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April 21, 1986

To: Senator William S. Cohen
Attention: Jeff Hinsky

From: American Law Division

Subject: Constitutionality of S. 1134—A Bill to Provide Administrative Civil Penalties for Certain False Claims and Statements

This will respond to your inquiry and our conversations regarding S. 1134, a bill to provide administrative civil penalties for certain false claims and statements. Specifically, you have asked that we review the bill, as reported, for the purpose of analyzing whether the bill raises constitutional issues under the Seventh Amendment or the Due Process Clause.

We have reviewed the bill and the appropriate constitutional authorities, and it appears that the bill does not raise constitutional issues. Our analysis follows.

The Provisions of S. 1134

On May 15, 1985, Senators William S. Cohen, William V. Roth, Jr., Sam Nunn, Carl Levin, and Lawton Chiles, introduced S. 1134, a bill to provide certain administrative civil penalties for false claims and statements made to the United States by certain recipients of property, services, or money from the United States, by parties to contracts with the United States, or by federal employees. Somewhat different legislation, similar in purpose to the

current legislation, was introduced, and was the subject of committee hearings, in both the 97th Congress and the 98th Congress.[1]

On December 10, 1985, The Senate Committee on Governmental Affairs reported S. 1134.[2] During the Committee consideration of the bill, a hearing was held at which many legal issues were discussed,[3] and an extensive case in support of the legislation has been offered.[4] As reported by the committee,[5] the bill provides for a civil penalty of up to $10,000 and for an assessment of double the amount of certain improper claims made against the United States. Section 802 provides, in pertinent part:

> (a)(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know--
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> (A) is false, fictitious, or fraudulent;
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> (B) includes or is supported by any statement which violates paragraph (2) of this subsection; or
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> (C) is for payment for the provision of property or services which the person has not provided as claimed,
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> shall be subject to, in addition to any other remedy that may be

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[1] On April 1, 1982, a hearing was held on S. 1780. See, Program Fraud Civil Penalties Act, Hearing before the Senate Committee on Governmental Affairs, 97th Congress, 2d Session (1982). And, on November 15, 1983, a hearing was held on S. 1566. See, Program Fraud Civil Penalties Act of 1983, Hearing before the Senate Committee on Governmental Affairs, 98th Congress, 1st Session (1983).

[2] Senate Report 99-212, 99th Congress, 1st Session (1985).

[3] See, Program Fraud Civil Penalties Act of 1985, Hearing before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 99th Congress, 1st Session (1985).

[4] Fraud in Government Programs:--How Extensive Is It?--How Can It Be Controlled? Report to the Congress by the Comptroller General reprinted in Program Fraud Civil Penalties Act of 1985, Hearing before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 99th Congress, 1st Session (1985), at p. 238. See also, Civil Money Penalties Law of 1981: A New Effort To Confront Fraud and Abuse in Federal Health Care Programs, by Richard P. Kusserow (Inspector General for the Department of Health and Human Services), 58 Notre Dame Law Review 985 (1983).

[5] S. 1134, Report No. 99-212, 99th Congress, 1st Session (1985).

> prescribed by law, a civil penalty of not more than $10,000 for each such claim. Such person shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim, or the portion of such claim, which is determined under this chapter to be in violation of the preceding sentence.
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> (2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a statement that the person knows or has reason to know—
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> (A) asserts a material fact is false, fictitious, or fraudulent; or
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> (B)(i) omits a material fact,
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> (ii) as a result of such omission, such statement is false, fictitious, or fraudulent, and
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> (iii) the person making, presenting, or submitting such statement has a duty to include such material fact in the statement, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $10,000 for each such statement.

The bill limits the administrative enforcement of this provision to small claims—claims of less that $100,000--under Section 803(c), and applies to all federal "authorities," including executive departments, military departments, the U.S. Postal Service, and certain "establishments."[6]

Procedurally, the administrative imposition of the penalties provided for under the bill are initiated at the agency level. The "investing official" of the agency reports the findings and conclusions concerning liability for civil penalties to a "reviewing official" in the agency. "Investigating officials" are agency officials authorized to conduct investigations pursuant to the Inspector General Act of 1978, and, in agencies not subject to that Act, certain authorized officials.[7] "Reviewing officials" are certain authorized officials, or certain specified independent officials in the Armed Forces.[8]

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[6] See, Section 801(a)(1) of the bill.

[7] See, Section 801(a)(5) of the bill.

[8] See, Section 801(a)(8) of the bill.

If the reviewing official determines on the basis of the investigating official's report that there is adequate evidence to believe that a person is liable for civil penalties, the reviewing official is to transmit a written notice to the Attorney General of the United States that the reviewing official intends to refer the allegations to a hearing examiner.[9] The Attorney General, or his designated Assistant Attorney General, may disapprove the referral within 90 days after receipt, thereby terminating the matter. If the Attorney General makes a written finding that the matter should be stayed because its continuation may adversely affect a related pending or potential civil or criminal action, the matter is stayed until resumption is authorized by the Attorney General. Otherwise, written notice is given to the person allegedly liable, who may request, and has a right to, a hearing before a hearing examiner. The hearing is to be conducted in accordance with regulations promulgated by the agency, with specified rights to counsel, discovery, cross-examination, and other procedural guarantees. The hearing examiner is to issue a written decision, including findings and determinations. An appeal from the hearing examiner to the agency head is required before the matter becomes final agency action subject to judicial review.

The determination of liability for the civil penalties under Section 802 of the bill by means of the administrative process is subject to judicial review under Section 805 of the bill. Petitions for judicial review may be filed after the administrative remedies are exhausted and within 60 days after the date on which the authority head sends the final decision to a person.[10] The petitions for review may be filed with the United States Court of Appeals

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[9] See, Section 803(a)(2) of the bill.

[10] See, Section 805(a) of the bill.

1) in the circuit in which the person resides or transacts business, 2) in the circuit in which the claim or statement upon which the determination of liability is based was made, presented, or submitted, or 3) in the District of Columbia Circuit.

The findings of fact made by the hearing examiner are final and conclusive, and may only be set aside if the decision of the hearing examiner is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if such findings are not supported by substantial evidence."[11]

As the foregoing outline of the bill indicates, the bill essentially provides for the determination of liability for civil penalties by an agency hearing examiner, subject to judicial review. You have asked that we review the bill and the appropriate legal authorities to ascertain whether or not the bill raises either Seventh Amendment or Due Process issues.

The Seventh Amendment

The Seventh Amendment provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Quite obviously, the bill does not provide for a jury trial, but provides instead for fact-finding before a hearing examiner of a federal agency. The

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[11] See, Section 805(c) of the bill.

question arises as whether such a procedure is violative of the right to a trial by jury.

The leading case involving the question of whether or not administratively imposed civil penalties comply with the Seventh Amendment's right to a jury trial is Atlas Roofing, Inc. v. Occupational Safety and Health Review Commission.[12] There, the Supreme Court was presented directly with that question as the result of civil penalties imposed by the Occupational Safety and Health Review Commission pursuant to its statutory authority under the Occupation Safety and Health Act of 1970.[13]

The Supreme Court made this important observation:

> At least in cases in which "public rights" are being litigated--e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact--the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.
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> Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred. These statutory schemes have been sustained by this Court, albeit often without express reference to the Seventh Amendment. (Footnote omitted.)[14]

In reaching its unanimous conclusion, the Supreme Court drew an important, and determinative, distinction between the civil cases brought to enforce Common Law causes of action and administrative cases brought to enforce federal statutory civil penalties:

> The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it, and

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12 430 U.S. 442 (1977) (Unanimous opinion, Blackmun, J., not participating.).

13 84 Stat. 1590 (1970), 29 U.S. Code Sections 651 et seq.

14 Atlas Roofing, supra at 450.

> there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. We cannot conclude that the Amendment rendered Congress powerless--when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate--to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law--such as an administrative agency--in which facts are not found by juries.[15]

Thus, in Atlas Roofing the Supreme Court concluded that the Seventh Amendment right to a jury trial did not extend to administrative fact-finding proceedings involving the imposition of a civil penalty. But Atlas Roofing did not constitute a departure from prior holdings concerning administrative fact-finding. As the Court observed in Atlas Roofing, the Seventh Amendment issue had already been squarely addressed in National Labor Relations Board v. Jones & Laughlin Steel Corp.[16] in 1937. There, the Supreme Court held that Congress could properly commit fact-finding to the National Labor Relations Board--an administrative tribunal--for the purpose of deciding whether unfair labor practices had been committed and for the purpose of administratively ordering an employer to provide back pay. The NLRB Court observed:

> It is argued that the requirement [under the National Labor Relations Act for payment of certain lost wages] is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Amendment this preserves the right which existed under the common law when the Amendment was adopted... Thus, it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law... It does not apply where the proceeding is not in the nature of a suit at common law...
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> The instant case is not a suit at common law or in the nature of such suit. The proceeding is one unknown to the common law. It is a

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15 Atlas Roofing, supra, at 460.

16 301 U.S. 1 (1937).

> statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merits. (Citations omitted.)[17]

Other earlier cases are in accord. For example, as early as 1909, the Supreme Court observed in Oceanic Steam Navigation Co. v. Stranahan,[18] that "...it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking judicial power." Later, in Lloyd Sabaudo Societa Anonima Per Azioni v. Elting,[19] the Supreme Court again approved agency adjudication of violations and assessments of penalties. In Block v. Hirsh,[20] Mr. Justice Holmes, speaking for the Court, rejected a constitutional challenge based on the Seventh Amendment to a statute transferring actions to recover possession of real property from the courts to a rent control commission:

> The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the Commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.[21]

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[17] Id., at 48-49.

[18] 214 U.S. 320, 339 (1909).

[19] 287 U.S. 329 (1935).

[20] 256 U.S. 135 (1921).

[21] Id., at 158.

Nevertheless, the right to jury trials before courts for Common Law causes of action remains vital. In Pernell v. Southall Realty,[22] the Supreme Court agreed that the Seventh Amendment "would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right of possession, to an administrative agency."[23] But there, the Court found that Congress' statutory provision that actions be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction did give rise to the right of a jury trial, because the remedial proceeding was judicial.

Thus, under Atlas Roofing and related cases two key factors decide the right under the Seventh Amendment to a jury trial. The first involves the legal analysis of whether the action was in the nature of an action available at the time of the framing of the Constitution under the Common Law. And the second involves the question of whether the tribunal is judicial or administrative.

We are not aware of any pertinent decision of the Supreme Court since Atlas Roofing, supra, that would lessen in any way the meaning of the Seventh Amendment set forth in that decision. Moreover, several lower court decisions since Atlas Roofing have applied its principles consistently. For example, the District of Columbia Circuit held in Washington Star Co. v. International Typographical Union Negotiated Pension Plan,[24] that withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act[25] do not deny

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22 416 U.S. 363 (1974).

23 Id., at 383.

24 729 F.2d 1502 (D.C. Cir. 1984).

25 29 U.S. Code Section 1381 et seq.

employers the right to trial by jury under the Seventh Amendment because the procedures of that Act are a proper exercise of congressional power to delegate fact-finding functions to administrative bodies in cases involving public rights.

Similarly, in Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.,[26] the Second Circuit concluded that when Congress creates a new cause of action and remedies unknown at Common Law, it may vest fact finding in a tribunal other than a jury, without running afoul of the Seventh Amendment.[27]

The case law under the Seventh Amendment is sufficiently well settled so that it may be asserted with some confidence that Congress may provide for statutory causes of action not available at Common Law, vest fact-finding for such causes of action in administrative tribunals, and not violate the Seventh Amendment.

Both the civil penalty provision and the double claim assessment provision of S. 1134, as reported, appear to fall within the permissible constitutional powers of Congress. Both provisions establish remedies not available at Common Law, and both provisions involve the determination of fact by an administrative tribunal, in the form of a federal agency hearing examiner. For these reasons, it would appear that the civil penalty and assessment provisions of S. 1134 do not violate the right to a jury trial under the Seventh Amendment.[28]

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26 725 F.2d 843 (2d Cir. 1984), cert. denied 104 S. Ct. 3554, 82 L.Ed.2d 856.

27 See also, Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1124 (1st Cir. 1984), on rehearing 762 F. 2d 1137 (1st Cir. 1984); and, A. Soloff & Son, Inc. v. Asher, 604 F. Supp. 787 (D.C.N.Y. 1985).

28 We note that the Report of the Committee on Governmental Affairs on S. 1134, supra, sets forth a legal analysis of the Seventh Amendment at pp. 31-32 that is in accord with the foregoing.

Due Process of Law

We turn, now, to the second aspect of your inquiry--the question of whether the administrative imposition of civil penalties violates the Due Process Clause of the Fifth Amendment. The concept of Due Process of law under the Fifth Amendment embraces a broad range of procedural and substantive requirements intended to preserve "those canons of decency and fairness which express the notions of justice of English-speaking peoples."[29] This fundamental fairness has been said to be derived "not alone...from the specifics of the Constitution, but also...from concepts which are part of the Anglo-American legal heritage."[30]

Notice and hearing are fundamental to due process in civil proceedings.[31] Nevertheless, the Supreme Court has held that the demands of due process do not require a hearing at the initial stage, or any particular point in the proceeding, so long as a hearing is held before an agency's decision becomes final.[32] Moreover, the Court has specifically held that "due process of law does not require that the courts, rather than administrative officers, be

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29 Rochin v. California, 342 U.S. 165, 169 (1952) (Justice Frankfurter for the Court).

30 Sniadach v. Family Finance Corp., 395 U.S. 337, 342-343 (1969) (Justice Harlan concurring).

31 Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915).

32 Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941). Congress has been sustained in providing for judicial review after regulations have become effective during a war emergency in the face of due process challenges. See, Bowles v. Willingham, 321 U.S. 503 (1944).

charged, in any case, with determining facts upon which the imposition of...a fine depends."[33]

As reported, S. 1134 provides for written notice and a hearing on the record,[34] despite the fact that these formalities may not be required to this extent by due process.[35] In addition, S. 1134 allows for extensive rights of discovery and cross-examination beyond the minimum due process requirements.

Other aspects of due process also appear to be met by the provisions of the bill. For example, one question that has been raised relatee to the neutrality of administrative officials. It is fundamental that when the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets the currently prevailing standards of impartiality.[36] But, in Marshall v. Jerrico, Inc.,[37] the Supreme Court distinguished administrative proceedings from judicial proceedings and held that the return of the administratively assessed civil penalties to the Employment Standards Administration of the Department of Labor in reimbursement for the costs of determining violations and assessing the penalties did not violate the Due Process Clause of the Fifth Amendment. Thus, the strict requirements of

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33 Lloyd Sabaudo Societa Anonima Per Azioni, supra.

34 Section 803(e) of the bill.

35 For example, in some instance the "hearing" requirement of due process can be met simply through the notice and comment process of the Administrative Procedures Act, 5 U.S. Code Section 553. See, United States v. Florida East Coast Railroad, 410 U.S. 224 (1973). On several occasions, the Supreme Court has reaffirmed its view that administrative hearings do not have to follow the judicial model. See, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); and, Mathews v. Eldridge, 424 U.S. 319 (1976).

36 Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

37 446 U.S. 238 (1980).

neutrality of officials performing judicial or quasi-judicial functions[38] under the Due Process Clause are not applicable to administrative enforcement of civil penalties.

Finally, a brief word might be mentioned concerning the question of whether or not the civil penalty of up to $10,000, plus the assessment in lieu of damages of twice the amount of the claim as provided under S. 1134 might be viewed as "penal" rather than civil--thereby raising consitutional protections attached to criminal proceedings under the Fifth Amendment Due Process Clause and the Sixth Amendment. The Supreme Court in Helvering v. Mitchell,[39] held that remedial sanctions in the form of forfeiture of goods, payment of fixed or variable sums are valid civil sanctions, and not criminal sanctions despite their severity, that have been used by the federal government since the original revenue law of 1789. With specific regard to false claims against the United States, the Supreme Court in United States ex rel. Marcus v. Hess,[40] upheld the False Claims Act as constitutional and gave specific approval to the double damages and forfeiture provisions of that legislation as a constitutionally valid remedial statute imposing a civil sanction. And, the more recent decision in United States v. Bornstein,[41] lends further authority to the valid imposition of the double assessment in lieu of damages provision contained in S. 1134.

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38 See, Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village of Monroeville, 409 U.S. 57 (1972); and, Carey v. Piphus, 435 U.S. 247 (1978).

39 303 U.S. 391 (1938).

40 317 U.S. 537 (1943).

41 423 U.S. 303 (1976).

For all these reasons, it would appear that the procedures set forth for the administrative hearing under S. 1134 do not raise significant constitutional impediments under the Due Process Clause of the Fifth Amendment.

Conclusion

The statutory authority for the administrative imposition of civil penalties is common to the organic authority of many federal agencies. In 1972 --prior to the Supreme Court's decision in Atlas Roofing--the Administrative Conference of the United States published a thorough review and analysis of the use of civil money penalties by federal agencies at that time, and documented an extensive history and use of the effectiveness of the penalties.[42]

The Congress, itself, is aware of the extensive use of civil penalties as an extremely important method of enforcement of federal law--including the enforcement of agency rules and regulations. For example, the House Committee on Government Operations recently held an oversight hearing[43] concerning the enforcement of civil penalties against coal mine operators for violations of mining standards established under the Surface Mining Control and Reclamation Act of 1977. [44]

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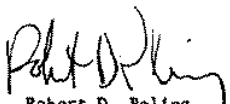
[42] Report in Support of Recommendation 72-6--An Evaluation of the Present and Potential use of Civil Money Penalties as a Sanction by Federal Administrative Agencies, by Harvey J. Goldschmid, 2 Recommendations and Reports of the Administrative Conference of the United States 896 (1972).

[43] Review of the Department of the Interior's Civil Penalty Program, Hearing before a Subcommittee of the House Committee on Government Operations, 99th Congress, 1st Session (1985).

[44] 30 U.S. Code Section 1201 et seq.

While there may be important public policy considerations relating to the imposition of civil penalties by administrative agencies, it appears that the widespread use of civil penalties and the constitutionality of the various aspects of their administrative imposition are now well established.

We trust that the foregoing has been responsive to your inquiry.



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Senator COHEN. The second issue I will touch upon just briefly is the due process protections afforded to people who are alleged to be liable.

Mr. Chairman, the Government Affairs Committee has crafted an administrative proceeding that I think provides elaborate due process protections. As Professor Bruff has noted: "S. 1134 not only passes due process scrutiny, it goes as far as to protect those charged with fraud as is possible without impairing the Government's efforts to obtain remedies that will protect the public."

I think it has already been outlined to you the very serious steps that we have laid out in the bill that would ensure due process protection. First, you have to have the agency investigating official, who is usually the inspector general, conduct the initial investigation. The IG's findings then have to be considered by the agency's reviewing official, who independently evaluates the allegations to determine whether or not there is adequate evidence to believe that a false claim or statement has been made. If that reviewing official believes there is adequate evidence, the matter has to be referred to the Justice Department for yet another review before the agency is allowed to proceed any further.

Then, once at the hearing stage, the hearing examiner who is presiding is an administrative law judge, who is independent of the agency. The hearing itself is conducted pursuant to all of the Administrative Procedure Act requirements and then, as you have heard before, we have a judicial review provision as well.

It is worth nothing that the Supreme Court has upheld laws that provide far less elaborate due process protections than we afford in this bill.

Taken together, Mr. Chairman, I think the checks and balances inherent in the legislation are more than adequate to insure due process in a fair proceeding against individuals alleged to have defrauded the Government.

This bill is long overdue, and this end, we have worked very closely with Senator Hatch's staff. He has raised a number of questions. I believe we are well on the road to answering any objections that he has, and I want to commend him and his staff for taking the time to work with my staff and I to iron out any difficulties that he might have with the legislation.

Senator HATCH. I want to thank the distinguished Senator for the efforts that are being made to work this out. I think that they really are not only good faith, I think they have been pretty fruitful so far, from what little I know about it.

Excuse me, Mr. Chairman, I did not mean to interrupt.

The CHAIRMAN. Senator, we want to thank you very much for your presence. You make a very impressive case. I am still disturbed over not giving a jury trial to people who, say, are guilty of fraud because they could be prosecuted for criminal violations.

So we will have to think about this, but thank you so much for coming.

Senator Grassley, do you have any questions?

Senator GRASSLEY. I am a cosponsor of your bill, Senator Cohen, and I want to thank you for your testimony and I want to thank Senator Levin as well.

Senator COHEN. Well, we have tried to build upon the false claims legislation which you have been very actively involved with, and we have patterned much of this based upon that which is already a matter of law.

Senator HATCH. Let me just add one other thing. There is some concern about the *Northern Pipeline* case. There is no question that under that case, there is a difference between public rights and private rights.

The problem here that may be created—and I have to study it a little bit more to see if there really is a problem, maybe some of the subsequent witnesses can help me on this—the problem here is that, of course, even with Northern Pipeline in place, this bill provides an administrative proceeding and a right to appeal and go through the court process, so literally there is not court-stripping except for one possible question and that is this:

As I understand it, unless the circuit court finds that the administrative law judge, as the finder of the facts, does not meet a certain standard that of substantial evidence to support the findings, then the courts cannot overrule him. So the courts are not going to have this case de novo.

Senator COHEN. That is a test of all the cases under the APA law itself.

Senator HATCH. It may be stripping in the eyes of some if the courts do not have a right to hear the case de novo and are bound by the factual findings of the administrative law judge.

Senator COHEN. As I recall, there is substantial evidence test in the APA, and the court would have to find that there is not substantial evidence to support the administrative law judge's decision.

Senator HATCH. Under your bill that is true, but——

Senator COHEN. Under the Administrative Procedure Act it is also true.

Senator HATCH. OK.

Senator COHEN. Mr. Chairman, I would just point out that what we are trying to do is deal with individuals and companies who submit false, fictitious, or fraudulent claims or statements which are currently not being litigated because the dollar amount is too low. I know of your concern in this area, and it seems to me we have tried to take those concerns into acount by fashioning a remedy for the Government that still protects the due process rights of the individuals.

The CHAIRMAN. We certainly want to try to collect all these claims that are due and punish these people who make fraudulent statements. It does concern me that we not abrogate the private right of trial by jury, though, and we have to look into that further.

Thank you so much for coming.

Senator HATCH. Just one other thing. One thing that bothers a lot of people, Bill, and it bothers me, too, is that—and, as you know, I raised the issue of 10(b)(5) under the securities laws where a person is branded as a defrauder even though what it means is they made an error or omission for the most part in a registration statement, so they go through life as somebody who has committed fraud under rules that really provide for almost automatic finding

of fault, really oppressive rules in my opinion in some ways as the courts have interpreted them.

In this particular case, this is a little bit different from other administrative law actions, and that is you are actually allowing an administrative judge to make a finding of civil fraud which that contractor or whoever it may be, is going to have to carry through the rest of his life.

Senator COHEN. We do that now, Senator Hatch, under the Civil Monetary Penalties Law.

Senator HATCH. I understand, but that does not necessarily make it right or advisable. You see, that is the problem, and that is something that I am trying to resolve. However, I think you are working with us, we are doing whatever we can here and I am intrigued with wbat we have agreed to so far.

Senator COHEN. But if we were to require that fraudulent statements or fictitious claims must be prosecuted under a criminal statute, they would never be prosecuted. If you look at the backlog of cases——

Senator HATCH. I understand that argument, too.

Senator COHEN [continuing]. They would never be prosecuted. What we are talking about is, if you are going to come to the Government and ask for Government contracts or benefits, then you have got to deal honestly and not act in gross negligence or with reckless disregard when submitting claims to the Government.

It seems to me that when you are coming to the taxpayer and asking for some benefit or relief, you bave got to deal honestly with us.

The CHAIRMAN. Senator, you do a great job on Armed Services and you are an able lawyer and we are honored to have you before us.

Senator COHEN. Thank you very much.

[The prepared statement of Senator Cohen follows:]

Prepared Statement of Senator William S. Cohen

Mr. Chairman, I appreciate the opportunity to testify this morning on a problem which we, in the Governmental Affairs Committee, have devoted considerable time and attention to -- fraud in federal programs.

As you know, Senators Levin and I, along with fourteen other Senators, have sponsored legislation, the Program Fraud Civil Remedies Act, that we believe goes a long way toward solving this problem. I am pleased to note that four distinguished members of the Judiciary Committee, Senators Grassley, DeConcini, Kennedy and Leahy, are among the cosponsors.

Briefly, the Program Fraud bill provides agencies with an administrative remedy for false claim and false statement cases under $100,000 which the Justice Department has declined to litigate.

I think it is important to emphasize at the outset, Mr. Chairman, that S. 1134 would not create a new category of offenses. Rather, it simply establishes an administrative alternative, patterned largely after the civil False Claims Act, that would capture only that conduct already prohibited by current law. In other words, Mr. Chairman, S. 1134 merely establishes a new remedy for old wrongs.

The provisions of the bill, moreover, are consistent with those amendments to the False Claims Act reported unanimously by the Judiciary Committee last December.

Judicial remedies are available to penalize and deter fraud. For small-dollar cases, however, the cost of litigation often exceeds the amount recovered, thus making it economically impractical for the Justice Department to go to court. The

government is frequently left without an adequate remedy for many small-dollar cases.

The consequence, according to the Justice Department, is that the federal government loses "tens, if not hundreds, of millions of dollars" to fraud each year. Beyond the actual monetary loss, fraud in federal programs also erodes public confidence in the administration of these programs by allowing ineligible persons to benefit from them.

Since 1981, the Governmental Affairs Committee has worked diligently to fashion a solution to this problem that is both effective and fair. The Program Fraud Civil Remedies Act, which marks the culmination of that effort, would capture those small-dollar fraud cases that now fall through the cracks of our judicial system. Last November, after careful consideration, the Committee reported S. 1134 with only one dissenting vote.

The bill also is strongly supported by the major players in the fight against fraud -- the Justice Department, the General Accounting Office, and the Inspectors General -- as well as the Administrative Conference of the United States, the Federal Bar Association, and, most recently, the Packard Commission.

Despite this overwhelming support for the Program Fraud bill, we, unfortunately, have been blocked from bringing this legislation to the floor. With each passing day, the federal government loses more money and public confidence in its programs because of the failure of this bill to be approved.

The benefits of establishing an administrative remedy, as provided in S. 1134, are numerous. First, it would allow the government to recover money that, up until now, has been irretrievably lost to fraud. Second, it would provide a more

expeditious and less expensive procedure to recoup losses, compared with the extensive investments of time and resources required to litigate in federal court. Finally, such an administrative remedy would serve as a deterrent against future fraud by dispelling the perception that small-dollar frauds against the government may be committed with impunity.

An additional benefit is that we already know such a remedy can work. Under the Civil Monetary Penalties Law (CMPL), the Department of Health and Human Services is authorized to impose penalties and assessments administratively against health-care providers who knowingly or with reason to know submit false claims for services. Since implementation of the CMPL, HHS has been able to recover over $22 million resulting from 175 settlements and litigated cases.

Nor is the HHS law the only statute of its kind. Indeed, approximately 200 statutes already authorize the administrative imposition of civil penalties. It should be abundantly clear, therefore, that the administrative proceeding we've proposed in S. 1134 is by no means novel.

Mr. Chairman, in the interest of time, I would like to turn now to what I understand to be the Committee's chief interests: the constitutionality of S. 1134, the adequacy of the due process protections, and the grant of testimonial subpoena power to the Inspectors General.

CONSTITUTIONALITY

I asked several distinguished constitutional scholars for their opinions on S. 1134. They were unanimous in their view that the bill easily passed constitutional muster. As Professor Harold Bruff of the University of Texas stated: "No serious

constitutional question attends this bill." The American Law Division of the Congressional Research Service echoed Professor Bruff's conclusion, stating: "the [Program Fraud] bill does not raise constitutional issues."

Some critics of the legislation have asserted that establishing an administrative remedy for small-dollar frauds violates a person's Seventh Amendment right to a jury trial. The Supreme Court, however, unanimously rejected this constitutional challenge in Atlas Roofing Co. v. Occupational Safety and Health Administration, upholding a civil penalty scheme with the same essential features as the Program Fraud bill. The Court noted in Atlas Roofing that:

> Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.

Another constitutional challenge, which I find even less convincing, is the contention that S. 1134 "thoroughly strips the court of jurisdictional authority." That simply is not true. According to Joseph Kennedy, Chairman of the Committee on Administrative Judiciary of the Federal Bar Association:

> The fact that the administrative remedy is subject to oversight by the Article III courts under the provision for judicial review ensures the constitutionality of S. 1134. For it has long been recognized that so long as the essential attributes of judicial power such as review of agency findings and enforcement of agency orders remain in the Article III courts there is no constitutional impediment to the power of Congress to vest initial adjudication of such rights in Article I courts and administrative agencies.

Furthermore, nothing in the bill precludes the Justice Department from litigating any false claim or false statement case, whether it involves $99,000 or two dollars.

Those few critics who characterize S. 1134 as a "court-stripping" bill point to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. for support. In the Marathon decision, as you know, the Court held unconstitutional the provisions of the Bankruptcy Reform Act of 1978 that granted to bankruptcy judges, who are Article I judges, jurisdiction over all civil proceedings arising under the bankruptcy laws of the United States. The Court held that suits involving private rights, in this case, breach of contract, are solely within the jurisdiction of Article III courts.

Marathon clearly does not apply to Program Fraud proceedings for the simple reason that it deals with the enforcement of private rights. S. 1134 establishes an administrative remedy to deal with public rights, that is, suits between the government and others.

Mr. Chairman, I would like to include in the hearing record a copy of the Justice Department's testimony before my Governmental Affairs Subcommittee citing the Atlas Roofing case in support of the Program Fraud bill's constitutionality, as well as letters from the Administrative Conference, the Federal Bar, the American Law Division of the Congressional Research Service, and several constitutional scholars in support of the bill's constitutionality.

DUE PROCESS

The second issue I'd like to discuss is the due process protections afforded to persons alleged to be liable. Mr. Chairman, the Governmental Affairs Committee has crafted an administrative proceeding that, in my judgment and in the judgment

of administrative law experts, provides elaborate due process protections for individuals subject to a program fraud proceeding. As Professor Bruff noted:

> S. 1134 not only passes due process scrutiny; ...it goes as far to protect those charged with fraud as is possible without impairing the government's efforts to obtain remedies that will protect the public.

Under the bill, allegations of wrongdoing are first investigated by the agency's "investigating official," usually the Inspector General. The IG's findings then are considered by the agency's "reviewing official," who independently evaluates the allegations to determine whether or not there is adequate evidence to believe that a false claim or statement has been made. If the reviewing official believes there is adequate evidence to proceed, the matter is referred to the Justice Department for yet another review before the agency is allowed to proceed any further.

An agency may only then go forward with a hearing if the Attorney General approves it or, within 90 days, takes no action to disapprove it. The Attorney General also has the right to block agency action if, for example, he believes that the case lacks prosecutive merit. Once at the hearing stage, the "hearing examiner" presiding is an Administrative Law Judge who, given the procedures for ALJ selection, evaluation, and removal, is independent of the agency.

The hearing itself would be conducted pursuant to the due process safeguards of the Administrative Procedure Act, which entitles the person to a written notice of the allegations, the right to be represented by counsel, and the right to present evidence on his or her own behalf. The bill even goes beyond these APA protections by granting the person limited discovery rights and

by providing a more complete notice than is required under the APA.

Finally, the person alleged to be liable has the right to appeal the hearing examiner's decision to the agency head and then, having exhausted all administrative remedies, the right to obtain judicial review in a U.S. Court of Appeals.

It is worth noting that the Supreme Court has upheld laws that provide far less elaborate due process protections than are afforded by S. 1134. The Court has repeatedly rejected the notion that administrative hearings must adhere to the judicial model of due process, stating in Mathews v. Eldridge, for example, that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."

Taken together, Mr. Chairman, the checks and balances inherent in the program fraud proceeding, the due process protections adopted from the Administrative Procedure Act, and the use of Administrative Law Judges as hearing examiners provide more than sufficient insulation between actors to ensure fair and impartial determinations.

TESTIMONIAL SUBPOENA POWER

The third issue I'd like to discuss concerns the need for testimonial subpoena authority. S. 1134 authorizes the Inspectors General under limited circumstances to require by subpoena the attendance and testimony of witnesses. I believe, as do the Inspectors General, that this authority would be an essential tool in helping the government prove the elements required under the bill to establish liability, since few who defraud the government leave a sufficient "paper trail" to enable proof of fraud by documents alone.

Concerns have been raised, primarily by some defense industry representatives, that this testimonial subpoena authority is "unfettered" and "unprecedented." Neither is the case.

Under S. 1134, an Inspector General may only subpoena a witness when the subpoena is necessary to the investigation. The bill was amended in Committee to provide other significant limitations to safeguard against abuse. First, the Justice Department is given veto authority over its use. S. 1134 requires that the investigating official, prior to issuing a subpoena, must first notify the Attorney General, who then has 45 days within which to disapprove the subpoena. Second, S. 1134 limits the use of this authority only to the 18 statutory Inspectors General, appointed by the President and confirmed by the Senate; the IGs may not delegate this authority.

In addition to these safeguards, S. 1134 provides significant due process protections for those individuals subpoenaed by a Inspector General. These protections include the right to be accompanied, represented, and advised by an attorney. The bill also specifies that the testimony is to be taken in the judicial district in which the subpoenaed person resides or transacts business, and the person would be paid the same fees and mileage paid to witnesses in U.S. district court.

Moreover, there is ample precedent for granting investigatory testimonial subpoena authority to executive departments and regulatory agencies. The American Law Division of the Congressional Research Service compiled a list of more than 65 statutes that provide such authority, ranging from the broad power granted to the Department of Health and Human Services for investigations of claims for Social Security retirement and disability benefits to the authority given to the Department of Agriculture for investigations under the Horse Protection Act.

These are only a few of the panoply of issues carefully considered by our Committee. The standard of knowledge and the burden of proof in S. 1134, for example, were subject to particularly close scrutiny. I am pleased that the Judiciary Committee adopted virtually identical standards in its amendments to the civil False Claims Act. As you know, the knowledge and burden of proof standards adopted by our two Committees are strongly supported by the Justice Department.

Mr. Chairman, the enactment of an administrative remedy for small-dollar fraud cases is long overdue. The fact that the Justice Department declines prosecution in most cases where the government does not sustain a significant monetary loss is an open invitation to those individuals tempted to defraud the federal government. Until federal agencies are given the power to bring administrative proceedings in such cases, these small-dollar frauds will continue unabated. The Program Fraud Civil Remedies Act will help combat fraud without compromising the rights of individuals accused of wrongdoing.

We look forward to working with you and your colleagues to enact this bill this year.

The CHAIRMAN. I am now going to turn the hearing over to the distinguished Senator from Utah, who is one of the ablest lawyers in the Congress. I have got to go back to Armed Services.

Judge Sneeden, we are very pleased to have you here and I am going to make it a point to read your statement because I have so much confidence in what you have to say.

Senator Hatch, if you will now take over.

Senator HATCH [presiding]. Thank you, Mr. Chairman.

Let us now call Hon. Richard Kusserow, who is the inspector general for Health and Human Services.

We are happy to have you here.

STATEMENT OF RICHARD P. KUSSEROW, INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY THOMAS S. CRANE, COUNSEL

Mr. KUSSEROW. Thank you, Mr. Chairman.

Senator HATCH. We are going to limit all witnesses from here on to 5 minutes each. That is the only time I have left. I have to be to a very important meeting for my State at 12 noon over on the House side, so I do not have much choice other than do that.

Mr. Kusserow, we will turn the time over to you.

Mr. KUSSEROW. Thank you, Mr. Chairman. I brought with me today Thomas S. Crane, of our general counsel's staff, involved in prosecuting the civil monetary penalties authorities we have in our department. I will in fact abbreviate my statement and, with your permission, submit it in its entirety for the record.

Senator HATCH. Without objection, we will put all statements in the record as though fully delivered.

Mr. KUSSEROW. In June of last year, I testified before the Senate Governmental Affairs Committee on S. 1134, the Program Fraud and Civil Penalties Act of 1985. At that time I voiced our strong support for a Governmentwide authority to impose civil administrative penalties against individuals or entities who defraud the Federal Government.

In addition, on behalf of the President's Council on Integrity and Efficiency, I communicated the unanimous endorsement of the entire community of statutory and inspector general to such a streamlined authority.

As you know, since 1981, the Department of Health and Human Services has enjoyed statutory authority to impose civil monetary penalties and assessments against those who file false or otherwise improper claims for payment in the Medicare, Medicaid, and Maternal and Health Programs.

The first civil monetary penalty statute can serve as a prototype, I believe, for possible Governmentwide application. Through the combined efforts of various components of our department, the Office of Inspector General, the Office of General Counsel, the Grants Appeals Board, and the Office of the Under Secretary, the program to date has proved to be a highly useful tool in sanctioning wrongdoers and recouping for the Medicare Trust Funds and general revenue accounts, those unjust enrichments acquired through false and fraudulent claims.

Furthermore, evidence suggests that our program is having a significant effect in deterring fraudulent and abusive conduct in our programs. In addition, the manner by which we operate the program provides a great deal of flexibility in coordinating our activities with the Department of Justice

In this regard, I am pleased to inform the committee that the department, with the positive support and assistance of the Department of Justice, has successfully negotiated and imposed penalties and assessments on an average of about $1 million a month since implementation of the program.

What I think is also very significant, Mr. Chairman, is that of the 186 total cases in which action has been completed, 170 cases were settled prior to issuance of any demand letter. We had 16 cases where demand letters have been issued, 1 where the respondent defaulted, and 9 cases settled after receipt of the demand letter and prior to a hearing, but only 6 cases where we actually had to go to a hearing stage.

Another 23 cases, involving an estimated $2.3 million, has been retsined by the Civil Division of the Department of Justice for possible recovery under the False Claims Act.

The above information I think is noteworthy for three reasons: First and foremost, it demonstrates the success of the program in dollars and cents; second, the table that we have submitted as part of our formal testimony illustrates that the cases are in fact settled prior to going into a formal administrative proceeding; and, third, the process avoids overloading the burdens of the Department of Justice.

Given the record of the civil monetary program at HHS, it is really not surprising that we are strong advocates for extension of similar authority to other programs administered by our department as well as Governmentwide.

For too long, many providers of goods and services to the Government have been playing the game catch me if you can, knowing full well that even if caught, the overburdened court docket minimized their chance of being prosecuted and penalizied. We are convinced that an effective administrative authority is sorely needed alternative to this overloaded Federal court system, and we are convinced that such Governmentwide authority modeled along the lines of our prototype would provide a significant Governmentwide deterrent to those who would defraud State and Federal Government programs.

We would like to address two important issues pertaining to the legislation. One is the stsndard of knowledge necessary for the imposition of penalties and assessments. The second is the testimonial and subpoena power for investigating officials.

With respect to the knowledge stsndard, the Congress has an opportunity to enact a landmark piece of legislation, namely to authorize the Government to impose civil monetary penalties and assessments when an individual doing business with the Government submits claims or statements that he knows or should have reason to know are false. In doing so, Congress would state that claimants for public funds have an affirmative duty to ascertain the true and accurate basis for their claims on which the Government is asked to rely. The duty should encompass both factual basis of claims as

well as their legal basis, that is, statutory, regulatory or contractual basis. However, their duty should be limited to what is reasonable and prudent under the circumstances.

The second issue of particular concern to the IG's is the testimonial and subpoena power for investigating officials. There really are two major reasons why we think it is essential to bave that ability to compel testimony.

We feel that successful fraud investigations really require that when certain representations are made and those representations are false, then the person making the representation has actual or constructive knowledge of the falsity. Typically, the people that are in the best position to provide that kind of information are under the supervision or direction of the entity for which the claims were made. They may be billing clerks or, in the case of our department, nurses or other people that work for a physician. Often they are reluctant to come forward without being protected against retribution by their employer. Therefore providing that kind of protection for witnesses is essential to the process.

If we do not have the testimonial or subpoena, authority then, as we have encountered in many, many cases in our own department's program, there will be had many cases where we will not be able to take any action because of the fact that the witnesses would not come forward or they are operating under instructions from their superiors not to cooperate with the Government.

Let me move, Mr. Chairman, quickly to the conclusion that we want to emphasize, that is, our support for the extension of this authority Governmentwide. We think that the model program of our department has demonstrated that civil money penalties can be an effective tool. We also have demonstrated that by setting up very flexible and reasonable ground rules and effective due process for those individuals involved in the civil monetary penalty programs, we can see that unjust enrichment is returned to the Government. And in most cases this can be done without requiring a formal hearing, let alone having it go into the courts.

Thank you.

[The prepared statement of Mr. Kusserow follows:]

Prepared Statement of Richard P. Kusserow

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM RICHARD P. KUSSEROW, INSPECTOR GEHERAL OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES. I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU THIS MORHING TO PROVIDE YOU WITH AH OVERVIEW OF OUR CIVIL MONETARY PENALTIES PROGRAM (CMP) ESTABLISHED UNDER P.L. 97-35.

IN JUNE OF LAST YEAR, I TESTIFIED BEFORE THE SENATE GOVERNMEHTAL AFFAIRS COMMITTEE ON THE BILL, S. 1134, THE "PROGRAM FRAUD AND CIVIL PENALTIES ACT OF 1985." AT THAT TIME I VOICED MY STROHG SUPPORT FOR GOVERNMEHT-WIDE AUTHORITY TO IMPOSE ADMINISTRATIVE CIVIL PEHALTIES AGAINST INDIVIDUALS OR ENTITIES WHO DEFRAUD THE FEDERAL GOVERNMENT. IN ADDITIOH, ON BEHALF OF THE PRESIDENT'S COUNCIL OH INTEGRITY AND EFFICIENCY, I COMMUNICATED THE UNANIMOUS ENDORSEMENT OF ENTIRE STATUTORY INSPECTORS GEHERAL (IG) COMMUNITY FOR SUCH AUTHORITY. OUR SUPPORT CONTINUES, MR. CHAIRMAN. AS THE FEDERAL OFFICIALS CHARGED WITH THE RESPOHSIBILITY FOR PREVENTIHG AND DETECTIHG FRAUD AND ABUSE IN OUR RESPECTIVE AGENCIES, THE IGS FIRMLY BELIEVE TRAT CIVIL MONETARY PENALTIES AUTHORITY WILL PROVIDE A CRITICAL TOOL IH THE ONGOING EFFORTS TO COMBAT FRAUD AGAINST THE UNITED STATES.

AS YOU KNOW, SINCE 1981, THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) HAS ENJOYED STATUTORY AUTHORITY TO EXERCISE CIVIL MONETARY PENALTY AUTHORITY AND THEREBY LEVEL ADMINISTRATIVE ASSESSMENTS AND PEHALTIES AGAINST THOSE WHO FILE FALSE OR OTHERWISE IMPROPER CLAIMS POR PAYMENT IH THE MEDICARE, MEDICAID AND MATERNAL AND CHILD HEALTH PROGRAMS. THIS FIRST CIVIL MONETARY PENALTY STATUTE CAN SERVE AS A PROTOTYPE FOR POSSIBLE GOVERNMEHT-WIDE APPLICATIOH. THROUGH THE COMBIHED EFFORTS OF THE VARIOUS COMPONENTS OP THE

DEPARTMENT - THE OFFICE OF IHSPECTOR GENERAL, THE OFFICE OF THE GEHERAL COUNSEL, THE GRANT APPEALS BOARD, AND THE OFFICE OF THE UNDER SECRETARY - THE PROGRAM, TO DATE, HAS PROVED TO BE A HIGHLY USEFUL TOOL IN SANCTIOHING WROHGDOERS AND RECOUPIHG FOR THE HEALTH TRUST FUNDS AND GENEEAL REVENUE, THOSE UNJUST ENRICHMENTS ACQUIRED THROUGH PALSE OR FRAUDULEHT CLAIMS. FURTHERMORE, EVIDEHCE SUGGESTS THAT OUR PROGRAM IS HAVING A SIGNIFICANT EFFORT ON DETERRING FRAUDULENT AND ABUSIVE CONDUCT IH OUR PROGRAMS.

THE MOST TANGIBLE INDICATION OF THE SUCCESS OF THIS PROGRAM IS THE MOHEY RECOVERED PROM FRAUDULENT HEALTH CARE PROVIDERS. IN THIS REGARD, I AN PLEASED TO IHFORM THE SUBCOMMITTEE THAT THE DEPARTMEHT, WITH THE POSITIVE SUPPORT AND COOPERATION OF THE DEPARTMENT OF JUSTICE, SUCCESSFULLY NEGOTIATED AND/OR IMPOSED PBNALTIES AND ASSESSMENTS OF AN AVERAGE OF NEARLY S1 MILLION PBR MONTH SINCE THE IMPLEMENTATION OF THE PROGRAM. THE FOLLOWING TABLE ITEMIZES AND INDICATES THE STAGES OP THE PROCEEDING AT WHICH THE PENALTIES OR SETTLEMENTS WERE RECOVERBD OR OBLIGATED.

186: TOTAL CASES IH WHICH ACTIOH HAS BEEN COMPLETED

170 CASES:	SETTLED PRIOR TO ISSUANCE OF DEMAND LETTER	$17,971,224.73
16 CASES:	DEMAND LETTERS ISSUED	
	1 CASE: RESPOHDENT DEFAULTEO	468,524.00
	9 CASES: SETTLED AFTER RECEIPT OF DEMAND LETTER AND PRIOR TO HEARIHG	425,725.00
	6 CASES: WHERE HEARIHG IS COMPLETED	2,238,072.86
	TOTAL	$21,213,635.10

IN ADDITIOH, ANOTHER 23 CASES INVOLVING AN ESTIMATED $2.3 MILLION HAVE BEEN RETAINED BY THE CIVIL OIVISION OF THE OEPARTMENT OF JUSTICE FOR POSSIBLE RECOVERY UNDER THE FALSE CLAIMS ACT.

THE ABOVE TABLE IS NOTEWORTHY FOR TWO REASONS. FIRST AND FOREMOST, IT DEMONSTRATES THE SUCCESS OF THE PROGRAM IN DOLLARS AND CENTS. SECOND, THE TABLE ILLUSTRATES THAT THE VAST MAJORITY OF CASES HAVE BEEN SETTLED PRIOR TO A HEARING, THEREBY MINIMIZING ADMINISTRATIVE COSTS.

I WOULD ALSO LIKE TO POINT OUT THAT THE DEPARTMENT HAS PREVAILED IN THOSE SIX CASES THAT HAVE BEEN ADMINISTRATIVELY ADJUDICATED BEFORE AN ADMINISTRATIVE LAW JUDGE WITH APPROPRIATE DUE PROCESS RIGHTS AND PRIVILEGES. THE FOLLOWING CASES ARE ILLUSTRATIVE OF THE KINDS OF FRAUDULENT CONDUCT THAT MAY BE SUCCESSFULLY SANCTIONED UNDER OUR CMPL AUTHORITY:

- A CHIROPRACTOR WNO OWNED AND OPERATED A CLINIC IN FLORIDA, ENGAGED IN A LARGE SCALE SCHEME TO DEFRAUD THE MEDICARE PROGRAM BY FALSELY REPRESENTING INELIGIBLE CNIROPRACTIC SERVICES AS REIMBURSABLE MEDICAL SERVICES. IN EXECUTING TNIS SCHEME, THAT SPANNED SEVERAL YEARS AND INVOLVED TNOUSANDS OF CLAIMS, THE CHIROPRACTOR BILLED FOR UNALLOWABLE SERVICES UNDER THE NAMES OF PHYSICIANS WHO NOT ONLY NEVER PERFORMED THE SERVICES IN QUESTION, BUT WERE NO LONGER EMPLOYED BY TNE CLINIC AT TNE TIME TNE SERVICES WERE RENDERED. TNE ADMINISTRATIVE LAW JUDGE HANDED DOWN A DECISION AWARDING TNE DEPARTMENT NEARLY S1.8 MILLION IN PENALTIES AND ASSESSMENTS AGAINST TNE CNIROPRACTOR.

- TNE DEPARTMENT WAS ALSO AWARDED S156,136 IN PENALTIES AND ASSESSMENTS AGAINST A KANSAS NURSING NOME OPERATOR WHO HAD INCLUDED NUMEROUS FALSE ITEMS IN HIS COST REPORTS. THE OPERATOR CREATED FALSE INVOICES TO SUPPORT FICTITIOUS ENTRIES IN THE REPORTS. TNERE HAD BEEN A SUCCESSFUL CRIMINAL PROSECUTION IN TNIS CASE; NOWEVER, WITNOUT CMPL, MUCH OF THE UNJUST ENRICHMENT WOULDN'T HAVE BEEN RECOUPED.

- A TEXAS DOCTOR, WHO CONTROLLED A HOSFITAL, BILLED MEDICARE FOR DAYS WHERE HE DID NOT VISIT FARTICULAR FATIENTS AND FOR FATIENT VISITS BY HIS DAUGHTER, WHO WAS NOT LICENSED TO FRACTICE IN TEXAS. THE DEPARTMENT WAS AWARDED $106,000 IN FENALTIES AND ASSESSMENTS. I WOULD LIKE TO POINT OUT THAT THE U.S. ATTORNEY DEFERRED CRIMINAL FROSECUTION IN FAVOR OF FROCEEDING ADMINISTRATIVELY UNDER CMPL.

- THE DEFARTMENT ALSO RECEIVED $83,776 FROM A CALIFORNIA FSYCHOLOGIST, WHO HAD FILED CLAIMS FOR 50-MINUTE INDIVIDUAL THERAPY SESSIONS FOR LARGE NUMBER OF FATIENTS. IN FACT, HE HAD RENDERED EITHER SESSIONS OF MUCH SHORTER DURATION OR GROUP THERAFY SESSIONS, BOTH OF WHICH ARE REIMBURSED AT A MUCH LOWER RATE PER FATIENT. THE FSYCHOLOGIST ALSO FLED GUILTY TO NUMEROUS CRIMINAL CHARGES BROUGHT AGAINST HIM BY THE STATE ATTORNEY GENERAL.

GIVEN THE RECORD OF THE CMFL FROGRAM AT HHS, IT IS NOT SURPRISING THAT WE ARE STRONG ADVOCATES FOR THE EXTENSION OF SIMILAR AUTHORITY TO OTHER PROGRAMS ADMINISTERED BY OUR DEPARTMENT AS WELL AS TO OTHER AGENCIES THROOGHOUT THE FEDERAL GOVERNMENT. FOR TOO LONG, MANY FROVIDERS OF GOODS AND SERVICES TO THE GOVERNMENT HAVE BEEN FLAYING A GAME OF "CATCH ME IF YOU CAN", KNOWING FULL WELL THAT EVEN IF CAUGHT, THE CROWDED FEDERAL COURT DOCKET MINIMIZED THEIR CHANCES OF BEING FROSECUTED AND FENALIZED. WE ARE CONVINCED THAT THIS ADMINISTRATIVE AUTHORITY IS A SORELY WEEDED RESOLUTION ALTERNATIVE TO AN OVERLOADED FEDERAL COURT SYSTEM. WE ARE EQUALLY CONVINCED THAT SUCH GOVERNMENT-WIDE AUTHORITY, MODELED ALONG THE LINES OF OUR FROTOTYFE, WOULD FROVIDE A SIGNIFICANT GOVERNMENT-WIDE DETERRENT TO THOSE WHO WOULD DEFRAUD THE UNITED STATES.

AS THE CURRENT VICE-CHAIRMAN OF THE PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY (PCIE), AND IT FORMER LEGISLATIVE COMMITTEE CHAIRMAN, I HAVE CONSULTED WITH THE IG COMMUNITY ON THE PROPOSED LEGISLATIVE ALTERNATIVES. THE FOLLOWIHG IS A BRIEF DESCRIPTION OF SOME BROAD CATEGORIES OF CASES THAT WOULD APPEAR APPROPRIATE FOR ADMIHISTRATIVE RESOLUTION.

- CASES THAT HAVE BEEN INVESTIGATED AND REFERRED TO THE DEPARTMENT OF JUSTICE FOR CRIMINAL PROSECUTION, BUT SUCH PROSECUTIOH WAS DECLINED, AND NO CIVIL ACTION WAS UNDERTAKEN.

- CASES WHERE THE SUBJECT IS PROSECUTED AND CONVICTED, BUT WHERE CIVIL ACTION FOR FULL RECOVERY IS NOT DEEMED WARRANTED AS COST EFFECTIVE BY THE DEPARTMENT OF JUSTICE.

- CASES WHERE NO CIVIL ACTION UNDER THE FALSE CLAIMS ACT WAS TAKEN BECAUSE:

  A: NO MONETARY INJURY TO THE UNITED STATES COULD BE ESTABLISHED;

  B: DOLLAR AMOUNT LOST TO GOVERNMENT COULD NOT BE ASCERTAINED; AND

  C: NOT DEEMED COST EFFECTIVE TO SEEK RECOVERY UNDER COURT SYSTEM.

THE ABOVE CATEGORIES IN WHICH IMPOSITIOH OF CIVIL MONETARY PENALTIES MIGHT HAVE BEEN SUITABLE AND EFFICACIOUS IS BY NO MEANS EXHAUSTIVE. MANY EXAMPLES WERE INCLUDED IN A JOIHT STATEMENT OF ALL STATUTORY INSPECTORS GENERAL IH SUPPORT OF GOVERNMENT-WIDE AUTHORITY FOR THE CIVIL MONETARY PENALTIES FOR FHAUD, SUBMITTED TO THE SENATE COMMITTEE ON GOVERNMENTAL

AFFAIRS DURING THEIR JUNE 18, 1985 HEARING ON S.1134. THESE EXAMPLES BRING HOME THE FACT TRAT AUTHORITY TO IMPOSE ADMINISTRATIVE PENALTIES FOR FRAUD IS NOT MERELY A DESIRABLE ADJUNCT TO CRININAL AND CIVIL COURT ACTION; IN SOME CASES; IT WOULD BE OUR ONLY EFFECTIVE SANCTION AGAINST ENTITIES WHO DEFRAUD THE GOVERNMENT.

DURING THE LAST SEVERAL YEARS, IN RESPONSE TO THE ABOVE DEMONSTRATED NEED FOR AN EFFECTIVE ADMINISTRATIVE SANCTION AGAINST FRAUD, A NUMBER OF BILLS AUTHORIZING THE IMPOSITION OF CIVIL MONETARY PENALTIES RAVE BEEN CONSIDERED BY VARIOUS COMMITTEES OF THE CONGRESS. LAST YEAR, UNDER THE LEADERSHIP OF SENATORS COHEN AND ROTH, THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS COMPLETED WORK ON S.1134, THE "PROGRAM FRAUD RENEDIES ACT OF 1985,". SINILAR BILLS HAVE BEEN INTRODUCED IN THE HOUSE INDICATING GROWING SUPPORT FOR SUCH LEGISLATION. THE ADNINISTRATION HAS ALSO BEEN A STRONG SUPPORTER OF A CIVIL MONETARY PENALTIES BILL.

WE WOULD LIKE TO ADDRESS TWO OF THE INPORTANT ISSUES PERTAINING TO THIS LEGISLATION: (1) THE STANDARD OF KNOWLEDGE NECESSARY FOR IMPOSITION OF PENALTIES AND ASSESSMENTS AND (2) TESTIMONIAL SUBPOENA POWER FOR INVESTIGATING OFFICIALS.

WITH RESPECT TO THE KNOWLEDGE STANDARD, THE CONGRESS HAS THE OPPORTUNITY TO ENACT A LANDMARK PIECE OF LEGISLATION -- NAMELY, TO AUTHORIZE THE GOVERNMENT TO INPOSE CIVIL MONETARY PENALTIES AND ASSESSMENTS WHEN AN INDIVIDUAL DOING BUSINESS WITH THE GOVERNMENT SUBMITS CLAIMS OR STATEMENTS THAT HE KNOWS <u>OR HAS REASON TO KNOW</u> ARE FALSE. IN SO DOING, THE CONGRESS WOULD STATE THAT CLAIMANTS FOR PUBLIC FUNDS HAVE AN AFFIRMATIVE <u>DUTY</u> TO ASCERTAIN THE TRUE AND ACCUHATE BASIS FOR THEIR CLAIMS ON WHICH THE GOVERNMENT IS ASKED TO RELY. THE DUTY SHOULD ENCOMPASS BOTH THE FACTUAL BASIS OF CLAINS, AS

> WELL AS THEIR LEGAL BASIS (THAT IS, STATUTORY, REGULATORY OR CONTRACTUAL). HOWEVER, TNEIR DUTY SHOULD BE LIMITED TO WHAT IS REASONABLE AND PRUDENT UNDER THE CIRCUMSTANCES.
>
> TNE GENESIS OF THIS IDEA WAS THE CASE OF U.S. v COOPERATIVE GRAIN AND SUPPLY CO., 476 F.2d 47 (8th CIR. 1973), WHERE TNE COURT SAID THAT:
> THE APPLICANT FOR PUBLIC FUNDS HAS A DUTY TO . . . BE INFORMED OF THE BASIC REQUIREMENTS OF ELIGIBILITY.

476 F.2d AT 60. THE COURT FURTHER STATED:

> . . . A CITIZEN CANNOT DIGEST ALL TNE MANIFOLD REGULATIONS NDR CAN THE GOVERNMENT ADEQUATELY AND INDIVIDUALLY INFORM EACH CITIZEN ABOUT EVERY REGULATION, BUT THERE IS A CORRESPONDING DUTY TO INFORM AND BE INFORMED.

ID AT 55. TNIS DUTY HAS THE PRIMARY OBJECTIVE OF REACHING THOSE WHO PLAY "OSTRICH"; THAT IS, THOSE WHO AVOID FINDING OUT THE TRUE FACTS UNDERLINING THEIR CLAIMS, OR THE CONTENT OF THE APPLICABLE RULES AND REGULATIONS, AND THEN SEEK TO NIDE BEHIND TNEIR IGNOHANCE. TOO OFTEN WE NEAR TNE PLEA TNAT "TNE BILLING CLERK DID IT," OR "THEY DID THAT OUT IN THE FIELD," OR "NO ONE TOLD ME WHAT THE RULES WERE."

TYPICALLY, IT IS THE CLAIMANTS WHO CONTROL THEIR CLAIM PROCESSES, AND WHO ARE IN A POSITION TO CONDUCT REASONABLE CHECKS TO ENSURE THAT APPROPRIATE FINANCIAL AND BILLING CONTROLS FOR TNEIR OWH BUSINESSES ARE IN PLACE. IT IS UNREASONABLE FOR THE GOVERNMENT TO BE EXPECTED TO KNOW THOSE CLAIMS THAT ARE PROPER AND THOSE THAT ARE NOT, TO BEAR THE RISKS OF CLAIMS GENERATED BY SLOPPY PROCEDURE OR UNTRAINED PERSONNEL. WE MIGNT ALLUDE TO TNE FACT THAT IRS REQUIRES

THAT BOOKS AND RECORDS BE MAINTAINED TO JUSTIFY VARIOUS BUSINESS AND PERSONAL CLAIMS. THEREFORE, WE BELIEVE THE BURDEN OF MAKING REASONABLY SURE THAT CLAIMS ARE CORRECT, SNOULD BE PLACED ON TNOSE WHO MAKE CLAIHS UPON TNE TREASURY OF THE UNITED STATES.

IT IS IHPORTANT TO UNDERSTAND WHAT WE ARE NOT SAYING NERE. WE BELIEVE THAT THE LEGISLATIVE RECORD SNOULD BE CLEAR THAT THOSE WHO MAKE HONEST MISTAKES OR WHO ARE INVOLVED IN GOOD FAITH DISPUTES WITH THE GOVERNMENT WILL NOT BE PENALIZED. AS WITH OUR CMPL STATUTE AT HHS, THE BURDEN OF PROOF IS ON TNE GOVERNMENT TO DEMONSTHATE KNOWLEDGE OR A REASON TO KNOW OF EITHER FALSE CLAIHS OR WILLFULL CONCEALMENT OF MATERIAL INFORMATION.

IN ORDER TO PROTECT NIMSELF, AN EXECUTIVE OF A COMPANY NEEDS ONLY TO CONDUCT SUCH STEPS AS ARE REASONABLE OR PRUDENT UNDER THE CIRCUMSTANCES TO ASSURE THE ACCURACY OF TNEIR CLAIHS. THE EXECUTIVE WOULD HAVE TO HAVE REASONABLE COMPETENT PEOPLE FOR HIS BILLING PROCESS AND SEE THAT THEY RECEIVED APPROPRIATE TRAINING. FURTHER, HE SHOULD HAVE IN PLACE APPROPRIATE AUDIT CONTROLS AND INSURE THAT PERIODIC CHECKS WERE MADE TO SEE THAT TNE WORK WAS BEING DONE CORRECTLY. THESE ARE SIMPLE CONCEPTS, ONES THAT A REASONABLE AND PRUDENT EXECUTIVE WOULD DO ANYWAY. THE STATUTE WOULD NOT ADD TO THESE NORMAL BUSINESS RESPONSIBILITIES.

THE SECOND ISSUE OF PARTICULAR CONCERN TO THE IGs IS THAT OF TESTIMONIAL SUBPOENA POWER FOR INVESTIGATING OFFICIALS. FOR THE FOLLOWING REASONS, WE BELIEVE STRONGLY THAT SUCH AUTHORITY WOULD PROVIDE A CRITICAL TOOL IN INVESTIGATING FRAUD AGAIHST THE GOVERNMENT.

SUCCESSFUL FRAUD INVESTIGATIONS REQUIRE PROOF THAT (1) CERTAIN REPRESENTATIONS WERE MADE, (2) THOSE REPRESENTATIONS

WERE FALSE, AND (3) THE PERSON MAKING THE REPRESENTATIONS HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THEIR FALSITY. EXCEPT IN THOSE RARE CASES IN WHICN ONE OBTAINS A DIRECT CONFESSION FROM THE SUBJECT, KNOWLEDGE OR INTENT IS DIFFICULT TO PROVE. TYPICALLY, KNOWLEDGE IS PROVED BY PROVING THE FACTS AND CIRCUMSTANCES SURROUNDING THE PREPARATION AND SUBMISSION OF THE CLAIMS. HOWEVER, FEW WRONGDOERS LEAVE A SUFFICIENT "PAPER TRAIL" TO ENABLE PRDOF OF KNOWLEDGE THROUGN DOCUMENTS ALONE. IN FACT, BY THE VERY NATURE OF A FRAUD CASE, MANY KEY DOCUMENTS WILL HAVE BEEN FALSIFIED AND DESIGNED TO DECIEVE.

THEREFORE, AN INVESTIGATOR MUST OBTAIN INFORMATION CONCERNING DIRECTIONS, INSTRUCTIONS AND CONVERSATIONS AMONG THE SUBJECTS AND THEIR EMPLOYEES, CLIENTS, BUSINESS ASSOCIATES, ETC. IN MOST CASES, WITHESSES AND PARTICIPANTS IN THE CONVERSATION ARE UNDER THE INFLUENCE OR CONTROL OF THE SUBJECTS AS RESULT OF EMPLOYMENT OR CONTRACTUAL RELATIONS. THEY ARE, AS A RULE, RELUCTANT TO INJURE THEIR POSITION WITH THE SUBJECT. WHERE THESE EMPLOYEES AND THEIR WITHESSES FEEL THAT THEY ARE NOT IN A POSITION TO SUBMIT VOLUNTARILY TO AN INTERVIEW, TESTIMONIAL SUBPOENA AUTHORITY WOULD PROVIDE AN ESSENTIAL TOOL TO OVERCOME THEIR RELUCTANCE TO PROVIDE EVIDENCE.

THREE ADDITIONAL POINTS SHOULD BE NOTED WITH RESPECT TO TESTIMONIAL SUBPOENAS. FIRST, THE AUTHORITY TO COMPEL ATTENDANCE AND TESTIMONY OF WITHESSES IN THE COURSE OF INVESTIGATIONS IS BY NO MEANS UNUSUAL IN THE EXECUTIVE BRANCN OF GOVERNMENT. CONGRESS HAS CONFERRED SUCN POWER IN 68 SPECIFIC STATUTES UPON A NUMBER OF FEDERAL DEPARTMENTS AND AGENCIES FOR A WIDE VARIETY OF PURPOSES. FOR EXAMPLE, THE DEPARTMENT OF JUSTICE FOR ANTITRUST CASES, THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FOR INTERSTATE

LAND SALES, THE DEPARTMENT OF TREASURY FOR CONTROLLED SUBSTANCE IMPORTATION, AND THE DEPARTMENT OF AGRICULTURE FOR THE HORSE PROTECTION ACT. OTHER DEPARTMENTS INCLUDE TRANSPORTATION, COMMERCE, LABOR, INTERIOR, ENERGY, AND HHS. IF TERSTIMONIAL SUBPOENA AUTHORITY CAN BE GRANTED TO THESE VARIOUS AGENCIES AND DEPARTMENTS, SURELY THE INSPECTORS GENERAL SHOULD HAVE THIS AUTHORITY FOR THE PURPOSE OF COMBATTING FRAUD AGAINST THE UNITED STATES.

SECOND, LEGITIMATE DUE PROCESS SAFEGUARDS TO PROTECT THE INDIVIDUAL WHOSE TESTIMONY IS COMPELLED MAY BE INCLUDED IN THE GRANT OF SUBPOENA POWER. FOR EXAMPLE, SPECIFIC PROVISIONS FOR THE ASSISTANCE OF COUNSEL, RIGHT OF ACCESS TO TRANSCRIPTS, RIGHT TO A GENERAL STATEMENT OF THE SCOPE OF THE INVESTIGATION, AND SOME DEGREE OF CONFIDENTIALLY ALL SEEM TO BE APPROPRIATE PROTECTION FOR THE WITHESS.

THIRD, PROCEDURES COULD BE PRESCRIBED FOR ENFORCEMENT OF SUBPOENAS. FOR EXAMPLE, THE LEGISLATION COULD STATE THAT AN IG WOULD HAVE TO SEEK, FIRST, THE CONCURRENCE AND ASSISTANCE OF THE JUSTICE DEPARTMENT, AND THEN, A FEDERAL DISTRICT COURT WOULD HAVE TO BE PERSUADED TO ISSUE AN ORDER ENFORCING THE SUBPOENA.

IN CONCLUSION, LET ME AGAIN EMPHASIZE OUR SUPPORT FOR EXTENSION OF CIVIL MONETARY PENALTIES AUTHORITY TO ALL AGENCIES THROUGHOUT THE FEDERAL GOVERNMENT IN A MANNER MODELED ON OUR EXISTING EXPERIENCE WITH THE CMPL AT HHS. BASED ON THAT EXPERIENCE, WE BELIEVE THAT SUCH LEGISLATION, IF ENACTED, WOULD GREATLY ENHANCE THE ABILITY OF THE UNITED STATES TO REMEDY AND ULTIMATELY TO DETER, FRAUD.
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Senator HATCH. Thank you, Mr. Kusserow. We appreciate that. I think I will just submit questions to you in writing.

Mr. KUSSEROW. Thank you, Mr. Chairman.

Senator HATCH. Thank you for coming. We appreciate both of you coming.

Mr. KUSSEROW. Thank you.

[The questions of Senator Hatch follow:]

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

July 3, 1986

The Honorable Richard Kusserow
Inspector General
Department of Health and Human Services

Dear Mr. Kusserow:

As indicated in the Commiteee's hearing on June 17, 1986, concerning S. 1134, false claims and fraud legislation, I would appreciate your written responses to the attached questions. Please return yout answers to the Committee in 212 Senate Dirksen Office Building, Washington, D.C. 20510 not later than the close of business on July 15, 1986 . If your have any questions please contact Jean Leavitt at (202) 224-8191.

QUESTION 1): As you know, the courts today are split among three different views of the appropriate standard of knowledge or intent for fraud actions, varying from a "constructive knowledge" test, adopted only by the eighth circuit, to actual knowledge with specific intent to defraud the United States, a position held by the fifth and ninth circuits. The majority of circuits rejected both of these-positions and have adopted the view that proof of actual knowledge is required but specific intent to defraud the United States is not. I have concerns that botn S. 1134 and S. 1562, contain a very liberal gross negligence standard. The American Bar Association and others have recommended a definition of knowledge which includes actual knowledge, deliberate ingorance and reckless disregard for the truth. Can you respand to these concerns that a gross negligence standard for a fraud action is inappropriate ?

[illegible] under S. 1134, the agency's [illegible] personal appearance and testimony [illegible] [illegible] of the nature of the investigation or the purpose of the investigation. The person subpoenaed is not even given notice that he may be accused of wrongdoing. In addition to concerns for the lack of Due Process protections for the subject, there are concerns that it has not been made clear why governmental agencies in civil proceedings should be entitled to benefits not available to ordinary civil litigants, particularly when the inspector general already has very broad powers of investigation under current law. How would you respond to these concerns? In light of these concerns regarding the unlimited subpoena power, what provisions could be added to protect against potential abuse?

QUESTION 3): S. 1134 combines the investigative, prosecutorial and adjudicative functions into one agency.

Given the serious nature of fraud charges and their impact upon personal and business reputations, many are concerned that the hearing officer under this procedure is not sufficiently isolated from the political and programatic concerns of his agency so as to afford the plaintiff with a fair and impartial hearing. How would you respond to this concern and would you offer suggestions that would ensure greater Due Process protections?

Thank you for your willingness to answer these questions. With kindest regards and best wishes,

Sincerely,

Orrin G. Hatch
United States Senator

OGH:jj

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

AUG 13 1986

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are responding to your letter of July 3, 1986 regarding S.1134, specifically, the issues of (1) the standard of knowledge required for imposition of liability, (2) testimonial subpoena authority for Inspectors General, and (3) the use of the administrative process as a remedy for fraud. Thank you for the opportunity to bring our views on these issues to your attention.

As you know, we are a strong supporter of S.1134, as are all eighteen statutory Inspectors General. We believe there is a need for an administrative remedy to handle cases of fraud against the United States, where the Department of Justice declines to proceed in U.S. District Court under the False Claims Act. As you know, here at the Department of Health and Human Services (HHS), we have been using a prototype of S.1134 (the Civil Monetary Penalty Law, 42 U.S.C. 1320a-7a), in order to recover millions of dollars from health care providers who have defrauded Medicare and Medicaid. This program shows than an administrative remedy can be effective in recovering monies unlawfully claimed against Government programs, in a manner which is fair to all parties. In addition, we believe that this Act has served as a significant deterrent to those who would defraud Medicare and Medicaid.

With respect to the first issue you raised, the knowledge standard, we believe that the Congress should take this opportunity to enunciate a national policy that a claimant of Government funds has a duty to make a reasonable inquiry regarding the factual and legal bases of those claims. This duty has the primary objective of reaching "ostriches," i.e., those who avoid finding the true facts underlying their claims, or the content of applicable rules and regulations. It is our understanding that the sponsors of this legislation have chosen to adopt the knowledge standard advocated by a section of the American Bar Association, that is, requiring the Government to show acutal knowledge, deliberate ignorance of the facts, or reckless disregard of

the facts. We believe that this standard reasonably achieves the goals specified above, although we continue to prefer an express statement that claimants are under a duty to make an inquiry as to the legal and factual bases of claims.

The second issue raised in your letter is testimonial subpoena authority for Inspectors General for investigations of fraud. While Inspectors General currently have authority to subpoena documents, there is no authority for subpoenaing persons to give testimony. In our view, the testimonial subpoena is a critical investigative tool. In a fraud case, the Government has the burden of proof to show that (1) certain representations were made, (2) those representations were false, and (3) the person making the representations had actual or constructive knowledge of their falsity. Except in those rare cases in which one obtains a direct confession from the subject, knowledge or intent is difficult for the Government to prove. Typically, knowledge is shown by proving the facts and circumstances surrounding the preparation and submission of the claims, allowing the finder of the fact to infer that the subject had knowledge that the claims were false.

However, few wrongdoers leave a sufficient "paper trail" to enable proof of knowledge through documents alone. Therefore, an investigator must obtain information concerning oral instructions and conversations among the subject and others, such as employees, clients, and business associates. In most cases, witnesses to, and participants in such conversations are under the influence or control of the subject as result of employment or contractual relations. They are, as a rule, reluctant to injure their position with the subject. Where these witnesses and participants feel that they are not in a position to submit voluntarily to an interview, testimonial subpoena authority provides an essential tool to obtain their evidence.

It is important to note that the Congress has previously granted testimonial subpoena authority to departments and agencies for investigations in sixty-eight other contexts. A list of these authorities is enclosed. The list includes the major anti-fraud agencies of the Government, such as the Federal Trade Commission, Securities and Exchange Commission, and Commodity Futures Trading Commission. If testimonial subpoena authority can be granted to this wide spectrum of departments and agencies for various purposes, surely the statutory Inspectors General should have this critical power for investigations of fraud against the United States.

We believe that the recent version of the testimonial subpoena authority adopted by the sponsors of S.1134 is a

very carefully limited authority, with appropriate due process safeguards for those subpoenaad. Significantly, prior to such a subpoena being issued, the Department of Justice would be required to approve the subpoena, and it could not later be anforced unless the Department of Justice is successful in obtaining an enforcement order from a U.S. District Court Judge.

We would oppose any requirament in this authority that the potential subject(s) be notifisd of a subpoena and that they be afforded the right to be present at the taking of the testimony. Such a procedure is contrary to all the other subpoena authorities with which we are familiar; we know of no agency where the subject of the investigation participates in the investigation. We are concerned with the potential chilling effect on employees or businees associates who are testifying, if the subject is sitting at the same table. And again, this procedurs is at the investigatory stage of a proceeding, where the Government is attempting to determine whether adequate evidence exists to meet its burden of proof. Later in ths proceeding, a respondent is afforded formal notice of any charges, a hearing where he can confront all witnesses presented by the Government, a decision based on the evidence received, appeal to the courts, and the many other due process rights delineated in S.1134.

The last issue raised in your letter concerns the sdministrative process, where the investigatory, prosecutorial and adjudicative functions are in one agency. While this structure may seem unfair on the surface, both S.1134 and the Administrative Procedure Act require separation of these functions within the agency. In fact, most if not all administrative tribunals within the United Statss Government combines these functions in one agency.

If the concern is that Federal departments and agencies are not capable of rendering fair and just treatment in cases involving large dollar amounts in complex cases, such a proposition is totally at odds with the authorities Congress has already entrusted to a variety of executive departments and independent agencies. For example, the Office of Hearings and Appeals at the Department of Energy has been adjudicating the liability of major oil producers for penalties and overcharges of over one half billion dollars per case in some instances. A number of departments and agencies, such as Defense, Housing and Urban Development, Transportation and the National Aeronautics and Space Administration, employ administrative law judgss (ALJs) on Boards of Contract Appeals, who preside over complex contract disputes with no dollar limit over the amount in controversy. It is not at all uncommon for such claims to involve millions of dollars.

The Department of Labor administers several statutes (e.g., mine safety and health, fair labor standards and certain civil rights actions) which call for hearings before ALJs with amounts in controversy up to $8 million. The Environmental Protection Agency administers Superfund and other litigation before ALJs with controversies worth tens of millions. The Grant Appeals Board at the Department of HHS, staffed by board members appointed by the Secretary, adjudicates HHS grant disallowances that commonly involve amounts in excess of $5 million, and as much as $100 million.

In addition, many independent agencies adjudicate cases of considerable size and dollar value before ALJs. For example, ALJs at the Federal Energy Regulatory Commission have decided several cases where more than a billion dollars was at stake. The Federal Trade Commission adjudicates anti-trust suits directed at restructuring whole industries before ALJs. ALJs also adjudicate cases worth many millione of dollars at the Securities and Exchange Commission, Federal Communications Commission, International Trade Commission, and the Commodity Futures Trading Commission.

In summary, we believe that S.1134 provides for appropriate standards of liability and contains appropriate due process rights for respondents.

Sincerely yours,

Richard P. Kusserow
Inspector General

Enclosure

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
5 U.S.C. § 1205	Merit Systems Protection Board	Investigations relating to hearings within its jurisdiction
5 U.S.C. § 1507	Merit Systems Protection Board	Investigations of political activity of certain state and local employees
5 U.S.C. § 7131	Federal Labor Relations Authority	Investigations within its jurisdiction
7 U.S.C. § 15	Commodity Futures Trading Commission	Investigations under the Commodity Exchange Act, 7 U.S.C. § 1 et seq.
7 U.S.C. § 87f	Administrator of the Federal Grain Inspection Service	Investigations under the United States Grain Standards Act, 7 U.S.C. §§ 71 et seq.
7 U.S.C. § 511n	Secretary of Agriculture	Tobacco inspection
7 U.S.C. § 2115	Secretary of Agriculture	Investigations under the Cotton Research and Promotion Act, 7 U.S.C. 2101 et seq.
7 U.S.C. § 2622	Secretary of Agriculture	Inspections under the Potato Research and Promotion Act, 7 U.S.C. §§ 2601 et seq.
7 U.S.C. § 2717	Secretary of Agriculture	Investigations under the Egg Research and Consumer Information Act, 2 U.S.C. §§ 2701 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
7 U.S.C. § 2917	Secretary of Agriculture	Inspections under the Beef Research and Information Act, 7 U.S.C. §§ 2901 et seq.
7 U.S.C. § 3412	Secretary of Agriculture	Investigations under the Wheat and Wheat Foods Research and Nutrition Education Act, 7 U.S.C. §§ 3401 et seq.
7 U.S.C. § 4317	Secretary of Agriculture	Investigations under the Floral Research and Consumer Information Act, 7 U.S.C. 4301 et seq.
7 U.S.C. § 4511	Secretary of Agriculture	Investigations under the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501 et seq.
8 U.S.C. § 1446	Attorney General or Immigration and Naturalization Service	Investigation of naturalization petitioner
12 U.S.C. § 1464	Federal Home Loan Bank Board	Investigations with respect to Federal Savings and Loan Associations
12 U.S.C. § 1730	Federal Savings and Loan Insurance Corporation	Examinations of insured institutions
12 U.S.C. § 1786	National Credit Union Administration Board	Investigations of insured credit unions
12 U.S.C. § 1818	Bank supervisory agencies	Investigations connected with the Federal Deposit Insurance Corporation programs
12 U.S.C. § 2404	National Commission on Elections Transfer	Investigations within its jurisdiction

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
12 U.S.C. § 2617	Secretary of Housing and Urban Development	Investigations under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.
15 U.S.C. § 57b-1*	Federal Trade Commission	Investigation of unfair or deceptive methods of competition
15 U.S.C. § 77s	Security and Exchange Commission	Investigations under the Securities Act of 1933, 15 U.S.C. §§ 77s et seq.
15 U.S.C. § 77uuu	Securities and Exchange Commission	Investigations under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa et seq.
15 U.S.C. § 780	Securities and Exchange Commission	Investigations under the Securities Exchange Act of 1934, 15 U.S.C. §§78a et seq.
15 U.S.C. § 79r	Securities and Exchange Commission	Investigations under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 et seq.
15 U.S.C. § 80b-9	Securities and Exchange Commission	Investigations relating to investment companies and advisors under 15 U.S.C. §§80b-1 et seq.
15 U.S.C. § 80a-41	Securities and Exchange Commission	Investigations relating to investment companies and advisors under 15 U S.C. §§ 80a-1 et seq.
15 U.S.C. § 634	Small Business Administration	Investigations under the Small Business Act, 15 U.S.C. 631, at seq.

*Civil investigative demand

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
15 U.S.C. § 687b	Small Business Administration	Investigations relating to revocation of license granted under 15 U.S.C. § 671 et seq.
15 U.S.C. § 717m	Secretary of Energy	Investigations under the natural gas provisions of 15 U.S.C. §§ 717 et seq.
15 U.S.C. § 772	Secretary of Energy	Investigations under the Federal Energy Act of 1974, 15 U.S.C. §§ 761 et seq.
15 U.S.C. § 1312[a]	Attorney-General or Anti-trust Division of Department of Justice	Civil antitrust investigation
15 U.S.C. § 1401	Secretary of Transportation	Investigations under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 et seq.
15 U.S.C. § 1714	Secretary of Housing and Urban Development	Investigations under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq.
15 U.S.C. § 1825	Secretary of Agriculture	Investigations under the Horse Protection Act, 15 U.S.C. §§ 1821 et seq.
15 U.S.C. § 1914	Secretary of Transportation	Investigations to carry out the bumper standards law; Cost Saving Act, 15 U.S.C. §§ 1961 et seq.
15 U.S.C. § 1944	Secretary of Transportation	To carry out the purposes of the automobile consumer information study law, 15 U.S.C. § 1941 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
15 U.S.C. § 2005	Secretary of Transportation the Environmental Protection Administrator	Investigations under the law requiring fuel economy standards, 15 U.S.C. § 2001 et seq.
15 U.S.C. § 2076	Consumer Product Safety Commission	Investigations within its jurisdiction
15 U.S.C. § 4013x	Attorney General or Antitrust Division of Department of Justice	Investigations connected with issuance of export trade certificates of review
16 U.S.C. § 773 i	Secretary of Commerce	Law enforcement investigations under the Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773 et seq.
16 U.S.C. § 825f	Secretary of Energy and the Federal Energy Regulatory Commission	Investigations under the Federal Power Act, 16 U.S.C. §§ 791 et seq.
18 U.S.C. § 1968*	Attorney General	Racketeer Influenced Corrupt Organizations (RICO) statute investigations
19 U.S.C. § 2321	Secretary of Labor	Investigations connected with trade adjustment assistance
21 U.S.C. § 876	Attorney General	Investigations relating to controlled substance law under 21 U.S.C. §§ 801 et seq.
21 U.S.C. § 967	Secretary of the Treasury	Investigations relating to smuggling of controlled substances
22 U.S.C. § 287c	Secretary of Treasury	Investigations relating to Rhodesian sanctions

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
22 U.S.C. § 1623	Foreign Claims Settlement Commission	Investigations of claims within its jurisdiction
22 U.S.C. § 2824	Commission on the Organization and Conduct of Foreign Policy	Investigations within its jurisdiction
22 U.S.C. § 3004	Commission on Security and Cooperation in Europe	Investigations within its jurisdiction
29 U.S.C. § 161	National Labor Relations Board	Investigations relating to representative elections and unfair labor practices
29 U.S.C. § 1303	Pension Benefit Guaranty Corporation	Investigations Under the Employee Retirement Income Security Act of 1924, 29 U.S.C. §§ 1301 et seq.
29 U.S.C. § 1862	Secretary of Labor	Investigations under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq.
30 U.S.C. § 1717	Secretary of Interior	Investigations under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 et seq.
33 U.S.C. § 506	Secretary of Transportation	Investigative hearings relating to reasonableness of bridge tolls
33 U.S.C. § 1907	Secretary of Transportation	Investigations under the Act to Prevent Air Pollution from Ships, 33 U.S.C. §§ 1901 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
42 U.S.C. § 405	Secretary of Health and Human Services	Investigations under Title II of the Social Security Act, which concerns federal old-age, survivors, and disability insurance benefits
42 U.S.C. § 5413	Secretary of Housing and Urban Development	Investigations relating to functions under the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 et seq.
45 U.S.C. § 40	Secretary of Transportation	Investigations connected to railway accidents
45 U.S.C. § 362	Railroad Retirement Board	Investigations within its jurisdiction
46 U.S.C. § 1124	Secretary of Commerce	For functions under merchant marine legislation, 46 U.S.C. §§ 1101 et seq.
46 U.S.C. App. § 1717	Advisory Commission on Conferences in Ocean Shipping	To carry out its functions
47 U.S.C. § 409	Federal Communications Commission	Investigations under the Communications Act of 1934, 47 U.S.C. §§ 151 et seq.
49 U.S.C. § 502	Secretary of Transportation	Investigations under legislation relating to motor carriers of migrant workers

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
49 U.S.C. § 305	Interstate Commerce Commission	Investigations within its jurisdiction under the Interstate Commerce Act, 49 U.S.C. §§ 10101 et seq.
49 U.S.C. § 10321	Interstate Commerce Commission	Investigations under part II of the Interstate Commerce Act, 49 U.S.C. § 302 et seq. relating to motor carriers
50 U.S.C. App § 643a	Any federal agency involved as the Chairman of the War Production Board	Investigation of war contracts
50 U.S.C. App § 2001	Foreign Claims Settlement Commission	Investigation under the War Claims Act of 1948

Senator HATCH. The last two witnesses will be Hon. Judge Emory Sneeden and Mr. Joseph Creighton, representing the National Association of Manufacturers.

We are happy to have both of you come before the committee. We respect both of you, and we will be interested in your comments criticizing this particular piece of legislation.

We will start with you, Judge Sneeden. I am going to have to limit you to 5 minutes each, if you can, because I just have to get to this Utah luncheon. It happens to deal with our steel problems out in Utah and I just simply have to be there.

STATEMENT OF EMORY M. SNEEDEN ON BEHALF OF WESTINGHOUSE ELECTRIC CORP.; AND JOSEPH R. CREIGHTON ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. SNEEDEN. Thank you, Mr, Chairman. If you will just call time on me at 5 minutes, I will quit.

Senator HATCH. I will, Emory. I know you understand that better than anybody.

Mr. SNEEDEN. Yes, sir.

Mr. Chairman and members of the committee, it is a great pleasure to appear before you to testify regarding S. 1134. I will limit my remarks to that bill. I do not address, nor have I studied Senator Grassley's proposal which this committee earlier ordered reported.

I am appearing today on behalf of the Westinghouse Electric Corp. Senator Hatch, I am going to skip down, if I may, and get right to the meat of this statement.

Senator HATCH. That would be fine.

Mr. SNEEDEN. My prepared statement identifies and discusses those issues that I feel should be of greatest concern to this committee. In my oral presentation today, I would like to highlight two constitutional issues, which I believe are raised by the provisions of S. 1134.

One of these issues was not directly addressed by the Governmental Affairs Committee report; the other was briefly considered in the committee report. The first and most fundamental issue is whether there is an article III separation of powers problem posed by this bill.

As you know, article III of the U.S. Constitution provides that the judicial power of the United States shall be vested in a Supreme Court and such inferior courts as the Congress creates. The primary attribute of article III courts is that they are comprised of judges who have life tenure, and who are not subject to diminution of pay. Thus, the question raised is whether Congress may be improperly, in this bill, referring to an administrative panel actions historically based in common law. I am not talking about OSHA, which Congress clearly had a right to set up, and Medicare which was set up by statute. Congress further established procedures in aid of those statutes which it clearly had the authority to do.

Under the bill, persons may have administrative proceedings brought against them for activities essentially amounting to fraud and negligent misrepresentation. I refer you to my full statement

on this—it is clear, and there is a citation supporting the proposition—that fraud and negligent misrepresentation are common law offenses.

Liability for these torts exists, regardless of the passage of any legislation. The Senate is not taking a rifle shot under this bill. It is a shotgun blast covering all the departments listed in the bill, from Agriculture right across the board to the Small Business Administration. There must be 15 or 20 agencies. I have not counted them.

Statutes such as the False Claims Act do not create an entirely new cause of action for the Government, but they provide for additional remedies such as civil penalties and twice the amount of actual damages.

S. 1134 also provides remedies that are unavailable at common law, but the causes of action involved—and this is the point—are clearly grounded in the common law.

The administrative scheme which would be established by S. 1134 is clearly different from others created by Congress, as I mentioned a minute ago, such as the Occupational Health and Safety Act, and in aid of that Congress established enforcement procedures. In the National Labor Relations Act, again, Congress established procedures to make sure that law worked. There are others, such as the Commodity Exchange Act. There Congress created entirely new statutory causes of action unknown to the common law and referred their adjudication to administrative forums.

The holding of a case that is very familiar to this committee, *Northern Pipe Line Construction Co.* v. *Marathon Pipeline Co.,* suggests that the referral of such traditional common law actions to an administrative forum may be unconstitutional, although that was, I submit, Senator Hatch, a State common law action in contact. I submit now what we are talking about is the Federal common law.

Mr. Chairman, I cannot unequivocally state that the provisions of this bill would violate article III, and I do not think anyone could; but it is the duty of the Senate, as you know and I know, to consider this issue as prior to passing legislation.

Supreme Court precedents concerning article III make up one of the most controversial and confusing areas of the law, and I am almost quoting Mr. Justice White on that point. One would need a crystal ball to determine the fate of S. 1134 before the Court.

Congress has a responsibility to consider, however, this issue and to make its best determination of whether passage of S. 1134 would comport with the requirements of article III. It must also determine whether as a policy matter actions based upon common law fraud and negligent misrepresentation should be referred to non-article III forums, where the right to a jury trial and other procedural rights are not afforded.

As members of this committee well know from their efforts to enact a constitutional bankruptcy system, consideration of the article III implications of a piece of legislation is vital to its ultimate survival.

I have got another 2 or 3 minutes of comments on jury trial, but I am going to submit those for the record.

Thank you.

[The prepared statement of Mr. Sneeden follows:]