be governed by public policies—policies that are driven not only by economic objectives but also by social and political considerations.

PROCUREMENT ROUND TABLE 2000, THE FEDERAL ACQUISITION SYSTEM: TRANSITIONING TO THE 21ST CENTURY 6 (1999), *available at* <http://www.contracts.ogc.doc.gov/cld/papers/21CentAcqn.pdf>. The Procurement Round Table is a nonprofit organization chartered by former Federal acquisition officials, serving pro bono, seeking to advise and assist the government in making improvements in Federal acquisition. *Id.*

the government lacks a profit motive.²⁹⁹ Not only do the ends that business and government seek differ, the dichotomy between their purposes breed distinct cultures and norms.³⁰⁰ The government is not on equal footing with those from which it buys.³⁰¹ It no longer makes sense to accept the oft-cited proposition that, when the government steps down from its sovereign perch and enters the commercial domain, it submits itself to the same laws and subjects itself to the same treatment as ordinary businesses.³⁰² Rather, there is truth in the sentiment, expressed almost forty years ago, that “the myth of the government descending to the market place and negotiating like any other businessman is being slowly exploded.”³⁰³

Professor Kelman, however, tenaciously clings to the private sector model. Accordingly, my fundamental departure from Professor Kelman’s regime can be summarized by one of his most frequent “ice-breakers.”

Kelman . . . would often introduce his ideas by talking about his

299. For these and other reasons, I cannot accept Frug’s endeavor to treat as similar governmental and corporate bureaucracies. See Frug, *supra* note 267.

300.

A businessman who bends the rules is showing flexibility, and a rule book which is highly general allows scope for individual initiative in the pursuit of profit. A civil servant who does the same is guilty of misconduct, and a rule book which allows large discretion to the official in dealings with the public is inviting arbitrariness in the treatment of different citizens. Rule keeping is not a means to the end of profit . . . but a value in itself.

BEETHAM, *supra* note 295, at 32. If this analogy does not ring true on first reading, substitute the word “contractors” for “citizens.” This substitution implicates citizenship at a number of different levels. Some contractors, particularly small businesses, are individual citizens. Larger contractors are owned, managed, and staffed by citizens whose employment may depend upon certain contracts. Finally, citizens own stock in companies that are affected by government purchasing decisions. In these, and other scenarios, affected citizens have reason to expect that the government will not be arbitrary in dealing with them or others similarly situated.

301. See J. RONALD FOX, *ARMING AMERICA: HOW THE U.S. BUYS WEAPONS* 453 (1974) (“In truth, the defense industry is not free enterprise. It never has been.”).

302. See generally *Cooke v. United States*, 91 U.S. 389, 396 (1875) (noting that the government “conceded . . . that, when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances”). Further, the Court in *Cooke* stated, “if [the Government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.” *Id.* at 398.

303. Gilbert A. Cuneo & Eldon H. Crowell, *Impossibility of Performance—Assumption of Risk or Act of Submission?*, 29 *LAW & CONTEMP. PROBS.* 531, 548 (1964); see Arthur S. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 *VA. L. REV.* 27, 56 (1955) (“Conditions imposed by the Government in its contracts are on a take-it-or-leave-it basis, and give only the illusory freedom of choice to business concerns.”); Whelan & Pearson, *supra* note 155, at 339-40 (“No contract between private parties is so deeply involved in the policies, politics and economy of the whole nation. . . . In what other lines of business . . . are contractors subjected to scrutiny for the purpose of determining whether their total contract activities have yielded ‘excessive profits’? . . . Another striking difference is found in the process known as ‘debarment.’”).

daughter Rory. She loved going to a restaurant that featured children's party games. The eatery rewarded skilled players with tickets that could be converted into prizes upon departure. On one outing Rory, then 6, was left holding 23 tickets, two short of the minimum needed to claim a prize. But the employee behind the counter gave her a prize anyway. When Kelman remarked on the restaurant's generous spirit, Rory replied, 'They want us to come back.' The family tale, in Kelman's view, represented a common sense example of the value of 'past performance,' one of several new federal buying practices that he championed. . . .³⁰⁴

It is a great story, but inapt.³⁰⁵ For the same reason that you cannot tip a government employee, *either before or after* he or she calculates your social security benefits, one of the most fundamental precepts of Federal procurement is that you are not entitled to obtain a leg up on your competition if you offer, let alone provide, "freebies" to government customers.³⁰⁶

304. Stephen Barr, *Outgoing Chief Leaves His Mark on Procurement Process*, WASH. POST, Sept. 12, 1997, at A23. I witnessed Kelman spin this yarn frequently, and it was well received by a broad cross-section of audiences. Consistent with his businesslike approach, Kelman did not hesitate to identify the restaurant as the popular family-with-children chain, Chuck E. Cheese (visited Aug. 1, 2000), at <http://www.chuckecheese.com/>.

305. Even the oracles of governmental reinvention concede that there are limits to businesslike government.

Many people, who believe government should simply be 'run like a business,' may assume this is what we mean. It is not. Government and business are fundamentally different institutions. Business leaders are driven by the profit motive Businesses get most of their money from their customers; governments get most of their money from taxpayers. Businesses are usually driven by competition; governments usually use monopolies Government is democratic and open; hence it moves more slowly than business Government's fundamental mission is to 'do good,' not to make money Government must often serve everyone equally These differences add up to one conclusion: government cannot be run like a business.

OSBORNE & GAEBLER, *supra* note 268, at 20-21; *see also* WILSON, *supra* note 19, at 369 ("The difference, of course, is that both the price system and the profit motive provide a discipline in markets that is absent in non-markets.").

306. My four-year-old son's experience similarly distinguishes acceptable behavior in the private marketplace from tolerable behavior in the public sector. My son's favorite grocery store, Harris-Teeter, won his loyalty by offering him, each time he visits, a "free" sugar cookie, balloon, and coloring book. Unlike my son, I recognize that I am paying—albeit indirectly—for each of these amusements. Although I often willingly pay more for my groceries in exchange for my son's entertainment, government buyers do not enjoy this luxury. An extensive statutory and regulatory construct is intended to limit both actual and apparent conflicts of interests involving government procurement officials. *See, e.g.*, 48 C.F.R. § 3.1 (2000) (discussing safeguards against improper business practices and personal conflicts of interest). The regulatory mandate is clear:

Government business shall be conducted in a manner above reproach and . . . with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general

Congress, of course, bears a significant responsibility for the current regime. Although, historically, Congress prided itself on its commitment to the integrity of the procurement system,³⁰⁷ it seemed caught up in the euphoria associated with potential savings. As a result, the legislature turned a blind eye toward the need for external oversight just as it eschewed common sense in diminishing internal oversight by systematically gutting the acquisition workforce.

2. *Reflections on the National Performance Review*

Professor Kelman deserves credit for making acquisition reform the NPR's most successful endeavor. To be clear, streamlining procurement featured prominently in the NPR's initial efforts and literature. Acquisition reform did not begin headlining the NPR literature, however, until Professor Kelman's initiatives gained traction through legislation and other NPR initiatives—such as reform of the civil service personnel system—began to falter. To the extent that these buying reforms echoed the NPR's larger themes of businesslike government, the NPR repeatedly touted the Kelman initiatives.

Acquisition reform, therefore, serves as a microcosm to study the larger effort to reinvent government. Thus, as critical as reduced internal and external oversight may seem to the public purchasing regime, the policies implicated reach beyond government buying, addressing the larger issues of the purpose of government.³⁰⁸

rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

Id. § 3.101-1; see also 18 U.S.C. § 201 (1994) (discussing gratuities and bribes). It is unlawful to offer, give, solicit or accept gifts (or things of value) to or by government employees). See *id.* "Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value." 5 C.F.R. § 2635.203(b) (2000) (emphasis in original). The same regulations define "prohibited source" as "any person who: (2) Does business or seeks to do business with the employee's agency. . . ." *Id.* § 2635.203(d) (emphasis added). Although the Office of Government Ethics has promulgated a number of de minimus exceptions, the exceptions are just that—exceptions to the prohibition. See generally Standards of Ethical Conduct by Employees of the Executive Branch, *id.* § 2635.

307. See, e.g., Cancian, *supra* note 185, at 192 ("The Congress is moved primarily by its fiduciary responsibilities; that is, the need to ensure that public moneys are seen to be used in ways consistent with national purposes. Here the end does not justify the means; the means must stand on their own. This concern is often characterized by a focus on fraud, waste, and abuse.")

308. See KETTL, *supra* note 2, at 56. Kettl acknowledges that:

[N]o results come for free. Buried in every good-government initiative to strengthen customer service, *reform procurement*, or improve the performance of a high-impact agency are implicit trade-offs. The more reformers hope to increase government's productivity through administrative reform, the more

Consider the NPR's basic mandate: creating a government that works better and costs less. It is indeed difficult to disagree with that aspiration, yet what sounds good in principle may prove problematic in practice. The government can act *more like* a business without being one,³⁰⁹ but its ability to do so in the long-term hinges, in large part, on standards unrelated to the bottom line. Government is not a business, and a market-based private sector model cannot sustain the public trust.³¹⁰ The goal, therefore, remains electing the most efficient or effective alternatives, consistent with a vision of government that the public can accept.

Determining with specificity the actual boundaries of the public's tolerance in this regard is neither feasible nor realistic. Nevertheless, it is safe to assume that the public favors a government that works better and costs less. Specifically, few would complain—at a macro level—about a procurement system that promises to provide goods and services for government agencies more quickly, generates higher levels of end-user customer satisfaction, and costs less to maintain. What proves to be more difficult is asking the questions at a micro level. Consider the following examples:

If the government's competition requirements were diluted, it could purchase more goods and services using fewer personnel, thereby saving money. Thus, a compelling argument can be made that the government can fulfill its requirements by buying solely from a small number of (hypothetically) superior vendors. Thus, if the government prefers to buy billions of dollars of personal computers from Dell, should Compaq, Gateway, or Toshiba be permitted to compete for the public's dollars?

There seems little doubt that the government would be more businesslike and could work better (*e.g.*, save time and increase customer satisfaction) and cost less (*e.g.*, utilize fewer personnel) if buyers were unencumbered by congressionally mandated social

important those implicit tradeoffs are. *Should managers invest more time in fighting fraud or delivering services?*

Id. (emphasis added)

309. "Government can become efficient but not in the same way a business can." Verkuil, *supra* note 291, at 1235.

310. For a discussion of an isolated example of the private sector model run amok in federal procurement and administrative law, see Andrew M. Sherman, *GPO Answers Critics: Commerce Department Policy to Suspend Publication of Solicitation Notices For Debtor Agencies Furthers Procurement Process Objectives*, 41 GOV'T CONTRACTOR ¶ 167 (Apr. 14, 1999); Steven L. Schooner, *Feature Comment—The Future of "Businesslike" Government: The CBD Asserts Its Rights Against Debtor Federal Agencies*, 41 GOV'T CONTRACTOR ¶ 112 (Mar. 10, 1999) (discussing the Commerce Department's and the Government Printing Office's willingness to bar agencies from publishing *statutorily mandated public notices* in the Commerce Business Daily based upon delinquent intra-agency transfers of \$5 fees).

policies. Is it, therefore, a public service to be less vigilant in enforcing these mandates? Should the government buy all of its office supplies from a national superstore, or should local small businesses have the opportunity to compete for, or be given a preference in obtaining, that business? Should government employees take the time to identify and buy recycled copy paper or re-refined oil? Should government employees write with pens manufactured by blind and severely handicapped workers, or the latest, stylish imports?

The government could work better and cost less if it did not need to operate in the sunshine. How important is it for the public to know how the government buys, what the government intends to buy, what it eventually purchases, and which businesses earn the public's funds?

To the extent that both internal and external oversight are expensive (costs more) and frequently interferes with transaction efficiency (impairs buyers' efforts to work better), how important is it for government buyers to follow the rules? What level of investment is justified to maintain the desired level of integrity? What level of corruption is tolerable? If a government buyer, who possesses only the best of intentions, can get a "good deal" by avoiding the rules, should she? How troubling is it if individual government buyers go astray?

Professor Kelman and I differ with respect to the answers to many of these questions. Businesses consider similar questions, and their responses are simplified by the profit motive. For larger firms, the analysis may depend upon return on stockholder investment. Lacking the profit motive as its ultimate catalyst, government agencies require clear guidance. It is difficult to divine congressional intent while attempting to serve the public interest.

Whether phrased as efficiency versus oversight, or discretion versus control, the stark contrast remains. Management commentator Tom Peters succinctly summed up the problem facing the government's reinvention efforts:

[W]e're trapped on the horns of a monumental dilemma. The United States was invented *against* government. Historically we don't trust those who govern. Thus[,] our rulers, counterpoised against each other to begin with (legislative, judicial, executive branches), create procedures to make government inefficient—so as to protect us from corruption and abuse over the long haul. But those self-imposed inefficiencies, especially in a \$1.5 trillion outfit that even the prescient [James] Madison couldn't have imagined,

lead to a million madneses. . . .

Make no mistake, while most of the eight hundred suggestions in [the (NPR) Report] appear innocent, they aren't. Collectively they depend on allowing federal employees a degree of freedom that might worry Mr. Madison.³¹¹

Agencies cannot succeed simply by being efficient or even profitable; they are held to a different, arguably higher, standard of conduct. Thus, if government plans to follow a private sector model, its greatest chance of success in serving the public while maintaining the public's trust would be to integrate a robust public oversight regime into that model.

CONCLUSION

I agreed with Professor Kelman when he wrote: "Reform is not possible as long as people believe that the current system minimizes corruption, provides all Americans a fair opportunity to bid for government business, and gets the good products or services for a good price."³¹² I subsequently joined Professor Kelman in his efforts to make the procurement process more efficient. Unfortunately, something went awry in Professor Kelman's attempts to convince Congress that the pre-existing procurement "system represent[ed] an

311. Tom Peters, *Forward*, in AL GORE, FROM RED TAPE TO RESULTS; CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS; THE REPORT OF THE NATIONAL PERFORMANCE REVIEW xx-xxi (rev. ed. 1993) (emphasis in original); see also Kettl, *Public Administration*, *supra* note 163, at 26. Kettl suggests that:

Indeed, the NPR's arguments for customer service and entrepreneurial government enraged Madisonians. Not only did they see the public and private sectors as so different that private reforms simply were not transferable to government, they also believed that private-sector approaches threatened democratic accountability.

Id. James Madison asserted that:

[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to *take the most effectual precautions for keeping them virtuous whilst they continue to hold the public trust.*

THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). Although Jefferson might favor the customer service orientation of the NPR initiatives, it seems that many of the NPR's entrepreneurial initiatives would offend Jefferson's concern with public accountability. See, e.g., STILLMAN, *supra* note 159, at 362-63, 386-88. As Jefferson warned:

Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and claws after he shall have entered.

Thomas Jefferson, *Notes on Virginia*, in 2 THE WRITINGS OF THOMAS JEFFERSON 165 (Andrew A. Lipscomb ed., 1904).

312. KELMAN, *supra* note 1, at 102.

affront to our common sense.”³¹³ The resulting procurement regime exhibits disregard for whether noncompliance (or worse, corruption) permeates the system. A substantial portion of the government’s acquisitions deny Americans (and our trading partners) a fair opportunity to compete for the taxpayer’s dollar. Moreover, in the interest of furthering efficiency-related policies, current buying practices devalue the importance of obtaining a good price in most transactions.

Any effort to improve the operation of the Federal Government requires difficult decisions, seemingly irreconcilable trade-offs, and hard work. I harbor neither illusions with regard to rolling back the successful NPR reforms, nor do I aim for inefficiency or aspire to recreate the pre-Clinton/Gore procurement system. Yet, I fear that, in the same manner in which irrational exuberance animated the securities markets, the public too easily became enthralled with businesslike government. To the extent that our ever-evolving government is not yet utopian,³¹⁴ we must continue to examine the role of oversight and endeavor to quantify the risks of reduced monitoring of governmental behavior. We can aspire to an ultimate public procurement system, which exhibits the peak of efficiency while maintaining absolute integrity through a non-burdensome oversight regime. Until that aspiration becomes reality, however, trade-offs are necessary.

No one expects the government to make a profit. At the same time, the public does not want, nor should it tolerate, a government that is so inefficient that it is wasteful. Within those extremes, Professor Kelman (in the context of procurement) and the Clinton Administration (through the larger NPR initiative) have pushed in the direction of businesslike government.³¹⁵ I fear they may have

313. *Id.* at 103.

314. Our system is not yet Panglossian, nor should we necessarily aspire to nirvana. *See, e.g.*, Harols Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969), *cited in* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1229-30 (1994) (suggesting that a fundamental flaw of much social choice scholarship is to “erroneously compare real-world institutions with some abstract or ideal institution, even if the ideal institution has never existed or . . . has been proven impossible to devise.”). For a broader view of the origins of social choice theory, see Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 984-93 (1998) (providing a historical assessment of the Social Choice Theory, as well as implications that emanate therefrom).

315. The NPR’s most dramatic statement along these lines is referred to as “the Dilbert Report.” *See generally* AL GORE, *BUSINESSLIKE GOVERNMENT: LESSONS LEARNED FROM AMERICA’S BEST CORPORATIONS* (1997) (featuring DILBERT comic strips by Scott Adams, and discussing how the Clinton Administration worked to create a government that worked in a more efficient and cost-effective manner than in the past).

2001]

FAILURE OF BUSINESSLIKE GOVERNMENT

723

pushed too far. Efficiency, whether or not driven by a profit motive, may be a public good. Like most things, I prefer this public good in moderation. Efficiency coupled with meaningful oversight seems a prudent approach. Lacking oversight, we may soon learn what price we are willing to pay for efficiency in spending the public's funds.