

# FALSE CLAIMS ACT OF 1979, S. 1981

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
IMPROVEMENTS IN JUDICIAL MACHINERY  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
NINETY-SIXTH CONGRESS  
FIRST SESSION  
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NOVEMBER 19, 1979  
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# FALSE CLAIMS ACT OF 1979, S. 1981

MONDAY, NOVEMBER 19, 1979

U.S. SENATE,  
SUBCOMMITTEE ON IMPROVEMENTS IN  
JUDICIAL MACHINERY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 6226, Dirksen Senate Office Building, Senator Dennis DeConcini (chairman of the subcommittee) presiding.

Present: Senator DeConcini.

Also present: Romano Romani, staff director; Robert E. Feidler, counsel; Kevin O'Malley, staff assistant, and Pamela J. Phillips, chief clerk.

## OPENING STATEMENT OF SENATOR DeCONCINI

Senator DeCONCINI. The Subcommittee on Improvements in Judicial Machinery will come to order.

Today we will hold hearings on S. 1981, the amendments to the False Claims Act of 1979, which would provide the United States with an effective and useful tool to combat fraud in modern times.

This bill was developed by the Department of Justice in an attempt to bolster the mechanism available to the Department to carry out its responsibility of vigorously pursuing fraudulent practices in dealings with the Federal Government.

There can be no doubt that a need exists for reforming the False Claims Act, which has not been amended in any substantial respect since its enactment by the Congress in 1863. Although I retain some reservations about certain provisions of the bill, I am convinced that, on the whole, it is a valuable and necessary step forward in our struggle to protect the taxpayer from those who would defraud the United States.

The wholesale reform contemplated by the act would include provisions expanding jurisdiction and venue, increasing recoverable damages, raising the forfeiture levels and redefining the mental element required for a successful prosecution.

In addition, the burden of proof would be altered, *nolo contendere* pleas would take on more serious consequences in subsequent civil actions and a mechanism would be established to provide the necessary investigative tools so crucial to the development of a case in the face of these sophisticated schemes.

I want to pay particular thanks to the Judiciary Subcommittee, Bob Feidler, and Kevin O'Malley, who put in a great deal of time in this effort.

The first witnesses will be a panel from the Department of Justice headed by Roger Edgar, Director, Commercial Litigation Branch, Civil Division.

Subsequently, we will look forward to hearing from L. Stanley Paige, who is presently vice president for legal affairs, Post-News-week Stations, Inc., but who for many years headed up the Fraud Section of the Civil Division of the Department of Justice.

I understand joining you, Mr. Edgar, on the panel, will be Mr. Younger; is that right?

Mr. EDGAR. That's correct, Mr. Chairman.

Senator DECONCINI. Also Mr. Eugene R. Sullivan, Alan C. Brown, and one other person have accompanied you this morning.

Mr. EDGAR. Mr. Merrick Garland, Special Assistant to the Attorney General.

Senator DECONCINI. Very good. We are pleased to have you with us today. If you would, please proceed in whatever way you care to put your case on. We welcome you this morning.

#### **PANEL OF DEPARTMENT OF JUSTICE OFFICIALS:**

**ROGER EDGAR, DIRECTOR, COMMERCIAL LITIGATION BRANCH;  
ALEXANDER YOUNGER, ASSISTANT DIRECTOR, COMMERCIAL  
LITIGATION BRANCH; EUGENE R. SULLIVAN AND ALAN C.  
BROWN, TRIAL ATTORNEYS, CIVIL DIVISION, AND MERRICK  
GARLAND, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL**

Mr. EDGAR. Mr. Chairman, I do want to thank the committee for an opportunity to present the Department's views on this bill.

I have a prepared statement which has been distributed to the committee, and if the Chair will permit me, I would like to have that incorporated into the record of these proceedings, and thereafter, depart from that statement and present to you the highlights of the bill.

Senator DECONCINI. Your complete statement will appear at the conclusion of your oral testimony.

You may proceed to highlight it, if you desire.

Mr. EDGAR. Senator, you noted at the outset, in your remarks opening these proceedings, that the False Claims Act has not been amended in any substantial respect since its enactment following the Civil War.

This bill is an effort on the part of the Department of Justice, working with virtually every interested component of the executive branch, to modernize and to bring up to date a very useful statutory tool.

But I should hasten to emphasize that we are not in any way suggesting to the committee that the entire body of law known as the False Claims Act should be discarded. There are many provisions of that statute which have been utilized by the Department over the years to effect substantial recoveries in civil fraud cases. Those provisions have continuing vitality and from our perspective it would be most unwise to discard a body of precedent which has been established at considerable effort in 116 years. Nevertheless, there are a number of changes which circumstances make appropriate that we suggest to the Congress for consideration.

The bill comes to this committee as a result of a study which was suggested during the session of the last Congress when an amendment to the False Claims Act was presented dealing with nationwide service of process.

On the House side and on the Senate side, a number of the Members, a number of the Senators, suggested to the Department that this statute should be updated. The time had come for serious study to be given to this problem and we ought to go back and try to see what we could do to bring it up to date. This bill, as it has been presented to the committee this morning, is the result of that study.

The jurisdiction and venue provisions have been considerably broadened. Many of our cases which are brought involve multiple defendants, and, under the present law, an action under the False Claims Act can be brought only where a defendant can be found.

Now in a case where you have multiple defendants as is frequently true in most of our litigation, that will sometimes require that duplicitous lawsuits be begun in several districts, even though the conduct which gave rise to the litigation has a common genesis and a common origin. The bill is designed to remedy those deficiencies by providing a wider selection of jurisdiction and venue so that one action can be commenced in a single forum and that that court will have jurisdiction and venue over the action.

The Department believes that duplicitous litigation involving similar facts is not in the public interest. The bill is designed to correct that perceived deficiency.

A second significant change that the bill effects is a change in the damage calculation which is made upon a finding of liability in a suit brought under the False Claims Act. At the present time, there is considerable confusion among the circuits as to whether or not consequential damages can be recovered in an action under the False Claims Act.

These consequential damages are particularly significant in most procurement cases. Many times we have found that the consequential damages will far exceed and in some instances even exceed the actual damages that are sustained by the Government in a procurement fraud situation. Again, this bill remedies this deficiency and codifies, to some extent, existing law.

The forfeiture provision of the act has been modified. Under existing law, the United States may recover a \$2,000 forfeiture for each false claim which is presented. Again, this particular provision was enacted during the Civil War, and given 116 years of escalating costs, we think it not unreasonable to suggest to the Congress, for its consideration, an increase of a fairly substantial amount in the forfeiture provisions of the act and the bill does that by increasing the forfeiture amount from \$2,000 to \$5,000.

Another significant change made by this legislation is to provide that a plea of nolo contendere in a criminal case involving fraud against the Government will collaterally estop the defendant in a subsequent civil case upon those same facts from denying the truth of those facts.

In brief, the bill which is before the committee this morning would give to a nolo plea the same effects as that presently attributable to a guilty plea. The nolo plea, Senator, is the plea of the white-collar

criminal. I believe I can say this looking back on 16 years of prosecuting and defending criminal cases in the State and Federal courts. The nolo plea is not the plea of the bank robber, the interstate car thief and the like. The nolo plea is the plea of the sophisticated white-collar criminal represented by able, competent counsel who appreciates the fact that a nolo plea will have absolutely no collateral consequences in subsequent civil litigation.

I would like to give you one, I think, graphic illustration of the problems that the Department encounters under existing law.

In 1969, a Federal grand jury, in the Eastern District of Louisiana, began a criminal investigation of widespread fraudulent practices in the grain industry. The pattern of conduct that emerged from that investigation, which resulted in indictments of virtually all of the major grain exporting companies, showed a systematic, industrywide practice of shortweighing and misgrading grain which the United States was either purchasing or financing under the food for peace program.

Indictments were returned and one by one the corporations began to enter pleas of nolo contendere. One corporation entered a plea of nolo contendere on a 37-count indictment and was fined \$370,000.

Thereafter, the Department began civil litigation against this same corporation under the False Claims Act, and after 3½, almost 4 years of litigation, that case was settled by a payment from the corporation to the Treasurer of the United States of a sum of \$4 million.

I think that case illustrates a number of points. First of all, that the civil consequences of engaging in a fraud against the Government, at least in monetary terms, in many instances will far outweigh the consequences, again in financial terms, attendant upon a criminal conviction.

Second, I believe the case illustrates the anomaly that existing law contemplates by requiring that the Department of Justice begin anew an effort to establish the corporation's liability in Federal court.

The case required literally thousands of attorney hours and it is difficult to explain, and I believe rightfully so, to interested citizens and to the public why a corporation who pleads nolo contendere, and, hence, is subject to the full sanctions of the criminal law, the full extent of any fine that might be imposed, and in the case of an individual, indeed, even imprisonment to the maximum amount permitted by the statute, why that same individual is permitted to relitigate, in a civil case, his liability.

Again, let me emphasize that this provision is designed to eliminate that anomaly and it is directed at what we have found consistently to be true in cases involving white-collar crime. That is a marked departure from existing law, but I do believe that the facts and the circumstances warrant it, that it is in the public interest, and that the Congress should enact it.

Another provision which has been included in this draft bill is a provision dealing with civil investigative demands. As you probably know, Mr. Chairman, many of our cases follow antecedent criminal cases which are developed through the mechanism of a Federal grand jury.

We, on the civil side of the Department of Justice, are foreclosed under existing law, and properly so, from having any input into that investigation with a view toward directing the development of evi-

dence which is designed or which has as its object and purpose garnering facts for the development of the civil case.

The Supreme Court decisions on that subject are quite clear. This provision providing the Department with civil investigative demands will provide an independent avenue for the Department to develop evidence which is crucial to the development of these cases without waiting for the results of a Federal grand jury and without tempting prosecutors to pursue the civil consequences of a case through the vehicle of a Federal grand jury.

A number of years ago, the Congress gave similar powers to the Department in the form of the Hart-Scott-Rodino amendments, called the Antitrust Improvements Amendment Act; I believe that is the title. The provisions in this bill are patterned quite carefully, quite closely after the provisions in that bill.

We believe that these provisions are truly essential for the development of the facts that we need to bring before the courts to pursue these cases.

I would like to mention one other change in existing law which is contemplated by the present bill, and then make myself and other members of the panel available for whatever questions you may have.

The final thing I would like to mention is the changes made in the existing law and the provisions of the bill that deal with bribery and official corruption.

At the present time, the Department of Justice is investigating widespread corruption in the General Services Administration. It is a sorry history of bribery and misconduct among Government employees that appears in virtually every edition of the newspapers. What we have found, and I regret to say this, because I am a Government employee, but the facts are there: We have found in our investigation that many individuals employed by the Government have been corrupted by bribes and the corruption was so endemic, so pervasive, that these individuals were literally on the payroll of private contractors.

Payments were made over a period of time to these individuals in relatively modest amounts, sometimes in cash and sometimes in kind, in exchange for which the employee would agree to execute receipts for goods which are never delivered or which were never delivered, or if delivered were not delivered in the quantity stated in the invoice. But because the practice had continued for so many years, the employees were unable, not unwilling, they were simply unable to point specifically to a particular contract and say, "Yes, indeed, this is a contract which gave us, the General Service Administration, merchandise on its face, but in fact and in truth, that merchandise was never delivered." Obviously, the practice was not followed in every case and the employees have told us that they did this to avoid or at least to minimize the risk of detection.

So, perhaps in one case out of three or in one case out of four there would be a so-called "phony" or "bogus" invoice. This is truly shocking, but under existing law, in order for the Government to be made whole, we must have proof to tie up a particular bribe to a particular tainted contract and even though we have willing witnesses, witnesses who participated in the wrongdoing and hence are in the best position to tell us what in fact transpired, we face considerable and, indeed, in some instances, insurmountable problems of proof.



This bill will remedy those deficiencies.

Mr. Chairman, that does conclude my prepared remarks. I should say by way of introduction, the members of the panel which I have brought with me collectively have between them, I suspect, 30 years of litigating experience in the pursuit of these cases. They are staff attorneys who, like myself, are litigators, I hope that we will be able to answer any questions that the committee might have.

Senator DECONCINI. Thank you very much, Mr. Edgar. I appreciate your testimony. Let me say that I am very interested in this bill. I think you are correct that the time is long overdue to take some corrective measures. We are pleased to work with the Department in this area.

You did point out the GSA problem and a few other particular areas of concern. But in order to gain a perspective on the nature and magnitude of the problem that is addressed by the proposed amendment, could you, or someone on the panel provide us with some statistics on the number of cases brought by the Department under the False Claims Act per year and any estimate as to the dollar amount involved?

Mr. EDGAR. Mr. Chairman, I can tell you that in an average year the Civil Division of the Department of Justice receives between 6,000 and 7,000 referrals primarily in the form of FBI investigative reports which detail instances of wrongdoing and which are potentially the subject of action under the False Claims Act.

Some of those were closed at the outset for reasons as diverse as collectability or lack of litigative merit, but in an average year the Department of Justice Civil Division will have open approximately 1,100 matters. Many of our cases are settled prior to the time that suit is instituted. We afford every prospective defendant an opportunity, prior to the institution of suit, to come in and explore with us the possibility of settlement and compromise.

Senator DECONCINI. Do you think the 1,100 figure would increase with these amendments?

Mr. EDGAR. I believe that it would, Mr. Chairman. We will have the ability to develop better cases. At the present time, the 1,100 cases, many of which are settled, are settled for the reason that because of limited resources, we select out the cases to pursue fairly carefully.

Senator DECONCINI. Now you say the resources; do you mean the resources of manpower?

Mr. EDGAR. Yes.

Senator DECONCINI. Within your Division?

Mr. EDGAR. Yes.

Senator DECONCINI. This bill would assist you not by necessitating more manpower, but by giving you better tools?

Mr. EDGAR. It would not require any additional manpower for the Department of Justice. It would enable us to use our existing resources more effectively, particularly in the area of developing evidence about financial collectability.

It is very difficult for me as a manager to justify to the Assistant Attorney General or to the Attorney General 3 years of litigative effort, only to conclude at the termination of that litigation that the defendant lacks the ability to satisfy the judgment. That is one area which I think these amendments would enable us to take a much more careful look at to actually trace assets into the hands of recipients. This is information to which access now is effectively foreclosed.

Senator DECONCINI. Have you any recollection of cases whereupon getting civil judgment the defendant has gone bankrupt? Does that occur often?

Mr. EDGAR. Well, being a trial lawyer, I hate to use the word "never," but as best we can, we strive to insure financial collectability from the outset. If we cannot satisfy ourselves with available information, we will close the case, reluctantly to be sure, but we will close it.

There are, I suspect, instances in which we have pursued cases in which the defendant has gone bankrupt.

Maybe Mr. Younger knows of an instance. Do you know of any case of that sort where we chase the defendant only to have a bankrupt defendant at the end of the line?

Senator DECONCINI. I am just interested in knowing if that ever occurs in your effort. It does in the civil practice of law where I have experience. I wonder if it does with the Government when you get a judgment. Does it happen that by the time you get a judgment the company has gone bankrupt? Of course, there is no fault on the Government or anybody else, it just happens. I wondered if that problem is prevalent in your collection efforts.

Mr. EDGAR. I believe that we could probably furnish the committee with some statistics that were developed in a recent GAO study.

Senator DECONCINI. That is not necessary. You gave us some examples of where false claims are presented and where litigation ensues. Is the GSA situation the biggest area that you are involved with now or is it medicare-medicaid fraud? Can you provide us some insight on your present resource allocation?

Mr. EDGAR. Well, certainly GSA occupies a major portion of our resources, but the medicare-medicaid area is an area which is, I regret to say, burgeoning. The efforts of the Inspector General at the Department of Health, Education, and Welfare has generated a significant number of cases. We have seen a significant increase of cases in those areas.

Frankly, we are quite apprehensive. I can recall a number of years ago that the Department of HUD launched a major investigation to ferret out abuses in the FHA and VA loan program. As a result of that investigative effort almost 800 or 900 cases were referred to the Department and many of which we are still litigating.

So, we anticipate that I think our greatest area of potential growth is in medicare-medicaid fraud, the GSA scandals, and I think one possible further area would be in the area of procurement fraud.

Senator DECONCINI. Can you give the committee any feeling for the number of cases and the dollar amounts involved in any of these particular areas such as medicare, over a year?

Mr. EDGAR. Well, our average case, Senator, involves not less than \$120,000.

Senator DECONCINI. That is in medicare?

Mr. EDGAR. No, that is just the average case. That is across the board.

Senator DECONCINI. Do you have minimum damage limits on the claims you will file?

Mr. EDGAR. As a general rule, if the case involves less than \$60,000 in single damages, and under the False Claims Act that is in effect a \$120,000 case, because of the doubling provisions of the act, that case is delegated to the U.S. attorney.

But, our average case——

Senator DeCONCINI. If the case involves less than \$60,000, it is delegated to the U.S. attorney?

Mr. EDGAR. Automatically delegated to the U.S. attorney.

Senator DeCONCINI. What kind of criteria on amount does the U.S. attorney have for filing cases? Is there any?

Mr. EDGAR. The U.S. attorney has no authority to file a case if the damages exceed \$60,000 without the prior approval of the Assistant Attorney General for the Civil Division. I can tell you that with our limited resources any U.S. attorney who calls me on the telephone and asks for permission to institute a suit, even though the amount of money involved exceeds his delegated authority, is greeted quite warmly by me. I am delighted to give him that authority and work carefully with him in the development of the cases.

Senator DeCONCINI. What about the minimum amount? Do you have any minimum amount?

Mr. EDGAR. We——

Senator DeCONCINI. Do the U.S. attorneys file \$1,000 cases?

Mr. EDGAR. I don't believe they file \$1,000 cases. Again, the medicare area is, I think, particularly illuminating. If you have a doctor who is submitting false claims, the amount of damages involved may be quite small.

Let me give you an illustration of a typical medicare fraud case. A doctor submits a bill for a patient that he never saw. Typically, these are people who are confined in a nursing home or other environment. The doctor has a relationship with the nursing home. The doctor is down in Boca Raton, playing golf and the bills keep coming in, \$8 for seeing a number of patients that the physician never treated.

Now the amount of damages in a case of that kind are relatively small, but the forfeiture provisions of the act escalate that case into a case of significant financial dimensions for the doctor. When you consider that each one of these false claims carries with it a \$2,000 forfeiture provision.

So, there are a number of cases filed by the U.S. attorneys where the damages themselves are perhaps \$5,000 or \$10,000 but the doctors total financial exposure runs into the hundreds of thousands of dollars because of the forfeiture provisions of the act.

Senator DeCONCINI. How many such cases would you estimate that you have annually?

Mr. EDGAR. In the medicare field?

Senator DeCONCINI. Yes.

Mr. EDGAR. Oh, my estimate would be somewhere between 200 and 300 cases. But I could supply more definitive data.

Senator DeCONCINI. Do you frequently have criminal cases pending at the same time that you are filing civil cases?

Mr. EDGAR. Ordinarily the criminal case will go first. The reason for that is the reason that I alluded to earlier. We are on the civil side most reluctant to subject ourselves to the charge that we have utilized the grand jury to develop evidence of a civil case and thereby engraft onto an already difficult and complex case some additional factors.

Senator DeCONCINI. Doesn't that pose a problem for your department waiting for the period of time for the criminal case to be completed?

Mr. EDGAR. Very much so. In the grain cases that I alluded to, the criminal investigation was concluded in 1969, or was begun in 1969. I believe it was concluded in the latter part of 1972 or the early part of 1973, and because the criminal investigation had developed no evidence of damages, which, of course, is a crucial component of our case, it took us perhaps an additional 1½ years with, I must say, enthusiastic support from the agency and from the Bureau, to develop that damage information. But we had an additional 1½ years of lag time.

During that 1½ years there are many things that could happen although they didn't happen in those cases. You have witnesses whose memories grow dim and defendants whose pockets grow empty. That is a continuing problem that we have.

Senator DECONCINI. What is the estimated recovery value? Have you ever done any statistical research in your department on an annual basis?

Mr. EDGAR. Well, I took a quick poll of attorneys before I came up here to testify. We concluded, at least on the number of attorneys that I was unable to interview, that our recoveries in the prior fiscal year were somewhere in the neighborhood of \$15 million.

Now those recoveries represent——

Senator DECONCINI. Some \$15 million?

Mr. EDGAR. Yes, \$15 million. That is just from the Civil Division alone. I don't have the data from the——

Senator DECONCINI. What kind of a burden would it be, Mr. Edgar, to give the committee some breakdown on say the major areas of litigation and the amount of judgments that you received last year?

Mr. EDGAR. We would be happy to do that, yes.

Senator DECONCINI. Would you supply that to us?

Mr. EDGAR. Yes.

Senator DECONCINI. Is it also possible for you to gather that information from the U.S. attorneys?

Mr. EDGAR. I believe that they have data which can be utilized to get that information.

Senator DECONCINI. Good. We would appreciate having that information. It would help us in our deliberation.

[The material referred to above can be found in the appendix.]

Mr. EDGAR. I think we could also supply the committee with some perception of the magnitude of the problem as well which I think would be informative. I think some of the reports prepared by the Inspectors General will suggest to the committee what is coming up, what is down the road; what is the magnitude of the problem. We could provide that as well.

Senator DECONCINI. Fine, but that won't be required for the record.

You have explained the manner in which damages are presently calculated. I would like to talk about consequential damages. Can you give us a hypothetical case explaining just how far-reaching such damages could be if this were enacted into law?

Mr. EDGAR. Well, I can give you an actual case. I am sure that the committee can appreciate why I will be obliged to mask the identity of the participants in the case because the case is still under investigation. But, at least to me, it is a shocking case and one which I think will graphically illustrate the point we are trying to make.

We have a case right now where we have a defense contractor making and supplying tiny electronic components which are inserted into the

guidance systems of missiles. An investigation developed by the Defense Logistics Agency concluded that this contractor was submitting substandard parts. Now these are little tiny parts. And the amount—there is no other pleasant word for it—cheating which was going on was substituting an inferior part.

Now the amount of money that we are talking about is only pennies. The part involved I think had a total cost of around 17 or 18 cents. The contractor was submitting used components or components which had been refabricated with a cost to him of approximately 11 cents. But these components were going into missiles.

Now under existing law, and this case arises in the fifth circuit, if we were to bring a False Claims Act case against this particular contractor, we could recover the difference only between the amount the Government agreed to pay, 17 cents, and what it in fact got which is a part worth 11 cents.

But think of the cost that the Government incurs in tearing down a missile to get to the part to replace it. When you are dealing with people of this kind, are you comfortable in taking their assurance that the particular practice that you are talking about continued only over a 6-month period of time. The answer to that is obvious.

Senator DECONCINI. Indeed it is. You make a very good argument. I am pleased to have such a fine statement on the record, because I agree with the bill that these consequential damages should be recoverable.

Let me ask you this. Do you have any estimates in that case or any other case of just what the damages might be incurred by the Government in order to rectify such an error?

Mr. EDGAR. Well, we are asking the Defense Logistics Agency to develop that information for us now. I can only say that they believe the cost will be substantial.

Senator DECONCINI. When will you have that estimate?

Mr. EDGAR. I am unclear when the Agency will complete its investigation. I believe that it is not in the foreseeable future. That is to say that within 3 months or 4 months.

Senator DECONCINI. Do you have any current cases or ones that are already resolved where you have made estimates of what the actual consequential damages were that obviously you couldn't recover under the present act?

Mr. EDGAR. Well, we do have one case where we litigated this issue and lost it, called the *Aerodex* case. That is why we are before the committee this morning. I am sure from the facts of that case we could—

Senator DECONCINI. Is that the ball bearing case?

Mr. EDGAR. That is the ball bearing case, yes. I am sure that we could supply the committee with the information.

Senator DECONCINI. Would you do that for us, provide a logical presentation of what the estimated consequential damages were?

Mr. EDGAR. Yes, we would be happy to.

Senator DECONCINI. That you were not able to recover. I would like to have on the record an estimate of the damages you were unable to recover under the false claims act.

[For a discussion of the consequential damages in the *Aerodex* case see the statement of L. Stanley Paige on page 26.]

Senator DECONCINI. How far in your interpretation does the concept of consequential damages extend? Do you have any thoughts on that, Mr. Edgar? Perhaps, some of your trial lawyers have a view on this matter.

Mr. EDGAR. I think, Mr. Chairman, that perhaps Mr. Younger could give you some perception of the problem. He has litigated a number of cases in the housing area and consequential damages in those cases are always a problem. Perhaps if I could, I would turn the microphone over to him. Perhaps he could give you some insights into that.

Senator DECONCINI. Mr. Younger, I am interested in some presentation of just how far this might extend.

Mr. YOUNGER. Well, I think what we have sought in the cases we have brought under the act, Mr. Chairman, has been all damages that are reasonably foreseeable to the Government as a result of the fraudulent conduct giving rise to his suit.

In the housing area, for example, we have sought to recover where FHA is fraudulently induced to insure mortgages which go into default, aside from the amount paid on the claim, the amounts incurred by HUD to maintain properties after the Secretary acquires them through foreclosure proceedings, and the taxes that HUD has to pay as well as any resale expenses that it incurs.

We have taken the position that these additional consequential damages which are separate and distinct from the amount that HUD pays on the insurance claim are reasonably foreseeable to a defendant who fraudulently induces HUD to insure home mortgage loans.

Likewise in the *Aerodex* case, for example, which involved the ball bearings, we would maintain, if we were litigating that case anew, that all of the Government costs in replacing the defective ball bearings were foreseeable to the contractor at the time that he engaged in the fraudulent conduct.

Senator DECONCINI. What about the cost of the investigation? Would that be a consequential damage?

Mr. YOUNGER. We have not taken that position, Mr. Chairman.

Senator DECONCINI. Would you under this bill?

Mr. YOUNGER. I think the answer probably would be no, because of the theory enunciated by the Supreme Court for the forfeiture provisions of the False Claims Act. The court has held that those provisions are there to compensate the Government for its investigative costs.

Senator DECONCINI. What about personal liability, personal injury, arising, for example, in the missile case. If the missile exploded and caused death or injury on the launching pad and it were related to this contractual inefficiency, would that be consequential damages?

Mr. YOUNGER. I would say that if it were—if it could be brought under the rubric of a reasonably foreseeable result of the conduct involved in the missile case, we would certainly give consideration to trying to recover it.

Senator DECONCINI. Is there a standard for consequential damages now, in case law or otherwise?

Mr. YOUNGER. Well, the general rule excludes the recovery of consequentials under the False Claims Act.

Senator DeCONCINI. Yes, I know.

Mr. YOUNGER. In common law tort liability the standard is reasonable foreseeability.

Senator DeCONCINI. Is that what it is?

Mr. YOUNGER. Yes, sir.

Senator DeCONCINI. Thank you. I had forgotten.

Section 12(b) defines the term "knowingly," for purposes of the act. The definition includes the phrase "the defendant should have known that the claim was false and fictitious." Does this language connote a negligence standard?

Mr. EDGAR. I would like to have Mr. Younger respond to that, Mr. Chairman. He spent, I think, 2 years of his life grappling with that very problem. I think he is probably pretty well equipped to give you the answer to that one.

Senator DeCONCINI. Mr. Younger, could you comment on that?

Mr. YOUNGER. The answer to your question, Mr. Chairman, is no. The bill was, as prepared at the Department of Justice, not drafted to include negligence alone, but rather to address those situations in which we are confronted with reckless conduct on the part of individuals participating in Government programs.

Senator DeCONCINI. Is your thrust in using that term directed at the corporate management or the policymakers of a company that might be doing business with the Government.

Mr. YOUNGER. Yes, that is correct, Mr. Chairman.

Senator DeCONCINI. What protection would there be for the small businessman?

Mr. YOUNGER. Well, a small businessman who could establish, of course, that he had no actual knowledge of falsity and that he had conducted his business with the Government in such a way that it comported with reasonable notions of business practice would, I think, have adequate protection under that, on that basis.

We are primarily trying to get at a problem which has been called, characterized by Judge Gisell, here in this district as a problem of self-imposed ignorance. Situations in which corporate officers set up internal arrangements to isolate themselves from any documents showing that they had actual knowledge.

Senator DeCONCINI. But they should have.

Mr. YOUNGER. That's correct.

Senator DeCONCINI. Do you find that to be prevalent?

Mr. YOUNGER. Yes, we do, Mr. Chairman. It is a recurring problem in False Claims Act litigation.

Senator DeCONCINI. Generally, is that a good defense from the standpoint of the management of a company?

Mr. YOUNGER. Yes, it has been a very difficult defense for us to deal with.

Senator DeCONCINI. This would provide then that notwithstanding self-serving memos covering the corporate management if the standard is they should have known they would be liable?

Mr. YOUNGER. That's correct, Mr. Chairman.

Senator DeCONCINI. I see.

Mr. YOUNGER. Also, I would say notwithstanding the absence of any self-serving memos. In some of our cases there simply is no documentation indicating awareness of any kind.

Senator DeCONCINI. Mr. Edgar, let me ask you a general question. I would like to know the background of the commercial litigation branch. Can you give the committee the benefit of how many people are in your division, how many cases you handle annually, and just how you are set up administratively? I would like to know that for myself and it would help the record.

Mr. EDGAR. Yes, I would be happy to, Mr. Chairman. There are six litigating divisions within the Department of Justice as I recall. The Civil Division is one such litigating division. The Civil Division is in turn organized into three branches. One is called the Federal Programs Branch. One is called the Torts Branch. The third branch of which I am the director is called the Commercial Branch.

We have—I believe our current attorney staffing is approximately 100 attorneys, and an equivalent number of support personnel, secretaries, messengers, paraprofessionals and the like.

Senator DeCONCINI. Are those all in Washington?

Mr. EDGAR. They are all in Washington with the exception of—there are some attorneys in New York who handle the customs work. I believe there is an office in San Francisco as well. But 95 percent are here in Washington, D.C.

The branch handles all litigation involving monetary damages of a civil character. Either affirmative suits or defensive litigation suits are brought or defended in the Customs Court, in the Court of Claims, in the U.S. district courts and involve areas as diverse as patent cases, cases arising under the customs law, cases arising under all Federal programs either seeking to recover money or to defend the Government in suits brought against us. All cases which have as their common thread some commercial context, the transaction involving the Government has its genesis in some commercial transaction. We represent virtually every Federal agency, the Maritime Administration, the Agriculture Department, and the like.

The number of cases that are handled within the branch are many thousands. Those cases are handled in either one of two ways. The cases are handled personally by the attorneys here in Washington or they are handled by the U.S. attorney as the Government's primary attorney on the case and the division provides whatever assistance the U.S. attorney may require.

Senator DeCONCINI. You are totally separate from the Criminal Division?

Mr. EDGAR. Totally separate.

Senator DeCONCINI. You have no joint meetings or interplay on a scheduled basis or anything like that?

Mr. EDGAR. Well, I have a fairly regular contact with the Assistant Attorney General for the Criminal Division because it is my responsibility to coordinate cases involving fraud against the Government. As I believe I have mentioned to the committee many of those cases that many of our cases are preceded by the criminal cases.

So, I will meet on a fairly regular basis with the Assistant Attorney General for the Criminal Division or his principal deputies to discuss how best to coordinate the Government's litigative efforts in this area, to see whether or not it is in the Government's interest to consider the case civilly to the exclusion of the criminal case, whether we should go first, whether we should after, whether we should go at the same time or not.



Senator DECONCINI. Would there be any conflict with the Criminal Division in proceeding with this legislation without doing something about the criminal aspects of false claims?

Mr. EDGAR. No, I don't believe that there would at all. Mr. Chairman. We all work for the Attorney General. There are many components with the Department of Justice who, for example, if I were to feel that it was in the public interest and in the Government interest to pursue a civil case before a criminal case and the Assistant Attorney General for the Criminal Division, for reasons that he might have felt to the contrary, that would be an internal dispute within the Department. We all work for the same boss. We would present our arguments and he would make a ruling.

Senator DECONCINI. There is no conflict then from the Criminal Division concerning proceeding with this legislation at this time?

Mr. EDGAR. No; no.

Senator DECONCINI. Prior to consideration of any changes in the criminal law that might be necessary?

Mr. EDGAR. No, Mr. Chairman. We have consulted carefully with the Criminal Division in the development of this bill. Part of the internal deliberative processes that occurred within the Department of Justice included the full participation by the Criminal Division. There were numerous discussions both at the staff level and at higher levels and the bill as it is presented to the Congress today has the support and the backing of the Attorney General. He has telephoned me many times to see if I could report to him where we are going.

I know that he is going to be gratified when I see him this afternoon to tell him that we have had hearings on the bill.

Senator DECONCINI. Well, when you see him you can tell him we are very positive on the bill.

Regarding the GSA litigation, how many years has this problem been going on? Is this a constant thing that has been there for generations or decades or is it something new that we have discovered recently, say in the last 3 or 4 years?

Mr. EDGAR. Mr. Chairman, I regret to say that this is not new. The effort that we have thus far been able to devote to the GSA cases has focused primarily, and for understandable reasons, on cases within the statute of limitations. We have not devoted a significant amount of time to going back into those possible claims which might have occurred prior to the statute of limitations. But every indication that we have indicates that we are not uncovering any startling change. We have no new crop of fraud-doers who were recruited in the middle 1960's.

I regret to say that these employees, at least on the Government's standpoint, unfortunately, are employees who have been with the Government for most of their working lives.

It is a tragedy to see these employees who spent their entire adult lives, they are people for the main part in their later forties and early fifties, GS-9's, 10's, and 11's who have spent their entire career with the Federal Government and have it conclude in this sordid way is—

Senator DECONCINI. How many active cases do you have in the GSA area?

Mr. EDGAR. At the present time, I believe there are about 16 cases in actual litigation. Many of these matters have been settled without litigation. The criminal investigation which was undertaken

by the U.S. attorney's offices in the district of Baltimore and the District of Columbia were quite thorough.

Timmy Baker's cases, for example, were developed and at the conclusion of the criminal phase of one level of the cases, he immediately began to work the civil side of the cases and I am informed that most of those cases have settled.

So, I think the actual number of cases which are in litigation does not reflect the actual amount of effort which has been devoted by the Government in this area.

Senator DeCONCINI. The reference in your testimony to the GSA indicated that because of the long period of time that some of the employees have been involved in this activity it is very difficult to make cases because they can't remember and they didn't keep records or copies of incriminating documentation.

The civil investigative demands in section 3 of this act would provide you a needed tool I take it to investigate from the standpoint of the defendant's side or the suspected defendant's side as to some of these records; is that correct?

Mr. EDGAR. That's correct, Mr. Chairman. It will provide a crucial investigative tool. As you quite properly point out, the typical fraud defendant does not keep meticulous records of his wrongdoing in order to complete his Federal income tax return, but there are records which are available to us which we can, if we had this authority, profitably obtain at the outset to, if I might use a euphemism, to refresh the employee's recollection to the point where it would be extremely difficult for him to have a convenient memory lag.

There are documents and evidence which trained investigators, if they only had access to it, can use, which can enable an employee or for that matter anyone who defrauds the Government to pinpoint with more precision the actual dimension of his wrongdoing.

Senator DeCONCINI. Do you have any statistics or estimates of the percentage of judgments in favor of the Government in your division versus the number of cases that you actually file in court?

Mr. EDGAR. In the area of the civil frauds' litigation. [Pause.] I know this is going to sound laudatory but I can't recall the last time we lost a case.

Senator DeCONCINI. You say in at least 90 percent of those filed you get a judgment in favor of the Government?

Mr. EDGAR. We either get a judgment or we settle it. Again, we have an enormous data base. We have 7,000 referrals a year. We, to use a country expression, "cull out" a lot of cases. So, when we have a case going in we think it is a darn good case.

Senator DeCONCINI. If there was a provision in this bill or, if S. 265 is passed, which provides that the defendant would collect damages, including attorney's fees if the Government lost a case at trial, what would your reaction be?

Mr. EDGAR. Well, I wouldn't be happy, but I don't think I would be disconsolate. We intend to use this responsibly.

Senator DeCONCINI. Apparently you do now with that type of record. I compliment you, realizing, of course, that you don't file bad cases. But, after all, that is your responsibility.

Mr. EDGAR. I want to back away from that somewhat, Senator. As a practicing lawyer, I am sure that you would be leery of the lawyer who said he never lost a case. I have lost a case just about every way you could lose them, on the facts and on the law and on both.

So, we have lost cases, I am sure along the line. But I like to think that given the data base that we have that if we lose them there ought to be a pretty good reason. I want to know why. As I say, I can't recall recently any case we have lost. We have gotten something, either by judgment or by settlement.

Senator DECONCINI. If there was such a provision enacted in the law, based on the present operations of your division, you wouldn't see any great losses to the Government because you don't lose that many cases, correct?

Mr. EDGAR. Well, certainly not in the fraud area. Again, I don't say I would be happy with that kind of a provision to put a premium on disaster.

Senator DECONCINI. What if such a provision applied only to small business?

Mr. EDGAR. As a protection for the small businessman?

Senator DECONCINI. What if the act or the provision applied to individuals who have \$1 million net assets or partnerships or joint ventures or corporations with \$5 million in net assets providing that if they succeeded in winning the case, then they would be entitled to collect their actual cost of litigation, including attorney's fees?

Mr. EDGAR. We certainly take a real close look at every case that we bring. I can tell you that many of our defendants are Fortune 500 defendants. The case that I alluded to earlier was against Cook Industries, the largest grain exporter in the United States, at one time. We have a case now against LTV. I assume the kind of protection that you are suggesting would not be applicable to—

Senator DECONCINI. S. 265, which has passed the Senate, has that provision in it to protect the small business person.

Mr. EDGAR. I think the area that would give us the greatest problem would be in the medicare area. Doctors are perhaps individually the most affluent members of our society, but I don't know too many doctors who have a net worth of in excess of \$1 million.

Senator DECONCINI. Let me go to one other area, the nolo contendere plea. Do you or any member of the panel know just offhand or from your experience, Mr. Edgar, the background for this provision in our criminal statute?

Mr. EDGAR. Mr. Chairman, I think I would like to have Mr. Brown respond to that because we devoted a substantial amount of time and research to answering that very question. I think, if he could briefly respond to that, I think you might find it interesting. We certainly did.

Senator DECONCINI. Mr. Brown.

Mr. BROWN. Mr. Chairman, it is difficult to see the historical genesis of the nolo contendere plea, and the Supreme Court has so noted. However, it is merely an evidentiary rule. The law is clear that for the purpose of the particular criminal case, a person convicted on the basis of a nolo contendere plea is convicted the same as if he was convicted after a jury trial or on a plea of guilty.

The sole difference is that that plea cannot later be used against him in another proceeding.

Several States do not even recognize the existence of a nolo contendere plea, and allow only a not guilty or a guilty plea.

That rule, however, has been incorporated in the Federal Rules of Evidence and the Federal Rules of Criminal Procedure that a nolo

contendere plea may be accepted by the court and cannot be used subsequently in a later civil case against a party.

We find that it is most frequently used, as Mr. Edgar has said before, as the tool of the *white-collar criminal*, for example, in the antitrust or tax fraud area. It is used frequently in the white-collar fraud area as well, enabling a businessman or a corporation to defeat or retry a civil case which could have resulted in much greater possible liability than his potential fine in the criminal action.

Senator DECONCINI. Do you think that there is merit to the position that it is a valuable tool for the prosecutor?

Mr. EDGAR. I don't think it is a valuable tool for the prosecutor, and indeed, because this case or this bill comes before the committee with the full support of the Department of Justice, and the personal approval of the Attorney General, if it has any utility as a tool, it is one that he is willing to destroy.

Senator DECONCINI. I somewhat agree with that position, having been a prosecutor, I just wondered what the Department of Justice's position is, if they use it as a tool, because, it seems to me it is kind of a copout.

Mr. EDGAR. Well, the Attorney General is certainly supportive of this bill, wants it to go forward and urges the Congress to pass it. He is certainly willing to do without this tool. He doesn't like *nolo* pleas. If there was never a *nolo* plea entered, I don't think it would displease him at all.

Senator DECONCINI. One last question. Section 1(i), creates a remedy for cases involving bribery-tainted contracts which allows the Government to retain all consideration received and recover all considerations paid out under the contract involved. Is there precedence for this type of remedy in other areas of law with which you are familiar?

Mr. EDGAR. There is considerable precedent, Mr. Chairman. Under chapter 11, title 18, of the United States Code, one can recover consideration paid under a contract where there has been a conviction in connection with the bribery or conflict of interest provisions of that same chapter.

Additionally, the Federal Property and Administrative Services Act of 1949 contains similar provisions. There are analogous provisions contained, I believe, in 41 U.S.C. section 119.

Also, there is a long line of State cases which embody the same concept, a number of cases, well-reasoned cases from New York come quickly to mind. So this is by no means unprecedented in its approach that one who bribes a Government employee in order to obtain a contract, ought not to benefit from it. That is what this statute is designed to eliminate.

Senator DECONCINI. Thank you very much, Mr. Edgar, and gentlemen, for your fine presentation this morning. I want to compliment your department for the well-formulated legislation that you have brought to our attention. We can assure you that we will expend every effort to try to expedite this matter.

Mr. EDGAR. Thank you, Mr. Chairman. I might say that the next witness who will appear here will certainly tell you about himself. But I do wish to publicly and on the record express the Department's appreciation for Mr. Paige's testimony. Mr. Paige was with the Department of Justice for a long period of time. I am striving with

some difficulty to fill the shoes that he left. I think he can provide the committee with a certain sense of history and continuation of what this effort in this area is all about. I did want to publicly express the appreciation of the Department for his testimony and his appearance here today.

Senator DeCONCINI. Thank you very much, gentlemen.

[The prepared statement of Mr. Edgar follows:]

#### PREPARED STATEMENT OF J. ROGER EDGAR

Mr. Chairman and members of the committee: My name is J. Roger Edgar and I appear today at the committee's request, to provide the views of the Department of Justice on S. 1981, a bill to amend the False Claims Act. This legislation was submitted as an administration bill, and the Department, of course, supports the bill.

By way of introduction I should explain that I am a Director of the Commercial Litigation Branch of the Civil Division and responsible for the Department's litigation to effect civil recoveries on cases involving fraud against the Government or official corruption.

The False Claims Act is the primary litigative tool employed by the Department of Justice to recover money from those who have defrauded the Government. In its present form, the act, R.S. 3490-3494, 5438, empowers the United States to recover double damages, and one \$2,000 forfeiture for each claim made, or caused to be made, upon the United States.

The False Claims Act was adopted in 1863 in response to widespread fraudulent practices discovered by the Government in connection with military procurements made for the Union Army during the Civil War. The act has not been amended in any substantial respect since its enactment. The amendments to the act proposed by the present bill are designed to make the act an effective remedy to combat fraud in modern times. The present bill is the result of considerable study and effort by the Department of Justice, an effort which was begun following passage of Public Law 95-582, a bill to provide for nationwide service of trial or hearing subpoenas in suits brought under the False Claims Act which was signed by the President on November 2, 1978. During hearings on that bill before the House Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary, the committee encouraged the Department to present to the Congress legislation to modernize the False Claims Act. Similar concerns were expressed by the Senate during its consideration of Public Law 95-582, concerns with which you are undoubtedly familiar, Mr. Chairman, as one of the Senate sponsors of Public Law 95-582.

The study suggested by the Congress began immediately within the Department under the direction of Mr. Civiletti, then the Deputy Attorney General. All components of the Department of Justice were asked to contribute to this effort and, following the submission of written comments, and after considerable study by the staff, the present bill was approved by the present Attorney General. We worked closely with the executive branch, and particularly the Inspectors General of the various departments and agencies. This was done and the constructive suggestions received by the Department were included in the bill.

It is important for me to emphasize at the outset that the present bill is in no sense a "new" false claims act nor is it an omnibus bill containing every provision the Department believes might be necessary to enable the Department and agencies to use civil litigation to fight white-collar crime. This is so because the Department concluded that many of the original provisions of the False Claims Act, as construed by the courts over the 116-year history of the act, had continuing vitality. For example, the amendments make no change to the so-called "qui-tam" or "informer" provisions of the act which consumer advocates have singled out for special praise.

Because the present bill is carefully structured as amendments to the False Claims Act, it leaves unaltered these and many other provisions of the original statute. In short, it was thought unwise to discard over a hundred years of history in the name of reform. Thus, to a large extent, the present bill codifies many decisions of the Supreme Court and of the lower courts, and hence is a restatement of existing law. This restatement was thought to be necessary for several reasons. First, it acts as a legislative confirmation of crucial principles judicially established by the Department in years of costly litigation. This, in turn, forecloses the possibility that in subsequent suits the Department is not forced to

relitigate these same issues. For example, no change was made in the term "claim" as it is used in the present False Claims Act and, accordingly, the decisions construing that term in the original False Claims Act will have continued precedential force if a court is required to construe that term in the act as amended. In summary, much of the decisional law will remain viable to guide the courts in their interpretation of the act as amended.

The provisions of the bill discussed below are each necessary to improve existing law or to legislatively overrule decisions which are at variance with the weight of judicial authority or otherwise inconsistent with the modern view of the False Claims Act. The Attorney General believes that this bill is vitally necessary to improve the Department's litigating ability in the area of civil frauds claims because he is firmly committed to the use of civil remedies as an integral part of the Department's total efforts to fight fraud and white-collar crime.

#### A. JURISDICTION AND VENUE

Under existing law, the Government can only bring a False Claims Act suit in the judicial district in which the defendant can be "found." While this provision may have been satisfactory when the statute was first enacted, it now constitutes a restriction which considerably hinders our litigative efforts in cases against multiple defendants in today's highly mobile society. Many of our suits involve several defendants, and frequently they all cannot be "found" in any single district.

For example, in recent years we have brought a number of suits in Detroit against real estate brokers and salesmen who have fraudulently abused the FHA mortgage insurance programs. Our experience in these suits has been that some defendants remain in the Detroit area after exposure of their conduct, while others, who may have lost their brokers' licenses, move to other jurisdictions. The Government is thus left with the prospect of initiating multiple suits in multiple judicial districts relating to the same conduct. This is a waste of the taxpayers' money. The bill provides that in cases involving multiple defendants, jurisdiction and venue will be proper in any district in which any one of the defendants may be found, transacts business or is doing business or where an act constituting the violation took place.

#### B. DAMAGES AND FORFEITURES

The amendments dealing with damages recoverable in suits brought under the act, set forth in section 1 of the bill, would increase recoverable damages and forfeitures. The enhanced damage provisions will substantially improve the Department's litigating ability, particularly in cases involving procurement frauds. In many cases, Mr. Chairman, the consequential damages sustained by the Government far exceed the Government's direct out-of-pocket loss. At the present time, for example, repair and replacement costs are recoverable in some jurisdictions and not in others. The bill would eliminate this confusion.

Likewise, the forfeiture provisions of the act are increased from \$2,000 to \$5,000. The \$2,000 amount was established when the act was first passed during the Civil War, and the Department urges the Congress to eliminate this anachronistic amount. The forfeiture provisions of the act take on particular significance in cases where multiple fraudulent small claims are presented such as those submitted by a doctor seeking to defraud the medicare program. Although the total damages might be small, the forfeiture provisions considerably increase such a defendant's financial exposure if his conduct is detected and clearly would warn potential fraudsters that the public will not tolerate this kind of theft.

#### C. BURDEN OF PROOF AND KNOWLEDGE

The bill redefines the mental element required for a successful prosecution. The False Claims Act as originally enacted was part of a criminal statute. Partly because of the unusual genesis of the act, many courts have imposed extremely difficult standards of proof which are inconsistent with the "preponderance of the evidence standard" applicable to civil cases generally. Thus, at the present time, existing law requires that the Government prove its case by clear, unequivocal, and convincing evidence. *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962). Our experience has been that this is the functional equivalent of a criminal standard. Indeed, the Supreme Court has recently noted in another context that this standard may even exceed that used in criminal cases because the term "unequivocal", taken by itself, means proof that admits of no doubt. *Addington v. Texas*, — U.S. — (1979), Slip Op. at p. 13. Since the Supreme Court's decision in *United States ex*

*rel. Marcus v. Hess*, 317 U.S. 537 (1943), it is now well settled that an action under the act is "remedial" and one which imposes a "civil sanction". In the Department's view, the Supreme Court's decision in *United States ex rel. Marcus v. Hess* necessarily carries with it a repudiation of the concept of a higher burden of proof than that imposed in other civil cases. Accordingly, the bill clarifies this confusing area of the law and adopts the reasoning of the Court in *United States v. Gardner* 73 F. Supp. 644 (N.D. Ala. 1947).

A similar misconception of the purposes of the act has led some courts to impose a scienter requirement similar to that required in criminal cases. In many circuits, we are required to prove that the defendant intended to defraud the United States. E.g., *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972); *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970). In keeping with the concept that the act is civil, not criminal, in nature, the bill requires only that the Government prove that the defendant had either actual or constructive knowledge that the claim was false, an interpretation approved in *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 56-59 (8th Cir. 1973) and *Miller v. United States*, 550 F.2d 17 (Ct. Cl. 1977), to mention only a few of the more modern decisions.

#### D. NOLO CONTENDERE PLEAS

Many cases brought by the Department under the False Claims Act follow criminal cases brought upon essentially the same facts. Under existing law, a nolo contendere plea in a criminal case, unlike a guilty plea or finding of guilt, has no evidentiary value in a subsequent civil case. *Hudson v. United States*, 272 U.S. 451, 455 (1926); see also, *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F.Supp. 366 (D. Minn. 1939). This is an anomalous result because a person who is convicted upon a nolo plea in a criminal case can be fined or imprisoned to the same extent as one who has pled guilty or has been found guilty after trial. This is a conviction in every sense of the word and the courts have so held.

The Department urges that the Congress no longer countenance a continuing disparity in the civil consequences of convictions of guilt depending on how concluded. The case law is now well developed that convictions in a criminal case by a guilty plea or after trial estops the defendant from denying the essential elements of the criminal offense in subsequent civil litigation. *Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct. Cl. 1973); *United States v. Silliman*, 167 F.2d 607 (3rd Cir. 1948); *United States v. Levinson*, 369 F. Supp. 575 (E.D. Mich. 1973). The civil consequences of any conviction should be identical—an estoppel as to essential elements of the offense charged. Defendants who cheat the Government by making false claims and whose guilt is established in a prior criminal proceeding whether by guilty plea, nolo contendere plea, or a finding of guilt should not be able to relitigate the question of their innocence for civil purposes. The bill would correct this deficiency which every year costs the taxpayer millions of dollars.

#### E. CIVIL INVESTIGATIVE DEMANDS

The bill also establishes a mechanism to provide the necessary investigative tools crucial to the successful developments of the complex cases typically brought under the act. The typical criminal fraud investigation which precedes our cases under the False Claims Act is conducted by Federal grand juries. Under existing law the grand jury cannot be used for the primary purpose of developing evidence for use in civil proceedings. *United States v. Doe*, 341 F.Supp. 1350 (S.D. N.Y. 1972); *In re Perlin*, 589 F.2d 260, 268 (7th Cir. 1978). The Department believes that no changes in the function of the grand jury are either appropriate or necessary. On the other hand, because the grand jury investigation typically does not yield evidence of importance to the development of a civil case, usually in the area of damages, some means is needed for the Government to develop this evidence, rather than depend upon voluntary cooperation. Accordingly, the bill contains provisions for the issuance of Civil Investigative Demands, closely patterned after those given to the Government by the Antitrust Improvements Act of 1976, Public Law 94-435, which became effective on September 5, 1978.

This model was chosen because the cases brought under the False Claims Act resemble antitrust cases in magnitude and complexity. For example, we recently concluded a False Claims Act suit against one of the world's largest grain exporters. This case involved hundreds of complex transactions recorded in thousands of documents which extended over a 6-year period. These documents, many of which were in the hands of third parties, could have been obtained prior to the commencement of suit. Substantial savings to the taxpayers could have been achieved. I say this because the Department presently has no means either to

subpena necessary records or to obtain needed testimony for a civil case until after suit is filed. In the case just cited it took years of litigation in the courts simply to obtain records because the defendants had the will and financial resources to delay the Department's efforts to obtain records that they and others were required by law to maintain.

The Department's inability to obtain necessary information before a civil suit is instituted will not infrequently cause us to close our investigative file, even though there may be concrete indications of wrongdoing. For example, only last week the Department of Agriculture reluctantly agreed with us to close an investigation against a major grain exporter although there was some evidence that the company had deliberately misgraded and shortweighed grain that was either purchased or financed by the Commodity Credit Corporation. We, of course, had the option of instituting suit upon the basis of our speculations concerning the incomplete available evidence with the hope of finding additional evidence through discovery. However, the Department has traditionally declined to bring serious charges of fraud, unless there is a substantial likelihood of success based upon available evidence before suit is instituted. Civil frauds suits are serious matters and it is simply unfair to the defendant and to the public to begin such proceedings without a realistic expectation of success.

#### F. PREJUDGMENT ATTACHMENT

Under rule 64 of the Federal Rules of Civil Procedure, the Government's prejudgment attachment remedies are governed by State law in the district in which the district court is held. Because the Department litigates in virtually every State, the use of attachment remedies necessarily varies with every case. Fraud and concealment of assets are common in the civil frauds cases brought by the Department and we believe it unwise to allow a State law to govern our efforts to recover Federal funds. A uniform Federal standard for the employment of these remedies in cases brought under the False Claims Act would significantly enhance the Government's litigating ability in this area, and the bill contains remedies the Department believes will be effective towards the end. Those remedies are based on the district court's broad power to grant injunctions, a remedy which is familiar to all Federal judges and litigants who practice in the Federal courts. The elimination of the local variances and idiosyncrasies of State statutory and judicial standards in this area will enable Government attorneys to more promptly obtain a court order to prevent the concealment or dissipation of the taxpayers' money by fraud-doers.

#### G. BRIBERY AND OTHER OFFICIAL MISCONDUCT

Under existing law, the Government can void a contract tainted by bribery or kickbacks. See, for example, *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), and *United States v. Acme Process Equipment Co.*, 385 U.S. 138 (1966). In the cases which have sanctioned such a result, the bribery or other misconduct was discovered prior to the payment of the claim. The bill seeks to extend the logical holding of these cases to permit civil recovery of all consideration paid by the Government in those cases where the wrongdoing is not discovered until after the claim has been paid, a result which has been reached in several well-reasoned State court decisions. See e.g., *S. T. Grand, Inc. v. City of New York*, 32 N.Y. 2d 300, 298 N.E. 2d 105 (1973).

In order for the Government to use the remedies described in the preceding paragraph, existing law requires that the Government prove that the bribe or gratuity was directly related to the contract or claim at issue, an evidentiary burden which is almost impossible to meet in many cases. The bill provides that a bribe or other gratuity is presumptively linked to any contract in which the corrupted Federal employee performed any substantial function within a 12-month period either preceding or following the date of receipt of the bribe.

In our investigation of the GSA scandal we found repeated instances where GSA employees had accepted bribes in exchange for acknowledging receipt of goods that either were never delivered or not delivered in the quantity stated in the invoice. These same employees told us, however, that they did not follow this practice on every purchase order because they hoped to minimize the risk of detection. They were simply unable to recall which contracts were tainted because the practice had gone on for years. Under these circumstances we believe that it would be fair to require the contractor to prove that he had delivered the goods in the quantity and quality stated and the bill is designed to achieve this objective.



## H. EFFECTIVE DATE

The Department believes that the substantive changes to the act suggested by the bill, that is, those pertaining to the elements of liability, damages, burden of proof and knowledge, should be made applicable only to those suits brought following enactment. The Department also believes that the other provisions of the bill may properly be made applicable to suits pending at the time of enactment. This is so because the substantive changes in this bill could foreseeably affect the outcome of pending litigation. Given this consideration, the Department believes that fairness requires that the substantive standards governing pending litigation remain unaffected. The bill is designed to achieve these objectives.

## CONCLUSION

The efficient civil prosecution of fraud requires these amendments to the False Claims Act. The alternatives are expensive and often inadequate litigation to effect resolution of a civil fraud case.

I have not attempted in my prepared remarks to supply a wealth of data on the magnitude of the problem of fraud against the Government. Many of those shocking statistics fill other reports now before this Congress. It seems enough to point out that our President deemed the problem of sufficient gravity to discuss it with the Congress in his state of the Union message delivered earlier this year.

In conclusion, I must add that the Department does not believe that this bill is the final answer to fraud against the Government or even a complete answer to the problem of civil recoveries in this area. The various agencies and departments of our Government must be given the power to help the Department by helping police their own program by efficient administrative proceedings against fraud-doers. But this bill is a good beginning, is in the public interest, and we urge its prompt consideration and enactment by this Congress.

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Senator DECONCINI. The next witness is Mr. Stanley Paige, vice president for legal affairs, Post-Newsweek Stations, Inc., former Chief of the Fraud Section, Civil Division, Department of Justice.

Indeed, Mr. Paige, you have left behind a sterling record in the Department of Justice. We are very pleased to have you here today. Your statement will appear in the record or you may read it if you like, however you care to proceed.

**STATEMENT OF L. STANLEY PAIGE, VICE PRESIDENT FOR LEGAL AFFAIRS, POST-NEWSWEEK STATIONS, INC.**

Mr. PAIGE. Thank you very much, Mr. Chairman, for having me here. I appreciate the opportunity and am embarrassed by all the preceding laurels, of course. We can never live up to those.

I would like to say that I was with the Department of Justice for 19½ years, all in the Frauds Section of the Civil Division and was the Chief of that Section from 1967 until 1974.

Let me note for the record that I am appearing today as a private citizen. There is no connection between my appearance and testimony here and my present employment, and none of the views I express on S. 1981, are attributable to or associated with my employer.

S. 1981 embodies measures to remedy impediments to the effective enforcement of the False Claims Act and other legal tools available to the Department of Justice for the protection of the monetary interests of the United States and the recovery of funds wrongfully obtained from it. I believe that the Government's ability to recover its losses from fraud-doers and to invoke effective civil deterrents to all forms of corruption in its monetary, contractual, and property

dealings deserve this legislature's priority attention. Overall, S. 1981 solves the most critical problems in these areas.

Turning to the bill's individual provisions, I offer these comments:

The language of the False Claims Act describing the conduct it proscribes is ambiguous and cumbersome. Those dealing with the Government who may become subject to its provisions deserve a clear understanding of their jeopardies, those in Government agencies involved in committing millions of dollars in public funds need to be able to identify possibly actionable wrongdoing. The precise, lucid restatement in the pending bill of the conduct coming within its purview serves these purposes.

My next point. Giving the district courts the power to bring all defendants together in one action removes a major obstacle to effective enforcement of the act and related remedies.

The necessity of commencing several suits in different Federal districts to reach all those implicated in a common scheme, and then to shepherd these various actions through the courts in some orderly manner, without incurring premature rulings in one of the secondary suits that may undermine the lead cases, is an exercise that neither fosters a just result for the parties nor contributes to the sensible use of the Federal judiciary's time and energies.

Let me depart for 1 minute for two examples that come to mind. We once had a case referred to generally as the *Austrian Barter* case. This is where a lot of wheat and other grains were to go to Austria. Instead, when these ships reached the North Sea Ports of Rotterdam, Bremerhaven, and Hamburg, much of that grain, or all of that grain, was diverted into West Germany and other European countries where the shippers and freight forwarders could obtain much more money for it.

We brought suits versus Bungee, Continental Grain, Garnac, and other international organizations. But in order to vindicate the civil interests of the United States, we had to bring a suit in the Southern District of New York, across the river in Newark, in Washington, D.C., and in New Orleans and would have had to bring an additional suit in Minneapolis, except for the fact that those defendants first settled out before we brought suit.

I also recall the *Sergeant Majors'* case. Those were the noncommissioned Army men in Europe, particularly West Germany, who were responsible for running the Post Exchange System. The Post Exchanges served all the American troops then in Europe.

These individuals operated under what they called "The Organization." They had a requirement of contractors dealing with them that each contractor pay say 10 percent of the annual amount of contracts received from them, back to them, and it was filtered through. It was a famous case at the time.

We brought as I recall, six to eight suits in this country where each of the defendants was found. Because we were not able to control the progress of that litigation, the first suit that came up for trial was in Miami, and I went there to try it with one of my staff attorneys, and it was just against one of the individuals on very narrow issues. We were quite hampered in endeavoring to show the dimensions of the conspiracy and, of course, to refer to all the other contractors who were not directly dealing with this individual.

Fortunately, we did prevail as to that defendant. It just shows how crippled we were in effectively presenting the Government's claims and in a logical forum, I felt.

Senator DECONCINI. Mr. Paige, this bill would provide that venue would be enlarged sufficiently to remedy that problem?

Mr. PAIGE. Yes, as I understand the bill, the suit could have been brought where most of the defendants then resided, in Los Angeles; and the others, his conspirators or cohorts, could all be brought into that suit as I understand it. I do have a comment on that or a caveat.

Senator DECONCINI. I would appreciate that.

Mr. PAIGE. If, as the Government's complaint in a suit under the act will allege, these individuals acted together in duping the United States, then, generally, it is in everyone's best interest that they be tried together.

Now, caveat. I, however, also believe that fairness may warrant adding to the bill a grant to the district court of the discretionary authority to enter protective orders where to compel a given defendant to answer the charges in a distant district would be unduly oppressive. The court could sever, as to that defendant, transfer to a convenient forum, and/or grant full cost if that defendant prevails. The Senator was just mentioning that concept in another connection a moment ago.

However, I believe that attorneys more sophisticated in the Federal judiciary than I am might well advise the committee that district courts already have that authority to enter such protective orders as an inherent power or an ancillary power so that my suggestion here might not really have meaning.

Codification—I am turning now to civil bribery—is what we used to call it. Codification of the Government's right to affirmative relief against the payor of a bribe or a perverse gratuity is essential. The judicial confirmation of this common law remedy, flowing as it does from fundamental principles of agency law, have been scant and somewhat equivocal.

We had a major suit in Denver years ago. We were able to prove that the Government employee negotiating the contract regularly received gratuities from the individual, the parties he was dealing with, and that the contract was negotiated badly as to the United States. But, the court required clear and convincing proof that there was a direct connection between the gratuities received from the contractor and the manner in which that contract was defectively negotiated, which really meant opening up his mind. And, of course, we were not able to meet that burden. That was a \$4 or \$5 million case. It was one of the few we lost.

Punishment of the Government employee, which is the usual object of the criminal phase, does little or nothing to deter those contractors or other private parties who engage in such practices. And they are the ones who stand to reap the real profits from such chicanery.

The investigative demand procedure which S. 1981 would institute would equip the Department of Justice with an important new enforcement mechanism. It makes possible, among other things, preservation of essential documentary evidence while the investigation is being conducted and during the pendency of any companion criminal proceedings.

For instance, proof of the damages sustained by the United States is not material to the criminal phase and, therefore, the suspected

fraud-doers' records pertinent to that issue may not be obtained or analyzed by the Government for purposes of the criminal prosecution. Unless the Civil Division is able to procure and retain those records until the decision regarding civil suit is made, there is a significant likelihood that those records will be lost or disposed of.

In my view, requiring persons to produce written evidence and give testimony under oath as a part of a civil fraud investigation is justified by the seriousness of the conduct in question and the dimensions of the Government's annual losses to felonious opportunists.

S. 1981 contains appropriate protections of an individual's entitlement to the advice of counsel and to his or her constitutional privileges. Conversely, it liberates the Department of Justice from dependence upon voluntary cooperation as the only vehicle for developing and preserving the facts and the evidence in a civil fraud matter prior to suit.

In summary, I consider the principal merits of S. 1981 to be—if I might, I would like to allude, again, if I may, to the *Aerodex* case which I did try together with a staff attorney. This could help, I believe, the committee to recognize the frustration that suit brought about because it was not a ball bearing, it was a master rod bearing. That master rod bearing, about that size [indicating]. And there were some 300 of them as I recall, connected to the power train, was the connection between the power train and the rotor going up to the—these were helicopters. Curtiss-Wright helicopters—to the helicopter engine.

What these individuals had done, rather than deliver new, unused bearings as specified, would be to find some old bearings, I believe out in California or on someone's shelf or a scrap dealer's shelf, have them brought to Miami and reworked. That reworking included putting new serial numbers on them.

We showed through Curtiss-Wright testimony in fact, that these bearings had, the ones supplied, had a lesser ability to resist stress and heat. I remember the court stopping the testimony at one point and saying, "Well, Mr. Witness, tell us plainly, what would happen if that bearing cracked in flight." He said, "The helicopter would go down."

So, the consequential damages involved bringing all the helicopter engines back from around the world in which these bearings had already been installed, bringing them back up to Jacksonville—they had a retrofit center there—and taking out the old bearing and putting in the new bearing.

We never found nine of those bearings as I recall, but some of them were in action in Vietnam, so we never knew why we never found them.

You have asked Mr. Edgar to get the information on the disparity between the actual damages and the consequential damages. My recollection is those bearings actually cost about \$23,000, and that was the limit of our damage recovery. Whereas, that retrofit program cost the United States, as I recall now from years ago, about \$256,000.

Senator DECONCINI. Thank you. That is very helpful information in that area.

Mr. PAIGE. I will conclude. In summary, I consider the principal merits of S. 1981 to be: Establishment of uniformity in the definitions and elements of civil fraud violations, averting or minimizing conflicting decisions by different district courts on the same factual and legal issues in multiple actions brought against defendants residing

in several districts, preservation of essential evidence while the suspicions of wrongdoing are investigated, statutory confirmation of the civil accountability of the party that remits a bribe or perverse gratuity, and willful depredations of the public treasury warrant heavy sanctions and optimum enforcement capability.

I believe S. 1981 fulfills those needs. Thank you for hearing my testimony today.

Senator DECONCINI. Mr. Paige, thank you very much. You were here I think during the testimony of Mr. Edgar. Do you agree with the position of the Justice Department on the nolo plea?

Mr. PAIGE. I asked Mr. Edgar about that and only asked him what the reaction of the Criminal Division had been, because I assumed there had been one. I think Mr. Edgar very correctly stated the position, what I believe the position of the Department would be and certainly should be; that is, it is a somewhat overused and abused plea bargaining device. It is only available to those who have the sophistication to know how to use it to their advantage. I think it is long since time that it is confined or eliminated.

Senator DECONCINI. Mr. Paige, do you feel that the civil investigative demands provision opens the door to possible harassment of individuals, small businessmen?

Mr. PAIGE. I reviewed it. I was pleased to see it there. I know the problems we have had absent such mechanisms. I don't know that there is any such track record of the Antitrust Division in using comparable provisions. I believe there are sufficient safeguards to prevent that within the Department of Justice, to prevent that kind of activity. When we were there, before we were able to invoke any special provisions of this nature, there were several layers that had to grant approval to do so.

The Department of Justice is invested in all its functions with a good deal of authority and a lot of discretionary ability. Every now and then any human being or sets of human beings will make mistakes. I don't think or believe there is any significant record of the attorneys of the Department of Justice abusing any of their many authorities. I don't believe this is particularly susceptible of that.

Senator DECONCINI. I could see where it would be a very useful tool. I am also quite concerned about it being overused or used for the purpose of just eliciting a lot of information in a broad area to help build statistical data or for some other purpose.

I just wanted your comments on it.

Thank you very much.

Mr. PAIGE. Thank you.

Senator DECONCINI. We appreciate your testimony.

That concludes the hearing for today. The record will remain open for Justice or anyone else to submit statements for 2 weeks. Thank you.

Mr. PAIGE. Thank you, Mr. Chairman.

[The prepared statement of Mr. Paige follows:]

#### PREPARED STATEMENT OF L. STANLEY PAIGE

My name is L. Stanley Paige. I reside at 4740 Connecticut Avenue in Washington, D.C.

I earned the bachelor of arts and bachelor of law degrees at Howard University, and the master of laws from Georgetown Law School. I was admitted to the bar in the District of Columbia in 1954.

On December 7, 1954, I joined the Department of Justice, assigned to the Frauds Section of the Civil Division. In September 1967 I was named Chief of,

the Frauds Section. I resigned from the Department in June 1974 to accept my present position as vice president for legal affairs of Post-Newsweek Stations, Inc.

Let me note for the record that I am appearing today as a private citizen. There is no connection between my appearance and testimony here and my present employment, and none of the views I express on S. 1981 are attributable to or associated with my employer.

## II

S. 1981 embodies measures to remedy impediments to the effective enforcement of the False Claims Act and other legal tools available to the Department of Justice for the protection of the monetary interests of the United States and the recovery of funds wrongfully obtained from it. I believe that the Government's ability to recover its losses from fraud-doers and to invoke effective civil deterrents to all forms of corruption in its monetary, contractual, and property dealings deserve this legislature's priority attention. Overall, S. 1981 solves the most critical problems in these areas.

Turning to the bill's individual provisions, I offer these comments:

(1) The language of the False Claims Act describing the conduct it proscribes is ambiguous and cumbersome. Those dealing with the Government who may become subject to its provisions deserve a clear understanding of their jeopardies; those in Government agencies involved in committing millions of dollars in public funds need to be able to identify possibly actionable wrongdoing. The precise, lucid restatement in the pending bill of the conduct coming within its purview serves these purposes.

(2) Giving the district courts the power to bring all defendants together in one action removes a major obstacle to effective enforcement of the act and related remedies. The necessity of commencing several suits in different Federal districts to reach all those implicated in a common scheme, and then to shepherd these various actions through the courts in some orderly manner, without incurring premature rulings in one of the secondary suits that may undermine the lead cases, is an exercise that neither fosters a just result for the parties nor contributes to the sensible use of the Federal judiciary's time and energies. If, as the Government's complaint in a suit under the act will allege, these individuals acted together in duping the United States, then generally it is in everyone's best interest that they be tried together.

I, however, also believe that fairness may warrant adding to the bill a grant to the district court of the discretionary authority to enter protective orders where to compel a given defendant to answer the charges in a distant would be unduly oppressive. The court could sever, transfer to a convenient forum, and/or grant full costs if that defendant prevails.

(3) Codification of the Government's right to affirmative relief against the payor of a bribe or perverse gratuity is essential. The judicial confirmation of this common law remedy, flowing as it does from fundamental principles of agency law, have been scant and somewhat equivocal. Punishment of the Government employee, which is the usual object of the criminal phase, does little or nothing to deter those contractors or other private parties who engage in such practices. And they are the ones who stand to reap the real profits from such chicanery.

(4) The investigative demand procedure which S. 1981 would institute would equip the Department of Justice with an important new enforcement mechanism. It makes possible, among other things, preservation of essential documentary evidence while the investigation is being conducted and during the pendency of any companion criminal proceedings. For instance, proof of the damages sustained by the United States is not material to the criminal phase and, therefore, the suspected fraud-doers' records pertinent to that issue may not be obtained or analyzed by the Government for purposes of the criminal prosecution. Unless the Civil Division is able to procure and retain those records until the decision regarding civil suit is made, there is a significant likelihood that those records will be lost or disposed of.

In my view, requiring persons to produce written evidence and give testimony under oath as a part of a civil fraud investigation is justified by the seriousness of the conduct in question and the dimensions of the Government's annual losses to felonious opportunists. S. 1981 contains appropriate protections of an individual's entitlement to the advice of counsel and to his or her constitutional privileges. Conversely, it liberates the Department of Justice from dependence upon voluntary cooperation as the only vehicle for developing and preserving the facts and the evidence in a civil fraud matter prior to suit.

In summary, I consider the principal merits of S. 1981 to be: (a) Establishment of uniformity in the definitions and elements of civil fraud violations, (b) averting or minimizing conflicting decisions by different district courts on the same factual and legal issues in multiple actions brought against defendants residing in several districts, (c) preservation of essential evidence while the suspicions of wrongdoing are investigated, and (d) statutory confirmation of the civil accountability of the party that remits a bribe or perverse gratuity.

Willful depredations of the public treasury warrant heavy sanctions and optimum enforcement capability. I believe S. 1981 fulfills those needs.

Thank you for giving me the opportunity to testify today. I would be pleased to respond to any questions.

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Senator DECONCINI. The committee will stand in recess subject to the call of the Chair.

[Whereupon, at 11:07 a.m., the hearing was adjourned, subject to the call of the Chair.]

## APPENDIX

96TH CONGRESS  
1ST SESSION

# S. 1981

To improve judicial machinery by amending the jurisdiction and venue requirements and damage provisions in all suits involving the False Claims Act, and for other purposes.

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### IN THE SENATE OF THE UNITED STATES

NOVEMBER 6 (legislative day, NOVEMBER 5), 1979

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To improve judicial machinery by amending the jurisdiction and venue requirements and damage provisions in all suits involving the False Claims Act, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That sections 3490, 3491, and 3494 of the Revised Statutes,  
4       as amended, are amended as follows:

5       SECTION 1. Section 3490 of the Revised Statutes, as  
6       amended, is amended as follows:

7               (1) By deleting from section 3490 of the Revised  
8       Statutes the following words "who shall do or commit



1       any of the acts prohibited by any of the provisions of  
2       section 5438, title 'Crimes' shall forfeit and pay to the  
3       United States the sum of two thousand dollars, and, in  
4       addition, double the amount of damages which the  
5       United States may have sustained by reason of the  
6       doing or committing of such act, together with the  
7       costs of suit; and such forfeiture and damages shall be  
8       sued for in the same suit" and, inserting in lieu thereof  
9       the following:

10    "who:

11           "(a) makes or causes to be made, or presents or  
12       causes to be presented, for payment or approval, to or  
13       by any person or officer in the civil, military, or naval  
14       service of the United States, any claim upon or against  
15       the Government of the United States, or any depart-  
16       ment or officer thereof, knowing such claim to be false  
17       or fictitious; or

18           "(b) for the purposes of obtaining or aiding to  
19       obtain the payment or approval of such claim, makes,  
20       uses, or causes to be made or used, any false bill, re-  
21       ceipt, voucher, roll, account, claim, certificate, affida-  
22       vit, deposition, computer printouts, or other computer-  
23       readable media, including, but not limited to, magnetic  
24       discs, paper tapes, punch cards, and discs, knowing the

1 same to contain any false or fictitious statement or  
2 entry; or

3 “(c) knowingly enters into any agreement, combi-  
4 nation, or conspiracy to present, or cause to be pre-  
5 sented, any false or fictitious claim to the Government  
6 of the United States, or any department or officer  
7 thereof, by obtaining or aiding to obtain the payment  
8 or allowance of any false or fictitious claim,  
9 shall be liable to the United States as provided in the next  
10 subsection.”.

11 (2) By adding new subsections (a) and (b), as  
12 follows:

13 “(a) Any person who shall do or commit any of the acts  
14 prohibited by any of the provisions of the preceding subsec-  
15 tion shall for each such claim, forfeit and pay to the United  
16 States the sum of \$5,000; and in addition thereto—

17 “(1) double the amount of its damages, including  
18 double the amount of its consequential damages, which  
19 damages the United States would not have sustained  
20 either but for—

21 “(i) the doing or commission of any of the  
22 acts set forth in the preceding section; or

23 “(ii) having entered into or made any con-  
24 tract or grant as a result, in any material part, of  
25 any false statement; and, in addition thereto,

1           “(2) the costs of suit; minus

2           “(3) any credits to which the defendant may es-  
3       tablish entitlement, which credits shall be deducted  
4       only after the damages sustained by the United States  
5       have been doubled as set forth in subsection (2) hereof.  
6       Such forfeiture or forfeitures and damages shall be sued for in  
7       the same suit.

8       “(b) The term ‘knowing’ or ‘knowingly’, as used in this  
9       Act, shall mean either that the defendant—

10           “(1) had actual knowledge; or

11           “(2) had constructive knowledge in that—

12               “(i) the defendant acted in reckless disregard  
13       of the truth; or

14               “(ii) the defendant should have known that  
15       the claim was false or fictitious;

16       and, in any suit under this Act, no proof of intent to defraud  
17       or proof of any other element of a claim for fraud at common  
18       law shall be required.”.

19       SEC. 2. Section 3491 of the Revised Statutes, as  
20       amended, is amended as follows:

21           (a) by deleting subsection A of section 3491 and  
22       adding a new subsection A in lieu thereof as follows:

23       “(A) The district courts of the United States, the United  
24       States District Court for the District of Columbia, the United  
25       States District Courts for the Districts of Puerto Rico, the

1 Virgin Islands, Guam, and any territory or possession of the  
2 United States, shall have jurisdiction over any action com-  
3 menced by the United States under sections 3490 through  
4 3494 of the Revised Statutes, as amended, and venue of such  
5 action shall be proper in any district in which any defendant,  
6 or in the case of multiple defendants, any one defendant  
7 either can be found, resides, transacts business, or in which  
8 any act proscribed by this Act shall be alleged by the United  
9 States to have occurred, and a summons as required by the  
10 Federal Rules of Civil Procedure shall be issued by said dis-  
11 trict court and served at any place within the United States,  
12 Puerto Rico, the Virgin Islands, Guam, and any territory or  
13 possession of the United States, or in any foreign country.  
14 The Court of Claims shall likewise have jurisdiction of any  
15 such action if such is asserted by way of counterclaim by the  
16 United States, which may join as additional parties in such  
17 counterclaim all persons who may be jointly and severally  
18 liable with such party against whom a counterclaim is assert-  
19 ed by reason of having violated sections 3490 through 3494  
20 of the Revised Statutes, as amended: *Provided, however,*  
21 *That no cross-claims or third-party claims shall be asserted*  
22 *among such additional parties except as such claims may oth-*  
23 *erwise be within the jurisdiction of the Court of Claims."*

24           (b) by adding new subsections G, H, I, and J, as  
25 follows:

1       “(G) In any action hereafter brought under sections  
2 3490 through 3494 of the Revised Statutes, as amended, the  
3 United States shall be required to prove all essential ele-  
4 ments of its cause of action, including damages, by a prepon-  
5 derance of the evidence.

6       “(H) A final judgment hereafter rendered in favor of the  
7 United States in any criminal proceeding charging fraud or  
8 false statements, whether upon a verdict after trial or upon a  
9 plea of guilty or nolo contendere, shall estop the defendant  
10 from denying the essential elements of the offense in any  
11 action brought by the United States pursuant to sections  
12 3490 through 3494 of the Revised Statutes, as amended.

13       “(I) Any person, including, but not limited to, any part-  
14 nership, firm, corporation, or other association, State or polit-  
15 ical subdivision thereof, who shall pay or give, directly or  
16 indirectly, any thing of value to any officer or employee of  
17 the United States to influence such officer or employee in the  
18 performance of his official duty shall be liable in a civil action  
19 by the United States for any such amount so paid or given  
20 and, in addition, any contract made with such person, part-  
21 nership, firm, corporation, or other association, State or polit-  
22 ical subdivision thereof, in which such officer or employee  
23 shall have performed any substantial function, made within  
24 one year preceding, or following the payment or receipt or  
25 the agreement for the payment or receipt, of any such thing

1 of value shall be null and void and the United States may  
2 retain all benefits or consideration received by it pursuant to  
3 such contract and sue to recover in addition all benefits or  
4 consideration conferred or paid by it. Jurisdiction, venue,  
5 service of process, and trial subpoenas and burden of proof in  
6 such actions shall be the same as in actions brought pursuant  
7 to sections 3490 through 3494 of the Revised Statutes, as  
8 amended.

9       “(J) The Attorney General or his designee may apply to  
10 any district court having jurisdiction over any action com-  
11 menced pursuant to sections 3490 through 3494 of the Re-  
12 vised Statutes, as amended, for provisional relief whenever  
13 he has reasonable cause to believe that said sections may  
14 have been violated, and, if the court shall find there is a  
15 reasonable likelihood that the United States will prevail after  
16 trial on the merits of its claim, it shall enjoin the defendant  
17 from taking any action which the court, in the exercise of its  
18 discretion, finds reasonably likely to hinder or delay the  
19 United States in the collection of any judgment which may be  
20 obtained in such action and, in addition, the court may from  
21 time to time make such other orders as it deems appropriate  
22 including, but not limited to, requiring the defendant to post  
23 security for judgment, or to seek the prior approval of the  
24 court before making any transfer without an adequate and  
25 full consideration in money or moneys worth, paying an ante-

1 cedent debt which has matured more than thirty days prior to  
 2 payment, or otherwise engaging in any transaction not in the  
 3 usual and regular course of the defendant's business. Except  
 4 as provided for herein, such application by the Attorney Gen-  
 5 eral and proceedings hereunder shall be governed by rule 65  
 6 of the Federal Rules of Civil Procedure.”.

7 SEC. 3. Section 3494 of the Revised Statutes, as  
 8 amended, is amended as follows:

9 (a) by deleting the words “and not afterwards”  
 10 and inserting in lieu thereof, the following: “or within  
 11 three years from the time when facts material to the  
 12 right of action are known or reasonably should have  
 13 known by the official within the United States Depart-  
 14 ment of Justice charged with responsibility to act in the  
 15 circumstances, whichever shall occur last”, and

16 (b) by further amending section 3494 to add the  
 17 following new subsections 2, 3, 4, and 5, as follows:  
 18 “SEC. 2. For the purpose of subsections 2 through 5 of  
 19 section 3494:

20 “(a) The term ‘False Claims Act law’ includes—

21 “(1) each provision of sections 3490 through 3498  
 22 and 5498 of the Revised Statutes, commonly known as  
 23 the False Claims Act; and

24 “(2) any statute hereafter enacted by the Con-  
 25 gress which prohibits, or makes available to the United

1 States in any court of the United States any civil  
2 remedy with respect to any false claim or bribery or  
3 corruption of any officer or employee of the United  
4 States.

5 “(b) The term ‘False Claims Act investigation’ means  
6 any inquiry conducted by any False Claims Act investigator  
7 for the purpose of ascertaining whether any person is or has  
8 been engaged in any False Claims Act violation, including  
9 any bribery or corruption of any officer or employee of the  
10 United States proscribed by subsection I of section 3491 of  
11 the Revised Statutes, as amended;

12 “(c) The term ‘False Claims Act violation’ means any  
13 act or omission in violation of any False Claims Act law;

14 “(d) The term ‘False Claims Act investigator’ means  
15 any attorney or investigator employed by the Department of  
16 Justice who is charged with the duty of enforcing or carrying  
17 into effect any False Claims Act law;

18 “(e) The term ‘person’ means any natural person, part-  
19 nership, corporation, association, or other legal entity, includ-  
20 ing any State or political subdivision;

21 “(f) The term ‘documentary material’ includes the origi-  
22 nal or any copy of any book, report, memorandum, paper,  
23 communication, tabulation, chart, or other document; and



1       “(g) the term ‘custodian’ means the custodian, or any  
2 deputy custodian designated by the Assistant Attorney Gen-  
3 eral of the Civil Division.

4       “SEC. 3. (a) Whenever the Attorney General, or the  
5 Assistant Attorney General in charge of the Civil Division of  
6 the Department of Justice, has reason to believe that any  
7 person may be in possession, custody, or control of any docu-  
8 mentary material, or may have any information, relevant to a  
9 False Claims Act investigation, he may, prior to the institu-  
10 tion of a civil proceeding thereon, issue in writing, and cause  
11 to be served upon such person, a civil investigative demand  
12 requiring such person to produce such documentary material  
13 for inspection and copying or reproduction, to answer in writ-  
14 ing written interrogatories, to give oral testimony concerning  
15 documentary material or information, or to furnish any com-  
16 bination of such material, answers, or testimony.

17       “(b) Each such demand shall state the nature of the  
18 conduct constituting the alleged False Claims Act violation  
19 which is under investigation, and the provision of law appli-  
20 cable thereof.

21               “(1) If it is a demand for production of documen-  
22 tary material—

23                       “(A) describe the class or classes of docu-  
24 mentary material to be produced thereunder with

1           such definiteness and certainty as to permit such  
2           material to be fairly identified;'

3           “(B) prescribe a return date or dates which  
4           will provide a reasonable period of time within  
5           which the material so demanded may be assem-  
6           bled and made available for inspection and copy-  
7           ing or reproduction; and

8           “(C) identify the custodian to whom such  
9           material shall be made available.

10          “(2) If it is a demand for answers to written  
11          interrogatories—

12               “(A) propound with definiteness and cer-  
13               tainty the written interrogatories to be answered;

14               “(B) prescribe a date or dates at which time  
15               answers to written interrogatories shall be submit-  
16               ted; and

17               “(C) identify the False Claims Act investiga-  
18               tor to whom such answers shall be submitted.

19          “(3) If it is a demand for the giving of oral testi-  
20          mony—

21               “(A) prescribe a date, time, and place at  
22               which oral testimony shall be commenced; and

23               “(B) identify a False Claims Act investigator  
24               who shall conduct the examination and the custo-

1           dian to whom the transcript of such examination  
2           shall be submitted.

3           “(c) No such demand shall require the production of any  
4 documentary material, the submission of any answers to  
5 written interrogatories, or the giving of any oral testimony if  
6 such material, answers, or testimony would be protected  
7 from disclosure under—

8           “(1) the standards applicable to subpoenas or sub-  
9           poenas duces tecum issued by a court of the United  
10          States in aid of a grand jury investigation, or

11          “(2) the standards applicable to discovery requests  
12          under the Federal Rules of Civil Procedure, to the  
13          extent that the application of such standards to any  
14          such demand is appropriate and consistent with the  
15          provisions and purposes of sections 3490 through 3494  
16          and 5498 of the Revised Statutes.

17          “(d)(1) Any such demand may be served by any False  
18 Claims Act investigator, or by any United States marshal or  
19 deputy marshal, at any place within the territorial jurisdiction  
20 of any court of the United States.

21          “(2) Any such demand or any petition filed under sub-  
22 section 5 of this section may be served upon any person who  
23 is not to be found within the territorial jurisdiction of any  
24 court of the United States, in such manner as the Federal  
25 Rules of Civil Procedure prescribe for service in a foreign

1 country. To the extent that the courts of the United States  
2 can assert jurisdiction over such person consistent with due  
3 process, the United States District Court for the District of  
4 Columbia shall have the same jurisdiction to take any action  
5 respecting compliance with this section by such person that  
6 such court would have if such person were personally within  
7 the jurisdiction of such court.

8       “(e)(1) Service of any such demand or of any petition  
9 filed under subsection 5 of this section may be made upon a  
10 partnership, corporation, association, or other legal entity  
11 by—

12           “(A) delivering a duly executed copy thereof to  
13 any partner, executive officer, managing agent, or gen-  
14 eral agent thereof, or to any agent thereof authorized  
15 by appointment or by law to receive service of process  
16 on behalf of such partnership, corporation, association,  
17 or entity;

18           “(B) delivering a duly executed copy thereof to  
19 the principal office or place of business of the partner-  
20 ship, corporation, association, or entity to be served; or

21           “(C) depositing such copy in the United States  
22 mails, by registered or certified mail, return receipt re-  
23 quested, duly addressed to such partnership, corpora-  
24 tion, association, or entity at its principal office or  
25 place of business.

1       “(2) Service of any such demand or of any petition filed  
2 under subsection 5 of this section may be made upon any  
3 natural person by—

4           “(A) delivering a duly executed copy thereof to  
5 the person to be served; or

6           “(B) depositing such copy in the United States  
7 mails by registered or certified mail, return receipt re-  
8 quested, duly addressed to such person at his residence  
9 or principal office or place of business.

10       “(f) A verified return by the individual serving any such  
11 demand or petition setting forth the manner of such service  
12 shall be proof of such service. In the case of service by regis-  
13 tered or certified mail, such return shall be accompanied by  
14 the return post office receipt of delivery of such demand.

15       “(g) The production of documentary material in re-  
16 sponse to a demand served pursuant to this section shall be  
17 made under a sworn certificate, in such form as the demand  
18 designates, by the person, if a natural person, to whom the  
19 demand is directed or, if not a natural person, by a person or  
20 persons having knowledge of the facts and circumstances re-  
21 lating to such production, to the effect that all of the docu-  
22 mentary material required by the demand and in the posses-  
23 sion, custody, or control of the person to whom the demand is  
24 directed has been produced and made available to the  
25 custodian.

1       “(h) Each interrogatory in a demand served pursuant to  
2 this section shall be answered separately and fully in writing  
3 under oath, unless it is objected to, in which event the rea-  
4 sons for the objection shall be stated in lieu of an answer, and  
5 it shall be submitted under a sworn certificate, in such form  
6 as the demand designates, by the person, if a natural person,  
7 to whom the demand is directed or, if not a natural person,  
8 by a person or persons responsible for answering each inter-  
9 rogatory, to the effect that all information required by the  
10 demand and in the possession, custody, control, or knowledge  
11 of the person to whom the demand is directed has been  
12 submitted.

13       “(i)(1) The examination of any person pursuant to a  
14 demand for oral testimony served under this section shall be  
15 taken before an officer authorized to administer oaths and  
16 affirmations by the laws of the United States or of the place  
17 where the examination is held. The officer before whom the  
18 testimony is to be taken shall put the witness on oath or  
19 affirmation and shall personally, or by someone acting under  
20 his direction and in his presence, record the testimony of the  
21 witness. The testimony shall be taken stenographically and  
22 transcribed. When the testimony is fully transcribed, the offi-  
23 cer before whom the testimony is taken shall promptly trans-  
24 mit a copy of the transcript of the testimony to the custodian.

1       “(2) The False Claims Act investigator or investigators  
2 conducting the examination shall exclude from the place  
3 where the examination is held all other persons except the  
4 person being examined, his counsel, the officer before whom  
5 the testimony is to be taken, and any stenographer taking  
6 such testimony.

7       “(3) The oral testimony of any person taken pursuant to  
8 a demand served under this section shall be taken in the judi-  
9 cial district of the United States within which such person  
10 resides, is found, or transacts business, or in such other place  
11 as may be agreed upon by the False Claims Act investigator  
12 conducting the examination and such person.

13       “(4) When the testimony is fully transcribed, the False  
14 Claims Act investigator or the officer shall afford the witness  
15 (who may be accompanied by counsel) a reasonable opportu-  
16 nity to examine the transcript; and the transcript shall be  
17 read to or by the witness, unless such examination and read-  
18 ing are waived by the witness. Any changes in form or sub-  
19 stance which the witness desires to make shall be entered  
20 and identified upon the transcript by the officer or the False  
21 Claims Act investigator with a statement of the reasons  
22 given by the witness for making such changes. The transcript  
23 shall then be signed by the witness, unless the witness in  
24 writing waives the signing, is ill, cannot be found, or refuses  
25 to sign. If the transcript is not signed by the witness within

1 thirty days of his being afforded a reasonable opportunity to  
2 examine it, the officer or the False Claims Act investigator  
3 shall sign it and state on the record the fact of the waiver,  
4 illness, absence of the witness, or the refusal to sign, together  
5 with the reason, if any, given therefor.

6       “(5) The officer shall certify on the transcript that the  
7 witness was duly sworn by him and that the transcript is a  
8 true record of the testimony given by the witness, and the  
9 officer or False Claims Act investigator shall promptly  
10 deliver it or send it by registered or certified mail to the  
11 custodian.

12       “(6) Upon payment of reasonable charges therefor, the  
13 False Claims Act investigator shall furnish a copy of the  
14 transcript to the witness only, except that the Assistant At-  
15 torney General in charge of the Civil Division may, for good  
16 cause, limit such witness to inspection of the official tran-  
17 script of his testimony.

18       “(7)(A) Any person compelled to appear under a  
19 demand for oral testimony pursuant to this section may be  
20 accompanied, represented, and advised by counsel. Counsel  
21 may advise such person, in confidence, either upon the re-  
22 quest of such person or upon counsel's own initiative, with  
23 respect to any question asked of such person. Such person or  
24 counsel may object on the record to any question, in whole or  
25 in part, and shall briefly state for the record the reason for



1 the objection. An objection may properly be made, received,  
2 and entered upon the record when it is claimed that such  
3 person is entitled to refuse to answer the question on grounds  
4 of any constitutional or other legal right or privilege, includ-  
5 ing the privilege against self-incrimination. Such person shall  
6 not otherwise object to or refuse to answer any question, and  
7 shall not by himself or through counsel otherwise interrupt  
8 the oral examination. If such person refuses to answer any  
9 question, the False Claims Act investigator conducting the  
10 examination may petition the district court of the United  
11 States pursuant to subsection 5 of this section for an order  
12 compelling such person to answer such question:

13       “(B) If such person refuses to answer any question on  
14 the grounds of the privilege against self-incrimination, the  
15 testimony of such person may be compelled in accordance  
16 with the provisions of part V of title 18, United States Code.

17       “(8) Any person appearing for oral examination pursu-  
18 ant to a demand served under this section shall be entitled to  
19 the same fees and mileage which are paid to witnesses in the  
20 district courts of the United States.

21       “SEC. 4. (a) The Assistant Attorney General in charge  
22 of the Civil Division of the Department of Justice shall desig-  
23 nate a False Claims Act investigator to serve as custodian of  
24 documentary material, answers to interrogatories, and tran-  
25 scripts of oral testimony received under this section, and such

1 additional False Claims Act investigators as he shall deter-  
2 mine from time to time to be necessary to serve as deputies  
3 to such officer.

4       “(b) Any person upon whom any demand under subsec-  
5 tion 3 of this section for the production of documentary mate-  
6 rial has been duly served shall make such material available  
7 for inspection and copying or reproduction to the custodian  
8 designated therein at the principal place of business of such  
9 person (or at such other place as such custodian and such  
10 person thereafter may agree and prescribe in writing or as  
11 the court may direct, pursuant to subsection 5(d) of this sec-  
12 tion) on the return date specified in such demand (or on such  
13 later date as such custodian may prescribe in writing). Such  
14 person may, upon written agreement between such person  
15 and the custodian, substitute copies for originals of all or any  
16 part of such material.

17       “(c)(1) The custodian to whom any documentary mate-  
18 rial, answers to interrogatories, or transcripts of oral testimo-  
19 ny are delivered shall take physical possession thereof, and  
20 shall be responsible for the use made thereof and for the  
21 return of documentary material, pursuant to this section.

22       “(2) The custodian may cause the preparation of such  
23 copies of such documentary material, answers to interroga-  
24 tories, or transcripts or oral testimony as may be required for  
25 official use by any duly authorized official or employee of the

1 Department of Justice under regulations which shall be pro-  
2 mulgated by the Attorney General. Notwithstanding para-  
3 graph (3) of this subsection, such material, answers, and  
4 transcripts may be used by any such official or employee in  
5 connection with the taking of oral testimony pursuant to this  
6 section.

7       “(3) Except as otherwise provided in this section, while  
8 in the possession of the custodian, no documentary material,  
9 answers to interrogatories, or transcripts of oral testimony,  
10 or copies thereof, so produced shall be available for examina-  
11 tion, without the consent of the person who produced such  
12 material, answers, or transcripts, by any individual other  
13 than a duly authorized official or employee of the Department  
14 of Justice. Nothing in this section is intended to prevent dis-  
15 closure to either body of the Congress or to any authorized  
16 committee or subcommittee thereof.

17       “(4) While in the possession of the custodian and under  
18 such reasonable terms and conditions as the Attorney Gener-  
19 al shall prescribe, (A) documentary material and answers to  
20 interrogatories shall be available for examination by the  
21 person who produced such material or answers, or by any  
22 duly authorized representative of such person; and (B) tran-  
23 scripts of oral testimony shall be available for examination by  
24 the person who produced such testimony, or his counsel.

1       “(d) When ever any attorney of the Department of Jus-  
2 tice has been designated to appear before any court, grand  
3 jury, or Federal administrative or regulatory agency in any  
4 case or proceeding, the custodian of any documentary materi-  
5 al, answers to interrogatories, or transcripts of oral testimony  
6 may deliver to such attorney such material, answers, or tran-  
7 scripts for official use in connection with any such case,  
8 grand jury, or proceeding as such attorney determines to be  
9 required. Upon the completion of any such case, grand jury,  
10 or proceeding, such attorney shall return to the custodian any  
11 such material, answers, or transcripts so delivered which  
12 have not passed into the control of such court, grand jury, or  
13 agency through the introduction thereof into the record of  
14 such case or proceeding.

15       “(e) If any documentary material has been produced in  
16 the course of any False Claims Act investigation by any  
17 person pursuant to a demand under this section and—

18               “(1) any case or proceeding before any court or  
19 grand jury arising out of such investigation, or any  
20 proceeding before any Federal administrative or regu-  
21 latory agency involving such material, has been com-  
22 pleted, or

23               “(2) no case or proceeding in which such material  
24 may be used has been commenced within a reasonable  
25 time after completion of the examination and analysis

1       of all documentary material and other information as-  
2       sembled in the course of such investigation,  
3       the custodian shall, upon written request of the person who  
4       produced such material, return to such person any such ma-  
5       terial (other than copies thereof furnished to the custodian  
6       pursuant to subsection (b) of this section or made by the De-  
7       partment of Justice pursuant to subsection (c) of this section)  
8       which has not passed into the control of any court, grand  
9       jury, or agency through the introduction thereof into the  
10      record of such case or proceedings.

11       “(f) In the event of the death, disability, or separation  
12      from service in the Department of Justice of the custodian of  
13      any documentary material, answers to interrogatories, or  
14      transcripts of oral testimony produced under any demand  
15      issued pursuant to this Act, or the official relief of such custo-  
16      dian from responsibility for the custody and control of such  
17      material, answers or transcripts, the Assistant Attorney Gen-  
18      eral in charge of the Civil Division shall promptly (1) desig-  
19      nate another False Claims Act investigator to serve as custo-  
20      dian of such material, answers, or transcripts, and (2) trans-  
21      mit in writing to the person who produced such material,  
22      answers, or testimony notice as to the identity and address of  
23      the successor so designated. Any successor designated under  
24      this subsection shall have, with regard to such material, an-  
25      swers or transcripts, all duties and responsibilities imposed

1 by this Act upon his predecessor in office with regard there-  
2 to, except that he shall not be held responsible for any default  
3 or dereliction which occurred prior to his designation.

4       “SEC. 5. (a) Whenever any person fails to comply with  
5 any civil investigative demand duly served upon him under  
6 section 3 or whenever satisfactory copying or reproduction of  
7 any such material cannot be done and such person refuses to  
8 surrender such material, the Attorney General, through such  
9 officers or attorneys as he may designate, may file in the  
10 district court of the United States for any judicial district in  
11 which such person resides, is found, or transacts business,  
12 and serve upon such person a petition for an order of such  
13 court for the enforcement of this section.

14       “(b) Within twenty days after the service of any such  
15 demand upon any person, or at any time before the return  
16 date specified in the demand, whichever period is shorter, or  
17 within such period exceeding twenty days after service or in  
18 excess of such return date as may be prescribed in writing,  
19 subsequent to service, by any False Claims Act investigator  
20 named in the demand, such person may file, in the district  
21 court of the United States for the judicial district within  
22 which such person resides, is found, or transacts business,  
23 and serve upon such False Claims Act investigator a petition  
24 for an order of such court, modifying or setting aside such  
25 demand. The time allowed for compliance with the demand,

1 in whole or in part, as deemed proper and ordered by the  
2 court shall not run during the pendency of such petition in  
3 the court, except that such person shall comply with any  
4 portions of the demand not sought to be modified or set aside.  
5 Such petition shall specify each ground upon which the peti-  
6 tioner relies in seeking such relief, and may be based upon  
7 any failure of such demand to comply with the provisions of  
8 this section or upon any constitutional or other legal right or  
9 privilege of such person.

10       “(c) At any time during which any custodian is in custo-  
11 dy or control of any documentary material, answers to inter-  
12 rogatories delivered, or transcripts of oral testimony given by  
13 any person in compliance with any such demand, such person  
14 may file, in the district court of the United States for the  
15 judicial district within which the office or such custodian is  
16 situated, and serve upon such custodian a petition for an  
17 order of such court requiring the performance by such custo-  
18 dian of any duty imposed upon him by this section.

19       “(d) Whenever any petition is filed in any district court  
20 of the United States under this section, such court shall have  
21 jurisdiction to hear and determine the matter so presented,  
22 and to enter such order or orders as may be required to carry  
23 into effect the provisions of this section. Any final order so  
24 entered shall be subject to appeal pursuant to section 1291 of  
25 title 28, United States Code. Any disobedience of any final

1 order entered under this section by any court shall be pun-  
2 ished as a contempt thereof.

3       “(e) To the extent that such rules may have application  
4 and are not inconsistent with the provisions of this section,  
5 the Federal Rules of Civil Procedure shall apply to any peti-  
6 tion under this section.

7       “(f) Any documentary material, answers to written in-  
8 terrogatories, or transcripts of oral testimony provided pursu-  
9 ant to any demand issued under this Act shall be exempt  
10 from disclosure under section 552 of title 5, United States  
11 Code.”.

12       SEC. 4. This Act, and the amendments made by this  
13 act, shall become effective upon enactment but shall not be  
14 applicable to cases pending on that date.





Address Reply to the  
Division Indicated  
and Refer to Initials and Number

# UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

November 23, 1979

Telephone:  
(202) 724-7174

JRE:amc

Honorable Dennis DeConcini  
United States Senate  
Chairman, Subcommittee on  
Improvements in Judicial Machinery  
Senate Judiciary Committee  
Washington, D. C. 20510

Dear Senator DeConcini:

On Monday, when I testified before your subcommittee concerning S. 1981, a bill to improve judicial machinery by amending the jurisdiction and venue requirements and damage provisions in all suits involving the False Claims Act, and for other purposes, you requested that we furnish data pertaining to recent recoveries and to types of suits brought under the Act.

For Fiscal Year 1979, the amounts recovered by the attorneys in the Civil Division of the Department of Justice in Washington, D. C., in suits under the False Claims Act aggregated approximately \$11,913,000. There is an additional amount for those recovered by United States Attorneys' Offices, in False Claims Act suits, in which the Government's damages are \$60,000 or less. We do not presently have those figures available.

With regard to the types of cases pending, no completed data has been accumulated for Fiscal Year 1979. Completed data has, however, been accumulated for Fiscal Year 1978. It reflects that as of September 30, 1978, the close of Fiscal Year 1978, we had a total of 1,167 fraud matters pending in the Civil Division. Among these were 53 matters from the Department of Agriculture, with a total amount claimed of \$10,898,060; 33 matters involving fraud or the acceptance of bribes of Federal employees, with a total amount claimed of \$1,397,545; 49 matters involving fraudulent conduct in procurement contracts, with a total amount claimed of \$28,587,310; and 59 Medicare fraud cases, with a total amount claimed of \$2,832,543. There were also 76 miscellaneous matters pending, with a total amount claimed of \$109,683,311.

The Civil Division also furnishes assistance to the various United States Attorneys' offices in False Claims Act suits which are delegated pursuant to departmental regulations because the amount of the Government's single damages are \$60,000 or less. United States v. Hughes, 585 F.2d. 284 (7th Cir., 1978), is a recent case of this nature. In the last Fiscal Year, the 94 United States

cc: Kevin O'Malley

Attorneys' offices had pending 115 False Claims Act and fraud cases in which the Government was the plaintiff, with a total amount of double damages and forfeitures claimed aggregative \$170,392,726. Their offices also had 16 fraud cases pending in which the Government was asserting fraud claims as a defendant, with the total double damages and forfeitures aggregative \$40,119,829.

During the hearings, you also expressed concern regarding the potential for abuse of the civil investigative demand (CID) provisions of S.1981. We believe that the procedural structure of the bill itself, as well as numerous protections already in place, provide more than ample safeguards to ensure that CID's will be prudently utilized only for legitimate investigative purposes.

Section 3 of the bill, which would enact new sections 2, 3, 4 and 5 of Section 3494 of the Revised Statutes, authorizes only the Attorney General and Assistant Attorney General in charge of the Civil Division to issue CID's. Neither a single attorney in the Civil Division, nor a United States Attorney, will be able to issue a CID on his own. Rather, the attorney or United States Attorney will be required to justify the necessity for issuance of a CID and obtain authorization from the Attorney General or Assistant Attorney General. This provision alone significantly reduces the potential for abuse since it necessitates a review of the need for and potential benefits of the CID by persons less directly involved in the case, and prevents an attorney or United States Attorney from utilizing a CID on his own for personal or political reasons. Furthermore, to prevent fishing expeditions, new section 3(b) requires that the CID itself must describe the alleged False Claims Act violations being investigated. Thus, the United States must have a reasonable basis for believing that a fraud has been committed on the United States before a CID will be issued.

In addition, new section 5(b) provides a judicial mechanism by which a person may challenge a CID in a United States District Court, and new section 4 provides strict controls on the use, storage and dissemination of materials or testimony obtained by means of a CID.

These built-in safeguards are in addition to the protection provided by existing statutes and procedures. For example, if a CID is used to obtain the records of an individual under investigation for alleged fraud against the United States from a financial institution, the individual could avail himself of the significant safeguards provided by the Right to Financial Privacy Act of 1978, 12 U.S.C. §§3401, *et seq.* Also, any allegation of wrongdoing or unethical conduct by a Department of Justice attorney, including abuse of CID's, may be referred to the Department's Office of Professional Responsibility pursuant to 28 C.F.R. §0.39, *et seq.* That office is empowered to investigate such matters and to take appropriate disciplinary action. We believe that these procedures both protect the individual being investigated and act as a substantial deterrent to possible abuse.

I very much appreciate the opportunity to testify before your Subcommittee on S. 1981. If I can be of any further service, please do not hesitate to call me.

Sincerely yours,



J. ROGER EDGAR  
Director  
Commercial Litigation Branch  
Civil Division