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CLEAR AND CONVINCING TO WHOM? THE FALSE
CLAIMS ACT AND ITS BURDEN OF PROOF
STANDARD: WHY THE GOVERNMENT
NEEDS A BIG STICK

*John Terrence A. Rosenthal**
Robert T. Alter†

The conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every state house, every office of the Federal Government . . . Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of huge indus-

* Associate, Morrison & Foerster, LLP; B.A., University of California, Berkeley, 1988; Captain, United States Marine Corps (1987–95); J.D., Notre Dame Law School, 1999. This Article is dedicated to the Marines, sailors, and civilians who did so much with so little at the risk of their lives, and with whom I was fortunate enough to serve during my Marine Corps career. In particular, I would like to acknowledge the following Marines who had a tremendous influence on me during my military career: Lt. Col. Charles Triplett, Lt. Col. Richard Hensel, Maj. Mathew Sampson, Maj. Ty Scheiber, Capt. Kirk “Jake” Williams, CWO3 Keith Sampson, 1st Sgt. Michael Jacobs, SSGT Kevin Arnold, SSGT Martin Sarabia, and SSGT Rodney Hill. I wish to thank Professor G. Robert Blakey for his guidance, time, and insight, and Paul Bohr and Helder Pereira for their helpful comments on the early drafts of this Article. Thanks are also due to Darren O’Neill, Article Editor, *Notre Dame Law Review*, for his patience and editing skills. Finally, I wish to thank my son Alexandre Xavier Rosenthal for reminding me daily that life is a miracle.

† Associate, Hahn Loeser & Parks, LLP; B.A., Ohio State University, 1995; J.D., Notre Dame Law School, 1999. I dedicate my contribution to this Article to my wife, Samantha, and my parents, David and Barbara Alter.

*trial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.*¹

*I have considerable experience in letting public contracts; and I have never yet found a contractor who, if not watched, would not leave the Government holding the bag.*²

*Patriotism is a very beautiful thing but it must not be permitted to interfere with business.*³

INTRODUCTION

The False Claims Act (FCA) is the Government's primary statutory weapon for deterring private commercial contractors, from whom the Government procures goods and services, from submitting false or fraudulent claims for payment. In 1986, Congress responded to research indicating widespread fraud in the government procurement system and amended the FCA to provide the Government with a stronger weapon to deter such conduct. Since then, some critics, including legal scholars and economists, have argued that the 1986 amendments to the FCA have created negative consequences in the government procurement system and that these consequences are burdening taxpayers rather than benefiting them.⁴ In defending their position, some critics of the current FCA have argued that the 1986 amendments degraded the FCA's character as a civil fraud stat-

1 *Farewell Address, The Dwight Eisenhower Library* (visited March 25, 2000) <<http://redbud.lbjlib.utexas.edu/eisenhower/farewell.htm>>; see also 2 STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 612 (1984) (quoting President Dwight D. Eisenhower's Farewell Address).

2 ALONZO L. HAMBY, *MAN OF THE PEOPLE: A LIFE OF HARRY S. TRUMAN* 249 (1995) (quoting then-Senator Harry S. Truman).

3 EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME* 174 (1949) (quoting an unidentified businessman).

4 See FREDERICK A. DUNBAR, *NAT'L ECON. RES. ASS'N, THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT: DO THEY HELP OR HURT THE PUBLIC?* (1997); William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, in 6 *SUP. CT. ECON. REV.* 201 (Ernest Gellhorn & Nelson Lund eds., 1998) [hereinafter Kovacic, *A Deterrent*]; C. Stanley Dees, *The Tenth Annual Gilbert A. Cuneo Lecture: The Role of Procurement Lawyers in the Era of Reduced Defense Spending*, 141 *MIL. L. REV.* 199 (1993); *The Civil False Claims Act: An Obstacle to Effect Acquisition Reform* (Mayer, Brown & Platt, 1997) (unpublished manuscript, on file with author) [hereinafter *An Obstacle*]. By arguing against the FCA as it presently stands, these critics seem to disregard the prophetic words of one of America's most respected generals and presidents. See *Farewell Address*, *supra* note 1.

ute.⁵ Given the Act's "preponderance of the evidence" burden of proof standard, critics insist that "it is too easy for the Government to prevail in marginal cases" and that the "risk of loss weighs far more heavily on defendants than plaintiffs."⁶ "There is no *obvious reason* for loosening the proof requirements that apply in purely commercial settings simply because the Government—or a private party standing in the Government's shoes—is the plaintiff."⁷ They argue that taxpayers would benefit if the FCA mimicked the civil fraud law that equity courts developed and common law courts later applied, the civil fraud law that some courts still apply today in cases involving private commercial transactions.

5 See *An Obstacle*, *supra* note 4, at 25 ("The False Claims Act's relaxed standard of proof is inconsistent with the more stringent requirements for showing fraud in the private sector.").

6 *Id.* 1–2.

7 *Id.* at 25 (emphasis added). Actually there are at least three very good reasons why the government should have a lower burden of proof standard in instances of fraud committed by government contractors. First, the government supplies contractors with tremendous amounts of capital for research and development. Contractors then turn around and use the information gleaned from this government-sponsored research and development for commercial gain without fully repaying the government for this commercial gain. The government's research and development support for these companies is so great that companies in Europe argued this constituted subsidies for trade purposes. See Paulo Carozza, Remarks During International Business Transactions Class at Notre Dame Law School (Jan.–Apr. 1999). In one instance, a commercial plane manufacturer derived almost all of the technology for its commercial plane from the technology acquired from the development of a military aircraft supported by the Department of Defense. See *id.* When the government does retain rights to the technology gained by contractors through government-supported research and development, the government gives contractors cut-rate royalty agreements to use the technology for commercial gain. See *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983) (describing contractual provisions in government research and development contracts).

Second, the government actively markets contractor goods to foreign countries using taxpayer dollars. The government and its agents do this in the name of jobs at home, but the process still adds up to increased commercial profits for contractors without paying for the advertising. See *infra* note 18 and accompanying text for a description of this process in action.

Third, the government relaxes certain anti-trust standards for contractors in the name of jobs and national security. This costs the government and taxpayers by decreasing competition and through various subsidies paid to government contractors for the effects of the mergers.

These are three very good reasons why the government should have a lower burden of proof standard for the FCA because often the contractors who have perpetrated the fraud have acquired huge commercial benefits from the government without fully paying for those benefits.

In arguing for a "clear and convincing" burden of proof standard for the FCA, professed reformers maintain that this standard is more appropriate for a statute aimed at deterring "genuine fraud."⁸ For these critics, "genuine fraud," the type of fraud the statute should deter, represents an activity that equates to "common law fraud."⁹ They insist that the "time-tested rules"¹⁰ of common law civil actions for fraud and deceit, including the "clear and convincing" burden of proof standard, are far more appropriate for the FCA than the Act's present "preponderance of the evidence" standard. This Article will demonstrate that these critics misconstrue the history of civil fraud law,¹¹ the current status of the same,¹² and the nature of the present

8 See *An Obstacle*, *supra* note 4, at 1.

9 *Id.* at 26.

10 *Id.* at 17.

11 "A higher standard of proof [for fraud] apparently arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388 n.27 (1982). See *infra* Part II.B for a detailed discussion of the history of the preponderance and clear and convincing standards in civil fraud cases.

12 See, e.g., *Compagnie De Reassurance D'ile De France v. New England Reinsurance Corp.*, 57 F.3d 56 (1st Cir. 1995) ("Massachusetts has not adopted a 'clear and convincing' standard in cases of fraud."); *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1320 (5th Cir. 1977) (stating that the plaintiff's burden of proof in fraud cases in Alabama is by preponderance of the evidence, but that the character of such evidence must be clear and convincing); *Eckholt v. American Bus. Info., Inc.*, 873 F. Supp. 526, 531 (D. Kan. 1994) (stating that under Kansas law, "the burden of proving fraud is by a preponderance of the evidence, but that evidence must be clear, convincing, and satisfactory" (quoting *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70 (1979))); *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964) ("No more than a preponderance of evidence is necessary to establish fraud."); *Malakul v. Altech Ark., Inc.*, 766 S.W.2d 433, 435-36 (Ark. 1989) ("Preponderance of the evidence is required to establish fraud in obtaining a contract by fraudulent representation."); *Barrett v. Bank of Am.*, 229 Cal. Rptr. 16, 22 (Cal. Ct. App. 1986) ("[P]reponderance of the evidence required in most civil cases, including actions for fraud."); *Liodas v. Sahadi*, 562 P.2d 316, 323 n.8 (Cal. 1977) ("[W]e note it has long been settled that in civil cases even a criminal act may be proved by a preponderance of the evidence. Surely the proof of an act of civil fraud should require no higher standard.") (citations omitted); *Goodfellow v. Kattnig*, 533 P.2d 58, 59 (Colo. Ct. App. 1975); *Rigot v. Bucci*, 245 So. 2d 51, 53 (Fla. 1971) ("We hold that only a preponderance or greater weight of the evidence is required to establish fraud, whether the action is at law or in equity."); *Ballard's, Inc. v. North Am. Land Dev. Corp.*, 677 So.2d 648, 651 (La. Ct. App. 1996) ("Fraud is proved by a preponderance of the evidence . . ."); *Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 791 (Minn. 1993) ("[U]nless otherwise indicated by the legislature, the standard of proof in all fraud cases is the preponderance of the evidence standard."); *Taylor v. State Compensation Ins. Fund*, 913 P.2d 1242, 1245 (Mont. 1996) ("Fraud can never be presumed but must be proved by a

government procurement system.¹³ The elements and standards of civil fraud evolved at a time when the doctrine of *caveat emptor* dominated the legal landscape.¹⁴ The circumstances in which the present government purchasing system exists bear little resemblance to the environment in which the law of civil fraud was created.¹⁵ Thus, this Article will argue that a legal regime designed to fight fraud in private commercial transactions in the eighteenth and nineteenth centuries should not be the model for a statute designed to prevent fraud committed against the government in the twenty-first century. The Article will argue that much data suggests that the effects of the 1986 amend-

preponderance of the evidence.”); *Huffman v. Poore*, 569 N.W.2d 549, 559 (Neb. Ct. App. 1997) (“Courts of law require proof of fraud by a preponderance of the evidence Since this is an action at law, Huffman must prove fraudulent misrepresentation by a preponderance of the evidence.”) (citations omitted); *Citizens Nat’l Bank v. Kennedy & Coe*, 441 N.W.2d 180, 181 (Neb. 1989) (“The correct standard of proof in an action for fraud tried to a court of law is proof by a preponderance, or greater weight, of the evidence.”); *Domo v. Stouffer*, 580 N.E.2d 788, 792 (Ohio Ct. App. 1989) (“[I]n an ordinary action at law for money owing based upon fraud, a preponderance of the evidence is sufficient to prove such fraud.”); *Ostalkiewicz v. Guardian Alarm*, 520 A.2d 563, 569 (R.I. 1987) (“[F]raud in a civil suit need only be proven by a fair preponderance of the evidence.”); *Flockhart v. Wyant*, 467 N.W.2d 473, 477 n.6 (S.D. 1991) (“[I]n South Dakota, only a preponderance of the evidence is required to prove fraud.”).

13 “The commercial and defense environments created different incentives and elicited different behaviors from the people managing the programs. Specific practices took root and were sustained because they helped a program succeed in its environment” NAT’L SEC. & INT’L AFF. DIV., U.S. GEN. ACCT. OFF., GAO/NSIAD-98-56, BEST PRACTICES: SUCCESSFUL APPLICATION TO WEAPON ACQUISITIONS REQUIRES CHANGES IN DOD’S ENVIRONMENT 5 (1998). A copy of this report is available at <<http://www.fas.org/man/gao/nsiad98056.htm>>.

One of the major differences between the civilian sector and the military procurement sector is the tendency of military program budgeters to overestimate the future availability of budget money and dramatically underestimate the future costs of the program. See NAT’L SEC. & INT’L AFF. DIV., U.S. GEN. ACCT. OFF., GAO/T-NSIAD-97-103, DEFENSE AIRCRAFT INVESTMENTS: MAJOR PROGRAM COMMITMENTS BASED ON OPTIMISTIC BUDGET PROJECTIONS (1997), available in <<http://www.fas.org/man/gao/ns97103.htm>>.

14 The ideal of *caveat emptor* has not always been the dominant force in the history of business related jurisprudence. See Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1136 (1931) (stating that “[c]aveat emptor is not to be found among the reputable ideas of the middle ages”); Courtney C. Genco, Note, *What Ever Happened to Durland?: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333 (1992).

15 See CARLO M. CIPPOLA, BEFORE THE INDUSTRIAL REVOLUTION: EUROPEAN SOCIETY AND ECONOMY, 1000–1700 (2d ed. 1980), for an in-depth look at government intervention in the economy prior to the industrial revolution.

ments and the amendments' ultimate ramifications for American taxpayers are beneficial as opposed to injurious as the critics conclude.

To begin, this Article will define some terms that will be used with frequency hereinafter. The "government procurement system" is the sum of all government procurement transactions. A "government procurement transaction" is a transaction in which an agent for the Government—for example, executive departments such as the Department of Defense (DOD) or an administrative agency such as the Medicare Administration—contracts to procure goods or services from a private commercial firm, or "private commercial contractor."

This Article will argue that the historical development of civil fraud law in equity courts must be understood in its proper context. Most pertinent here, the equity courts' development of the "clear and convincing evidence" burden of proof standard for civil fraud cases was not the product of judicial wisdom attempting to address some peculiar nature of civil fraud matters. Rather, it was the product of the peculiar relationship between common law courts of law and courts of equity.¹⁶ Specifically, the "clear and convincing" burden of

16 Unlike courts of law, which provided only money damages, courts of equity had a variety of methods for providing relief to plaintiffs.

[I]t is impossible to overlook the fact that the consequences of a wrong decision may be more serious in [equity courts], because of the nature of the weapon employed. Under a wide variety of situations, therefore, one who invokes against another any one or more of a broad group of powerful remedial agencies—*e.g.*, injunction, receivership, specific performance, reformation, cancellation—must satisfy the court that the facts warrant the relief sought, by a standard of proof somewhat higher than is required in an issue where damages alone are at stake. The most frequent are "clear and convincing," "plenary," "unequivocal," "clear, precise and indubitable," "satisfactory," "irrefragable," "clear and decisive."

1 FRED F. LAWRENCE, EQUITY JURISPRUDENCE 78 (1929). These two reasons, forum-shopping and the differences in available remedies, were proposed by equity judges and academics as the "ostensible" reasons for imposing a higher standard of proof on civil fraud litigants in courts of equity, and subsequently in courts of law. The economic and societal forces of early America may point to another reason for why the courts decided to exact this higher standard for litigants: protection of entrepreneur capitalists to facilitate capital accumulation and allow for increased investment in plant and equipment leading up to and during the industrial revolution in this country. See generally MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) [hereinafter HOROWITZ, 1780-1860].

During the eighty years after the American Revolution, a major transformation of the legal system took place, which reflected a variety of aspects of social struggle. That the conflict was turned into legal channels (and thus rendered somewhat mysterious) should not obscure the fact that it took place and enabled emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society.

proof standard was the product of equity judges accounting for the differences in actionable civil fraud claims and more lax evidentiary rules of their courts vis-a-vis the law courts. Equity judges feared litigious plaintiffs using their courts as an alternative forum in which to pursue fraud claims that their brethren in the law courts would not hear.

In the United States, jurisdictions merged the courts of law and equity, so that what constituted grounds for an actionable claim (and the evidentiary rules) would be identical regardless of the remedy the plaintiff sought. While some courts maintained, and still maintain, the old equity courts' burden of proof standard for civil fraud cases, the original justification for the standard has been vitiated. Thus, critics of the FCA who argue that the "clear and convincing" burden of proof standard is more appropriate for the matters with which the statute deals and support their position by pointing to the "wisdom" of common law judges regarding civil fraud are standing on shaky ground.

Similarly, critics of the FCA who argue that the government procurement system should be governed by a legal regime similar to that governing private commercial transactions so that the Government can "do business" like private firms stand on equally shaky ground. In government procurement transactions, the incentives that motivate

The transformed character of legal regulation thus became a major instrument in the hands of these newly powerful groups. While they often used the rhetoric of promotion of the public interest—and what self-interested group does not?—one ought to remain skeptical about their claims.

[I]f we look at the resulting distribution of economic wealth and power—at the legal expropriation of wealth or at the forced subsidies to growth coerced from the victims of the process—it is difficult to characterize it as codifying some consensus on the objective needs of the society.

Id. at xvi. One example of this is the limiting of the application of strict liability by American courts after the English courts decided *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (H.L. 1968). "Under strict liability, enterprises, especially railroads, would be held liable for all injuries regardless of fault. Many jurists, including Holmes, devoted themselves to marginalizing this feared authority for redistribution in torts." MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 13 (1992) [hereinafter HOROWITZ, 1870-1960]; see also Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 260-74 (1987) (giving a brief history of strict liability and discussing how the "American courts initially reacted negatively" to the *Rylands* decision). This idea of limiting business's exposure to liability is also reflected in what Prosser affectionately titled "[t]he three wicked sisters of the common law—contributory negligence, assumption of the risk and the fellow servant rule." WILLIAM L. PROSSER, *THE LAW OF TORTS* 383 (2d ed. 1955). These defenses effectively allowed entrepreneurs and business owners to avoid liability in all but the most egregious violations of a duty of care.

the government's participant or agent differ greatly from the incentives that motivate the private participant.¹⁷ While profit maximization clearly is the primary and ultimate incentive operating on the private participant, various incentives, the least of which is profit maximization, motivate the government participant.¹⁸ Instead, because of

17 According to Todd Sandler and Keith Hartley,

In private firms, incentives to operate efficiently and to substitute relatively cheaper for more expensive factor inputs are provided by the profit motive and competition. Such incentives are absent in the military "firm." Instead, the military sector is a good example of a command economy, operating in a world without markets. In such a world, individuals and groups of military personnel are unlikely to minimize costs unless there are strong pressures for them to do so. Opportunism, bounded rationality, uncertainty, and information asymmetries provide the circumstances for "shirking" and X-efficient outcomes.

TODD SANDLER & KEITH HARTLEY, *THE ECONOMICS OF DEFENSE* 175 (1995).

18 Recent events reflect the tension between the profit motive of defense contractors, the national defense motive of the government, and the re-election motive of elected officials. The United States (read: Lockheed Martin) is about to sell "[t]he hottest jet fighter in the world," the F-16 Fighting Falcon, to the United Arab Emirates. Bruce B. Auster, *Is the Right Stuff in the Wrong Hands?: A Sheik Gets an OK for Top-Flight F-16s*, U.S. NEWS & WORLD REP., Mar. 1, 1999, at 16.

Not long ago, the United States did not sell aircraft more advanced than its own, even to allies. The fear was that friends could turn into foes, as did Iran in 1979, or that supersecret technology could be captured by Iraq or Iran. But, pressed by warplane makers who have seen their U.S. market dry up, the Clinton administration has relaxed many of the old rules.

. . . .

Normally, the Pentagon would be expected to resist export of a plane this good. Indeed, when Boeing applied to sell similarly equipped F-15s to Saudi Arabia, Egypt, and elsewhere, the United States denied the sale. But despite internal protests, top Defense Department officials approved the F-16 sale Why this happened is not entirely clear. Some say the sale may be a trade to ensure U.S. access to bases in the UAE. Others believe the Air Force wants to keep Lockheed Martin's F-16 production lines open for the next generation fighter.

Clearly, industry considerations played a role: The UAE was eyeing a competing jet being marketed by France, and Vice President Al Gore, in announcing the deal, projected that 30,000 workers nationwide would work on the project.

Id. The controversy over waivers given to defense contractors is another example of the tensions between profits, national security, and re-election. Loral Space and Communications Corporation was granted a waiver in 1998 "to launch one of its communications satellites on a Chinese rocket, even though the Justice Department was investigating whether the company improperly helped China upgrade its missiles after an earlier launch carrying one of the firm's satellites crashed." Ronald Brownstein et al., *Red Scare? The Sensational Rhetoric over the China Scandal Obscures a Basic Question: Is China Friend or Foe?* (visited Mar. 26, 2000) <<http://www.usnews.com/usnews/issue/>

980608/8chin.htm>; see also *Loral's Waiver Request, Text of Correspondence on Waiver to Permit Satellite Export* (visited Mar. 26, 2000) <<http://www.mtholyoke.edu/acad/intrel/satwave.htm>>.

Congress had prohibited launches in China in response to the Tiananmen Massacre, but allowed the President to exempt certain launches from the prohibition based on "national interest." See Brownstein et al., *supra*. "American companies have . . . turned to China for launches because it offers cheaper rates." *Id.* In apparent support of the commercial interests of defense contractors, "Clinton . . . moved responsibility for the export of commercial satellites from the State Department to the Commerce Department and granted Loral one waiver." *Id.* After the waiver was granted, Congress discovered a "classified Pentagon report from May 1997 . . . [that] concluded that scientists from Loral and Hughes 'turned over expertise that significantly improved the reliability of China's nuclear missiles' at a risk to U.S. national security interests." *Clinton Welcomes China Satellite Probe* (visited Feb. 10, 1999) <<http://www.usatoday.com/news/index/finance/ncfn275.htm>>. It was later revealed that "Loral CEO Schwartz gave \$632,000 in 'soft money' in the 1995-96 presidential election cycle and an additional \$421,000 in the [1998] one." *Id.* Responsibility for the approval of such waivers has recently been transferred back to the State Department. See Eric Pooley, *Red Face over China*, TIME, June 1, 1998, at 46, 47-48. "[A]fter Clinton was elected President, he [like President Bush before him] came under the same pressures from business leaders, who argued that export controls endangered American telecommunications primacy." *Id.* at 47-48. A recent decision by the U.S. to deny a \$450 million Hughes satellite deal with China seems to symbolize the different attitude of the State Department to such deals. See *US Nixes China Satellite Deal* (visited Feb. 10, 1999) <<http://abcnews.go.com/sections/tech/DailyNews/chinasats990223.html>>. "The Commerce Department had favored approving the license but the State and Defense departments feared the sale would put U.S. security at risk due to the potential for transfer of sensitive launch information that could ultimately be used in China's missile program." *Id.*

The conflict between profits and national security is evident in the attempts of industry groups to lobby for lighter export controls on technology. "Industry groups plan to lobby Congress this spring to allow more powerful [computers] to be exported, arguing that the 1995 limits are already outdated. The Cox report [a report by a panel by Congressman Chris Cox of California], calls for greater scrutiny There are 'two trains rushing down the track directly at each other on this,' an administration official said." Warren P. Strobel & Douglas Pasternak, *By Hook or By Crook: China Grabs U.S. Technology to Modernize Military*, U.S. NEWS & WORLD REP., Mar. 8, 1999, at 34.

This tension between corporate profits and national security is particularly evident in the area of offset agreements in defense contracts between U.S. defense contractors and foreign governments. Offsets are "the entire range of industrial and commercial compensation practices provided to foreign governments and firms as inducements or conditions for the purchase of military goods and services. They include co-production, technology transfers, training, investment, marketing assistance, and commodity trading." NAT'L SEC. & INT'L AFF. DIV., U.S. GEN. ACCT. OFF., PUB. NO. GAO/NSIAD-96-65, *MILITARY EXPORTS: OFFSET DEMANDS CONTINUE TO GROW* 1 (1996).

The monetary amount of these offsets is no small figure. "Since the mid-80s, government figures show that U.S. companies have entered into offset agreements

valued at over \$84 billion." *Id.* Offsets were of such a concern to Congress that Congress enacted the Feingold Amendment to the Arms Export Control Act, prohibiting contractors from "making incentive payments to a U.S. company or individual to induce or persuade them to buy goods or services from a foreign country that has an offset agreement with the contractor." NAT'L SEC. & INT'L AFF. DIV., U.S. GEN. ACCT. OFF., GAO/NSIAD-97-189, MILITARY OFFSETS-REGULATIONS NEEDED TO IMPLEMENT PROHIBITION ON INCENTIVE PAYMENTS 2 (1997); *see also* 22 U.S.C. §§ 2761, 2762, 2779(a) (1994).

Two relatively recent offset cases, the FS-X project and the F/A-18 sale to Malaysia, demonstrate the conflict between corporate profits on the one hand and national security and national economic interests on the other. In the late 1980s, General Dynamics (now Lockheed) got into a cooperative agreement to produce the FS-X, an advanced fighter aircraft modeled on the F-16 Fighting Falcon. After initial approval of the project by the Reagan Administration, the project began to come under serious attack by Congress during the Bush Administration. *See* Center for Sec. Pol'y, *The U.S.-Japan FS-X Fighter Agreement: Assessing the Stakes* (visited Feb. 22, 1999) <<http://www.security-policy.org/papers/1989/89-12.html>>. Congressional critics worried that the technology transfers required under the offset portions of the contract would allow the Japanese to build a foundation for competing with the U.S. commercial and military aviation industries. *See Conflicting U.S. Objectives in Weapon System Codevelopment: The FS-X Case* (visited Mar. 28, 1999) <<http://www.rand.org/publications/RB/RB20.html>>.

The project will go ahead, but on drastically different terms than originally agreed upon. *See id.* "Perhaps the most important lesson of the FS-X is that the U.S. government needs to formulate and implement a single, coordinated policy on weapon system procurement collaboration that harmonizes U.S. military and economic objectives." *Id.* at 2. For a detailed analysis of the problems and technology transfers associated with the FS-X deal, *see* NAT'L SEC. & INT'L AFF. DIV., U.S. GEN. ACCT. OFF., GAO/NSIAD-95-145, U.S.-JAPAN COOPERATIVE DEVELOPMENT: PROGRESS ON FS-X PROGRAM ENHANCES JAPANESE AEROSPACE CAPABILITIES (1995). *See also* <<http://www.fas.org/man/gao/gao95145.htm>> for a copy of the same report. The F/A-18 sale to Malaysia shows how defense contractors can promote the idea of jobs at home to facilitate the sale of weapons abroad.

Take the case of Malaysia, which just completed a deal for eight sophisticated jet fighters made by McDonnell Douglas Corp. In December 1992, while returning to Kuala Lumpur after a tour of the aircraft carrier USS Kitty Hawk, Defense Minister Datuk Mohamed Najib Abdul Razak told U.S. Ambassador John Wolf that the Southeast Asian nation would order \$660 million of Russian MiG-29R fighters. Malaysia would have bought American, he explained, but "you probably wouldn't be prepared to release your high-tech aircraft."

Alerted by the ambassador, top U.S. government and corporate officials sprang into action. And in a matter of months they persuaded Malaysia to augment the Russian purchase with the F/A-18 attack jets.

....

[T]he drift of U.S. arms-export policy, as domestic economic concerns take precedence over geo-political goals, is raising questions about the risks of proliferation. While keeping U.S. industry strong aids the nation's security, providing top-tier weapons to contentious neighbors in the world's hot

the nature of the government procurement system, other diverse motivations move government agents, such as the public interest, political considerations, securing budgetary appropriations, inter-organization rivalries, career advancement within the Government, and potential career advancement with their private sector counterparts.

This asymmetry in profit maximization's role as an incentive in the government procurement system has several effects, all of which are deleterious to the government's effort to deter fraud. In a purely private commercial transaction where profit motivates both participants, each agent monitors the other's goods, services, and billing practices as if their respective jobs depended on it. Clearly, their jobs do depend on it; a business that loses money is generally forced to leave the playing field. By contrast, in the government procurement system, the government agents, from department secretaries and administrative agency heads to their most subordinate contracting agents, are generally not evaluated on how financially efficient their programs are. Indeed, because of the nature of the budgetary process, one can argue that there is an incentive for government agents to spend money unnecessarily. It is axiomatic that in such a system the government participant will not monitor the goods, services, and billing practices of their private commercial counterparts with the same vigilance that private commercial contractors monitor one another.

The second related consequence is that in such an environment, the private commercial contractors have less incentive to develop internal controls to police the conduct of their own agents. Therefore, unlike in the private commercial setting where both parties' agents have incentives to monitor aggressively both one another and themselves, in the government procurement system, absent government regulation, significantly less motivation exists on both sides. While

spots could be tantamount to striking matches in a tinderbox. Further, the U.S. sales push is stirring competitive vigor within Russia and Europe, increasing chances of regional destabilization.

....

Even some U.S. defense-company executives worry that global-security considerations are getting short shrift because arms-exporting countries are so pressed to protect jobs and their industrial base. "I think the world as a whole is perilously close to that line," says Norman Augustine, chairman of Martin Marietta Corp., a leading arms exporter.

Jeff Cole & Sarah Luberman, *Weapons Merchants Are Going Great Guns in Post-Cold War Era*, (visited Mar. 28, 1999) <<http://www.infomanage.com/nonproliferation/conventional/deathmerchants.html>>. For deeper discussions of the political and military incentives at work in the purchase of weapons, see *infra* Part IV.1-2.

critics of the FCA argue that the government, and ultimately taxpayers, would benefit if the laws regarding government procurement transactions were like those regarding private commercial transactions, they overlook the distinction between the two kinds of transactions.

Both the critics and some advocates of the FCA also misconstrue the effects of the 1986 amendments on the government procurement system. This Article will discuss the key provisions of the amendments below, but the amendments generally accomplished the following:

- (1) Increased the penalty and damages provisions of the FCA;
- (2) Increased incentives for private parties to bring *qui tam* actions on behalf of the government;
- (3) Broadened the statute's definition of "knowingly," so that the state of mind required for liability includes "deliberate ignorance" and "reckless disregard" for the truth, and eliminated the need to prove specific intent; and
- (4) Clarified that the applicable burden of proof standard is "preponderance of the evidence," and resolved some confusion in the Circuit Courts.

Advocates of the amendments accurately relate that these changes increase the *disincentives* for contractors to commit fraud or file false claims for payment from the government by increasing the likelihood that such conduct will result in liability and increasing the potential breadth of such liability. Advocates also correctly argue that the amendments increase the incentives for private commercial contractors to monitor their own conduct and strengthen internal controls in an attempt to reduce the potential for FCA liability. Thus, the advocates argue that the amendments benefit the government, and ultimately taxpayers, by increasing the probability that malfeasants will recompense the government for their ill-gotten gains (i.e., with treble damages and penalties) and by decreasing the likelihood that private commercial contractors will either knowingly or recklessly submit false claims to the government.

The critics of the amended FCA have seized upon that which the advocates tend not to discuss. The critics rightly point out that costs born by the government, and ultimately by taxpayers, accompany the benefits discussed above. Critics correctly argue that the private commercial contractors will account for the increased risk of liability and increased cost of internal controls and regulatory compliance by increasing the price of the goods and services they offer in government procurement transactions. Also, some private commercial contractors will decide to limit or eliminate their contracts with the government

because of the increased costs associated with government procurement transactions. This latter phenomenon will result in an increase in the prices that the government pays for services as competition decreases among private commercial contractors due to fewer contractors. Basic economics and marginal analysis indicates that this is so. As a result, the government will pay higher prices for goods and services because of the increased supplier costs and reduced competition that the amendments create.

While the observations that both the advocates and the critics of the FCA make are correct, the inquiry cannot stop there. This Article suggests an answer to the question that both the advocates and critics of the amended FCA do not address: whether the total financial costs or total benefits of the amendments are greater. Due to the FCA amendments, does the government successfully prosecute, recover, and deter enough fraud so that the money saved is greater than the increase in prices that the government will pay for the goods and services it must procure? This Article offers data that suggest that the benefits *do* outweigh the costs and that the 1986 amendments to the FCA promote the financial welfare of the government, and ultimately taxpayers. This conclusion is based on the following:

- (1) A factual analysis of the nature of the government procurement system, which indicates that government procurement transactions are entirely unlike private commercial transactions regarding the incentives at work on the respective participants;
- (2) Data that suggest that the increase in the amount of fraud the amendments allow the government to recover against and deter is great; and
- (3) Data that suggest that, after an initial decline, the number of private commercial defense contractors willing to do business and actively contracting with the government has not decreased but increased during an era of consolidation among large private commercial contractors and relatively static overall budget growth.

From this evidence, which this Article will detail below, it follows that the government procurement system is a peculiar arrangement completely unlike the private commercial sector. Thus, the legal regime for which critics of the FCA argue, which is tailored to make whole a private sector civil fraud plaintiff, simply will not suffice to ensure the government is not robbed blind. Also, the mass exodus of private commercial contractors desiring to contract with the government about which the critics of the FCA complain is simply not represented in the data. Rather, despite the increased costs of doing

business with the government because of the FCA amendments, firms are competing for government contracts. Finally, while the current FCA and its enforcement is not flawless, the government has already recovered, will recover, has deterred, and will likely deter more fraud and false claims than with the pre-1986 FCA.

To relate the above argument, this Article will assume the following format. In Part I, this Article will briefly describe the creation of the FCA in its Civil War context and the subsequent amendments to the FCA in their respective contexts. Part I will conclude by describing in greater detail the 1986 amendments to the FCA.

Part II of this Article will then offer a brief history of the development of civil fraud law. Initially, Part II will describe what the phrase "burden of proof" means and how the burden of proof functions in allocating evidentiary requirements between plaintiff and defendant. Next, it will explain in greater detail the relationship between the courts of law and the courts of equity, and why equity judges created and applied the "clear and convincing" burden of proof standard to civil fraud cases.

Part III will show that not all states have adopted the "clear and convincing" burden of proof standard for civil fraud, that many states are following the federal government's lead by creating FCA-like statutes with a "preponderance" standard, and that the federal courts have used the "clear and convincing" standard sparingly while applying the "preponderance" standard to a variety of fraud-style actions.

Against this backdrop of the development of civil fraud law, Part IV will factually analyze the nature of the government procurement system as it existed in 1986 and as it still exists today. It is in this context of the contemporary government procurement system generally, and the defense procurement system specifically, that the Government must utilize the FCA. First, Part IV will describe the history of war profiteering and defense fraud in the United States. Part IV will then describe the basics of the budgetary process, from Congress to the executive departments and administrative agencies. It will also describe the concept of regulatory capture and the unique relationships among branches of the armed services and between members of the branches and their private commercial contractor counterparts. This Part will characterize some of the various and sundry incentives that motivate government participants in government procurement transactions and document actual examples of the unfortunate consequences that can result from a poorly policed government procurement system.

After briefly explaining an economic model for deterrence and the concept of optimal deterrence, Part V will describe in economic

terms some of the effects that the 1986 amendments will cause and why these effects occur. Part V lays out in economic terms the concept of optimal efficiency and its relationship to optimal deterrence. This Part will then show the data supporting the conclusions suggested above and will argue that, while one cannot perform the ideal study of optimal efficiency in this context because too many variables cannot be quantified, the data suggest that the 1986 amendments move our public fisc towards, rather than away from, optimal efficiency.

In Part VI, the Article concludes by summarizing the history behind the burden of proof standard, the reason the FCA was amended in 1986, and why those amendments were proper under the incentive system that surrounds the government contracting arena in 1986 and the present.

I. A HISTORY OF THE FALSE CLAIMS ACT

Congress created the FCA in 1863¹⁹ to combat perceived "widespread procurement fraud in Civil War defense contracts."²⁰ The incredible surge in war spending during this period, coupled with a lack of sufficient federal enforcement organizations,²¹ created the impetus for Congress to legislate the Act in an effort to curb the "widely-publicized abuses by unscrupulous private contractors."²² As originally written, the Act provided both civil and criminal penalties for fraudulent and false claims submitted to the United States for payment.²³ In 1874, the Act was re-codified and the civil sanctions were placed in one section of the code while the criminal provisions were placed in a different section.

The Act was specifically designed to combat fraud and false claims by essentially "deputizing" private citizens and giving them the

19 False Claims Act, ch. 67, 12 Stat. 696, 696-98 (1863) (codified as amended at 18 U.S.C. § 287 (1994) and 31 U.S.C. §§ 3729-33 (1994)).

20 Sharon A. Jenks & Brian Kaplan, *False Claims*, 34 AM. CRIM. L. REV. 555, 555 (1997); see also S. REP. NO. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273 ("The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War Contracts."); JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-5 to 1-6 (Supp 1999).

21 See James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 OHIO N.U. L. REV. 35, 35 (1991); see also BOESE, *supra* note 20, at 1-6.

22 BOESE, *supra* note 20, at 1-6.

23 See False Claims Act § 6, 12 Stat. at 698. Although ultimately dropped from the law, the initial bill included a provision that subjected contractors accused of fraud or false claims not to trial but military court-marshal. See BOESE, *supra* note 20, at 1-8.

right to file a civil action against any person who submitted a false or fraudulent claim for payment to the United States government.²⁴ This *qui tam* provision allowed the private citizen to collect up to fifty percent of all monies recovered in the lawsuit.²⁵ The *qui tam* portion of the statute served an important role in the enforcement of the Act. At the time of the statute's enactment, the federal government had no investigative or prosecutorial bodies, other than Postal Inspectors, to ferret out fraud. Given the long history of the use of *qui tam* provisions in this country,²⁶ such a provision in the Act seemed perfect to augment the government's ability to police fraud and profiteering during the war. In order to recompense the government for losses due to fraud, the Act provided for the collection of double damages and a \$2000 penalty for each false claim made by a contractor.²⁷ Although the language of the Act and its legislative history emphasize fraud and false claims in military procurement, the statute was applicable to all government claimants.²⁸

Prior to 1930, there were very few decisions in the federal courts involving the civil provisions of the FCA.²⁹ *United States v. Griswald*³⁰ is the most renowned early case. In its decision, the *Griswald* court noted the following:

The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed on the theory . . . that one of the least expensive and most

24 See 132 CONG. REC. H6428 (daily ed. Sept. 9, 1986) (statement of Rep. Berman).

25 See False Claims Act § 6, 12 Stat. at 698. The term *qui tam* is an abbreviation for the Latin phrase "*qui tam pro domino rege quam pro seipso*," which translates to "he who as much for the king as for himself." BOESE, *supra* note 20, at 1-7. For a complete history and analysis of *qui tam* actions, see Note, *The History and Development of Qui Tam*, WASH. U. L.Q. 81, 83 (1972) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (1st ed. 1768)); see also BOESE, *supra* note 20, at 1-5 to 1-10.

26 See generally *supra* note 27 (discussing the history of *qui tam* in this country).

27 See False Claims Act § 3, 12 Stat. at 698.

28 See §§ 2-3, 12 Stat. at 698.

29 Cf. BOESE, *supra* note 20, at 1-10. Most of the early cases deal with actions brought under the military court martial or criminal provisions in the Act. See *United States v. Kapp*, 302 U.S. 214 (1937); *Carter v. McClaughry*, 183 U.S. 365 (1902); *Edgington v. United States*, 164 U.S. 361 (1896); *Kurzrok v. United States*, 1 F.2d 209 (8th Cir. 1924); *United States ex rel. Viscardi v. MacDonald*, 265 F. 695 (E.D.N.Y. 1920); *United States ex rel. Williams v. Barry*, 260 F. 291 (S.D.N.Y. 1919); *Ex parte Henderson*, 11 F. Cas. 1067 (C.C.D. Ky. 1878) (No. 6349); *United States v. Jennison*, 26 F. Cas. 608 (C.C.D. Kan. 1874) (No. 15,475); *In re Bogart*, 3 F. Cas. 796 (C.C.D. Cal. 1873) (No. 1596).

30 24 F. 361 (D. Or. 1885), *aff'd*, 30 F. 762 (C.C.D. Or. 1887).

effective means of preventing fraud on the Treasury is to make the perpetrators of them liable to actions by private persons acting . . . under strong stimulus of personal ill will or the hope of gain.³¹

The *Griswald* court recognized that the *qui tam* provision played an important role in discovering fraud and that government actions could not void or preempt the vested rights of a citizen plaintiff to the receipt of damages.³²

One problem with the Act as originally written was the ability of individuals to file civil False Claim suits against contractors based on information gleaned from criminal indictments filed by the government.³³ *United States ex rel. Marcus v. Hess*³⁴ stands out as an excellent and famous example of this type of "parasitic lawsuit."³⁵ As a result of this type of civil action under the Act, Congress amended the Act in December 1943.³⁶ This modification of the FCA specifically stated

31 *Id.* at 366.

32 *See* *United States v. Griswald*, 30 F. 762, 763 (C.C.D. Or. 1887).

33 *See* Helmer & Neff, *supra* note 21, at 38.

34 317 U.S. 537 (1943).

35 *See generally* S. REP. NO. 99-345, at 10-12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275-76.

36 Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. § 232-35 (1976)). It seems incredibly short-sighted on the part of Congress and the President to amend the Act just when war spending was coming to its peak. Just as during the Civil War, World War I, and the other times of increased defense activity and government spending on the military, defense contractor fraud during World War II was rampant. In reaction to the reports of contractor fraud, then-Senator Harry S. Truman organized the Truman Committee in 1941 to investigate waste, fraud, and corruption in defense contracts.

The committee uncovered numerous examples of corruption. Empire Ordnance, a firm started with \$42,500 in capital, had employed the Washington attorney Thomas Corcoran to gain entrée to defense officials, secured over \$47 million in contracts for allied shipping, and then proceeded to build a shipyard in Savannah so defective that it had to be taken over by the Maritime Commission. Proving that no bad deed goes unrewarded, Empire eventually extracted a settlement of \$1,285,000 for the government seizure of its shoddy facilities.

HAMBY, *supra* note 2, at 256-57. For an in-depth look at the workings and findings of the Truman Committee, see DONALD H. RIDDLE, *THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY* (1964). The type of situation described above, contractor malfeasance and the contractor's subsequent receipt of money from the government for terminating the problematic program, is still a problem today. In 1998, the Court of Federal Claims awarded General Dynamics and the Boeing Company \$1.2 billion in damages and an additional \$538 million in interest charges based on the termination of the A-12 contract by the government. *See Federal Court Awards \$1.2 Billion to General Dynamics and Boeing* (visited Feb. 12, 1999) <<http://www>.

that prior knowledge of the government concerning the false or fraudulent claim “was an absolute bar to jurisdiction over *qui tam* suits.”³⁷ Relators³⁸ now had to present all of their evidence to the government before filing a False Claims civil suit, and the government had sixty days in which to decide whether to pursue the case.³⁹ If the government decided to prosecute, then the Department of Justice took over the case, and the relator became nothing more than an interested observer. The 1943 amendments significantly decreased the rewards possible for a relator, reducing the maximum bounty to no more than twenty-five percent if the government did not take over the case, and ten percent if it did.⁴⁰

An equally plausible, and possibly more accurate, explanation for the actions of Congress in amending the FCA after *Hess* was the desire of Congress to reduce any possible impediments to the war effort. Resistance to the Truman Committee’s formation and powers is an indication of Congress’s hesitation to construct any sort of obstacles that might hamper the war effort. Although there were serious allegations of defense contractor fraud during this period, Congress saw the Truman Committee as a repetition of the disastrous Committee on the Conduct of the War created during the Civil War. The Committee on the Conduct of the War was seen as having little to do with improving the war effort of the Union Army and everything to do with advancing the political agendas of its members.⁴¹ In 1943, the time of the FCA amendment, the nation was losing the war in the Pacific and nothing was as important as getting back the momentum from the Japanese. Amending the FCA so that it was more business “friendly” probably looked like a necessary evil if it meant helping to win the War. Deterring any business from providing goods for the war effort was the last thing Congress wanted to do.⁴²

aerotechnews.com/starc/022398/022498d.html#federal>; *The Project on Government Oversight: Concerns and Questions: The A-12 Aircraft Financial Fiasco* (visited Feb. 22, 1999) <<http://www.pogo.org/mici/products/a-12.html>>. The government originally cancelled the program due to cost overruns and schedule delays. No weapons were ever produced or given to the government despite the expenditure of over three million dollars. See *id.* For further discussion of the A-12 program, see *infra* Part IV.B.

37 BOESE, *supra* note 20, at 1-13 (Supp. 1997).

38 This term is used for a *qui tam* plaintiff.

39 See Act of Dec. 23, 1943, ch. 377, 57 Stat. at 608.

40 See *id.*

41 See MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 164-65 (1974).

42 This should in no way be interpreted to mean that fraud in government contracting did not go on during World War II in the United States. As the investigations of the Truman Committee proved, fraud by some defense contractors was rampant

Due to these changes in the law, coupled with the decisions of some courts of appeal requiring proof by "clear and convincing" evidence in civil False Claims actions,⁴³ the *qui tam* provisions of the Act fell into disuse.⁴⁴

Congress again was energized to amend the FCA in the wake of the fraud and false claims allegations made by a defense worker, John M. Gravitt against General Electric Corporation.⁴⁵ The incredible upsurge in government defense spending in the 1980s mirrored the conditions present during the Civil War and World War II eras in which fraud and false claims by defense contractors were seen as abundant. The difficulties Mr. Gravitt experienced, both from the government and the defendant, in attempting to bring the company's fraudulent practices to light and in his subsequent pursuit of a claim, prompted Congress to revisit the issue of *qui tam* suits under the Act. Extensive hearings were held on the subject of fraud, waste, and "governmental

and it cost many service men their lives. The best example is the investigation of the Wright Aeronautical Corporation, a wholly owned subsidiary of the Curtiss-Wright Corporation. The Committee found that the company was supplying the Army Air Corp with substandard aircraft engines and spare parts. During the investigation, the committee discovered that Army Air Corps officials had created an environment in which inspectors felt pressured by the military to give passing marks to defective goods. The discovery of these problems "suggest[s] that Curtiss-Wright was more interested in its own welfare than in its duty in the struggle in which its products were playing an important part." RIDDLE, *supra* note 36, at 137. The press criticized the Committee's findings in this case with venom stating "that the Committee was hurting production for that its findings were bad for morale and should be kept quiet." *Id.* at 138. The Justice Department did file a civil suit against the company, but it was never pursued, and no criminal charges were ever brought against the company. See HAMBY, *supra* note 2, at 257.

43 Compare *United States v. Milton*, 602 F.2d 231, 233 (9th Cir. 1979) (requiring clear and convincing evidence), *United States v. Ueber*, 299 F.2d 310, 314 (6th Cir. 1962) (same), *United States v. Lawson*, 522 F. Supp. 746, 750 (D.N.J. 1981) (same), *United States v. Klein*, 230 F. Supp. 426, 433 (W.D. Pa. 1964) (same), *Hagney v. United States*, 215 Ct. Cl. 412, 428 (1978) (same), and *United States v. Shapleigh*, 54 F. 126, 134 (8th Cir. 1893) (requiring proof beyond a reasonable doubt), with *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 727 (8th Cir. 1985) (requiring a preponderance of the evidence), *United States v. Thomas*, 717 F.2d 1397 (5th Cir. 1983) (same), *United States v. JT Const. Co.*, 668 F. Supp. 592, 592-93 (W.D. Tex. 1987) (same), and *Thevenot v. National Flood Ins. Program*, 620 F. Supp. 391, 394 (D.C. La. 1985) (same).

44 See BOESE, *supra* note 20, at 1-3; Helmer & Neff, *supra* note 21, at 39-40.

45 For an in-depth discussion of the case, see Helmer & Neff, *supra* note 21, at 41-44, and see also *Gravitt v. General Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio. 1988).

acquiescence"⁴⁶ in the area of contracting, the direct results of which were the 1986 amendments to the FCA.⁴⁷

"There is no question that the 1986 amendments were intended to be a watershed in enforcement and recovery under the Act."⁴⁸ The congressional record is replete with testimony and debate that reflect Congress's dismay at the endemic level of fraud and false claims in government programs in general and defense programs in particular.⁴⁹ There was also congressional concern about the diminished deterrent effect of the penalties portion of the statute due to inflationary erosion.⁵⁰

The 1986 amendments to the Act addressed both of these issues. First, the amendments clarified that preponderance of the evidence is the requisite statutory burden of proof standard for the Act.⁵¹ Congress made this change in order to bring the statute in line with the standard normally applied in civil actions.⁵² Second, under the newly amended statute, "knowing" and "knowledge" were defined so as to include not only actual knowledge, but acts of deliberate ignorance and reckless disregard of the truth.⁵³ The debate contained in the legislative history of these amendments indicates that Congress

46 BOESE, *supra* note 20, at 1-17 (Supp. 1994).

47 See S. REP. NO. 99-345, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-68; *see also* *Hearings on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong. 49, 53 (1985) (statements of John M. Gravitt and James B. Helmer, Jr., Esq.); *Hearings on False Claims Act Amendments Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong. 339, 339-392 (1986) (statements of John M. Gravitt and James B. Helmer, Jr., Esq.).

48 BOESE, *supra* note 20, at 1-17 (Supp. 1994).

49 See S. REP. NO. 99-345, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-68. The Department of Justice estimated that between one and 10% of the Federal budget was consumed by fraud. *See id.*

50 In 1863 dollars, \$2000 in 1863 dollars would have been the equivalent of \$18,000 in 1986 dollars. *See* 132 CONG. REC. H6479 (daily ed. Sept. 9, 1986) (statement of Rep. Glickman).

51 31 U.S.C. § 3731(c) (1994) now provides that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence."

52 "False Claims proceedings are civil and remedial in nature and are brought to recover compensatory damages." S. REP. NO. 99-345, at 30-31 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5296.

53 See 31 U.S.C. § 3729(b) (1994). "Congress intentionally fell short of imposing liability for mere negligence." BOESE, *supra* note 20, at 1-19 (Supp. 1994); *see also* 132 CONG. REC. H9389 (daily ed. Oct. 7, 1986) (remarks of Rep. Berman). In essence, the statute requires a level of knowledge that eliminates the chance of a person being subject to an FCA action due to a mistake or mere negligence. The Act is intended to promote the idea that persons getting paid by the government should put forth some

adopted the idea "that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek."⁵⁴ Third, the amended Act afforded the plaintiff "three times the amount of damages which the government sustains because of the act of that person"⁵⁵ and allows the government to collect a "civil penalty of not less than five thousand and not more than \$10,000"⁵⁶ for each act.

A. *Liability Under the False Claims Act*

Although, "the False Claims Act was not designed to reach every kind of fraud practiced on the government,"⁵⁷ the 1986 amendments do extend the reach of the FCA with regard to various types of fraud committed against the United States. Section 3729(a) of the FCA broadly defines seven different forms of activity that constitute violations under the FCA.⁵⁸ Each one of these seven violations contains

effort to ensure that the money or goods they are receiving from the government under a contract have actually been earned.

54 S. REP. No. 99-345, at 20 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5285. This portion of the Amendment eliminated a split in the circuits over whether the statute required specific intent to defraud. *Compare* *United States v. Hughes*, 585 F.2d 284, 286-88 (7th Cir. 1978) (stating no specific intent required), *with* *United States v. Mead*, 426 F.2d 118, 122-23 (9th Cir. 1970) (requiring specific intent to defraud).

55 31 U.S.C. § 3729(a)(7) (1994).

56 *Id.*

57 *United States v. McNinch*, 356 U.S. 595, 599 (1958).

58 A defendant is liable to the government, under the FCA, if the defendant does any one of the following:

- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States government a false or fraudulent claim for payment or approval;
- (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
- (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
- (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member

various elements that must be proved in order for the plaintiff to sustain a cause of action and prevail against a defendant.⁵⁹ These various violations under the FCA do, however, contain certain common language, and the way in which courts have interpreted this language has created a variety of contours in the law's application.

1. What Constitutes a "Claim" Under the FCA?

In rejecting the restricted definition given to the word "claim" by various courts,⁶⁰ Congress defined the term in the 1986 amendments and expanded its meaning. A "claim" now includes any request or demand for money or property, either through a contract or other device, as long as some amount of the money or property demanded will be provided or reimbursed by the United States Government.

Consistent with this expanded definition of the word "claim," courts have found that the term encompasses progress reports and vouchers, false presentations of compliance with various environmental regulations in a government contract, and redemption of illegally obtained food stamps. In certain instances, courts have held that a defendant who retains money paid him by mistake has made a "claim" under the FCA. A bid for a contract, however, is not a "claim" covered by the FCA, and the FCA explicitly excludes any claims made under the Internal Revenue Code.

2. Defining "False or Fraudulent" Under the FCA

Since the FCA does not specifically define the terms "false" or "fraudulent," courts have defined the terms through "judicial interpretation and construction."⁶¹ Although in most cases there is little

of the Armed Forces, who lawfully may not sell or pledge the property;
or

- (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

31 U.S.C. § 3729(a).

59 For an excellent discussion of how the courts define the requisite elements of each violation provided for in the FCA, see BOESE, *supra* note 20, at 2-6 to 2-31 (Supp. 1995).

60 See *United States v. McNinch*, 356 U.S. 595 (1958) (restricting the meaning of the word "claim" under the FCA); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, *reh'g denied*, 318 U.S. 799 (1943) (stating that a "claim" under the Act means a demand for money or property); *United States v. Cohn*, 270 U.S. 339 (1926) (finding the FCA inapplicable because no money or property claim was asserted against the government).

61 BOESE, *supra* note 20, at 2-45 (Supp. 1995).

doubt as to whether or not a claim is false, cases involving the "interpretation of government regulations,"⁶² contracts, or other instruments often present vexing problems as to what is "false." In many of these cases, contractors have successfully defeated Government allegations of falsity by showing that their reading of a statute or regulation was reasonable even if not correct.⁶³ Thus, in determining falsity, courts appear to use an objective determination standard.

3. The Meaning of "Knowingly" Under the FCA

Prior to the 1986 amendments, the circuit courts were split as to whether the word "knowingly" required proof of specific intent to defraud.⁶⁴ Some courts held that since the FCA was aimed at criminal-type conduct, the government was required to prove that the defendant specifically intended to defraud the government.⁶⁵ Other courts held that the government need only prove that the defendant had actual knowledge that the claim was false to satisfy the knowledge element.⁶⁶ Finally, a third group of court decisions viewed the FCA as a civil statute in nature, and thus concluded that, "extremely careless and foolish acts amounted to a 'knowing' violation of the Act."⁶⁷

The 1986 amendments resolved this dispute between the circuits in no uncertain terms. The FCA provides in relevant part,

(b) Knowing and Knowingly Defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.⁶⁸

62 *Id.* at 2-45 to -46 (Supp. 1995).

63 *See* *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978); *United States v. Krizek*, 859 F. Supp. 5, 11 (D.D.C. 1994); *United States v. Napco Int'l*, 835 F. Supp. 493 (D. Minn. 1993).

64 The decisions of various courts basically breaks "down into three groups." BOESE, *supra* note 20, at 2-66 (Supp. 1995).

65 *See* *United States v. Mead*, 426 F.2d 118, 121 (9th Cir. 1970).

66 *See* *United States v. Hughes*, 585 F.2d 284, 286-88 (7th Cir. 1978) (requiring no specific intent); *Fleming v. United States*, 336 F.2d 475 (10th Cir. 1964).

67 BOESE, *supra* note 20, at 2-67 (Supp. 1995); *see also* *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973).

68 31 U.S.C. § 3729(b) (1994).

In adding this sub-section to the FCA, Congress was determined "to reach what has become known as the 'ostrich' type situation where an individual 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims were being submitted."⁶⁹ In amending the FCA, Congress made an explicit determination that those who obtain funds from the government have a duty to inquire as to whether or not their claim is accurate in all respects.⁷⁰

4. Burden of Proof

As with the meaning of "knowingly," circuit courts also split as to the correct standard for the burden of proof for the FCA. Despite the fact that the Act was conspicuously civil, the decision of courts as to this aspect of the FCA ranged from a "preponderance" standard all the way to a "beyond a reasonable doubt" standard.⁷¹ The 1986 amendments did away with this uncertainty. The FCA specifically states that "[i]n any action brought under Section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence."⁷² In providing for this standard in the FCA, Congress determined that FCA litigation is civil and remedial, and therefore, a higher standard is inappropriate.

II. FALSE CLAIMS ACT AND THE BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE

Opponents of the present burden of proof standard for the Act state that "[t]here is no obvious reason for loosening the proof requirements that apply in purely commercial settings simply because the Government . . . is the plaintiff."⁷³ The basis for this argument is the assumption that (a) "[t]he standard of proof necessary to win a judgment should reflect the relative risk to the parties of an incorrect outcome,"⁷⁴ and (b) the interactions between contractors and the government are analogous to those of private sector commercial entities.

69 S. REP. NO. 99-345, at 20-21 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5286. See *supra* Part II for a discussion of the *Gravitt* case.

70 See BOESE, *supra* note 20, at 1-19 (Supp. 1994).

71 See *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985) (preponderance of the evidence); *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962) (clear and convincing); *United States v. Shapleigh*, 54 F. 126 (8th Cir. 1883) (beyond a reasonable doubt); *Hageny v. United States*, 570 F.2d 924 (Cl. Ct. 1978) (clear and convincing).

72 31 U.S.C. § 3731(c) (1994).

73 An Obstacle, *supra* note 4, at 25.

74 *Id.* at 1.

Would-be reformers then reason that elements of the Act, like civil fraud suits in many jurisdictions, should require a plaintiff to prove fraud by "clear and convincing" evidence.

Unfortunately, this conclusion by FCA critics fails for at least two reasons. First, it does not accurately explain the history and reasoning behind the "clear and convincing" standard of proof for civil fraud cases and does not clarify why many jurisdictions have adopted the lower standard of "preponderance" for such cases. Second, the argument mischaracterizes the relationship and interaction between the government and the contractors delivering goods and services to the government. This Section of the Article will define the phrase "burden of proof," layout the history behind the "clear and convincing" burden of proof standard, and show that many state legislatures, Congress, and the federal courts have rejected this standard for certain types of fraud cases.

A. *Burden of Proof: The Meaning of the Phrase*

Although an often used word in legal vocabulary, the term "proof" lacks a definitive meaning; it can refer to evidence, such as documents used at trial, or to one's certainty as to whether or not a proposed state of events actually took place.⁷⁵ Since the word "proof" has various meanings, it naturally follows that the expression "burden of proof" retains these same sorts of definitional ambiguities.⁷⁶ In our system of law, however, the phrase "burden of proof" has come to refer to two distinct and separate concepts.⁷⁷ Professor James Bradley Thayer was the first to point out the two different aspects of the phrase in his 1898 work.⁷⁸ "The two distinct concepts may be referred to as: (1) the risk of nonpersuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evidence, or simply the production burden or the burden of evidence."⁷⁹

75 "Proof" is an ambiguous word." MCCORMICK ON EVIDENCE 947 (Edward William Cleary ed., 3d ed. 1984).

76 "[T]he phrase [burden of proof] is an ambiguous one; and its uncertainty runs into and perplexes the subject of evidence, so that the student of that subject needs to reflect carefully on these ambiguities." JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 354 (1898).

77 See FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 313 (3d ed. 1985); see also Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51 (1961).

78 See THAYER, *supra* note 76, at 353.

79 JAMES & HAZARD, *supra* note 77, at 314.

1. Burden of Proof: The Burden of Producing Evidence

This aspect of the term "burden of proof" generally takes on importance at the beginning of a trial. The party assigned the burden of proof must produce and offer to the court enough evidence to overcome the possibility of a directed verdict for the opponent. Essentially, if the party with the burden of proof puts forth enough evidence for a reasonable trier of fact to decide in the party's favor, that party has met the burden of proof. The burden of producing evidence affords the judge control over the case from its outset. A party with the burden of proof who does not present sufficient evidence, from a judicial perspective, to sustain his or her allegations will lose the case through procedural devices such as non-suit, directed verdict, or dismissal.

2. Burden of Proof: The Burden of Persuasion

The phrase "burden of proof" encompasses a second meaning which relates to the persuasive function of the evidence that a party produces during litigation. Once a party, generally the plaintiff, meets the initial burden of production, each party will produce evidence in an effort to persuade the jury, or the judge in a bench trial, as to the validity of its case. The party with the burden of persuasion must produce evidence sufficient to convince a jury that its claim against the opponent merits a decision for that party. This function of the burden of persuasion essentially directs how a trier of fact should decide in those instances in which the "trier's mind is in equipoise."⁸⁰ In those instances when the trier's mind is in equipoise, the party carrying the burden of proof should not prevail in the case.

3. The Three Different Burden of Proof Standards

The burden of persuasion standard indicates "the quantity and quality" of the evidence that the party carrying the burden of proof must produce at trial in order to win.⁸¹ Over time, three different standards for the burden of persuasion have evolved. These three standards signify a societal, although often judicially imposed, decision balancing the nature of the conduct involved against the severity of the penalty or the desire for deterrence. Most civil actions require the plaintiff to prove the case by a preponderance of the evidence. This verbal formulation seems to stand for the proposition that a party

80 *Id.* at 314.

81 JOHN C. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 992 (7th ed. 1997).

must bring forth evidence at trial that would lead the trier to believe "that the existence of the contested fact is more probable than its non-existence."⁸² Thus, the meaning ascribed to the phrase "preponderance of the evidence" appears to refer to the level of certainty created in the trier of fact's mind as to whether or not the event took place or the fact exists.⁸³

In a very limited number of civil actions, the "clear and convincing" evidence standard has replaced the traditional preponderance standard.⁸⁴ The classes of civil actions that use the higher burden of proof standard include, but are not limited to, the following:

- (1) charges of fraud and undue influence,
- (2) suits on oral contracts to make a will, and suits to establish the terms of a lost will,
- (3) suits for the specific performance of an oral contract,
- (4) proceedings to set aside, reform or modify written transactions or official acts on grounds of fraud, mistake or incompleteness, and
- (5) miscellaneous types of claims and defenses, varying from state to state, where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds.⁸⁵

The use of this intermediate standard implies that the trier of fact must have a higher degree of certainty as to the litigated event or fact than under the preponderance standard.⁸⁶ How much higher re-

82 MCCORMICK ON EVIDENCE, *supra* note 75, at 957 (footnote omitted). "An alternative phrase often used is *greater weight* of the evidence." JAMES & HAZARD, *supra* note 77, at 316.

83 Preponderance of the evidence can be used in the criminal law context in the sentencing stage. *See* *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1979) ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof . . . We see nothing in Pennsylvania's scheme [stating that preponderance of the evidence is used during sentencing] that would warrant constitutionalizing burdens of proof at sentencing.") (citations omitted).

84 This higher burden of proof standard has been phrased in many different ways by courts, including "clear, convincing and satisfactory," "clear, cogent and convincing," and "clear, unequivocal, satisfactory, and convincing" to name just a few. *See* MCCORMICK ON EVIDENCE, *supra* note 75, at 959.

85 *Id.* at 960-61 (footnotes omitted).

86 Fraud must also satisfy a higher pleading standard under the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 9(b). But "[n]o very persuasive reason for this requirement has ever been advanced." VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 843 (1994). Judges like Richard Posner have suggested that the element of particularity in Fed. R. Civ. P. 9(b) is required for the following reason: "Accusation of fraud can do serious damage to the goodwill of a business firm or

mains unclear. "No high degree of precision can be attained by . . . groups of adjectives"⁸⁷ such as "clear and convincing" or "clear and unequivocal." Unlike the preponderance standard, the clear and convincing standard calls on the jury, or the judge, to make a much more subjective determination about the persuasive quality of the evidence introduced by both parties at trial. Thus, the inherent uncertainty as to the meaning of "clear and convincing" coupled with the more subjective nature of evaluation gives juries and judges wider latitude to import a meaning into the phrase on a case-by-case basis.⁸⁸ The lack of precision and the subjective nature of the phrase probably means that the use of such a standard may introduce more uncertainty into civil fraud litigation rather than less.

The highest standard of proof, "beyond a reasonable doubt," is saved for criminal trials. With respect to the criminal justice system, society has determined that an individual's life and liberty should not

a professional person. People should be discouraged from tossing such accusations into complaints in order to induce advantageous settlements or for other ulterior purposes." *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992). The 9(b) particularity requirement regarding fraud may have the same source as the heightened burden of proof standard: equity courts. The particularity requirement is not found in older legal treatises on fraud and actions at law but is read in older equity treatises. The particularity requirement "probably originated in equity pleading and reflected a reluctance to upset or investigate judgments, settled accounts and other completed transactions." William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 967 (1987). And like the higher burden of proof standard for fraud, although "the original motivating policy no longer fit, new purposes were articulated and adapted." *Id.* at 968. For history and analysis of the heightened pleading for fraud, see generally *id.* Whatever the source, the "damage to goodwill" rationale seems inapplicable in the case of government defense contractors. In 1985, the Department of Defense found that 45 of the nation's top 100 defense contractors were under investigation for fraud offenses. In that same report, the Department of Defense stated that nine of the top 10 defense contractors were under investigation for fraud. See *History of the Law* (visited Dec. 28, 1999) <www.philipsandcohen.com/html/body/history.htm>. In 1999, most, if not all, of those same defense contractors are still providing the nation with weapons and reaping large profits. In the defense contractor arena, a charge of fraud seems to do very little in the way of damage to goodwill.

87 MCCORMICK ON EVIDENCE, *supra* note 75, at 959.

88 The phrases "preponderance of the evidence" and "clear and convincing . . ." are awkward vehicles for expressing the degree of the jury's belief" and really fail to provide for a quantifiable amount of evidence upon which to rest a verdict. *Id.* at 956-57 (footnote omitted). Although advocates of the clear and convincing standard assume that this verbal formulation has a significant effect on juries with respect to the evidence, the phrase probably does no more than put the jury "more in a frame of mind to resist persuasion than . . . the usual test, and it is doubtful whether anything more can be done where a difference in degree is sought in dealing with factors so subjective and imponderable." JAMES & HAZARD, *supra* note 77, at 55.

be taken unless the judicial process has provided the jury or judge with an extremely high level of certainty regarding the litigated event or facts.

B. The Origin of the "Clear and Convincing" Burden of Proof Standard in Civil Fraud Cases

A simple look at the history of equity courts in England and the United States and their handling of civil fraud cases explains the origin of the present day "clear and convincing" standard of proof for civil fraud. Despite the contention and desire of critics of the FCA, the standard for proving civil fraud has not always been by "clear and convincing" evidence. Rather, the "clear and convincing" burden of proof standard has been incorporated by the courts in this country during this century with the merger of law and equity in the federal system and in most state court systems.

The "clear and convincing" standard of proof for civil fraud actions arose from the differences in the doctrines, rules, and available remedies administered by the courts of law and equity in England and later adopted by the various court systems in America. In the courts of common law, in both England and the United States, "there . . . [were] certain prescribed forms of action to which the party . . . [had to] resort to furnish him a remedy."⁸⁹ If the facts of a particular case did not conform to the rigid requirements of the various forms of action at law, then a plaintiff could not bring suit despite the just nature of his cause.⁹⁰

Due to the character of the proceedings and the rules governing those proceedings, certain types of evidence were inadmissible to prove fraud in courts of law.⁹¹ Under laws like the Statute of Frauds or the Wills Act, parol evidence could not be introduced as evidence to prove fraud regarding dealings in property which were unwritten. Yet, in those actions for fraud which could be brought in a court of law, the burden of proof was by preponderance of the evidence.⁹²

89 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 23 (W.H. Lyon, Jr., ed., 14th ed. 1918).

90 See *id.* at 24 ("From their very character and organization . . . [courts of law] are incapable of the remedy, which the mutual rights and relative situations of the parties, under the circumstances, positively require.").

91 See MELVILLE M. BIGELOW, THE LAW OF FRAUD AND THE PROCEDURE PERTAINING TO THE REDRESS THEREOF 472 (Boston, Little, Brown & Co. 1877).

92 See *id.* at 474.

It is settled law that, upon the trial of a civil action in which the claim or defence is based on alleged fraud, the issue may be determined in accordance with the preponderance or weight of evidence In . . . cases of

The courts of equity in England and America represented a doctrinal departure from the common law courts.⁹³ Early treatises on the subject of equity jurisprudence “defined the very nature of equity to be the correction of the law wherein it is defective by reason of its universality.”⁹⁴ As distinguished from other courts, equity courts looked not just to the letter of the law, but to the “reason and spirit”⁹⁵ for enacting the law.⁹⁶ Thus, equity courts, unlike courts of law, allowed parties to introduce parol evidence to prove facts regarding the circumstances surrounding a written document or a deal involving no writing.

Equity courts also differentiated themselves from common law courts through the rights they acknowledged and the remedies they administered.⁹⁷ Equity courts “would enforce trusts (by which one could evade the common law rule that one could not devise land by will) and assignments of claims” neither of which common law courts acknowledged.⁹⁸ Equity courts, however, did recognize these so-called equitable estates and provided parties with remedies against abuses like unconscionable bargains, betrayals of confidences, and the like.

In addition to the differences in the types of rights recognized by the two court systems, the remedies available to plaintiffs varied between the two courts. Courts of law traditionally dealt only in money damages, while courts of equity could, and would, afford a plaintiff “specific performance, rescission and reformation of contracts and other documents.”⁹⁹ Injunctions were also within the exclusive do-

fraud, nothing more is required than that the evidence should be sufficient to satisfy the conscience of a common man, although the evidence does not amount to an absolute certainty. . . . Hence, an instruction to the jury that the fraud in question could not be found by them, except upon clear and undoubted proof of it, is erroneous. If the party alleging the fraud produce such evidence as the jury could reasonably and safely rest their consciences upon, it is sufficient.

Id. at 474–75 (footnotes omitted).

93 For a concise history of the origin and history of equity courts and equity jurisprudence, see STORY, *supra* note 89, at 42–63, and RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 13–16 (1996).

94 STORY, *supra* note 89, at 3 (footnote omitted).

95 *Id.* at 7 (footnote omitted).

96 “[I]t is by no means uncommon to represent that the peculiar duty of a Court of Equity is to supply the defects of the common law, and next, to correct its rigor or injustice.” *Id.* at 17 (footnote omitted).

97 “Another peculiarity of Courts of Equity is that they can administer remedies for rights, which rights Courts of Common Law do not recognize at all” *Id.* at 25.

98 FREER & PERDUE, *supra* note 93, at 14–15.

99 *Id.* at 15.

main of equity courts, whereas courts of law could not fashion and apply this type of remedy.

The methods of enforcing "judicial decisions" also differentiated the two court systems.¹⁰⁰ Courts of law "enforced . . . judgements . . . *in rem* . . . against property."¹⁰¹ If a defendant lost a money judgment and subsequently refused to pay the plaintiff, a plaintiff could request a writ of execution.¹⁰² A writ of execution allowed a sheriff to seize the defendant's property, sell it at public auction, and use the sale's proceeds to satisfy the plaintiff's money judgment.¹⁰³ A money judgment, however, was a pyrrhic victory if the defendant had no assets for the sheriff to seize and sell, for instance, if the defendant was judgment proof. Equity courts, though, "enforced . . . decrees *in personam*, that is, against the person."¹⁰⁴ A defendant who refused to obey an equity judge's decree could find himself jailed until he agreed to comply with the decree.¹⁰⁵

Thus, in looking at the two court systems in an historical context, courts of equity represent a trend toward increasingly flexible rules and remedies, and away from the static methods and remedies of the courts of law. With this move to flexibility, however, judges in the equity system obtained expanded powers and the increased ability to alter the lives of those persons who entered into the equity courts. Commentators, in recognition of the tremendous power of equity courts, have noted that equity was a kind of forum of last resort. Discussing the equity court character of the new Federal Rules of Civil Procedure, Challen B. Ellis expressed the following concerns about the adoption of the Rules:

The fundamental difference between law and equity is that law is concerned with the settlement of an issue of fact by a jury and does not in any manner involve any restraint on the person of the plaintiff or defendant

Thus, the flexible rules and remedies in equity not only tend to repair the inadequacies of the law, but they do in fact protect him whose property is about to be wrested from him through an unconscionable, oppressive, and unjust contract, the enforcement of which is not necessary to the one, and would work a needless hardship upon the other.

STORY, *supra* note 89, at 27.

100 FREER & PERDUE, *supra* note 93, at 15.

101 *Id.* at 15.

102 *See id.*

103 *See id.*

104 *Id.*

105 *See id.*

Considering the tremendous powers of the chancellor and dangers of abuse, certain safeguards were thrown around an action in equity which would not be needed nor appropriate in an action at law.

One of the first and most important safeguards is that equity is always an extraordinary remedy; that is, the drastic action of the court against the person of the parties may not be exercised unless that is the only way the complainant can escape irreparable injury¹⁰⁶

Thus, equity rules and procedures, including those relating to fraud, should be seen as methods by which equity judges placed limits on the reach of equity courts. Equity rules forced plaintiffs to go above and beyond the requirements of courts of law because the potential equitable remedies could be so drastic in scope.

1. Fraud and Equity Courts

The courts of common law and equity had, in most instances, concurrent jurisdiction over cases involving fraud.¹⁰⁷ This, however, does not mean that the jurisdiction of equity courts coincided exactly with that of the law courts. In certain situations, the equity courts had exclusive jurisdiction over cases "in which fraud [was] utterly irremedial at law."¹⁰⁸ Not only did the equity courts provide relief against fraud in these cases, but they often went against the rules laid down in the courts of law to do so.¹⁰⁹

106 *Rules of Civil Procedure for the United States District Courts: Hearings Before a Subcomm. of the Comm. on the Judiciary United States Senate, 75th Cong., 3rd Sess., on S.J. Res. 281, A Joint Resolution to Postpone the Effective Date of the Rules of Civil Procedure for the District Courts of the United States, Part 2, 75th Cong. 29, 46-47 (1938).*

107 One large exception to this general rule of concurrent jurisdiction is the obtaining of a will by fraud. "The proper remedy . . . [was] exclusively vested in other courts" STORY, *supra* note 89, at 260.

108 *Id.* at 261.

109 *See id.*

Whatever amounts to fraud, according to the legal conception, is also fraud in the equitable conception; but the converse of this statement is not true. The equitable theory of fraud is much more comprehensive than that of the law, and contains elements entirely different from any which enter into the legal notion.

2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 1802 (4th ed. 1918).

Lord Coke, by the same passage in which he confines the jurisdiction of Courts of Equity to "such frauds, covins and deceits for which there is no remedy by the ordinary course of Law," admits that all frauds are not relievable at law: and Lord Hardwicke judicially declared, that, "the points of fraud

In order not to unduly circumscribe their jurisdiction over the wide variety of potential fraud cases, equity courts defined fraud with broad brush strokes.¹¹⁰ At its most basic, fraud, defined by equity courts, “properly include[d] all acts, omissions, and concealments which involve[d] a breach of legal or equitable duty, trust, or confidence, justly reposed, and . . . [were] injurious to another, or by which an undue and unconscientious advantage . . . [was] taken of another.”¹¹¹ With this expansive definition, early equity jurisprudence commentators often divided fraud into five different categories: 1) “Frauds which . . . [are] actual, arising from facts and circumstances of imposition”; 2) Fraud that “may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice”; 3) “Fraud which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is that it must be proved, not presumed”; 4) “Fraud which may be collected and inferred in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement”; 5) “Fraud in what are called catching bargains with heirs, reversioners, or expectants in the life of the parents.”¹¹²

Looking at these various scenarios, what differentiated courts of equity from courts of law is that courts of equity would presume fraud under certain circumstances; courts of law never presumed fraud.¹¹³

and collusion establish the authority of the Court of Chancery, often contrary to, and beyond, the rules of Law.”

1 JOHN EYKYN HOVENDEN, A GENERAL TREATISE ON THE PRINCIPLES AND PRACTICE BY WHICH COURTS OF EQUITY ARE GUIDED AS TO THE PREVENTION OR REMEDIAL CORRECTION OF FRAUD 15 (New York, Collins & Hannay 1832) (footnotes omitted).

110 See 1 MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF FRAUD ON ITS CIVIL SIDE 3 (Boston, Little, Brown & Co. 1890). “Fraud is infinite; and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man’s invention would contrive.” *Id.* at 3 n.2 (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 185 n.2 (Jarius W. Perry ed., Boston, Little, Brown & Co. 12th ed. 1877)).

111 STORY, *supra* note 89, at 262. “Fraud consists in endeavor to alter rights, by deception touching motives, or by circumvention not touching motives.” BIGELOW, *supra* note 110, at 5 (footnote omitted).

112 STORY, *supra* note 89, at 263; see also POMEROY, *supra* note 109, at 1805 (breaking down fraud into only four categories).

113 See STORY, *supra* note 89, at 264.

"In other words Courts of Equity [would] grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law."¹¹⁴ Thus, as opposed to courts of law that "presume[d] all men to deal fairly and to be honest,"¹¹⁵ equity courts could find fraud based on circumstantial evidence that did not meet the standards required to prove fraud in the courts of law.

2. Civil Fraud and the Burden of Proof

Both equity and law courts placed the burden of proof on the party making the allegations of fraud. Yet, here is where clarity stops and confusion begins. The early treatises on the subject of equity jurisprudence made a distinction between the standard for the burden of proof and the standard for the type of evidence required to meet that burden of proof. To succeed at trial, a plaintiff had to "prove the fraud, which means that he . . . [had to] show it by clear and satisfactory evidence, such as will preponderate over [the] presumption [of innocence] or evidence on the other side."¹¹⁶

Although not directly so stated in cases, the rationale behind this rule appears to stem from a judicial belief that courts of equity would become a veritable legal safe haven for individuals wishing to get out of bad deals. Equity judges surmised that if equity courts retained the preponderance standard used in the law courts, combined with the powerful equitable remedies, the methods for forcing defendant compliance, and the willingness to find fraud based on either testimony not admissible in courts of law or circumstantial evidence not cogniza-

114 *Id.*

115 PHILIP T. VAN ZILE, A TREATISE ON EQUITY PLEADING AND PRACTICE 411 (1904).

116 BIGELOW, *supra* note 110, at 123 (footnote omitted); *see also* LOUIS L. HAMMON, HAMMON ON EVIDENCE 24 (1907) ("The strict measure of evidence required in criminal cases does not obtain in civil procedures Thus a preponderance of evidence is sufficient to establish fraud") (footnotes omitted); 3 CLARK A. NICHOLS, APPLIED EVIDENCE 2324 (1928) ("A preponderance of the evidence is sufficient to prove fraud Notwithstanding judicial expressions concerning necessity of clear and satisfactory proof of fraud, the code rule that a preponderance of the evidence controls in a civil case applies in a civil case, where fraud is claimed.") (footnotes omitted). "The party alleging fraud is the one who assumes the burden of establishing it, and whether he be plaintiff or defendant he must do so by a preponderance of the evidence." JOHN W. SMITH, A TREATISE ON THE LAW OF FRAUDS AND THE STATUTE OF FRAUDS 280 (1907). "Evidence must be clear and satisfactory." *Id.* at 287. On allegations of fraud, an equity court should not set aside a conveyance upon parol evidence alone unless "the preponderance of the evidence should be clear, and the evidence should be so convincing as to leave no reasonable doubt upon the mind." VAN ZILE, *supra* note 115, at 410-11 (quoting *Hunter v. Hopkins*, 12 Mich. 227, 229 (1864)).

ble in courts of law, would-be plaintiffs would flock to the courts of equity.

The requirement in civil actions of more than a preponderance of the evidence was first applied in equity to claims which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of the conscience. Conceding the validity of policies which the parol evidence rule and the Statutes of Wills and Frauds were designed to carry out, the chancery courts compromised between becoming a mecca for the trumped-up prayer for relief and refusing altogether to mitigate the stern fulfillment of these policies in the law courts, by granting relief only in cases where the evidence in support of this type of claim was "clear and convincing."¹¹⁷

With the creation and congressional adoption of the Federal Rules of Civil Procedure, the federal line between courts of law and equity disappeared.¹¹⁸ The rules provided for only one form of action called a "civil action."¹¹⁹ Most state court systems followed suit, merging their two courts systems.¹²⁰ Although certain distinctions between

117 Note, *Appellate Review in the Federal Courts of Findings Requiring More Than a Preponderance of the Evidence*, 60 HARV. L. REV. 111, 112 (1946) (footnotes omitted); see also Note, *Horner v. Flynn: A Preponderance of Clear and Convincing Evidence*, 28 ME. L. REV. 240, 241 (1976) [hereinafter *Clear and Convincing Evidence*] ("The policy of a stricter standard of proof in fraud cases is derived from early equity decisions. The requirement of 'clear and convincing evidence' was created in order to avoid a direct clash with the Statute of Frauds and the Wills Act when parol evidence was allowed to contradict the terms of written instruments.").

[I]f there exists in courts of chancery, a capacity, or right, or duty, or disposition, to find fraud, upon less proof, or different proof, from that which is required in courts of law, a ground of preference between the two jurisdictions is at once established, which was never before claimed, and one of a very invidious character in its practical operation.

1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 190a (Jarius W. Perry ed., Boston, Little, Brown & Co. 1877).

The requirement of proof more than usually convincing for certain types of contentions seems to have had its origins in the standards prescribed for themselves by the chancellors in determining questions of fact in equity cases. . . .

Among the classes of cases to which this special standard or persuasion has been applied are . . . charges of fraud

MCCORMICK ON EVIDENCE, *supra* note '75, at 960 (footnotes omitted).

118 See FREER & PERDUE, *supra* note 93, at 15-16.

119 FED. R. CIV. P. 2.

120 See FREER & PERDUE, *supra* note 93, at 16.

law and equity still remain,¹²¹ in many areas "equity practice . . . dominate[s] modern procedure."¹²²

The consolidation of courts of equity with courts of law helped not only to perpetuate the confusion over the correct burden of proof standard in civil fraud cases, but may have added to judicial confusion over the subject. *Horner v. Flynn*¹²³ stands out as a prime example of how this legal "Gordian Knot" perplexed individuals at the highest levels of our legal system. In *Horner*, a shareholder of a small corporation encouraged an outside investor to purchase an interest in the company. The investor later found out that the sales reports he viewed were false, and he sued the shareholder for fraud.

During trial, the defendant requested the trial judge to instruct the jury that the plaintiff had to prove his case by "clear and convincing" evidence. The trial judge, instead, instructed the jury that the burden of proof for a civil fraud action was a preponderance of the evidence. The Maine Supreme Judicial Court held that "the burden of proof in fraud cases requires only a preponderance of the evidence, but that such a preponderance can be effected only by evidence which is clear and convincing."¹²⁴ In an apparent effort to reduce the quandary this decision produced, the Maine Supreme Judicial Court later overturned *Horner* and instituted the "clear and convincing" standard.

This history of the burden of proof standard in civil fraud cases makes it evident that the "clear and convincing" standard did not evolve from an empirical study of civil fraud cases. Rather, the "clear and convincing" standard was a child conceived in the unproven belief on the part of equity judges that equity courts would be consumed by unworthy or unmeritorious civil fraud cases. With the general collapse of the courts of equity and law into one system, the burden of proof standard of equity courts was carried over with little or no examination as to whether or not its original justifications were present in the new court systems. Thus, the contention by critics that the preponderance standard contained in the FCA does not follow the historical norm is unfounded. Critics of the FCA evidence a misunderstanding of the origin of the "clear and convincing" burden

121 The Constitution still guarantees the right to a jury trial in civil suits at common law, and there are differences between legal and equitable remedies.

122 *Id.* at 16. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

123 334 A.2d 194 (Me. 1975), *overruled by* Taylor v. Commissioner of Mental Health & Mental Retardation, 481 A.2d 139 (Me. 1984). For an in-depth analysis of the case and the Maine Supreme Court's decision, see *Clear and Convincing Evidence*, *supra* note 117.

124 *Id.* at 240-41 (footnotes omitted).

of proof standard, and thus make arguments about the FCA's need for modification based on inaccurate premises.

III. FALSE CLAIMS ACT AND THE BURDEN OF PROOF: THE NEW TREND

Critics of the 1986 amendments to the FCA assert that the Act's "relaxed standard of proof is inconsistent with the more stringent requirements for showing fraud in the private sector."¹²⁵ These critics state that the more stringent "clear and convincing" burden of proof standard is the common law standard and is the standard "most courts require" for a plaintiff to successfully prove fraud.¹²⁶ As the previous Section points out, this argument is inaccurate. The original burden of proof standard for civil fraud cases in courts of law was a preponderance standard. Only after the consolidation of equity courts with law courts in this country did the "clear and convincing" standard become the majority standard in civil fraud proceedings.

In addition to misstating the origin of the standard, commentators on the FCA also fail to point out several important facts with regard to the "clear and convincing" burden of proof standard in civil actions analogous to fraud. First, the standard has not been universally accepted in the United States. Various states still retain the preponderance standard for fraud.¹²⁷ This variation among the states as to the requisite burden of proof in civil fraud cases means that there exists no categorical rule. At least ten states, including California,¹²⁸ Colorado, and Florida, use a preponderance of the evidence standard in all civil fraud cases.¹²⁹ Two other states, Nebraska and Ohio, make a clear distinction between the evidentiary requirements in cases at

125 An Obstacle, *supra* note 4, at 25.

126 *Id.* at 26.

127 *See supra* note 12 and accompanying text.

128 Although critics claim that the False Claims Act's legal regime is a significant barrier to entry, the preponderance standard seems not to have significantly inhibited the growth of the commercial sector in California. California uses a preponderance standard for civil fraud cases. As it stands now, California has at least the seventh largest economy in the world and accounts for approximately 13% of the United States' Gross Domestic Product. In particular, California accounted for almost 30% of the nation's exports in electronics and electrical products and 24% of the computer equipment as measured by the value of the goods. All of this data seems to suggest that the critics of the False Claims Act significantly overestimate the effect of the Act's standard of proof on the commercial sector's decision making process. *See California Trade and Commerce Agency: About California* (visited Aug. 23, 1998) <<http://commerce.ca.gov/california>>.

129 *See supra* note 12 and accompanying text.

law and in equity, requiring only a preponderance of the evidence standard for fraud cases at law.¹³⁰

Second, many states have enacted laws to deal with government procurement abuses that mirror the FCA and include a preponderance burden of proof standard. California enacted the California False Claims Act¹³¹ and modeled the Act upon the federal statute, including the preponderance of the evidence standard.¹³² Like California, Florida also enacted a False Claims Act¹³³ designed like the federal law and containing a preponderance standard.¹³⁴ Although not denominated as a False Claims Act, the Illinois Whistleblower Reward and Protection Act¹³⁵ is another state produced piece of legislation aimed at deterring persons from taking advantage of the public fisc and giving the state a mechanism through which to regain that money. As in the previously mentioned statutes, the Illinois incarnation of the FCA states that preponderance is the Act's burden of proof standard.¹³⁶

The District of Columbia, in 1996, passed a form of FCA in the Procurement Reform Amendment Act of 1996.¹³⁷ The D.C. statute also requires a plaintiff to prove each element of the offense by a preponderance of the evidence.¹³⁸ In another variation on the FCA theme, Tennessee established the Tennessee Medicaid False Claims Act.¹³⁹ Again, like the above mentioned acts, the Medicaid Act also uses the preponderance standard as its burden of proof standard.¹⁴⁰ More recently, Louisiana and Texas have joined the trend by states of enacting FCA-like laws.

Third, the United States Supreme Court and lower federal courts have adopted the "preponderance" standard in a variety of statutes that are analogous to civil fraud. In civil RICO cases, the federal courts have determined that "preponderance" of the evidence is the appropriate standard required of a plaintiff to successfully prove his

130 *See id.*

131 *See* CAL. GOV'T CODE §§ 12650-55 (West 1992).

132 *See id.* § 12654(c).

133 *See* FLA. STAT. ANN. §§ 68.081-.092 (West 1995).

134 *See id.* § 68.09.

135 *See* 740 ILL. COMP. STAT. ANN. 175/1-175/8 (West 1995).

136 *See id.* 175/5.

137 *See* D.C. CODE ANN. §§ 1-1188.5 to .11 (1997); *see also* W. Bruce Shirk, *District of Columbia False Claims Act: A Comparison to the Federal Statute* (visited Nov. 20, 1998) <<http://pgfm.com/publications/falseclaims.html>>.

138 *See* D.C. CODE ANN. § 1-1188.11(c) (1997).

139 *See* TENN. CODE ANN. §§ 71-5-181-86 (1995).

140 *See id.* § 71-5-184(c) (1995).

or her case.¹⁴¹ This means that predicate acts of fraud need only be proven by a preponderance of evidence under civil RICO. In civil, private anti-trust actions, federal courts insist that the plaintiff prove all the elements of the statute by a preponderance of the evidence.¹⁴² Bankruptcy fraud also requires plaintiffs to prove fraud by a preponderance of the evidence.¹⁴³ Plaintiffs in private causes of action for securities fraud under section 10(b) of the Securities Exchange Act of 1934 need only prove their cases by a preponderance of the evidence,¹⁴⁴ and the SEC must also prove fraud in securities actions by a preponderance of the evidence.¹⁴⁵ Thus, the FCA is not alone as a federal statute that allows plaintiffs in civil suits to prove their cases by a preponderance of the evidence.

In making the decision to mandate a "clear and convincing" standard for the burden of proof, the United States Supreme Court has stated that it "required proof by clear and convincing evidence where particularly important individual interests or rights are at stake."¹⁴⁶ The Court has determined that such important interests and rights include proceedings to terminate parental rights,¹⁴⁷ involuntary commitment proceedings,¹⁴⁸ and deportation.¹⁴⁹ At no time, though, has the Court ever equated the risk of potentially large money damages with the interest and rights mentioned previously. For the Court to do so would amount to placing liberty on an equal footing with

141 See *Fleischhauer v. Feltner*, 879 F.2d 1290, 1296 (6th Cir. 1989) (stating that predicate acts of fraud under civil RICO require only a preponderance of the evidence standard); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302-03 (7th Cir. 1987) (holding that the preponderance of the evidence standard applies in civil actions under Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1994), which allows for treble damage awards).

142 See *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir. 1982); *Clark Marine Corp. v. Cargill, Inc.*, 226 F. Supp. 103, 111 (E.D. La. 1964) (holding that the preponderance standard applies in civil actions seeking a treble damages award under the Sherman Antitrust Act, 15 U.S.C. § 15 (1994)).

143 See *Grogan v. Garner*, 498 U.S. 279 (1991); *In re Cornner*, 191 B.R. 199 (Bankr. N.D. Ala. 1995).

144 See *Herman & McLean v. Huddleston*, 459 U.S. 375 (1983) (holding that preponderance of the evidence was required in a private civil action under section 10(b) of the Securities Exchange Act of 1934); see also *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (stating that common law doctrines of fraud that developed during a period when transactions involved tangible items do not seem applicable to transactions in a modern economy involving intangibles like securities).

145 See *SEC v. Lorin*, 877 F. Supp. 192 (S.D.N.Y. 1995).

146 *Huddleston*, 459 U.S. at 389.

147 See *Santosky v. Kramer*, 455 U.S. 745 (1982).

148 See *Addington v. Texas*, 441 U.S. 418 (1979).

149 See *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966).

money, an idea still repugnant to most Americans despite our society's preference for, and tendency to, resort to markets in which everything has a price. Thus, for critics of the FCA to argue for a higher burden of proof standard for the Act is to fly in the face of Supreme Court rationale which dictates that the "clear and convincing" burden of proof standard should apply only in cases involving the changing of one's liberty status.

IV. MILITARY PROCUREMENT AND THE FALSE CLAIMS ACT'S STANDARD OF PROOF

The 1986 amendments were a specific legislative response to the documented problems unique to government procurement in general, and military procurement in particular. Critics of the Act would like to down play the significance of military procurement incentives and practices when analyzing the Act's effects. A look at the nation's budget, however, quickly shows that the various institutional incentives inherent in the military procurement system are behind the enactment and enforcement of the FCA.¹⁵⁰

Critics insist that the FCA, as it presently exists, inhibits private sector suppliers and government purchasers of goods and services from behaving as private sector commercial actors. What this argument fails to acknowledge is that government purchases, unlike commercial dealings, are generally not motivated by profit and loss considerations. The military buys goods and services in order to effectively accomplish an endeavor—war—that it hopes it will never be forced to prosecute. Yet the most significant differences between commercial dealings and military procurement are the incentives of the decision-making institutions involved. Members of Congress, Department of Defense civilian employees, and military officials of the various services all have different motivations for procurement of certain goods and services, none of which are based on profit motive. Thus, the argument that the FCA, designed to account for the actions

150 President Truman expressed his disgust at the lack of scrutiny regarding military spending in the following passage:

It's an amazing thing. Every ten cents that was [sic] spent [on social welfare programs,] . . . every dime was looked into, and somebody was always against spending a nickel that would help poor people and give jobs . . . to the men that didn't have any.

But the minute we started spending all that defense money, the sky was the limit and no questions asked. The "economy boys" never opened their mouths about that, and I don't understand it. I don't now, and I didn't then.

MILLER, *supra* note 41, at 163–64 (quoting President Harry S. Truman).

of persons involved in the military procurement system, should reflect commercial realities seems ill-conceived.

An understanding of the history of military procurement and the economic incentives peculiar to that system will show that the FCA, as presently enacted, is an effective and necessary means for achieving a government procurement system with a reduced level of waste and fraud. The preponderance burden of proof standard reflects the fact that the players involved in the military procurement process respond to economic incentives that are different from those in the private sector.

A. *A Brief History of Profiteering in Defense Spending*

The problems of false claims and fraud in defense spending are not new problems in this country.¹⁵¹ Before the FCA was enacted in 1863, our nation's history was replete with instances of individuals taking undue advantage of the Government during the inevitable chaos and dire Government needs normally experienced in times of war. The history of the Revolutionary War contains numerous instances of defense spending corruption involving both merchants and high Government officials.¹⁵² These corrupt practices involved co-mingling of funds, unauthorized use of government assets, inadequate record keeping, bid rigging, and collusion between Government officials and merchants.¹⁵³ Not long after the end of the Revolutionary War,

151 One need only look at the history of defense spending in countries around the world to realize that fraud and false claims are an inherent part of the defense procurement process.

The military-industrial complex in the United States is a fairly new phenomenon. It has existed in other nations and at other times, whenever there were large peacetime armed forces and substantial arms-manufacturing institutions to support them. The problems this combination creates vary little from nation to nation. You basically have a lot of corruption and inefficiency in military procurement no matter what the nation or era. In democratic America, as we have seen, you also have a serious warping of the legislative process because the military-industrial complex distributes its contracts among select congressional districts so as to secure the votes needed to maintain large defense allocations in future budgets.

JAMES F. DUNNIGAN & ALBERT A. NOFI, *SHOOTING BLANKS: WAR MAKING THAT DOESN'T WORK* 338 (1991); see also WILLIAM MANCHESTER, *THE ARMS OF KRUPP* (1968) (describing the rise of the Krupp's weapons industry and its influence on the history of German politics for over 400 years); see also *Prominent Convictions End Bribery Scandal*, WASH. POST, Dec. 24, 1998, at A12 (discussing a bribery scandal involving a former NATO Secretary General).

152 See RICHARD F. KAUFMAN, *THE WAR PROFITEERS* 5-8 (1970).

153 See *id.* at 7.

profiteers again "victimized the United States Army"¹⁵⁴ in 1791 by supplying U.S. troops with tents that did not meet Army standards and boots that fell apart after only slight use.¹⁵⁵

The advent of the Civil War ushered in a new era of corrupt and fraudulent practices aimed at acquiring defense dollars.¹⁵⁶ This new level of fraud probably derives from the massive numbers of men and arms required to prosecute a war in the industrial age. The words of representative Charles H. Van Wyck seem to sum up best the problems encountered by the Union in its attempts to outfit the country for war:

The government has been the victim of more than one conspiracy, and remarkable combinations have been formed to rob the treasury. The profits from the sale of arms to the government have been enormous, and realized, too, in many instances, even by our own citizens, through a system of brokerage as unprincipled and dishonest, as unfriendly to the success and welfare of the nation, as the plotting of actual treason.¹⁵⁷

With reports of soldiers opening up would-be crates of guns only to find sawdust, muskets sold at twice their peacetime prices, and instances of triple over-counting in the sale of animals to the Army, President Lincoln pushed for the enactment of a law to deter such activity and recover the illicit gains of contractors committing fraud.¹⁵⁸ On March 2, 1863, President Lincoln signed into law the False Claims Act of 1863.¹⁵⁹

154 JAMES B. HELMER, JR. ET AL., FALSE CLAIMS ACT: WHISTLEBLOWERS LITIGATION 25 (1994).

155 *Id.*

156 See CLARK R. MOLLENHOFF, THE PENTAGON: POLITICS, PROFITS AND PLUNDER 41 (1967) ("The operations of the War Department in the Civil War still represent the ultimate example of corruption in American military history. This period illustrates almost everything that can go wrong with the military establishment when under corrupt as well as incompetent political control.").

157 *House Select Comm. to Inquire into Contracts of the Government*, 37th Cong. 34 (1861), quoted in KAUFMAN, *supra* note 152, at 8.

158 See HELMER, *supra* note 154, at 26-27. "During the Civil War, President Abraham Lincoln groused that his troops found sawdust instead of gunpowder when they pried open ammunition crates at the front. The cavalry discovered it was being charged for the same horses two and three times." ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 11 (1995).

159 Act of March 2, 1863, ch 67, 12 Stat. 696. The False Claims Act was reenacted as sections 3490-94 of the Revised Statutes, see 36 U.S. Rev. Stat. §§ 3490-94 (1875), and section 5438 of the Revised Statutes, see 70 U.S. Rev. Stat. § 5438 (1875). Section 5438 was later codified under §§ 231-35 of Title 31 of the United States Code, 31 U.S.C. §§ 231-35 (1976), and recodified in 1982 under §§ 3729-31 of Title 31 of the United States Code, 31 U.S.C. §§ 3729-31 (1982).

Despite the enactment of this new law, fraud in defense contracting did not abate before or during times of war.¹⁶⁰ Both the Spanish American War and World War I saw inexplicable acts of fraud with regard to military procurement.¹⁶¹ Bid rigging, deceptive accounting practices, artificially high prices, payoffs of government and military officials all took place while men in the trenches fought and died. Public outrage at the practices resulted in several investigations but with few tangible results.¹⁶² Yet, as military spending drastically declined after both wars, as it had during all other prior post-war periods, public condemnation subsided and business as usual continued in defense contracting.

Between the end of World War II and the beginning of the Cold War, America changed its usual pattern of defense spending,¹⁶³ ushering in a new era of defense contracting fraud. Although the defense budget did not reach war levels, neither did it return to pre-war levels. With the advent of the Cold War, the military-industrial complex had set its roots into the American psyche and dramatically changed the way our country spent money on defense, military manpower, and procurement during the rest of the twentieth century.

From 1947 to 1997, military spending represented no less than sixteen percent of the federal government's total expenditures, and often was as high as sixty-nine percent during this period.¹⁶⁴ Yet, this figure dramatically underemphasizes the real import of military expenditures in the federal budget. Although defense spending represented sixteen percent of the total federal outlays in 1997,¹⁶⁵ as a percentage of the federal government's discretionary spending in 1997, expenditures on national defense constituted almost half of all the government's outlays.¹⁶⁶ In 1997 alone, the military spent over

160 "One million feet of lumber vanished from the Boston Navy Yard during the corruption-stained administration of Ulysses S. Grant." PASZTOR, *supra* note 158, at 11.

161 "After World War I, President Warren Harding's administration was sent reeling by the Teapot Dome scandal, which involved payment of bribes for leases of the Navy's oil reserves in the West." *Id.*

162 See KAUFMAN, *supra* note 152, at 9-20.

163 See *infra* 1487 app. A.

164 See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFF. OF THE PRESIDENT OF THE U.S., BUDGET OF THE UNITED STATES GOVERNMENT, HISTORICAL TABLES, FISCAL YEAR 1999, at 42-49 (1998).

165 See *id.* at 74.

166 See *id.* at 102. "[T]he Pentagon will spend nearly \$280 billion in 1999, more than 55% of the total \$500 billion discretionary spending package thrown together by Congress . . ." Center for Def. Info., *Military Analysts Critical of Pentagon Spending "Plus-Up"* (visited Apr. 21, 2000) <<http://www.cdi.org/press/fy99supp.html>>.

half of its \$258 billion budget on operations and maintenance, procurement, and research, development, test, and evaluation.¹⁶⁷ No other expenditures on goods and services in the discretionary portion of the federal budget come close to this figure.

With these figures in mind, it is easy to see why concerns about how military procurement of goods and services is performed should play an important role with regard to how the FCA functions. To change the Act to accommodate relatively small expenditure patterns in other parts of the budget without regard to the problems in defense spending would, in essence, allow the tail to wag the dog—a dog the size of *tyrannosaurus rex*.

It took over forty years for Congress to recognize and respond to the new paradigm in defense spending by revising and updating the FCA to deal with the Cold War and Post-Cold War defense spending levels. In the interim period prior to the 1986 FCA amendments, the country expended precious defense dollars on “\$600 toilet seats and \$400 hammers,”¹⁶⁸ in addition to weapons that did not work as advertised.

B. The Military Procurement Game: Lots of Dollars, Sometimes No Sense

To understand the military procurement system, one must first recognize that the environment and relationships among defense contractors, Congress, the Office of the President, the Department of Defense (DOD), the individual military services, and service members bear little resemblance to a commercial environment or any sort of commercial relationship among firms in the private sector.¹⁶⁹ Because the incentives that propel military spending do not correspond

167 See 1999 BUDGET, *supra* note 164, at 54. This figure does not include the country's expenditures on weapons and nuclear capabilities budgeted separately under the State Department and the Energy Department, respectively.

168 JAMES G. BURTON, *THE PENTAGON WARS* 9 (1993).

169 For a unique perspective on which institutional players are involved in the military procurement process and their influences on that process, see Gregory A. Bischak, *The Obstacles to Real Security: Military Corporatism and the Cold War State*, in *REAL SECURITY: CONVERTING THE DEFENSE ECONOMY AND BUILDING PEACE* 133 (Kevin J. Cassidy & Gregory A. Bischak eds., 1993) [hereinafter *REAL SECURITY*]. “There can be little doubt that the military and civilian professionals within the Pentagon, and their supporters in Congress and the executive branch, have sought to promote the expansion of military spending and their own bureaucratic control over resources.” *Id.* at 148. This combination of Congressional, presidential, and bureaucratic support may be an example of the failure of Madison's theory regarding the Constitution and its ability to control factions. Though “[t]he regulation of these various and interfering interests forms the principle task of modern legislation,” in the defense context, all the factions seem to have an incentive in perpetuating large defense budgets with

to the incentives at work in the private commercial sector, the opportunities and likelihood for fraud are increased.¹⁷⁰

First, Congress controls the federal purse with regard to the military¹⁷¹ and, thus, has tremendous influence on the military procurement process. Although FCA critics would like one to believe that the procurement process resembles a purely commercial setting, actions by Congress indicate how fanciful that portrayal of the military procurement process actually is.¹⁷² Congress is a political institution whose members are motivated by ideology, constituents, and re-election and not the "bottom-line" like participants in private sector commercial markets.¹⁷³ Public choice theory economics shows how the

consistent friendly programs. *THE FEDERALIST* NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1941).

170 Even those within the military procurement system understand that the environment within that system differs dramatically from that of the private sector. See Mark Cancian, *Acquisition Reform: It's Not as Easy as It Seems*, *ACQUISITION REV. Q.*, Summer 1995, at 189. "Yes, we all know that the defense industry is different. However, reviewing the reasons why this is so will put the discussion about reform into perspective and remind us of how different the defense industry actually is from commercial industry . . ." *Id.* at 190 (providing a list of eight things that differentiate the defense industry from the commercial industry). "There is no sensible reason to deny the obvious. . . . The basic tenets of the free enterprise system do not apply [to the defense industry]. As a result many, perhaps most, business practices common in commercial industry for evaluating and controlling operations have no application in the defense world." *Id.* at 191 (citations omitted).

171 See U.S. CONST. art. I, § 8, cl. 12-13.

172 See BARRY M. BLECHMAN, *THE POLITICS OF NATIONAL SECURITY: CONGRESS AND U.S. DEFENSE POLICY* 56 (1990).

The common congressional decision is to preserve programs, even those unwanted by the military services and the secretary of defense. Congressman Mahon, for example, kept the production line for the A-7 aircraft open for years after Robert S. MacNamara has wanted to shut large numbers of defense installations to reduce the department's overhead, but has been prevented from doing so by congressional resistance.

Id.

173 "The criteria applied in congressional decision making are often inappropriate from a national perspective: the overriding criterion in congressional deliberations necessarily is to protect the interests of constituents. This often means that dollars allocated for defense are used inefficiently." *Id.* at 55.

For the most part, senators' initiatives [are] intended to protect, or add to, constituents' special interests ("pork" in the vernacular). They each tended to involve relatively small amounts of money (that add up to large sums). According to one senator's estimates, in the fiscal 1988 mark-up, when authorizing committees cut roughly \$30 billion from the administration's budget proposal overall, congressional initiatives still added something like \$4-5 billion to the budget.

Id. at 47.

behavior of Congress, a political institution, can be explained and contrasted with the economics of market system transactions:

Government policy making is far removed from the anonymous decision making that characterizes market transactions. Although markets appear chaotic, they guide resources to their highest value uses when allowed to work. In contrast, government is personal and political, and it is a serious mistake to talk about "the government" or "federal and state governments" as if they are benevolent despots. When "the government" guides the allocation of resources, every decision becomes a political decision.¹⁷⁴

Public choice theory reveals that "political decision makers behave just like consumers and businesses."¹⁷⁵ Yet the ultimate goals of these two groups are not the same even if their behavior patterns are similar. Politicians "attempt to maximize their own self interest" by getting re-elected, not to make a business profit.¹⁷⁶ Thus, attempting to get good deals for special interest groups who contribute money to campaigns, and not finding low cost producers, is an economically rational response to the incentives in the re-election process.¹⁷⁷ Businessmen, on the other hand, attempt to maximize their self-interest by making a profit in order to sustain their business. Re-election, thus,

174 HENRY N. BUTLER, *ECONOMIC ANALYSIS FOR LAWYERS* 106 (1998).

175 *Id.*

176 *Id.* See generally SAM PELTZMAN, *POLITICAL PARTICIPATION AND GOVERNMENT REGULATION* (1998) (discussing the economic theories that try to explain the link between voting, political decisions, and regulations).

177 See Jonathan Chait, *Money Man*, *THE NEW REPUBLIC*, Nov. 23, 1998, at 15 (discussing Senator Mitch McConnell and his role in blocking campaign finance reform); see also Sheila Kaplan, *Campaign 2000, by the Numbers*, *U.S. NEWS & WORLD REP.*, Jan. 18, 1999, at 20, 21 (stating that for the 2000 presidential campaign, "[a] candidate will need to raise as much as \$25 million between now and the end of the year to be viable. That's nearly \$60,000 per day, every single day"). This need for money to fuel the political process is no new phenomena. As one political historian put it, "[B]efore business learned to buy statesman at wholesale [in the twentieth century], it had to buy privileges retail. . . . A disgruntled Congressman from Ohio declared in 1873 that 'the House of Representatives was like an auction room where more valuable considerations were disposed of under the speaker's hammer than in any other place on earth.'" RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION & THE MEN WHO MADE IT* 219 (Vintage Books 1974). However, not all politicians have succumbed to the temptation of trading favors for money. James Madison, "[a]s a matter of principle, . . . refused to follow the custom of treating the voters to whiskey; it smacked too much of buying votes," and he was then defeated in his 1777 run for the Virginia legislature. CARLTON B. SMITH, *JAMES MADISON: A BRIEF BIOGRAPHICAL SKETCH* 5 (1995). See generally *Symposium, Campaign Finance Reform*, 24 *J. LEGIS.* 167 (1998) (discussing the problems of soft money in the political process).

plays no role in motivating business decisions, while it plays a significant, if not dominate, role in making political decisions.¹⁷⁸

Yet, the economics of re-election do not fully explain why political actors in Congress behave as they do within the context of voting and budgetary decisions. "Our best picture of the political process, then, is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct."¹⁷⁹ This qualification, however, only serves to bolster the premise that congressmen do not make government purchase or military budgetary decisions based on profit. They often make military budgeting decisions based on the needs of their constituents.

Recent military budget decisions by Congress exemplify how little the military procurement process resembles commercial transactions.¹⁸⁰ During budget planning, in an unabashed example of pork-barrel politics, then-Speaker of the House Newt Gingrich, Representa-

178 "Reelection is the prime motivator of Congress, but remember who elects the driver is C³—equaling constituent, constituent, constituent. Understanding a corporate constituent's interest will allow you to respond best to the Member." WILBER D. JONES, JR., *CONGRESSIONAL INVOLVEMENT AND RELATIONS: A GUIDE FOR DEPARTMENT OF DEFENSE ACQUISITION MANAGERS*, at x (4th ed. 1996).

179 DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 33 (1991).

180 Older military purchasing decisions also reflect the influence of Congress and its preference for constituent jobs when making buying decisions. The M9 Beretta was a congressionally-directed non-developmental buy. Part of the contract requirement for the winning weapon's manufacturer was that the production of the weapon must transition to the U.S. after two years. Beretta of Italy was awarded the contract. Since its initial purchase, the Beretta has experienced some breakage problems in its slide. As an armory officer for his squadron, one of the authors oversaw the requirement that his armorers add a strengthening piece to the weapon, a process that required manpower and material. Although the M9 has a required service life of 7000 rounds, the weapon it replaced, the Colt 1911, had a track record in the 100,000s of rounds. For more on this, see Wayne Facca, *Beretta Horror Story* (visited Mar. 5, 2000) <<http://www.stokesworld.com/berettastory.html>>, U.S. Marine Corp, *FactFile: M9 Pistol* (visited Mar. 5, 2000) <<http://www.hqmc.usmc.mil/factfile.nsf/htm>>, and *Firearm Information by Type* (visited Mar. 5, 2000) <<http://www.recguns.com/IIIC2b6.html>>. The manufacturer budget decisions for big ticket items are not the only victims of congressional self-interest and choice of congressional action that do not reflect commercial profit motive. Defense-related job cuts and military base closures are also exposed to the vagaries of the political process. One example is the request by Senators Moynihan and Schumer and Representative Boehlert of New York to meet with deputy Secretary of Defense John Hamry to discuss job cuts at the Rome Laboratory. *See Officials Ask to Meet on Cuts Planned for Lab*, N.Y. TIMES, Mar. 7, 1999, § 1, at 47. "The cuts are the result of a shift in Pentagon spending to space-based laser and radar research." *Id.* The cuts would reduce the lab's payroll and save the Air Force \$5 million. The importance of jobs in a given congressional district and the desire to take credit for the creation of those jobs is evidenced by the frequency with which

tive from Georgia, attempted to add the purchase of C-130J transport aircrafts to the budgets for fiscal years 1999 and 2000.¹⁸¹ Lockheed

politicians announce the closure of a contract between the military and a local business in the congressman's district.

U.S. Rep. Rosa DeLauro (D-Conn.) today announced that Dow-United Technologies Composite Products, Inc., has been awarded \$30.2 million in new contracts to build parts for the U.S. Air Force F-22 next generation air superiority fighter.

Speaking to employees following a tour of the company's plant here today, Rep. DeLauro said, "Your work on the F-22 will guarantee that our nation's Air Force Pilots will fly the best fighter in the air. It makes me proud to know that people in Connecticut are building such advanced aircraft."

Wallington Firm Wins \$30.2 Million Contracts: U.S. Rep. Rosa DeLauro Announces New Technology to Build Parts for F-22 Advanced Tactical Fighter (visited Aug. 10, 1995) <<http://www.dowut.com/news0017.htm>>.

181 See Elaine M. Grossman, *House Speaker Presses Air Force to Procure C-130Js It Does Not Yet Need*, INSIDE THE PENTAGON, Sept. 24, 1998, at 1. In fact, the continued existence of the Georgia facility may be a thorn not only in the taxpayer's side, but also in the side of Lockheed Martin itself.

The recent resignation of Newt Gingrich as Speaker of the House may be a Blessing to Lockheed Martin Chairman Vance Coffman. His \$28 billion (1998 Revenues) aerospace giant is carrying an albatross: its 9,600-employee Marietta, Ga. aircraft plant.

....

[W]hen you get more than 80% of your business from government orders—from defense, NASA, the U.S. Postal Service and various states—as Lockheed Martin does, you can't afford to alienate Congress by closing unneeded plants, since that would eliminate voters' jobs. The sprawling Marietta plant, mostly leased by Lockheed Martin from the U.S. Air Force, has long had powerful protectors. First it was Sam Nunn, Georgia senator and for years chairman of the Senate Armed Services Committee. After Nunn stepped down, the protector was Gingrich, whose 6th congressional district in Georgia lies next to the district where the plant is located and is home to many of the workers.

Elsewhere in the sprawling empire, Coffman, two years in the top job, has been an effective cost cutter. . . . But the cuts have so far fallen lightly on the Marietta plant. . . . Buried deep in the company's third-quarter 10Q statement was a notice that the company would take a writedown of \$350 million to \$400 million (\$1.84 to \$2.10 a share) in the first quarter of 1999. The writedown is mostly to cover cost overruns on the latest update of the C-130 Hercules, which is built in Marietta.

Howard Banks, *Blessing in Disguise*, FORBES, Dec. 28, 1998, at 92-93.

Lockheed Martin Corp., beset by plunging profit and problems across its product lines, said Friday it is conducting an internal review that could result in selling or shrinking its core satellite and aircraft manufacturing facilities in order to cut costs.

....

Martin Corporation makes the C-130 transport. The manufacturing plant is located in Marietta, Georgia and employs large numbers of Gingrich's constituents.¹⁸² None of these aircrafts were requested by the military and, in fact, the spending increases on this aircraft seem to go against the desires of the services to spend more money on operations and maintenance and less on the procurement of new goods.¹⁸³ Although not all congressional spending decisions are about large

Political resistance to major cutbacks at the Marietta facility, for example, may have weakened in recent years as the Georgia delegation's clout slipped with the departures of Sen. Sam Nunn and Rep. Newt Gingrich.

Jeff Leeds, *Lockheed Martin Looking into Cutting 2 Core Plants*, L.A. TIMES, Nov. 13, 1999, at C1.

182 See *id.*

183 One source reported,

"The FY-99 [Defense] Authorization Act increases the budget request for procurement by almost \$800 million and includes funding for planes and ships which are not even in the Future Years Defense Plan, while it reduces o&m funding by almost \$350 million below the FY-99 budget request," Levin said. "That's what the joint chiefs asked us not to do."

Darcia R. Harris, *Hamre Lists Congressional 'Pork' Projects as DOD Prepares Supplemental*, INSIDE THE PENTAGON, Oct. 1, 1998, at 1. This is no single occurrence:

Deputy Secretary of Defense John White noted in a letter to the Democratic leadership that "many of the proposed increases . . . are for systems or programs which are not included in the departments' five-year plan. And he warned that those increases will force the Pentagon to divert money from projects with a higher priority later to stay within the military spending ceilings Congress has set for the end of the decade.

Walter Pincus & Dan Morgan, *Defense Budget "Add-Ons" (or Pork and Pet Projects) Manage to Survive*, WASH. POST, July 19, 1996, at 31.

Indeed, Congress is still deeply mired in Cold War thinking and has perpetuated many Cold War related procurement programs in classic pork-barrel style. The process has become so entrenched that even when the Pentagon wishes to terminate obsolete programs, Congress continues to fund them in order to provide jobs for constituents. In the Defense Authorization Act for Fiscal 1993, Congress saved the V-22 Osprey and the F-16 aircraft programs from termination, and continued funding upgrade programs for the M1A tank, the Bradley fighting vehicle, and the Apache AH-64 helicopter.

Bischak, *supra* note 169, at 11, 20.

Ignoring the navy's wishes, two members of the House Armed Services Committee are pushing to reopen a closed assembly line of Tomahawk Cruise Missiles in a move that would benefit a company in one of the lawmakers' districts.

. . . .

"For members to throw money to their constituents for parochial reasons is an example of politically motivated waste," said retired Rear Adm. Eugene Carroll.

Support for Missiles the Navy Doesn't Want, SAN FRANCISCO CHRON., July 8, 1999, at A6.

goods like aircraft, the decisions often reflect lobbying by special interest groups who are constituents of certain congressmen.¹⁸⁴

184 One such situation is as follows:

A new beneficiary of federal defense spending is a small Illinois company that produces neither weapons nor widgets. It makes chewing gum.

....

Rep. J. Dennis Hastert (R-Ill.) . . . slipped in \$250,000 in research funds to study the potential defense uses to Stay Alert [gum].

....

It turns out, officials said, that the money is destined for a doctor at Walter Reed Army Institute of Research who will study the effects of Stay Alert on soldiers.

It also turns out that Stay Alert is a new product of Amuro! Confections Co. of Yorkville, Ill.—Hastert's hometown.

....

Col. Gregory Belenky, the psychiatrist who runs the Army's sleep deprivation program, said Amuro! approached him this summer, and when he expressed interest, asked what it would cost to test the new gum. He said he thought the company would foot the bill and was unaware it went to Hastert, seeking to have the taxpayers pick up the tab.

....

J.D. Hamilton, chief executive of lockmaker Mas-Hamilton Group in Lexington, Ky., has had help from his state's congressional delegation for years in getting federal business for his company. . . . Defense Department records show the Pentagon spent more than \$50 million to install 121,568 Mas-Hamilton locks in its facilities.

Now, with the help of Rep. Harold Rogers (R-Ky.), a member of the House Appropriations Committee, \$5 million was added to the defense-spending bill during conference deliberations to start expanding the lock retrofit to defense contractors as well.

Charles R. Babcock, *Pentagon Budget's Stealth Spending: Lawmakers Slip in Special-Interest Items*, WASH. POST, Oct. 13, 1998, at 1.

At a time when the Pentagon is lamenting a lack of money for key programs, the annual defense appropriations bill headed toward passage this fall contains an estimated \$4 billion in projects the military never asked for—programs added on by members of Congress seeking to steer military spending to their home districts.

....

Even when the projects have an arguable defense purpose, many of them reflect only the tenacious agendas of their congressional sponsors. The defense bill includes more pork projects—known on the Hill as "earmarked money"—than any other federal spending measure. . . .

In the House version of the fiscal 1999 defense appropriations bill, Rep. John P. Murtha (D-Pa.) has inserted \$25 million in funding for DRS Laurel Technologies in Johnstown, his hometown.

....

In six years, stoked by Murtha's clout as the ranking Democrat on the House defense appropriations subcommittee, DRS Laurel's annual revenue

Given the incentives of Congress for promoting the purchasing of various military weapons systems, services, and parts, the FCA stands as an appropriate response to a situation that contains none of the trappings of the commercial sector. Individual congressmen often have little reason to scrutinize the military contracts made with defense contractors from their home districts who provide jobs for constituents.¹⁸⁵ The FCA takes account of this situation by providing an increased incentive for contractors to abide by their contracts and to ensure the conduct of their employees does not constitute fraud. The lower burden of proof standard is important because it provides defense contractors with an added incentive to monitor their own activities. Given the fact that Members of Congress do not have an incentive to scrutinize defense contractor behavior, the defense con-

has ballooned from \$3 million to \$70 million and its work force has grown from 45 to 260. Jack Donnelly, the president of DRS Laurel Technologies, credits Murtha "100 percent for opening the door" to lucrative Pentagon business.

....

Like some of his colleagues, Murtha demonstrates his effectiveness in press releases touting new money for local enterprises. And the publicity helps come election time. A power in military spending, Murtha garners his largest chunk of campaign donations from the defense industry, according to an analysis by the Center for Responsive Politics.

Charles R. Babcock, *Congress Fattens Defense Bill with \$4 Billion in Pork: Some Earmarked Projects Have Little Military Value, Officials Say*, WASH. POST, Aug. 15, 1998, at 1. Other examples of unrequested military funding are as follows: \$79 billion for eight more UH-60 Blackhawk helicopters and \$94 million for more two-and-a-half ton trucks than the Army asked for in the budget, \$25 million for unrequested submarine acoustic off the shelf processors and \$12 million for other unrequisioned DDG 51 Smart ship equipment for the Navy, and \$72 million in advanced acquisition money for E-8C JSTARS aircraft to the airforce although never requested. See John Donnelly, *McCain: Senate Defense Bill Contains \$2.5 Billion in Pork*, DEF. WEEK, June 1, 1998, at 5; see also *Citizens Against Government Waste, 1998 Pig Book: Chapter 10—Military Construction* (visited Nov. 28, 1998) <<http://www.govt-waste.org/publications/pigbook/index.html>>.

185 See JAMES P. STEVENSON, *THE PENTAGON PARADOX: THE DEVELOPMENT OF THE F-18 HORNET* 219 (1993).

If Congress and the Pentagon are about anything, they are about the acquisition of money—money for military projects to transform colonels into generals and money to ensure the reelection of senators and congressmen who funded various military programs. During the ongoing F-18 debates, two of the most powerful men in Congress, Senator Ted Kennedy and Speaker of the House Tip O'Neill, knew the F-18's engine would be built in their state of Massachusetts. They were mighty proponents of the F-18, and pivotal to its acceptance by Congress.

Id. For an extensive discussion of the correlation between defense contractors and congressional support, see BRUCE M. RUSSETT, *WHAT PRICE VIGILANCE? THE BURDENS OF NATIONAL DEFENSE* 56–90 (1970).

tractor incentive produced by the FCA plays an important part in the Act's deterrent effect.¹⁸⁶

Like congressmen, the President is also a creature of politics, born of constituents' votes and special interest support. Being a creature of politics, the President is also not immune to the incentives that motivate politicians. *Nixon v. Fitzgerald*¹⁸⁷ stands as an excellent example of how politics and not profits motivate presidential decisions regarding military procurement. A. Ernest Fitzgerald was a management analyst for the Department of the Air Force. After testifying before Congress about "concealed cost overruns and the technical problems of the giant Lockheed C-5A transport plane,"¹⁸⁸ Fitzgerald was fired from his job. Although Fitzgerald got his job back at a later date, the scandal his comments generated was a huge embarrassment to the Pentagon and the White House. Documents disclosed during the investigation "showed explicitly how top Pentagon officials had conspired to falsify official government records to cover up the C-5A cost overruns."¹⁸⁹ Despite his coming forward and revealing these problems in the program, Fitzgerald was not hailed as an upstanding citizen by the Nixon White House. Rather, he was referred to as the guy who "ratted on the C-5A overruns."¹⁹⁰ Fitzgerald's sin was failing to keep the code of silence with regard to defense contractors and cost problems. Thus, unlike a businessman motivated by profit and seeking to maximize efficiency and minimize costs, the White House was more worried about image and embarrassment, again showing how little defense procurement decisions mirror private sector business purchase decisions and subsequent contract monitoring.

Like Congress and the President, the DOD also plays an essential role in the purchasing of military weapons and services. And like Congress and the President, the DOD does not operate in an environment equivalent to that of the private commercial sector.¹⁹¹ The DOD func-

186 Some authorities also argue that "Congress has not the resources, the incentives, nor the organization to review and evaluate each year the thousands of individual programs that make up the defense posture." BLECHMAN, *supra* note 172, at 28.

187 457 U.S. 731 (1982).

188 A. ERNEST FITZGERALD, *THE PENTAGONISTS: AN INSIDER'S VIEW OF WASTE, MISMANAGEMENT, AND FRAUD IN DEFENSE SPENDING* 3 (1989).

189 *Id.* at 14.

190 *Id.* at 3.

191 President Harry S. Truman stated,

The thing I've always felt about the Pentagon is that while it was probably necessary . . . , it's not right to have all those people in one building without a single watchdog. There ought to be somebody looking into every penny that's spent, but there isn't. And we are all in trouble when that goes on, when the generals get that much power.

tions, essentially, as a non-profit organization whose budget depends not on profits from the sale of products or services, but on the decisions of bureaucrats and political appointees.¹⁹² The DOD provides a public good¹⁹³ and the DOD will never go out of business as long as the nation feels the need to provide itself with some sort of national defense. Essentially, the DOD is a government-perpetuated monopoly whose operation is not measured by profits or losses. Thus, the DOD is not constrained by the "market" or shareholders in its decision making processes regarding capital acquisitions, such as procurement of weapons systems, spares, and services.¹⁹⁴

DOD bureaucrats make decisions to buy weapons and parts based on a wide variety of influences, including, but not limited to, the parochial interests of DOD survival,¹⁹⁵ such as big defense budgets,¹⁹⁶ the desire for technologically advanced weapons to satisfy a technology

MILLER, *supra* note 41, at 170 (quoting President Harry S. Truman).

Each of the many organizations [that make up the DOD] seeks to be "successful," but success for a government agency is not an easily defined or measured concept. Unlike their business counterparts, government organizations have no product that can be priced and sold for profit on the open market. A dollar measure can be applied to tanks and airplanes in terms of cost, but not their final product—national security. Success tends to be measured indirectly, through surrogate means.

AMOS A. JORDON ET AL., *AMERICAN NATIONAL SECURITY: POLICY AND PROCESS* 221 (4th ed. 1993).

192 See generally *BUREAUCRATIC POLITICS AND NATIONAL DEFENSE: THEORY AND PRACTICE* (David C. Kozak & James M. Keagle eds., 1988) (discussing the various theories behind defense procurement decisions and the bureaucratic politics that influence those decisions).

193 "Public Goods [are goods] that no individual can be excluded from consuming . . ." BUTLER, *supra* note 174, at 932.

194 "The basic reason for the problem [of weapons procurement] is incredibly simple and will be incomprehensible to anyone who has not spent time in the system: there is no profit and loss sheet. Thus, there is no competition and incentive to produce. The goal of every good bureaucrat is to get an exclusive franchise on what he is doing." Thomas S. Amlie, *Defense Acquisition—Some Observations and Suggestions* (unpublished manuscript), *quoted in* JAMES FALLOWS, *NATIONAL DEFENSE* 63 (1981).

195 "Another bureaucratic measure of organizational 'success' is size; a successful organization is one that is growing, usually in terms of budget and personnel. Organizational growth implies increasing capabilities and greater importance in decision-making and implementation." JORDON ET AL., *supra* note 191, at 221.

196 "In too many cases of weapons procurement decisions, organizational survival is at stake. It is impossible to separate out the competition that goes on concerning weapons decisions among military services over budget, promotion, approval, and power." LAUREN HOLLAND, *WEAPONS UNDER FIRE* 7 (1997). "Each of the services is as parochial in defending its interests as ever." *Id.*

fix,¹⁹⁷ and the politics of jobs¹⁹⁸ and re-appointment.¹⁹⁹ One could also add DOD's granting of contracts to ensure the continued economic viability of certain prime contractors.²⁰⁰ None of these incentives regarding weapons procurement decisions reflects the model of the wealth-maximizer used to explain commercial transactions in the private sector.²⁰¹

197 In the case of many weapons systems purchases "technology can substitute for military need as the original impetus for the conception" of the system. HOLLAND, *supra* note 196, at 10.

198 "Careerism is a pervasive force inside the Pentagon. Its symptoms are often subtle, not blatant." BURTON, *supra* note 168, at 5.

199 "Behind each weapon is a group of legislators responding to constituent demands, bureaucrats seeking to perpetuate their organization, executive officers reacting to governmental pressures, and defense contractors struggling for economic survival." HOLLAND, *supra* note 196, at 14.

200 According to one source,

The government, furthermore, has not been adverse to giving special breaks to [aerospace, communications, and electronics] firms when they get into trouble, ostensibly on the grounds of preserving the industrial base for national defense. Between 1958 and 1973 the government undertook some 3,652 rescue operations to help financially troubled firms. . . . Underlying such bailouts is a form of economic blackmail, aptly expressed in the quip by Congressman William Moorhead (D-PA) in 1970, in which he compared Lockheed's threat of bankruptcy to that of "an 80-ton dinosaur who comes to your door and says, 'If you don't feed me, I will die.' And what are you going to do with 80 tons of dead, stinking dinosaur in your yard?"

The Pentagon also attempts to spread around its contracts to ensure the well-being of its principle contractors. James Kurth calls this practice the "follow-on imperative," in which big companies get "turns" in being granted the latest contract in the sequence of new weapons systems. Kurth recently predicted that Lockheed, which has been having financial difficulties, would be the next to receive a follow-on contract. In early 1990 the Lockheed-led team won the bid for the lucrative Advanced Tactical Fighter contract.

Joel Yudken, *Economic Development, Technology, and Defense Conversion: A National Policy Perspective*, in REAL SECURITY, *supra* note 169, at 41, 49.

201 According to the United States General Accounting Office,

The commercial and defense environments created different incentives and elicited different behaviors from the people managing the programs. Specific practices took root and were sustained because they helped a program succeed in its environment—not because they were textbook solutions. The success of commercial product developments were determined when production units were sold. Until that point, the firms' own money was at risk. Failure was seen as both clear and painful if the customer walked away. This definition of success, coupled with the realization that production startup was relatively close at hand, made production concerns a key factor in program start and subsequent decisions and provided strong incentives to identify risk early and realistically. DOD programs began without needed technology in hand; rather they were encouraged to include undeveloped

Traditionally, DOD has focused most of its attention on justifying its need for funding rather than on the outcomes that its programs produced. DOD generally measures its performance by the amount of money spent, number of people employed, or number of tasks completed. Also, incentives for DOD decisionmakers to implement changed behavior have been minimal or nonexistent.²⁰²

DOD managers have little incentive to change behavior:

DOD managers have few incentives to improve the Department's financial, acquisition, and infrastructure management approaches. For example, in DOD's culture, the success of a manager's career depends more often on moving programs and operations through the DOD process than on improving the process. The fact that a given program costs more than estimated, takes longer to complete, and does not generate results or perform as promised is secondary to implementing the new program.²⁰³

What the present system of procurement within the DOD does promote is a system in which individuals monitoring the development and purchase of weapons have very little reason to scrutinize spending within a weapons program or to root out the fraud that might exist.²⁰⁴

technology. Because these programs ran much longer, production concerns did not play as big a role and were not critical to success in the early stages. The definition of success was more complicated in DOD. During most of production development, success was defined as getting DOD and Congress, as the customers, to fund the development annually. Optimistic assessments of performance and cost helped ensure this kind of success; realistic risk assessments did not.

U.S. GEN. ACCT. OFF., GAO/NSIAD-98-56, BEST PRACTICES: SUCCESSFUL APPLICATION TO WEAPONS ACQUISITIONS REQUIRES CHANGES IN DOD'S ENVIRONMENT 5 (1998) (visited Feb. 2, 1999) <<http://www.fas.org/man/gao/nsiad98056.htm>>. "The pressures and incentives in the DOD environment explain why the behaviors of managers and other sponsors of product developments differ from those of commercial programs. According to a 1994 study done for the Undersecretary for Acquisition, government program managers found their formal role of objective program management at odds with their informal role of program advocates." *Id.* at 36. "A feeling of responsibility for program advocacy appears to be the primary factor causing government managers to search aggressively and optimistically for good news relating to their programs, and to avoid bad news, even when it means discrediting conventional management tools that forecast significant negative deviations from plan." *Id.*

202 U.S. GEN. ACCT. OFF., GAO/T-NSIAD-97-143, DOD HIGH-RISK AREAS: ELIMINATING UNDERLYING CAUSES WILL AVOID BILLIONS OF DOLLARS IN WASTE 23 (1997) (statement of Henry L. Hinton Jr., Assistant Comptroller General, National Security and International Affairs Division).

203 *Id.* at 3.

204 According to Burton,

The majority of daily activities inside the Pentagon deal with weapons system acquisition. Although the public believes the business of the Penta-

Although not officially designated as a regulatory agency, the DOD and its subagencies act in a regulatory capacity with regard to purchasing and development decisions. Due to this quasi-regulatory function, the DOD has, in many instances, succumbed to what is known as "regulatory capture."

The history of economic regulation shows that industry-specific regulatory agencies tend to lose sight of their public interest mission over time. That is, although an agency may be created to control a particular industry, experience reveals that most regulatory agencies eventually adopt the perspective of the regulated industry. This is referred to as regulatory capture. Thus, eventually, the regulated industry frequently benefits from the regulation.

. . . .

It is not unusual for administrative agencies to act in the interest of the regulated industry rather than the so-called public interest. One explanation that has often been given is that the selection of board or commission members is biased towards choosing individuals from the industry.²⁰⁵

gon is defending the nation, its real business is buying weapons. The acquisition community within the Office of the Secretary of Defense, each service, and Capital Hill dominates the system. The entire process of acquisition, in turn, is dominated by unchecked advocacy. Many incentives exist for people to usher in new weapons successfully into the system. The rewards include promotions, career advancements, and the possibility of high-salaried jobs with the defense industry after retirement.

Programs for the acquisition of weapons systems are spawned and nurtured within this community. Because the incentives and rewards favor successful advocacy, there is seldom a serious attempt by the acquisition community to cancel its own programs.

BURTON, *supra* note 168, at 111.

205 BUTLER, *supra* note 174, at 129. For a discussion of the revolving door syndrome, see Edna Earle & Jass Johnson, "Agency Capture": The "Revolving Door" Between Regulated Industries and Their Regulated Agencies, 18 U. RICH. L. REV. 95 (1983). There are rational, economics-based reasons why the public does not affect such processes and selections: the rationally ignorant voter and the free-rider. Since the tax dollars lost due to lax regulation may only amount to a few dollars per year per voter, it makes little sense for voters to spend time on the problem since the money they would have to expend to get the information and organize to affect the change would far exceed the amount of money that they would save in taxes each year—thus the rationally ignorant voter phenomena. The free-rider problem is much more simple; since the problem affects every tax payer, every taxpayer has the incentive to wait for someone else to deal with the problem in order not to incur the expenses while reaping all the benefits. See PELTZMAN, *supra* note 176, at 329 (explaining the theory of the rational ignorance as it applies to regulations).

The regulated industry has the greatest interest in the rules and regulations to be promulgated by the agency. Thus, in administrative hearings on pro-

All the elements of “regulatory capture” exist within the DOD. Examples abound of administrations appointing defense contractors to top positions within the DOD, defense contractors that subsequently return to positions in companies that the DOD is supposed to oversee and regulate. Probably the most recent and highly publicized instance of the revolving door between the defense industry and the DOD leading to scandal is “Operation Ill-Wind.” Aimed at the corruption running rampant in the defense industry, this FBI-run sting operation led to the indictment and conviction of several defense industry executives, including Melvyn Paisley, a Boeing executive who was the Assistant Secretary for the Navy in charge of research and engineering in the Reagan Administration.²⁰⁶

posed rule-makings, their perspective is likely to be better articulated than the public interest. This bias is not surprising, because individual citizens do not have the incentive to voice their positions on public policy issues because of the free-rider problems. Thus, there is underrepresentation of dispersed citizens’ interests in the political process in general and the administrative process in particular.

BUTLER, *supra* note 174, at 130.

206 See PASZTOR, *supra* note 158, at 84, 368. It is not uncommon in the defense industry to encourage executives to work within the Pentagon and DOD. “[C]ountless civilian Pentagon officials, who had been appointed from the ranks of defense contractors, conduct themselves as if they were still working for the defense industry instead of the troops in the field. I have seen . . . civilian officials leave government service and go to work for defense contractors, who benefited from actions they took before leaving.” BURTON, *supra* note 168, at 66. “As a matter of policy, Boeing liked to loan fast-rising executives to the government for a couple of years. It bred good will for the company and demonstrated the high caliber of its people. For Boeing, the practice also ensured a steady stream of up-to-date intelligence about what was happening inside the services and the secretary’s office.” PASZTOR, *supra* note 158, at 48–49. Boeing exploited this type of relationship in its Minuteman missile project with the Air Force through executive Ben Plymale. Plymale had worked within the DOD from 1968–72, holding “a high-ranking research post in the Pentagon, advising the secretary of defense.” *Id.* at 48. The Air Force wanted to retain control over one leg of the nuclear deterrence triad; ground-based intercontinental missiles. The Minuteman program gave them the vehicle for doing so in the face of success of the Navy’s submarine launched missiles.

When it came to the Minuteman program, Boeing actually manufactured a very small part of the missiles themselves. But it was hired to put everything together The extraordinary close ties that developed between the company and the Pentagon on Minuteman became a model for managing future weapons projects. Boeing and the Air Force has such a good rapport and understood each other’s problems so well, Paisley liked to joke, that “pretty soon you couldn’t see the difference between them.” That symbiotic relationship paid off handsomely. Boeing ultimately collected nearly half of all Minuteman revenues, becoming the Air Force’s favorite supplier in the process.

A statement by Dr. Thomas S. Amlie, former Technical Director at the Naval Weapons Center at China Lake, California, describes the hazards for fraud and false claims inherent in the defense procurement system:

Nobody cares much what is bought so long as the money gets spent The DOD has all the symptoms of being corrupt, incompetent, and incestuous, and is so to an alarming degree. This is not because of some sinister plot but because the present structure forces millions of players to act like rational human beings and do what is necessary for their survival or perceived best interests. Many of the players are aware that things are going badly and are unhappy They are not, in the main, dishonest or incompetent, just caught in a very bad situation.²⁰⁷

With this statement in mind, and given the nature of the relationship between the DOD and present and prospective defense contractors, a call by FCA critics to create a legal regime that mirrors that used in the private commercial sector defies logic. The incentive for those within the DOD bureaucracy to scrutinize every project undertaken is simply not the same as in the private sector since, unlike the private commercial sector decision making processes driven primarily by profits, DOD bureaucratic decisions are more often made within political constraints.

The other important and possibly most influential players in the military buying game are the separate branches of the military: the Marine Corps, Navy, Air Force, and Army. The individual services, like the Congress, the President, and the DOD bureaucracies, have motives other than profit and loss that drive procurement and buying decisions: the perpetuation of their own existence being a prime motivator. These motives cause each service and the individuals within

Id. at 50–51. Another example of a high ranking DOD official coming from the defense industry was then-Undersecretary of Defense for Research and Engineering Dr. Richard DeLauer. Dr. DeLauer was an executive with TRW, Inc., a major defense contractor. See BURTON, *supra* note 168, at 118.

The rise of the defense industry and the government's reliance [due to the advent of the Cold War], to a greater degree than ever before, upon defense contractors for its weapons needs accompanied the decline of government in-house laboratories, arsenals and shipyards. At the same time, the traditional dividing line between government and industry was all but obliterated as high-ranking military and civilian officials shuttled back and forth between posts in the Pentagon and the defense community, creating blatant conflicts of interest which [have been] ignored or glossed over.

KAUFMAN, *supra* note 152, at xv–xvi.

207 Thomas S. Amlie, Defense Acquisition—Some Observations and Suggestions (unpublished manuscript), *quoted in* FALLOWS, *supra* note 194, at 64.

those services to make procurement decisions based on what is good for the integrity and continued existence of the service, and possibly the advancement of individual careers.²⁰⁸ Thus, there is little motivation on the part of the services or personnel within a particular service to investigate issues of fraud or false claims that might jeopardize their longevity.

This desire to extend the life of their particular branch exhibited by military service men finds various ways to express itself. One of them is interservice rivalry.²⁰⁹ Several well-documented cases evidence the corrosive force of inter-service rivalry and its deleterious effects on the buying of weapons for the military.²¹⁰ A prime example

208 Another observation from President Truman may shed some light as to why the costs of military projects tend to spiral out of control:

I do know from my experience . . . that no military man knows anything at all about money. All they know how to do is spend it, and they do not give a damn whether they're getting their money's worth or not. There are some of them . . . I've known a good many who feel that the more money they spend, the more important they are.

That's because of the education they get. I told you. It's like putting blinders on a man. . . .

So somebody has to keep tabs on the military and all the time, too. That's the reason our government is set up the way it is.

MILLER, *supra* note 41, at 164 (quoting President Truman).

The thing I've always felt about the Pentagon is that while it was probably necessary . . . it's not right to have all those people in one building without a single watchdog. There ought to be somebody looking into every penny that's spent, but there isn't. And we're all in trouble when that goes on, when the generals get that much power.

Id. at 170. For more insight into this problem, see COLONEL DAVID H. HACKWORTH, *HAZARDOUS DUTY* 298–315 (1996) (discussing the tendency of the services to oust those officers who speak out regarding issues of waste that hurt their service's image and budget).

209 "Wrote one British observer of his American cousins shortly after World War II, 'The violence of interservice rivalry has to be seen to be believed, and was an appreciable handicap in their war effort.'" RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR* 151 (1993). This rivalry even asserted itself during the Gulf War. "The Navy and Air Force wrangled about matters both foolish and urgent. The Navy resented aircraft rules of engagement . . . which discriminated against Navy pilots because they lacked redundant electronic means of distinguishing friend from foe." *Id.* "Many Army and Marine strategists believed the Air Force was trying to prove its worth at a time when one of the service's primary missions—maintaining the U.S. fleet of intercontinental bombers and land-based nuclear missiles—appeared increasingly obsolete." *Id.* at 223.

210 Even recent events in Kosovo reflect the deeply imbedded nature of interservice rivalry in the military psyche. "Army and Marine officers grumble that the Air Force oversold air power. Air Force officers say the air campaign is too limited in scope and size, with no ground-troops element." *A Special Weekly Report from the Wall*

of this inter-service rivalry pushing weapons procurement is the drive by the Air Force and the Navy to purchase the next generation of fighter aircraft. Both services believe that it is essential that they determine the design specifications for their next generation fighter. These two services both believe that to have the design for an aircraft imposed on them by a sister military service would undermine the "loser's" credibility with Congress and possibly jeopardize that service's share of the military budget.²¹¹

The debate and fight over acceptance of the F-16 demonstrates how inter-service rivalry, and not commercial factors like expense, drive procurement decisions. The concept for the F-16, a small, maneuverable fighter aircraft, was designed outside the Air Force's nor-

Street Journal's Capital Bureau: Finger-Pointing Begins at the Pentagon over Criticism of the Kosovo Bombing, WALL ST. J., Apr. 2, 1999, at A1.

211 The briefing discussed two threats—the "external threat," from the Russians, and the "internal threat," from the Navy. Its final chart read,

Unless the US Air Force thoroughly studies high performance austere fighters and is prepared to consider them as a necessary complement to other air superiority aircraft, the US Air Force may be:

A. Outgamed by the Navy (Again)

. . . .

"That got [the Air Force's] attention," [Air Force Colonel Everest Riccioni] said later. "The Air Force doesn't respond to what the Russians do. It reacts to what the Navy does."

FALLOW, *supra* note 194, at 102. "Unless the Fighter Mafia [in the Air Force] beat the navy to the punch, the Air Force would probably wind up with another Navy airplane." BURTON, *supra* note 168, at 17.

This competition concerning aircraft design is nothing new to the Navy and Air Force. Another example of this competition was the acquisition of the F-4 Phantom II. Under the direction of then Secretary of Defense McNamara, both services were forced to accept the F-4. Although the McNamara pushed to have the F-111 become the next fighter for the Navy and the Air Force, the Navy successfully thwarted this effort and acquired the F-14 Tomcat. See STEVENSON, *supra* note 185, at 55-62.

The Navy [and Air Force are] guilty of similar maneuvers. [The Navy] accepted the F-14 in spite of the airplane's failure to meet specifications in the same areas where the F-111B performed better. This is not to suggest the resurrection of the F-111B or to castigate the F-14. It merely illustrates the syndrome that services will support projects they initiate and actively destroy programs they did not. On their own projects, the services will look the other way if the projects fail to live up to specifications. In fact, they will change the specifications to conform to the aircraft's performance. The Navy did this with the F-14 and eventually with the F-18. If the Navy had sponsored the F-16 design, the Fighting Falcon would be flying off aircraft carriers today.

Id. at 218. For an in depth look at the inter-service rivalry and controversy surrounding the design and purchase of the TFX aircraft, see MOLLENHOFF, *supra* note 156, at 298-323.

mal development channels.²¹² Although the Air Force had no desire to buy or build the F-16 "Fighting Falcon," it felt compelled to test and ultimately buy the F-16 before the Navy could test a similar fighter and preempt the Air Force as to the design of this next generation of U.S. fighter aircraft.

The Navy responded to the F-16 by testing and purchasing the F/A-18 Hornet. The F-18 design actually lost in a fly-off competition against the F-16, but the Navy refused to buy an Air Force aircraft.²¹³ In this climate of interservice rivalry, each branch of the service has little or no incentive to police the behavior of the contractors making the weapon system that the branch favors for fear that the system will be canceled.

The culture of procurement teaches officers that there are two paths to personal survival. One is to bring home the bacon for the service as the manager of a program that gets its full funding. "Procurement management is more and more the surest path to advancement" within the military, says John Morse, who retired as a Navy captain after twenty-eight years in the service. When the cruise missile was gathering steam in the early seventies, there were two promising young officers, one in the Air Force and one in the Navy,

212 See FALLOWS, *supra* note 194, at 95-106; see also BURTON, *supra* note 168, at 7-27.

213 The following is an account of this development:

The U.S. Navy announced that it would develop the loser in the Air Combat Fighter competition, a decision that appeared to be in direct contradiction to the congressional will. At the May 2, 1975, news conference, announcing the decision, Dr. David Potter said, "It is perfectly clear that this does not meet the language of the Congressional Report, and there is nothing further to be said on that score. We're aware of the fact that the proper selection for the Navy had this unfortunate property."

Dr. Potter had testified the previous year that neither the YF-16 nor the YF-17 could be made into a successful carrier-capable Navy fighter. Yet it was the YF-17 that the U.S. Navy was announcing on May 2 as the winner—well, not quite. It publicly redesignated the F-17 as the F-18 at the time of the announcement. This redesignation implied a new and different airplane. By changing the designation, the Navy violated the substance and form of the directive. The Joint Committee language said that the naval Air Combat Fighter should be a common airplane with the Air Force Air Combat Fighter. Furthermore, the navy should make use of "technology and hardware."

The decision to redesignate the YF-17 as the F-18 had to be one of the worst public relations blunders of the decade. The navy was saying to Congress, not only do we reject your directions for the common airplane, but we are going to take the uncommon airplane and make it *appear* even less common.

STEVENSON, *supra* note 185, at 209.

who were in charge of their respective service's cruise missile programs. The Navy liked the cruise missile from the start, seeing in it ways to add more missions to the fleet. The Air Force saw the cruise missile as a potentially threatening alternative to its plans for a new bomber, and dragged its heels. The Navy man became an admiral and directed the combined cruise-missile program when the Navy and Air Force programs were merged. The Air Force man resigned, his career in a stall.²¹⁴

This interservice rivalry fuels another, equally problematic type of behavior within the military procurement process—lack of serious oversight by military personnel in charge of projects. There are innumerable cases of high ranking military personnel not scrutinizing the work of defense contractors because those officers identified their career advancement with the success of a given project.²¹⁵ Since there is no requirement for a project manager to show a profit or a loss, project managers can and have overlooked serious contractor misconduct in order to ensure project completion.

Perhaps one of the most recent flagrant examples of this type of systemic behavior within the military project and procurement process is the story of the A-12 Avenger. The A-12 was to be the replacement aircraft for the aging A-6, a Vietnam era attack aircraft. With an advanced version of the stealth technology presently incorporated in the F-117, the A-12 was touted as an example of cutting edge military aviation advancement.

Almost from the start of the program, however, the aircraft was beset by cost overruns and performance problems.²¹⁶ Yet senior officials, both military and civilian, within the Navy overlooked the problems.²¹⁷ The most extraordinary example of the obfuscation as-

214 FALLOWS, *supra* note 194, at 64.

215 "For military officers assigned to the Pentagon, advancement is a function of how well they help their respective service increase its share of the defense budget." STEVENSON, *supra* note 185, at x.

216 A cost analyst for the A-12 program, Deborah D'Angelo, prepared written cost estimates for the program manager, Navy Captain Elberfeld. She gave Captain Elberfeld a range of cost estimates and the captain chose continually to use the low-ball figure in his reports to superiors. In two other instances, he used numbers lower than those contained in D'Angelo's reports. Other analysts discovered the cost over runs and were also ignored or their reports suppressed. See BURTON, *supra* note 168, at 219-21.

217 According to Burton,

The investigative staff of the House Armed Services Committee identified ninety red flags of warning raised by various individuals in the Navy and OSD between January 1988, when the contract was signed, and 26 April 1990, when [Secretary of Defense] Cheney testified before the committee that the [A-12] program was on track.

sociated with the A-12 is the visit by Secretary of Defense Dick Cheney to the McDonnell Douglas A-12 manufacturing facility on March 14, 1990.²¹⁸ With the “A-12 contract call[ing] for the first test flight in June 1990, just a few months away,”²¹⁹ Cheney wanted to see the program’s progress. What Cheney saw, unbeknown to him, but more than likely known to the program’s management, was that “[a]ll the parts [of the A-12] were broken or had failed acceptance tests. Workers set up the plant floor to look like everything was progressing normally.”²²⁰

In the end, Cheney canceled the A-12 “complaining that he had been hoodwinked not only by the contractors but also by the Navy. ‘No one can tell me exactly how much more it will cost to keep this program going, and I do not believe a bailout is in the national interest,’ a livid Cheney announced”²²¹ The program’s termination was the culmination of a project in which “[o]ver \$3 billion of the taxpayers’ money was completely wasted, with nothing of any value received in return.”²²² In discussing the problems of military program managers overlooking defense contractor mismanagement in this case and in general, Chester Paul Beach, deputy general counsel to Navy Secretary Garrett, referred to this behavior as a “cultural problem.”²²³

There is no reason to believe that the factors which made these officials choose to respond the way they did are unique to [the Navy]. Indeed, experience suggests they are not. Unless means can be found to solve this abiding cultural problem, the failures evidenced . . . can be anticipated to occur again in the same or similar form.²²⁴

All of the warnings had been ignored or suppressed by people higher up the chain of command.

Id. at 218.

218 *See id.* at 222.

219 *Id.*

220 *Id.* at 222–23.

221 PASZTOR, *supra* note 158, at 127.

222 BURTON, *supra* note 168, at 232. “Nearly \$3 billion was spent [on the A-12], without a single prototype ever being fully assembled.” PASZTOR, *supra* note 158, at 126.

223 BURTON, *supra* note 168, at 228 (quoting Deputy General Counsel Chester Beach).

224 *Id.* (quoting Chester Beach); *see also* Mark Thompson, *A Crash and a Collision?: A Defense Contractor May Have Escaped Punishment Because the Marines Depend on It Too Much*, TIME, Sept. 20, 1999, at 40.

Pentagon officials acknowledge that the Cobra’s crash—and Bell’s role in it—could complicate the Marines’ efforts to keep buying V-22’s because of the doubts it might raise about Bell. “If the Marines come down hard on Bell, the whole program could be called into question,” says Lawrence Korb,

Other instances of the military supporting the line of the defense contractor despite evidence of hardware problems occurred during the recent Gulf War conflict. Tremendous claims were made by the Army and Raytheon, maker of the Patriot missile. At one point both were claiming a 100% kill rate for the Patriot against Scud missiles.²²⁵ Yet many insiders questioned the veracity of this kill figure.²²⁶ This incredible success rate may have prompted Congress to fund even more research and spending into various military missile defense programs. Subsequent studies indicate, however, that the claims of the Army and Raytheon were greatly exaggerated. The actual kill rate of the Patriot against the Scud missile may have been as low as nine percent.²²⁷ Yet, the Army could get little mileage out of publicizing such a low kill rate; poor performance of a program equates to termination and loss of budget dollars. "Not until more that a year after the war would the Army acknowledge that it has 'high confidence' in only ten Scud kills proclaimed in Israel and Saudi Arabia"²²⁸

Another aspect of the present military procurement system that potentially lends itself to abuse is the flow of mid and senior-level military officers into the corporate ranks of defense contractors.

The other path that procurement opens leads outside the military, toward the contracting firms. To know even a handful of professional soldiers above the age of forty and the rank of major is to keep hearing, in the usual catalogue of life changes, that many have resigned from the service and gone to contractors: to Martin Marietta, Northrop, Lockheed, to the scores of consulting firms and middlemen whose offices fill the skyscrapers in Rosslyn, Virginia, across the river from the capital. In 1959 Senator Paul Douglas of

who oversaw Pentagon logistics and personnel during the Reagan Administration.

Id.

²²⁵ See *Activities of the House on Government Operations, Performance of the Patriot Missile in the Gulf War* (visited Mar. 5, 2000) <<http://www.radix.net/~jcturner/patriot.html>>.

²²⁶ "In Tel Aviv and at the Israeli embassy in Washington, [the patriots' kill rate] was known as 'the Patriot bullshit.' American claims were based largely on faith and wishful thinking." ATKINSON, *supra* note 209, at 278. "On February 4 at the defense ministry headquarters in Tel Aviv, Major General Avihu Ben-Nun, commander of the Israeli air force, confronted Colonel Lew Goldberg, head of the Pentagon's Patriot Management cell. 'The Patriot doesn't work,' Ben-Nun declared bluntly. Of the twelve Scud-Patriot engagements analyzed by the Israelis, at most three warheads had been destroyed." *Id.*

²²⁷ *Id.*; see also ATKINSON, *supra* note 209, at 538. But see Center for Sec. Pol'y, *More "Patriot Games": Government Ops. Committee Discredits Patriot Critics, Cancels Report on Missile's Performance* (visited Mar. 5, 2000) <<http://www.security-policy.org/papers/1992/92-D124.html>> (contesting the low kill rate of the Patriot).

²²⁸ ATKINSON, *supra* note 209, at 278.

Illinois reported that 768 retired *senior* officers (generals, admirals, colonels, and Navy captains) worked for defense contractors. Ten years later Senator William Proxmire of Wisconsin said that the number increased to 2,072.²²⁹

This situation is unlike any that exists in the private commercial sector. In the military procurement setting, those individuals responsible for enforcing a given contract are subsequently looking to get a job from the very company that must fulfill the contract.²³⁰ No law prohibits officers from going to work for the defense contractors they were once responsible for monitoring. The potential for abuse is palpable. In other government contexts, the problem of undue influ-

229 FALLOWS, *supra* note 194, at 64–65 (footnotes omitted).

For the military, especially, the prospect of a plush revolving-door retirement job gives the coalition [of defense contractors and political appointees] a real hold on all but the most principled and selfless officers. Most are pushed out of the service in their mid-forties by the up-or-out system, and they need jobs for that expensive phase of life, what with growing families and staggering college costs ahead. They need good jobs, and the door at Defense Boondoggle Systems, Inc. (DBS) is open.

FITZGERALD, *supra* note 188, at 289; *see also* SENATOR WILLIAM PROXMIRE, REPORT FROM WASTELAND 151 (1970).

[O]ne of the most dangerous and shocking aspects of the military-industrial complex is the ease with which military officers retire and move into big jobs in the defense industries. It matches the way in which high-ranking civilians in defense or defense-related industries move into the Pentagon—and out again into industry. There is, in fact, an active, ever-working, fast-moving, revolving door between the Pentagon and its big suppliers.

Id. at 151–52. For the number of former, high-ranking officers working for large defense contractors in the late 1960s, *see id.* at 154–55.

230 Recent examples of this abound. In March, 1998, General Dynamics elected U.S. Army General George A. Joulwan to its board of directors. Joulwan was the Commander in Chief, United States European Command. *See General George A. Joulwan Joins General Dynamics Board* (visited Mar. 6, 1998) <<http://www.gd.com>>. General Richard D. Hearney, United States Marine Corp, former commanding general, 2d Marine Aircraft Wing, is now Managing Director of a division of McDonnell Douglas. Admiral David E. Jeremiah, United States Navy, is President and CEO of Technology Strategies and Alliances. General Robert Ris Cassi, U.S. Army, is Vice President of L-3 Communications Corp. and Lockheed Martin Corp. *See General Dynamics, The National Defense Panel: Conflict of Interest Doesn't Get Any Clearer Than This* (visited Nov. 24, 1998) <<http://www.pogo.org/mici/products/ndp.htm>>. All of these officers have outstanding credentials, but they also used and were responsible for monitoring the weapons systems made by the contractors they now work for in the civilian world.

The author, himself, has personal experience with this crossover problem. After leaving the Marine Corps, he was immediately hired by the company which made and serviced the aircraft he did research and development work on while in the Marines. He was recruited by another former marine officer who also worked on the aircraft before leaving the service.

ence and the appearance of undue influence in such circumstances prompted Congress to enact laws to account for the possibility and perception of abuse.²³¹

Nothing in the preceding paragraphs describing the incentives for Congress, the Executive branch, the DOD, or the Armed Services and their members is meant to imply a great degree of corruption on the part any of these institutions or their members. The preceding paragraphs do indicate, however, that none of these institutions nor their members have the same incentives to monitor contracts for fraud committed by defense contractors as commercial parties do in a profit based commercial transaction. One author accurately describes the situation as such:

There is nothing wrong with congressmen acting this way. Our system of government is built on this play of local interests in Congress; but from the perspective of the national interest in an efficient defense posture, there is a price to be paid for the supremacy of parochial interests in congressional decision making.²³²

We want our congressmen to protect our local interests, and one of those interest is bringing jobs to a local area; be it through highway construction or defense related industries. Getting a defense company indicted for fraud may help the nation as a whole, but it does little to put food on the plate of one's constituents.

Likewise, we want our military leaders and services to take pride in their respective services. This enhances esprit de corps, service solidarity, and morale. Good morale wins wars, the primary objective of any military force. The problem lies in the fact that this type of incentive structure may lead the different military services and the DOD to promote rivalries that are self-serving and destructive in terms of policing fraud in defense contracts. If a service feels its lifeblood and future existence depend on successful defense projects, what incentive

231 The Ethics in Government Act of 1978 was designed to prevent former government officials now acting as lobbyists from using their connections to influence their former employers. See Ethics in Government Act, Pub. L. No. 95-521, tit. VII, 92 Stat. 1864 (1978) (codified in part as amended at 18 U.S.C. § 207 (1994 & Supp. III 1997)). According to the Senate report on the Act, "[The Act and its amendments are] an attempt to prevent corruption and other official misconduct before it occurs, as well as penalizing it once it is uncovered." S. REP. NO. 95-170, at 30, *reprinted in* 1978 U.S.C.C.A.N. 4216, 4247; see also Matthew T. Fricker & Kelly Gilchrist, Case Comment, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803 (1990) (discussing the problems that resulted in the amendments of the law).

232 BLECHMAN, *supra* note 172, at 56.

does it have for aggressively rooting out failures and fraud? Obviously not the same incentive that a commercial company has to root out fraudulent conduct by the other party to a commercial contract. A commercial entity must make money to survive. A military service and a DOD office do not have to show a profit. They must prove they are viable entities, a viability demonstrated by big budgets and good projects, not by policing public programs tainted with fraud.

Although critics assert that the fundamental assumptions about participants in the procurement process have changed, from that of "government purchasing agencies lack[ing] sufficient incentives to identify and prosecute contractor misconduct"²³³ to a sympathetic view of DOD officials,²³⁴ they fail to show how the system has actually changed. The incentives, described above, operating on the government procurement agents still exist in the '90s, and assumptions aside, nothing dramatic about the DOD procurement system has changed since the '80s. Although critics state that "[t]he 1990s reforms reject the view of DOD procurement officials as being routinely captured by the industry and therefore prone to make contracting choices that systematically favor suppliers at the expense of taxpayers,"²³⁵ they provide no evidence to support these assumptions. What emerges from the data depicted in this Article is that the DOD procurement process is still beset by an incentive structure that favors less policing and deterrence of fraud than a similar commercial procurement transaction.

Simply stated, the military procurement system, serving as a proxy for the government procurement system in general, looks nothing

233 Kovacic, *A Deterrent*, *supra* note 4, at 207.

234 *See id.* at 207–209. Not all economists have adopted this belief about a fundamental change of opinion regarding the motivations of bureaucrats.

Although there are no doubt selfless civil servants and politicians concerned with the public good, not all individuals are selfless, and it may be more realistic to assume that individual actors within the public sector are as concerned with their self-interest as those in the private sector. Self-interest may be focused on survival, on promotion, on re-election, or on other rewards. On occasion, these achievements are consistent with good technocratic analysis like carrying out an appropriate cost-benefit analysis and correctly sizing and placing a damn. But on other occasions, the decision-maker may well attempt to minimize social cost of a given activity subject to winning reelection, or possibly to maintaining or at least avoiding diminution of chances for promotion.

Anne O. Krueger, *Government Failures in Development*, 4 J. ECON. PERSP. 9 (1990), reprinted in PAUL B. STEPHAN III ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS* 605, 607 (2d ed. 1996).

235 *Id.* at 208. For an example of this very debate, see *DefenseLink*, U.S. Department of Defense, DOD News Briefing (visited Aug. 22, 1998) <<http://www.defenselink.mil/news/May1995/#briefings>>.

like that of private sector commercial parties. Due to the character of the institutions involved in the procurement process, the incentives and influences that shape the contracting with and monitoring of defense contractors by Congress, the DOD, and the individual military services do not mirror those in the private sector. Thus, laws like the FCA should reflect the existing and very different environment of the military procurement world and not that of the commercial sector. Given the lack of incentives on the part of government defense procurement actors to monitor contractors for potential fraud with the same vigor as their commercial counterparts, the FCA should provide an increased incentive for contractors to monitor themselves.

V. AN ECONOMIC ANALYSIS AND SURVEY OF THE FCA

The objective of the FCA is to protect the public from being depleted of resources through fraud and false claims on the federal government. Yet critics of the Act assert that the statute does just the opposite. They insist that enforcement of the FCA actually costs the federal government more than the government recovers through FCA suits and settlements. To substantiate this assertion, critics turn to economic analysis to prove that the costs of enforcement outweigh the benefits. What the critics do not account for in their economic analysis is the fact that the government participants are not motivated by profit. Since the government side of a procurement deal is not motivated by profit, the incentive structure in government procurement transactions is altogether different from that of complete private sector transactions. Given the faulty premise of the critics' analysis, that government deals contain the same incentive structure as private deals, the critics' economic analysis is off the mark.

In order to show where the critics go wrong, it is necessary to define and explain several economic principles. First, economics shows "how incentives influence behavior."²³⁶ With the supply of resources finite, human choices are constrained: no one can have everything he or she wants; a person must choose between competing desires given his or her income or wealth. Income influences a person's choices. Second, "laws . . . affect incentives,"²³⁷ and because laws affect incentives, they can and do change human behavior by altering the incentives. Since all humans do not live under exactly the same conditions and constraints, laws will affect behavior in varying degrees—that is, those whose incomes are large may not be deterred from speeding if it saves them time and allows them to do more work

236 BUTLER, *supra* note 174, at 3.

237 *Id.*

at a high rate of income despite a potentially large ticket, while those with lower incomes may not speed. Thus, despite the existence of a law or regulation, some individuals may continue to participate in the prohibited activity if they would lose more by stopping the activity than they lose from continuing it.

Since a change in a law will affect the behavior of some individuals more than others, economists speak of such changes as affecting people at the margins. "The basic marginal analysis decision-making rule is that if the marginal benefit of an activity is greater than the marginal cost of an activity,"²³⁸ a person should choose to continue the activity. This prediction of behavior assumes that people act in their rational self-interest by attempting to maximize their own utility. These economic principles lead to the conclusion that if the government wants an economically efficient law, it must create a law that generates a marginal dollar of benefits for every marginal dollar of costs. Or, in economic terms, the marginal benefit of the law should equal its marginal cost.

If efficiency is the goal of a law, then the law should strive for optimal deterrence.²³⁹ Optimal deterrence exists when the law proscribing certain conduct does not cost society more than society gains from the law's implementation. Commentators have pointed to three areas which constitute the costs of illegal activity: "(1) the [social] costs imposed by the conduct itself; (2) the costs of detecting and apprehending suspected violators and of establishing their guilt; and (3) the costs of imposing sanctions. An ideal legal system would minimize the sum of these three costs."²⁴⁰

Critics of the FCA state that instead of reducing such costs, the Act actually increases the costs. They contend that the increase in the costs is the result of overdeterrence.²⁴¹ Overdeterrence in this situation occurs when too many potential contractors decline to engage in government contracting for fear of being civilly prosecuted under the FCA. They argue that this reduction in the number of contractors lessens competition, thereby driving up the prices of goods, lowering

238 *Id.* at 5.

239 This goal is not without its critics. See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1265 (1998) (arguing that an efficiency standard reduces the law to nothing more than a "pricing scheme" for non-compliance).

240 Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 1-2 (1989) (footnotes omitted).

241 Overdeterrence is a cost of the first type.

the quality of goods, and thus costing the government more than it would pay if competition for government contracts were greater.

To support this conclusion, critics point to anecdotal evidence of overdeterrence. "Anecdotal evidence suggests that the threat of False Claims Act liability has already driven some firms out of government contracting, and has caused others to isolate their government contracts business in separate divisions."²⁴² This instance fails to support the critics concerns for several reasons. First, the critics inaccurately describe the entire circumstances surrounding the financial problems of one contractor sued under the FCA. Second, the critics fail to point out the equally plausible and more likely reason why companies separate their divisions. Third, the critics do not address one of the concepts regarding deterrence, that of pricing deterrence properly both as to the likelihood of the plaintiff's success in litigation and the damages that might accrue. Finally, recent defense contractor data does not support their contention that contractors are leaving government contracting in droves.

A. *Why the Critics' Anecdotal Data Doesn't Translation*²⁴³ Well

To support the assertion that the FCA costs taxpayers money, critics point to anecdotal evidence, two relatively recent cases and a survey, and then apply an economic analysis to this data to support the claim of contractor overdeterrence.²⁴⁴ The critics, however, either fail to provide all the relevant data or fail to apply economic analysis to data that does not support their argument.

The case of *United States v. Data Translation, Inc.*²⁴⁵ stands as the centerpiece of the critics' arguments against the FCA as it is presently structured. In 1983, Data Translation, Inc. (DTI), a high-tech firm, entered into a government contract to sell computer boards to the government.²⁴⁶ The contract, a Multiple Award Schedule (MAS) contract, replaced the way that the federal government had previously purchased products from DTI.²⁴⁷ An MAS style contract is analogous to an option in that it stipulates a price for the product but not a

242 An Obstacle, *supra* note 4, at 3-4; see also DUNBAR, *supra* note 4, at 1-3. "Every company I represent in an FCA case vows to get out of government business as quickly as possible." Fax from attorney John T. Boese to John Terrence A. Rosenthal (Feb. 3, 1999) (on file with author).

243 See *United States v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992).

244 See generally DUNBAR, *supra* note 4; Kovacic, *A Deterrent*, *supra* note 4; An Obstacle, *supra* note 4.

245 984 F.2d 1256 (1st Cir. 1992).

246 See *id.* at 1257.

247 See *id.* at 1258.

requirement for the government to purchase the product.²⁴⁸ As a result of the contracting negotiations, the MAS in this case “permitted DTI to sell its boards . . . to government agencies at DTI’s ordinary list price less a four percent discount, provided that the ordering [government] agency placed orders for no more than ten items at any one time.”²⁴⁹ The contract also included a reference to the seller’s “Certificate of Established Catalogue or Market Price,” a document that contained language stating “that DTI certifies that all ‘data submitted’ are ‘accurate, complete and current.’”²⁵⁰

In October 1989, the government brought suit under the FCA, one of two claims in this case, because DTI did not reveal to the GSA that DTI offered discounts to particular customers under two different plans: one for “Special Price Customers,” and another regarding “Volume Purchase Agreement[s].”²⁵¹ The complaint alleged that DTI had presented 386 false claims at a cost of \$439,414 to the Government.²⁵² After hearing the evidence on the breach of contract claim and the FCA claim, the district court directed a verdict for DTI on the breach of contract claim,²⁵³ and the jury found DTI had not violated the FCA.²⁵⁴ The Government appealed both rulings.²⁵⁵

The Government’s FCA appeal related to the judge’s jury instruction regarding the FCA’s knowledge requirement. The Government argued that the state of mind requirement of the FCA included “not only 1) a specific intent to deceive, but also 2) ‘deliberate ignorance of the truth,’ and 3) ‘reckless disregard of the truth.’”²⁵⁶ The First

248 *See id.*

249 *Id.*

250 *Id.* at 1259.

251 *Id.*

252 *See* DUNBAR, *supra* note 4, at 2.

253 The critics misinterpret the judge’s decision in the case when they state that “then-appellate court judge, now-Supreme Court Justice Stephen Breyer concluded ‘that no reasonable jury could have found that DTI . . . violated the False Claims Act.’” DUNBAR, *supra* note 4, at 2. What Justice Breyer did write was that given the facts, the district court’s decision to direct a verdict for DTI on the Government’s breach of contract claim was correct since in the First Circuit’s estimation, no reasonable jury could have found for the Government on the contract claim. *See* United States v. Data Translation, Inc., 984 F.2d 1256, 1266 (1st Cir. 1992). The Court stated clearly that it would not apply the 1986 amendment’s knowledge standard retroactively, a question that had nothing to do with a reasonable finding by the jury, but with the proper jury instructions as to the Government’s burden of proof standard. *See id.*

254 *See id.* at 1257.

255 *See id.*

256 *Id.* at 1266.

Circuit, following the lead of the Sixth Circuit in *United States v. Murphy*,²⁵⁷ declined to retroactively apply the FCA's amended 1986 "knowledge" standard to DTI.²⁵⁸ The Court went on to state that it "need not decide the matter definitely, however . . . , [since] any error was 'harmless.'"²⁵⁹ The Court's decision not to apply the FCA's amended "knowledge" standard to DTI in this case should come as no surprise given the antipathy of federal courts to the retroactive application of amended statutes.²⁶⁰

Critics of the FCA point to several factors in the DTI case as support for their proposition that the FCA's burden of proof standard is an inappropriate one. First, critics point to the fact that upon completion of the suit, DTI left the government contracting business.²⁶¹ They contend that DTI's leaving the government contracting business is an indication of how the FCA, and the threat of an FCA suit, may tend to drive firms out of the government contracting arena, thus lowering the supply of goods and driving up prices for those goods. Second, the price of DTI's stock "fell by nearly 30 percent" upon initiation of the suit, and DTI's stock price never regained its pre-suit price even after the company's "legal vindication."²⁶² Critics attribute this loss almost wholly to "the reputational effect of the lawsuit."²⁶³ These two reasons, in addition to others, provide the critics with grist for their anti-FCA mill. Yet, these reasons bear some examination, for what they purport to prove does not seem to measure up under scrutiny.

First, the DTI story is a bit more complex than the critics let on. A look at the stock price of the company prior to the initiation of the law suit or the publicly released information concerning the indictment shows a company in trouble. Between mid-1987 and August 1989, the month DTI reported the FCA suit, the company's stock price had fallen from approximately twenty-five dollars per share to less than fifteen dollars per share and was on a downward trend at the

257 937 F.2d 1032, 1038 (6th Cir. 1991).

258 See *Date Translation*, 984 F.2d at 1266.

259 *Id.* at 1267.

260 "Retroactivity is not favored in the law . . . [and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). For a brief discussion of the history of the jurisprudence of retroactivity, see Michael S. Rafford, Note, *The Private Securities Litigation Reform Act of 1995: Retroactive Application of the RICO Amendment*, 23 J. LEGIS. 283, 285-93 (1997).

261 See generally *An Obstacle*, *supra* note 4.

262 DUNBAR, *supra* note 4, at 2.

263 *Id.* "Regardless of a lawsuit's outcome . . . defendants suffer reputational harm . . ." *An Obstacle*, *supra* note 4, at 16.

time of the suit's announcement.²⁶⁴ Earnings had dropped in 1988 from the previous year, and the company had announced in July, 1989, that it was cutting its work force by nineteen percent to control costs.²⁶⁵ Not quite the picture of the booming success destroyed by the FCA suit critics would have one believe. In fact, the deterioration of DTI's stock price may have little to do with the company's FCA suit, and everything to do with selling a noncompetitive product, resulting in poor earnings performance and poor stock performance.

Second, the argument about reputational harm of an FCA suit goes against some theories and actual experience. The efficient market hypothesis states that "capital markets instantaneously and fully reflect, in an unbiased manner, all economically relevant information regarding a security's prospective risks and returns."²⁶⁶ That is, the price of a stock reflects investors' beliefs in a company's future profitability. Although controversial, studies seem to suggest that the price of stock does reflect information about the company.²⁶⁷ Critics of the FCA state that although DTI was vindicated, the price of its stock never returned to pre-suit value because of the reputational effects of the charges.²⁶⁸ This seems to fly in the face of the efficient market hypothesis. As stated previously, the reputational harm theory as applied to DTI fails to account for the fact that DTI was not making money and that poor earnings were actually the reason the stock price stayed low! In addition, the critics do not explain why these reputational effects have not hit other contractors like Boeing, McDonnell Douglas, and others who have had several FCA claims brought against them, lost those claims, and yet whose stock price has done exceptionally well.²⁶⁹

264 See STANDARD & POOR'S CORP., STANDARD & POOR'S STOCK REPORTS: OVER THE COUNTER 3661G (Dec. 1989).

265 See *id.*

266 BUTLER, *supra* note 174, at 841.

267 See Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984).

268 See DUNBAR, *supra* note 4, at 2.

269 Lockheed Martin was the number one defense contractor in 1998, the third year in a row. It has been on the other end of several FCA suits and yet is still in the defense contracting business. See *Market Saavy for 3rd Year, Lockheed Martin Tops Pentagon's Defense Contractor List*, L.A. TIMES, Feb. 6, 1999, at C3. General Dynamics, the number three defense contractor, reported a 14% rise in its 1998 earnings despite being the subject of several FCA suits over the years. For further discussion, see S. REP. NO. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5267 ("In 1985, the Department of Defense Inspector General, Joseph Sherlick, testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses.").

It should be noted that small firms, like DTI, may be more likely to engage in fraudulent practices and thus are in greater need of scrutiny, not less. A recent report on the financial reporting of U.S. companies suggests that smaller firms, companies with less than \$100 million in assets, committed a significant amount of financial statement fraud,²⁷⁰ an activity analogous to submitting false claims. With this in mind, a legal regime designed to deter fraud should provide these small companies an extra incentive not to commit fraud.

Third, deterrence must account for the damages the plaintiff sustains and the risk that a defrauder will be caught and successfully sued. Deterrence, in economic terms, reflects the idea that if the amount of potential for loss under a certain course of action multiplied by the risk of the loss occurring outweighs the amount of the potential benefit multiplied by the likelihood of realizing the benefit, then a person should not and rationally will not engage in the activity. If the activity benefits society more through people pursuing it than society loses from people pursuing it, then any rule change which causes individuals to leave the activity may actually cost society even though less fraud is committed. This is the idea of overdeterrence: that a given activity has decreased too much due to changes in the law that raise the costs of the activity. Critics point to the FCA as having this effect on potential and actual government contractors.

What the critics do not address is the fact that deterrence should account for several things: (1) the gains through fraud obtained by the defendant, (2) the likelihood of being caught, and (3) the likelihood of the plaintiff succeeding in the suit. The latter two are not unitary, meaning that the chance of them happening are not one hundred percent certain. In fact, the nature of the government procurement setting in general, and the military procurement system in particular, assures that the second element of the equation will be a percentage much lower than one hundred percent. That is because often false claims submitted to the government are carelessly or conscientiously overlooked by the government body responsible for scrutinizing the contract. Like a civil RICO cause of action requiring a preponderance standard for treble damages, the FCA should have the same to properly deter false claims.

270 See MARK S. BEASLEY ET AL., COMMITTEE OF SPONSORING ORGANIZATIONS OF THE TREADWAY COMMISSION, FRAUDULENT FINANCIAL REPORTING 1987-1997: AN ANALYSIS OF U.S. PUBLIC COMPANIES 1-7 (1999); Elizabeth MacDonald & Joann S. Jublin, *SEC May Put Small Firms in Audit Plan*, WALL ST. J., Mar. 25, 1999, at A2 ("[A] new study of more than 200 corporate-fraud cases brought by the SEC between 1987 and 1997 found that most financial statement fraud is committed by companies with tiny market capitalizations and less than \$100 million in assets and revenue.").

Because frauds are concealable, trebling is important to produce proper incentives. If perpetrators pay what they took when they get caught, and keep the proceeds the rest of the time, then fraud is profitable. If victims recoup only what they lost, and face the burdens and uncertainties of the legal process plus the costs of their own counsel, then victory will not make them whole, and the shortfall may mean that victims will not vigorously investigate and litigate. Trebling addresses both halves of this equation.²⁷¹

The rationale underlying Judge Easterbrook's decision supports the FCA based on the findings of Congress as indicated by the report below:

Fraud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence. GAO concluded in its 1981 study that most fraud goes undetected due to the failure of Government agencies to effectively ensure accountability on the part of program recipients and Government contractors. The study states:

For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim The sad truth is that crime against the Government often *does* pay.²⁷²

In addition to the aforementioned criticisms of the FCA, critics also point to the division of Litton Industries and imply that the division was motivated by an attempt to limit the company's liability exposure after it settled an eighty-two million dollar FCA case.²⁷³ The conclusion critics wish to draw is that companies, faced with the possibility of FCA lawsuits, are forced to act inefficiently when doing government contracting. The more plausible reason for the Litton spin-off, however, is the desire of the Litton Chairman, Alton Brann, to increase shareholder value. The spin-off of the Western Atlas division allowed the market to more accurately value the assets of both Atlas and Litton. This valuation play has little or nothing to do with the FCA, but everything to do with under-valued stock prices hurting a company and investors.²⁷⁴

Another plausible reason for separating a company's government contracts business from its commercial business is the desire to keep the incentive system present in the government contracting arena

271 *Mosler v. S/P Enters., Inc.*, 888 F.2d 1138, 1143-44 (7th Cir. 1989) (citation omitted) (discussing the deterrent effect of treble damages).

272 S. REP. NO. 99-345, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 (quoting a GAO Report).

273 *See* An Obstacle, *supra* note 4, at 4.

274 For more information on the spin off of Western Atlas, see Christopher Palmeri, *Divide and Prosper*, FORBES, Nov. 21, 1994, at 118.

from influencing the individuals who operate in the commercial arena. As noted by one critic of the military procurement system, "To the [large] extent that the DOD performs non-competitive procurement, it forces industry into the same habits. Indeed, the large corporations have to separate those divisions which do business with the Government from those in the competitive market because of the corrupting."²⁷⁵ Thus, the possibility of FCA suits may have nothing to do with the decision of commercial contractors to keep their government and commercial divisions separate. Much more important in that decision may be the desire to keep the commercial division's personnel focused on efficiency and not on abiding by the labyrinth of government regulations that exist in the government procurement sector.

Instead of focusing attention on reworking the legal regime that deters fraud, critics ought to be worried about the mounds of regulations which seem to be the real culprit in government procurement inefficiencies.

Thus, as shown above, despite the desires of critics to paint every seemingly negative happenstance to a company with an FCA brush, the facts suggest otherwise.

B. *Overdeterrence: What the Numbers Really Say*

Because the FCA's burden of proof standard lowers the threshold for plaintiffs winning FCA suits, critics, using marginal analysis, conclude that the statute is an overdeterrent, keeping potential contractors out of the market and causing existing contractors to leave the market. Although critics concede in certain instances that "there is little empirical evidence on the impact of the False Claims Act,"²⁷⁶ and that Professor Kovacic "presents no quantitative data to support his thesis, his point that the False Claims Act lessens competition by reducing the number of vendors is theoretically sound."²⁷⁷

Theoretically, the conclusion is sound. It follows the principle of marginal analysis, that changes in rules or laws will affect behavior at the margins. However, the statements by the critics that there is little empirical data is not accurate. There is a body of data on the number of defense contractors awarded contracts starting in 1966 to the pres-

275 FALLOWS, *supra* note 193, at 64 (quoting T.S. Amlie, Defense Acquisition—Some Observations and Suggestions (unpublished manuscript)).

276 DUNBAR, *supra* note 4, at 3.

277 *Id.* at 21. There is another plausible explanation, other than the FCA lower burden of proof, for the decrease in commercial contractors making contracts with the government; the shrinking level of government influence on the economy as a whole. See Kathy Chen, *Pentagon Finds Fewer Firms Want to Do Military R&D*, WALL ST. J., Oct. 22, 1999, at A20.

ent, and this data does not support the critics' conclusions. To see if their assumptions are correct, one need only look at the data regarding the number of contractors engaged in government work to get a sense of whether or not the assumption of contractor flight is warranted. Using the number of contractors in the military procurement field as a proxy, the critics' drastic marginal analysis assumption does not appear to hold up.²⁷⁸ In 1986, the DOD employed 34,267 prime contractors, prime contractors being those firms that obtained direct contract awards of over \$25,000.²⁷⁹ Although the number of prime contractors sustained a decrease through 1989, to a low of 28,220,²⁸⁰ in 1990 the number of prime contractors began to rise. By 1996, the number of prime contractors doing DOD work stood at 37,406, exceeding the number of prime contractors employed by the DOD in 1986. The following year the number decreased to 37,071.²⁸¹ It is important to note that the net increase in the number of prime contractors occurred during and despite a period of declining defense budgets,²⁸² which could lead one to conclude that there is actually more competition in the defense contracting arena than there was prior to the FCA's amendment in 1986.

What this data suggests is that the cries of the critics regarding the deterrent effect of the FCA may be overblown. Although marginal analysis does suggest that a decrease in the burden of proof standard will induce some contractors to leave government contracting and some never to begin government contracting, the actual numbers are minimal and the increase in prices and lowering of quality inconsequential if not undetectable. It is difficult for the critics to argue that the Act was not overdetering prior to 1986, with 34,000 defense contractors, but that it is overdetering in 1998, with 34,000 defense contractors.

278 Given the fact that almost half the FCA suits filed each year relate to military contractors, this proxy seems appropriate. See *infra* 1488 app. B (containing a chart graphically displaying the number of military contractors doing business with the government from 1966–98).

279 See Fax from Washington Headquarters Services Directorate for Information Operations and Reports to John Rosenthal, Federal Practice and Procedure Editor, *Notre Dame Law Review* 2 (Feb. 11, 1999) (on file with author).

280 See *id.* at 8.

281 See *Number of DOD Prime Contractors with Awards of \$25,000 or More by Types of Business* (visited Apr. 21, 2000) <<http://web1.whs.osd.mil/peidhome/protrend/prochist/typebus.htm>>.

282 See *infra* 1487 app. A.

C. *Conflicting Surveys*

The critics hold up the results of a small survey as proof of their claim that the FCA has an insidious effect on the costs of goods and services procured by the government.²⁸³ Several other surveys of much larger magnitude contradict the conclusions of the critics. In one survey, defense contractors cited six primary areas in which government procurement practices impose significant burdens requiring the contractors to fundamentally alter the way they do business.²⁸⁴ None of the areas cited by the contractors included mention of the FCA as a significant impediment.

In another survey done by the DOD regarding firms doing commercial and government contract work, the survey indicated that the two major reasons for the increased costs for the government were DOD's quality assurance standards and the Truth In Negotiations Act.²⁸⁵ The study mentioned nothing about the FCA. The Center for Strategic and International Studies (CSIS) conducted a recent study and concluded that four areas of legislation and regulation by the government cause significant differences between government contracting and commercial contracting.²⁸⁶ As in the other surveys, military specifications and standards, as well as unique federal contracting requirements, were deemed the culprits. Nothing seemed to indicate that the FCA was a major or even significant cause of the differential between commercial and government production.

All of the surveys and studies mentioned above do have certain features in common: they all mention the problem of government specific standards and requirements and do not mention the FCA. The fact that the FCA was not mentioned as a significant factor by the very individuals it is allegedly driving out of the government contracting business would indicate that the FCA is not the negative deterrent critics would have one believe it is.

283 See Kovacic, *A Deterrent*, *supra* note 4.

284 See *DefenseLink*, U.S. Dep't of Defense, *Accompanying Report of the National Performance Review: Part I*, at 27 (1993) (visited Nov. 29, 1998) <<http://defenselink.mil/speeches/1995/t19950221.html>>.

285 See *DefenseLink*, U.S. Department of Defense, *DOD Must Re-Engineer Its Procurement System Now* (Prepared Statement of Colleen Preston, Deputy Undersecretary of Defense for Requisition Reform, to the House Government Reform and Oversight Comm.) (Feb. 21, 1995) (visited Aug. 22, 1998) <<http://defenselink.mil/speeches/1995/t19950221-preston.html>>.

286 See CENTER FOR STRATEGIC & INT'L STUD., *INTEGRATING COMMERCIAL AND MILITARY TECHNOLOGIES FOR NATIONAL STRENGTH: AN AGENDA FOR CHANGE* (1991).

D. Reduction of Incentives at Just the Wrong Time

Particularly troubling about the critics' analysis is their failure to account for the fact that the DOD is drastically scaling back the size of its acquisition workforce.²⁸⁷ The following statement by Eleanor Hill, Inspector General, Department of Defense, encapsulates the threat and costs of downsizing the acquisitions workforce:

Maintaining public support for Defense programs requires good contract management and prompt identification of any potential fraud. As personnel reductions in the acquisition workforce have occurred, we have also seen reductions in programs for fraud prevention, detection, and reporting. For example, I am very concerned about the decrease in the number of fraud referrals that we receive from the Defense Logistics Agency. Since 1995, the number of referrals that we receive for procurement cases has dropped by 47 percent. This decrease is partially because the number of personnel in the Office of the General Counsel involved in fraud detection and referral at the Defense Logistics Agency has been cut from 15 to 3. As reform efforts continue to emphasize partnering with industry, there also seems to be less emphasis at the working level on reporting fraud. While we understand the many benefits of the new emphasis on Government/industry teamwork, the Department should not assume that procurement fraud no longer occurs. To the contrary, our criminal investigators report that their proactive undercover efforts regularly reveal significant fraudulent activity. Unfortunately, due to the ongoing downsizing, those proactive efforts are likely to be curtailed in the future and we are concerned

²⁸⁷ See *Hearings Before the Subcomm. on Acquisition and Technology of the Senate Comm. on Armed Services*, 105th Cong. 22 (1998) (statement of Eleanor Hill, Inspector General, Department of Defense). A transcript of this hearing is available at <http://www.senate.gov/~armed_services/statemnt/980318eh.htm>. During the hearing, Inspector General Hill stated,

The acquisition workforce at DOD is undergoing a 47-percent reduction from 617,000 personnel in 1989 to 329,000 in 2000. . . . Unfortunately, there has been no risk assessment or systematic determination on whether needed process improvement, such as electronic contracting, will occur before the personnel reductions are made. The General Accounting Office has repeatedly reported that Defense contract management is a high risk area. Nevertheless, both contracting staffs and audit resources have been drastically reduced, and further reductions are planned. At the same time, DOD plans to increase the contracting out of numerous functions, thus creating more contract administration workload. The DOD also plans to increase its procurement budgets significantly in the coming years, spending over \$350 billion for fighter and attack aircraft alone. Both trends will increase the need for effective contract award, administration, and audit.

that DOD fraud awareness and detection programs will be unable to adequately protect the many taxpayer dollars that fund DOD procurement efforts.

....

Many advocates of drastic changes in Government acquisitions practices are unaware of, or chose to ignore, the fact that procurement fraud remains a threat to the DOD and the U.S. taxpayer.²⁸⁸

This statement reveals what the critics refuse to acknowledge; the incentive structure inherent in the 1986 amendments to the FCA address the very issues that face the DOD and other government agencies in their attempts to procure goods and services and thwart fraud. With the recent trend of downsizing the Government, government contracting laws must place a great economic incentive on contractors to police and administer government contracts. This need for a greater economic incentive to be placed on contractors follows from the fact that there will be fewer government officials around to monitor those contracts for fraud.

E. The Most Important Cost

Critics of the FCA contend that the amount of money recovered by the government through FCA suits is more than offset by the amount of money the government loses, as a result of over-deterrence, through decreased competition and decreased quality of goods and services. The recovery of monies by the government since the 1986 FCA amendments is no small sum.²⁸⁹ Yet, that sum pales in comparison to the estimated amount of government funds lost to fraud each year.²⁹⁰ While FCA critics point out that FCA proponents fail to include the costs of alleged over-deterrence in calculations about the Act's success, critics fail to include the most significant benefit of the FCA in their calculations: bolstering of public confidence in the institutions of government.

The cost of fraud cannot always be measured in dollars and cents, however. GAO pointed out in its 1981 report that fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. Even in cases where there is no dollar loss—for

288 *Id.* at 22–23.

289 As of 1999, the United States government had recovered some \$6 billion under the FCA. See Peter Aronson, *Supreme Court's Qui Tam Case Is Having an Impact*, NAT'L L. REV., Dec. 20, 1999, at A9.

290 The Department of Justice estimated that fraud consumes between one and 10% of the budget each year. See S. REP. NO. 99-345 (1986), reprinted in 1986 U.S.S.C.A.N. 5266.

example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined.²⁹¹ Although no one can attach a hard and fast number to this cost, the effects of decreased public confidence in government are not easily dismissed.

The FCA in its present configuration not only brings in revenue and deters future fraud, it helps increase public confidence in government by demonstrating to citizens that government institutions, with the help of citizens, can and do effectively police their own programs. This effect alone, although not quantifiable, may be the most important benefit of the FCA in the long run. A decrease in the Act's effectiveness caused by an increase in the burden of proof standard may cause much more harm than what adding a couple of contractors to the government roles is worth.

VI. CONCLUSION

The original enactment of the FCA was the federal government's first attempt at deterring contracting abuses that affected the national fisc and the nation's security. The 1986 amendments to the FCA represent the federal government's clear understanding that the circumstances surrounding the government purchase of goods and services in general, and by the military in particular, have changed dramatically. Despite the emphatic calls by critics of the FCA to reshape the Act, their arguments do not accurately portray why the FCA's 1986 amendments were enacted in the first place.

First, as pointed out by this Article, the history of the burden of proof standard indicates that the "clear and convincing" standard for civil fraud is a creation of the courts of equity. This intermediate standard was a response to the perceived, but not empirically proven, supposition that equity courts would become the domain of unmeritorious civil fraud cases. The standard was later adopted by some state law courts when the courts of law and equity merged in this country. Thus, nothing in our legal history mandates that "preponderance of the evidence" should not be the standard for a statute aimed at not only fraud but false claims.

Second, many states, including California, the seventh largest economy in the world, have adopted the "preponderance of the evidence" standard for civil fraud cases without any apparent deleterious effects on the interactions of private sector commercial parties. In

291 *Id.*

fact, besides the states that presently have the preponderance standard for civil fraud cases, many states have enacted and are in the process of enacting FCA-like statutes that include a “preponderance” burden of proof standard.

Third, the military procurement system, which may account for two-fifths of the federal government’s discretionary budget, has none of the incentives that exist in the private commercial sector with regard to monitoring contracts for fraud. The military procurement system is not a profit driven system, like that of the private commercial sector. As indicated in this Article, the participants in the military procurement process (Congress, the DOD, the individual services, and personnel within those services) work under an entirely different set of incentives and constraints than those of the private sector. In order to deter fraud and false claims, the laws that regulate this system must reflect that different reality.²⁹²

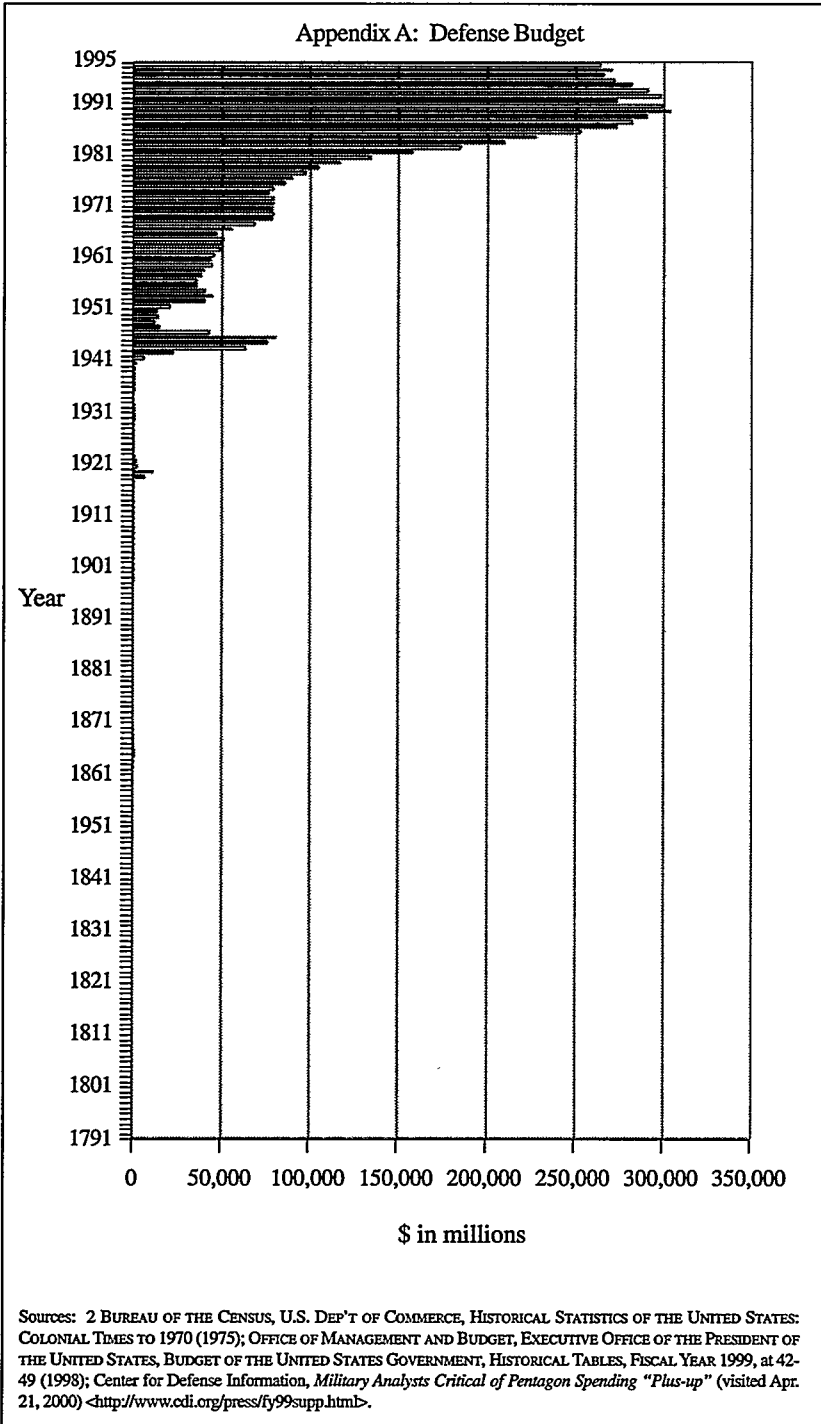
Fourth, some of the data on the actual number of contractors doing business with the government suggests that the statute is not causing the overdeterrence the critics contend it should.

In sum, the FCA and its burden of proof standard are rational responses to a government procurement system that bears little resemblance to the commercial sector. Thus, the FCA should retain its “preponderance” burden of proof standard.

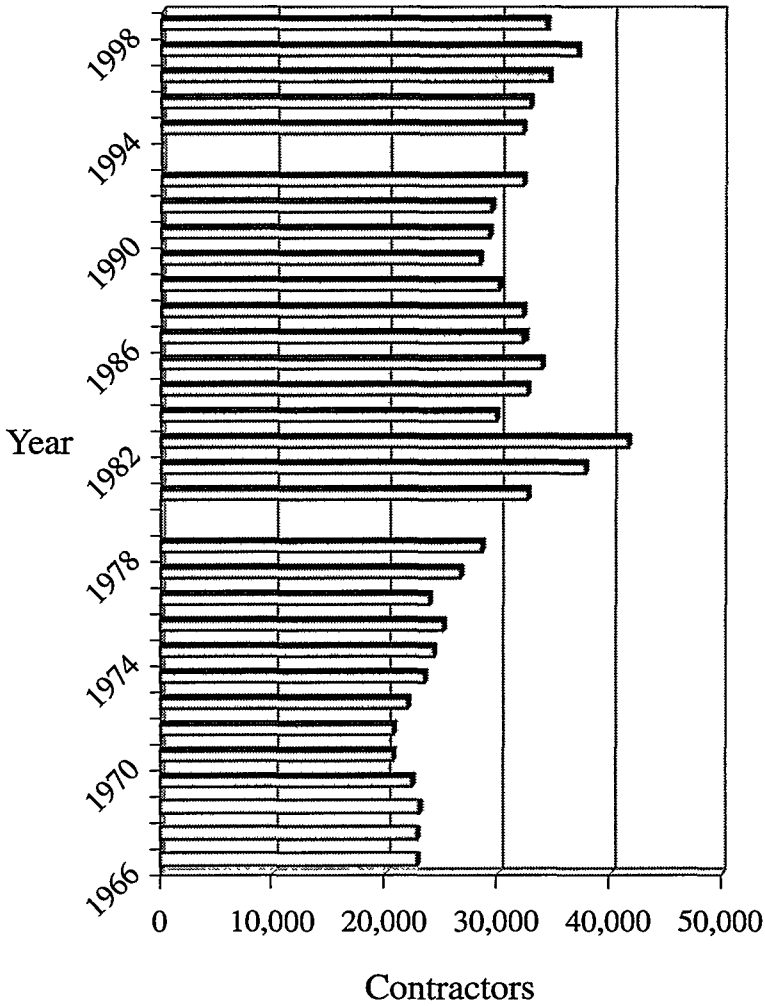
292 Members of industry have recently suggested changes to the False Claims Act, 31 U.S.C. §§ 3729–33 (1994):

Some of those who have called for changes in the Act claim that commercial contractors will not do business with the Government because they fear that if they make a simple mistake and submit incorrect or erroneous documentation to the Government they will be treated like criminals and accused of defrauding the Government. . . . I note that we have seen no evidence of such misuse of the statute from those making these arguments. Secondly [sic], their argument ignores the clear reading of the statute. A simple mistake does not amount to a false claim subject to the False Claims Act.

Hearings Before the Subcomm. on Acquisition and Technology of the Senate Comm. on Armed Services, 105th Cong. 24–25 (1998) (statement of Eleanor Hill, Inspector General, Department of Defense). A transcript of this hearing is available at <http://www.senate.gov/~armed_services/statemnt/980318eh.htm>.



Appendix B: Total Number of Defense Contractors with Contracts Exceeding \$25,000



Sources: *Number of DOD Prime Contractors with Awards of \$25,000 or More by Types of Business* (visited Apr. 21, 2000) <<http://web1.whs.osd.mil/peidhome/protrend/prochist/typebus.htm>>; Fax from Washington Headquarters Service Directorate for Informations Operations and Reports to John Rosenthal, Federal Practice and Procedure Editor, *Notre Dame Law Review* 2 (Feb. 11, 1999) (on file with author).