TWENTY-THIRD MAJOR FRANK B. CREEKMORE LECTURE: WHERE WE CAME FROM AND WHERE WE MAY BE GOING[*]

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[*] This is an edited transcript of a lecture delivered on November 17, 2011, by Dr. Michael J. Davidson, to attendees of the Government Contract and Fiscal Law Symposium, members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 60th Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

The Major Frank B. Creekmore Lecture was established on January 11, 1989. The lecture is designed to assist The Judge Advocate General's School in meeting the educational challenges presented in the field of government contract law.

Frank Creekmore graduated from Sue Bennett College, London, Kentucky, and from Berea College, Berea, Kentucky. He attended the University of Tennessee School of Law, graduating in 1933, where he was inducted into the Order of the Coif for scholarly achievement. After graduation, Mr. Creekmore entered the private practice of law in Knoxville, Tennessee. In 1942, he entered the Army Air Corps and was assigned to McChord Field in Tacoma, Washington. From there, he participated in the Aleutian Islands campaign and served as the Commanding Officer of the 369th Air Base Defense Group.

Captain Creekmore attended The Judge Advocate General's School at the University of Michigan in the winter of 1944. Upon graduation, he was assigned to Robins Army Air Depot in Wellston, Georgia, as contract termination officer for the southeastern United States. During this assignment, he was instrumental in the prosecution and conviction of the Lockheed Corporation and its president for a $10 million fraud related to World War II P-38 Fighter contracts. At the War's end, Captain Creekmore was promoted to the rank of major in recognition of his efforts.

After the war, Major Creekmore returned to Knoxville and the private practice of law. He entered the Air Force Reserve in 1947, returning to active duty in 1952 to successfully defend his original termination decisions. Major Creekmore remained active as a reservist and retired in the rank of lieutenant colonel in 1969. He died in April 1970.

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Prior to ICE, Mr. Davidson was employed as a litigation and supervisory attorney at the Department of the Treasury for six years. He is a retired Army judge advocate, retiring as a lieutenant colonel after twenty-one years of active duty. While an Army JAG, he was a Special Trial Attorney with the Department of Justices's Commercial Litigation Branch (Civil Fraud) specializing in civil False Claims Act litigation, a Special Assistant U.S. Attorney in Arizona specializing in defense procurement fraud and public

If history is a gauge there has always been procurement fraud and there will always be procurement fraud. From the birth of the nation, there have been contractors who have put personal profit before patriotic fervor and have defrauded the military. Unfortunately that misconduct continues today as our nation is engaged in two wars in Southwest Asia.

In the procurement community there are two competing forces, corruption control on one side and commercial/business-like acquisition reform advocates on the other. The corruption control forces want greater

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integrity prosecutions; and a Branch Chief in the Army Procurement Fraud Division responsible for the coordination of legal remedies for contract fraud and for the development and presentation of contractor fraud and performance failure cases to the Army Suspension and Debarment Official. In addition, he also served as the Chief of Contract & Administrative Law at Army Component Central Command, as a litigation attorney in the Army's Litigation Center, and as a military prosecutor at Fort Hood, Texas.

Mr. Davidson graduated from the U.S. Military Academy in 1982. He received his law degree from the Marshall-Wythe School of Law, College of William & Mary in 1988, where he was a member of the Order of the Coif and an Editor & staff member of the *William & Mary Law Review*. Mr. Davidson received a LL.M. in Military Law from the Judge Advocate General's School in 1994 and a second LL.M. in Government Procurement Law, *with highest honors*, in 1998 from the George Washington University School of Law, where his thesis discussed Individual Surety Bond Fraud. Finally, Mr. Davidson was awarded the Doctor of Juridical Science (SJD) degree in 2007 from George Washington University School of Law in Government Procurement Law. His doctoral dissertation focused on defense procurement fraud.

Mr. Davidson is the author of two books: *A Call To Action: Re-Arming The Government In The War Against Defense Procurement Fraud* (Vanderplas Publishing, 2009); *A Guide to Military Criminal Law* (Naval Institute Press, 1999) and over forty legal articles. His procurement fraud-related articles include: *The ICE Suspension and Debarment Program Heats Up*, PROC. LAW. 1 (Fall 2010) (co-author); *Show Me The Money! Maximizing Agency Recoveries In Fraud Cases*, J. OF PUB. INQUIRY 1 (Fall/Winter 2009-2010); *VFATA: Virginia's False Claims Act*, 3 LIBERTY U. L. REV. 1 (Spring 2009); *The Government Knowledge Defense to the Civil False Claims Act: A Misnomer By Any Other Name Does Not Sound As Sweet*, 45 IDAHO L. REV. 41 (2008); *Combating Small-Dollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act*, 37 PUB. CONT. L.J. 213 (2008); *Protest Challenges to Integrity-Based Responsibility Determinations*, 14 FED. CIR. BAR J. 473 (2005); *Governmental Responses to Elder Abuse And Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act*, 12 ELDER L.J. 327 (2004); *Applying the False Claims Act to Commercial IT Procurements*, 34 PUB. CONT. L.J. 25 (2004), *reprinted at* 38 TAXPAYERS AGAINST FRAUD Q. REV., July 2005, at 105; *Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations*, ARMY LAW., Sept. 2002, at 21; Procurement Fraud Division Note, *The Miscellaneous Receipts Statute and Permissible Agency Recoveries of Monies*, ARMY. LAW., Mar. 2001, at 35; *10 U.S.C. 2408: An Unused Weapon in the Procurement Fraud Wars*, 26 PUB. CONT. L.J. 181 (Winter 1997); *The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields*, ARMY LAW., June 1997, at 17.

government oversight and regulation, and a strong anti-fraud legal regime. In contrast, there are those who want to procure or sell goods and services as efficiency and inexpensively as possible, with little regulation and oversight. Beginning during the Civil War, the interplay between these two forces influenced the development of our current body of law, and the tug and pull between them has been particularly pronounced in modern times.

First, I will review the history of procurement fraud, primarily focusing on the military as victim and the development of the current fraud control regime. Second, I will discuss three current issues: (1) the disturbing involvement of uniformed members of the military in procurement fraud; (2) the need for a sustained source of anti-fraud funding; and (3) the President's recent draft Executive Order attempting to merge campaign finance reform with the procurement fraud regime.

I. Where We Came from: A History of Procurement Fraud and the Development of a Fraud Control Regime

A. In The Beginning . . . There Was Fraud

Procurement fraud has plagued the military since the birth of our nation. During the Revolutionary War, the Continental Army suffered from shoddy supplies, war material, and foodstuffs delivered by unscrupulous contractors. Axes arrived without heads, food was inedible, blankets and shoes were substandard, and gunpowder unusable.[1] General George Washington exclaimed: "These murderers of our cause ought to be hunted down as pests of society and the greatest enemies to the happiness of America. I wish to God that the most atrocious of each state was hung . . . upon a gallows five times as high as the one prepared for Haman."[2]

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[1] JAMES F. NAGLE, HISTORY OF GOVERNMENT CONTRACTING 19 (2d ed. 1999) (citation omitted).

[2] William P. Barr, *Foreword, Seventh Survey of White Collar Crime*, 29 AM. CRIM. L. REV. 169, 171 (1992) (citing MARSHALL CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER 69 (1990)).

B. The Civil War Produces The False Claims Act

During the Civil War, the Union Army encountered widespread fraud from defense contractors. Union soldiers opened ammunition crates and discovered sawdust instead of gunpowder.[3] Union cavalry were charged multiple times for the same horse[4] and many of the horses purchased were diseased or disabled.[5] Shoes were of such poor quality that they fell apart when wet and blankets were characterized as "little better than trash."[6]

Faced with such widespread fraud, Congress initially reacted by subjecting contractors to military jurisdiction.[7] Subsequently, in 1863, Congress again reacted to the rampant fraud and passed the False Claims Act.[8] Significantly, the Act also contained a *qui tam* provision, which permitted an individual (aka relator) to sue on behalf of the United States.[9] Following the defense procurement scandals of the 1980s, Congress significantly strengthened the FCA, reducing the scienter requirement, providing for treble damages, increasing the relator's potential recovery, and providing whistleblower protections.[10]

The Civil False Claims Act (FCA), 31 U.S.C. §§ 3729–3733, is now one of the Government's most powerful weapons against fraud, generating more than $27 billion since 1986.[11] Further, at least three

[3] ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 11 (1995).
[4] *Id.*
[5] NAGLE, *supra* note 1, at 202; *see also* Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, 76 OKLA. B. J. 901, Apr. 9, 2005, at 901 ("decrepit horses and mules in ill health").
[6] NAGLE, *supra* note 1, at 198.
[7] In 1862, Congress extended military jurisdiction over contractors who supplied supplies and war material to the Army or Navy. At least nineteen contractors were convicted at Army courts-martial. Michael J. Davidson, *Court-Martialing Civilians Who Accompany the Armed Forces*, 56 FED. LAW. 43, 44 (Sept. 2009).
[8] Joe R. Whatley, Jr. & Thomas J. Butler, *Update on Government Contract Litigation: The False Claims Act and Beyond*, 56 FED. LAW. 39 (Jan. 2009) ("The FCA was passed in 1863 to address rampant misconduct in sales of military 'equipment' (mules, rifles, rations, and so forth) to the Union Army.").
[9] Lahman, *supra* note 5, at 901.
[10] *Id.* at 902.
[11] Press Release, Dep't of Justice, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010 (Nov. 22, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html.

major cities (Washington, D.C., New York City, Chicago) and twenty-six states have enacted their own versions of the FCA.[12]

C. Fraud on the Frontier and An Unlikely Hero

Even though there was a relatively small Army on the post Civil War frontier, there were reports of procurement fraud. Contractors provided old, Civil War era hardtack to the cavalry[13]and cheated the Army on supply contracts.[14] Highly sought-after fort construction contracts "sometimes involved illegal payoffs, cozy arrangements with key officers, and substandard inspections of the finished product."[15] The cost of Army contracts in Texas were regularly inflated.[16] Some of the local citizenry deliberately stirred up trouble with the Indian tribes so that the Army would be called in, along with their lucrative contracts.[17]

One historic figure who became involved in anti-fraud efforts was George Armstrong Custer, who would become famous after his defeat at the Battle of the Little Big Horn.[18] Custer publicly "related instances

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[12] Whatley & Butler, *supra* note 8, at 40.

[13] LAWRENCE A. FROST, THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER 79 (1987) ("Dishonest contractors had provided hardtack obviously old, as the dates of the Civil War years still were visible on the containers.").

[14] FAIRFAX DOWNEY, INDIAN-FIGHTING ARMY 139 (1957) (In Arizona, "contractors cheated the Government right and left on orders for hay, lumber, and other Army supplies."); *see* MICHAEL L. TATE, THE FRONTIER ARMY IN THE SETTLEMENT OF THE WEST 124 (1999) (Report from Fort Concho, Texas of inferior hay supplied by a contractor and repeatedly paid for by the post quartermaster, "even through cavalry officers refused to feed the hay to their horses").

[15] TATE, *supra* note 14, at 118.

[16] *Id.* at 124. The Acting Assistant Surgeon of Fort Concho, Texas, asserted that the inflation occurred with the assistance of "the entire Texas congressional delegation." *Id.*

[17] DOWNEY, *supra* note 14, at 139; *see also* TATE, *supra* note 14, at 114 ("Fanning the fires of an 'Indian Scare' became a common practice in the West when civilian contractors wished to expand their army business or save existing economic ties that were threatened by new policies."); ROBERT WOOSTER, THE MILITARY & UNITED STATES INDIAN POLICY 1865–1903, at 103 (1988) ("Army and Interior Department officials complained that western merchants provoked violence with Indians in order to attract more soldiers, government supply contracts, and money.").

[18] On June 25, 1876, a combined force of Sioux and Cheyenne warriors killed Custer and wiped out five companies of the U.S. Seventh Cavalry, a force of approximately 225 soldiers. Michael J. Davidson, *Court-Martialing Cadets*, 36 CAP. UNIV. L. REV. 625, 642 & n.63 (2008). A controversial figure, Custer had suffered a court-martial conviction as both a cadet (neglect of duty and conduct unbecoming) and as a Regular Army officer (absence without leave, failing to adequately repulse an Indian attack, and ordering

where bread baked and dated in 1861 was issued to his regiment in 1867; where huge stones weighing as much as twenty-five pounds were found in unbroken packages of provisions, for which the government had paid a food contractor high prices per pound."[19] Further, he complained of corrupt Indian agents and traders, who often defrauded the tribes.[20]

In addition, Custer testified twice before the House Committee on Expenditures in the War Department, which was investigating Secretary of War William Belknap for accepting bribes and kickbacks in exchange for Army post traderships, positions which gave the traders exclusive trading rights on Army posts.[21] Custer testified that "it was a common belief in the Army that the secretary was in league with the corrupt traders at Army posts and Indian reservations"[22] and that the frauds of which Custer was aware "could not possibly have been carried on to anything like the extent they were without [Belknap's] connivance and approval . . ."[23] Further, Custer testified that the post trader at his post, Fort Abraham Lincoln, had revealed to him that post traders were required to pay a hefty "tax to outside people," a third of which went to "an intimate friend of the Secretary" and "a portion went to the Secretary of War."[24] Custer also complained that the post traders charged the Army officers, soldiers and their families "exorbitant" prices for goods, and when one of Custer's officers attempted to purchase goods elsewhere and resell them to his men "at cost," Secretary Belknap sent a written rebuke to Custer reminding him that "no other person will be allowed to trade, peddle, or sell goods, by sample or otherwise, within the limits of the

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deserters shot). *Id.* at 643–44. Also, he enjoyed an impressive battlefield record during the Civil War, advancing to the temporary rank of Brigadier General by age twenty-four. *Id.* at 643. In comparison, Custer's brother Thomas, who also perished during the Battle of the Little Big Horn, was a two time recipient of the Medal of Honor. EDITORS OF THE BOSTON PUBLISHING COMPANY, ABOVE AND BEYOND: A HISTORY OF THE MEDAL OF HONOR FROM THE CIVIL WAR TO VIETNAM 53 (1985).

[19] FROST, *supra* note 13, at 35–36; *see also* GENERAL GEORGE A. CUSTER, MY LIFE ON THE PLAINS 46 (reprinted 2010) (1874).

[20] CUSTER, *supra* note 19, at 114–15.

[21] JAMES S. ROBBINS, LAST IN THEIR CLASS: CUSTER, PICKETT AND THE GOATS OF WEST POINT 335 (2006).

[22] *Id.*

[23] *Testimony of Gen. George A. Custer Before the Committee of Expenditures of the War Department* 26 (Mar. 29, 1876) [hereinafter Custer Testimony] (copy on file with author).

[24] *Id.* at 6.

[military] reserve."[25] Eventually, Belknap resigned to avoid impeachment and further embarrassment to the administration.[26]

In addition, Custer offered "vivid portraits of corrupt Army traders and Indian agents," including accusing Orville Grant—the President's brother—of accepting a bribe in exchange for the award of an Indian reservation trading post,[27] and being complicit in various frauds against the Army and tribes.[28] Custer explained how contractors with the Indian Department would deliver corn for the tribes, but then reroute the same corn to an Army post for sale, to be paid twice for the same corn.[29] In one instance, Custer discovered that an Army Sergeant had been bribed to inflate the weight of the corn sacks before the Army purchased them.[30] He also relayed reports of steamer boats contracted to transport food up river to the tribes, selling a portion to citizens along the route.[31] The testimony proved embarrassing for the President,[32] who replaced Custer as commanding officer of the Seventh Cavalry on the eve of the expedition against the Sioux.[33] Only after the intervention of Generals Terry and Sheridan did Grant changed his mind and return Custer to command.[34]

D. WWII: Truman Takes a Road Trip

The massive build-up of the armed forces during WWII generated an increase in associated procurement fraud. Largely dormant since the Civil War, the False Claims Act found renewed vigor.[35] In addition, the

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[25] *Id.* at 4–5.
[26] ROBBINS, *supra* note 21, at 335; WOOSTER, *supra* note 17, at 22 ("Belknap resigned to avoid impeachment for illegally selling post sutlerships.").
[27] ROBBINS, *supra* note 21, at 360; *see also* Custer Testimony, *supra* note 23, at 8 (Grant bribed), 16 (tribes defrauded), 16–17 (dishonest contractors), 22 (fraudulent Indian agents).
[28] Custer Testimony, *supra* note 23, at 23.
[29] *Id.* at 16–17.
[30] *Id.* at 17.
[31] *Id.* at 18–19, 23.
[32] ROBBINS, *supra* note 21, at 360. Custer had also annoyed Grant by openly associating with Democratic politicians in Washington and by publicly criticizing Grant's Indian policy. *Id.* at 360–61.
[33] *Id.* at 364.
[34] *Id.* at 365.
[35] John P. Robertson, *The False Claims Act*, 26 ARIZ. ST. L. REV. 899, 901 (1995) (The "Act lay essentially dormant until World War II broke out and fraud on the government by defense contractors increased.").

fraud, waste, and abuse attendant with America's build-up and procurement of goods and services necessary to fight the war also produced a fraud fighter whose other successes have largely eclipsed his contributions to curbing procurement fraud throughout the WWII period—Harry S. Truman.

After receiving complaints of "gross extravagancy and profiteering in the construction of Fort Leonard Wood," Truman decided to investigate for himself.[36] Using the family car, an "old Dodge," Truman drove from Washington, D.C., to Florida, then to the Midwest, and finally into Michigan inspecting Army bases and defense plants.[37] He discovered that the primary contractor for the construction of Fort Leonard Wood had no prior construction experience, material had been abandoned to the elements, and "hundreds of men [were] just standing around collecting their pay, doing nothing."[38] Further, most contracts were on a cost-plus basis ("paid for all costs plus a fixed percentage profit")—"an open ticket . . . for excessive profits."[39]

Returning to Washington, Truman convinced President Roosevelt and his colleagues in the Senate to permit him to form "the Senate Special Committee to Investigate the National Defense Program, " which became known as the Truman Committee.[40] During the Civil War, Lincoln's political opponents had formed a similar committee, which they used as a weapon against Lincoln, and while Roosevelt harbored concerns that he would suffer the same fate, he eventually relented.[41]

The Truman Committee found that the cost of building Army bases was grossly excessive, caused in part by cost-plus contracts.[42] Truman expanded the scope of his committee's investigation, traveling throughout the country, holding hearings both locally and in Washington, inspecting defense plants and investigating all aspects of defense production.[43] After discovering that a contractor was manufacturing

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[36] DAVID MCCULLOUGH, TRUMAN 256 (1992).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 257–59.
[41] *Id.* 258. Confederate General Robert E. Lee reportedly "remarked that the committee was worth two divisions to him . . . ." *Id.*
[42] *Id.* The Army's Chief of Services of Supply attributed over $250 Million in cost savings to Truman's investigative efforts. *Id.*
[43] *Id.* at 263, 265–66.

defective engines, the Committee rejected over 400 engines and the Army Air Corps eventually disciplined one of its generals involved with the contract.[44] Similarly, the Committee discovered that the defense contractor producing the B-26 bomber knew that the wingspan was not wide enough, causing the plane to crash, but continued to produce the plane because production plans were too far along and the Government had already awarded it a contract.[45] After Truman threatened to terminate the contract and ensure the contractor never received another, the wings were corrected.[46]

Investigating reports of "outrageous" payrolls, Truman and other members of his Committee traveled to an airport in the Dallas-Fort Worth area for an inspection. The Committee discovered over six hundred men hiding in a hanger basement, who were on the contractor's payroll but performed no work.[47] Truman required the contractor to return the overpayments and then ensured it received no further contracts.[48] By war's end, Truman believed that his committee had saved the Government over $15 billion and thousands of lives.[49]

E. Vietnam and the Loss of Court-Martial Jurisdiction

The most significant development to come out of the Vietnam War, from a fraud control perspective, was the loss of court-martial jurisdiction over contractors. By today's standards, civilian contractors in Vietnam represented only a tiny percentage of the American presence in that theater of war, peaking at 9000 by 1969.[50] The military's legal pursuit of civilian contractors in Vietnam was hardly the result of prosecutorial zeal since only sixteen civilians were considered for court-martial by 1968 and only four of the sixteen actually went to trial.[51]

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[44] *Id.* at 271–72; MERLE MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN 177–78 (1974).
[45] MCCULLOUGH, *supra* note 36, at 272; MILLER, *supra* note 44, at 177.
[46] MCCULLOUGH, *supra* note 36, at 272; MILLER, *supra* note 44, at 177.
[47] MILLER, *supra* note 44, at 177.
[48] *Id.*
[49] *Id.* at 176–77.
[50] MAJOR GENERAL GEORGE S. PRUGH, VIETNAM STUDIES: LAW AT WAR, VIETNAM 1964–1973, at 88 (1975).
[51] LT. COL. GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 168 (1989); PRUGH, *supra* note 50, at 109.

Rather, it was a reaction to concerns of an increased contractor presence and an associated increase in contractor misconduct.[52]

In *United States v. Averette* an Army contractor in Vietnam challenged his court-martial conviction for conspiracy and attempted larceny of Government-owned batteries, and the resultant sentence of a $500 fine and confinement for a year.[53] Reversing the conviction, the U.S. Court of Military Appeals held that Article 2(10)'s jurisdiction reach over contractors was limited to periods of declared war.[54] Significantly, an earlier decision from the U.S. Court of Appeals for the District of Columbia Circuit had also overturned the court-martial conviction of a civilian contractor on jurisdictional grounds.[55] With the loss of jurisdiction, the military resorted to a form of administrative debarment (and subsequent removal from Vietnam) to deal with misbehaving contractors, eventually debarring 943 by April 1971.[56]

The military's jurisdiction shortcomings were largely remedied by the John Warner National Defense Authorization Act for Fiscal Year 2007, which expanded Uniform Code of Military Justice jurisdiction over civilians accompanying the armed forces to include contingency operations.[57] Shortly thereafter, the Army achieved its first court-martial conviction of a contractor since Vietnam, an Army contractor in Iraq who stabbed another contractor.[58]

F. The Modern Era

During our professional lifetimes we have seen wide swings between the fraud control forces and the acquisition reform advocates, who desire less oversight and regulation and more efficiency and streamlined

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[52] PRUGH, *supra* note 50, at 109. After negotiations between the military, which desired greater jurisdiction, and the State Department, which wanted to rely on administrative sanctions, American authorities agreed to consider "the most serious and exceptional cases be tried by court-martial." *Id.*; *see also* SOLIS, *supra* note 51, at 168.
[53] 41 C.M.R. 363 (1970).
[54] *Id.*
[55] SOLIS, *supra* note 51, at 167–68 (citing Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969)).
[56] *Id.* at 168; PRUGH, *supra* note 50, at 110.
[57] Pub. L. No. 109-364, 120 Stat. 2083, § 552 (2006). A contingency operation is defined at 10 U.S.C. § 101(13) (2006).
[58] *Civilian Contractor Pleads Guilty at Court-Martial: First Prosecution Under Amended UCMJ*, 77 U.S. LAW WEEK (BNA) No. 1, at 2003 (July 1, 2008).

procedures. During the 1980s the acquisition community saw widespread corruption within the Defense industry and Congress reacted accordingly. For example, Operation Ill Wind was a massive investigation of defense procurement fraud involving large numbers of investigators and prosecutors, which resulted in the issuance of over 800 grand jury subpoenas, and the review of over two million documents.[59] Misconduct included "bribery and illegal gratuities; misuse of procurement information; mail and wire fraud; . . . conversion of government documents, including classified documents . . . and . . . false claims and false statements."[60] Ultimately, the Government convicted ninety individuals and entities.[61] Among those convicted were "an Assistant Secretary of the Navy, a Deputy Assistant Secretary of the Navy, and a Deputy Assistant Secretary of the Air Force."[62] In the wake of these scandals, Congress enacted the Procurement Integrity Act,[63] the Major Fraud Act,[64] the Prohibited Employment Statute,[65] the Program Fraud Remedies Act,[66] the Anti-Kickback Act,[67] and strengthened the Civil False Claims Act.[68] Beginning in the early 1980s Congress also

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[59] Brigadier General (Retired) Richard J. Bednar, *The Fourteenth Major Frank B. Creekmore Lecture*, 175 MIL. L. REV. 286, 290 (2003).

[60] *Id.*

[61] *Id.* For a detailed discussion of Operation Ill Wind, see generally PASZTOR, *supra* note 3.

[62] Press Release, U.S. Attorney, E. Dist. of Va., Combating Procurement Fraud: An Initiative to Increase Prevention and Prosecution of Fraud in the Federal Procurement Process 2 (Feb. 18, 2005), *available at* http://www.usdoj.gov/usao/vae/ArchivePress/FebruaryPDFArchive/05/21805FraudWhitePaper.pdf.

[63] 41 U.S.C. § 423 (recodified at 41 U.S.C. §§ 2101–2107 (2006)); *see* George Cahlink, *Closing Doors*, GOV'T EXEC., July 15, 2004, at 48, 52 (as a result of Ill Wind "Congress passed the 1988 Procurement Integrity Act . . . ").

[64] 18 U.S.C. § 1031 (2006).

[65] 10 U.S.C. § 2408 (2006); *see generally* Michael J. Davidson, *10 U.S.C. 2408: An Unused Weapon in the Procurement Fraud Wars*, 26 PUB. CONT. L. J., Winter 1997, at 181.

[66] 31 U.S.C. §§ 3801–3812 (2006); *see generally* Michael J. Davidson, *Combating Small-Dollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act*, 37 PUB. CONT. L.J. 213 (2008).

[67] 41 U.S.C. §§ 51–58.

[68] Bednar, *supra* note 59, at 301 (major revisions); *see also* Whatley & Butler, *supra* note 8, at 39 ("[I]n 1986 . . . the FCA became a viable tool in modern-day federal courts. Among other changes, the 1986 amendments restored the preponderance of the evidence standard, imposed treble damages and civil fines per false claim, increased rewards for qui tam plaintiffs, and provided for the payment of a successful plaintiff's expenses and attorneys' fees.").

began to pressure agencies to make better use of administrative suspension and debarment.[69]

By the 1990s however, the pendulum swung back toward procurement reform and a more efficient, business-like acquisition model.[70] The Federal Acquisition Streamlining Act (FASA) of 1994[71] and the Clinger-Cohen Act of 1996[72] brought significant changes to the federal procurement system, including streamlining procurement actions.[73] As part of the procurement reform efforts of the 1990s a number of systemic protections were reduced or eliminated, particularly for commercial item acquisitions. For example, the Prohibited Employment Statute, which prohibits felons from serving in positions of responsibility on defense contracts, is inapplicable to commercial items.[74] Additionally, the Certification Regarding Responsibility Matters requirement, which mandates that a contractor identify if it or its principals are suspended, debarred, proposed for debarment, have had a recent fraud-related conviction or civil judgment, or are under indictment, is likewise inapplicable for commercial item contracts under the simplified acquisition threshold.[75]

Further, Congress mandated reductions to the acquisition workforce.[76] Congressional policies reduced the acquisition workforce from "460,516 in fiscal 1990 to 230,556 in fiscal 1999."[77] The

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[69] Bednar, *supra* note 59, at 293.

[70] *See* Michael J. Benjamin, *Multiple Award Task And Delivery Order Contracts: Expanding Protest Grounds And Other Heresies*, 31 PUB. CONT. L.J., Spring 2002, at 429, 430 ("Procurement reform in the 1990s was characterized by greatly increased purchaser discretion and greatly reduced internal and external oversight"); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001) (procurement reforms of the mid-1990s "were intended to make the procurement system less bureaucratic and more businesslike").

[71] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[72] Pub. L. No. 104-106, 110 Stat. 679 (1996).

[73] Ezenia!, Inc. v. United States, 80 Fed. Cl. 60, 64 (2008) ("The purpose of [FASA] was to streamline, in some instances, federal procurement actions").

[74] 10 U.S.C. § 2408(a)(4)(B) (2006); DFARS 212.503(a)(vii) (Jan. 2012).

[75] FAR 12.301(b)(2) (Jan. 2012); *id.* 52.212-3(h).

[76] Matthew Weigelt, *Panel Finds Contracting Disarray*, FED. COMPUTER WEEK, Nov. 12, 2007, at 42 ("Congress legislated acquisition workforce cuts of 25 percent in the 1990s . . . ."); *see* Joseph J. Petrillo, *Wrong Lessons Learned*, FED. COMPUTER WEEK, Sept. 17, 2007, at 38 ("it was the acquisition reforms of the 1990s that hollowed out government acquisition offices").

[77] Steven l. Schooner, *Keeping Up with Procurement*, GOVEXEC.COM (July 5, 2006), *available at* http://www.govexec.com/dailyfed/0706/070506.htm

acquisition workforce has yet to recover from the earlier reductions. Since 2000 federal procurement spending rose 155 percent, while the acquisition workforce only increased by 10 percent.[78]

Several procurement fraud scandals arose during the last decade, which caused the pendulum to again shift course. Notable among these scandals were the fraud, waste, and abuse seen in the wake of Hurricanes Katrina and Rita,[79] the Darlene Druyun affair,[80] and reports of widespread contract fraud and waste in Iraq/Afghanistan.[81]

Congress has taken some positive steps to address the fraud, most notably by again strengthening the Civil False Claims Act. The Fraud Enforcement and Recovery Act of 2009 modified the FCA, eliminating the requirement that a false claim be presented directly to the Government, ensuring that liability attaches when a subcontractor submits a false claim to the prime contractor or a government grantee rather than directly to the Government.[82] Additionally, Congress revised the FCA's language to eliminate any specific intent requirement.[83]

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[78] Scott Wilson & Robert O'Harrow Jr., *President Orders Review of Federal Contracting System*, WASH. POST, Mar. 5, 2009, at A4.

[79] The Government Accountability Office determined that "as much as 16 percent of the billions of dollars in Federal Emergency Management Administration aid to individuals after the two hurricanes was unwarranted" and that the Government paid "out as much as $1.4 billion in bogus assistance to victims of Hurricanes Katrina and Rita . . . ." Larry Mabgasak, *Fraudulent Katrina and Rita Claims Top $1 Billion*, WASH. POST, June 14, 2006, at A3; *see also* Chris Gosier, *New Reports of Katrina Contracting Abuse Anger Lawmakers*, FED. TIMES, May 8, 2006, at 7 ("Debris removal contractors gamed the system to inflate their profits . . . ."); *see Katrina Task Force Awaits Spike in Fraud Cases*, FED. TIMES, May 15, 2006, at 8 (noting a federal task force had prosecuted 261 persons for fraud).

[80] A senior DoD procurement official, Druyun "obtained jobs with Boeing for her daughter, her daughter's fiancée, and herself while negotiating a contract with Boeing on behalf of the Air Force. Druyun gave Boeing a 'parting gift' by agreeing to a higher price than she believed appropriate for Boeing's tanker aircraft." *Combating Procurement Fraud*, *supra* note 62, at 2. Druyun pled guilty to conspiracy and was sentended to nine months in prison. Laura M. Colarusso, *Revolving Door Leads to Jail*, FED. TIMES, Oct. 11, 2004, at 1.

[81] In 2011, the Commission on Wartime Contracting estimated that "[a]s much as $60 billion in U.S. funds has been lost to waste and fraud in Iraq and Afghanistan over the past decade through lax oversight of contractors, poor planning, and payoffs to warlords and insurgents . . . ." *Billions of War Dollars Lost to Fraud and Waste*, WASH. POST, Aug. 31, 2011, at A5. By the end of Fiscal Year 2010, civil FCA "settlements and judgments in procurement fraud cases involving the wars in Southwest Asia total[ed] $137.2 million." Press Release, *supra* note 11, at 3.

[82] Pub. L. No. 111-21, 123 Stat. 1617 (2009); *see* Steven L. Briggerman, *False Claims Act Amendments: A Major Expansion In The Scope of the Act*, 23 NASH & CIBINIC REP. ¶

Once again, there is a renewed emphasis on using suspension and debarment as an administrative remedy.[84] Recently, Congress has held hearings on the subject,[85] the Government Accountability Office has issued reports,[86] and on November 15, 2011, the Office of Management and Budget directed various actions by Executive Branch agencies to improve the use of suspension and debarment as an administrative remedy.[87]

II. Current Issues and Where We May Be Going

A. The Uniformed Military and Procurement Fraud

A particularly disturbing product of procurement fraud prosecutions arising out of Southwest Asia is the involvement in fraud by uniformed members of the armed forces. As an institution, the military should examine the causes and extent of this unsettling development and take corrective action. Historically, convictions of the uniformed military for

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58 (Nov. 2009). This change to the FCA was in response to *United States ex rel. Totten v. Bombardier Corp*., 380 F.3d 488 (D.C. Cir. 2004), which involved a false claim submitted to Amtrak, which was a government grantee. *Id.*

[83] Briggerman, *supra* note 82, ¶ 58. This revision was in response to *Allison Engine Co. v. United States ex rel Sanders*, 128 S. Ct. 2123 (2008), which interpreted 31 U.S.C. § 3729(a)(2)'s language, "to get a false or fraudulent claim paid," as requiring specific intent. This reasoning would also apply to the FCA's conspiracy provision. *Id.* Other revisions included an enlarged reverse false claim cause of action, increased whistleblower protections, and easier access to a Civil Investigative Demand. *Id.*

[84] Jason Miller, *Push for More Suspension, Debarments Receives Mixed Reactions*, Federal News Radio (11/18/2011), *available at* http://www.federalnewsradio.com/index.php?nid=851&sid=2638305 ("[P]ush by Congress and the administration for agencies to be more aggressive in suspending and debaring contractors . . . .").

[85] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-127T, SUSPENSION AND DEBARMENT, SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011) (Statement of William T. Woods, Dir. Acquisition and Sourcing Mgmt. (Oct. 6, 2011) (Testimony Before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives); *cf.* Geoffrey Emeigh, *SIGIR 'Aggessively' Pursuing Debarments, Suspensions, Bowen Tells Senate Panel*, 87 FED. CONTRACTS (BNA) 378 (Mar. 27, 2007) (testimony before committee investigating contract fraud in Iraq).

[86] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-739, SUSPENSION AND DEBARMENT, SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011).

[87] Memorandum from Jacob J. Lew, Dir., Office of Mgmt. and Budget to Heads of Executive Dep'ts and Agencies, *Suspension and Debarment of Federal Contractors and Grantees* (Nov. 15, 2011).

procurement fraud exist, but have been relatively episodic.[88] Despite the breadth of the Government's investigation in Operation Ill Wind, none of the ninety convictions included a uniformed service member.[89]

Unfortunately, news reports and press releases have reported a large number of convictions, indictments, and investigations of uniformed military personnel for procurement fraud related offenses. The ranks of those convicted for misconduct committed while on active duty in Southwest Asia include at least a colonel,[90] five lieutenant colonels,[91] eight majors or equivalent,[92] five captains,[93] a first lieutenant,[94] a chief

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[88] *See, e.g.*, United States v. Washington, 46 M.J. 477 (1997) (Air Force Staff Sergeant, contingency contracting officer during Operations Desert Shield and Storm, convictions included bribery and graft); United States v. Long, 12 C.M.R. 420 (A.B.R. 1953) (Army major, serving as a receiving officer certifying services rendered, accepted gifts from Korean contractor); United States v. Canella, 63 F. Supp. 377 (S.D. Calif. 1945), *aff'd* 157 F.2d 470 (9th Cir. 1946) (Army colonel convicted of conspiracy to defraud after receiving money for awarding contracts on an Army base); United States v. Hollis, 32 B.R. 331 (CBI-IBT 1943) (Army major in India, acting as contracting officer, wrongfully attempted to obtain a financial interest in companies he was purchasing from on behalf of the Army Air Corps).

[89] MICHAEL J. DAVIDSON, A CALL TO ACTION: RE-ARMING THE GOVERNMENT IN THE WAR AGAINST DEFENSE PROCUREMENT FRAUD 9 & n.95 (2008).

[90] Press Release, Dep't of Justice (DOJ), U.S. Army Colonel and Lt. Colonel Convicted of Conspiracy for Role in Fraud Scheme in Al-hillah, Iraq (Nov. 7, 2008).

[91] *Id.*; *see also* Press Release, DOJ, Former Army Official Sentenced to 18 Months in Prison for Accepting Illegal Gratuities from Contractors in Iraq (July 29, 2011) (Army LTC); Press Release, DOJ, Former Army Colonel Pleads Guilty in Bribery Scheme Involving Department of Defense Contracts in Iraq (June 10, 2008) (Army LTC); Press Release, DOJ, Army Lieutenant Colonel Pleads Guilty to Participating in Wire Fraud Scheme Arising out of Al-Hillah, Iraq (July 28, 2008) (two Army LTCs convicted).

[92] Press Release, DOJ, Former U.S. Army Major Pleads Guilty to Bribery Related to Contracting in Support of Iraq War (June 13, 2011); Press Release, DOJ, Army Contracting Officer Sentenced to 60 Months in Prison for Bribery (Jan. 19, 2011); Press Release, U.S. Attorney's Office, E. Dist. of Va., Business Owner and Former Naval Officer Plead Guilty to Bribery Scheme (Dec. 7, 2010) (Lieutenant Commander); Press Release, DOJ, Army Officer, Wife and Relatives Sentenced in Bribery and Money Laundering Scheme Related to DOD Contracts in Support of Iraq War (Dec. 2, 2009); Press Release, DOJ, Retired Army Major Pleads Guilty in Bribery Scheme Involving Department of Defense Contracts in Kuwait (Jan. 8, 2009); Press Release, DOJ, A U.S. Army Reserve Major Pleads Guilty for Role in Bribery Schemes Involving Department of Defense Contracts in Iraq (Dec. 22, 2008); Press Release, DOJ, U.S. Army Major Pleads Guilty to Bribery Scheme Related to Department of Defense Contracts in Kuwait (Aug. 13, 2008); Press Release, DOJ, Former Army Reserve Officer Sentenced to 10 Years in Prison on Bribery, Conspiracy and Money Laundering Charges (Oct. 19, 2007).

[93] Press Release, DOJ, Former Army Reserve Captain Sentenced to 120 Months in Prison for Soliciting 41.3 Million in Bribes and Conspiring to Traffic Heroin (Sept. 23, 2011); Press Release, DOJ, Former U.S. Army Reserve Officer Pleads Guilty to Accepting

warrant officer,[95] two sergeants first class,[96] two staff sergeants,[97] and a sergeant.[98] News reports identified other service members who had been indicted or were under investigation for misconduct in Southwest Asia[99] or elsewhere.[100]

One of the most egregious cases to come out of Southwest Asia involved Army Major John Cockerham, a contracting officer in Kuwait who pled guilty to bribery, conspiracy, and money laundering.[101] Cockerham received more than $9 million in bribes for awarding illegal contracts for supplies in Iraq and was expecting another $5.4 million.[102] The complex scheme involved Cockerhams's wife, sister, and niece. His

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Illegal Gratuities Related to Contracting When Serving at Camp Arifjan, Kuwait (Apr. 15, 2010); Press Release, DOJ, Former Military Officer Sentenced to 97 Months in Prison for Participating in Scheme to Steal Fuel from U.S. Army in Iraq (Nov. 6, 2009); Freeman Klopott, *Two U.S. Soldiers Plead Guilty to Selling Supplies to Iraqi Man*, WASH. EXAMINER, May 19, 2009, at 7; *Capt. Admits Taking Bribes in Iraq*, ARMY TIMES, Jan. 14, 2008, at 5.

[94] Press Release, DOJ, Retired Military Official Pleads Guilty to Bribery and Conspiracy Related to Defense Contracts in Afghanistan (July 1, 2009).

[95] *CWO5 Pleads Guilty to Bribery*, ARMY TIMES, Feb. 26, 2007, at 5.

[96] Press Release, DOJ, Army Sergeant Pleads Guilty to Accepting $1.4 Million in Illegal Gratuities Related to Military Dining Contracts in Kuwait (Apr. 21, 2010); Klopott, *supra* note 93, at 7.

[97] Press Release, DOJ, Former U.S. Army Staff Sergeant Pleads Guilty to Bribery in Afghanistan Fuel Theft Scheme (Sept. 24, 2010); Nedra Pickler, Former Marine Pleads Guilty to Accepting Bribes, Federal News Radio (Oct. 5, 2010), *available at* http://www.federalnewsradio.com/index.php?nid=110&sid=2070892.

[98] Press Release, DOJ, U.S. Army Sergeant Pleads Guilty to Bribery and Money Laundering Conspiracy Related to Department of Defense Contracts in Afghanistan (Oct. 20, 2009).

[99] Freeman Klopott, *Ex-Army Officer Charged in $40M Fuel Scam to Be Sentenced*, WASH. EXAMINER, Apr. 17, 2009, at 7; Press Release, DOJ, Five Individuals Arrested, Two Contracting Companies Charged in Bribery Conspiracy Related to Department of Defense Contracts in Afghanistan (Aug. 27, 2008) (Major and Technical Sergeant); *see* Richard Lardner, *Iraq Fraud Inquiry Focuses on Retired Army Colonel*, FED. NEWS RADIO.COM (Sept. 9, 2009), *available at* http://www.federalnewsradio.com/index.php?nid=110sid=1758285.

[100] Maria Glod, *Army Officer; 2 Area Men Indicted In Contract Scam*, WASH. POST, Aug. 25, 2009, at B2; *Former Army Officer Charged with Bribery*, WASH. TIMES, Dec. 13, 2007, at B3. In 2003, an Army colonel in Korea admitted to accepting bribes. Press Release, U.S. Attorney, Cent. Dist. of California, U.S. Army Colonel Pleads Guilty to Taking Bribes from South Korean Companies Seeking Military Contracts (Jan. 29, 2003).

[101] Dana Hedgpeth, *2 Plead Guilty to Army Bribery Scheme*, WASH. POST, June 25, 2008, at A9.

[102] *Id.*

wife and sister deposited the money in safe deposit banks in Kuwait and Dubai, and the niece helped create cover stories for the bribe money.[103]

B. The Need For A DoD Procurement Fraud Fund

To effectively, and consistently, combat procurement fraud, the Department of Defense—indeed most Executive Branch agencies—needs a sustained source of funding immune to competing policy and budgetary priorities. Our present circumstances provide compelling factual support to this proposition.

Following the terrorist attacks against the United States on September 11, 2001, law enforcement entities normally involved in procurement fraud shifted their mission focus to counterterrorism.[104] In 2005, Attorney General Alberto Gonzales testified before a Senate Subcommittee that DOJ's "No. 1 priority" was "preventing and combating terrorism."[105] Counterterrorism continues to be DOJ's first priority.[106] The Federal Bureau of Investigation's (FBI) shift was particularly pronounced. As one FBI official noted: "The foreign terrorist attacks upon the United States on September 11, 2001 demanded an instant 100% commitment from the FBI towards counter-terrorism. In the days and weeks that followed the attacks, almost every FBI Agent in the world worked diligently on one of the most massive investigations in

[103] Press Release, Dep't of Justice, Army Officer, Wife and Relatives Sentenced in Bribery and Money Laundering Scheme Related to DOD Contracts in Support of Iraq War (Dec. 2, 2009).

[104] *See* Bednar, *supra* note 59, at 291 ("almost all of our investigative resources at the federal level are now being devoted not to procurement fraud, but to chasing the terrorists—to the anti-terrorist campaign").

[105] Prepared Statement of Alberto R. Gonzales, Attorney General of the United States Before the United States Senate Committee on Appropriations Subcommittee Commerce, Justice, Science and Related Agencies (May 24, 2005), *available at* http://www.usdoj.gov/ag/testimony/2005/052405committeeonappropriations.htm. During the Bush Administration, the Department of Justice "strongly emphasized immigration and terrorism-related investigations," with a ten percent reduction in the number of white collar prosecutions between 2000 and 2006. Dan Eggen & John Solomon, *Justice Dept.'s Focus Has Shifted*, WASH. POST, Oct. 17, 2007, at A1; *see also* Carrie Johnson, *Justice Department Putting New Focus on Combating Corporate Fraud*, WASH. POST, Feb. 12, 2009, at A6 (business fraud prosecutions "plunged after the Sept. 11, 2001 attacks . . . ").

[106] Jerry Seper, *Terrorism Top Concern at Justice*, WASH. TIMES, Nov. 15, 2011, at A6 ("counterterrorism remains the Justice Department's highest priority").

the FBI's history."[107] Since 9/11 the FBI has shifted 1,200 out of its criminal division, doubled the number of agents in its counterterrorism/counterintelligence division, increased the number of intelligence analysts by 205 percent and created a new category of intelligence agent.[108]

Similarly, DoD law enforcement entities reacted to the terrorist attacks by shifting resources to meet the new threat. For example, the Air Force Office of Special Investigations "nearly tripled" its antiterrorism services following 9/11.[109] Unfortunately, as investigative and prosecutorial resources devoted to procurement fraud were declining, the level of contracting—and attendant potential for fraud—was on the rise.[110]

In addition to competing priorities, fraud investigators and prosecutors must compete for funding. The current focus on fiscal responsibility and budget cuts provides a perfect example on point. The Department of Defense is anticipating significant budget cuts over the next decade,[111] with anticipated reductions in the civilian workforce.[112] The military saw similar reductions following the end of the Cold War; "when the Pentagon saw its budget slashed by nearly a quarter from 1989 to 1994."[113]

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[107] Letter from Joseph L. Ford, Chief Fin. Officer, Fed. Bureau of Investigation to Linda M. Calbom, U.S. Gov't Accountability Office 2 (Apr. 13, 2005), *reprinted at* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-388, FEDERAL BUREAU OF INVESTIGATION: ACCOUNTABILITY OVER THE HIPAA FUNDING OF HEALTH CARE FRAUD INVESTIGATIONS IS INADEQUATE 19 (2005); *see* Bednar, *supra* note 59, at 291 ("The FBI has almost no resources dedicated to Army procurement fraud or to Defense procurement fraud anymore. They are all after terrorists.").

[108] Barton Gellman, *The Terrorist Hunter: Has FBI Director Bob Mueller Fixed the Bureau That Blew 9/11?*, TIME, May 9, 2011, at 22, 26–27. The FBI criminal division investigates white collar crime. *Id.* at 26.

[109] Christine E. Williamson, *The Air Force Office of Special Investigations, Postured for the Future*, AIR & SPACE POWER J. at *3 (Summer 2005), *available at* http://www.airpower.maxwell.af.mil/airchronicles/apj/apj05/sum05/williamson.html.

[110] *See* Aimee Curl, *Contract Spending Climbs 83 Percent Since 2000,* FED. TIMES, Oct. 16, 2006, at 4; Griff Witte, *Prosecutor Addresses Contractors on Fraud*, WASH. POST, May 26, 2005, at E2 ("[M]oney has been flowing to contractors in record amounts since the terrorist attacks of Sept. 11, 2001.").

[111] Craig Whitlock, *Ex-Budget Chief Panetta Now on Other Side of Pentagon Cuts*, WASH. POST, Nov. 4, 2011, at A4 (National security/defense spending expected to be reduced $456-$600 billion over the next ten years.).

[112] Joe Davidson, *Pentagon Worries That Civilian Rolls Could Be Cut Further*, WASH. POST, Nov. 8, 2011, at B4.

[113] Whitlock, *supra* note 111, at A4.

The current fiscal landscape adds to the problem. There exist few mechanisms available for an agency to retain fraud-related recoveries. The Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), requires that an agency return all recoveries to the general fund of the Treasury unless specific statutory authority exists to retain the money or unless the money constitutes a repayment to an appropriation.[114] For example, a victim agency may retain fraud-related restitution[115] and may retain single damages recovered pursuant to the Civil False Claims Act, 31 U.S.C. §§ 3729–3733.[116] Agency-recovered monies in the nature of a refund must generally be returned to the appropriation or fund charged with the original expenditure.[117] However, if that appropriation account is closed, the money is no longer available to the agency and must be returned to the Treasury.[118]

The notion of a dedicated source of funding for anti-fraud efforts is not a new one. For example, following passage of the Health Insurance Portability and Accountability Act (HIPAA) in 1996, Congress created the Health Care Fraud and Abuse Control Account to receive recoveries from health care fraud investigations and prosecutions, to supplement DOJ and the Department of Health and Human Services (HHS) appropriations, as well as to serve as a funding source for HHS Office of Inspector General's (OIG) anti-fraud efforts concerning Medicare and Medicaid.[119] Further, the Department of Justice's Three Percent Fund allows DOJ to retain money from its civil debt collection litigation activities, including Civil FCA litigation, as "no year" money to be used

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[114] *National Aeronautics and Space Administration-Retention of Demunization Compensation*, B-305402, 2006 WL 39322, at * 2 (Comp. Gen. Jan. 3, 2006).

[115] The Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663, as amended by the Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A, provides statutory authority for a victim agency to retain restitution.

[116] National Science Foundation-Disposition of False Claims Recoveries, B-310725 (Comp. Gen. May 20, 2008).

[117] Appropriation Accounting-Refunds And Collectibles, B-257905, 1995 WL 761474, at *2 (Comp. Gen. Dec. 26, 1995); Department of Interior-Disposition of Liquidated Damages Collected For Delayed Performance, B-242274, 1991 WL 202596, at *2 (Comp. Gen. Aug. 27, 1991). In *Federal Motor Carrier Safety Administration*, B-308478, 2006 WL 3956702, at *3 (Dec. 20, 2006), the GAO limited agency retention of restitution to that amount qualifying as a refund.

[118] Appropriation Accounting-Refunds and Collectibles, B-257905, 1995 WL 761474, at *2 (Dec. 26, 1995).

[119] DAVIDSON, *supra* note 89, at 109 (contains a detailed discussion of the fund); *see also* U.S. DEPARTMENT OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM AND GUIDELINES, CRIMINAL RESOURCE MANUAL ch. 978, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title 9/crm00978.htm.

to pay for its debt collection efforts, including supporting the U.S. Attorney Office's Financial Litigation Units.[120]

One potential area to consider as a possible vehicle for a self-generating anti-fraud fund is a reinvigorated voluntary disclosure program for not only DoD, but for most of the Executive Branch as well. The DoD initiated the program in 1986 to "facilitate contractor self-governance and to encourage contractors to adopt a voluntary disclosure policy . . . "[121] To be accepted into the program, the disclosing contractor "must (1) not be motivated by the recognition of imminent detection; (2) have status as a business entity; (3) take prompt and complete corrective actions; and (4) fully cooperate with the government in any ensuing investigation or audit."[122] In return, the contractor was to receive several benefits, including "(1) its liability in general to be less than treble damages, (2) action on any suspension to be deferred until after the disclosure is investigated, (3) the overall settlement to be coordinated with government agencies, (4) the disruption from adversarial government investigations to be reduced, and (5) the information may be kept confidential to the extent permitted by law and regulation."[123]

Initially, the program was a success. "During the first few years, the number of self-disclosures by contractors averaged almost sixty per year, and all the major DoD contractors participated."[124] The number of disclosures peaked in 1988, but slowly declined until by 2000 they never reached ten a year.[125] Eventually, the program fell into disuse and appears to have been eclipsed by the new mandatory disclosure rule.

Several factors contributed to the failure of the program. First, the Government took too long to resolve the disclosures.[126] Further, DOJ oftentimes demanded significant FCA damages despite the contractor

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[120] DAVIDSON, *supra* note 89, at 108 (Pub. L. No. 107-273, § 11013, 116 Stat. 1823 (2002)).
[121] U.S. GOV'T ACCOUNTING OFFICE, GAO/NSIAD-96-21, DOD PROCUREMENT: USE AND ADMINISTRATION OF DOD'S VOLUNTARY DISCLOSURE PROGRAM 2 (1996).
[122] *Id.* at 3.
[123] *Id.* at 4.
[124] James Graham, *The Twenty-First Major Frank B. Creekmore, Jr. Lecture*, 205 MIL. L. REV. 204, 207 (2010).
[125] DAVIDSON, *supra* note 89, at 56–57 (listing disclosures by year).
[126] Graham, *supra* note 124, at 207 ("It is undisputed that DoJ took too long to process the disclosures . . . .").

having voluntarily disclosed misconduct.[127] The program provided little financial incentive for disclosure. Additional problem areas included "(1) the lack of guarantees against prosecution or debarment for both the corporation and its employees, (2) the possibility of derivative litigation, [and] (3) the possibility and ramifications associated with privilege waiver . . . ."[128]

On December 12, 2008, the Federal Acquisition Regulation's (FAR's) mandatory disclosure requirements went into effect. The FAR requires federal contractors to disclose certain violations of criminal law (i.e., fraud, conflict of interest, bribery and gratuities), violations of the Civil False Claims Act (FCA), and receipt of significant overpayments.[129] Further, the knowing failure to disclose such violations, and significant overpayments, constitute grounds for suspension and debarment.[130]

Initial criticisms of the new FAR rule have focused largely on the ambiguity of its terms.[131] For example, the reporting requirement is triggered by "credible evidence" of violations of certain criminal laws and the FCA or significant overpayments,[132] but the term "credible evidence" is undefined.[133] Similarly unclear, according to critics of the rule, are the requirements for a "timely" disclosure and "full cooperation" with the Government.[134]

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[127] *Id.* at 207 ("[I]t is also undisputed that it too often punished the disclosing contractors, as opposed to rewarding them, by demanding inflated False Claims Act damages.").
[128] DAVIDSON, *supra* note 89, at 59.
[129] FAR 3.1003(a)(2)-(3); 3.1004, 52.203-13(b)93) (Jan. 2012) [hereinafter FAR].
[130] *Id.* 3.1003(a)(2)-(3); 9.406-2(c)(vi); 9.407-2(a)(8).
[131] *See, e.g.*, Elizabeth Newell, *Acquisition Lawyers Say Mandatory Disclosure Rule Is Opaque*, GOV'T EXEC. (Feb. 12, 2009) ("[R]life with complicated and often ambiguous terminology"), *available at* http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0209/021209e1.htm.
[132] FAR, *supra* note 129, 3.1003(a)(2)-(3).
[133] Jeremy A. Goldman, *New FAR Rule on Compliance Programs and Ethics: A Hidden Assault on the Corporate Attorney-Client Privilege?*, 39 PUB. CONT. L.J., Fall 2009, at 71, 87 ("When does 'credible evidence' become ripe for reporting?"); Alice Lipowicz, *Analysis: Contractor Self-Disclosure Rules Raise Questions*, WASH. TECH. (Feb. 2, 2009) ("What is credible evidence"), *available at* http://washingtontechnology.com/Articles/2009/02/02/New-federal-contracting-rules.aspx?p=1.
[134] Newell, *supra* note 131, at *1; *see* Goldman, *supra* note 133, at 88 ("[Q]uestions remain concerning the practical boundaries of full cooperation."). FAR, *supra* note 129, 3.1003(a)(2)-(3) (requiring the "timely" disclosure of violations of certain laws and of significant overpayments, respectively). *Id.* 52.203-13 (requiring "full cooperation" with the Government's investigators, auditors, and those responsible for corrective actions).

It is premature to gauge the success of the mandatory disclosure rule. Agency OIGs have received disclosures,[135] but at this junction it is unclear how meaty those disclosures have been or whether the required disclosures are being reported. Further, the private sector has yet to challenge the rule. Regardless, a voluntary disclosure program serves as one of several possible vehicles for the creation of a self-sustaining anti-fraud fund. Here, it is a convenient basis for discussion in the event the Government elects to return in the future to a system based on voluntary contractor disclosures of misconduct or simply because those in the federal procurement are familiar with the earlier DoD model and, as such, it provides a familiar platform.

Opponents of a new DoD procurement fraud fund may raise PAYGO as one ground for objection. The current statutory version of PAYGO, which means "pay-as-you-go," was signed into law by President Obama on February 12, 2010[136] as part of the Public Debt Limit Increase.[137] The President characterized the legislation as "a return to what he called 'a simple but bedrock principle: Congress can only spend a dollar it if it saves a dollar elsewhere.'"[138]

The Statutory Pay-As-You-Go Act was designed "to enforce a rule of budgetary neutrality on new revenue and direct spending legislation."[139] Under the Act, new laws that increase spending or decrease revenue must be deficit neutral in the aggregate.[140] The Act is enforced through sequestration, which means that if the upcoming year projects a net cost, the President must "issue an order temporarily

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[135] *See, e.g.*, Office of Inspector Gen., U.S. Gen. Servs. Admin'n, Semiannual Report to the Congress, October 1, 2010–March 31, 2011, at ix (2011) ("[T]he OIG received nine disclosures, which related to timekeeping system errors, compliance failures, contractor employee fraud/inappropriate behavior, misuse of task order funds, and overbilling, both deliberate and unintentional"); Graham, *supra* note 124, at 214 (over 100 received of various types, including a large number of individual employee time card cases that will unlikely be prosecuted or subject to the Civil False Claims Act).

[136] Walter Alarkon, *Pay-Go Gets Passed, Then It Gets Bypassed*, THE HILL, Feb. 17, 2010, at 1, 10 ("[S]igned the pay-go bill into law on Feb. 12.").

[137] Pub. L. No. 111-139, 124 Stat. 8 (2010).

[138] David Rogers, *House Hikes Debt Ceiling But Returns to 'Pay-Go,'* POLITICO, Feb. 5, 2010, at 1.

[139] § 2, 124 Stat. 8.

[140] Testimony of Peter R. Orszag, Dir. of the Office of Mgmt. & Budget, Before the Committee on the Budget, U.S. House of Representatives 2 (June 25, 2009), *available at* http://www.whitehouse.gov/omb/assets/testimony/director_062509_paygo.pdf. Pay-go legislation is examined against a ten year base line established by OMB. *Id.*

sequestering resources," which triggers "automatic cuts in non-exempt mandatory programs" until the PAYGO debit is satisfied.[141]

How the legislation creating a DoD procurement fund would be scored for PAYGO purposes depends on whether it is viewed as a new tool, in which case it receives credit for the money it will generate, or as simply an administrative effort, in which case it receives no such credit.[142] Since no formal DoD program currently exists, a statutorily created DoD (or Executive Branch) voluntary disclosure program designed to serve as a self-sustaining anti-fraud fund should be treated as a new program, and scored as a surplus for purposes of PAYGO.

Based on their long history of investigating fraud, the DoD should be able to generate data to support a net-gain program. For example, in 2005 the Taxpayers Against Fraud produced a health care fraud study establishing that for every dollar the Government spent on anti-fraud efforts, it received thirteen dollars in return.[143] Similarly, in support of its Three Percent fund DOJ projected that "for each additional dollar applied to civil debt collection activities, between $15 and $32 in additional debt can be collected."[144]

Like the DOJ Three Percent fund, the DoD fund enacting legislation should provide an exception to the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), so that an agency may retain funds received, and treat money collected as no-year funds (remain available until expended), to maximize their period of availability. Funds recovered through disclosures could be put back into the program in the form of training, agents, and support personnel, to investigate and timely resolve disclosures.

Such a program should appeal to the private sector as it returns many of the benefits found in the earlier program, but are missing from the

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[141] *Id.* at 3.

[142] *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, CIR. NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET app. A, r. 14 (10 Nov. 2011).

[143] Jack A Meyer, *Fighting Medicare Fraud: More Bang for the Federal Buck*, Apr. 2005, at 3, *available at* http://www.taf.org/MedicareFraud040805.pdf. More recently, DOJ noted that "[f]or every dollar Congress has provided for health care enforcement over the past three years, we have recovered nearly seven." *Deputy Attorney General James M. Cole Speaks on a Press Conference Call Regarding the Campaign to Cut Waste*, JUST. NEWS, Dec. 13, 2011.

[144] Conf. Rep. on H.R.2419, CONG. REC. H7974 (daily ed. Oct. 14, 1993).

mandatory disclosure rule. Significantly, the contractor would receive favorable consideration for purposes of suspension and debarment, and for sentencing. If monetary recoveries are put back into the program, the Government should be able to timely resolve disclosures. A new program should also provide a financial incentive to contractors, such as capping any associated Civil FCA liability at double damages—a result the defendant may be able to achieve through negotiation with DOJ without disclosure.[145]

C. Executive Order TBD: Campaign Finance Reform Meets Fraud Control

Federal contractors have been subject to restrictions on campaign contributions since at least 1940.[146] Although federal contractors are limited in their ability to contribute funds to political candidates and parties, the restriction is not absolute. It is illegal for a federal contractor[147] "to make, either directly or indirectly, any contribution or expenditure of money or other thing of value, or to promote expressly or impliedly to make any such contribution or expenditure to any political party, committee, or candidate for Federal office or to any person for any political purpose or use."[148] However, this broadly worded prohibition does not apply to personal contributions by employees of a federal contractor, including its partners, officers and shareholders.[149] Further, the restrictions do not apply "to separate segregated funds established by contributions or labor organizations with government contracts."[150] These separate segregated funds are commonly known as Political

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[145] *See* Lahman, *supra* note 5, at 903 (noting that when settling a civil FCA case, the government is willing "to waive penalties and accept less than triple damages or even less than 'doubles'. . .").

[146] Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 16 (2005) (The 1940 amendments to the Hatch Act "prohibited political contributions to candidates and to party committees by federal contractors.").

[147] 11 C.F.R. § 115.1 (Jan. 1, 2001) defines a federal contractor for purposes of this prohibition as essentially any person who enters into a contract with the federal government for services, goods or the selling of land or a building, and the contract is funded with appropriated funds.

[148] *Id.* § 115.2(a).

[149] FEDERAL ELECTION COMMISSION, CONTRIBUTIONS 6 (2005 ed.) (updated April 2009) ("[D]oes not apply, however, to personal contributions by employees, partners, shareholders or officers of businesses with government contracts . . . .").

[150] *Id.*

Action Committees (PACs).[151] Subject to contribution limits and reporting requirements, PACs may collect voluntary contributions from corporate employees and their families and then make contributions to political candidates.[152] Finally, the prohibition does not extend to contributions and expenditures made for state and local elections.[153]

In April 2011, the Obama Administration began to circulate a draft executive order requiring federal contractors to disclose political contributions.[154] The draft executive order followed in the wake of the Administration's failure to pass the Disclose Act, [155] which in turn was in response to *Citizens United v. Federal Election Commission*.[156] The Disclose Act would have required corporations, unions and various other groups to disclose their contributions to federal political campaign

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[151] Joe Reeder & Dave Hickey, *Defense Industry Political Activities: Do's and Don'ts*, NAT'L DEF., at *1 (Feb. 2006), *available at* http://www.nationaldefensemagazine.org/archive/2006/February/Pages/EthicsCorner5446 ("[C]ontractors may establish a separate fund known as a political action committee, or PAC."); *cf.* Trevor Potter, *The Current State of Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 60 (2005) ("[F]ederal contractors that are corporations can establish federal PACs.").

[152] Reeder and Hickey, *supra* note 151, at *1. During the 2010 elections, defense industry PACS contributed $16,809,037 to various federal candidates and political parties. Jen DiMascio, *Defense Goes All-In For Incumbents*, POLITICO, Sept. 27, 2010, at 26.

[153] 11 C.F.R. § 115.2(a) (Jan. 1, 2011).

[154] T.W. Farnam, *Obama Urged to Make Contractors Disclose Donations*, WASH. POST, Jul. 29, 2011, at A4 ("In April, the White House first circulated a draft of the executive order, which would have required companies bidding on federal contracts to disclose political donations from their corporate coffers and top executives, including contributions to nonprofit advocacy groups that would not otherwise be a part of the public record.").

[155] Dan Eggan, *Bill on Political Ad Disclosures Falls Short in the Senate*, WASH. POST, July 28, 2010, at A3; *see also* Hans A. von Spakovsky, *DISCLOSE Executive Order Would Politicize Contracting*, WASH. EXAMINER, Apr. 27, 2011, at 28 (draft executive order sought to implement portions of the Disclose Act, which in turn was designed to overturn the *Citizens United* decision). In *Citizens United* the Court held unconstitutional the statutory prohibition on corporations and unions using their general treasury funds for independent expenditures for electioneering communications. An independent expenditure expressly advocates for the election or defeat of a clearly defined candidate, but it is "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17) (2006). Electioneering communications refers to "any broadcast, cable, or satellite communication" that refers to a clearly identified federal candidate within a certain period of time before the various types of elections. *Id.* § 434(f)(3). Following the issuance of the Supreme Court's decision, the President took the unusual step of publicly criticizing the decision in his State of the Union address. Eggan, *supra*, at A3.

[156] 558 U.S. 50 (2010).

advertising and would have banned political advertisements from federal contractors.[157]

Significantly, the draft executive order represents an effort to inject campaign finance reform into the procurement fraud control regime, and highlights a federal pay-to-play problem. Entitled "Disclosure of Political Spending by Government Contractors," the document was designed "to ensure the integrity of the federal contracting system to produce the most economical and efficient results for the American people" and to "increase transparency and accountability to ensure an efficient and economical procurement process . . . ."[158] Further, the draft document emphasized the need for the entire contracting process, including the appropriations stage, to "be free from the undue influence of factors extraneous to the underlying merits of contracting decision making, such as political activity or political favoritism."[159] The document recognized the existing restrictions on contributions by federal contractors, and the diligent effort of the federal acquisition community, but posited that additional measures were needed to address "the perception that political campaign spending enhanced access to or favoritism in the contracting process."[160]

The draft Executive Order would "require all entities submitting offers for federal contracts to disclose certain political contributions and expenditures that they have made within two years prior to submission of their offer," with a disclosure certification being required as a condition of award.[161] The draft Executive Order mandated the disclosure of:

> All contributions or expenditures to or on behalf of federal candidates, parties or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control; and . . .

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[157] Stephen Dinan, *Senate GOP Blocks Campaign-Finance Bill*, WASH. TIMES, July 28, 2010, at A3.; Eggan, *supra* note 155, at A3; Meredith Shiner, *Fate of Campaign Finance Bill Still Unclear*, POLITICO, July 27, 2010, at 8.

[158] Executive Order, Draft 4/13/11; 4:00 pm, Disclosure of Political Spending by Government Contractors, intro. & sec. 2 (2011), *available at* http//www.federalnews radio/pdfs/EO-contractspending.pdf [hereinafter Executive Order].

[159] *Id.* § 1.

[160] *Id.*

[161] *Id.* § 2.

> Any contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications.[162]

The disclosure requirement was triggered "whenever the aggregate amount of such contributions and expenditures made by a bidding party, its officers and directors, and its affiliates and subsidiaries exceeds $5000 to a given recipient during a given year."[163] Finally, the disclosed information would "be made publicly available in a centralized, searchable, sortable, downloadable and machine readable format on data.gov as soon as practicable upon submission."[164]

Significantly, the draft executive order was designed to impose disclosure obligations on contractors beyond what the law currently requires be reported to the Federal Election Commission.[165] The order's requirement to report all contributions to third party entities intended or reasonably expected to be used for campaign-related purposes would expand the disclosure requirement to several entities that "have spent millions on political advertising in recent congressional campaigns but have fought to keep their donors secret."[166] For example, the draft executive order would expand the disclosure requirement to the U.S. Chamber of Commerce, which has approximately 300,000 corporate members and is "[o]ne of the biggest spenders on election ads . . . ."[167]

The draft executive order quickly proved controversial. Critics of the draft document charged that it would have a chilling effect on First

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[162] *Id.* § 2(a), (b).
[163] *Id.* § 2.
[164] *Id.* § 3.
[165] Kenneth P. Doyle, *Reformers Press for Obama Executive Order on Contractor Contributions as GOP Fights It*, 95 FED. CONT. REP. (BNA) No. 18, at 482, 483 (May 10, 2011). Currently, only "hard money" (i.e., regulated money) is required to be reported to the FEC. *Id.*
[166] *Id.* at 483 ("Tens of millions of dollars in such contributions to entities that do not disclose their donors were used to fund political advertising in the 2010 congressional elections and other, previous campaigns."); *see also* Perry Bacon Jr. & T.W. Farnam, *Obama Looks at Contractors' Donations*, WASH. POST, Apr. 21, 2011, at A4 ("It is not known how many government contractors contribute to interest groups active in elections because many of those contributions don't need to be disclosed, but the number of companies with government contracts means that could be significant.").
[167] Bacon & Farnam, *supra* note 166, at A4; *see also* Doyle, *supra* note 165, at 483 ("including the U.S. Chamber of Commerce and others").

Amendment rights and political contributions;[168] would politicize the acquisition process, making campaign contributions a factor in contract awards;[169] would reduce competition by discouraging contractors from bidding;[170] would provide irrelevant information to the contracting officer[171] and "would circumvent the legislative process."[172] Critics also questioned its motivation (transparency), pointing out that "political donation information is already publicly online."[173]

Supporters of the draft executive order declared "that it 'attacks the perception and reality of . . . pay-to-play arrangements by shining a light on political spending by contractors.'"[174] One small-business advocate praised the disclosure requirements as a means of leveling the playing field: "small businesses do not have the resources 'to compete with the enormous amount of capital, influence, and lobbyist activity' that large businesses can use to help win Government contracts."[175] Defenders of

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[168] Susan M. Collins, *A Wrong Turn for Contracting*, WASH. POST, May 20, 2011, at A17 ("[c]hilling effect on the First Amendment rights of individuals to contribute to the political causes and candidates of their choice"); *see also* Mike Lillis, *Hoyer Sides with GOP Against Obama's Order*, THE HILL, May 11, 2011, at 1, 6 (GOP leaders concerned that effect of order "would be stifled political speech"); Doyle, *supra* note 164, at 483 ("chilling effect on campaign contributions").

[169] Collins, *supra* note 168, at A17 ("[P]roposal violates the fundamental principle that federal contracts should be awarded free from political considerations and be based on the best value to taxpayers.") ("Requiring disclosure of one's political activities and leanings as part of the process would make it inevitable that politics would play a role in the award of federal contracts."); *see also* Lillis, *supra* note 168, at 6 ("could politicize the bidding process"); Doyle, *supra* note 165, at 483 ("would make the contributions a factor in awarding contracts"); von Spakovsky, *supra* note 155, at 28 ("introduce political gamesmanship into the government contracting business"); Bacon & Farnam, *supra* note 166, at A4 (Trade association posited that the proposed order would "inject politics into the source selection process").

[170] Collins, *supra* note 168, at A17.

[171] Bacon & Farnam, *supra* note 166, at A4 ("irrelevant information to government contracting officers"). Significantly, the draft Executive Order does not identify to whom the disclosure must be made.

[172] Doyle, *supra* note 165, at 483.

[173] Carly Cox, *Draft Executive Order on Political Donations: Emphasizing Transparency or Politicizing Acquisitions?*, CONT. MGMT. 25, 26 (Sept. 2011); *see* Collins, *supra* note 168, at A17 ("Campaign contributions to candidates and political committees already are required to be reported to the Federal Election Commission and, with a click of a mouse, can be viewed on FEC.gov."). However, the draft executive order appears to require disclosure of contributions beyond that currently mandated by law. *See supra* note 164.

[174] Doyle, *supra* note 165, at 482, 483.

[175] *Officials, Witnesses Stake Positions on Draft Contractor Disclosure EO*, 53 GOV'T CONTRACTOR ¶ 169 (May 20, 2011). She also opined that the draft EO "could bring

the rule noted that "the only significant expansion of disclosure rules would be the requirement to disclose campaign contributions to third parties."[176]

On June 14, 2011, the Congressional Research Service issued a report entitled "Presidential Authority to Impose Requirements on Federal Contractors."[177] The report appeared to support the President's authority to issue such an executive order, noting the President's "broad authority under the Federal Property and Administrative Services Act of 1949 (FPASA) to impose requirements upon contractors."[178] The report concluded: "In sum, Congress appears to have granted the President wide latitude to issue executive orders on federal procurement. Courts seeking to uphold such orders may use the presidential findings in the executive order itself to determine that the requisite nexus exists between an order issued under the authority of the FPASA, or executive branch actions taken pursuant to that order, and the FPASA's goals of economy and efficiency in procurement."[179]

In part, the executive order is an attempt to address, or at least highlight, a perceived federal pay-to-play problem. Specifically, the draft executive order states: "additional measures are appropriate and effective in addressing the perception that political campaign spending provides enhanced access to or favoritism in the contracting process."[180] Further, the document noted that several states had adopted remedial pay-to-play laws that limit "not only contributions by the contracting entity itself, but also by certain officers and affiliates to prevent circumvention and in other cases by requiring disclosure."[181] The document then called on the Federal Government to "draw from the best practices developed by the states."[182]

The practice of "pay to play" refers to businesses buying political access through campaign contributions or other forms of compensation

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transparency, de-politicize the contracting process [and] help prevent pay-to-play schemes . . . ." *Id.*

[176] *Id.*

[177] VANESSA K. BURROWS & KATE M. MANUEL, CONG. RESEARCH SERV., R41866, PRESIDENTIAL AUTHORITY TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS (2011).

[178] *Id.* at 22.

[179] *Id.* at 24.

[180] Draft Executive Order, *supra* note 158, § 1.

[181] *Id.*

[182] *Id.*

in order to favorably influence the award of a contract or to otherwise obtain some measure of favoritism.[183] Within the federal system, there is the unsettling, but apparently not always illegal, connection between campaign contributions and earmarks.[184] That a pay-to-play problem exists within the federal system is not subject to serious debate. One need only look to the Supreme Court's opinion in *McConnell v. Federal Election Commission*[185] for support.

In *McConnell*, the Court upheld the constitutionality of the bulk of the Bipartisan Campaign Reform Act of 2002.[186] In its opinion the Court discussed the corrupting influence of campaign contributions. Stating what should be considered obvious, the Court determined that "[i]t is not only plausible, but likely that candidates would feel grateful" to large donors to the national parties, which spend significant sums of money to positively influence the candidate's election, and that "donors would seek to exploit that gratitude."[187] The Court went further, however, determining that some donors contributed soft-money contributions specifically "to create debt on the part of officeholders "[188] and to secure "influence over federal officials."[189] Not surprisingly, the Court also determined that "large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption."[190]

The factual record that the Court relied upon provides compelling support for recognition of a federal pay-to-play problem. The Court

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[183] *See* Tom Lindenfeld, *How to Drive Corruption Out of D.C.*, WASH. POST, July 6, 2011, at A13 ("[C]ontributions . . . that has or intends to seek a city government contract."); Diana H. Jeffrey, *Pay to Play: Big Money, Politics, and the Vote*, N.J. LAW., Aug. 2008, at 28 ("[P]ay to play usually involves a business entity buying political access for consideration of a government contract.").

[184] MARCHUS STERN ET AL, THE WRONG STUFF 87 (2007) ("Members of Congress routinely, though covertly, exchanged multimillion-dollar earmarks for tens of thousands of dollars in campaign checks contributed by earmark recipients and lobbyists."); *id.* at 201 ("there is no law against a congressman's providing earmarks to a political supporter"); *see* Robert Brodsky, *Earmark Offensive*, GOV'T EXECUTIVE, Oct. 2008, at 14 (Oct. 2008) ("The congressional earmarking process is often decried by critics as a shady system in which lawmakers seek to reward contributors and attract voters by cutting backroom deals to direct federal dollars to a favored few.").

[185] 540 U.S. 93 (2003).

[186] Pub. L. 107-155, 116 Stat. 81.

[187] *McConnell*, 540 U.S. at 144.

[188] *Id.* at 146.

[189] *Id.* at 147.

[190] *Id.* at 144 (emphasis in original). "Soft" money refers to unregulated money.

referenced an extensive Senate Committee on Government Affairs report on the campaign practices of federal elections in 1996, which, among other things, examined "the effect of soft money on the American political system, including elected officials' practice of granting special access in return for political contributions."[191] The report "concluded that both parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions."[192] The Court further determined that the record before it established that national party committees regularly "peddl[ed] access to federal candidates and officeholders in exchange for large soft-money donations."[193] As an example of the pervasiveness of the problem, the Court noted that "six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access."[194]

The Court found as "[p]articularly telling, "the fact that in both the 1996 and 2000 elections, "more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology."[195]

Significantly, the Court did not limit its view of corruption to that misconduct addressed by criminal laws directly, such as "simple cash-for-votes corruption," but also recognized Congress' interest in curbing the "'undue influence on an officeholder's judgment and the appearance of such influence.'"[196] Although it appeared to create a safe zone from Government regulation for the "mere political favoritism or opportunity for influence alone," the Court clearly recognized the Government's interest in combating the appearance of corruption associated with the sale of access, with the implication that "money buys influence."[197]

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[191] *Id.* at 129.
[192] *Id.* at 130. One party's promotional materials for two major donor programs "promised 'special access' to high-ranking . . . elected officials, including governors, senators, and representatives." *Id.*
[193] *Id.* at 150.
[194] *Id.* at 151.
[195] *Id.* at 148.
[196] *Id.* at 150 (citation omitted).
[197] *Id.* at 153–54; *see also id.* at 143 ("Of 'almost equal' importance has been the Government's interest in combating the appearance or perception of corruption endangered by large campaign contributions.").

As noted in the draft executive order, many states have enacted laws designed to curb pay-to-play.[198] New Jersey stands out as a state that enacted tough pay-to-play legislative reforms[199] following a series of contract fraud-related scandals.[200] Mirroring the Supreme Court's recognition of a similar federal interest in combating corruption from *McConnell*,[201] as a legislative finding, the New Jersey Campaign Contributions and Expenditures Reporting Act states that the State "has a compelling interest in preventing the actuality or appearance of corruption . . . ."[202]

New Jersey law requires contractors receiving public contracts worth more than $50,000 annually to report political contributions to the New Jersey Election Law Enforcement Commission.[203] Further, the New Jersey Act prohibits award of any contract valued at over $17,500, which is not awarded "pursuant to a fair and open process," to a person or corporation that has contributed, within the preceding year, to a state or county political committee, with similar restrictions on contractors contributing to a gubernatorial candidate.[204] For contracts valued in excess of $17,500, which is not publicly advertised, bidders must submit "a list of political contributions" made during the preceding year at least ten days prior to contract award.[205] Significantly, New Jersey makes it a

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[198] *See* Mark Renaud, *Pay-to-Play Laws: Play Fair or Pay the Consequences*, CONT. MGMT., June 2009, at 24 (June 2009) (discussing laws in Illinois, Vermont, Colorado, Connecticut, New Mexico, and New Jersey); *Philadelphia Targets 'Pay to Play' Politics*, WASH. POST, May 27, 2005, at A8 ("[T]he City Council voted . . . for the first time to impose limits on campaign contributions by people seeking municipal contracts.").

[199] Lindenfeld, *supra* note 183, at A13 ("Other states, notably New Jersey, have taken this step (end "pay-to-play") after their own scandals became too corrosive and damaging to public trust."); Beth DeFalco, *'Pay to Play' Curtailed in NJ After Reforms*, WASH. TIMES, Apr. 7, 2010, at A4 ("The laws-hailed as among the toughest in the nation . . . ."). In addition to state law, "more than 90 municipalities and all 21 counties have passed some version of pay to play reform." Jeffrey, *supra* note 183, at 30.

[200] Jeffrey, *supra* note 183, at 27 (Essex County official convicted of proving no-show jobs and county contracts to contributors, mayor convicted of accepting bribes from FBI agent posing as corrupt contractor, Hudson County official convicted of taking bribes in exchange for awarding county contracts), 28 (state contract awarded to incapable contractor after lobbyist contributes significant campaign contributions to influential lawmakers).

[201] 540 U.S. at 143, 150, 153–54.

[202] N.J. STAT. ANN. § 19:44A -2.1(d) (2011).

[203] DeFalco, *supra* note 199, at A4; N.J. STAT. ANN. § 19:44A-20.27.

[204] *See* Jeffrey, *supra* note 183, at 28; DeFalco, *supra* note 197, at A4; *see also* N.J. STAT. ANN. §§ 19:44A-20.3 (state); § 19:44A-20.4 (county); § 19:44A-20.5 (municipality); § 19:44A-20.14 (state).

[205] N.J. STAT. ANN. § 19:44A-20.26.

breach of contract for a business entity to violate the Act's prohibitions directly or through intermediaries.[206] Further, violations of the Act may result in debarment, penalties up to the value of the contract, criminal conviction, and forfeiture of public office.[207]

One of the most notorious recent illegal pay to play scandals involved the defense contractors MZM, Inc. and ADCS, Inc., and former Congressman Randy "Duke" Cunningham. In 2005, Cunningham pled guilty "to conspiring to commit Bribery, Honest Services Fraud, and Tax Evasion, as well as Tax Evasion involving more than $1 million of unreported income . . ."[208] As part of his plea, Cunningham admitted receiving "at least $2.4 million in bribes" from defense contractors in return for which he used his office "to influence the appropriations of funds and the execution of government contracts in ways that would benefit two of the coconspirators, who were the majority owners of defense contracting companies."[209] In some cases, Cunningham arranged for government funding beneficial to these defense contractors and then pressured defense officials to award contracts to the contractors.[210] In one instance, a defense official informed Cunningham that invoices submitted by a defense contractor (ADCS) appeared fraudulent, prompting Cunningham to contact the official's supervisor to complain about how the defense contractor was being treated.[211]

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[206] *Id.* § 19:44A-20.21.

[207] *Id.* §§ 19:44A-20.10; 19:44A-21 (conviction); § 19:44A-22 (civil penalty and forfeiture of office); *see also id.* § 19:44A-20.1 (penalties for reimbursing contributions of corporate employees).

[208] News Release, Office of the U.S. Attorney, S. Dist. of Cal., Congressman Randall "Duke" Cunningham Pleads Guilty to Receiving Millions in Bribes (Nov. 28, 2005).

[209] *Id.* at 2. The court sentenced Cunningham to federal prison for eight years and four months. Sonya Geis & Charles R. Babcock, *Former GOP Lawmaker Gets 8 Years*, WASH. POST (Mar. 4, 2006), at A4. He was also ordered to "pay $1.8 million in back taxes and penalties plus $1.85 million in restitution based on the bribes he received." *Id.* at A7.

[210] Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST, Nov. 29, 2005, at A1, A4. During the late 1990s, Cunningham reportedly intervened with Pentagon officials on behalf of another defense contractor (ADCS, Inc.) that had provided him with "numerous campaign contributions . . . " *Id. See also* Charles R. Babcock & Walter Pincus, *Maximum Sentence Used for Cunningham*, WASH. POST, Mar. 2, 2006, at A8 ("The prosecutors also cited several instances in which Cunningham and his staff pressured Pentagon officials to release earmarked money to the contractors' companies.").

[211] Charles R. Babcock & Pincus, *supra* note 209, at A8. The contract involved computerizing military maps and engineering drawings at military installations. Stern, *supra* note 184, at 130–31. Many of the documents were of no value to the military. *Id.* at 131. Although a military project, the work was performed through an interagency

MZM, who "donated generously to Cunningham's campaigns,"[212] was one of these defense companies.[213] In February 2006, MZM's founder, Mitchell Wade, pled guilty to conspiring to bribe Cunningham, "in order to: receive special consideration in Cunningham's use of his special defense appropriations; and to pay for Cunningham's use of power in an effort to steer funds and contracts to MZM."[214] Wade also admitted to "corrupting defense officials and election fraud."[215] Wade provided benefits to DoD procurement officials in order to obtain procurement sensitive information, favorable performance evaluations and additional work.[216] For example, in an effort to get task orders from the Army's National Ground Intelligence Center in Charlottesville, Virginia, Wade hired the son of a program manager who oversaw MZM's work, "the cost of which was ultimately paid for by the government in reimbursable agreement with MZM," and then hired the program manager.[217] Further, Wade made illegal campaign contributions to two additional members of Congress "in hopes that they, like Cunningham, would 'earmark' federal money for MZM."[218]

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agreement with the Department of Veterans Affairs. *Id.* at 132. When a contracting specialist at Veterans Affairs noticed that ADCS was charging for goods at twice the GSA-recommended price and billing for work performed at locations where the contract specialist knew no work had been performed, she refused to pay the invoices. *Id.* at 135. Cunningham reportedly complained to the DoD project manager. *Id.* at 135–36. When a second submission of invoices were refused by a DoD logistics officer as suspect, Cunningham reportedly contacted the officer's supervisor, an assistant undersecretary for defense, to complain. *Id.* at 136.

[212] Jerry Seper, *Cunningham Pleads Guilty in Bribe Case*, WASH. TIMES, Nov. 29, 2005, at A4.

[213] Carol D. Leonnig & Charles R. Babcock, *Contractor Plans Guilty Plea for Bribe-Case Role*, WASH. POST, Feb. 24, 2006, at D1, D4 ("[I]dentifiable in Cunningham's plea agreement as Wade's MZM").

[214] Press Release, U.S. Attorney for the D.C., Defense Contractor Mitchell Wade Pleads Guilty to Bribing Former Congressman "Duke" Cunningham, Corrupting Department of Defense Officials, and Election Fraud (Feb. 24, 2006).

[215] *Id.*

[216] *Id.*; Charles R. Babcock, *Contractor Pleads Guilty to Corruption*, WASH. POST, Feb. 25, 2006, at A1, A6.

[217] Press Release, *supra* note 214, at 2; Babcock, *supra* note 216, at A6; STERN ET AL., *supra* note 184, at 209.

[218] Babcock, *supra* note 216, at A6. "Wade gave the funds for the donations to 19 of his employees and their spouses, who then wrote $2,000 checks to the members . . . ." *Id.* In July 2006, MZM's facility director pled guilty to violating the Federal Election Campaign Act by entering into a scheme with Wade to "unlawfully reimburse MZM employees for campaign contributions to a congressman." Press Release, U.S. Attorney for the D.C., Former Senior Employee of Military Contractor Pleads Guilty to Making Illegal Congressional Campaign Contributions (July 21, 2006).

The ADCS, which also contributed generously,[219] was another defense contractor that bribed Cunningham. In 2008, its founder, Brent Wilkes, was convicted of "conspiracy, bribery, honest services wire fraud and money laundering."[220] According to the Department of Justice, "Wilkes provided more than $700,000 in bribes to Cunningham [and] . . . [i]n return, Cunningham . . . directed more than $80 million in defense contract funds to Wilkes's company, ADCS, Inc. . . ."[221]

Cunningham, a Vietnam War hero[222] who rose to become a member of both the House Appropriations defense subcommittee and the intelligence committee,[223] reportedly inserted earmarks valued at as much as $80 million in classified intelligence authorization bills for the benefit of contractors who were bribing him.[224] Some of these contracts involved significant services for the military.[225] In one meeting with

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[219] STERN ET AL., *supra* note 184, at 124 (ADCS's founder, his family, and associates donated over $80,000 to Cunningham and his political action committee), at 147 (ADCS's founder "donated $150,000 to Cunningham's campaign and political action committee").

[220] News Release, Office of the U.S. Attorney, S. Dist. of Cal., Defense Contractor Brent R. Wilkes Sentenced to 12 Years Imprisonment for Bribing Former Congressman Randall "Duke" Cunningham (Feb. 19, 2008).

[221] *Id.* Also indicted at the same time as Wilkes, former CIA Executive Director Kyle Foggo was charged with, among other things, using "his seniority and influence within the CIA to influence the awarding of contracts to his life-long friend, Brent Wilkes." News Release, Office of the U.S. Attorney S. Dist. of Cal., Indictments Charge Defense Contractor Brent Wilkes with Corruption Involving CIA Executive Director Kyle "Dusty" Foggo and Former Congressman Randy "Duke" Cunningham (Feb. 14, 2007). Eventually, Foggo pled guilty to defraud the United States. Press Release, Dep't of Justice, Former CIA Executive Director Kyle "Dusty" Foggo Pleads Guilty to Defrauding the United States (Sept. 29, 2008).

[222] Cunningham was the recipient of the Navy Cross, two Silver Stars, fifteen Air Medals, and the Purple Heart. STERN ET AL., *supra* note 184, at 7. On May 10, 1972, Cunningham became a Navy "ace," the first since the Korean War, when he shot down three North Vietnamese MiGs. *Id.* at 23 (he had shot down two MiGs earlier in the year); Lois Romano, Cunningham Friends Baffled by His Blunder into Bribery, WASH. POST, Dec. 4, 2005, at A6 ("Navy's first ace pilot of the Vietnam War").

[223] Babcock & Weisman, *supra* note 210, at A4.

[224] Shaun Waterman, *Bribes Cost Millions In Earmarks*, WASH, TIMES, Oct. 18, 2006, at A3 ("[a]ccording to an interim report from a special House investigation"); *see also* STERN ET AL., *supra* note 184, at 295 ("[T]he Intelligence Committee had approved $70 million to $80 million in Cunningham defense and intelligence earmark requests that benefited his co-conspirators."). *But cf.* Sonya Geis & Charles R. Babcock, *Former GOP Lawmaker Gets 8 Years*, WASH. POST, Mar. 4, 2006, at A1, A7 (indicating Cunningham used his influence to earmark funds for ADCS and MZM, resulting in contracts worth $80 million and $150 million, respectfully).

[225] One "multimillion-dollar, classified sole-source earmark" awarded to MZM through Cunningham's influence involved the Counter-IED Targeting program. Brodsky, *supra*

MZM, Cunningham sketched out a bribe menu on his congressional stationary. On the left side of the menu, Cunningham listed the federal contracts, in millions of dollars, that he would direct to the defense contractor; and on the right side he listed the amount of bribe required to obtain the contracts.[226] The first entry reflected a $16 million dollar contract that Cunningham would provide in exchange for a yacht valued at $140,000.[227] Cunningham then expected an additional $50,000 in bribes for each additional million dollars in contracts, up to $20 million in contracts, at which point the required bribe would reduce from $50,000 to $35,000 per additional million in contracts.[228]

Thank you for the opportunity to speak here today. Are there any questions?

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note 184, at 14. MZM was required to deliver "intelligence to troops on the ground about the location of roadside bombs, so American forces could root them out," but after the program failed Army officials reported that "MZM had hired only a third of the employees it had been paid for, and the money it spent under the contract was misdirected." *Id.*

[226] Charles R. Babcock, *Prosecutors Urge 10-Year Sentence for Cunningham*, WASH. POST, Feb. 18, 2006, at A2; STERN ET AL., *supra* note 184, at 3.

[227] Babcock, *supra* note 226, at A2; STERN ET AL., *supra* note 184, at 3.

[228] Babcock, *supra* note 226, at A2; STERN ET AL., *supra* note 184, at 3.