

10-1-2004

Boeing 767 Tanker Boondoggle: How the Corporate-Sales-Pitch Procurement Regime Lost Its Parent and the U.S. Economy International Billions, The

Philip J. Sweitzer

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

Recommended Citation

Sweitzer, Philip J. (2004) "Boeing 767 Tanker Boondoggle: How the Corporate-Sales-Pitch Procurement Regime Lost Its Parent and the U.S. Economy International Billions, The," *Penn State International Law Review*: Vol. 23: No. 2, Article 6.
Available at: <http://elibrary.law.psu.edu/psilr/vol23/iss2/6>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

The Boeing 767 Tanker Boondoggle: How the Corporate-Sales-Pitch Procurement Regime Lost Its Parent and the U.S. Economy International Billions

Philip J. Sweitzer*

I. Introduction

Corruption has been said to inhere in the military arms/government contracting trade.¹ Even so, as military contract scandals go, the recent Boeing KC-767 tanker boondoggle has established some new parameters for abuse of public money and trust, revealing an extensive pattern of conflict-of-interest riddled mismanagement of government contract awards, the dimensions of which are still emerging.² In sum, both criminal and ethics investigations have concluded that Boeing received special treatment in the procurement process with the KC-767 deal, one this article will characterize as the “corporate sales pitch procurement regime.”³

* B.A., The Pennsylvania State University, 1976, J.D., The University of Baltimore School of Law, 2004. A former manager in the domestic and international airline industry, the author also functioned as a research assistant for Prof. Charles Tiefer, former Assistant Solicitor and Deputy General Counsel to the House of Representatives and an authority on government contract law, during his law school career. That juxtaposition of backgrounds tended to fuse and focus his interests on the current topic at hand.

The author acknowledges Prof. Tiefer’s learned guidance and mentoring in developing this article.

The author also acknowledges the patient assistance of his editor, Tiffany Richards.

1. ANTHONY SAMPSON, *THE ARMS BAZAAR: FROM LEBANON TO LOCKHEED* (Viking Press, 1977) (a complete historical monograph of the military armaments trade, in particular covering the 1976 Lockheed bribery scandal whose revelations rocked the governments of both the Netherlands and Japan. Sampson concludes that the international arms trade is largely a product of a “desperate” economic competition requiring official bribery and corruption for growth and support.)

2. Renae Merle and Jerry Markon, *Ex-Air Force Official Gets Prison Time*, WASH. POST, Oct. 2, 2004, at A1. According to the *Washington Post*, investigations continue to target Marvin R. Sambur, Assistant Secretary of the Air Force for Acquisitions.

3. *Id.*

Therefore, to fully explore what some scholars have called the “unique culture”⁴ of government military contracting in the context of aircraft procurement and how the politicized the atmosphere surrounding the corporate-sales-pitch procurement regime eventually played to Boeing’s detriment, the following discussion offers a brief history and contextual study in contrasts, juxtaposing Boeing’s struggling KC-767 tanker program against that of its main competitor, EADS.⁵

This historical overview of the politicized nature of the Boeing tanker proposal, and contrasting study of the EADS tanker—the MRTT—and the procurement process in the United Kingdom will establish: 1) the value of an openly competitive bidding regime in aircraft procurement generally developed along infrastructural “multi-use” lines, a regime the Department of Defense has already endorsed in the full-scale engineering and development context for fighter aircraft,⁶ and 2) why Boeing’s lack of foresight and candor about the transaction has already assured its loss of billions of international dollars to EADS’s infrastructural vision of adapting its commercial airframes to multiple tanker and transport roles.

II. Background: Crisis Management—Boeing’s Merger with Douglas, the World Market for Commercial Aircraft After September 11, 2001, and Boeing’s Failure in Head to Head Contract Competition with Lockheed

The production and procurement of both civil and military aircraft is a powerful international economic engine.⁷ That force, more focused with the consolidation of Boeing and McDonnell-Douglas into a single corporate entity, made Boeing the world’s largest producer of both civil

4. CHARLES TIEFER & WILLIAM A. SHOOK, *GOVERNMENT CONTRACT LAW* 4 (Carolina Academic Press, 1999).

5. EADS is currently engaged in an aggressive sales campaign against Boeing to market its MRTT (Multi-Role Tanker Transport) Airbus Industrie-airframe tanker derivatives to the world’s military market, in two configurations: one retrofitted on the A310-300 fuselage, and the other retrofitted on the A330-200 fuselage. See European Aeronautic Defence and Space Company, Press Releases, available at <http://www.eads.com/frame/lang/en/1024/xml/content/OF00000000400004/6/03/31000036.html> (last visited Sept. 29, 2004).

6. See Tom Ramstack, *Boeing Demonstrates Airplane in Competition for Military Contract*, THE WASHINGTON TIMES, July 20, 2001.

7. By some accounts, aviation production is the largest single export industry in the world, affecting up to eighty percent of the United States’ economy alone. See David Cantor, AIRCRAFT PRODUCTION AND THE UNITED STATES ECONOMY, in STAFF OF HOUSE SUBCOMMITTEE ON TECHNOLOGY AND TRADE, 102nd Cong., AIRBUS INDUSTRIE: AN ECONOMIC AND TRADE PERSPECTIVE 45 (1992). See also Daniel I. Fisher, “*Super Jumbo*” Problem: Boeing, Airbus and the Battle for the Geopolitical Future, 35 VAND. J. TRANSNAT’L. L. 865 (2002).

and military aircraft.⁸ Boeing's acquisition of McDonnell was initially fortuitous: not only did it come on the heels of adoption of the Uruguay Round GATT accord, an agreement that left the question of governmental subsidies for domestic civil aircraft production largely untouched,⁹ it also presaged exponential growth of passenger traffic and further consolidation in both the domestic and international airline industry.¹⁰ In August 1997, when Boeing subsumed McDonnell-Douglas into its operations, it had a huge backlog of orders for commercial aircraft from booming domestic and international operators.¹¹

A. September 11th Precipitated a Drop-Off in Commercial Orders through Contract Rescission and Bankruptcy Filings

The tragedy of September 11, 2001, however, changed the boom to a bust, leading to a complete collapse of the civil air transport market.¹² Other than at low-cost, short-haul niche carriers like Southwest and Jet Blue, one hundred thousand airline employees lost their jobs as one

8. Boeing and former competitor McDonnell-Douglas agreed to merge into a single company, called the Boeing Company, on December 15, 1996. At roughly the same time, but in a separate transaction, Boeing also acquired much of Rockwell International's aerospace and military contracting business. These two transactions helped to ensure Boeing's preeminence in a global market in which its interests seem much more directly adverse to those of European rival Airbus Industrie than ever before. Patrick McGeehan, *Succession Planning Takes a Back Seat in Turbulent Times*, N.Y. TIMES, Dec. 2, 2003, at C1 (detailing the career of Boeing CEO Philip Condit, under whose helm Boeing acquired McDonnell and completed the acquisition in August, 1997). See Fisher, *supra* note 7.

9. See generally Fisher, *supra* note 7, for an extensive discussion of the contentious nature of the GATT negotiations around the question of domestic subsidies for civil aircraft manufacture, research and development, and a complete history and development of GATT's impact on the competition between Boeing and Airbus Industrie in the development of the next-generation, super-jumbo jet in particular.

10. *Travel Set to Break Records in the Summer of 1998*, TRAVEL AGENT, June 1, 1998, at 92 (referring in particular to the airlines' "blockbuster" summer of 1997 and the prospects for even higher bookings in the summer of 1998).

11. Peter Robison, *New Bottom Line: Retirement; Tough Exec Harry Stonecipher Retires Today as Boeing's No. 2*, THE SEATTLE TIMES, June 1, 2002, at C1. Stonecipher, the former McDonnell Douglas CEO, arguably saved Boeing from post-merger disaster by tough financial stewardship, "cleaning up" the backlog mess that cost Boeing nearly \$3 billion in production costs and charges; see also James Wallace, *Boeing Threatened in Congress Pleas for More Contracts, East Coast Layoffs Prompt a Vow to Ban Company Lobbyists from Capitol Hill*, SEATTLE POST-INTELLIGENCER, Dec. 14, 2001, at E1 (discussing Boeing's backlog of orders for the MD-95—the stretched and redesigned DC-9 Boeing rechristened the 717—it inherited from McDonnell Douglas, still an issue after the collapse of the civil aviation industry precipitated by the events of September 11, 2001).

12. See Jackie Thompson, *Beneath the Turmoil*, AIRLINE BUSINESS, Dec. 2001, at 99 (arguing that air transport after the events of September 11, 2001, descended into a "state of near anarchy" where strategic management decisions were supplanted by "the need to respond to a chain of uncontrollable and unpredictable events").

major U.S. air carrier after another contemplated the spectra of bankruptcy protection.¹³ The calamitous crash of the civil air transport market washed across the entire world economy, particularly those sectors either related or tangential to travel,¹⁴ and Boeing's house inevitably fell with it. With the exception of the 717 program, production backlogs suddenly vanished as air carriers sought bankruptcy protection to extricate themselves from binding aircraft lease and purchase agreements.¹⁵

In the wake of the post-9/11 depression in the airline and travel industries, predictably, the commercial aircraft production line was the next domino to fall, as airliners were retired in record numbers to storage facilities in the Mojave and Sonora deserts.¹⁶ Having assimilated its major U.S. competitor, with double its pre-McDonnell-Douglas-merger production capacity, the world surplus in commercial jets and the paucity of airline customers lining up to buy its product coalesced into a stark and sobering crisis for behemoth Boeing: it needed a new customer for its commercial airplanes, and a customer flush with cash at that.¹⁷ Thus, to bolster its sagging commercial airplane sales, it determined to approach the United States military with its own government procurement regime: the corporate sales pitch.¹⁸

13. *E.g.*, Scott Bernard Nelson, *U.S. Airways Warns it May File Chapter 11*, BOSTON GLOBE, May 11, 2002, at C1; *The JOL—Fourth Year in the Limelight*, ASSET FINANCE INTERNATIONAL, May 1, 2002, at 11 (detailing the unfavorable climate for the Japan Operating Lease in airline lease agreements, specifically after the bankruptcies of Sabena and Swissair following the September 11, 2001, attacks).

14. George Hager and Tom Fogarty, *Economy Fights Hard to Bounce Back*, USA TODAY, Oct. 25, 2001 at 3B.

15. *Swissair Seeks Protection from Creditors*, AIRLINE INDUSTRY INFORMATION, Oct. 2, 2001 (detailing cancellation of aircraft purchase and lease agreements); *Air Europa and Iberia End Aircraft Dispute*, AIRLINE INDUSTRY INFORMATION, Mar. 22, 2002 (detailing dispute over return of rented aircraft with Iberia's decision to cut capacity by 11% in the wake of the attacks); *US Airways Allowed to End More Leases*, AIRLINE INDUSTRY INFORMATION, Oct. 4, 2002 (detailing bankruptcy trustee's permission to end over 150 aircraft and engine leasing agreements).

16. Joe Sharkey, *Air Traffic Increases Despite Stored Planes*, N.Y. TIMES, Feb. 3, 2004, at C5 (detailing the storage of some 1,610 commercial airliners in the Sonoran and Mojave deserts, nearly a third of which were wide-bodied aircraft, in December, 2002).

17. See CBS Marketwatch, *Boeing Quarterly Profits Nearly Double*, (Oct. 14, 1999) (detailing Boeing's first money-losing year—1997—in fifty after the McDonnell-Douglas merger and its need to "streamline" its workforce and improve efficiency).

18. Robison, *supra* note 11. See also Wallace, *supra* note 11; Rick Anderson, *Boeing's War*, SEATTLE WEEKLY, Oct. 11, 2001, at 11.

B. Another Setback for Boeing: Losing the Largest Military Fighter Jet Contract in History to Competitor Lockheed-Martin

Boeing, known primarily for its mark on the evolution of airliners,¹⁹ was no stranger to military contracting. To the contrary, Boeing's post-9/11 desperation for military contract money was also a direct consequence of its failure to win the most lucrative military jet-building contract in history—a contract it lost in a head-to-head competition with one of its only two remaining major rivals: Lockheed-Martin.²⁰ The competition began in March of 1996, with requests for proposals issued to the prospective contractors and subsequent “concept demonstration phase” awards issued in November of 1996.²¹ In November of 2001, the final full-scale engineering and development production contract was awarded to Lockheed-Martin.²² Losing the contract left Boeing reeling, scrambling for other defense-related work.²³

C. Boeing Aggressively and Illegally Pursued a Noncompetitive Government Contract Deal to Cross-Pollinate its Commercial Airplane Business with Military Contracting Dollars: To Recover, It Aimed to Retrofit and Adapt Commercial 767s for Use as Tanker

19. See PBS Home, *Chasing the Sun: The Boeing 707*, available at <http://www.pbs.org/kcet/chasingthesun/planes/707.html> (last visited Sept. 28, 2004).

20. Boeing and Lockheed went head to head in a competition for the lucrative full-scale engineering and development (FSED) “Joint Strike Fighter” contract, a competition sponsored by the Department of Defense. See Tom Ramstack, *Boeing Demonstrates Airplane in Competition for Military Contract*, THE WASHINGTON TIMES, July 20, 2001. By some estimates, the value of the contract was at least \$200 billion, with much more in revenue likely to flow to the successful bidder from sales to foreign governments. *Id.* The Department of Defense’s goal in the competition was to develop a unitary design that would simplify deployments and lower costs—in both the development and production phases of the procurement process and in the operational phase after procurement—providing design commonalities across all three service branches. See Joint Strike Fighter Home, available at <http://www.jsf.mil> (last visited Sept. 28, 2004). Primarily, the program was conceived to address the aged distress of America’s military aircraft fleet—ostensibly to replace such well-worn standouts as the Harrier, A-10 Wart Hog, F-14 Tomcat, F-16 Fighting Falcon and F/A-18 Hornet—as inexpensively as possible. See Ramstack, *supra*.

21. *Id.*

22. See Joint Strike Fighter, Program Management and Milestones, *supra* note 20.

23. See Alan Bjerga, *War Helps and Hurts: Boeing’s Case for Fuel Tankers*, WICHITA EAGLE, Apr. 16, 2003 (Boeing’s loss of the Joint Strike Force contract to Lockheed made selling the KC-767 tanker deal to Congress a “higher military priority.”) See also Rick Anderson, *Boeing’s War*, SEATTLE WEEKLY, Oct. 11, 2001, at 11 (on Boeing’s strategy after loss of the JSF contract to press for sales of its F/A-18 Hornet (a McDonnell-Douglas design) to both the United States military for use in the Afghanistan theatre, and to the government of China); Sampson, *supra* note 1.

*Aircraft.*²⁴

To recover from “nosediving” commercial aircraft sales,²⁵ Boeing developed a strategy to sell a large number of civil commercial aircraft to the government as military aircraft: adapt the civil commercial 767 airframe to military use as a flying tanker.²⁶ Boeing’s popular 767, a mid-size, two-aisle, wide-bodied commercial airplane configured in several fuselage types (the -200ER, -300ER, and -400ER—extended range with auxiliary fuel tanks—and freighter based on the -300ER fuselage type), seemed particularly well suited to the requirements of the job.²⁷ Among its several strengths were proven reliability, ideal range/payload capacity, fuel efficiency and Boeing’s proven tanker development and production expertise.²⁸ Additionally, Boeing’s tanker product, the KC-135, retrofitted on the 707 airframe, is already in wide U.S. military use.²⁹ As such, Boeing already had an established track

24. In a report released March 29, 2004, Department of Defense Inspector General Joseph Schmitz identified five statutory provisions that were not satisfied in the acquisition process. Office of the Inspector General for the Department of Defense, Rpt. No. D 2004-064, Acquisition of the Boeing KC767A Tanker Aircraft (U.S. Gov’t Printing Office, Mar. 29, 2004). First, he was critical of the appropriations legislation itself—adopted as Pub. L. No. 107-117, 115 Stat. 2230 § 8159 (2001) (codified as amended in scattered sections of the U.S.C.)—that authorized the leasing arrangement to acquire the tankers, finding that it was not a “disciplined procurement strategy.” Second, he expressed concerns about the “commercial” nature of the acquisition, creating cost-oversight opacity. Specifically, because the KC-767A is an adapted commercial—rather than military—aircraft, Boeing was exempt from certain pricing disclosures under the Federal Acquisition Reform Act (FARA) of 1996, Pub. L. No. 104-106, 110 Stat. 678 (1996) (codified as amended in scattered sections of the U.S.C.). For a discussion of pricing information exemptions for commercial products available under FARA and the evolution of FARA in relation to both the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-155, 108 Stat. 1994 (1994) (codified as amended in scattered sections of the U.S.C.), and the Truth in Negotiation Act (TINA), 10 U.S.C. § 2306, see generally, Charles Tiefer and Ron Stroman, *Congressional Intent and Commercial Products* 32 PROCUREMENT LAW. 22 (1997). Inspector General Schmitz’ report, ultimately, found that the KC-767 did not meet the statutory definition of a “commercial” aircraft, because no real commercial market for the item “exists to establish reasonable prices by the forces of supply and demand.” Office of the Inspector General for the Department of Defense, *supra*.

25. *How a Hometown Jobs Plan Led to a Big Time Scandal*, USA TODAY, Dec. 17, 2003, at 23A (using the term “nosedive” to describe Boeing’s finances in the wake of the events of September 11, 2001).

26. Bjerga, *supra* note 23.

27. See Paul Guse, *767 Tanker Transport: The Latest from the Greatest*, 8 BOEING NEWS, Mar. 8-21, 2002, available at <http://www.boeing.com/commercial/767family/pdf/767tanker.pdf> (last visited Mar. 13, 2004).

28. *Id.*

29. See *id.* The KC-135 is a modified 707 airframe, a design dating from the 1950s. The RC-135 is also a modified 707 designed for reconnaissance missions. The KC-767 program, in fact, was specifically marketed to the U.S. Air Force to address the issue of the aging KC-135 tanker fleet.

record with the U.S. military, viewed as the contractor of choice for specifically this sort of work.

1. Retrofitting Commercial Aircraft for Military Use as Tankers Served Dual Boeing Purposes

Retrofitting civil commercial airliners to adapt them for military use served two principal Boeing objectives: first, it propped up Boeing's sagging commercial aircraft sales;³⁰ second, in the process, Boeing could circumvent price accountability.³¹

As to the first of these dual objectives, Boeing's intention in pursuing the KC-767A contract was to supplement its commercial revenues with military contract revenues.³² According to media accounts, Boeing is currently dependent on military contracting for more than half of its corporate revenues specifically because of the decline in the production of civil transport aircraft.³³ To make matters worse, from 2002 until 2003, Boeing was bleeding money from payment delinquencies on aircraft it had already sold and financed to airline customers.³⁴

As to the second goal, price opacity, not only did this meet Boeing's objectives, it also met certain political goals.³⁵ Seen as a way to turn powerful defense dollars into job growth and political hay, the deal also had the imprimatur and blessing of key Congressional leadership as well as the White House.³⁶ The lack of clarity on the cost of building and retrofitting the tankers most clearly served Boeing's interests, making it

30. See *How a Hometown Jobs Plan Led to Big-Time Scandal*, *supra* note 25.

31. Office of the Inspector General for the Department of Defense, *supra* note 24.

32. See Tony Capaccio, *Pentagon: 'No Reason' to Scrap Boeing Tanker Plan*, CHICAGO SUN-TIMES, Mar. 16, 2004, at 55 (Boeing "dependent on military contracts for more than half its revenue as *commercial aircraft sales have slumped*") (emphasis added).

33. *Id.*

34. *Briefs*, 21 AIRLINE FINANCIAL NEWS, Aug. 18, 2003, at 32 (Twenty-three percent of Boeing Capital's \$1.76 billion in receivables were at least ninety days delinquent in the first half of 2003.).

35. See Mark S. Mellman, *Bush Losing Credibility*, THE HILL, Mar. 17, 2004, at 23 (comparing the Bush Administration's projections on job growth to its extrapolation that the U.S. military would find weapons of mass destruction in Iraq). See also Joseph L. Galloway, *Air Force Allowed Boeing to Rewrite Terms of Tanker Contract, Documents Show*, KNIGHT RIDDER NEWSPAPERS, available at <http://www.realcities.com/mld/kwashington/8293531.htm> (last visited Mar. 28, 2004) (detailing White House Chief of Staff Andrew Card's direct involvement in brokering and mediating the Boeing tanker deal, with documents and emails showing that Card's primary interest was how many jobs it would create).

36. See Jill Zuckman, *GOP's Go-To Leader on Capitol Hill: Hastert Resolves Conflicts on Bill Such as Medicare Drug Plan*, THE CHICAGO TRIBUNE, Nov. 21, 2003, at C8 (detailing Hastert's involvement in keeping the Boeing deal alive).

possible for Boeing to charge the government much more than it would in a closely cost-scrutinized commercial sale.³⁷ In addition, flaccid price accountability standards met the politicians' interests in providing what served as a hidden government subsidy to Boeing,³⁸ aimed to save and foster job growth.³⁹ While creating and preserving American jobs are laudable goals, the lack of candor about the transaction and the way in which Boeing repositioned itself to influence congressional decision-makers was telling.

2. Boeing Used Whatever Means Necessary to Close the Deal

To cement relationships and win the military contracting money it needed, Boeing determined to do whatever it took, even if that meant abandoning its strong historical and cultural relationships with the Pacific Northwest, specifically the greater Seattle/Tacoma/Everett metropolitan area.⁴⁰ Boeing's longstanding connection to Seattle is the stuff of corporate legend: "Sea-Tac"⁴¹ and Boeing are virtually two sides of the same aviation coin;⁴² its corporate association with Seattle was as integral to Boeing's brand as the trade name "767."⁴³

However, largely predicated on repositioning itself from its primary commercial aircraft business to focus on government contracting work, Boeing announced in 2001 that it was relocating its corporate headquarters. The Seattle business community was stunned.⁴⁴ Boeing

37. Office of the Inspector General for the Department of Defense, *supra* note 24.

38. See Alex Taylor III, *Lord of the Air: What's Left for Airbus after Overtaking Boeing in the Commercial Aircraft Market?*, FORTUNE, Nov. 10, 2003, at 144 (comparing Boeing's "steady supply of treats from Washington such as a controversial \$21 billion air tanker deal" to Airbus's direct government subsidies from EU member countries); see also Robert J. Samuelson, *The Bad News from Boeing*, NEWSWEEK, June 30, 2003, at 38 (comparing the 767 tanker deal to a "disguised [corporate] rescue.")

39. Galloway, *supra* note 35.

40. William E. Boeing founded the Boeing company in the Seattle/Puget Sound area in 1916. Originally incorporated as the Pacific Aero Products Company, the corporation's very identity reflected its commitment to the Pacific Northwest. Boeing Company History, available at <http://www.boeing.com/history/boeing/> (last visited Sept. 28, 2004).

41. Aviation parlance for the Seattle-Tacoma Airport.

42. See Todd Bishop, *Boeing Through and Through: Condit's Career Begins and Ends With Company*, SEATTLE POST-INTELLIGENCER, Dec. 2, 2003, at A8 (considering the corporation's move to Chicago and Condit's retirement as the "last nail in the coffin of the company's connection to Seattle.")

43. See, e.g., Boeing, *Commercial Airplanes Gallery*, available at <http://www.boeing.com/companyoffices/gallery/images/commercial/767400-02.html> (last visited Mar. 31, 2004); Steven Dunphy, *140,000 Puget Sound-Area Workers Depend on Boeing for their Jobs Directly or Indirectly. What happens if Boeing Decides to Build its Airplanes Somewhere Else?*, SEATTLE TIMES (Oct. 26, 2003) (commenting that, historically, Boeing and Seattle have been "joined at the hip").

44. Bishop, *supra* note 42

downplayed the move, pledging to keep the bulk of its commercial aircraft operation in Seattle.⁴⁵

Despite its promises to Washington state and Seattle civic leaders, Boeing moved to exploit and strengthen politically significant relationships. More specifically, Boeing understood that it would need to both influence the Congressional leadership and, more important, secure White House backing for any appropriations legislation in order to ensure the deal was foolproof.⁴⁶

a. It Relocated its Corporate Headquarters to Chicago to Garner Political Influence

Thus, roughly concurrent with Boeing's decision to "float" the tanker deal concept to Congress as a much smaller package—in the spring of 2001—it announced it was considering relocating its corporate headquarters to Dallas, Denver, or Chicago.⁴⁷ The fact that the Speaker of the House, Dennis Hastert, and Representatives Blagojevich, Evans, and Kirk—all of Illinois and all on the House of Representatives Armed Services Committee⁴⁸—had direct links not only to Chicago but also to the military contracts selection process, was not lost on many.⁴⁹ Boeing

45. Boeing Company History, *supra* note 40. Some, however, have suggested that Boeing intends to withdraw from the commercial airplane business altogether to focus on military contracting, like competitor Lockheed-Martin. DAVID PRITCHARD & ALAN MACPHERSON, *THE TRADE AND EMPLOYMENT IMPLICATIONS OF A NEW AIRCRAFT LAUNCH: THE CASE OF THE BOEING 7E7* (Canada-United States Trade Center, State University of New York, Buffalo, New York 2003), available at <http://www.geog.buffalo.edu/custac/7e7%20University%20at%20Buffalo.pdf> (last visited Mar. 28, 2004).

46. Stephen J. Hedges, *Hardball Tactics Backfire on Boeing: Military Tanker Deal Brings Probes*, CHI. TRIB., Jan. 26, 2004, at 1, available at 2004 WL 65046314. According to the Chicago Tribune, Boeing—in a display of political bravado—went over OMB Director Mitch Daniel's head because he expressed misgivings that the tanker deal violated government accounting standards. Boeing went straight to the White House and arranged a series of meetings with key White House and Congressional leadership—including the President, Chief of Staff to the President Andrew Card, and Speaker of the House Dennis Hastert (a resident of the Chicago suburbs)—to push the deal through by May, 2003. *Id.*

47. Susan Chandler, *Deal Trims Boeing's Payoff*, Clout, CHI. TRIB., Nov. 7, 2003, at C1 (detailing inception of the tanker proposal and the financing proposal to pay for the leases by "floating" a bond issue); John Schmeltzer, *Hewing to New Course*, CHI. TRIB., Sept. 2, 2001 (detailing the date and time of the move to Chicago, Condit's plans for expansion of Boeing's core businesses, and the "bright spot" represented by military contracting).

48. National Defense Authorization Act for Fiscal Year 2003: Hearing on H.R. and Oversight of Previously Authorized Programs Before the Comm. On Armed Services H.R., 107th Cong. 33 (2002) (statement of James G. Roche, Secretary, United States Air Force) (at which the Illinois contingent is in full attendance).

49. Katherine Pflieger, *Illinois Friend in High Places Helped Pilot Boeing-Air Force Deal*, THE SEATTLE TIMES, Nov. 13, 2003, at A1.

eventually announced its intention to move to Chicago to position itself closer to “global financial markets” with “easy access to major Boeing operations and customers.”⁵⁰

b. Boeing Circumvented Procurement Law by Structuring the Tanker Deal as a Leasing Arrangement that Did Not Meet the Executive Branch’s Own Budgetary Guidelines.

To further obfuscate the inflated, final cost of the 767-tanker contract deal to the American taxpayer, Boeing structured it as a lease to achieve an “end run” around the standard Congressional budget and procurement process.⁵¹ In the Inspector General’s own language:

[T]he Air Force used Section 8159 of the Department of Defense Appropriations Act for FY 2002 to justify its *informal acquisition strategy*, the focus and goal of which was to expeditiously lease 100 Boeing 767A tanker aircraft *without regard to best business practices, prudent acquisition procedures*, and compliance with statutory requirements for testing.⁵²

Specifically, the lease did not meet three of the six specific requirements established by the Office of Management and Budget for capital operating leases.⁵³ More troubling still, during the investigation of the

50. *Id.* The major customer Boeing sought to woo—the United States military—by “repositioning” its corporate headquarters within Hastert’s particular sphere of influence—greater Chicago—also did not go unnoticed.

51. 149 CONG. REC. S. 14261-62 (floor speech of Senator John McCain addressing the topic of “Congressional pork,” in which he expresses concern that the lease proposal, as originally conceived and presented to the Air Force—specifically to avoid the procedural check of the standard Pentagon budget process, the Secretary of Defense, and OMB—would “defer the payment burden to someone else at some unspecified point in the future”).

52. Office of the Inspector General for the Department of Defense, *supra* note 24 (emphasis added). With respect to the lease agreement itself, the IG determined that the proposed lease agreement did not conform to the requirements of OMB Circular No. A-11. See Executive Office of the President of the United States, Office of Management and Budget, Circular No. A-11, Preparation, Submission and Execution of the Budget, (Appendix B—Scoring Lease-Purchases and Leases of Capital Assets) (July 2003) at 633. The specific testing requirement mandated by 10 U.S.C. § 2366 (2003) and 10 U.S.C. § 2399 (2003) to ensure the tanker fleet was “operationally effective, suitable and survivable” prior to the commencement of large-scale production, was also cited as a specific omission.

53. Those requirements are: 1) ownership of the asset remains with the lessor during the term of the lease and is not transferred to the Government at or shortly after the end of the lease term; 2) the lease does not contain a bargain-price purchase option; 3) the lease term does not exceed 75 percent of the estimated economic life of the asset; 4) the present value of the minimum lease payments over the life of the lease does not exceed 90 percent of the fair market value of the asset at the beginning of the lease term; 5) the asset is a general purpose asset rather than being for a special purpose of the Government and is not built to the unique specification of the Government as lessee; 6) there is a private

tanker procurement process that was eventually ordered by Secretary of Defense Donald H. Rumsfeld on December 17, 2003, conflicts of interest between Boeing officials and former Deputy Air Force Assistant Secretary for Acquisition and Management, Darlene Druyun, then a Boeing Vice-President, were brought to light.

3. A Scandal Erupted, Ending the Tenure of CFO John Sears, CEO Phil Condit, and Subjecting Former Pentagon Staffer and Boeing Executive Darlene Druyun to Criminal Prosecution for Conspiracy to Defraud the United States

Specifically, Ms. Druyun was accused and eventually convicted of conspiring to defraud the United States by using her daughter, Heather McKee, to conduct pre-employment discussions with Boeing Chief Financial Officer Michael Sears while she was administering the proposed tanker contract.⁵⁴ Eventually, Ms. Druyun recused herself from all Boeing contract procurement decision-making just 10 days prior to her mid-November 2002 retirement.⁵⁵ However, her recusal did not precede the investigation that revealed she had already largely orchestrated much of the 767 tanker lease program while Boeing was actively recruiting her to assume an influential position as a Vice President of its Missile Defense Systems division.⁵⁶ Boeing fired her and CFO Michael Sears in November 2003, citing ethics violations.⁵⁷ She eventually pled guilty to the conspiracy charge.⁵⁸

sector market for the asset. Executive Office of the President, OMB Circular No. A-11 *supra* note 52, at 638.

54. See Susan Chandler, *Boeing Fires Pair in Ethics Investigation*, CHI. TRIB., Nov. 25, 2003, at C1.

55. *Id.*

56. *Id.*

57. *Id.*

58. *United States v. Druyun*, No. 04-CR-150-ALL (E.D. Va., filed Apr. 6, 2004) (plea agreement to charges brought under 18 U.S.C. § 371, entered April 20, 2004, with sentencing scheduled for August 6, 2004); Merle and Markon, *supra* note 2 (detailing imposition of sentence on October 1, 2004, with the Honorable T.S. Ellis, III imposing nine months of incarceration in a federal Bureau of Prisons facility). See also Office of Inspector General for the Department of Defense, *supra* note 24. There were also allegations in media reports that Druyun had violated the Procurement Integrity Act, 41 U.S.C. § 423 (2004) by divulging valuable source selection information or competing contractor bid information, specifically competing price information submitted by Airbus' military contracting arm, EADS (European Aeronautic Defence and Space Company) and competing information from Lockheed-Martin on a pending rocket contract. She eventually admitted this at her sentencing allocution. Merle, *supra* note 2. Cynthia Wilson, *Pentagon Investigates Fired Boeing Worker*, ST. LOUIS POST-DISPATCH, Nov. 26, 2003, at A1. Later, these suspicions were confirmed, with EADS, Lockheed and BAE threatening to sue. Renae Merle, *Boeing Competitors Protest*, THE WASHINGTON POST, (October 13, 2004) at E 03.

Once the scandal broke, Senator John McCain became a particularly vociferous critic of the tanker contract proposal considering it largely a “bailout” for Boeing.⁵⁹ Further movement on the 767 proposal came to a screeching halt.⁶⁰

II. A Study in Contrasts: The Former Regime in U.S. Production and Procurement of Military Aircraft

The Boeing 767 tanker scandal underscores the basic premise of Anthony Sampson’s definitive 1970s expose of the military arms trade: it is susceptible to “desperate” competition that often depends entirely upon politically corrupt processes rather than a rational scheme for support.⁶¹ In the face of such obviously corrupt processes and Boeing’s protestations of corporate innocence despite incontrovertible evidence to the contrary,⁶² the continued political will of major congressional sponsors and the Air Force to get the Boeing tanker deal funded seems all the more remarkable.⁶³

The Boeing tanker procurement regime—a throwback to the past—is not so much an organized regimen as an orchestrated and politicized study in crisis management, revolving primarily around contractor sales needs, veneered with the laudable, if somewhat implausible, political goals of economic growth and full employment. Stated in the alternative, when procurement is primarily driven by political and corporate interests, the process devolves.⁶⁴ Given the complexity and

59. 148 Cong. Rec. S.7710 (July 31, 2002).

60. John Tirpak, *Tanker Twilight Zone*, 48 Air Force Magazine (Feb. 2004); Merle and Markon, *supra* note 2.

61. Sampson, *supra* note 1.

62. Merle and Markon, *supra* note 2 (detailing a pending guilty plea by Boeing CFO John Sears).

63. Office of the Inspector General for the Department of Defense, *supra* note 24. Inspector General Schmitz concluded, for instance, that the Operational Requirements Document (ORD) had been “tailored”—not to operational requirements for “interoperability” as required—but to Boeing’s requirements. Media reports have suggested that at the June 7, 2002, meeting of the Pentagon’s Joint Requirements Oversight Council, at which the ORD was reviewed, a direct question about whether the tanker proposal had been “tailored” to Boeing’s requirements was answered in the negative. That answer was allegedly a lie, giving rise to other allegations of impropriety within the Air Force. Joseph Galloway & Alan Bjerga, *Pentagon Report Indicates Boeing Investigations Have Widened*, KNIGHT RIDDER NEWS SERVICE, Mar. 31, 2004. The Joint Oversight Requirements Council, moreover, is a relatively recent statutory development, implemented with passage of the National Defense Authorization Act for FY 1996, Pub. L. 104-106, 110 Stat. 104, codified at 10 U.S.C. § 181 (2003). As the Boeing tanker contract process has thus far demonstrated, contractor “insiders” have little difficulty circumventing the statutory requirement. More specifically, Druyun explicitly acknowledged inflating pricing on the tanker proposal as a parting “gift” to her new employer Boeing, during her sentencing allocution. Merle and Markon, *supra* note 2.

64. *Id.* The current process involving the bidding for the 767-tanker contract,

cost associated with developing tactical and commercial aircraft for the specialized uses of the military, advocates as persuasive as Senator John McCain have argued that the United States no longer has the fiscal luxury to artificially support an uncompetitive contractor with “political pork.”⁶⁵ More pointedly, many in the aviation business community suggest that Boeing’s appetite for acquiring rivals and its short-term bottom line orientation led to its own eventual undoing. This, in turn, led to the need to orchestrate the 767-tanker deal, even further delegitimizing the fat government lease payments Boeing may yet win.⁶⁶

A. Purpose-Specific Fleet Planning—Aircraft-Specific Fleet Procurement

The impulse to protect American industry and jobs is a natural—even admirable—political aspiration. But the current aviation procurement regime at work in such schemes as the Boeing 767 tanker deal did not start with job growth or creation as its impetus; the starting point, instead, has been the promotion of a product-specific corporate goal, couched in the corporate sales pitch and insider influence.⁶⁷

however, is hardly anything new. Similar charges were lodged against military aviation contractors in the Reagan administration—for instance—with the award of a transport contract to McDonnell Douglas to produce C-17 aircraft. The Administration, which wanted Lockheed—a California-based company—to get the contract for its C-5B, essentially ignored the Air Force’s original recommendation that McDonnell-Douglas—based in St. Louis—get the Pentagon’s nod. Congress overrode the Executive, however, with powerful Senator Henry Jackson of Washington leading the charge to retrofit and adapt Seattle-based Boeing’s 747 airframe. Eventually, Lockheed’s conflict-of-interest laden lobbying of Air Force personnel and an ensuing public scandal sabotaged its own promotion efforts, and McDonnell-Douglas’ C-17 assembly line was saved. See *American Defence Contracts: Transports of Hate*, THE ECONOMIST, July 10, 1982, at 63. See also, Glenn R. Pascall, *Boeing’s Real Issues Are Just Beneath the Surface*, SEATTLE BUSINESS JOURNAL, Dec. 5, 2003 (calling the award of the C-17 contract to Douglas “pure politics” when the 747 adaptation was clearly the superior design).

65. The question of how appropriations and spending decisions are made and how the current system for appropriating funds evolved is, of course, an enormously complex consideration unto itself, completely beyond the scope of this limited discussion. See Tiefer, *supra* note 4, at 124-131 (for a concise outline and description of the appropriations and funding processes). See generally GOVERNMENT CONTRACT LAW: THE DESKBOOK FOR PROCUREMENT PROFESSIONALS (American Bar Association, Section on Public Contract Law 1999).

66. Pascall, *supra* note 69 (arguing that Boeing is a company “scrambling to find its way” since the McDonnell Douglas merger with no “strategic foresight”).

67. The Druyun prosecution has produced fresh allegations of wrong doing in Boeing’s intense sales efforts. Specifically, allegations about similar kinds of inside dealing between Druyun and Boeing’s Integrated Defense System head, James Albaugh, recently surfaced and the Justice Department has subsequently launched an investigation into the cozy relationship between Boeing and the Department of the Air Force. See David Bowermaster, *Defense Tags Boeing AWACS Deal for Criticism*, THE SEATTLE TIMES, Apr. 16, 2004, at C1.

Much of the former U.S. military tactical aircraft fleet, therefore, is not the product of serious *integrated* fleet planning.⁶⁸ Integrated fleet planning—from the military perspective—is a fairly novel concept derived largely from the civil context, the application of which the military branches have largely borrowed from the airlines.⁶⁹ Faced with the cutthroat economic environment of low fares, razor thin margins, and relatively fixed labor costs, successful airline carriers have understood the cost-benefits of common fleet design, which includes limiting the kinds of aircraft they fly in order to regulate costs for maintenance, training, deployment, and software development.⁷⁰

This is not to say, of course, that the U.S. military's air fleet has not been the product of extensive, even exhaustive, planning.⁷¹ Nor is it intended to minimize the functional variations required in a military fleet that are not present in the civil context.⁷² Often, however, military fleet needs and planning have conflicted with corporate and political interests as well as the more parochial goals of the specific service branches.⁷³ Furthermore, because of the technological sophistication required of military fleets, cost considerations have also taken a back seat to the inherent inefficiencies of developing heretofore-unknown technologies.⁷⁴

68. Nowhere is this more apparent than in the wide disparities in maintenance required as America's aging military air fleet crumbles. See *Getting Worse with Age*, AIR FORCE TIMES (Aug. 2, 2004) (discussing the need for integrated fleet modernization, the cost implications of upgrading the fleet, and the problems with maintaining an aging, disintegrated fleet as the age of an average Air Force fighter aircraft approaches nineteen years and the average bomber twenty-two years).

69. Lockheed's Joint Strike Fighter is a major exception to this rule, and a major "rethink" for U.S. military aircraft fleet planning and deployment. CHRISTOPHER BOLCKOM, JOINT STRIKE FIGHTER PROGRAM (Congressional Research Service, Library of Congress, 2003).

70. Some of the more successful niche carriers, like Southwest and JetBlue, fly only a single kind of airplane, the Boeing 737 or Airbus A-320, specifically to be most cost-efficient. This has helped make Southwest and JetBlue much more competitive in markets against old-school carriers operating upwards of eight aircraft types like USAirways, who during the late 1990s were struggling to modernize fleets to diminish costs along common aircraft types. This efficiency has, in certain markets like Baltimore, enabled Southwest—for instance—to essentially drive USAirways out where it was once the dominant carrier. See JetBlue 101, available at <http://www.jetblue.com/learnmore/air101.html> (last visited Sept. 28, 2004). See also Southwest Airlines, Fleet, available at http://www.southwest.com/about_swa/press/factsheet.html#Fleet (last visited Sept. 28, 2004).

71. See Bolckom, *supra* note 69.

72. *Id.* Most military fleets include tactical fighter aircraft, which are used to destroy enemy command and control as well as prepare the way for munitions delivery by bomber aircraft. The United States currently has eight fighter aircraft in its current fleet, including the A-10, F-14, F-15, F-16, F-18, F-22, the AV-8 Harrier, and the F-117.

73. Both the current Boeing 767 tanker scandal and the Lockheed/McDonnell-Douglas C-17 scandal strike the author as archetypal examples.

74. See Bolckom, *supra* note 69, at 17. See also, LANE PIERROT AND JOANN VINES,

B. Stealth—The Beginnings of an Integrated, Infrastructural Approach to Fleet Planning but Not Procurement

Nowhere has the tension between cost control and the commitment to duplicating or improving an already-realized technology been more apparent than in the story of Northrop's research and development of the "stealthy" B-2 Bomber and McDonnell-Douglas's unsuccessful attempt to develop the carrier-based A-12 during the early 1990s.⁷⁵ Faced with the prospect of having to devise a design that was "invisible" to enemy radar, Northrop experimented with several possible designs and finally settled on the now-familiar "flying wing" profile of the B-2 in an effort to reduce its radar signature and overall visibility.⁷⁶ Along the way, Northrop did not have the benefit of Lockheed's expertise in managing both the complexity of the program and design process; Lockheed's expertise, for instance, brought the initial development and design of the original "stealthy" F-117 Nighthawk Fighter in on time and under budget.⁷⁷

Unsurprisingly, the cost overruns in developing both the B-2 and the Navy's "stealthy" A-12 were the stuff of corporate and government scandals in the early 1990s. Accusations that Northrop, General Dynamics, and McDonnell-Douglas had intentionally distorted cost overruns and that Navy managers—in the case of the A-12—had lied about the costs of the respective programs to the Pentagon ran rampant.⁷⁸ These scandals emerged despite the fact that all of the aircraft in development under these respective programs were ostensibly conceived along the same tactical design premise: the implementation of "stealth" technology in land and aircraft carrier-based fighter aircraft, as well as strategic bomber aircraft, was proposed to inhibit advance discovery by enemy radar systems, increase the effectiveness of munitions delivery, and reduce U.S. losses.⁷⁹ The emergence of "stealth" technology

A LOOK AT TOMORROW'S TACTICAL AIR FORCES (Report of the Cong. Budget Office, 1997).

75. See Rick Atkinson, *Stealth: From 18-inch Model to \$70 Billion Muddle*, THE WASH. POST, Oct. 8, 1989, at A1. Lockheed, in fact, openly mocked Northrop's radical "flying wing" design and derided its fiscal mismanagement of the project at the time, arguing that because it had already developed the F-117 and brought the project in under budget, it should have been awarded the B-2 contract as well.

76. See Northrup-Grumman Home, B2 Spirit Page, available at http://www.is.northrupgrumman.com/products/usaf_products/b2/b2.html (last visited Sept. 29, 2004).

77. See *AF Will Keep Enough F-117 Tooling for Spare Parts, Repairs*, AEROSPACE DAILY, May 17, 1990, at 282 (detailing program's ahead-of-schedule and under-budget status).

78. *This One Will Overrun, and Run, and*—FLIGHT INTERNATIONAL Dec. 12, 1990.

79. David A. Fulghum, *Stealth Retains Value, but its Monopoly Wanes*, AVIATION

embodied in the F-117 was arguably the starting point for modern U.S. military aircraft fleet because it forced the implementation of a common concept across the divided lines of the various service branches.⁸⁰

Starting from this unitary concept, as a managerial scheme, it is difficult to fathom why the government would subsequently parcel the research and development work out to four or five different contractors, each bringing his or her set of distinctive "trademark" designs to the process.⁸¹ Given Lockheed's "stealth" design expertise after the F-117, with its sophisticated development of graphite and carbon-based composites in particular, it was the natural choice for the B-2 contract.⁸²

As a procurement regime, however, parceling the research and development work out to several different contractors for a project where an existing contractor had already realized much of the developmental technology was even more baffling.⁸³ Such a regime was certain to increase the cost of procurement because by having to "start from scratch," research and development commonalities between projects were effectively eliminated.⁸⁴

In the case of the A-12 program, the disastrous financial fallout was predictable because neither McDonnell-Douglas, beneficiary of the program to the tune of nearly \$2 billion, nor General Dynamics, its design partner, had any particular design experience in the extensive adaptation of composites, which was required to lighten the A-12 to suitable aircraft-carrier takeoff/landing operating weight.⁸⁵ Nearly a third heavier than required, McDonnell-Douglas eventually failed to deliver even a single A-12 aircraft.⁸⁶

The government, led by then Secretary of Defense Richard Cheney and Rear Adm. William Morris, issued a cure notice on December 17, 1990.⁸⁷ McDonnell-Douglas and General Dynamics, in response, requested the contract be restructured.⁸⁸ The government declined,

WK. & SPACE TECH, Feb. 5, 2001, at 53.

80. It took Congress nearly ten years to figure this out, however, and required "joint interoperability" between the various service branches after the establishment of the JROC. *See* 10 U.S.C. § 118.

81. For the defining example, *see* *McDonnell-Douglas v. United States*, 323 F. 3d 1006, 1011 (Fed. Cir. 2003).

82. *See supra* note 80.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. A "cure notice" is typically a letter, advising the contractor of conditions that might eventually result in termination. In the case of the A-12 program, however, the cure notice included notice of actual intention to terminate, leaving the result much less hypothetical. Atkinson, *supra* note 75.

88. *Id.*

terminating the contract for default and demanding repayment of the liquidated progress payments.⁸⁹ Litigation ensued in the Federal Court of Claims that, nearly thirteen years later, has not yet concluded, with McDonnell and General Dynamics arguing that the termination for default be equitably adjusted to termination for convenience.⁹⁰ The McDonnell/General Dynamics A-12 case, indeed, seems to be the poster-child for infrastructurally-conceived aircraft fleet planning, design, production, and procurement programs that are designed to support, rather than frustrate, the common benefits of hard-earned technological breakthroughs the taxpayer has already bought.⁹¹ With the Joint Strike Fighter program, the government appeared to learn that limited lesson, though its larger benefits still appear to take a “back seat” to corporate sales needs.⁹²

III. A New Infrastructurally-Conceived Regime: Aircraft as Cogs in the Air Defense Wheel—The Boeing/Lockheed JSF and EADS MRTT/Boeing KC-767 Contract Competitions in the United States and the United Kingdom

A. *The Joint Strike Fighter Program*

Largely in response to the A-12 debacle, development and procurement of the next generation of fighter aircraft took a completely different turn.⁹³ According to the Congressional Research Service, the government did a “bottom-up-review” of the cost of tactical aviation procurement in 1993, concluding that it needed to “reduce acquisition and operating costs.”⁹⁴ In response it approved the new Joint-Strike Fighter program, novel in very concept; rather than contract a product-specific research and development plan for a service-and-use-specific

89. *McDonnell-Douglas v. United States*, 25 Cl. Ct. 342 (1992), later proceeding, 27 Fed. Cl. 204 (1992), later proceeding, 29 Fed. Cl. 791 (1993), adopted by, 35 Fed. Cl. 358 (1996), later proceeding, 37 Fed. Cl. 270 (1996), motion denied in part, 37 Fed. Cl. 285 (1997), summary judgment denied, 37 Fed. Cl. 295 (1997), motion denied, 1997 U.S. Claims LEXIS 319 (June 13, 1997), partial summary judgment denied, 1997 U.S. Claims LEXIS 318 (Aug. 21, 1997), modified, 39 Fed. Cl. 665 (1997), judgment entered, appeal dismissed, 152 F.3d 944 (Fed. Cir. 1998), vacated, 40 Fed. Cl. 429 (1998), vacated, 182 F.3d 1319 (Fed. Cir. 1999), cert. denied, 529 U.S. 1097 (2000), remanded, 50 Fed. Cl. 311 (2001), aff'd in part, vacated in part, remanded, 323 F. 3d 1006 (Fed. Cir. 2003), reh'g, reh'g en banc denied (Aug. 27, 2003) (listing of the case's extensive procedural history and posture to demonstrate the duration and complexity of the litigation, with some related matters omitted).

90. *Id.*; see Tiefer, *supra* note 4, at 473.

91. *Id.*

92. Merle and Markon, *supra* note 2.

93. Bolckom, *supra* note 69.

94. *Id.*

aircraft, the Department of Defense approached Boeing and Lockheed to start with a unitary design that was capable of being adapted to use-specific variants (i.e., conventional take off and landing (CTOL) in an Air Force variant, carrier-capable (CV) in a Navy version, and short take off and vertical-landing (STOVL) maneuver-capable in its Marine Corps adaptation).⁹⁵ The concept of one airplane adapted to all three service branches was radical at the time in military circles.⁹⁶ In airline circles, however, the basic concept was already a twenty-year-old established orthodoxy.⁹⁷

Though the uses of military aircraft do not entirely analogize to those of civil aircraft, both military and commercial aircraft fleets share—at a minimum—this: the cost of developing, maintaining, training for, and operating use-specific heterogeneous fleets far exceeds their benefit, especially when a unitary design concept can be adapted for multiple uses.⁹⁸ Airbus Industrie's rise to dominance over Boeing in the global commercial/civil aircraft manufacturing sector commonality is largely predicated on its adoption of this design philosophy.⁹⁹ Airbus boasts that since perfecting its “fly-by-wire” technology¹⁰⁰ in the early 1980s, its cabin and cockpit designs share remarkable “uniformity and trim characteristics,”¹⁰¹ such that flying one Airbus airliner is “virtually identical” to flying any other.¹⁰²

95. Bolckom, *supra* note 69.

96. *Id.*

97. Herb Kelleher founded southwest Airlines in 1971 with three Boeing 737s flying short routes from Dallas' Love Field. The airline committed early on to operating only one kind of aircraft. Stanley Holmes, *Boeing Asks Airlines for Advice on New 737s, and Old Customers Help Out*, SEATTLE TIMES Nov. 17, 1997, at 1E. Today, Southwest is a model of efficiency and profitability in the industry, because its operating costs are so low. See Tom Belden, *Southwest Airlines Aims Plan for Rapid Expansion in Philadelphia*, THE PHILADELPHIA INQUIRER, Mar. 26, 2004, at C1.

98. Bolckom, *supra* note 69.

99. See Airbus Industrie, *Media Library*, available at <http://www.airbus.com/media/commonality.asp> (last visited Sept. 28, 2004).

100. *Id.* “Fly by wire” technology, a reference to an electronic flight deck that employs on board computers to effect the mechanical maneuvering of aircraft parts—as opposed to the more standard mechanical linkages on Boeing and Douglas aircraft available at the time of its inception—however, is not without its controversies. Boeing has subsequently adopted fly-by-wire technology on its 777, but includes fail-safe devices to permit the crew to take control of the aircraft away from the computer should—for any reason—it fail.

101. When an aircraft is flying in equilibrium, it is in trim. Trim characteristics typically refer to the ease or difficulty of balancing the countervailing forces of lift and downforce to keep the aircraft in level flight. When trim stabilizers malfunction, the defect is frequently catastrophic. See Chuck Taylor, *Flight 261: Looking for Answers*, SEATTLE TIMES, Feb. 2, 2000, at A1 (detailing the crash of Alaska Airlines' Flight 261 near Oxnard, California implicating a defective rear tail trim stabilizer in the crash of the MD-80).

102. Bolckom, *supra* note 69; see also, Ramstack, *supra* note 6.

In the JSF project, the United States military began to understand for the first time what the civil aviation sector had known since at least the 1980s; the development of individual aircraft types had to be conceived in relation to the total fleet's air defense infrastructure, rather than as isolated pieces of high tech weaponry designed solely for a specific use or task.¹⁰³ More important, such a development philosophy was directly linked to procurement and operations, because cost savings was the principal policy goal.¹⁰⁴

With this in mind, the Joint Strike Fighter procurement regime was structured completely differently to produce a "common family" of aircraft: first, there was direct government subsidy for the development phase, given to two—rather than one—potential contractors, Boeing and Lockheed, structured as Concept Demonstration Phase prime contracts; that paved the way for a direct competition phase between them, with one selected to finally enter the engineering and manufacturing development (EMD) phase.¹⁰⁵

1. Direct Government Subsidy for Research and Development

To put both contractors on equal footing, the government directly subsidized a competition, making it illegal for Boeing and Lockheed to spend their own monies on initial development.¹⁰⁶ To this end, Congress appropriated approximately \$1.5 billion, split equally between the two aerospace giants.¹⁰⁷ In the latter phase of the competition, the cap on spending became something of an issue because both Boeing and Lockheed had significant cost overruns directly related to the cost of developing the "short take-off, vertical landing" (STOVL) technology.¹⁰⁸ Boeing abandoned its original design in favor of a redesign in view of projected production costs, and Lockheed had development problems implementing a complex, mechanical vertical lift-fan design in the STOVL variant for the Marine Corps.¹⁰⁹ In response, the government modified the contract, relaxing the rigid requirement that restricted the contractors from spending their own development dollars.¹¹⁰ Instead,

103. Bolckom, *supra* note 69.

104. *Id.*

105. *Id.*

106. See Pub. L. No. 104-201, 110 Stat. 2422 (1996); Pub. L. No. 105-85, 111 Stat. 1629 (1997); Pub. L. No. 106-398, 114 Stat. 1654 (2000) (all codified as amended in scattered sections of the U.S.C.) (authorizing Joint Strike Fighter appropriations during the Concept Demonstration Phase).

107. *Id.*

108. *E.g.*, David A. Fulghum, *Lockheed-Martin Faces JSF Cost Overruns*, 150 AVIATION WK. & SPACE TECH. 6, Feb. 8, 1999, at 27.

109. *Id.*

110. *Industry to Spend Their Own Money to Keep JSF Teams Together*, ARMED

their own respective internal expenditures were capped at \$60-100 million each.¹¹¹

Direct congressional funding of the “concept demonstration” phase had been controversial, particularly when news broke of the cost overruns.¹¹² Critics charged that corporations like Boeing and Lockheed were reaping the benefit of government-bought technologies, using those development dollars to apply the emerging technologies to their own commercial products.¹¹³ Boeing, which has complained for years of the direct governmental subsidies afforded its principal competitor, Airbus Industrie, suddenly developed a new-found corporate tolerance for the idea of direct government assistance.¹¹⁴

In the case of the JSF program, such aid was a conspicuous part of the contract package and appropriations legislation.¹¹⁵ Even with political infighting over the goals and costs of the program, there was complete candor about funding the R & D phase because cost containment was an integrated program goal. Spending money in the short-term to save it in the long-term made sense.¹¹⁶ This approach, incidentally, largely mirrored that of the nations of the European Community for funding aerospace development. Specifically, direct government subsidy of aerospace development in the hands of private contractors was in the government’s interest, because it ensured both technologic and economic soundness of the military-industrial base as well as international competitiveness.¹¹⁷

FORCES NEWSWIRE SERVICE, Apr. 14, 2000 (describing JSF Program Office’s intention to “incorporate[e] new contractual language” permitting internal expenditures).

111. *Id.*

112. Bolckom, *supra* note 69.

113. Specifically, Boeing’s incorporation of innovative composite technology in the 7E7 adapts many of the lessons it learned in developing the same materials for the JSF. See William Cole, *The Value of Lessons Learned*, 2 BOEING FRONTIERS 8 (Dec. 2003—Jan. 2004), Internal Boeing e-newsletter available at http://www.boeing.com/news/frontiers/archive/2003/december/ts_sf5.html (last visited Sept. 28, 2004).

114. Airbus Industrie, moreover, has recently “turned the tables” on Boeing’s “corporate grumbling” about direct government subsidies, arguing that Japanese support for the new 7E7 airliner launch, as well as State of Washington tax incentives, are forbidden under both General Agreement on Tariffs and Trade, EC-US AGREEMENT ON TRADE IN LARGE CIVIL AIRCRAFT, July 17, 1992, Arts. 3, 4 & 5, 1993 B.D.I.E.L. A.D. LEXIS 60 (1993), and the General Agreement on Tariffs and Trade, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, 1994 B.D.I.E.L. A.D. LEXIS 58, which limit both direct and indirect governmental support for large civil aircraft development. James Wallace, *About Those Subsidies for 7E7*, SEATTLE POST-INTELLIGENCER, (March 31, 2004), at D1. See PRITCHARD & MACPHERSON, *supra* note 45.

115. *Id.* See also *supra* note 106.

116. *Id.*

117. Alternatively, when the French, German and British governments announced

2. The Multiple Rewards of Direct Competition

After funding for the “concept demonstration” phase was approved, Boeing and Lockheed competed directly with one another to produce their respective vision of the “base” unitary design, with the competition organized along subsequent development of the three specific variant capabilities required for the particular service branches.¹¹⁸ Boeing’s vision was the X-32.¹¹⁹ Lockheed’s was the X-35.¹²⁰

While the particulars of the competition are beyond the scope of this discussion, the benefits of the competition for the government were obvious: development costs were controlled, technological breakthroughs were achieved, and a common design framework and unitary base for the United States’ tactical air fleet was realized.¹²¹ Eventually, Lockheed-Martin—which took a huge gamble during the competition phase by opting for a risky, radical mechanical lift-fan design in the Marine (STOVL) variant—won the production-phase contract.¹²² In the process, however, it arguably produced a more stable vertical lift/landing technology than was previously available in the British Harrier “jump jet.”¹²³

B. The EADS Tanker Program—Multi-Use Variants and Directly Competitive Procurement Process in The United Kingdom

1. EADS’s MRTT Tanker—Multiple Roles for Tanker Aircraft in Variations on a Unitary Tanker Design Theme

The EADS tanker program, Multi-Role Tanker Transport (MRTT), also stressed multiple-use variants like the Joint Strike Fighter program, something that quintessentially distinguished its Airbus-airliner

interest-free loans to Airbus for the development of the “Super Jumbo” A380—a civil aircraft analogizing to procurement of the 767 under FARA’s commercial exemption—the notion of government subsidies for civil aerospace development was completely intolerable to the United States’ government. *Airbus Jumbo in U.S. Sights*, THE AUSTRALIAN, Jan. 12, 2001, at 24 (quoting an unnamed U.S. “trade official” commenting that, “Airbus is a grown-up company that has 50 per cent of the market and is doing fine and there is no reason why the government needs to subsidise it.”).

118. Bolckom, *supra* note 69.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. For this reason, the Royal Navy has elected to acquire the X-35, rechristened the F-35 after Lockheed won the concept demonstration phase of the contract competition, to replace the Harrier. See Royal Navy, *Future Aircraft*, available at <http://www.royal-navy.mod.uk/static/pages/2002.html> (last visited Apr. 2, 2004).

adaptations from Boeing's retrofitted 767 transport version.¹²⁴ EADS built inherent flexibility into its airliner tanker adaptations, which could dispense on-board fuel from pods located at each wing to two fighter jet aircraft simultaneously.¹²⁵ The A-310 MRTT, with containerized auxiliary refueling tanks confined to the cargo hold, is available in multiple variants.¹²⁶ In one configuration, the aircraft can function as a flying hospital to accommodate up to six intensive-care status and fifty-six stretcher-case status wounded.¹²⁷ In another variant, like the Boeing KC-767, the MRTT can also be configured to carry troops and freight, in addition to acting as an aerial refueling station.¹²⁸ Additionally, the MRTT is available either in the A310 or the A330 fuselage variant for range and payload flexibility.¹²⁹

Not conceived merely as an airborne gas station converted from an airliner airframe, the MRTT's multi-role transport adaptations are integrated instead into its refueling function and integrated with its varying payload and range capabilities to meet the demands of near or far military theatres.¹³⁰ In short, the MRTT is a multi-use cog in a complex air-defense infrastructural wheel.¹³¹ From Airbus, a contractor whose central design philosophy is commonality—i.e., manufacturing related

124. Airbus Media, Military Programs, available at: http://www.airbus.com/media/airbus_military.asp (last visited Sept. 28, 2004).

125. *Id.*

126. *Id.*

127. See Lufthansa-Technik, AG, Media Page, *Erster Airbus A310 für Luftbetankung Vorgestellt* (First Airbus A310 for Aerial Refueling Introduced) (Dec. 9, 2003), available at <http://www.lufthansatechnik.com/applications/portal/lhtportal/portlets/searchResultPortlet/resolve.jsp?id=3b4290b8843482f8e0e15e31d9bf59fa78e4144e0c44a4fc501d5accefdcc99e938953bcc94f82558d0b4256804e5893> (last visited Sept. 25, 2004.)

128. *Id.* Boeing News Releases, Deborah Bosick, *Boeing's 767 Tanker Aircraft Delivers More of Everything* (July 17, 2003), available at http://www.boeing.com/news/releases/2003/q3/nr_030717b.html (last visited Apr. 2, 2004).

129. The A-310 is a mid-range aircraft flying roughly 5,200 nautical miles with lower fuel-hauling capacity; the A-330 is a longer-range aircraft of up to 6,500 nautical miles with higher payload-carrying capacity. See Airbus Aircraft Families, available at http://www.airbus.com/product/a300_a310_backgrounder.asp (last visited Sept. 28, 2004).

130. *Id.*

131. Maj. Thomas L. Gibson, *The Death of "Superman": The Case Against Specialized Tanker Aircraft in the USAF* (June 2002) (unpublished thesis, School of Advanced Air Power Studies, Maxwell A.F) (on file with the author) (arguing that the Air Force should move away from single-use tanker aircraft toward "multi-role" platforms like the MRTT, in reconnaissance, medevac, or other configurations, with the refueling function relegated to a supplemental or secondary role. Major Gibson was, himself, a tanker aircraft pilot, and though not fully endorsing procurement of either the MRTT or KC-767, his thesis also fails to account for the multiple variants in which MRTT is currently available. Nevertheless, in the author's opinion, his comprehensive, well-thought study on the infrastructural role of multi-role tanker transports is persuasive and should have driven procurement policy.)

“families” of aircraft—this is not a particularly innovative developmental step.¹³²

2. Directly Competitive Process in the U.K.

In stark contrast to the way the Boeing 767 tanker competition was mismanaged in the United States, the process of procuring tanker aircraft in the United Kingdom was, like the JSF procurement process, managed with greater candor in a direct competition.¹³³ Hoping to sell its KC-767 to the British Government as well as to other former British Commonwealth states such as Australia, Boeing competed directly against EADS’s MRTT for the contract.¹³⁴ Britain initiated the Future Strategic Tanker Aircraft (FSTA) Programme in 1997, to study and make recommendations for replacing outdated Royal Air Force VC10 and Lockheed TriStar tankers.¹³⁵ The British Ministry of Defence invited Boeing to submit a request for information (RFI) at the Programme’s outset, which was followed by an Invitation to Submit Outline Proposals (ISOP).¹³⁶ An Invitation to Negotiate followed to two primary “consortia” in December 2000, with Boeing and EADS submitting formal bids in July 2001.¹³⁷ Final bids followed in late April 2003.¹³⁸

In the interim, questions about the viability of Boeing’s 767-tanker program, as well as its lack of “multi-role” suitability, inevitably intruded into the United Kingdom’s selection process.¹³⁹ In November 2003, with the full panoply of the scandal playing out in the American press, and the

132. Boeing’s counterargument would likely be that it has also put a high value on commonality in its commercial airplanes, in such models as the 757 and 767 in particular; however, in that respect, it followed Airbus’s lead. Boeing’s other argument would likely be that it simply produces a more reliable, comfortable and serviceable commercial airplane with greater dispatch reliability, which is a good argument but beside the point. Boeing’s quality of individual design has always been quite high: the process of relating individual designs to multiple use roles and an integrated whole—for procurement efficiencies—is clearly Airbus’s trademark rather than Boeing’s.

133. By way of contrast, the playing field in the U.S. for EADS was never level, with its lower-priced competitive offer to build MRTT for the United States directly undermined by the Pentagon. See Merle and Markon, *supra* note 2.

134. Robert Wall and Douglas Barrie, *Refueling Rivalries*, AVIATION WEEK & SPACE TECH., Apr. 26, 2004.

135. See Royal Air Force, News, available at http://www.raf.mod.uk/news/news_jan04_04.html (last visited Mar. 21, 2004).

136. See Ministry of Defence, *Projects*, available at http://www.mod.uk/dpa/projects/FSTA_Detail.htm (last visited Apr. 24, 2004).

137. *Id.*

138. *Id.*

139. Rich Tuttle, *EADS Eyes U.K. Tanker Work as it Rolls Out MRTT Aircraft*, 49 Aerospace Daily 1, 3 (2003) (noting that, “Boeing’s prospects in the U.K. competition appear to have dimmed since two executives were fired for apparent conflict of interest in a potential \$18 billion U.S. Air Force deal to lease 20 and buy 80 767 tankers”).

767 tanker proposal dead in the water in the U. S. Congress, experts appeared to agree that Boeing's "backfir[ing] hard-ball tactics"¹⁴⁰ in the United States had effectively made the Ministry of Defence's selection of the EADS Airbus derivative a virtual *fait accompli*.¹⁴¹ In contrast to the so-called "competitive" bidding process between EADS and Boeing in the U.S.—tainted by conflict-of-interest-riddled mismanagement and violations of the Procurement Integrity Act¹⁴²—the U.K. competition was tipped by Boeing's own scandal-ridden executive suite.¹⁴³

Therefore, in January 2004, Boeing lost the contract—valued at approximately £13 billion—with the British Ministry of Defence awarding it instead to EADS, despite a direct appeal to Prime Minister Blair by President Bush on Boeing's behalf.¹⁴⁴ In April 2004, the Australian government followed suit, opting for the MRTT in a contract deal valued at approximately \$2 billion (Australian).¹⁴⁵ The Canadian and German governments also committed to order the plane.¹⁴⁶

IV. Conclusion

The long-range effects of Boeing's full-court press to sell U.S. taxpayers the KC-767 deal are yet unknown. In some respects, it is still too early to tell because events continue to unfold. However, with the loss of sales to the British, Australian, Canadian, and German governments, Boeing's corporate misdeeds have dealt a serious blow to its proposal to widely market the KC-767 internationally. Although it has commitments from both the Italian and Japanese governments, the tanker program appears to be in real jeopardy in the United States, with talk that EADS may yet win a contract with the Americans.¹⁴⁷ This much is clear, however: Boeing's troubles will not merely cost it the

140. Hedges, *supra* note 46, at 13.

141. Tuttle, *supra* note 139.

142. Merle and Markon, *supra* note 2.

143. Mary Fagan, *Bush Backs BAE in Air Tanker Dogfight*, THE SUNDAY TELEGRAPH (LONDON), Nov. 16, 2003, at 1. *See also* Tuttle, *supra* note 139 (suggesting further that the scandal in the United States was a "10 percent" determinative factor in Boeing's losing the contract award along with EADS's superior multi-role concept where—otherwise—both aircraft proposals were extremely competitive.)

144. Tuttle, *supra* note 139.

145. Fagan, *supra* note 143.

146. Tuttle, *supra* note 139 (noting that, "Boeing's prospects in the U.K. competition appear to have dimmed since two executives were fired for apparent conflict of interest in a potential \$18 billion U.S. Air Force deal to lease 20 and buy 80 767 tankers.")

147. Stephen J. Hedges, *Audit Urges a Hold on Boeing Deal*, CHI. TRIB., Apr. 1, 2004, at C12 (in which Secretary of the Air Force James Roche indicates he would "welcome an [alternate] bid by Airbus if Pentagon leaders decide to scrap the Boeing contract."); Suzanne D. Patrick, *The Defense Industrial Base: Myth vs. Reality*, AVIATION WEEK & SPACE TECH., (Sept. 13, 2004) (where the Undersecretary of Defense for Industrial Policy indicates EADS' tanker proposal will now be "welcome").

KC-767 contract in the United States. To the contrary, it has already lost billions of international dollars by attempting to suppress international competition at home, abusing its advantage with the Pentagon, Congress, and White House.

More importantly, its American operations have been seriously damaged. In particular, three of its commercial facilities in Wichita, Kansas and in Tulsa and McAlester, Oklahoma, may be sold with the KC-767 contract in jeopardy.¹⁴⁸ Boeing, which has used the “internationalized” nature of the “systems-integrated” aircraft manufacturing and subcontracting processes to pressure its unions for concessions, will jeopardize its workforce by failing to account for the “internationalized” implications of its own conduct.¹⁴⁹

A. A Disciplined, Infrastructurally-Supported Production and Procurement Regime is Already a Stated DOD Goal and, In Fact, the Law.

In the final analysis, an infrastructural approach to procurement is not merely a good idea; to the contrary, it is both a stated goal of the Department of Defense and it is already law.¹⁵⁰ The deficiencies of the B-2 and A-12 scandals were, in fact, instructive, paving the way for Congressional mandates that the Department of Defense ensure “interoperability” of acquisitions. Here, the process devolved for several reasons, not the least of which was the political will to get the Boeing deal done despite its legal defects.¹⁵¹

Strategic aircraft procurement, however, must be conceived not only along cost containment lines and “interoperability.” The goal, in addition, must be focused integration, with a view toward making the most of research and development design commonalities, emphasizing the subordinated role of the individual airplane to the needs of the total air defense fleet. These goals are consistent with cost containment, even with direct government support for research and development as the JSF project proved. Ultimately, the KC-767 contract process has been a throw back to the days of purpose-specific fleet planning and use-

148. Fagan, *supra* note 143. See also Tuttle, *supra* note 139.

149. Tuttle, *supra* note 139.

150. 10 U.S.C. § 118 (2004).

151. Representative Norm Dicks and Alaskan Senator Ted Stevens, in particular, remain undeterred in pressing the cause of the KC-767 tanker deal, whatever the DOD’s Inspector General’s recommendations. Further, there is a recent move in Congress to block international competition from EADS, despite its commitment to assemble and retrofit its MRTT product in the United States. Andrew Doyle, *Defence Graham Warwick/Washington DC Fresh Doubt Raised Over USAF Tanker Procurement Remains on Hold Pending Investigation*, FLIGHT INTERNATIONAL, Apr. 6, 2004, at 8.

specific fleet procurement, an approach whose time has long since come and gone.¹⁵²

B. A Disciplined, Multi-Role Production and Procurement Regime with the KC-767 Would Have Served Boeing's Corporate Interests by Making it a More Competitive International Contractor

Boeing, the beneficiary of huge tax incentives to build its 7E7, has the most powerful of corporate friends. Its prowess in procuring questionably ethical favors from Congress, the White House, and state governments in the wake of its "eclipse by Airbus"¹⁵³ as the world's leading manufacturer of commercial airplanes, has made Boeing a target for particularly harsh criticism.¹⁵⁴ Such criticism, moreover, is warranted. To expect the American taxpayer to foot the bill for Boeing's shortsighted competitive vision makes little sense.

Boeing certainly understood that a contract scandal in the United States could have far-reaching, international implications; from the outset, the KC-767 program had been designed to garner not only sales in the United States, but also additional sales abroad.¹⁵⁵ According to some experts, Boeing has been skimping on research and development for years in favor of acquisitions and fatter corporate profits.¹⁵⁶ Others have hypothesized that Boeing became "overconfident," specifically because it knew its friends in high places would come to its aid.¹⁵⁷ In a Republican administration that emphasizes individual responsibility; that wants to trim the funding of social programs; and touts the inherent value of the free-enterprise¹⁵⁸ *laissez-faire* American free market, corporate dependence is hypocritical enough. Where criminality attends such

152. Airbus Aircraft Families, *supra* note 134.

153. Robert Samuelson, *Boeing's Rapid Descent*, THE WASH. POST, June 26, 2003, at A29 (calling Boeing's "eclipse by Airbus" as the world's largest commercial airplane manufacturer "one of the most fascinating and momentous business stories of our time," precipitated by a combination of "bad luck, bad management and bad government policy." Samuelson attributes Airbus' rise with commercial airplane users—airlines—to its commitment to commonalities of design across its entire product line.).

154. Jay Hancock, *Boeing Takes Its Turn at the Corporate Welfare Trough*, THE BALTIMORE SUN, June 29, 2003, at 1D (calling Boeing a "whiny corporation" whose insistence on "tilt[ing] the business playground maim[s] pledges of equal treatment under the law").

155. Guse, *supra* note 27, at 8.

156. Samuelson, *supra* note 153 (quoting Teal Group consultant Richard Aoulafia, who commented that Boeing had, until the launch of the 7E7, decided to take a "product-development holiday for the last eight years").

157. *Id.*

158. Tom Pelton, *EPA Report Faults Bush on Air Pollution Policies*, THE BALTIMORE SUN, (Oct 1, 2004) at 3A (attributing the Bush Administration's "cap and trade" pollution credit trading program to its emphasis on "free market policies").

corporate-government codependence, however, and the official response is to close American markets to foreign competition to foster even greater dependence on the State, we have indeed reached the point of "Soviet style economic planning."¹⁵⁹

To use the words of that unnamed U.S. trade official cited above, Boeing "is a grown-up company that has" nearly "50 per cent of the market."¹⁶⁰ While there may be a "reason why the government needs to subsidise it,"¹⁶¹ such subsidies should be granted with full candor, as in Europe. Shoring up Boeing's flagging research and development is not something the United States government can realistically achieve on the sly, nor can state governments, as Hancock points out, afford the fiscal "sophistry" of granting huge tax incentives to corporations like Boeing in the hopes of gaining jobs and economic "spinoff."¹⁶²

In the end, Boeing's lax product development and short-term profit orientation, coupled with its confidence that a huge infusion of congressionally authorized Pentagon cash was virtually guaranteed, made it a less competitive bidder. Ironically, its corporate dominance and lack of free-market tenacity and ingenuity cost it and the U.S. economy billions in the international marketplace. Boeing has fallen behind Airbus in the commercial airplane business, betting on its next "big gamble," the 7E7.¹⁶³ Though Boeing recently announced an initial order by All Nippon Airways for 50 of the luxury jets, it is too early to tell whether its gamble on the 7E7 will pay off.¹⁶⁴ The airplane's major selling points are flight-deck commonality with other Boeing products, a humidity-controlled environment for increased passenger comfort, and 20% fuel economy with lightening of the aircraft through the extensive use of composites.¹⁶⁵

The U.S. taxpayer, however, should not be hedging Boeing's bets, particularly without full public disclosure. The lack of candor about the tanker deal's hidden benefits to Boeing—very much like Lockheed's lack of candor in the McDonnell-Douglas C-17 scandal—have sabotaged its own efforts to widely market the tanker proposal to foreign

159. Hancock, *supra* note 154.

160. THE AUSTRALIAN, *supra* note 117.

161. *Id.*

162. Hancock, *supra* note 154. See also Wallace, *supra* note 114 (the purported preservation of jobs comes at an unacceptably high price: for instance, tax concessions recently afforded Boeing to keep its new 7E7 airliner in Everett during the development and marketing phase—to the tune of \$3.2 billion—have been calculated to cost Washington state taxpayers some \$2.67 million per estimated conserved job).

163. Samuelson, *supra* note 153.

164. Melissa Allison, *50-plane Order Gets Boeing 7E7 Off Ground*, CHI. TRIB., Apr. 27, 2004, at C1.

165. THE AUSTRALIAN, *supra* note 117.

governments. Furthermore, disguised rescue attempts are not in Boeing's own interests: if the KC-767 scandal proves anything, it demonstrates that when complacency is rewarded, there is little incentive to innovate.

V. Post-Script

In the months since the original draft of this article was completed, events surrounding the 767-tanker contract deal have continued to unfold. The controversy refuses to die. Ms. Druyun, facing an August sentencing proceeding in her conspiracy prosecution, cooperated with the U.S. Attorney and provided federal investigators with extensive information on a conflict-riddled federal defense contracting hierarchy.¹⁶⁶ In early June 2004, Secretary of Defense Donald Rumsfeld declined to release pertinent documents about the proposed aircraft sale to the Senate.¹⁶⁷ The White House, however, eventually capitulated.¹⁶⁸

Later in June, moreover, *The New York Times* revealed that two members of the Defense Policy Board, the "quasi-governmental" agency that advises the Secretary on military acquisitions, were hired by Boeing as consultants at the same time the tanker deal was being sold to the Air Force.¹⁶⁹ The Project on Government Oversight's report, revealing that 224 senior federal officials and members of Congress had worked for powerful defense contracting interests or corporations over the past seven years, sparked a Washington Post report the same day.¹⁷⁰

Two weeks earlier, Boeing was nevertheless awarded a lucrative \$4 billion contract to build the "next generation" submarine-hunting aircraft, the MMA (multi-mission maritime aircraft) based, predictably, on one of its more popular commercial airframes, the 737-800.¹⁷¹ Despite the legal defects and public relations challenges inherent in and mounted against the 767-tanker deal, Boeing's resolve to cross-pollinate its sagging commercial airplane sales with military contracting dollars eventually

166. Leslie Wayne, *An Anxious Time for Boeing as Fired Worker Starts to Talk*, N.Y. TIMES, June 16, 2004, at C1.

167. Joseph L. Galloway, *Rumsfeld to Restrict Senators' Access to Documents in Boeing Deal*, KNIGHT RIDDER WASHINGTON BUREAU, June 4, 2004, at K4524.

168. Amy Klamper, *White House May Provide Tanker Documents to Senate Panel*, July 9, 2004, available at <http://nationaljournal.com/pubs/congressdaily/>.

169. Leslie Wayne, *Pentagon Brass and Military Contractors' Gold*, N.Y. TIMES, June 29, 2004, at C1.

170. Renae Merle, *Report Examines Defense Hiring: 224 Ex-Federal Officials Worked for Contractors in Past Seven Years*, THE WASHINGTON POST, June 29, 2004, at E02.

171. *Boeing Wins Navy Aircraft Bid*, L.A. TIMES, June 15, 2004, at C3 (quoting Congressman Norman Dicks who praised the deal with Boeing as offering the Navy an aircraft, in the 737-800, with greater speed and flexibility).

succeeded. With the tanker proposal still dormant—the lease deal, as originally structured, is effectively dead, though Boeing announced in mid-October that it still expects to build 100 KC-767 for the Air Force—it seems likely Boeing will still have its corporate way with the Congress, though for a far smaller price tag this time.¹⁷²

172. Renee Merle, *Boeing Expects Air Force Contract: Firm Looks to Sell, Not Lease, Tankers*, THE WASHINGTON POST, Oct. 12, 2004 at E01.

