POLITICS OF ENFORCEMENT: HOW THE DEPARTMENT OF JUSTICE ENFORCES THE CIVIL FALSE CLAIMS ACT

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By

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ABSTRACT

When politicians speak of combating fraud against the government, they score points. The reason why is simple—fraud is bad. Every year the Department of Justice (DOJ) goes after and collects billions from government defrauders using the Civil False Claims Act (FCA). However, the Attorney General, a political appointee, runs the DOJ and determines the scope and level of enforcement. This study focuses on the politics of enforcement by testing whether political ideology impacts how aggressively the DOJ combats governmental fraud. This study uses data collected and released by the DOJ to determine whether the political party in control of the White House affects the number of FCA claims brought against government defrauders. Using multivariate analysis, this paper analyzes whether the number of FCA claims filed since 1987 changed as a result of the political party in control of the White House, controlling for other factors known to influence the volume of FCA claims such as the health of the economy, inflation and government spending. The results of this study show there is a statistically relevant correlation between the political orientation of the White House and how rigorously the DOJ combats government fraud using the FCA. On average, when a Democrat is in the White House, DOJ enforcement of the FCA increases by about 30%. Accordingly, the article proposes a series of Amendments to the FCA that broaden the power of individual (non-political) DOJ Attorneys to investigate and pursue FCA claims and require the Attorney General to make annual disclosures to Congress and the public. This article also recommends that Congress establish a permanent Subcommittee on Government Fraud to create an institutional infrastructure that can pressure the Attorney General to combat government fraud regardless of political orientation.
I would like to thank my thesis advisor Andrew Wise for his invaluable help and guidance in writing this thesis. I would also like to specifically thank U.S. Attorney Gary Plessman who first exposed me to the False Claims Act and gave me the idea to focus on its political enforcement. I would finally like to thank my family for supporting and encouraging me through this process. Thank you all.
# Table of Contents

Chapter 1. Introduction .......................................................................................... 1

Chapter 2. Background and Literature Review ................................................... 3  
  Background ................................................................................................. 3  
  Literature Review ................................................................................. 6

Chapter 3. The Data, Variables, Theoretical Framework and Model ............... 11  
  The Theoretical Framework ................................................................. 11  
  The Data & Variables .................................................................... 12  
  Empirical Model ........................................................................... 18

Chapter 4. Results and Policy Recommendations ............................................. 20  
  Model Results .................................................................................. 20  
  Policy Recommendations .............................................................. 24  
    First Recommendation: Amend FCA to Facilitate Civil Investigative Demands .............................................................................. 26  
    Second Recommendation: Amend FCA to Create Institutional Oversight over the DOJ .......................................................... 31

Chapter 5. Conclusion ....................................................................................... 36

References ............................................................................................................. 37
Chapter 1. Introduction

When politicians speak of combating fraud against the government, they score points. The reason why is simple—fraud is bad. This is why every year the Department of Justice (“DOJ”) goes after and collects billions from government defrauders, and why every year the DOJ reports its successes to the public. However, the Attorney General, a political appointee, runs the DOJ and determines the scope and level of enforcement. This study focuses on the politics of enforcement by testing whether political ideology impacts how the DOJ combats governmental fraud. Specifically, this study tests whether the DOJ’s intensity in combating government fraud depends on the political party in control of the White House.

Every year the U.S. Federal Government recovers billions from government defrauders under the Civil False Claims Act (“FCA”). The FCA is the Federal Government’s primary method of combating governmental fraud, and its enforcement is monitored and controlled by the DOJ. However, considering the political nature of the DOJ and the Attorney General, there remains a question as to whether political control of the White House effects the enforcement and application of the FCA. The Attorney General, appointed by the president, is in a unique position to effect FCA enforcement. The Attorney General can establish agency priorities, issue focus areas for enforcement, issue or fail to issue civil investigative demands, and
generally guide the direction of FCA enforcement. However, the scope of that
influence, as measured against political ideology, has never been studied.

This study uses data collected and released by the DOJ to determine
whether the political party in control of the White House affects the number of FCA
claims brought against government defrauders. Using multivariate analysis, this paper
analyzes whether the number of FCA claims filed since 1987 changed as a result of the
political party in control of the White House, controlling for other factors known to
influence the volume of FCA claims such as the health of the economy, inflation and
government spending.

This study is organized into three sections. First, I provide a historical
and substantive background on the FCA and review previous literature to better
understand how this study will fit within current scholarship. Second, I describe and
detail a statistical model aimed at isolating what effect political orientation has on DOJ
enforcement of the FCA. Finally, I discuss and interpret the results of the study and
make policy recommendations about how Congress can develop a FCA that combats
fraud more effectively regardless of the political orientation of the White House.
Chapter 2. Background and Literature Review

This study focuses exclusively on the FCA because of the importance and historical role the statute played in combating fraud against the Federal government. This chapter first gives a brief historical and substantive background on the FCA, and then looks at scholarly research dealing with the FCA to convey how this study fits within current scholarship.

Background

The first version of the FCA emerged in 1863 during the Civil War. (Beck 2000). Rampant fraud against the Union Army prompted President Lincoln to press for legal reform, and Congress responded by passing what was colloquially called “Lincoln’s Law.” The original law, which mirrors contemporary FCA legislation, provided the government with a means to bring civil law suits to recover monies lost to fraud. Unlike common law fraud, which is tedious and offers victims only restitution, the original FCA allowed double recovery; for every dollar stolen from the government, the defrauder was forced to pay two in return. (Helmer, 2000). The original FCA also contained a “qui tam” provision whereby individuals could bring FCA suits on behalf of the Federal Government when the government decided not to prosecute the claim. Qui tam is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning “he who sues in this matter for the king well as for
himself.” (Rich, 2008). This is frequently referred to as the whistleblower or relator provision.

After the Civil War, the FCA went through periods of use and disuse, until Congress revamped and refitted the FCA in 1986. (Rich, 2008). In response to perceived wide-spread fraud, Congress passed the 1986 amendments and fundamentally increased the FCA’s scope and efficacy. (Rich, 2008). This modern FCA, like the original, still provides for increased recovery, but instead of double recovery, damages are now trebled. In addition, the modern FCA provides for civil penalties. (Civil False Claims Act, 1987). This means for every false claim submitted to the government, the defendant is required to pay up to $15,000 in civil penalties.¹ From a legal perspective, the modern FCA is also much easier to prove. The government does not need to prove that the would-be defrauder knew they were committing fraud, which was required under the original FCA and common law fraud. The government only needs to show that the defendant should have known the claim was false to prove a FCA case. Like the original FCA, the modern FCA thoroughly exploits the *qui tam* provision, and allows relators (whistleblowers) to earn up to 30%

¹ While this may not seem to be particularly high, take for example Medicare fraud cases. For hospitals that systematically overcharge Medicaid by only few dollars but through routine practice submitted tens of thousands of claims, civil penalties can quickly reach stratospheric levels compared to amount of actual damages.
of a settlement or judgment and provides for measures to protect relators from retaliation.  

Today, the FCA is primarily enforced by the DOJ. (Bucy, 2004). Claims either originate within the DOJ itself, typically as a civil law suit brought after a criminal prosecution, or by individuals in *qui tam*. When the case originates in the DOJ, the DOJ prosecutes the claim as it would any case. However, when the claim originates from a relator, the process is quite different. First, the relator must file a *qui tam* compliant against the defendant under seal before the applicable court. While under seal, the DOJ reviews the case to decide whether to intervene. If the DOJ intervenes, then the DOJ will take over the case and prosecute the fraud. (Bucy, 2004). If the DOJ declines the case, then the relator can prosecute the case on the government’s behalf.

Since the DOJ plays such a pivotal role in enforcing the FCA, the Attorney General is in a unique position to influence the intensity of FCA enforcement. For example, before the government decides to intervene in a case, the DOJ is allowed to issue civil investigative demands (CIDs) which allow the DOJ to secretly subpoena

\[ \text{\cite{Bucy, 2004}} \]

- In 2009, Congress again amended the FCA to broaden the scope the FCA even more. The effects and interpretation of these amendments is still new law, and it will be fascinating to see how the FCA changes in response. However, since this study uses multivariate regression analysis, this study focuses only on the years 1986 – 2008, when there was relatively little change made to the FCA.
documents, depositions and evidence before the case is revealed to the defendant. The use of CIDs allows the DOJ to gather evidence before the defendant is on notice of the pending FCA suit and helps ensure important documents and records do not disappear. However, the Attorney General has authority, or delegate authority, to issue CIDs and each CID must be expressly authorized and signed by the Attorney General. Thus, if the Attorney General does not want to get involved with FCA enforcement, this valuable tool is not available to government lawyers. Since the Attorney General plays such an important role in FCA enforcement, and the Attorney General is a political appointee, it begs the question—do politics affect FCA enforcement?

**Literature Review**

There is a paucity of scholarly econometric research on the FCA. The FCA is traditionally a subject relegated to the legal profession, and the application of econometric analysis is few and far between. Literature dealing with the FCA focuses primarily on the substantive law underpinning the statute, case law and the policy of combating governmental fraud generally. This study, which will address the politics of FCA enforcement, is new territory. There are, however, a few areas of scholarly work which may prove beneficial in understanding and interpreting the scope of this study. First, I review the literature dealing with the efficacy of the FCA in combating fraud and whether it is currently the best tool of the Federal Government to combat fraud.
Second, I review the literature to determine whether using the FCA is still relevant in the context of modern fraud. Third, I review the literature dealing with the politics of agency enforcement to determine what previous empirical research models have done to evaluate the effect of politics on the vigor of agency enforcement generally.

This study presumes that the enforcement of the FCA is a good outcome because its enforcement directly combats fraud on the government. Therefore, I begin this literature review by looking at scholarly writing dealing with how well the FCA combats fraud. The FCA is the primary tool of the government to combat fraud.

Specifically, over $25 Billion has already been recovered since the FCA took form in 1986 (Meyers, 2006). Meyers found that for every dollar spent on FCA enforcement, the government receives approximately fifteen in return. Stringer (1996) finds that $21 billion will be recovered in the next decade and that since the 1986 Amendments, the FCA deterred $480.3 billion in government fraud. The question at the core of any current FCA debate is whether the FCA is the best vehicle for combating fraud. For example, Depoorter and De Mot (2006) argue that the incentive structure built into the FCA, whereby whistleblowers receive a cut of the recovery, motivates potential whistleblowers to wait until fraud occurs instead of preempting fraud. However, even they acknowledge the success the FCA has had in combating fraud on the government. Rich (2008) argues that the *qui tam* provisions of the FCA creates a perverse incentive
for the DOJ to let unmeritorious cases proceed to trial. However, Rich also concedes that while the incentives are wrong, the FCA is the primary tool of the government to recoup fraud. The literature uniformly suggests that while the FCA is not necessarily the best method to combat government fraud, in the current system of enforcement, the FCA is the primary tool used by the government.

The specific mechanics of the FCA are not the focus of this study, merely the level of its enforcement. Thus it is important to ensure that the FCA is still a relevant metric in determining how vigorously the government combats fraud and that there are not other methods being used to supplement the FCA. Because of the FCA’s overall success and adaptability the literature suggests that the FCA is still relevant to combat modern fraudulent schemes. For example, Bucy (1999) notes that in the sector of healthcare fraud, the importance of the FCA rose in prominence and adapted to healthcare fraud schemes throughout the 90’s. In fact, the FCA is now the primary vehicle for the government to reclaim monies lost from fraud under Medicare and Medicaid. Lansdale (2007) notes that the FCA is also heavily used to combat the fraudulent use of off-label marketing of pharmaceuticals, a recent development in government fraud as the government became heavily involved in providing medication under Medicare Plan D. According to Schneider (2007) over $3 billion has been recovered from pharmaceutical companies during 2000-2006 and recovery is projected
to increase over time. Historically, the FCA aimed to combat military contractor fraud, and that trend has not changed in recent years. Avery (2006) suggests that the FCA unique broad language is still an effective mechanism for combating modern complex military contracting fraud. Morris (2007) also argues that the FCA’s historical roots of combating war-profiteering are still applicable as the U.S. continues to wage war in the Middle East. Collectively, the literature suggests that FCA enforcement is an effective and relevant proxy for determining how the government combats modern fraud.

While there is no literature specifically dealing with how politics impacts DOJ enforcement of the FCA, there is literature about how the political control of the White House effects agency enforcement of other specific laws. With regard to the DOJ, the literature almost exclusively deals with how political control of the White House effects enforcement of antitrust law. Gallo and Chosal (2001) evaluated whether political control of the White House affected the number of antitrust cases filed and pursued by the DOJ. That study used multivariate analysis and controlled for variables relating to the economy, and found that there was no statistical relationship between party control of the White House and Congress and antitrust enforcement in the DOJ. Posner (1970) conducted a similar econometric analysis and also found that political control of the White House did not effect the level of antitrust enforcement in the DOJ. Furthermore, using data over 1890-1974, Lewis-Beck (1979) also did not
find any significant evidence that Republican control of the President, House and Senate correlated to the level of DOJ enforcement of antitrust law. With regard to other agencies, research suggests that political control of the White House effects enforcement. Nourayi (1996) found that the president’s political party impacted the number of litigation releases (letters allowing suit to proceed in securities cases) offered by the Securities and Exchange Commission. Hughes (2006) found that party control of the White House effects enforcement by the Environmental Protection Agency. Amacher et al. (1985) used Federal Trade Commission data and concluded that Democratic dominated commissions pursued consumer protection more vigorously with regard to the number of cases filed. Collectively, previous empirical research on the political effects on agency enforcement suggest that robust models include variables on the political control of the White House, the state of the economy and the number of cases filed.
Chapter 3. The Data, Variables, Theoretical Framework and Model

This chapter delineates the overall structure of the model and study. First, I discuss the econometric model from a theoretical standpoint, to convey the theory and approach used to isolate the political impact on government fraud. Second, I describe in detail the data set and each variable. Finally, I describe the actual model used in this study and how it can effectively isolate and test the relationship between political control of the White House and how well the DOJ enforces government fraud.

The Theoretical Framework

This study measures whether the political orientation of the White House effects how vigorously the DOJ enforces the FCA. I hypothesized that on average Republican administrations enforce the FCA less effectively then Democratic administrations because Republicans are typically more big business friendly and FCA defendants are typically massive corporations. Therefore, the independent variable will need to reflect the efficacy of the DOJ’s enforcement of the FCA, and the primary dependent variable will need to isolate the political orientation of the DOJ. I will also need to control for omitted factors that influence fraud independent of DOJ enforcement. From a theoretical standpoint, the proposed study will use the following model:
\textbf{Eq. 1: Theoretical Model}

\[ \Delta \text{DOJ Enforcement} = \beta_0 + \beta_1 \text{Political Orientation} + \beta_2 \text{Other Influences} + \mu \]

Using multivariate analysis, I can isolate any relationship between the political orientation and the vigor of the DOJ’s enforcement of the FCA. At the outset, I note that it is imperative to control for factors that would influence the vigor of FCA enforcement to mitigate any omitted variable bias. Variables, such as general government spending, can influence the amount of fraud occurring and be correlated with political orientation.

\textbf{The Data \& Variables}

To test this hypothesis, I collected data from several sources. The data consists of 22 observations, each representing a year between 1987 – 2008. For each observation, I selected 5 variables: (1) \textit{NewMatters}—the number of new FCA matters filed in court, (2) \textit{Party}—the party in control of the White House, (3) \textit{GovtSpend}—the amount of government spending, adjusted to 1987 dollars, (4) \textit{GDP}—the annual percentage change of the United States gross domestic product, and (5) \textit{CPI}—the annual change in the consumer price index.
Table 1: Descriptive Statistics of Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Number</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>NewMatters</td>
<td>22</td>
<td>457.4</td>
<td>113.7</td>
<td>253</td>
<td>730</td>
</tr>
<tr>
<td>Party (Dummy Variable)</td>
<td>22</td>
<td>8 obs = 1</td>
<td>14 obs. = 0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>GovtSpend (In Billions)</td>
<td>22</td>
<td>1.77</td>
<td>0.553</td>
<td>1.004</td>
<td>2.81</td>
</tr>
<tr>
<td>GDP (In percent)</td>
<td>22</td>
<td>2.92</td>
<td>1.33</td>
<td>-0.2</td>
<td>4.8</td>
</tr>
<tr>
<td>CPI (In percent)</td>
<td>22</td>
<td>2.95</td>
<td>1.29</td>
<td>0</td>
<td>6.3</td>
</tr>
</tbody>
</table>

(1) NewMatters (Source: The United States Department of Justice) This variable measures the number of new FCA claims filed before the courts in any given year. This variable is the independent variable. It serves as a proxy for determining how forcefully the DOJ is enforcing the FCA. This variable includes cases which originate within the DOJ and cases which were filed under *qui tam*. On rare occasions, the DOJ can take several years to decide whether to intervene in a particular case. Thus, a few of the cases reported by the DOJ may have actually been initiated several years prior. However, the variable still captures the affect this study purports to measure—namely, the intensity and efficacy of the DOJ’s
enforcement of FCA. If the DOJ takes several years to decide whether to intervene, then the DOJ is stalling or less effectively enforcing the FCA. This variable measures the scope of the DOJ’s enforcement of the FCA because it measures the number of FCA matters filed, which is the initial outcome of any civil FCA enforcement action. If the DOJ drops off in FCA claims, then it suggests that there is less rigorous enforcement of the FCA, whereas if there is a noticeable increase of FCA claims, it suggests the converse.

![Figure 1: NewMatters Scatterplot](https://example.com/figure1.png)

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3 I did not include the amount recovered from FCA enforcement as a measure of DOJ enforcement. Looking at judgment amounts can be very misleading, because it does not necessarily capture the intensity of enforcement. Some cases may be worth more than others, and that determination cannot be effected very easily by the Attorney General since it is ultimately a question left to a jury or judge. The number of cases, however, is something that the Attorney General has control over.
Looking at the scatter plot of NewMatters, it suggests that there is a strong correlation between political administrations and number of FCA claims. Specifically, the DOJ was controlled by Republicans from 1986 until 1992, by the Democrats from 1992 until 2000, and then again by the Republicans from 2000 until 2008. The number of NewMatters closely follows this cycle, dropping below the trend line for Republicans and rising above it for the Democrats.\(^4\)

(2) *Party* (Source: The White House) This is a dummy variable that measures which party controlled the White House, and thus the DOJ. This variable captures the political orientation of eight separate United States Attorney Generals between the years 1987 – 2008.

(3) *GovtSpend* (Source: Executive Office of the President of the United States) This variable measures the amount spent by the Federal Government in outlays between the years 1987 – 2009 as measured in billions of dollars. This variable is fundamentally a control variable. The assumption is that government fraud increases proportionately to the amount of money available for fraud. If fraud increases when government spending increases, then it follows that the overall amount of government fraud enforcement would also increase. Government spending would indirectly affect the number of FCA cases filed by the DOJ.

\(^4\) The overall up sloping trend is likely the result of overall increases in Government spending and the general expansion of the DOJ.
Therefore, I include this variable and deflate the values to 1987 dollars in order to control for its potential effect on the number of cases filed. Also, the DOJ’s budget may increase with a general increase in government spending.

![Figure 2: GovtSpend Scatterplot (in $ Trillions)](image)

This upward slope of GovtSpend should, if my hypothesis is correct, account for the general upward sloping of the NewMatters data because it reflects the general expansion of the DOJ during this time and the increased opportunity for government fraud and its respective enforcement.

(4) GDP (Source: Bureau of Economic Analysis, Department of Commerce) This variable measures the how much gross domestic product increased each year.
between 1987 – 2009. This variable is also a control variable. I assume that fraud decreases when the economy is poor, and increases when the economy is good because fraud is an opportunistic crime. When the economy is poor, individuals dispersing money are more careful and the opportunities to commit fraud decrease. With less fraud, there would be a similar decline the opportunity for the DOJ to combat. By including this metric of the US economy, I control for the potential effect the economy has on the amount of fraud and thus FCA claims.

![GDP Scatterplot](image)

(5) CPI (Source: Bureau of Labor Statistics, United States Department of Labor) This variable measures the increase of prices to consumers for each year between 1987
– 2009. This variable is also a control variable. I assume that when prices increase, then it makes it more difficult to bring claims because of increases in litigation costs. Thus, by including the annual CPI in the equation, I control for the potential effect inflation has on the number of cases filed by the DOJ.

Figure 4: CPI Scatterplot
(in percent change)

\[ Y_{NewMatters} = \beta_0 + \beta_1 Party + \beta_2 GovtSpend + \beta_3 GDP + \beta_4 CPI + \varepsilon \]
In this model, \textit{NewMatters} is the independent variable and functions as a proxy for establishing how effectively the DOJ enforces the FCA. \textit{Party} is the dependent variable of interest. If my hypothesis is correct, I predict that this model will yield a positive and statistically relevant $\beta_1$, which would indicate there is a positive relationship between a Democratic DOJ and the number of new FCA cases filed. \textit{GovtSpend}, \textit{GDP} and \textit{CPI} provide important control variables. Collectively, these variables control for other likely drivers behind the number of new matters filed, or drivers behind the general level of fraud in the government for any given year.
Chapter 4. Results and Policy Recommendations

This chapter uses the results of the model to suggest policy recommendations that reduce the impact the DOJ’s politician orientation has on FCA enforcement. Overall, the results of the model confirm the hypothesis, that the political orientation of the DOJ impacts how rigorously the DOJ enforces the FCA. This chapter is divided into two sections. The first section details the results of the model, and how to interpret each coefficient. The second section focuses on what these results mean, and proposes three fundamental policy recommendations to reduce the effect politics plays in FCA enforcement.

Model Results

The model confirms that there is a correlation between the political party in control of the DOJ and the magnitude of FCA enforcement. The primary variable of interest (Party) is significant at the 99% level, and every other dependant variable is significant at the 90% level or higher (see Table 2). Moreover, the model appears robust. The equation has an F-value of 13.28 which indicates that the dependent variables are jointly significant at the 99% level. The equation’s $R^2$ value indicates that the dependent variables explain over 75% of the variation in NewMatters. Considering the relatively small sample size of the dataset, the high $R^2$ value and strong F-value confirm that this model is functioning the way it was
intended. The model appears to capture and isolate the relationship between political orientation and the number of FCA claims filed by the DOJ. The results of the regression are displayed in Table 2. Because each dependent variable captures an important aspect of the hypothesis, this section explains and interprets each coefficient individually.

**Eq. 2: NewMatters Model**

\[ \text{NewMatters} = 229 + 115.5 \text{ Party} + .1 \text{ GovtSpend} + 26.6 \text{ GDP} - 23.8 \text{ CPI} \]

**Table 2: Regression Results**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Std. Error</th>
<th>T-Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
<td>229.87</td>
<td>84.38</td>
<td>2.72</td>
</tr>
<tr>
<td>Party (Dummy Variable)</td>
<td>115.5</td>
<td>38.20</td>
<td>3.03</td>
</tr>
<tr>
<td>GovtSpend (In Billions)</td>
<td>.1</td>
<td>288.5</td>
<td>3.49</td>
</tr>
<tr>
<td>GDP (In percent)</td>
<td>26.6</td>
<td>13.22</td>
<td>2.01</td>
</tr>
<tr>
<td>CPI (In percent)</td>
<td>-23.79</td>
<td>13.04</td>
<td>-1.82</td>
</tr>
</tbody>
</table>

\[ R^2 = 0.7575 \quad F-value = 13.28 \]
(1) *Party*: This variable is the primary variable of interest because it reflects directly how different presidential administrations enforce the FCA. The value of the coefficient confirms the original hypothesis. It reveals that when a Democratic administration controls the DOJ (Party = 1), on average, 115 more FCA claims are filed each year. Considering that the intercept is 229, that means on average Democrat administrations file over 30% more claims a year then their respective Republican administrations holding constant the state of the economy and government spending. The coefficient on *Party* is significant at the 99% level, which means this variation between political parties is not just random variation in the data. It signifies a pattern and correlation between how effectively different political administrations enforce FCA claims.

(2) *GovtSpend*: I expected there to be a strong correlation between the amount of money the government was spending and the number of FCA claims filed. I suspected this because when there is more money going around, there are greater opportunities for fraud and thus greater opportunities for enforcement. The coefficient on *GovtSpend* confirms this suspicion. For every extra $10 billion the government spends, one additional FCA claim is filed. This is a significant impact, as for every trillion the government spends, the DOJ files an additional 100 FCA claims. The coefficient is significant at the 99% level,
which suggests that as the government spends greater amounts of money, FCA enforcement also increases. Moreover, this variable controls for an important effect on the FCA enforcement. By holding GovtSpend constant, it accounts for the impact government spending has on fraud in general.

(3) GDP & CPI: These variables work in tandem. They are designed to isolate the impact of the general economy, with the understanding that in an affluent economy individuals are less likely to engage in fraud. These variables are only significant at the 90% level in the model when they are both used.\(^5\) However, these variables effectively capture two aspects of the economy. GDP reflects the overall growth rate of the economy, whereas CPI reflects the ability of individuals to purchase goods. The results of these variables are not surprising. The coefficient suggests that as the economy grows, the number of FCA claims increase, and conversely, when the economy is poor, people engage in less fraud. Fraud is an opportunistic enterprise, and when the economy is good, there are more opportunities to engage in fraud. This is supported by the GovtSpend coefficient. Thus, it is entirely consistent to see an increase of fraud when the economy is growing. Thinking of economic growth

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\(^5\) It should be noted that excluding these two variables from the equation does not significantly alter the magnitude or significance of the coefficients of Party and GovtSpend, it only impacts the \(R^2\) value of the overall model. This suggests that these two variables should remain because they do not appear to suffer from multicollinearity and yet they still explain variation in NewMatters.
in this context, the coefficient on \( CPI \) also follows. An increasing CPI erodes the future value of all goods and investments, including returns from fraud, so the incentive to commit fraud decreases.

Before moving from these results, it is important to first discuss potential problems with the model. The primary issue with this model is that is lends itself to bias because of its small sample size. To address this issue, I ran two tests on the data and model to see if it suffered from common regression issues. First, I ran a White Test to test for heteroscedasticity, which also yielded a heteroskedastic-robust result. The test did not yield a significant result or change to the model. Second, I ran a test for collinearity by testing the variance inflation of the model. Again, the test did not yield any significant results. Overall, the model is robust and powerful and captures a substantial amount of variation.

**Policy Recommendations**

In theory, combating government fraud is not a political issue. Democrats and Republicans both dislike fraud and overtly condemn it. However, the results of this study indicate that there is a political link between the political orientation of the White House and the rigor in which the DOJ enforces the FCA. This correlation is troubling because political ideology should not play such a role in how aggressively the government combats fraud. Accordingly, I propose two policy
recommendations that give individual DOJ Attorneys broader power to enforce and follow through with FCA enforcement. First, I argue that the FCA should be amended to facilitate the ability of U.S. Attorneys to get and issue Civil Investigative Demands. Second, I argue that the FCA should be amended to create institutional oversight over the DOJ.

I understand that limiting the discretion of the President to selectively enforce law or set enforcement priorities fundamentally undermines the Presidential prerogative. This is why these policy recommendations do not limit the ability of the Attorney General to exercise discretion over enforcement actions; they only increase the ability of individual DOJ Attorneys to follow through without enforcement actions independently of the Attorney General.

One way to view the results of this study is to condemn Republican administrations as not being as “tough” on government fraud. One could argue that Republican’s are simply too “big-business friendly” and that because FCA claims typically involve massive corporations, Republican Attorney Generals simply do not enforce the FCA as rigorously. However, regardless of the political “spin” one puts on these results, the primary focus of any policy recommendation should be to distance political motivation from the enforcement functions of the DOJ. Over time, the White House switches political orientation, but the DOJ’s career attorneys do not.
First Recommendation: Amend FCA to Facilitate Civil Investigative Demands

Under the FCA there is a valuable tool to investigate potential defrauders. It is called a Civil Investigative Demand (“CID”). The CID provision of the FCA that was in effect for the duration of this study (1986 – 2008) granted express authority to the United States Attorney General to demand information from a potential defrauder in the form of documentary material, answers to interrogatories, and oral testimony. (Civil False Claims Act, 2007). However, under the Fraud Enforcement and Recovery Act of 2009, signed into law by President Obama, Congress amended the FCA to allow the Attorney General to delegate the CID power. The most recent CID provision in the FCA provides,

> Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand . . .

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the
Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.

CIDs are only permitted when the government has not yet commenced a civil proceeding. Otherwise, the DOJ is bared from issuing CIDs and a Federal Court will quash the CID and require the DOJ to seek information through traditional discovery if a proceeding is already underway. The DOJ issues CIDs when there is “reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation.” (Civil False Claims Act, 2009). Thus, CIDs are used before a civil proceeding begins, and before the courts are involved. This is why the FCA originally vested the Attorney General with the sole authority to issue CIDs as the traditional vanguard of a potential defendant’s rights (i.e. the court) is not involved.

The uses of information obtained from a CID were originally limited in their use against an individual. During the duration of this study (1986 – 2008), information collected from a CID could not be shared with whistleblowers as part of an investigation, and would only be disclosed if the investigation ultimately led to an FCA claim. However, after the Fraud Enforcement and Recovery Act of 2009, Congress expanded the uses of CID information, and now it can be shared with whistleblowers as part of an investigation and regardless of whether it leads to an actual FCA claim.
In the context of a whistleblower case, CIDs are permitted even through a “civil proceeding” commenced because it was not technically commenced by the government; it was a case filed by the whistleblower in *qui tam*. The DOJ is permitted to issue CIDs to investigate whistleblower cases and use that information to determine whether to intervene in the case. However, as soon as the government intervenes, the DOJ is no longer permitted to issue CIDs in the case. This poses a unique problem for DOJ Attorneys. The FCA only gives the government sixty days to determine whether it will intervene in any case. Since every CIDs must come from the United States Attorney General, it is difficult to get a CID approved and enforced within the sixty day window.

Nonetheless, CIDs are an integral part of FCA enforcement. Uniformly, research suggests that government lawyers believe CIDs to be exceptionally helpful in pursing investigations, and ultimately, FCA claims (Barger, *et al*, 2005). CIDs allow the DOJ to determine whether a potential defrauder is worth the time and energy to pursue long and complex litigation. It also allows the DOJ to uncover defrauders that might have otherwise avoided the DOJ because the DOJ would have not bothered to go through the long a formal process of bringing a FCA claim in court.

Congress already took an important step in 2009 by amending the FCA to allow the Attorney General to delegate the authority to issue CIDs. Because the
Attorney General can delegate CID issuing authority to another senior officer, or even multiple officers, it will facilitate the entire CID process. DOJ Attorneys seeking to obtain a CID no longer need to get approval from the very top the DOJ, but can instead seek CIDs from their local U.S. Attorney or from a designated official in Washington, D.C. charged specifically with dealing with CIDs. It will also, at least in principle, further insulate the political pressures of the Attorney General position from DOJ’s FCA enforcement. If the Attorney General does not have the political will to sign CIDs, then possibly another senior officer will.

However, because each CID must be signed and issued by the Attorney General or by a “designee,” getting and using CIDs is only an effective tool if the Attorney General is interested in issuing them or delegating his authority to issue CIDs. Here is where politics becomes a serious problem. If the Attorney General, who is a political appointee, does not support the use of CIDs then it becomes an ineffective tool to combat fraud and will impact the ability of DOJ Attorneys to pursue investigations. Politics can directly impact the DOJ’s ability to combat government fraud. For example, during the Clinton administration, Janet Reno issued hundreds of CID during her time as Attorney General. However, John Ashcroft, under President Bush, never issued a single CID.
Congress should amend the FCA to allow DOJ Attorneys, seeking to investigate a *qui tam* case, to obtain a CID from the court overseeing the sealed case. Specifically, the following paragraph should be added to the FCA:

A U.S. Attorney, in a sealed *qui tam* case before a United States District Court under this subsection, may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand upon a showing of reasonable belief to the United States District Court presiding over the case that the target of the civil investigative demand may be in possession, custody, or control of any documentary material or information relevant to a *qui tam* case filed under seal.

Since *qui tam* cases are initially filed under seal before a court, DOJ Attorneys seeking to investigate the potential fraud should be able to go the court charged with presiding over the case and request a CID. Specifically, instead of having the Attorney General personally authorize every CID, DOJ Attorneys should be able to, independent of the political hierarchy, show sufficient evidence to a federal judge that a CID is needed to explore a potential FCA claim. The DOJ Attorney would be required to show sufficient cause (similar to the criminal law notion of probable cause) before the Judge would issue the CID and allow the DOJ Attorney to go after government defrauders.

This amendment would facilitate DOJ investigations into fraud. It would remove the ability of the Attorney General to impede FCA enforcement by not
issuing CIDs or delegating CID issuing authority and give aggressive government attorneys the ability to litigate FCA cases as vigorously as they desire. Moreover, the rights of the alleged defrauder would be protected because the CID would only be issued by a Federal Judge overseeing a sealed *qui tam* case. If the Federal Judge believes that the DOJ Attorney is overstepping his grounds in the investigation, it will be within the court’s discretion to limit or prohibit CIDs. This scheme would increase the ability of DOJ Attorneys to investigate would-be government defrauders regardless of the political orientation of the White House.

**Second Recommendation: Amend FCA to Create Institutional Oversight over the DOJ**

This study reveals that the political orientation of the White House impacts how rigorously the DOJ enforces the FCA. If politics can negatively impact FCA enforcement, then there should be a policy that enables politics to impact FCA enforcement positively as well. Specifically, Congress should play a larger role in the oversight and direction of the DOJ’s FCA enforcement. Recently, Congress gave the FCA an overhaul in the Fraud Enforcement and Recovery Act of 2009. However, Congress did not establish institutional changes to ensure that Congress kept a close eye on how DOJ combats fraud. The 2009 Amendments broadened the ability of DOJ lawyers to bring FCA suits, but the 2009 Amendments did not address the role politics plays in how rigorously the DOJ combats government fraud. Congress should do two
things: First, House of Representatives should establish a subcommittee on government fraud that reviews how effectively the DOJ enforces the FCA. Second, Congress should amend the FCA to include provisions that systematically increase Congressional oversight.

(1) Establishing Sub-Committee on Government Fraud

Government fraud appears to become “an issue” every few decades as the political elements begin looking for places to sure up government funds. The 1986 Amendments to the FCA emerged after there was public perception that government fraud was widespread (Kolis, 1993). The 2009 Amendments emerged after the collapse of the banking sector and on the heels of massive injections of capital into U.S. banking and manufacturing industries (Harney, 2009). However, despite perennial investigations on the Hill, there is exists no independent subcommittee devoted to developing policy aimed at combating government fraud. The House of Representatives is responsible for ensuring that government monies are properly spent, and thus the House of Representatives should establish a subcommittee charged with ensuring that government fraud is being dealt with effectively every year.

One of the primary sources of government fraud is in the healthcare sector (Bucy, 1999). Medicare and Medicaid spending are projected to expand as the Baby-Boomer generation retires. Moreover, Congress may pass a massive healthcare reform bill that invests billions in universal healthcare. The incidence of government
fraud will increase for the foreseeable future. By establishing a Subcommittee on Government Fraud, Congress will be able to closely monitor the level of government fraud, and more importantly, provide a political check on the DOJ to ensure the FCA is enforced.

(2) Amend FCA to Create Reporting Requirements to Congress

Congress should amend the FCA to include a reporting requirement. Specifically, Congress should include the following paragraph as part of the FCA,

The Attorney General shall annually report to Congress about the Department of Justice’s activities under the Civil False Claims Act and how the Attorney General intends to combat fraud on the United States for the coming year. The Attorney General shall also maintain an online database with information about the DOJ’s enforcement of the False Claims Act. The Attorney General shall annually evaluate government contractors receiving at least $100 million in government monies and report those evaluations to Congress.

This policy recommendation would work in tandem with a House Subcommittee on Government Fraud. The amendment would require the Attorney General to submit an annual report to Congress detailing the successes and failures of the FCA for the previous year, and outline a strategy for enforcement. Every year, the Subcommittee would review the Attorney General’s report and have an opportunity to conduct investigations into DOJ activity to ensure that the FCA is being enforced as rigorously as possible. The reporting requirement would put pressure on the Attorney General to enforce the FCA aggressively regardless of whatever political agenda the
President may have. Drop-offs in FCA enforcement would be noted, and the Attorney General would be required to account for it.

This amendment would also enable consumer groups and researchers to evaluate better how well the DOJ enforces the FCA. Specifically, statistics like the number of FCA cases investigated, the average length of investigation, the number of potential relators interviewed, the average length of litigation and the percentage of cases settled divided by industry are not released by the DOJ. The DOJ only releases very general statistics, and thus independent consumer groups and researchers have a difficult time evaluating how effectively the DOJ enforces the FCA. If the DOJ was forced to reveal these types of the statistics, and make them available on a public website, it would increase the ability of consumer groups, researchers and Congress to conduct oversight.

Finally, this amendment also puts the onus on the Attorney General to rate government contractors. Any contractor receiving over $100 million in government funds would be rated by the Attorney General. This puts pressure on would-be defrauders to “keep their noses clean.” Companies with a long history of fraud on the government would be disclosed to the public, and Congress would have that information available to it as it considers future appropriations. More importantly, it lends itself to increased transparency. The government would not be able to continue
doing business with a poorly rated government contractor without some Congressman on the Subcommittee on Government Fraud making a political debacle out of it. It would create a disincentive for the major government contractors to commit fraud. This rating system would also be another tool for DOJ Attorney to use against would-be defrauders. DOJ Attorneys can use the possibility of being graded poorly as leverage to gain cooperation from companies under investigation.
Chapter 5. Conclusion

Government fraud is bad. Everyone agrees. There is little political debate on the matter. However, this study proves that there is a correlation between the political orientation of the White House and how rigorously the DOJ combats government fraud using the FCA. Evidently, politics plays a role in how the DOJ combats government fraud. The Attorney General, a political appointee, has broad discretion and ability to impact how effectively the DOJ combats fraud. This study reveals that on average, when a Democrat is in the White House, DOJ enforcement of the FCA increases by about 30%, holding constant the level of government spending and the state of the economy. This result is troubling because politics should not influence how well the DOJ combats fraud.

In response to the results of this study, I propose a series of Amendments to the FCA that broaden the power of individual (non-political) DOJ Attorneys to investigate and pursue FCA claims. I also recommend amending the FCA to require the Attorney General to make annual disclosures to Congress and the public, holding the Attorney General accountable through transparency. Finally, I recommend that Congress establish a permanent Subcommittee on Government Fraud to create an institutional infrastructure that pressures the Attorney General to combat government fraud regardless of political orientation.
References


Bucy, Pamela H. “Games and Stories: Game Theory and the Civil False Claims Act.”


