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"Banned in Boston—and Birmingham and Boise and . . .": Due Process in the Debarment and Suspension of Government Contractors

By John Montague Steadman*

The United States government spends over $50 billion annually in procurement from the private sector. Access to this Niagara of government spending is very big business indeed, involving tens of thousands of firms; for some, it is the major, or even sole, source of income. To be barred, permanently or temporarily, from the competition for govern-

* B.A., 1952, Yale College; LL.B., 1955, Harvard Law School. Professor of Law, Georgetown University; member, California and District of Columbia Bars. This article is based upon a report by the author as consultant to the Administrative Conference of the United States. However, the Conference has not evaluated or approved the report or this article. Responsibility for their contents is solely my own. I would like to express my appreciation to my research assistant, D. Edward Wilson, for his valuable and cheerfully rendered assistance. The Administrative Conference of the United States was permanently established by Congress in 1964 to study the efficiency, adequacy, and fairness of federal administrative practices and procedures.

1. Exact annual figures are hard to obtain. One report estimated that in fiscal year 1972, the Department of Defense (DOD) spent approximately $39.4 billion out of a total procurement budget of $57.5 billion, followed by the Atomic Energy Commission (AEC) ($2.9 billion), the Department of Agriculture (DOA) ($2.6 billion), the National Aeronautics and Space Administration (NASA) ($2.5 billion), the General Services Administration (GSA) ($1.3 billion), and other agencies and accounts ($8.8 billion). See 1 Report of the Commission on Government Procurement 3 (1972) [hereinafter cited as COGP Report].

2. In the Defense Department alone, more than 20,000 contractors are involved in prime defense and aerospace research, development, and production programs. These 20,000 contractors select more than 100,000 subcontractors. It is true that a relatively small number receive the majority of the procurement dollars. For example, in 1970, the top 100 defense contractors received 69.7% of all defense spending. With a defense procurement budget in the area of $40 billion, however, the remaining 30.3% constitutes a substantial sum. See J. Fox, Arming America 41, 43 (1974).
ment contracts can be a matter of fiscal life and death to government contractors.³

Some fourteen years ago, the Administrative Conference of the United States (ACUS) conducted what was rightly termed “the most thorough research job ever done on the actual facts of debarment and suspension by the federal government.”⁴ The cardinal recommendations emerging from the study related to the woeful due process inadequacy of the procedures leading to debarment and suspension. The purpose of this article is to trace subsequent developments, which form an intriguing example of the complexities of effecting administrative reform in the federal government in even a relatively limited area of activity.

Substantive Grounds for Debarment or Suspension

For almost half a century,⁵ the federal government’s procurement process has provided for the debarment or suspension⁶ of potential

3. For example, one contractor, at the time of its summary suspension, did 95% of its business with the Department of Defense and 5% with the Coast Guard. Brief for Appellant at 6, Horne Bros., Inc. v. Laird, Civil No. 73-1325 (D.C. Cir., filed March 26, 1973). See text accompanying notes 51-53 infra.

4. Gantt & Panzer, Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United States, 5 B.C. IND. & COM. L REV. 89, 92 (1963) [hereinafter cited as Gantt & Panzer]. This article also cites several early congressional hearings and a study by the Attorney General’s Committee on Administrative Procedure in 1939. See id. at 89. Gantt & Panzer had earlier been the co-authors of a pioneering study in the field. See Gantt & Panzer, The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts, 25 GEO. WASH. L. REV. 175 (1957). See also Miller, Administrative Discretion in the Award of Federal Contracts, 53 MICH. L. REV. 781 (1955).


6. Precise distinctions between the two terms are in many respects technical. A debarment follows agency determination that stated grounds for such action in fact exist. See ASPR 1-604 to -604.3, 3 GOV'T CONT. REP. ¶¶ 32,162-32,162.5 (1975); 41 C.F.R. §§ 1-1.601-1 to -1.602-1 (1975). A suspension may occur when such grounds are only suspected to exist; the most common situation involves suspicions of fraud or criminal conduct by a prospective contractor. See ASPR 1-605, 3 GOV'T CONT. REP. ¶ 32,163 (1975); 41 C.F.R. § 1-1.605 (1975). Suspension occurs only on grounds of nonresponsibility. See notes 17-19 & accompanying text infra. The word “ineligibility” is used with respect to determinations under the Walsh-Healey Act that a firm is not a manufacturer or regular dealer of goods of the kind involved and to determinations that a firm has violated the equal opportunity clause. Walsh-Healey Act § 1(a), 41 U.S.C. § 35(a) (1970). See, e.g., ASPR 7-103.18, 4 GOV'T CONT. REP. ¶ 33,636.90 (1975). Regula-
Such actions bar private entities, on a department-wide and often government-wide basis, from receiving awards of government contracts, with possibly devastating economic effects. The substantive grounds for the government's drastic action reflect the dual nature of the government as it enters the marketplace. On the one hand, the government is no different from any other buyer who seeks the best quality at the lowest price from reliable sellers. But on the other hand, the government is the sovereign, seeking by diverse means

7. The distinction between government contracts and government grants, while generally understood, is at times less than precise. See 3 COGP REPORT, supra note 1, at 155-60; Boasberg & Hewes, The Washington Beat: Federal Grants and Due Process, 6 Urban Law. 399 (1974). Generally, it may be said that a contract is an agreement for the procurement of property or services for the government. See ASPR 1-201.4, 3 Gov'T Cont. Rep. ¶ 32,036.20 (1975); 41 C.F.R. §§ 1-1.208 to -.209 (1975). In contrast, a grant is the provision of money, services or property by the government for the purpose of aiding or assisting a nonfederal activity. 3 COGP REPORT, supra note 1, at 153 n.3. Legislation has been proposed to clarify and distinguish the two concepts. See S. 1437, 94th Cong., 1st Sess. (1975). Federal procurement is generally governed by the Armed Services Procurement Act for the Department of Defense and NASA, 10 U.S.C. §§ 2301-14 (1970), and by the Federal Property and Administrative Services Act for most other agencies, 41 U.S.C. §§ 251-60 (1970), together with implementing regulations. See Grossbaum, Procedural Fairness in Public Contracts: The Procurement Regulations, 57 VA. L. REV. 171 (1971).

8. One of the grounds for debarment is such action taken by another agency. ASPR 1-604.1(iv), 3 Gov't Cont. Rep. ¶ 32,162.05 (1975); 41 C.F.R. § 1-1.604(a)(6) (1975). Furthermore, debarments on "inducement" grounds usually apply automatically government-wide, although not necessarily to all forms of contracts.

9. Inducement debarments and Walsh-Healey determinations of ineligibility may be applicable to only certain classes of contracts. For example, the Armed Services Procurement Regulations (ASPR) carefully distinguish six categories of debarment. See ASPR 1-603(a), 3 Gov't Cont. Rep. ¶ 32,161 (1975). The Department of Housing and Urban Development (HUD), on the other hand, provides that its debarments apply not only to its procurement, but also to direct or indirect participation in its grant and loan guarantee programs. See 24 C.F.R. § 24.3 (1975). Debarment under the labor acts also broadly affects contractors and subcontractors of federally-assisted construction. See 29 C.F.R. §§ 5.0-.14 (1975). A debarred entity is likewise ineligible to participate as a subcontractor in a government contract for which government approval of subcontractors is required. ASPR 1-603(c), 3 Gov't Cont. Rep. ¶ 32,161 (1975); 41 C.F.R. § 1-1.603(e) (1975). The time period of a debarment is a mandatory three years under the Davis-Bacon Act, 40 U.S.C. § 276a-2(a) (1970), and the Buy American Act, 41 U.S.C. § 10b(b) (1970). Otherwise, the period is discretionary, not to exceed three years without further proceedings, and the debarment may be lifted at any time. ASPR 1-604.2(a), 3 Gov't Cont. Rep. ¶ 32,162.10 (1975); 41 C.F.R. § 1-1.604(c) (1975). A recent trend in inducement debarments, however, is to debar until compliance is achieved. See, e.g., 40 C.F.R. § 15.20(c) (1975).
to carry forward national social and economic policies. The substantive
grounds for debarment and suspension reflect both roles.10

"Nonresponsibility" Debarment

Like any private buyer in the marketplace, the government seeks to
deal only with honest, reliable sellers. The concept of the "responsible
bidder" is deeply imbedded in government contract law. It was early
held that "the term 'responsible' means something more than pecuniary
ability; it includes also judgment, skill, ability, capacity, and integrity."11
Thus, regulations today expressly require that before the government
may award a contract, the contracting officer must make an affirmative
determination, in accordance with listed criteria, that the prospective
contractor is responsible; included in the list are requirements that the
contractor have a satisfactory record of performance and "of integri-
ty."12

Debarment and suspension for nonresponsibility are in substance
blanket determinations that such standards are not met.13 Through

10. A notably lucid analysis of the distinction between these two roles and indeed
of the whole area of this study may be found in Debarment of Government Contractors
K-1 (May 13, 1974). For a similarly excellent discussion of these issues, see A.
Lahendro, The Debarment and Suspension of Government Contractors: Who's on
First?, 1975 (unpublished thesis on file at the National Law Center at George Wash-
ington University).


12. ASPR 1-903.1, 3 Gov't Cont. Rep. ¶ 32,248 (1975); 41 C.F.R. § 1-1.1203-1
(1975).

13. The General Accounting Office (GAO) has commented on this process as fol-
lows: "[T]he evaluation of integrity and business ethics in determining responsibility
is undeniably difficult. These elements are not only relative in nature but their measure-
ment is complicated, additionally, by the necessity of estimating the extension, if any,
of particular conduct into and through a future period of performance. For these rea-
sons, the formulation of precise rules defining limits within which discretion to debar
properly may be exercised in the general 'integrity' area does not appear to be feasible.
The observation may be made, however, in the light of factors so far considered in our
decisions, that a lack of integrity such as would justify a determination of irresponsibility
and the imposition of debarment should be predicated upon a reasonable expectation,
evidenced by something more than an accusation, an unrelated offense, or an offense
remote in time, that an impairment of responsibility exists which will interfere with cur-
rent satisfactory performance of a Government contract." Senate Subcomm. on Ad-
mnistrative Practice and Procedure, Selected Reports of the Administrative Confer-
[hereinafter cited as ACUS Report].

The power of executive procurement agencies to debar or suspend on an across-the-
board basis is implied from the requirement that a bidder be "responsible." See, e.g.,
10 U.S.C. § 2305(c) (1970); 41 U.S.C. § 253(b) (1970). See also Gonzalez v. Fre-
eman, 334 F.2d 570 (D.C. Cir. 1964); Copper Plumbing & Heating Co. v. Campbell,
It is thus asserted that unless debarment or suspension is expressly authorized by statute,
regulations, the procuring agencies have provided that contractors may be debarred on a department-wide basis following: 1) convictions of criminal offenses which relate to the procurement process or otherwise indicate a lack of business integrity or business honesty, and/or 2) serious violations of prior government contracts.\textsuperscript{14} Debarments are not

\textsuperscript{14} The full text of a typical provision reads:

"Causes for debarment. The following are causes for debarment:

\textsuperscript{(i)} conviction by or a judgment obtained in a court of competent jurisdiction for—

\textsuperscript{(A)} commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;

\textsuperscript{(B)} violation of the Federal antitrust statutes arising out of submission of bids or proposals; or

\textsuperscript{(C)} commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility as a Government contractor.

If the conviction or judgment is reversed on appeal, the debarment shall be removed upon receipt of notification thereof. The foregoing does not necessarily require that a firm or individual be debarred. The decision to debar is discretionary; the seriousness of the offense and all mitigating factors should be considered in making the decision to debar.

\textsuperscript{(ii)} clear and convincing evidence of violation of contract provisions, as set forth below, when the violation is of a character so serious as to justify debarment action—

\textsuperscript{(A)} willful failure to perform in accordance with the specifications or delivery requirements in a contract (including violation of the Buy American Act with respect to other than construction contracts);

\textsuperscript{(B)} a history of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts; \textit{Provided}, That such failure or unsatisfactory performance is within a reasonable period of time preceding the determination to debar. (Failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered as a basis for debarment);

\textsuperscript{(C)} violation of the contractual provision against contingent fees; or

\textsuperscript{(D)} violation of the Gratuities clause, as determined by the Secretary in accordance with the provisions of the clause.

\textsuperscript{(iii)} for other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the Secretary of the Department concerned to justify debarment; or

\textsuperscript{(iv)} debarment for any of the above causes by some other executive agency of the Government. (Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts obtained by the original debarring agency.)" ASPR 1-604.1, 3 Gov'T Contr. Rep. ¶ 32,162.05 (1975).

Comparable provisions appear in the Federal Procurement Regulations (FPR). \textit{See} 41 C.F.R. § 1-1.604 (1975). Sometimes special grounds are added; for example, HUD states as a ground of debarment failure to pay debts due to HUD, and provides several other grounds reflecting the fact that its debarments apply to grants as well as contracts. \textit{See} 24 C.F.R. §§ 24.7(h), 24.9 (1975). Special provisions relative to grounds of de-
to punish such actions but only to protect the interests of the government: the General Accounting Office (GAO) has repeatedly stressed nonresponsibility as the sole acceptable basis for any administrative debarments not expressly authorized by statute.

The suspension process was developed to meet the situation presented when a prospective government contractor was merely suspected of offenses of the type which would authorize debarment. In such cases, if "adequate evidence" of such wrongdoing exists, the contractor may be suspended pending further investigation. Of course, from the contractor's view the effect is the same as a debarment, but analytically the process is only a prelude to possible debarment. Since suspension is based upon possible nonresponsibility of a contractor, it is used only in that connection and is not found in situations involving "inducement" debarment, to be discussed in the next section. It is in the suspension process, perhaps, that the greatest tension exists between the government's desire for unhampered participation in the market-

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16. ASPR 1-604, 3 Gov't Cont. Rep. ¶ 32,162 (1975); 41 C.F.R. § 1-1.601 (1975). The latter specifically states that debarments "should preclude awards only for the probable duration of the period of non-responsibility."
17. For a good summary of this entire area, see ACUS Report, supra note 13, at 297-302.
18. The ASPR, for example, read: "Causes for suspension. The Secretary or his authorized representative (see § 1.600(b)) may, in the interest of the Government, suspend a firm or individual:"
"
"(i) suspected, upon adequate evidence, of—"
"
"(A) commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;"
"
"(B) violation of the Federal antitrust statutes arising out of the submission of bids and proposals; or"
"
"(C) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor; or"
"
"(ii) for other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the Secretary of the Department concerned to justify suspension. Suspension of a firm or individual by the Secretary or his authorized representative shall operate to suspend such firm or individual through the Department of Defense." ASPR 1-605.1, 3 Gov't Cont. Rep. ¶ 32,163.05 (1975).
19. See notes 20-34 and accompanying text infra.
place and constitutional and policy limitations on its freedom of action. A private buyer could refuse to deal with a seller on a whisper of suspicion. Not so, perhaps, the sovereign.

Because the procurement statutes do not expressly provide for the use of department-wide debarments and suspensions on the grounds discussed above, such actions are sometimes called "administrative" debarments and suspensions. One may suggest, however, that it is more precise, in view of the theoretical purpose and statutory derivation of such actions, to term them "nonresponsibility" debarments and suspensions. Furthermore, the term "nonresponsibility" more clearly discriminates such debarments from "inducement" debarments, which are taken to further social and economic goals unrelated to the procurement process.

"Inducement" Debarment

Unlike a private buyer, the government is interested, as the sovereign, in achieving a wide variety of social and economic goals. The leverage provided by the sheer size of the government's procurement budget is a tempting weapon to use in furthering such goals. Specifically, the government, by statute or regulation or by inclusion as a term in a government contract, prescribes a norm of conduct designed to promote social or economic goals, and if a private entity fails to comply with that norm, one of the possible sanctions may be to deny the private entity the right to receive government contracts. This sanction may take the form of an outright ban on any government business for a set period of time or of a ban which continues until the private entity complies with the prescribed norm of conduct. In either event, the aim is to induce governmentally desired conduct.

20. One of the early uses of the power was the extension in 1892 of the mandatory eight-hour day to workers employed by contractors and subcontractors engaged in federal contracts. In 1905, an executive order prohibited the use of convict labor on government contracts, carrying out the policy of an 1887 statute prohibiting the hiring-out of convict labor. See 1 COGP REPORT, supra note 1, at 111-24. See generally Morgan, Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process, 1974 Wis. L. Rev. 301.

21. As already mentioned, only the Buy American Act and the Davis-Bacon Act make the three-year period mandatory. In other cases, the stated period of debarment may be a fixed term, but, in the case of norms related to contract performance, it is provided that the debarment may be lifted if compliance with the stated norm has occurred or seems likely to occur. See, e.g., 29 C.F.R. § 5.6(b)(1) (1975).

22. In the case of mandatory fixed-term debarments, of course, the debarment is in effect a penalty and induces not so much the punished party as others who might otherwise be tempted to stray. To be sure, it may induce the punished party not to re-
Such inducement goals, which the government as sovereign imposes on contractors, are often antithetical to the aims of the government in its capacity as buyer since the government's conditions reduce the number of potential bidders or add costs which are unrelated to the procurement process itself. Debarment on such grounds, therefore, is invoked only when the social or economic goal pursued has been expressly recognized as one which the leverage of the governmental procurement process should be used to further. Normally, Congress has made this determination in passage of legislation establishing the norm of conduct; hence debarment on such grounds is often called “statutory debarment,” in contrast to “administrative” debarment. Again, however, one may suggest that in view of the theoretical purpose, it is more precise to use the term “inducement” debarment. Furthermore, such usage recognizes that occasionally the only express authorization for inducement debarments is found in executive orders or administrative regulations, with the power to promulgate inducement debarments derived only inferentially from underlying statutory or con-

repeat the offense. One of the ACUS recommendations in 1962 was to eliminate the mandatory fixed term. See ACUS REPORT, supra note 13, at 63, 270, 293-95.

23. Illustrative of the difficulty in such terminology, however, is the fact that the secretary of HUD is expressly authorized by section 512 of the National Housing Act to make a blanket denial of participation in a wide series of HUD loan programs, whether directly as a lender or borrower or indirectly as a builder or the like, to persons who have violated provisions of the National Housing Act or the related Veterans Administration (VA) loan program. 12 U.S.C. § 1731a (1970). Such debarments, however, seem to have as their basic concern the responsibility of the participant and are not intended as inducements to achieve other social and economic goals. Conversely, some inducement debarments lack express statutory authority. See note 24 infra.

24. See, e.g., Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961) (debarment for violations of labor standards); Exec. Order No. 11,246, 3 C.F.R. 169 (1974) (debarment for violations of the equal opportunity clause); 40 C.F.R. § 15.20 (1975) (debarment for violations of environmental protection regulations). By the GAO analysis, all these grounds would presumably involve “nonresponsibility” determinations; the legal theory seems to flow from the thought that if a contractor violates a federal statutory or regulatory requirement (or a contractual term inserted pursuant thereto) he is inherently “nonresponsible.” The difficulty analytically is that the statutory or regulatory requirement really has no intrinsic relationship to the integrity of the procurement process, but is inserted for other purposes. For example, while the government is concerned about the employment conditions or pollution standards of a seller, it would be unusual for a private buyer to share this interest. The due process and policy considerations relating to debarment and suspension on nonresponsibility grounds could differ conceptually from those applicable to debarment and suspension on inducement grounds. Such considerations could become increasingly important if, as has been noted with some apparent concern, the procurement process is increasingly recognized as a means of implementing government social and economic policies. 1 COGP REPORT, supra note 1, at 111-24.
stitutional provisions. In this sense, of course, so-called “administrative” debarments are also statutory.

The statutes providing for inducement debarments fall into three major categories:

(1) A series of well-known labor standards acts, most notably the Davis-Bacon Act, 25 Walsh-Healey Act, 26 Contract Work Hours and Safety Standards Act, 27 and Service Contract Act of 1965, 28 prescribe wage rates and other working conditions that must be followed;

(2) The Buy American Act 29 provides generally for the use of American-produced materials in connection with government contracts (subject, of course, to exceptions); and

(3) The Clean Air Act 30 and the Federal Water Pollution Control Act amendments of 1972 31 contain numerous provisions to prevent and control air and water pollution.

In addition, an inducement debarment may follow when a contractor

25. 40 U.S.C. §§ 276a to a-5 (1970). A number of related statutes require wage payments similar to those specified in Davis-Bacon but may not contain express debarment authority for violation. The Labor Department provides for a single administrative debarment procedure for violations of Davis-Bacon and about 30 related statutes, presumably relying on the technical “nonresponsibility” rationale already discussed and the close analogy of the related statutes to Davis-Bacon in which the debarment sanction is expressly authorized. See 29 C.F.R. § 5.6(c) (1975). Such action was sustained in Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961).


27. 40 U.S.C. §§ 327-33 (1970). Section 333(d) deals with safety and health standards and permits debarment on the record after opportunity for an agency hearing. Otherwise debarment is not expressly authorized.


29. Id. §§ 10a-d. By its terms the debarment authority under the act applies only to construction contracts, although the requirement to buy American items applies to all contracts. Id. § 10b(a). Violation of the act by nonconstruction contractors is thus made an administrative ground of debarment. Oddly enough, this application of the act is appropriate if one believes all administrative debarments must turn on “responsibility.” See, e.g., ASPR 1-604.1(ii)(A), 3 Gov’t Contr. Rep. ¶ 32,162.05 (1975).


31. 33 U.S.C. §§ 1251-1376 (Supp. IV, 1974). Executive Order 11,738 prohibited all agencies from entering into any contract to be performed at a facility which had given rise to a conviction for violating the air or water acts or from extending federal assistance by grant or loan or contract which would support a program or activity involving the use of such a facility. Exec. Order No. 11,738, 3 C.F.R. 373 (1974); 42 U.S.C. § 1857h-4 (Supp. IV, 1974). Relying on its power to set forth procedures, sanctions, and penalties, the Environmental Protection Agency in its implementing regulations has also provided for the listing of facilities prior to conviction in certain cases. See 40 C.F.R. § 15 (1975).
violates the nondiscrimination provisions imposed on government contractors.32

The wonder may be that Congress has not enacted more statutes expressly authorizing debarment to further desired social or economic goals. Given the potential of the leverage, the Clean Air and Water Pollution Control Act amendments may presage things to come.33 Of course, the procurement process includes other methods besides debarment to further social and economic goals. For instance, small businesses may compete on preferential terms, labor surplus areas may be given special treatment, and price differentials may be paid in certain cases. One may venture to say that the procurement community tends to view such use of the procurement process for nonprocurement goals with limited enthusiasm, as adding numerous obligations and administrative complexities for government contracting officers. A report by the Commission on Government Procurement (COGP) devotes an
Evolution of Procedures for Debarment and Suspension

Given the potentially searing impact of debarment or suspension, the procedures leading to such actions have been the subject of repeated scrutiny as to their fairness and adequacy. One may perhaps outline the present situation most effectively by tracing the evolutionary history of debarment and suspension procedures over the past dozen-odd years.

The 1962 ACUS Study

Any analysis of debarment and suspension must begin with the monumental examination undertaken by the ACUS early in the 1960's. Under the direction of then Department of Defense General Counsel Cyrus R. Vance, the committee on adjudication of claims submitted an extensive report including nine recommendations concerning the debarment and suspension process. The conference adopted all the recommendations, which had been made "after ascertaining the detailed views of the Government departments and agencies concerned and of a special subcommittee of the American Bar Association." The recommendations covered several aspects of the process, but a central finding of the committee was that "[e]xcept for a small percentage, this Governmental action [of debarment or suspension] is taken without opportunity for an adversary hearing and if based on suspected criminal conduct is generally without being officially notified or informed of meaningful reasons, or opportunity to learn why."


35. The administrative conference referred to was established by Executive Order in 1961, to complete its work and terminate by the end of 1962. The conference consisted of an 11-member council and 75 additional participants, of which 46 were from the federal government and 29 from private life. The chairman was Judge E. Barrett Prettyman. See _Fuchs, The Administrative Conference of the United States, 15 Admin. L. Rev._ 6 (1963); Gantt & Panzer, _supra_ note 4, at 89. The present permanent body of the same name was established pursuant to the Administrative Conference Act, Pub. L. No. 89-554, 80 Stat. 388 (codified at 5 U.S.C. §§ 571-76 (1970)), and was activated in 1968. (President Eisenhower had also established a temporary conference in 1953.)


37. _ACUS REPORT, supra_ note 13, at 280.

38. _Id._ at 273.
As a result, the ACUS proposed as its central and probably most controversial recommendation that any initial debarment action should be preceded by an “opportunity for a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact relevant to the debarment issue”; in other words, that such debarment should be made only after the equivalent of the sort of hearing provided for in section 7 of the Administrative Procedure Act. On the related problem of indefinite suspension, the committee recommended a limit of eighteen months per suspension, a requirement of substantial grounds of suspected nonresponsibility, and the availability of high-level review.

The final ACUS report, containing these recommendations along with the numerous other ones adopted by the conference, went to President Kennedy at the end of 1962. President Kennedy, in acknowledging its receipt and thanking the ACUS for its recommendations, stated:

I have instructed the appropriate Government departments to consider them and report to me upon the best method to assure their implementation. I am confident that actions on these recommendations will contribute materially to improved administration of Federal regulatory programs.

39. Id. at 267.
40. Id. at 281. See 5 U.S.C. § 556 (1970). The special subcommittee of the American Bar Association (ABA) commenting on the recommendation thought it did not go far enough, in that it was limited to cases in which a material fact was in dispute. They asked that the recommendation be broadened to permit an opportunity to explain and to demonstrate present responsibility as a contractor, even when prior wrongdoing was admitted. In reply, the ACUS report noted that when a hearing was held, obviously such arguments could be made; when it was not, the arguments could be made to the debarment official. It also stated: “While decision of whether there are such issues warranting a trial-type hearing would rest with the agency proposing debarment, it is contemplated that such decisions would not be made on narrow technicalities or reflect an inhospitable view of what are disputed material facts.” ACUS REPORT, supra note 13, at 283-84; cf. Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 218-22 (1956).

41. The report had found that firms suspected of fraud or other criminal conduct in their government dealings were suspended pending investigation and action by the Department of Justice for indefinite periods that frequently exceeded three years, in some cases without even an opportunity to know the reasons or the evidence supporting the suspension. See ACUS REPORT, supra note 13, at 276.

42. Id. at iv; see Gantt & Panzer, supra note 4, at 101. The Gantt and Panzer article contains an excellent summary of the activities of the 1962 conference with respect to debarment and suspension. The president’s instruction was followed up in a bulletin by the Bureau of the Budget. See id.
The COGP Report

In its extensive report in December of 1972, the COGP\textsuperscript{43} reexamined the debarment and suspension processes.\textsuperscript{44} Among other matters it referred at length to the ACUS report and related the progress (or lack thereof) in implementing the recommendations. The COGP report noted that with respect to debarments, "to date, adversary hearings are required only for debarments under the Walsh-Healey and Service Contract acts, and Executive Order 11246,\textsuperscript{45} and that with respect to suspensions, as a result of a recent case\textsuperscript{46} new regulations were being prepared. Formal recommendation 46 of the commission urged the government to "revise current debarment policies to provide for uniform treatment for comparable violations of the various social and economic requirements and to establish a broader range of sanctions for such violations."\textsuperscript{47} The text of the report also noted the lack of uniformity among debarment and suspension procedures and the uncertainty con-

\textsuperscript{43} The COGP was established in November 1969 to study and recommend to Congress methods "to promote the economy, efficiency and effectiveness" of government procurement. Act of Nov. 26, 1969, Pub. L. No. 91-129, §§ 1-9, 83 Stat. 269, as amended, Act of July 9, 1971, Pub. L. No. 92-47, 85 Stat. 102. The 12-member commission and a staff of approximately 50 professionals produced its final report in 4 volumes in December 1972. The study included consultations with approximately 12,000 persons engaged in procurement; more than 2,000 meetings at 1,000 government, industry, and academic facilities; and questionnaires from nearly 60,000 individuals and others connected with procurement. Reports from study groups formed by the commission totaled more than 15,000 pages. The final commission report contained 149 recommendations for improving government procurement. 1 COGP REPORT, supra note 1, at vii-viii.

\textsuperscript{44} An entire chapter of the report is devoted to debarment and suspension procedures. See 4 COGP REPORT, supra note 1, at 61-68. In addition, various aspects of debarment and suspension are discussed in 1 id. at 123-24 and 4 id. at 9-10.

\textsuperscript{45} 4 id. at 66. The quoted statement may not be entirely accurate if individual department implementing regulations are included. Its general thrust, however, is on point.

\textsuperscript{46} Home Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972). See text accompanying notes 51-53 infra.

\textsuperscript{47} This recommendation was one of four made in a chapter entitled "National Policies Implemented Through the Procurement Process." Among other observations, the commission noted that while some statutes and regulations providing for implementation of socio-economic policies through the procurement process provide for debarment in the event of violation, others do not. Examples cited dealt with convict labor, labor surplus, and bonds for public works. The commission also noted that while some debarment provisions (for example, Davis-Bacon) specify the period of debarment, others describe a maximum period or an indefinite period that will end when the contractor demonstrates compliance with program requirements. The report remarked that "[t]he indefinite debarment period reflects the current trend." 1 COGP REPORT, supra note 1, at 123. Among alternative sanctions to debarment, the commission suggested the use of fines. This particular suggestion was rejected by the task group formed to study the recommendation. See notes 63-95 and accompanying text infra.
cerning due process requirements, and it urged a review having as its
goal published, uniform, expeditious, and fair rules.\textsuperscript{48}

Following the issuance of the COGP report, the executive branch
of the government organized task groups to deal with each of the
commission's recommendations. One such task group concerned itself
with the debarment process, as will be described.\textsuperscript{49} In May of 1972,
however, even before the report was completed, the decision by the
United States Court of Appeals for the District of Columbia in \textit{Horne
Brothers, Inc. v. Laird}\textsuperscript{50} had resulted in a flurry of activity by the
executive branch to revise the procedures for suspension of government
contractors.

\section*{The Suspension Revision of 1974}

The controversy in \textit{Horne Brothers} arose when the Navy summarily
suspended Horne Brothers because of suspected wrongdoing.\textsuperscript{51} The
court criticized the total absence in the regulations of any right to a
hearing in such cases and stated that while a temporary suspension for a
short period, not to exceed one month, might be permissible, for a
longer suspension “fairness requires that the bidder be given specific
notice as to at least some charges alleged against him, and be given, in
the usual case, an opportunity to rebut those charges.”\textsuperscript{52} On the other
hand, the court recognized that a full hearing might force the government to reveal its case prior to a criminal indictment and trial. The opinion discussed various possible ways to handle the balancing of these competing interests. The 1962 ACUS report also dealt with these same underlying considerations.

As a result of this decision, the government procurement fraternity engaged in an overhaul of its suspension procedure regulations. Proposed changes in the Armed Services Procurement Regulations (ASPR) were extensively commented upon by the Section of Public Contract Law of the American Bar Association (ABA) and by the Council of Defense and Space Industry Associations. In mid-1974 the resulting amendments were incorporated in the ASPR and the Federal Procure-

by describing the proceeding as one “attended by the contractor and his representatives, to provide an opportunity to offer evidence, to rebut charges and confront accusers, in short, to demonstrate the lack of adequate evidence to warrant suspension.” Id. at 1272.

53. See id. at 1271-72. The court said, “There may be reasons why the Government should not be required to show any of its evidence to the contractor, particularly reasons of national security, or, more likely, the concern that such a proceeding may prejudice a prosecutorial action against the contractor. The Government may also be concerned that a suspended contractor may seek a proceeding not so much to obtain reinstatement as a bidder, but in order to obtain a discovery not generally provided to criminal defendants.” Id. at 1271. The court observed that the standard to sustain suspension was only “adequate evidence,” analogous to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. Ordinarily, the government could meet this standard without prejudicing the case. In situations in which it could not, the court suggested a high-level determination that significant injury would result if a hearing were to be held, adding that this determination could be reviewed by a court if challenged as arbitrary. In its second appeal, Horne Brothers argued that it was precisely when the government's case was weakest that the disclosure of adequate evidence would most prejudice the future prosecution, and that a hearing therefore should be required in every case of suspension. Horne Brothers argued further that the failure to disclose to a contractor the nature of the suspected wrongdoing makes it impossible for the contractor to correct the wrong (for example, to fire the suspected employee) and thus restore itself to a responsible status. It was also charged that the draft regulations to comply with the original decision had misinterpreted and distorted the court's guidelines. Brief for Appellant at 25-31, 38-39.

54. The ABA group found in general that the proposed ASPR regulation adequately dealt with the issues raised by the Horne Brothers decision. Certain clarifications were suggested, and the group said that its comments were based upon the assumption that the DOD intends actually to conduct a hearing in the adversary sense contemplated by the court. See Letter from the American Bar Association to ASPR Committee, March 27, 1973 [hereinafter cited as ABA Letter]. The Council of Defense and Space Industry Associations suggested that several further revisions were necessary before fundamental fairness could be achieved, focusing on more detail in the notice and hearing guidelines. See Letter from the Council of Defense and Space Industry Associations to ASPR Committee, March 26, 1973; Fed. Cont. Rep. at A-1 (April 9, 1973). By and large, the final regulations followed the draft form.
ment Regulations (FPR). In their final form, these regulations require greater specificity in the notice of suspension, although the irregularities prompting suspension are still to be described "in general terms, without disclosing the Government's evidence." In addition, an opportunity for a hearing before an agency official is provided within twenty days unless the suspension is based upon an outstanding indictment or unless a hearing "would adversely affect possible civil or criminal prosecution" against the private entity. The FPR also mentions adverse effect on possible labor proceedings. The determination of adverse effect is made upon advice from the Department of Justice (or Labor), and if a hearing is denied, "any information or argument in opposition to the suspension may be presented in person, in writing, or through representation." In no event may a suspension exceed eighteen months unless legal proceedings have commenced.

One should observe, as is stated above, that suspensions are relevant only in connection with "responsibility" grounds. The suspicion that a private entity has committed a criminal act relating to business integrity obviously triggers the procurement official's concern about the responsibility of the bidder. In contrast, when "inducement" grounds are involved, there is no reason to take any action on mere suspicion of a violation, nor is there usually any concern about interference with a criminal prosecution. Therefore, the suspension process is unnecessary, and any action waits until a firm debarment decision is made.

58. ASPR 1-605.2(a), 3 Gov't Cont. Rep. ¶ 32,163.10 (1975); 41 C.F.R. § 1-1.605-4(c) (1975).
60. In its letter of comment, the ABA Section on Public Contract Law stated that it believed this time period is too long and is subject to legal attack in the courts. The group said, "If an investigation of a contractor or its employees is going to consume more than several months without indictments, we feel that the Government is legally obligated to continue to accept and fairly consider bids from the contractor with appropriate safeguards exercised internally by the Government to insure that the Government is not victimized in any areas in which the contractor may be under investigation." See ABA Letter, supra note 54. The 18-month rule followed one of the 1962 ACUS recommendations. See ACUS REPORT, supra note 13, at 60-61.
61. See notes 11-34 and accompanying text supra.
62. The EPA regulations provide for the "listing" of a facility when an order of
The Task Group Proposals of 1975

As already mentioned, as following the issuance of the report of the COGP, interagency task groups were formed to examine and recommend executive branch positions on each of the 149 formal recommendations of the commission. One such task group dealt with COGP recommendation number 46, concerning debarment and suspension. On May 22, 1975, the task group's proposals were made public.

The task group considered two areas of debarment. With respect to the labor standards statutes which provide for debarment for violations, the COGP report had pointed out that debarment procedures under the Walsh-Healey Act and the Service Contracts Act of 1965 expressly provide for the equivalent of an APA section 7(c) hearing. The hearing provided before debarment under the Davis-Bacon Act and the numerous related statutes dealing with minimum wages, however, is more limited: upon request, a party charged with violation may receive "an informal proceeding . . . before a hearing examiner, a regional director of the Wage and Hour Division, or any other Departmental officer of appropriate ability"; and before the hearing the party charged will have available any information disclosed by the investigation which is not privileged or found confidential for good cause. The hearing provided before debarment under the Davis-Bacon Act and not the related statutes, debarment is handled by the GAO, but the GAO considers the Labor Department

the administrator is not complied with or a civil enforcement action has been brought. See 40 C.F.R. §§ 15.20(a)(1)(iii), (vi) (1975). Listings on this ground must be lifted within a year unless a criminal conviction or civil court ruling has been obtained. Id. at § 15.20(c). Hence, in a sense, such a listing may be viewed as analogous to a suspension.

63. See text accompanying note 49 supra.
64. The effort was initially directed and coordinated by the Office of Management and Budget, but this responsibility was later shifted to the GSA. See Exec. Order No. 11,717, 3A C.F.R. 177 (1973).
65. See 40 Fed. Reg. 22318-19 (1975). The discussion in this article concerning the task group and its proposals is based upon the Federal Register account, which was prepared by the GSA.
66. See notes 25-28 and accompanying text supra.
68. 29 C.F.R. § 5.6(c) (1975).
69. The Davis-Bacon Act expressly provides that the Comptroller General of the United States shall "distribute a list . . . giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors." 40 U.S.C. § 276a-2 (1970). No such provision appears in the related acts. Authority to debar for such violations was centralized in the Secretary of Labor by Reorganization
findings and recommendations. In commenting on the Davis-Bacon procedure, the COGP report noted the following apparent weaknesses: 1) the party's file is made available ex parte, without opportunity for confrontation of witnesses, 2) the nature of the hearing is discretionary with the Department of Labor, and 3) no separation of function exists between the officials proposing debarment and those who decide. The task group proposal states that the Department of Labor has spent much time and money in preparing a consolidated labor statute which will include provisions for uniform labor debarment procedures and intends at some point to include a bill calling for such consolidation as part of the Department of Labor legislative program.

The task group characterized its other area of study that of “administrative debarment,” presumably including all responsibility debarments. The task group investigated administrative debarments from the standpoint of both due process in debarment and suspension cases and uniformity of procedure. Focusing on “responsibility” debarments as provided in the FPR and the ASPR, the task group contrasted the FPR provision requiring that a hearing be granted under “procedural safeguards which satisfy the demands of fairness” as set forth in the regulations of each agency, with the comparable ASPR provision, which provides only that “information in opposition to a proposed debarment

Plan No. 14 of 1950, providing that the secretary should “prescribe appropriate standards, regulations and procedures.” 5 U.S.C. App. 534 (1970). This authority was held broad enough to permit debarment in Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961).

70. The Secretary of Labor's regulations provide for an identical procedure whether the violation is under Davis-Bacon or under one of the related acts, although they of course recognized that with respect to Davis-Bacon actions, any action is subject to “action to be taken by the Comptroller General.” 29 C.F.R. § 5.6(c) (1975). GAO has established certain procedures which it is to follow, specifying the criteria for reports to be submitted and for recommendations of the agency concerned and of the Department of Labor.

71. 4 COGP REPORT, supra note 1. at 62. The due process adequacy of the Davis-Bacon procedure, particularly the failure to produce witnesses for cross-examination, was challenged in Framla Corp. v. Dembling, 360 F. Supp. 806 (E.D. Pa. 1973). Although the court seemed to view with general approval the entire regulatory procedure, the precise holding was that no such right to cross-examine at the appellate level was required by due process. The contractor had not sought such a right at the original hearing.

72. See 40 Fed. Reg. 22319 (1975). It was stated that such a bill would be part of the Department's program for the current 94th Congress, but it is understood that this will not be the case. See id.

73. With respect to suspension procedures, the published proposal simply refers to the 1974 amendments as having overtaken the COGP report in that area, and apparently concludes that the revised suspension procedures meet due process requirements. See id.

74. 41 C.F.R. § 1-1.604-1 (1975).
may be presented in person, in writing or through representation.\footnote{75} The task force proposal stated that the group believed the FPR provision adequately handled the due process issue and recommended that ASPR be similarly amended "by providing for a hearing in the interest of due process." The Department of Transportation member disagreed, believing that administrative procedures for debarment should be conducted in the same manner as that provided in the Labor Department statutes, which require full due process consideration before administrative law judges. (Administrative debarments are heard before agency personnel.)\footnote{76}

An examination of the implementing regulations developed by the individual civilian agencies casts more light on the effect of the FPR requirement of a hearing prior to debarment. These regulations differ somewhat, but the major agencies subject to the FPR usually have gone beyond the minimum they set forth. The General Services Administration (GSA), for example, requires debarment hearings to be held before the administrator or by a hearing authority, thus separating the prosecuting and judging functions,\footnote{77} and the GSA hearings provide for the participation of counsel, the questioning of witnesses, and procedures similar insofar as practicable to those used by the Board of Contract Appeals.\footnote{78} The Department of Health, Education, and Welfare (HEW) expressly provides for witnesses and counsel.\footnote{79} The Department of Agriculture, the Atomic Energy Commission (AEC),\footnote{80} and the

\footnote{75} ASPR 1-604.3, 3 Gov't Cont. Rep. ¶ 32,162.15 (1975). When the ground for debarment is violation of the gratuities clause, an administrative determination of such violation is made only after a full hearing. Also, of course, when debarment is based on a criminal conviction of the precise person debarred, a full due process hearing has perforce been held on that factual issue. \textit{Cf.} Gonzalez v. Freeman, 334 F.2d 570, 578 n.17 (D.C. Cir. 1964). As a result of the July 1974 amendment to the suspension procedures, the literal terms of the ASPR regulations now afford the possibility of greater due process protection in cases of suspension than in cases of debarment. The ABA committee pointed out this situation in its comments on the draft suspension regulations. \textit{See} ABA Letter, \textit{supra} note 54. It might be noted that the FPR in requiring a hearing explains that "at the minimum information in opposition to the proposed debarment may be presented, in person or in writing, and, if desired through an appropriate representative." 41 C.F.R. § 1-604-1 (1975).

\footnote{76} The minority report states in summary: "It is my view that due process should be provided from the beginning of debarment considerations, and that it is both practicable and necessary to consider statutory and regulatory debarment together rather than separately to arrive at optimum Government-wide uniformity." 40 Fed. Reg. 22319 (1975).

\footnote{77} \textit{See} 41 C.F.R. §§ 5-1.604-1, 3A-1.604-1 (1975).
\footnote{78} \textit{Id.} §§ 5-1.606.53, 5A-1.604-1(d)(2).
\footnote{79} \textit{See id.} § 3-1.604-1(b).
\footnote{80} The AEC's existence as such of course terminated in 1974 with the establish-
Department of Transportation (DOT) provide for hearings before their Boards of Contract Appeals. The National Aeronautics and Space Administration (NASA), on the other hand, follows the ASPR text. The task group recommends that both the procedures and the substantive grounds for administrative debarment be made uniform among all government agencies, presumably under the aegis of the Office of Federal Procurement Policy.

The published task group proposal does not specifically mention procedures for "inducement" debarments other than the procedures based on the labor statutes. Under the Buy American Act, each individual agency determines violations, but apparently no regulations have been promulgated specifically covering the procedures to be followed. The Environmental Protection Agency's (EPA) recent regulations under the Clean Air and Water Pollution Acts require a "Listing Proceeding" before any adverse action takes place. This procedure calls for notice and an opportunity to confer with the deciding official and to present information orally or in writing, with counsel. If a facility is listed and a request for removal is denied, the regulation provides for a full-scale hearing similar to a trial. Debarment based on the fourth inducement debarment ground, violation of the equal...
opportunity clause, is imposed only after procedures\textsuperscript{88} which, in the words of the COGP report, "go far in providing 'safeguards' normally associated with adversary hearings . . . ."\textsuperscript{89}

Another special area is Department of Housing and Urban Development (HUD) debarments and suspensions, which, as will be shown hereafter,\textsuperscript{90} constitute the major proportion of reported activity in the department/suspension area today. Such action excludes the debarred or suspended entity from any HUD program, whether by way of contract or grant. The grounds for such debarment may be statutory\textsuperscript{91} or administrative.\textsuperscript{92} In both cases, however, the grounds usually relate to responsibility rather than achievement of social or economic goals, because the statutory grounds, which appear in section 512 of the National Housing Act, concern offenses under the National Housing Act or the Veteran's Administration loan program (or contracts thereunder) and the administrative grounds are similar to those in ASPR and FPR. In other words, the basis for debarment or suspension is actual or suspected wrongdoing in connection with a HUD contract, grant, or loan program. Somewhat oddly, perhaps, section 512 debarments and administrative debarments are dealt with in separate regulations, despite their similarity. Before a section 512 debarment can take place, the accused party is entitled to written notice specifying the charges in reasonable detail, to an opportunity to be heard, and to representation by counsel before the deciding official, who is also the person initiating the action. The deciding official must base the determination on the preponderance of the evidence.\textsuperscript{93} Administrative debarments are governed by extensive due process procedures promulgated in 1971. Hearings are held before a departmental hearing officer, who is responsible for the "fair and expeditious conduct" of the proceedings, counsel are permitted, and a record of the proceedings is made available to the parties upon request. A similar hearing is provided prior to a suspension.\textsuperscript{94}

\begin{thebibliography}{99}
\bibitem{88} See 41 C.F.R. §§ 60-1.26 to -1.27 (1968). Debarment under the Rehabilitation Act follows the same full trial-type hearings used for the Service Contract Act or is carried out "in accordance with procedures prescribed by the contract." \textit{Id.} § 1-12.1309.
\bibitem{89} See note 102 and accompanying text \textit{infra}.
\bibitem{90} See note 102 and accompanying text \textit{infra}.
\bibitem{93} \textit{Id.} §§ 200.190-200.194. Although the regulations prescribe the described procedure, it is understood that in practice, section 512 actions follow the same procedure as administrative debarments.
\bibitem{94} \textit{Id.} §§ 24.0-24.10. One possible objection is that the hearing officer is
\end{thebibliography}
In summary, then, a general review of formal debarment/suspension procedures in the federal establishment shows that the 1962 ACUS recommendation of a “trial-type hearing before an impartial agency board or hearing examiner”\(^9\) prior to debarment is not in universal effect, although a number of agencies have taken steps to expand procedural rights, and improvements seem to continue.

For a full assessment of the nature and extent of the due process problem in debarments and suspensions, one must turn to an examination of the numbers and types of debarments and suspensions actually occurring today.

**Debarment and Suspension in Action**

The elaborate statutory and regulatory structure for debarment and suspension described above,\(^9\) together with the several past and continuing studies and activities in the area, might suggest that such actions are common in the federal government. The facts indicate the contrary. Information on debarments and suspensions is not collected in one single place. There presently exist three “centralized” lists, in GAO, GSA, and the Department of Defense (DOD). The GAO list, sometimes termed the “statutory debarment list,” covers debarments for violations of labor statutes and of the equal opportunity clause.\(^9\) The GSA list covers all administrative debarments, including those by the DOD.\(^9\) The DOD list is a joint consolidated list of debarred, ineligible,
and suspended contractors who are thereby unable to compete for DOD business; thus, it includes the statutory and administrative debarments by other agencies that apply to DOD.\textsuperscript{99} The lists, then, overlap in part.\textsuperscript{100} Also, agencies keep their own lists similar to the DOD consolidated list; for example, HUD maintains a list applicable to HUD, published quarterly.\textsuperscript{101}

An examination of the lists\textsuperscript{102} indicates that at the beginning of 1975 there were 458 firms in a debarred status, as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Housing Act</td>
<td>272</td>
</tr>
<tr>
<td>Secretary</td>
<td>61</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
</tr>
<tr>
<td>Walsh-Healey and Service Contracts Acts</td>
<td>70</td>
</tr>
<tr>
<td>Davis-Bacon and related labor acts</td>
<td>24</td>
</tr>
</tbody>
</table>

Debarments undertaken under section 512 of the National Housing Act nevertheless appear on this list, because debarment under section 512 is by HUD directive a ground for administrative debarment applicable to all HUD contractors and grantees. 24 C.F.R. § 24.9(a)(6) (1975). Section 512 by its terms only debars from participation in certain loan programs stated therein.

99. This DOD Consolidated List, maintained by the Department of the Army on behalf of all defense components, is the only consolidated list currently containing suspension information. ASPR 1-601.3, 3 Gov'T CONT. Rep. ¶ 32,159 (1975), provides for this consolidated list and also provides that each defense component will maintain its own list. The consolidated list is no longer classified, although the underlying data is. See ASPR 1-601.4, 3 Gov'T CONT. Rep. ¶ 32,162.05 (1975). Although it might appear that the list would be the most complete of the three, the absence of any of the HUD administrative debarments makes the list deceptively short. Administrative debarment by one component of the federal government may be a ground for debarment by another component but is not mandatorily so; in the Defense Department, however, a debarment or suspension by any component (by any component) automatically takes effect throughout the department. ASPR 1-604, 1-605.1, 3 Gov'T CONT. Rep. ¶¶ 32,162, 32,163.05 (1975).

100. The debarment and suspension task group "strongly advocates" that the Office of Procurement Policy take over responsibility for preparing and issuing a consolidation of all contractor suspension, debarment, and ineligibility lists. A consequence would be that a contractor debarred or suspended by one agency would be considered debarred or suspended government-wide, although the task group conditions this feature on the establishment of uniform grounds for such actions which would be applicable government-wide. See 40 Fed. Reg. 22319 (1975).

101. The HUD list is entitled "Consolidated List of Debarred, Suspended and Ineligible Contractors and Grantees" and is unclassified. See 24 C.F.R. § 24.6 (1975). Because of the activity of HUD in this area, the list is considerably longer than any of the major consolidated lists. The FPR require every agency to keep its own list, but it is understood that in fact few do. See 41 C.F.R. § 1-1.602 (1975).

102. These figures have been analyzed as accurately as possible. It should be noted, however, that because of time lag and other factors, certain discrepancies exist among the lists. The data are taken from the GSA list of December 2, 1974 and the GAO list of January 2, 1975.
The sum of these numbers represents the total number of debarments. The annual debarment figure (that is, the number of additions to the list) was 97, as follows:

DOD (combined) 12
GSA 9
Exec. Order 11,246 (equal opportunity) 5
Other 4

An examination of the actual debarments taking place and of the due process procedures provided in each case, as discussed above, shows that of the ninety-seven debarments, seventy-nine were conducted under procedures which approximate the trial-type hearing. These procedures were used at the HUD administrative debarments, and the debarments under the Walsh-Healey and Service Contracts Acts and the equal opportunity clause. Thirteen of the debarments involved the Davis-Bacon and related labor acts or the National Housing Act, statutes which expressly provide for a hearing of a lesser nature.

Suspensions, which are always administratively imposed, do not appear on the GSA list, and so government-wide figures are unavailable. The DOD list, however, does contain information on suspension and shows only fifteen firms in that status as of the beginning of 1975; the HUD list shows 217 suspensions. Since all HUD suspensions are administrative, they are subject to the same full hearing requirement imposed for debarment, as mentioned above; the DOD suspensions are now subject to the revised ASPR regulation on suspensions, which went into effect on July 1, 1975.

One may contrast present procedures with the situation existing at the time of the 1962 ACUS study. At that time, there were no debarments or suspensions recorded from the predecessors of HUD, the

103. See notes 66-94 and accompanying text supra.
104. See notes 90-94 and accompanying text supra.
106. The GAO consolidated list of administrative debarments of August 1, 1962, showed only three administrative debarments outside of the DOD, of which two were by the DOA, one by the VA.
department which now accounts for the great majority of all debarments and suspensions. Nevertheless, some 340 firms were in debarred or suspended status, as follows:\footnote{107}

<table>
<thead>
<tr>
<th>Status</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debarred under Walsh-Healey Act</td>
<td>170</td>
</tr>
<tr>
<td>Debarred under Davis-Bacon and related labor acts</td>
<td>34</td>
</tr>
<tr>
<td>Debarred by DOD</td>
<td>39</td>
</tr>
<tr>
<td>Suspended by DOD</td>
<td>77</td>
</tr>
</tbody>
</table>

One can only speculate as to the reasons for the decline in debarments and suspensions outside of HUD.\footnote{108} Possibly, rather than using the more complex procedures now required for formal debarments and suspensions, somewhat the same result is being achieved through adverse determinations on the “responsibility” of a prospective bidder\footnote{109} in each individual case, perhaps by using the “experience lists” maintained by some agencies.\footnote{110} No widespread complaints of such actions have

\footnote{107. ACUS Report, supra note 13, at 273 n.1.}
\footnote{108. The DOD consolidated list of January 1, 1970, contains 32 defense suspensions and 11 defense debarments. The comparable list of January 1, 1966, contains 29 defense suspensions and 24 defense debarments. One factor that might explain the paucity of suspension in the 1970's is the period of uncertainty following the Horne Brothers decision and continuing until the effective date of the new suspension regulations in mid-1974. A comparison of the defense consolidated lists at the beginning of 1974 and the beginning of 1975 indicates that no new suspension action occurred in 1974, at least none that continued until the first day of 1975.}
\footnote{109. Cf. 40 N.Y.U. L. Rev. 804 (1965). The successive use of nonresponsibility determinations in lieu of debarment, however, would violate the comptroller general's requirements set forth in 43 Comp. Gen. 140 (1963). That opinion involved two successive nonresponsibility determinations based on the same criminal offense. Under such circumstances, debarment procedures had to be invoked, because to conclude otherwise “would necessarily result in authorizing contracting agencies to continue indefinitely to disregard low bids by successive determinations of nonresponsibility, and without affording the bidder opportunity to be heard.” Id. at 141. Therefore, when a nonresponsibility finding is based upon a criminal offense, the steps to debar should be taken at the same time as the criminal prosecution. See also 43 Comp. Gen. 387 (1963).}
\footnote{110. Both ASPR and FPR require that a contracting officer, in reaching a determination on responsibility, make maximum use of currently valid information on file within the agency. They also require that each agency “shall, at such level and in such manner as it deems appropriate, make available all records and experience data which shall be made readily available for use by contracting officers . . . .” 41 C.F.R. § 1-1.1205-1(b) (1975); accord, ASPR 1-905.1(b), 3 Gov't Cont. Rep. ¶ 32,250 (1975). At least four agencies, the Defense Supply Agency, the Navy, the Air Force, and the GSA, provide by regulation for a formal “Contractor Experience List” or “Review List of Bidders.” See 32 C.F.R. §§ 1001.905-50, 1201.950 (1975); 41 C.F.R. § 5A-1.1205-50 (1975). The Air Force Contractor Experience List, for example, is maintained by the directorate of procurement policy at Air Force headquarters, and includes contractors whose performance has been unsatisfactory “or whose responsibility is questioned for other specific reasons.” 32 C.F.R. § 1001.905-50(d)(5) (1975). Prior to being placed on the list, the contractor is given notice of the specific deficiencies. He has 15 days...}
reached the current published literature. The 1962 ACUS report attempted to deal with this possible problem by making it clear that its requirement of a hearing similar to a trial should be interpreted broadly to cover every form of agency black-listing of proposed contractors or subcontractors, and the report further recommended that any government rejection of a bid on grounds of lack of business integrity or business honesty be preceded by a written explanation of the reasons for that determination "and by the opportunity for such proposed contractor or subcontractor to reply to the contracting officer within a reasonable period of time . . . ." This recommendation has not been put into effect, but a bidder rejected on grounds of nonresponsibility may follow the usual route for protest of awards.

within which to present reasons why he should not be listed. Id. at § 1001.905-50(e)(2). The Air Force regulation states clearly, as do the other provisions, that a listing will not be interpreted to bar an award to a contractor: "The CEL's [Contractor Experience List] have no relationship to the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors, and the inclusion of any contractor on a CEL will not in any sense be regarded as a determination of debarment or ineligibility." The purpose of the listing is to alert contracting officers to possible difficulties. Id. at § 1001.905-50(b)-(c). The GSA characterizes firms on its "Review List" as ones which "because of questionable responsibility, require extraordinary consideration before award of contracts . . . ." The list is marked "For Official Use Only," and private parties are not to be apprised of it in any way whatsoever. No notice is provided to a listed contractor at any time. On the other hand, when a bid is rejected on grounds of nonresponsibility, the contracting officer must promptly notify the bidder by letter, settling forth the reasons for the rejection, to provide an opportunity for the correction of the offending practices prior to future offerings. Nonetheless, "[t]he List shall not be cited as a reason for, or factor contributing to, the nonresponsibility determination." 41 C.F.R. § 5A-1.1205-50 (1975).


112. See ACUS REPORT, supra note 13, at 281. The report specifically includes as such conduct "de facto debarments or debarment-type actions such as inclusion on agency or bureau 'review lists' or 'experience lists' of firms of questionable responsibility." Id.

113. Id. at 62; see Comment, Due Process in Public Contracts: Pre-Award Hearings to Determine Responsibility of Bidders, 5 Pac. L.J. 142 (1974); cf. Housing Authority v. Pittman Constr. Co., 264 F.2d 695 (5th Cir. 1959).

114. See 4 COGP REPORT, supra note 1, at 35-49. Generally speaking, when a
The paucity of litigation also indicates the absence of a large amount of federal activity in the field of debarment and suspension. In 1964, the United States Court of Appeals for the District of Columbia decided Gonzalez v. Freeman, in which a private firm was debarred for five years from participating in contracts with the Commodity Credit Corporation (CCC), a corporate instrumentality established by Congress. No hearing was provided, nor were any grounds stated for the action, although it seemed fairly evident that it stemmed from misuse of official inspection certificates, which had resulted in a misdemeanor conviction. The CCC had not issued any regulations authorizing or governing debarment. In the opinion, then Circuit Judge Warren Burger made it clear that a debarred contractor had standing to bring suit and that the action was subject to judicial review. The narrow holding on the merits was that while the statute establishing the CCC by implication authorized such debarment, Congress did not intend to authorize such debarment “without either regulations establishing stand-
ards and a procedure which are both fair and uniform or basically fair treatment of appellants."\textsuperscript{117} While avoiding the constitutional issue directly, the opinion was replete with references to "the obligation to deal with uniform minimum fairness" and the need for "safeguards which satisfy the demands of fairness." Indeed, one passage suggested that only the full trial-type hearing would suffice in debarments:

The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.\textsuperscript{118}

This is strong language. Yet in the decade since \textit{Gonzalez v. Freeman}, only a single reported case has arisen directly bearing on this area, that of \textit{Horne Brothers, Inc. v. Laird},\textsuperscript{119} described above,\textsuperscript{120} involving suspension.\textsuperscript{121} During this decade, as has been much noted,\textsuperscript{122} numerous cases have been decided by the Supreme Court asserting and reasserting in a myriad of contexts the necessity for due process protection consistent with countervailing governmental considerations.\textsuperscript{123}

Furthermore, a dramatic change in the judicial attitude toward the government contract area itself occurred in 1970. For a generation, it was thought that a private contractor usually had no right to complain about the way in which the government administered its contracting process. In the leading case of \textit{Perkins v. Lukens Steel Co.},\textsuperscript{124} the Court expounded this doctrine:

\begin{itemize}
  \item \textsuperscript{117} 334 F.2d at 580.
  \item \textsuperscript{118} \textit{Id.} at 578.
  \item \textsuperscript{119} 463 F.2d 1268 (D.C. Cir. 1972).
  \item \textsuperscript{120} See notes 51-53 and accompanying text supra.
  \item \textsuperscript{121} Framlau Corp. v. Dembling, 360 F. Supp. 806 (E.D. Pa. 1973), tangentially involved the due process issue in a labor standards setting, but the holding directly concerned only a determination of a wage standard violation, since the Wage Appeals Board had recommended against debarment.
  \item \textsuperscript{123} See text accompanying notes 130-39 infra.
  \item \textsuperscript{124} 310 U.S. 113 (1940). The precise holding of the case was that a private firm had no standing to challenge a wage determination by the Secretary of Labor under the Walsh-Healey Act, but the sweeping language of the decision by Justice Black was widely construed to bar all generalized attacks on the government procurement process.
\end{itemize}
Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . . [The Public Contracts Act] was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government. . . .

In Scanwell Laboratories, Inc. v. Shaffer, 126 in a lengthy opinion by Judge Tamm, the doctrinal sweep of this exclusion of governmental contract matters from judicial review was effectively undercut by the court's recognition of the right of a disappointed bidder on a government contract to challenge in court the legality of the government's action. While the exact limits of this extension of judicial review to government contracting are still being worked out, 127 the case and its progeny justify the conclusion that "judicial influence on Government contracts is, on the whole, waxing in importance." 128 The Scanwell case, like Gonzales and Horne Brothers, was widely discussed and well-known in the government contracts bar. In a litigious age, with the private government contracts bar an organized and vocal group and with substantial economic interest at stake, the small number of reported cases at least suggest the limited nature of the problem.

Conclusion

Whether common or rare, however, a decision to debar or suspend—and perforce the procedures whereby the decision is reached—can be of transcendent importance to the contractor involved. True it is that these procedures have been and are yet the subject of extensive and continuing study. The 1962 ACUS report covered in exhaustive detail the underlying factual situation and relevant policy considerations. The COGP again surveyed the same area a decade later. The Labor Department is said to be in the process of developing a comprehensive statute on labor standards debarments. An executive branch task group has recently reviewed administrative debarments and suspensions. The suspension procedures were amended just a year ago.

Of course, once the government has entered into a contract with a private concern, judicially-protected rights arise which are enforceable against the United States under the Tucker Act, 28 U.S.C. § 1491 (1970).

125. 310 U.S. at 127.
to expand the due process coverage, after study and comment from private groups.

Ever so haltingly and so slowly, the federal government edges toward the goal of the ACUS's key 1962 recommendation. To sound a refrain: surveying the area in its entirety, the conference concluded that the agencies should go the whole way, that regardless of the ground or nature of debarment, statutory or administrative, inducement or responsibility, formal or informal, the parties should have the opportunity "to have a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact."129

This straightforward and clear recommendation is still a sound standard. The reluctance of the government to implement this recommendation seems to stem from several sources. In part, no doubt, the reluctance is simply inertia. It seems to be perceived that the more the due process, the slower the action, and the procurement community's basic task is to get the goods delivered to the government. The need for and purpose to be served by a hearing is questioned. The problem of hearing costs is raised. The reluctance of the procurement community to permit the debarment power to pass out of its hands into those of a hearing officer may reflect a belief that debarment, flowing from a determination of the overall "responsibility" of a prospective bidder, is essentially a procurement decision which should be made by procurement officials. Likewise, in the case of inducement debarment, those responsible for achieving the social and economic goals sought by the government may feel a need to retain direct control of the weapon of debarment. These and related considerations were, of course, fully vented at the time of the 1962 ACUS recommendation, and the balance was seen to tip in favor of a full trial-type hearing.

Furthermore, the legal setting since 1962 has undergone a revolution. The Gonzalez and Scanwell decisions have effectively negated any assertion that government contracting is a privilege rather than a right to which the due process clause can attach. While only the Gonzalez and Horne Brothers cases bear directly upon the extent of due process required in debarments and suspensions, the Supreme Court in case after case over the past half-decade has emphasized the breadth and force of the constitutional requirement of procedural fairness embraced in the due process clause. This development is a familiar story and will

129. ACUS REPORT, supra note 13, at 60. Suspensions as opposed to debarments, of course, present special considerations. See text accompanying notes 41, 51-60 supra.
not be rechronicled here in detail.\textsuperscript{130} \textit{Goldberg v. Kelly,}\textsuperscript{131} in which the Court held that a welfare recipient is entitled to an evidentiary hearing before the termination of benefits, was of course the seminal case. The constitutional emanations from that case as to a hearing right prior to adverse governmental action are reflected in holdings relating to replevin actions,\textsuperscript{132} to automobile license revocations,\textsuperscript{133} to employment in public colleges when de facto tenure was alleged,\textsuperscript{134} to revocations of parole,\textsuperscript{135} and just last term to ten-day suspensions of high school students.\textsuperscript{136}

These decisions, to be sure, make clear that "the interpretation and application of the Due Process Clause are intensely practical matters"\textsuperscript{137} and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."\textsuperscript{138} They emphasize that "the nature of the hearing will depend on appropriate accommodation of the competing interests involved."\textsuperscript{139}

Surely, the balancing process that led to the view over a decade ago, in a quite different legal setting, that fairness required a trial-type hearing on disputed facts in debarments—through which businesses might be driven into bankruptcy—would not today yield a different result. The scale still tips the same way. Indeed, the question should be: has not the time long since come for acknowledgment by the federal government's contracting community that the wave of the due process revolution has reached its shores as well?

\begin{itemize}
\item \textsuperscript{130} See note 122 supra.
\item \textsuperscript{131} 397 U.S. 254 (1970).
\item \textsuperscript{132} See Fuentes v. Shevin, 407 U.S. 67 (1972).
\item \textsuperscript{133} See Bell v. Burson, 402 U.S. 535 (1971).
\item \textsuperscript{134} See Perry v. Sindermann, 408 U.S. 593 (1972).
\item \textsuperscript{135} See Morrissey v. Brewer, 408 U.S. 471 (1972).
\item \textsuperscript{137} Goss v. Lopez, 419 U.S. 565, 578 (1975).
\item \textsuperscript{138} Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).
\item \textsuperscript{139} Goss v. Lopez, 419 U.S. 565, 579 (1975).
\end{itemize}