

Perception Is Reality, or Is It?

*A Case Study of Four Department of Defense (DoD) Procurement Scandals
Does Media Coverage Lead to Procurement Reform?*

By

Airon Ann Mothershed

B.S., May 1998, University of Idaho

J.D., May 2001, University of Idaho College of Law

A Thesis submitted to

The Faculty of

The George Washington University

Law School

in partial satisfaction of the requirements

for the degree of Master of Laws

August 31, 2011

Thesis directed by

Christopher R. Yukins

Professor of Government Contracts Law and

Co-Director, Government Procurement Law Program

Acknowledgements

The author wishes to thank Professors Christopher R. Yukins and Karen D. Thornton for their insight, guidance, and encouragement on this paper.

Disclaimer

Major Airon A. Mothershed serves in the U.S Air Force Judge Advocate General's Corps. This paper was submitted in partial satisfaction of the requirements for the degree of Master of Laws in Government Procurement at The George Washington University Law School. The views expressed in this paper are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

Abstract

Perception Is Reality, or Is It?

A Case Study of Four Department of Defense (DoD) Procurement Scandals Does Media Coverage Lead to Procurement Reform?

Over the past thirty years, American taxpayers have seen multiple Department of Defense (DoD) procurement scandals brought to light. Of these historic scandals, some of the most egregious examples include: the spare parts scandal that emerged in the early to mid-1980s, which introduced the public to the \$435 hammer and \$600 toilet seat; the Operation Illwind scandal, which exposed a network of corruption in the DoD procurement system; and the Darleen Druyun scandal, which led to a decade-long saga surrounding the replacement of the refueling tanker aircraft. Based upon lessons learned from these past mistakes, Congress and the DoD have reformed the federal procurement system several times in numerous ways. Nevertheless, the current federal procurement system is not perfect. As such, new DoD procurement scandals arise from time to time, and with each new occurrence, Government and DoD officials must again review the process to determine if new reforms are necessary.

One recent procurement scandal has again drawn attention to the procurement process. Identified as the “Contracting With the Enemy” scandal in this thesis, this crisis was revealed in Fall 2009 when a news journalist reported the Taliban and other enemies of the U.S. were being indirectly funded via U.S. taxpayers’ dollars through U.S. contracting activities in Afghanistan.

Throughout the history of these DoD procurement scandals, the media has played an important role. All of the historic scandals met the criteria of newsworthy stories. They were current, negative, and related to the Government's spending an exorbitant amount of taxpayers' money. These elements provided continuous fodder and helped journalists maintain public interest in the news stories surrounding the scandals throughout the life of each scandal. As news journalists reported on each scandal, they emphasized the most salacious, human-interest factors of each scandal – these included “greedy” contractors and defense consultants, corrupt high-level procurement officials, and crusading public servants. The current scandal, thus far, seems to be presenting similar elements.

The purpose of this paper is to analyze and determine the correlation between media coverage and procurement reform to determine if such coverage promotes reform. In this endeavor, this thesis will explore the facts, circumstances, and related media coverage surrounding the three historic and one current DoD procurement scandals mentioned above. This paper will briefly discuss the definition of a procurement scandal and the criteria news media use to determine whether to publicize scandals. It will then present three methodologies for analyzing the correlation between media coverage, scandals, and reform. The facts of the three historic scandals will be applied and analyzed to the methodologies to ascertain the correlation between the media coverage and subsequent reform that occurred in those cases. Then, the results and analyses derived from the historic scandals will be applied to the current DoD procurement scandal and used as a tool to predict whether or not reform will occur in the case of the Contracting With the Enemy scandal.

Table of Contents

I. INTRODUCTION	1
A. What is a Scandal?	2
B. Scandals As Newsworthy Stories	4
II. A CASE HISTORY OF THE \$435 HAMMER AND \$600 TOILET SEAT SCANDALS AND RELATED MEDIA COVERAGE.....	5
A. How it Began.....	6
B. The \$435 Hammer Scandal	7
1. Background Facts	7
2. Media Coverage and the Development of the Hammer Scandal.....	8
C. The \$600 Toilet Seat Scandal.....	12
1. Press Coverage of the \$600 Toilet Scandal and Ongoing Hammer Scandal.....	13
D. Outcome and Reform Resulting From the Spare Parts Scandals	15
III. A CASE HISTORY OF OPERATION ILLWIND AND ITS RELATED MEDIA COVERAGE.....	20
A. How it Began.....	20
B. Media Coverage and the Development of the Operation Illwind Scandal	24
C. Outcome and Reform Resulting from the Operation Illwind Scandal	46
IV. A CASE HISTORY OF THE DARLEEN DRUYUN SCANDAL AND ITS RELATED MEDIA COVERAGE	52
A. How it Began.....	54
B. The Darleen Druyun Scandal	59
1. Background Facts	59
2. Media Coverage and the Development of the Darleen Druyun Scandal.....	61
C. Outcome and Reform Resulting from the Darleen Druyun Scandal	81
V. A CURRENT STUDY OF THE CONTRACTING WITH THE ENEMY SCANDAL AND RELATED MEDIA COVERAGE.....	89
A. How it Began.....	89
B. The Contracting With the Enemy Scandal	91
1. Background Facts	91

2. Media Coverage and the Development of the Contracting With the Enemy Scandal.....	92
C. Reform Thus Far Resulting From the Contracting With the Enemy Scandal	108
VI. METHODOLOGIES AND ANALYSIS REGARDING THE RELATIONSHIP BETWEEN MEDIA COVERAGE, SCANDALS, AND REFORM	111
A. Methodology 1: Drohan’s Seven Stages of Scandal	112
1. Findings and Analysis: Drohan’s Stages of Scandal as Applied to the Hammer and Toilet Seat Scandals.....	115
2. Findings and Analysis: Drohan’s Stages of Scandal as Applied to the Operation Illwind Scandal.....	120
3. Findings and Analysis: Drohan’s Stages of Scandal as Applied to the Darleen Druyun Scandal	125
B. Methodology 2: Sherman’s Study of Correlation Between Scandal and Reform.....	137
1. Findings and Analysis: Sherman’s Theory as Applied to the Hammer and Toilet Seat Scandals	138
2. Findings and Analysis: Sherman’s Theory as Applied to the Operation Illwind Scandal.....	140
3. Findings and Analysis: Sherman’s Theory as Applied to the Darleen Druyun Scandal.....	142
C. Methodology 3: The News Framing Analysis Theory	144
1. Findings and Analysis: The News Framing Analysis Theory as Applied to the Hammer and Toilet Seat Scandals.....	147
2. Findings and Analysis: The News Framing Analysis Theory as Applied to the Operation Illwind Scandal.....	148
3. Findings and Analysis: The News Framing Analysis Theory as Applied to the Darleen Druyun Scandal.....	151
D. Overall Conclusions Regarding the Relationship Between Media Coverage, Scandals, and Reform.....	153
1. Drohan’s Theory.....	153
2. Sherman’s Theory.....	157
3. News Framing Theory	158
VII. APPLICATION OF PRECEDING METHODOLOGIES AND ANALYSES TO PREDICT PROBABILITY OF REFORM ASSOCIATED WITH THE CONTRACTING WITH THE ENEMY SCANDAL	159
A. Drohan’s Stages of Scandal as Applied to the Contracting With the Enemy Scandal	159

B. Findings and Analysis: Sherman’s Theory as Applied to the Contracting With the Enemy Scandal	163
C. Findings and Analysis: The News Framing Analysis Theory as Applied to the Contracting With the Enemy Scandal	165
D. Prediction Regarding Reform In Connection With the Contracting With the Enemy Scandal	166
VIII. CONCLUSION.....	169

List of Tables

The Stages of Drohan's Theory	113
-------------------------------------	-----

I. INTRODUCTION

Several recent crises related to government procurement, including the BAE Systems bribery scandal in the United Kingdom and the United States' DoD logistics and security contract scandals in Afghanistan, have suggested that prolonged, negative media coverage of procurement scandals have the potential to move a proposed change to procurement policy from the “back burner of some committee straight off the stove and onto the table” as nothing else can.¹ These events further imply that publicized procurement scandals can be instrumental in promoting reform because “when subjected to public scrutiny, [they have the ability to] unify senior management and politicians in a newly found and shared resolve to solve the problems”² However, not all procurement crises and problems rise to the level of “scandals.” Many deserving procurement issues are never publicized, and despite academic authorities' and procurement officials' tiring push for reform, are largely ignored unless and until a scandal comes into play. Further, even when such problems are publicized, the coverage may not always lead to the reform of applicable processes, laws, and/or regulation(s).³

¹ Michael Asner, Address at the 14th Annual Florida Government Purchasing Conference and Trade Show: Moving Away from Scandal-Driven Procurement Reform (September 14, 2006), http://www.rfpmentor.com/cms_pdfs/Scandals%20Promote%20Procurement%20Reform.doc; *see also*, THE LAW COMMISSION, REFORMING BRIBERY, 2008-09, H.C. 313, at 12-14 (U.K.), available at <http://www.lawcom.gov.uk/bribery.htm> [hereinafter *Reforming Bribery*]; *see also* No Contracting with the Enemy Act of 2011, S. 341, 112th Cong. § 3 (2011).

² Asner, *supra* note 1.

³ *See generally* Sandeep Kathuria, *Best Practices for Compliance With the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulations*, 38 PUB. CONT. L.J. 803, 810 (2009).

The purpose of this thesis is to determine whether a correlation exists between media coverage and procurement reform. This thesis will begin with a brief definition and explanation of what a “scandal” is, along with an explanation of the criteria procurement crises and scandals must meet to receive media attention. Then, case histories of the hammer and toilet seat, Operation Illwind, and Darleen Druyun scandals will be provided, along with a summary of each scandal’s media coverage. A case history of the current Contracting With the Enemy scandal will then be offered, summarizing events up to the time of this writing, including the current scandal’s facts and to-date media coverage. Afterwards, three methodologies will be presented and applied to each historic DoD procurement scandal. Using each methodology in turn, this thesis will then analyze the correlation between the facts and media coverage of each historic scandal, and its subsequent reform (if any), to derive whether or not media coverage of DoD procurement scandals leads to reform. These findings will then be applied to the current Contracting With the Enemy scandal to project whether or not reform will result from the current scandal’s media coverage.

A. What is a Scandal?

In order to determine why some procurement crises become scandals and others do not, it is helpful to understand what a “scandal” is, and how a crisis may evolve into a public scandal.⁴ While definitions of “scandal” vary somewhat between social scientists and other authorities,⁵ the common theme throughout is that in its most simple form, a

⁴ MEDIA SCANDALS 11 (James Lull & Stephen Hinerman, eds., 1997).

⁵ See *Scandal definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/scandal> (last visited Mar. 29, 2011). Likewise, a common dictionary definition of “scandal” states in relevant part that a scandal includes the:

scandal has three basic characteristics: (1) it is a transgression; (2) it is publicized; and (3) the public is interested in it and its outcome.⁶ Social science data demonstrates a “transgression” occurs when social norms that reflect the public morality are broken.⁷ A transgression can be anything that brings about shame or that will embarrass or provoke when made public.⁸ For a transgression to rise to the level of a genuine scandal, it must typically: 1) demoralize or shame the public to whom the transgression is communicated and/or respected or publicly trusted individuals, groups, or institutions; and/or 2)

loss of or damage to reputation caused by actual or apparent violation of morality or propriety; a circumstance or action that offends propriety or established moral conceptions or disgraces those associated with it; a person whose conduct offends propriety or morality (i.e., a *scandal* to the profession); and/or malicious or defamatory gossip.

See also MEDIA SCANDALS, *supra* note 4, at 11. Social scientists have defined the term further yet, determining that for a crisis or problem to meet the definition of a “scandal,” it must meet ten criteria. First, (1) social norms reflecting the dominant morality must be transgressed. According to Lull and Hinerman, this criterion is fundamental because without it, no story can be considered a scandal. In addition, crucial, compound considerations are also required. The “transgressions must be performed by (2) specific persons who carry out (3) actions that reflect an exercise of their desires or interests.” Further, individuals must be “(4) identified as perpetrators of the act(s) . . . and must be shown to have acted (5) intentionally or recklessly and must be (6) held responsible for their actions.” The transgressions must result in “(7) differential consequences for those involved.” And finally, before an event may be considered, “the revelations must be (8) widely circulated via communications media where they are (9) effectively narrated into a story which (10) inspires widespread interest and discussion.”

⁶ ARI ADUT, ON SCANDAL: MORAL DISTURBANCES IN SOCIETY, POLITICS, AND ART 12 (Mark Granovetter, ed., 2008).

⁷ MEDIA SCANDALS, *supra* note 4, at 11; *see also* ADUT, *supra* note 6, at 13. “Scandalous transgressions are often willful wrongdoings that, when made public, make the transgressor look like a bad person. Yet exceptional acts by those we trust (such as politicians or doctors) can also set off scandals – but usually when they are particularly harmful and when the opinion leaders loudly and successfully frame the matter in moral terms.”

⁸ *See* ADUT, *supra* note 6, at 13.

challenge the public, authorities, or both.⁹ Further, in meeting the second and third prongs of the definition, a problem or crisis cannot rise to the level of a scandal unless it is communicated, or publicized, “to an audience that is negatively oriented to it.”¹⁰

Although scandals may be publicized in various ways,¹¹ since procurement crises of the past have only become full-blown procurement scandals after receiving media attention, this paper will focus specifically on media-publicized scandals.

B. Scandals As Newsworthy Stories

Although it has been established that a procurement crisis cannot become a full-blown procurement scandal until published by the media, the crisis will never be published unless a journalist first believes the problem or issue to be newsworthy of the attention that may elevate it to the status of a scandal. Factors that determine potential newsworthiness of a story include whether the event: 1) is happening currently; 2) will have a major impact; 3) involves many people; 4) is novel or unusual behavior; 5) involves an elite or respected person or agency; 6) includes a human interest factor (versus abstract social forces); 7) involves some type of conflict; 8) is unambiguous and easy to understand; and 9) references something negative.¹² The more of these factors a procurement crisis includes, the more likely it will be published as a news story and the greater chance it has of rising to the level of a procurement scandal. Of the above listed criteria, the eighth – that the public be able to understand the story – is essential for a

⁹ *See id.* at 22.

¹⁰ *Id.* at 16.

¹¹ *See id.* at 14.

¹² Tony Harcup & Deirdre O’Neill, *What Is News? Galtung and Ruge Revisited*, 2 JOURNALISM STUDIES 261, 262-63 (2001).

government procurement issue to become a bona fide scandal. If the story meets the criteria for news but is too complicated for anyone but experts to understand, the story will never become a scandal.¹³ Stated in another way, “A scandal is like any other melodrama: It can’t be a crowd pleaser unless the audience can follow the plot.”¹⁴ Further, once the first set of criteria is met, the story must still meet with the organization’s editorial policy, and a journalist must determine that the organization’s readers or listeners will be interested in following the topic.¹⁵

II. A CASE HISTORY OF THE \$435 HAMMER AND \$600 TOILET SEAT SCANDALS AND RELATED MEDIA COVERAGE

The passage of the Federal Acquisition Streamlining Act (FASA), along with the Clinger-Cohen Act of 1996, “represented the culmination of . . . Congress’ efforts to eliminate or reduce the barriers commercial companies faced in selling to the United States Government.”¹⁶ While these acts brought significant reform to the way in which the U.S. Government procures commercial items and services, it took a significant length of time, several scandals, and a great deal of media coverage for the reform to come about. As President Bill Clinton prepared to sign FASA on October 13, 1994, he remarked,

¹³ Madelaine Drohan, *Scandals and Their Aftermath: Why We Are Doomed to Repeat Our Mistakes* 4, NIEMAN REPORTS: NIEMAN FOUNDATION FOR JOURNALISM AT HARVARD, Winter 2005, <http://www.nieman.harvard.edu/reports/article/100610/Knowing-When-to-Stop-Reporting-About-a-Scandal.aspx>.

¹⁴ Frank Rich, *Get Tom DeLay to the Church On Time*, N.Y. TIMES, Apr. 15, 2005, <http://www.nytimes.com/2005/04/17/opinion/17rich.html>.

¹⁵ See Drohan, *supra* note 13, at 4.

¹⁶ Carl L. Vacketta, *Lessons From the Commercial Marketplace*, 2 PUB. PROCUREMENT L. REV. 126, 128 (2002).

I kind of hate to sign this bill today. What will Jay Leno do? There will be no more \$500 hammers, no more \$600 toilet seats, no more \$10 ashtrays. Al Gore will never get on David Letterman again. It's sort of a sad moment – the passing of Government purchasing as the butt of all jokes¹⁷

At that point in time, the jokes regarding \$500 hammers and \$600 toilet seats had been ongoing for nearly ten years.

A. How it Began

As a matter of background, even prior to the 1980s, the acquisition of commercial items “was perceived as being plagued by cost overruns, inefficiencies, and burdensome government specifications.”¹⁸ Procurement officials and others believed “[g]overnment-unique specifications [were] a major impediment to the efficient procurement of otherwise suitable, commercially developed products and services.”¹⁹ However, even though the Commission on Government Procurement urged Congress as early as 1972 to “promote the acquisition of commercial products over ‘Government-designed items to avoid the high cost of developing unique products,’” significant reform did not occur during that decade.²⁰ Reform occurred only after several “spare parts” procurement

¹⁷ Remarks on Signing the Federal Acquisition Streamlining Act of 1994, 2 PUB. PAPERS 1738 (Oct. 13, 1994).

¹⁸ ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 47 (2007), available at <https://www.acquisition.gov/comp/aap/finalaapreport.html> [hereinafter, “ACQUISITION ADVISORY PANEL REPORT”].

¹⁹ See *id.* (quoting Stephen Barr, ‘Reinvent’ Government Cautiously, Study Urges, WASH. POST, July 28, 1993, at A17.) One such impediment reported was that “the military specifications for fruitcake once ran eighteen pages.”

²⁰ See *id.* at 48.

scandals emerged in the 1980s and pressured Congress to make significant changes to the commercial item acquisition process.

B. The \$435 Hammer Scandal

1. Background Facts

In 1981, the Navy issued a sole-source contract to Gould, Inc. (“Gould”), an electronics company that manufactured the flight instruments for the T-34 aircraft.²¹ Under the contract, Gould was responsible to provide over 400 different parts and tools, one of which was an ordinary claw hammer.²² After negotiation of the entire contract price, the hammer was eventually offered to the Government by Gould at a line item cost of \$435.²³ In the line item of each part offered to the Government, including the hammer, Gould included an allocation for overhead.²⁴ The overhead cost built into the cost of each part was distributed using an equal allocation method which meant the total indirect costs (such as indirect labor and overhead) were divided by the total number of parts on the list, and then each part was assigned an equal amount of the support costs, basically rendering the line item prices meaningless.²⁵ Although the equal allocation method worked as “a bookkeeping procedure to create billing prices so that Gould could be paid

²¹ James Fairhall, *The Case for the \$435 Hammer – Investigation of Pentagon’s Procurement*, WASH. MONTHLY, Jan. 1987, http://findarticles.com/p/articles/mi_m1316/is_v18/ai_4619906/.

²² *See id.*

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

as it shipped line items at different times during the contract,” very few non-procurement Agency employees and even fewer members of the public knew and understood this.²⁶

This became apparent in 1983, when a Navy chief petty officer saw the line item prices on the Gould contract and saw the hammer’s \$435 unit-price. Questioning the \$435 cost, the chief petty officer made agency-level inquiries which led to several agency investigations and an audit conducted by the Naval Audit Service, who determined the Gould contract contained “excess costs of about \$729,000.”²⁷ Secretary of Defense Caspar Weinberger responded by issuing a public announcement that Gould had overcharged the Navy, and that not only was the DoD seeking immediate repayment from Gould, the DoD needed to make “major changes” in the way it procured spare parts.²⁸ Although Gould believed the Navy’s audit was flawed, it agreed to make a good faith repayment of \$84,000 in August 1983 to appease the DoD.²⁹

2. Media Coverage and the Development of the Hammer Scandal

Early on, the media coverage of the hammer scandal was neutral and even somewhat optimistic. In early September of 1983, newspapers framed the root cause of spare parts problem as one resulting from a combination of the equal allocation system for distributing overhead and the DoD’s lack of oversight in managing its inventory and

²⁶ *See id.*

²⁷ *See Fairhall, supra note 21.*

²⁸ *See Weinberger Demands New Effort to Cut Costs*, N.Y. TIMES, Jul. 28, 1983, at A17; *see also Fairhall, supra note 21.*

²⁹ *See Fairhall, supra note 21.*

procurement systems.³⁰ As additional, related facts were uncovered, the portrayal of the issue evolved. Just a few weeks later, newspapers reported the real problem behind the high cost of hammers and other spare parts was the lack of competitive bidding on commercial item contracts, while acknowledging the DoD's efforts to remedy the system through demanding (and receiving) repayment for the previous overcharges and establishing incentives for increased competition.³¹ Surprisingly, the early coverage of the scandal appears to have been its most accurate.

In October 1983, media framing of the issue began to change dramatically. Reports began suggesting the spare parts problem was due to a "wasteful system."³² Nearly a month later, the presentation of the issue had again evolved, and this time, the media blamed the high cost of spare parts on a combination of greedy contractors and a lack of competition.³³ Congress quickly responded to the negative publicity, with those

³⁰ See James Barron, *High Cost of Military Parts*, N.Y. TIMES, Sep. 1, 1983, at D1 ("Gould officials have told staff members of the House Armed Services Committee that the high markups resulted from the way the Defense Department requires contractors on some military projects to bill overhead").

³¹ See William H. Miller, *DoD Opens War on Spare-Parts Costs*, INDUSTRY WEEK, Sep. 19, 1983, at 21; see also Brad Knickerbocker, *Pentagon's Misers Now Take Closer Look at Spare Parts Purchases*, CHRISTIAN SCIENCE MONITOR, at 3. "[O]fficials . . . admit that while other criminal probes are under way, this only begins to scratch the surface [The] problem is a wasteful system that has grown without much control [b]ut the Pentagon is doing quite a bit these days to crack down on the exorbitant sums it's been paying for spare parts".

³² See Knickerbocker, *supra* note 31, at 3. This report stated that officials had admitted that proposed DoD remedies would only "begin to scratch the surface in a \$13-billion-a-year business involving millions of parts."

³³ See *Capitalism for the Pentagon*, N.Y. TIMES, Nov. 15, 1983, at A1. The article blamed the spare parts problem on a "lack of bidding," and on contractors who "blame the Pentagon for ordering spares in small quantities and justify their fancy prices as including overhead that has been officially sanctioned."

leading the charge, particularly Representative Berkley Bedell, advocating for “spare parts amendments.”³⁴ Believing their high cost to be the primary result of unethical contractors, Bedell soon became a “crusader” in the movement to eliminate the overpricing of spare parts.³⁵

Perhaps based partly on Bedell’s efforts, media portrayal of the hammer and spare parts scandal had again evolved by February 1984, with media coverage once again framing the scandal as one of waste but, this time also suggesting poor management was at fault.³⁶ A few weeks later, “waste and poor management” shared the blame with “unscrupulous defense contractors,” while journalists lauded the efforts of “people like Joe Sherick, a highly respected civil servant [who] rove[e] like alligators through . . . a ‘swamp’ of mismanagement and abuse at the Pentagon.”³⁷

While journalists lauded the efforts of Sherick and Bedell, unfortunately these individuals did not understand the true nature of the problem. Specifically, Bedell did not understand how the equal allocation formula worked, did not comprehend the complicated nature of the commercial acquisition process, and believed contractors were mostly to blame for the high parts costs.³⁸ With journalists following and supporting

³⁴ See Fairhall, *supra* note 21.

³⁵ See Steven V. Roberts, *Congress: the Provocative Saga of the \$400 Hammer*, N.Y. TIMES, Jun. 13, 1984, at A22.

³⁶ See *Waste is Charged in Military Work*, N.Y. TIMES, Feb. 22, 1984, at A15. Here, the report charged, “the Defense Department has wasted millions of dollars in buying new weapons because of lax management and supervision of pricing by subcontractors.”

³⁷ See Brad Knickerbocker, *Pentagon Steps Up Its War on Unscrupulous Defense Contractors*, CHRISTIAN SCI. MONITOR, Mar. 15, 1984, at 4.

³⁸ See Fairhall, *supra* note 21.

Bedell's lead, Bedell advocated for Gould's prosecution and spare parts legislation.³⁹ Bedell's efforts led to the passage of legislation in the House of Representatives to control the cost of spare parts.⁴⁰ His efforts, as covered by the media, likely also fed the anger felt by the American public. By June of 1984, the American public was "terribly disturbed over the waste" it believed had occurred in the Government.⁴¹ Media stories of that time frame compared the DoD to a fiscally irresponsible "teenager" that should receive less money and more discipline.⁴²

This anger put pressure on elected officials to remedy the underlying causes of the issue, and small changes resulted. The Government responded with "more laws, more rules, more people checking on the checkers."⁴³ DoD abolished the equal allocation method in 1984,⁴⁴ and Congress passed the Competition in Contracting Act (CICA), also in 1984, "to establish a statutory preference for the use of competitive procedures . . . and commercial products whenever practicable."⁴⁵ In addition, Congress enacted the Defense Procurement Reform Act as a component of the National Defense Authorization Act for

³⁹ *See id.*

⁴⁰ *See* Wayne Biddle, *House Approves Stiff Rules to Control Costs of Military Spare Parts*, N.Y. TIMES, May 31, 1984, at B24.

⁴¹ *See* Roberts, *supra* note 35, at A22.

⁴² *See* Mary McGrory, *Pentagon's Guardians Should Give Less Money, More Discipline*, WASH. POST, Jun. 26, 1984, at A2 ("It's no wonder the Pentagon swaggers around the way it does and frightens some of the less privileged kids in the neighborhood, like programs for the poor A few people try to keep the kid in line, but it's pretty hopeless").

⁴³ *See* Fairhall, *supra* note 21.

⁴⁴ *See id.*

⁴⁵ S. Rep. No. 98-50, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. at 2110-11; *see also* ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 48.

Fiscal Year 1985, in which Congress directed the DoD to use “standard or commercial parts . . . whenever such use is technically acceptable and cost effective.”⁴⁶

C. The \$600 Toilet Seat Scandal

Just as these new changes were taking place, an additional spare parts scandal emerged. In late January 1985, Senator William Roth, chairman of the Governmental Affairs Committee (the same committee charged with investigating the suspected cost overruns in the hammer case), received a letter from a contractor in Washington state.⁴⁷ The contractor had been invited to bid but had had difficulty entering the bidding process on a contract for 54 “light weight, corrosive-resistant, thermo-formed, polycarbonate material, seamless, and sufficiently durable” plastic cases that fit over toilets used aboard the Navy’s P-3C Orion antisubmarine planes.⁴⁸ The contractor contacted Senator Roth when he learned the contract had been awarded to Lockheed Corp. (“Lockheed”), and that under the contract, the unit price of each toilet seat cover to the Government was approximately \$600.⁴⁹ In his letter to Roth, the contractor contended similar items could be purchased in the commercial marketplace for approximately \$25.⁵⁰

⁴⁶ ACQUISITION ADVISORY PANEL REPORT , *supra* note 18, at 48.

⁴⁷ See Wayne Biddle, *Price of Toilet Seat is Cut for Navy*, N.Y. TIMES, Feb. 6, 1985, at D15; see also *Adjusting the Bottom Line*, TIME, Feb. 18, 1985, <http://www.time.com/time/magazine/article/0,9171,960748,00.html>.

⁴⁸ *See id.*

⁴⁹ *See Adjusting the Bottom Line*, *supra* note 47.

⁵⁰ *See id.*

1. Press Coverage of the \$600 Toilet Scandal and Ongoing Hammer Scandal

By mid-February 1985, the \$600 toilet seat had become another of government procurement's most publicized spare parts scandals and unfortunately for the DoD, a punch line. Time magazine reported that Senator William Cohen quipped during a Senate Armed Services Committee meeting that the \$600 toilet seat "[gave] new meaning to the word throne."⁵¹ In addition, Secretary Weinberger was depicted in a political cartoon as being fiscally wasteful with a toilet seat around his neck, and President Ronald Reagan was forced to defend him regarding the topic at a televised press conference.⁵²

The toilet seat scandal livened the media coverage surrounding the larger spare parts scandal, and added fuel to the media's contention that the underlying cause was waste and uncontrolled spending.⁵³ As the scandal continued to play out in the media, however, it started to become clear that at least some members of the media and Congress were beginning to understand that a more systemic problem underlying commercial acquisition was to blame. As early as February 1985, news stories reported that upon learning the DoD had purchased 54 toilet seat covers from Lockheed, Representative Cohen had stated, "What I don't understand about this procurement is why we have an aircraft manufacturer making toilet covers. Would we ask a toilet company to build a C5?"⁵⁴

⁵¹ *See id.*

⁵² William Safire, *On Language; But It Would Be Wrong*, N.Y. TIMES, Apr. 13, 1986, at §6, at 16.

⁵³ Fred Hiatt, *Now, the \$600 Toilet Seat*, WASH. POST, Feb. 5, 1985, at A5.

⁵⁴ *Id.*

Although some were beginning to understand the complicated nature of the problem, due to the prolonged negative publicity surrounding the issue, most of the American public did not and was increasingly angry. In April 1985, Secretary Weinberger published an article in *The Washington Post* seeking to reinstate public trust by presenting the facts surrounding the various DoD spare parts purchases, including the hammer.⁵⁵ Secretary Weinberger's article did little to assuage the public's concerns, and when *The New York Times* published a front page article in May 1985, alleging that the \$84,000 repayment Gould had made to the Navy in 1983 for the hammer contract was only 11 percent of what the U.S. Government was owed, the public pushed for action.⁵⁶ The Navy responded by conducting a new audit of the Gould contract and determined Gould owed the Government only an additional \$8,310, in addition to the already paid \$84,000, due to the overpricing.⁵⁷ These findings and their publication prevented Gould's prosecution but also did what previous media coverage had been unable to do – it showed the primary cause of the problem was not due to unscrupulous contractors but from some type of systemic problem and assisted in the march towards effective reform.⁵⁸

⁵⁵ Caspar Weinberger, *How the Pentagon Bought 3,500 Pliers at \$3.10 Each*, WASH. POST, Apr. 13, 1985, at A21 (“Editorials . . . regarding the purchase of pliers from Boeing Aircraft Company cast an incomplete and inaccurate perspective on Department of Defense procurement. The public needs to know all the facts”).

⁵⁶ See Jeff Gerth, *Contract Savings by U.S. Questioned*, N.Y. TIMES, May 2, 1985, at A1.

⁵⁷ See Fairhall, *supra* note 21.

⁵⁸ See Vacketta, *supra* note 16, at 127.

D. Outcome and Reform Resulting From the Spare Parts Scandals

By mid-May 1985, the hammer and toilet scandals, combined with scandals over weapons procurement, had outraged the public to the extent that both chambers of Congress passed an unprecedented one-year defense budget freeze.⁵⁹ Less than a month later, the media was portraying Secretary Weinberger as a “victim of inflated Pentagon budgets . . . and [the] ‘toilet seat syndrome’” and as the one responsible “for all of the Pentagon’s blunders and boondoggles – symbolized in the public mind by the notorious \$640 paid . . . for a toilet seat.”⁶⁰ As such, media coverage suggested Secretary Weinberger was no longer trusted even by the President.⁶¹

In reality, the true nature of the spare parts scandal was that the Government’s “host of burdensome and intrusive laws and regulations”⁶² relating to commercial item acquisition were “costly, burdensome, and risky” for most commercial businesses, and as

⁵⁹ Dina Razor, *News and Analysis – Corruption at Home: the DoD’s \$436 Hammer*, TRUTHOUT BLOG (Dec. 8, 2010), <http://sheridanworks.com/blog/2010/12/09/news-and-analysis-corruption-at-home-the-dods-436-hammer>; *see also* Chris Reidy, *Budget Squeaks By With Defense Freeze*, ORLANDO SENTINEL (May 11, 1985), http://articles.orlandosentinel.com/1985-05-11/news/0300050184_1_reagan-budget-budget-committee-senate-budget.

⁶⁰ *See* William Johnson, *Weinberger Victim of Military Bills*, THE GLOBE AND MAIL, Jun. 5, 1985. According to Johnson, Secretary Weinberger was “in political trouble, a victim of inflated Pentagon budgets, of his own loss of credibility, and above all, of the ‘toilet seat syndrome.’” Johnson further reported that “the man who carried through President Ronald Reagan’s big military buildup over the past four years . . . can no longer get through to the President as he used to.”

⁶¹ *See id.* Johnson reported that Secretary Weinberger no longer had the influence on President Reagan he had once had, and that the President had “accepted a Senate proposal for a package deal [that included] defense spending frozen . . . without consulting Mr. Weinberger.”

⁶² *See* Vacketta, *supra* note 16, at 127.

such, the Government effectively deterred all but a few companies from the federal market by “maintaining detailed standards and specifications for the products and services” it sought to buy.⁶³ Although the media, the public, and even Congress did not understand the specific cause underlying the spare parts scandals, “the constant drumbeat of propaganda about defense scandals and defense spending” had made it clear the system was broken.⁶⁴

Due to pressure from the public to fix the system, President Reagan created the President’s Blue Ribbon Commission on Defense Management (hereinafter, “Packard Commission”)⁶⁵ in 1985 to recommend reforms for defense management.⁶⁶ While the Packard Commission focused mainly on the acquisition of major weapons systems, it also analyzed the spare parts cases.⁶⁷ Upon review, the Packard Commission determined the “the problems [surrounding the spare parts scandals] were seldom the result of fraud or dishonesty . . . [but] [r]ather . . . were symptomatic of other underlying problems . . . [affecting] the entire acquisition system.”⁶⁸ In response to its findings, the Packard Commission determined:

⁶³ *See id.*

⁶⁴ Lou Cannon & David Hoffman, *An Interview with President Reagan: Transcript of President Reagan’s Interview Yesterday With White House Correspondents Lou Cannon and David Hoffman*, WASH. POST, Feb. 11, 1986, at A8.

⁶⁵ *See* ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 49.

⁶⁶ Evan Thomas, Barrett Seaman & Bruce van Voorst, *Defensive About Defense*, TIME, Mar. 10, 1986, <http://www.time.com/time/printout/0,8816,960862,00.html>.

⁶⁷ *See generally* The President’s Blue Ribbon Commission on Defense Management, A Quest for Excellence: Final Report to the President and Appendix (Washington, D.C.: The Packard Commission, June 1986), at 44 [hereinafter, The Packard Commission].

⁶⁸ *See id.*

DoD should make greater use of components, systems, and services available “off-the-shelf.” It should develop new or custom-made items only when it has been established that those readily available are clearly inadequate to meet military requirements No matter how DoD improves its organization or procedures, the defense acquisition system is unlikely to manufacture products as cheaply as the commercial marketplace Products developed uniquely for military use and to military specifications generally cost substantially more than their commercial counterparts”⁶⁹

The Packard Commission Report further advocated using competition “as a ‘foremost’ commercial practice . . . [to] be aggressively used in the acquisition of ‘systems, products, and professional services.’”⁷⁰ Congress responded to the Packard Commission Report by making an amendment in Title 10 of the United States Code, establishing a DoD preference to use “nondevelopmental items” (NDIs), or “any item of supply that is available in the commercial marketplace,” where those items would meet DoD’s needs.”⁷¹

Congress followed up this legislation with direction to the DoD, set forth in the Defense Authorization Act for Fiscal Years 1990 and 1991,⁷² to “issue new regulations to address . . . impediments to the acquisition of commercial items.”⁷³ The DoD responded by creating Parts 210 and 211 of the Defense Federal Acquisition Regulation Supplement

⁶⁹ See ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 49-50 (quoting The Packard Commission, *supra* note 67, at 60).

⁷⁰ See ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 50 (quoting The Packard Commission, *supra* note 67, at 62).

⁷¹ See ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 50.

⁷² See National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824(b), 103 Stat. 1352, 1504-05 (1989).

⁷³ H.R. Conf. Rep. No. 101-331, at 612 (1989), *as reprinted in* 1989 U.S.C.C.A.N. 977, 1069.

“DFARS”) in 1991,⁷⁴ which defined and set forth a preference for NDIs and also “contained an early predecessor to the modern statutory definition of “commercial items.”⁷⁵ Seeing a need for further reform in this area, Congress established an Advisory Panel on Streamlining and Codifying Acquisition Laws, otherwise known as the “Section 800 Panel” in 1990.⁷⁶

The Section 800 Panel’s recommendation led to the passage of the FASA in 1994.⁷⁷ The passage of FASA then resulted in major revisions to FAR parts 10, 11, 12, and 52.⁷⁸ These reforms, along with the passage and implementation of the Federal Acquisition Reform (“Clinger-Cohen”) Act in 1996,⁷⁹ resulted in: 1) a uniform definition for a “commercial item;” 2) “clear federal precedence for the acquisition of commercial items”; and 3) mandates that government procurement officials conduct market research to determine whether there is a commercial item on the marketplace that will meet the agency’s needs prior to developing new, detailed design specifications.⁸⁰ Although the FASA and Clinger-Cohen Act resulted in the bulk of reform that currently exists

⁷⁴ See 56 Fed. Reg. 36,315, 36,315-17 (Jul. 31, 1991) (codified at 48 C.F.R. Ch. 2, pts. 210, 211).

⁷⁵ See Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587.

⁷⁶ See *id.*

⁷⁷ Carl L. Vacketta & Susan H. Pope, *Commercial item Contracts: When Is a Government Contract Term or Condition Consistent with “Standard” or “Customary” Commercial Practice?*, 27 PUB. CONT. L.J. 291, 294 (1998).

⁷⁸ See *id.* at 296.

⁷⁹ See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; see also Federal Acquisition Reform (“Clinger-Cohen”) Act of 1996, Pub. L. No. 104-106, 110 Stat. 642.

⁸⁰ See Vacketta, *supra* note 16, at 128.

regarding commercial acquisition, Congress and the Executive Branch have continued to improve commercial item procurement by making subtle changes to the “definition of ‘commercial items’ and the process of their acquisition” over the past several years.⁸¹

These changes have resulted in long-standing and effective reform to ensure “there [are] no more \$500 hammers, no more \$600 toilet seats.”⁸² Such reform has allowed commercial companies to enter the federal marketplace free from overly complicated government contract clauses and “unique requirements that would require them to change the way they do business.”⁸³ As a result of this reform, federal agencies now have uniform practices for buying commercial goods and services.⁸⁴ This has ensured that commercially available items, such as hammers and toilet seat covers, are acquired in the commercial marketplace, from those who specialize in making them, at the most competitive prices.

⁸¹ See ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 56. For example, in 1998, Congress directed the Executive Branch to clarify the meaning of “catalog-based pricing” and “market-based pricing” in the FAR’s definition of “commercial items.” See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 803(a), 112 Stat. 1920, 2082 (1998). In 1999, the definition of “commercial items” was further modified to explain the meaning of “services in support of commercial items.” See National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 805, 113 Stat. 512, 705 (1999). The definition of “commercial items” was defined even further in 2003 to “accommodate explicit authorization for time-and-material commercial services contracts.” See Service Acquisition Reform Act of 2003 (“SARA”), Pub. L. No. 108-136, tit. XIV, § 1432, 117 Stat. 1663, 1672-73 (2003).

⁸² Remarks on Signing the Federal Acquisition Streamlining Act of 1994, 2 PUB. PAPERS 1738 (Oct. 13, 1994).

⁸³ See Vacketta, *supra* note 16, at 128.

⁸⁴ See *id.*

III. A CASE HISTORY OF OPERATION ILLWIND AND ITS RELATED MEDIA COVERAGE

During the Reagan era, as a result of “spending \$160 billion a year on . . . huge purchases of sophisticated weapons and mundane supplies, the U.S. Defense Department [became] the most important business enterprise in the world.”⁸⁵ One of the Government’s objectives in the aftermath of the spare parts scandals was to achieve greater competition in the federal marketplace. However, in the end, greater competition was not the panacea some had hoped for. Due, in part, to the negative publicity that followed the spare parts scandals, procurement officials at the Pentagon became “obsessed with low costs” which led to a “pressure cooker environment” that set the United States up for its next major procurement scandal.⁸⁶

A. How it Began

On September 6, 1986, a defense contractor informed the Naval Investigative Service (NIS)⁸⁷ he had been approached by Mr. John Marlowe, a “small-time industry consultant.”⁸⁸ Marlowe promised the contractor he would “deliver a Marine Corps

⁸⁵ See Ed Magnuson, Elaine Shannon, & Bruce van Voorst, *The Pentagon Up for Sale*, TIME (Jun. 27, 1988), <http://www.time.com/time/printout/0,8816,967780,00.html>.

⁸⁶ Following the outcome of the spare parts scandals, some complained that “competition . . . caused the Pentagon to become obsessed with low costs, creating a pressure cooker environment that . . . led to problems like the Operation Ill Wind scandal, where consultants allegedly bribed government officials to get inside information on competitors’ prices.” See Sandra Sugawara, *A Winning Strategy in Defense-Cost War; Despite Savings, “Second Source” Competition Threatened*, WASH. POST, Feb. 12, 1989, at H1.

⁸⁷ The NIS was renamed the Naval Criminal Investigative Service in 1992. See NAVAL CRIMINAL INVESTIGATIVE SERVICE, <http://www.ncis.navy.mil/AboutNCIS/History/Pages/default.aspx> (last visited Aug. 30, 2011).

⁸⁸ See *How the Feds Broke the Case*, FORTUNE (Jan. 11, 1993), <http://money.cnn.com/>

communications contract worth several million dollars”⁸⁹ to the contractor’s company for the price of “\$15,000 up front and \$2,000 monthly for the duration of the contract.”⁹⁰ Under the terms of the agreement proposed, Marlowe offered to provide “proprietary information about a competitor’s bid” to the contractor in return for monetary compensation.⁹¹ In response to the call, the NIS contacted the Federal Bureau of Investigation (FBI), and together, began investigating the information provided by the informant.⁹²

The contractor/informant, “Mr. X,” agreed to assist the NIS and FBI agents with their investigation in exchange for complete anonymity.⁹³ Through Mr. X’s efforts, subsequent conversations with Marlowe were recorded which resulted not only in incriminating evidence against Marlowe but in information suggesting Marlowe’s actions

magazines/fortune/fortune_archive/1993/01/11/77356/index.htm; *see also* ANDY PASZTOR, *WHEN THE PENTAGON WAS FOR SALE* 32 (1995) (stating that the whistleblower who provided the initial tip was a “defense company executive”).

⁸⁹ *See* PASZTOR, *supra* note 88, at 32.

⁹⁰ *See* Elizabeth Tucker & Ruth Marcus, *Defense Probe Informer Named; Retired Marine, Now in Prison, Said to Cooperate With Investigators*, WASH. POST, Jul. 9, 1988, at A8.

⁹¹ *See How the Feds Broke the Case*, *supra* note 88.

⁹² *See id.*

⁹³ Dubbed “the Last Honest Man,” due to the fact the informant had come forward based upon a “burning sense of moral courage,” only a handful of agents knew the identity of Mr. X to begin with. His identity has been fiercely protected, and to this day, has never been publicly released. *See* PASZTOR, *supra* note 88, at 165; *see also* Robert E. Kessler, *Plea Stills “Ill Wind”; Military Fraud Probe Found Local Targets*, NEWSDAY, Jan. 15, 1994, at 19 (stating that the outraged contractor who initially reported the attempted bribery had “always wanted to remain anonymous”).

were indicative of system-wide corruption within the DoD procurement system.⁹⁴

Believing Marlowe to be a small-time player in a much larger game, the agents eventually convinced Marlowe to act as a “double agent” and assist them in their investigation in return for leniency against prosecution.⁹⁵

Marlowe led agents to his contact at the Marine Corps, a civilian supervisory contracting officer.⁹⁶ After Marlowe made a number of successful “buys” from this contact, the agents expanded their investigation, and Marlowe led them “steadily through a netherworld of corrupt consultants”⁹⁷ and a “far-reaching fraud case” that lasted nearly two years.⁹⁸ Officially dubbed “Operation Illwind,”⁹⁹ the investigation led to a

⁹⁴ See *How the Feds Broke the Case*, *supra* note 88; see also Stephen Engelberg, *Inquiry Into Pentagon Bribery Began With a Telephone Call*, N.Y. TIMES, Jun. 19, 1988, at 1.

⁹⁵ The agents believed Marlowe could be a valuable informant if he could be turned. At the time, Marlowe was free on bail and awaiting an appeal of a conviction for child molestation. Therefore, the agents used the information regarding the child molestation case, along with the incriminating evidence of the conversation with Mr. X, as leverage to convince Marlowe to assist them with their investigation. See *How the Feds Broke the Case*, *supra* note 88; see also *Major Faces Sex Counts*, WASH. POST, Mar. 8, 1984, at C24 (stating, “John P. Marlowe . . . a retired Marine Corps major . . . was charged with two counts of taking indecent liberties . . . [against] two girls, 9 and 10”); see also Tucker & Marcus, *supra* note 90, at A8 (noting Marlowe was convicted in March 1985 and served a six-year sentence at a Virginia state prison after losing an appeal of his conviction on July 29, 1987); see also James Bamford, *Wire Taps, Big Waste, Wild Trips*, L.A. TIMES, Jun. 26, 1988, § 5, at 1; see also Gaylord Shaw, *Pentagon Scandal’s Ill Winds*, NEWSDAY, Jul. 17, 1988, at 7 (stating a consultant, “who has not been identified, was confronted by federal investigators, and . . . agreed to cooperate by recording his conversations with other consultants, contractors, and government employees”).

⁹⁶ See *How the Feds Broke the Case*, *supra* note 88.

⁹⁷ See *id.*

⁹⁸ See Engelberg, *supra* note 94, at 1.

⁹⁹ Although the media would later mistakenly identify the investigation’s code word as two separate words, the FBI’s official code name for the investigation was only one word. See PASZTOR, *supra* note 88, at 188 (stating that agents “got a rise years later,

staggering amount of evidence. At the height of the investigation, 36 phone lines were tapped in various states throughout the country.¹⁰⁰ Those under surveillance included Pentagon procurement officials, defense contractors, and several consultants, most of whom were former Pentagon insiders working as middlemen between their former associates and firms seeking military contracts.¹⁰¹ Over the course of the investigation, agents and investigators collected 4,800 conversations over 290 days, with approximately 671 of them containing incriminating statements.¹⁰² On June 14, 1988, the investigation went public when 38 search warrants were executed throughout the U.S.¹⁰³ At that point in time, principal targets of the investigation included several former and current high-ranking officials, such as John Lehman, a former Secretary of the Navy; Melvyn Paisley, a former Assistant Secretary of the Navy for Research, Engineering and Systems; James Gaines, then the current Director for Acquisition and Congressional Support for the Navy; and Victor Cohen, then the current Deputy for Tactical Warfare Systems for the Air Force.¹⁰⁴

amid the media frenzy, when reporters mistakenly identified the investigation's code name as two separate words"). See Shaw, *supra* note 95, at 7.

¹⁰⁰ Specifically, 24 phone lines were tapped . . . in northern Virginia with 12 more under surveillance in Florida, California, New York, and Minnesota. See *How the Feds Broke the Case*, *supra* note 88.

¹⁰¹ See Magnuson, Shannon, & van Voorst, *supra* note 85.

¹⁰² See Barbara Bradley, *Racketeering Laws Raise Stakes for Defense Contractors in Probe*, CHRISTIAN SCI. MONITOR, Jun. 20, 1988, at 3. See also Magnuson, Shannon, & van Voorst, *supra* note 85.

¹⁰³ See *How the Feds Broke the Case*, *supra* note 88.

¹⁰⁴ See Magnuson, Shannon, & van Voorst, *supra* note 85.

B. Media Coverage and the Development of the Operation Illwind Scandal

As soon as the investigation went public, a deluge of media coverage followed. Most early press coverage emphasized the investigation was the “first time in a military procurement case . . . [that] court-authorized wiretaps,” manned 24 hours a day, had been used.¹⁰⁵ But more importantly, the news media clearly portrayed two messages regarding the cause of the scandal that remained consistent throughout the coverage of the scandal. The first was that the defense procurement system was filled with a multitude of greedy and corrupt individuals on every plane, extending to the very highest levels of DoD leadership at the Pentagon.¹⁰⁶ The second message was that the Reagan administration was largely to blame for the crisis, due to the “hands-off,” streamlined approach to the DoD procurement process promoted by Secretary Weinberger.¹⁰⁷

In support of its first message, the media called Operation Illwind the “largest fraud investigation in history.”¹⁰⁸ Journalists cited corruption as being “endemic to the [defense procurement] system”¹⁰⁹ and questioned to what extent the corruption went.

¹⁰⁵ See Engelberg, *supra* note 94, at 1.

¹⁰⁶ See generally *id.*

¹⁰⁷ See Bradley, *supra* note 102, at 3. In reference to how the scandal began, some believed the “scandal[l] grew out of an environment of laissez-faire government, one that allowed much good work to be done but also . . . left Pentagon procurers to deal with weapons makers in back-alley fashion.” Stephen J. Hedges, James Wallace, Jim Impocco, Jeff Trimble, & Eva Pomice, *Where Oh Where Have All the Scandals Gone?*, U.S. NEWS & WORLD REPORT, Jan. 16, 1989, at 11.

¹⁰⁸ See Engelberg, *supra* note 94, at 1.

¹⁰⁹ See Geoffrey Barker, *Pentagon Scandal Growing*, THE ADVERTISER, Jun. 21, 1988 (stating, “prominent critics say corruption is endemic to the system . . .”). Additional reports stated that on the basis of the facts uncovered by Operation Illwind, it appeared “the bidding system for awarding some military contracts [had] corrupted into an underground economy . . . [where] consultants traffic[ked] in information about military

Editorials of this timeframe referenced the public's growing outrage and disgust towards government procurement scandals with one suggesting an honest public procurement system might be impossible if the public demanded competitive prices, stating, "[p]eople have to understand that, with the Pentagon, they can have integrity, or they can have cheaper toilet seats. But they can't have both."¹¹⁰

For the first several months after the search warrants in Operation Illwind were executed, since the investigation was still continuing, the public knew only a few details.¹¹¹ In the meantime, and in further support of its first message, the media denigrated high-level procurement officials working at the Pentagon and defense consultants, the two main factions of people who appeared to be involved in the scandal. The media charged that although DoD procurement officials had "boasted about streamlining . . . procurement practices," it appeared "they . . . [had] eliminated . . .

contracts." See Bradley, *supra* note 102, at 3. The news also indicated individuals implicated in the investigation who had "reportedly received money and job guarantees [unethically]" were "singing like canaries" and reporting other defense industry figures [to protect themselves]. See G. Barker, *An Ill Wind for Reagan*, HERALD, Jun. 20, 1988.

¹¹⁰ In one editorial, the author referred to a conversation he had had with a defense consultant he identified only as "Ragged Tonsils." Tonsils stated he had set up a situation in which secret procurement information inside the Pentagon was passed to consultants who then passed the information to contractor clients. Tonsils maintained he had participated in the scheme for the "good of the country" to ensure bids were kept at their most competitive level. Tonsils also alleged he "didn't know how" to work within the law, because the current law did not seem to work, and that through his arrangements, he ensured the Pentagon did not pay too much for "toilet seats" and other common items. See Michael Grant, *Editorial*, SAN DIEGO UNION-TRIB., Jun. 23, 1988, at D1.

¹¹¹ See Ruth Marcus, *Details of Defense Probe Remain Shrouded; Disclosures So Far Suggest a Complex Web of Information-Dealing Conspiracies*, WASH. POST, Jun. 26, 1988, at A6.

safeguards against corruption along with . . . supposed bureaucratic barriers.”¹¹² In addition, DoD procurement officials were compared to the Mafia, with reports stating that “although the techniques might be old, the criminals were new . . . held top-secret clearances and preferred mugging the U.S. taxpayer on the Pentagon’s plush E-ring to rolling winos in back alleys.”¹¹³ The role of defense consultants was similarly disparaged in news articles, with reports asserting military contractors were paying such consultants retainers of \$100,000 or more, in hopes the consultants’ assistance would lead to military contracts for their companies.¹¹⁴ Consultants were also portrayed as deceitful, and “free-wheeling in their approach to . . . [confidential] information, working simultaneously for competing companies.”¹¹⁵

¹¹² See *The Stench Grows*, L.A. TIMES, Jun. 21, 1988, § 2, at 6. One example of this was reported in an article that highlighted Victor Cohen, the Air Force’s Assistant Secretary for Acquisition. The news report stated that although he had a reputation for “criticizing military officials’ plans for acquiring costly weapons systems . . .,” he had been the subject of “near-constant investigation for alleged misconduct wholly at odds with his image as one of the Pentagon’s good guys.” See Caryle Murphy, *Investigation of Civilian Air Force Official a Shock to Associates*, WASH. POST, Aug. 21, 1988, at A6; see also Jim Schachter & Mark Arax, *AF Weapons Expert Cohen; Defense Probe Focuses On Nonsense Foe of Waste*, L.A. TIMES, Oct. 11, 1988, § 1, at 1.

¹¹³ See Bamford, *supra* note 95, at 1.

¹¹⁴ During Operation Illwind, via court-authorized wiretaps, investigators overheard suspects “talk[ing] freely about their dealings in Washington and with various military contractors, some of whom were paying consultants retainers of \$100,000 and more.” See Engelberg, *supra* note 94, at 1.

¹¹⁵ See *id.* While the media villanized procurement officials and consultants, it quickly embraced the efforts of government “heroes” such as U.S. Attorney Henry Hudson, who led prosecution efforts in the case. See Caryle Murphy, *U.S. Attorney Hudson’s Star Rises With Pentagon Probe; U.S. Attorney Hudson’s Reputation Rises on Operation Ill Wind*, WASH. POST, Jun. 26, 1988, at B1. In lauding the efforts of these individuals, the media reported the difficulty they encountered prosecuting white collar procurement scandals. See Barbara Bradley & Scott Armstrong, *Defense Fraud is a Tough Case for Justice*, CHRISTIAN SCI. MONITOR, Jun. 29, 1988, at 1. It also reported the FBI’s recent

In support of its second message that the Reagan era administration was largely to blame for the environment that had allowed the corruption to take hold, early news reports claimed U.S. leadership had been aware several years earlier that “consultants were trafficking in information valuable to military contractors” but had refused to do anything about it.¹¹⁶ They also reported the corruption had been “intensified by huge spending on defense and poor management during the tenure of Defense Secretary Weinberger,”¹¹⁷ and questioned whether the scandal would discredit President Reagan’s administration.¹¹⁸ As a specific example of the hands-off procurement process that had

efforts to aggressively fight white collar crime and corruption. *See* Bamford, *supra* note 95, at 1.

¹¹⁶ One report claimed Government officials had been aware consultants were trafficking in information, potentially valuable to military contractors, for at least three years as the Justice Department had brought charges against GTE Government Systems Corporation and several individuals tied to the company, back in September of 1995. *See* Engelberg, *supra* note 94, at 1. Another news article quoted ABC-TV’s *This Week with David Brinkley*, stating a former assistant secretary at the Pentagon had declared there were “many occasions when Secretary Weinberger knew that [Secretary of the Navy] Lehman’s office was leaking information to consultants and did nothing about it. *See* Bradley, *supra* note 102, at 3. Additional, related articles quoted Senator Charles Grassly as stating that Attorney General Meese and Secretary Weinberger had been warned of the scandal three years earlier but had ignored it. *See* G. Barker, *supra* note 109; *see also* *The Stench Grows*, *supra* note 112, at 6; *see also* Barker, *supra* note 109.

¹¹⁷ For example, Senator Sam Nunn, Chairman of the Senate Armed Services Committee, noted procurement managers were often selected for their “ideological beliefs [and] for their salesmanship, but not for good, sound management.” *See* G. Barker, *supra* note 109; *see also* Barker, *supra* note 109.

¹¹⁸ The media compared Operation Illwind to the “Teapot Dome” scandal, a crisis revealed in 1921 that discredited President Harding’s administration after Harding’s former Interior Secretary, Albert Fall, was convicted of accepting a \$100,000 bribe. *See* G. Barker, *supra* note 109. Another report also questioned the impact the scandal might have on Reagan and his administration, noting “Operation Ill Wind, the grand jury investigation of bribery and corruption in the Pentagon’s procurement program, [was] starting to show every sign of developing into a gale-force scandal for the Reagan Administration.” *See* *The Stench Grows*, *supra* note 112, at 6.

developed during Reagan's administration, the media reported that Operation Illwind investigators had found not only that defense consultants were bribing procurement officials, but that there were problems with the DoD's accounting system and its inspectors as well.¹¹⁹

Although Henry Hudson, the U.S. Attorney responsible for prosecuting the Operation Illwind cases, had promised indictments "within 60 to 90 days" of the scandal breaking, as of early September 1988, none had been forthcoming.¹²⁰ News stories expressed Congress' frustration over the seeming lack of action on the part of federal prosecutors.¹²¹ Nevertheless, although no new facts had yet been released, the media reported DoD officials and Congress believed they had seen and heard enough to know

¹¹⁹ Specifically, the media reported inspectors employed by the Defense Contract Administrative Service, an organization that was to act as a "government watchdog over Pentagon contractors," were being "wined and dined" by defense contractors, that the inspectors were "easily corrupted," and that "eventually . . . [the defense contractors] hire[d] almost all of them anyway." In regards to the accounting system itself, media reports noted secret military units and related budgets were in existence that allowed senior level agency officials to use public funds for their private benefit virtually undetected. *See* Bamford, *supra* note 95, at 1.

¹²⁰ *See* Thom Shanker, *Ill Wind Pentagon Probe Is Calm Before the Storm*, CHICAGO TRIB., Sep. 4, 1988, at C4. Other news reports similarly reported that when the Pentagon procurement investigation broke into public view three months earlier, "there were quick, easy predictions from senior Justice Department officials that indictments would swiftly follow in what was described as one of the biggest defense corruption scandals of the post-war era [I]ndictments were predicted to occur "within 60 to 90 days." Further, "other senior law enforcement officials foresaw a steady stream of guilty pleas from suspects quaking at the knowledge that their telephone conversations had been overheard by investigators for more than a year." *See* Caryle Murphy, *Pace of Pentagon Probe Belies Predictions; Despite Lack of Indictments, Officials Say Task of Building Case on Wiretaps is Going Well*, WASH. POST, Sep. 20, 1988, at A4.

¹²¹ A Congressional aide was quoted as stating, "The whole thing has been in kind of a trough. There have been no disclosures. The investigators aren't talking to us, and you can be sure they're not telling the Pentagon anything either." *See* Shanker, *supra* note 120, at C4.

significant procurement reform was immediately needed. One report quoted Senator James Exon as stating, “I want to see someone go to jail.”¹²² Another account described Senator Charles Grassley’s reactions after receiving a personal briefing on Operation Illwind, citing Grassley as having declared the investigation’s findings were “beyond the wildest imagination,” and as proof that those involved were following a “good-old boy . . . ‘catch us if you can’” mentality.¹²³ Yet another alluded to a comment made by Senator John Warner that the scandal was “the most serious case in the history of the Department of Defense.”¹²⁴

News coverage surrounding the Operation Illwind scandal saturated the public, and the DoD and Congress immediately responded. Soon after the scandal broke, the Air Force transferred Victor Cohen to a job with no purchasing authority.¹²⁵ In addition, the then-Secretary of Defense, Frank Carlucci, enacted interim steps requiring that any new defense contracts worth \$100,000 or more awarded to any of the 16 defense contractor companies under investigation, include language enabling the government to recover profits if the contract award was later found improper.¹²⁶ Secretary Carlucci also ordered

¹²² See G. Barker, *supra* note 109.

¹²³ See *id.*

¹²⁴ See Ruth Marcus & Caryle Murphy, ‘*Ill Wind*’: *A Scandal Overblown?; Indictments Delayed In Pentagon Probe*, WASH. POST, Dec. 27, 1988, at A1.

¹²⁵ See Richard W. Stevenson, *Guilty Plea in Military Bid Case*, N.Y. TIMES, Aug. 23, 1991, at D1.

¹²⁶ Soon thereafter, Congress urged Secretary Carlucci to require that this language be included in all new Pentagon contracts. This recommendation was to give the Government an alternative to canceling “tainted” contracts, especially when a contractor’s work on an important weapon contract [was] . . . nearing completion.” See *Congressmen to Pentagon: Recoup Companies’ Illegally Gained Profits*, BALTIMORE SUN, Aug. 24, 1988, at 57.

a hiring freeze on consultants working directly for the Department of Defense and urged Pentagon contractors to police their own employees.¹²⁷

In addition, highly motivated by what they had seen and heard of the scandal, Congress took several steps. First, Senator David Pryor proposed including a requirement in the upcoming DoD appropriations bill to mandate the regulation and registration of all defense consultants.¹²⁸ In the meantime, Congress began an independent review of procurement abuses,¹²⁹ and started drafting and considering new legislation immediately. Prior to the scandal, the House had already begun drafting amendments to the Office of Federal Procurement Policy (OFPP) Act (hereinafter,

¹²⁷ See Shanker, *supra* note 120, at C4.

¹²⁸ One news story featured Senator Pryor and his draft legislation, describing consultants as “shadowy figures clinging to the Pentagon’s coffers,” and alleging that because consultants were unregulated and not required to register, no one knew how many there were or what exactly they did. While the Senate initially passed Pryor’s “consultant-registration” measures, afterwards, Pryor’s proposal went through “intense industry lobbying and was eventually dropped from the appropriations bill. See Shaw, *supra* note 95, at 7; see also Sandra Sugawara, *Congress Drops Registration Plan for Defense Consultants*, WASH. POST, Oct. 4, 1988, at C1.

¹²⁹ According to one media report of that time, separate and apart from the Operation Illwind investigation, Congress made an effort to “ferret out” procurement abuses and as a result, was “expected to produce a pile of legislation.” The media highlighted that one of the most radical proposals considered by Congress was “one to remove from the Pentagon all purchasing power and turn that responsibility over to an independent military procurement agency.” Explaining that Calucci vehemently opposed that option, the same report explained he had argued enacting such a proposal would “isolate the acquisition process from input and oversight by the very people who know best what weapons we need, who will be asked to use them in the field, and who therefore have an immediate incentive to make certain those weapons perform as planned.” Another proposal suggested included a system for disgruntled contractors to challenge awards to competitors and a bill to make government recovery of all tainted contractor profits a part of all future Pentagon contracts. See Shanker, *supra* note 120, at C4.

“OFPP bill”), and had planned to add a new section relating to procurement integrity.¹³⁰

However, in response to the negative publicity generated by Operation Illwind,¹³¹ the

OFPP bill gained new attention, and therefore the House included sanctions

for contractors, subcontractors, or their representatives [if they] offer Government procurement officials jobs or other things of value during the conduct of a procurement. It also create[d] rules governing the release of inside procurement information . . . [and prohibited] a Federal procurement official from becoming an employee of a contractor on a contract for a period of 3 years after ceasing to work for the Government on that contract.¹³²

Although the bill underwent “long and intense” negotiations in the House, by the time the

House’s version made it to the Senate floor, the legislative session was nearly over.¹³³

Acknowledging the evidence uncovered in the Operation Illwind investigation was

serious, the Senate determined legislation in this area could not wait until the next

legislative session,¹³⁴ and passed the new OFPP bill on October 19, 1988, without

¹³⁰ See H.R. Rep. No. 100-911, 100th Cong., 2d Sess. 12 (Sep. 9, 1988) (stating, “[t]he full Committee [on Government Operations] ordered reported H.R. 3345, amended, to the House on September 29, 1987 . . . [and] in an attempt to forge a consensus on the legislation . . . the bill [was] ordered . . . amended on June 29, 1988”).

¹³¹ See *id.* at 12, 18 (declaring, “[r]ecent news accounts of procurement fraud scandals in the Department of Defense have generated considerable interest in the Procurement Integrity Section of this bill”).

¹³² See *id.* at 12.

¹³³ See 134 CONG. REC. 31,690 (1988) (Senator Carl Levin stated, “The negotiations with the house on this bill have been long and intense because the issues the bill addresses are complicated in the area of procurement integrity [and] groundbreaking”).

¹³⁴ See *id.* (In explaining the events that had occurred in rapid succession, Senator Levin asserted that, “Given the seriousness of offenses . . . [relating to the Operation Illwind evidence], I would have preferred to have extensive agency and public comment on the final language. But, we were not able to avail ourselves of such input, given the limited time constraints we faced in reauthorizing this office prior to our adjournment”).

“committee hearings, or agency and public comment.”¹³⁵ While members of Congress were optimistic regarding the OFPP bill,¹³⁶ surprisingly, there was little media coverage noting its passage.¹³⁷

As time marched on, the media continued to portray the defense procurement system as corrupt and full of fraudulent behavior.¹³⁸ News accounts claimed that all involved participated in “lying, cheating, and stealing” on a regular basis and stated the

¹³⁵ See *Pikes Peak Family Housing, LLC v. United States*, 40 Fed. Cl. 673, 681 n. 14 (paraphrasing Senator Levin’s statement that the agreement was reached by the House and Senate in an “eleventh hour compromise” prior to the adjournment of the legislative session at 134 CONG. REC. 31,690 (1988)).

¹³⁶ Senator John Glenn stated that the bill represented “reasoned action to change a procurement system which has lost the public’s confidence” and which he hoped would “correct the seedy trade of favors and information which has fueled the [Operation Illwind] scandal.” Senator Carl Levin asserted it was “a reasonable approach to solving what remains to be a pressing . . . problem.” And, Senator Howard Metzenbaum argued it necessary because “defense fraud rips off American taxpayers and endangers the lives of our fighting forces.” See 134 CONG. REC. 31,690 (1988); see also *Reagan Signs Bill Stiffening Insider Trading Penalties; He Also Approves Legislation Covering Contractor Fraud*, L.A. TIMES, Nov. 20, 1988, § 1, at 1.

¹³⁷ When President Reagan signed the bill into law on November 19, 1988, it went into effect with very little fanfare. Rather, the “White House . . . put out a brief announcement that Reagan had signed the bill . . . along with numerous other pieces of legislation.” See *id.*

¹³⁸ Although the promised indictments had not yet come about, Gilfillan pleaded guilty in October 1998, as a result of the Operation Illwind investigation. As news of its plea was relayed, tales were told of defense contractors “plying civilian contracting officers . . . with meals, liquor, theater tickets, and golf outings in exchange for sensitive Air Force planning documents and data about competitors’ bids.” The media also reported Gilfillan had argued in its defense that contractors had long been “accustomed to receiving from military procurement officials precisely the kinds of planning data” the Gilfillan division was accused of obtaining through illegal means. See Jim Schachter, *ITT Unit to Plead Guilty to Illegal Procurement Tactics*, L.A. TIMES, Oct. 1, 1988, § 4, at 1.

motive of contractors and consultants was simply greed.¹³⁹ By November 1988, a number of these allegations were confirmed when Congress released the results of a Pentagon study showing “excessive and unjustified use of consultants by major defense firms.”¹⁴⁰ In the weeks leading up to the release of the first indictments, public outrage was again stoked as the media reported the Pentagon was considering criminal prosecution against eight or nine of the nation’s biggest defense contractors for allegedly trafficking in classified DoD documents including: Boeing, McDonnell Douglas, Northrop, TRW, General Dynamics, Martin Marietta, Litton Systems, and Sanders Associates (a division of Lockheed).¹⁴¹

However, by late December 1988, the media’s portrayal of the scandal began to change slightly. Although much had been made of the upcoming indictments, journalists began questioning whether the crisis was really a “scandal overblown.”¹⁴² Prosecutors

¹³⁹ See Elizabeth Tucker, *Penalties for Contractor Scams Getting Stiffer; Government is Steadily Beefing Up Investigative Forces, Toughening Rules*, WASH. POST, Oct. 23, 1988, at H1.

¹⁴⁰ See John M. Broder, *Unjustified Use of Consultants by Arms Firms Reported*, L.A. TIMES, Nov. 5, 1988, §1, at 19. To explain just how excessive consultant fees had become, another news story reported that the Pentagon had “identified \$43 million in questionable professional fees and consultant costs charged by defense contractors to government contracts” as a result of an audit directed in July 1988 by Secretary Carlucci. It further stated the purpose of the audit was to determine the nature and extent of consulting costs charged to defense contracts by a representative sample of large defense contractors. The audit discovered that all of the 12 firms audited had weak internal controls. See Brendan M. Greeley, Jr., *Pentagon Questions \$43 Million in Consultant, Professional Costs*, AVIATION WEEK & SPACE TECH., Nov. 14, 1988, at 43.

¹⁴¹ See Reuters, *Eight Defense Firms Under Scrutiny*, L.A. TIMES, Dec. 21, 1988, § 1, at 2.

¹⁴² Although Operation Illwind burst into public view “with a blitzkrieg of more than 40 searches of defense contractors, consultants, and Pentagon officials, and was described in horrified tones,” journalists predicted the scandal may have been overblown. While one of the most tantalizing aspects of the investigation had initially been that members of

were quoted as being “disappoint[ed] . . . [that] the initial wave [of evidence] wasn’t as good as they [had] hoped it would be,”¹⁴³ while defense attorneys informed the media the various drafts of the charges against their clients did not constitute corruption of the magnitude expected from the highly publicized investigation.¹⁴⁴ While the promised indictments had not yet come to fruition, defense contractors’ response to the scandal was clear. By year’s end, bid protests soared in number, evidencing contractors’ beliefs the whole federal procurement process was dishonest.¹⁴⁵

In early January 1989, the first charges in Operation Illwind were filed. Facts released with the first indictments confirmed reports the scandal had been somewhat exaggerated.¹⁴⁶ Nevertheless, U.S. Attorney Hudson attempted to assure the public the

Congress might have had roles in appropriating procurement funds, this aspect of the case was the least developed. *See* Marcus & Murphy, *supra* note 124, at A1.

¹⁴³ *See id.*

¹⁴⁴ *See id.* Separate reports criticized that “the charges [had come] months after U.S. Attorney Henry Hudson first predicted them. Struggling to make evidence fit law, his staff had to rework various versions turned down by the Justice Department. In addition, such stories noted prosecutors readily admitted they were a long way from nailing bigger targets such as Melvyn Paisley, former assistant secretary of the Navy for research.” *See* Hedges, Wallace, Impocco, Trimble, & Pomice, *supra* note 107, at 11.

¹⁴⁵ The *Washington Post* reported Operation Illwind had “triggered a rush of protests by losing bidders, who argue[d] that they lost out on government work because of ethics violations.” A general counsel for a defense contractor was quoted as stating, “For years, people have suspected that these types of activities have been going on in defense procurements . . . but then when you have these sort[s] of disclosures . . . people say, ‘Wow! There’s more than just a few. I guess this is affecting me.’” *See* Sandra Sugawara, *Losing Bidders Challenging U.S. Contracts; Pentagon Probe Sparked Rise in Protests by Firms Alleging Violations*, WASH. POST, Dec. 20, 1988, at C1.

¹⁴⁶ For example, *The Washington Post* reported, “although Ill Wind was once touted as one of the most massive military corruption scandals in history, some law enforcement officials now assert it was exaggerated by the news media.” *See* Caryle Murphy & Ruth Marcus, *Major Defense Firm Admits Conspiracy; Second Contractor Charged with Bribery*, WASH. POST, Jan. 7, 1989, at A1; *see also* *First Gust from an Ill Wind*, TIME,

early indictments “represent[ed] just a small percentage of the investigation” and that over the next year, “a great deal of additional activity” would be forthcoming.¹⁴⁷ Even though the scandal appeared to have been somewhat inflated at that point, the early indictments still clearly showed the defense procurement system had become infused with corruption.¹⁴⁸ Tantalizing fact patterns were publicized, illustrating a “clandestine, cutthroat world of insider trading in procurement secrets”¹⁴⁹ between the defense consultants, their defense contractor clients, and their “silent partners,” the federal procurement officials selling the protected information.¹⁵⁰ Consistent with press

Jan. 16, 1989, <http://www.time.com/time/magazine/article/0,9171,956735,00.html> (maintaining the recent indictments had been a “far cry from the scores of prosecutions originally anticipated”).

¹⁴⁷ See Murphy & Marcus, *supra* note 146, at A1; see also *Firm, Six Men Charged In Defense Procurement Case*, L.A. TIMES, Jan. 8, 1989, § 1, at 1. Trusting Hudson’s pledge for additional indictments, another report stated “Ill Wind [was] likely to keep on blowing.” See *First Gust from an Ill Wind*, *supra* note 146.

¹⁴⁸ See *Firm, Six Men Charged In Defense Procurement Case*, *supra* note 147, at 1.

¹⁴⁹ See Caryle Murphy & Ruth Marcus, *Cutthroat Trading of Secrets Portrayed; Indictments in Pentagon Procurement Investigation Allege Double-Dealing, Boasting*, WASH. POST, Jan. 8, 1989, at A6. A separate but similar article described Operation Ill Wind as a 2-year old probe of a web of bribery and document theft that . . . was the preferred business practice among some Pentagon consultants and defense contractors. See Hedges, Wallace, Impocco, Trimble, & Pomice, *supra* note 107, at 11.

¹⁵⁰ Such news reports portrayed a world where documents served as currency for consultants and where defense consultants, “[h]oping to profit from confidential information, tried to double deal their corporate clients, their fellow consultants, and even their own sources.” Situations were described where consultants threatened contractor clients that they would persuade the Government not to exercise option years on the contract in question if the contractor did not pay the consultant additional fees. In addition, examples were cited where defense consultants, who had typically and formerly held high-level federal procurement positions, boasted of their sway over Pentagon officials and convinced officials at defense firms that they would not be awarded defense contracts unless they paid for inside information and favoritism for their firms. See Hedges, Wallace, Impocco, Trimble, & Pomice, *supra* note 107, at 11; see also Murphy & Marcus, *supra* note 149, at A6.

coverage from the early days of the scandal, news accounts once again stressed the “scandal[1] [had grown] out of an environment of laissez-faire government [during the Reagan administration], one that allowed much good work to be done but also . . . left Pentagon procurers to deal with weapons makers in back-alley fashion.”¹⁵¹

In light of such press coverage and the indictments, the DoD and Congress responded. After the first indictments, the Pentagon immediately suspended one of the two defense contractors, and the other after it had pleaded guilty to the charges.¹⁵² Senator Pryor, who had advocated regulating consultants about six months earlier, again pushed for consultant reform.¹⁵³ But more importantly, as a sign of the times, the Senate sent a very strong message in March of 1989 by rejecting President George H. W. Bush’s

¹⁵¹ Overall, the media coverage depicted consultants, contractors, and Reagan-era procurement officials in a decidedly unflattering light. Although reports noted Reagan was leaving office with “soaring popularity,” the press highlighted that since Reagan’s time in office, the number of suspensions and debarments of defense contractors had dramatically increased. Similarly, the number of Pentagon inspectors and auditors had substantially increased from 17,300 to 22,200, and the operating budget for such monitoring had increased by more than \$1 billion. See Hedges, Wallace, Impocco, Trimble, & Pomice, *supra* note 107, at 11; see also Richard Halloran, *Disciplining Pentagon Suppliers*, N.Y. TIMES, Jan. 14, 1989, §1, at 33; see also Murphy & Marcus, *supra* note 149, at A6.

¹⁵² After Hazeltine pleaded guilty, the DoD immediately responded by temporarily suspending it from bidding on new government contracts. In addition, the DoD suspended Teledyne from bidding on new government work due to its indictment. See James Bernstein, *U.S. Bars Hazeltine from Bidding*, NEWSDAY, Jan. 12, 1989, at 3; see also Halloran, *supra* note 151, at 33.

¹⁵³ Pryor wrote a newspaper article arguing “the basic work of government ha[d] been delegated to a work force that [was] nowhere to be found on the official organization charts – a shadow government.” He once again advocated the use of a registration system, declaring his abhorrence for the idea that consultants could “profitee[r] off one’s privileged access to information” and suggested that until there was total disclosure, the extent of the procurement problems would remain unknown. See David Pryor, *Insiders on the Loose; Nobody Knows What All the Government’s Consultants Are Doing*, L.A. TIMES, Jan. 6, 1989, § 2, at 7.

nominee for Defense Secretary, John Tower.¹⁵⁴ Although the Senate had never rejected a Cabinet nominee in the first 90 days of a presidency, at the time of his nomination, Tower was a defense consultant and had strong ties to the defense world.¹⁵⁵ Although there was “no solid proof Tower had done anything illegal while a defense consultant,” the Senate was suspicious of his closeness to the industry makers, with some members suggesting it was doubtful Tower could be “sufficiently critical of contractors’ products and claims.”¹⁵⁶ In response to Tower’s rejection, newspapers and magazines published editorials claiming the rejection confirmed “the capital [was] rife with misconduct,” and

¹⁵⁴ See Susan F. Rasky, *Senate Panel to Deny Recommendation of Tower as Bush’s Defense Secretary*, N.Y. TIMES, Feb. 24, 1989, at A1; see also John G. Tower, *Statements After Defeat*, N.Y. TIMES, Mar. 10, 1989, at B6.

¹⁵⁵ In late January 1989, Bush nominated John Tower, a former Republican senator from Texas, as the new Defense Secretary. Although initial news reports noted “presidents [were] usually granted their choices for Cabinet positions unless there [was] some compelling reason to do otherwise,” the previous year’s scandal had not been lost on Congress or the public. Tower had been employed as a highly paid defense consultant for several major defense contractors, was not widely liked on Capitol Hill, and had a reputation of womanizing and heavy drinking. Journalists claimed Tower’s “extraordinary struggle [was] proof that the normal rules for Cabinet nominations [were] not holding,” and pointed to the fact that one of Operation Illwind’s central targets, Melvyn Paisley, had been confirmed by the Senate after only a cursory review that failed to detect numerous questionable incidents of the past. Further coverage quoted a Democratic congressional aide as opining the Senate was “pinioned by the Paisley syndrome. They know they screwed up on that one, and now, no stone can go unturned.” See John M. Boder & Melissa Healy, *New Ethics, Democrats Pose Hurdle for Tower; Nominee Hurt By Defense Firm Ties, Arrogance, Talk of Vindictiveness, Drinking, and Womanizing*, L.A. TIMES, Feb. 9, 1989, § 1, at 1; see also Fred Kaplan, *Quick Confirmation Expected for Tower*, BOSTON GLOBE, Jan. 25, 1989, at 9.

¹⁵⁶ See Steven Waldman, *Days of Whine and Poses; John Tower’s Lament – And What It Misses*, WASH. MONTHLY, Mar. 1, 1991, at 51. In further support of Tower’s rejection, Senator Carl Levin asserted Tower had earlier served as an arms negotiator for the U.S. and when he left that job, Tower possessed some of the nation’s most critical weapons information. Levin stated, “[Tower] left those ongoing talks and became a consultant to companies involved in producing those same systems, and part of his job description included advice on the probable outcome of those talks. [While] Tower . . . saw no bad appearance in the type of activity he undertook, I do.” Rasky, *supra* note 154, at A1.

that although the country had “always experienced individual cases of corruption and impropriety in government,” the rejection evidenced “a system of legalized, institutionalized corruption.”¹⁵⁷

While the drama of Operation Illwind continued to unfold, and those under investigation struggled to defend themselves from upcoming indictments, the media consistently portrayed its prior messages regarding the scandal. For example, even when defense contractors claimed they had learned from the scandal and were currently adhering to ethics laws in greater numbers, the media quickly discounted their efforts by emphasizing that of the “46 major military contractors [with] written codes of ethics,” 39 were under criminal investigation.¹⁵⁸ Further, throughout the next several months, the press highlighted the indictments of the major players in Operation Illwind, particularly as they seemed to edge closer to high-level Pentagon officials.¹⁵⁹ The press published a “score card” in mid-March for the public to keep track of the main defendants charged in

¹⁵⁷ Editorials further alleged, “the rules themselves allow activities to take place legally that are improper and corrupting, and almost everyone is participating.” See *Drain Ethics Swamp*, CHRISTIAN SCI. MONITOR, May 30, 1989, at 20.

¹⁵⁸ These responses came about as a result after the Ethics Resource Center, a nonprofit organization of business executives and former government officials in Washington, announced “defense contractors [were] taking ethics a lot more seriously.” See James Bernstein, *Defense Firms Are Putting Their Ethics in Writing*, NEWSDAY, Feb. 13, 1989, at 7.

¹⁵⁹ For example, in March 1989, Charles Gardner, a former executive of a major military supplier, made headlines when he pleaded guilty to bribing former Assistant Secretary of the Navy Melvyn Paisley. A few weeks later, the media reported William Parkin, a defense consultant who had been the “chief Pentagon contact for corrupt defense contractors” had pleaded guilty to conspiracy, bribery, and fraud charges. See *3 Plead Guilty in Defense Probe*, CHICAGO TRIB., Mar. 10, 1989, at 10. The media described the pattern of corruption that had emerged from the Illwind cases as “classic influence peddling.” See Michael Mecham, “*Ill Wind*” *Guilty Pleas Show Pattern of Basic Corruption*, AVIATION WEEK & SPACE TECH., Apr. 3, 1989, at 24.

the Operation Illwind scandal and their outcomes, showing the public's growing anger towards the controversy.¹⁶⁰ With each corporate indictment or guilty plea, the Government responded quickly, typically either suspending or debarring each organization.¹⁶¹

By June 1989, the sentencing hearings for some of the main defendants began to occur. After evidence emerged that a high-level procurement official had requested a bribe from a consultant, the media quickly framed the seriousness and motivation of the crime by quoting the prosecuting attorney as stating it was “perhaps the most serious offense that a government official can commit . . . [because it was] . . . a violation of the public trust. [The official was] motivated by nothing more than his own greed.”¹⁶²

Throughout the rest of 1989, indictments, guilty pleas, and sentencing continued in the Operation Illwind scandal.¹⁶³ The media continued to portray the gravity of the crimes.

¹⁶⁰ See Michael Wines, *Two Plead Guilty to a Conspiracy in Pentagon Case*, N.Y. TIMES, Mar. 24, 1989, at A1; see also *Navy Freezes Out 3 Units of Unisys*, CHICAGO TRIB., Mar. 17, 1989, at M5.

¹⁶¹ Specifically, less than a week after Unisys pleaded guilty based on evidence gathered through the Operation Illwind investigation, the Navy suspended three units of Unisys from bidding on or receiving federal contracts on the basis of “expense account abuses, improper use of consultants . . . , and bribery of government officials.” See *Navy Freezes Out 3 Units of Unisys*, *supra* note 160, at M5.

¹⁶² Two major players in the Operation Illwind scandal, William Parkin, a former DoD procurement official turned defense consultant, and Stuart Berlin, a senior Navy procurement official were sentenced to 26-month prison terms and fined \$25,000 each for “illegally scheming to help two companies get lucrative Pentagon contracts.” In addition, Parkin admitted “he had taken over \$50,000 in bribes over a 10-year period while employed with the Department of Defense.” See *Parkin, Berlin Sentenced for Pentagon Fraud*, L.A. TIMES, Jun. 3, 1989, § 1, at 21.

¹⁶³ For instance, Charles Gardner pleaded guilty and agreed to cooperate extensively with the prosecution, although he was still sentenced to 32 months and fined \$40,000 for his role in setting up a complicated scheme to bribe public officials. See Robert E. Kessler, *Former Executive for Unisys Gets Jail for Defense Scams*, NEWDAY, Sep. 16, 1989, at 9.

For example, after Boeing pleaded guilty on criminal charges of illegally obtaining Pentagon documents in November 1989,¹⁶⁴ the media stressed that during the sentencing hearing, the judge had lectured Boeing that the documents improperly acquired were “not . . . minor document[s] . . . [but] a classified, secret set of documents.”¹⁶⁵

As each court proceeding of the Operation Illwind cases revealed additional evidence surrounding the corruption that had become accepted in the DoD procurement system, Congress passed new and more stringent ethics laws.¹⁶⁶ Although the new rules were meant to prevent the unlawful flow of inside information, most defense contractors contended the new requirements “caused harmful disruptions in the way they [went] about their legitimate tasks of finding out what the military want[ed] and providing what the military need[ed]” and many procurement officials commented they found the new rules confusing.¹⁶⁷ Due to the confusion and ambiguities surrounding the new law and

¹⁶⁴ Boeing pleaded guilty on November 13, 1989. *See* Molly Moore & Robert F. Howe, *Boeing Co. is Guilty in Defense Case; Probe of Trafficking in Military Data by Contractors Revealed*, WASH. POST, Nov. 14, 1989, at A1.

¹⁶⁵ *See id.*

¹⁶⁶ By late summer and early fall of 1989, new rules required Pentagon procurement officials to read a number of legal-sounding questions from a printed card when meeting with big defense contractors. The questions were meant to determine if the conversation was legally permissible to “stem the flow of inside information that could give one company an advantage over its competitors.” *See* Sandra Sugawara, *Ethics Law Has Defense Contractors Confused; Process Slows Due to Uncertainty Over What Is or Isn’t Permitted*, WASH. POST, Oct. 6, 1989, at D1.

¹⁶⁷ One frequently mentioned example of an ambiguity with the new requirements was that the “new regulations restrict[ed] communication between a company and many government officials once a procurement process [had] begun but [did] not spell out when that moment [was] reached.” *See id.*

the potential penalties involved, procurement officials and contractors became afraid to talk to each other for fear an inadvertent violation would occur.¹⁶⁸

By the winter of 1989, news of indictments, guilty pleas, and sentences related to Operation Illwind had slowed down substantially although they did continue.¹⁶⁹ Although indictments, and therefore news coverage, had tapered off a great deal, the Government's response to the scandal persisted. For example, by March of 1990, the Government was devoting more resources to attacking white collar crime,¹⁷⁰ and the DoD Inspector General's (IG) Office had grown substantially.¹⁷¹ Nevertheless, some

¹⁶⁸ The new law carried criminal penalties of up to five years in jail. *See* 41 U.S.C. § 423(e)(1) (1994); *see also* Procurement Policy Amendments of 1988, Pub. L. 100-679, 102 Stat. 4055. Some procurement officials were concerned that "if they [had] a conversation with one individual, someone later [would] claim that the contractor was given information that was not generally available." Sugawara, *supra* note 166, at D1. Overall, contractors and procurement officials complained the "regulations and law [were] not clearly drawn, and they invoke[d] criminal penalties for conduct that [was] not clearly defined." *See id.*

¹⁶⁹ For instance, in May 1990, a former a former Grumman Corp. official pleaded guilty to accepting \$75,000 in kickbacks as part of a defense –fraud scheme discovered as part of Operation Illwind. *See Ex-Grumman Official Pleads Guilty*, WASH. POST, May 10, 1990, at A12. Further, in January 1991, Cubic Defense Systems and a former Cubic executive pleaded guilty to conspiracy and other charges. Cubic's guilty plea was a major achievement for prosecutors who hoped to indict Victor Cohen through Cubic. In coverage surrounding Cubic's guilty pleas, the media portrayed events surrounding the case as part of a long-running conspiracy involving Cubic in which the defense consultant provided Cohen with "gifts, meals, payments to friends and associates, assistance in opening a Swiss bank account and promises of future employment." *See* Michael Lev, *Guilty Pleas In Pentagon Fraud Case*, N.Y. TIMES, Jan. 16, 1991, at D4.

¹⁷⁰ *See* Sandra Sugawara, *Criminal Indictments: Training Bigger Guns on Corporations*, WASH. POST, Mar. 2, 1990, at A1.

¹⁷¹ The DoD IG's Office grew from a few dozen people in 1983, when it was created, to about 1,400 people. The media reported it had been a powerful tool to investigate reports of waste, fraud, and abuse. Nevertheless, the media maintained such additional resources would not have been needed but for the faulty actions of the Reagan administration. *See id.*

journalists claimed neither the Government's response nor the media's coverage of the scandal had been enough.¹⁷²

In the next four years, as indictments, guilty pleas, and sentencing hearings continued, albeit at a much slower rate, several major players' cases came to the forefront. In mid-June 1991, Unisys Corp. pleaded guilty and agreed to the single-most expensive procurement fraud settlement of the time, a record \$190 million.¹⁷³ The press called the plea in the Unisys case "a landmark because more than the other Illwind cases, it expose[d] a reprehensible pattern of corruption directed at the executive and legislative

¹⁷² Specifically, an editorial author claimed the scandal had not received as much negative media coverage as it should have, because of President George H.W. Bush's popularity, due to his association with the Reagan administration. The author stated,

A fleet of scandals stuttering along in low gear or next-to-no gear would be a lot more visible if the last presidential election had gone the other way In this, Year 10 of the Reagan-Bush continuum, we get lots of buttoning up, hunkering down, and covering over of potential stinkbombs like . . . Operation Ill Wind, the Pentagon exposé that's had a longer run than "Chorus Line." This would be an ideal time for a spring cleaning of the federal stable, a real turning over of the compost heap in Washington. But don't expect the news media to do any deep digging or heavy lifting. The media have declared peace against this particular White House. No scandal, no matter how long festering is worth pestering this inexplicably popular president When a fellow is lounging in the neighborhood of 80 percent approval ratings, as Bush is, the mainstream media treat him like the 800-pound gorilla pollsters think he is.

See David Nyhan, *A Lot of Dirt's Beneath that Broccoli*, BOSTON GLOBE, Apr. 1, 1990, at A9.

¹⁷³ See Report: *Computer Giant to Pay Up; Settling Pentagon Fraud Charges Will Cost Unisys A Record \$190 Million*, *The Wall Street Journal Says*, ORLANDO SENTINEL, Jun. 11, 1991, at B1; see also *Operation Ill Wind Blows on Unisys*, INFO. WEEK, Jun. 17, 1991, at 25; see also Robert F. Howe, *Unisys to Pay Record Fine in Defense Fraud; Ill Wind Probe Nets Sixth Corporation*, WASH. POST, Sep. 7, 1991, at A1; see also Paul Mann, *Unisys Admits Bribery and Fraud, Will Pay Record \$190 Million Fine*, AVIATION WEEK & SPACE TECH., Sep. 16, 1991, at 24.

branches of our government.”¹⁷⁴ With Unisys’ conviction, the press portrayed the Operation Illwind investigation in a decidedly mixed light. On one hand, the media lauded the investigation, stating it had “close[d] the book on an era when defense acquisition was accomplished largely on the basis of personal contacts and friendships.”¹⁷⁵ But, on the other, journalists questioned whether the investigation had been “misdirected in a way” because it had led to a “mountainous amount of useless procedures that [had] deformed the entire business of selling goods and services to the Defense Dept.”¹⁷⁶

Following Unisys’ guilty plea, Melvyn Paisley pleaded guilty in June 1991,¹⁷⁷ and Victor Cohen did as well in mid-August 1991,¹⁷⁸ both to charges of bribery and conspiracy. With Cohen’s plea and conviction, the media reported the prosecution’s effort demonstrated “both the success of Operation Ill Wind and the necessity for strict scrutiny and review of our contracting process [noting it was] particularly disturbing

¹⁷⁴ See Howe, *supra* note 173, at A1.

¹⁷⁵ Such coverage predicted personal contacts would not matter much as much in the future in regards to the defense network and claimed that “the good-ole’-boy network, if not dead, [was] definitely comatose.” See Mann, *supra* note 173, at 24.

¹⁷⁶ One report quoted Edward N. Luttwak, a defense specialist, who stated, “Fraud is much less important than waste, and waste is much less important than mismanagement, which involves the entire multibillion-dollar weapons establishment. The true corruption is in the mountainous amount of useless procedures that have deformed the entire business of selling goods and services to the Defense Department.” See *id.*

¹⁷⁷ See Stevenson, *supra* note 125, at D1.

¹⁷⁸ As part of his plea, Cohen admitted he “accept[ed] money and extravagant favors in exchange for illegally steering huge military contracts to two defense contractors.” See Robert F. Howe, *Defense Procurement Fraud Figure Pleads Guilty; former Air Force Official Cohen Is Second-Highest Ranking individual Prosecuted*, WASH. POST, Aug. 23, 1991, at A12; see also Stevenson, *supra* note 125, at D1; see also *Ex-Aide Admits Bribe*, NEWSDAY, Aug. 23, 1991, at 17.

that such a high-level official in the government would be involved.”¹⁷⁹ Just a few months later, James Gaines, by then a former deputy assistant Navy secretary, was charged and then later sentenced in June 1992.¹⁸⁰

The following two years saw guilty pleas from four additional defense contractors including United Technologies Corp. in late August 1992,¹⁸¹ LTV in May 1993,¹⁸² Grumman Corp. in November 1993,¹⁸³ and Litton Industries, Inc. (“Litton”) in January 1994.¹⁸⁴ With the conviction and settlement of Litton, Operation Illwind came to a close.¹⁸⁵ The media reported Operation Illwind had been a huge success. Overall, it led

¹⁷⁹ See Howe, *supra* note 178, at A12.

¹⁸⁰ See *Ex-Navy Official Charged in Fraud Probe*, CHICAGO TRIB., Dec. 4, 1991, at C24; see also *Ex-Official Sentenced*, N.Y. TIMES, Jun. 1, 1992, at D5.

¹⁸¹ United Technologies pleaded guilty to fraud and conspiracy charges and agreed to pay \$6 million in penalties in connection with Operation Illwind. See “*Ill Wind*” *Guilty Plea*, NEWSDAY, Aug. 29, 1992, at 8.

¹⁸² LTV pleaded guilty and agreed to pay \$2.3 million in criminal and civil fines in connection with a bribery scheme that helped the subsidiary illegally win a \$32 million Navy communications contract in the mid-1980s. See Robert F. Howe, *LTV Pleads Guilty In “Ill Wind” Probe; Former Aerospace Unit Won Contract Illegally*, WASH. POST, May 19, 1983, at F1.

¹⁸³ Grumman agreed to pay \$20 million in restitution to the U.S. government to settle charges in connection with the sweeping Operation Ill Wind probe of defense industry corruption (although Grumman admitted no wrongdoing). See *Grumman Corp.*, News Breaks, AVIATION WEEK & SPACE TECH., Nov. 29, 1993, at 19.

¹⁸⁴ Litton Industries, Inc., pleaded guilty to conspiracy, illegal conversion of government property, and wire fraud, and agreed to pay \$3.9 million in fines for buying insider information in an attempt to win three military contracts. See Charles W. Hall, *Litton Industries Pleads Guilty, Closing Book on “Ill Wind” Scandal*, WASH. POST, Jan. 15, 1994, at A1; see also *Fraud Costs Litton \$3.9 Million*, Business Digest, BALTIMORE SUN, Jan. 15, 1994, at 22C; see also *Litton Industries, Inc.*, AVIATION WEEK & SPACE TECH., Jan. 24, 1994, at 31.

¹⁸⁵ “Litton Industries, Inc. . . . pleaded guilty to charges of conspiracy, fraud, and illegal conversion of government property and agreed to pay the government \$3.9 million in

to the convictions of 54 individuals, including a former assistant secretary of the Navy, a former deputy assistant Navy secretary, and a former deputy Air Force secretary.¹⁸⁶ In addition, ten corporations were convicted, including Unisys Corp., which paid a record \$190 million fine.¹⁸⁷ Overall, it raised more than \$250 million from those convicted.¹⁸⁸

As the scandal drew to a close, the media lauded the efforts of those who had helped to bring the scandal to a close and highlighted the public's fury that the scandal had occurred in the first place. In reference to Mr. X, the informant who had helped break the case, news accounts asserted, "This case shows that one person does count."¹⁸⁹ Further, Attorney General Janet Reno was quoted as stating, "Operation Ill Wind has been one of the most successful investigation and prosecutions ever undertaken by the Department of Justice against white-collar crime."¹⁹⁰ In relation to the public sentiment at that time, one editorial declared,

[o]ne of the more troubling aspects of [the Operation Illwind scandal] . . . is that the companies involved include some of the stars that have contributed so much to this country's unmatched military strength Should the American people be expected to look the other way and count fraud as part of the cost of keeping the armed forces second to none? Only a mind utterly indifferent to traditional American values would seriously suggest such a

finances and penalties. The settlement mark[ed] the final chapter in Operation Ill Wind, the Justice Dept.'s 7 ½ -year probe of defense contracting fraud." See *Litton Industries, Inc.*, *supra* note 184, at 31.

¹⁸⁶ See Hall, *supra* note 184, at A1.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*; see also Kessler, *supra* note 93, at 9 (quoting U.S. Attorney Joseph Aronica as stating, "Never say one person doesn't count").

¹⁹⁰ See Hall, *supra* note 184, at A1.

cynical course. Only a flaccid, lazy citizenry would substitute a yawn for a cry of outrage Punishment and some form of restitution are important, but so is the curt message Ill Wind sends: Never again.¹⁹¹

C. Outcome and Reform Resulting from the Operation Illwind Scandal

In contrast to the spare parts scandal, the Operation Illwind scandal resulted in immediate reformatory legislation. From the moment Operation Illwind broke, it was clear the scandal had revealed at least four important lessons: 1) both the Government and the defense industry needed to “establish and maintain effective internal controls to minimize improper conduct;”¹⁹² 2) “danger [could] arise from the use of consultants,” particularly in the release of inside information, since consultants worked for contractors, the Government, and sometimes both;¹⁹³ 3) in the realm of federal employment, there was a “revolving door through which former government and contractor employees frequently pass[ed];”¹⁹⁴ and 4) “the massive amounts of money involved with Government procurement [would] always lure the less scrupulous, tempt the desperate,

¹⁹¹ See Editorial, *Sweeping Up; Defense Contractors Guilty of Fraud Pay*, COLUMBUS DISPATCH, Jan. 26, 1994, at 8A.

¹⁹² See generally Timothy M. Cox, *Is the Procurement Integrity Act “Important” Enough for the Mandatory Disclosure Rule?: A Look at the Procurement Integrity Act and the Case for Its Inclusion in the Mandatory Disclosure Rule 13* (June 2010) (unpublished LL.M. thesis, George Washington University) (on file with the George Washington University Law School Library system) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE WEAPONS SYSTEM ACQUISITION 43 (1992)).

¹⁹³ See generally *id.* at 15 (citing Richard Bednar, *The Fourteenth Major Frank B. Creekmore Lecture*, 175 MIL. L. REV. 286, 289 (2003) (stating that during Operation Illwind, federal procurement officials were found to have sold defense contractors' information to corrupt “consultants” outside the Pentagon who, in turn, would resell the precious information to [unrelated and separate] defense contractors)).

¹⁹⁴ See generally *id.* at 17.

and blind the overzealous.”¹⁹⁵ For these reasons, Congress quickly, decisively, and without hearings or comments, passed new procurement integrity legislation.¹⁹⁶

This legislation was included as section six of the OFPP bill and was passed within five months of the scandal coming to light.¹⁹⁷ The legislation would later become known as the Procurement Integrity Act (PIA) and although passed in 1988, did not go into effect until November of 1990.¹⁹⁸ The purpose of the PIA was, and still is, fourfold: 1) to prevent the disclosure of procurement information; 2) to prevent the unlawful attainment of procurement information; 3) to prevent former federal officials from accepting or even discussing outside employment with contractors when such employment would be a conflict of interest; and 4) to prevent former federal officials from accepting compensation from a contractor when it would be a conflict of interest.¹⁹⁹ In addition, in drafting the legislation that eventually became the PIA, the House Committee determined the Government should have a right to refuse to do business with

¹⁹⁵ See generally *id.* at 19.

¹⁹⁶ See 134 CONG. REC. 31,690, 32,156 (1988); see also *Reagan Signs Bill Stiffening Insider Trading Penalties; He Also Approves Legislation Covering Contractor Fraud*, L.A. TIMES, Nov. 20, 1988, § 1, at 4.

¹⁹⁷ See Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6, 102 Stat. 4063 (1988) (repealed by Pub. L. No. 104-106, 110 Stat. 665 (1996)).

¹⁹⁸ Originally, the Procurement Integrity Act was to go into effect in May 1989; however, it was suspended until November 1990 “in an attempt to reach agreement among various committees considering the Act.” See Elizabeth Dietrich, *The Potential for Criminal Liability in Government Contracting: A Closer Look At the Procurement Integrity Act*, 34 PUB. CONT. L.J. 521, 525 (2005) (citing 134 CONG. REC. 23,585, 23,589, 32,155, 32,156 (1988); Donald P. Arnavas & Clayton S. Marsh, *The Procurement Integrity Act*, 9 BRIEFING PAPERS COLLECTION 1, 1-2 (1991)); see also Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6, 102 Stat. 4063 (1988) (repealed by Pub. L. No. 104-106, 110 Stat. 665 (1996)).

¹⁹⁹ See 41 U.S.C. § 423(a)-(d) (2006 & Supp. III 2009).

unscrupulous individuals and companies through debarment procedures so that procurement actions would not be “held up for long periods of time while [winding] their way first through the Justice Department, then through the Federal court system.”²⁰⁰ Further, since penalties had not been proscribed by statute for many of the problematic activities that came to light through Operation Illwind, Congress set out to provide penalties as part of the PIA.²⁰¹

Although there had been some opposition to the PIA prior to its passage and enactment, additional resistance came once it went into effect.²⁰² Both industry and government officials argued the law “was overly burdensome and too complex” and pressed Congress to remedy these problems.²⁰³ One of the main complaints was the

²⁰⁰ See H.R. REP. NO. 100-911, 100th Cong., 2d Sess. 22 (Sep. 9, 1988).

²⁰¹ Upon its passage, Senator Glenn stated that the PIA

provides appropriate administrative penalties for failure to comply with the [PIA’s] requirements. Government employees who have knowingly violated such requirements will be subject to appropriate administrative personnel actions, including dismissal from the service. They will also be subject to the provision which enables the Justice Department to bring civil suits and seek appropriate penalties for this behavior. If a contractor or consultant has violated the [PIA’s] requirements, the agency shall determine whether to utilize new contractual remedies required by [the PIA, or], whether to terminate the procurement and initiate a debarment proceeding. Contractors will, of course, be subject to . . . civil fines and criminal provisions

See 134 CONG. REC. 32,156 (1988); see also H.R. REP. NO. 100-911, 100th Cong., 2d Sess. 22 (Sep. 9, 1988); see also Sharon A. Donaldson, *Section 6 of the Office of Federal Procurement Policy Act Amendments of 1988: A New Ethical Standard in Government Contracting?*, 20 CUMB. L. REV. 421, 445 (1990).

²⁰² See Dietrich, *supra* note 198, at 525.

²⁰³ See *id.*

certification process the PIA required.²⁰⁴ Another was that the PIA's requirement that barred contractors from knowingly providing anything of value to procurement officials was "duplicative of statutes already in effect."²⁰⁵ Congress responded by making significant changes to the PIA as part of the "Clinger-Cohen Act of 1996, at section 4304 of the Federal Acquisition Reform Act of 1995."²⁰⁶ To date, this remains the most significant amendment to the PIA since its enactment.²⁰⁷ The Clinger-Cohen Act eliminated the certification provisions and the prohibition on gratuities to procurement officials.²⁰⁸ It also "repealed numerous employment restrictions and conflicts of interest prohibitions."²⁰⁹ Other than these major and several other minor changes, the PIA has remained virtually the same since the changes made in 1996.²¹⁰

²⁰⁴ Under these mandates, "agency heads . . . [could] require contractors or procurement officials to submit written certification [at any time] asserting [the individual was] familiar with the PIA's provisions, [was] not aware of any violations, and had disclosed all information about possible violations." It further required "retiring procurement officials to certify their understanding of an ongoing obligation not to discuss source selection or proprietary information." These provisions were burdensome to both government and industry officials and provided little value but had a history of leading to "frequent protests." *See id.* at 526.

²⁰⁵ *See id.* at 527 (*quoting* 41 U.S.C. § 423(a)(2) (1994) (prior to amendment by Pub. L. No. 104-106, 110 Stat. 186 (1996))).

²⁰⁶ *See id.* at 526.

²⁰⁷ *See* Timothy M. Cox, Is the Procurement Integrity Act "Important" Enough for the Mandatory Disclosure Rule?: A Look at the Procurement Integrity Act and the Case for Inclusion, 40 PUB. CONT. L.J. 347, 352 n. 26 (2011).

²⁰⁸ *See* Dietrich, *supra* note 198, at 526-27.

²⁰⁹ *See id.* at 526-27 (*citing* Clinger-Cohen Act, Pub. L. No. 104-106, § 4304, 110 Stat. 186, 664 (1996)).

²¹⁰ *See id.* at 526-27.

Today, the PIA “still targets four areas: 1) disclosing confidential procurement information; 2) receiving confidential procurement information; 3) employment discussions between contractors and agency officials; and 4) post-government employment opportunities with a contractor.”²¹¹ First, the statute prohibits any present or former U.S. official from knowingly disclosing “contractor bid or proposal information or source selection information before the award” of a contract.²¹² It also prohibits any person, unless otherwise authorized by law, from knowingly obtaining such information.²¹³ In addition, the PIA also requires agency officials who are “participating personally and substantially” in a procurement action to report any job offers from contractors who are competing for that particular contract.²¹⁴ The statute then requires the agency official who has received the job offer to either reject it or disqualify himself from further participation in the procurement.²¹⁵ Similarly, a contractor who participates in employment discussions with an official who is subject to the restrictions of the PIA and knows that the official has either not reported the contact or disqualified himself will

²¹¹ See Cox, *supra* note 207, at 352 (citing 41 U.S.C. § 423(a)-(d) (2006)).

²¹² See 41 U.S.C. § 423(a) (2006 & Supp. III 2009); FAR 3.104-3(a) (2011). While the statute prohibits a present or former U.S. official from knowingly disclosing such information, the PIA contains an exemption describing six circumstances. These allow disclosures authorized by regulation, disclosures by contractors of its own information, disclosures by an agency after it has canceled a procurement, meetings between agency and contractor officials, or disclosures to Congress, the Comptroller General, another federal agency, or a federal agency inspector general. See 41 U.S.C. § 423(h)(1)-(6); see also FAR 3.104-4(e).

²¹³ See 41 U.S.C. § 423(b); see also FAR 3.104-3(b).

²¹⁴ See 41 U.S.C. § 423(c)(1)(A); see also FAR 3.104-3(c).

²¹⁵ See 41 U.S.C. § 423(c)(1)(B); see also FAR 3.104-3(c)(1)(ii).

be subject to penalties and administrative actions under the PIA.²¹⁶ The PIA also limits some post-government employment for certain Government officials.²¹⁷ But, perhaps most importantly, the PIA includes various administrative, contractual, civil, and criminal penalties for those who violate it.²¹⁸

Above all, the PIA represented the “first procurement-specific anti-corruption statute that penalized the exchange of confidential procurement information.”²¹⁹ While the passage and enactment of the PIA has likely prevented and discouraged a scandal similar to Operation Illwind from repeating itself, it has not been without its critics. More than twenty years after its enactment, the PIA has not entirely prevented confidential information from being improperly disclosed in all procurement cases, nor

²¹⁶ See 41 U.S.C. § 423(c)(4); *see also* FAR 3.104-8(b).

²¹⁷ If, at the time a contract in excess of \$10,000,000 was awarded, the official acted as the contracting officer, source selection authority, a member of the source selection evaluation board, the chief of a financial or technical evaluation team, the program manager, deputy program manager, or administrative contracting officer, the official may not accept a job with that contractor for one year. *See* 41 U.S.C. § 423(d)(1)(A)-(B); *see also* FAR 3.104-3(d)(1)(i)-(ii). In addition, the same requirement applies to a federal official who personally awards a contract, subcontract, modification, task order, or delivery order in excess of \$10,000,000; who establishes overhead or other rates on a contract related to that particular contractor in excess of \$10,000,000; who approves a contract payment in excess of \$10,000,000 to that contractor; or who pays or settles a claim in excess of \$10,000,000 with that specific contractor. *See* 41 U.S.C. § 423(d)(1)(C)(i)-(iv); *see also* FAR 3.104-3(d)(1)(iii)(A)-(D).

²¹⁸ *See* 41 U.S.C. § 423(e); *see also* FAR 3.104-7; FAR 3.104-8. Specifically, criminal penalties include a maximum of five years’ imprisonment, a fine as provided under Title 18 of the United States Code, or both. *See* 41 U.S.C. § 423(e)(1). In addition, if a civil action is brought, individuals may be fined up to \$50,000, and organizations up to \$500,000, for each violation as well as twice the amount the individual received or offered for the prohibited conduct. *See* 41 U.S.C. § 423(e)(2). After discovering a violation of the PIA, a federal agency may also cancel or rescind a contract, suspend or debar a contractor, or take adverse personnel action. *See* 41 U.S.C. § 423(e)(3)(A).

has it prevented all incidents of bribery.²²⁰ And some argue the statute remains “overly burdensome on both contractors and government officials.”²²¹ However, the “PIA [remains] an important tool in the prevention of fraud and corruption It provides criminal liabilities, bolstering criminal penalties set forth in other relevant statutes, and is necessary to prevent conduct that is harmful to the integrity of the procurement process.”²²² And in that sense, the PIA may be Operation Illwind’s “most important legacy.”²²³

IV. A CASE HISTORY OF THE DARLEEN DRUYUN SCANDAL AND ITS RELATED MEDIA COVERAGE

The Operation Illwind scandal and its subsequent reform, via the PIA, brought about necessary changes to help prevent at least some instances of integrity breaches, fraud, and corruption. However, as mentioned above, the PIA was not a solution to cure all potential DoD procurement scandals. A little more than a decade later, another large controversy surfaced, this time surrounding a contract for aircraft refueling tankers. This scandal’s after effects would be felt for well over ten years and was not completely resolved until early 2011.

²²⁰ For example, in 2009, the Army discovered an Army civilian program director for a technology center at Ft. Belvoir, Virginia, had released sensitive procurement information to a contractor. The program director later admitted the release of information but argued the procurement system depended upon close relationships to be successful. *See generally* Robert O’Harrow, Jr., *A \$191 Million Question: How a Relationship Between an Army Official and a Private Contractor Led to Allegations of Collusion and Impropriety*, WASH. POST, Aug. 7, 2009, at A1.

²²¹ *See* Dietrich, *supra* note 198, at 531.

²²² *See id.* at 538.

²²³ Cox, *supra* note 207, at 351 (*citing* H.R. REP. NO. 100-911, at 20-21 (1988)).

In regards to this scandal, although Boeing eventually “won a \$35 billion contract to replace the Air Force’s Eisenhower-era fleet of refueling tanker planes . . . [it occurred only after] a decade-long contracting saga that [was] one of the lengthiest and strangest in Pentagon history.”²²⁴ One news report described the troublesome after effects of this scandal in the following manner:

the damage this deal . . . wrought, measured in wasted taxpayer dollars and wasted lives, includes two people who have gone to prison; one CEO who . . . resigned in disgrace; two members of Congress who . . . died unable to close the deal and another who has been indelibly tainted by scandal; the destroyed credibility of some senior military leaders; and in the end, a U.S. military that is still being moved around the world by an airplane that will, sooner or later, be unfit to fly.²²⁵

During its history, the tanker contract was awarded “three times to two different companies over two presidencies.”²²⁶ The first time, the contract was nullified after Darleen Druyun, a high-level Air Force procurement official, set in motion “one of the worst pay-for-play scandals in recent political memory.”²²⁷ Although Druyun’s actions were unethical, had they not been related to a highly unusual lease contract involving the tanker aircraft, it is likely they might never have been discovered.²²⁸

²²⁴ See Whet Moser, *How Boeing Won the KC-X Tanker Contract, Maybe For Good This Time*, CHICAGO MAGAZINE, Feb. 25, 2011, <http://www.chicagomag.com/Chicago-Magazine/The-312/February-2011/How-Boeing-Won-the-KC-X-Tanker-Contract-Maybe-For-Good-This-Time/>.

²²⁵ See Shane Harris, *Own the Sky*, WASHINGTONIAN (Nov. 2010), <http://www.washingtonian.com/articles/people/17244.html>.

²²⁶ See Moser, *supra* note 224.

²²⁷ See *id.*

²²⁸ See Margaret Larezos, *Leaders Can Learn From Druyun’s Ethical Lapses and Their Consequences* 5 (Mar. 15, 2008) (unpublished strategy research project, U.S. Army War College), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA479019&Location=>

A. How it Began

Although the Air Force's aerial refueling fleet is necessary to sustain U.S. and allied aircraft in military operations beyond U.S. shores,²²⁹ today's tankers are "flying fossil[s] from the era of Elvis"²³⁰ and have been falling apart, literally at the seams, for the past several years.²³¹ This became apparent in 1999 after two very serious accidents occurred involving malfunctions of the aged KC-135 Stratotanker aircraft.²³² As such, by the end of the twentieth century, Air Force leadership determined the tanker fleet needed to be replaced by newer models.²³³ The problem was that as much as the Air Force needed new tankers, it was spending nearly its entire budget for planes on the development and acquisition of the F-22 aircraft.²³⁴

U2&doc=GetTRDoc.pdf.

²²⁹ See Loren Thompson, *How Boeing Won the Tanker War*, FORBES (Feb. 28, 2011, 6:54 PM), <http://blogs.forbes.com/beltway/2011/02/28/how-boeing-won-the-tanker-war/>.

²³⁰ See Editorial, *Such a Deal*, ST. LOUIS POST-DISPATCH, Dec. 7, 2003, at B2.

²³¹ "By 1999, Senior Air Force leaders watched as maintenance crews peeled the skin layers [of the aircraft] apart and powder fell out from the middle. Corrosion and fatigue were overtaking the planes." See Harris, *supra* note 225.

²³² One accident occurred on January 13, 1999, when a KC-135 Stratotanker aircraft crashed while approaching the runway at Geilenkirchen Air Base in Germany after its horizontal stabilizer "spontaneously locked into an extreme 'nose-up' position" which caused the tanker to crash, killing all four of its crew members. The Air Force grounded 350 tankers but never determined the cause of the malfunction. Four months after the crash, another tanker "blew apart during a routine cabin-pressure test." See *id.*

²³³ Then-Secretary of the Air Force Whitten Peters stated, "We were in a race between the cost of operating the aircraft and trying to find money to replace this stuff. If this were your car, you'd trade it in." See *id.*

²³⁴ See *id.*

In the meantime, the chairman of the Senate’s Appropriations Committee, Senator Ted Stevens, became aware of the deteriorating fleet of tanker aircraft and suggested the Air Force “lease existing commercial aircraft” modified to operate as aerial refuelers.²³⁵ Soon thereafter, in February 2001, Boeing “approached the Air Force with an unsolicited offer to lease three dozen 767s . . . for \$124 million each.”²³⁶ In response, Air Force officials conducted their own research, finding that buying the planes outright would cost a great deal less, at only \$52 million per tanker.²³⁷ Nevertheless, after the terrorist attacks of September 11, 2001, the Air Force quickly realized that the United States was going to war and that the replacement of the tankers needed to become a top priority.²³⁸ As a result, the Air Force began to seriously consider Boeing’s offer.²³⁹ Since the commercial airline market had collapsed at that point in time, those outside of the Air Force and in favor of the plan believed the deal was beneficial for all involved.²⁴⁰ “[T]he Air Force would get its planes, . . . [m]embers of Congress would . . . [satisfy] their constituencies

²³⁵ *See id.* “In other words, the idea was that the Air Force would use existing commercial transport planes that had been modified into replacement tankers.” *See* Thompson, *supra* note 229.

²³⁶ *See* Harris, *supra* note 225.

²³⁷ *See id.*

²³⁸ *See id.*

²³⁹ *See id.*

²⁴⁰ “Boeing’s backers in Congress made no pretense about using taxpayer money for a corporate bailout.” *See id.* Further, “the commercial airline market was collapsing, so it was explicitly presented as a practical bailout of the manufacturer.” *See* Moser, *supra* note 224.

and American industry, . . . [and] Boeing would be saved. The three points in the ‘iron triangle’ of the defense business [would] all [be] satisfied.”²⁴¹

Knowing the deal would have to receive the approval of the Senate Armed Services Committee (SASC), and with it, Senator John McCain, known for his fiscal conservatism, the Air Force mounted a campaign to gain the necessary support.²⁴² One of the senior civilian Air Force procurement officials leading the fight was Darleen Druyun.²⁴³ A tall woman with “oversized, saucer-shaped eyeglasses,” Druyun “inspired a fair amount of terror”²⁴⁴ from many who believed she “would rather burn you than be your friend.”²⁴⁵ Due to her shrewd bargaining skills and icy personality, many Pentagon insiders knew her as “the dragon lady.”²⁴⁶ Due to various factors, the Air Force “never seriously considered any company other than Boeing.”²⁴⁷ Therefore, Druyun began quietly negotiating with Boeing, only discussing the deal with Boeing officials and Stevens’ chief of staff.²⁴⁸ In December 2001, Stevens “slipped in a provision to a

²⁴¹ Harris, *supra* note 225.

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ *See* George Cahlink, *Fallen Star*, GOVERNMENT EXECUTIVE, Feb. 1, 2004, <http://www.govexec.com/features/0204/0204s1.htm>.

²⁴⁵ *See* Harris, *supra* note 225.

²⁴⁶ *See Such a Deal*, *supra* note 230, at B2.

²⁴⁷ *See* Harris, *supra* note 225.

²⁴⁸ *See id.*

Defense spending bill”²⁴⁹ “during a closed session after the bill had passed both chambers.”²⁵⁰ This legislation not only authorized the Air Force to lease the tankers but stated the Air Force was specifically authorized to lease Boeing 767s.²⁵¹ When McCain learned what had occurred, he argued the plan was nothing more than “‘gross negligence’ and a giveaway to Boeing.”²⁵² McCain asserted the best way to procure new tanker aircraft was through competition.²⁵³ Nevertheless, the bill passed the Senate, despite McCain’s and others’ objections.²⁵⁴

Soon after the bill went into effect, at a hearing where Air Force Secretary James Roche was testifying, McCain strongly “criticized Roche for an uncompetitive deal, and Roche agreed to conduct a competitive bidding.”²⁵⁵ As a result, the Air Force opened the tanker lease to competition, inviting both Boeing and EADS, a parent of Airbus, to bid on the procurement.²⁵⁶ Although EADS was given only “12 days to bid on the project,” and

²⁴⁹ “Stevens had pulled off a maneuver known as the ‘virgin birth.’ In Washington, every dollar the government spends comes from the union of two parents: The authorizing committees in Congress decide what to buy, and the appropriators decide how much to spend on it. Stevens circumvented that process, planting a seed in the spending bill as if by divine intervention.” *See id.*; *see also* Moser, *supra* note 224.

²⁵⁰ *See* Harris, *supra* note 225.

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ *See id.*

²⁵⁴ *See* Joseph L. Galloway, *U.S. Tanker Scandal Grows; Papers: Air Force Picked Boeing Over Cheaper Bid, Let is Set Terms of Deal*, DETROIT FREE PRESS, Mar. 29, 2004, at 1A.

²⁵⁵ *See id.*

²⁵⁶ *See* Harris, *supra* note 225; *see also* Galloway, *supra* note 254, at 1A.

“met more than 20 of the original 26 specifications and offered a price that was \$10 billion less than Boeing’s,” the Air Force awarded the contract to Boeing.²⁵⁷

Continuing to believe the tanker lease was a fiscally poor decision and a “sweetheart deal,”²⁵⁸ in April 2002, Senators McCain, Carl Levin, and John Warner, requested the Congressional Budget Office (CBO) conduct a cost-benefit analysis of the proposed tanker lease.²⁵⁹ The CBO determined the leasing option would cost approximately \$37 billion while a direct purchase of the tankers would cost \$25 billion.²⁶⁰ McCain publicized the findings in a press release a month later²⁶¹ and also

²⁵⁷ The Air Force’s rationale for the decision was that EADS’ proposal “failed to meet several specifications . . . [and its aircraft] was larger than what the Air Force wanted.” See Galloway, *supra* note 254, at 1A.

²⁵⁸ See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, CHICAGO TRIB., Aug. 20, 2003, at C1; see also Susan Chandler, *Pentagon Probe Freezes Deal for Boeing Tankers*, CHICAGO TRIB., Dec. 3, 2003, at C1.

²⁵⁹ See Jeffrey Branstetter, Darleen Druyun: *An Evolving Case Study in Corruption, Power and Procurement*, 34 PUB. CONT. L.J. 443, 452 (2005) (citing Press Release, Senator John McCain, CBO Analysis: Boeing Leasing Deal Totals \$37 Billion; ‘Significantly More Expensive’ Than Tanker Purchase (May 8, 2002), at http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=b3b29fa4-56bf-40cd-bead-3f3112ef1d8d&Region_id=&Issue_id=1172f761-a830-4020-ae1b-7ec3db088fc9).

²⁶⁰ See Letter from Dan L. Crippen, Director, Congressional Budget Office, to John McCain, Senator, U.S. Senate (May 7, 2002), <http://www.cbo.gov/ftpdocs/34xx/doc3413/tankers.pdf>; see also Stephen J. Hedges, *Pentagon Probing Bid by Boeing; Company Memos Suggest Air Force Official Shared Rival’s Pricing Details*, CHICAGO TRIB., Sep. 4, 2003, at C1 (using different statistics from the CBO analysis to quote the cost of leasing the planes through 2017 as \$21.5 billion, and for purchasing them outright as \$15.9 million for the same period of time).

²⁶¹ See Press Release, Senator John McCain, CBO Analysis: Boeing Leasing Deal Totals \$37 Billion; ‘Significantly More Expensive’ Than Tanker Purchase (May 8, 2002), at http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=b3b29fa4-56bf-40cd-bead-3f3112ef1d8d&Region_id=&Issue_id=1172f761-a830-4020-ae1b-7ec3db088fc9.

“cited a letter from the Office of Management and Budget” that stated the deal would cost “\$6 billion more than the Air Force, Boeing, and congressional proponents had [originally] claimed.”²⁶²

B. The Darleen Druyun Scandal

1. Background Facts

In the meantime, by August of 2002, Druyun had become increasingly dissatisfied at work and decided to retire.²⁶³ She informed her supervisor, Marvin Sambur, the Air Force's Assistant Secretary for Acquisition, that she planned to discuss post-government employment options with Lockheed Martin and Raytheon Corp. and “disqualified herself from handling contracts involving only those two contractors.”²⁶⁴ In the interim, Druyun continued negotiating the \$23.5 billion tanker lease deal with Boeing to lease “100 Boeing KC 767A tanker aircraft,” as the primary Air Force procurement official.²⁶⁵

²⁶² See Harris, *supra* note 225.

²⁶³ Soon after being appointed as the Air Force's Assistant Secretary for Acquisition in late 2001, Marvin Sambur (also assigned as Druyun's supervisor) learned Druyun “was the ultimate decision maker on virtually all Air Force contracts and controlled a \$30-billion-dollar-a-year procurement budget.” Sambur openly questioned Druyun's authority. Determining she had been given too much responsibility with too little oversight in the past, Sambur decreased Druyun's authority. As a result, “within six months . . . [Druyun] announced she was retiring. See Peter Pae, *Air Force Contracting Scandal Blamed on Bureaucratic Flaws; An Official Tells How Darleen Druyun Was Able to Negotiate Billions of Dollars in Deals*; L.A. TIMES, Nov. 25, 2004, at C1; see also Larezos, *supra* note 228, at 4-5.

²⁶⁴ Druyun submitted her recusal in writing on August 26, 2002. See Statement of Facts at 1, *United States v. Darleen Druyun* (E.D. Va. 2004) (No. 04-150-A), 2004 WL 868630; see also Pae, *supra* note 263, at C1.

²⁶⁵ In this role, Druyun “participated personally and substantially as a government official through decisions, approvals, disapprovals, recommendations, and the rendering of advice in connection with the negotiation of this lease agreement with Boeing” Pae,

Just a month later, additional events occurred that eventually led to Druyun's downfall. As a matter of background, one of Druyun's daughters, Heather, worked for Boeing.²⁶⁶ On September 3, 2002, Heather sent an email to a Boeing executive, Michael Sears, advising Sears her mother was retiring from the Air Force and encouraging him to actively recruit Druyun for a position at Boeing.²⁶⁷ This led to a correspondence with Sears over the following month, as Heather acted as an intermediary between her mother and Boeing, with Druyun "outlining to [Heather] what [she] should communicate to [Sears] regarding [Druyun's] potential employment with Boeing."²⁶⁸ Although Druyun had not recused herself from work surrounding the tanker lease or other Boeing contracts, she agreed to meet with Sears in October 2002 at the Orlando, Florida, airport to discuss her potential employment with Boeing.²⁶⁹ At the meeting, Druyun acknowledged she had not yet disqualified herself from any matters involving Boeing in her employment with the Air Force, and Sears and Druyun agreed to keep the meeting confidential.²⁷⁰

supra note 263, at C1; *see also* Statement of Facts at 2, *United States v. Darleen Druyun* (E.D. Va. 2004) (No. 04-150-A), 2004 WL 868630.

²⁶⁶ Heather Druyan was hired by the Boeing Company to work in their student development program in November 2000 after her mother contacted Michael Sears, a senior executive at Boeing, seeking his assistance in obtaining a position for Heather. A position was then created for Heather as a college recruiter for Boeing. *See* Statement of Facts at 2, *Druyun* (No. 04-150-A).

²⁶⁷ *See id.*

²⁶⁸ *See id.*

²⁶⁹ *See id.* at 3.

²⁷⁰ *See id.* at 4.

By November 2002, after it appeared the tanker lease contract was going to be approved, Druyun announced her retirement.²⁷¹ Just a few days later, she submitted paperwork to the Air Force stating her intention to enter into post-employment discussions with Boeing and disqualifying herself from any Air Force matters involving Boeing.²⁷² Druyun retired from the Air Force on November 15, officially accepted employment with Boeing on December 16,²⁷³ and began working for Boeing on January 2, 2003.²⁷⁴

2. Media Coverage and the Development of the Darleen Druyun Scandal

Druyun's employment with Boeing went fairly smoothly until the summer of 2003, when several press reports questioned the propriety of the Boeing tanker lease contract and the "contemporaneous hiring of Druyun by Boeing."²⁷⁵ Boeing quickly asserted "the company [had] approached Druyun only after she retired in November

²⁷¹ See Branstetter, *supra* note 259, at 453.

²⁷² See Statement of Facts at 4, *Druyun* (No. 04-150-A).

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.* One news report stated the hiring of Druyun had "raised some eyebrows." See Bradley Graham, *Air Force Lease With Boeing Still Under Fire*, WASH. POST, Jul. 7, 2003, at A2. Another alleged that while working for the Air Force on a C-17 contract, Druyun had tried to "fre[e] Boeing from government supervision over costs and quality," and that to show its appreciation for her efforts, Boeing had hired Druyun to "lead the company's missile defense division." See Editorial, *Dangers of the Revolving Door*, WASH. POST, Jul. 19, 2003, at A19. Yet another maintained, "the most titillating news from the McCain hearing was the strange case of Air Force official-cum-Boeing executive Darleen Druyun. The former fly girl landed herself a cushy job at Boeing not long after the company landed the big leasing contract, and her critics assume that the job was payback for steering the contract to Boeing – taxpayer dollars be damned." See David Greising, *Boeing Scandal Talk Snipped in the Bud*, CHICAGO TRIB., Sep. 7, 2003, at C2.

[2002]” and that Druyun was working in a Boeing division involving missile defense, not tankers.²⁷⁶ Nevertheless, in response to the negative publicity, Boeing hired independent counsel to investigate the circumstances surrounding the background of Druyan’s hiring.²⁷⁷

Boeing’s internal investigation continued. Then, on August 29, 2003, *U.S. News and World Report* published an internal Boeing email on its website alleging Druyun had improperly provided a competitor’s pricing information to Boeing prior to her retirement from the Air Force.²⁷⁸ Subsequent articles responding to these claims clearly portrayed Druyun as a “Defense Department bureaucrat trying to keep a favored program alive by greasing it through the hazards of congressional oversight.”²⁷⁹ For McCain, who had believed the Boeing tanker lease was a “bad deal for taxpayers” from the beginning, the allegation of improper disclosures by Druyun was a gift.²⁸⁰ Within the next week, the press reported McCain had released thousands of emails and other communications between Boeing and the Air Force which evidenced an “inappropriate coziness” between

²⁷⁶ See Graham, *supra* note 275, at A2.

²⁷⁷ See Statement of Facts at 4, *Druyun* (No. 04-150-A).

²⁷⁸ Specifically, the article claimed Druyun told Boeing “‘several times’ that Airbus’ price was \$5 million to \$17 million less than Boeing’s.” See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1; see also Ken Guggenheim, *Reconsider Refueling-Plane Leases, U.S. Asked; A Key Senator Wants the Pentagon to Explore Renting 25, Not 100, And Buying the Rest Instead*, *PHILA. INQUIRER*, Sep. 5, 2003, at C8; see also Greising, *supra* note 275, at C2.

²⁷⁹ See Greising, *supra* note 275, at C2.

²⁸⁰ See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1.

the two.²⁸¹ News articles asserted that, “from the beginning, the Air Force [had] not so much . . . negotiate[d] with Boeing as . . . advocate[d] for it.”²⁸²

In response, the DoD announced the Pentagon IG had initiated an informal investigation into the matter and identified Druyun, by name, as the individual allegedly responsible.²⁸³ The press retorted that the public wanted answers,²⁸⁴ noting that regardless of what the investigation concluded, “the appearance [was] one of inappropriate behavior at the expense of taxpayers.”²⁸⁵ Ultimately, the allegations surrounding the alleged release of proprietary information by Druyun put the tanker lease back on the table for discussion.

Press coverage described the very public battle surrounding the tanker lease between McCain and the members of his committee versus the Air Force and its

²⁸¹ See Brad Knickerbocker, *Costly Aircraft Lease Stirs Ire In Congress*, CHRISTIAN SCI. MONITOR, Sep. 5, 2003, at 2.

²⁸² See Hedges, *supra* note 260, at C1. In addition, beyond “coziness,” McCain very nearly alleged the Air Force had broken the law, stating, “In all my years of Congress, I have never seen the security and fiduciary responsibilities of the federal government quite so nakedly subordinated to the interests of the one defense manufacturer.” See Knickerbocker, *supra* note 281, at 2.

²⁸³ See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1; see also Leslie Wayne, *Senator Ridicules Boeing Lease at Hearing*, N.Y. TIMES, Sep. 4, 2003, at C8; see also Hedges, *supra* note 260, at C1; see also Guggenheim, *supra* note 278, at C8.

²⁸⁴ Press coverage noted that “McCain and others want to know whether a senior Air Force civilian shared proprietary information about another aircraft manufacturer with Boeing . . . [particularly since] the official – Darleen Druyun, former principal deputy assistant secretary of the Air Force for acquisition and management – has gone to work for Boeing.” See Knickerbocker, *supra* note 281, at 2.

²⁸⁵ See *id.*

Congressional backers.²⁸⁶ News accounts described and supported McCain’s public ridicule of the lease plan in general as well as his belief that entering into such a lease would be “living for today and plundering the resources for tomorrow.”²⁸⁷ In addition, the media suggested the tanker lease’s scope was likely to be decreased substantially if not canceled altogether.²⁸⁸ Eventually, in a hard-fought compromise, Congress agreed to proceed with a lease of only 20 tankers with a plan to purchase an additional 80 in the future.²⁸⁹

In the next several weeks, the facts of the scandal developed further, impacting the media’s portrayal and affecting the public’s opinion of the scandal. By mid-September 2003, the DoD IG affirmed to the SASC that enough “credible information exist[ed]” to begin a formal investigation into the alleged release of pricing information by Druyun.²⁹⁰ In response, Boeing immediately denied wrongdoing.²⁹¹ Soon thereafter, the Project On Government Oversight (POGO), a non-profit government procurement

²⁸⁶ See Wayne, *supra* note 283, at C8.

²⁸⁷ See Greising, *supra* note 275, at C2; see also Wayne, *supra* note 283, at C8. The media coverage heavily supported McCain’s assertion that the lease procurement was a fiscally poor plan, reporting the “added cost of leasing the airplanes . . . pencil[ed] out to at least \$5.7 million . . .,” and stating that that was “real money . . . even in Washington.” See Knickerbocker, *supra* note 281, at 2.

²⁸⁸ For instance, one news story claimed the tanker contract was not “look[ing] good for Boeing as evidenced by the fact that Senator John Warner, one of Boeing’s biggest Congressional proponents of the tanker deal, was “pushing to reduce the contract [lease] size by 75 percent.” See Greising, *supra* note 275, at C2.

²⁸⁹ See Chandler, *supra* note 258, at C1.

²⁹⁰ See *U.S. Inquiry Into Boeing*, N.Y. TIMES, Sep. 18, 2003, at C7; see also *Pentagon Opens Probe Into Boeing Jet Deal; The Company Denies Receiving Information On a Rival’s Bid For the Aerial Tanker Contract*, L.A. TIMES, Sep. 18, 2003, at C13.

²⁹¹ See *id.*

watchdog organization, released a number of emails it asserted provided additional evidence that Druyun had acted inappropriately while working for the Air Force on the tanker lease contract.²⁹² The National Legal and Policy Center (NLPC), an organization opposing the tanker lease, announced just a week later that it had learned Druyun had sold her house in Fall 2002 to a Boeing lawyer while negotiating the Boeing tanker deal on behalf of the Air Force.²⁹³ In response to POGO's and NLPC's allegations, Boeing again denied any wrongdoing, asserting Druyun had "brought any potential conflicts to the attention of Air Force lawyers and recused herself from [dealings with Boeing] . . . prior to accepting a job with Boeing."²⁹⁴

By mid-October 2003, the press had begun actively villanizing Druyun. News accounts reported that Druyun was not only currently under investigation by the DoD IG's office for improperly releasing proprietary information to Boeing but had been "under scrutiny [by the Air Force] before" and had escaped punishment.²⁹⁵ In regards to

²⁹² Among other things, POGO alleged the emails showed Druyun had acknowledged the tanker lease deal might violate the Anti-Deficiency Act but sought to hide the fact from Congress, and that despite her and Boeing's claims to the contrary, Druyun was currently working for a division related to the tanker program. See Press Release, Project On Government Oversight, More Documents Show Darleen Druyun's Inappropriate Role In Boeing Lease Deal (Sep. 4, 2003), <http://www.pogo.org/pogo-files/alerts/government-corruption/gc-rd-20030904.html>.

²⁹³ Most of the reports stated the home sale was likely "more of an appearance issue than an actual illegality." Renae Merle, *New Questions Raised About Boeing Deal*, WASH. POST, Oct. 8, 2003, at E1; see also Susan Chandler, *Boeing's Druyun Probed in Early '90s; Was Exonerated By Air Force*, CHICAGO TRIB., Oct. 12, 2003, at C1; see also Peter Pae, *Defense Dealing Too Close for Comfort?; An Air Force Official's Relationship With Boeing Continues to Reverberate Through the Company and Military*, L.A. TIMES, Jun. 13, 2004, at C1.

²⁹⁴ Merle, *supra* note 293, at E1.

²⁹⁵ Specifically, the press reported that in the early 1990s, while working for the Air Force, Druyun had been implicated in a scheme to funnel millions of dollars to

this development, journalists emphasized it was “disturbing Druyun had been involved in allegations with McDonnell Douglas since McDonnell Douglas [had become] part of Boeing.”²⁹⁶ During this timeframe, the media further depicted Druyun as “brusque with defense contractors,”²⁹⁷ feared by most,²⁹⁸ and even as “un-American.”²⁹⁹

By late November, the constant media pressure caught up with both Druyun and Boeing. On the same day President Bush signed a defense appropriations bill authorizing a \$26 billion contract with Boeing to lease 20 tankers and buy the rest,³⁰⁰ Boeing fired both Druyun and the Boeing executive, Michael Sears, who had conducted employment discussions with her.³⁰¹ Boeing announced the terminations had been “for cause,”

McDonnell Douglas Corp. in an attempt to keep the contractor afloat while the contractor was performing the C-17 contract. Reports declared that in response, the Pentagon IG had recommended disciplinary action be taken against Druyun and four others for “improper ‘progress payments.’” However, the Air Force challenged the IG’s conclusions, conducted its own report and, in due course, determined Druyun was not at fault, although actions were taken against all four of the other individuals. *See* Chandler, *supra* note 293, at C1.

²⁹⁶ *See id.*

²⁹⁷ *See id.*

²⁹⁸ *See id.*

²⁹⁹ One journalist stated Druyun was “un-American” for accepting employment with Boeing because: 1) her daughter worked for Boeing; and 2) due to the current allegations suggesting Boeing had provided a competitor’s pricing information to Boeing. The editorial suggested that even if it was not illegal for Druyun to accept employment with Boeing, it was not something to be proud of. *See* David Brooks, Editorial, *True Believers, Please Rise*, ORLANDO SENTINEL, Oct. 29, 2003, at A17.

³⁰⁰ *See* Editorial, *Boeing’s Fall From Grace*, THE OREGONIAN, Nov. 28, 2003, at D6; *see also* Kenneth N. Gilpin, *Buffeted By Scandal, Boeing Chief Resigns*, SUN-SENTINEL, Dec. 2, 2003, at 1D.

³⁰¹ *See* Susan Chandler, *Boeing Fires Pair in Ethics Investigation; Hiring of Former Air Force Officer Called a Violation*, CHICAGO TRIB., Nov. 25, 2003, at C1.

specifically, “for . . . unethical conduct related to a controversial \$26 billion Air Force contract to buy refueling planes.”³⁰² Although the media had villanized Druyun earlier, with Boeing’s confirmation of wrongdoing, the media framing of the scandal at this point, changed yet again. After Druyun’s and Sears’ terminations, the press framed news accounts as if Druyun and Boeing had already been convicted of “rigging” the Boeing tanker lease contract. For example, articles reported it was “unfortunate that it [took] such public pressure to get a contractor to fess up to this kind of questionable behavior”³⁰³ and emphasized that Druyun had been the one to “craf[t] [the] deal for the refueling tankers that involved an unusual and costly plan.”³⁰⁴

While the media disparaged Druyun and Boeing, it lauded McCain and his efforts, asserting the tanker lease should be “adjusted, if . . . not scrapped altogether.”³⁰⁵ As such, reports asserted the new developments being uncovered showed what people knew all

³⁰² The press reported that as a part of the internal investigation Boeing had begun back in the summer of 2003, it had determined: 1) improper employment negotiations had occurred, both indirectly and directly, between Druyun and Sears, in violation of Boeing and Air Force policy, and 2) that Druyun and Sears had tried to hide the negotiations. See Chandler, *supra* note 301, at C1; see also Editorial, *Boeing’s Tawdry Deal*, N.Y. TIMES, Nov. 26, 2003, at A24.

³⁰³ See Chandler, *supra* note 301, at C1.

³⁰⁴ See Chandler, *supra* note 301, at C1; see also *Boeing’s Tawdry Deal*, *supra* note 302, at A24.

³⁰⁵ Similar reports asserted that due to Boeing’s conduct, “the deal to modernize the tanker fleet is so tainted that it may not be salvageable.” These journalists held McCain and other critics’ suspicions had been correct when they kept “insisting something smelled about Boeing’s tanker deal with the Air Force.” As such, new stories described the tanker lease deal as “a poster child for the sheer corruption of the Pentagon’s procurement process” and “a classic case of government corruption, a spinning revolving door and mutual backscratching” See *Boeing’s Tawdry Deal*, *supra* note 302, at A24; see also *Boeing’s Tarnished Reputation*, CHICAGO TRIB., Nov. 26, 2003, at C26; see also *Boeing’s Fall From Grace*, *supra* note 300, at D6.

along – that even while working for the Air Force, Druyun “was already on Boeing’s team.”³⁰⁶ Although Boeing’s internal investigation had initially uncovered Druyun’s and Sears’ wrongdoing, most reports were critical of Boeing, alleging it was conducting “crisis management 101” to try to save the tanker deal in spite of the ethics problem involving Druyun and Sears.³⁰⁷ To this end, most news reports were quick to stress that rather than acknowledging his part in the saga, Sears had responded to his termination by vehemently denying he had violated any company policy and claiming he had “faithfully carried out [his] duties on behalf of Boeing to the best of [his] abilities.”³⁰⁸ Articles that did praise Boeing for its internal investigation and early response did so cautiously.³⁰⁹

In response to Druyun’s and Sears’ terminations, both Secretary of Defense Donald Rumsfeld and Senators McCain and Peter Fitzgerald urged the Pentagon to

³⁰⁶ See Chandler, *supra* note 301, at C1. Additional articles questioned whether “Druyun, while negotiating the tanker deal, was looking out for the interests of the Air Force and American taxpayers, or was eager to swing a sweetheart deal for the company promising to hire her.” See *Boeing’s Fall From Grace*, *supra* note 300, at D6. Similar new stories portrayed the situation as one in which Sears “dangled a job in front of . . . Druyun . . . at a time when she could influence the \$21 billion tanker deal” See *Such a Deal*, *supra* note 230, at B2.

³⁰⁷ See Chandler, *supra* note 301, at C1; see also *Boeing’s Stall; Board of Directors Showing Who Is In Control*, HOUSTON CHRONICLE, Dec. 5, 2003, at A46.

³⁰⁸ See John Schmeltzer, *Rumsfeld Wants Tanker Deal Review; Ousted Boeing Executive Denies Any Wrongdoing*, CHICAGO TRIB., Nov. 26, 2003, at C1; see also *Former Boeing Official Denies Misconduct*, N.Y. TIMES, Nov. 27, 2003, at C4; see also Dave Carpenter, *Fired Boeing CFO Denies He Did Anything Wrong*, CHICAGO SUN-TIMES, Nov. 27, 2003, at 73.

³⁰⁹ Particularly, one report “wonder[ed] about the company’s ethical values” due to the fact Boeing had been banned the previous summer for having admitted it had acquired proprietary documents in an unrelated procurement action. See *Boeing’s Fall From Grace*, *supra* note 300, at D6; see also *Boeing’s Stall*, *supra* note 307, at A46; see also Susan Chandler, *A Stiff Cost For Boeing’s Ethics Lesson; Scandals Leave Behind Trail of Firings, Losing Contracts, and Resignation of CEO*, CHICAGO TRIB., Dec. 7, 2003, at C1.

consider delaying award of the tanker lease contract to Boeing.³¹⁰ In the meantime, the DoD also tried to do a little damage control as Secretary Rumsfeld acknowledged the “[DoD is] the custodia[n] of the taxpayers’ dollars, [and] [w]e have an obligation to see that things are done properly.”³¹¹

By early December, it was evident the scandal and its media coverage had impacted Boeing hard. On December 1, 2003, Boeing’s chairman and chief executive, Phil Condit, tendered his resignation.³¹² In his place, Boeing called Harry Stonecipher, a former Boeing chief executive, out of retirement.³¹³ In attempting to revamp its image, Boeing released statements declaring the alleged ethics breaches were isolated events, and were not due to “fundamental flaws or a systemic failure.”³¹⁴ In response to Boeing’s attempts, journalists went from questioning whether the steps taken were enough³¹⁵ to

³¹⁰ See Schmeltzer, *supra* note 308, at C1; see also *Former Boeing Official Denies Misconduct*, *supra* note 308, at C4; see also *Two Senators Seek to Postpone Boeing Deal for Tankers*, N.Y. TIMES, Nov. 29, 2003, at C4; see also Byron Acohido, *Boeing’s Call For Help From Air Force Raises More Questions*, USA TODAY, Dec. 8, 2003, at 3B.

³¹¹ See Schmeltzer, *supra* note 308, at C1.

³¹² Articles noted Condit stepped down after the encouragement of Boeing’s board of directors. See Gilpin, *supra* note 300, at 1D; see also Stephen Lynch, *Boeing CEO Jets – Condit Leaves and Government Contract Scandal*, N.Y. POST, Dec. 2, 2003, at 37; see also Leslie Wayne, *Chief Executive at Boeing Quits Under Criticism*, N.Y. TIMES, Dec. 2, 2003, at A1.

³¹³ See Wayne, *supra* note 312, at A1.

³¹⁴ See *Boeing Needs Stronger Ethics Program, Report Says*, L.A. TIMES, Dec. 19, 2003, at C3.

³¹⁵ One journalist cited a government watchdog group who believed Boeing needed to publicly admit it had “gone astray, . . . had a cultural of ethical troubles at its company, . . . and that it was sorry.” See Chandler, *supra* note 309, at C1. An article a few weeks later cited an outside report released by Boeing which stated Boeing’s managers had “not done enough to strengthen ethics.” See *Boeing Needs Stronger Ethics Program, Report Says*, *supra* note 314, at C3.

concluding Boeing needed to make changes to its oversight of employees' behavior.³¹⁶ While publicly, Boeing stated its belief that the "tanker deal [would] not be scrapped,"³¹⁷ the media painted a different picture entirely, quoting analysts who "warn[ed] . . . the company could lose a lucrative contract because of the scandal."³¹⁸

New revelations in December also sent the DoD, but more specifically the Air Force, spiraling. As the Air Force conducted its internal investigation into the Darleen Druyun scandal, a number of emails sent by high-level Air Force officials surfaced and were published by the media. One of the most inflammatory described a situation in which the Secretary of the Air Force had called a lobbyist at Boeing and instructed him to pressure a Pentagon employee in order to get the tanker contract approved.³¹⁹ Additional emails showed that after President Bush signed the appropriations bill authorizing the Air Force to lease 20 tankers and buy 80 more later, one of Boeing's top executives had requested assistance from Marvin Sambur, Druyun's former boss, to try to "win support for an immediate contract even though . . . Secretary Rumsfeld . . . had [stated] the deal needed further review."³²⁰ The press reported Sambur had acquiesced, and the Air Force

³¹⁶ See Romaine Bostick, *2 Reports Recommend Changes At Boeing But Say Ethics Woes Likely Isolated*, CHICAGO SUN-TIMES, Dec. 19, 2003, at 87.

³¹⁷ See Gilpin, *supra* note 300, at 1D.

³¹⁸ See Lynch, *supra* note 312, at 37.

³¹⁹ See Susan Chandler, *McCain Rips Air Force Over Boeing Dealings*, CHICAGO TRIB., Dec. 9, 2003, at C1; see also Stephen J. Hedges and Susan Chandler, *Pentagon Proves a Pipeline to Boeing; Company Defends Hiring Practices*, CHICAGO TRIB., Dec. 14, 2003, at C1.

³²⁰ See Acohido, *supra* note 310, at 3B.

was accused of “secretly trying to undercut Congress’ scaled-down compromise plan.”³²¹ The Air Force was accused of being responsible for much of the scandal, yet as being “unrepentant” for its role.³²² Reports began suggesting that two of the root causes of the Druyun scandal were that: 1) DoD procurement officials’ attention was often spent planning more for their own post-government employment than the public’s trust,³²³ and 2) that because procurement personnel had been dramatically downsized through early retirements and attrition under the Clinton administration during the 1990s,³²⁴ the defense procurement system had become a “loosey-goosey atmosphere.”³²⁵

In response to all of the negative publicity, award of the tanker contract was delayed while the Pentagon’s internal auditor “examine[d] whether the conduct of the two executives had any negative impact on the contract to lease 20 tankers and buy another 80.”³²⁶ The media painted a more grim assessment of the situation, however,

³²¹ In regards to Air Force actions to try to get the tanker lease contract approved, Senator McCain stated, “It’s astonishing. Even in light of serious allegations, [the Air Force] continued to push to railroad the deal through, and they still are.” An investigator from POGO was also cited, declaring, “Ever since the beginning, [the Air Force has] been trying to push this thing through as fast as they could. It’s hard to tell whether the need was driving the deal or the deal was driving the need.” See Acohido, *supra* note 310, at 3B; see also Chandler, *supra* note 319, at C1.

³²² The media supported Senator McCain’s assertions that, “Boeing appears to be making an effort to restructure and change the way they do business. I can see no effort to change the way the Air Force does business nor to resolve this situation.” See Chandler, *supra* note 319, at C1.

³²³ See Acohido, *supra* note 310, at 3B.

³²⁴ See Chandler, *supra* note 309, at C1.

³²⁵ See *id.*

³²⁶ See *Boeing Deal Up in the Air; Pentagon to Delay Acquiring 100 Tankers*, NEWSDAY, Dec. 3, 2003, at A20; see also Chandler, *supra* note 258, at C1.

suggesting Secretary Rumsfeld and Air Force Secretary Roche might “scrap” the lease of the 20 tankers altogether and reopen the contract to other bidders.³²⁷ Overall, most media depicted this possibility positively, stating the deal had come “to resemble corporate welfare more than a good deal for the Air Force or for taxpayers” anyway.³²⁸

In the meantime, published snippets of additional Boeing emails released seemed to confirm earlier press assessments of Druyun. News coverage claimed internal Boeing emails showed Druyun as an “advocate for Boeing,” with one Boeing email relating that at a tanker negotiation meeting “Darleen spent most of the time bringing down the [U.S. Air Force’s] price up to our number It was a good day!”³²⁹ In response to the emails, journalists quoted McCain as describing the relationship between the Air Force and Boeing as “unbelievable” and “incestuous.”³³⁰ Articles claimed McCain was so outraged by the situation he had vowed to hold Secretary Roche responsible by “holding up Bush’s nomination of Roche to become secretary of the Army.”³³¹ The negative

³²⁷ See Chandler, *supra* note 258, at C1; see also *Boeing’s Stall*, *supra* note 307, at A46.

³²⁸ See *Boeing’s Stall*, *supra* note 307, at A46. However, the media questioned whether true competition would occur in a future procurement, noting Boeing’s competition had been EADS, a division of Airbus which is a European company, and opined “American taxpayers [would not] . . . send \$21 billion and a couple of thousand jobs off to Europe.” See *Such a Deal*, *supra* note 230, at B2.

³²⁹ An earlier email sent the same day from another Boeing executive described an effort by Druyun “to keep the big liability that the government would face if it terminated the tanker contract early off the president’s budget” and noted the executive’s suspicion that Druyun might be “running her own covert operation on [that] one.” See Susan Chandler, *Emails Color Ex-Air Force Buyer As Key Boeing Ally*, CHICAGO TRIB., Dec. 11, 2003, at C1.

³³⁰ See Chandler, *supra* note 319, at C1. In his fury, McCain predicted the investigation would also “sooner or later involve Air Force officials.” See *Boeing Hiring Focus of Criminal Probe*, CHICAGO TRIB., Dec. 13, 2003, at C2.

³³¹ See Chandler, *supra* note 319, at C1.

reports impacted Druyun as well. By mid-December 2003, the U.S. Attorney's office had begun a criminal investigation of the events surrounding her employment with Boeing.³³²

By January 2004, media coverage was varied but clearly showed the preceding months' worth of media coverage had taken its toll. News stories featured the needs and challenges of Air Force tanker pilots, who looked to be flying antiquated planes in furtherance of the nation's security missions for the unforeseeable future.³³³ And in a different direction, journalists highlighted Boeing's attempts to assure the public and its stockholders it was being proactive in trying to clean up its ethics problems.³³⁴ The DoD, working to restore its image as well, announced the Pentagon's probe involving Druyun would be expanded to any contacts Druyun had had with other defense contractors.³³⁵

By early February, it was clear the tanker lease contract was all but dead in response to all of the negative publicity. First, Secretary Rumsfeld announced the tanker lease contract appeared to "have been tainted by 'wrongdoing,'" and would be delayed until at least May.³³⁶ In addition, Rumsfeld revealed he had ordered two new reviews of the current tanker fleet to reconsider the necessity of replacing the tankers with the

³³² See *Boeing Hiring Focus of Criminal Probe*, *supra* note 330, at C2.

³³³ One reporter emphasized the comments of a senior Air Force pilot and wing commander, who compared flying the old tanker to driving a '57 Chevy as a work vehicle, stating, "[The tanker] is a proud workhorse. It's maintained well. But would UPS rely on a '57?" See Keith Espstein, *Standbys Keep On Refueling*, TAMPA TRIB., Jan. 4, 2004, at 1.

³³⁴ See Ron Insana, *We're Cleaning Up Our Own House*, USA TODAY, Jan. 5, 2004, at 4B.

³³⁵ See *Rumsfeld to Widen Boeing Investigation*, L.A. TIMES, Jan. 17, 2004, at C3.

³³⁶ See *id.*

possibility of upgrading them instead.³³⁷ Finally, President Bush's defense budget proposal did not include any funding for tankers.³³⁸ In the meantime, Secretary Rumsfeld announced he had ordered "an examination of the Pentagon's rules on post-government employment . . . to ensure they [were] stringent enough."³³⁹

By March, Boeing's internal investigation was completed, and Boeing announced the investigators had determined the ethical issues surrounding Druyun's employment had been an isolated incident but had also discovered the company often ignored its own policies regarding hiring government officials.³⁴⁰ While Boeing worked to reassure the public of its integrity, for others, the negative publicity was just too much to overcome. In mid-March, Air Force Secretary Roche announced he had withdrawn his nomination to head the Army, primarily because of resistance by McCain, due in large part to the issues involving Druyun and the tanker lease.³⁴¹

³³⁷ See Susan Chandler, *Rumsfeld Reviewing Tanker Deal; Air Force-Boeing Contract on Hold*, CHICAGO TRIB., Feb. 5, 2004, at C1.

³³⁸ See *id.*

³³⁹ See Renae Merle, *Recruiting Uncle Sam; The Military Uses a Revolving Door to Defense Jobs*, WASH. POST, Feb. 19, 2004, at E1.

³⁴⁰ See Independent Counsel Report, A Report to the Chairman and Board of Directors of the Boeing Company Concerning the Company's Policies And Practices For the Hiring of Government and Former Government Employees 29-30 (Feb. 26, 2004), http://www.boeing.com/news/releases/2004/q1/rudman_030904.pdf; see also *Independent Panel Finds Boeing Often Ignores Its Own Policies On Hiring; Report Recommends Changes After Firings of Druyun and Sears*, ST. LOUIS POST-DISPATCH, Mar. 10, 2004, at C3; see also *Ethics Review of Boeing Cites Hiring Weaknesses*, L.A. TIMES, Mar. 10, 2004, at C11; see also *Hiring Slip An Isolated One, Boeing Says*, CHICAGO TRIB., Mar. 10, 2004, at C3.

³⁴¹ See Esther Schrader, *Roche Bails Out as Pick for Top Army Job; The Air Force Secretary, Selected by Rumsfeld to Guide Pentagon Reform, Was Tarnished By Links to a Boeing Deal and the Academy's Sex Scandal*, L.A. TIMES, Mar. 11, 2004, at A30.

In the next few weeks, the tanker scandal continued to grow. Although the Pentagon IG announced in mid-March his investigation had found “no compelling reason” to cancel the tanker lease contract,³⁴² the media suggested wrongdoing had occurred. Specifically, news reports revealed additional facts that showed the Air Force, under Druyun’s tutelage, had initially allowed Boeing five months to “rewrite official specifications” so the company “would win a \$23.5 billion deal.”³⁴³ As further validation the contract had been improperly awarded, a Pentagon IG study released in mid-April 2004 found the award erroneous³⁴⁴ and recommended the Air Force not go forward with the tanker lease deal unless major changes were made to procurement practices.³⁴⁵ In

³⁴² See INSPECTOR GENERAL, DEP’T OF DEF., ACQUISITION OF THE BOEING KC-767A TANKER AIRCRAFT, D-2004-064, at i (2004), <http://www.dodig.mil/audit/reports/fy04/04-064.pdf>; see also Tony Capaccio, *Pentagon: ‘No Reason’ to Scrap Boeing Tanker Plan*, CHICAGO SUN-TIMES, Mar. 16, 2004, at 55.

³⁴³ The reports further noted that once forced by Congress to compete the contract, the Air Force had only allowed EADS twelve days to bid on the project, and that although Boeing was ultimately selected as the award winner, EADS had met more than twenty of the original twenty-six specifications and had offered a bid that was \$10 billion less than Boeing’s. See Joseph L. Galloway, *Tanker Bid Was Tailored to Boeing; Air Force Let It Rewrite Specs on a \$23.5 Billion Deal, Papers Say*, THE PHILA. INQUIRER, Mar. 28, 2004, at A1.

³⁴⁴ See *Boeing Deal is Found to Be Improper*, L.A. TIMES, Apr. 16, 2004, at C10.

³⁴⁵ The IG investigation also found Air Force officials had “failed to do enough homework before concluding they were paying a fair price for the tankers” and that officials had “improperly waived the government’s right to audit the program and failed to follow other important acquisition and testing practices. Of extreme importance, one article noted that due to the officials’ failures, the planes as acquired under the lease deal, “[might] not [even] be . . . effective, suitable, and survivable” in warfare. Further, the Pentagon might end up paying \$560 million or more to lease rather than buy the aircraft. See Richard A. Oppel, Jr., *Pentagon Says Changes Are Needed In Boeing Jet Deal*, N.Y. TIMES, Apr. 10, 2004, at A9; see also R. Jeffrey Smith, *U.S. Deal To Lease Tankers Criticized; Report: Procedures Waived for Boeing*, WASH. POST, Apr. 1, 2004, at E1.

response, the Air Force took “strong issue” and “non-concur[red] emphatically” with the report.³⁴⁶

During the same timeframe, the tanker lease contract was negatively impacted again when Druyun pleaded guilty³⁴⁷ to a felony count of conspiracy and agreed to cooperate with prosecutors.³⁴⁸ News accounts highlighted that under Druyun’s plea, she had admitted to entering into employment negotiations with Boeing while working for the Air Force and then conspiring with Sears to hide the discussions.³⁴⁹ Reporting the charges came with a maximum of five years in prison, media coverage suggested that for the first time, a government procurement official might go to jail.³⁵⁰

In the interim, the press also suggested the Air Force might be hiding further scandal from coming to light. Earlier, McCain had requested the Air Force turn over all communications between Air Force officials and Boeing, and reports claimed McCain believed he was being stonewalled.³⁵¹ Journalists asserted that in response to what he saw as the Air Force’s refusal to provide the information, McCain was “holding up

³⁴⁶ See Oppel, *supra* note 345, at A9.

³⁴⁷ See *Official Hired by Boeing Pleads Guilty*, N.Y. TIMES, Apr. 21, 2004, at C4.

³⁴⁸ See Philip Dine, *Guilty Plea Could Have Impact on Boeing Tanker Deal, Opponent Says*, ST. LOUIS POST-DISPATCH, Apr. 14, 2004, at A1; see also Matthew Barakat, *Boeing Ex-Officer to Plead Guilty to Conspiracy in Air Force Deal; She Was an Air Force Procurement Officer When Boeing Hired Her. She Faces 5 Years in Jail*, PHILA. INQUIRER, Apr. 14, 2004, at D7; see also John O’Dell, *Fired Boeing Executive to Plead Guilty to Conspiracy; The Scandal Involving Aerial Tankers is One of Two Surrounding the Company in the Last Year*, L.A. TIMES, Apr. 14, 2004, at C1.

³⁴⁹ See *Official Hired by Boeing Pleads Guilty*, *supra* note 347, at C4.

³⁵⁰ See Dine, *supra* note 348, at A1; see also O’Dell, *supra* note 348, at C1.

³⁵¹ See Dine, *supra* note 348, at A1.

nominations of prospective Pentagon officials” until he received all of the requested materials.³⁵² As a result, editorials opined the tanker deal “smell[ed] worse by the day” and asserted the Air Force and Boeing had “acted more like partners” throughout the course of the tanker lease negotiations than a buyer and seller.³⁵³

By early May, Boeing had begun a full-scale public relations campaign to try to keep its tanker lease contract intact and restore the public’s confidence. In various news outlets, Boeing publicly asserted the tanker lease contract would still occur within the year and pledged it had new ethics measures in place.³⁵⁴ Further, Boeing “bought full-page newspaper advertisements to defend its proposed \$23.5 billion tanker deal with the Air Force.”³⁵⁵

In the next few weeks, however, it became more and more likely the tanker lease contract would be canceled.³⁵⁶ First, the Pentagon publicly released a report, undertaken by The Defense Science Board (DSB), which concluded the Air Force did not need to replace its tanker fleet immediately and suggested there were available options outside of

³⁵² See *supra* note 348, at A1; see also Barakat, *supra* note 348, at D7.

³⁵³ See Editorial, *A No-Haggle Deal*, ST. PETERSBURG TIMES, Apr. 17, 2004, at 18A; see also Renae Merle, *Boeing Buys Ads to Defend Proposed Tanker Deal*, WASH. POST, May 5, 2004, at E3.

³⁵⁴ See Melissa Allison, *Boeing Tanker Deal Ok Expected; Stonecipher Sees Sale By Year-End*, CHICAGO TRIB., May 4, 2004, at C3.

³⁵⁵ See Merle, *supra* note 353, at E3.

³⁵⁶ One expert stated, “Although the fat lady has yet to sing about the Boeing deal, it sounds like she’s humming a few bars.” See Stephen J. Hedges and Susan Chandler, *Rumsfeld Postpones Decision On Boeing; 2 More Studies On Tankers Under Way*, CHICAGO TRIB., May 26, 2004, at C14.

leasing tankers that would meet the Air Force's needs for the near term.³⁵⁷ In addition, another report was released by the DoD shortly thereafter, stating the Air Force and Pentagon had "liberally interpreted" cost and pricing guidelines, failing to get the best price from Boeing.³⁵⁸ Just a few days later, Secretary Rumsfeld announced he had decided to order two additional studies and further defer a decision regarding the tanker deal for an additional six months.³⁵⁹

By June 2004, McCain announced he planned to offer an amendment that would stall the tanker lease even longer³⁶⁰ as further developments showing the extent of Druyun's connection to Boeing came to light.³⁶¹ Specifically, news accounts alleged that as far back as 2000, Druyun had asked Sears, the same Boeing executive who later hired her, to find a job for her daughter's fiancé and then later, for her daughter.³⁶² As the new facts were revealed, Druyun was consistently portrayed as "placing [the welfare of] Boeing above the welfare of the taxpayers, who she was supposed to be working for."³⁶³

³⁵⁷ See Leslie Wayne, *Study Finds No Dire Need To Replace Tanker Fleet*, N.Y. TIMES, May 13, 2004, at C4.

³⁵⁸ See Tony Capaccio, *Report: Air Force, Pentagon Mishandled Tanker Deal*, CHICAGO SUN-TIMES, May 19, 2004, at 81.

³⁵⁹ See Hedges & Chandler, *supra* note 356, at C14.

³⁶⁰ See *McCain Seeks to Prevent Lease of Boeing 767s*, L.A. TIMES, Jun. 9, 2004, at C11.

³⁶¹ See Pae, *supra* note 293, at C1.

³⁶² See *id.*

³⁶³ See *id.*

By this time, Sears had agreed to plead guilty to “conspiring to deceive the U.S. Government about negotiations on a \$23 billion contract” few weeks later.³⁶⁴ Although the media reported most believed the “case was over” when Druyun pleaded guilty,³⁶⁵ journalists responded favorably to Sears’ plea, asserting it showed the Government was willing to “take on both sides . . . both the person responsible with the government and the counterparty in the private sector.”³⁶⁶

By late September, the media portrayed Druyun as unscrupulous and difficult, claiming prosecutors planned to seek a sentence of six months or more because Druyun had been uncooperative in the case.³⁶⁷ Just a month later, Druyun was sentenced to nine months in prison.³⁶⁸ In the aftermath of Druyun’s sentencing hearing, news accounts suggested that in addition to the media’s previous depictions of Druyun, she was also an unrepentant liar due to events that had been made clear at the hearing. Specifically, journalists reported that at her sentencing hearing, Druyun had admitted she improperly negotiated a job with Boeing and agreed to a “higher price than appropriate in the tanker

³⁶⁴ Statement of Facts at 10, *United States v. Michael Sears*, No. 04-310-A (E.D.Va. 2004), 2004 WL 2683692; *see also Boeing Ex-CFO to Admit Guilt In Tanker Deal, Source Says*, CHICAGO SUN-TIMES, Jul. 26, 2004, at 68. In early February 2005, Sears was sentenced to four months in a federal prison and a \$250,000 fine for his role in the Druyun scandal. *See George Cahlink, Boeing CFO Gets Four-Month Jail Sentence*, GOVERNMENT EXECUTIVE, Feb. 18, 2005, <http://www.govexec.com/dailyfed/0205/021805g1.htm>.

³⁶⁵ *See Boeing Ex-CFO to Admit Guilt In Tanker Deal, Source Says*, *supra* note 364, at 68.

³⁶⁶ *See id.*

³⁶⁷ *See Jail Term Is Seen for Druyun*, L.A. TIMES, Sep. 29, 2004, at C3.

³⁶⁸ *See Philip Dine, Druyun Gets Prison Time In Boeing Case*, ST. LOUIS POST-DISPATCH, Oct. 2, 2004, at 1.

talks ‘as a parting gift to Boeing’ in return for the employment Boeing had offered both Druyun and her family members.³⁶⁹ However, the media also revealed Druyun had unexpectedly³⁷⁰ acknowledged she had lied to investigators by initially denying her job discussions with Boeing had harmed the Government’s interests when she knew they had.³⁷¹ The media further stressed that until Druyun’s guilty plea, she had “maintained that her crime was merely a technical violation and that she had upheld the Government’s interests during the contract process.”³⁷²

Druyun’s sentencing was not the end of the fallout related to her actions. A few days after her sentence was rendered, General Gregory Martin, who had been nominated by President Bush to head the U.S. Pacific Command, withdrew his name from consideration, “following scathing questioning in Congress over his role in approving [the] controversial tanker deal” while assigned as Commander of the Air Force Materiel Command (AFMC).³⁷³ The same day, the media reported Boeing had “lost the fight,”

³⁶⁹ See Dine, *supra* note 368, at 1; see also Stephen J. Hedges, *Boeing Deals Bring 9-Month Prison Term*, CHICAGO TRIB., Oct. 2, 2004, at C1; see also *Boeing Co.: Tanker Deal Scuttled By Congress*, CHICAGO TRIB., Oct. 10, 2004, at C3.

³⁷⁰ See Dine, *supra* note 368, at 1.

³⁷¹ See Leslie Wayne, *Ex-Pentagon Official Gets 9 Months for Conspiring to Favor Boeing*, N.Y. TIMES, Oct. 2, 2004, at C1; see also Matthew Barakat, *Air Force Official Sentenced for Helping Boeing*, CHICAGO SUN-TIMES, Oct. 2, 2004, at 33.

³⁷² See Barakat, *supra* note 371, at 33.

³⁷³ Although Martin had not taken command of the AFMC until after the tanker deal had been completed, in a Senate hearing, McCain asked Martin very pointed questions regarding Druyun. Specifically, McCain asked, “How is it, General Martin, that this could happen? How is it possible that one person can wreak this kind of havoc in the case of the tankers? . . . We’re talking about billions of dollars here.” See John Hendren, *U.S. Pacific Command Nominee Bows Out; Air Force General Withdraws After McCain Grills Him Over Boeing Tanker Deal at Hearing*, L.A. TIMES, Oct. 7, 2004, at A12; see

noting that members of “key” House and Senate committees had agreed to a “2005 funding bill that would prohibit the Air Force from following through on the contract with [Boeing]” and which had “kill[ed] the . . . lease deal dead.”³⁷⁴

C. Outcome and Reform Resulting from the Darleen Druyun Scandal

Most responded favorably to both Druyun’s sentencing and Congress’ decision to “kill” the Boeing lease deal.³⁷⁵ Unlike the spare parts and Operation Illwind scandals, which led to new laws, the Darleen Druyun scandal led mainly to additional internal processes and greater scrutiny of large defense contracts. Although some initially worried the scandal would “prompt an overly harsh correction of the procurement reforms of the 1990s,”³⁷⁶ in reviewing the changes that occurred in the years following the scandal, that does not appear to have been the case.

also Otto Kreisher, *General Withdraws Pacific Command Bid; Attempt Blocked By Sen. McCain*, SAN DIEGO UNION-TRIB., Oct. 8, 2004, at A-6.

³⁷⁴ See Susan Chandler, *Boeing Tanker Contract Setback; Congress Bars \$23.5 Billion Plan, Source Says*, CHICAGO TRIB., Oct. 8, 2004, at C1. The new bill authorized “a multiyear procurement for 100 new refueling tankers” in order to “brin[g] the Air Force’s plan back to square one” and necessitated “full and open competition.” See *Boeing’s Tanker Bid Is Rejected*, L.A. TIMES, Oct. 9, 2004, at C3.

³⁷⁵ See Editorial, *Boeing’s Tankers Tank*, CHICAGO TRIB., Oct. 9, 2004, at C28. In regards to the terminated lease contract, some expressed optimism that a “fresh deal [could] be hammered out.” See Byron Acohido, *What’s Next Unclear After Congress Lowers Boom on Boeing Deal*, USA TODAY, Oct. 11, 2004, at 2B. One journalist portrayed Congress’ decision as “really the only move Congress could make in good faith” in light of all that had happened. He additionally opined the “demise of Boeing’s tanker deal . . . [would] guarantee more scrutiny of its Pentagon contracts – and of the entire defense contracting industry . . .” which was “overdue and . . . a positive development.” See *Boeing’s Tankers Tank*, *supra* note 375, at C28.

³⁷⁶ See Branstetter, *supra* note 259, at 464.

Initial responses to Druyun's sentence by the DoD and others was varied. Most were shocked, as "no one had heard of anyone going to jail over acquisition issues."³⁷⁷ One of the first reactions came from Lockheed Martin and several of Boeing's other competitors, who filed bid protests surrounding an unrelated DoD contract that each had competed for, but Boeing had won, alleging Druyun had improperly steered it to Boeing.³⁷⁸ "Fearing . . . it would not appear independent in its review of the protests," the Air Force asked the General Accountability Office (GAO) to investigate the contract and protests, even though the protests had been filed "over three years after the award was made, a far longer period than the norm."³⁷⁹

In addition, the Air Force and DoD sought to reassure the public it was seeking to remedy any problems by publicizing earlier reforms made as well as implementing further internal changes. For example, within a month of Druyun's sentence, the Air Force released a press statement declaring it had begun instituting procurement reform and had been implementing changes since March 2002, long prior to learning of the scandal.³⁸⁰ In addition, per request by the DoD, the Defense Contract Management

³⁷⁷ See Larezos, *supra* note 228, at 7.

³⁷⁸ See Dave Hirschman, *Pentagon Irregularities Hit Lockheed Hard; Defense Contractor Seeks Remedies For Lost Work That Corrupt Official Steered to Boeing*, ATLANTA J.-CONST., Oct. 24, 2004, at 1Q; see also Branstetter, *supra* note 259, at 41.

³⁷⁹ See Branstetter, *supra* note 259, at 456 (referencing Matter of: Lockheed Martin Aeronautics Company; L-3 Communications Integrated Systems L.P.; BAE Systems Integrated Defense Solutions, Inc., B-295401, B-293401.2, B-295401.3, B-295401.4, B-295401.5, B-295401.6, B-295401.7, B-295401.8, 2005 U.S. Comp. Gen. LEXIS 38 (Comp. Gen. Feb. 24, 2005)).

³⁸⁰ In particular, the Air Force noted that since March 2002, it had: 1) created the Acquisition Center of Excellence "to improve program structure and execution"; 2) realigned Druyun's responsibilities to include removing her source selection and head

Agency (DCMA) created a team of DoD, Army, and Navy officials to investigate all contract actions for irregularities that Druyun may have been involved in during her Air Force career.³⁸¹ Further, Michael Wynne, the Under Secretary of Defense for Acquisition, Technology, and Logistics, ordered a review of the Air Force's procurement system by the DSB to "determine whether internal policies [could] prevent future abuses."³⁸²

Soon thereafter, Secretary Wolfowitz announced that once a new procurement plan was developed, the new Air Force tanker contract would be open to new bidders.³⁸³

While the media questioned whether a new procurement, even with new competition,

of contracting authorities; 3) eliminated Druyun's position upon her departure in November 2002; 4) realigned the reporting structure of the Air Force program executive office that Druyun had worked ; 5) implemented quarterly program executive office program reviews, monthly and weekly status reporting, and automated program reporting and tracking tools; and 6) directed that the assistant secretary for acquisition be briefed on all major source selections before contract awards. See Air Force Press Release, *DoD Investigating Contracts, Reviewing Procedures* (Nov. 18, 2004), <http://www.af.mil/news/story.asp?id=123009211>.

³⁸¹ The purposes of the DCMA team was to "look not only at scenarios where Druyun was the source selection official for a contract, but [also] into any area where her influence may have been exerted." See Air Force Press Release, *supra* note 380; see also *Pentagon Seeks Probe of More Air Force Deals; Ex-Official Admits to Aiding Boeing*, CHICAGO TRIB., Nov. 10, 2004, at C3.

³⁸² See Jeffrey Branstetter, *The Darleen Druyun Debacle: Procurement, Power, and Corruption* 31 (Aug. 2005) (unpublished LL.M. thesis, George Washington University) (citing generally, *Report of the Defense Science Board Task Force on Management Oversight in Acquisition Organizations*, (March 2005), <http://www.acq.osd.mil/dsb/reports/ADA435469.pdf> [hereinafter, *Report of the Defense Science Board*]); see also *Pentagon Seeks Probe of More Air Force Deals*, *supra* note 381, at C3.

³⁸³ See Tony Capaccio, *Pentagon Will Open Contract to New Bids; Lockheed, Northrop Say They Would Work With EADS On Bid*, CHICAGO SUN-TIMES, Nov. 23, 2004, at 57.

would lead to a new result,³⁸⁴ the media spent several weeks in November 2004 trying to determine just what had gone wrong in the tanker deal and what Druyun's motivation had been.³⁸⁵ Ultimately, the media concluded Druyun's actions were the result of a combination of nepotism and too much authority with too "little adult supervision."³⁸⁶

Over the next several months and into the next year, several events occurred to help lead towards reform. In February 2005, the Department of Justice (DoJ) announced it had created a Procurement Fraud Working Group (PFWG), to be comprised of representatives from several different federal agencies to "facilitate the exchange of information among the parties and assist them in developing new strategies to prevent

³⁸⁴ Some news reports opined that even in a new procurement, "the government [would] . . . have a hard time awarding a contract to Airbus" due to its European ties and predicted that Boeing would receive the award even after new competition. *See id.*

³⁸⁵ *See Pae, supra* note 263, at C1; *see also* Editorial, *Stewing in Scandal*, ST. LOUIS POST-DISPATCH, Nov. 28, 2004, at B2; *see also* Andy Pasztor, *Family Loyalty Leads Air Force Official to Jail In Boeing Case*, ST. LOUIS-DISPATCH, Dec. 12, 2004, at G2.

³⁸⁶ Secretary Rumsfeld stated Druyun had "acquired much authority with 'little adult supervision above, below, or on the side'" due to the high turnover of senior Department of the Air Force officials, who were political appointees. Due to the fact the supervisory position over Druyun was often vacant, Druyun had been temporarily elevated to acquisition chief four times, for a total of 47 months, during which time she was able to acquire a great deal of responsibility and authority. She had used this authority to become the "ultimate decision maker on virtually all Air Force contracts" until Marvin Sambur was appointed over her and subsequently decreased her responsibility and power. While the majority of the media painted her motivation as greed and power, others portrayed Druyun as a fiercely loyal mother who used her authority to gain employment for family members. *See Pae, supra* note 263, at C1; *see also Stewing in Scandal, supra* note 385, at B2; *see also McCain Presses Probe Into Deal for Tankers*, L.A. TIMES, Dec. 7, 2004, at C6.

and promote early detection of procurement fraud³⁸⁷ and restore public “faith in the integrity of the procurement system.”³⁸⁸

In March, the DSB published the report Under Secretary Wynne had ordered in November 2004.³⁸⁹ Similar to the media’s conclusions, the DSB also concluded the underlying cause of the Druyun scandal was Druyun had been allowed to gain too much control with too little oversight.³⁹⁰ The DSB further determined that since recent reforms had been effective, a recurrence seemed unlikely.³⁹¹ However, it offered several recommendations, one of which was that the DoD conduct a “top-down assessment to streamline and simplify the system and preclude exclusive expertise and its resulting power from residing in a small portion in the acquisition work force.”³⁹²

In addition, the DoD IG’s office continued its investigation into all of the contracts Druyun had had a role in. DCMA had a cooperative role in the investigation, and after DCMA found eight of 407 contracts suspect, the IG carefully scrutinized all eight, eventually publishing a report for each of the contracts.³⁹³ In June 2005, the media

³⁸⁷ See Branstetter, *supra* note 382, at 51-52; see also Michael Bruno, *Justice Department Beefing Up Effort To Prosecute Procurement Fraud*, AEROSPACE DAILY & DEFENSE REPORT, Oct. 13, 2006, at 1.

³⁸⁸ See Michael Bruno, *Justice Department Beefing Up Effort to Prosecute Procurement Fraud*, AEROSPACE DAILY & DEFENSE REPORT, Oct. 13, 2006, at 1.

³⁸⁹ See Larezos, *supra* note 228, at 18 (citing generally Report of the Defense Science Board, *supra* note 382, at 11-19).

³⁹⁰ See *id.*

³⁹¹ See *id.*

³⁹² See *id.* at 18-19.

³⁹³ See Larezos, *supra* note 228, at 16.

revealed the IG had concluded the Air Force “ignored legal requirements and violated its own rules as U.S. officials pushed for a deal to lease and buy refueling tankers from Boeing.”³⁹⁴

By this time, the DoD had already implemented the Defense Acquisition Performance Assessment (DAPA), yet another study that made recommendations relating to the types of procurement reform the DoD should make.³⁹⁵ Because of the events that had occurred over the past few years, in order to ensure the DoD, and specifically the Air Force continued to work towards procurement reform, Congress “exercised its legislative to reform the defense acquisition structure . . . through the annual National Defense Authorization Acts.”³⁹⁶ Specifically, in its fiscal year 2007 National Defense Authorization Act, Congress required the DoD to report biannually, from January 1, 2007, through December 31, 2008, on how it was implementing the DAPA’s as well as other major studies’ recommendations.³⁹⁷

Although each new study and internal process implemented improvements, the Darleen Druyun scandal haunted the Air Force and Boeing for many years. After the scandal, Boeing continued working to repair its reputation. After nearly a year of trying

³⁹⁴ See *Report Cites Violations on Air Force Tanker Deal*, ST. PETERSBURG TIMES, Jun. 8, 2005, at 4A.

³⁹⁵ See generally Assessment Panel of the Defense Acquisition Performance Assessment Project, *Defense Acquisition Performance Assessment Report* (January 2006), <http://www.frontline-canada.com/Defence/pdfs/DAPA-Report-web.pdf> [hereinafter, Defense Acquisition Performance Assessment Report].

³⁹⁶ See MOSHE SCHWARTZ, CONG. RESEARCH SERV., RL34026, DEFENSE ACQUISITIONS: HOW DOD ACQUIRES WEAPON SYSTEMS AND RECENT EFFORTS TO REFORM THE PROCESS 17 (2010), <http://www.fas.org/sgp/crs/natsec/RL34026.pdf>.

³⁹⁷ See John Warner Nat’l Defense Authorization Act, Pub. L. No. 109-364, § 804(a)-(d), 120 Stat. 2083, 2314 (2006).

to “hamme[r] out a comprehensive settlement” with DoJ to avoid facing criminal charges relating to the tanker lease deal,³⁹⁸ in summer 2006, Boeing agreed to pay \$615 million, the “biggest penalty paid by a defense contractor” to settle allegations of misconduct.³⁹⁹ As the Air Force worked to award a new tanker contract, it became clear the public had not forgotten the scandal surrounding the initial tanker lease contract.

Nearly two years later, in February 2008, in a new procurement action, the EADS-Northrop Grumman team beat Boeing on a tanker contract to buy, not lease, aerial refuelers.⁴⁰⁰ Boeing immediately filed a bid protest with the GAO,⁴⁰¹ and the GAO found the Air Force had “conducted misleading and unequal discussions with Boeing” and determined the Air Force had favored EADS and Northrop Grumman this time.⁴⁰² The media alleged the Air Force had shown preference to EADS to “avoid the wrath of John McCain.”⁴⁰³ Whatever its motivation, the Air Force was once again condemned to repeat history as it started the procurement action over.

By 2009, the Air Force decided it had to make “the next contract protest-proof. To do that, they stripped the evaluation of any subjective judgments⁴⁰⁴ and made the

³⁹⁸ See Susan Chandler, *Boeing, U.S. Talking Deal; Hefty Fine Possible in Defense Scandals*, CHICAGO TRIB., Sep. 10, 2005, at C1.

³⁹⁹ See Dana Hedgpeth, *A Mission to Rebuild Reputations; Upcoming Deals to Test Reforms at Air Force, Boeing*, WASH. POST, Jan. 17, 2008, at D1.

⁴⁰⁰ See Harris, *supra* note 225.

⁴⁰¹ See *id.*

⁴⁰² See *id.*

⁴⁰³ See *id.*

⁴⁰⁴ See *id.*

procurement for tankers a “lowest price, technically acceptable” acquisition.⁴⁰⁵ After a decade of scandal, the Air Force finally awarded the aerial refueling tanker contract to Boeing on February 24, 2011, as Boeing priced its proposal most aggressively.⁴⁰⁶

In the end, the Darleen Druyun scandal led to several task forces, working groups, studies, and even some temporary legislation, by way of National Defense Authorization Acts. Together, these resulted in changes to the alignment and structure of the Air Force’s top civilian procurement positions to ensure a civil servant was not allowed to amass such great authority in the future,⁴⁰⁷ resulted in additional scrutiny of large dollar contracts (particularly weapons contracts),⁴⁰⁸ placed a greater emphasis on providing ethics training to military and civilian procurement officials,⁴⁰⁹ and incurred a number of new internal processes.⁴¹⁰ Nevertheless, as previously noted, the scandal did not result in any dramatically different laws. Therefore, in the aftermath of the Darleen Druyun scandal, the real question is whether the reforms made are enough to prevent a federal defense procurement official from committing this type of behavior in the future. The apparent answer seems to be that although the DoD, Air Force, and DoJ have done their best to create stronger deterrents, revamp processes to lessen the opportunities for one to

⁴⁰⁵ *See id.*

⁴⁰⁶ *See* K.B. Menon, *And the Winner Is . . .*, SP AVIATION, May 1, 2011; *see also* Loren Thompson, *How Boeing Won the Tanker War*, FORBES (Feb. 28, 2011, 6:54 PM), <http://blogs.forbes.com/beltway/2011/02/28/how-boeing-won-the-tanker-war/>.

⁴⁰⁷ *See* Air Force Press Release, *DoD Investigating Contracts, Reviewing Procedures* (Nov. 18, 2004), <http://www.af.mil/news/story.asp?id=123009211>.

⁴⁰⁸ *See* Editorial, *Boeing’s Tankers Tank*, CHICAGO TRIB., Oct. 9, 2004, at C28.

⁴⁰⁹ *See generally* Air Force Press Release, *supra* note 380.

⁴¹⁰ *See generally id.*

commit ethics or bribery violations, more robustly prosecute wrongdoers, and create and improve ethics training for procurement officials, there really is no guarantee that a similar event will never happen again. Rather, in regards to this type of scandal, the greatest deterrent of all for procurement officials and defense contractors may be the fear of creating the type of negative publicity Druyun created for herself, her family, Boeing, the Air Force, and the DoD.

V. A CURRENT STUDY OF THE CONTRACTING WITH THE ENEMY SCANDAL AND RELATED MEDIA COVERAGE

As evidenced by the above scandals, once news of a DoD military procurement scandal breaks, it may take years to develop and resolve for a variety of reasons. Some, like the following scandal, take not only years to resolve but years to gain the public's attention, even if previously publicized. Although the scandal continues to evolve, its related media coverage and ensuing public pressure have already resulted in a number of measures to limit the corruption involved.

A. How it Began

When the U.S. forces entered Afghanistan in October 2001,⁴¹¹ it quickly learned the “quarter century of war and years of drought had destroyed Afghanistan’s government, judicial, economic, and social institutions and its transportation, health, and other infrastructure.”⁴¹² Initially, the U.S. military did little in helping to rebuild

⁴¹¹ Patrick Wintour, Kamal Ahmed, Ed Vulliamy, Ian Traynor, and Jabal Saraj, *It's Time for War, Bush and Blair Tell Taliban*, THE OBSERVER (Oct. 7, 2001), <http://www.guardian.co.uk/world/2001/oct/07/politics.september11>.

⁴¹² Bradley A. Cleveland, *The Last Shall Be First: The Use of Localized Socio-Economic Policies in Contingency Contracting Operations*, 197 MIL. L. REV. 103, 118 (2008) (citing generally, U.S. Gov't Accountability Office, *Afghanistan Reconstruction:*

Afghanistan; however, after a number of mistakes learned regarding nation-building in Iraq,⁴¹³ military and government leaders directed that cooperative rebuilding efforts in Afghanistan be accomplished. These efforts emphasized “active participation by local [Afghan] citizens” in the related programs, with the intent the locals’ participation would lead to greater success in rebuilding the country.⁴¹⁴ Unfortunately, “the trouble with trying to fix failed states is that it implicates the United States in a vast nation-building effort in countries where the odds of success are low and the risk of unintended consequences is very high.”⁴¹⁵ According to one expert, the

explosion of U.S. cash – \$450 billion in ten years, thrown into a country with a \$29 billion annual GDP – put Afghanistan on a path to institutional dysfunction. With more foreign money than the capacity to absorb it, corruption in Afghanistan became ‘the real internal system of national politics,’ not a deviation from it Afghans had to do what they could to survive and this meant that all saw a steady rise in corruption and the role of powerbrokers at every level.⁴¹⁶

Despite Some Progress, Deteriorating Security and Other Obstacles Continue to Threaten Achievement of U.S. Goals, GAO-05-742 (2005), <http://www.gao.gov/new.items/d05742.pdf>).

⁴¹³ Adil E. Shamoo, *Nation-Building in Afghanistan*, Foreign Policy In Focus (Nov. 30, 2009), http://www.fpif.org/articles/nation-building_in_afghanistan (last visited Aug. 30, 2011).

⁴¹⁴ See generally Cleveland, *supra* note 412, at 118.

⁴¹⁵ Fareed Zakaria, *The Failed State Conundrum*, WASH. POST, Jul. 19, 2010, at A15.

⁴¹⁶ Spencer Ackerman, *Who’s Really Responsible For Afghan Corruption? You*, WIRED, (Sept. 8, 2010, 2:57 PM), <http://www.wired.com/dangerroom/2010/09/whos-really-responsible-for-afghan-corruption-you/>.

B. The Contracting With the Enemy Scandal

1. Background Facts

In November 2007, a member of the 101st Sustainment Brigade posted a contractor report on <http://wikileaks.org> which asserted the U.S. military in Afghanistan was making indirect “protection payments” to the Taliban themselves, or their aiders and abettors, to secure the U.S. military’s supply routes.⁴¹⁷ In pertinent part, the contractor report stated that on November 9, 2007, “Taliban personnel” approached a defense logistics contractor for the U.S. military and demanded payments for the safe passage of the contractor’s convoys through the Taliban’s area.⁴¹⁸ Although the report was posted for anyone to read, the news did not make the headlines until two years later. In November 2009, Aram Roston, a journalist, used the report to write a scathing exposé that revealed a minimum of “10 percent of the Pentagon’s logistics contracts – hundreds of millions of dollars – consist[ed] of [indirect] payments to insurgents.”⁴¹⁹

Roston’s article explained the U.S. military had contracted out its logistics services in a “gargantuan” \$2.2 billion contract to six Afghan trucking companies.⁴²⁰ Each contractor was responsible for moving everything needed “to keep the U.S. military efforts alive . . . [from] “toilet paper . . . [to] fuel . . . [to] vehicles” over a perilous route

⁴¹⁷ See Justin Elliott, *Wikileaks: U.S. Knew of Contractor Bribes to Taliban*, WAR ROOM (Jul. 28, 2010, 1:01 PM), http://www.salon.com/news/politics/war_room/2010/07/28/protection_payments_to_taliban.

⁴¹⁸ The payments demanded varied between \$50 to \$500 per truck, based upon the route used. *See id.*

⁴¹⁹ See Aram Roston, *How the U.S. Funds the Taliban*, THE NATION (Nov. 11, 2009), <http://www.thenation.com/article/how-us-funds-taliban>.

⁴²⁰ *See id.*

“controlled by warlords, tribal militias, insurgents, and Taliban commanders.”⁴²¹ In order to ensure security on these roads, Roston learned the logistics contractors were paying these warlords, Taliban, and other enemies to prevent attack of its convoys “because there were few other ways to bring goods to the combat outposts and forward operating bases where soldiers need them.”⁴²² In addition, and of greater concern, the article emphasized several senior military leaders knew the U.S. military was indirectly paying the enemy to allow the convoys through but had done nothing about it.⁴²³ Roston asserted the crisis was not that the Government knew about the extortion payments, but that “as with so much in Afghanistan – the United States doesn’t seem to know how to fix [the problem].”⁴²⁴

2. Media Coverage and the Development of the Contracting With the Enemy Scandal

Although Roston’s article did not spark a frenzy of media coverage, it did catch immediate congressional attention. In the wake of its publication, Senator John Tierney

⁴²¹ *See id.*

⁴²² Due to international agreements between the U.S. and Afghanistan, logistics contractors were not allowed to defend themselves or their cargo with any weapon “heavier than a rifle” even though insurgents were known to use rocket-propelled grenades.” In light of the rules, one logistics contractor stated, “If you tell me not to pay these insurgents in this area, the chances of my trucks getting attacked increase exponentially.” *See id.*

⁴²³ For example, COL David Haight, Commander of the Third Brigade of the Tenth Mountain Division stated, “The American soldier in me is repulsed by [the payments] I know . . . it is: essentially paying the enemy, saying, ‘Hey, don’t hassle me.’ I don’t like it, but it is what it is.” COL Wayne Shanks, the chief public affairs officer for the international forces in Afghanistan declared military officials are “aware of the allegations that procurement funds may find their way into the hands of insurgent groups, but we don’t directly support or condone this activity.” *See Roston, supra* note 419.

⁴²⁴ *See id.*

of the Subcommittee on National Security and Foreign Affairs, chaired an investigation into Roston's allegations that began in November 2009.⁴²⁵ Within the month, Chairman Tierney sent letters to the DoD and the eight host nation trucking (HNT) contractors on the contract, requesting information pertaining to the operation of the DoD's Afghan HNT contract.⁴²⁶ In the coming months, as Chairman Tierney and his staff began investigating and drafting what would later be called the "Warlord, Inc." report, news coverage began trickling in regarding the investigation.⁴²⁷

In early December 2009, the media referred to Roston's article and its related congressional investigation, asserting the underlying cause of the problem was the Afghan countryside was "so deeply permeated by the Taliban that contractors shipping logistical supplies to our troops [must] routinely bribe the enemy to allow safe passage."⁴²⁸ Even in the beginning, the public's outrage and frustration was clear, as one editorial noted "billion[s] [are] end[ing] up in the coffers of the Taliban, far more than they need to buy the ammunition and explosives that kill our soldiers."⁴²⁹ In the coming

⁴²⁵ See generally Majority Staff of the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform, *Warlord, Inc.: Extortion and Corruption Along the U.S. Supply Chain in Afghanistan* 111th Cong. iii (2010), http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/6.22.10_HNT_HEARING/Warlord_Inc_compress.pdf [hereinafter *Warlord, Inc. Report*].

⁴²⁶ See *id.*

⁴²⁷ See *id.*

⁴²⁸ See Joe Conason, *The War in Afghanistan; Salvaging What We Can of the 'Good War,'* OREGONIAN, Dec. 4, 2009.

⁴²⁹ See *id.*

months, press coverage consistently portrayed the underlying cause of the scandal as “corruption,” acknowledging that “corruption is a very complicated enemy.”⁴³⁰

However, as the scandal continued to develop, news articles stressed that the thorny nature of corruption presented difficult decisions for U.S. military commanders who were often faced with allowing extortion payments to continue if they wished short-term mission objectives to be accomplished.⁴³¹ Although U.S. and Afghanistan military and civilian leaders had created task forces to help fight corruption, the same media coverage stressed the problem was so significant that even General Stanley McChrystal, then the top commander of the coalition forces in Afghanistan, seemed to be at a loss to know how to solve the problem.⁴³²

In the next several months, the crisis began to be showing signs of a full-fledged scandal as it landed on the front page of *The Washington Post*.⁴³³ In March 2010, evidence Tierney’s staff had uncovered as part of its congressional investigation began

⁴³⁰ See Joshua Partlow, *Afghan Corruption Is the Enemy. Unless It Helps Us*, WASH. POST, Jan. 31, 2010, at B1.

⁴³¹ The report, written in January 2010, noted that U.S. military commanders are often forced to rely on known extortionists to provide assistance to the U.S. military in “short-term security, intelligence gathering . . . [and] moving supply trucks over the border.” *See id.*

⁴³² One account described General McChrystal’s recent trip to Afghanistan, including a visit to a suspected extortionist and drug smuggler. McChrystal requested the individual’s assistance in “accelerating the flow of trucks across the border.” When confronted by the media regarding the alleged crimes the individual had committed, McChrystal stated, “I don’t have anything to say on that. I just don’t have the depth of information.” *See id.*

⁴³³ See Karen DeYoung, *For the U.S., Afghan Corruption Is An Elusive Target; Some Security Payoffs May Be Going to Taliban; Solutions Are Unclear*, WASH. POST, Mar. 29, 2010, at A1.

leaking to the press.⁴³⁴ Journalists reported congressional investigators had learned prime Afghan HNT contractors were sitting atop a “murky pyramid” of subcontractors responsible for providing the convoy vehicles and safeguarding the vehicles’ passage.⁴³⁵ These reports stated investigators had determined there was a definite economic advantage of using Afghan contractors on the HNT contract.⁴³⁶ However, the facts revealed seemed to confirm Congress’ and the public’s worst suspicions that “siphoning off [U.S.] contractual money . . . [was] a major source of funding for the Taliban,”⁴³⁷ particularly when President Barack Obama made a surprise trip to Afghanistan to urge President Hamid Karzai to do more to curb corruption.⁴³⁸ As the weeks continued, the breadth of the scandal widened as reports claimed extortion for bribery payments extended even to small Afghan construction companies holding small DoD contracts.⁴³⁹ With these new developments, the media’s framing of the scandal began to change slightly. Even though the media still acknowledged corruption in Afghanistan as an underlying cause of the problem, it began placing a share of the blame on the U.S.

⁴³⁴ *See id.*

⁴³⁵ *See id.*

⁴³⁶ Investigators found it would cost “10 times” more to use U.S. military members or contractors to provide security to convoys than Afghan contractors. *See id.*

⁴³⁷ *See* Karen DeYoung, *Fighting Corruption Proves Difficult Task In Afghanistan; Questions Arise on Contracts to Transport Goods*, WASH. POST, Mar. 30, 2010, at 4; *see also* DeYoung, *supra* note 433, at A1.

⁴³⁸ *See id.*

⁴³⁹ *See* “Afghan First” Policy Delays Military Building, MILITARY.COM (May 3, 2010), <http://www.military.com/news/article/afghan-first-policy-delays-military-building.html> (reporting that the U.S. military received invoices for as much as \$40,000 from Afghan contractors for bogus building permits, who asserted they did not have the power to decline paying for the permits).

military for possessing a “willful blindness” in desiring to have its supply convoys arrive safely and on time without getting into the details of how they arrived.⁴⁴⁰

In June 2010, just a few days prior to the release of the “Warlord, Inc.” report, the DoD announced the creation of Task Force (TF) 2010, a U.S. military-led anti-corruption organization, and stated it would begin operating on July 1, 2010.⁴⁴¹ Clearly hoping to preempt the backlash that was sure to result when the “Warlord, Inc.” report was released, the DoD announced TF 2010 would “track how money is used as it goes to contractors and subcontractors and to target companies with corrupt practices.”⁴⁴² Further, the DoD emphasized TF 2010 was only part of a “broader effort” to fight corruption, to include other U.S. agency-led organizations and newly focused individual efforts by U.S. forces.⁴⁴³

The “Warlord, Inc.” report was publicly released on June 22, 2010, and widely followed by the press. The report found the HNT contract, and those like it, “fuel warlordism, extortion, and corruption, and [are likely] a significant source of funding for insurgents.”⁴⁴⁴ Further, it noted that many of the principal private security contractors are

⁴⁴⁰ See DeYoung, *supra* note 433, at A1.

⁴⁴¹ See Maria Abi-Habib & Matthew Rosenberg, *Task Force to Take on Afghan Corruption*, WALL ST. J., Jun. 18, 2010, <http://online.wsj.com/article/SB10001424052748703650604575313062382545140.html>.

⁴⁴² See *id.*; see also Dianna Cahn, *Corruption Leads to New Rules for Afghan Contracts*, STARS AND STRIPES (Jun. 26, 2010), <http://www.stripes.com/mobile/news/middle-east/afghanistan/corruption-leads-to-new-rules-for-afghan-contracts-1.108877>.

⁴⁴³ See Abi-Habib & Rosenberg, *supra* note 441.

⁴⁴⁴ Although the committee could not find direct evidence, it found enough circumstantial evidence to be convinced that many of these protection payments were, and likely are, a significant source of funding to the Taliban. See generally Warlord, Inc. Report, *supra* note 425, at 2-3.

“warlords, strongmen, commanders, and militia leaders who compete with the Afghan central government for power and authority . . . [and whose] interests are in fundamental conflict with U.S. aims to build a strong Afghan government.”⁴⁴⁵ The report also revealed that even if HNT contractors were not warlords or similar to begin with, they and/or their subcontractors were often forced to “pay ‘tens of millions of dollars’ annually to local warlords . . . in exchange for protection . . . [of the] supply convoys” delivering goods in support of U.S. troops.⁴⁴⁶ But perhaps the most significant, and disturbing, finding was the confirmation that DoD officials had been notified by HNT contractors of the extortion but had failed to properly respond to the contractors’ complaints.⁴⁴⁷

In response to the “Warlord, Inc.” report, the media’s framing of the scandal once again began to evolve slightly. While many journalists continued to assert the corruption-prevalent society in Afghanistan was the main, underlying cause of the problem,⁴⁴⁸ the portrayal began taking a decidedly more negative tone towards the role of the U.S. military in the scandal. The press emphasized the military had turned “a blind

⁴⁴⁵ *See id.* at 24.

⁴⁴⁶ The committee also found many of the security contractors hired to protect the HNT contractors were paying anywhere from \$1,000 to \$10,000 in monthly bribes to various local government and military leaders, through which territories the convoys were passing. *See id.* at 3.

⁴⁴⁷ *See id.* at 4.

⁴⁴⁸ Some press coverage portrayed the bribery payments as inevitable, saying “contractors have little choice but to use them.” *See* Richard Lardner, *\$4 Million a Week Allegedly Diverted To Taliban Coffers*, HOUSTON CHRON., Jun. 22, 2010, at A5. Further defining the problem, other coverage noted that while “ordinary Afghans see money pouring into their country . . . it seldom get[s] past flamboyantly corrupt government officials.” *See* Cahn, *supra* note 442.

eye to problem,” and insisted something had to be done.⁴⁴⁹ Further, some articles contended the entire situation painted a “grim picture of a deteriorating security situation in Afghanistan,”⁴⁵⁰ and questioned whether TF 2010 could get the job done.⁴⁵¹

The DoD responded. First, it announced that in reference to the “Warlord, Inc.” report and its related media coverage, criminal investigations had begun with the purpose of looking into the activities of the Afghan HNT contractors referenced in the report.⁴⁵² About a week later, the Senate confirmed President Obama’s nomination of General David Petraeus to replace General McChrystal as commanding general of the International Security Assistance Force in Afghanistan.⁴⁵³ As General Petraeus took command, he “intensified efforts to uncover the scope and mechanics of the pervasive theft, graft, and bribery in the Afghan government, examine U.S. contracting practices,

⁴⁴⁹ See Farah Stockman, *U.S. Military Faulted Over Truck Security In Afghanistan; Supply Firms Pay Warlords For Protection; Corrupt System Aiding Taliban*, BOSTON GLOBE, Jun. 22, 2010, at 3. Journalists and blogs noted extreme concern regarding the military’s role in the problem. One blog stated: “More good news from Afghanistan: the U.S. military has no idea where the billions it’s spending on warzone contractors is actually ending up. And nine years into the war, the Pentagon has barely started the long, laborious process of figuring it out.” See Spencer Ackerman, *9 Years In, U.S. Finally Tries to Get a Grip on Warzone Contractors*, DANGER ROOM (Jun. 28, 2010, 12:01 AM), <http://www.wired.com/dangerroom/2010/06/9-years-in-u-s-finally-tries-to-get-a-grip-on-warzone-contractors/>.

⁴⁵⁰ See Stockman, *supra* note 449, at 3.

⁴⁵¹ See *id.*; see also Ackerman, *supra* note 449.

⁴⁵² See Stockman, *supra* note 449, at 3; see also Lardner, *supra* note 448, at A5.

⁴⁵³ General Petraeus was confirmed on June 29, 2010. See *Petraeus Ok’d As Commander*, NEWSDAY, Jul. 1, 2010, at A26; see also Craig Whitlock, *Senate Panel Backs Petraeus Confirmation*, BOSTON GLOBE, Jun. 30, 2010, at 4.

and assist Afghan authorities in arresting and convicting corrupt bureaucrats.”⁴⁵⁴ In the meantime, the public was growing frustrated with the U.S. military’s role in the scandal. By the end of July, one blogger noted he had recently discovered the war log on Wikileaks that had originally led to Roston’s article that sparked the “Warlord, Inc.” report.⁴⁵⁵ He wrote, “The Wikileaks document is just one example of these problems being reported to the military going back years [The “Warlord, Inc.” report found that] regular complaints about protection payments [to the military] met a brick wall.”⁴⁵⁶

By the end of August, news reports portrayed the situation involving HNT contractors and other Afghan security contractors as unmonitored, wasteful, and dangerous.⁴⁵⁷ The press alleged the Pentagon did not know how much it was spending on foreign subcontractors.⁴⁵⁸ Further, it charged the U.S. Government was assisting the very enemies it was fighting because it “[did] not have the ability to monitor Afghan security contractors or determine the nature of their affiliation or allegiance.”⁴⁵⁹

⁴⁵⁴ Joshua Partlow, *For Petraeus, Rooting Out Afghan Corruption Is a Priority*, WASH. POST, Jul. 29, 2010, at A11.

⁴⁵⁵ *See* Elliott, *supra* note 417.

⁴⁵⁶ *Id.*

⁴⁵⁷ *See* Nick Schwellenbach & Lagan Sebert, *U.S. Struggling to Track Corrupt Contracting Practices*, ST. LOUIS POST-DISPATCH, Aug. 29, 2010, at A12.

⁴⁵⁸ *See id.*

⁴⁵⁹ *Id.* As support, the press noted the DoD “couldn’t be more precise about how much [it had] spent on foreign subcontractors other than offering an estimate in the ‘lower billions of dollars.’”

The DoD again responded. On September 8, 2010, General Petraeus issued new contracting guidelines for U.S. contracting work in Afghanistan.⁴⁶⁰ In his guidance, Petraeus declared the U.S. had been “spend[ing] large quantities of international contracting funds quickly and without sufficient oversight . . . [and had likely] unintentionally fuel[ed] corruption, finance[d] insurgent organizations, strengthen[ed] criminal patronage networks, and undermine[d] . . . efforts in Afghanistan.”⁴⁶¹ To counter these problems, Petraeus set forth several mandates. In pertinent part, these requirements stated that those involved in contracting activities must: 1) place a priority on hiring Afghans and buying Afghan product; 2) understand where DoD money was going by establishing effective systems to trace the path of funds; 4) exercise responsible, planned acquisitions; 5) integrate contracting into intelligence, plans, and operations; 6) develop new partnerships with a broader range of Afghan companies to help eliminate monopolies; 7) look beyond cost, schedule, and performance to support the Afghan people and campaign objectives; 8) conduct and ensure post-award oversight; and

⁴⁶⁰ Memorandum from General David Petraeus, Commander, International Security Assistance Force/United States Forces-Afghanistan, to Commanders, Contracting Personnel, Military Personnel, and Civilians of NATO ISAF and US Forces Afghanistan (Sep. 8, 2010) (on file with the author) [hereinafter, Memorandum from General David Petraeus]; *see also* Alissa J. Rubin, *Afghan Commander Issues New Rules On Contractors*, N.Y. TIMES, Sept. 12, 2010, at A15; *see also* Deb Reichmann, *Petraeus Issues Afghan Contracting Guidance*, ARMY TIMES (Sep. 13, 2010), <http://www.armytimes.com/news/2010/09/ap-petraeus-afghanistan-contractingguidelines-091310/>; *see also* NATO Issues New Guidelines for Afghanistan Contracts, BBC NEWS (Sep. 13, 2010), <http://www.commondreams.org/print/60267>; *see also* Spencer Ackerman, *Petraeus To Troops: Cash Rules Everything Around You*, DANGER ROOM (Sep. 13, 2010, 2:46PM), <http://www.wired.com/dangerroom/2010/09/petraeus-to-troops-cash-rules-everything-around-you/>.

⁴⁶¹ *See* Memorandum from General David Petraeus, *supra* note 460.

10) take appropriate actions to suspend and debar unscrupulous individuals, terminate contracts, and decline to renew contract option periods where appropriate.⁴⁶²

Petraeus' guidelines were widely covered by the press and for the most part, used to frame the military's efforts in a positive light. One article asserted the guidelines were a positive development because "better oversight in the contract process [needed] to be part of any overall drive by the United States in combating corruption in Afghanistan"⁴⁶³ Another mentioned the new rules might be what was needed to overcome President Karzai's criticism that "war-weary Afghans [had] not reaped the full benefits [of the international contracting process] . . . because so much of the money goes to high-priced contractors, subcontractors, and powerbrokers . . . [or is often] awarded to the same contractors."⁴⁶⁴ However, although the rules were progress, the press noted the new guidelines would not provide a complete cure and would likely result in tradeoffs.⁴⁶⁵

While the media appeared cautiously optimistic, it was clear the public was still skeptical that any real improvement was occurring. In late September, only four months after TF 2010 had begun operating, the DoD announced the first commander of TF 2010,

⁴⁶² *See id.*

⁴⁶³ *See Rubin, supra* note 460, at A15.

⁴⁶⁴ *See Reichmann, supra* note 460.

⁴⁶⁵ For example, one tradeoff mentioned was that "construction can either be done on time, or contracted to the Afghans." It was also questioned whether monitoring the contracts would even be possible in a country with such wide-spread corruption. *See id.* Similarly, the press asserted the roles of private security contractors were conspicuously absent from the guidelines, due to the political nature of the subject, with one blogger maintaining it was a mistake not to deal with the issue at that point in time. *See Ackerman, supra* note 460.

a Rear Admiral, had been replaced by another commander of junior rank.⁴⁶⁶ Although TF 2010 officials downplayed the change of command as “part of a normal rotation,” at least one blogger questioned whether the admiral’s replacement had occurred due to lackluster performance due to the brevity of her post.⁴⁶⁷

Just a few days later, the SASC released a report surrounding its year-long investigation into the role and oversight of private security contractors in Afghanistan.⁴⁶⁸ Similar to the findings surrounding the “Warlord, Inc.” report, but relating specifically to Afghan security rather than logistics contractors, the SASC’s report “uncovered evidence of private security contractors funneling U.S. taxpayers’ dollars to Afghan warlords and strongmen linked to murder, kidnapping, bribery as well as other Taliban and anti-Coalition activities” to include providing information to Iran.⁴⁶⁹ In addition, the SASC’s report found shoddy performance on the part of Afghan security contractors and determined many had failed to train their guards, used insufficient and unserviceable weapons, left their posts unmanned, or otherwise threatened the safety of U.S. military personnel.⁴⁷⁰ Congressional investigators determined one major underlying cause of the

⁴⁶⁶ *See id.*

⁴⁶⁷ *See id.*

⁴⁶⁸ *See generally* Committee on Armed Services United States Senate, *Inquiry Into the Role and Oversight of Private Security Contractors in Afghanistan* 111th Cong. (2010), <http://levin.senate.gov/imo/media/doc/supporting/2010/SASC.PSCReport.100710.pdf> [hereinafter Private Security Contractors Report].

⁴⁶⁹ *See id.* at i, 48; *see also* James Risen, *Report: U.S. Hires ‘Enemies’ Senators Told Militants, Backers Guarding Bases*, HOUSTON CHRON., Oct. 8, 2010, at A17.

⁴⁷⁰ *See* Private Security Contractors Report, *supra* note 468, at i.

problems was “serious gaps in government oversight that allowed such failures to persist.”⁴⁷¹

Of the examples of corruption set forth in the report, one of the most serious and widely reported by the media dated back to 2007 and was related to a contract to build a base for the Afghan Air Corps between the U.S. military and Environmental Chemical (“Environmental Chemical”) Corp., a California company.⁴⁷² The investigation found Environmental Chemical had subcontracted with a British firm, Armor Group (“Armor”), to provide security at the construction site.⁴⁷³ Armor then subsequently subcontracted the security contract again, this time, to two Afghan nationals, referred to in the report as “Mr. White” and “Mr. Pink.”⁴⁷⁴ At least one of these two men had been recommended by U.S. military personnel.⁴⁷⁵ In June 2007, while performing the contract, Mr. White was shot and wounded just outside the air base.⁴⁷⁶ Believing this to have been done by Mr. Pink and his forces, Mr. White and several guards loyal to him left their posts, and went after Mr. Pink in revenge.⁴⁷⁷ The feuding continued over the next several weeks and led to a firefight in a local bazaar, in which Mr. Pink killed Mr. White.⁴⁷⁸ As a result,

⁴⁷¹ *See id.*

⁴⁷² *See id.* at 5.

⁴⁷³ *See id.*

⁴⁷⁴ *See id.*

⁴⁷⁵ *See id.* at 9.

⁴⁷⁶ *See Private Security Contractors Report, supra* note 468, at 11.

⁴⁷⁷ *See id.* at 11-12.

⁴⁷⁸ *See id.* at 14.

Mr. Pink went into hiding, and was eventually reported to be a “known Taliban.”⁴⁷⁹ Although Mr. Pink was rumored to have ties with the Taliban, Armor continued to employ his men.⁴⁸⁰ Further, after Mr. White’s death, Armor hired Mr. White’s brother (“Mr. White II”) as a replacement for Mr. White.⁴⁸¹ In August 2008, U.S. and Afghan forces conducted an operation on Mr. White II’s home, believing it to be a Taliban meeting place, and U.S. airstrikes were called in.⁴⁸² Mr. White II, along with seven of the men he employed as security guards (under the Armor subcontract) were killed in the raid.⁴⁸³ “A search of the raid site later revealed ‘extensive stores of weapons, explosives, [and] intelligence materials.’”⁴⁸⁴ While the evidence presented in the report showed Armor’s actions had likely compromised the safety of U.S. military personnel, the report noted the fallout from the air strike had been severe. It not only led to civil unrest as local Afghans protested the killings but resulted in strained relations between Afghanistan and the United States.⁴⁸⁵

⁴⁷⁹ *See id.* at 15-16, 21.

⁴⁸⁰ *See id.*

⁴⁸¹ *See id.* at 17, 21-22.

⁴⁸² *See Private Security Contractors Report, supra* note 468, at 28-29.

⁴⁸³ *See id.* at 30.

⁴⁸⁴ *See id.* at 7.

⁴⁸⁵ In its report, the SASC noted that after the air strikes, Afghan President Karzai “strongly condemned” what he called “the unilateral operation of the Coalition Forces. In addition, the Afghan Independent Human Rights Commission expressed “deep concerns” about the civilian casualties that had occurred as a result of the air strikes and sent a team to investigate the bombing. Further, as relations continued to decline, then-President George W. Bush called Karzai on September 3, 2008, to express regret over civilian casualties from the operation. Secretary of Defense Robert Gates apologized again two weeks later in a meeting with senior Afghan officials. *See id.* at 31.

In response to the release of the SASC’s report, media coverage of the scandal yet again landed on the front page. Once more, media framing evolved slightly as journalists asserted the reliance on private security firms was fraught with problems.⁴⁸⁶ Specifically, news accounts claimed the U.S. military had little to no knowledge or control over the Afghan locals it indirectly hired to safeguard U.S. military installation, many of whom were reported to be “warlords and strongmen linked to murder, kidnapping, [and] bribery” with Taliban ties.⁴⁸⁷ Further coverage emphasized private contractors comprised up to “60 percent of the Defense Department’s workforce.”⁴⁸⁸ In addition, consistent with prior framing of the scandal, journalists once again placed large blame on the DoD for “indirectly funding warlords and the Taliban,” claiming it had undermined its own mission and contributed to the death of U.S. military members.⁴⁸⁹ Nevertheless, at the same time, the media acknowledged the tenuous situation, opining progress might be

⁴⁸⁶ See Anna Mulrine, *Rogue Security Companies Threatens U.S. Gains In Afghanistan War*, CHRISTIAN SCI. MONITOR, Oct. 21, 2010.

⁴⁸⁷ See *id.* In one particularly scathing article, a defense expert claimed that one of the main problems was the DoD had “absolutely no quality control of the people [it was] putting in these jobs . . . [but was still] authorizing them to use deadly force in the name of the United States. Further, it stated “private security companies . . . may . . . be lining the pockets of Taliban insurgents.” *Id.*; see also Karen DeYoung, *Afghan Guards Said to Help Enemy; Senate Inquiry Rips U.S. Military on the Oversight of Subcontractors*, PITTSBURGH POST-GAZETTE, Oct. 8, 2010, at A1. Another article categorized the Pentagon’s oversight of Afghan guards as “virtually nonexistent.” See James Risen, *Afghans Linked to the Taliban Guard U.S. Bases*, N.Y. TIMES, Oct. 8, 2010, at A1.

⁴⁸⁷ See Mulrine, *supra* note 486.

⁴⁸⁸ See *id.*

⁴⁸⁹ See Karen DeYoung, *supra* note 487, at A1.

possible if the U.S. military could have patience with “less-connected contractors” who might perform contracts more slowly.⁴⁹⁰

Congress, DoD, and experts also responded to the SASC’s troubling report. Defense Secretary Robert Gates announced the Pentagon had recently created new anti-corruption task forces and guidelines to “help overhaul the contracting procedures in Afghanistan.”⁴⁹¹ Senator Levin, who had chaired the SASC’s report, called for reform, declaring it necessary to “shut off the spigot of U.S. dollars flowing into the pockets of warlords and power brokers.”⁴⁹² Similarly, defense experts asserted the report had served as a “wake-up call” to ensure that new procedures were put in place to help the U.S. “get a better handle on contractors in Afghanistan”⁴⁹³

By December 2010, the DoD debarred the Watan Group, one of the HNT contractors criticized in the “Warlord, Inc.” report, for bribing Afghan government officials and Taliban commanders.⁴⁹⁴ With the debarment, the press’ portrayal of the scandal began to back away from the blame it had previously placed on the U.S. military, stating the move was part of “efforts to clean up . . . [the] contracting process in Afghanistan” and pointing out that Watan was the seventh Afghan company to be

⁴⁹⁰ Admitting there were no easy solutions to the problem, one defense expert suggested high-level U.S. military officials should vet Afghan security companies rather than “junior troops in charge of contracting.” See Mulrine, *supra* note 486.

⁴⁹¹ See Risen, *supra* note 487, at A1; see also Risen, *supra* note 469, at A17; see also Mulrine, *supra* note 486.

⁴⁹² See Risen, *supra* note 487, at A1.

⁴⁹³ See *id.*

⁴⁹⁴ See Heidi Vogt, *U.S. Military Blacklists Afghan Firm Tied to Karzai Documents: Security Group Paid Taliban*, STAR-LEDGER, Dec. 10, 2010, at 13.

debarred in 2010.⁴⁹⁵ Just two months later, in February 2011, Senators Kelly Ayotte and Scott Brown co-sponsored legislation called the “No Contracting With the Enemy” Act to make it easier for U.S. officials to terminate contracts with contractors who “funnel money to Afghan warlords.”⁴⁹⁶

Although these steps clearly show the DoD is taking steps to curb, if not prevent, corruption, recent news reports show the scandal has not yet finished developing. In May 2011, *The New York Times* published an exposé surrounding the construction of the Gardez-Khost Highway, a United States Agency for International Development (USAID) project.⁴⁹⁷ Describing the road as a “sinkhole” of U.S. taxpayers’ money, “treacherous” and even faulty, *The Times* reported U.S. money is not only being wasted but is again being funneled to the Taliban through extortion and bribery payments, with American officials knowing of the payments but being reluctant to prevent them.⁴⁹⁸ The most recent coverage shows the media’s portrayal of the scandal has regressed back to where it was several months ago. Currently, the media still places most of the blame regarding the underlying scandal on Afghan corruption but also maintains the United States’ own

⁴⁹⁵ *See id.*

⁴⁹⁶ *See Ayotte Targets Contractors Aiding Taliban*, BOSTON GLOBE, Feb. 16, 2011, at 2.

⁴⁹⁷ *See* Alissa J. Rubin & James Risen, *Costly Afghanistan Road Project Is Marred By Unsavory Alliances*, N.Y. TIMES, May 1, 2011, at A1. The highway is one of the “most expensive and troubled transportation projects in Afghanistan.” Running 64 miles and having yet to be completed, it is estimated its final cost will be \$176 million or \$2.8 million per mile. *See id.*

⁴⁹⁸ Construction subcontractors admitted paying an Afghan extortionist, “Mr. Arafat,” up to \$1 million per year to secure its job sites, with many of the payments being funneled to Taliban insurgents. Although acknowledging Mr. Arafat was recently fired by American officials, the article portrayed such officials supervising the very political project as choosing to “look the other way” regarding the payments in order to get the project completed more quickly and with less attacks. *See id.*

worst enemy may be itself, asserting that “military or politically driven timelines and locations make no sense . . . which force [U.S. military and civilian officials] into alliances with the very malign actors that are powerfully part of the broader battles we are fighting.”⁴⁹⁹

C. Reform Thus Far Resulting From the Contracting With the Enemy Scandal

While it appears the Contracting With the Enemy scandal is still far from over, as mentioned above, the DoD has worked to improve its processes, even if they are simply “stop gap” measures to be used until new laws are put in place. And, in the meantime, two senators have introduced legislation.⁵⁰⁰ If passed and implemented, this legislation may make it easier for the DoD to terminate contracts when there is evidence to support allegations a contractor is funneling money to the Taliban.⁵⁰¹

Currently, the U.S. and NATO forces in Afghanistan continue to follow General Petraeus’ contracting guidelines set forth in September 2010.⁵⁰² In addition, TF 2010 still exists and “leverages intelligence, law enforcement and forensic financial investigative techniques to gain visibility on the flow of contracting funds below the prime contractor level, to determine where issues and concerns exist, and to identify actions to mitigate risk.”⁵⁰³ Officially, the task force meets these objectives through the following ways:

⁴⁹⁹ *See id.*

⁵⁰⁰ *See Ayotte Targets Contractors Aiding Taliban, supra* note 496, at 2.

⁵⁰¹ *See id.*

⁵⁰² *See generally* Information Paper, Task Force 2010, U.S. Forces-Afghanistan 1 (May 8, 2011) (on file with the author).

⁵⁰³ *See id.*

- provides education to U.S. and NATO military commanders and acquisition teams to help them understand the flow of contract funds;
- recommends actions to be taken to deny power brokers, criminal networks and insurgents the opportunity to benefit from stolen property or illicit revenue;
- supports U.S., allied, and Afghan law enforcement agencies in the interdiction and recovery of stolen U.S. Government property and the disruption of power brokers and criminal networks; and
- promotes and distributes best practices as articulated in General Petraeus' contracting guidelines.⁵⁰⁴

Since its creation, TF 2010 appears to have accomplished a great deal, some of the most impressive being:

- recovering \$157,123,687 worth of stolen equipment, repair parts, and supplies;
- creating a plan to replace the troubled HNT contract when it expires in September 2011 with a National Afghan Trucking (NAT) contract that will increase prime contractors from eight contractors to somewhere between 24 and 40 to decrease monopolies and increase competition;
- vetting 374 companies prior to contract award and identifying 23 as high risk; and
- conducting an exhaustive review process of hundreds and thousands of companies, contracts, and bank transactions, finding that approximately

⁵⁰⁴ *See id.*

14% have connections to power brokers, criminal networks, or the enemy.⁵⁰⁵

In addition to the DoD's efforts, as previously mentioned, Senators Ayotte and Brown introduced the No Contracting With the Enemy legislation in February 2011.⁵⁰⁶ After its introduction, the legislation was referred to the Committee on Homeland Security and Governmental Affairs, as of this writing.⁵⁰⁷ As currently drafted, the legislation would: 1) prohibit awarding any federal contracts to known enemies of the United States; and 2) allow procurement officials to terminate a contract without cost to the Government, upon the determination a contract had been entered into with an enemy.⁵⁰⁸ The Act places the responsibility for creating regulations establishing a process to determine "enemy" status on the Secretary of Defense, in coordination with the Secretary of State.⁵⁰⁹ Those found to be an enemy would be allowed to contest the finding under 41 U.S.C. § 71, the Contract Disputes Act.⁵¹⁰ Although media coverage of the proposed legislation has thus far been extremely limited,⁵¹¹ some high-level DoD officials appear to highly favor the legislation. In February 2011, General Petraeus testified before the SASC regarding the urgent need to pass the legislation, stating "my

⁵⁰⁵ *See id.* at 4,7.

⁵⁰⁶ *See* S. 341: 2011 No Contracting With the Enemy Act of 2011, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-341> (last visited Aug. 31, 2011).

⁵⁰⁷ *See id.* (last visited Aug. 31, 2011).

⁵⁰⁸ *See* S. 341, 112th Cong. § 3(a)(1)-(2) (2011).

⁵⁰⁹ *See* S. 341, § 4(a)(1).

⁵¹⁰ *See* S. 341, § 5(a).

⁵¹¹ *See Ayotte Targets Contractors Aiding Taliban*, *supra* note 496, at 2.

view [on the legislation] is very simple . . . the sooner the better. As my comments . . . indicat[e], it would be very helpful to us. Indeed, the fact is that [historically,] we were not spending anywhere near enough time, energy or sheer man hours and focusing on where our money was going.”⁵¹²

VI. METHODOLOGIES AND ANALYSIS REGARDING THE RELATIONSHIP BETWEEN MEDIA COVERAGE, SCANDALS, AND REFORM

While several studies have suggested procurement scandals have the potential to lead to reform,⁵¹³ there is a complete lack of scholarly literature on the correlation between media coverage of procurement scandals and any subsequent reform. Therefore the case study below adapts and applies three related methodologies, from other disciplines, to the above-described facts of the hammer and toilet seat scandals to analyze the effects of between media coverage and scandals. Specifically, it tests a theory set forth by Madelaine Drohan that scandals must transit through each of the seven stages before effective reform will occur. Against the backdrop of Drohan’s theory, it then considers two supporting methodologies posited by Lawrence Sherman and framing analysts. Because the hammer and toilet seat scandals were not separate scandals, in and of themselves, but were rather “sub-scandals” of the larger spare parts scandal, the

⁵¹² *ICYMI: General Petraeus: Pass the Brown-Ayotte “No Contacting with the Enemy” Legislation*, KELLY AYOTTE SENATE WEBSITE (Mar. 15, 2011), http://ayotte.senate.gov/?p=press_release&id=42.

⁵¹³ See Kathuria, *supra* note 3, at 814-818. Following several procurement scandals in the 1980s, the U.S. government responded by launching investigations, prosecuting wrongdoers, establishing a “Blue Ribbon Commission” to review the defense acquisition process, and implementing voluntary agency compliance programs and sentencing guidelines. In addition, although the “United States has been witness to procurement scandals since the beginning of the republic,” it was not until the procurement scandal of Operation Illwind occurred in the mid to late 1980s that the Procurement Integrity Act was passed and implemented. See Cox, *supra* note 207, at 351.

discussion below will analyze the hammer and toilet seat scandals together as part of the same scandal chronologically.

A. Methodology 1: Drohan's Seven Stages of Scandal

From 2004-2005, Madelaine Drohan, a Canadian journalist, conducted research regarding the correlation between media coverage and corporate business scandals to determine if the media coverage resulted in lasting reform, punishment, or attitudes to improve accountability.⁵¹⁴ Although similar in nature to the other two methodologies described below, Drohan's theory appears to be the first of its kind to identify discrete stages of scandals and then associate the effects of media coverage to these various stages. For the present case study, Drohan's theory is primarily helpful in understanding how media coverage may impact a scandal in its various stages, and how those effects may impact reform further down the line.

Drohan found that one can predict, to at least some degree, whether a scandal will result in the reformation of applicable laws or regulations by analyzing how journalists have chosen to frame the scandal in recent news stories and which stage it is in.⁵¹⁵ Specifically, under Drohan's theory, how a journalist frames a scandal will determine which stage the scandal will end in, and thus, whether it ever results in reform.⁵¹⁶ According to Drohan, corporate and monetary scandals progress through a discernable

⁵¹⁴ See Drohan, *supra* note 13, at 1.

⁵¹⁵ See *id.* at 15.

⁵¹⁶ See generally *id.* at 1-2.

pattern of seven discrete stages, including: “anxiety, focus, denial, validation, definition, punishment, and aftermath.”⁵¹⁷

THE STAGES OF DROHAN’S THEORY

<u>NUMBER</u>	<u>NAME OF STAGE</u>	<u>DESCRIPTION SUMMARY</u>	<u>DROHAN’S CONCLUSIONS</u>
One	Anxiety	Scandal emerges from pre-existing public anxiety about a situation.	The first three stages are necessary to give the scandal momentum. If the next two stages not reached, scandal often dies out.
Two	Focus	Occurs after a “crystallizing event” happens that attracts media attention and stokes public outrage and indignation over the incident.	
Three	Denial	Individual or organization denies or evades responsibility.	
Four	Validation	Authorities officially confirm a foundation of wrongdoing.	These two stages are often reached together or in close succession.
Five	Definition	Occurs if and when an investigation of some kind is ordered to specify the underlying causes of the scandal.	
Six	Punishment	Wrongdoer receives some type of punishment in response to the wrongdoing.	This stage is the most important from the public’s point of view.
Seven	Aftermath	Authorities address and remedy the underlying causes of the scandal.	This stage is where reform occurs, if it occurs.

As noted from the table above, in the first, or “anxiety” stage, a scandal emerges from pre-existing public anxiety about a situation.⁵¹⁸ The second stage, “focus,” occurs after a “crystallizing event” happens that attracts the attention of the media, which then “stokes public outrage and indignation.”⁵¹⁹ It is at this point the media applies the newsworthiness values described above, to determine if the event warrants further media

⁵¹⁷ See *id.* at 15.

⁵¹⁸ See *id.*

⁵¹⁹ See *id.*

coverage, and has the potential to become a scandal. In the third stage of “denial and evasion,” an individual or organization denies or evades responsibility which increases the longevity of the scandal.⁵²⁰ The first three stages are necessary to give the scandal momentum; however, if the next two stages are not reached, the scandal will often die out.⁵²¹ The fourth and fifth stages, “validation” and “definition,” are often reached together or in close succession. Validation occurs when authorities officially confirm a foundation for the suspicion of wrongdoing, while “definition” then occurs if, and when, an investigation of some kind is ordered to specify the underlying causes of the scandal.⁵²² Under Drohan’s theory, this step helps keep the scandal alive by keeping the news in the public eye and distributing additional information about any wrongdoing.⁵²³ According to Drohan, the most important stage from the public’s point of view is the sixth, or “punishment stage” since once a scandal has run its course, due to the extensive publicity, the public will only “[only] be appeased by a fitting punishment.”⁵²⁴ In the final, “aftermath,” stage, authorities “address [and remedy] the underlying causes of the scandal.”⁵²⁵ This is where reform occurs, if it occurs.

In regards to the stages of punishment, Drohan determined that “when a scandal “skips” a stage, “public unease” will result, along with “the feeling that the scandal has

⁵²⁰ See Drohan, *supra* note 13, at 15.

⁵²¹ See *id.*

⁵²² See *id.*

⁵²³ See *id.*

⁵²⁴ See *id.* at 18.

⁵²⁵ See *id.* at 19.

not been dealt with properly.”⁵²⁶ She found that many scandals end in the punishment stage, and that when they end in this stage, they never get to the aftermath stage and therefore, long-lasting reform does not occur.⁵²⁷ Drohan found that scandals that ended in the punishment phase often ended there because “once [the punishment] stage has passed, much of the media loses interest and the pressure on authorities to tighten laws and regulations is lessened.”⁵²⁸ She further discovered that this was more likely to happen when the media framed the transgression involved as the action(s) of one or a few wayward individuals, and not due to a systemic problem relating to a process, law, or regulation.⁵²⁹ Drohan opines that when a scandal does make it to the “aftermath” stage, media coverage often ends because a process provides little human interest and few events to cover, and reporters are often “generalists” who know very little about the detailed subject matter being addressed and reformed.⁵³⁰ Drohan ultimately determined consistent media coverage was often necessary, even in step seven, to maintain pressure on government officials to make and implement necessary reform measures.⁵³¹

1. Findings and Analysis: Drohan’s Stages of Scandal as Applied to the Hammer and Toilet Seat Scandals

Drohan opined that before a scandal can emerge there must already be some pre-existing public “anxiety” regarding a situation concerning the scandal. Here, because

⁵²⁶ See Drohan, *supra* note 13, at 15.

⁵²⁷ See *id.* at 18-19.

⁵²⁸ See *id.* at 18.

⁵²⁹ See *id.*

⁵³⁰ See *id.* at 19.

⁵³¹ See *id.* at 19-20.

hammer and toilet seat scandals involved the Department of Defense (DoD) procurement system, they were perfect storms waiting to happen. In mid to late-1983, the American public was already somewhat uneasy regarding the amount of money being spent for weapons to acquire the “largest real-dollar peacetime military program in history.”⁵³² Therefore, when news of the \$435 hammer scandal broke, these pre-existing public concerns regarding defense spending increased public interest, encouraged media coverage, and exerted pressure on authorities to act. The second stage then quickly followed when the “crystallizing event” or focus, occurred when agency-level investigations were conducted regarding the \$435 item unit price of the hammer charged to the Navy, as discovered by the Navy chief petty officer and reported by the press.⁵³³

According to Drohan’s theory, under stage three, a scandal requires some type of denial or evasion to continue and can normally be averted or at least short-lived by an early admission of guilt or wrongdoing.⁵³⁴ In regards to the hammer scandal, this step appears to have been at least initially skipped. While on a local level, there may have been some denial or evasion about how the \$435 price was calculated, this is simply unknown due to lack of media coverage on the topic. What is known is that after the initial Navy audit confirmed an overcharge, Secretary Weinberger made a public announcement validating the problem and informing it the DoD had demanded repayment from Gould.⁵³⁵ Within a month, Gould had paid the demanded sum.⁵³⁶

⁵³² *Capitalism for the Pentagon*, *supra* note 33, at A1.

⁵³³ *See* Fairhall, *supra* note 21.

⁵³⁴ *See* Drohan, *supra* note 13, at 16.

⁵³⁵ *See Weinberger Demands New Effort to Cut Costs*, *supra* note 28, at A17; *see also* Fairhall, *supra* note 21.

Under Drohan's theory, Weinberger's admission and Gould's repayment should have short-circuited the scandal. After all, initial media framing of the story suggested the scandal was due only to negligence and a faulty accounting system.⁵³⁷ However, the scandal did not stop here. It may have continued because the hammer scandal was only one of several sub-scandals surrounding the spare parts scandal or because some saw Gould's voluntarily repayment as a sign of guilt,⁵³⁸ but regardless, it continued.

Secretary Weinberger's admission/validation of the Gould's "overcharge" acted not only as step three but four as well. Between late 1983 to the middle of 1985, the scandal wavered between stages four and five. During this time, although the media's framing of the scandal evolved several times, the problem was portrayed in two basic lights - that the underlying cause was due to: 1) a faulty, non-competitive, and/or wasteful government system;⁵³⁹ or 2) the result of unscrupulous defense contractors.⁵⁴⁰

Whether due to a number of misunderstandings, the fact that additional overpriced parts were discovered, or that it was not clear exactly whether the root cause was due to individual contractors or a larger systemic problem (and if so, what type of systemic problem), it took Congress and procurement officials over a year to get past stage five to define the problem and assess appropriate reform.

⁵³⁶ See Fairhall, *supra* note 21.

⁵³⁷ See Barron, *supra* note 30, at D1.

⁵³⁸ See Fairhall, *supra* note 21.

⁵³⁹ See Miller, *supra* note 31, at 21; see also Knickerbocker, *supra* note 31, at 3.

⁵⁴⁰ See Knickerbocker, *supra* note 37, at 4.

In the case of the hammer scandal, stage six, or “punishment” was initially considered but ultimately skipped. Although Representative Bedell believed unscrupulous contractors were the cause of the spare parts scandal and pushed for the prosecution of Gould, eventually a new Navy audit determined that Gould’s overcharge had been much less than originally thought.⁵⁴¹ These findings prevented Gould’s prosecution, assisted in suggesting the true nature of the problem was systemic rather than individual, and resulted in the public pushing for reform.⁵⁴² It also shifted the media’s portrayal of the issue from focusing on individual defense contractors to focusing on overall problems in commercial item acquisition.

When this occurred, the hammer scandal was pushed back into stage five, as members of Congress and others struggled to define the true nature of the problem. At this point, members of Congress attempted to push the scandal into stage seven by abolishing the equal allocation method,⁵⁴³ passing CICA,⁵⁴⁴ and enacting the Defense Procurement Reform Act as a component of the National Defense Authorization Act for Fiscal Year 1985.⁵⁴⁵

However, when the \$600 toilet seat scandal came along in January 1985, rather than as a new and separate scandal, it was seen simply as a new development in the

⁵⁴¹ See Fairhall, *supra* note 21.

⁵⁴² See Vacketta, *supra* note 16, at 127.

⁵⁴³ See Fairhall, *supra* note 21.

⁵⁴⁴ S. Rep. No. 98-50, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. at 2110-11.

⁵⁴⁵ ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 48 (*citing* Pub. L. No. 98-525, tit. XII, 98 Stat. 2492, 2588 (1984)).

continuing saga of the larger spare parts scandal.⁵⁴⁶ Therefore, the toilet seat scandal joined the hammer scandal as part of the larger spare parts scandal and in so doing, skipped stages one and two. The ensuing media coverage of the toilet seat scandal, however, resulted in additional concern among the public which generated more questions and moved the overall spare parts scandal (including the hammer and toilet seat scandals) back to stages three through five. In the repeated stage five, DoD responded to the new development of the toilet seat scandal by denying wrongdoing and trying to explain the calculation of the cost of toilet seat cover, while at the same time validating that reforms were needed.⁵⁴⁷ As the media coverage concentrated its portrayal of the problem as systemic and wasteful, the American public became further distrustful and outraged over defense spending, and as a result Congress passed an unprecedented one-year defense budget freeze.⁵⁴⁸

This event once again led the overall spare parts scandal to stage five. This time, as a result of the public's outrage over government spending, the Packard Commission was created, in part, to investigate the underlying causes of the spare parts cases and recommend reform.⁵⁴⁹ After the Packard Commission issued its report, the hammer and toilet seat scandals, as part of the overall spare parts scandal, finally moved into step seven, or the "aftermath." As explained in detail above, although it took several years for

⁵⁴⁶ See Biddle, *supra* note 47, at D15.

⁵⁴⁷ See Hiatt, *supra* note 53, at A5.

⁵⁴⁸ See Rasor, *supra* note 59; see also Reidy, *supra* note 59.

⁵⁴⁹ See Thomas, Seaman & van Voorst, *supra* note 66; see also The Packard Commission, *supra* note 67, at 44); see also ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, 49-50.

full and effective reform to take place, the Packard Commission's recommendations ultimately led to the passage of the FASA in 1994⁵⁵⁰ and the Clinger-Cohen Act in 1996,⁵⁵¹ which finally resulted in the lasting reform needed regarding commercial items acquisition.

2. Findings and Analysis: Drohan's Stages of Scandal as Applied to the Operation Illwind Scandal

As with the hammer and toilet seat scandals, even before the Operation Illwind scandal made headlines, the public was already uneasy regarding the DoD procurement system, particularly in regards to defense spending by the Reagan-era administration.⁵⁵² The spare parts scandals had occurred only a few years earlier, and the public had not forgotten.⁵⁵³ Therefore, similar to the spare parts scandals, the "anxiety" stage of Drohan's theory was present long before Operation Illwind was ever publicized. The "crystallizing event," or focus stage, then occurred when FBI and NIS agents executed the numerous search warrants, and the media reported it to the public.⁵⁵⁴

⁵⁵⁰ See Vacketta & Pope, *supra* note 77, at 294.

⁵⁵¹ See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; *see also* Federal Acquisition Reform ("Clinger-Cohen") Act of 1996, Pub. L. No. 104-106, 110 Stat. 642.

⁵⁵² See George C. Wilson, *Champion of the Military and of Reagan*, WASH. POST, Nov. 3, 1987, at A1. While "Weinberger . . . [was] a masterful fund-raiser . . . [he did not] ride herd on the military services to ensure that all the mountain of money Congress appropriated was spent wisely The rule was buy, buy, buy – even after Congress balked at making annual military budget increases." *See id.*

⁵⁵³ *See id.*

⁵⁵⁴ *See How the Feds Broke the Case*, *supra* note 88.

Per Drohan's theory, scandals can continue only if there is some type of denial or evasion and often may be averted or at least shortened by an admission of wrongdoing.⁵⁵⁵ The Operation Illwind scandal was filled with denials and evasions at several points throughout the scandal. These were most evident in regards to the individuals and organizations who were the subjects of the investigation. For example, soon after the investigation went public, Victor Cohen refused to be interviewed by the press, but stated, "I am appalled at the things being written and said. I think the whole thing has been exaggerated out of proportion."⁵⁵⁶ Another target of the investigation, William Galvin was described by a "knowledgeable source" as being uncooperative with the investigation.⁵⁵⁷ Further, Melvyn Paisley's defense attorney publicly "dispute[ed] the notion . . . Paisley had violated conflict-of-interest requirements" and instead, declared Paisley had been "careful to abide by so-called 'recusal' notices that required him to avoid potentially improper activities."⁵⁵⁸

Defense contractors under investigation issued similar statements. For example, even when ITT-Gilfillan pleaded guilty to a felony conspiracy charge of corrupting the procurement system to obtain inside information, its attorney issued a statement declaring, "We are distressed and disturbed that we had to settle this case by pleading guilty. We did so only as a matter of corporate prudence in the aftermath of [a] former

⁵⁵⁵ See Drohan *supra* note 13, at 16.

⁵⁵⁶ Likewise, Cohen's defense attorney stated to the press, "There was always a sound basis for [Cohen's] position. The man never took a bribe from anyone. That's not the way he lived." See Murphy, *supra* note 112, at A6.

⁵⁵⁷ See Murphy & Marcus, *supra* note 120, at A4.

⁵⁵⁸ Jim Schachter, *Paisley Talked to Boeing Despite His Pledge, Panel Says*, L.A. TIMES, Oct. 8, 1988, § 4, at 1.

employee's guilty plea."⁵⁵⁹ In addition, the defense attorney who represented the Northrop, Gould, and BDM companies described the Illwind investigation to the press as a "feeding frenzy" asserting, "A lot of good companies and good people will be unfairly tarnished"⁵⁶⁰ Moreover, after its indictment, General Electric argued "the government [was] stretching beyond reasonable bounds" as it declared it should not be held responsible "for the acts of two contract administration personnel in a unit which represents about one-one-hundredth of one percent of GE's sales"⁵⁶¹

While most involved denied or evaded any wrongdoing in regards to the Operation Illwind scandal, there were some who admitted it. Drohan theorized that an admission could often shorten the life of a scandal.⁵⁶² However, in Operation Illwind, some admissions merely provoked the public's anger. For example, one defense consultant identified only as "Ragged Tonsils," not only admitted to participating in the unethical and illegal exchange of sensitive procurement information but argued he was doing so to help "drive prices down . . . for the good of the country."⁵⁶³

As the Operation Illwind scandal developed, several events served as validation, confirming that some type of wrongdoing had happened. First, after being personally briefed by the U.S. attorney prosecuting the case, several members of Congress made

⁵⁵⁹ See Schachter, *supra* note 138, at 1.

⁵⁶⁰ See Nicholas C. McBride, *Government Closes In on Fraud Indictments in Pentagon Scandal*, CHRISTIAN SCI. MONITOR, Nov. 23, 1988, at 4.

⁵⁶¹ Michael Weisskopf & George C. Wilson, *GE Accused of Cheating*, WASH. POST, Nov. 30, 1988, at A21.

⁵⁶² See Drohan *supra* note 13, at 16.

⁵⁶³ See Grant, *supra* note 110, at D1.

statements to the press regarding their beliefs as to the strength of the evidence with one stating “he wanted to see someone go to jail” and another declaring the evidence in the scandal was “beyond the wildest imagination.”⁵⁶⁴ In addition, even before charges were filed against any individuals or defense contractors, Congress drafted and passed legislation, that later became the PIA, to prevent similar conduct harmful to the procurement process and to set forth liabilities and penalties.⁵⁶⁵ Finally, by January of 1989, charges were beginning to be filed against federal procurement officials, defense consultants, and defense contractors.⁵⁶⁶ These events, when publicized by the media, confirmed to the public that there was a foundation for their suspicion of wrongdoing, and further investigation was required to determine the extent of the damage. The indictments and convictions in Operation Illwind acted as the definition stage. The indictments acted as a means to release the evidence surrounding the charges filed against the individuals and organizations. As the media publicized the evidence from the indictments, it assisted in narrowing the public’s focus to the corruption that had become such a part of the defense procurement system.

In regards to Operation Illwind, the punishment and sixth stage occurred with the sentencing in the numerous cases filed against responsible individuals and organizations, and also when the DoD acted to debar and/or suspend the defense contractors who had

⁵⁶⁴ See G. Barker, *supra* note 109.

⁵⁶⁵ As described above, this legislation included “consultant-registration” measures as part of the next fiscal year’s appropriation bill as well as procurement integrity requirements as part of the OFPP bill, which later became known as the PIA. See Sugawara, *supra* note 128, at C1; see also H.R. REP. NO. 100-911, 100th Cong., 2d Sess. 12 (Sep. 9, 1988); see also 134 CONG. REC. 31,690, 32, 156 (1988).

⁵⁶⁶ See *First Gust From An Ill Wind*, *supra* note 146.

been indicted and/or had pleaded guilty. In Operation Illwind, in line with Drohan's theory, the punishment stage was the climax of the scandal. Here, the punishment stage lasted nearly four years.⁵⁶⁷ As referenced and analyzed above, the punishment cycle was extensively covered by the media, who announced each guilty plea and sentenced rendered. By the end of the scandal, as noted above, 54 individuals and 10 corporations had been convicted, and more than \$250 million had been generated in fines.⁵⁶⁸

According to Drohan's theory, with the passing of the punishment stage, the scandal cycle often ends, unless the media continues to pressure authorities to tighten or create new laws and regulations.⁵⁶⁹ Under Drohan's theory, this is particularly the case where the media has "bought the 'bad apple' argument" throughout the scandal, or has portrayed only a few individuals as being to blame for the underlying problem.⁵⁷⁰ In Operation Illwind, the media never portrayed the scandal as being due to a "bad apple." Rather, throughout the life of the scandal, the media consistently reported that the entire defense procurement system, up to its highest levels, had become corrupt and blamed the problem on the "laissez-faire government" environment the Reagan-era administration had allowed to grow.⁵⁷¹ Therefore, per Drohan's theory, because the media had consistently portrayed the problem as a systemic one, after the sentencing phase, the

⁵⁶⁷ The first convictions and sentences came about in early 1991 as a result of various guilty pleas while the last did not arise until Litton Systems, Inc. agreed to plead guilty in January 1994 and pay the government a settlement of \$3.9 million. *See Lev, supra* note 169, at D4; *see also Litton Industries, Inc., supra* note 184, at 31.

⁵⁶⁸ *See Hall, supra* note 184, at A1.

⁵⁶⁹ *See Drohan supra* note 13, at 18.

⁵⁷⁰ *See id.* at 18.

⁵⁷¹ *See generally Engelberg, supra* note 94, at 1; *see also Hedges, Wallace, Impocco, Trimble, & Pomice, supra* note 107, at 11.

media should have placed greater pressure on the authorities to address laws and regulations related to the cause of the scandal. This did not happen.

While at least one editorial writer emphasized his disgust regarding Operation Illwind soon after Litton's settlement,⁵⁷² for the most part, the media attention surrounding the scandal ended within a week or two of the Litton's conviction and settlement. The media attention may have ended for several reasons. It may have ended because Congress had addressed the underlying cause of the scandal years earlier in passing the PIA, and the media was confident that in doing so, Congress had already taken appropriate steps. Alternatively, media coverage may have ceased because the media believed it had thoroughly saturated the public with five years of coverage regarding the scandal, and that the public was no longer interested. Or, the press may have stopped its coverage due to the sheer number of convictions the scandal resulted in, believing the public satisfied with that result. But, nevertheless, for whatever reason, the scandal ended with the Litton Industries settlement and never reached Drohan's seventh, or aftermath, stage.

3. Findings and Analysis: Drohan's Stages of Scandal as Applied to the Darleen Druyun Scandal

Several U.S. events occurred in late 2001 and 2002 that, in all likelihood, contributed to the public concerns present in the background when the Druyun scandal was exposed. First, the terrorist attacks of September 11, 2001, had occurred just a year prior. Patriotism was at a high, as Americans continued to be uneasy about the idea that

⁵⁷² See *Sweeping Up; Defense Contractors Guilty of Fraud Pay*, *supra* note 191, at 8A.

future attacks might yet occur on the U.S.'s own soil,⁵⁷³ and therefore, favored increasing defense spending in areas that “support[ed] the military’s ability to fight terrorism.”⁵⁷⁴

On the other hand, while Americans were patriotic and supportive of their military during this timeframe, by the summer of 2002, they were also furious with corporate greed. Just two months after the terrorist attacks, Enron disclosed a “stunning \$618 million loss for its third quarter” – the first sign of its financial woes.⁵⁷⁵ In the next weeks and months that followed, the nation learned Arthur Andersen, one of the most respected accounting firms in the country, had counseled its employees to destroy important documents surrounding the Enron case, and that Enron executives had hid its debts and liabilities for years from auditors, profiting richly.⁵⁷⁶

In the wake of such events, the Darleen Druyun scandal included the best and worst parts of both the September 11th attacks and the Enron scandal. On the one hand, even two years after the terrorist attacks, the nation was highly supportive of buying the items the military needed, such as the aerial refueling tanker, to support the war on terror while keeping it off U.S. soil. Further, Senator McCain was trusted and respected by many Americans for both his military service and his protection of American tax

⁵⁷³ See Todd Connor, *Celebrating American Patriotism*, FOX NEWS (Sep. 8, 2002), <http://www.foxnews.com/story/0,2933,62336,00.html>.

⁵⁷⁴ By August 2002, 61% of Americans stated they favored increasing defense spending in areas that “support[ed] the military’s ability to fight terrorism.” See Program on International Policy Attitudes (PIPA), *Americans on Defense Spending and the War on Terrorism A PIPA/Knowledge Networks Poll* (August 2, 2002), http://www.pipa.org/OnlineReports/DefenseSpending/DefenseTerror_Aug02/DefenseTerror_Aug02_rpt.pdf.

⁵⁷⁵ See Daniel Kadlec, *Enron: Who's Accountable?*, TIME, Jan. 13, 2002.

⁵⁷⁶ See *id.*

dollars.⁵⁷⁷ Therefore, when McCain released the internal Boeing emails and alleged Druyun had improperly released a competitor's pricing information to Boeing,⁵⁷⁸ the public trusted the information. This attracted the media's attention and both focused and stoked the public's anxieties and outrage as the mounting evidence against Druyun and Boeing continued to pile up.⁵⁷⁹ As the facts emerged, it appeared that Druyun, a high-level DoD official, had colluded with powerful Boeing executives to fix bid prices. Moreover, McCain's allegation that the tankers might not even need replacing and were entirely too high-priced⁵⁸⁰ only increased Americans' distrust of corporate America. To the public, it appeared Boeing had attempted to take advantage of Americans' patriotism in order to save the existence of its failing 767 assembly line while getting a "sweetheart deal."⁵⁸¹

Similar to the Operation Illwind scandal, there were many denials and evasions of wrongdoing in the Druyun scandal. In the Druyun scandal, however, the denials and evasions often brought suspicion that additional individuals and/or organizations were involved. Due to this, as new facts were uncovered, the scandal moved back and forth between stages three and even seven. The definition stage was extremely important in

⁵⁷⁷ See generally Massimo Calabresi & Perry Bacon, Jr., *America's 10 Best Senators; John McCain: The Mainstreamer*, TIME, Apr. 16, 2006, <http://www.time.com/time/magazine/article/0,9171,1184028,00.html>.

⁵⁷⁸ See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1; see also Hedges, *supra* note 260, at C1; see also Wayne, *supra* note 283, at C8.

⁵⁷⁹ See Wayne, *supra* note 283, at C8; see also Hedges, *supra* note 260, at C1.

⁵⁸⁰ See Harris, *supra* note 225.

⁵⁸¹ See generally *id.*; see also *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1.

the present scandal because as new developments occurred, those in charge attempted to define the true underlying cause of the scandal to ensure proper punishment and/or reform would occur.

For these reasons, the Druyun scandal does not follow the chronological order of the stages in Drohan's theory. For example, here, the denial and evasion stage initially occurred prior to the focus stage. When the media began questioning the propriety of Druyun's employment at Boeing in Summer 2003,⁵⁸² a Boeing spokesman tried to quash the rumblings, stating that neither Boeing nor Druyun had committed wrongdoing.⁵⁸³ In this case, although there had been a few media reports raising questions of Druyun's employment, which prompted the initial denial, the issue had not yet captured the public's attention and become a full-fledged scandal. Nevertheless, likely in hopes of preempting a scandal from occurring, after the rumors and media reports regarding Druyun's employment continued, Boeing began conducting its own internal investigation.⁵⁸⁴

In the meantime, and for a seemingly unrelated reason at the time, Boeing voluntarily released a number of Boeing's email communications to the SASC upon its request.⁵⁸⁵ Upon reviewing these emails, the SASC found the internal email referenced above that was written by a Boeing executive which suggested Druyun had improperly

⁵⁸² See Graham, *supra* note 275, at A2.

⁵⁸³ See *id.*

⁵⁸⁴ See *Dangers of the Revolving Door*, *supra* note 275, at A19; see also Greising, *supra* note 275, at C2; see also Statement of Facts at 4, *Druyun* (No. 04-150-A).

⁵⁸⁵ See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1.

provided a competitor's pricing information to Boeing.⁵⁸⁶ After this email was leaked to and widely publicized by the press, the current scandal moved quickly into the "focus," or stage two, of Drohan's theory. After publication of the email, stage three repeated itself. Initially, and for several months thereafter, Boeing continued to deny that its company, or any of its employees were guilty of any wrongdoing regarding Druyun's employment.⁵⁸⁷ Similarly and individually, from the time the rumors began until her guilty plea, Druyun continued to assert she had done nothing illegal and had continuously upheld the government's interests.⁵⁸⁸

In the interim, despite Boeing's and Druyun's denials, the DoD IG's confirmation to the public in September 2003 that enough credible evidence existed to conduct an internal investigation⁵⁸⁹ moved the scandal into stage four. For the next several weeks, additional facts surfaced questioning the propriety of Druyun's relationship with Boeing during her employment with the Air Force and defining the scandal further, firmly placing the scandal into stage five. Specifically, the media claimed Druyun: 1) had knowingly violated the Anti-Deficiency Act while working for the Air Force;⁵⁹⁰ 2) sold her home to a Boeing attorney while negotiating the tanker deal on behalf of the Air

⁵⁸⁶ *See id.*

⁵⁸⁷ *See U.S. Inquiry Into Boeing, supra* note 290, at C7; *see also Pentagon Opens Probe Into Boeing Jet Deal, supra* note 290, at C13.

⁵⁸⁸ *See Barakat, supra* note 371, at 33.

⁵⁸⁹ *See U.S. Inquiry Into Boeing, supra* note 290, at C7; *see also Pentagon Opens Probe Into Boeing Jet Deal, supra* note 290, at C13.

⁵⁹⁰ *See More Documents Show Darleen Druyun's Inappropriate Role In Boeing Lease Deal, supra* note 292.

Force;⁵⁹¹ 3) negotiated the tanker deal while her daughter was employed by Boeing;⁵⁹² and 4) had been under scrutiny for improper dealings related to a defense contractor approximately ten years earlier.⁵⁹³

Stage four continued into late November 2003, when Boeing announced it had fired both Druyun and the Sears for cause.⁵⁹⁴ As clarification, Boeing explained its internal investigation had discovered evidence showing Druyun and the Boeing executive who had hired her, Michael Sears, had improperly held employment discussions while Druyun was negotiating the Air Force tanker lease. Although Sears and Druyun continued to deny either had done anything wrong,⁵⁹⁵ the resignation of Boeing's chief executive a few days later provided additional confirmation that something had gone very wrong indeed.⁵⁹⁶

When these additional events happened, the scandal progressed into stage five, as the DoD announced plans to delay the award of the tanker lease while it conducted further investigation to further define the problem.⁵⁹⁷ Meanwhile, the scandal continued

⁵⁹¹ See Merle, *supra* note 292, at E1.

⁵⁹² See Renae Merle, *New Questions Raised About Boeing Deal*, WASH. POST, Oct. 8, 2003, at E1.

⁵⁹³ See Susan Chandler, *Boeing's Druyun Probed in Early '90s; Was Exonerated By Air Force*, CHICAGO TRIB., Oct. 12, 2003, at C1.

⁵⁹⁴ See Susan Chandler, *Boeing Fires Pair in Ethics Investigation; Hiring of Former Air Force Officer Called a Violation*, CHICAGO TRIB., Nov. 25, 2003, at C1.

⁵⁹⁵ See *Former Boeing Official Denies Misconduct*, *supra* note 308, at C4; see also Carpenter, *supra* note 308, at 73.

⁵⁹⁶ See Gilpin, *supra* note 300, at 1D; see also Lynch, *supra* note 312, at 37; see also Wayne, *supra* note 312, at A1.

⁵⁹⁷ See Schmeltzer, *supra* note 308, at C1.

in its development, as the press publicized several inflammatory emails showing several high-level Air Force leaders had partnered with Boeing to try to push the tanker lease through, despite Congress' scaled-down compromise plan.⁵⁹⁸ Additional internal Boeing emails were released showing Druyun had exerted favoritism towards Boeing while working for the Air Force.⁵⁹⁹ This additional evidence continued to keep the scandal in stage five, as the DoD promised to have the Pentagon's internal auditor conduct an additional inquiry into the Boeing lease contract to determine if Druyun's favoritism had negatively impacted the tanker lease contract.⁶⁰⁰

As a result, in December 2003, the Senate delayed Secretary Roche's nomination for Secretary of the Army.⁶⁰¹ This event simultaneously moved the scandal to stages four and five. First, it acted another validation to the public suggesting something improper had occurred in reference to the tanker lease contract. And second, it further defined the scandal by suggesting high-level Air Force and perhaps even DoD officials, other than Druyun, might be involved. Secretary Rumsfeld's announcement in February 2004 that the DoD IG's investigation found the tanker contract had been "tainted" by wrongdoing, kept at least a part of the scandal in stage four, validating that unlawful activity had occurred.⁶⁰²

⁵⁹⁸ See Chandler, *supra* note 319, at C1; see also Hedges & Chandler, *supra* note 319, at C1; see also Byron Acohido, *supra* note 310, at 3B.

⁵⁹⁹ See Chandler, *supra* note 329, at C1.

⁶⁰⁰ See *Boeing Deal Up in the Air*, *supra* note 326, at A20; see also Chandler, *supra* note 258, at C1.

⁶⁰¹ See Chandler, *supra* note 319, at C1.

⁶⁰² See *Rumsfeld Sees Probable Tanker Bid 'Wrongdoing'*, L.A. TIMES, Feb. 5, 2004, at C3.

Over the next few months, the scandal vacillated between stages four (validation) and five (definition). Secretary Rumsfeld's announcement in mid-February 2004 that he had ordered an examination into post-government rules for senior officials⁶⁰³ acted as a validation stage once again and progressed the scandal into stage five, as the DoD struggled to further identify and define the underlying causes of the problem. Secretary Roche's withdrawal of his nomination for Secretary of the Army in mid-March suggested even further confirmation that the Air Force had acted improperly in the scandal under Roche's leadership.⁶⁰⁴ Therefore, stage four was once again repeated with Roche's confirmation. As a result, the scandal was again pushed into stage five defining the controversy further, as additional facts provided evidence showing Druyun had favored Boeing⁶⁰⁵ over its competitor and also that the Air Force had failed to conduct sufficient research on the tanker lease contract and follow its own procurement rules.⁶⁰⁶ When Druyun pleaded guilty during the same timeframe, her plea once again pulled at least a portion of the scandal back to stage four, as it validated and publicly confirmed her illegal behavior.⁶⁰⁷

By May 2004, the scandal appeared to moving into step five yet again as the Pentagon released two reports that further defined Druyun's improper actions regarding the lease contact. One reported stated that in the short-term, there were feasible and

⁶⁰³ See Merle, *supra* note 339, at E1.

⁶⁰⁴ See Schrader, *supra* note 341, at A30.

⁶⁰⁵ See Galloway, *supra* note 343, at A1; *see also* Galloway, *supra* note 254, at 1A.

⁶⁰⁶ See Oppel, *supra* note 345, at A9; *see also* Smith, *supra* 345, at E1.

⁶⁰⁷ See *Official Hired by Boeing Pleads Guilty*, *supra* note 347, at C4.

better options available other than leasing tanker aircraft.⁶⁰⁸ The other found the Air Force had liberally interpreted cost and pricing guidelines in the deal with Boeing, which had resulted in excessive costs for the Air Force.⁶⁰⁹ In addition, new evidence revealed during this time frame showed Druyun had previously asked Sears to find jobs for two family members back in 2000.⁶¹⁰

The scandal finally evolved into at least the beginning of the sixth (punishment) stage in October 2004 when Druyun was sentenced to nine months in prison.⁶¹¹ In November, Sears pleaded guilty to improperly hiring Druyun.⁶¹² Although Sears refused to admit he had colluded to fix Boeing's bid price and no significantly new facts surfaced as a result of his guilty plea,⁶¹³ the plea offered yet additional validation to the public that Boeing had acted improperly in the Air Force tanker lease contract. The punishment stage continued in February 2005, when Sears was sentenced to four months in federal prison and a \$250,000 fine.⁶¹⁴

⁶⁰⁸ See Wayne, *supra* note 357, at C4.

⁶⁰⁹ See Capaccio, *supra* note 358, at 81.

⁶¹⁰ See Pae, *supra* note 293, at C1.

⁶¹¹ See Dine, *supra* note 368, at 1.

⁶¹² See Matthew Barakat, *Ex-Boeing Official Pleads Guilty In Illegal Hiring; He Had Offered an Air Force Officer A Job While She Was Still Negotiating a \$23 Billion Contract With the Aircraft-Maker*, PHILA. INQUIRER, Nov. 16, 2004, at C1; see also Peter Pae & Jube Shiver, Jr., *Ex-Executive of Boeing Pleads Guilty; Michael Sears Admits to Recruiting a Pentagon Official As She Negotiated A Deal With the Company*, L.A. TIMES, Nov. 16, 2004, at C1.

⁶¹³ See George Cahlink, *Boeing CFO Gets Four-Month Jail Sentence*, GOVERNMENT EXECUTIVE, Feb. 18, 2005, <http://www.govexec.com/dailyfed/0205/021805g1.htm>.

⁶¹⁴ See *id.*

With the punishment stage completed in Druyun's sentence, the scandal simultaneously moved between the fourth (validation), fifth (definition), and seventh (aftermath) stages in the coming months. Druyun's conviction suggested that contracts she had worked on, in addition to the Boeing tanker lease contract, might have been tainted. As such, the Air Force requested the GAO conduct an investigation into several of the contracts Druyun's hands had touched.⁶¹⁵ This moved at least a portion of the scandal into the fifth stage, which continued with Secretary Roche's resignation and the flurry of emails released, which highly suggested he had shown and supported the favoritism towards Boeing.⁶¹⁶ Similar to the preceding exposés that had occurred in the past, these emails once again concurrently pushed part of the scandal back to the fourth stage as they seemed to both confirm McCain's allegation that high-level Air Force or DoD officials had been involved in the scandal and also worked to further define the scandal.⁶¹⁷

However, in the meantime, the Air Force and DoD began implementing reform. During the same timeframe, the Air Force announced it had begun employing new internal policies, and the DoD revealed it had requested that DSB conduct another review, this time to recommend new and beneficial internal policies to prevent a similar

⁶¹⁵ See *Pentagon Seeks Probe of More Air Force Deals*, *supra* note 381, at C3.

⁶¹⁶ See R. Jeffrey Smith, *Air Force E-Mails Reveal Cheering for Boeing; Sen. McCain Releases Documents Describing A Push for the Company to Win a Tanker Contract*, L.A. TIMES, Nov. 20, 2004, at C3; see also Stephen J. Hedges, *E-mails Shed Light On Boeing Deal; Air Force Chief's Messages Released*, CHICAGO TRIB., Nov. 21, 2004, at C14.

⁶¹⁷ The Air Force's announcement that the DoD IG's office had conducted a new, larger investigation to look at the actions of additional officials surrounding the scandal just provided further definition to the scandal. See Peter T. Kilborn, *Senators Want Boeing Deal Investigated*, N.Y. TIMES, Nov. 21, 2004, § 1, at 32.

lapse of ethics in the future.⁶¹⁸ These events brought the scandal concurrently into the seventh stage. Additional individual efforts of reform included the creation of the DoJ's PFWG in February 2005 to deter and prosecute procurement fraud.⁶¹⁹ Moreover, although the DSB's report found Druyun's actions were likely an isolated occurrence, it recommended changes to help streamline and simplify the DoD's procurement process to help eliminate uneven expertise and power among its workforce.⁶²⁰ The DoD also conducted the DAPA and began implementing its recommendations.⁶²¹ And finally, Congress provided new biannual reporting requirements to the DoD via the 2007 NDAA.⁶²²

Although a portion of the scandal was clearly in the aftermath or seventh stage, a part had regressed to stages four and six. In relation to stage four, Boeing worked for nearly a year with the DoJ to negotiate a settlement for its wrongdoing and to avoid criminal prosecution.⁶²³ News of the settlement validated to the public yet again that Boeing and some of its employees had committed improper, if not illegal, actions as related to the tanker contract. In Summer 2006, news of Boeing's \$615 million fine, the largest ever paid by a defense contractor at that point in time, progressed the Druyun

⁶¹⁸ See Air Force Press Release, *supra* note 380; see also *Pentagon Seeks Probe of More Air Force Deals*, *supra* note 381, at C3.

⁶¹⁹ See Branstetter, *supra* note 382, at 51-52; see also Bruno, *supra* note 387, at 1.

⁶²⁰ See generally Report of the Defense Science Board, *supra* note 382, at 11-19.

⁶²¹ See generally Defense Acquisition Performance Assessment Report, *supra* note 395.

⁶²² See John Warner Nat'l Defense Authorization Act, Pub. L. No. 109-364, § 804(a)-(d), 120 Stat. 2083, 2314, (2006).

⁶²³ See Chandler, *supra* note 398, at C1.

scandal yet again to the sixth, or “punishment” stage.⁶²⁴ In line with Drohan’s theory, once Boeing’s fine was paid, media coverage of the reform processes ceased entirely.

Although the media continued to cover new iterations of the tanker contract on and off for the next several years,⁶²⁵ such coverage mostly related to the type of acquisition method the Air Force had chosen to use and the service’s pledge to ensure the acquisition was done with integrity.⁶²⁶ Overall, the reform made was largely to internal DoD and Air Force acquisition processes rather than amending or passing any major laws. Throughout the scandal, the media continually emphasized the illegal but individual actions taken by Druyun, Sears, and Boeing, rather than highlighting any major systemic flaws. Similar to the spare parts scandal, analyzing the Druyun scandal against Drohan’s theory once again confirms that in contradiction to her theory, complicated procurement scandals may move back and forth between and even concurrently through stages rather than chronologically following them. With that said, Drohan’s premise that media coverage typically ends at the punishment when the media has consistently portrayed the underlying cause of the scandal as “individual” rather than “systemic”⁶²⁷ appears to be valid here. In this case, the coverage abruptly ceased with Boeing’s \$615 million fine.

⁶²⁴ See Hedgpeth, *supra* note 399, at D1.

⁶²⁵ See Harris, *supra* note 225; see also *Scandal Tars All Sides*, ST. PETERSBURG TIMES, Mar. 14, 2008, at 14A; see also Menon, *supra* note 406; see also Thompson, *supra* note 406; see also Moser, *supra* note 224.

⁶²⁶ See *id.*

⁶²⁷ See Drohan, *supra* note 13, at 19.

B. Methodology 2: Sherman's Study of Correlation Between Scandal and Reform

Although major academic writings have not yet cited Drohan's theory of the "seven" stages of scandal, several studies conducted in related disciplines support and closely coincide with several of her findings regarding the various stages. One example is a theory initially set forth by Lawrence W. Sherman, an academic criminologist, in 1978, regarding the relationship between scandal and reform. Sherman's work primarily studied the role and effect of scandals reform in police organizations.⁶²⁸ Since the executive agencies which utilize the government procurement system involve similar public trust, and as there has been very little research conducted on the relationship between organizational deviance and scandal,⁶²⁹ Sherman's theory is relevant and applicable to this case study.

Although Sherman recognized the importance of the media in publicizing scandals, unlike Drohan, he believed their primary value was their ability to mobilize the scandal, as he theorized that "internal conflict was dominant" in influencing the public's motivation to encourage reform.⁶³⁰ For the below analysis, Sherman's work is useful because it describes how scandals can impact reform. Under Sherman's theory, a social

⁶²⁸ LAWRENCE W. SHERMAN, SCANDAL AND REFORM: CONTROLLING POLICE CORRUPTION xv (1978).

⁶²⁹ See Brandon A. Sullivan, Scandal and Reform: An Examination of Societal Responses to Major Financial and Corporate Crime 6 (Aug. 2010) (unpublished M.S. thesis, Bowling Green University), <http://etd.ohiolink.edu/view.cgi/Sullivan%20Brandon.pdf?bgsu1277141954>.

⁶³⁰ Tony G. Poveda, *The Effects of Scandal on Organizational Deviance: The Case of the FBI*, 2 JUST. Q. 237, 242 (1985).

control mechanism must be enacted to address deviant behavior.⁶³¹ He believed that scandals could be agents of change⁶³² because they could work as tools to “mobiliz[e] external social control.”⁶³³ However, similar to Drohan’s “stage two” of a scandal, Sherman believed change could only result if the public’s reaction to a scandal, particularly one related to the violation of public trust in an institution, is “one of intense outrage and anger, rather than . . . mere disapproval.”⁶³⁴ Further, like Drohan’s stages two through six, Sherman’s theory holds that in order to lead to reform, a negative reaction must be sustained.⁶³⁵ Finally, similar to Drohan’s seventh stage, Sherman found that the “deterrent effect of [scandals] on [corruption] does not seem to be lasting”⁶³⁶ unless, long-term “controls and policies which deter [the underlying cause are] implemented.”⁶³⁷

1. Findings and Analysis: Sherman’s Theory as Applied to the Hammer and Toilet Seat Scandals

Under Sherman’s theory, scandals can be a catalyst of change⁶³⁸ and work as a tool of social control.⁶³⁹ In the cases of both the hammer and toilet seat scandals, from

⁶³¹ See SHERMAN, *supra* note 628, at 3.

⁶³² See *id.* at xv.

⁶³³ See *id.* at 59.

⁶³⁴ See *id.* at 60-61.

⁶³⁵ See *id.* at 61.

⁶³⁶ See *id.* at 226.

⁶³⁷ See Poveda, *supra* note 630, at 241.

⁶³⁸ See SHERMAN, *supra* note 628, at xv.

⁶³⁹ See *id.* at 59.

the facts set forth, it is clear the public had an extremely negative and sustained reaction to the spare parts scandals that lasted a number of years. Examples of events demonstrating the public's intense and sustained anger over the related matter includes the following: 1) the media story published in June 1984 comparing the DoD to a fiscally irresponsible "teenager"⁶⁴⁰; 2) the immediate internal steps the DoD took to respond to the scandals that included "more rules, more people checking on the checkers."⁶⁴¹; 3) Congress' passage of CICA⁶⁴² and enacting the Defense Procurement Reform Act as a component of the National Defense Authorization Act for Fiscal Year 1985⁶⁴³; 4) the depiction of Secretary Weinberger in a political cartoon with a toilet seat around his neck; 5) President Reagan's public defense of Secretary Weinberger regarding the toilet seat at a press conference⁶⁴⁴; 6) the April 1985 *Washington Post* article written Secretary Weinberger seeking to reinstate public trust regarding defense spending by presenting a set of facts relating to the hammer and toilet seat⁶⁴⁵; 7) the outrage over the May 1985 *New York Times* article that led to a second audit of Gould by the Navy Audit Service⁶⁴⁶; 8) the unprecedented one-year defense budget freeze⁶⁴⁷; and 9) the June 1985 story

⁶⁴⁰ See McGrory, *supra* note 42, at A2.

⁶⁴¹ See Fairhall, *supra* note 21.

⁶⁴² S. Rep. No. 98-50, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. at 2110-11.

⁶⁴³ ACQUISITION ADVISORY PANEL REPORT, *supra* note 18, at 48.

⁶⁴⁴ See Safire, *supra* note 52, at 16.

⁶⁴⁵ See Weinberger, *supra* note 55 at A21.

⁶⁴⁶ See Fairhall, *supra* note 21.

⁶⁴⁷ See Rasor, *supra* note 59; *see also* Reidy, *supra* note 59.

portraying Secretary Weinberger as the man responsible “for all of the Pentagon’s blunders and boondoggles – symbolized in the public mind by the notorious \$640 paid . . . for a toilet seat.”⁶⁴⁸ These events, particularly the defense freeze, are examples of the public’s sustained negative reaction that forced Congress, the DoD, and procurement officials to create and implement commercial item reform.

2. Findings and Analysis: Sherman’s Theory as Applied to the Operation Illwind Scandal

Like the hammer and toilet seat scandals, once the news of Operation Illwind was made known to the public, understandably, the public was outraged for a significant time. Soon after the Operation Illwind investigation was publicized, the press billed it as “the largest fraud investigation in history” and asserted the evidence uncovered to that point in time showed corruption had become “endemic to the [defense procurement] system.”⁶⁴⁹ The public’s disgust with the situation was evident from the beginning as news stories compared procurement officials to the mafia but stated federal officials “preferred mugging the U.S. taxpayer on the Pentagon’s plush E-ring to rolling wins.”⁶⁵⁰ Further examples of the public’s ire included: 1) the numerous media reports villanizing procurement officials, contractors, and defense consultants but revering the efforts of the U.S. attorneys prosecuting the Operation Illwind cases;⁶⁵¹ 2) the U.S. Air Force’s nearly immediate reassignment of Victor Cohen to a non-procurement job with no purchasing

⁶⁴⁸ See Johnson, *supra* note 60.

⁶⁴⁹ See Engelberg, *supra* note 94, at 1; see also G. Barker, *supra* note 109; see also Barker, *supra* note 109.

⁶⁵⁰ See Bamford, *supra* note 95, at 1.

⁶⁵¹ See Engelberg, *supra* note 94, at 1; see also Murphy, *supra* note 115, at B1.

authority;⁶⁵² 3) the news articles referencing the frustration of Congress over the time it was taking for the U.S. Attorney to begin charging the individuals and organizations that were the focus of the Operation Illwind investigation;⁶⁵³ 4) the media coverage quoting Congress' strong reactions to the evidence in the Operation Illwind case;⁶⁵⁴ 5) the reports following Senator Pryor's consultant-registration bill;⁶⁵⁵ 6) the near-immediate steps the DoD took to add language to contracts enabling the Government to recover profits from companies who had won contracts unfairly;⁶⁵⁶ 7) Congress' passage of the PIA within five months of when the Operation Illwind scandal broke, without committee hearings, or agency or public comment;⁶⁵⁷ 8) the deluge of bid protests that were filed after the Operation Illwind scandal became public;⁶⁵⁸ and 9) perhaps most tellingly, the fact that John Tower, a former Senator turned defense consultant, was rejected by the Senate as the President's Secretary of Defense nominee due in large part to his "closeness" to defense industry makers.⁶⁵⁹ Although in the case of the Operation Illwind scandal, legislative reform was passed a couple of months before the Illwind indictments even began occurring, the public's prolonged outrage and disgust over the matter continued to

⁶⁵² See Stevenson, *supra* note 125, at D1.

⁶⁵³ See Shanker, *supra* note 120, at C4.

⁶⁵⁴ See G. Barker, *supra* note 109; see also Marcus & Murphy, *supra* note 124, at A1.

⁶⁵⁵ See Shaw, *supra* note 95, at 7.

⁶⁵⁶ See *Congressmen to Pentagon: Recoup Companies' Illegally Gained Profits*, *supra* note 126, at 57.

⁶⁵⁷ See 134 CONG. REC. 31,690 (1988).

⁶⁵⁸ See Sugawara, *supra* note 145, at C1.

⁶⁵⁹ See Rasky, *supra* note 154, at A1; see also Tower, *supra* note 154, at B6; see also Waldman, *supra* note 156, at 51.

pressure the Government to continue prosecuting those responsible and sent a strong message to both Congress and the DoD that the public would not tolerate such behavior.

3. Findings and Analysis: Sherman's Theory as Applied to the Darleen Druyun Scandal

The Druyun scandal resulted in longstanding damage to the Air Force's and Boeing's reputation as well as the entire military procurement system.⁶⁶⁰ Although Druyun had worked on other contracts besides the tanker lease contract, her actions impacted the tanker contract more than anything else. Indeed, her behavior and decisions regarding the contract led to a prolonged and sustained negative reaction by the public and defense contracting community that lasted nearly a decade.⁶⁶¹ Specific examples showing the public's outrage over the scandal include the following: 1) large-scale media coverage and emphasis on McCain's statement that the tanker lease contract was a "sweetheart deal" for Boeing;⁶⁶² 2) the immediate internal investigation Boeing conducted in response to wide-spread media allegations questioning the propriety of Druyun's employment with Boeing;⁶⁶³ 3) the formal DoD IG investigation conducted soon after the SASC found the internal Boeing email suggesting Druyun had improperly provided a competitor's pricing information to Boeing;⁶⁶⁴ 4) editorials criticizing the

⁶⁶⁰ See Harris, *supra* note 225.

⁶⁶¹ See Thompson, *supra* note 229.

⁶⁶² See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1; see also Greising, *supra* note 275, at C2; see also *Boeing's Tarnished Reputation*, *supra* note 305, at C26; see also *Boeing's Fall From Grace*, *supra* note 300, at D6.

⁶⁶³ See Statement of Facts at 4, *Druyun* (No. 04-150-A).

⁶⁶⁴ See *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1; see also Wayne, *supra* note 283, at C8; see also *U.S. Inquiry Into Boeing*, *supra*

tanker lease after official reports determined Druyun had favored Boeing, such as the one that asserted the contract was nothing more than “living for today and plundering the resources for tomorrow”;⁶⁶⁵ 5) Boeing’s termination “for cause” of both Druyun and Sears after its internal investigation confirmed Druyun’s improper hiring;⁶⁶⁶ 6) the press’ publicization of POGO’s statement (in relation to Druyun’s and Sears’ terminations) that it was “unfortunate that it takes such public pressure to get a contractor to fess up to this kind of questionable behavior”;⁶⁶⁷ 7) the resignation of Boeing’s chief executive Phil Condit in response to the terminations of and negative publicity surrounding Druyun and Sears;⁶⁶⁸ 8) the Senate’s withholding of Secretary Roche’s nomination for Secretary of the Army, Roche’s eventual withdrawal of the nomination, and ultimately, his resignation as Secretary of the Air Force;⁶⁶⁹ 9) the many studies and reports ordered by both the Air Force and the DoD in response to the scandal to determine the root cause of the scandal and suggest reform measures;⁶⁷⁰ 10) Boeing’s campaign to restore its public image,

note 290, at C7; *see also* *Pentagon Opens Probe Into Boeing Jet Deal*, *supra* note 290, at C13.

⁶⁶⁵ *See* Greising, *supra* note 275, at C2; *see also* *Such a Deal*, *supra* note 230, at B2; *see also* Wayne, *supra* note 283, at C8.

⁶⁶⁶ *See* Chandler, *supra* note 301, at C1; *see also* *Boeing’s Tawdry Deal*, *supra* note 302, at A24.

⁶⁶⁷ *See* Chandler, *supra* note 301, at C1.

⁶⁶⁸ *See* Gilpin, *supra* note 300, at 1D; *see also* Lynch, *supra* note 312, at 37; *see also* Wayne, *supra* note 312, at A1.

⁶⁶⁹ *See* Chandler, *supra* note 319, at C1; *see also* Schrader, *supra* note 341, at A30; *see also* Stephen J. Hedges, *Air Force Chief Tied To Tanker Deal Quits*, L.A. TIMES, Nov. 17, 2004, at C18.

⁶⁷⁰ *See* *U.S. Inquiry Into Boeing*, *supra* note 290, at C7; *see also* *Pentagon Opens Probe Into Boeing Jet Deal*, *supra* note 290, at C13; *see also* *Boeing Deal is Found to Be*

including its purchase of full-page ads;⁶⁷¹ 11) Druyun's nine-month prison sentence, the first bestowed on a government procurement official;⁶⁷² 12) General Martin's withdrawal of his nomination for the U.S. Pacific Command after a hostile reception by the Senate and media due to his assignment as Commander of the AFMC during part of the scandal;⁶⁷³ and 13) ultimately, the greatest example – the many delays, and ultimate termination of the Boeing tanker lease contract due to evidence of favoritism by Druyun.⁶⁷⁴

C. Methodology 3: The News Framing Analysis Theory

While Sherman believed media's role in scandal to be only tangentially important in bringing about reform, a number of social scientists have conducted exhaustive studies regarding the correlation between the manner in which issues are "framed" or portrayed by the news media and its effects.⁶⁷⁵ These studies substantiate Drohan's theory that how

Improper, *supra* note 344, at C10; *see also* Oppel, *supra* note 345, at A9; *see also* Smith, *supra* note 345, at E1; *see also* Wayne, *supra* note 357, at C4; *see also* *Pentagon Seeks Probe of More Air Force Deals*, *supra* note 381, at C3; *see also* 4 C.F.R. § 21.2(a)(1)(2004); *see also* Air Force Press Release, *supra* note 380; *see also* Report of the Defense Science Board, *supra* note 382, at 11-19; *see also* *Report Cites Violations on Air Force Tanker Deal*, *supra* note 394, at 4A; *see also* Defense Acquisition Performance Assessment Report, *supra* note 395.

⁶⁷¹ *See* Merle, *supra* note 353, at E3.

⁶⁷² *See* Dine, *supra* note 368, at 1.

⁶⁷³ *See* Hendren, *supra* note 373, at A12; *see also* Kreisher, *supra* note 373, at A-6.

⁶⁷⁴ *See* Schmeltzer, *supra* note 308, at C1; *see also* Lynch, *supra* note 312, at 37; *see also* *Boeing Deal Up in the Air*, *supra* note 326, at A20; *see also* Chandler, *supra* note 258, at C1; *see also* *Rumsfeld Sees Probable Tanker Bid 'Wrongdoing'*, *supra* note 602, at C3; *see also* Chandler, *supra* note 374, at C1.

⁶⁷⁵ *See* William G. Jacoby, *Issue Framing and Public Opinion on Government Spending*, 44 AM. J. POL. SCI. 751 (2000); *see also generally*, Paul R. Brewer & Kimberly Gross,

a scandal is framed will affect public response to the transgression, which may in turn, lead to subsequent reform.

Social scientists have long established that the media plays an influential role as an agenda setter⁶⁷⁶ by focusing readers' or listeners' attention on particular attributes within an event or issue.⁶⁷⁷ Studies surrounding agenda setting have determined “differing amounts of emphasis and coverage of issues by the mass media lead over time to the public regarding these issues to be of differing levels of importance.”⁶⁷⁸ Taking agenda-setting a step further, social scientists have also extensively studied, though to a lesser degree, “issue framing” (also known as “framing”).⁶⁷⁹

Framing analyses have found the “manner in which an issue is framed can affect the manner in which citizens learn about and formulate opinions on it.”⁶⁸⁰ Under a framing theory, the mass media “provide[s] frames that tell audience members how to understand [certain] controversies . . . [suggesting] what the controversy is about.”⁶⁸¹

Studying the Effects of Framing on Public Opinion About Policy Issues, in *DOING NEWS FRAMING ANALYSIS* 159 (Paul D'Angelo & Jim A. Kuypers ed., 2010).

⁶⁷⁶ See Michael W. Wagner, *Think of it This Way: Issue Framing, Salience, and Public Opinion Change* 2 (Apr. 15, 2004) (unpublished manuscript), http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/2/3/7/pages82377/p82377-1.php.

⁶⁷⁷ Jim A. Kuypers, *Framing Analysis From a Rhetorical Perspective*, in *DOING NEWS FRAMING ANALYSIS* 298 (Paul D'Angelo & Jim A. Kuypers ed., 2010).

⁶⁷⁸ See Wagner, *supra* note 676, at 6.

⁶⁷⁹ See *id.* at 2.

⁶⁸⁰ See *id.* at 7.

⁶⁸¹ See Brewer & Gross, *supra* note 675, at 159 (citing W. Gamson & A. Modigliani, *The Changing Culture of Affirmative Action*, in *RESEARCH IN POLITICAL SOCIOLOGY* 137-77 (R. Braungart ed., 1987)).

The frame selects “aspects of a perceived reality and make[s] . . . [it] more salient in a communicating text, in such a way to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation.”⁶⁸² The news media “can so focus on an issue that it takes center stage on the nation’s attention stage” and suggests a certain opinion of an issue.⁶⁸³ Social scientists have determined that when a framed message emphasizes a certain aspect of an issue, that aspect “is accorded greater weight in the individual’s attitude” which leads to “framing effects,” such as changes in attitudes or opinions.⁶⁸⁴ Researchers have further found that the public does not need to be persuaded by a frame for the frame to play a role in the evolution of an issue; the public only needs to have a strong reaction to it as “frames can merely activate long-existing opinions on issues that previously were not highly salient.”⁶⁸⁵ Ultimately, social scientists have concluded that although “the press ‘may not be very successful in telling its readers what to think, [it] is stunningly successful in telling its readers what to think about.’”⁶⁸⁶

⁶⁸² *See id.* at 159.

⁶⁸³ *See* Kuypers, *supra* note 677, at 299.

⁶⁸⁴ *See* Wagner, *supra* note 676, at 8.

⁶⁸⁵ *See id.*

⁶⁸⁶ Jim A. Kuypers & Stephen D. Cooper, *A Comparative Framing Analysis of Embedded and Behind-the-Lines Reporting on the 2003 Iraq War*, 6 QUALITATIVE RES. REP. IN COMM’N 1 (2005) (citing M.E. McCombs & D.L. Shaw, *The Agenda-Setting Functions of the Mass Media*, 36 PUB. OP. Q. 176-187 (1972)).

1. Findings and Analysis: The News Framing Analysis Theory as Applied to the Hammer and Toilet Seat Scandals

Here, it is clear that news framing had a hand in the life of the scandal from the beginning. Originally, the scandal was portrayed as one due to negligence and a faulty accounting system.⁶⁸⁷ Then, by late 1983, it was framed as due to a lack of competitive bidding.⁶⁸⁸ By mid-1984, the problem was painted as a systemic “waste and poor management” problem combined with “unscrupulous defense contractors.”⁶⁸⁹ As explained above, once the Navy conducted a new audit of the hammer contract and Gould was somewhat absolved,⁶⁹⁰ the media’s portrayed the underlying cause of the issue as one of systemic waste.⁶⁹¹

The examples the actions that occurred due to public disdain described in the Sherman analysis above demonstrate that by the time the defense freeze had been put into place, the American public believed the DoD had committed widespread fiscal waste and violated their trust. When compared with the framing of news stories set forth in the case history above, it is clear the public’s perceptions were in line with the media’s representation of the facts involved from the beginning of the scandal up to the time of the defense freeze. Evidence that the public had accepted the media’s views of these events is further suggested by the facts that although Secretary Weinberger and President Reagan attempted to “set the record straight” regarding the actual facts of the scandal by

⁶⁸⁷ See Barron, *supra* note 30, at D1.

⁶⁸⁸ See Miller, *supra* note 31, at 21; *see also* Knickerbocker, *supra* note 31, at 3.

⁶⁸⁹ See Knickerbocker, *supra* note 37, at 4.

⁶⁹⁰ See Fairhall, *supra* note 21.

⁶⁹¹ See Johnson, *supra* note 60.

writing newspaper articles and holding press conferences as late as April 1985,⁶⁹² the public did not appear to believe them. Rather, the public continued to pressure Congress which led to the unprecedented defense freeze just a month later,⁶⁹³ and indirectly led to the ultimate reform of the commercial items acquisition process.

2. Findings and Analysis: The News Framing Analysis Theory as Applied to the Operation Illwind Scandal

Similar to the spare parts scandal, the press' portrayal of the Operation Illwind scandal affected the public's reaction to it. However, unlike the hammer and toilet seat scandals, in Operation Illwind, the media consistently framed the scandal and its root causes from the beginning of the scandal until the end. From the beginning, the press' coverage of the scandal was extensive, detailed, and extremely negative towards DoD procurement officials and the Reagan administration. Further, throughout the life of the scandal, the news media depicted the defense procurement system as corrupt. The media did this by suggesting that all players involved – from defense contractors to the defense consultants, who often acted as “middlemen,” to the highest levels of federal procurement officials at the Pentagon – were greedy and participated in a “clandestine, cutthroat world of insider trading in procurement secrets.”⁶⁹⁴ Further, the press repeatedly reported that the underlying cause of the “insider trading” that resulted in Operation Illwind was the

⁶⁹² See Weinberger, *supra* note 55, at A21; see also Cannon & Hoffman, *supra* note 64, at A8.

⁶⁹³ See Raser, *supra* note 59; see also Reidy, *supra* note 59.

⁶⁹⁴ See generally Engelberg, *supra* note 94, at 1; see also Murphy & Marcus, *supra* note 146, at A1; see also Mecham, *supra* note 159, at 24.

“hands-off” approach to procurement encouraged under President Reagan’s administration.⁶⁹⁵

As a result of the pressure resulting from the negative publicity, the DoD and Congress took several immediate steps. First, it reassigned high-level procurement officials suspected of wrongdoing into other jobs without purchasing power while the investigation was continuing.⁶⁹⁶ In addition, the DoD put language into procurements to allow the Government to recoup profits if contractors were later found to have been awarded the contracts unfairly; and ordered a hiring freeze on defense consultants.⁶⁹⁷ Perhaps most importantly, Congress responded by passing legislation, eventually known as the PIA, just five months after the scandal was publicized and without any committee hearings, or agency or public comment.⁶⁹⁸

While the media reported several of the DoD’s efforts, Congress’ efforts in passing the PIA went largely unnoticed, or at least unpublicized. Instead, perhaps because of its human interest factor, the media chose to focus the majority of its coverage on the various individuals and organizations who were the focus of the Operation Illwind investigation. As a whole, the press strongly emphasized the negative role defense consultants had played in the scandal.⁶⁹⁹ One result of this coverage was that it

⁶⁹⁵ See G. Barker, *supra* note 109; see also Engelberg, *supra* note 94, at 1; see also *The Stench Grows*, *supra* note 112, at 6.

⁶⁹⁶ See Stevenson, *supra* note 125, at D1.

⁶⁹⁷ See Stevenson, *supra* note 125, at D1; see also *Congressmen to Pentagon: Recoup Companies’ Illegally Gained Profits*, *supra* note 126, at 57; see also Shanker, *supra* note 120, at C4.

⁶⁹⁸ See 134 CONG. REC. 32,156 (1988).

⁶⁹⁹ See Shaw, *supra* note 95, at 7; see also Sugawara, *supra* note 128, at C1.

“triggered a rush of protests by losing bidders who argue[d] that they lost out on government work because of ethics violations.”⁷⁰⁰ Another was that the public grew to distrust and dislike defense consultants, and through its Congressional representatives sent a very strong message to the DoD when the Senate denied John Tower’s Cabinet nomination for Secretary of Defense, a historical event.⁷⁰¹

After Tower’s rejection, in large part, news coverage introduced the various individuals and corporations who had been indicted, had pleaded guilty, and/or who had been sentenced for their roles in the Operation Illwind Scandal. When the first round of indictments came in early January 1989, the media reported disappointment that there were only a small number of indictments since the scandal had been billed as “one of the most massive military corruption scandals in history.”⁷⁰² The fact the public was also underwhelmed and wanted to see punishment meted out to the individuals responsible is evident by the fact the U.S. Attorney on the case felt required to issue a statement asserting the early indictments were only a small percentage of the investigation and that “a great deal of additional activity” would be forthcoming.⁷⁰³ The media and public continued to pressure the DoJ and U.S. Attorney’s Office until all of the cases had been prosecuted, nearly five years later.⁷⁰⁴

⁷⁰⁰ See Sugawara, *supra* note 145, at C1.

⁷⁰¹ See Fred Kaplan, *supra* note 155, at 9; see also Boder & Healy, *supra* note 155, at 1; see also Tower, *supra* note 154, at B6.

⁷⁰² See Murphy & Marcus, *supra* note 146, at A1; see also *First Gust from an Ill Wind*, *supra* note 146.

⁷⁰³ See *Firm, Six Men Charged in Defense Procurement Case*, *supra* note 147, at 1.

⁷⁰⁴ See *Litton Industries, Inc.*, *supra* note 184, at 31.

3. Findings and Analysis: The News Framing Analysis Theory as Applied to the Darleen Druyun Scandal

As with the analysis of the preceding scandals, the media's portrayal of the scandal involving Druyun's favoritism towards Boeing in the tanker lease contract had a profound impact on the development of the scandal, the public's response to it, and ultimately the outcome. Similar to the spare parts scandal, it took a number of years for the Druyun scandal to completely unfold. While the depiction of the scandal changed slightly as more and more facts were uncovered, it was nearly always portrayed as due to the failures of Druyun, Sears, and Boeing. While reports were later circulated by the press suggesting additional, high-level government officials, such as Secretary Roche, had been involved in the scandal,⁷⁰⁵ such allegations were short-lived although they certainly heightened the impact on the Air Force's reputation in the long-term. Thus, the underlying cause of the scandal was never presented as indicative of a systemic or service-wide problem, despite McCain's efforts to make such allegations stick.⁷⁰⁶

There are several possibilities as to why the media did not depict the scandal as a systemic failure. On one hand, findings from the various studies and reports ordered by the Air Force and DoD suggested the root cause of the underlying issue that had led to the scandal was not due to the procurement system itself or even collusion but rather its

⁷⁰⁵ See Dine, *supra* note 348, at A1; see also Hedges, *supra* note 669, at C18; see also Smith, *supra* note 616, at C3; see also Hedges, *supra* note 616, at C14.

⁷⁰⁶ See Hendren, *supra* note 373, at A12; see also Kreisher, *supra* note 373, at A-6; see also *Two Senators Seek to Postpone Boeing Deal for Tankers*, *supra* note 310, at C4; see also Acohido, *supra* note 310, at 3B; see also Chandler, *supra* note 319, at C1.

independent actors⁷⁰⁷ and Air Force officials' laziness and failure to follow existing procurement rules.⁷⁰⁸ Further, another possibility the media chose to hold Druyun, Sears, and Boeing responsible for the scandal rather than the overall system may be that by the time the most egregious emails involving Roche were released, he had already resigned and was no longer a public servant.⁷⁰⁹

For whatever reason, the scandal was depicted as mainly due to the faults of these individuals and Boeing. The Sherman analysis above provides a list of events and outcomes that occurred in response to public pressure from the scandal. The ultimate outcomes appear to correlate directly to the way the media framed the scandal. For example, after mid-October 2003, when news articles began to negatively describe Druyun's personality, work habits, and interactions with other defense officials and contractors, Druyun suddenly became villanized as the "dragon lady."⁷¹⁰ This depiction and negative press likely impacted Boeing's decision to terminate both Druyun and Sears for cause relating to Druyun's improper hiring.⁷¹¹ Further, the public pressure resulting from the deluge of media coverage may also have affected the judge's decision to sentence Druyun to a prison term, something never before seen in relation to errant

⁷⁰⁷ For example, findings from internal investigations conducted by both Boeing and the DSB, on behalf of the DoD, indicated the actions that led to the scandal had been isolated occurrences. *See Merle, supra* note 339, at E1; *see also Larezos, supra* note 228, at 18.

⁷⁰⁸ *See Report Cites Violations on Air Force Tanker Deal, supra* note 394, at 4A.

⁷⁰⁹ *See Hedges, supra* note 669, at C18.

⁷¹⁰ *See Such a Deal, supra* note 230, at B2; *see also Chandler, supra* note 293, at C1.

⁷¹¹ *See Chandler, supra* note 301, at C1.

government acquisition officials.⁷¹² The negatively charged public reactions certainly had a great deal to do with the resignations by both government and Boeing officials and the withdrawals of presidential nominations.⁷¹³

Further, by the time the DoD decided to cancel the tanker lease contract in October 2004, the public had grown to believe there was no other appropriate option.⁷¹⁴ In the public's view, the tanker lease contract had been irreparably tainted by Druyun's decision to give a "parting gift" to Boeing.⁷¹⁵ The public's acceptance of the press' depiction of the events is evidenced by the fact that despite Boeing's very public campaign to repair its image, to include buying full-page magazine and newspaper ads to defend its contract,⁷¹⁶ the public continued to pressure Congress to "kill . . . the lease deal dead."⁷¹⁷

D. Overall Conclusions Regarding the Relationship Between Media Coverage, Scandals, and Reform

1. Drohan's Theory

Drohan's theory, as applied to procurement scandals, has its strengths and weaknesses. Overall, the aspect of Drohan's theory suggesting that the media framing of

⁷¹² See Dine, *supra* note 368, at 1; see also Hedges, *supra* note 369, at C1.

⁷¹³ See Gilpin, *supra* note 300, at 1D; see also Lynch, *supra* note 312, at 37; see also Wayne, *supra* note 312, at A1; see also Schrader, *supra* note 341, at A30; see also Hendren, *supra* note 373, at A12; see also Kreisher, *supra* note 373, at A-6; see also Hedges, *supra* note 669, at C18.

⁷¹⁴ See *Boeing's Tankers Tank*, *supra* note 375, at C28.

⁷¹⁵ See Dine, *supra* note 368, at 1; see also Hedges, *supra* note 369, at C1; see also *Boeing Co.: Tanker Deal Scuttled By Congress*, *supra* note 369, at C3.

⁷¹⁶ See Merle, *supra* note 353, at E3.

⁷¹⁷ See Chandler, *supra* note 374, at C1.

a scandal directly correlates to the stage the scandal will end in and whether or not it will lead to reform⁷¹⁸ appears valid to some degree. The press' depiction of all three historic DoD procurement scandals shows that when the media portrayed the root cause of each scandal as being caused by specific individuals or organizations in violation of law or regulation, Congress and the public sought their prosecution.⁷¹⁹ And, in contrast, it shows that when the media portrayed the problem as a systemic one, rather than individual, the public pushed for swift action to stop similar events from happening or wrongdoers from benefiting, to include the unprecedented defense spending freeze that forced Congress, DoD, and other officials to reform commercial item procurement laws,⁷²⁰ the passage of the Procurement Integrity Act,⁷²¹ and the cancellation of the tanker contract.⁷²²

While Drohan's theory provides insight regarding the importance of media influence on the public, it is not a perfect methodology to use in procurement scandals, particularly where there are new developments or a series of sub-scandals derived from a main scandal. Drohan opines that scandals tend to transit the stages of her theory in an orderly fashion. However, when applying her theory to procurement scandals, it is clear

⁷¹⁸ See Drohan, *supra* note 13, at 18.

⁷¹⁹ See Fairhall, *supra* note 21; see also *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1; see also G. Barker, *supra* note 109.

⁷²⁰ See Rasor, *supra* note 59; see also Reidy, *supra* note 59.

⁷²¹ See 134 CONG. REC. 31,690, 32,156 (1988); see also *Reagan Signs Bill Stiffening Insider Trading Penalties*, *supra* note 136, at 4.

⁷²² See *Boeing's Tanker Bid Is Rejected*, *supra* note 374, at C3; see also Susan Chandler, *Boeing Tanker Pact at Center of War of Word and Wills; McCain, House Member Battle*, CHICAGO TRIB., Nov. 5, 2004, at C1; see also *Boeing's Tankers Tank*, *supra* note 375, at C28.

this is not always the case. For example, the spare parts and Darleen Druyun scandals clearly show a main scandal may be forced to repeat the stages of Drohan's theory when a new development or sub-scandal comes to light. As such, the larger scandal may not transit through the seven stages in a chronological way. In fact, as with the Druyun scandal, there may be times a scandal simultaneously occupies several stages at once. And further, as shown by this case study, there may be situations where a scandal skips a step entirely. This is evidenced from the spare parts scandal, where the "denial and evasion" stage and, more importantly, the "punishment" stage were skipped entirely, the stage Drohan opines is the "most important" to the public.

Drohan's finding that the media often loses interest once the punishment stage passes⁷²³ appears to hold true as related to the above DoD procurement scandals. In regards to the spare parts scandal, once the Packard Commission convened and recommended changes, media coverage decreased dramatically, and only mentioned the spare parts scandal when reflecting upon historic examples of government "waste."⁷²⁴ Similarly, in the example of Operation Illwind, after the media announced that Litton Industries, the last government contractor prosecuted in the scandal, had agreed to a

⁷²³ See Drohan, *supra* note 13, at 18.

⁷²⁴ See Michael O. Leavitt and Thomas Barker, *Fix Competitive Bidding, Don't Kill It*, WASH. TIMES, Feb. 28, 2011, at B3; see also William Safire, *Bridge to Nowhere*, N.Y. TIMES, Oct. 8, 2006 (comparing the "bridge to nowhere" to "the \$600 toilet seat in budget-cutters' periodic denunciations of government "waste, fraud and abuse"); see also John J. Hamre, *Realities of Today Demand a New Defense Acquisition Reform*, AVIATION WEEK & SPACE TECHNOLOGY, Nov. 28, 2005, at 74 (reflecting on the spare parts scandal "most often characterized as \$600 toilet seats and \$427 hammers"); see also *Hard to Swallow*, WASH. POST, Apr. 16, 1991, at A18 (editorial questioning whether the attendance of a military staff sergeant at a cooking school at the Greenbrier Hotel was comparable to "the \$600-toilet-seat inquiry").

settlement,⁷²⁵ media attention surrounding the scandal ceased. This was also the case with the Druyun scandal. Once Druyun and Sears' prison sentences were implemented, and Boeing's fine had been adjudicated for its part in the scandal, the media failed to cover any further related reform, although the media did continue to sporadically report on new procurement efforts related to the aerial refueling tanker contract until it was finally awarded to Boeing in February 2011.⁷²⁶

Under Drohan's theory, authorities may become less inclined to make significant changes in laws or regulations once media attention lessens.⁷²⁷ This is sometimes, but not always, the case with DoD procurement scandals. For example, it does apply to the Druyun scandal. The Druyun scandal led to several changes in internal processes; however, once individual punishments were imparted and media coverage tapered off, no further reform occurred. However, the premise does not apply to the spare parts or Operation Illwind scandals, at least to some degree. Although little, if any, media coverage continued during the commercial item acquisition reform process, effective and lasting reform continued for many years. Therefore, the spare parts example shows this hypothesis may not apply in some cases.

Further, with Operation Illwind, Congress passed the PIA only five months after the scandal was publicized and without any committee hearings or agency or public

⁷²⁵ See *Sweeping Up*, *supra* note 191, at 8A.

⁷²⁶ In these articles, it mentioned the Darleen Druyun saga only tangentially to address the history of the tanker deal. See Harris, *supra* note 225; see also *Scandal Tars All Sides*, *supra* note 625, at 14A; see also Menon, *supra* note 406; see also Thompson, *supra* note 406; see also Moser, *supra* note 224.

⁷²⁷ See Drohan, *supra* note 13, at 20.

comment and long prior to the punishment stage.⁷²⁸ This suggests Congress and the DoD are very sensitive to media coverage and the pressure it brings and shows reform likely occurred in direct correlation to the media pressure. However, with that said, the timing of the reform shows that in contrast to Drohan's theory, in some cases, significant reform may occur long prior to the punishment stage if the pressure is strong enough. In this manner, Drohan's theory appears flawed.

2. Sherman's Theory

In regards to Sherman's theory, from reviewing the historical facts and outcomes of the above three DoD procurement scandals, it is clear that for a scandal to lead to significant change, it must meet each of the criteria set forth in Sherman's theory. Specifically and similarly to Drohan's stages two through six,⁷²⁹ the public's reaction to the scandal must be "one of intense outrage and anger rather than . . . mere disapproval" and must be sustained for a significant period of time.⁷³⁰ Of the three historic DoD procurement scandals described above, the toilet seat and hammer scandals and Operation Illwind scandal resulted in significant reform to procurement law,⁷³¹ while the Darleen Druyun scandal resulted only in several individual punishments and changes to internal agency policies. Nevertheless, as described above, the media coverage shows the public had extremely strong and negative feelings about each of the scandals, and all three lasted a number of years. Specifically, the toilet seat and hammer scandals lasted

⁷²⁸ See 134 CONG. REC. 32,156 (1988).

⁷²⁹ See Drohan, *supra* note 13, at 2-19.

⁷³⁰ See SHERMAN, *supra* note 628 at 60-61.

⁷³¹ See 134 CONG. REC. 31,690, 32,156 (1988); see also *Reagan Signs Bill Stiffening Insider Trading Penalties*, *supra* note 136, at 4.

for approximately three years, the Operation Illwind scandal for six years, and the Darleen Druyun scandal for five years. This suggests that while a sustained and very negative reaction to a particular scandal makes it more *probable* the scandal will result in significant change, it does not *guarantee* it.

3. News Framing Theory

Finally, from the perspective of a news framing analysis, the facts, outcomes, and analyses of the above DoD procurement scandals supports Drohan's theory and shows the framing of issues by the news media does affect public opinion, which can in turn, pressure officials to reform a process or punish specific individuals or organizations deemed to be responsible. For example, as described above, after the public accepted the media's portrayal of systemic waste and abuse regarding the spare parts scandal, it placed pressure on Congress, which resulted in a defense freeze followed by several years of commercial item procurement law reform.⁷³² Further, early coverage of the Operation Illwind scandal led all to believe it was the worst procurement scandal in history, that something was inherently wrong with the DoD procurement system, and that all DoD procurement officials were dishonest and somehow involved.⁷³³ This led to extremely swift reform when the PIA was passed as well as multiple punishments over a number of years. Finally, negative press coverage of the Druyun scandal led the public to the conclusion that Druyun was a corrupt government official who had shown favoritism to Boeing and resulted in a historic prison sentence for Druyun, a prison sentence for Sears,

⁷³² See Rasor, *supra* note 59; see also Reidy, *supra* note 59.

⁷³³ See Marcus & Murphy, *supra* note 124, at A1; see also Engelberg, *supra* note 94, at 1; see also Mecham, *supra* note 159, at 24.

and a hefty fine for Boeing.⁷³⁴ As described above, the press spent the majority of its coverage emphasizing the improper and faulty actions of Druyun, Sears, and Boeing. Therefore, the framing analysis theory strongly supports Drohan's premise that for reform to occur, the public must believe there is a systemic problem that needs reforming to begin with.

VII. APPLICATION OF PRECEDING METHODOLOGIES AND ANALYSES TO PREDICT PROBABILITY OF REFORM ASSOCIATED WITH THE CONTRACTING WITH THE ENEMY SCANDAL

As noted, there is a strong correlation between the media coverage of procurement scandals and any subsequent reform when certain criteria are met. The following applies each of the above methodologies to the Contracting With the Enemy Scandal. It then compares and contrasts the findings of the current scandal with the analyses and findings of the preceding and historic DoD procurement scandals to predict the probability of reform in regards to the Contracting With the Enemy Scandal.

A. Drohan's Stages of Scandal as Applied to the Contracting With the Enemy Scandal

The Contracting With the Enemy scandal is still evolving and probably will continue to do so for some time. Therefore, in order to predict whether or not reform will result, it is necessary to determine what stage of Drohan's theory the present scandal is currently in, as well as how the media has depicted it to date.⁷³⁵ In the case of the present scandal, it entered the first stage well before news of the present scandal broke. In the weeks prior to Aram Roston's article being published, the public was cynical and anxious

⁷³⁴ See Dine, *supra* note 368, at 1; see also Cahlink, *supra* note 613; see also Hedgpeth, *supra* note 399, at D1.

⁷³⁵ See generally Drohan, *supra* note 13, at 15.

regarding the enormous amount of money being spent in Iraq and Afghanistan to employ “battlefield” contractors, often portrayed as greedy and unprincipled.⁷³⁶ Once Roston’s article was published, it revealed information that only stoked the public’s anxiety when it informed the public that U.S. taxpayers’ money was indirectly funding the very enemy responsible for killing American soldiers.⁷³⁷ As a result, Roston’s article increased public interest in the problem, encouraged additional media coverage, and exerted extreme pressure on the authorities to act.

After Roston’s article was published, and before stage two of the scandal had even occurred, Congress immediately intervened by ordering a congressional investigation into Roston’s claims. The focus stage of the scandal occurred when evidence uncovered through the investigation (that resulted in the “Warlord, Inc.” report)

⁷³⁶ Magazine articles released just prior to Aram Roston’s article (that launched the “Warlord, Inc.” Report), portrayed a vast amount of taxpayers’ dollars being spent to pay “battlefield contractors,” and depicted these contractors as immoral and unscrupulous. One article from August 2009, stated the U.S. employed nearly 240,000 battlefield contractors that collected \$100 billion of the \$830 billion defense budget. *See Wall Street Goes to War*, FORBES, Aug. 3, 2009, at 76. Another article of the same timeframe stated,

there seems to be no end to contractor abuse scandals in countries fighting terrorism or undergoing “nation-building” The culture of the “internationals,” whether contractors or functionaries is remarkably uniform. Beyond their usually minimal knowledge of local realities, traditions, and languages, they are often young and inexperienced or old and exhausted . . . some exhibit the cynicism of the professional mercenary. They are far from home and from any sense of restraint or accountability.

See Stephen Schwartz, *Contractors Gone Wild; A Trail of Misconduct From Kabul to Kosovo*, DAILY STANDARD, Oct. 11, 2009.

⁷³⁷ *See* Roston, *supra* note 419.

began leaking to the press.⁷³⁸ Interestingly, although Roston’s article attracted the immediate attention of Congress, the article itself attracted little media attention in the weeks after its publication, perhaps because of Congress’ immediate response. With the release of the “Warlord, Inc.” report, however, media coverage and public attention peaked.⁷³⁹

Similar to the spare parts scandals, the Contracting With the Enemy scandal has thus far, not gone through Drohan’s stage three of denial or evasion. Rather, as soon as Roston’s article was published, a congressional investigation was immediately ordered.⁷⁴⁰ In addition, perhaps in hopes of decreasing public outrage and indignation, after the investigation was completed and just a few days prior to the public release of the Warlord Inc. report, Congress announced the creation of TF 2010.⁷⁴¹ This announcement, combined with the release of the “Warlord, Inc.” Report, confirmed and validated, rather than denied, Roston’s allegations, leading to Drohan’s stage four.

Since reaching the validation stage, the Contracting With the Enemy scandal has consistently transited between stages five through seven, and not necessarily in chronological order. The definition stage of the scandal first began after TF 2010 was created when TF 2010 officials began briefing General Petraeus twice a week on issues

⁷³⁸ See Conason, *supra* note 428; see also Partlow, *supra* note 430, at B1; see also DeYoung, *supra* note 433, at A1.

⁷³⁹ See Lardner, *supra* note 448, at A5; see also Cahn, *supra* note 442; see also Stockman, *supra* note 449, at 3; see also Ackerman, *supra* note 449.

⁷⁴⁰ See Warlord Inc. Report, *supra* note 425, at iii.

⁷⁴¹ See Abi-Habib & Rosenberg, *supra* note 441.

and solutions raised by the corruption described in the “Warlord, Inc.” report.⁷⁴² From that time forward, the scandal evolved to a “pseudo” stage seven approximately one month later, when General Petraeus issued new contracting guidelines for DoD and NATO contracts.⁷⁴³ However, when the SASC released its report confirming that DoD employment of private security contractors in Afghanistan was indirectly financing enemy activity, the present scandal regressed back to Drohan’s stage five, as the new congressional report continued to further define the scandal.⁷⁴⁴

Over the past six to eight months, the Contracting With the Enemy scandal has progressed to the punishment stage, as multiple contractors have been debarred.⁷⁴⁵ However, since then, it has occupied several stages simultaneously. For example, while the debarments were occurring, it concurrently entered a “pseudo” seventh stage when legislation responding to the scandal was introduced in February 2011.⁷⁴⁶ At least a portion of the scandal currently remains in that stage as the legislation is working its way through Congress.⁷⁴⁷ Under Drohan’s theory, the development of legislation to address

⁷⁴² See Joshua Partlow, *Petraeus Takes On Afghan Corruption; Boosts Effort As Bribery Pervades*, BOSTON GLOBE, Jul. 30, 2010, at 4.

⁷⁴³ See DeYoung, *supra* note 487, at A1. The media reported Petraeus’ “reforms [would] have to serve as a stop-gap measure to rein in Afghan corruption” until official reforms could occur. *See id.*; see also Memorandum from General David Petraeus, *supra* note 460; see also Rubin, *supra* note 460, at A15; see also Reichmann, *supra* note 460; see also *NATO Issues New Guidelines for Afghanistan Contracts*, *supra* note 460; see also Ackerman, *supra* note 460.

⁷⁴⁴ See generally *Private Security Contractors Reports*, *supra* note 468.

⁷⁴⁵ See Vogt, *supra* note 494, at 13.

⁷⁴⁶ See *Ayotte Targets Contractors Aiding Taliban*, *supra* note 496, at 2.

⁷⁴⁷ See *id.*

the underlying causes of a scandal normally comprises the aftermath, or seventh stage.⁷⁴⁸ However, the current legislation, the No Contracting With the Enemy Act, does not address the underlying cause of the scandal, nor would its passage prevent future corruption from occurring.⁷⁴⁹ Its purpose is only to allow the DoD to more easily terminate contracts with contractors deemed to be enemies of the U.S. to ensure that any corruption that does occur is limited in scope.⁷⁵⁰ For this reason, the new legislation does not appear to have moved the scandal into a true stage seven yet, at least under Drohan's theory. Since the new legislation would result in a form of punishment to wrongdoers by allowing the DoD to terminate its contracts with them, if anything, the legislation seems to have moved the current scandal to a stage six of some type. However, at the same time, the recent *New York Times* series of articles describing the corruption and bribery payments surrounding the Gardez-Khost Highway⁷⁵¹ suggests that the present scandal is simultaneously occupying stage five, as the scandal continues to be defined. Therefore, it appears the current scandal is currently in both stages five and six.

B. Findings and Analysis: Sherman's Theory as Applied to the Contracting With the Enemy Scandal

If the amount of media coverage is any indication of how negatively charged the public's reaction has been in response to the Contracting With the Enemy scandal, it appears the public is much less "outraged" regarding the present scandal than it was over

⁷⁴⁸ See Drohan, *supra* note 13, at 19.

⁷⁴⁹ See *Ayotte Targets Contractors Aiding Taliban*, *supra* note 496, at 2; see also S. 341: 2011 No Contracting With the Enemy Act of 2011, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-341> (last visited Jun. 1, 2011).

⁷⁵⁰ See *id.*

⁷⁵¹ See Rubin & Risen, *supra* note 497, at A1.

the preceding three scandals. Events resulting from public pressure have resulted in several events including: 1) the congressional investigation that resulted in the “Warlord, Inc.” Report;⁷⁵² 2) the creation of TF 2010 and particularly, the public announcement of its creation prior to the release of the “Warlord, Inc.” report;⁷⁵³ 3) the release of General Petraeus’ new contracting guidelines in September 2010 to assist in preventing the indirect support of the Taliban and other enemies indirectly through DoD and NATO contracting activities;⁷⁵⁴ 4) the SASC investigation regarding the role and oversight of private security contractors;⁷⁵⁵ 5) the debarments of several Afghan contractors deemed to be corrupt and related to the congressional investigations;⁷⁵⁶ and 6) the introduction of the No Contracting With the Enemy legislation.⁷⁵⁷ Although the listed events are significant ones, the present scandal differs from preceding scandals in that the amount of negative press, including editorials, is significantly less as compared with the above-mentioned scandals. This may be due to the fact that Congress may have preempted a great deal of negative news coverage of Roston’s article by ordering a congressional investigation, that TF 2010 was created and announced prior to the public release of the inflammatory “Warlord, Inc.” report, and/or that General Petraeus announced his new

⁷⁵² See generally Warlord Inc. Report, *supra* note 425.

⁷⁵³ See Abi-Habib & Rosenberg, *supra* note 441.

⁷⁵⁴ See Memorandum from General David Petraeus, *supra* note 460; see also Rubin, *supra* note 460, at A15; see also Reichmann, *supra* note 460; see also Ackerman, *supra* note 460.

⁷⁵⁵ See generally Private Security Contractors Reports, *supra* note 468.

⁷⁵⁶ See Vogt, *supra* note 494, at 13.

⁷⁵⁷ See Ayotte Targets Contractors Aiding Taliban, *supra* note 496, at 2.

contracting guidelines prior to the release of the SASC's report on security contractors. Or, perhaps the public today is simply less shocked by DoD procurement scandals. Although the scandal has resulted in less coverage so far, the media attention of the scandal has already been sustained for a year and a half.

C. Findings and Analysis: The News Framing Analysis Theory as Applied to the Contracting With the Enemy Scandal

Although the present scandal has not yet finished evolving, thus far, the news media has portrayed the cause of the problem as split between the corruption prevalent in Afghanistan and the U.S. military's willingness to look the other way in order to accomplish short-term mission objectives more easily. For example, during the first several months of the scandal, the media blamed the corruption permeating the Afghan countryside as the cause of the indirect financing of the Taliban and other enemies occurring through contracting activities.⁷⁵⁸ In March 2010, this changed slightly as the media began placing at least a portion of the blame on the U.S. military for possessing a "willful blindness" in allowing the payments to continue in order to ensure timely or easier completion of the military's mission.⁷⁵⁹ This portrayal continued into late June 2010.⁷⁶⁰ For months afterwards, the media continued to emphasize the blame on the DoD, alleging the situation involving the HNT and Afghan security contractors was "unmonitored, wasteful, and dangerous."⁷⁶¹ By December 2010, the media was still projecting the root cause of the issue as a combination of corruption and military

⁷⁵⁸ See Partlow, *supra* note 430, at B1.

⁷⁵⁹ See DeYoung, *supra* note 433, at A1.

⁷⁶⁰ See Stockman, *supra* note 449, at 3.

⁷⁶¹ See Schwellenbach & Sebert, *supra* note 457, at A12.

negligence,⁷⁶² and this portrayal has remained constant to the present time.⁷⁶³ The events that occurred in response to congressional and public pressure as set forth in the above Sherman analysis suggest that TF 2010 was created, General Petraeus' contracting guidelines were implemented, and the "No Contracting With the Enemy" legislation was introduced in direct response to public and Congressional pressure.

D. Prediction Regarding Reform In Connection With the Contracting With the Enemy Scandal

As described above, Drohan's theory has its strengths and weaknesses when applied to DoD procurement scandals. Overall, its application suggests the way the media portrays a scandal will often, though not always, correlate to the stage the scandal will end in and whether or not it will lead to reform.⁷⁶⁴ Specifically, it appears that when the media describes the root cause of a scandal as being caused by specific individuals or organizations, Congress and the public will seek their prosecution.⁷⁶⁵ And, when the media portray an issue as being a systemic one, the public will often push for reformation. However, as noted above, the main problem with Drohan's theory is that procurement scandals often do not follow the stages of Drohan's theory chronologically and may even occupy more than one stage simultaneously, due to the constant new developments that seem to occur with procurement scandals. For this reason, it is often difficult to predict with complete accuracy which stage a current DoD procurement

⁷⁶² See Mulrine, *supra* note 486.

⁷⁶³ See Rubin & Risen, *supra* note 497, at A1.

⁷⁶⁴ See Drohan, *supra* note 13, at 18.

⁷⁶⁵ See Fairhall, *supra* note 21; see also *Boeing Denies Getting Insider Information on Airbus Tanker Bid*, *supra* note 258, at C1; see also G. Barker, *supra* note 109.

scandal will next transit or even end in unless it is clear all new developments have ceased.

For this reason, to predict whether reform will occur in the present scandal, the resultant analyses of the three historic DoD procurement scandals in relation to both Sherman's and the news framing analysis theories are helpful. The analyses under Sherman's theory show that for actual reform to take place, the public must react "with intense outrage and anger . . ." and must sustain that for a significant period of time.⁷⁶⁶ Further, under the news framing theory, the analyses show that how the media portrays events affects public opinion which may lead to reform if the media presents the problem as being due to a system or process-wide program, and if the coverage is negative or frequent enough to pressure officials to make significant changes to laws or regulations.

Similar to the spare parts and Darleen Druyun scandals, the Contracting With the Enemy scandal has already had several new developments since news of it broke. Similar to those two scandals, the Contracting With the Enemy scandal has not transited Drohan's stages in an orderly manner. The scandal is currently occupying two stages simultaneously while the No Contracting With the Enemy Act legislation makes its way through Congress, and as news regarding the Gardez-Khost Highway further defines the scandal. Although the current scandal has resulted in a fair amount of media coverage over about the past one and a half years, the public has not reacted as strongly or negatively as it did to the three historic DoD procurement scandals described above. Because the public's fury certainly seems less thus far in comparison with the other

⁷⁶⁶ See SHERMAN, *supra* note 628, at 60-61.

scandals, it is unclear whether there has been enough public outrage to result in actual reform to the law.

Further, as evidenced by the spare parts scandal and Operation Illwind scandals, when the media portrays the underlying cause of the scandal as being due to a faulty process rather than to individuals or organizations, it is more likely a scandal will result in reform. Here, the media has emphasized the problem is due to a combination of widespread corruption in Afghanistan and DoD military leaders willing to look past the bribery payments if it means the success of short-term mission objectives.⁷⁶⁷ Although these problems are grave and widespread, the corruption may not be the type of systemic problem new U.S. legislation can fix. As many journalists have described, the corruption problem in Afghanistan is complicated and extremely political.⁷⁶⁸ As a result, there are no easy answers, and it may be that the corruption can only be fixed by Afghanistan's leaders and people.

In contrast, the problem with DoD military officials showing "willful blindness" may be the kind of problem best remedied by revised internal processes if high-level military and U.S. leaders are willing to create an internal culture where bribery payments are not tolerated for any reason, and where military members and U.S. civilians who allow such extortion to persist are disciplined. For this to occur, however, there must be a paradigm shift by high-level U.S. Government and military leaders, who must accept that intolerance for corruption will have a price of its own and may lead to the increased loss of American lives, the delay or failure of mission objectives, and/or increased

⁷⁶⁷ See Rubin & Risen, *supra* note 497, at A1.

⁷⁶⁸ See Partlow, *supra* note 430, at B1.

tension in relations with Afghan leaders. For these reasons, it appears unlikely that true reform will take place. Rather, based on the historical precedent of the above DoD procurement scandals, it seems more likely that for the next few years, or as long as the U.S. military is in Afghanistan, the scandal will hover between stages four and six as new developments in the scandal occur, corrupt contractors are debarred or prosecuted, and Congress and the DoD attempts to implement new law or policy that will allow the DoD to minimize, but not eliminate, its risk regarding Afghan corruption and bribery payments.

VIII. CONCLUSION

As analyzed above, the three historic DoD procurement scandals including the spare parts, Operation Illwind, and Darleen Druyun scandals all met the criteria of newsworthy stories from their very beginning. All three of these scandals were current, negative, and involved an enormous amount of taxpayers' money. They included elements of human interest and also seemed to include, at least initially in some cases, a simple and easily understood set of facts. Each lasted a number of years, during which the American public was subjected to a constant stream of news regarding the scandals. In contrast, although the Contracting With the Enemy scandal took a little more time to initially get noticed, it too has proven itself a newsworthy scandal over time for the same reasons as the historic scandals.

The above analysis shows that although Drohan's theory of scandals is not perfect, it has several elements of accuracy which are supported by Sherman's study of scandal and reform as well as by the news framing analysis theory. This case study demonstrates that the way the media portrays a problem will impact whether or not it

rises to the level of a scandal and will impact the scandal throughout its various stages by impacting the public's personal reactions, opinions, and responses to the scandal. Above all, it shows that when the public's reactions to scandal are negative and strong, last long enough, and result in public pressure, such media coverage may indirectly lead to lasting reform of faulty processes.