PREPARED STATEMENT OF EMORY M. SNEEDEN

Mr. Chairman and Members of the Committee, it is a great pleasure to appear before you to testify regarding S. 1134, the Program Fraud Civil Remedies Act of 1985. As you know, I am appearing today on behalf of my client, the Westinghouse Electric Corporation.

I would first like to commend the distinguished Chairman of this Committee, Senator Thurmond, and the distinguished Chairman of the Constitution Subcommittee, Senator Hatch, for deciding to hold a hearing on S. 1134. This bill has already been favorably reported by the Committee on Governmental Affairs and is pending on the Senate Calendar. Thus, timely attention is needed to address the issues raised by this legislation.

While no responsible individual or company could disagree with the goal of reducing and, if possible, eliminating fraud against the Government, it is crucial that the legislative mechanism chosen by Congress to accomplish that goal be in accord with the Constitution, be fair to all parties involved, and be carefully crafted in terms of its liability provisions. In its present form, S. 1134 raises significant concerns in each of these areas. Moreover, many of the issues presented by this legislation, particularly those relating to the constitutionality of the bill, are of obvious interest to this Committee.

I appreciate this opportunity to present my views and concerns regarding S. 1134. My testimony today will identify and briefly discuss those constitutional issues that I feel should be of greatest concern to this Committee. My client's additional concerns about this bill are detailed in an appendix to my statement.

ARTICLE III -- SEPARATION OF POWERS

Mr. Chairman, I would like to discuss two constitutional issues that are raised by the provisions of S. 1134. One of these issues was not directly addressed by the Governmental Affairs Committee, and the other was only briefly addressed in the Committee's Report. S. Rept. No. 212, 99th Cong., 1st Sess. (1985).

The first, and most fundamental, issue is whether there is an Article III separation of powers problem posed by the provisions of S. 1134. Article III of the United States Constitution provides that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. The primary attribute of an Article III court is that it is comprised of judges who have life tenure and who are protected from any salary diminution. Despite the clear mandate of Article III, courts have recognized that Congress, under certain circumstances, has broad authority to create and refer seemingly judicial functions to a non-Article III forum. That authority is not, however, without limit. For example, Congress cannot refer certain disputes between private parties to a non-Article III forum. See Northern Pipeline Construction Company v. Marathon Pipe Line Company, 102 S. Ct. 2858 (1982) (a non-Article III bankruptcy court may not adjudicate a traditional state common law contract action).

Congress has greater authority to refer a matter to a non-Article III forum if the dispute is between the Government and a private party. This principle, known as the "public rights" doctrine, governs referral of matters to administrative agencies. Although first set forth in 1856 in Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 15 L.Ed. 372 (1856), the extent of the doctrine is still unclear. At a minimum, a public right occurs "between

the Government and others." Northern Pipeline, 102 S.Ct. at 2870 (quoting Ex parte Bakelite Corp., 49 S. Ct. 411, 416 (1929)). See also Crowell v. Benson, 52 S. Ct. 285 (1932). The fact that the United States is a party to the proceeding, however, is a "necessary but not sufficient means of distinguishing 'private rights' from 'public rights'." Northern Pipeline, 102 S.Ct. at 2870 n.23.

Case law also indicates that a public right is one statutorily created by Congress, not one that historically existed at common law. In discussing the holding of Crowell, Justice Brennan observed the following in his plurality opinion in Northern Pipeline:

> [W]hile Crowell certainly endorsed the proposition that Congress possesses broad discretion to assign fact finding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, Crowell does not support the further proposition necessary to appellants' argument -- that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress.

102 S. Ct. at 2877 (emphasis added).

Furthermore, Justice Brennan had earlier stated that the public rights doctrine:

> extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," Crowell v. Benson, 285 U.S. 22, 50, 52 S. Ct. 285, 292, 76 L.Ed. 598 (1932), and only to matters that historically could have been determined exclusively by those departments, see Ex parte Bakelite Corp., supra, 279 U.S., at 458, 49 S. Ct., at 416 . . . The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently . . . judicial." [citations omitted.] For example, the Court in Murray's Lessee looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. Ibid. Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary

> procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.

Id. at 2869-70 (emphasis added).

Applying these principles to the administrative scheme created by the Program Fraud bill, the question raised is whether Congress may be improperly referring actions based in common law -- matters which have historically been heard by the courts -- to an administrative agency. Under the bill, persons may have adminstrative proceedings brought against them for activities essentially amounting to fraud and negligent misrepresentation. Actions for both fraud and negligent misrepresentation have historically existed at common law. See W. Prosser, Law of Torts §105 (1971).

Liability for these torts exists regardless of the passage of any legislation and thus was not created by such legislation. Statutes such as the False Claims Act (FCA), 31 U.S.C. §§3729 et seq., do not create an entirely new cause of action for the Government, but instead provide additional remedies. See United States v. Mead, 426 F.2d 118, 123 (9th Cir. 1970) (the False Claims Act is not in derogation of the common law but is merely another remedy which the government can invoke to protect itself from fraud). Case law makes it clear that the United States had, and continues to have, a common law right to sue for fraud despite passage of the False Claims Act. See United States v. Borin, 209 F.2d 145, 148 (5th Cir.), cert. denied, 348 U.S. 821 (1954) ("It is well settled that no statute is necessary to authorize the United States to recover funds, the illegal payment of which was induced by fraud."); see also United States v. Silliman, 167 F.2d 607, 611 (3rd Cir.), cert. denied, 335 U.S. 825 (1948) (the fact that Congress passed a statute applicable to those who make false claims is not to be interpreted as depriving the United States as plaintiff of remedies which it has for violation of a common law right).

S. 1134 would also provide the Government with remedies that are not available at common law. For example, the bill provides for the imposition of civil penalties of up to $10,000 for each violation of its provisions. Under the bill, a person is liable for an "assessment" of twice the amount of a claim or portion of a claim determined to be false or fraudulent, rather than for "damages."

While S. 1134 provides new remedies, the causes of action involved are still clearly grounded in common law. Thus, the administrative scheme established in the present legislation may be distinguished from that considered by the Supreme Court in Atlas Roofing Company v. Occupational Safety and Health Commission, 97 S.Ct. 1261 (1977). In Atlas Roofing, the Supreme Court specifically addressed whether adjudication of violations of the Occupational Safety and Health Act (OSHA) violated the Seventh Amendment's requirement that the right to a jury trial be preserved in suits at common law. The Court also discussed, however, the public rights doctrine and the circumstances under which Congress could refer adjudication of certain rights to an administrative forum. While the Court noted that new remedies were created by OSHA, it also pointed out that the Act created a "new statutory duty" to avoid maintaining unsafe or unhealthy working conditions. Id. at 1264. The Court further noted that existing state statutory remedies and common law remedies for actual injury and wrongful death remained unaffected. Id.

With regard to referral of violations of the Act to an administrative forum, the Court stated 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." Id. at 1266-67 (emphasis added). The Court went on to make clear, however, that the new statutory duty created by OSHA was not

based in common law:

> Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved.

Id. at 1272 (emphasis added).

The administrative scheme which would be established by S. 1134 is obviously different from that of OSHA. The actions that may be adjudicated in an administrative forum under the Program Fraud bill are clearly known to common law. Prior to passage of any statute, the Government could have brought a common law action for fraud or negligent misrepresentation to recover its losses resulting from such activities. By contrast, the passage of OSHA created a new statutory duty and provided the Government with the authority to prosecute a breach of that duty. Prior to enactment of OSHA, the Government had no authority to bring suit against an employer. Instead, only the employee or his family was entitled to bring suit for injury or wrongful death. Thus, in enacting OSHA, Congress provided a totally new cause of action for the Government. S. 1134, on the other hand, essentially codifies previously existing common law actions and provides additional remedies unavailable at common law. The former may clearly be referred to an administrative forum. The latter should be referred to an administrative forum only after carefully analyzing the Article III implications.

The mere passage of a statute that codifies the essence of previously existing rights should not automatically convert such rights into statutory causes of actions that may then be referred to a non-Article III forum. Acceptance of such a proposition could result in a serious weakening of Article III protections. Congress could, if it wished, codify numerous common law rights and

then require that they be litigated in an administrative forum. This cannot be an appropriate result.

Mr. Chairman, the case law governing the issue of which matters may be referred to a non-Article III forum and which matters must be heard by an Article III judge is far from clear. As Justice White pointed out in his dissent in Northern Pipeline, this is "one of most confusing and controversial areas of constitutional law." 102 S.Ct. at 2883.

For example, in the recent case of Thomas v. Union Carbide Agricultural Products Co., 105 S.Ct. 3325 (1985), the Supreme Court, through Justice O'Connor, criticized the analysis of the public rights doctrine found in Justice Brennan's plurality opinion in Northern Pipeline. In Union Carbide, the Court upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requiring mandatory arbitration of disputes between private parties regarding compensation for the use of certain data by the Environmental Protection Agency. The Court noted that the rights involved resulted from the passage of FIFRA and did not depend on, or replace, a right to compensation under state law. Id. at 3335. Justice O'Connor found, however, that the public rights doctrine does not provide a "bright line" test for determining the requirements of Article III. Id. at 3336. She noted in dictum that the statutory scheme approved in Crowell v. Benson involved the displacement of a traditional cause of action and affected a pre-existing relationship based on a common law contract for hire -- an action which would clearly have fallen into the range of matters reserved to Article III courts under the holding of Northern Pipeline. Id. Justice O'Connor concluded that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III" and counseled that consideration be given to the origin of the right at issue and the

concerns that guided Congress to select a particular method of dispute resolution. Id. Also important to an analysis of S. 1134, she emphasized that the majority in Northern Pipeline did not "endorse the implication of the private right/public right dichotomy that Article III has no force simply because a dispute is between the Government and an individual." Id.

Northern Pipeline and Union Carbide, taken together, present at best a confused picture of what matters must be reserved to an Article III court. Congress has a responsibility, however, to consider 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 in common law fraud and negligent misrepresentation should be referred to a non-Article III forum where the right to a jury trial and other procedural rights are not afforded. As the Members of this Committee well know from their strenuous efforts to enact a constitutional bankruptcy system, consideration of the Article III implications of a piece of legislation is vital to its ultimate survival.

SEVENTH AMENDMENT -- RIGHT TO TRIAL BY JURY

By requiring adjudication in an administrative forum, S. 1134 obviously does not provide for a trial by jury. The Seventh Amendment to the United States Constitution, however, requires that "[i]n suits at common law, where the value in Controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." Throughout the years, courts have treasured and safeguarded this constitutional right. "It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts than can a single judge." Sioux City & Pacific Railway Co. v. Stout, 84 U.S. (1 Wall.) 657, 664 (1873). Moreover, "[m]aintenance of the jury as a fact-finding body

is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Beacon Theatres, Inc. v. Westover, 79 S.Ct. 948, 952 (1959) (quoting Dimick v. Schiedt, 55 S.Ct. 296, 301 (1935)).

As stated earlier, an action brought under the Program Fraud bill is essentially a common law action for fraud or negligent misrepresentation. When the only remedy sought for fraud or misrepresentation is damages, the action is legal in nature and the accused must be given a jury trial. 9 C. Wright & K. Miller, Federal Practice and Procedure §2311 (1971).

The Program Fraud bill permits an "assessment" of twice the value of a false claim made to the Government and provides for a $10,000 "civil penalty" for false claims or statements. Its proponents agrue that the bill is meant to compensate the Government for its injuries and to provide a mechanism to punish persons who defraud or who misrepresent facts. Although they bear the statutory labels of "assessments" and "penalties," these provisions by their form and function are analagous to damages and punitive damages. Federal courts have held that there is a constitutional right to have a jury assess punitive damages for fraud. Smyth Sales, Inc. v. Petroleum Heat & Power Co., 141 F.2d 41 (3rd Cir. 1944). A jury trial should therefore be provided for what is arguably a codification of a common law action for fraud or misrepresentation which carries the familiar threat of damages or punitive damages.

The cases relied on in the Governmental Affairs Committee Report do not counter the assertion that a jury trial was mandated in common law actions for fraud in which damages were sought. As discussed earlier, the Supreme Court in Atlas Roofing v. Occupational Safety and Health Review Commission, 97 S.Ct. at 1272, specifically noted that

the cause of action created by Congress when it enacted OSHA was "unknown at common law." Similarly, in National Labor Relations Board v. Jones & Laughlin Steel Corp., 57 S.Ct. 615 (1937), the Supreme Court rejected a Seventh Amendment challenge to the National Labor Relations Act, and noted that:

> [t]he instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a 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 merit.

Id. at 629. The Report quotes the preceding language but does not address the fact that actions under the Program Fraud bill are in the nature of common law suits and that actions for fraud and negligent misrepresentation are clearly known to the common law. Report at 32. The creation of a statutory scheme per se should not render these actions purely "statutory" proceedings not subject to the Seventh Amendment. As with the Article III analysis, such an interpretation cannot be correct because it could lead to an emasculation of the Seventh Amendment.

ADDITIONAL COMMENTS OF
WESTINGHOUSE ELECTRIC CORPORATION

CONCERNING S. 1134
THE PROGRAM FRAUD CIVIL
REMEDIES ACT OF 1985

STANDARD OF KNOWLEDGE

S. 1134 makes a person liable for statements or claims which that person knows or has reason to know are false, fictitious, or fraudulent. §§802(a)(1) and (2). The bill defines "reason to know" as acting in "gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement." §801(a)(6). S. 1134 thus incorporates a negligence standard which is not the prevailing standard in case law developed under the False Claims Act.

The clearly predominant view among the circuit courts of appeal is that the Government must show actual knowledge of falsity. See, e.g., United States v. Hughes, 585 F.2d 284 (7th Cir. 1978); United States v. Ekelman & Assoc., 532 F.2d 545 (6th Cir. 1976); United States v. Children's Shelter, Inc., 604 F. Supp. 865 (W.D. Okla. 1985); and United States v. DiBona, 614 F. Supp. 40 (E.D. Pa. 1984)(noting that five of eleven circuits have held that the Government must show that the defendant knew the claims to be false). At least two other circuits require not only actual knowledge of falsity, but also specific intent to defraud the Government. See United States v. Mead, 426 F.2d 118 (9th Cir. 1970); United States v. Thomas, 709 F.2d 968 (5th Cir. 1983).

As part of its justification for a negligence standard, the Governmental Affairs Committee cites the

decision of the Eighth Circuit in United States v. Cooperative Grain and Supply Company, 476 F.2d 47 (1973). In that case, the Court held that extreme carelessness or recklessness could constitute sufficient knowledge or intent to establish liability under the False Claims Act. No other circuit, however, has adopted this interpretation of the FCA. Moreover, a generous reading of Cooperative Grain is required to find support for the negligence standard currently contained in S. 1134.

The bill clearly goes beyond the language of Cooperative Grain concerning extreme carelessness and reckless disregard for the truth to impose a duty on a claimant or person making a statement to conduct a "reasonable and prudent" inquiry to determine the truth of the claim or statement. As the Public Contract Law Section of the American Bar Association pointed out in its report dated February 14, 1986, on the standard of knowledge under S. 1134, the inclusion of a duty of inquiry shifts the focus from the defendant's actual state of mind to whether he complied with the conduct expected of a hypothetical reasonable and prudent person. This presents the possibility that a person acting in a good faith belief that his claim or statement was accurate could nevertheless be found liable under the Program Fraud bill because he failed to make a reasonable inquiry to determine whether the claim or statement was indeed accurate.

In light of the significant penalties provided for in the bill, the fact that actions for fraud have traditionally required some showing of knowledge of falsity, and the significant diminution of procedural protections under the bill, the standard of knowledge currently found in S. 1134 would appear inappropriate. It seems more proper, under these circumstances, for the standard of knowledge to focus on the defendant's state of mind and to require some

showing of actual knowledge of falsity or deliberate action on the part of the defendant.

COVERAGE OF STATEMENTS UNRELATED TO CLAIMS

S. 1134 makes a person liable for false, fictitious or fraudulent statements, made to the Government or to intermediaries, that are unrelated to any claim. §802(a)(2). This is an extremely broad provision and, as the Governmental Affairs Committee Report acknowledges, represents a change from existing law. There is currently no civil penalty for false statements unrelated to a claim. There is only a criminal statute, 18 U.S.C. §1001, covering such behavior. Unlike S. 1134, however, the criminal statute does not cover statements negligently made. Also, the criminal statute requires a higher standard of proof to establish culpability. The coverage of statements made to intermediaries, rather than directly to the agency, is also troublesome and will be difficult for a corporation to monitor. This is of concern because the Report makes clear that a corporation will be held liable for the "collective knowledge" of its employees under the doctrine of respondeat superior. Report at 22.

Moreover, §802(a)(2) permits the imposition of penalties for the making of such statements without any requirement that the Government have suffered any loss or damage. To the extent that S. 1134 provides for penalties for activities resulting in no loss to the Government, the bill looks increasingly like a penal statute rather than the remedial statute which it is intended to be.

NO REQUIREMENT THAT THE GOVERNMENT PROVE DAMAGE TO RECOVER

The False Claims Act currently provides that a person is liable for a civil penalty of $2,000 plus an amount equal to twice the amount of damages the Government sustains "because of the act of that person." 31 U.S.C. §3729. Thus, under the FCA, in order to recover double

penalties, there must be some causal connection between the false or fraudulent activity of the defendant and the damages sustained by the Government. See United States v. Miller, 645 F.2d 473 (5th Cir. 1981) (Government must demonstrate element of causation between false statements and loss; in federal housing case, Government must show that false statements in the application were the cause of subsequent defaults).

Section §802(a)(1) does not include such an element of causation. The bill provides for an assessment, "in lieu of damages sustained by the United States because of such claims," of not more than twice the amount of such claim, or portion of the claim, determined to be false or fraudulent. A person may therefore be held liable for a double assessment regardless of whether his false or fraudulent claims, or statements related thereto, caused any damage or harm to the Government. This is in significant contrast to existing law under the FCA, and completely eliminates the Government's burden of proof in this area. Furthermore, under the bill, there is no requirement that there be a causal connection between a person's false or fraudulent activities and any damage to the Government in order to impose civil penalties of up to $10,000 for each claim or statement.

As with coverage of false statements causing no loss to the Government, the absence of requirements that the Government prove its damages, and prove that the defendant's activities caused those damages, makes S. 1134 look increasingly like a penal, rather than a remedial, statute. Moreover, the substantial civil penalty of $10,000 for each false claim or statement, in addition to the $2,000 penalty already available under the FCA, contributes to this impression. Nevertheless, S. 1134 does not provide the procedural protections normally afforded in criminal proceedings.

"PREPONDERANCE OF THE EVIDENCE" STANDARD OF PROOF

Section 803(e) of the bill provides that a determination of liability shall be based on the preponderance of the evidence. Although the Governmental Affairs Committee Report cites one case suggesting that this is the appropriate standard of proof under the FCA, Report at 16, the circuit courts of appeal are split on this issue, with several courts requiring clear and convincing evidence of fraud. At least the Second, Sixth, and Ninth Circuits have chosen some version of the clear and convincing burden of proof. See, e.g., United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979); United States v. Ekelman & Assoc., Inc. 532 F.2d 545, 548 (6th Cir. 1976); United States v. Foster Wheeler Corp., 447 F.2d 100, 101 (2nd Cir. 1971). Moreover, clear and convincing evidence is normally the standard of proof in civil fraud cases between private parties. See, e.g., Davis v. Upton, 250 S.C. 288, 157 S.E.2d 567 (1967).

The higher standard of proof appears more appropriate here since cases under the bill will often involve allegations of fraud that have historically required clear and convincing evidence to establish liability. Also, requiring a higher standard of proof would provide some counterbalance to the loss of procedural protections that occurs when cases are litigated before an administrative agency. The elevated standard of proof would also provide some assurance that the severe penalties available under S. 1134 would not be improperly imposed.

SUBPOENA AUTHORITY

One of the most disturbing and potentially far-reaching features of S. 1134 is the subpoena authority given to the agency's investigating official. That official would have authority to require production of "all information," including documents, reports, answers, records, accounts, papers and data "not otherwise reasonably

available to the authority." §804(a)(1)(B). There is no statutory requirement that the information requested be relevant or material to the ongoing investigation or that consideration be given to the burden being placed on the respondent. Thus, the door is opened for an agency to conduct whatever "fishing expeditions" it wishes to conduct.

Even more significant is the fact that each statutory Inspector General is authorized to subpoena the attendance and testimony of witnesses. §804(a)(2). Again, there is no requirement that the information sought be relevant and material to the investigation, just that it be "necessary" to the conduct of the investigation. Moreover, there is no indication of whether such testimony could be discovered by the accused if an action is brought.

The grant of investigatory testimonial subpoena power is highly unusual as illustrated by the fact that the Justice Department does not currently have such authority in civil fraud cases, nor does the FBI have such authority. Despite the fact that it may disapprove the issuance of such a subpoena, the Department of Justice is opposed to the Inspectors General being given that authority. The Department has stated that there is no demonstrable justification for such extraordinary powers. It has also pointed out that this broad authority creates a potential for interference with ongoing criminal investigations and has expressed the fear that the procedures for review by the Department are unworkable. See Letter from Phillip D. Brady, Acting Assistant Attorney General, to Senator William S. Cohen (November 4, 1985), reprinted in Report at 36-7.

Furthermore, the bill provides no satisfactory review mechanism either for the issuance of a subpoena duces tecum or for a testimonial subpoena. With regard to the former, there is no review either at the agency level or by the Department of Justice. The Justice Department does have some review authority for the issuance of an investigatory

testimonial subpoena, but the bill does not require affirmative approval by the Department. Such a subpoena may be issued if the Department simply fails to take action for forty-five days after receipt of notice from an Inspector General. With regard to review by a federal court, the bill provides that, in the case of contumacy or refusal to obey a subpoena, the Justice Department may seek enforcement in federal district court. There is no concomitant right, however, given to the defendant to bring an action in federal court to quash a subpoena issued by an investigating official or Inspector General.

DISCOVERY

In stark contrast to the sweeping investigatory authority given to the Government, S. 1134 permits discovery by the defendant "only to the extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues." §803(f)(3)(B)(ii). While the bill provides that discovery shall not be denied "unreasonably", this requirement fails to counteract the very broad discretion given to the hearing examiner to determine what discovery should be permitted. Moreover, the legislative history of S. 1134 provides little assurance that discovery will be adequate. The Governmental Affairs Committee Report states that, in "ordinary" cases, "timely exchange of exhibits, witness lists and witness statements will constitute sufficient discovery." Report at 15.

This obviously falls far short of the discovery rights available in federal court and hardly seems adequate or fair in light of the Government's opportunity to investigate and develop its case prior to the hearing through the use of its subpoena power. Moreover, discovery of certain documents, such as the notice sent by the reviewing official to the Justice Department that the

official intends to refer a case to a hearing examiner, is specifically prohibited. Also, it is unclear whether the term "witness statements" would include statements taken by the Government pursuant to its testimonial subpoena power.

Finally, there is no immediate recourse if discovery is unreasonably denied by a hearing examiner. While a denial of discovery might eventually be challenged in a court of appeals on due process grounds, it seems preferable to provide some limited review, at least within the agency, to prevent abuses.

$100,000 JURISDICTIONAL LIMIT

Section 803(c) provides that no allegations of liability shall be referred to a hearing examiner if the reviewing official determines that the claim involves a monetary amount in excess of $100,000 or property or services valued at over $100,000. Since §803(c) by its terms applies to claims over this amount, it is unclear whether this "jurisdictional" requirement applies to statements unrelated to claims. Furthermore, the determination of whether an amount in excess of $100,000 is involved is subject to little review. The Justice Department does not review the agency's file, but instead receives a summary prepared by the reviewing official. Despite its obvious importance, judicial review of this determination is precluded by §805(a)(1). Also, varying results may obviously be achieved depending on which claims an agency determines are related and should be aggregated toward the $100,000 limit.

Finally, it is clear that a person's ultimate liability may far exceed $100,000 once the amount of the claim is doubled and civil penalties are added. Thus, very substantial penalties may be imposed on a person who has only had the opportunity to litigate before an administrative agency.

"ADEQUATE" EVIDENCE TO REFER CASE TO DOJ

S. 1134 provides that, if the reviewing official determines there is "adequate" evidence to believe that a person is liable under §802, the reviewing official shall transmit to the Department of Justice a written notice of the official's intention to refer the allegations to a hearing examiner. This notice must include a statement of the reasons for referring the allegations, a statement of the supporting evidence, a description of the claims or statements, an estimate of the amount of money or the value of services or property involved, and a statement of any exculpatory or mitigating circumstances. §803(a)(2).

There are several problems with this provision. First, the term "adequate evidence" is an unfamiliar legal term and is not defined in the bill. Second, it is questionable whether the Department will be able to provide effective review of the agency's determination of adequate evidence. The Department does not receive the agency's file on the investigation, but rather a summary of the case prepared by the reviewing official. Moreover, the referral of the case to a hearing examiner takes place automatically if the Justice Department fails to take action within ninety days. Finally, judicial review of an reviewing official's determination of adequate evidence is specifically prohibited. §805(a)(1).

PROCEDURAL PROTECTIONS COMMITTED TO THE DISCRETION OF THE HEARING EXAMINER

Several key procedural protections provided for in the bill are committed to the hearing examiner's discretion. As noted earlier, the extent of discovery permitted is entirely within the discretion of the hearing examiner. The opportunity for the defendant to submit facts and arguments, among other things, is also basically within the discretion of the hearing examiner since the examiner determines "when time, the nature of the hearing, and the public interest

permit" such submission. §803(f)(2)(B). The hearing examiner also determines, subject to agency regulations, whether a particular line of cross-examination is "required for a full and true disclosure of the facts." §803(f)(2)(E). While an egregious denial of these procedural protections may ultimately be reviewable in a court of appeals on due process grounds, other determinations by a hearing examiner not rising to the level of a due process violation may have a very detrimental impact on the presentation of a person's case.

EVIDENCE ADMISSIBLE AT THE HEARING

S. 1134 does not address the admissibility of evidence at the hearing. It is generally recognized, however, that the Federal Rules of Evidence do not apply in administrative proceedings. Thus, for example, hearsay is admissible in an administrative hearing and may provide the substantial evidence upon which the hearing examiner's decision is based. See Johnson v. United States, 628 F.2d 187 (D.C. Cir. 1980).

VENUE

Under §803(f)(4), the hearing must be held in the judicial district in which the person resides or does business, in the judicial district in which the claim or statement was made or presented, or in such other place agreed to by the hearing examiner and the person. This provision presents the possibility that cases may often be brought in the District of Columbia if the mere submission of a claim or statement to an agency located in Washington, D.C., would constitute the making or presenting of a claim there. It is important to keep in mind that S. 1134 covers persons such as students applying for federal loans or individuals seeking federal employment. To allow the hearing to be held in Washington, D.C., may effectively deny many individuals their right to a hearing. Since S. 1134

purports to cover only small cases, it would seem more appropriate to require that the hearing be held in the judicial district in which the person resides or does business.

CONCLUSION

The Program Fraud Civil Remedies Act of 1985 is meant by its proponents to be a "mini False Claims Act" that simply provides a mechanism for adjudicating certain cases which the Department of Justice often declines to prosecute because the expense of litigation frequently exceeds the amount of the claim. The Governmental Affairs Committee Report states that S. 1134 "is intended to capture only conduct already prohibited by federal criminal and civil statutes which could be litigated in federal court but is not." Report at 10. This statement fails to adequately describe the sweeping changes in existing law that S. 1134 would make.

As explained above, the bill makes very significant changes in the scope of liability and burden of proof. Under the knowledge standard of the bill, for example, persons acting in good faith, who would not have been liable under the existing False Claims Act, may now have administrative proceedings brought against them. Also, the Government is no longer required to prove that it has suffered any damage as a result of a defendant's false or fraudulent claim. Nor is the Government required to prove its case by clear and convincing evidence. Certain activities which, until now, have only been prosecuted criminally -- for example, the making of false statements resulting in no loss to the Government -- may now be the subject of a civil action.

These changes in liability and the Government's burden of proof are of even greater concern when coupled with the significant decrease in procedural protections that will result from adjudication of such cases in an

administrative forum. No longer will a defendant be able to present his case to an Article III judge, whose independence and impartiality are protected by the Constitution; nor will he be afforded a trial by jury. He will instead be forced to litigate his case before an agency hearing examiner who is not bound by the provisions of the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, or the Federal Rules of Evidence. Moreover, he may very well be required to litigate his case having been afforded little or no discovery, while the agency will have had extensive opportunity to develop its case through its newly granted investigatory subpoena powers.

In addition to expanding liability, significantly decreasing the Government's burden of proof, and substantially lessening procedural protections, S. 1134 also provides stiff penalties for violation of its provisions. A $10,000 penalty for each false, fictitious, or fraudulent claim or statement is superimposed on the present penalty of $2,000 under the False Claims Act. Also, the accused is no longer liable for twice the damages sustained by the Government, but for twice the amount of the entire claim or portion of the claim determined to be false. Finally, all of these changes are triggered by an agency determination -- judicial review of which is specifically prohibited -- that an amount of less than $100,000 is involved. S. 1134, albeit well intentioned, has the anomalous result of affording greater procedural protections and narrower liability to persons accused of defrauding the Government of substantial amounts of money, while denying those same protections to those whose wrongdoing is less serious.

Senator HATCH. Thank you, Judge Sneeden. We will put that all in the record and we appreciate your comments here today.

Mr. Creighton, why do we not finish with you.

Mr. CREIGHTON. Thank you, Mr. Chairman.

Senator HATCH. Let me say this, Judge. I am going to submit questions to you in writing and I would like you to take the time to answer them and give them back to me.

Mr. SNEEDEN. I will respond to those, Senator.

Senator HATCH. Fine. I will do the same for you, Mr. Creighton, so there is no reason for you to stay if you like. I would like to just save you that time.

Mr. CREIGHTON. Thank you very much.

Senator HATCH. We appreciate you being here.

[The questions of Senator Hatch follow:]

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

July 3, 1986

Joseph Creighton
National Association of Manufacturers

Dear Joe:

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 your 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 you have any questions please contact Jean Leavitt at (202) 224-8191.

QUESTION 1): In your testimony, you raise a concern about the subpoena authority provided in the Program Fraud Civil Remedies Act. Under S. 1134, the agency's inspector general may compel personal appearance and testimony without notifying the subject of the subpoena of the nature of the questioning 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. Can you explain more specifically your concerns as to how this authority could be abused by the investigating agency?

QUESTION 2): 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 both S. 1134 and S. 1652, contain a very liberal gross negligence standard. The American Bar Association and others have recommended a definition of knowledge which includes actual knowledge, deliberate ignorance and reckless disregard for the truth. In your view, what is the appropriate knowledge standard for actions for fraud?

QUESTION 3): I am concerned that the Program Fraud Civil Remedies Act places the accused at a disadvantage with regard to the right to discovery when compared to the protections afforded him during a civil trial. Under S. 1134, the accused has a right to discovery only to the "extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair and reasonable consideration of the issues." Under this "expeditious hearing" standard, the accused could be denied the right to obtain copies of transcripts taken pursuant to the testimonial subpoena of the witnesses or to documents subpoenaed. In your testimony you also express concerns as to the lack of discovery protection under S. 1134. What is an appropriate standard for discovery within an administrative proceeding alleging fraud?

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

Sincerely,

Orrin G. Hatch
Chairman
Subcommittee on the Constitution

OGH:sgl

HARRIS

JOSEPH R. CREIGHTON
VICE PRESIDENT
SENIOR LEGAL ADVISOR

July 24, 1986

The Honorable Orrin G. Hatch
The United States Senate
Committee on the Judiciary
212 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Hatch:

Thank you for your letter of July 3, 1986, asking for my comments on three questions. Unfortunately, the letter did not reach Harris Corporation until Monday, July 21, so my response cannot meet the July 15 deadline.

The three questions deal with three very important issues out of the many raised in the NAM statement. These issues illustrate the larger problem that the fundamental purpose of this legislation is to facilitate prosecutions and to curtail the present right of accused persons to be tried in court under normal procedural rules. Although the purpose of combatting fraud and simplifying procedures is laudable, we doubt if it is really necessary to achieve the goal by this limitation of personal rights which are guaranteed by the Constitution and have been traditionally observed.

Question 1.

I appreciate your concern about possible abuse of the testimonial subpoena. Your question implicitly asks me to justify the right of individuals to be free of governmental intrusion into their privacy unless I can demonstrate that the intrusion will be abused. I suggest that the real question is, if the Inspector General of an agency already has very broad powers of investigation, why is it necessary to confer additional powers beyond those possessed by the Justice Department?

Anyone who has experience with any government investigation knows that it goes on and on. Power feeds on itself. Prosecutors have a job to do, and good ones want desperately to succeed. If they have the right to ask anyone and everyone any question they want to ask with no question of need and no standard of relevance, many will do it. Our law now gives citizens some protections, which, in fact, are already quite limited. Nevertheless, at present, prosecutors cannot call individuals in for personal interrogation except in grand jury proceedings where protective rules apply. The purpose of S.1134 is to give federal investigators even more rights, and to allow citizens even fewer protections. The legislative record is devoid of any basis for doing that, except for the argument that conviction will be easier and cheaper. That should not be a sufficient justification for either the Senate or this Administration.

My specific comment about "benefits not available to ordinary civil litigants" was intended to make it clear what S.1134, as well as S.1562, really do, and what the arguments for them really mean. That boils down to saying that court cases take too long, are too expensive, and are inconvenient for the Justice Department. However, the real problem is that all litigation is expensive, time consuming and frustrating. The federal government now seeks to help itself by legislating special rules for itself to make it easier for it to win. This is done, first, by making it easier for the government to get the facts. Then it can try the cases before its own hearing officers, rather than in court. Finally, it can apply its own procedural rules rather than the Federal Rules of Civil Procedure. All of these changes simplify the case for the government only. The rest of us still have the problem of expensive litigation, and when we litigate with the government, we are put at a greater disadvantage than already exists. If the Congress really wants less expensive justice, the solution is not S.1134. It is a simplified procedure to try these cases fairly.

Question 2.

The problem in devising an appropriate "knowledge" or "intent" standard is that, if a conviction is to be allowed without proof of actual knowledge or intent to defraud, the lesser standard of proof should be different for different situations. For example, "intent" and "knowledge" can be possessed only by people, not by legal entities. When applied to any organization, such as a charitable organization or corporation, any knowledge they have is merely knowledge of someone in the organization. To impute that knowledge to the entity as a whole, or to charge other persons in the organization with such knowledge, several questions must be examined:

(1) Did any person know?
(2) If so, who? Was it a person in management?
(3) Was there a duty to tell someone else?
(4) Was there a duty to investigate further based on what was known?
(5) Should management have established preventive procedures?
(6) Should management urge employees to "tattle" on other employees?
(7) Does every manager have a duty to interrogate subordinates, superiors or associates before taking any action in reliance upon their statements?

Even for individuals, although the issue is simpler, culpability for knowledge should depend upon the circumstances, such as whether the individual was an employee in a sophisticated company, a welfare recipient, a doctor, or whatever.

The courts have been dealing with this issue in a relatively successful manner because it is done always case by case, where variations can be taken into account. That offends those seeking uniformity and is viewed as a problem by prosecutors whose success is measured by the number of convictions they can get. But the court decisions as to actual knowledge have in recent years reached reasonable results, even though the language of the judicial opinions may vary. For example, they have given short shrift to defendants who stick their heads in the sand to avoid knowing. That is because--as to businesses at least--the issues are not in fact actual knowledge or intent, but whether the organization or a person who has no actual knowledge should be held accountable.

I have examined the legislative history of S.1134 and S.1562 and find no real evidence indicating there is any need for a change or any real understanding of these issues. Instead the record contains unsupported testimony by prosecutors and federal officials who say they have a problem. It seems to me that the ABA has simply recognized that, if some amplification is demanded, the proposed definition incorporating "reckless disregard" comes reasonably close. It is hoped that this legislative formulization will allow justice to prevail in actual cases.

Question 3.

S.1134 establishes a detailed series of procedural rules, including a limitation on the right of discovery by accused persons. At the same time, the government's rights of investigation are to be drastically increased. No one has given any reason for not using normal civil procedure rules for discovery, the rules of evidence or other procedural matters. That possibility is not even discussed in the Committee Report. Also, no reasons have been offered for putting limits on the right of discovery, as far as I can discover. Certainly the right should not be curtailed simply to expedite the hearing, as S.1134 now contemplates. If S.1134 is a "civil" proceeding, then normal civil discovery rules should be made applicable.

Although your question refers only to the need for balanced discovery rights, the problem is not limited to discovery. Most of the generally accepted rules applicable to civil litigation are also dispensed with or greatly modified by S.1134. The "hearsay rule" and all the other rules of evidence for civil proceedings go out the window because the Federal Rules of Civil Procedure do not apply. What is the justification for doing that? If accused citizens are to be tried without the benefit of the protections afforded in criminal proceedings merely because S.1134 is termed "civil" in nature, then why not at least allow them the rights of civil litigants?

Perhaps it would be useful to consider a possible example. At an administrative hearing, the citizen accused of fraud against a federal agency will likely be faced by witnesses from the agency. These government witnesses can give hearsay evidence of things they have heard from other agency employees. If conflicts in the testimony develop, who really thinks that the agency's hearing officer will believe the accused citizen against the agency witness? What valid reason can there be for not giving the defendant the protection of civil rules of evidence? Administrative convenience cannot justify such a denial of ordinary civil litigation rights.

In conclusion, let me express our appreciation for your interest in this matter. As the NAM statement indicates, the issues to which your questions relate are only symptoms of broader problems with this legislation. Substituting trial by the accusatory agency in its own tribunal for a proper court trial is the real problem.

Very truly yours,

Joseph R. Creighton

/md

Senator HATCH. Mr. Creighton.

STATEMENT OF JOSEPH R. CREIGHTON

Mr. CREIGHTON. Obviously, NAM favors the objectives of S. 1134. What we are questioning is tbe means both on policy grounds and also raising constitutional questions, and I think we would reiterate, particularly for our smaller members and the employees in the various companies and citizens, obviously the general public we do not represent, that for a Supreme Court to decide constitutionality 10 years after all of us have lived under a statute is hardly what we would call private citizens' rights, and we would urge the Congress not to extend Federal power to its absolute limits. We do not think that is what this administration and this Congress has stood for, and I think we can demonstrate—we may not be able to show that the statute is unconstitutional, but we can show it goes beyond any of the decisions today.

First, it is new. I would say with regard to Senator Cohen's comment, the false statement part is new except in the criminal law. I would submit that if you remove criminal defenses and court proceedings from a determination as to whether somebody has committed an offense, you will in fact find people guilty in cases where they were not found guilty before. That in my view is a new offense.

We think this is new not only because there is no jury trial and no court trial, there are no rules of evidence, there is no hearsay rule, there is no right of discovery. This bill, to anyone looking at it, looks criminal, but if it is not criminal and it is deemed civil in order to avoid the rules of criminal procedure, then, instead of being civil and civil means that when I go to court, both sides have rights of discovery, the rules of evidence apply, there is a judicial review court or jury, depending with the rules that apply.

This bill eliminates all of those in an adversary proceeding between an agency and a citizen. It eliminates all of the civil requirements and puts in their stead the Administrative Procedure Act. The Administrative Procedure Act was not designed for adversary proceedings of the normal civil sort.

In almost all of the constitutional cases that are cited, almost all of the policies and almost all the precedents are administrative proceedings. I do not believe that prosecuting individual employees of our companies and small business people by the agency that they have a dispute with is a proper administrative proceeding. As Judge Sneeden pointed out, the *Atlas Roofing* case and all of the cases cited on the seventh amendment, the remedies provided were an integral part of the regulatory process. They were not applied, as S. 1134 does, across the board to all Federal—not only administrative agencies but executive departments. The executive departments are carrying out some arcane, old fashioned rule, Customs, everybody else.

I believe it is unprecedented to say that those agencies have a right to decide their adversary proceed:ings with the people they deal with in their own court, eliminating not only a jury trial but a court trial, and all the rest.

Now, we would concede that a simple administrative remedy would be desirable. We would like it to be both ways. I would just like to point out one thing about CMPL. It is not a precedent. One, the standard of knowledge is not the same.

The standard of knowledge there does not apply to false claims as such. It applies only to knowledge, the question of knowledge as to whether the services you billed for were performed. Well, it is no great step to say that if you bill somebody for doing something, you ought to know whether it is done.

There is no testimonial subpoena in CMPL. It does not apply to false statements, only to claims, and the average size of the cases, using Senator Cohen's testimony, is $144,000. They are not small claims. They are being applied in big claims. It is not a precedent.

I would add only that the Department of Justice in other testimony has warned that increasing the penalties and using punishment and retribution as your purpose raises another constitutional issue, that is, we have three: One, the article III courts, the seventh amendment, a question which we have discussed in our statement, and the third is the fact that when you make the penalties larger and the purpose is punishment and retribution, the cases cited in the committee report do not go as far as this.

So we would submit that what this does that is new is giving every executive branch administrative agency the right to try people in adversary proceedings on their own in a suit between the Government and the individual in their own courts without application of even the civil rights of procedure.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Creighton follows:]

TESTIMONY
OF
JOSEPH R. CREIGHTON
ON BEHALF OF
NATIONAL ASSOCIATION OF MANUFACTURERS
GIVEN BEFORE
THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE
ON S.1134
THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1985

My name is Joseph R. Creighton, Vice President-Senior Legal Advisor of Harris Corporation. I am here in my capacity as Chairman of the Administrative Remedies Task Force for the National Association of Manufacturers. NAM is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ 85% of all workers in manufacturing and produce 80% of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Association's Council and National Industrial Council.

Because the membership of the NAM is representative of all types of manufacturers, we believe we can offer a unique perspective on the issues raised by S.1134, The Program Fraud Civil Remedies Act. NAM and its members are certainly as concerned as is the government about possible fraud directed against the government. We support the stated objectives of S.1134, not only on moral grounds but also because all taxpayers, corporate and individual, are the ultimate losers.

At the same time, any legislation which can result in charges against individuals and corporations and ultimate fines up to $100,000, and perhaps more, must be examined carefully as to the impact upon both individuals and businesses. It must preserve constitutional rights and be consistent with due process of law. S.1134 could have broad impact upon individuals, but as a representative of businesses, NAM's comments here will be directed only at the possible impact upon business organizations and the effect the legislation will have upon individual employees.

Although S.1134, coupled with other pending legislation dealing with false claims, has been discussed extensively in connection with large defense contractors, NAM's due process concerns relate to the vast number of smaller businesses which are not primarily engaged in contracting with the federal government or are primarily smaller subcontractors under government programs, and also to those who have

only tangential relationships with federally funded programs. Since S.1134 for the first time seeks to extend federal fraud statutes to cover businesses and individuals who may have no direct contractual relationship with the fedaral government, their relationship with a federal agency and that agency's power over them must be examined in an entirely different context from that applying in a major defense contract. These companies and their employees have not agreed by contract to submit to factual determinations by a government agency or its Board of Contract Appeals. That is also true for the employees of government contractors. As it appears to us, there is no reason to subject such businesses and individuals to any rules, or to deny them any procedural or substantive rights, which are different from those applicable in normal criminal or civil litigation between private parties. In other words, the principles of due process do not permit the federal government, in its sovereign capacity, to impose upon individuals who have not contracted with it a lesser level of civil rights and procedural protections than the law generally requires.

Due process and constitutionality, we submit, are not solely matters for the Judiciary. The legislative branch has equal responsibility. These issues are not resolved merely because of a legal opinion that the Supreme Court would not strike down the legislation. The Court defers to the other branches of government where possible, avoids consideration of constitutional issues unless it is absolutely necessary to decide them, and holds a law valid if any rational basis for its validity can be found. Thus, the Congress makes the initial decision. That decision will be final as to most citizens who will have neither the inclination nor the resources to challenge it.

In this light, we say that S.1134 goes too far, particularly if S.1562 were also to be enacted amending the Civil False Claims Act. It cannot be disputed that the bill goes beyond any of the court decisions cited to support it. Some of these decisions upheld a specific procedure in a specific adminsitrative context. None combined all these features, nor did the decisions purport to validate the specific remedy or procedure in a different context from that in which the case was decided. Because S.1134 invades new ground, we ask this Committee to review carefully its potential effects on the rights of citizens, as well as the true applicability of the claimed precedents.

We believe tha bill proposes to go beyond exieting law and to limit individual rights in several important reapects. We point to the following "firets."

1. Businesses end individuals may be subjected to a fadaral agency's procedures even though they have enterad into no contract directly with the agency and have not received any grant or loan from the federal governmant. Although faderal funds must be involved before tha statute would apply, if an allegedly false statement is made by an independent third party in connection with a fedarally funded program, that party is subjact to tha agency's broad inveatigatory and penal powere. Aleo, employeea of businesses which deal with the govarnment can be personally subjectad to the agancy's procadures, and fined personally, aven though they have never agreed to waive any of their normal rights to a court or jury trial.

2. For the first time, we beliave, mera statements, unaccompanied by any claim against the government, or payment or loss by the govarnment, can be the subject of finas assessed by a federal egency outside of any court proceedings. Note that the proposed statute does not apply only to written statemanta. Oral conversations and statements over the telephone would also be covered. All convareations in connection with marketing efforts, negotiations, audits, engineering discussions, settlementa and about everything else would be subject to this law, howaver casual they might have been. In auch a caae, the exact wording of the statement, its context, and a reaaonable interpratetion of it will be provabla only by teatimony of witneseea, rather than by a clear written statement of the accuaed or the text of a document or claim submitted to the government, or by a payment by the government. Theee can of coursa be objectively subetantiated in a manner not poseible for oral and telephonic conversations.

3. The faderal govarnment's right to compel a witneee to appear and personally testify prior to the filing of any chargee or the initiation of any litigation is eatablished here for the firet time in civil proceedinge, ae fer ae we are able to ascertain. Although auch personal teetimony can be required by a grand jury, the reeulte cennot normally be utilized by the government in

subsequent civil proceedings; and in criminal proceedings, the accused has all the constitutional rights which normally apply. The Senate Judiciary Committee in considering the companion legislation amending the Civil False Claims Act, S.1562, specifically rejected a proposal to allow the results of grand jury proceedings to be utilized in subsequent civil proceedings. There is no basis for a grant of even broader rights to federal agencies and executive departments generally.

4. In contrast with the prevailing rule of burden of proof in civil false claims proceedings, the government's rights would be increased and the rights of the accused diminished by changing the standard from "clear and convincing evidence" to "preponderance of the evidence." This is a particular problem when a new standard of knowledge is proposed, when mere oral statements can be the subject of the accusation, and where the judgment is made by employees of the charging agency rather than any court of law.

5. A new concept of fraud is introduced by S.1134 which specifically eliminates any requirement of intent to deceive or defraud the government or any requirement that the accused has made a claim against the government or received any money payment or any benefit whatsoever from the statement in question.

The application of these new rules must be examined carefully under constitutional and due process principles. Although the precise rights of accused persons may depend upon whether a proceeding is deemed to be civil or criminal, the requirements of due process apply even to civil proceedings. Moreover, the difference between "civil" and "criminal" is more than just a label which can be applied either way by the Congress. A fine of $100,000 is certainly penal in character, whatever its claimed justification and regardless of whether or not other fines have previously been deemed by the courts to be non-criminal. In our view, the rights of a defendant to both procedural and substantive due process do not depend solely upon that designation.

If the proceedings are civil, NAM believes that a person accused of wrongdoing should, as a minimum, have the same procedural rights

and protactions as apply in normal civil procaadings. Although tha Report of the Sanata Committee on Governmantal Affairs on S.1134. Report 99-212 (the Raport), saeks to justify compliance with due process principlas by complience with the Administrative Procedure Act (5 U.S.C. 500, et. seq.) that should not and the investigation. If the accusad is chargad with fraud, and is not to ba accordad the rights of criminal dafendants, at the very least, tha rights of civil procaadings should epply. Thesa includa the rights of deposition and othar methods of discovery, for example. Appellate rights should ba the same as applicable in other civil procaadings. Ragardlass of rules which have been daveloped in administretive proceedings under the procedures of various faderal regulatory agencies, any limitations on the rights of the eccusad with respect to venue, discovery and appeal that are not in accord with the Federel Rules of Civil Procedure must ba the subjact of close axemination by this Subcommittee.

Although NAM has many quastions concarning the impact of S.1134, if enacted, upon bueinesses both large and small, and also upon thair many amployees, in this statament we are listing thoee concarns which we beliave raisa due process issues, as follows:

1. The Agency Inspector General is empowerad to compal parsonal appearances and testimony by enyone, virtually without limitation, and without notifying that person of the subject of the investigation or whether the person may be eccused of wrongdoing. There is no requirement of relevance. We believe there is no precadent for such a "Kafkeesque" grant of federel power which can be exercised in civil proceedings befora a charge ie mada or litigation ie commencad.

2. Although tha witness is permitted to be raprasantad by counsal, the target of tha inveetigation, if there is one, need not be notified that witnassas are being intarrogatad and, by spacific provisions of the etatute, has no right to be preeent or be represanted by an attorney - 804 (a)(5)(B). This is in direct contrast to tha Federal Rules of Civil Procedure which allow the partias to civil proceadings to be presant at all depositions, with the rights of cross-examinetion. No provision of the stetute gives the eccused any right, ever, to find out or challenge what a witness might heve said in these proceedings.

3. The place for the hearing can be selected by the agency to include the place where a claim or statement "was made, presented or submitted" - 803 (f)(4)(B). In the case of letters or documents transmitted by meil or statements over the telephone, it appears likely that a federal agency located in Washington, D.C., could hold its hearings in Washington even though the accused sent the lettsr or made the telephone cell from the West, the South, or some other part of the country far from the netion's Capital. For smell claims and statements not amounting to e claim, thet may be most inconvenient for the eccused, and perhaps for many of the witnesses which the accused might wish to present. No provision is made similar to "forum non conveniens", end the rules of procedure applicable in the courts would not be available.

4. Contrery to the normel requirement for e hearing, S.1134 grants a hearing only if specifically requested by the charged person within 30 deys. Since employees of small businesses end many individuals may not have much familiarity with legal proceedings, and would probably need consultation with an attorney, the possibility of inedvertent forfeiture of the right to e hearing seems substantial. A hearing should be required unless waived <u>in writing</u> by the defendant, after an adequats opportunity to consult with counsel.

5. The prevailing burden of proof requirement applied by the courts under the Civil False Cleims Act should be adopted. Even if these administrative procedures are not criminal in nature, they are even more quasi-criminal in their penalties then was the case under these prior federal court decisions.

6. The propoeed change in the standerd of knowledge which will be applied is particulerly disturbing, especielly when the stetute appliee to false statements in the absence of any claim and where the burden of proof is to be reduced. Not only can the accused be fined without any ehowing of actuel knowledge of the falsity of the etatement, or sny intent to deceive or defraud, but also the Report specificelly includee, within the concept of falee etatament, a eeriee of fully true etetemente which ere deemed to

have been incomplate so that, in tha judgment of the haaring examiner, further statamsnts should have baen made by tha accuaad to clarify the admittedly trua statemants to avoid misintarpretation - 802 (a)(2)(B). This is tha standard applied under the Securitias laws to corporate diaclosuras. That may ba appropriete for larga public issuars of securitiea, but is not tha standard of truth which normal citizens liva by.

7. A particular danger arises whan penaltias are assasaed on those who admittedly had no actuel knowledge but ellegedly should have known. It is clear from the committee raport, (page 21), that the statutory language of Section 801 (a)(6)(B) concerning the standard of knowledge was intended to imposa a "duty to make inquiry." Compliance with this duty is obviously a subject for decision by the hearing officer based upon all the evidence availabla to the hearing officar aftar a full investigation. This is a hindsight judgmant--eftar an extansive investigation and examination of documents. At tha haaring, such facts may appaar far differant from the way thay looked to the accusad at tha tima of tha statement, and with the knowledge than availeble to him or her. In a business setting, the issua of knowledge alweys raises two questions: First, who in the company hed the knowladge and did that parson have anough knowladga or breadth of experiance to properly interprat what has coma to his attention; and second, whether this knowledge was adaquata to causa "red flags" to be raised sufficient to impoee aome duty to inquire. In addition, the issue elways arisas as to tha extent to which a responsibla person must astablish procaduras or take advanca steps to prevent some ectivity or to find out about it. Thet judgment is aasiar to make by hindsight aftar an avant has occurred and other people testify thet they knew about it, than it is to anticipata what should hava bean known and what prevantiva action should have been takan. Thue, thie "duty to inquire" goes far beyond any requirement of knowladge or any reasonabla intarpretation of what ehould ba callad "fraud."

8. Full diacovary ehould be parmitted for the accused, including depoeitione, particularly if broad testimonial subpoena powers ara given to the govarnmant prior to bringing the caee, the

results of which need not be provided to the accused. In spite of this, the statute in Section 803 (f)(3)(B) specifically grants discovery only to the extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues. The standard of an "expeditious" hearing is not that which civil due process requires.

9. Although the proceedings are termed "civil," rather than "criminal," the procedures are not those available to parties in normal civil proceedings. Two illustrations should suffice to make this clear:

(a) The accused person's right of cross-examination at the hearing is limited to that which "may be required for a full and true disclosure of the facts." Presumably, the hearing examiner selected by the agency makes a determination as to the scope of cross-examination which will be allowed.

(b) The rules of evidence which would be applicable in normal civil proceedings, such as the hearsay rule, are presumably not applicable since the entire prosecution, hearing, and penalty procedure is treated as merely administrative.

10. No normal civil right of appeal from the agency's decision is available. Judicial review is allowed only through an appeal to the United States Court of Appeals, which may be very costly and only at a distant place. Moreover, the standard of review is the very limited standard applicable to administrative and regulatory proceedings and does not meet the standards applicable to either civil or criminal proceedings.

11. Cumulative and overlapping remedies can be applied against the accused person, often simultaneously. Existing remedies include:

(i) Remedies included in the Federal Acquisition Regulations, applicable agency regulations, or the specific contract, such as contractual recovery for allegedly defective pricing;

(ii) Debarment proceedings or agency threats to utilize them;

(iii) Criminal false claims prosecution;

(iv) Criminal prosecution under other statutes;

and

(v) Qui tam proceedings initiated by third parties.

12. The pending amendment of the False Claims statute before the Senate (S.1562) goes even further and specifically provides that an agency can proceed with administrative penalties (as provided in S.1134), notwithstanding any proceedings brought under the qui tam provisions of S.1562, whether prosecuted by the government or by the qui tam claimant. There is no provision in either statute for an election between the two remedies if they are applicable to the same transactions, nor is there a prohibition of double recovery. Since the agency proceedings under S.1134 are not judicial proceedings, principles of double jeopardy, res judicata and collateral estoppel would seem not to be available to protect the accused person.

The full Judiciary Committee will soon begin consideration of reforming the Racketeer Influenced Corrupt Organizations Act (RICO). NAM believes that Congress should note the decision of the Supreme Court of the United States in Sedima S.P.R.I. v. Imrex Co., Inc., 473 U.S., 87 L.Ed. 346 (1985), applying literal language which apparently did not carry out the real intent of the Congress for a legislative solution to an urgent problem. RICO was enacted in 1970 with the uncontroversial goal of weeding out organized crime from American businesses. Yet legitimate businesses with absolutely no ties to organized crime have had cases, which otherwise would have been normal civil litigation in state courts, brought within the federal court system and the resulting harsh penalties of RICO merely because of the broad language of the statute. To avoid repetition of this experience, we believe that the legislation before this Subcommittee should be reviewed carefully, with a view to protecting the rights of businesses and individuals, as well as to achieve prevention of fraud. We note that violations of this statute might be predicate acts within the meaning of RICO with somewhat unpredictable additional liabilities for the accused persons.

In this context, we submit that many of the powers proposed to be granted to the federal government by S.1134 go beyond existing precedents or what is required to achieve any of the legitimate purposes of the legislation. Also, the rights of the accused are curtailed for reasons expressed in the Report as necessary to provide efficient enforcement and reduce costs to the government. We would point out that litigation costs today are excessive for all litigants, and we see no reason for the federal government, with all its

resources, to have special relief not accorded to less affluent citizens and businesses. A specific example of lack of concern for the rights of accused persons is Section 803(f)(2)(B). This paragraph sets forth a doubtful standard for fairness of hearings when it specifies that the hearing procedures shall provide for the availability to

> "...any person alleged to be liable under Section 802 of this title of opportunities for the submission of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the hearing, and the public interest permit." (emphasis added)

NAM does not understand why the opportunity of the accused for submission of facts, arguments, etc. should be so limited. The limitation of due process rights for the accused is alien to our system of jurisprudence and contrary to tradition. Also, it is difficult to foresee how such a provision will be applied or how its meaning would be interpreted by a court if the opportunity for a court test were available. Although in a wide variety of administrative proceedings it may be reasonable to limit the appearances and submission of evidence by certain parties which may have an interest in the proceedings, we question if the standards of due process are met when that standard of justice is applied to individuals, such as employees of businesses around the country, who may be subjected to fines of $100,000.

NAM's concerns about this legislation go primarily to policy questions, particularly if companion legislation is enacted to broaden the Civil False Claims Act. They are not limited solely to issues of due process and constitutionality. Nevertheless, we would like to direct the attention of the Committee to the constitutional justification for S.1134 as set forth on pages 33 and 34 of the Government Affairs Committee Report. Reliance upon the Supreme Court decision in United States ex rel. Marcus v. Hess 317 U.S. 537 (1943) seems misplaced. As stated by the Court, and summerized briefly on page 34 of the Report, the Civil False Claims Act is a "remedial statute imposing a civil sanction." Its primary purpose is "...to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." Further, the Court said "This remedy does not lose the quality of a civil action because more than the precise amount of so-called 'damage' is recovered."

That seems to us to be a strange justification for a statute which not only increases drastically the total penalty which may be assessed, but is intended by its express terms to apply when the government has suffered no loss whatsoever, and even where the defendant has made no claim against the government. An examination of the Senate Governmental Affairs Committee Report indicates a clear intent to "panalize and deter" (page 4), and it is said that an administrative remedy "would serve as a deterrent against future fraud" (page 6). The supporting testimony at the hearings mentioned that monatary sanctions would be a useful deterrent (page 8). It may not be entirely clear from the precedents exactly how penal in nature a statute must be to qualify as "criminal", so as to provida dafandants with rights normally accorded to those accused of crimes. However, the Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), declared unconstitutional tha application of a "civil" statute whare the intent of Congress was to provide for deterrents and retribution. If the legislation before this Subcommittee is to survive these constitutional tests, the Subcommittee should make necessary revisions to assura its remedial character, and also to assure that there are no penal faatures of detarrence and ratribution which do not comport with tha raquired civil standard.

A significant constitutional issue is also raisad by the size of the penalty under S.1134, particularly when viewed in connection with S.1562, the False Claims Reform Act. At the Septamber 17, 1985 hearing on S.1562 bafora the Subcommittee on Administrative Practices and Procedures of the Senate Judiciary Committee, Justice Dapartment tastimony questioned on constitutional grounds tha proposad incraasa of false claims penalties from $2,000 to $10,000. Not only could S.1134 penalties ($10,000 plus double damages) be added to thoae assessed under S.1562, but also a $10,000 penalty under S.1134 for a raiterated false statemant could be $100,000 or more, even whan no claim had ever been made by the accusad person. Whatever the current opinion of DOJ or constitutional axperts may ba as to the possibility that these statutes would be daclared unconstitutional by the Supreme Court, it is clear that S.1134 would push faderal agency power bayond the point which has haretofore been validatad by the courts. Tha issue is--does the Congress wish to do that now, when most of us baliava the powar of federal agencies have alraady baan pushad too far?

In the view of NAM, these statutes go too far. Nevertheless, it is not the purpose of this etstament to provida a comprehensive anelysie of court decieions relating to constitutionality. As indicated earlier, we believe the decision of Congress as to conetitutionality will, for all practical purposes, be the only one which is relevent to the everege person eccueed under this type of legislation. Moreover, a United States Supreme Court decision on the constitutional issues would be long delayed. Therefore, NAM again urges this Committee to review carafully the judicial precedents which have been cited on behalf of this legislstion.

We believe reliance upon these eerlier decisions is questionable. In the first place the concept of almost unlimited federal administrative powers originated many years ago with the explosive growth of administrative agencies in the 1930's and 1940's. It is not clear that current judicial authority would in ell cases support the axtansion of federal powera as broadly as previously. The Supreme Court has recently limited the power of Congress to establish so called "legisletive courts," or Article I courts, to adjudicate disputes properly within the scope of Article III courts. Northern Pipeline Construction Co. v. Marathon Pipe Line Compeny, 485 U.S. 50 (1982). Ae Justice White's diasent stetes, many Article I courts "go by the name of 'administrative agencies.'" This deciaion inherently limits the adjudicative power which cen be granted to federal agenciee. Tha more recent decision in Thomas v. Union Carbide Agricultural Producta Co. 473 U.S.___, 87 L Ed. 2d 409 (1985) does nothing to overrule the principle of Northern Pipeline thet there are constitutional limits to the adjudicative powera which may be given to federal adminietrative agencies. All the Justices in Northern Pipeline recognized that euch limita exiet. In Thomee, the majority upheld the grant of powar, but to do so the court looked at the epecific problem which the agency was created to addrees (87 L. Ed. 2d 413 et eeq.), and empheeized thet the court'e holding wae limited to the propoeition thst mattere "cloeely integrated into a public regulatory echeme" are appropriate for agency reeolution (87 L. Ed. 2d 428). In ehort, there wee no blanket delegation of adjudication authority acroee the board to the whole gamut of adminietrstive end executive brench egencies, ee contempleted by S.1134. The Congreeeionel grent of euthority wee upheld beceuee it wae epecific to the egency, it wee en integrel psrt of the epecific reguletory echeme,

end it wee eppropriete for the circumstances. Tha grant of euthority in S.1134 does not meet that etanderd.

For the same reeeon, S.1134 contrevenes the Seventh Amendment requirement for e jury triel. The Governmentel Affeirs Committee Report relies for support of S.1134 upon e series of Supreme Court ceses deeling with administretive egency decision-meking powers, (peges 31-33). In these cesee, the stetute in question wes specific to the agency, not e blanket, government-wide grent es contempleted here. As an example, Justice White's opinion in the primary cese relied upon, Atles Roofing Co., Inc. vs. Occupationel Sefety & Heelth Rev. Comm., 430 U.S. 442 (1977) first reviews OSHA and its background, and then stetes thet Congress has often "creeted new statutory penelties, provided for civil penelties for their violetion, end given the egency the function of deciding whether e violetion hes, in fact, occurred" (430 U.S. et 450). A new statute with eppropriate remedies wes empheeized (430 U.S. at 453).

This is the threed thet ties together the cases which ellow nonjury fact-finding by edministrative agencies. See other cases cited in the Report et peges 31-33. Several decieions justify elimination of e jury trial because a new, stetutory remedy is creeted, e.g., NLRB v. Jonss & Laughlin Steel Corp. 301 U.S. 1 (1937); Textile Workers Pension Fund v. Stenderd Dye & Finishing Co., 725 F 2d 843 (2d. Cir. 1984). In contrast, other decisione have applied the Seventh Amendment to require e jury trial even where e new etetuery right wes creeted. E.g., Curtis vs. Loether, 415 U.S. 189 (1974), which held that an ection under Title VIII of the Civil Righte Act of 1968 required triel by jury. The court compered Title VIII with Court of Appeels ceses under Title VII, where beck pey ewarde without e jury trial were effirmed. The Court noted thet the statutory lenguage in Title VII of the 1964 Civil Righte Act celling for effirmative ection, including reinstetement end beck pey, "contreste shsrply with Section 812's (Title VIII) eimple euthorizetion of en ection for ectuel end punitive demages." [perentheeis edded]

Although epplicetion of the Sevsnth Amendment by court decisions is confusing, it ssems cleer that S.1134 goes well beyond the authorities cited for its support. Thoss cesss rely primarily upon the nexus between the etetutory scheme under which sgencies ars givsn power to rsgulate and ths rsmediss thsy may uss for invsstigation snd enforcsment. Where enforcement end penalties srs divorced from thst

context, as S.1134 proposes, trial by jury should be required.

In summary, the National Association of Manufacturers, on behalf of its membership, supports this Committee's examination into the constitutional and due process requirements of this legislation. NAM fully supports the objective of eliminating fraud and ensuring wise and efficient use of tax monies paid into the national treasury. However, care must be exercised during the legislative process so that normal business procedures are not jeopardized, and that civil liberties and due process rights are not violated. We are certainly willing and available to join in an effort to develop a well-reasoned and balanced approach to the prevention of government program fraud.

This ends my prepared testimony and I am prepared to answer any questions the members of the Committee may have at this time.

Senator HATCH. Thank you, Mr. Creighton. Like I say, we will submit questions to you in writing. Immediately following Senator Thurmond's statement will be my statement and the statement of Senator Grassley, the statement of Senator McClure, and we will also submit questions for Richard Willard, the Assistant Attorney General, and for Richard Kusserow, from the distinguished Senator from Pennsylvania, Senator Specter, who was also here.

So with that, this has been an intriguing hearing, it raises a lot of interesting legal issues and let us see if we can resolve those.

I do have to say that I believe that there is no excuse for the fraud against the Government that has gone on in the past. The seriousness of Government program fraud is well documented. In 1981, for instance, the General Accounting Office documented over 77,000 cases of fraud and other illegal activities reported in 21 agencies over a 3-year period. Now, you know, that fraud has a tremendous impact particularly in light of efforts to trim the burgeoning Federal deficit. However, the establishment of a broad based administrative procedure to punish fraud and false claims has many important implications, some of which, if not most of which have been brought out here today.

So I am very concerned about this bill and we are trying to work to help resolve some of those concerns and I hope we can. There is little or no excuse for some of the fraud that has gone on.

On the other hand, I am concerned about having people branded as defrauders under a system that might be less than a due process system. So let us see where we go from here and, with that, we will recess this committee until further notice.

Thank you.

[Whereupon, at 12:04 p.m., the committee was recessed, subject to the call of the Chair.]

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APPENDIX

STATEMENT OF THE

SHIPBUILDERS COUNCIL OF AMERICA

ON S-1134

THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

1. INTRODUCTION

The Shipbuilders Council of America is pleased to have an opportunity to submit a statement on S-1134, the Program Fraud Civil Remedies Act of 1986. We thank the Committee for requesting our comments, and we hope that our thoughts will assist the Committee in its deliberations.

The Shipbuilders Council of America is a national organization of more than sixty companies, including the principal domestic shipbuilders, ship repairers and suppliers of equipment and services to those industries. A list of the Council's members is attached to this statement. Due to the nature of our products and services, the United States government is one of our major customers. Accordingly, we are concerned that limited federal funds earmarked for the shipbuilding industry not be squandered due to waste, fraud or abuse. However, we also are concerned that in our zeal to apprehend and punish those who submit false claims and statements to the government, we do not retreat from the fundamental principles of due process that are inherent in the American judicial system.

Given these concerns, when this legislation originally was introduced by Senator Roth several years ago, the Council supported the concept that additional measures were necessary to enable the government to effectively and efficiently combat "small" false claims. Although we disagreed with specific provisions of the proposed legislation, at the time we believed that government prosecutors generally did not pursue the perpetrators of small procurement frauds.

This no longer appears to be the case. Statistics released by the Department of Defense Inspector General's Office reveal a significant increase during the last several years in the number of procurement fraud-related criminal prosecutions and the suspension and debarment of

government contractors. According to the DOD IG, during the second half of FY 1985 alone, DOD criminal investigations resulted in a total of 502 convictions and indictments and 346 contractors' suspensions and debarments. We believe that examination of the individual cases upon which these statistics are based will reveal that many involve "small" false claims and dollar values. This demonstrates that the laws and remedies presently available to the government are sufficient to counter and deter procurement fraud, including small frauds, if adequate resources are dedicated to the problem.

Therefore, in our view, S-1134 is superfluous and would not enhance the government's ability to obtain legal remedies in small fraud cases. This is particularly true because the provisions of the bill, as presently drafted, are not limited to "small" false claims as originally intended, but rather would apply to claims of unlimited value. In addition, as discussed below, there are a number of critical flaws in the bill which render our constituents unable to support its passage.

II. THE STANDARD OF KNOWLEDGE

When originally introduced, the stated purpose of S-1134 was to create an administrative counterpart to the government's existing false claims remedies. The individuals who introduced the bill and that have supported it have claimed that such an administrative procedure is necessary because the existing judicial processes and their attendant due process safeguards are too costly to permit the government economically to take action against the perpetrators of small procurement related frauds.

However, S-1134 goes far beyond the creation of a new, inexpensive process for the prosecution of small false claims. The bill would lower the standard of knowledge necessary for submission of a false claim, thereby creating new legal obligations for potential defendants and greatly increasing the scope of behavior defined to be illegal. The courts generally have defined the existing False Claims Act to require the government to establish that a defendant had actual knowledge of the falsity of a claim. See, e.g., United States v. Hughes, 585 F.2d 284 (7th Cir. 1978); United States v. Ekelman and Assoc., 532 F.2d 545 (6th Cir.

1976); see also, United States v. Meade, 426 F.2d 118 (9th Cir. 1970) (requiring actual knowledge and specific intent to defraud). Actions arising from mistakes or negligence, therefore, are not actionable under the existing false claims laws.[1]

Section 801(a)(6) of the bill would significantly change existing law by defining the knowing submission of a false claim to include "acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement." Creation of this "duty of inquiry" establishes a new subjective standard that could result in an individual being found to have defrauded the government due to the submission of a claim which he honestly and in good faith believed to be accurate. For example, a company officer who in good faith relies on information provided by his employees may later be found to have defrauded the government if a hearing examiner determines that the officer should have made further inquiry before submitting the claim to the government.

We believe it inappropriate to establish a law that could result in an individual being found to have defrauded the government as a result of mere negligence or a mistake. Accordingly, we urge the Committee to delete the gross negligence standard and to maintain the standard presently found in the False Claims Act if the Committee decides to go forward with this bill.

III. SEPARATION OF FUNCTIONS

The Council is extremely concerned about the lack of separation and isolation of the prosecutorial function from the procurement and investigative functions. Under the proposed system, the investigating official and the reviewing official, whose function is to decide whether the case presented by the investigator should be prosecuted, would be employees of the allegedly defrauded agency. Under these circumstances,

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[1] In United States v. Cooperative Grain & Supply Co., 476 F.2d 67 (8th Cir. 1978), the court held that facts evincing "constructive knowledge" were sufficient to give rise to a violation of the False Claims Act. However, the court did not find that negligence in and of itself was sufficient to create a violation of the Act.

the independence of the reviewing authority would be subject to question. Moreover, combining the investigative and review functions in the allegedly defrauded agency would create a great potential for abuse of process by the government. In some instances, the affected agency may attempt to divert public attention from its own mismanagement or inefficiencies by attempting to blame an outside party. In other instances, an agency may succumb to public pressure to find a wrongdoer in response to an embarrassing situation. In these and other situations, it is apparent that the reviewing official employed by an affected agency may not be in a position to exercise the independent judgment necessary for such a sensitive task.

Under the circumstances, we believe it would be an error for the reviewing authority to be located in the affected agency. Rather, the reviewing authority more appropriately should be the Department of Justice. A Department of Justice attorney who has experience in the criminal process would be in the best position to assess the legal merits of a case independent of any pressures from the investigators or program managers in the agency that allegedly has been defrauded. Accordingly, we would urge the Committee to place this reviewing authority in the Department of Justice. We further would urge that the Department of Justice be required to give its affirmative approval before an agency may proceed with an action under this legislation. To permit an agency to go forward merely because the Department of Justice fails to veto an action would allow a number of prosecutions to be initiated because of the tardiness, overwork or oversight of Department of Justice attorneys.

IV. EXCESSIVE SCOPE

Our third concern is the unnecessarily broad scope of S-1134. As discussed above, the basic premise of this bill is to provide an administrative forum only for those cases where it is not economical to pursue the matter under the normal criminal or civil judicial process. However, the bill, as drafted, would far exceed this limited purpose.

A. Excessive Ceiling

If we are truly concerned only with creating an economical remedy for small false claims cases, we believe that e $50,000 cap would be more appropriate than the $100,000 cep presently included. Based on our experiance, we believe that U.S. attorneys generally prosecute claims in excess of $50,000 and have the resources to do so. Claims in excess of this amount should be left to the normal judicial process.

B. No Effective Ceiling

More importantly, we believe that the language of the bill does not limit its application to claims less than the proposed $100,000 ceiling. Section 803 provides that tha bill does not epply to a cleim or a "group of related cleims which are submitted et the time such claim is submitted" and which exceed $100,000 in value. Accordingly, the ceiling applies only to claims submitted simultaneously. One act or group of releted ects resulting in the separate submission of numerous invoices, each of which totals less than $100,000, could result in the institution of numerous proceedings under this bill. Therefore, this legislation could be applied to a situation involving one allegedly fraudulent act or group of relatad acts resulting in millions of dollers of false claims. Thus, this legisletion would reach fer more than "small" claims. If this bill goes forward, it should be amended to provide thet the ceiling be applied to any claim or group of releted claims arising out of a single aet of operative facts.

C. Excessive Penalties

Section 802 of the bill, as drafted, is vague and ambiguous and would permit the imposition of penalties unrelated to tha amount of damages actually suffered by the government. Sections 802(a)(1) and (2) would permit the assessment of a substantial penalty for false claims or false statements where the government has suffered no loss whatsoever. Under such circumstances, the bill becomes punitive and, we believe, is inappropriate. Moreover, Section 802(a)(1)(C) appears to provide for a penalty of twice the amount "claimed" regardless of whether the claimed

amount was paid and whether the government sustained any damages. Such a punitive provision, which could result in the imposition of massive penalties, cannot be justified in a proceeding with the minimal due process protection afforded under this bill. If the bill goes forward, these provisions providing for the assessment of substantial penalties even where the government has suffered no damages should be deleted.

V. SUBPOENA AUTHORITY

The provision of testimonial subpoena authority to agents investigating alleged violations of the bill is extraordinary, excessive and unnecessary. Neither the FBI nor other investigative agents have the right to compel individuals to give oral testimony, regardless of the severity of the alleged crime being investigated. Certainly, in a situation involving small procurement fraud cases, granting investigative agents intrusive authority to compel testimony is not warranted. Further, such authority clearly would be subject to abuse. Although the grant of subpoena authority is theoretically limited to investigations of alleged violations under this bill, investigative agents would be able to use this authority regardless of the nature of the investigation by alleging that they are investigating a potential violation of this bill. Thus, the government could use this process to avoid and undercut the grand jury process. This provision must be eliminated from the bill.

VI. SUMMARY

In conclusion, the Shipbuilders Council of America is fully supportive of the federal government's efforts to eradicate procurement fraud. However, this bill would not further serve this purpose. It is duplicative of existing remedies available to the government and, as indicated by recent history, is not necessary to enable the government effectively to prosecute perpetrators of fraud, regardless of the size of the fraud. Instead, this bill would serve only to create further unnecessary adversity between the government and its suppliers. These factors, combined with the significant due process concerns raised by the bill, cause us to urge that this legislation not be enacted.

Attachment

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Tampa Shipyards, Inc., Tampa, FL

Avondale Industries, Inc.
Avondale Shipyards Division
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Bath Iron Works Corporation
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Bath, ME 04530

Bay Shipbuilding Corporation
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Bethlehem Steel Corporation
Marine Construction Group
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Coastal Dry Dock & Repair Corporation
Brooklyn Navy Yard - Building 131
Brooklyn, NY 11205

General Dynamics Corporation
Pierre Laclede Center
St. Louis, MO 63105
Electric Boat Division, Groton, CT
and Quonset Point, RI
Quincy Shipbuilding Division, Quincy, MA
and Charleston, SC

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Litton Industries
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Jacksonville Shipyards, Inc.
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Jacksonville, FL 32203

Lockheed Shipbuilding Company
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Marinette Marine Corporation
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Marinette, WI 54143

National Steel & Shipbuilding Company
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Newport News Shipbuilding
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Norfolk Shipbuilding & Drydock Corporation
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Norfolk, VA (2 plants)
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One World Trade Center
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M. Rosenblatt & Son, Inc.
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