Essay

Defying Debarment: Judicial Review of Agency Suspension and Debarment Actions

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Abstract

Judicial review of agencies' suspension and debarment decisions is currently in flux. Recently, courts are more closely scrutinizing such decisions, potentially altering the way these tools are used. Both Congress and the courts need to consider creating a clear and consistent standard for agency review of suspension and debarment actions. To illuminate the current issues that agencies and contractors face, this Essay touches on five points: (1) the history of judicial deference, (2) the application of suspension and debarments, (3) judicial scrutiny of suspension and debarment decisions, (4) the current trend in agency suspension and debarment actions, and (5) the consequences of stricter judicial review.

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Introduction

The U.S. government is the world's largest buyer of goods and services, spending more than $500 billion in 2017 through the procurement process.[1] The federal government spends billions of federal tax dollars on public procurement, leading Congress and the public to closely scrutinize many of these transactions.[2] Numerous statutes and regulations have been implemented with the goal of ensuring transparency and integrity among both the government and contractors.[3] The federal procurement process is regulated by the Federal Acquisition Regulation ("FAR") system, found at title 48 of the Code of Federal Regulations.[4] The FAR sets forth substantive and procedural standards that govern procurement by federal and independent agencies.[5]

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1 *See Spending Over Time*, USAspending.gov, https://www.usaspending.gov/#/search/50ce4df26ebf50b5518460e05ba049f0 (follow the "Time" tab and select "Contracts") (last visited September 3, 2018).

2 *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 629 (2001).

3 *See generally* 48 C.F.R. § 3 (2017) ("prescrib[ing] policies and procedures for avoiding improper business practices and personal conflicts of interest"); *id.* § 4.6 ("prescrib[ing] uniform reporting requirements for the Federal Procurement Data System"); *id.* § 9.4 ("[p]rescrib[ing] policies and procedures governing the debarment and suspension of contractors by agencies"); *id.* § 24 ("prescrib[ing] policies and procedures that apply requirements of the Privacy Act of 1974 . . . to Government contracts"); *id.* § 33 ("prescrib[ing] policies and procedures for filing protests and for processing contract disputes and appeals").

4 *See* Schooner, *supra* note 2, at 635.

5 *See* 48 C.F.R. § 9.2 (2017). The FAR consolidated other regulations, including those found in the Defense Acquisition Regulation and the Federal Procurement Regulation. *See* Gerald P. Norton, *The Questionable Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?*, 18 Pub. Cont. L.J. 633, 634 n.3 (1989). It also created uniform standards for suspension and debarment. *See id.*

The government has broad authority when choosing its business partners.[6] It also has powerful remedies to protect itself from contracting with suppliers whose actual or alleged conduct may threaten the government's interest.[7] Suspension and debarment are among the tools that government agencies possess to ensure that they only work with "responsible" contractors.[8] Debarment removes a contractor, business unit, or individual from future contracts for a fixed time that may not exceed three years.[9] Suspension, on the other hand, only debars a contractor for the duration of an agency investigation or the subsequent litigation relating to the alleged inappropriate conduct.[10]

Suspension and debarment have been used for many years, but judicial oversight has only recently created controversy.[11] Previously, agencies were criticized by Congress, and more recently by the Obama Administration,[12] for not using their suspension and debarment tools.[13] In 1980, Brigadier General Richard Bednar, an Army debarring official, testified that the Army had an "aggressive" debarment program—it debarred twelve contractors that year.[14] Five years later, the Senate urged agencies to "more aggressively use suspension

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6 *See* Norton, *supra* note 5, at 633.

7 *See id.*

8 *See* KATE M. MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 1 (2010). Other institutions have also created their own systems to ensure that their funds are used properly. For example, the World Bank created a broader quasi-judicial scheme to combat corruption and fraud (two of the biggest obstacles to economic and social development) in connection with World Bank–funded projects. *See* WORLD BANK, WORLD BANK SANCTIONS PROCEDURES 1 (2012), http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctions_Procedures_April2012_Final.pdf [https://perma.cc/5VHY-7QJS].

9 *See* 48 C.F.R. § 9.406-4(a)(1)–(1)(b) (2017); Jessica Tillipman, *A House of Cards Falls: Why "Too Big to Debar" Is All Slogan and Little Substance*, 80 FORDHAM L. REV. RES GESTAE 49, 50 (2012).

10 *See* MANUEL, *supra* note 8, at 8.

11 *See* Emily N. Seymour, *Refining the Source of the Risk: Suspension and Debarment in the Post-Andersen Era*, 34 PUB. CONT. L.J. 357, 358 (2005).

12 President Barack Obama's July 2014 executive order, "Fair Pay and Safe Workplaces," required businesses to disclose violations of fourteen federal labor and employment laws; some argue this will increase suspension and debarments "significantly." *See* David Hansen, *Suspension, Debarment Caseloads Up, Individuals Targeted*, FED. CONT. REP. (Oct. 29, 2015), http://www.friedfrank.com/siteFiles/News/Suspension%20Debarment%20Caseloads~.pdf [https://perma.cc/R7PV-78GT].

13 *See id.*

14 *See Government-Wide Debarment and Suspension Procedures: Hearing Before the S. Subcomm. on Oversight of Gov't Mgmt.*, 97th Cong. 166 (1981) (statement of Brigadier General Richard Bednar).

or debarment of contractors convicted of crimes."[15] As a result, the Army increased debarments, reaching 296 debarments in 1990 alone.[16] It seems likely, therefore, that congressional pressure played a role in this drastic increase in Army debarments.[17]

The legislative branch continued to influence agencies, and, in 2011, the Government Accountability Office ("GAO") issued a report urging agencies to increase their use of the suspension and debarment process.[18] The GAO director of acquisition and sourcing management, William Woods, warned that "agencies that fail to devote sufficient attention to suspension and debarment issues likely [would] continue to have limited levels of activity and risk[,] fostering a perception that they are not serious about holding the entities they deal with accountable."[19] According to the Interagency Suspension and Debarment Committee ("ISDC"),[20] suspension and debarment proceedings increased from 1,585 in 2010 to 2,938 in 2014.[21] In 2015, suspension and debarments plateaued, staying at 2,791 per year.[22] Nonetheless, the overall increase in exclusion actions resulted in many courts questioning whether suspension and debarment decisions complied with the requirements outlined in the FAR.[23]

There are several explanations for this plateau in suspension and debarment proceedings. First, it "may, at least in part, be indicative of

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15 Ethics in Government Act Amendments of 1985, Pub. L. No. 99-190, sec. 114(b), 99 Stat. 1318 (1985); *see also* 131 CONG. REC. 35,548 (1985).

16 *See* COMM. ON GOV'T OPERATIONS, DEBARMENT AND REINSTATEMENT OF FEDERAL CONTRACTORS: AN INTERIM REPORT, H.R. REP. NO. 102-1061, at 7 (1992).

17 *See id.*

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

19 *See id.* at 23.

20 The ISDC is an Office of Management and Budget committee that monitors federal suspension and debarment activities. *See Interagency Suspension and Debarment Committee*, EPA (Oct. 16, 2017), https://www.epa.gov/grants/interagency-suspension-and-debarment-committee [https://perma.cc/N6FJ-ACQV].

21 *See* Letter from David M. Sims, Chair, & Duc H. Nguyen, Vice Chair, Interagency Suspension & Debarment Comm., to Jason Chaffetz, Chairman, Comm. on Oversight & Gov't Reform 9–10 (June 15, 2016) [hereinafter ISDC Report], https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2016/09/ISDC-873-Report-FY-2015.pdf [https://perma.cc/R6GP-DCNU].

22 *See id.*

23 *See, e.g.*, Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 969 (D.C. Cir. 1980) (finding an agency's repeated denial of a contract violated the contractor's due process rights); Canales v. Paulson, No. 06-cv-1330(GK), 2007 WL 2071709, at *6 (D.D.C. July 16, 2007) (setting aside debarment when the suspension and debarment official failed to explain the FAR's mitigating factors).

programs becoming established throughout the Executive Branch and transitioning from start up into effective programs."[24] Several agencies have created formal polices and guidelines for suspension and debarment proceedings.[25] Second, the ISDC believes that this plateau is, in part, due to increased use of alternatives to suspension and debarment.[26] The ISDC "encourage[s] its members to take into consideration, as appropriate, alternative tools to promote contractor and participant responsibility."[27] As a result, agencies have increasingly used tools such as show-cause letters, requests for information, and administrative agreements.[28] Additionally, contractors are becoming more savvy about the process, so they are more willing to report potential misconduct to the agency, which allows the contractor to shape the story.[29] Generally, these contractors revamp their compliance programs prior to contacting the suspension and debarment official ("SDO") and are more willing to cooperate with investigations.[30] Although the number of debarments and suspensions appears to have plateaued, the total rise in suspension and debarment actions has resulted in increased judicial scrutiny of agencies' decisions.[31]

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24 ISDC Report, *supra* note 21, at 1; *see also* Sandy Hoe et al., *ISDC Reports a "Plateauing" in Suspension and Debarment Activity*, INSIDE GOV'T CONT. (Aug. 18, 2016), https://www.insidegovernmentcontracts.com/2016/08/isdc-reports-a-plateauing-in-suspension-and-debarment-activity [https://perma.cc/P65S-KJSH].

25 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-513, FEDERAL CONTRACTS AND GRANTS: AGENCIES HAVE TAKEN STEPS TO IMPROVE SUSPENSION AND DEBARMENT PROGRAMS 1 (2014). For example, the number of suspensions and debarments by the Department of Commerce increased from zero in 2009 to thirty-four in 2012. *Id.* at 8. At the time, the Department of Commerce staff also increased, allowing the Department to incorporate the new policies and guidelines for its suspension and debarment program. *See id.* at 6.

26 *See* Hoe et al., *supra* note 24.

27 *See* Letter from David M. Sims, Chair, & Lori Y. Vassar, Vice Chair, Interagency Suspension & Debarment Comm., to Jason Chaffetz, Chairman, Comm. on Oversight & Gov't Reform (Jan. 12, 2017), https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2017/03/873-Report-FY-2016.pdf [https://perma.cc/W8TE-4FTM].

28 *See id.* at 2. Typically, administrative agreements require a contractor to create new regulations to improve the ethical culture and often also require the contractor to hire an independent third-party monitor. *See id.* at 2, 5. In 2016, seventy-five administrative agreements were reported. *See id.* at 2, 8.

29 *See* Telephone Interview with Dismas Locaria, Partner, Venable LLP (Nov. 28, 2017).

30 *See id.*; Jessica Tillipman, *Suspension & Debarment Part III: Mechanics and Mitigating Factors*, FCPA BLOG (June 25, 2012), http://www.fcpablog.com/blog/2012/6/25/suspension-debarment-part-iii-mechanics-and-mitigating-facto.html [https://perma.cc/A4UM-3QMA].

31 *See, e.g.*, Friedler v. GSA, No. 15-cv-2267, 2017 WL 4236521, at *2 (D.D.C. Sept. 21, 2017); Agility Def. & Gov't Servs., Inc. v. U.S. Dep't of Def., No. CV-11-S-4111-NE, 2012 WL 2480484, at *1 (N.D. Ala. June 26, 2012), *rev'd*, 739 F.3d 586, 589–91 (11th Cir. 2013).

Three recent cases demonstrate the increase in judicial scrutiny. One such case is *Friedler v. General Services Administration*.[32] In 2015, the U.S. District Court for the District of Columbia enjoined the General Services Administration's ("GSA") debarment of Ariel Friedler, the founder and CEO of Symplicity Corporation.[33] In *Friedler*, the court affirmed the importance of the requirement that agencies provide contractors notice and opportunity to respond to *all* allegations underlying an action.[34] The debarment at issue in *Friedler* also demonstrates that agencies have been willing to exclude individuals.[35]

Another example is *Inchcape Shipping Services Holdings Ltd. v. United States*,[36] a 2014 case in which the Court of Federal Claims considered the Navy's suspension of the cargo company Inchcape.[37] The Navy accused Inchcape of inflating prices and bribing officials to secure contracts. Inchcape asserted that it had a "substantial chance" of being awarded several pending contracts, which this suspension would wrongfully preclude them from obtaining.[38] Ultimately, the Navy suspended Inchcape because Inchcape did not reconcile its accounts and failed to disclose the inadequate reconciliation.[39] The court, however, found it suspicious that the Navy waited over a year to suspend Inchcape and enjoined the suspension due to the Navy's reliance on "stale facts."[40]

A final example of a court's willingness to examine an agency's exclusion decision is *Agility Defense and Government Services, Inc. v. U.S. Department of Defense*.[41] In 2012, the U.S. District Court for the Northern District of Alabama rejected the Defense Logistics Agency's ("DLA") suspension of two companies based on their affiliation with an excluded contractor.[42] The court held (1) that it could review an

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32 2017 WL 4236521.

33 *Id.* at *1, *18.

34 *See id.* at *18.

35 *See id.* at *2–8.

36 No. 13-953 (Fed. Cl. Jan. 2, 2014) (order granting preliminary injunction).

37 *See id.* at *2.

38 *See id.* at *1–2.

39 *See id.* at *3. The Navy based its findings on an Inchcape internal audit of payments "related to [a] Southwest Asia contract," conducted in 2008—five years before the suspension. *See id.* at *1–3. The Navy had obtained the audit more than a year prior to Inchcape disclosing it. *See id.*

40 Dietrich Knauth, *BP Contracting Ban Reinforces Debarment Misconceptions*, Law360 (Mar. 31, 2014, 8:29 PM), https://www.law360.com/articles/518588/bp-contracting-ban-reinforces-debarment-misconceptions [https://perma.cc/SHF3-JTND] (quoting Jessica Tillipman, assistant dean at The George Washington University Law School).

41 No. CV-11-5-4111-NE, 2012 WL 2480484 (N.D. Ala. June 26, 2012).

42 *See id.* at *10.

agency's suspension and (2) that the suspension exceeded the FAR's eighteen-month suspension time limit.[43] On appeal, the Eleventh Circuit, showing greater deference to the agency, reversed the district court's ruling and held that under the FAR an agency could suspend an affiliate for more than eighteen months based on its affiliation with a contractor, so long as legal proceedings were initiated against the contractor.[44] Despite this, the Alabama district court's decision is notable because it demonstrates the judicial trend of closely scrutinizing agency decisions.

All of these cases have one thing in common: rather than deferring to the agencies' findings, the courts scrutinized their suspension and debarment decisions. Part I of this Essay discusses how agencies use suspension and debarment to protect the government's interest. Part II examines the changing judicial landscape and how it affects suspension and debarment actions. Finally, Part III considers the justifications for judicial scrutiny of agency determinations and how agencies can mitigate this.

I. Suspension and Debarment

Federal agencies may use suspension and debarment actions as tools to protect the government from nonresponsible contractors.[45] There are two types of debarments: statutory and discretionary.[46] A statutory debarment, also known as a mandatory debarment, is when an act of Congress restricts an agency's discretion, requiring it to debar contractors that violate certain provisions.[47] Conversely, a discretionary debarment allows an executive-branch agency the authority to determine independently whether a debarment is the appropriate means to protect the government's interest.[48] The FAR is the primary

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43 *See id.* at *6, *8, *10; *see generally* 48 C.F.R. § 9.407-4(b) (2017).

44 *See* Agility Def. & Gov't Servs., Inc., v. U.S. Dep't of Def., 739 F.3d 586, 589–91 (11th Cir. 2013).

45 *See* 48 C.F.R. § 9.402(a)–(b) (2017).

46 *See* Reginald Jones & Nicholas Solosky, *Suspensions and Debarments: A Practical Guide to Navigating Government Contract Exclusion Proceedings*, 99 Fed. Cont. Rep. (BNA) 280 (2013).

47 *See id.* ("For example, an employer found to have violated the provisions of the Davis-Bacon Act with respect to wage rates for laborers and mechanics faces a mandatory three-year debarment.").

48 *See* 48 C.F.R. § 9.406-1 ("The existence of a cause for debarment, however, does not necessarily *require* that the contractor be debarred . . . ." (emphasis added)); Jones & Solosky, *supra* note 46 (asserting that discretionary debarments "are less straightforward and contain ample room for interpretation").

regulation that governs contracting by federal executive agencies to help them ensure that the government's interests are protected.[49]

Under the FAR, the purpose of suspension and debarment is to protect government interests by preventing agencies from funding contractors whose previous violations suggest that they are nonresponsible.[50] Because the FAR aims to protect the government's interest, an agency may not debar or suspend a contractor merely to punish the contractor's misconduct.[51] Moreover, because these contracts are with the federal government, a contractor is entitled to due process before being suspended or debarred.[52] A court, therefore, may overturn an agency's decision if the exclusion was imposed to punish the misconduct or violates the contractor's due process rights.[53]

The FAR requires that agencies follow decisionmaking processes that are "consistent with principles of fundamental fairness," but also states that agencies should promulgate their own regulations.[54] The government's policy is to do business only with contractors that are ethical and "responsible."[55] The FAR provides agencies with the discretion to decide whether suspension or debarment of a government contractor is appropriate,[56] so each agency has the authority and responsibility to establish its own suspension and debarment practices.[57]

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49 The FAR is issued under the Office of Federal Procurement Policy Act of 1974. *See* 41 U.S.C. § 1121(b) (2012).

50 *See* 48 C.F.R. § 9.402(a); MANUEL, *supra* note 8, at 4.

51 *See* 48 C.F.R. § 9.402(b). Subpart 9.103 of the FAR requires an *affirmative* finding of responsibility prior to a contract award.

52 *See* MANUEL, *supra* note 8, at 12.

53 *See id.* at 5.

54 48 C.F.R. § 9.406-3(b)(1); *see also id.* § 9.407-3(b)(1).

55 *See id.* § 9.103(a) ("Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only."); *id.* § 9.104-1 (defining responsible contractors as ones who "[h]ave adequate financial resources . . . satisfactory performance record[s] . . . a satisfactory record of integrity and business ethics . . . [and] the necessary organization, experience, accounting and operational controls, and technical skills" to satisfactorily perform the contract).

56 *See id.* §§ 9.2013(b), 9.103; CONG. RESEARCH SERV., RL 34753, PROCUREMENT DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: LEGAL OVERVIEW 12 (2015). The FAR does not require suspension or debarment, but rather states that an agency "may debar" or "may suspend" a contractor after evaluating the public interest. *See* 48 C.F.R. §§ 9.406-2, 9.407-2.

57 *See* Kara M. Sacilotto & Craig Smith, *Push to Consolidate and Expand Suspension and Debarment Continues on the Hill*, WILEY REIN (2013), https://www.wileyrein.com/newsroom-newsletters-item-4790.html [https://perma.cc/GY24-SFFQ]. Some agencies designate staff to work solely on suspension and debarment activities, while other agencies have SDOs whose suspension and debarment responsibilities are only part of their job responsibilities. *See id.*

Naturally, this leads to inconsistencies between agencies' suspension and debarment initiatives.[58]

Every agency has at least one SDO, who determines an entity's ability to contract with the government and decides whether suspension or debarment proceedings are necessary.[59] A suspension or debarment by a single agency affects an entity's ability to contract with the entire federal government.[60] An agency will suspend a contractor when there is an immediate need for action to protect the public interest.[61] A suspended contractor is excluded from future government contracts during any investigation into or litigation involving their conduct,[62] not exceeding eighteen months.[63] Generally, a suspension lasts only for the duration of an agency's investigation, but it may be extended for the duration of any legal proceedings related to the misconduct.[64] A suspension is appropriate when an agency, *upon adequate evidence*,[65] determines that a contractor committed certain offenses.[66] Typically, a suspension is based on an indictment, which is sufficient grounds for an immediate suspension.[67]

Debarment removes a contractor from the marketplace for government contracts for a set period of time, which varies depending on the gravity of the conduct but generally is not more than three years.[68] An agency may extend a debarment if it determines that an extension is necessary to protect the government's interest.[69] A debarment is permissible when an agency uncovers, by a *preponderance of the evi-*

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58 *See id.*

59 *See* Steven A. Shaw, *Suspension and Debarment: The First Line of Defense Against Contractor Fraud and Abuse*, 26 REP. 4, 4 (1999).

60 *See* 48 C.F.R. § 9.405 (1984).

61 *See* Sloan v. Dep't. of Hous. & Urban Dev., 231 F.3d 10, 17 (D.C. Cir. 2000).

62 *See* MANUEL, *supra* note 8, at 8.

63 *See* 48 C.F.R. § 9.407-4(a)–(b) (1984); Steven D. Gordon, *Suspension and Debarment from Federal Programs*, 23 PUB. CONT. L.J. 573, 574 (1993). After an agency issues a suspension notice, they have twelve months to initiate a legal proceeding or the suspension will be terminated. *See* 48 C.F.R. § 4(b) (1984).

64 *See* 48 C.F.R. § 9.407-4(a)–(b) (1984).

65 *Id.* § 9.403 (defining adequate evidence as "information sufficient to support the reasonable belief that a particular act or omission has occurred").

66 *See id.* § 9.407-2.

67 *Frequently Asked Questions: Suspension & Debarment*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/about-us/organization/office-of-governmentwide-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-debarment-division/suspension-debarment/frequently-asked-questions-suspension-debarment [https://perma.cc/WAG9-Q5XG]; *see also* 48 C.F.R. § 9.407-2(b) (1984).

68 *See* MANUEL, *supra* note 8, at 6.

69 *See* 48 C.F.R. § 9.406-4(b) (1984). An extension may not be based solely on the facts and circumstances of the original debarment. *See id.*

dence, that a contractor committed a qualifying offense.[70] This includes contractors convicted of or civilly liable for an integrity offense, such as embezzlement or falsification of records.[71]

Even when no conviction or civil judgment exists, certain offenses still allow an agency to exclude a contractor.[72] For example, the FAR contains a catch-all provision, allowing for suspension or debarments based on "any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."[73]

The repercussions of suspension and debarment are severe.[74] A contractor who is suspended or debarred is ineligible for contract awards from the whole government—not just the excluding agency—in addition to being barred from nonprocurement actions, such as grants.[75] A suspended or debarred contractor is also excluded from working as an agent of a nondebarred contractor for government business.[76] The suspension or debarment of a contractor may also cause reputational damage, affecting a contractor's relationship with its commercial partners.[77]

Additionally, an individual's "improper conduct" may be imputed to a contractor.[78] Specifically, when an individual's conduct is related to his or her performance of duties for or on behalf of the

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70 48 C.F.R. § 9.406-2(b) (2017).

71 *Id.* § 9.406-2(a); *see* MANUEL, *supra* note 8, at 5–7. An agency that finds sufficient evidence to suspend or debar a contractor is not required to do so if it determines that the contractor is "presently responsible." *See* Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849 (S.D. Cal. 1993) (holding that the contractor can meet the test of present responsibility by demonstrating that it has taken steps to ensure that the wrongful acts will not recur).

72 These offenses include a serious violation of the terms of a contract and failure to timely disclose violations of the False Claims Act. *See* 48 C.F.R. § 9.406-2(b); MANUEL, *supra* note 8, at 6.

73 48 C.F.R. § 9.406-2(c).

74 *See* AUI Mgmt., LLC v. U.S. Dep't of Agric., No. 2:11-CV-0121, 2015 WL 1293288, at *3 (M.D. Tenn. Mar. 23, 2015) ("The suspension, while nominally 'temporary,' was essentially a permanent death blow to most of the business of Plaintiffs, effectively rendering them 'pariahs' with respect to other contracting possibilities.").

75 *See* 48 C.F.R. § 9.403 (additional nonprocurement transactions include "grants, cooperative agreements . . . contracts of assistance, loans, loan guarantees, subsidies, [and] insurance"); MANUEL, *supra* note 8, at Summary; Kara M. Sacilotto & Craig Smith, *Suspension and Debarment: Trends and Perspectives*, 48 PROCUREMENT LAW. 3, 4 (2012).

76 *See* 48 C.F.R. § 9.405.

77 *See* Tillipman, *supra* note 9, at 53, 55. ("A debarred contractor is almost (if not, entirely) starved of future revenue.").

78 *See* 48 C.F.R. § 9.406-5(a).

contractor, the contractor may also be responsible.[79] Business models such as joint ventures must be cautious, as the conduct of one contractor may be imputed to the other.[80] Agencies must also be watchful: although agencies have discretion, they must be careful that their exclusion decisions do not violate a contractor's due process rights.[81]

A. Discretionary Process

Not all contractors who engage in misconduct that satisfies the grounds for suspension or debarment face repercussions.[82] The FAR clearly provides agencies with the discretion to determine whether suspension or debarment is appropriate.[83] According to the FAR, agencies may initiate suspension or debarment proceedings when they become aware of facts warranting action.[84] Because suspension and debarment are not intended to punish, the FAR recommends that SDOs consider "the seriousness of the contractor's acts or omissions and any mitigating factors" when evaluating a contractor's present responsibility.[85] The FAR emphasizes that an agency should weigh the significance of the contractor's actions and any mitigating measures—such as cooperating with a government investigation, implementing new procedures, or hiring new employees.[86] Because the intent of these administrative tools is to ensure that agencies award contracts to responsible contractors, if the contractor "presents no threat to the government's interests," debarment or suspension is inappropriate.[87]

Agencies need discretion "to exercise [their] business judgment regarding the public interest, [which] also provides an agency with the ability to influence the conduct of its contractors" to avoid contracting with dishonest contractors.[88] "[T]he public interest encompasses *both*

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79 *See id.* (stating that a contractor may be responsible for "any officer, director, shareholder, partner, employee, or other individual associated with [it]").

80 *See id.* § 9.406-5(c).

81 *See id.* § 9.402(a); *id.* § 9.405-1.

82 *See id.* § 9.402(a).

83 *See id.* §§ 9.402(a), 9.406-2(a), 9.407-1(a).

84 *See id.* §9.406(a); *see also* Janet Levine et al., *The Impact of Criminal Conviction on Public Sector Contractors and Grantees*, CROWELL & MORING (Mar. 3, 2016), https://www.crowell.com/NewsEvents/Publications/Articles/The-Impact-of-Criminal-Conviction-on-Public-Sector-Contractors-and-Grantees-The-30th-Annual-National-Institute-on-White-Collar-Crime [https://perma.cc/BJ3H-YSE7].

85 48 C.F.R. § 9.406-1(a)–(b); *see id.* § 9.407-1(b); MANUEL, *supra* note 8, at 9; Tillipman, *supra* note 9, at 51.

86 *See* 48 C.F.R. §§ 9.406(a), 9.407-1(b); MANUEL *supra* note 8, at 5.

87 Tillipman, *supra* note 9, at 51; *see also* 48 C.F.R. § 9.402(a)–(b).

88 Letter from Hubert J. Bell, Jr., Chair, ABA Section of Pub. Contract Law, to James M. Inhofe, Chairman, Senate Env't and Pub. Works Comm. (June 14, 2014), https://www.american

safeguarding public funds by excluding contractors who may be nonresponsible *and* not excluding contractors who are fundamentally responsible and could otherwise compete for government contracts."[89] The FAR provides agencies with the discretion to decide whether to continue current contracts and only prohibits renewals or extensions.[90] Therefore, even when a contractor is suspended or debarred, an agency generally can allow the contractor to complete its outstanding contracts.[91]

By granting agencies discretion, the FAR intends agencies to be the primary decisionmakers, not the judiciary or Congress.[92] Discretion affords agencies the flexibility necessary to ensure that the evolving needs of the government and public are met.[93] The agency officials often have specialized knowledge and experience in the industry, putting them in a better position than Congress and the courts to determine the appropriate tool to protect the government.[94]

B. Due Process Requirement

An entity facing a suspension or debarment has a constitutionally protected interest at stake and, therefore, must be afforded certain minimum due process protections.[95] Due process requires that the agency give the contractor notice of the charges, opportunity to contest the charges, and, in most cases, a hearing.[96] Because there are

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bar.org/content/dam/aba/administrative/public_contract_law/comments/susdebar_section_1802_of_s1072%20.authcheckdam.pdf [https://perma.cc/D2J2-WAWN]; MANUEL, *supra* note 8, at 1.

89 *See* MANUEL, *supra* note 8, at 8.

90 *See* 48 C.F.R. § 9.405-1. Under the FAR, an agency may waive a contractor's exclusion and enter into a new contract when the agency head "determines that there is a compelling reason for such action." *Id.* § 9.405(a).

91 *See* 48 C.F.R. § 9.405-1(a); MANUEL, *supra* note 8, at 10.

92 *See* 48 C.F.R. § 9.402(a) (2017); Recommendation 95-2: Debarment and Suspension from Federal Programs, 60 Fed. Reg. 13,695, 13,697 (Mar. 14, 1995) (adopted Jan. 19, 1995), [hereinafter Recommendation 95-2] https://www.acus.gov/sites/default/files/documents/95-2_0.pdf [https://perma.cc/J33Q-GNNP].

93 *See* Recommendation 95-2, *supra* note 92, at 13,697; Shane Meat Co. v. U.S. Dep't of Def., 800 F.2d 334, 339 n.6 (3d Cir. 1986) ("Debarment and suspension are discretionary actions that . . . are appropriate means to effectuate th[e] policy [that agencies only contract with responsible vendors]." (quoting 48 C.F.R. § 9.402(a))).

94 162 CONG. REC. H4617-18 (daily ed. July 11, 2016) (statement of Rep. John Conyers, Jr.).

95 *See* Gonzalez v. Freeman, 334 F.2d 570, 580 (D.C. Cir. 1964); Pro-Mark, Inc. v. Kemp, 781 F. Supp. 1172, 1176 (S.D. Miss. 1991) (finding that suspension allegations based on a criminal indictment did not violate any due process liberty interest), *aff'd without opinion*, 952 F.2d 401 (5th Cir. 1992).

96 *See, e.g.*, *Gonzalez*, 334 F.2d at 570; Art-Metal–USA, Inc. v. Solomon, 473 F. Supp. 1, 4 (D.D.C. 1978).

different consequences for suspension versus debarment, courts apply different due process protections to each decision making process.[97] For example, a suspension is permissible *without* prior notice or an opportunity to be heard so long as the contractor is "immediately" notified of the suspension and given thirty days to provide information challenging the suspension.[98] A debarment, on the other hand, requires an agency to give the contractor notice of the proposed debarment and an opportunity to contest it *prior* to its imposition.[99] Additionally, in a suspension proceeding—unlike a debarment proceeding—an evidentiary hearing may usually be denied if the agency, with the advice of the Department of Justice, determines a hearing would prejudice the government's interest in pending or contemplated litigation.[100] Finally, debarments require the agency to specify the reason for the decision and the length of the debarment, including effective dates,[101] whereas there are no specific regulations on what must be addressed in a suspension decision.[102]

Over the years, there has been relatively little caselaw discussing the due process protections for suspension and debarment decisions.[103] One of the few cases addressing a contractor's due process rights is *Gonzalez v. Freeman*.[104] In *Gonzalez*, the D.C. Circuit held that an agency debarment was reviewable under the Administrative Procedure Act ("APA").[105] *Gonzalez* involved a contractor who was temporarily excluded by the Secretary of Agriculture from contracting

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97 *See* Gordon, *supra* note 63, at 591 ("As a general matter, the courts have held that the dictates of due process are less exacting with respect to suspensions than with regard to debarments because only a temporary exclusion is at stake and because the government may need to protect the secrecy of an ongoing criminal investigation.").

98 *See* 48 C.F.R. § 9.407-3(b)–(c) (2017).

99 *See id.*; *id.* § 9.406-3(c); Gordon, *supra* note 63, at 593.

100 *See* 48 C.F.R. § 9.407-3(b)(2), (d)(1) (2017).

101 *See* Gordon, *supra* note 63, at 599.

102 *See id.*

103 *See, e.g.*, Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 962–63 (D.C. Cir. 1980) (finding that an agency's determination of a contractor's nonresponsibility gave rise to a stigma against the contractor that implicated a protected liberty interest); Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849 (S.D. Cal. 1993) ("[G]overnment contractors must be afforded a meaningful 'opportunity to overcome a blemished past,' to ensure that an agency 'will impose debarment only in order to protect the government's proprietary interest and not for purpose of punishment.'" (quoting *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989)); Inchcape Shipping Servs. Holdings, Ltd. v. United States, No. 13-953, slip op. at 4 (Fed. Cl. Jan. 2, 2014) (order granting preliminary injunction, in part because "[i]t is clear that Inchcape is in danger of suffering irreparable harm as a result of the suspension").

104 334 F.2d 570 (D.C. Cir. 1964).

105 *See id.* at 578.

with the Commodity Credit Corporation.[106] The contractor was accused of misusing official inspection certificates.[107] Twenty-nine months after the suspension, the Department of Agriculture—without any reason—decided that the suspension would continue for an additional five years.[108] The court held that, in this case, the debarment was invalid "[a]bsent such procedural regulations and absent notice, hearing and findings."[109] The court concluded that the record did not demonstrate "basic fairness" and the notice of debarment "was silent as to the reasons for the action taken and . . . [n]o hearing was held, no evidence recorded, no findings were made."[110] But the court noted the importance of agency discretion: "Without such power to deal with irresponsible bidders and contractors, the efficiency of . . . operations would be severely impaired."[111]

The D.C. Circuit again addressed due process requirements for contractors in *Horne Brothers, Inc. v. Laird*.[112] *Horne Bros.* involved a contractor who had allegedly been giving gratuities to Navy personnel.[113] The court followed its rationale in *Gonzalez* that an agency determination must have "the appearance [and] the reality of fairness."[114] *Horne Bros.* also found that absent an indictment, the government should be given thirty days to hold a hearing after a suspension.[115] The court cautioned that the thirty days did not apply to every case: "A question of judgment is involved, but . . . no contractor may be suspended under the regulations unless there is 'adequate evidence' of a dereliction."[116]

The District Court for the District of Columbia has also overturned agency decisions on grounds of violations of contractors' due

106 *See id.* at 571–72.

107 *See id.* at 572.

108 *See id.*

109 *Id.* at 578–79 (noting that for a reasonable period pending an investigation, a temporary suspension may be valid).

110 *Id.* (footnote omitted).

111 *Id.* at 577 (concluding that the power to debar is "inherent and necessarily incidental to the effective administration of the statutory scheme").

112 463 F.2d 1268 (D.C. Cir. 1972).

113 Horne Bros., Inc. v. Laird, 342 F. Supp. 703, 705 (D.D.C.), *rev'd and remanded*, 463 F.2d 1268 (D.C. Cir. 1972).

114 *Horne Bros.*, 463 F.2d at 1271 (quoting *Gonzalez*, 334 F.2d at 578) ("Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.").

115 *See id.* at 1270, 1272.

116 *Id.* at 1271.

process protections.[117] In 2002, the Department of Housing and Urban Development ("HUD") imposed a three-year debarment on a contractor without conducting a fact-finding hearing.[118] HUD alleged that Eugene Burger Management Corporation managed property without HUD's approval and performed management activities after being suspended.[119] The corporation denied HUD's allegation, arguing that the employee at issue acted only as a consultant (not an agent) for the property.[120]

The regulation at issue required that an SDO "determine whether 'respondent's submission in opposition raises a genuine issue over facts material to the proposed debarment' . . . [, and] [i]f it does, then 'the respondent shall be afforded [a hearing].'"[121] HUD conducted an informal presentation of matters in opposition, but it did not conduct a fact-finding hearing, which is required only when a genuine issue of material fact exists.[122] HUD's SDO also provided written findings of fact explaining why HUD's employee was an agent.[123] But written findings of fact are needed only when there is a genuine issue of fact; thus, HUD "implicitly" determined a material fact was at issue.[124] Consequently, the court found that "[o]bviously, there was a genuine, dramatic and absolute dispute" regarding the employee's role.[125] Therefore, the court held it was "irrational" for HUD to merely rely on its written findings of fact because (1) the implicit determination did not satisfy the requirement that a genuine dispute of material fact exist and (2) the contractor was entitled to a fact-finding

117 *See, e.g.*, Cohen v. U.S. Dep't of the Air Force, 707 F. Supp. 12, 12–13 (D.D.C. 1989) (finding that the agency's failure to hold a hearing and conflicting testimony were insufficient evidence of wrongdoing); *see also* 48 C.F.R. § 2.101 (2017) (defining adequate evidence as "information sufficient to support the reasonable belief that a particular act or omission has occurred").

118 *See* Eugene Burger Mgmt. Corp. v. U.S. Dep't of Hous. & Urban Dev., Nos. 01-1701, 98-2812, 2002 WL 1000254, at *1, *4 (D.D.C. May 9, 2002).

119 *See id.* at *1–2 (noting that HUD proffered that the employee was an agent, relying in part on the employee's daily actions and consulting agreement and the Eugene Burger Management employee's correspondence with HUD).

120 *See id.* at *2 (noting that employee provided a declaration where she insisted that she was acting only as a consultant).

121 *Id.* (quoting 24 C.F.R. § 24.313(4)(b) (2001)).

122 *See id.* There are two types of proceedings that arise with suspensions and debarments: (1) presentations of matters in opposition and (2) fact-finding hearings. *See* 48 C.F.R. § 9.403, 9.406-3, 9.407-3 (2017). If an SDO determines that a contractor's presentation of matters in opposition raises a genuine dispute of material fact, then a fact-finding hearing will be held. *See id.* § 9.407-3.

123 *See Eugene Burger Mgmt. Corp.*, 2002 WL 1000254, at *2.

124 *See id.* at *3.

125 *Id.* at *4.

hearing when the SDO discovered a genuine dispute of material fact.[126]

As a result of this and similar decisions, an agency typically is deemed to satisfy the FAR's due process requirements by providing a contractor, prior to debarment, with notice and opportunity for a hearing.[127] These decisions also demonstrate courts' willingness, under certain circumstances, to reject an agency's suspensions and debarment determinations.[128]

II. The Changing Judicial Landscape

The power struggle between the judiciary and agencies to interpret laws has been widely documented, dating back to the Federalist Papers and *Marbury v. Madison*.[129] Historically, the judiciary would give an agency's interpretation of its regulation "controlling weight unless it [was] plainly erroneous or inconsistent with the regulation."[130] Only recently did judicial deference to suspension and debarment actions receive much attention.[131] This is in part because a majority of suspension and debarment decisions were previously based upon criminal prosecutions.[132] For example, in 1994, ninety-six percent of the suspension and debarment actions by the Air Force were based on indictments and convictions, removing the agency's need to establish the cause for exclusion.[133] Furthermore, the increase in suspension and debarment actions inherently results in an increase in lawsuits.[134]

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126 *See id.* at *4–5.

127 *See* 48 C.F.R. § 9.406-3(b)–(c) (2017). Debarments based upon convictions or civil judgment do not require notice or a hearing. *See* Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 968 (D.C. Cir. 1980).

128 *See* Gordon, *supra* note 63, at 601.

129 5 U.S. (1 Cranch) 137 (1803); *see, e.g.*, The Federalist No. 78, at 521 (Alexander Hamilton) (Paul Leicester Ford ed., 1898) ("It therefore belongs to [the courts] to ascertain [a law's] meaning, as well as the meaning of any particular act proceeding from the legislative body.").

130 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (creating what is commonly referred to as *Seminole Rock* deference).

131 *See* Steven D. Gordon & Richard O. Duvall, *It's Time to Rethink the Suspension and Debarment Process*, Fed. Cont. Rep. (BNA) 720 (June 18, 2013), http://www.mondaq.com/unitedstates/x/248174/Government+Contracts+Procurement+PPP/Its+Time+To+Rethink+The+Suspension+And+Debarment+Process [https://perma.cc/A9Q3-K425].

132 *See id.*

133 *See id.*

134 *See supra* Introduction.

A contractor may appeal a suspension or debarment decision by seeking judicial review in federal court.[135] Challenges to suspension and debarment actions usually rely on either (1) the Constitution, based upon a denial of due process, or (2) the APA, based on allegations of "a clear error in agency decision making."[136] Because Congress gives agencies discretion in suspension and debarment decisionmaking, in reviewing an agency's determination, courts apply a very narrow and deferential standard of review—often referred to as the "arbitrary and capricious" test.[137] Under this test, a court may not substitute its judgment for that of the agency.[138] Instead, a court may only decide "whether the agency examined the case facts and articulated a satisfactory explanation for its decision, including a 'rational connection between the facts found and the choice made.'"[139]

Nevertheless, a court may refuse to defer to an agency's decision in certain instances.[140] First, courts will not defer to the agency if it "raises *serious* constitutional concerns."[141] Second, under the arbitrary and capricious test, a court must reverse an agency determination that has no rational basis.[142] Finally, courts will reverse decisions that were

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135 *See* Pascale Hélène Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, 2012 U. CHI. LEGAL F. 195, 214 (2012).

136 Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 587 (2009); *see* Dubois, *supra* note 135, at 214.

137 *See* 5 U.S.C. § 706(2)(A) (2012); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 55–57 (1983); Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1132 (9th Cir. 2011); Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003) (noting "substantial deference").

138 *See* U.S. Postal Serv. v. Gregory, 534 U.S. 1, 6–7 (2001); Burke v. EPA, 127 F. Supp. 2d 235, 238 (D.D.C. 2001).

139 *Burke*, 127 F. Supp. 2d at 238 (quoting *State Farm*, 463 U.S. at 43 (1983)).

140 Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) (reasoning that the balance between agency expertise and the legislator shifts against agency deference when a "constitutional line is about to be crossed").

141 *See id.*; Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 366–67 (9th Cir. 1996) ("Generally, challenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or the jurisdiction of an agency."); Chamber of Commerce v. FEC, 69 F.3d 600, 605 (D.C. Cir. 1995) (declining to defer to an agency decision interpreting an undefined statutory term because it would raise serious constitutional questions).

142 *See* Minn. Mining & Mfg. Co. v. Shultz, 583 F. Supp. 184, 187 (D.D.C. 1984) (noting the duty of the court to overturn an agency's decision when the bidder demonstrates that the agency decision had no rational basis).

made for an improper purpose or that disregarded applicable regulations.[143]

In 1984, the Supreme Court made its clearest articulation of agency deference.[144] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[145] the Court held that (1) an agency shall first determine the meaning of ambiguous statutes and (2) the courts must defer to this interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute."[146] The Court began by focusing on the rationale behind Congress's delegation of authority, finding that an agency's interpretation may be "controlling" and not just "persuasive."[147]

The Court's approach in *Chevron* helps reduce circuit splits by directing courts to defer to an agency's reasonable understanding of ambiguous terms.[148] Supporters of *Chevron* believe it demonstrates "a healthy awareness that the resolution of ambiguities calls for judgments of policy—and an accompanying belief that such judgments should be made by political actors, not by the federal judiciary."[149] On the other hand, critics argue that in *Chevron* the Court merely "paraphrased" the text of the APA.[150] Justice Scalia noted that *Chevron*

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143 *See* Sellers v. Kemp, 749 F. Supp. 1001, 1006 (W.D. Mo. 1990); Gordon, *supra* note 63, at 601.

144 *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 445 (2007). ("The Court's decision in *Chevron*, establishing a rule of judicial deference to agency decisionmaking, rested on a self-conscious recognition that key differences between agencies and courts make the former the more appropriate institution to exercise the policymaking discretion inherent in the administration of most modern statutes.").

145 467 U.S. 837 (1984).

146 *Id.* at 842–44; *see also* Manjares v. Newton, 411 P.2d 901, 905 (Cal. 1966) (noting that the arbitrary and capricious standard does not allow courts to substitute its judgment for that of a reasonable agency decision, such as an agency choosing to ignore aggravating circumstances indicating culpability). Generally, *Chevron* deference applies whenever a statute granting an agency rulemaking authority is ambiguous; however, the agency's interpretation must be reasonable. *See* Nancy M. Modesitt, *The Hundred-Years War: the Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 958 (2009).

147 *Chevron*, 467 U.S. at 844 (emphasizing an agency's ability to evaluate an issue in more detail than the judiciary).

148 *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987).

149 Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 824 (2006).

150 *See* Richard O. Faulk, *'Chevron' Deference Conflicts with the Administrative Procedure Act*, WLF LEGAL PULSE (Sept. 18, 2015) (emphasis omitted), https://wlflegalpulse.com/2015/09/18/chevron-deference-conflicts-with-the-administrative-procedure-act [https://perma.cc/3HY3-5M3S] (noting that the *Chevron* Court did not even cite the APA in its opinion).

goes against the clear language of the APA, which directs "that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[151]

A. The Administrative Procedure Act

After intense political debate over the role of agencies, Congress enacted the APA in 1945.[152] The APA had the potential to alter the role of agencies by directing that "the reviewing court shall decide *all* relevant questions of law."[153] Importantly, the judicial review provision of the APA extends to suspension and debarment decisions.[154] The APA allows a federal district court to review a suspension or debarment action after a contractor has exhausted all available administrative remedies.[155]

Under the APA, "a court will examine whether the agency action 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[156] This affords agencies a great deal of discretion, with judges typically relying on an agency's expertise.[157] In fact, the APA requires a court to limit the question to *only* whether the agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[158] The arbitrary and capricious standard also applies to "factual disputes involving substantial agency expertise"—such as suspension and debarment decisions.[159] The courts, therefore, do not generally overturn an agency's suspension or debarment decision so long as a "ra-

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151 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring).

152 *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 789 (2010).

153 5 U.S.C. § 706 (2012) (emphasis added); *see also* Beermann, *supra* note 152, at 788–89.

154 Gordon, *supra* note 63, at 600.

155 *See* Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163, 167 (D.C. Cir. 1983).

156 *See* Seymour, *supra* note 11, at 366 (quoting Shane Meat Co. v. U.S. Dep't of Def., 800 F.2d 334, 336 (3d Cir. 1986)).

157 *See id.*; *see also* Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) (noting that judges "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case"); Joseph D. West et al., *The Environmental Protection Agency's Suspension and Debarment Program*, BRIEFING PAPERS: SECOND SERIES, Nov. 2013, at 18 (quoting *Kiewit Sons' Co.*, 714 F.2d at 168–69).

158 5 U.S.C. § 706(2)(A) (2012); *see also* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one."); Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1148 (9th Cir. 2010).

159 Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1150 (9th Cir. 2002) (citing Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1194 (9th Cir. 2000)).

tional connection between the facts found and the choice made" exists.[160]

A court reviewing an agency determination will "examine the relevant data" and determine whether there is "a satisfactory explanation for [the] action."[161] Because the government is protected by sovereign immunity, the only remedy available for excluded contractors is an injunction against the suspension or debarment.[162]

B. Judicial Review Versus Agency Discretion

Increasingly, courts are second-guessing agency discretionary actions, citing an agency's failure to adhere to its own standards.[163] Some scholars believe that increased judicial scrutiny "places so many analytic burdens and such uncertainty on agency policymaking that it discourages agencies from acting even when regulatory changes are needed."[164] As a result, in an effort to avoid being sued, agencies may become hesitant to act and afraid to use tools such as suspension and debarment.[165]

Historically, Congress has pressured agencies to rely more on suspension and debarment actions.[166] Consequently, SDOs started aggressively suspending and debarring federal contractors.[167] At the same time, some companies became more assertive and willing to test the agencies' determinations.[168] Three recent cases that demonstrate

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160 Seymour, *supra* note 11, at 378 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

161 Franklin v. Massachusetts, 505 U.S. 788, 822 (1992) (Stevens, J., concurring) (quoting *State Farm*, 463 U.S. at 43).

162 *See* Joseph D. West et al., *Suspension & Debarment*, Briefing Papers: Second Series, Aug. 2006, at 13.

163 *See* Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849–50 (S.D. Cal. 1993) (holding an agency's debarment decision "arbitrary, capricious and an abuse of discretion" because it failed to consider mitigating factors surrounding the plaintiff's plea); Inchcape Shipping Servs. Holdings Ltd. v. United States, No. 13-953 (Fed. Cl. Jan. 2, 2014).

164 Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 Ohio St. L.J. 251, 252 (2009).

165 *See id.* ("[J]udicial review raises the costs of agency adoption of new policy and thereby discourages such action.").

166 *See* Ethics in Government Act Amendments of 1985, Pub. L. No. 99-190, § 114(b), 99 Stat. 1318 (1985) ("[T]he government should more aggressively use suspension or debarment of contractors . . . ."); David Robbins, *How to Measure Effectiveness of Suspension and Debarment*, Law360 (Oct. 22, 2013), https://www.law360.com/articles/481922/how-to-measure-effectiveness-of-suspension-and-debarment [https://perma.cc/759K-MRUS].

167 *See supra* Introduction.

168 *See* Dietrich Knauth, *5 Areas of Growing Debarment Risk for Contractors*, Law360 (Jan. 13, 2014, 10:49 PM), https://www.crowell.com/files/5-Areas-Of-Growing-Debarment-Risk-For-Contractors.pdf [https://perma.cc/XG9J-37VC]; Jason Miller, *Agencies More Aggressive in Sus-*

contractors' willingness to challenge agency exclusion decisions are *Friedler*, *Inchcape*, and *Agility*.[169]

1. Friedler v. General Services Administration

In 2015, the court that overruled the GSA's debarment of Symplicity CEO Ariel Friedler determined that Friedler's due process rights had been violated because the GSA did not give him proper notice of all the grounds for his debarment and an opportunity to respond prior to the final determination.[170] Initially, Friedler was suspended based on an indictment for conspiracy to access a protected computer without authorization.[171] Friedler entered into negotiations with the GSA's SDO, but no settlement was reached.[172] After the negotiations, the GSA issued a notice of proposed debarment and reentered into negotiations with Friedler.[173] During this time, Friedler returned to Symplicity and conducted business with the government, in violation of prior agreements Friedler had made.[174] When the GSA issued its final debarment notice ("Notice"), Friedler's "lack of present responsibility" conviction rested not only on Friedler's indictment but also on Friedler's recent actions, which were not discussed during the negotiations.[175]

Friedler challenged the debarment, alleging that the failure to afford him notice and opportunity to respond to these additional grounds violated the APA.[176] In response, the GSA alleged that the additional grounds were proper because they constituted mere findings of fact of Friedler's present responsibility.[177] GSA further justified

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pending, Debarring Contractors, FED. NEWS RADIO (Oct. 21, 2011, 3:52 PM), https://federalnewsradio.com/all-news/2011/10/agencies-more-aggressive-in-suspending-debarring-contractors [https://perma.cc/7KEY-QP4W].

169 There have been numerous other recent successful suits by contractors. *See, e.g.*, Humphreys v. DEA, 96 F.3d 658, 664 (3d Cir. 1996) (reversing agency revocation when the agency failed to examine defendant's primary defense); Int'l Exps., Inc. v. Mattis, 265 F. Supp. 3d 35, 49–50 (D.D.C. 2017) (holding that a fifteen-year debarment was arbitrary and capricious because the evidence indicated that the alleged misconduct was done for legitimate purposes—a material fact that requires the agency to make written findings of fact).

170 *See* Friedler v. GSA, No. 15-cv-2267, 2017 WL 4236521, at *1 (D.D.C. Sept. 21, 2017).

171 *See id.*

172 *See id.* at *4–8.

173 *See id.*

174 *See id.* at *15.

175 *Id.* at *5, *7–8. The GSA had only recently discovered the two new grounds included in the Notice. *See id.*

176 *See id.* at *8.

177 *See id.* at *1, *8.

the inclusion of these new grounds because they were only used to support the longer debarment period.[178]

The district court agreed with Friedler and held that the error was not harmless.[179] The court explained that GSA's debarment violated the FAR's notice requirement.[180] It explained that these factors were labeled "new causes" in the Notice and, further, when the notice of the proposed debarment was issued, the conduct alleged in these new causes had not yet occurred.[181] Moreover, even if these new causes were merely aggravating factors, the court clarified that Friedler was still entitled to notice and an opportunity to respond under section 9.406-4(b) of the FAR.[182]

Friedler demonstrates that despite agency deference, courts are willing to scrutinize SDOs' decisions to ensure due process protections are afforded to contractors.[183] This decision helps to clarify the edges of SDO authority and demonstrates the importance of notifying a contractor of *all* new allegations that will be included in the final debarment.[184]

2. Inchcape Services Holdings Ltd. v. United States

In 2013, the Navy suspended Inchcape Shipping Services Holdings Ltd. and several of its affiliates for not reconciling its accounts and for its failure to disclose overpayments.[185] The SDO's suspension was based on an Inchcape internal audit conducted in 2008 (more than five years prior to the suspension).[186] Inchcape did not release this audit to the Navy until 2012, although the Navy obtained an informal copy prior to June 2011.[187]

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178 *See id.*

179 *See id.* at *2, *17–18.

180 *See id.* at *11–14.

181 *See id.*

182 *See id.*; *see also* 48 C.F.R. § 9.406-4 (2017) (requiring that when extending the debarment period, "the procedures of [section] 9.406-3 above shall be followed"); *id.* § 9.406-3 (requiring notice and opportunity to respond).

183 *See* Dismas Locaria, *D.D.C. Enforces Procedural Requirements for Debarment and Extension of Debarment Period*, VENABLE LLP (Sept. 26, 2017), https://www.venable.com/ddc-enforces-procedural-requirements-for-debarment-and-extension-of-debarment-period-09-26-2017 [https://perma.cc/9VXK-FQHM].

184 *See id.*

185 *See* Inchcape Shipping Servs. Holdings Ltd v. United States, No. 13-953 (Fed. Cl. Jan. 2, 2014).

186 *See id.*, slip op. at 1–2.

187 *See id.* at 1–3.

Inchcape challenged its suspension in the Court of Federal Claims, alleging that the Navy failed to meet the requirements of the FAR section 9.407-1(b)(1).[188] That section requires that a suspension be based on (1) "adequate evidence" and (2) a finding that "immediate action" is needed to protect the government's interest.[189] The court noted that it had "significant concerns" regarding whether the Navy based the suspension on adequate evidence, due to the SDO's limited and narrow assessment of Inchcape.[190] The court cited the lack of evidence in the SDO's decision—it solely relied on the one internal audit report and contract without assessing the "myriad of additional, potentially relevant documents relating to both account reconciliation and disclosures of overbilling."[191] Therefore, the court concluded, the Navy did not meet the FAR requirements because it failed to consider all the available evidence and make a determination after weighing the credibility of this information.[192]

Additionally, the court found that there was likely no immediate need to suspend Inchcape.[193] The court mentioned that the Navy's year-long delay after receiving the audit report to take action "cast[] serious doubt on the government's claim that immediate action was necessary."[194] Instead, the court believed that the Navy's suspension appeared more like a punishment than a protection of the government's interest.[195]

Inchcape suggests that courts will examine whether a suspension (used when immediate protection is necessary) is based on "stale

188 *See id.* at 2–3.

189 48 C.F.R. § 9.407-1(b)(1) (2017). The suspension notice stated: "Based on the Administrative Record before me, I find that protection of the Government's business interests requires the *immediate* suspension of the Inchcape Services companies." *Inchcape*, slip op. at 3 (emphasis added). The Court found that this was "conclusory" and had "questionable support" in the record since the Navy had first learned of the audit in 2011 but provided no rationale as to why in 2013 this became an emergency necessitating a suspension. *See id.* at 3–4.

190 *Inchcape*, slip op. at 3.

191 *Id.* Interestingly, the Navy possessed all of this at the time the suspension was imposed. *See id.*

192 *See id.* (noting that while the SDO's report contained several of Inchcape's contracts, the SDO failed to consider other potentially relevant documents relating to disclosures of overbilling and account reconciliations); 48 C.F.R. § 9.407-1(b)(1) (2017).

193 *See Inchcape*, slip op. at 3.

194 *Id.* The court noted that the Navy failed to explain why a 2008 overbilling matter only became an emergency in 2013, when the Navy had knowledge of the issue in 2011. *See id.* at 4.

195 *See id.* at 4. The Navy may have chosen to delay its suspension because it was conducting a bribery investigation of three Navy officials and several contractors. *See* Jeffrey P. Bialos et al., *Judicial Review of Government Contractor Suspensions*, LEXOLOGY (Jan. 28, 2014), https://www.lexology.com/library/detail.aspx?g=da0d5cb0-9b39-44d1-a5f3-8b28948fd4d9 [https://perma.cc/2RYP-8LDL].

facts" at the time the suspension is actually carried out.[196] In *Inchcape*, rather than defer to the agency, the court scrutinized the SDO's lack of investigation and the delay in taking action.[197]

3. Agility Defense & Government Services v. United States

In 2009, the DLA suspended Public Warehousing Company, a contractor that had been indicted for fraud in connection with a government contract to supply food to troops in the Middle East.[198] DLA extended the suspension to two of Public Warehousing Company's affiliates, Agility Defense and Government Services and its subsidiary, Agility International.[199] The DLA based its suspension solely on the relationship between Public Warehousing Company and Agility and its subsidiary.[200] Both companies, neither of which were included in the indictment, submitted written requests for reinstatement.[201] Agility brought suit in the U.S. District Court for the Northern District of Alabama.[202] The district court ended Agility's suspension, reasoning that the applicable regulation limited automatic suspensions to eighteen months, unless legal proceedings are initiated against the contractor.[203] Accordingly, the court found that any suspension longer than eighteen months required the SDO to begin legal proceedings to determine the affiliates' involvement.[204]

The Eleventh Circuit disagreed with the lower court and reversed.[205] The question on appeal was whether the FAR's eighteen-month limitation applied only to the indicted contractor or to the affiliates as well.[206] The district court—which noted that neither it nor the parties could find a "single judicial decision addressing the issue"—

196 Knauth, *supra* note 40; *see also Legal Alert: Judicial Review of Government Contractor Suspensions*, EVERSHEDS SUTHERLAND (Jan. 28, 2014), https://us.eversheds-sutherland.com/mobile/NewsCommentary/Legal-Alerts/160795/Legal-Alert-Judicial-Review-of-Government-Contractor-Suspensions [https://perma.cc/PV2E-63BG].

197 *See* Bialos et al., *supra* note 195.

198 *See* Agility Def. & Gov't Servs., Inc., v. U.S. Dep't of Def., No. CV-11-S-4111-NE, 2012 WL 2480484, at *3 (N.D. Ala. June 26, 2012), *rev'd*, 739 F.3d 586 (11th Cir. 2013).

199 *See id.* at *2–3.

200 *See id.* at *8.

201 *See id.*

202 *See id.* at *1.

203 *See id.* at *8.

204 *See id.*

205 Agility Def. & Gov't Servs., Inc., v. U.S. Dep't of Def., 739 F.3d 586 (11th Cir. 2013).

206 *See id.* at 587–88. The court noted that "[i]t is unlikely that the regulation infringes on the liberty interests of the affiliates given that their suspensions were predicated solely on their status as affiliates of [the indicted contractor] and the agency did not make any allegations of wrongdoing against them." *Id.* at 591.

was willing to second-guess the agency's decision in light of its own interpretations.[207] The Eleventh Circuit, however, disagreed and construed this provision differently than the district court.[208] The Eleventh Circuit agreed with the agency's interpretation and held that "legal proceedings" applied to "proceedings against the indicted government contractor" and that affiliates could be suspended without any evidence of wrongdoing on behalf of themselves.[209]

Although in *Agility* the Eleventh Circuit agreed with the agency, the case still demonstrates the court's willingness to scrutinize an agency's decision.[210] The Eleventh Circuit, rather than citing agency deference as a reason supporting its reversal of the district court, analyzed how the agency arrived at its decision.[211]

C. Proposed Legislation

Courts continue to defer to agency decisions in most cases,[212] although the courts may soon lose the ability to decide whether deference is appropriate. In 2016, Republicans in the Senate and House introduced the Separation of Powers Restoration Act ("SOPRA"),[213] which proposes to alter *Chevron* deference.[214] The law recommends amending the APA to require "de novo [review of] all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules"—essentially requiring the judiciary to ignore an agency's interpretation.[215] Not only will this impact numerous agency actions that rely on broad congressional mandates, but it may also discourage agencies from exercising their authority.[216] For-

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207 *See Agility Def.*, 2012 WL 2480484, at *18, *25.

208 *See Agility Def.*, 739 F.3d at 587–88.

209 *Id.* at 589.

210 *See id.* at 590.

211 *See id.*

212 *See, e.g.*, Leitmen v. McAusland, 934 F.2d 46, 50 (4th Cir. 1991) (upholding debarment even when no conviction or civil judgment existed); Agan v. Pierce, 576 F. Supp. 257, 260 (N.D. Ga. 1983) (upholding agency's debarment).

213 Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (introduced July 13, 2016), https://www.congress.gov/bill/115th-congress/house-bill/76 [https://perma.cc/FX9W-H7GQ]. In 2016, SOPRA made it past the House by a near party-line vote. *See id.*; Vikram David Amar, Chevron *Deference and the Proposed "Separation of Powers Restoration Act of 2016": A Sign of the Times*, JUSTIA: VERDICT (July 26, 2016), https://verdict.justia.com/2016/07/26/chevron-deference-proposed-separation-powers-restoration-act-2016-sign-times [https://perma.cc/V273-A79M]. The Act was reintroduced in the House on January 3, 2017. *See* Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong.

214 *See id.*

215 *Id.*

216 *See* Press Release, U.S. House Comm. on Judiciary Democrats, Floor Statement of the

mer Representative John James Conyers Jr. fears that "[b]y eliminating judicial deference, the bill would effectively empower the courts to make public policy from the bench even though they lack the specialized expertise and democratic accountability that agencies possess, through delegated authority from and oversight by the American people's elected representatives."[217]

In 2017, the future of judicial deference was again questioned. The death of Antonin Scalia and the appointment of Neil Gorsuch created much speculation on how the Court would be impacted.[218] Justice Gorsuch, who shares a conservative legal philosophy similar to Justice Scalia's, has openly voiced his disdain for *Chevron* deference, calling it a "judge-made doctrine for the abdication of the judicial duty."[219] It is important to note that judges currently have great discretion in deciding whether and when to apply *Chevron*.[220]

III. Judicial Scrutiny and Its Justifications

The changing landscape of government contracts has highlighted the potential deficiencies in the suspension and debarment system. Generally, courts do not second-guess an agency's suspension or debarment decision.[221] But recent court decisions suggest that courts are willing to overturn an agency's determination when contractors are denied their right to respond.[222]

With the rise in suspension and debarment actions, some scholars have advocated for increased judicial scrutiny as well, arguing that judicial deference violates the separation-of-powers principle.[223] These critics of judicial deference explain that although Congress was vested with the "legislative" power, there are still restrictions on what it may

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Honorable John Conyers, Jr. in Opposition to H.R. 4768, the "Separation of Powers Restoration Act of 2016," (July 11, 2016), https://democrats-judiciary.house.gov/news/press-releases/floor-statement-honorable-john-conyers-jr-opposition-hr-4768-separation-powers [https://perma.cc/W5VJ-KLGX].

217 *See id.*

218 *See* Jimmy Hoover, *Even With Gorsuch, Supreme Court Unlikely to Toss Chevron*, Law360 (July 13, 2017, 3:57 PM), https://www.law360.com/articles/934856/even-with-gorsuch-supreme-court-unlikely-to-toss-chevron [https://perma.cc/BBT6-W7BJ] (noting that the nomination "ramped up the recent conservative movement against [*Chevron*]").

219 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016).

220 *See* Miles & Sunstein, *supra* note 149, at 842.

221 *See id.* at 823.

222 *See, e.g.*, Friedler v. GSA, No. 15-cv-2267, 2017 WL 4236521, at *18 (D.D.C. Sept. 21, 2017) (holding the GSA's debarment invalid because it did not give notice of any new grounds for debarment nor provide the required thirty days to respond to each new finding).

223 *See* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 355–61 (2002).

delegate.[224] Essentially, they proffer that the power to legislate is exclusive and Congress may only delegate responsibility to "fill up the details."[225]

In fact, some scholars go so far to advocate that even agency inaction should be subject to judicial review.[226] They believe that because a contractor's right to pursue a certain profession is a constitutionally protected right, an agency's inaction violates these rights and courts should review their inaction.[227] Not all scholars believe increased judicial scrutiny is the answer. Chief Justice William Rehnquist believed that agency inaction should not generally be subject to judicial review: "an agency's decision not to take enforcement action should be presumed immune from judicial review under [the APA]."[228] In the same case, Justice Thurgood Marshall elaborated in his concurring opinion that the interests involved in administrative decisions are "more focused and in many circumstances more pressing than those at stake in criminal prosecutorial decisions."[229]

A. Current Trend

Years of congressional pressure to increase exclusion actions, including creating mandatory suspension or debarment in certain cases, has led to an increase in exclusion proceedings.[230] For example, recently, there has been an increase in "fact-based" suspension and debarment actions.[231] A fact-based suspension or debarment—unlike one based on a criminal proceeding or indictment—involves an agency independently conducting an investigation, deciding the facts, and determining whether the misconduct necessitates suspension or

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224 *See id.*

225 *See id.* at 361 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825)).

226 *See* David B. Robbins & Laura Baker, *The (Unacceptable) Cost of Growing Delays in the Suspension and Debarment System*, 45 PUB. CONT. L.J. 35, 45 (2015).

227 *See id.*; James A. Merritt & Sons v. Marsh, 791 F.2d 328, 331 (4th Cir. 1986) (explaining that an agency's failure to suspend a contractor indicted for procurement fraud is "highly irresponsible").

228 Heckler v. Chaney, 470 U.S. 821, 832 (1985). It should be noted that the Court found the agency's inaction unreviewable but cited cases where judicial review was appropriate for inaction. *See id.* Justice Rehnquist noted, however, that "Congress did not set agencies free to disregard legislative discretion." *Id.* at 833.

229 *See id.* at 848 (Marshall, J., concurring).

230 *See* Robbins & Baker, *supra* note 226, at 37. Congress should avoid mandatory exclusions, which remove an agency's ability to determine when a suspension or debarment is necessary to protect the government's interest. *See* Sacilotto & Smith, *supra* note 75, at 3.

231 *See* Gordon & Duvall, *supra* note 131.

debarment.[232] Many of these fact-based suspension and debarment actions rely on the FAR's catch-all provision, instead of a criminal offense or some other defined action.[233] Now that agencies are willing to rely on the catch-all provision, contractors must be more cautious regarding risk as to the type of conduct that allows suspension and debarment.[234]

With the congressional push for increased suspension and debarments, agencies have become more willing to exclude individuals.[235] Similar to actions against corporate entities, suspension and debarments of individuals have also received judicial attention.[236] In part, this may be due to the ambiguity in the FAR regarding individuals; the FAR mainly focuses on what a *business* can do to mitigate and show present responsibility.[237] For example, in July 2008, the Air Force debarred Christopher Alf, his wife, and several other individuals, including his air cargo company.[238] Alf sued the Air Force.[239] The court issued an injunction precluding the Air Force from enforcing the debarment, allowing Alf to resume his government contract work.[240] The court explained that based on the Air Force's allegations, the decision to debar Alf was "logically flawed."[241] The court held that to impute the fraud to Alf, the Air Force needed to show he had knowledge of the fraud, which the record did not do.[242]

Recent decisions emphasize courts' willingness to scrutinize suspension and debarment decisions of both corporations and individuals but often overlook the implications this may have on the agencies.[243]

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232 *See id.* Unlike a criminal conviction, the burden of proof is a "preponderance of the evidence," not "beyond a reasonable doubt." *Id.*

233 *See id.*

234 *See id.*

235 *See* Telephone Interview with Dismas Locaria, Partner, Venable LLP (Nov. 28, 2017).

236 *See, e.g.*, Novicki v. Cook, 946 F.2d 938, 942–43 (D.C. Cir. 1991) (reversing an agency debarment of a corporation's president because the agency record failed to show that the president had "reason to know" of other officials' misconduct); Caiola v. Carroll, 851 F.2d 395, 400–01 (D.C. Cir. 1988) (reversing DLA debarment of individuals); Feinerman v. Bernardi, 558 F. Supp. 2d 36, 45, 52 (D.D.C. 2008) (holding SDO improperly imputed conduct to individuals). Generally, courts justify any increased scrutiny by citing an agency's alleged violation of a due process right. *See* Robbins & Baker, *supra* note 226, at 36 ("Given the significance and effect of these actions, due process rights have evolved in regulations and case law over the years that are supposed to ensure fundamental fairness in the application of suspension and debarment.").

237 *See* Telephone Interview with Dismas Locaria, Partner, Venable LLP (Nov. 28, 2017).

238 *See* Alf v. Donley, 666 F. Supp. 2d 60, 63 (D.D.C. 2009).

239 *See id.* at 62.

240 *See id.* at 71–72.

241 *Id.* at 66.

242 *See id.* at 68–69.

243 *See* Friedler v. GSA, No. 15-cv-2267, 2017 WL 4236521, at *18 (D.D.C. Sept. 21, 2017)

Conceivably, Congress is partially to blame for the increase in debarment and suspension determinations that are being overturned by the courts.[244] While agencies are expected to issue more suspensions and debarments—and support their determinations in writing—they do not receive an increase in personnel.[245]

B. Implications of Judicial Scrutiny

Agencies possess technical expertise that both Congress and the courts lack.[246] Often agencies are staffed by experts in the field who, throughout their career, gain substantial specialized experience in a particular area.[247] This is because agency officials, such as SDOs, have more time to focus on a specific industry and acquire knowledge of its inner workings.[248] Judges and politicians, on the other hand, are less knowledgeable than SDOs about issues within the agencies' jurisdiction.[249]

It is impossible for courts, with their broad jurisdiction, to acquire the specialized skills that agencies possess.[250] While agency officials are specialists in their field, Congress and the judiciary are generalists.[251] Congress understands that both it and the judiciary often lack the technical expertise necessary to decide contemporary legal problems.[252] Recognizing this knowledge gap, Congress expressly del-

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(finding a final debarment decision "arbitrary, capricious, and otherwise not in accordance with law" when it was based at least in part on new, independent causes to which the defendant did not have an opportunity to respond).

244 *See* Robbins & Baker, *supra* note 226, at 37.

245 *See id.* This may also lead to delays in the investigation process. *See id.*

246 *See* Lemos, *supra* note 144, at 445; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975) ("Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.").

247 *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23–24 (1938) ("With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.").

248 *See* Lemos, *supra* note 144, at 445.

249 *See id.*; Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 865 (1984) ("Judges are not experts in the field . . . .").

250 *See* Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) (stating that agencies are accorded deference because "the agency has superior expertise in the particular area").

251 *See* LANDIS, *supra* note 247, at 31 (noting that judges are "jacks-of-all-trades and masters of none").

252 *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (citing *Chevron*, 467 U.S. at 843–44) ("Congress . . . understood that the ambiguity would be resolved, first and fore-

egates certain authority to administrative agencies—including the power to debar and suspend government contractors.[253]

Personalized determinations, not a "one-size-fits-all approach," are integral to the American notion of fairness.[254] Each agency has unique demands and the discretion to create guidelines and assess whether suspension or debarment is necessary to protect the government's interest.[255] Agencies are in the best position to continually assess the precise demands and appropriate remedies.[256] They understand the individualized needs for industries.[257] Without discretion, it is impossible for agencies to tailor their regulations to address the specific problems in their field.[258] Not only do agencies possess the required expertise, but they are the ones, not the courts, working with the contractors.[259]

Congress is not the only one who has recognized the importance of agencies' inside knowledge. The courts have also acknowledged the significance of agency expertise in determining appropriate remedies.[260] In *SEC v. Chenery Corp.*,[261] the Court noted that agency officials possess "special administrative competence" acquired from their "experience[s] and insight[s] denied to others."[262] In *Agility*, the Eleventh Circuit took agency discretion a step further.[263] The court held that, under the FAR, affiliates of a contractor facing indictment may be suspended or debarred, even though the affiliate committed no wrongdoing, if the SDO deems it necessary to protect the government's interests.[264]

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most, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

253 *See* United States v. Mead Corp., 533 U.S. 218, 218 (2001) (finding that deference exists when "Congress delegated authority to the agency generally to make rules carrying the force of law" and the agency's interpretation "was promulgated in the exercise of such authority").

254 *See id.*; Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 New Eng. L. Rev. 21, 23–24, 32 (2015).

255 *See* VanLandingham, *supra* note 254, at 23–24.

256 *See* Coal Exps. Ass'n v. United States, 745 F.2d 76, 82 (D.C. Cir. 1984).

257 *See* Kenneth Culp Davis, Discretionary Justice 25 (1969).

258 *See id.* ("Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice.").

259 *See* Gonzalez v. Freeman, 334 F.2d 570, 577 (D.C. Cir. 1964).

260 *See* SEC v. Chenery Corp., 318 U.S. 80, 92–93 (1943).

261 318 U.S. 80 (1943).

262 *Id.* at 92–93.

263 *See* Agility Def. & Gov't Servs., Inc. v. U.S. Dep't of Def., 739 F.3d 586, 590 (11th Cir. 2013).

264 *See id.* at 588, 590.

Although agency discretion is necessary, judicial review also has an important role in the administrative system.[265] Clearly, not all suspension and debarment determinations are appropriate, which judicial review can help remedy.[266] But increased judicial scrutiny is not the answer.[267] Rather, a more effective alternative is additional training for SDOs to understand all the procedural requirements.[268] This allows agencies to continue to use their specialized knowledge, while ensuring a contractor's due process rights are protected.

Given the recent judicial scrutiny and increase in individual debarments, agencies could benefit from clearer standards. To help streamline agency procedures—while retaining an agency's flexibility—the government should implement more consolidated training for SDOs.[269] While a majority of the FAR's procedural requirements are quite clear, recent cases like *Friedler* and *Inchcape* demonstrate some of the gray areas SDOs may overlook. By implementing consolidated training that uses all of the agencies' knowledge, SDOs could learn from each other's cases and avoid making similar mistakes. To further this objective, an interagency case tracking system should be created to educate SDOs on any new court precedents and allow agencies to monitor trends in the suspension and debarment process.[270]

Additionally, agencies could mitigate judicial scrutiny by implementing internal review processes of SDOs' decisions prior to litigation.[271] The FAR allows agencies to create an internal appellate

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265 *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2061–68 (2011).

266 *See id.* at 2032.

267 *See* Seidenfeld, *supra* note 164, at 252 (explaining the harmful impacts of judicial scrutiny on agency actions).

268 *See* Warren Bianchi, *Equality in Exclusion: Empowering Individuals in the Suspension and Debarment System*, 45 Pub. Cont. L.J. 79, 82 (2015) ("If the government is to contract only with responsible parties, the inverse power to exclude irresponsible parties follows." (footnote omitted)).

269 *See* Kara Sacilotto, *GAO Agrees with ISDC: Many Agencies Have Enhanced Their Suspension and Debarment Programs and Increased the Use of Suspension and Debarment Remedies*, Wiley Rein (Spring 2014), https://www.wileyrein.com/newsroom-newsletters-item-4988.html [https://perma.cc/BHS5-NPLQ] (detailing training materials available to SDOs).

270 The Department of Justice and several other agencies have created internal case tracking systems to manage case referrals. *See* U.S. Gov't Accountability Off., GAO-14-513, Federal Contracts and Grants: Agencies Have Taken Steps to Improve Suspension and Debarment Programs 6–8 (2014). The Office of Management and Budget could also provide periodic newsletters to all SDOs with advice from attorneys involved in recent court decisions, training tips, and any new initiatives.

271 *See* Robert F. Meunier & Trevor B.A. Nelson, *Is It Time for a Single Federal Suspension and Debarment Rule?*, 46 Pub. Cont. L.J. 553, 584 (2017).

process, but a majority of agencies have not exercised this option.[272] The Environmental Protection Agency is one of the few agencies to implement a discretionary internal administrative appeal.[273] Given that suspension and debarment determinations should be decided by an executive agency, an internal review can promote settlements and avoid litigation.[274] Providing SDOs with more detailed explanations of the requirements for suspension and debarment actions will help facilitate streamlined procedures, while also allowing adequate discretion.[275]

Conclusion

Suspensions and debarments are necessary to ensure that taxpayer dollars are not being abused. The increasing reliance on these tools has also demonstrated the courts' willingness to examine an agency's determination. As more contractors are willing to sue the government, many of the differences in agencies' interpretations and understandings of the FAR are coming to light. While some judicial scrutiny is necessary to ensure that agencies do not overstep their power, too much power in the judiciary may hinder an agency's ability to protect the government's interest—the very purpose of suspension and debarment. Although judicial scrutiny is helpful in ensuring that the procedural requirements of the FAR are complied with, courts should be cautious when second-guessing an agency's expertise. To help prevent the need for increased judicial scrutiny, it makes sense to provide in-depth training to all SDOs on the legal requirements of suspension and debarment.

272 *See id.*
273 *See id.*
274 *See id.*
275 *See id.*