

# Too Big to Obey: Why BP Should Be Debarred

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# TOO BIG TO OBEY: WHY BP SHOULD BE DEBARRED

RENA STEINZOR & ANNE HAVEMANN\*

## INTRODUCTION

The Louisiana coast, the Gulf of Mexico, and BP are slowly emerging from the aftermath of the biggest environmental disaster in American history: an eighty-seven-day, slow-motion, underwater spill that deposited an estimated 205 million gallons of crude oil into fragile ecosystems.<sup>1</sup> The spectacle of the damage caused by the huge spill and the company's increasingly desperate efforts to control it were alarming enough. As investigative reporters converged on the scene, an equally disconcerting history of corporate scofflaw on a national scale soon emerged.

An explosion killed fifteen and injured 180 at the company's Texas City refinery in July 2005.<sup>2</sup> The tragedy was preceded by ample warnings that maintenance, training, and front-line risk management at the plant were alarmingly deficient.<sup>3</sup> That same month, BP's \$5 billion dollar production platform, which was nicknamed "Thunder Horse," tipped at a sharp angle toward the sea because a valve was installed backwards.<sup>4</sup> A few months later, a 200,000 gallon oil spill—the biggest ever on Alaska's North Slope—was preceded by whistle blower reports that inspections and maintenance were erratic to the point of willful negligence.<sup>5</sup> The

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<sup>1</sup> See Maureen Hoch, *New Estimate Puts Gulf Oil Leak at 205 Million Gallons*, PBS NEWSHOUR: THE RUNDOWN NEWS BLOG (Aug. 2, 2010, 10:07 PM), <http://www.pbs.org/newshour/rundown/2010/08/new-estimate-puts-oil-leak-at-49-million-barrels.html>.

<sup>2</sup> For an in-depth report on the tragedy and what caused it, see U.S. CHEM. SAFETY & HAZARD INVESTIGATION BD., REPORT NO. 2005-04-ITX, INVESTIGATION REPORT: REFINERY EXPLOSION AND FIRE (15 KILLED, 180 INJURED) 17 (2007), available at <http://www.csb.gov/assets/document/CSBfinalReportBP.pdf>.

<sup>3</sup> See TELOS GRP., BP TEXAS CITY SITE REPORT OF FINDINGS: TEXAS CITY'S PROTECTION PERFORMANCE, BEHAVIORS, CULTURE, MANAGEMENT, AND LEADERSHIP (2005), available at <http://s3.documentcloud.org/documents/5170/the-telos-report.pdf> (unpublished confidential report).

<sup>4</sup> See Sarah Lyall et al., *In BP's Record, a History of Boldness and Costly Blunders*, N.Y. TIMES (July 13, 2010), <http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?pagewanted=print>.

<sup>5</sup> See Abraham Lustgarten, *Furious Growth and Cost Cuts Led to BP Accidents Past & Present*, PROPUBLICA (Oct. 26, 2010), <http://www.propublica.org/article/bp-accidents-past-and-present>.

company settled criminal charges with the government but its performance was so poor in subsequent years that the government moved to revoke its probation.<sup>6</sup> Regarded as a rogue even by its oil industry compatriots,<sup>7</sup> BP was a company moving too fast to be bothered with what experts call a “safety culture” in any of its dangerous operations.<sup>8</sup> For years, it skipped past civil and criminal penalties, inflicting collateral damage on thousands of bystanders.

Lesson learned, crackdown coming? Hardly. To this day, BP remains the Pentagon’s largest supplier of jet and vehicle fuel, with government contracts valued at more than \$2.2 billion.<sup>9</sup> Any suggestion that the company could be debarred by the government’s biggest spender is summarily dismissed by expert observers, with Pentagon sources allegedly asserting that debarring BP would jeopardize fuel supplies needed by combat units in the Middle East.<sup>10</sup>

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<sup>6</sup> See Jason Leopold, *BP Still Being Awarded Lucrative Government Contracts*, TRUTHOUT (Apr. 21, 2011), <http://www.truth-out.org/bp-still-being-awarded-lucrative-government-contracts>.

<sup>7</sup> The world’s largest oil companies have taken the position that BP is, in essence, a rogue company that mishandled the drilling of the Macondo well that was the source of the disaster. John M. Broder, *Oil Executives Break Ranks in Testimony*, N.Y. TIMES, June 15, 2010, at A20 (“The chairmen of four of the world’s largest oil companies broke their nearly two-month silence on the major spill in the Gulf of Mexico on Tuesday and publicly blamed BP for mishandling the well that caused the disaster. Seeking to insulate their companies from the continuing crisis in the gulf and the political backlash in Washington, the leaders of Exxon Mobil, Chevron, Shell and ConocoPhillips insisted at a Congressional hearing that they would not have made the mistakes that led to the well explosion and the deaths of 11 rig workers on April 20.”). The special commission appointed by President Obama to investigate the spill disagreed with their diagnosis. NAT’L COMM’N ON THE BP DEEPWATER HORIZON SPILL & OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 122 (2011) [hereinafter GULF OIL SPILL COMMISSION REPORT] (“The blowout was not the product of . . . aberrational decisions made by rogue industry or government officials. . . . [T]he root causes are systemic and, absent significant reform . . . , might well recur. The missteps were rooted in systemic failures by industry management (extending beyond BP to contractors that serve many in the industry), and also by failures of government to provide effective regulatory oversight.”).

<sup>8</sup> See generally ANDREW HOPKINS, SAFETY, CULTURE, AND RISK, THE ORGANIZATIONAL CAUSES OF DISASTERS (2005) (discussing how it is the failure of companies and organizations, not individuals, and their view of safety management that causes major disasters in mines, chemical plants, etc.).

<sup>9</sup> Ben Rooney, *BP Still a Top Supplier to U.S. Military*, CNN MONEY (July 15, 2010, 11:25 AM), [http://www.money.cnn.com/2010/07/15/news/companies/BP\\_government\\_contracts/index.htm](http://www.money.cnn.com/2010/07/15/news/companies/BP_government_contracts/index.htm).

<sup>10</sup> See R. Jeffrey Smith, *BP Still Does Big Federal Business*, WASH. POST, July 5, 2010, at A1, A3 (however, the Department of Defense officially says “that there are adequate procedures and processes to protect the U.S. military missions should EPA determine that BP should be debarred.”).

In theory at least, the U.S. government does business only with firms considered “responsible” under the law.<sup>11</sup> Chronic malfeasance should trigger debarment and some statutes, including the Clean Air and Clean Water Acts, provide for immediate suspension for government contractors.<sup>12</sup>

Debarment, referred to as the “nuclear option” by pundits,<sup>13</sup> is explicitly limited in purpose to the protection of the public interest and cannot be used to “punish” contractors.<sup>14</sup> Perhaps because of this perplexing rule, debarment does not seem to worry the Fortune 500 corporations that dominate Department of Defense (“DOD”) purchase orders. Studies by the Government Accountability Office (“GAO”) and the Project on Government Oversight (“POGO”), a Washington-based public interest group, have documented the unfortunate truth that small contractors are much more likely to be suspended or debarred than large ones, no matter how egregious the latter’s behavior, rendering the process a pale carbon copy of what Congress intended it to be.<sup>15</sup>

In the context of BP, this Article asks whether the nation can tolerate the emerging reality that some firms are too big to suffer this powerful consequence of breaking the law, even if violations occur multiple times, with appalling consequences. If ever a company deserved to be debarred, it is BP. Conversely, if BP avoids government-wide debarment, the inescapable message will be that the U.S. government is not serious about this remedy and is willing to do business with any large corporation, no matter how irresponsible it may be. Over the last two decades, Fortune 500 companies with disgraceful track records have continued to do business with the government, avoiding debarment without taking effective

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<sup>11</sup> Federal Acquisition Regulations System, 48 C.F.R. § 9.402(a) (2010) (“Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.”).

<sup>12</sup> See, e.g., Clean Water Act, 33 U.S.C. § 1368 (2006); Clean Air Act, 42 U.S.C. § 7606 (2006).

<sup>13</sup> See Larry Kudlow, *Will Obama Go Nuclear on BP Tonight?*, NAT’L REV. ONLINE (June 15, 2010, 4:21 PM), <http://www.nationalreview.com/kudlows-money-politics/204230/will-obama-go-nuclear-bp-tonight>.

<sup>14</sup> See 48 C.F.R. § 9.402(b) (2010).

<sup>15</sup> See, e.g., *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, PROJECT ON GOV’T OVERSIGHT, at “Uneven Playing Field” (May 10, 2002), <http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html>; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-374, FEDERAL CONTRACTORS: BETTER PERFORMANCE INFORMATION NEEDED TO SUPPORT AGENCY CONTRACT AWARD DECISIONS 6, 8–10 (2009), available at <http://www.gao.gov/new.items/d09374.pdf> [hereinafter PERFORMANCE INFORMATION REPORT]; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-479, FEDERAL PROCUREMENT: ADDITIONAL DATA REPORTING COULD IMPROVE THE SUSPENSION AND DEBARMENT PROCESS 12–14 (2005), available at <http://www.gao.gov/new.items/d05479.pdf> [hereinafter FEDERAL PROCUREMENT REPORT].

action to remedy violations.<sup>16</sup> The root of this problem is DOD, which spends more money on contractors than any other agency or department and consequently holds the whip hand on government-wide debarment.<sup>17</sup> The threat of debarment conceivably is used behind-the-scenes as a threat to provoke settlement on less drastic terms. Given the confidentiality surrounding the settlement of government enforcement actions, we cannot know. But without routine, public enforcement of this powerful tool, that threat is likely to have lost its potency long ago.

Part I reviews the legal elements of debarment and suspension. Part II applies these provisions to what we know of the BP saga. Part III examines the problems that plague the system as a whole and proposes solutions that would strengthen debarment and suspension substance and procedure, returning it to its rightful place as a major factor in deterring lawbreaking by federal contractors.

## I. DEBARMENT AND SUSPENSION LAW

### A. *Overview*

Debarment and suspension (commonly referred to as “exclusion”) are available to all government agencies to ensure that they only enter into financial relationships with “responsible” contractors.<sup>18</sup> Suspension often precedes debarment and generally removes an entity’s eligibility for federal contracts for the duration of an investigation or litigation.<sup>19</sup> Debarment, which occurs after an entity is found liable of an offense covered by a statutory debarment provision or an agency determines that the contractor is not presently responsible,<sup>20</sup> removes the entity’s eligibility for a fixed period of time, generally no longer than three years.<sup>21</sup>

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<sup>16</sup> See *Federal Contractor Misconduct*, *supra* note 15, at “Repeat Offenders.” General Electric, Boeing, Lockheed Martin, Raytheon, and Fluor are all Fortune 500 companies. See *Fortune 500—Our Annual Ranking of America’s Largest Corporations*, FORTUNE ON CNNMONEY.COM, [http://money.cnn.com/magazines/fortune/fortune500/2011/full\\_list/index.html](http://money.cnn.com/magazines/fortune/fortune500/2011/full_list/index.html) (last visited Oct. 31, 2011).

<sup>17</sup> See *Summaries—Prime Award Spending Data By Agency*, USAspending.gov, <http://www.usaspending.gov/explore?carryfilters=on> (Select only “contracts” as spending type to view) (last visited Oct. 31, 2011).

<sup>18</sup> See 2 C.F.R. § 180.125(a) (2011); 48 C.F.R. § 9.402(a) (2010).

<sup>19</sup> See 2 C.F.R. § 180.605 (2011); 48 C.F.R. § 9.407-3 (2010).

<sup>20</sup> See 48 C.F.R. § 9.406-2 (2010); *Burke v. U.S. Envtl. Prot. Agency*, 127 F. Supp. 2d 235, 239 (D.D.C. 2001).

<sup>21</sup> See 2 C.F.R. § 180.865 (2011); 48 C.F.R. § 9.406-4 (2010).

Agencies have the authority to exclude entities when they have violated specific statutes or when they have breached administrative rules governing federal procurement and assistance programs. Statutes such as the Clean Air (“CAA”) and Clean Water (“CWA”) Acts trigger automatic disqualification for contractors who are found to have engaged in prohibited conduct.<sup>22</sup> In addition to these statutory debarments, federal agencies may exclude entities from contracting with or receiving assistance from the federal government pursuant to administrative rules. Government procurement is regulated by the Federal Acquisition Regulations (“FAR”) Subpart 9.4.<sup>23</sup> Non-procurement spending, such as grants, loans, and other federal assistance programs, is regulated in accordance with administrative guidance promulgated by the Office of Management and Budget.<sup>24</sup> This Article focuses solely on the first category: exclusion of companies hired by the federal government to accomplish a task or perform a service.

Most exclusions apply government-wide.<sup>25</sup> Excluded contractors and participants in federal assistance programs are listed in the Excluded Parties List System (“EPLS”).<sup>26</sup> Agencies may only contract with excluded contractors by granting them a waiver<sup>27</sup> or entering into an administrative agreement that requires them to remedy the underlying practices that make debarment appropriate.<sup>28</sup>

The fundamental paradox of debarment is that agencies cannot exclude a contractor “for purposes of punishment” and instead must find the action necessary to protect the “public interest.”<sup>29</sup> Because debarment is regarded as the ultimate punishment by everyone involved in the system,

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<sup>22</sup> See Clean Water Act, 33 U.S.C. § 1368 (2006); Clean Air Act, 42 U.S.C. § 7606 (2006).

<sup>23</sup> See 48 C.F.R. § 9.400 (2010).

<sup>24</sup> See 2 C.F.R. § 180.500 (2010).

<sup>25</sup> See 48 C.F.R. § 9.406-1(c) (2010) (debarment); 48 C.F.R. § 9.407-1(d) (2010) (suspension).

<sup>26</sup> See 48 C.F.R. § 9.404(b) (2010).

<sup>27</sup> See 48 C.F.R. § 9.406-1(c) (debarment); 48 C.F.R. § 9.407-1(d) (suspension).

<sup>28</sup> While the FAR does not explicitly authorize such agreements, they fall within agencies’ general authority to determine with whom and on what terms they contract. 48 C.F.R. § 1.601(a) (2010) (“Unless specifically prohibited by another provision of law, authority and responsibility to contract . . . are vested in the agency head.”).

<sup>29</sup> 48 C.F.R. § 9.402(b) (2010) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment.”). Mandatory statutory debarments do not contain similar public interest requirements. See 2 C.F.R. § 1532.1120 (2011) (“[T]he purpose of CAA and CWA disqualification is to enforce the Federal Government’s policy of undertaking Federal procurement and nonprocurement activities in a manner that improves and enhances environmental quality by promoting effective enforcement of the CAA or CWA.”).

the line between the two conditions provides ample excuse to avoid an affirmative finding against the contractor. To compound this confusion, the FAR does not define the term "public interest." Instead, two additional findings must support a debarment decision: (1) whether a cause for debarment exists under the FAR<sup>30</sup> and (2) whether the contractor is able to demonstrate that it has the *present* capacity to be responsible.<sup>31</sup> "Responsible" contractors must have a "satisfactory record of integrity and business ethics."<sup>32</sup>

Because the purpose of exclusion is to ensure that the government only transacts with responsible parties,<sup>33</sup> past transgressions may not be enough to demonstrate a lack of "present" responsibility.<sup>34</sup> Determinations of the public interest are two-dimensional and must encompass the safeguarding of public funds by excluding parties who are not responsible, while at the same time allowing contractors who are presently responsible to compete.<sup>35</sup> Debarment officials must also consider the seriousness and nature of past or present violations, including the possibility of

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<sup>30</sup> See 48 C.F.R. §§ 9.406-2(a) to (c) (2010).

<sup>31</sup> See 48 C.F.R. § 9.406-1(a) (2010) ("[T]he contractor has the burden of demonstrating . . . its present responsibility and that debarment is not necessary.").

<sup>32</sup> 48 C.F.R. § 9.104-1 (2010). As an example of how to determine when a contractor demonstrates a satisfactory record, the circular FAR directs contracting officers to section 42.1501, which instructs them to consider, among other things, "the contractor's record of integrity and business ethics." 48 C.F.R. § 42.1501 (2010). A "contractor responsibility" rule, which the Clinton administration proposed in July 1999, clarified that one element of a "[s]atisfactory record of integrity and business ethics" is compliance with the law. Federal Acquisition Regulation; Contractor Responsibility, 64 Fed. Reg. 37,359, 37,360 (proposed July 9, 1999). The rule was adopted in 2000. See Federal Acquisition Regulation; Contractor Responsibility, 65 Fed. Reg. 80,255, 80,256 (Dec. 20, 2000). Shortly after coming into office, President Bush revoked the clarifying rule. See Federal Acquisition Regulation; Contractor Responsibility, 66 Fed. Reg. 17,758 (proposed Apr. 3, 2001). As a result, the responsibility determination is not the thorough pre-screening exercise it was intended to be. See David Madland & Karla Walter, *Rein in Irresponsible Oil Drillers*, CTR. FOR AM. PROGRESS (June 3, 2010), [http://www.americanprogressaction.org/issues/2010/06/bp\\_contracts.html](http://www.americanprogressaction.org/issues/2010/06/bp_contracts.html).

<sup>33</sup> See 48 C.F.R. § 9.402(a) (2010).

<sup>34</sup> See *Burke v. U.S. Envtl. Prot. Agency*, 127 F. Supp. 2d 235, 239 (D.D.C. 2001) ("The initiation of a debarment proceeding requires the existence of past misconduct; however, the final decision to debar an individual must focus on that individual's present business responsibility."); see also *Shane Meat Co. v. U.S. Dep't of Def.*, 800 F.2d 334, 338 (3d Cir. 1986) ("A criminal sentence constitutes punishment for *past* wrongdoing. In contrast, a debarment is designed to insure the integrity of government contracts in the immediate present and into the future.").

<sup>35</sup> See *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964) ("Disqualification from bidding or contracting . . . directs the power and prestige of the government at a particular person and . . . may have a serious economic impact on that person.").

underlying intention, the contractor's remedial efforts, and the effect of such efforts.<sup>36</sup>

*B. Five Elements*

Five elements comprise procurement exclusions: (1) whether exclusion is mandatory or discretionary; (2) the grounds for exclusion; (3) the consequences of exclusion; (4) the availability of waivers to prevent exclusion; and (5) the duration of the exclusion.

1. Mandatory Versus Discretionary

Twelve federal statutes and one executive order include provisions specifying that parties who engage in certain conduct shall or may be excluded from future dealings with the federal government.<sup>37</sup> Although executive orders are not statutes, the terms “statutory debarment” and “statutory suspension” are used to refer to exclusions that result from such orders in order to distinguish them from exclusions authorized by administrative rules.<sup>38</sup> Persons identified by statute—often the head of an agency or department—make the debarment and suspension determination.<sup>39</sup> Of

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<sup>36</sup> See *Fed. Food Serv., Inc. v. Donovan*, 658 F.2d 830, 833 (D.C. Cir. 1981) (explaining that agencies must consider the seriousness of the contractor's past transgression(s) and whether the contractor acted willfully); *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989) (“[T]he contractor can meet the test of present responsibility by demonstrating that it has taken steps to ensure that the wrongful acts will not recur.”). The regulations require debarment and suspending officials to consider certain mitigating factors. See 48 C.F.R. §§ 9.406-1(a)(1) to (10) (2010). Examples of mitigating factors include (1) whether the contractor brought the activity cited as a cause for debarment to the attention of the government in a timely manner; (2) whether the contractor instituted new procedures and training programs; and (3) whether the contractor has taken other remedial measures. See *id.*

<sup>37</sup> The twelve statutory provisions that discuss debarment are: (1) Buy American Act, 41 U.S.C.A. § 8303 (2011); (2) Clean Air Act, 42 U.S.C. § 7606 (2006); (3) Clean Water Act, 33 U.S.C. § 1368 (2006); (4) Davis-Bacon Act, 40 U.S.C.A. § 31449(b) (2002); (5) Drug-Free Workplace Act of 1988, 41 U.S.C. § 701(a)(2) (2006); (6) Exec. Order No. 11,246, 3 C.F.R. 167, 174 (1964–1965), *as amended*; (7) Military Recruiting on Campus, 10 U.S.C. § 983(b) (2006); 48 C.F.R. § 209.470-2 (2010); (8) Service Contract Act, 41 U.S.C. § 354(a) (2006); (9) Walsh-Healey Act, 41 U.S.C. § 37 (2006); (10) Sudan Accountability and Divestment Act, Pub. L. No. 110-174, 121 Stat. 2516, 2521 (2007); (11) 21 U.S.C. § 862 (2006); and (12) 10 U.S.C. § 2408(a) (2006).

<sup>38</sup> See KATE M. MANUEL, CONG. RESEARCH SERV., RL 34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 2 (2011).

<sup>39</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7606 (2006) (EPA Administrator to debar contractors for certain violations of the Clean Air Act).



the twelve statutes and executive orders that provide for exclusion, nine provide for mandatory exclusion, including the CAA and CWA,<sup>40</sup> and three leave the decision up to the discretion of the designated official.<sup>41</sup>

Statutory exclusions usually require that the excluded party be convicted of wrongdoing, but a few authorize designated officials to issue administrative findings triggering the sanction.<sup>42</sup> For example, the mandatory exclusion provisions of the Clean Water Act and the Clean Air Act kick in automatically only after a conviction or a guilty plea.<sup>43</sup> In contrast, the Walsh-Healey Act, which governs workplace conditions and wages, grants the agency head, in this case the Secretary of Labor, the authority to make an administrative finding that persons or firms violated workplace-standard laws.<sup>44</sup>

In addition to statutory exclusions, agencies and departments may also exclude contractors under the Federal Acquisition Regulations, which provide authority for agencies or departments to debar and suspend contractors from future executive branch contracts.<sup>45</sup> Exclusion is carried out either by the agency head or a designee authorized by the agency head.<sup>46</sup> Unlike most statutory debarments, FAR debarments and suspension are discretionary.<sup>47</sup>

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<sup>40</sup> The nine statutory provisions that mandate debarment are: (1) Buy American Act, 41 U.S.C.A. § 8303 (2011); (2) Clean Air Act, 42 U.S.C. § 7606 (2006); (3) Clean Water Act, 33 U.S.C. § 1368 (2006); (4) Davis-Bacon Act, 40 U.S.C.A. § 3144 (2002); (5) Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (2006); (6) Military Recruiting on Campus, 10 U.S.C. § 983 (2006); 48 C.F.R. § 209.470 (2010); (7) Service Contract Act, 41 U.S.C. § 354 (2006); (8) Walsh-Healey Act, 41 U.S.C. § 37 (2006); and (9) 10 U.S.C. § 2408 (2006).

<sup>41</sup> Exec. Order No. 11,246, 3 C.F.R. 167, 174 (1964–1965), *as amended* (concerning equal employment opportunity and affirmative action requirements); Sudan Accountability and Divestment Act, Pub. L. No. 110-174, 121 Stat 2516, 2521 (2007); and 21 U.S.C. § 862 (2006) (regulating the distribution of controlled substances).

<sup>42</sup> Compare 21 U.S.C. § 862(a)(1) (2006) (debarment based on conviction), with 41 U.S.C. § 10b(b) (debarment based on agency head's findings).

<sup>43</sup> Pursuant to the Clean Water Act, “[n]o Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title . . . .” Clean Water Act § 1368(a). Pursuant to the Clean Air Act, “[n]o Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title . . . .” Clean Air Act § 7606(a) (2006). The offenses triggering automatic exclusion can be found at Clean Water Act § 1319(c) (2006) and Clean Air Act § 7413(c).

<sup>44</sup> See 41 U.S.C. § 37 (2006). Pursuant to the Walsh-Healey Act, the Secretary of Labor may find—and thus exclude—a person or firm that has maintained hazardous working conditions, failed to pay minimum wage, used child labor, or required mandatory and uncompensated overtime. 41 U.S.C. § 35 (2006).

<sup>45</sup> See 48 C.F.R. § 9.400 (2010).

<sup>46</sup> See 48 C.F.R. § 9.403.

<sup>47</sup> See 48 C.F.R. § 9.402(a) (“Debarment and suspension are discretionary actions.”).

## 2. Grounds

Grounds for statutory exclusions are delineated by each individual statute.<sup>48</sup> Under the CWA, the offenses triggering automatic exclusion include an unpermitted discharge of any pollutant into the waters of the United States; a discharge of any pollutant into a publicly owned treatment works in violation of a pre-treatment standard; or the introduction into a public owned treatment works of a pollutant or hazardous substance with knowledge that the substance could cause personal injury or property damage.<sup>49</sup> Prohibited acts under the CAA include violating new source performance standards, violating any requirements of state implementation plans, violating emission standards for various new and old sources, and releasing designated hazardous air pollutants in disregard of emissions standards.<sup>50</sup> Pursuant to the Walsh-Healey Act, the Secretary of Labor may find—and thus exclude—a person or firm that has maintained hazardous working conditions, failed to pay minimum wage, used child labor, or required mandatory and uncompensated overtime.<sup>51</sup>

Under the FAR, debarment may be imposed when a contractor is convicted of or found civilly liable for an integrity offense.<sup>52</sup> Adequate evidence of an “integrity offense”—an indictment, for example—may result in suspension.<sup>53</sup> Debarment may also be imposed when government officials find, by a preponderance of the evidence, that the contractor committed certain offenses, such as serious violations of the terms of a government contract, unfair trade practices, or failure to pay federal taxes.<sup>54</sup> Finally, the “catch-all” provision of the FAR allows debarment and suspension “based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”<sup>55</sup> Where grounds for debarment or suspension exist, the designated debarment official at *any*

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<sup>48</sup> See, e.g., Clean Water Act § 1368(a) (“No Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title . . .”).

<sup>49</sup> See Clean Water Act §§ 1319(c)(1) to (2). Violations occur when the actor acts negligently or knowingly. See *id.*

<sup>50</sup> See Clean Air Act, 42 U.S.C. § 7413(c) (2006). An actor must act knowingly for a violation to occur. See *id.*

<sup>51</sup> See Walsh-Healey Act, 41 U.S.C. § 35 (2006).

<sup>52</sup> See 48 C.F.R. § 9.406-2(a) (2010) for a full list of integrity offenses. They include acts such as “embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property.” 48 C.F.R. § 9.406-2(a)(3).

<sup>53</sup> See 48 C.F.R. §§ 9.407-2(a) to (b).

<sup>54</sup> See 48 C.F.R. §§ 9.406-2(b)(1) to (2) for a full list of qualifying offenses.

<sup>55</sup> 48 C.F.R. § 9.406-2(c) (debarment); 48 C.F.R. § 9.407-2(c) (suspension).

agency or department may act to exclude the contractor, although such proceedings are typically initiated by the government entity that wrote the initial contract.<sup>56</sup> This provision means, however, that the EPA has the authority to initiate debarment or suspension with respect to BP's contracts with the Pentagon.<sup>57</sup>

Conduct by a contractor's officers, directors, shareholders, partners, employees, or other associates that warrants debarment or suspension can be imputed to the contractor, and vice versa when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence.<sup>58</sup>

### 3. Consequences

While statutory exclusions generally apply government-wide, some limit the scope of the exclusion to only certain types of contractors or interactions with specified agencies.<sup>59</sup> Others limit the exclusion to the facility that gave rise to the conviction. So, for example, under the CWA and CAA, only the facility at which the violation occurred is excluded from contracting with the federal government.<sup>60</sup> Exclusion under the Walsh-Healey Act, on the other hand, is not limited to the facility at which the violation occurred.<sup>61</sup> A suspension or debarment under the FAR is effective throughout the executive branch and applies to all divisions or other organizational elements of an entity unless otherwise specified.<sup>62</sup>

Once excluded, a company is listed in the EPLS or its statutory equivalent.<sup>63</sup> EPLS is overseen by the General Services Administration

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<sup>56</sup> See 48 C.F.R. § 9.402(d) (2010) (describing the procedures when more than one agency has an interest in the debarment or suspension of a contractor).

<sup>57</sup> See, e.g., *EPA Lifts Temporary Suspension of IBM for Misconduct on Agency Contract Bid*, 89 Fed. Cont. Rep. (BNA) No. 89, at 371 (Apr. 8, 2008) (EPA suspended IBM because of its alleged misconduct when bidding on an EPA contract. At the time, IBM had contracts with numerous other federal agencies.).

<sup>58</sup> See 48 C.F.R. §§ 9.406-5(a) to (c) (2010).

<sup>59</sup> See, e.g., *Military Recruiting on Campus*, 10 U.S.C. § 983 (2004) (debarment for institutions of higher learning only); 48 C.F.R. § 209.470 (2010) (same); 10 U.S.C. § 2408 (2006) (debarment from Department of Defense contracts only).

<sup>60</sup> See Clean Water Act, 33 U.S.C. § 1368(a) (2006); Clean Air Act, 42 U.S.C. § 7606(a) (2006). However, the 1990 amendments to the Clean Air Act gave the Administrator discretion to extend the ban on contracts to other facilities owned or operated by the convicted person. See Clean Air Act § 7606(a).

<sup>61</sup> See Walsh-Healey Act, 41 U.S.C. § 37 (2006).

<sup>62</sup> See 48 C.F.R. §§ 9.406-1(b) to (c) (2010).

<sup>63</sup> See 48 C.F.R. § 9.404(c) (2010).

(“GSA”) and in theory contains the names and addresses of all contractors and persons that have been suspended, debarred, proposed to be debarred, or otherwise declared ineligible.<sup>64</sup> Because all excluded entities, no matter whether they are contractors or persons receiving federal assistance, are entered into EPLS, an entity excluded from contracting with the federal government will also be excluded from receiving assistance from the federal government, and vice versa.<sup>65</sup> In addition to EPLS, statutes that provide for exclusion generally direct an agency to maintain and distribute its own list of excluded parties.<sup>66</sup> For example, once a company or individual is convicted or settles a case under the CWA and CAA, the Environmental Protection Agency (“EPA”) must immediately list the offending facility or individual.<sup>67</sup> Under the Walsh-Healey Act, once the Secretary of Labor finds that an entity has violated certain workplace standards, the Comptroller General is directed to distribute a list of the violators to all federal agencies.<sup>68</sup>

#### 4. Waivers and Administrative Agreements

Because an excluded party is generally barred from contracting with the entire executive branch of the federal government, an agency may continue to do business with that party only if it determines that “compelling reasons” require granting it an exception (commonly known as

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<sup>64</sup> See 48 C.F.R. §§ 9.404(a) to (b); discussion *infra* Part III.C; see also INSPECTOR GEN., U.S. DEPT’ OF DEF., REPORT NO. D-2011-083, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS 19 (2011) (explaining that contracting officers occasionally receive no results from EPLS searches because of “typographical and user input errors”); see also FEDERAL PROCUREMENT REPORT, *supra* note 15, at 14 (explaining that incomplete or unreliable EPLS data make it difficult to identify excluded parties).

<sup>65</sup> See 2 C.F.R. § 180.140 (2010); 2 C.F.R. § 180.145 (2010).

<sup>66</sup> See, e.g., Walsh-Healey Act, 41 U.S.C. § 37 (2006) (“The Comptroller General is authorized and directed to distribute a list . . . containing the names of persons or firms found . . . to have breached any of the agreements or representations required . . .”).

<sup>67</sup> Until 1996, EPA administered the listing and debarment programs separately, maintaining a separate “List of Violating Facilities” for facilities and individuals barred from doing business with the federal government because of CAA and CWA convictions. DAVID R. WOOLEY & ELIZABETH MORSS, CLEAN AIR HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE § 11.18 (20th ed. 2010). Since then, EPA has merged the two and now incorporates its List of Violating Facilities into the EPLS. *Suspension and Debarment Program*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/ogd/sdd/debarment.htm> (last visited Oct. 31, 2011). An explanation of how EPA administers the “listing” provisions in both Acts can be found at 2 C.F.R. § 1532.1100 (2010).

<sup>68</sup> See Walsh-Healey Act § 37.

a waiver)<sup>69</sup> or by entering into an administrative agreement.<sup>70</sup> Most statutory debarment provisions allow for waivers, which vary in stringency.<sup>71</sup> Under the CWA and the CAA, for instance, only the President can waive an exclusion if he or she determines it is in the country's paramount interest and notifies Congress.<sup>72</sup> In contrast, the Walsh-Healey Act describes the Secretary of Labor's authority to grant waivers as a duty "when justice or the public interest will be served."<sup>73</sup>

The FAR allows an agency head to grant a waiver for a "compelling reason" but does not define the term.<sup>74</sup> Several agency-specific regulations list examples, including national defense,<sup>75</sup> "urgency" requiring award to the debarred firm,<sup>76</sup> availability of only one capable contractor,<sup>77</sup> or circumstances where "failure to contract with the debarred or suspended contractor would seriously harm the agency's programs and prevent accomplishment of mission requirements."<sup>78</sup>

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<sup>69</sup> See 48 C.F.R. § 9.406-1(c) (2010) ("A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless the agency head or a designee . . . states in writing the compelling reasons justifying continued business dealings between that agency and the contractor."); 48 C.F.R. § 9.407-1(d) (2010) (same for suspension).

<sup>70</sup> Administrative agreements fall within agencies' general authority to determine with whom and on what terms they contract. See 48 C.F.R. § 1.601(a) (2010) ("Unless specifically prohibited by another provision of law, authority and responsibility to contract . . . are vested in the agency head.").

<sup>71</sup> Compare Clean Water Act, 33 U.S.C. § 1368(d) (2006) (allowing the President to waive a debarment "in the paramount interests of the United States" with notice to Congress), with Davis-Bacon Act, 40 U.S.C.A. § 3144 (2011) (making no provisions for waiver).

<sup>72</sup> See Clean Water Act § 1368(d); Clean Air Act, 42 U.S.C. § 7606(d) (2006).

<sup>73</sup> 41 U.S.C. § 6508(a) (2011).

<sup>74</sup> See 48 C.F.R. §§ 9.405-1(b), 9.405-2(a), 9.406-1(c), 9.407-1(d) (2010).

<sup>75</sup> See Dep't of Def. Fed. Acquisition Reg. Supplement ("DFARS"), 48 C.F.R. § 209.405(a)(iv) (2010) ("The national defense requires continued business dealings with the debarred or suspended contractor.").

<sup>76</sup> See 48 C.F.R. § 209.405(a)(ii) ("Urgency requires contracting with a debarred or suspended contractor."); Dep't of Health & Human Servs. Acquisition Reg. ("HHSAR"), 48 C.F.R. § 309.405(a)(1)(ii) (2010) ("The urgency of the requirement dictates that HHS conduct business with the cited contractor.").

<sup>77</sup> See 48 C.F.R. § 309.405(a)(1)(I) (2010).

<sup>78</sup> Dep't of Agric. Acquisition Reg. ("AGAR"), 48 C.F.R. § 409.405 (2010); Nuclear Regulatory Comm'n Acquisition Reg. ("NRCAR"), 48 C.F.R. § 209.405 (2010). The Department of Energy further narrows the compelling reason exception by allowing the agency to disapprove of a debarred firm's choice of key federal personnel, for example, the contractor's choice regarding who at the federal agency will serve as principal investigator. See 48 C.F.R. § 909.405 (2010).

In addition to waivers, parties can avoid exclusion by participating in administrative agreements.<sup>79</sup> These agreements usually include an admission by the offending party regarding its wrongful conduct and provide for remedial measures, such as restitution, employee training, or other remedial measures.<sup>80</sup> The agency “reserves the right to impose additional sanctions, including debarment, if the contractor fails to abide by [its] agreement or engages in further misconduct.”<sup>81</sup> The FAR does not explicitly authorize such agreements, but they fall within agencies’ general authority to determine with whom and on what terms they contract.<sup>82</sup> Administrative agreements are recorded in the Federal Awardee Performance Integrity Information System (“FAPIIS”).<sup>83</sup>

## 5. Length of Exclusion

For statutory exclusions, the disqualification generally lasts until a designated official finds that the contractor has ceased the conduct that constituted its violation of the statute.<sup>84</sup> Under the CWA and CAA, for instance, the facility or individual remains disqualified until the EPA Administrator certifies that the condition giving rise to the conviction has been corrected.<sup>85</sup> Pursuant to the Walsh-Healey Act, exclusion lasts for three years, unless the Secretary recommends otherwise.<sup>86</sup> According to the FAR, debarments last for a period “commensurate with the seriousness of the cause,” generally not exceeding three years.<sup>87</sup> Suspension

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<sup>79</sup> See Memorandum from Paul A. Denett, Adm’r for Fed. Procurement Pol’y, & Linda M. Combs, Controller, Office of Fed. Fin. Mgmt. on Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations, to the Heads of Departments and Agencies (Aug. 31, 2006), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/m06-26.pdf> (“Agencies sometimes enter into administrative agreements with contractors and grant recipients as an alternative to suspension or debarment from doing business with the Federal government.”).

<sup>80</sup> See MANUEL, *supra* note 38, at 9.

<sup>81</sup> *Id.*

<sup>82</sup> See 48 C.F.R. § 1.601(a) (2010) (“Unless specifically prohibited by another provision of law, authority and responsibility to contract . . . are vested in the agency head.”).

<sup>83</sup> Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, 41 U.S.C. § 2313 (2011); FED. AWARDEE PERFORMANCE AND INTEGRITY INFO. SYS., <http://www.fapiis.gov> (last visited Oct. 31, 2011).

<sup>84</sup> Compare Drug-Free Workplace Act of 1988, 41 U.S.C. § 701(b)(3) (2006) (providing for debarment for up to five years), with Clean Water Act, 33 U.S.C. § 1368 (2006) (suspensions for certain violations of the Clean Water Act end when an official “certifies . . . condition giving rise to such conviction has been corrected”).

<sup>85</sup> See Clean Water Act § 1368(a) (2006); Clean Air Act § 7606(a) (2006).

<sup>86</sup> See Walsh-Healey Act, 41 U.S.C. § 37 (2006).

<sup>87</sup> See 48 C.F.R. § 9.406-4(a)(1) (2010). The FAR allows debarring officials to extend the debarment for an additional period if they determine that an extension is necessary to

lasts only as long as an agency's investigation of the conduct for which the contractor was suspended, or any ensuing legal proceedings, but generally may not exceed eighteen months.<sup>88</sup>

## 6. Grounds for Appeal

To successfully appeal exclusions, contractors must either satisfy the rigorous "arbitrary and capricious" standard of review under the Administrative Procedure Act ("APA")<sup>89</sup> or demonstrate that the procedures followed denied them constitutional due process.<sup>90</sup> APA judicial review provisions require a court to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>91</sup> A court is not permitted to substitute its judgment for the agency's judgment.<sup>92</sup> Thus, when cause for suspension or debarment exists, courts should defer to the agency's decision on whether to impose the sanction and the severity of the sanction.<sup>93</sup> Courts should consider 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."<sup>94</sup>

Courts will reverse sanctions that do not bear a rational relationship to the facts found,<sup>95</sup> or where the government has failed to consider all of the relevant factors in imposing the sanction.<sup>96</sup> Courts are particularly inclined to find that an agency's exclusion determination violates

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protect the government's interests. *See* 48 C.F.R. § 9.406-4(b). However, an extension cannot be based solely upon the facts and circumstances upon which the initial debarment was based. *See id.*

<sup>88</sup> *See* 48 C.F.R. § 9.407-4 (2010).

<sup>89</sup> *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

<sup>90</sup> *See* U.S. CONST. amend. V.

<sup>91</sup> Administrative Procedure Act § 706(2)(A) (2006).

<sup>92</sup> *See* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated* by *Califano v. Sanders*, 430 U.S. 99 (1977).

<sup>93</sup> *See* *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (explaining that an agency's interpretation of its own regulations is entitled to considerable deference).

<sup>94</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

<sup>95</sup> *See, e.g.,* *Caiola v. Carroll*, 851 F.2d 395, 399–401 (D.C. Cir. 1988) (noting that the facts did not support the debarring official's decision to debar two officers, on the basis that they had reason to know of the corporation's criminal conduct, but not the treasurer of the corporation who also had reason to know of the conduct).

<sup>96</sup> *See, e.g.,* *Shane Meat Co. v. Dep't. of Def.*, 800 F.2d 334, 337 (3d Cir. 1986) (noting that because the debarring official took the necessary mitigating factors into account, the debarment was not arbitrary and capricious).

the APA if the agency had previously awarded contracts to the contractor, despite being aware of the circumstances that ultimately caused it to exclude that same contractor.<sup>97</sup>

In addition to challenges under the APA, a contractor or participant that was excluded under a discretionary provision can challenge an agency's decision on constitutional due-process grounds.<sup>98</sup> Pursuant to the Fifth Amendment of the United States Constitution, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>99</sup> Courts have found that parties do not have a right to do business with the government and thus have no constitutionally protected property interest.<sup>100</sup> However, they have also said that contractors have a "liberty interest" in continuing to do business with the government except for just cause.<sup>101</sup>

Through various decisions, courts have determined that contractors and participants cannot be excluded without certain procedural safeguards.<sup>102</sup> Parties must receive notice, which must be sufficiently specific to enable the party to collect and present relevant evidence on his or her behalf.<sup>103</sup> In exceptional circumstances, a party may be suspended temporarily pending an investigation without providing notice and a

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<sup>97</sup> See, e.g., *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238, 247–48 (2001) (holding that an agency had acted arbitrarily and capriciously when it suspended a contractor based on circumstances that the agency had been aware of when it awarded it five separate contracts).

<sup>98</sup> See, e.g., *Gonzalez v. Freeman*, 334 F.2d 570, 575 (D.C. Cir. 1964); *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 964 (D.C. Cir. 1980); see also 2 C.F.R. § 1532.1200 (2008) (explaining that a party is "legally on notice by the statutes that a criminal conviction [under] the CAA or CWA" triggers automatic disqualification).

<sup>99</sup> U.S. CONST. amend. V.

<sup>100</sup> See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (government contracting is a privilege, not a right).

<sup>101</sup> See *Gonzalez*, 334 F.2d at 574 (explaining that the government cannot act arbitrarily against an entity when debarring it from government contracts); see also *Old Dominion Dairy Prods.*, 631 F.2d at 962 (noting that it is not entitlement to a government contract which gives a government contractor standing to challenge its debarment, but rather, its right to liberty, including the right to contract and to engage in the common occupation of life). A subsequent decision by the D.C. Circuit held that contractors are also entitled to due process in suspension determinations. See *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1971).

<sup>102</sup> See *Transco Sec., Inc. of Ohio v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981).

<sup>103</sup> See, e.g., *Horne Bros.*, 463 F.2d at 1271 ("[F]airness requires that the bidder be given specific notice. . . ."); *Transco Sec., Inc.*, 639 F.2d at 324 ("[D]ue process . . . required notice sufficiently specific to enable appellants to marshal evidence in their behalf so as to make the subsequent opportunity for an administrative hearing a meaningful one.").



hearing.<sup>104</sup> The period of such a temporary suspension should not exceed thirty days.<sup>105</sup> Once notified, the party then is granted an opportunity to rebut those charges, and, under some circumstances, a hearing.<sup>106</sup>

Acknowledging the flexible nature of due process, the Supreme Court in *Mathews v. Eldridge*<sup>107</sup> established a balancing test to guide courts in assessing administrative actions, including debarments.<sup>108</sup> The balancing test requires courts to consider three distinct factors: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>109</sup>

Courts apply the *Mathews v. Eldridge* balancing test to determine whether the process afforded the suspended or debarred contractor was constitutionally sufficient.<sup>110</sup> In response to these court decisions, regulations governing debarment today require that the debarring official notify the contractor or participant of its proposed debarment before it is debarred.<sup>111</sup> Suspension regulations, on the other hand, only require notice after the suspension has been imposed, so long as the notice is “immediate.”<sup>112</sup> Both debarment and suspension regulations provide that every party has the right to submit, in person, in writing, or through a representative, information and argument in opposition to the exclusion within thirty days of the receipt of notice.<sup>113</sup> To determine whether a hearing

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<sup>104</sup> See *Horne Bros.*, 463 F.2d at 1271.

<sup>105</sup> See *id.* at 1272.

<sup>106</sup> See *Transco Sec., Inc.*, 639 F.2d at 321 (“[P]rocedural safeguards includ[e] . . . an opportunity to rebut th[e] charges, and, under most circumstances, a hearing.”); see also *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (explaining that the opportunity for hearing must be “appropriate to the nature of the case”) (citation omitted).

<sup>107</sup> 424 U.S. 319 (1976).

<sup>108</sup> See *id.* at 334–35.

<sup>109</sup> *Id.* at 335.

<sup>110</sup> See, e.g., *ATL, Inc. v. United States*, 736 F.2d 677, 682–84, 687 (Fed. Cir. 1984) (explaining that courts must weigh three factors in their due process balancing analysis); *Old Dominion Dairy Prods. v. Sec’y of Def.*, 631 F.2d 953, 967 (D.C. Cir. 1980) (“[T]o identify the specific dictates of due process, three distinct factors must be considered . . .”).

<sup>111</sup> See 48 C.F.R. § 9.406-3(c) (2010) (“A notice of proposed debarment shall be issued by the debarring official . . .”).

<sup>112</sup> See 48 C.F.R. § 9.407-3(c) (2010) (“When a contractor and any specifically named affiliates are suspended, they shall be immediately advised . . .”).

<sup>113</sup> See 48 C.F.R. §§ 9.406-3(c)(4) (2010) (debarment), 9.407-3(c)(5) (2010) (suspension).

is necessary, courts apply the *Mathews v. Eldridge* balancing test.<sup>114</sup> Exclusion on the basis of a conviction or civil judgment does not require a fact-finding hearing,<sup>115</sup> and when a hearing is granted, it is informal.<sup>116</sup>

The judicially created doctrine of *de facto* debarment can also serve to protect parties from improper exclusion. Adverse agency action that effectively debars a contractor from government contract work without the required notice and opportunity to be heard constitutes *de facto* debarment and violates due process.<sup>117</sup> The *de facto* debarment analysis focuses mainly on conduct outside the debarment and suspension process that has the effect of excluding contractors, such as informal blacklisting of specific firms.<sup>118</sup> In addition to constitutional and APA challenges, contractors may also object to punitive exclusions under the FAR. Because administrative debarments and suspensions are meant to protect the public interest, not to punish, courts overturn discretionary debarments that they perceive to be punitive.<sup>119</sup>

## II. THE EXCLUSION OF BP

### A. *A Decade of Fiascos*

As the Gulf spill became a fixture of the nightly news, investigative reporters across the country began delving into BP's environmental and worker-safety track record in the United States in an effort to understand the corporate actor at the center of catastrophe on an unprecedented scale.

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<sup>114</sup> See *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 322 (6th Cir. 1981).

<sup>115</sup> See 48 C.F.R. §§ 9.406-3(b)(2) (2010) (debarment), 9.407-3(b)(2) (2010) (suspension).

<sup>116</sup> See 48 C.F.R. §§ 9.406-3(b)(1) (2010), 9.407-3(b)(1) (2010) (directing agencies to establish procedures governing the debarment and suspension processes that are "as informal as is practicable, consistent with principles of fundamental fairness.").

<sup>117</sup> See *Peter Kiewit Sons' Co. v. Army Corps. of Eng'rs*, 534 F. Supp. 1139, 1153 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 163, 165 (D.C. Cir. 1983).

<sup>118</sup> See *Old Dominion Dairy Prods. v. Sec'y of Def.*, 631 F.2d 953, 968 (D.C. Cir. 1980) ("[W]hen a determination is made that a contractor lacks integrity and the Government has not acted to invoke formal suspension or disbarment procedures, notice of the charges must be given to the contractor as soon as possible so that the contractor may utilize whatever opportunities are available to present its side of the story before adverse action is taken."); see also *Peter Kiewit Sons' Co.*, 534 F. Supp. at 1153 ("Defendants cannot bypass . . . important procedural safeguards merely by omitting the formal label to the sanction applied.").

<sup>119</sup> See, e.g., *IMCO, Inc. v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996) (upholding a debarment but noting that the debarment would have been improper had it been for the purpose of punishment); *Peter Kiewit Sons' Co.*, 534 F. Supp. at 1154 ("[T]he court cannot sustain or permit the denial of a contract if such action is a punishment.").

What they discovered is shocking by any metric. While it is tempting to agree with the oil industry's claims that BP is a rogue and does not reflect mainstream industry standards, the ineffectiveness of government sanctions over a decade of escalating violations does not leave room for much confidence that bad practices at other companies would be detected, much less resolved.

In the first of a series of incidents involving serious violations of the nation's environmental laws, BP pled guilty to felony charges under the Resource Conservation and Recovery Act ("RCRA") for illegal dumping of hazardous waste at its production facilities on Alaska's North Slope, paying \$22 million in civil penalties and criminal fines.<sup>120</sup> The violations began in 1993.<sup>121</sup>

Meanwhile, in deference to the company's size and sophistication, California regulators decided in 1994 to allow BP the privilege of inspecting its own facilities for compliance with the Clean Air Act, provided that it submit periodic reports to government officials.<sup>122</sup> In 2002, regulators began to wonder if the records submitted by the company were too good to be true: the documents showed that storage tanks at its Carson refinery in Los Angeles had no problems and required no repairs over the entire period.<sup>123</sup> Government inspectors informed the company that they needed to visit the plant in order to confirm these results, but company executives took the highly unusual and defiant step of refusing to grant access voluntarily, forcing regulators to get a search warrant.<sup>124</sup> When they finally entered the plant, the "inspectors discovered that some tanker seals had tears nearly two feet long," roofs had pervasive leaks, and these conditions constituted thousands of separate violations of applicable law.<sup>125</sup> The case was settled for a civil penalty of \$100 million.<sup>126</sup>

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<sup>120</sup> See Scott Hiaasen, *Any Criminal Charges Likely to be Against BP Rather Than Its Executives*, MCCLATCHEY-TRIB. NEWS. SERV. (June 6, 2010), [http://www.cleveland.com/business/index.ssf/2010/06/any\\_criminal\\_charges\\_likely\\_to.html](http://www.cleveland.com/business/index.ssf/2010/06/any_criminal_charges_likely_to.html). For an official explanation of the case, see *BP Exploration, Inc., Multimedia Settlement*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/resources/cases/civil/mm/bpexplor.html> (last visited Oct. 31, 2011).

<sup>121</sup> See *BP Exploration, Inc., Multimedia Settlement*, *supra* note 120.

<sup>122</sup> See Abraham Lustgarten & Ryan Knutson, *Years of Internal BP Probes Warned that Neglect Could Lead to Accidents*, PROPUBLICA (June 7, 2010), <http://www.propublica.org/article/years-of-internal-bp-probes-warned-that-neglect-could-lead-to-accidents>.

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> *Id.*

<sup>126</sup> See *id.*

On September 2, 2004, an accident involving superheated water killed two workers at BP's Texas City refinery, triggering soul-searching at the top levels of the facility's leadership and a \$109,000 civil penalty to settle a case with the Occupational Safety and Health Administration ("OSHA") for seven serious and one "willful" violation.<sup>127</sup> (The discrepancy between EPA and OSHA fines for such egregious misconduct is in and of itself enormously troubling.)

Alarmed by this and a rash of other accidents, Don Parus, the plant manager at Texas City and an industry veteran, traveled to London to beg top BP executives not to cut funding for minimal maintenance and upgrades of outmoded equipment.<sup>128</sup> Parus took the drastic step of presenting a power point containing photographs of dead workers to John Manzoni, the head of refining and marketing.<sup>129</sup> He also commissioned a consulting firm named Telos to conduct a confidential and anonymous survey of employees' concerns about safety and maintenance.<sup>130</sup> Telos reported that "[w]e have never seen a site where the notion 'I could die today' was so real."<sup>131</sup> Despite these extraordinary efforts, London headquarters did not respond.<sup>132</sup>

A mere six months after the superheated water incident, the chilling warnings in the Telos report came true again: a massive explosion killed fifteen people meeting in a conference room located too close to one

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<sup>127</sup> See Michael Graczyk, *Texas City Sees Its Share of Disasters*, KILLEEN DAILY HERALD (Mar. 25, 2005), <http://www.kdhnews.com/news/story.aspx?s=1607>; Press Release, U.S. Dep't of Labor, OSHA Cites Houston Refinery \$109,500 Following Fatal Texas City Accident (Mar. 4, 2005), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=11296](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=11296). The low level of these penalties is shocking given the severity and consequences of the violations and was the product of both inadequate law and agency timidity. For an analysis of these problems, see for example, SIDNEY SHAPIRO ET AL., CTR. FOR PROGRESSIVE REFORM, WHITE PAPER NO. 906, REGULATORY DYSFUNCTION: HOW INSUFFICIENT RESOURCES, OUTDATED LAWS, AND POLITICAL INTERFERENCE CRIPPLE 'PROTECTOR AGENCIES' (2009), available at [http://www.progressivereform.org/articles/RegDysFunction\\_906.pdf](http://www.progressivereform.org/articles/RegDysFunction_906.pdf); THOMAS MCGARITY ET AL., CTR. FOR PROGRESSIVE REFORM, WHITE PAPER NO. 1003, WORKERS AT RISK: REGULATORY DYSFUNCTION AT OSHA (2010), available at [http://www.progressivereform.org/articles/OSHA\\_1003.pdf](http://www.progressivereform.org/articles/OSHA_1003.pdf).

<sup>128</sup> See *The Spill—Don Parus' Powerpoint Presentation*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/the-spill/bp-troubled-past/don-parus-powerpoint.html> (last visited Oct. 31, 2011).

<sup>129</sup> See *id.*

<sup>130</sup> See generally Telos Grp., *supra* note 3.

<sup>131</sup> Lyall et al., *supra* note 4.

<sup>132</sup> See Daniel Schorn, *The Explosion at Texas City*, CBS NEWS (Feb. 11, 2009, 5:09 PM), <http://www.cbsnews.com/stories/2006/10/26/60minutes/main2126509.shtml?tag=mncol;lst;1>.

of the plant's most dangerous industrial operations.<sup>133</sup> The proximate cause of the incident was a decision not to invest \$150,000 to upgrade equipment that was considered to be state-of-the-art in the 1950s.<sup>134</sup> The incident was sufficiently serious that BP hired a blue-ribbon commission headed by former secretary of state James A. Baker III to evaluate what went wrong.<sup>135</sup> The Baker commission's 2007 report did not equivocate, attributing the accident to a culture that allowed crucial components of the physical plant to "run to failure" and penalized workers for expressing safety concerns.<sup>136</sup> A second report completed by the United States Chemical Safety and Hazard Investigation Board found that the Texas City disaster was caused by "organizational and safety deficiencies at all levels of the BP Corporation."<sup>137</sup> When it settled the last of 1300 lawsuits arising from the incident, BP apologized and pledged through its lawyer that it was "working hard to see that nothing like this ever happens again."<sup>138</sup>

The company may have been working, but not terribly hard. In the aftermath of Texas City, OSHA imposed \$21 million in civil penalties on the company, the largest in the agency's history, and placed the plant on a demanding schedule to rectify safety hazards.<sup>139</sup> Years later, a compliance check revealed that BP had ignored these requirements and missed the deadlines in its consent decree; this time, OSHA imposed a fine of \$50 million.<sup>140</sup> BP also pled guilty to a felony violation of the Clean Air Act and paid a \$50 million fine in a case referred to the Justice Department by the EPA in connection with the tragedy.<sup>141</sup>

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<sup>133</sup> See Ryan Knutson, *Blast at BP Texas Refinery in '05 Foreshadowed Gulf Disaster*, PROPUBLICA (July 2, 2010), <http://www.propublica.org/article/blast-at-bp-texas-refinery-in-05-foreshadowed-gulf-disaster>.

<sup>134</sup> See Lustgarten, *supra* note 5 ("BP considered switching them out [the blow-down drum] in 2002 but held off because of the \$150,000 cost. 'Capital expenditure is very tight,' said an internal BP e-mail from management about the decision at the time. 'Bank \$150k in savings now.'").

<sup>135</sup> See BAKER SAFETY REVIEW PANEL, THE REPORT OF THE B.P. U.S. REFINERIES INDEPENDENT SAFETY REVIEW PANEL (2007), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/SP/STAGING/local\\_assets/assets/pdfs/Baker\\_panel\\_report.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/SP/STAGING/local_assets/assets/pdfs/Baker_panel_report.pdf).

<sup>136</sup> See *id.* at 110, 117, 122.

<sup>137</sup> U.S. CHEM. SAFETY & HAZARD INVESTIGATION BD., *supra* note 2, at 18.

<sup>138</sup> James Doran, *BP Settles Texas Blast Lawsuits with an Apology*, THE TIMES (UK) (Nov. 10, 2006), <http://business.timesonline.co.uk/tol/business/law/article631960.ece>.

<sup>139</sup> See *BP Penalized \$50.6 Million for Texas City Refinery Explosion*, ENV'T NEWS SERV. (Aug. 12, 2011), <http://www.ens-newswire.com/ens/aug2010/2010-08-12-091.html> (reporting on both the first, \$21 million, and second \$50.6 million penalties).

<sup>140</sup> See *id.*

<sup>141</sup> See Hiaasen, *supra* note 120.

Then, in July 2005, Hurricane Dennis blew through the Gulf of Mexico.<sup>142</sup> In its wake, BP's \$5 billion Thunder Horse production platform tilted at an alarming twenty-degree angle towards the sea because a valve designed to stabilize the huge facility was installed backwards.<sup>143</sup> The platform was righted at a cost of \$250 million and now produces oil; however, it was plagued by construction problems, including "a welding job so shoddy that it left underwater pipelines brittle and full of cracks."<sup>144</sup>

On March 2, 2006, a BP pipeline ruptured, releasing 267,000 gallons of oil, the largest spill ever on Alaska's North Slope.<sup>145</sup> This incident occurred after the company once again hired a panel of independent investigators to evaluate employee concerns that it was failing to maintain and inspect the pipeline and had falsified inspection reports.<sup>146</sup> That panel's report criticized the unacceptable maintenance backlogs that had developed as BP tried to sustain profits despite declining production levels on the North Slope.<sup>147</sup> In the aftermath of the spill, the EPA settled a criminal Clean Water Act case with the company.<sup>148</sup> When the agreement was announced, the *Wall Street Journal* opined, "The settlements call for extraordinary future supervision over the energy giant that is almost certain to curb its risk-taking and could require it to go the extra mile on reforms and undergo extra expense to satisfy government officials."<sup>149</sup> The article

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<sup>142</sup> See Jack Beven, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT—HURRICANE DENNIS: 4–13 JULY 2005, 1 (2006), [http://www.nhc.noaa.gov/pdf/TCR-AL042005\\_Dennis.pdf](http://www.nhc.noaa.gov/pdf/TCR-AL042005_Dennis.pdf).

<sup>143</sup> See Kristen Hays, *Thunder Horse Platform Payoff a Long Time Coming for BP*, HOUSTON CHRON. (Nov. 17, 2007), <http://www.chron.com/business/energy/article/Thunder-Horse-platform-a-long-time-coming-1803712.php> ("Befitting its name, BP's massive Thunder Horse offshore platform has been beset by dark clouds ever since it was on the drawing board . . . [T]he company set out to build the biggest, boldest floating oil and gas production facility in the world, at a development cost of \$5 billion."); Lyall et al., *supra* note 4 ("Towering 15 stories above the water's surface, Thunder Horse was meant to be the company's crowning glory, the embodiment of its bold gamble to outpace its competitors in finding and exploiting the vast reserves of oil beneath the waters of the gulf.").

<sup>144</sup> Lyall et al., *supra* note 4.

<sup>145</sup> *See id.* ("It was the worst spill ever on the North Slope, and once again, the cause was preventable. Investigators found widespread corrosion in several miles of under-maintained and poorly inspected pipes. BP eventually paid \$20 million in fines and restitution.").

<sup>146</sup> *See* Lustgarten & Knutson, *supra* note 122.

<sup>147</sup> *See id.*

<sup>148</sup> *See* Richard Mauer & Anna M. Tinsley, *Gulf Oil Spill: BP Has a Long Record of Legal Ethical Violations*, MCCLATCHEY NEWS SERV., (May 8, 2010), <http://www.mcclatchydc.com/2010/05/08/93779/bp-has-a-long-record-of-legal.html>.

<sup>149</sup> Ann Davis et al., *BP Settles Charges, Submits to Watchdogs*, WALL ST. J., Oct. 26, 2007, at A3. The company persuaded the government to bundle settlements of charges with respect to the Alaska spill, the Texas City refinery explosion, and manipulation of propane

reported that the EPA was still considering a government-wide debarment case.<sup>150</sup> According to now-retired EPA debarment attorney Jeanne Pascal, the holdup was the Pentagon, which informed the EPA that BP was providing fuel essential to military campaigns in the Middle East.<sup>151</sup>

Despite the tough terms of the settlement and the seriousness of a criminal plea, BP once again failed to take the matter seriously. In November 2010, Mary Frances Barnes, a federal probation officer assigned to the Alaska case, petitioned a federal district court to revoke the company's probation, because its Lisburne facility on Alaska's North Slope had spilled 46,000 gallons of oil a year earlier.<sup>152</sup> BP is fighting the petition.<sup>153</sup>

Reporting by the Public Broadcasting System's *Frontline* program and the non-profit investigative journalism organization ProPublica attributes all of these incidents to frantic growth, as John Browne, the corporation's Chief Executive Officer, and his top executives raced to make BP the largest oil company in the world.<sup>154</sup> BP swallowed American competitors like Amoco and Atlantic Richfield ("ARCO"), neglecting crucial steps like integrating safety and compliance regimes.<sup>155</sup> It pushed the envelope of technology in its search for oil in the Alaska wilderness and the deepest waters of the Gulf of Mexico.<sup>156</sup> The company struck bold but extraordinarily risky business deals for development in unstable countries like Angola and Azerbaijan.<sup>157</sup> As top managers in London eyed the accumulation of burdensome debt that accompanies breakneck acquisitions, they felt irresistible pressure to cut costs with ruthless intensity.<sup>158</sup> Tony Hayward, who replaced Browne, admitted in a speech to Stanford business students in 2007, "We diagnosed . . . a company that was too top down,

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prices, apparently to "remove a cloud of uncertainty" over its newly appointed CEO, Tony Hayward, "who took over an energy leader distracted by scandal and lawsuits." *Id.*

<sup>150</sup> *See id.*

<sup>151</sup> *See* R. Jeffrey Smith, *BP has Steady Sales at Defense Department Despite U.S. Scrutiny*, WASH. POST, July 5, 2010, at A1.

<sup>152</sup> *See* Leopold, *supra* note 6.

<sup>153</sup> *See id.*

<sup>154</sup> *See Frontline: The Spill* (PBS television broadcast Oct. 26, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/the-spill/>.

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See Supplying Gas to Meet the Needs of Regional Consumers*, BP CASPIAN, <http://www.bp.com/sectiongenericarticle.do?categoryId=9006670&contentId=7015095> (last visited Oct. 31, 2011); *BP in Angola*, BP WORLDWIDE, <http://www.bp.com/sectiongenericarticle.do?categoryId=427&contentId=2000571> (last visited Oct. 31, 2011).

<sup>158</sup> *See Frontline: The Spill*, *supra* note 154.

too directive, and not good at listening.”<sup>159</sup> He promised big changes, including a focus on safety “like a laser.”<sup>160</sup> In the aftermath of the Gulf spill, he too was replaced by an American, Robert Dudley, who had headed its oil spill response effort.<sup>161</sup>

At the time of the Deepwater Horizon explosion, BP and its contractors, Transocean and Halliburton, were attempting to accomplish the “temporary abandonment” of the Macondo well so that the drilling rig could be hauled by boat to its next job.<sup>162</sup> BP would then erect its own permanent production platform over the well.<sup>163</sup> Drilling an oil well in deep water—the Macondo well was some 18,000 feet below sea level—is an extremely hazardous process, because pressure within rock formations that hold the petroleum is very high, requiring counter-pressure from the drilling rig to avoid the “blowout” of gases out of the well, up the hole, and into the drilling rig.<sup>164</sup> The temporary closure of the well required a series of challenging and difficult steps that would stabilize the casing that shored up the long column through which the drilling equipment had penetrated, fill the mouth of the well with drilling cement, and slowly withdraw the drilling equipment.<sup>165</sup>

The specific circumstances leading up to the Deepwater Horizon spill once again reveal relentless cost-cutting to the detriment of safety, but with even more catastrophic results. For example, four days before methane surged into the well, causing the explosion that released an estimated 205 million gallons of oil into the Gulf, BP employees rejected a recommendation by employees of its contractor Halliburton that twenty-one centralizers be installed to secure the well against explosive gases.<sup>166</sup> “It will take ten hours to install them,” a BP official said in an internal email.<sup>167</sup> “I do not like this.”<sup>168</sup> The blue-ribbon Commission appointed by President Obama prepared an exhaustive report on the mistakes that

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<sup>159</sup> Lustgarten, *supra* note 5.

<sup>160</sup> Peter Elkind & David Whitford, *BP: ‘An Accident Waiting to Happen,’* FORTUNE BLOG ON CNNMONEY (Jan. 24, 2011, 5:00 AM), <http://features.blogs.fortune.cnn.com/2011/01/24/bp-an-accident-waiting-to-happen/>.

<sup>161</sup> See Stanley Reed & Brian Swint, *BP Board Backs Plan to Replace Hayward with Dudley*, BLOOMBERG (July 26, 2010, 8:53 PM), <http://www.bloomberg.com/news/2010-07-25/bp-said-preparing-to-replace-hayward-with-dudley-as-board-seeks-recovery.html>.

<sup>162</sup> See Gulf Oil Spill Commission Report, *supra* note 7, at 4.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.* at 90–96.

<sup>165</sup> See *id.* at 90–127 (describing this process).

<sup>166</sup> See Knutson, *supra* note 133.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*



occurred during the week prior to the spill, documenting in meticulous detail how BP and its contractors, Transocean and Halliburton, worked with such haste to finish the drilling job that their errors multiplied, making the spill inevitable as well as uncontrollable.<sup>169</sup> Of the nine key mistakes it identified as central causes of the accident, seven were attributable to bad decisionmaking by BP.<sup>170</sup>

The Commission did not lay responsibility for the explosion solely at BP's doorstep, instead concluding that it was the product of "systemic" problems within the oil industry as a whole that "place in doubt the safety culture of the entire industry."<sup>171</sup> We understand this conclusion and have little sympathy with the oil industry's effort to turn BP into the solitary scapegoat for the spill.<sup>172</sup> Yet in the context of its shameful track record, BP's behavior in the Gulf underscores the very serious problems that infect its management, as Tony Hayward admitted, from the top down.

On November 2, 2010, BP estimated that its costs from the Gulf of Mexico spill would total \$40 billion.<sup>173</sup> To put this large figure in perspective, BP earned \$25 billion in profits in 2008.<sup>174</sup> And in 2009, the total budget for agencies that protect health, worker and consumer safety, and the environment was approximately \$10.3 billion.<sup>175</sup> By February 1, 2011, the company announced that its economic condition was sufficiently stable that it would resume paying dividends to its shareholders.<sup>176</sup> It also said that it would sell half its refining capacity in the United States while

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<sup>169</sup> See GULF OIL SPILL COMMISSION REPORT, *supra* note 7, at vii–viii.

<sup>170</sup> See *id.* at 125.

<sup>171</sup> *Id.* at vii.

<sup>172</sup> See, e.g., Broder, *supra* note 7 and accompanying text.

<sup>173</sup> See Graeme Wearden, *BP Oil Spill Costs to Hit \$40bn: Company Increases Estimate from the Deepwater Horizon Explosion by \$7.7bn*, GUARDIAN (U.K.) (Nov. 2, 2010), <http://www.guardian.co.uk/business/2010/nov/02/bp-oil-spill-costs-40-billion-dollars>.

<sup>174</sup> See BP, ANNUAL REPORTS AND ACCOUNTS 1 (2008), available at [http://www.bp.com/liveassets/bp\\_internet/annual\\_review/annual\\_review\\_2008/STAGING/local\\_assets/downloads\\_pdfs/BP\\_annual\\_report\\_accounts\\_2008.pdf](http://www.bp.com/liveassets/bp_internet/annual_review/annual_review_2008/STAGING/local_assets/downloads_pdfs/BP_annual_report_accounts_2008.pdf) (noting a "replacement cost profit" of \$25,593 million).

<sup>175</sup> See RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 3–5 (2010) (the agencies included in this figure are the Consumer Product Safety Commission, Environmental Protection Agency, Food and Drug Administration, National Highway Traffic Safety Administration, and Occupational Safety and Health Administration).

<sup>176</sup> See Julia Werdiger, *BP to Pay First Dividend Since Gulf of Mexico Spill*, N.Y. TIMES (Feb. 1, 2011), <http://www.nytimes.com/2011/02/02/business/global/02bp.html>.

expanding in “faster-growing economies” such as Brazil, Libya, and Jordan, where regulation is far less rigorous.<sup>177</sup>

*B. BP and the Public Interest*

BP is the fourth largest company in the world and the third largest oil company.<sup>178</sup> It is also the largest oil and gas producer operating in the United States and the sixty-fifth largest contractor supplying goods or services to the nation.<sup>179</sup> The process of debaring such a large company on a government-wide basis is both complicated and arduous. Not only must all the legal requirements be fulfilled, relevant agencies and departments must find another supplier, a task that becomes more difficult in direct proportion to the increasing size of the contractor and dollar value of the contracts at issue. Those realities acknowledged, the idea that a company is simply too big to debar conflicts with both the letter and the spirit of the law.

Debarment law sets up a ledger with two columns, instructing federal procurement officials to balance information on both sides against each other: namely, the impact of debarment on the contractor, including its work force, against the interests of the public.<sup>180</sup> Entries may require counterintuitive placement. For example, if BP truly is providing the bulk of the fuel used in Middle Eastern military operations, DOD’s strong interest in continuing a stable supply by rights belongs on the “no debarment/pro-company” side of the ledger. Of course, this factor cannot be taken too

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<sup>177</sup> *See id.*

<sup>178</sup> *See Global 500*, CNNMONEY, <http://money.cnn.com/magazines/fortune/global500/2011/snapshots/6327.html> (last visited Oct. 31, 2011). *But see The Global 2000*, FORBES, [http://www.forbes.com/lists/2010/18/global-2000-10\\_The-Global-2000\\_Rank.html](http://www.forbes.com/lists/2010/18/global-2000-10_The-Global-2000_Rank.html) (last visited Oct. 31, 2011) (using a different methodology to rank BP the tenth largest corporation worldwide).

<sup>179</sup> *See BP p.l.c.—Company Description*, HOOVER’S, [http://www.hoovers.com/company/BP\\_plc/hxxkti-1.html](http://www.hoovers.com/company/BP_plc/hxxkti-1.html) (last visited Oct. 31, 2011) (“BP is also BO (Big Oil). It is the world’s third-largest integrated oil concern, behind Exxon Mobil and Royal Dutch Shell. BP explores for oil and gas in 30 countries and has proved reserves of 18.1 billion barrels of oil equivalent. BP is the largest oil and gas producer in the US and also a top refiner, with stakes in 16 refineries, processing 4 million barrels of crude oil per day. BP markets its products in more than 80 countries and operates 22,400 gas stations worldwide. The company’s reputation took a major hit in 2010 when one of its deepwater rigs, working less than 50 miles south of Louisiana, exploded and killed 11 workers. Millions of gallons of crude gushed into the Gulf of Mexico for months.”); *see also Federal Contractor Misconduct Database*, PROJ. ON GOV’T OVERSIGHT, <http://www.contractormisconduct.org/> (last visited Oct. 31, 2011).

<sup>180</sup> *See MANUEL*, *supra* note 38, at 8–9 & n.45.

far. If the balancing test means that the procuring department can block suspension or debarment merely by asserting the inconvenience of finding another contractor, the public interest in preventing transactions with irresponsible contractors would be a null set.

Historically, debarment practice has been preoccupied with financial fraud (so-called “integrity offenses”).<sup>181</sup> Companies that cheat the government by padding their bills, asserting unforeseen and disproportionate cost overruns, delivering shoddy goods and services, or misrepresenting their qualifications are more likely candidates for exclusion.<sup>182</sup> On the other hand, companies with poor track records regarding worker safety and labor law compliance have largely escaped exclusion.<sup>183</sup>

No logic can explain this discrepancy, as the BP example well illustrates. The theory behind integrity offenses is that cheating exemplifies the poor character of a corporation’s leadership and is likely to recur. Corporate indifference to safe operations, demonstrated repeatedly in multiple contexts over a period of close to two decades, is no less deeply ingrained. The government certainly cannot tolerate being defrauded. Nor can it afford to run the risk that supplies will be disrupted as a direct and foreseeable result of a contractor’s negligence.

We acknowledge that company-wide debarment might not be appropriate if BP’s corporate structure is composed of discrete entities that are involved in different kinds of business and operate independently of the conglomerate’s London headquarters.<sup>184</sup> The United States could justify continuing to do business with such self-governing entities if they could demonstrate that the root causes of BP’s chronic violations and reckless behavior over the last decade, including the events leading up to the Gulf spill, have little relevance to their performance. Similarly, if the fiascos that afflicted BP had external causes—bad weather, political upheaval in the developing world, or even the stock market crash—the corporation might argue that its troubled history has little bearing on its ability to serve as a reliable contractor.

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<sup>181</sup> *See id.* at 5, 15 (explaining that contractor misconduct, such as failing to pay taxes and bribing foreign officials, has caught congressional interest in debarment and suspension).

<sup>182</sup> *See id.*

<sup>183</sup> *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1033, FEDERAL CONTRACTING: ASSESSMENTS AND CITATIONS OF FEDERAL LABOR LAW VIOLATIONS BY SELECTED FEDERAL CONTRACTORS, “Highlights” & 8 (2010) (stating that the federal government awarded \$6 billion to fifteen federal contractors that were cited for violating federal labor laws in 2009).

<sup>184</sup> *See* MANUEL, *supra* note 38, at 9 (explaining the grounds for partial debarment of a company that participated in wrongdoing).

Considering these factors, the case in favor of BP's debarment is quite strong. BP's extensive global operations were tightly controlled by London headquarters,<sup>185</sup> with top executives on a relentless cost-cutting campaign<sup>186</sup> that neglected essential maintenance, punished employees for reporting problems, disregarded rudimentary safety rules, and created situations where the physical plant—including equipment involved in highly hazardous operations—was run to failure.<sup>187</sup> Each of these episodes involved oil production, refining, and storage—the same activities involved in its contracts with the Pentagon.<sup>188</sup> The worst catastrophes killed people, cost large amounts of money, provoked civil and criminal charges, and the entry of rigorous consent decrees.<sup>189</sup> They involved ruinous public relations and repeated apologies from top executives, motivating BP to take the unusual step of convening high-profile panels of outside experts to make recommendations on how to remediate the underlying causes of the problems.<sup>190</sup> BP ignored their recommendations and, even after the Gulf spill, was still a recidivist violator.

The billions of dollars the company spent on the Gulf spill may have convinced it to mend its ways. Considering how quickly it was able to return to paying dividends, whether this motivation held when others failed is far from clear. Its stock price fell to a low of \$27.02 on June 25, 2010, and had rebounded to \$44.68 (up 165%) by April 2011.<sup>191</sup> But it was trading at \$59.52 on the eve of the accident.<sup>192</sup>

As of August 2011, the Chief Financial Officer ("CFO") (Byron Grote) and General Counsel (Rupert Bondy) are the same as before the spill.<sup>193</sup>

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<sup>185</sup> See GULF OIL SPILL COMMISSION REPORT, *supra* note 7, at 45.

<sup>186</sup> See Knutson, *supra* note 133 ("BP demanded a 25 percent budget cut across all its U.S. operations.").

<sup>187</sup> See *id.* ("units are to continue running no matter what"); GULF OIL SPILL COMMISSION REPORT, *supra* note 7, at 217–24; Telos Grp., *supra* note 3, at 17 ("Units are 90% of the time run to failure . . .").

<sup>188</sup> See Nick Turse, *Punishing BP with Half Measures*, CBS NEWS (June 20, 2010), [http://www.cbsnews.com/2100-215\\_162-6598856.html?tag=contentMain;contentBody](http://www.cbsnews.com/2100-215_162-6598856.html?tag=contentMain;contentBody) ("As an institution, the Pentagon runs on oil. . . . [It is] particularly heavily dependent on oil services, energy, and petroleum companies [such as BP].").

<sup>189</sup> See GULF OIL SPILL COMMISSION REPORT, *supra* note 7, at 217–25.

<sup>190</sup> See Lustgarten & Knutson, *supra* note 122.

<sup>191</sup> Steve Gelsi, *BP Shares Still Limping After Gulf spill*, MARKETWATCH (April 20, 2011, 12:08 AM), <http://www.marketwatch.com/story/bp-shares-still-limping-after-gulf-spill-2011-04-20>.

<sup>192</sup> *Id.*

<sup>193</sup> *Compare Executive Management*, BP, <http://www.bp.com/managedlistingsection.do?categoryId=9021627&contentId=7040960> (last visited Oct. 31, 2011), *with* BP, ANNUAL

Six of eight board members are also the same.<sup>194</sup> The most notable change was the elevation of Mark Bly, a twenty-eight-year BP veteran with an engineering background, to Executive Vice President for Safety & Operational Risk.<sup>195</sup> Until 2007, Bly had worked on a series of “engineering and commercial leadership assignments” and “Business Unit Leader posts,” when he was promoted to “Group Vice President” for exploration and production.<sup>196</sup> In 2008, he became “Group Head of Safety & Operations.”<sup>197</sup> He is the first occupant of the “executive team” position devoted to safety and was promoted in October 2010.<sup>198</sup> Given his lengthy tenure with the company and his scant experience with safety programs, Bly has his work cut out for him. His first important assignment was to write the *Bly Report*,<sup>199</sup> an internal audit intended to discover the causes of the Gulf spill. The first two paragraphs of the press release on the report read:

No single factor caused the Macondo well tragedy. Rather, a sequence of failures involving a number of different parties led to the explosion and fire which killed 11 people and caused widespread pollution in the Gulf of Mexico earlier this year.

A report released by BP today concludes that decisions made by “multiple companies and work teams” contributed to the accident which it says arose from “a complex and interlinked series of mechanical failures, human judgments, engineering design, operational implementation and team interfaces.”<sup>200</sup>

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REPORTS AND ACCOUNTS 2009 66 (2009), available at [http://www.bp.com/assets/bp\\_internet/globalbp/globalbp\\_uk\\_english/set\\_branch/STAGING/common\\_assets/downloads/pdf/BP\\_Annual\\_Report\\_and\\_Accounts\\_2009.pdf](http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/downloads/pdf/BP_Annual_Report_and_Accounts_2009.pdf).

<sup>194</sup> *Compare The Board*, BP, <http://www.bp.com/managedlistingsection.do?categoryId=9021626&contentId=7041219> (last visited Oct. 31, 2011) with BP, ANNUAL REPORTS AND ACCOUNTS 2009, *supra* note 193, at 66.

<sup>195</sup> See *Biography of Mark Bly*, BP, <http://www.bp.com/sectiongenericarticle.do?categoryId=9035618&contentId=7066011> (last visited Oct. 31, 2011).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> BP, DEEPWATER ACCIDENT INVESTIGATION REPORT (2010), [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/gom\\_response/STAGING/local\\_assets/downloads\\_pdfs/Deepwater\\_Horizon\\_Accident\\_Investigation\\_Report.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/gom_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf) [hereinafter BLY REPORT].

<sup>200</sup> Press Release, BP, BP Releases Report on Causes of Gulf of Mexico Tragedy (Sept. 8, 2010), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064893>.

The report was greeted with appropriate cynicism by press covering the story:

BP on Wednesday laid out its most detailed analysis yet on possible causes of the Deepwater Horizon accident in April, taking particular aim at mistakes by contractors on the doomed rig while claiming only a limited role in the disaster. . . . Though BP personnel are directly implicated in just one of the eight factors [identified in the report], company investigators stressed the report was not intended to be the final word on the subject, nor an accounting of legal responsibility. “Our purpose was not to apportion blame or liability but rather to learn, recommend areas for improvement and share lessons with others,” said Mark Bly, the BP safety chief who led the investigation.<sup>201</sup>

The decision to have its newly elevated, but inexperienced safety chief focus his energies first and foremost on a report shifting blame for the Gulf spill onto other parties does not provide much assurance that BP has finally accepted the need to infuse a safety culture from top to bottom and bottom to top. Given these peculiar priorities, Bly’s limited background in risk management, and the stability of company leadership before and after the spill—especially in the key categories of CFO and general counsel—any claim that safety has become BP’s top priority does not seem to us to be as compelling an indication of its future direction as its dreadful, recidivist history.

Because debarment is automatic under the Clean Air Act and Clean Water Act, the EPA is one of the few agencies with a full-time debarment staff.<sup>202</sup> An EPA attorney has chaired the Interagency Suspension and Debarment Committee,<sup>203</sup> a group tasked with coordinating the debarment

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<sup>201</sup> See, e.g., Brett Clanton & Jennifer Dlouhy, *BP Spreads Blame for Deadly Blowout*, HOUSTON CHRON. (Sept. 9, 2010), <http://www.chron.com/disp/story.mpl/business/energy/7192813.html>.

<sup>202</sup> As of 2005, the EPA had twelve professional staff members; the GSA had two professional staff members and one support staff member; the DLA had one professional staff member; the Air Force had three professional staff members and Co-op students providing support; the Army had six professional staff members and one support staff member; and the Navy had three professional staff members and one support staff member. FEDERAL PROCUREMENT REPORT, *supra* note 15, at 28.

<sup>203</sup> See INTERAGENCY SUSPENSION AND DEBARMENT COMM., <http://www.epa.gov/isdc/> (last visited Oct. 31, 2011).

and suspension actions across federal agencies, for many years.<sup>204</sup> Consistent with this investment in the debarment process, EPA attorneys were working on the debarment of BP for many years prior to the Gulf spill.<sup>205</sup> Nevertheless, relative to the DOD, the agency controls a small share of total federal contracting dollars and must depend on its sister agencies and departments for maximum impact on the debarred firm.

Although the reasoning underlying its resistance to debarring BP may not have been articulated very clearly, as a legal matter, if the EPA initiated debarment procedures and the DOD wanted to maintain BP as its primary fuel supplier, either a waiver must be granted or an administrative agreement signed.<sup>206</sup> Again, agencies or departments are allowed to grant waivers for compelling reasons, including, in the DOD's case, the imperatives of effective national defense,<sup>207</sup> and it is likely that the DOD made some variation on this argument when it informed EPA that it would not cooperate in the debarment of BP.<sup>208</sup>

The nub of this claim would be whether military units deployed in Iraq and Afghanistan could obtain alternative fuel supplies without disruption and for a reasonable price. Few people on the outside of government are able to gauge the viability of this alternative. The oil industry is oligopolistic in the sense that it is dominated by a few very large firms, yet competition still exists, and the size of the purchase—some \$2.2 billion in jet and other fuel—would probably make it an attractive bidding target.<sup>209</sup>

In the end, we suspect that something other than an evaluation on the merits is at the root of the Pentagon's reluctance to cooperate in the EPA's efforts to debar BP. At best, the military suffers from chronic inertia towards its largest contractors and, at worst, its contracting function is captured by those firms.

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<sup>204</sup> See *Interagency Suspension and Debarment Committee Members*, INTERAGENCY SUSPENSION AND DEBARMENT COMM. (Nov. 16, 2004), <http://web.archive.org/web/20041116101817/http://www.epa.gov/isdc/member.htm> (accessed by searching for Interagency Suspension and Debarment Committee in the Internet Archive index).

<sup>205</sup> See Lustgarten & Knutson, *supra* note 122.

<sup>206</sup> See 48 C.F.R. § 209.405 (2011).

<sup>207</sup> See 48 C.F.R. § 209.405(a)(iv) (2011).

<sup>208</sup> See *supra* notes 74–78 and accompanying text.

<sup>209</sup> See *Journal Community Discussion: Should BP Be Barred from Future Federal Contract or U.S. Oil Leases After Gulf Spill?*, WALL ST. J., <http://online.wsj.com/community/groups/question-day-229/topics/should-british-petroleum-barred-future> (last visited Oct. 31, 2011) (online poll indicating fifty-eight percent of readers believe BP should be barred).

### III. A BROKEN SYSTEM

#### A. *Too Big to Debar?*

In fiscal year 2010, the United States government spent an estimated \$535.3 billion, making it the largest buyer of goods and services in the world by many orders of magnitude.<sup>210</sup> In a system so vast, it perhaps should not surprise us that debarments and suspensions do not occur with the frequency or in the circumstances that the law clearly intends. How could any human effort to dispense such unimaginably huge amounts of money avoid allowing irresponsible companies to continue to do business with the government?

But critical evaluations of the system indicate not just that it has flaws, but that it is largely dysfunctional. In an uncomfortable analogy to the Federal Reserve's attitude toward the investment banks that were caught in the crosshairs of the 2008 economic meltdown,<sup>211</sup> the DOD has persuaded itself that its major contractors are simply too big to debar. The difference is that no imminent crisis justifies this attitude. And, while the most important suppliers are part of highly concentrated industries, as illustrated by BP's situation, it is far from clear that debarring them would cause significant disruptions of military operations around the world.<sup>212</sup> The simple fact is that the DOD does not appear to make any real effort to pursue exclusions against its largest suppliers, establishing the vicious cycle that those remedies are nothing to fear.

A number of large corporations with long records of misconduct have escaped debarment. A 2002 POGO study found that sixteen of the top forty-three companies with the most federal contracts had twenty-eight criminal convictions since 1990 and had paid close to \$3.4 billion in fines (BP did not make the list).<sup>213</sup> Of these forty-three companies, the

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<sup>210</sup> See MANUEL, *supra* note 38, at 15.

<sup>211</sup> See Ben S. Bernanke, Chairman, Federal Reserve System, Statement Before the Financial Crisis Inquiry Commission 2 (Sept. 2, 2010), available at <http://www.federalreserve.gov/newsevents/testimony/bernanke20100902a.pdf> (the problem of "[t]oo-big-to-fail financial institutions").

<sup>212</sup> In 2010, BP's contracts with DOD for fuel were worth \$1.03 billion. See USASPENDING, <http://www.usaspending.gov> (perform filtered search for Major Agency—"Department of Defense"; Product/Service Subcategory—"Liquid Propellants and Fuels"; Type of Spending—"Contracts"; Recipient—"BP P.L.C."; and Fiscal Year—"2010") (last visited Oct. 31, 2011). Royal Dutch Shell came in a close second at \$1.01 billion. See *id.* (change recipient filter to "Royal Dutch").

<sup>213</sup> See *Federal Contractor Misconduct*, *supra* note 15, at "Executive Summary" (including administrative, civil, and criminal violations and allegations of violations, as well as Superfund settlements, in the total amount of fines).



government only suspended or debarred one, and then only for five days.<sup>214</sup> First on POGO's Top-Ten Repeat Offenders list was General Electric ("GE"), which had sixty-three instances of misconduct or alleged misconduct resulting in approximately \$982.9 million in fines, restitution, settlements, and Superfund cleanup costs between 1990 and 2002.<sup>215</sup>

Since 1992, contractors have only increased in size and influence, with high-profile mergers of numerous defense companies including Lockheed and Martin Marietta, Boeing and McDonnell Douglas, Northrop and Grumman, and Honeywell and Allied Signal.<sup>216</sup> BP itself has grown enormously over the past decade, merging with oil companies Amoco and ARCO in 1998 and 2000, respectively.<sup>217</sup>

Clearly, large companies are better equipped to avoid exclusions because they can afford well-paid attorneys who mount expensive and time-consuming challenges to suspensions and debarments and are able to frame settlement terms that avoid application of the ultimate remedy.<sup>218</sup> However, an imbalance between private party and government resources does not account for the entire phenomenon. Some large contractors are perceived as so indispensable to the government that suspending or debarring them is nearly impossible.<sup>219</sup> For example, although the Air Force suspended Boeing in 2003, it awarded the company two additional contracts

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<sup>214</sup> See *id.* (compiling a list of convictions and fines for the top forty-three contractors and describing how, between 1990 and 2002, the government had only suspended one company for five days after having pled guilty to diverting money from the U.S. Foreign Military Aid Program).

<sup>215</sup> See *Federal Contractor Misconduct*, *supra* note 15, at "Repeat Offenders." The remaining nine on POGO's top-ten repeat offenders list are: Lockheed Martin with sixty-three instances of misconduct or alleged misconduct and \$231,872,404 in payments; Boeing, thirty-six and \$357,973,000; Raytheon, twenty-four and \$128,652,919; Northrop Grumman, twenty-one and \$87,876,581; Fluor, nineteen and \$70,016,614; United Technologies, eighteen and \$214,836,860; TRW, sixteen and \$389,484,000; AT&T, fourteen and \$16,090,000; and Unisys, twelve and \$182,245,692 in payments. See *id.*

<sup>216</sup> See *Federal Contractor Misconduct*, *supra* note 15, at "Uneven Playing Field;" see also Jennifer S. Zucker, *The Boeing Suspension: Has Increased Consolidation Tied the Department of Defense's Hands?*, ARMY LAW. (Apr. 2004) 14, 26, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/04-2004.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/04-2004.pdf) (demonstrating the reduction in the defense market between 1990 and 1998).

<sup>217</sup> See *Chronology—Big Oil's Years of Merger Mania*, REUTERS (July 14, 2011), <http://www.reuters.com/article/2011/07/14/us-conocophillips-mergers-idUSTRE76D56V20110714>.

<sup>218</sup> See *Federal Contractor Misconduct*, *supra* note 15, at "Uneven Playing Field;" Seth Morris, *The Dormant Power of the Purse: The Failure of the Government to Use Its Purchasing Power to Promote to Promote Corporate Compliance with the Law*, MULTINAT'L MONITOR (July/Aug. 2002), <http://www.multinationalmonitor.org/mm2002/072002/morris.html>.

<sup>219</sup> See *Federal Contractor Misconduct*, *supra* note 15, at "Uneven Playing Field."

that same year, explaining that it was the “only launch provider that can currently meet the requirements of this mission.”<sup>220</sup> The dependence on large contractors is not new. In 1985, the Air Force, the Navy, and NASA pursued dozens of contracts with GE despite its ineligibility because the company “was the sole qualified source” to perform the work.<sup>221</sup>

### B. *Lax Settlements*

In the examples above, DOD continued to contract with GE and other large companies by granting “compelling reasons” waivers. Because the FAR does not define the term, agencies such as the DOD have crafted open-ended definitions that cover nearly any situation. For example, DOD regulations allow waivers when “urgency” or “national defense” require it.<sup>222</sup> Most statutory debarment provisions stand in stark contrast to the FAR’s nonspecific waiver provisions.<sup>223</sup> Under the CWA and CAA, for example, only the President can waive an exclusion if he or she determines it is in the country’s paramount interest and notifies Congress.<sup>224</sup>

As the BP case demonstrates, it is impossible to tell what influence these open-ended waiver authorities have on the debarment process.

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<sup>220</sup> Renae Merle, *Boeing Wins Contract Despite Suspension*, WASH. POST, Oct. 1, 2003, at E3.

<sup>221</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/NSAID-87-37BR, PROCUREMENT: SUSPENSION AND DEBARMENT PROCEDURES 53 (1987). The Navy granted GE a compelling reason waiver within a month of its suspension. *See id.* at 55. The Air Force suspended GE for nearly five and a half months but narrowed the scope of the suspension twice, first limiting it to GE’s Space Systems Division and then only to the Re-entry Systems Operation. *See id.* at 53. The Defense Department’s reluctance to pursue suspension and debarment of its top contractors is perhaps best exemplified by the department’s approach to GE. Morris, *supra* note 218. (“A few years after GE’s five month suspension, the Defense Department established an office specifically to handle GE violations because the Pentagon believed General Electric was violating laws at such a high rate. At the request of the Department of Defense Inspector General, the Philadelphia Remedies Unit was established within the Defense Contract Management Agency’s Mid-Atlantic District on June 1, 1990. . . . Regarding suspension and debarment, the Unit’s report states: ‘None of the recommendations made for action against a corporate entity of the General Electric Company were approved by the debarring officials at DLA [Defense Logistics Agency] or the Army who reviewed these recommendations. In the only matter involving a GE entity which resulted in administrative action, the DLA debarring official issued a suspension against the Aircraft Engine Group and lifted it five days later. The result of these efforts make it fairly clear that, at least in the case of the General Electric Company and probably other major contractors, administrative action is not a threatening remedy.’”).

<sup>222</sup> *See* 48 C.F.R. §§ 209.405(a)(ii), (iv) (2011).

<sup>223</sup> *See* discussion *supra* Part I.B.4.

<sup>224</sup> *See* Clean Water Act, 33 U.S.C. § 1368(d) (2006); Clean Air Act, 42 U.S.C. § 7606(d) (2006).

According to press accounts, EPA debarment attorneys have tried for years to persuade the DOD to consider debarring BP, but have been spurned by their military counterparts behind the scenes.<sup>225</sup> Yet Jeanne Pascal, the lead EPA debarment attorney on the BP case, only spoke openly about her experiences following her retirement from government service and in the aftermath of the explosion that caused the eighty-seven-day Gulf spill.<sup>226</sup> This case study and POGO's research<sup>227</sup> indicate that the possibility of a waiver is routinely invoked, directly or by implication, behind the scenes, and is enough to stifle follow-through on debarment cases.<sup>228</sup> True, debarment under the CWA and CAA are automatic, but these actions are limited to the facilities involved in the specific violations and have much less impact than a company-wide exclusion would.

According to GAO's research, in the minority of cases where the DOD decides to pursue debarment, administrative agreements are the preferred alternative, despite the ready availability of waivers.<sup>229</sup> In 2004, six agencies—the Air Force, Army, Navy, Defense Logistics Agency (“DLA”), GSA, and EPA—proposed debarment in 651 cases, achieved it in 590 cases, and entered into a total of thirty-eight administrative agreements.<sup>230</sup> Out of those six agencies, only two—the Air Force and Army—issued a total of five compelling reasons waivers that same year.<sup>231</sup>

Administrative agreements require errant contractors to take a series of remedial steps, such as appointing an ombudsman, to ensure their compliance with the law and are meant to improve contractor responsibility without diminishing competition by removing the contractor from the business landscape.<sup>232</sup> Yet, there is reason to doubt that these agreements foster ethical behavior. For example, in 1995, Lockheed Corporation pled guilty to bribing an Egyptian official.<sup>233</sup> In addition to paying a \$24.8 million fine, it also entered an administrative agreement with the Air

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<sup>225</sup> See Lustgarten, *supra* note 5.

<sup>226</sup> See *id.*

<sup>227</sup> See *Testimony of POGO's Scott Amey on "Federal Contracting: Why Do Risky Contractors Keep Getting Rewarded With Taxpayer Dollars?"*, PROJECT ON GOV'T OVERSIGHT (July 18, 2007), <http://www.pogo.org/pogo-files/testimony/contract-oversight/co-fcm-20070718.html>.

<sup>228</sup> See *id.*

<sup>229</sup> See FEDERAL PROCUREMENT REPORT, *supra* note 15, at 12–13.

<sup>230</sup> See *id.* at 12 tbl.2.

<sup>231</sup> See *id.* at 13.

<sup>232</sup> See *id.* at 13 tbl.3.

<sup>233</sup> See Scott Doggett & Annette Haddad, *Commercial Bribery Under Attack*, L.A. TIMES, Mar. 20, 2000, at C2 (explaining that the case was one of the world's “biggest bribery cases” and “led to Lockheed Corp. paying a record \$24.8 million in penalties in 1995 for illegally bribing an Egyptian official to win an aircraft contract”).

Force.<sup>234</sup> Since implementing the agreement, Lockheed Martin and its subsidiaries have been accused of at least eight violations—related to procurement fraud, environmental pollution, employment discrimination, shareholder fraud, nuclear safety violations and violations of the Arms Export Control Act—and have paid approximately \$590.1 million in fines/penalties and settlements.<sup>235</sup>

The best solution to the potential misuse of broad waiver authority and lax administrative agreements is to require comprehensive self-reporting by government contractors to a centralized database. As we explain further in the next section, some reporting requirements exist, but they are so limited that BP would not have been required to report any of the escalating series of civil and criminal violations described here.

### C. *Incomplete and Incorrect Data*

Until recently, data on administrative agreements and compelling reason waivers was not shared among agencies or recorded in the Excluded Parties List System (“EPLS”), which is the central database used by federal officials tasked with assessing a potential contractor’s eligibility.<sup>236</sup> In 1994, agencies began collecting past performance data on contractors,<sup>237</sup> but they maintained their own separate and unconnected systems until 2002.<sup>238</sup> Even after the Past Performance Information Retrieval System (“PPIRS”) was created, contracting officials were suspicious of its relevance and reliability and routinely ignored it.<sup>239</sup> In 2009, the FAR was amended to mandate that all federal agencies post contractor performance evaluations in

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<sup>234</sup> Plea Agreement, *United States v. Lockheed Corp.*, No. 1:94-CR-226-01 (N.D. Ga. Oct. 1, 1995), available at <http://www.contractormisconduct.org/ass/contractors/38/cases/245/1333/lockheed-martin-egypt-plea.pdf> (last accessed Oct. 31, 2011).

<sup>235</sup> See *Federal Contractor Misconduct Database*, *supra* note 179 (ranked number one in the misconduct database).

<sup>236</sup> See 48 C.F.R. § 9.404 (2010).

<sup>237</sup> See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 § 1091, 108 Stat. 3242, 3272 (1994).

<sup>238</sup> See Memorandum from Angela B. Styles, Adm’r, Office of Mgmt. & Budget, to Agency Senior Procurement Executives (July 3, 2002), available at [http://georgewbush-whitehouse.archives.gov/omb/procurement/contract\\_perf/past\\_perf\\_070302.pdf](http://georgewbush-whitehouse.archives.gov/omb/procurement/contract_perf/past_perf_070302.pdf). Prior to 2002, the Defense Department alone managed three different systems. See Performance Information Report, *supra* note 15, at 7 (2009) [hereinafter PERFORMANCE INFORMATION REPORT].

<sup>239</sup> See PERFORMANCE INFORMATION REPORT, *supra* note 15, at 8–9. The 2009 GAO report found that for the contracts that required a performance assessment in 2007, past performance evaluations were done on less than one third. See *id.* at 11–12.

PPIRS and to require that contracting officers consult the database before awarding contracts of \$150,000 or more.<sup>240</sup>

In further response to persistent concerns about the inadequacy of contractor databases, the Duncan Hunter National Defense Authorization Act of 2009 establishes the Federal Awardee Performance and Integrity Information System (“FAPIIS”).<sup>241</sup> FAPIIS is a link providing access to EPLS and PPIRS. It also includes “contracting officers’ non-responsibility determinations (i.e., agency assessments that prospective contractors do not meet requisite responsibility standards to perform for the government),” as well as “contract terminations for default or cause, agency defective pricing determinations,” administrative agreements written in lieu of outright exclusion, and, most importantly, “contractor self-reporting of criminal convictions,” adjudicated or settled instances of “civil liability,” and “adverse administrative actions.”<sup>242</sup> The public can access the FAPIIS public site, which contains everything but contracting officers’ non-responsibility determinations.<sup>243</sup>

While theoretically a significant improvement over EPLS and PPIRS, government watchdogs have strongly criticized the scope and implementation of FAPIIS.<sup>244</sup> One notable limitation is that it only contains misconduct committed in direct connection to federal or state contracts or grants, and even then only “if the misconduct resulted in a conviction or a finding of fault.”<sup>245</sup> Thus, BP would not be listed for the

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<sup>240</sup> See 48 C.F.R. § 42.1502-03 (2010); see also Contractor Performance Information, 74 Fed. Reg. 31,557 (July 1, 2009). As of July 1, 2009, the FAR requires contracting officials to evaluate past performance information for orders exceeding the simplified acquisition threshold, generally \$150,000. See 48 C.F.R. § 2.101 (2010).

<sup>241</sup> See Duncan Hunter Defense Authorization Act of 2009, 41 U.S.C. § 2313 (2011).

<sup>242</sup> Federal Awardee Performance and Integrity Information System, 75 Fed. Reg. 14,059 (Mar. 23, 2010) [hereinafter FAPIIS Rule].

<sup>243</sup> See Supplemental Appropriations Act, Pub. L. No. 111-212, § 3010, 124 Stat. 2302, 2340 (2010). The public site went live April 14, 2011. See Gary Therkildsen, *FAPIIS is a Steaming Pile*, OMB WATCH (Apr. 25, 2011), <http://www.ombwatch.org/node/11628>.

<sup>244</sup> See Tom Lee, *FAPIIS May Be the Worst Government Website We’ve Ever Seen*, SUNLIGHT FOUND. BLOG (Apr. 19, 2011, 5:49 PM), <http://sunlightfoundation.com/blog/2011/04/19/fapiis-may-be-the-worst-government-website-weve-ever-seen/>; Therkildsen, *supra* note 243. But see Neil Gordon, *FAPIIS: An Inauspicious Debut, But Starting to Show Signs of Life*, PROJECT ON GOV’T OVERSIGHT BLOG (Apr. 29, 2011, 3:49 PM), <http://pogoblog.typepad.com/pogo/2011/04/fapiis-an-inauspicious-debut-but-starting-to-show-signs-of-life.html>.

<sup>245</sup> Neil Gordon, *Solution: How the Government Can Stop Doing Business With Risky Contractors*, TRUTHOUT (Mar. 3, 2011), <http://www.truth-out.org/solution-how-government-can-stop-doing-business-risky-contractors/1299139200>.

2010 oil spill, the 2005 Texas City refinery explosion, or the oil spills on Alaska's North Slope.<sup>246</sup>

The databases also suffer from persistent inaccuracies. Two GAO reports, one in 2005<sup>247</sup> and another in 2009, warned that ineffective management and control of databases prevented contracting officers from determining with confidence whether a prospective contractor was suspended, debarred or proposed for debarment.<sup>248</sup> In July 2011, the DOD Inspector General found typographical and user input errors throughout the database.<sup>249</sup>

Broader reporting requirements, more stringent quality control, and better enforcement of the requirement that contracting officers check FAPIIS prior to awards are critical reforms. Reporting requirements should apply to every incident when a contractor or its principals are convicted or plead guilty to federal or state criminal offenses that are cognizable under debarment statutes and administrative rules, because they could potentially affect the company's ability to perform services or provide goods in a safe, non-fraudulent, and legally compliant manner. Reporting should also apply to incidents when a company or its principals lose a verdict or settle any similarly relevant federal or state civil complaint. We realize that defining the scope and details of such reporting will require significant effort by the government and the contracting community, although technical barriers should be quite low. Only by introducing such transparency into the system can agencies and debarments be made accountable for implementing the law fairly and consistently.

## CONCLUSION

At some point—hopefully sooner rather than later—the nation must resolve its ambivalence about firms that are supposedly too big to fail, too big to debar, and, ultimately, too big to obey. A major cause of this

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<sup>246</sup> Even if the incident happened during the performance of a contract (BP was awarded over \$1 billion in federal contracts in 2010), the incident would also not be reported in FAPIIS if BP settled out of court “without an admission or finding of guilt or liability.” *Id.*

<sup>247</sup> See FEDERAL PROCUREMENT REPORT, *supra* note 15, at 14–15.

<sup>248</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-174, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS 4, 17–18 (2009).

<sup>249</sup> See INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. D-2011-083, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS 14 (2011), available at <http://www.dodig.mil/audit/reports/fy11/11-083.pdf>.

ambivalence is the contradictory positions taken by the far right of the political spectrum, known loosely as the Tea Party. On one hand, the movement was inspired in large measure by the government bailout of the nation's largest financial institutions.<sup>250</sup> Yet those same grassroots constituencies are also the inspiration for conservative congressional opposition to implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act on the grounds that government should not interfere with business.<sup>251</sup> Since no one would advocate the chaos that could result in the absence of either a bailout or financial system reform, hopefully it is only a matter of time before the nation resolves these contradictions, firmly rejecting the notion that any corporation is too big to suffer the consequences of its illegal, irresponsible, and destructive actions.

BP's survival as a government contractor would fatally undermine the credibility of enforcement of the law across the board, especially in the arena of protecting public health, worker safety, and natural resources. Beginning with BP, debarment should become the routine consequence of corporate misconduct that harms others more than the company itself.

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<sup>250</sup> See Oren Dorell, *Tax Revolt A Recipe for Tea Parties*, USA TODAY (Apr. 13, 2009), [http://www.usatoday.com/news/washington/2009-04-12-teaparties12\\_N.htm](http://www.usatoday.com/news/washington/2009-04-12-teaparties12_N.htm).

<sup>251</sup> See, e.g., Edward Hyatt, *Dodd-Frank Under Fire a Year Later*, N.Y. TIMES (July 18, 2011), [http://www.nytimes.com/2011/07/19/business/dodd-frank-under-fire-a-year-later.html?\\_r=1&scp=1&sq=dodd%20frank%20&st=cse](http://www.nytimes.com/2011/07/19/business/dodd-frank-under-fire-a-year-later.html?_r=1&scp=1&sq=dodd%20frank%20&st=cse).