

ARTICLE, THE USE OF WITHDRAWN FACTUAL STIPULATIONS IN DEBARMENT PROCEEDINGS: A STUDY IN PARALLEL PROCESSES

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Text

[*1] I. INTRODUCTION

The federal government frequently contracts with private individuals and businesses to perform research, provide services, and manufacture and [*2] supply goods. In FY 2013, the federal government awarded more than \$ 462 billion in prime contracts alone.¹ This number demonstrates the degree to which federal contracting directly implicates and impacts the interests of the American taxpayer, who largely finances federal procurement. Accordingly, executive branch agencies owe a duty to these stakeholders to safeguard funds withdrawn from public coffers and to protect the integrity of the procurement process.

Agencies protect that process through the standard of "responsibility." That is, agencies must ensure that only "responsible business concerns and individuals" receive taxpayer-funded awards.² Not every contractor, however, meets that standard; indeed, on occasion, the federal government finds that its business partner has misbehaved or performed unsatisfactorily.

When a contractor misbehaves, for example, by deceiving the government and submitting fraudulent claims, the federal government may avail itself of powerful, but varied, remedies that cut across four generic subsets: administrative,³ civil,⁴ contractual,⁵ and criminal.⁶ Each subset contains different "tools" that empower the

¹ *Total Prime Recipient Transaction Amount*, USASpending.gov, <http://usaspending.gov/advanced-search> (last visited Jan. 5, 2015) (displaying all prime awards in FY2013). While significant, this number omits amounts awarded in subcontracts, direct payments, grants, loans, and insurance.

² FAR 9.103(a) (stating that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only"); see also FAR 9.402(a) (stating that "[a]gencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only").

³ U.S. DEPT OF DEF., INSTRUCTION NO. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (May 12, 2014) [hereinafter DOD INSTRUCTION 7050.05], available at <http://www.dtic.mil/whs/directives/corres/pdf/705005p.pdf>.

government to punish (criminal)⁷ or penalize (civil) the perpetrator;⁸ return to the status quo ante or make itself whole (contractual);⁹ or protect the government's future interests (administrative).¹⁰ Although these remedies are not mutually exclusive, the use of tools from different subsets requires close coordination and, occasionally, considered compromise.

Sometimes, however, the parallel use of these varying remedies pits equally valid and sound public policy considerations against each other. For example, evidence that may be inadmissible to prove guilt in the criminal context may be otherwise admissible in a debarment proceeding to [*3] demonstrate a lack of present responsibility.¹¹ Using the following hypothetical, this article examines the natural tension and conflicting public policy interests that surface when the federal government collectively seeks to punish a miscreant contractor and protect the integrity of the procurement process:

A U.S. Attorney indicts Contractor A for violating the Foreign Corrupt Practices Act (FCPA). After discovery and countless motions, Contractor A enters into plea negotiations with the U.S. Attorney. The parties agree to terms, and Contractor A pleads guilty and provides a factual stipulation supporting the guilty plea. In exchange for a favorable sentence recommendation, Contractor A agrees to testify against Contractor B. Before trial, Contractor B's attorney successfully secures a court ruling vitiating the U.S. Attorney's charges and the theory of the case. The U.S. Attorney's Office, recognizing the legal difficulties inherent in challenging the court's decision, as well as the inefficient use of public resources that would result from a protracted battle, dismisses all charges against Contractor B. Because the charges against Contractor A rely on the same theory already deemed defective, the U.S. Attorney moves to dismiss all charges against Contractor A. The court grants the motion, dismisses the charges, and vacates Contractor A's guilty plea, including the associated factual stipulation.

This hypothetical presents certain known truths: Contractor A has not been convicted and, barring re-filed charges, will suffer no criminal sanctions. Nonetheless, the government may avail itself of other remedies, whether administrative, civil, or contractual. But the question presented is whether the government may, and should, rely on the contractor's withdrawn guilty plea and factual stipulation (in which Contractor A admitted to, for example, bribing a foreign official) to avail itself of contractual remedies or in meeting its burden in debarment proceedings.¹²

⁴ *Id.*

⁵ *Id.*

⁶ *Cf.* Memorandum from Att'y Gen. to All U.S. Att'ys; Dir., Fed. Bureau of Investigation; All Asst. U.S. Att'ys; All Litigating Divs.; All Trial Att'ys (Jan. 30, 2012) (available in U.S. Dep't of Justice, U.S. Attorneys Manual, Org. and Functions Manual § 27, Coordination of Parallel Criminal, Civil, Regulatory, and Admin. Proceedings), <http://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings> [hereinafter Att'y Gen. Memorandum] (reiterating a policy that encourages communication, coordination, and cooperation by all agencies across the remedial spectrum); DOD INSTRUCTION 7050.05, *supra* note 3, at 1, 13 (discussing various remedies available in response to procurement fraud).

⁷ See DOD INSTRUCTION 7050.05, *supra* note 3, at 13.

⁸ See *id.* at 14.

⁹ See *id.*

¹⁰ See *id.* at 15.

¹¹ See Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28854 (July 1, 1982); see also *infra* Part III.A.

¹² This article generally references the different remedies available to the federal government but focuses primarily on the criminal and administrative, and, with respect to the latter, specifically debarment. Extensive discussion concerning the admissibility, use, and effect of a withdrawn factual stipulation in contractual or civil settings is beyond the scope of this article but will be referenced in passing.

Using this hypothetical as an example of the conflict that can arise between parallel remedies, this article posits that the permissive--the "may"--remains simpler to answer than the normative--the "should." Part II lays the foundation for further discussion, addressing the admissibility of withdrawn guilty pleas and factual stipulations in both criminal and debarment proceedings¹³ and isolating the public policies that underlie positive [*4] rule-based and regulatory formulations. Part III compares the two proceedings, highlighting both the positive and negative secondary and tertiary effects caused by use of a contractor's withdrawn factual stipulation in a debarment proceeding. There remains no indication, however, that the scenario presented here is a frequent one; when the issue does arise, practitioners can often avoid parallel conflict through other means.¹⁴ For this reason, Part III counsels against a bright-line rule and instead advocates a case-by-case approach, ultimately concluding that, while withdrawn factual stipulations are admissible against government contractors in debarment proceedings, use of these stipulations must follow a careful, deliberate weighing and balancing of the sound, but competing, public policy interests. In doing so, practitioners advance those interests and ensure continued, and essential, coordination and cooperation among federal agencies.

II. PUBLIC POLICY CONSIDERATIONS: THE DRIVING FORCES

When a contractor enters and then withdraws a guilty plea and factual stipulation in a criminal proceeding, collateral attempts to offensively use and rely upon the withdrawn pleadings in parallel proceedings present two distinct considerations: (1) whether the government uses the withdrawn guilty plea and factual stipulation as evidence against the contractor and, if so, (2) whether the government should do so. The permissive inquiry depends, first and foremost, on the rules governing those proceedings; whereas the normative inquiry depends, primarily, on the public policy interests upon which those rules were formulated. Because this article juxtaposes criminal and administrative remedies, specifically, the rules and public policy concerns of each are addressed below.

A. *The Withdrawn Guilty Plea and Factual Stipulation in the Criminal Context*

1. The Role of Guilty Pleas in the Criminal Justice System

In the United States, few defendants demand trial on the merits. The vast majority of cases find resolution through plea bargaining. For example, in 2010 only 2.5 percent of all federal cases that ended in conviction were resolved by trial.¹⁵ The overall plea bargaining rate is equally significant: nearly eighty-nine percent of all federal defendants charged with a crime [*5] pled guilty or nolo contendere to an offense.¹⁶ Plea bargaining represents a quintessential feature of our functioning criminal justice system.¹⁷

¹³ Participants in criminal proceedings view withdrawn guilty pleas and factual stipulations (also known as the "Statement of Facts") jointly, in part because of the rules surrounding use of these documents. See *infra* Part II.A.2. Participants in the debarment process, namely the debarring officials, remain less concerned with the withdrawn guilty plea itself than with the factual stipulations. See *infra* Part II.B.2. Accordingly, to avoid confusion, this article refers to guilty pleas and factual stipulations separately. Where only the factual stipulation, itself, is relevant to the discussion, this article drops the generic term "guilty plea."

¹⁴ For example, through the use of other evidence, such as exhibits from an underlying investigation. See Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. at 28855 (July 1, 1982); see also *infra* Part III.A.

¹⁵ In 2010, 89,741 federal defendants' criminal cases ended in a conviction. See *Sourcebook of Criminal Justice Statistics Online*, Table 5.24.2010, Bureau of Justice Statistics, <http://www.albany.edu/sourcebook/pdf/t5242010.pdf> (last visited Aug. 16, 2015) [hereinafter Bureau of Justice Statistics]. Of those, only 2,323 (2.5%) went to trial; the remaining 87,418 pled guilty to at least one charge. See *id.*

¹⁶ In 2010, 98,311 federal defendants were charged with a crime. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 242-45 (2010). Of those, 87,418 (88.9%) pled guilty or nolo contendere. See Bureau of Justice Statistics, *supra* note 15.

¹⁷ See FED. R. EVID. 410 advisory committee's notes (discussing general purposes underlying the rule's enactment); see also *Santobello v. New York*, 404 U.S. 257, 260-61 (1971) (emphasizing plea bargaining as "an essential component of the administration of justice").

Whether the government and defendant reach a plea agreement depends upon numerous economic and practical considerations by both parties. Each party weighs these competing considerations in an effort to reach a compromise most beneficial to its interests.¹⁸ On the one hand, the government desires a conviction achieved through the most efficient means possible.¹⁹ Compromise through plea agreements facilitates efficiency by helping to clear overburdened prosecutorial dockets, permitting the investment of time, energy, and legal efforts elsewhere.²⁰ Similarly, disposition outside protracted courtroom proceedings conserves valuable judicial resources.²¹

In a macro sense, this expedited disposition benefits society by limiting the expenditure of taxpayer resources while maximizing its impact, thereby ensuring the efficient administration of justice.²² Since "[j]ustice delayed is justice denied,"²³ clearing cases that might otherwise clog the judicial system allows contested cases to reach trial sooner,²⁴ thereby providing closure to victims and defendants and fostering societal healing.²⁵ As Chief Judge Frank Easterbrook of the Seventh Circuit rightly noted, prosecutors engage in precisely such economic calculations, evaluating the opportunity to secure [*6] justice for society while maximizing available resources: "Police, judges, prosecutors, jails and jailers, and defense counsel are costly, and society gains by conserving their use."²⁶

Similarly, prosecutors must consider the key to any successful prosecution: the admissible evidence. Where admissible evidence remains lacking--whether because of a recalcitrant key witness, an incomplete investigation, or judicial suppression--a prosecutor will face a challenge meeting the government's burden at trial.²⁷ As such, the prosecutor's willingness to offer leniency or a generous deal in exchange for the defendant's guilty plea might indicate an inability to meet the government's burden or, quite simply, "a lack of confidence in the case against the [defendant]."²⁸ A prosecutor might also offer a lenient deal for tactical reasons, recommending that the defendant

¹⁸ For example, prosecutors and defendants may entertain economic considerations in negotiating plea agreements. See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 725 (2006). For a more in depth discussion about economic considerations in plea agreements, see generally *id.*

¹⁹ See *id.* at 717-18 (noting the government's motivations for plea bargaining); see also Jenny Elayne Ronis, Comment, *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1393-94 (2010) (discussing the rationale and process behind plea bargaining).

²⁰ See Ronis, *supra* note 19, at 1393-94.

²¹ 1A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 171 (4th ed. 2008) ("[T]he federal courts could not possibly offer trials to everyone who was entitled to one without drastically increasing the number of judges, prosecutors, defense counsel, and court personnel.").

²² *Cf. id.* (noting benefits beyond the defendant as "a plea resolves the case more quickly and can hasten the time within which the defendant will have paid his debt to society").

²³ This phrase is frequently attributed to Prime Minister William E. Gladstone. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 183 (Suzy Platt ed., Library of Congress 1989), available at <http://www.bartleby.com/73/954.html>.

²⁴ See Ronis, *supra* note 19, at 1393.

²⁵ *Cf.* FED. R. CRIM. P. 11 advisory committee's notes (stating that "[w]here the defendant by his plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant" and "a plea agreement may also contribute to the successful prosecution of other more serious offenders").

²⁶ Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 290 (1983).

²⁷ *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1346 (10th Cir. 2010).

²⁸ *Id.* at 1348 n.10.

receive the maximum reduction for acceptance of responsibility and arguing for a sentence at the bottom of the applicable guideline range if the defendant agrees to testify against a co-conspirator.²⁹

A defendant, on the other hand, weighs very different and personal considerations. After all, it is the defendant who will suffer a loss of liberty and damage to his image if convicted. Chief among those considerations, of course, is the desire to minimize punishment. He might also seek a plea agreement to spare himself and others the anxiety, unwanted public attention, and cost of litigation³⁰ because he was ill-informed by his attorney as to the consequences resulting from the conviction³¹ or because he had "little confidence in his appointed lawyer" to obtain an acquittal on the charge at trial.³²

A defendant may also enter a guilty plea for tactical reasons.³³ In conjunction with the defendant's desire to minimize the inherent risks of fighting the charges at trial, and the concomitant potential for severe punishment, a defendant might plead guilty to a lesser offense, whether that is a less serious felony or misdemeanor.³⁴ Even if the prosecutor refuses to amend the charges to something less serious, the guilty plea itself represents "acceptance of responsibility," which positively affects the sentencing guidelines a court [*7] uses in sentencing the defendant.³⁵ These bargained-for exchanges might also help the defendant avoid unwanted collateral consequences, such as the loss of employment.³⁶

These motivations become all the more salient where a business is the indicted party. An indicted business generally desires to resolve the criminal charges swiftly, while minimizing punishment, litigation costs, visibility, and harm to the corporation's standing in the industry and community.³⁷ Being seen as accepting responsibility for a corporate act and taking steps to "undo" the harm by voluntarily agreeing to harsh punishment restores order, demonstrates goodwill, and lessens the effects on the corporation's bottom line.³⁸ British Petroleum (BP) and the Deepwater Horizon oil spill serve as a recent example of corporate governance in the face of criminal charges. On April 20, 2010, a massive oil well blowout crippled and sank BP's Deepwater Horizon oil rig in the Gulf of Mexico,

²⁹ See Ronis, *supra* note 19, at 1394.

³⁰ See, e.g., *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, 905 N.E.2d 259, 316 n.1 (Ohio Ct. App. 2008) (citing defendant's suggestion that he entered the plea to spare his wife from prosecution); see also Ronis, *supra* note 19, at 1393 (citing Easterbrook, *supra* note 26, at 290).

³¹ See Garces, 611 F.3d at 1340 (restating Garces's testimony that his attorney advised him to plead guilty, despite his professed innocence, because he would receive nothing more than probation).

³² *Elevators Mut. Ins. Co.*, 905 N.E.2d at 316, n.1.

³³ See, e.g., Ronis, *supra* note 19, at 1394 (discussing "tactical advantages to plea bargaining").

³⁴ See *id.* (citing *Henderson v. Morgan*, 426 U.S. 637, 658 (1976) (Rehnquist, J., dissenting) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970))).

³⁵ See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2013) (stating that "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels").

³⁶ See *Crofoot v. U.S. Gov't Printing Office*, 761 F.2d 661, 663 (Fed. Cir. 1985) (stating that "[p]etitioner and his counsel stated in the district court that he was entering this plea . . . because of the . . . increased likelihood of retaining his job . . . if convicted of only a misdemeanor").

³⁷ See, e.g., Christopher A. Wray & Robert K. Hurr, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1103-04 n.33 (2006).

³⁸ See generally Ben Protess & Michael Corkery, *5 Big Banks Expected to Plead Guilty to Felony Charges, but Punishments May Be Tempered*, N.Y. TIMES (May 13, 2015), <http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html> (explaining that banks voluntarily plead guilty to felony charges).

resulting in eleven fatalities and incalculable damage to the Gulf Coast region's shorelines.³⁹ In the immediate aftermath of the blowout, BP's stocks tumbled from approximately \$ 60 per share to a low of \$ 27 per share,⁴⁰ roughly half of its pre-blowout value.⁴¹ The Department of Justice eventually brought charges against BP, as well as some of its top executives.⁴² One can only imagine the length and breadth of plea negotiations, but eventually the Department of [*8] Justice and BP reached an agreement for BP to plead guilty to fourteen offenses and pay \$ 4 billion in penalties.⁴³ Immediately following the announcement of an approved plea agreement, BP's stock prices rose, including a nearly two percent gain by BP America.⁴⁴ Those stock prices continued to rise, indicating an upward trend and lending credit to BP's strategic decision to plead guilty to the charges.⁴⁵ Whether BP was actually guilty is irrelevant here. BP recognized the benefit to be gained by entering a guilty plea and ending the potentially risky criminal process.

In essence, a guilty plea represents a mutually agreeable business decision by the government and the defendant. Each party to the proceeding weighs competing considerations in an effort to reach a compromise most beneficial to its respective interests. Such compromise requires open dialogue and candid communications by and among the parties. None of this would be possible, however, if defendants, at the first breakdown in communications or upon withdrawal, were exposed to the natural proclivity of eager prosecutors to employ admissions made in negotiating a favorable plea agreement against them in subsequent criminal proceedings. Accordingly, the system has placed certain restrictions on the subsequent use of statements, proffers, and concessions.

2. The Inadmissibility of Withdrawn Guilty Pleas

In recognition of the importance of compromise to the administration of justice, evidentiary rules and surrounding judicial pronouncements accord special status to withdrawn guilty pleas and factual stipulations. Here, two rules in particular, Federal Rule of Criminal Procedure 11 (FRCP 11)⁴⁶ and Federal Rule of Evidence 410 (FRE 410),⁴⁷ impact the withdrawal of guilty pleas and associated factual stipulations and the subsequent use thereof.

FRCP 11 dictates the circumstances under which a defendant may withdraw a plea. These circumstances depend primarily upon whether the court has already accepted the defendant's plea:

³⁹ See Steven Mufson, *BP Settles Criminal Charges for \$ 4 Billion in Spill; Supervisors Indicted on Manslaughter; BP Also Is Expected to Agree to a Criminal Plea in the 2010 Oil Spill in the Gulf of Mexico*, WASH. POST (Nov. 15, 2012), http://www.washingtonpost.com/business/economy/bp-to-pay-billions-in-gulf-oil-spill-settlement/2012/11/15/ba0b783a-2f2e-11e2-9f50-0308e1e75445_story.html (discussing the oil spill and the settlement of criminal charges).

⁴⁰ See *BP PLC ADR Stock Ticker*, WALL ST. J.MKT. WATCH, <http://www.marketwatch.com/investing/stock/bp> (last visited July 8, 2014) (displaying the five-year history of BP PLC stock prices); see also *BP Oil Spill Timeline*, GUARDIAN, <http://www.theguardian.com/environment/2010/jun/29/bp-oil-spill-timeline-deepwater-horizon> (analyzing BP stock during the period immediately preceding and succeeding the accident) (last visited July 14, 2015).

⁴¹ See Clifford Krauss, *Judge Accepts BP's \$ 4 Billion Criminal Settlement over Gulf Oil Spill*, N.Y. TIMES (Jan. 30, 2013) (reporting on Judge Sarah S. Vance's approval of the proposed plea agreement between BP and the Department of Justice).

⁴² See generally Mufson, *supra* note 39 (explaining that the Justice Department filed manslaughter charges against two BP supervisors and obstruction charges against a former VP); Krauss, *supra* note 41 (stating two BP officers charged with manslaughter and a former VP charged with obstruction of Congress and making false statements).

⁴³ Krauss, *supra* note 41.

⁴⁴ *Id.*

⁴⁵ See *BP PLC ADR Stock Ticker*, *supra* note 40 (displaying the five-year history of BP PLC stock prices).

⁴⁶ FED. R. CRIM. P. 11.

⁴⁷ FED. R. EVID. 410.

(d) **Withdrawing a Guilty or Nolo Contendere Plea.** A defendant may withdraw a plea of guilty or nolo contendere:

- (1) before the court accepts the plea, for any reason or no reason; or
- (2) after the court accepts the plea, but before it imposes sentence if:
 - (A) the court rejects a plea agreement under 11(c)(5); or
 - (B) the defendant can show a fair and just reason for requesting the withdrawal.⁴⁸

[*9] Once the court imposes its sentence, the defendant's opportunity to withdraw his plea is foreclosed;⁴⁹ the plea thereafter "may be set aside only on direct appeal or collateral attack."⁵⁰

In the hypothetical presented by this article, the theoretical Contractor A has met its burden under Rule 11 and successfully withdrew his plea when the U.S. Attorney moved to dismiss all charges. Successful withdrawal, however, would be meaningless if the government could later rely on Contractor A's guilty plea. Accordingly, the withdrawal must be accompanied by certain collateral effects--effects that give meaning to the withdrawal itself.

This meaning is found in the subsequent prohibition on use of a withdrawn guilty plea, a prohibition that grew out of a 1927 U.S. Supreme Court decision, *Kercheval v. United States*.⁵¹ There, petitioner originally pleaded guilty but obtained leave after sentencing to withdraw his plea and substitute a plea of not guilty, claiming he had been induced to plead guilty by the prosecutor's promise to recommend a relatively light sentence.⁵² During trial on the merits, the prosecutor offered petitioner's guilty plea as evidence of his guilt.⁵³ The trial court allowed the evidence and gave a limiting instruction to the jury.⁵⁴ On appeal, the Eighth Circuit affirmed, finding "no substantial or prejudicial error in the admission" of the evidence.⁵⁵

The Court granted certiorari to decide whether a withdrawn guilty plea is admissible on the merits of a subsequent criminal trial.⁵⁶ After considering jurisprudence on both sides of the issue, the Court concluded that a guilty plea, once withdrawn, ceases to be evidence and that permitting its admission would render meaningless the ability to withdraw a plea:

The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. It[s] subsequent use as evidence against petitioner was in direct conflict with that determination. When the plea was annulled, it ceased to be evidence. . . . As a practical matter, it could not be received as evidence without putting petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial. . . . The withdrawal of a plea of guilty is a poor privilege if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty.⁵⁷

⁴⁸ FED. R. CRIM. P. 11(d).

⁴⁹ *Id.* 11(e).

⁵⁰ *Id.*

⁵¹ 274 U.S. 220 (1927).

⁵² *Id.* at 221.

⁵³ *Id.* at 221-22.

⁵⁴ *Id.* at 222.

⁵⁵ *Id.* at 222-23 (quoting *Kercheval v. United States*, 12 F.2d 904, 907 (8th Cir. 1926)).

⁵⁶ *Id.* at 223.

⁵⁷ *Id.* at 224 (quoting *White v. Georgia*, 51 Ga. 286, 289 (1874) (internal quotation marks omitted)).

By treating a withdrawn guilty plea as void ab initio without further effect in criminal or civil proceedings,⁵⁸ the *Kercheval* Court created a standard that serves two important purposes. First, this standard upholds the "conclusiveness [*10] of the court's ruling"⁵⁹ and empowers the court to manage negotiations by both parties "in ways that will enhance its legitimacy in the eyes of the public and increase its attractiveness to defendants."⁶⁰ Second, the standard gives meaning to FRCP 11.⁶¹

The Court's holding in *Kercheval* paved the way for FRE 410, which, when enacted nearly fifty years later, codified the holding that the "weight of reason" prohibits the introduction of a withdrawn guilty plea as evidence in a subsequent criminal proceeding.⁶² The Advisory Committee also recognized that prohibiting introduction of the withdrawn plea alone would be a "poor privilege"⁶³ if the surrounding communications were left unprotected. Accordingly, under FRE 410 a withdrawn guilty plea, the associated factual stipulation, and any evidence related to the withdrawal are inadmissible against the defendant who offered the plea:

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

. . .

(3) a statement made during a proceeding on either [a guilty plea that was later withdrawn or a nolo contendere plea] under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.⁶⁴

FRCP 11 and FRE 410, along with *Kercheval* and its progeny, work conjunctively to protect the important public policies underlying plea bargaining in the criminal justice system. Defendants remain free to engage in plea negotiations, enter guilty pleas, and, absent judgment, withdraw those pleas without fear of repercussions in subsequent or collateral proceedings.⁶⁵ These rules and judicial decisions, therefore, not only encourage candor and "the promotion of disposition of criminal cases by compromise,"⁶⁶ but also [*11] prevent detrimental results, unnecessary inefficiencies,⁶⁷ and ineffective criminal law administration.⁶⁸

⁵⁸ *Id.*

⁵⁹ *United States v. Newbert*, 504 F.3d 180, 185 (1st Cir. 2007) (citing *Kercheval*, 274 U.S. at 224).

⁶⁰ 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., *FEDERAL PRACTICE & PROCEDURE* § 5342 (1st ed. 1980).

⁶¹ See *Newbert*, 504 F.3d at 185 ("[A]llowing a withdrawn guilty plea to be used against a defendant defeats the purpose of allowing the withdrawal in the first place.") (citing *Kercheval*, 274 U.S. at 224).

⁶² *Kercheval*, 274 U.S. at 225; see also FED. R. EVID. 410 advisory committee's notes (discussing the holding in *Kercheval*); *Newbert*, 504 F.3d at 185 (stating that "Rule 410 . . . is the legacy of *Kercheval*").

⁶³ *Kercheval*, 274 U.S. at 224 (quoting *White v. Georgia*, 51 Ga. 286, 289 (1874)) (internal quotation marks omitted).

⁶⁴ FED. R. EVID. 410 (emphasis in original omitted); see also FED. R. CRIM. P. 11(f) (referring to Rule 410 concerning the admissibility or inadmissibility of a plea or related statement).

⁶⁵ See generally FED. R. EVID. 410 advisory committee's notes.

⁶⁶ *Id.* (discussing also the general purposes underlying the rule's enactment); FED. R. CRIM. P. 11 advisory committee's notes (recognizing that permitting use may "discourage defendants from being completely candid and open during plea negotiations."); Jud. Conf. of the U.S., Comm. on Rules of Prac. & Proc., *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, Rules Governing Section 2255 Proceedings for the United States District Courts, and Federal Rules of Evidence* (Feb. 1978), reprinted in 77 F.R.D. 507, 534 (1978) [hereinafter *Proposed Amendments to the Federal Rules*] (noting the need for free and open discussion).

B. *The Withdrawn Factual Stipulation in the Debarment Context*

The criminal process, and its focus on guilt and punishment, represents one remedy available to the federal government in the face of contractor misbehavior; there are others, such as debarment.⁶⁹ But with different remedies come different policies. And while criminal practice rules and jurisprudence concerning withdrawn guilty pleas and associated factual stipulations encourage and promote candor and compromise, withdrawn factual stipulations in the debarment context implicate unique and separate, but no less important, public policy concerns.

1. The Role of Debarment in the Federal Procurement Process

Federal procurement policy holds that "[a]gencies shall solicit offers from, award contracts to, and consent to subcontracts with *responsible* contractors only."⁷⁰ Congress, recognizing that policies without enforcement mechanisms rarely command obedience,⁷¹ empowered certain executive branch agencies with powerful administrative tools, namely suspension and debarment,⁷² as "means to effectuate this policy."⁷³

[*12] Although Congress first sought to regulate the award of military supply contracts in the late 1880s,⁷⁴ the modern day debarment regime traces its lineage to a policy letter issued by the Office of Federal Procurement Policy on July 1, 1982.⁷⁵ Policy Letter 82-1 sought to remedy problems created by inconsistent regulatory application and the lack of adequate procedural due process by setting forth comprehensive policies and procedures governing the suspension and debarment of government contractors.⁷⁶ These policies and procedures

⁶⁷ See, e.g., *United States v. Acosta-Ballardo*, 8 F.3d 1532, 1535-36 (10th Cir. 1993) (citing *United States v. Lawson*, 683 F.2d 688, 692 (2d Cir. 1982) (discussing previous versions of Rule 410 and Federal Rule of Criminal Procedure 11(e)(6)(D) and noting that using statements made during plea discussions "for impeachment purposes will clearly affect the discussions and impair the frank and open atmosphere" the rules "were designed to foster"); Federal Rules of Criminal Procedure Amendments Act, H.R. REP. NO. 94-247, at 7 (1978) (highlighting that a lack of such protections might "discourage defendants from being completely candid and open during plea negotiations").

⁶⁸ Cf. FED. R. EVID. 410 advisory committee's notes (recognizing that effective criminal law administration would be difficult without compromise resolutions); FED. R. CRIM. P. 11 advisory committee's notes (recognizing the role of plea bargaining in the criminal justice system and its status as an "essential component of the administration of justice").

⁶⁹ See Yuri Weigel, *Is "Protection" Always in the Best Interests of the Government?: An Argument to Narrow the Scope of Suspension and Debarment*, 81 GEO. WASH. L. REV. 627, 629, 649 (2013).

⁷⁰ FAR 9.402(a) (emphasis added); see also *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (stating that "[i]t is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds").

⁷¹ See WALTER J. OLESZEK, CONG. RESEARCH SERV., R41079, CONGRESSIONAL OVERSIGHT: AN OVERVIEW 1, 7 (2010).

⁷² Although practitioners often refer to suspension and debarment together, the focus for this article remains solely on the debarment part of that equation. Accordingly, this article will reference debarment only.

⁷³ FAR 9.402(a); see also, e.g., *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 6 (D.C. Cir. 1998) (qualifying debarment as directing the "power and prestige of government" at a contractor with the potential for "economic injury"); *Bizzell*, 921 F.2d at 267 (characterizing debarment as "rough remedial justice") (citing *United States v. Halper*, 490 U.S. 435, 446 (1989)).

⁷⁴ Joseph D. West et al., *Suspension and Debarment*, BRIEFING PAPERS, Aug. 2006, at 2 [hereinafter West, *Suspension and Debarment*] (discussing Congress's requirement that "military supply contracts be awarded to the 'lowest *responsible* bidder.'") (emphasis in original).

⁷⁵ See *Government-wide Debarment, Suspension, and Ineligibility*, Policy Letter No. 82-1, 47 Fed. Reg. 28854 (July 1, 1982).

⁷⁶ *Id.*

were absorbed by the Federal Acquisition Regulation (FAR), forming today's regime as embodied by Subpart 9.4.⁷⁷

Debarment represents a permissible "prophylactic governmental action,"⁷⁸ a heady tool able to devastate a contractor's financial viability in one fell swoop.⁷⁹ Debarment prohibits the contractor from receiving contracts from the federal government;⁸⁰ precludes the government from soliciting offers from, awarding contracts to, or consenting to subcontracts with the contractor;⁸¹ and excludes the contractor from participation in nonprocurement transactions, such as grants or federally backed loans, for a prescribed period.⁸² This effect results not from the intent to "punish" the contractor, which is impermissible,⁸³ but rather from the intent to protect the government's interest.⁸⁴

Because of the incidental detrimental economic effect,⁸⁵ subpart 9.4 of the FAR requires that an agency first demonstrate "cause" for debarment.⁸⁶ The FAR informs an agency's analysis by setting forth an exhaustive list of causes, some narrow and some broad, that can justify exclusion.⁸⁷ This list is further subdivided into causes supported by a conviction or civil judgment and those **[*13]** supported by the preponderance of the evidence.⁸⁸ As such, debarments are often characterized as "judgment-based" or "fact-based."⁸⁹

The difference between judgment-based and fact-based debarments lies in the body of evidence presented to the agency's debarring official, or the "administrative record."⁹⁰ In a judgment-based debarment, the administrative record consists primarily of public records generated by the criminal or civil proceedings, such as indictments, guilty pleas and factual stipulations, and judgments.⁹¹ Fact-based debarments, on the other hand, lack the judicial pronouncement under equal or greater burdens of proof;⁹² accordingly, these debarments lack the tidy record

⁷⁷ West, *Suspension and Debarment*, *supra* note 74, at 2.

⁷⁸ Bizzell, 921 F.2d at 267 (citing Halper, 490 U.S. at 446) (internal quotation marks omitted).

⁷⁹ Angela B. Styles, et al., *How Proposed Debarment Became Equal to Suspension*, LAW360 (Feb. 2, 2015, 10:05 AM), <http://www.law360.com/articles/616957/how-proposed-debarment-became-equal-to-suspension>.

⁸⁰ FAR 9.405(a).

⁸¹ FAR 9.405(a).

⁸² See FAR 9.405, 9.405-1, 9.405-2 (2014).

⁸³ FAR 9.402(b).

⁸⁴ FAR 9.402(b).

⁸⁵ FAR 9.402(b); see also Steven A. Shaw & Jade C. Totman, TRANSPARENCY INT'L UK, DEFENCE & SEC. PROGRAMME & COVINGTON & BURLING LLP, *Suspension & Debarment: Strengthening Integrity in International Defence Contracting* 1, 8 (Jan. 2015).

⁸⁶ FAR 9.402(b).

⁸⁷ FAR 9.406-2.

⁸⁸ FAR 9.406-2.

⁸⁹ See U.S. DEP'T OF JUSTICE OFFICE OF INSPECTOR GEN., AUDIT DIV., REP. NO. 12-01, AUDIT OF ADMINISTRATIVE SUSPENSION, DEBARMENT, AND OTHER INTERNAL REMEDIES WITHIN THE DEPARTMENT OF JUSTICE vi, 6 (Oct. 2011), available at <https://oig.justice.gov/reports/2011/a1201.pdf>.

⁹⁰ FAR 9.406-3(d).

⁹¹ FAR 9.406-3(d).

⁹² FAR 9.406-3(d).

generated by the criminal or civil proceedings,⁹³ requiring that the agency build an evidentiary package sufficient to sustain its burden of demonstrating cause for debarment by a preponderance of the evidence.⁹⁴

If the agency believes that cause for debarment exists, it may recommend the contractor for debarment on the basis of the evidence before it.⁹⁵ Where an agency moves forward with a proposed debarment recommendation, the initial decision and action rest with an agency's debarring official,⁹⁶ who determines whether there is reason to question the contractor's present responsibility.⁹⁷

Implicit to this decision-making process is the debarring official's discretion,⁹⁸ which is traditionally rooted in the policy that the government, as a "fair and rational shopper,"⁹⁹ should "insist on capable, impeccably honest vendors and top quality goods and services."¹⁰⁰ While cause for debarment is a necessary condition, the analysis does not end there.¹⁰¹ Whether to propose, and ultimately debar, a contractor remains a business decision imposed by the debarring official in his discretion,¹⁰² but "only in the public interest

[*14] for the [g]overnment's protection"¹⁰³ and never for punitive purposes.¹⁰⁴ As such, debarment concerns more than past misconduct.¹⁰⁵ The debarring official's decision assumes a broader view, focusing attention on the contractor's present responsibility.¹⁰⁶ In evaluating a contractor's present responsibility, the debarring official considers the totality of the circumstances, including past misconduct, the seriousness of the misconduct, mitigating evidence, evidence of any remedial measures, and present responsibility criteria.¹⁰⁷

⁹³ FAR 9.406-2(a), 9.406-3(d).

⁹⁴ FAR 9.406-3(d)(3).

⁹⁵ See FAR 9.406-3(a).

⁹⁶ See FAR 9.406-1(a).

⁹⁷ See *generally* FAR 9.406-3(a)-(c) (requiring agencies to establish procedures for referral to a debarring official).

⁹⁸ FAR 9.406-1(a); see also Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 CATH. U. L. REV. 363, 419 (1995).

⁹⁹ *Frequency Elecs., Inc. v. Dep't of Air Force*, No. 97-1551, slip op. at 2 (4th Cir. July 1, 1998).

¹⁰⁰ *Id.*

¹⁰¹ *Cf.* FAR 9.406-1(a) (stating that "[t]he existence of a cause for debarment, however, does not necessarily require that the contractor be debarred. . .").

¹⁰² Shannon, *supra* note 98, at 419.

¹⁰³ FAR 9.402(b) (emphasis added).

¹⁰⁴ FAR 9.402(b) (emphasis added).

¹⁰⁵ *Cf.* FAR 9.402(a)-(b), 9.406-1(a).

¹⁰⁶ See FAR 9.402(a) (highlighting policy that agencies shall only contract with responsible contractors); see also FAR 9.104-1 (setting forth the general criteria exhibited by responsible contractors); Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28855 (July 1, 1982) (noting that "evidence of a contractor's lack of responsibility in the past may be considered when determining whether or not a contractor is *presently* responsible") (emphasis original).

¹⁰⁷ See FAR 9.406-1(a).

Once the debarring official decides to propose a contractor for debarment, the FAR imposes certain due process requirements.¹⁰⁸ Courts have long recognized that although bidders have no constitutionally protected property interest or right to receive government contracts,¹⁰⁹ they do possess valid liberty interests in the ability to pursue contracts and to avoid the economic impact of debarment on the basis of fraud, dishonesty, or questionable integrity.¹¹⁰ Accordingly, a contractor¹¹¹ facing potential debarment is entitled to notice and an opportunity to submit information in opposition.¹¹²

Notice of the proposed debarment must advise the contractor, and any specific affiliates, that the debarring official is considering debarment; the [*15] specific cause and reasons for the contemplated action; the agency's procedures for decision making; the effect of the proposed debarment; and, if imposed, debarment itself.¹¹³ Additionally, the contractor is generally entitled to a copy of the administrative record on which the debarring official will make a final decision¹¹⁴ and an opportunity, within thirty days of receipt, to "submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts. . . ." ¹¹⁵

The contractor may employ a variety of strategies to meet its burden to demonstrate present responsibility.¹¹⁶ The contractor may, for example, submit evidence of remedial measures undertaken in response to the misconduct, as well as extenuating or mitigating evidence.¹¹⁷ The contractor might also challenge factual statements advanced by the agency.¹¹⁸ And the contractor might supplement the administrative record and give an oral presentation to the

¹⁰⁸ The effect of a *proposed* debarment should not be overlooked as the proposal itself has profound implications. Under the FAR, a proposal for debarment renders contractors temporarily ineligible to receive contracts. FAR 9.405(a). Further, agencies may not "solicit offers from, award contracts to, or consent to subcontracts with these contractors." FAR 9.405(a). The negative economic effect, alone, can be substantial, especially where a contractor receives significant revenue from government contracts. Shannon, *supra* at note 98, at 364.

¹⁰⁹ Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 962 (D.C. Cir. 1980).

¹¹⁰ See *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed. Cir. 1984) (noting that bidders do "have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty"); see also *Khan v. Bland*, 630 F.3d 519, 535 (7th Cir. 2010) (recognizing "a valid liberty interest when an [individual's] good name, reputation, honor or integrity [is] called into question in a manner that makes it virtually impossible . . . to find new employment in his chosen field [I]t is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.") (quoting *Abrarian v. McDonald*, 617 F.3d 931, 941 (7th Cir. 2010)); *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) (discussing impact on liberty interest of a bidder when the deprivation of the right to bid on government contracts results from allegations of fraud or dishonesty); *Highview Eng'g, Inc. v. U.S. Army Corps of Eng'rs*, 864 F. Supp. 2d 645, 648 (W.D. Ky. 2012) (recognizing a bidder's liberty interest). Cf. *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (noting that, although there is no "right" to receive government contracts, "that cannot mean that the government can act arbitrarily").

¹¹¹ Also known as a "Respondent." See Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L.J. 277, 295, n.131 (2007).

¹¹² FAR 9.406-3(b)-(c).

¹¹³ FAR 9.406-3(c).

¹¹⁴ FAR App. H-101.

¹¹⁵ FAR 9.406-3(c)(4).

¹¹⁶ See FAR 9.406-1(a).

¹¹⁷ Todd F. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 553 n.23 (2009).

¹¹⁸ FAR 9.406-3(b)(2)(i).

debaring official.¹¹⁹ While the contractor's options remain relatively infinite, the debaring official must remain cognizant of the regime's overarching principles: the contractor's present responsibility and the need to protect the government's procurement process.¹²⁰

Once the contractor advances its interests, or the thirty days lapse¹²¹ (and assuming no genuine dispute over material facts remain),¹²² the debaring official will move expeditiously to render a decision on the basis of the administrative record, including any information submitted by the contractor.¹²³

Fact-based debarments can present other significant wrinkles for this decision-making process because they offer incalculable opportunities for factual disputes.¹²⁴ Akin to a judge considering a motion for summary judgment, the debaring official bears responsibility for identifying genuine disputes of material fact.¹²⁵ Thus, if an agency advances a particular fact germane to the proposed debarment, and if the debaring official concludes that evidence or information offered by the contractor places that fact in dispute, **[*16]** then the debaring official or a designated fact-finder must hold a fact-finding proceeding for the sole purpose of resolving the matter.¹²⁶

Notwithstanding the minor procedural variations for judgment-based versus fact-based debarments, once the debaring official renders a decision, she will provide written notice to the contractor, specifying the reasons for and period of debarment, and advising that the debarment is effective throughout the executive branch.¹²⁷

If the contractor disagrees with the debaring official's determination, a few recourses remain available. The contractor may request reconsideration or request that the debaring official reduce the period or extent of debarment,¹²⁸ especially where new, material evidence is discovered.¹²⁹ The contractor might also seek review in federal district court under the Administrative Procedure Act,¹³⁰ even though federal courts generally defer to agency determinations absent evidence that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." ¹³¹

The entire process serves at least two purposes. First, it provides a forum and due process for affected contractors.¹³² Second, it creates an environment that fosters a thoughtful, as opposed to unnecessarily expedient, balancing

¹¹⁹ FAR 9.406-3(c)(4), (d)(1).

¹²⁰ See *generally* FAR 9.402(a)-(b) (describing the policy behind debarment, suspension, and ineligibility rules).

¹²¹ FAR 9.406-3(d).

¹²² Genuine disputes over material facts are generally limited to fact-based debarment scenarios. See FAR 9.406-3(d).

¹²³ See FAR 9.406-3(d).

¹²⁴ See *generally* FAR 9.406-3(d)(2)(i) (explaining that written findings of fact are prepared when a genuine dispute of material fact calls for additional proceedings).

¹²⁵ Cf. FAR 9.406-3(d)(2)(i) (requiring written findings of fact to be prepared when additional proceedings are necessary).

¹²⁶ See FAR 9.406-3(d)(2)(i). The debaring official or designated fact-finder must prepare written findings of fact resulting from this proceeding. See FAR 9.406-3(e)(1).

¹²⁷ See FAR 9.406-3(e)(1).

¹²⁸ FAR 9.406-4(c).

¹²⁹ FAR 9.406-4(c).

¹³⁰ Administrative Procedure Act of 1946, § 702, (1966) (codified at 5 U.S.C. §§ 500, 702 (2012)).

¹³¹ 5 U.S.C. § 706.

¹³² See *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 956 (D.C. Cir. 1980).

of the public's interest in protecting the government and the desire for an open, competitive marketplace for goods and services.¹³³ It safeguards taxpayer dollars by excluding from participation those who lack the business ethics, integrity, or capabilities necessary to provide goods or services.¹³⁴ This, in turn, both narrows and expands the pool of eligible contractors: It narrows the pool by removing those who lack the responsibility required to receive taxpayer funds but expands the pool by enhancing legitimate market competition and opening doors for new, responsible businesses and individuals who might have otherwise lacked the opportunity to compete.¹³⁵ And, of course, debarring nonresponsible contractors and individuals protects the overall integrity of the acquisition process as deserving businesses can compete on the merits, and agencies and the public they serve receive necessary goods and services at the most competitive price.¹³⁶

[*17] 2. Evidentiary Standards and the Admissibility of Withdrawn Factual Stipulations

Achieving such a holistic review, however, would be challenging were the process saddled with the rules and motion practice familiar to civil and criminal practitioners. The debarment regime balances the needs for fairness and due process with the need to protect the government.¹³⁷ Thus, the debarment process established under the FAR represents an informal, nonadversarial administrative (i.e., nonjudicial) remedy that empowers agencies to protect their procurement processes.¹³⁸ At the same time, the FAR mandates that agency procedures, while as informal as practicable, nonetheless remain "consistent with principles of fundamental fairness."¹³⁹

Nowhere is this informality more readily apparent than in the approach taken concerning the admissibility of evidence. Neither the proceedings themselves nor the debarring official is bound by formal rules of evidence.¹⁴⁰ In fact, nowhere in subpart 9.4 is there mention of evidentiary standards other than the burden that cause be demonstrated by a preponderance of the evidence.¹⁴¹ Indeed, one must turn to the Administrative Procedure Act¹⁴² to locate the only guidance on evidentiary standards: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."¹⁴³ Accordingly, a debarring official may marshal all available evidence without adherence to formal

¹³³ See *id.* at 955.

¹³⁴ See *id.* at 968.

¹³⁵ See FAR 9.406-3.

¹³⁶ Note, however, the equally important notion that a debarring official's decision *not* to debar a contractor, where appropriate, also protects the integrity of the procurement process by reinforcing the concepts of fundamental fairness and legitimacy. See FAR 9.406-3(b).

¹³⁷ See FAR 9.406-3(b).

¹³⁸ See FAR 9.402(c).

¹³⁹ FAR 9.406-3(b)(1).

¹⁴⁰ See, e.g., Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28856 (July 1, 1982) (unequivocally stating that "the Rules of Federal Evidence do not apply to [suspension or debarment] proceedings"); see also, e.g., FED. R. EVID. 1101 (identifying the proceedings in which the Federal Rules of Evidence apply); FAR 509.406-3(d)(3)(vii) (stating that "[n]either the Federal Rules of Evidence nor the Federal Rules of Civil Procedure govern fact finding").

¹⁴¹ At best, subpart 9.407, which concerns suspension, provides a general outline for evaluating evidence, suggesting that agencies should consider the credibility of the evidence and whether the evidence is corroborated. See FAR 9.407-1(b)(1). Certain causes for debarment refer generically to "credible" evidence. See, e.g., FAR 9.406-2(b)(1)(vi).

¹⁴² Administrative Procedure Act of 1946, § 556, (1966) (codified at 5 U.S.C. §§ 500, 702 (2012)).

¹⁴³ 5 U.S.C. § 556(d).

evidentiary rules and without concern for gamesmanship.¹⁴⁴ This, in turn, facilitates greater information gathering and factual development.

A withdrawn factual stipulation nests comfortably in this environment. Unlike the withdrawn guilty plea, which provides little information concerning the contractor's underlying conduct, the factual stipulation amounts to a statement against party interests and bears certain reliability and probative value.¹⁴⁵ The information contained therein, coupled with other relevant information concerning the contractor's past performance and compliance [*18] efforts, paints a fuller picture, thereby aiding the debarring official in determining whether the acts resulted from a few rogue agents or more systemic corporate inadequacies.¹⁴⁶ This would be impossible, or at least significantly limited, were the process constrained by rules of evidence.¹⁴⁷

Federal jurisprudence recognizes and enforces the absence of such constraints on administrative processes. For example, in *Garces v. U.S. Attorney General*,¹⁴⁸ the Eleventh Circuit considered an appeal lodged by Roberto Garces from a Board of Immigration Appeals' decision upholding an immigration judge's order finding Garces removable.¹⁴⁹ At issue was whether the Board of Immigration Appeals erred in considering Garces' guilty plea¹⁵⁰ to trafficking and aggravated assault—a plea that was later vacated by the criminal court.¹⁵¹ Judge Carnes raised, but quickly dismissed, FRE 410's applicability to the issue presented;¹⁵² specifically, he concluded that because immigration proceedings are administrative, the Federal Rules of Evidence bear no persuasive force: "It is a well-settled principle that the Federal Rules of Evidence do not apply in administrative proceedings."¹⁵³

The informality embodied by the debarment process, and more importantly the inapplicability of all but the most basic of evidentiary standards, carries significant implications for the present discussion. Because the Federal Rules of Evidence do not apply here, contractors who have pleaded guilty, but later successfully withdraw the plea, cannot call upon FRE 410's protections to suppress either the plea or factual stipulation from the administrative record.¹⁵⁴

¹⁴⁴ 5 U.S.C. § 556(d).

¹⁴⁵ See *Myers v. Sec'y of Health & Human Servs.*, 893 F.2d 840, 849 (6th Cir. 1990).

¹⁴⁶ See generally FAR 9.407-1 (describing general suspension principles).

¹⁴⁷ See Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28856 (July 1, 1982).

¹⁴⁸ 611 F.3d 1337 (11th Cir. 2010).

¹⁴⁹ *Id.* at 1338-39.

¹⁵⁰ *Garces* is something of a novelty in that it lacks a factual stipulation. *Id.* at 1347. The record contained no transcript or minutes of the 1984 guilty plea hearing. *Id.* at 1340. As such, if Garces made any statements during the hearing, the panel did not have those statements for consideration. *Id.* For this reason, the panel references only the guilty plea and the resulting conviction. *Id.* at 1339.

¹⁵¹ See *id.* at 1338-40.

¹⁵² *Id.* at 1347.

¹⁵³ *Id.* (citing *U.S. Dep't of Treasury v. Lopez*, 960 F.2d 958, 964 n.11 (11th Cir. 1992); *Myers v. Sec'y of Health & Human Servs.*, 893 F.2d 840, 843 (6th Cir. 1990)); see also Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28856 (July 1, 1982) (unequivocally stating that "the Federal Rules of Evidence do not apply to [suspension or debarment] proceedings"). Cf. FED. R. EVID. 1101(a) (stating "[t]hese rules apply to proceedings in United States courts").

¹⁵⁴ See, e.g., Government-wide Debarment, Suspension, and Ineligibility, 47 Fed. Reg. at 28856 (stating unequivocally that "the Rules of Federal Evidence do not apply to [suspension or debarment] proceedings"); see also FED. R. EVID. 1101 (identifying the proceedings in which the Federal Rules of Evidence apply); *Myers*, 893 F.2d at 843 (stating that "appellants' general rule against admissibility of a *nolo* plea and conviction is not applicable in an administrative proceeding") (emphasis in original).

Although there appears to be no jurisprudence addressing this precise issue, at least one court has refused to extend FRE 410's protections to [*19] administrative proceedings akin to debarment. In *Myers v. Secretary of Health and Human Services*,¹⁵⁵ a panel for the Sixth Circuit considered a challenge to the Secretary of Health and Human Services' decision to exclude Myer, inter alia, from coverage under the Medicare program for two years.¹⁵⁶ In deciding to exclude Myer, the Secretary of Health and Human Services considered his plea of nolo contendere and subsequent conviction for knowingly and willfully making false statements and representations.¹⁵⁷ Myers argued that, under FRE 410, his plea of nolo contendere, as well as his subsequent conviction, was inadmissible in the later administrative proceeding.¹⁵⁸ Utilizing a remarkably straightforward analysis rooted in FRE 410's text, the panel disagreed: "[T]he rules prohibit use of a nolo plea in any *civil or criminal proceeding*, not in an administrative proceeding."¹⁵⁹

The Sixth Circuit panel's decision in *Myers* remains rooted in the omission of "administrative" from FRE 410's scope.¹⁶⁰ Some commentators suggest, however, that the omission of "administrative" from FRE 410 resulted from "oversight rather than a conscious policy decision . . . [as] Congress, which had the power to extend the rule to administrative proceedings, did not give the issue any consideration."¹⁶¹ The American Bar Association's Criminal Justice Section Standards, as well as a few parallel state rules, lend credence to this notion.¹⁶² For example, Criminal Justice Section Standard 14-2.2 suggests that withdrawn guilty pleas and related statements should not be admitted "in any criminal or civil action or *administrative proceedings*."¹⁶³ Under the California Evidence Code, withdrawn guilty pleas and related statements may not be used "in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, [*20] and tribunals."¹⁶⁴ But this information, while intellectually interesting, is of no moment. The views of the American Bar Association and the states may represent grounded decisions or overly cautious stances, but they do not carry the force of law in debarment proceedings.¹⁶⁵

¹⁵⁵ *Myers*, 893 F.2d at 841.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 843.

¹⁵⁹ *Id.* (internal quotation marks omitted and emphasis added). Importantly, an exclusion from participation in Medicare and Medicaid programs is analogous to the debarment of a contractor. See FED. R. EVID. 410(a) (prohibiting the use of withdrawn guilty pleas and attendant statements in "civil or criminal" proceedings only).

¹⁶⁰ See *Myers*, 893 F.2d at 843.

¹⁶¹ WRIGHT & GRAHAM, *supra* note 60, § 5348. The panel in *Myers* did not address congressional intent in its opinion. See *Myers*, 893 F.2d at 845.

¹⁶² Congress might also have considered, and dismissed, extending FRE 410 to administrative proceedings, recognizing the importance of informality to such proceedings and the sound public policies advanced thereby. Cf. *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971) (stating that "[t]here emerges an emphasis upon the informal rather than the formal . . . we think, is as it should be, for this administrative procedure, and these hearings . . . should be liberal and not strict in tone and operation . . . so long as the procedures are fundamentally fair"). This view would be consistent with the balance struck by proponents of the current debarment regime. See, e.g., Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28856 (July 1, 1982) (permitting debarring officials to consider convictions resulting from nolo contendere pleas, notwithstanding FRE 410's prohibition on use of evidence of a nolo contendere plea in a civil or criminal case, and reiterating the inapplicability of the Federal Rules of Evidence to debarment proceedings).

¹⁶³ AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-2.2 (3d ed. 1999) [hereinafter ABA CRIMINAL JUSTICE STANDARDS] (emphasis added).

¹⁶⁴ CAL. EVID. CODE § 1153 (West 2014).

¹⁶⁵ ABA CRIMINAL JUSTICE STANDARDS, *supra* note 163, at ii.

In short, debarment officials remain guided by little more than liberally construed standards such as relevancy and materiality.¹⁶⁶ While FRE 410 prevents a prosecutor from relying upon a withdrawn guilty plea and an associated factual stipulation, it offers no respite in the debarment context.¹⁶⁷ As long as the withdrawn factual stipulation is relevant to assaying the contractor's alleged misconduct and contains information material to the debarment official's business decision, then this evidence remains fair game for use in debarment proceedings.¹⁶⁸

III. RECONCILING THE SEEMINGLY IRRECONCILABLE: BALANCING PUBLIC POLICIES AND COMPETING INTERESTS

The discussion above establishes the necessary parameters: a withdrawn guilty plea and factual stipulation are barred from use in criminal, but not administrative, proceedings.¹⁶⁹ What remains unanswered, however, is whether agencies, and the respective debarment official, *should* use and rely upon a withdrawn factual stipulation in debarment of an individual or contractor from future contracting.

Participants in this process, whether prosecutors, the defense bar, contractors, or agency stakeholders, approach this query from unique viewpoints informed primarily by their respective policy goals.¹⁷⁰ While participants' approaches create little conflict in isolation, the government contracting arena and the frequent resort to parallel remedies present the potential for competition among distinctive aims.¹⁷¹ In the case of withdrawn factual [*21] stipulations, the arguments both for and against use can appear downright irreconcilable.

Rather than focusing on identifying which argument and position reflects a universal truth, participants should instead adopt a more fluid, case-by-case approach that accounts for the particular considerations implicated by use of withdrawn factual stipulations.

A. *Competing Normative Viewpoints*

Any discussion concerning the use of a withdrawn factual stipulation in the debarment context must first begin with examination of the respective positions of participants concerning the effect of such use. Each participant remains married to protecting its process and advancing, to the greatest extent possible, its policy goals. This in turn highlights the potential conflict embodied by the hypothetical presented here.

¹⁶⁶ See Administrative Procedure Act of 1946, § 556(d), (1966) (codified at 5 U.S.C. §§ 500, 702 (2012)) (cautioning against receipt of "irrelevant, immaterial, or unduly repetitious evidence").

¹⁶⁷ See WRIGHT & GRAHAM, *supra* note 60, § 5348 (noting that "pleas and related statements could be used against the defendant in a subsequent administrative proceeding").

¹⁶⁸ Cf. 5 U.S.C. § 556(d), 80 Stat. 386 (cautioning against receipt of "irrelevant, immaterial, or unduly repetitious evidence").

¹⁶⁹ However, FRE 410 provides limited exceptions. See *generally* FED. R. EVID. 410(b) (listing exceptions for a court to admit prohibited statements in FRE 410(a)).

¹⁷⁰ See Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28855 (July 1, 1982); see also *Santobello v. New York*, 404 U.S. 257, 260-61 (1971) (emphasizing plea bargaining as "an essential component of the administration of justice"). See *generally* FED. R. EVID. 410 advisory committee's notes (discussing general purposes underlying the committee's note).

¹⁷¹ See, e.g., Shannon, *supra* at note 98, at 364 (citing ABA COMM. ON DEBARMENT & SUSPENSION, THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT 5-6 (1994)) (noting that contractors "may fear a debarment or suspension far more than criminal or civil sanctions"). *But cf.* Government-wide Debarment, Suspension, and Ineligibility, 47 Fed. Reg. at 28856 (advancing the view that criminal sanctions are "potentially more serious than a debarment or suspension action").

Criminal practitioners, for example, might argue that the protections afforded by FRE 410 endeavor to encourage open and candid negotiations that naturally lead to the "disposition of criminal cases by compromise."¹⁷² Were these protections to be removed--were a defendant's statements in plea negotiations available as evidence in subsequent proceedings--the effect would be to chill plea negotiations and cause a concomitant waste of valuable government and judicial resources.¹⁷³ This explains, or so the argument goes, why the American Bar Association's Criminal Justice Section Standard 14-2.2 includes "administrative proceedings"¹⁷⁴ in the list of forums where withdrawn guilty pleas and factual stipulations should not be admitted.¹⁷⁵

They might also argue that excluding administrative proceedings from these protections harms the effective and efficient administration of justice.¹⁷⁶ Allowing inclusion of withdrawn factual stipulations in the administrative record, as well as consideration thereof by debarring officials, will result in significant economic consequences.¹⁷⁷ Contractors, already knowledgeable that debarment might result from a criminal conviction, appropriately factor the risk of such consequences when evaluating plea deals.¹⁷⁸ However, were agencies and debarring officials to consider withdrawn factual stipulations, notwithstanding the inadmissibility of this information in the criminal, and collateral or subsequent civil, context, contractors may shift or alter their [*22] decision-making calculus more radically, especially when the contractor's financial livelihood depends on winning government contracts.¹⁷⁹ Thus, a contractor might be inclined to hesitate or be less forthcoming when entering into plea negotiations with a government attorney for fear that those discussions will enter into the fray on the administrative side. Or a contractor might fervently litigate the criminal charges, accepting the risk of criminal sanctions before succumbing to likely debarment.

No one suggests that these concerns are not valid. Industry practitioners already advise business executives and their counsel to exercise caution and take steps to protect proffer statements from use in related proceedings.¹⁸⁰ In the Spring 2009 volume of *Pretrial Practice & Discovery*, published by the American Bar Association's Committee on Pretrial Practice and Discovery, two practitioners discussed the district court decision in *SEC v. Johnson*.¹⁸¹ In *Johnson*, Judge Gladys Kessler considered dueling motions in limine over proffer statements made by Christopher

¹⁷² FED. R. EVID. 410 advisory committee's notes; see also *Proposed Amendments to the Federal Rules*, *supra* note 66, at 534 (noting the need for free and open discussion).

¹⁷³ See FED. R. EVID. 410 advisory committee's notes.

¹⁷⁴ ABA CRIMINAL JUSTICE STANDARDS, *supra* note 163, at 14-2.2.

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* at xii.

¹⁷⁷ See *id.* at xi.

¹⁷⁸ See Steven Eichorn, *The Hidden Regulatory and Licensing Consequences to a Conviction or Arrest*, CRIME IN THE SUITES: AN ANALYSIS OF CURRENT ISSUES OF WHITE COLLAR DEFENSE (Sept. 8, 2014), <http://crimeinthesuites.com/hidden-regulatory-licensing-consequences-conviction-arrest/>.

¹⁷⁹ See, e.g., Shannon, *supra* note 98, at 364 (citing ABA COMM. ON DEBARMENT & SUSPENSION, THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT 5-6 (1994)) (noting that contractors "may fear a debarment or suspension far more than criminal or civil sanctions"). *But cf.* Government-wide Debarment, Suspension, and Ineligibility, Policy Letter No. 82-1, 47 Fed. Reg. 28855 (July 1, 1982) (advancing the view that criminal sanctions are "potentially more serious than a debarment or suspension action").

¹⁸⁰ Andrew F. Merrick & Howard S. Suskin, *Protecting Proffer Session Statements from Being Used in Civil Litigation*, 17 ABA COMM. PRETRIAL PRAC. & DISCOVERY (Spring 2009).

¹⁸¹ *Id.* (citing *SEC v. Johnson*, 534 F. Supp. 2d 63 (D.D.C. 2008)).

Benyo to prosecutors and investigators in a related criminal proceeding.¹⁸² A prosecutor contacted Benyo about allegations of securities fraud¹⁸³ and inquired into his willingness to enter into plea bargaining discussions.¹⁸⁴ Benyo participated in a few proffer sessions with prosecutors and investigators, but no plea agreement resulted from the discussions.¹⁸⁵ Sometime thereafter, the Securities and Exchange Commission (SEC) brought a civil enforcement proceeding against several company executives, including Benyo.¹⁸⁶ In granting Benyo's motion in limine to preclude admission of his statements at trial, Judge Kessler pointed to FRE 410's intent to "promote active plea negotiations and plea bargains, which . . . are important components of this country's criminal justice system."¹⁸⁷ In discussing *Johnson*, Andrew F. Merrick and Howard S. Suskin stressed the need to protect such statements from disclosure lest "other parties, including regulatory agencies and private litigants, may subsequently attempt to use . . . [those] statements."¹⁸⁸

[*23] Yet FRE 410 extends its reach to civil proceedings, which themselves are judicial.¹⁸⁹ Thus, while Merrick and Suskin's advice is well-taken, so long as parties place themselves in a position to call upon its defenses, FRE 410 strikes the appropriate balance between fostering dialogue and permitting the admissibility of unprotected statements.¹⁹⁰ The same cannot be said of administrative proceedings, where agencies and debarment officials operating outside the battlements of FRE 410 may rely on withdrawn factual stipulations.

If debarment officials began to rely on withdrawn factual stipulations, practitioners might view such reliance, rightly or wrongly, as a sea change in the debarment process and strike out accordingly by advising against open communications with all government participants. Perhaps so, but the decision to use and rely upon a withdrawn factual stipulation is not one made in a vacuum; rather, debarment practitioners must consider equally valid concerns and interests principal to the debarment process.¹⁹¹

Unlike a criminal proceeding, with its focus on guilt and the importance that compromise plays in greasing the overburdened criminal justice machinery, the debarment process concerns the sometimes nebulous, but always malleable, "government's best interest" standard and the desire to protect the integrity of the acquisition process.¹⁹² Debarment is a business decision that extends beyond simple guilt or innocence.¹⁹³

Of course, implicit to this business decision is the requirement for due diligence and informed decision making.¹⁹⁴ No one expects a chief executive officer for a major corporation to risk the company on a hasty, ill-informed

¹⁸² Johnson, 534 F. Supp. 2d at 64.

¹⁸³ Id. at 64-65.

¹⁸⁴ Id. at 65.

¹⁸⁵ Id. at 65-66.

¹⁸⁶ Id. at 64.

¹⁸⁷ Id. at 66 (quoting U.S. v. Davis, 617 F.2d 677, 683 (D.C. Cir. 1980) (quoting Blackledge v. Allison, 431 U.S. 63, 71 (1977))) (discussing FED. R. CRIM. P. 11(e)(6)) (internal quotation marks omitted).

¹⁸⁸ Merrick & Suskin, supra note 180.

¹⁸⁹ FED. R. EVID. 1101 (identifying the proceedings in which the Federal Rules of Evidence apply).

¹⁹⁰ Johnson, 534 F. Supp. 2d at 66-67 (discussing the role of Rule 410 in completely candid and open plea negotiations).

¹⁹¹ See Jessica G. Willard, *Balancing Goals: FAPIIS's Effect on Administrative Agreements*, 43 PUB. CONT. L.J. 105, 114 (2013).

¹⁹² See id. at 106.

¹⁹³ Id. at 114.

¹⁹⁴ See Kara M. Sacilotto & Craig Smith, *Suspension and Debarment: Trends and Perspectives*, 48 PROCUREMENT LAW. 3, 6 (2012).

decision; rather, the CEO is expected to gather and peruse all available information and to then, but only then, come to a decision. The same principle applies equally, if not more emphatically, where a public official considers whether the government should compensate a contractor in the future using public funds.¹⁹⁵

Access to, and consideration of, a contractor's withdrawn factual stipulation, specifically, informs the debarring official's appreciation for the facts and analysis of whether continued dealings would be wise.¹⁹⁶ It does so while still affording the contractor the opportunity to address the factual stipulation, the underlying motivation for pleading guilty, and any other [*24] information the contractor deems relevant.¹⁹⁷ Denying access to this information would do nothing but handicap the debarring official and work a disservice to vital public interests.¹⁹⁸

Agencies and debarring officials might also argue that to ignore a contractor's statements, as embodied in a withdrawn factual stipulation, would be to turn a blind eye to a clear admission of misconduct directly bearing on the issue of present responsibility in favor of theoretical, albeit justified, concerns about openness in future negotiations.¹⁹⁹ Unlike private purchasers, an agency must afford a measure of due process before depriving a contractor of its liberty interest in pursuing contracts.²⁰⁰ If a debarring official were to ignore relevant admissions and if no additional evidence existed to question a contractor's present responsibility, an agency could find itself in an awkward position where it must conduct business with an untrustworthy contractor using taxpayers' dollars.²⁰¹ And, from the larger sovereign's perspective, ignoring this information would produce more pronounced effects on the acquisition process, undermining efficient, fairly competed procurements, and thwarting public confidence in the agency's expenditure of taxpayer funds.²⁰²

In light of these somewhat conflicting aims, what can we make of the ultimate question? When the rules and public policies align across the spectrum for all remedies, few issues arise. But when these rules and public policies conflict, as they do with regard to withdrawn guilty pleas and factual stipulations, the challenges presented lay the foundation for less than ideal outcomes. As the discussion above demonstrates, each remedy--be it administrative or criminal, civil or contractual--advances differing interests and policy aims.²⁰³ With those aims come certain concerns and idiosyncrasies borne from desires to "protect" the processes. For example, investigative agents, desirous of seeing the fruits of their labor, may err on the side of protecting their investigation. Prosecutors, desirous of securing a conviction and advancing justice, will take steps to control, massage, and perfect their [*25]

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 7-8.

¹⁹⁷ *See id.* at 8.

¹⁹⁸ *But see* Willard, *supra* note 191, at 122 (stating that "[t]he CO could make a responsibility determination based solely on the descriptions of a contractor's past misconduct simply because the CO is required to consider it").

¹⁹⁹ While justified, these fears are misplaced. Sophisticated contractors already factor the possibility of debarment into the decision whether to plead guilty or enter settlement negotiations, knowing full well that any factual stipulation or admission will be used in any subsequent debarment proceeding.

²⁰⁰ *See, e.g.,* ATL, Inc. v. United States, 736 F.2d 677, 683 (Fed. Cir. 1984) (acknowledging bidders' liberty interests).

²⁰¹ *Cf. Merritt & Sons v. Marsh*, 791 F.2d 328, 331 (4th Cir. 1986) (identifying the proper expenditure of public funds as "a primary responsibility of the government" and calling it "irresponsible" to not "question the integrity of a contractor who has been indicted").

²⁰² *See* Emily N. Seymour, *Refining the Source of the Risk: Suspension and Debarment in the Post-Andersen Era*, 34 PUB. CONT. L.J. 357, 376 (2004).

²⁰³ *Id.*

case.²⁰⁴ Both will act in a manner that encourages cooperation and open dialogue, thereby facilitating efficient and expeditious convictions.²⁰⁵ In comparison, debaring officials, who also desire expeditious action to protect the acquisition process and the public fisc, will err in favor of a complete record, full of morsels upon which to form a rational business decision.²⁰⁶ In short, each participant will look first to her respective policy aims and do everything possible to meet those goals. In the context presented here, one side encourages honesty by precluding use of the withdrawn factual stipulation, whereas the other considers the withdrawn factual stipulation.

B. Accounting for Normative Viewpoints in a Case-by-Case Approach

Cynics might condemn parallel attempts to affect the public policies underlying both criminal and administrative remedies as irreconcilable. Citing competing interests, they might argue for the adoption of one set of policies as "more important" for advancement than others. To some degree, they offer a valid point: the use of a withdrawn factual stipulation in a debarment proceeding is difficult to reconcile with the equally important goal of fostering open dialogue in criminal and civil negotiations.

This realization does not mean that debaring officials should ignore withdrawn factual stipulations in debarment proceedings. Rather, it simply highlights the need for a nuanced weighing of equities and natural tensions on a case-by-case basis--an analysis that participants already undertake when effectively utilizing parallel proceedings. The key is not *whether* to use the withdrawn factual stipulation, but *when*.

As with much of the government contracting process, the issue presented finds no easy answer. No two cases are alike.²⁰⁷ While certain cases share similarities, all participants--whether debaring officials, prosecutors, civil attorneys, investigative agents, or contracting officers--must carefully dissect the facts, weigh and balance competing interests, and prioritize across the spectrum to maximize achievement of important public policy concerns.

A number of factors, some of which may cut both ways, can influence this analysis. For example, is there an ongoing, related prosecution, or have prosecutors encountered difficulty securing a conviction? If so, is there a potential for future, follow-on prosecution or have all criminal avenues been exhausted? Did the wrongdoing occur at the corporate level or was it limited to a few low-level employees? Will there be significant public or industry visibility to any action, whether criminal, civil, administrative, or contractual? Is there abundant information, other than the withdrawn factual stipulation, upon which the debaring official can rely? Did investigators compile a [*26] treasure trove of useful material or is the withdrawn factual stipulation necessary to connect the dots? Was the best evidence presented to the grand jury and, therefore, subject to secrecy under the Federal Rules of Criminal Procedure?²⁰⁸ Could information provided in the withdrawn factual stipulation lead investigators to other, less-objectionable evidence? Would exclusion of the withdrawn factual stipulation from the administrative record leave a false impression with the debaring official and, as such, is it necessary for the sake of completeness?²⁰⁹ Is there a voluminous file documenting poor performance or other evidence supporting administrative remedies? Has the

²⁰⁴ See Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 266-67 (2000) (describing processes prosecutors undertake to perfect their case).

²⁰⁵ See *id.* at 267.

²⁰⁶ See Sacilotto & Smith, *supra* note 194, at 4.

²⁰⁷ See *generally id.* at 3 (discussing suspension and debarment decisions as being decided on "more discretionary and "fact-based" " grounds).

²⁰⁸ See FED. R. CRIM. PROC. 6(e) (precluding disclosure of "a matter that occurred before the grand jury").

²⁰⁹ See, e.g., FED. R. EVID. 410(b)(1) (permitting the admission of statements made in plea negotiations "in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together").

contractor already taken steps to demonstrate present responsibility, such as meeting with the debarring official to discuss remedial measures? ²¹⁰ Has the contractor expressed a willingness to enter into an administrative compliance agreement on the basis of existing information without more? ²¹¹ Has the contractor been unjustly enriched and, if so, is the amount significant? Could the government fashion an alternative remedy ²¹² for the loss, such as returning the parties to the status quo ante, ²¹³ absent use of the withdrawn factual stipulation? ²¹⁴

The outcome of this balancing test, however, rests not on any one dispositive factor, ²¹⁵ but on the interplay and effect of each relevant consideration on overall efforts to advance public policy interests, including the predictable advantages and disadvantages of using a withdrawn guilty plea and factual stipulation beyond the criminal and civil context. In certain circumstances, the analysis may favor use of well-developed, accessible investigative materials in lieu of a withdrawn factual stipulation given the size of the contractor, visibility of the proceedings, and the potential for downstream chilling of open dialogue and candor. In other circumstances, the scale may tip in a direction that favors use of a withdrawn factual stipulation by a debarring official.

Some might consider this case-by-case analysis unworkable or tedious in practice. It need not be. In fact, the case-by-case analysis suggested here works in lockstep with longstanding policy that government attorneys coordinate and pursue all available remedies:

Department policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency **[*27]** attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings. By working together in this way, the Department can better protect the government's interests (including deterrence of future misconduct and restoration of program integrity) and secure the full range of the government's remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion and debarment). ²¹⁶

While a case-by-case balancing test may be challenging and time-consuming, it offers attorneys the opportunity to present case-specific and programmatic concerns and to reach a tailored solution that advances the government's interests. ²¹⁷ But how might this coordination and analysis look in practice?

1. Revisiting and Expanding the Hypothetical

The hypothetical presented at the outset ²¹⁸ provides an occasion to conduct an abbreviated analysis here. In that hypothetical, Contractor A agreed to testify against Contractor B in ongoing criminal proceedings in exchange for a favorable plea deal. After the charges leveled against Contractor B were deemed defective, the government moved to dismiss the charges against Contractor B and, as a matter of comity, Contractor A. The court, having already accepted Contractor A's plea, allowed Contractor A to withdraw the plea and dismissed all charges.

²¹⁰ FAR 9.406-1(a)(7) (2014)

²¹¹ FAR 9.406-1(a)(4).

²¹² FAR 9.406-1(a)(7).

²¹³ FAR 9.406-1(a)(9).

²¹⁴ The author does not intend these factors to portray an exhaustive list but rather intends them to provide several examples of relevant factors that can impact the analysis.

²¹⁵ This is because no one factor is dispositive. See *generally* FAR 9.406-1(a).

²¹⁶ Att'y Gen. Memorandum, *supra* note 6.

²¹⁷ See *id.*

²¹⁸ See hypothetical discussion, *supra* Part I.

The hypothetical offers little information. Without more, government attorneys would likely be unable to question their firmly rooted favoritism and determine whether use of a withdrawn factual stipulation in a debarment context would be wise or appropriate. If we expand the hypothetical, however, we see that the approach recommended by this article not only remains workable, but permits securing "the full range of the government's remedies" ²¹⁹ in a setting that ensures fundamental fairness to all participants.

Let us assume that the hypothetical reads as follows: ²²⁰ Contractor A, John Smith, ²²¹ is a mid-level employee of Contractor B, Jones Enterprises, a small government contractor that receives less than \$ 1 million in government awards per fiscal year. In fact, over the past five fiscal years, government agencies have awarded less than \$ 4 million in contracts to Jones Enterprises. In the current fiscal year, Jones Enterprises has received only one government contract valued at \$ 275,000. These government [*28] contracts, however, represent eighty percent of Jones Enterprises' operating revenue.

Mr. Smith is neither a principal nor shareholder of Jones Enterprises. Instead, Mr. Smith performs accounting tasks for Jones Enterprises' factory in the People's Republic of Pineland, ²²² a country notorious for its lackadaisical approach to public corruption. Mr. Smith loves working for Jones Enterprises and enjoys his exotic life in Pineland. He understands that successful performance in Pineland will allow Jones Enterprises to maintain operations in the country. More importantly, ongoing business will allow Mr. Smith to remain in Pineland.

Through his lavish lifestyle in Pineland, Mr. Smith has met many influential political figures, including General Azarov, the Supreme General of the Pineland Army. While meeting with General Azarov for coffee, Mr. Smith learns of a contract that the Pineland Army intends to award. This contract fits within Jones Enterprises' footprint. Mr. Smith offers to "compensate" General Azarov for his "friendship." Both understand, of course, that this "compensation" is intended to cause General Azarov to steer the contract in Jones Enterprises' direction. Mr. Smith, using his accounting skills, devises a means for concealing the bribe to General Azarov. And, a few months later, the Pineland Army awards a lucrative contract to Jones Enterprises, surprising other frontrunner entities. Suspicious of wrongdoing, these competitors alert U.S. officials.

An investigation involving numerous law enforcement agencies commences. The investigation, which lasts several years, eventually leads to a grand jury indictment of Mr. Smith for violating the Foreign Corrupt Practices Act by bribing General Azarov, a foreign official. Some of the evidence uncovered during the investigation suggests that Jones Enterprises knew of and condoned Mr. Smith's actions, thereby resulting in the indictment of Jones Enterprises.

During the pendency of the criminal proceedings, a debarring official suspends Mr. Smith and Jones Enterprises under FAR Subpart 9.407 ²²³ on the basis of the indictments. ²²⁴ Concerned about its financial viability, and eager to demonstrate its present responsibility, Jones Enterprises unilaterally communicates with the debarring officials of agencies from which Jones Enterprises regularly receives contracts. Corporate officials meet with the debarring

²¹⁹ Att'y Gen. Memorandum, supra note 6.

²²⁰ The names (individual and business) and surrounding circumstances in this hypothetical are fictitious. To the extent that these names or facts bear any resemblance to particular individuals, companies, or cases, such resemblance is purely coincidental.

²²¹ Despite much confusion, a "contractor" as defined under the FAR includes both individuals and business entities. See FAR 9.403 (including in the definition "any individual or other legal entity").

²²² Those familiar with the U.S. Army Special Forces Qualification Course will recognize Pineland as the fictitious country used in the course's culminating exercise, Robin Sage. Drew Brooks, *Robin Sage Exercise Begins Wednesday*, FAYETTEVILLE OBSERVER (July 12, 2015, 12:00 AM), http://fayobserver.com/military/robin-sage-exercise-begins-wednesday/article_23b3081c-dd6a-5f79-9f02-48686c3c2654.html.

²²³ See generally FAR 9.407.

²²⁴ FAR 9.407-2(b).

officials, provide information concerning the company's ethics and compliance program, and discuss remedial measures taken in light of Mr. Smith's misconduct. This includes, of course, Mr. Smith's termination.

[*29] In the criminal proceedings, Jones Enterprises and Mr. Smith contest the charges. After Mr. Smith fails to obtain an outright dismissal, he succumbs to the charges, agrees to plead guilty to paying a bribe in exchange for a reduced sentence, and implicates his employer, Jones Enterprises, as a participant in the scheme.

Jones Enterprises never reaches trial. The court issues a ruling characterizing the government's theory of the case as defective. Recognizing the cost to the American taxpayer in challenging the court's ruling, coupled with the possibility of an adverse legal precedent that could impact other, more significant but unrelated criminal proceedings, the U.S. Attorney's Office opts to dismiss the charges against Jones Enterprises.

The U.S. Attorney's Office expresses no intent to re-indict Jones Enterprises or Mr. Smith at a later date. Nor has the Civil Division expressed an interest in pursuing civil action against either party. Concerned about the government's ongoing business relationships with Jones Enterprises, investigative agents transmit evidence of the bribery to the lead agency for potential administrative action. Through no fault of the agents, the evidence contains a paucity of information and, taken as a whole, fails to demonstrate wrongdoing by Mr. Smith or Jones Enterprises by a preponderance of the evidence. Nonetheless, the evidence transmitted raises concerns over continued business with Jones Enterprises and Mr. Smith's future involvement with another government contractor.

The agency requests copies of the materials considered by the grand jury in issuing the indictments against Mr. Smith and Jones Enterprises, including information obtained via grand jury subpoenas. The agency suspects, and the investigative agents have confirmed, that the smoking gun pointing to Mr. Smith's bribe to General Azarov and Jones Enterprises' knowledge thereof can be found in this material. The U.S. Attorney's Office moves the court to authorize disclosure of the grand jury material, which the court denies without comment. The investigative agents have exhausted all investigative angles.

As for Mr. Smith, his (now withdrawn) guilty plea, and the statement of facts contained therein, provides the evidence necessary for the agency, and its debarring official, to meet its burden under the FAR for debarment.²²⁵ The withdrawn factual stipulation also provides greater context to concerns raised about Jones Enterprises' knowledge of the bribery scheme and, more importantly, the company's present responsibility. Here, the nongrand jury evidence intimated some knowledge by corporate officials; however, that evidence was subject to differing interpretations. Mr. Smith's withdrawn factual stipulation makes one interpretation more likely.

[*30] 2. The Case-by-Case Analysis in Practice: An Abbreviated Example

This more-developed hypothetical might countenance in favor of using Mr. Smith's factual stipulation in a parallel debarment proceeding. The scenario presents a reduced threat to the chief policy concerns for any criminal or civil practitioner, namely candor and compromise. There is no indication that the U.S. Attorney's Office will pursue charges against Mr. Smith or Jones Enterprises in the future for this misconduct and there are no related proceedings where use of the withdrawn factual stipulation in debarment proceedings could undermine ongoing plea negotiations. Although Mr. Smith will be wary of future communications with government representatives, the deterrent effect writ large is minimal.

Similarly, while any government action incurs visibility, proceedings against Jones Enterprises, a small government contractor, will not generate the same public interest and industry-wide repercussions as proceedings against a large government player.²²⁶ Increased visibility brings with it increased interest and potentially altered approaches

²²⁵ FAR 9.406-2(a)(1).

²²⁶ See Robert O'Harrow Jr., *SBA Suspends Major Contractor GTSI from Government Work*, WASH. POST (Oct. 1, 2010, 11:17 PM) (providing an example of how government action generates public interest by reporting on the SBA's suspension of a top-50 contractor and quoting Prof. Steven Schooner stating, "[i]t's the first time in decades that the government has completely suspended a significant player, a legitimate top-tier contractor").

from government contractors and the defense bar.²²⁷ This does not mean, of course, that small contractors receive disparate treatment; rather, greater visibility simply suggests that use of a withdrawn factual stipulation may more directly impact the interests of civil and criminal practitioners industry-wide and hasten their ability to obtain favorable plea agreements from other contractors in the future. Where the industry-wide repercussions and potential downstream effect on negotiations is manageable, as in this scenario, civil and criminal practitioners may be less protective of their process and passionate about collateral use of a withdrawn factual stipulation.

In contrast, the debarring official here might be more passionate about the need to use the withdrawn factual stipulation as non-use will negatively impact attempts to protect the government from contractors that may not be presently responsible. Other than Mr. Smith's withdrawn plea, the evidence available to the agency is sparse. For example, the documents that reveal the bribe--accounting books and records, bank statements, and critical correspondence--were obtained via grand jury subpoenas and considered by the grand jury in issuing the indictment. Because of the court's refusal to permit disclosure, the debarring official has little more than inferences and [*31] supposition. Further investigative avenues are unlikely to produce additional probative evidence.

The withdrawn factual stipulation represents not only an admission of wrongdoing by Mr. Smith, but also a basis for concerns about Jones Enterprises' present responsibility. His plea, along with the corroborating evidence, will permit the debarring official to conclude that debarring Mr. Smith is in the government's interest, thereby preventing him from representing a government contractor for a specified period.²²⁸ This result would be unlikely without the use of the withdrawn factual stipulation.²²⁹

Although Mr. Smith's withdrawn factual stipulation alone might be insufficient to debar Jones Enterprises,²³⁰ the information contained therein will raise additional unsettling questions that the company may address in meeting with the debarring official. Jones Enterprises has already demonstrated a willingness to adopt measures that soothe concerns among the agencies and their debarring officials.²³¹ These discussions might lead to measures that, while short of debarment, continue to protect the government's interests, such as an administrative compliance agreement wherein Jones Enterprises agrees to provide annual reports and hire an independent ombudsman.²³² Both sides might benefit from such an agreement: Jones Enterprises would be permitted to continue submitting offers for government contracts and the procurement process would gain participation from a contractor with strengthened ethics and compliance measures.

None of this would be possible without resort to Mr. Smith's withdrawn factual stipulation. Indeed, the decision to not use the withdrawn plea in considering debarment, along with the decision to not pursue civil action or re-indict Mr. Smith and Jones Enterprises, would represent abject failure for all involved to maximize use, where appropriate, of remedies available to the government. That is, neither Mr. Smith nor Jones Enterprises would be punished (civilly or criminally), nor would the government procurement process and public fisc be protected from non-responsible contractors.

²²⁷ See Jonathan S. Aronie, *Did a Butterfly Just Flap Its Wings? The Potential Industry-Wide Consequences of the SBA's Recent Suspension of a Premier IT Contractor*, GOV'T CONTRACTS, INVESTIGATIONS & INT'L TRADE BLOG (Oct. 7, 2010), <http://www.governmentcontractslawblog.com/2010/10/articles/compliance/did-a-butterfly-just-flap-its-wings-the-potential-industry-wide-consequences-of-the-sbas-recent-suspension-of-a-premier-it-contractor/> (describing how the suspension of one of the country's premier IT providers could have a "Butterfly Effect" on industry and contractors).

²²⁸ See FAR 9.406-3(d).

²²⁹ See *supra* Part II.B.2.

²³⁰ See FAR 9.406-3(d).

²³¹ See Jacquelyn L. Stanley, *Make Transparency Your Business: The Federal Awardee Performance and Integrity Information System and Its Implications for Contractors*, 41 PUB. CONT. L.J. 685, 694 (2012).

²³² *Id.*

The analysis here, however, might just as easily shift against use of the withdrawn factual stipulation in the debarment context. What if, rather than a small government contractor, Jones Enterprises was a large global conglomerate with operations in thirty countries and more than \$ 10 billion in annual revenue from government contracts? What if Mr. Smith was not just an accountant, but Jones Enterprises' chief financial officer? Would the alteration of these two facts be sufficient to tip the scales in favor of non-use?

[*32] Probably not. Given the size of Jones Enterprises, criminal proceedings against it might generate more intense public and industry interest, thereby implicating heightened concerns among civil and criminal practitioners that contractors and the defense bar will chill open dialogue and communications in future compromise negotiations if a debarring official were to rely on a withdrawn factual stipulation. Nonetheless, under these circumstances, an agency might suggest that Mr. Smith's withdrawn factual stipulation takes on greater significance. Far from a scorned mid-level employee looking for revenge against his former employer, Mr. Smith served as a corporate representative. His misdeeds alone might permit the debarment of Jones Enterprises under provisions derived from vicarious liability principles.²³³ The guilty plea and factual stipulation of Mr. Smith as CFO, compared with the guilty plea and factual stipulation of Mr. Smith as mid-level accountant, carries greater probative value in an overall evaluation.

How might the analysis change if the agency involved has access to a veritable treasure trove of evidence? Assume that the investigators and prosecutor followed the U.S. Attorney General's guidance to use "investigative means other than grand jury subpoenas for documents or witness testimony."²³⁴ Or that the prosecutor obtained an order under Federal Rule of Criminal Procedure 6(e) to allow information sharing with agency counterparts for use in administrative proceedings.²³⁵ Now the debarring official possesses a complete record and evidence that directly demonstrates wrongdoing. Here, the analysis might favor non-use of Mr. Smith's withdrawn factual stipulation.

But it might not. The content found in Mr. Smith's withdrawn factual stipulation might be necessary for the sake of completeness. For example, what if, in meeting with the debarring official, Jones Enterprises adopted the position that Mr. Smith was a rogue CFO and that none of its remaining principals knew of his bribery scheme. The evidence, except for Mr. Smith's withdrawn factual stipulation, supports this position. Mr. Smith's factual stipulation, however, identifies several other principals who knew of, and condoned, the scheme. If so, then perhaps the debarring official should consider these statements--those by Jones Enterprises and those by Mr. Smith--together. In fact, use of the withdrawn plea under these circumstances would comport with an existing exception under FRE 410 that permits admission of statements made during guilty plea proceedings or plea negotiations "in any proceeding in which another statement made during the same **[*33]** plea or plea discussions has been introduced, if in fairness the statements ought to be considered together."²³⁶

The rudimentary analysis above offers no answers to the fundamental question concerning use of withdrawn guilty pleas and, more importantly, factual stipulations in debarment proceedings. Nor is it intended to do so.²³⁷ No

²³³ See FAR 9.406-5 (permitting a debarring official to impute the misconduct of an officer "to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence").

²³⁴ Att'y Gen. Memorandum, *supra* note 6.

²³⁵ See *id.*

²³⁶ See FED. R. EVID. 410(b)(1); *cf.* Colin Miller, *The Best Offense Is a Good Defense: Why Criminal Defendants' Nolo Contendere Pleas Should Be Inadmissible Against Them When They Become Civil Plaintiffs*, 75 U. CIN. L. REV. 725, 734 (2006) (discussing the relationship between Rule 410(b)(1) and the "rule of completeness" found in Federal Rule of Evidence 106).

²³⁷ As noted throughout, the analysis is entirely case specific and cannot be distilled to universal principles. While the participants might decide against considering a withdrawn guilty plea in this scenario, the debarring official remains unbound and might

article could adequately set forth a comprehensive listing of relevant factors or a flow chart detailing the proper balance in any hypothetical scenario. There are simply too many factors, the considerations are too varied, and the discretion is too great. Moreover, such an endeavor, Herculean as it would be, is ill-advised. The attraction of parallel remedies remains, in part, the ability to tailor responses to any given situation without being married to past practices, rigid structure, or bright line rules.

What the above is intended to offer is twofold: to demonstrate that a case-by-case analysis is workable and that, because each case is truly unique, the recipe for success in any given situation will involve equal parts factual analysis, communication, cooperation, and coordination--with a dash of discretion. All attorneys must communicate early, frequently, and effectively to discuss common issues that may impact his or her proceeding, to coordinate available remedies, and to "enhance the overall result for the United States."²³⁸ Only in this way can we strike the appropriate balance that not only serves the government's best interests, but also continues to ensure fairness to contractors.

IV. CONCLUSION

The federal government has several tools to remedy contractor misconduct and protect the government's interests. Each subset does so in different ways, governed by distinctive rules, procedural vagaries, and unique public policy concerns.

As this article demonstrates, the intersection of these parallel remedies is fraught with potential conflict between equally valid and sound public policy concerns. Decisions in criminal proceedings may carry over into civil or administrative proceedings, and vice versa. This article uses withdrawn guilty pleas and factual stipulations as but one example for highlighting this potential conflict and dispelling the notion that participants must resort to false hierarchies.

[*34] Withdrawn guilty pleas and associated factual stipulations are, with limited exception, outside the bounds of permissible evidence in criminal and civil proceedings. The same prohibition does not extend to the administrative and contractual context. Yet, use in the latter might unintentionally undermine important public policies protected by applicable rules in the former. That a debarment official or contracting officer may use a withdrawn factual stipulation is without question, but the true issue lies in the interstices.

Some might suggest that the public policy for candor and compromise should prevail above all else, or that criminal and civil proceedings should be given greater priority than administrative and contractual remedies. These suggestions incorrectly create a "remedy hierarchy" for government contracting, imprudently ignoring important public interests and policies advanced by each. The better approach--and the one suggested here--is to consider the remedies on a continuum and carefully weigh the policies implicated, accounting for the facts, information available, and predictable risks and rewards, with an eye towards maximizing achievement, to the greatest extent possible, of each policy goal. In some circumstances, this analysis may favor use of a withdrawn factual stipulation in debarment proceedings; in others, not. Only close communication, cooperation, and coordination by and between relevant stakeholders can illuminate the appropriate balance, build critical interagency trust, and, most importantly, fulfill the overarching public policy: effective use of all remedies to protect the government's interests, while ensuring the greatest possible fairness to all participants.