recover losses incurred as a result of fraud, waste, and abuse. These cases, in part, are the reasons why H.R. 3334 was introduced.

Second, while the False Claims Act is not a penal statute, it does have an important deterrent effect. The False Claims Act allows the Government, on behalf of the taxpayer, to recover losses suffered through the submission of fraudulent claims. The double damages remedy has been a part of the law since 1863 and it implicitly contains a significant deterrence element.

It is analogous to the treble damages remedy available to private plaintiffs under the antitrust laws and actions authorized under the civil RICO statute.

The double damages recovery, with the accompanying civil fine, is intended to be a substantial penalty—to forcefully discourage individuals and companies that do business with the United States from engaging in fraudulent practices.

It is my understanding that the subcommittee has before it other bills—H.R. 3753; H.R. 3828, by Mr. Berman and others—which propose that the current double damage remedy in the False Claims Act be amended to provide for treble damages, and as well to strengthen the citizens' suits provision.

I also understand that Senator Grassley's companion bill, S. 1562, on this subject also provides for treble damages. Frankly, having worked for many years with antitrust legislation, the idea of treble damages in this statute has both substantive and symmetrical appeal to me.

In this context, I might mention that very soon I will be introducing a five-part antitrust reform package on behalf of the administration. Included in that package will be an amendment to section 4A of the Clayton Act which would allow the United States as a plaintiff to recover treble damages under the antitrust laws.

Ironically, right now only private parties automatically have their damages trebled in antitrust actions, whereas the United States may only sue for either injunctive relief or, where it is the party actually harmed by the anticompetitive action, actual damages.

The United States will use these amendments to the Clayton Act to respond to circumstances where the Government is the victim of a price-fixing conspiracy or a contract bid-rigging situation. If the United States is prepared to amend the antitrust laws to allow treble damages in these circumstances, Mr. Chairman, it seems logical to me that this subcommittee consider treble damages in the context of the amendments to the False Claims Act as well.

Related to this debate is how this subcommittee ultimately decides the question of the appropriate definition of damages in the False Claims Act. My bill—H.R. 3334—would broaden the scope of the damages to be doubled. Under current law, the Federal Government is limited to actual damages, which are then doubled under the statutory formula. Sections 101(a) and 101(b) of H.R. 3334 would make consequential damages the measurement standard—thus allowing a recovery for indirect losses that are the result of the fraud as well as actual, direct losses. The Justice Department, for example, believes that this is a necessary change to ensure the recovery of replacement costs in every case.

There is a relationship between the decision on measurement of damages—actual versus consequential—and whether treble damages should replace double damages. I defer to the expertise of the members of this subcommittee as to whether or not the double damage remedy contained in the current law provides a sufficient deterrent.

My only point is that your resolution of the appropriate measurement of damages is an important and related element to consider as part of the overall policy decision.

I would add that the Department of Justice is understandably concerned that the insertion of a treble damage remedy could have the counterproductive result of encouraging courts to continue to view the False Claims Act as a criminal rather than a civil law.

Last, but not least, of my general observations, is a point that I feel must be stressed at the outset. I do not view these legislative proposals as anticontractor in nature. That is certainly not my motivation, nor do I believe it is the motive of the administration. Rather, these legislative proposals should be viewed as protaxpayer. There is no question in my mind but that the responsible representatives of the private sector share our common goals.

Specifically, these goals are an efficient Federal procurement process that results in the purchase of quality products and services at fair prices and that the Government should be able to effectively recover its losses when victimized by fraud.

Allow me now to turn to these proposed amendments contained in my two bills and highlight those that I think are the most deserving of note. To my mind, the most important amendments contained in H.R. 3334 deal wilth the intent standard and the burden of proof in the False Claims Act. The language of the act currently provides that the Federal Government need only prove that the defendant knowingly submitted a false claim.

However, this statutory standard has been misconstrued by some courts so as to require the Government prove the defendant had actual knowledge of the fraud and even establish specific intent to submit a false claim.

A specific intent standard, Mr. Chairman, is wholly inappropriate in a civil statute and section 101(c) of H.R. 3334 would remove the ambiguity created by this case law.

As with anyone who enters the marketplace, the Federal Government relies upon the truthfulness of the representations of those with whom it is doing business.

This amendment clarifies the confused case law to extend liability to those who seek payment from the Government misstating their eligibility or who certify information to the Government in support of a claim with neither personal knowledge as to its accuracy, nor reasonable investigative efforts to determine the truth.

This standard is not intended to cover innocent mistakes or inaccurate claims submitted through mere negligence. It is intended to require that those who do business with the Government recognize their obligation to take reasonable steps to ensure the accuracy of the claims they submit. Persons doing business with the United States should not be permitted to hide behind a convenient shield of self-imposed ignorance.

The burden of proof in civil false claims cases is another area where legislative clarification is necessary to resolve ambiguities in the case law. Some courts have required tbat the United States prove a violation by clear and convincing, even unequivocal, evidence. Here again, such a burden is the functional, near equivalent of a criminal standard. Because the False Claims Act is a civil statute, the traditional preponderance of the evidence burden of proof, in my judgment, is more appropriate. Consequently, section 103(c) of my bill specifically provides that the Government must prove its case by a preponderance of the evidence, the ordinary standard in civil litigation.

H.R. 3334 also contains numerous other amendments, which are designed to resolve specific problems which have arisen under the act. Mr. Chairman, they start at the bottom of page 6 of my prepared testimony and run through pages 7, 8, and 9. I will just highlight a couple of them and they will be made part of the record.

Section 101(a) raises the fixed statutory penalty for submitting a false claim from $2,000 to $5,000. And as you mentioned, the $2,000 figure has been in the law for over a century.

Section 101(a) also amends the act to permit the United States to bring an action against a member of the Armed Forces, something that was excluded from the act at the time of enactment in the Civil War era.

My bill also provides that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the act as if he had submitted a false claim for money or property. For instance, the manager of a HUD-owned property may falsely understate income and/or overstate expenses in order to reduce the rental receipts which must be paid to HUD at the end of each month. The existing failure to cover these so-called reverse false claims situations is a serious gap in the present law.

The requirement that there must be a strict demand for money or property before an actual claim can exist under the False Claims Act must be broadened. Instead, the concept of "claim" should cover all those circumstances where the Government suffers a financial loss through a fraudulent misrepresentation or statement.

Section 101(d) would allow the Federal Government to sue under the False Claims Act to prosecute frauds perpetrated on certain grantees, States, and other recipients of financial assistance.

Anotber important amendment contained in section 105 is the grant of civil investigative demand [CID] authority to the Department of Justice to aid in the investigation of False Claims Act cases. The CID provisions are patterned after and analogous to the authority already exercised by the Antitrust Division under Hart-Scott-Rodino.

If the Assistant Attorney General of the Civil Division believes that a person has access to information relating to a False Claims Act investigation, he may, prior to filing a complaint, require the production of documents, answers to interrogatories and oral testimony.

The standards governing subpoenas and ordinary civil discovery would apply so as to protect against disclosure of privileged information.

Allow me to briefly discuss the Program Fraud Civil Penalties legislation. H.R. 3335 is intended to provide Federal departments and agencies with an administrative option to litigation in smaller fraud cases—those under $100,000.

Frankly, the problem is that the Department of Justice currently does not have the resources to proceed with many of these small fraud cases and the crowded Federal Court dockets also makes these cases a very low priority.

The proposed Program Fraud Civil Penalties Act would establish, for the first time, a Governmentwide administrative mechanism to resolve small civil fraud cases outside the courts. These claims initially would be decided by hearing examiners. The inspectors general of the various departments and agencies would initiate such claims when the Department of Justice makes a determination that the Federal Government has a valid claim but that it has neither the time nor the resources itself to litigate. A finding of liability in the administrative proceeding could be appealed to a Federal circuit court.

I certainly agree with the statements made by Mr. Kindness and I want to emphasize that I strongly believe this legislation must afford the accused individual or company with full due process protections. Therefore, H.R. 3335 should be amended to make it clear that these proceedings will be on the record before a qualified administrative law judge.

Second, the legislation should make it abundantly clear that all the protections contained in the Administrative Procedures Act would be applicable in these hearings. This includes the right to adequate, fair notice, the right to be represented by counsel and the right to cross-examine.

Mr. Chairman, Senator Cohen's bill, S. 1134, makes it clear that these due process protections are available to the accused. That bill, as you know, has been favorably reported by the Senate Committee on Governmental Affairs.

I recognize that in the Senate there has been some controversy over the scope of the investigatory, testimonial subpoena power, and I again would defer to the expertise of this subcommittee to resolve that problem.

In conclusion, Mr. Chairman and members of the subcommittee, I want to commend you for holding these hearings so promptly. There is no question that Congress must seek out appropriate legislative mechanisms to insure that the taxpayers' money is well spent and protected from fraud, abuse, and waste.

Should this subcommittee proceed to mark up this legislation, it would seem logical to me to merge the two proposals contained in H.R. 3334 and H.R. 3335 into one omnibus bill. Such a clean bill should be structured as an amendment to title 31, with the necessary cross references to title 5. My staff and I, stand ready to work with the subcommittee on crafting legislation that we all can support.

I thank you again for this opportunity to testify.

[The statement of Mr. Fish follows:]

STATEMENT OF THE HONORABLE HAMILTON FISH, JR.

THANK YOU, MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. I VERY MUCH APPRECIATE THE OPPORTUNITY TO BE HERE TODAY AND TESTIFY REGARDING LEGISLATION WHICH WILL GREATLY ENHANCE THE ABILITY OF THE FEDERAL GOVERNMENT TO DEAL WITH FRAUD AND WASTE IN GRANT AND LOAN PROGRAMS AND PROCUREMENT CONTRACTS.

I AM THE PRINCIPAL SPONSOR IN THE HOUSE OF REPRESENTATIVES OF THE ADMINISTRATION'S PROPOSALS THAT ARE, IN PART, THE FOCUS OF THIS HEARING THIS MORNING. THESE BILLS ARE THE FALSE CLAIMS ACT AMENDMENTS (H.R. 3334) AND THE PROGRAM FRAUD CIVIL PENALTIES ACT (H.R. 3335). I RECOGNIZE THAT YOU HAVE A NUMBER OF WITNESSES SCHEDULED THIS MORNING, SO I WILL ENDEAVOR TO KEEP MY REMARKS BRIEF.

THE FALSE CLAIMS ACT IS ONE OF THE OLDEST AND POTENTIALLY MOST EFFECTIVE REMEDIES AVAILABLE TO THE UNITED STATES TO DISCOURAGE AND RESPOND TO THE FRAUDULENT MISUSE OF FEDERAL RESOURCES. IT IS THE PRINCIPAL STATUTE UPON WHICH THE GOVERNMENT RELIES TO SEEK MONETARY RECOVERY IN FRAUD CASES. THE STATUTE WAS FIRST ENACTED IN 1863, AT THE HEIGHT OF THE CIVIL WAR. IT PERMITS THE FEDERAL GOVERNMENT TO RECOVER <u>TWO TIMES</u> THE AMOUNT OF ANY FALSE OR FRAUDULENT CLAIM SUBMITTED, PLUS A $2,000 CIVIL FINE. THE AMENDMENTS CONTAINED IN MY BILLS WOULD MAKE SEVERAL STATUTORY CHANGES SO AS TO RESOLVE INCONSISTENCIES AND AMBIGUITIES IN THE CASE LAW AND TO STRENGTHEN THE GOVERNMENT'S ABILITY TO INVESTIGATE, LITIGATE AND OTHERWISE RESOLVE FRAUD CASES.

BEFORE DETAILING THE PRINCIPAL ELEMENTS OF THESE TWO BILLS, PERMIT ME TO MAKE SOME GENERAL OBSERVATIONS. FIRST, IT NEEDS TO BE STRESSED THAT WE ARE DEALING HERE WITH A CIVIL -- NOT A CRIMINAL -- STATUTE. THE FALSE CLAIMS ACT IS REMEDIAL IN NATURE. AS IT IS NOW CONSTITUTED, THE FALSE CLAIMS ACT DOES NOT CONTAIN ANY CRIMINAL SANCTIONS AND THESE LEGISLATIVE PROPOSALS DO NOT CONTAIN ANY CRIMINAL PROVISIONS. THE REASON FOR MY EMPHASIS ON THIS POINT IS THAT CONSIDERABLE CONFUSION HAS BEEN PROMPTED BY JUDICIAL DECISIONS THAT HAVE TREATED THE FALSE CLAIMS ACT AS IF IT WERE A CRIMINAL STATUTE. THESE DECISIONS HAVE SEVERELY HAMPERED THE FEDERAL GOVERNMENT IN ITS EFFORTS TO EFFECTIVELY RECOVER LOSSES INCURRED AS A RESULT OF FRAUD, WASTE AND ABUSE. THESE CASES, IN PART, ARE THE REASON WHY H.R. 3334 WAS INTRODUCED.

SECONDLY, WHILE THE FALSE CLAIMS ACT IS NOT A PENAL STATUTE, IT DOES HAVE AN IMPORTANT DETERRENT EFFECT. THE FALSE CLAIMS ACT ALLOWS THE GOVERNMENT, ON BEHALF OF THE TAXPAYER, TO RECOVER LOSSES SUFFERED THROUGH THE SUBMISSION OF FRAUDULENT CLAIMS. THE DOUBLE DAMAGES REMEDY HAS BEEN A PART OF THIS LAW SINCE 1863 AND IT IMPLICITLY CONTAINS A SIGNIFICANT DETERRENCE ELEMENT. IT IS ANALOGOUS TO THE TREBLE DAMAGE REMEDY AVAILABLE TO PRIVATE PLAINTIFFS UNDER THE ANTITRUST LAWS AND ACTIONS AUTHORIZED UNDER THE CIVIL RICO STATUTE. THE DOUBLE DAMAGES RECOVERY, WITH THE ACCOMPANYING CIVIL FINE, IS INTENDED TO BE A SUBSTANTIAL PENALTY -- TO FORCEFULLY DISCOURAGE INDIVIDUALS AND COMPANIES THAT DO BUSINESS WITH THE UNITED STATES FROM ENGAGING IN FRAUDULENT PRACTICES.

It is my understanding that the Subcommittee has before it other bills (H.R. 3753; H.R. 3828) which propose that the current double damage recovery in the False Claims Act be amended to provide for treble damages. I also understand that Senator Grassley's companion bill (S. 1562) on this subject also provides for treble damages. Frankly, having worked for many years with antitrust legislation, the idea of treble damages in this statute has both some substantive and symmetrical appeal to me.

In this context, I might mention that very soon I will be introducing a four-part antitrust reform package on behalf of the Administration. Included in that proposal will be an amendment to Section 4A of the Clayton Act which would allow the United States as a plaintiff to recover treble damages under the antitrust laws. Ironically, right now only private parties automatically have their damages trebled in an antitrust action, whereas the United States may only sue for either injunctive relief or, where it is the party actually harmed by the anti-competitive action, actual damages. The United States will use these amendments to the Clayton Act to respond to circumstances where the government is the victim of a price-fixing conspiracy or a contract bid-rigging situation. If the United States is prepared to amend the antitrust laws to allow treble damages in these circumstances, it seems logical to me that this Subcommittee consider treble damages in the context of amendments to the False Claims Act as well.

Related to this debate is how this Subcommittee ultimately decides the question of the appropriate definition of damages in

THE FALSE CLAIMS ACT. MY BILL -- H.R. 3334 -- WOULD BROADEN THE SCOPE OF THE DAMAGES TO BE DOUBLED. UNDER CURRENT LAW THE FEDERAL GOVERNMENT IS LIMITED TO ACTUAL DAMAGES, WHICH ARE THEN DOUBLED UNDER THE STATUTORY FORMULA. SECTIONS 101(a) AND 101(b) OF H.R. 3334 WOULD MAKE "CONSEQUENTIAL DAMAGES" THE MEASUREMENT STANDARD -- THUS ALLOWING A RECOVERY FOR INDIRECT LOSSES THAT ARE THE RESULT OF THE FRAUD AS WELL AS ACTUAL, DIRECT LOSSES. THE JUSTICE DEPARTMENT, FOR EXAMPLE, BELIEVES THAT THIS IS A NECESSARY CHANGE TO ENSURE THE RECOVERY OF REPLACEMENT COSTS IN EVERY CASE.

THERE IS A RELATIONSHIP BETWEEN THE DECISION ON MEASUREMENT OF DAMAGES -- ACTUAL VERSUS CONSEQUENTIAL -- AND WHETHER TREBLE DAMAGES SHOULD REPLACE DOUBLE DAMAGES. I DEFER TO THE EXPERTISE OF THE MEMBERS OF THIS SUBCOMMITTEE AS TO WHETHER OR NOT THE DOUBLE DAMAGE REMEDY CONTAINED IN THE CURRENT LAW PROVIDES A SUFFICIENT DETERRENT. MY ONLY POINT IS THAT YOUR RESOLUTION OF THE APPROPRIATE MEASUREMENT OF DAMAGES IS AN IMPORTANT AND RELATED ELEMENT TO CONSIDER AS PART OF THIS OVERALL POLICY DECISION. I WOULD ADD THAT THE DEPARTMENT OF JUSTICE IS UNDERSTANDABLY CONCERNED THAT THE INSERTION OF A TREBLE DAMAGE REMEDY COULD HAVE THE COUNTERPRODUCTIVE RESULT OF ENCOURAGING COURTS TO CONTINUE TO VIEW THE FALSE CLAIMS ACT IN A CRIMINAL, RATHER THAN CIVIL, LIGHT.

LAST, BUT NOT LEAST, OF MY GENERAL OBSERVATIONS IS A POINT THAT I FEEL MUST BE STRESSED AT THE OUTSET. I DO NOT VIEW THESE LEGISLATIVE PROPOSALS AS ANTI-CONTRACTOR IN NATURE. THAT IS CERTAINLY NOT MY MOTIVATION, NOR DO I BELIEVE IT IS THE MOTIVE

OF THE ADMINISTRATION. RATHER, THESE LEGISLATIVE PROPOSALS SHOULD BE VIEWED AS PRO-TAXPAYER. THERE IS NO QUESTION IN MY MIND BUT THAT THE RESPONSIBLE REPRESENTATIVES OF THE PRIVATE SECTOR SHARE OUR COMMON GOALS. SPECIFICALLY, THOSE GOALS ARE AN EFFICIENT FEDERAL PROCUREMENT PROCESS THAT RESULTS IN THE PURCHASE OF QUALITY PRODUCTS AND SERVICES AT FAIR PRICES AND THAT THE GOVERNMENT SHOULD BE ABLE TO EFFECTIVELY RECOVER ITS LOSSES WHEN VICTIMIZED BY FRAUD.

ALLOW ME NOW TO TURN TO THOSE PROPOSED AMENDMENTS CONTAINED IN MY TWO BILLS AND HIGHLIGHT THOSE THAT ARE MOST DESERVING OF NOTE. TO MY MIND, THE MOST IMPORTANT AMENDMENTS CONTAINED IN H.R. 3334 DEAL WITH THE INTENT STANDARD AND THE BURDEN OF PROOF IN THE FALSE CLAIMS ACT. THE LANGUAGE OF THE FALSE CLAIMS ACT CURRENTLY PROVIDES THAT THE FEDERAL GOVERNMENT NEED ONLY PROVE THAT THE DEFENDANT "KNOWINGLY" SUBMITTED A FALSE CLAIM. HOWEVER, THIS STATUTORY STANDARD HAS BEEN MISCONSTRUED BY SOME COURTS SO AS TO REQUIRE THAT THE GOVERNMENT PROVE THE DEFENDANT HAD ACTUAL KNOWLEDGE OF THE FRAUD AND, EVEN, ESTABLISH SPECIFIC INTENT TO SUBMIT A FALSE CLAIM. SEE UNITED STATES V. MEAD, 426 F.2D 118 (9TH CIR., 1970). A SPECIFIC INTENT STANDARD, MR. CHAIRMAN, IS WHOLLY INAPPROPRIATE IN A CIVIL STATUTE AND SECTION 101(C) OF H.R. 3334 WOULD REMOVE THE AMBIGUITY CREATED BY THIS CASE LAW.

AS WITH ANYONE WHO ENTERS THE MARKETPLACE, THE FEDERAL GOVERNMENT RELIES UPON THE TRUTHFULNESS OF THE REPRESENTATIONS OF THOSE WITH WHOM IT DOES BUSINESS. THIS AMENDMENT CLARIFIES THE CONFUSED CASE LAW TO EXTEND LIABILITY TO THOSE WHO SEEK PAYMENT FROM THE GOVERNMENT MISSTATING THEIR ELIGIBILITY OR WHO CERTIFY

INFORMATION TO THE GOVERNMENT IN SUPPORT OF A CLAIM WITH NEITHER PERSONAL KNOWLEDGE AS TO ITS ACCURACY, NOR REASONABLE INVESTIGATIVE EFFORTS TO DETERMINE THE TRUTH. THIS STANDARD IS NOT INTENDED TO COVER INNOCENT MISTAKES OR INACCURATE CLAIMS SUBMITTED THROUGH MERE NEGLIGENCE. IT IS INTENDED TO REQUIRE THAT THOSE WHO DO BUSINESS WITH THE GOVERNMENT, RECOGNIZE THEIR OBLIGATION TO TAKE REASONABLE STEPS TO ENSURE THE ACCURACY OF THE CLAIMS THEY SUBMIT. PERSONS DOING BUSINESS WITH THE UNITED STATES SHOULD NOT BE PERMITTED TO HIDE BEHIND A CONVENIENT SHIELD OF SELF-IMPOSED IGNORANCE.

THE BURDEN OF PROOF IN CIVIL FALSE CLAIMS CASES IS ANOTHER AREA WHERE LEGISLATIVE CLARIFICATION IS NECESSARY TO RESOLVE AMBIGUITIES WHICH HAVE DEVELOPED IN THE CASE LAW. SOME COURTS HAVE REQUIRED THAT THE UNITED STATES PROVE A VIOLATION BY CLEAR AND CONVINCING, EVEN UNEQUIVOCAL, EVIDENCE. UNITED STATES v. UEBER, 299 F.2D 310 (6TH CIR., 1962). HERE, AGAIN, SUCH A BURDEN IS THE FUNCTIONAL, NEAR EQUIVALENT OF A CRIMINAL STANDARD. BECAUSE THE FALSE CLAIMS ACT IS A CIVIL STATUTE, THE TRADITIONAL "PREPONDERANCE OF THE EVIDENCE" BURDEN OF PROOF IS MORE APPROPRIATE. CONSEQUENTLY, SECTION 103(c) OF MY BILL SPECIFICALLY PROVIDES THAT THE GOVERNMENT MUST PROVE ITS CASE BY A PREPONDERANCE OF THE EVIDENCE, THE ORDINARY STANDARD IN CIVIL LITIGATION.

H.R. 3334 ALSO CONTAINS NUMEROUS OTHER AMENDMENTS, WHICH ARE DESIGNED TO RESOLVE SPECIFIC PROBLEMS WHICH HAVE ARISEN UNDER THE ACT:

° SECTION 101(a) RAISES THE FIXED STATUTORY PENALTY FOR

SUBMITTING A FALSE CLAIM FROM $2,000 TO $5,000. THE $2,000 FIGURE HAS REMAINED UNCHANGED SINCE THE INITIAL ENACTMENT OF THE FALSE CLAIMS ACT IN 1863.

- SECTION 101(a) ALSO AMENDS THE ACT TO PERMIT THE UNITED STATES TO BRING AN ACTION AGAINST A MEMBER OF THE ARMED FORCES, AS WELL AS AGAINST CIVILIAN EMPLOYEES. WHEN THE ACT WAS FIRST ENACTED IN 1863, THE MILITARY WAS EXCLUDED BECAUSE THE GOVERNMENT HAD AVAILABLE MORE SEVERE MILITARY REMEDIES.
- ALSO, AS I MENTIONED EARLIER, H.R. 3334 WOULD PERMIT THE GOVERNMENT TO RECOVER ANY CONSEQUENTIAL DAMAGES IT SUFFERS FROM THE SUBMISSION OF A FALSE CLAIM.
- MY BILL ALSO PROVIDES THAT AN INDIVIDUAL WHO MAKES A MATERIAL MISREPRESENTATION TO AVOID PAYING MONEY OWED THE GOVERNMENT WOULD BE EQUALLY LIABLE UNDER THE ACT AS IF HE HAD SUBMITTED A FALSE CLAIM FOR MONEY OR PROPERTY. FOR INSTANCE, THE MANAGER OF HUD-OWNED PROPERTY MAY FALSELY UNDERSTATE INCOME AND/OR OVERSTATE EXPENSES IN ORDER TO REDUCE THE RENTAL RECEIPTS WHICH MUST BE PAID TO HUD AT THE END OF EACH MONTH. THE EXISTING FAILURE TO COVER THESE SO-CALLED "REVERSE FALSE CLAIMS" SITUATIONS, IS A SERIOUS LOOPHOLE IN THE PRESENT LAW. THE REQUIREMENT THAT THERE MUST BE A STRICT DEMAND FOR MONEY OR PROPERTY BEFORE AN ACTUAL "CLAIM" CAN EXIST UNDER THE FALSE CLAIMS ACT MUST BE BROADENED. INSTEAD, THE CONCEPT OF "CLAIM" SHOULD COVER ALL THOSE CIRCUMSTANCES WHERE THE GOVERNMENT SUFFERS A FINANCIAL LOSS, THROUGH A FRAUDULENT MISREPRESENTATION OR STATEMENT.

- SECTION 101(d) WOULD ALLOW THE FEDERAL GOVERNMENT TO SUE UNDER THE FALSE CLAIMS ACT TO PROSECUTE FRAUDS PERPETRATED ON CERTAIN GRANTEES, STATES AND OTHER RECIPIENTS OF FINANCIAL ASSISTANCE. A RECENT DECISION, UNITED STATES V. AZZARELLI CONSTRUCTION CO., 647 F.2D 757 (7TH CIR., 1981), HAS CREATED SOME CONFUSION WITH RESPECT TO WHETHER THE FEDERAL GOVERNMENT MAY RECOVER IN GRANT CASES WHERE THE FEDERAL CONTRIBUTION IS A FIXED SUM.
- SECTION 101(e) CREATES A NEW, UNIFORM REMEDY TO PERMIT THE GOVERNMENT TO SEEK PRELIMINARY INJUNCTIVE RELIEF TO PREVENT A DEFENDANT FROM TRANSFERRING OR DISSIPATING ASSETS PENDING THE COMPLETION OF FALSE CLAIMS ACT LITIGATION.
- SECTION 104 MODERNIZES THE JURISDICTION AND VENUE PROVISIONS OF THE FALSE CLAIMS ACT TO PERMIT THE GOVERNMENT TO BRING SUIT NOT ONLY IN THE DISTRICT WHERE THE DEFENDANT IS "FOUND" (THE CURRENT STANDARD), BUT ALSO WHERE A VIOLATION "OCCURRED". CURRENTLY, WHEN MULTIPLE DEFENDANTS LIVE IN DIFFERENT DISTRICTS, THE GOVERNMENT MAY BE REQUIRED TO BRING MULTIPLE SUITS, A TIME-CONSUMING PROCESS THAT IS WASTEFUL OF JUDICIAL RESOURCES.
- SECTION 103 OF H.R. 3334 ALSO MODIFIES THE STATUTE OF LIMITATIONS TO PERMIT THE GOVERNMENT TO BRING AN ACTION WITHIN SIX YEARS OF WHEN THE FALSE CLAIM IS SUBMITTED (THE CURRENT STANDARD) OR WITHIN THREE YEARS AFTER THE GOVERNMENT LEARNS OF THE VIOLATION, WHICHEVER DATE IS LATER.
- ANOTHER IMPORTANT AMENDMENT -- CONTAINED IN SECTION 105 -- IS THE GRANT OF CIVIL INVESTIGATIVE DEMAND (CID) AUTHORITY

TO THE DEPARTMENT OF JUSTICE TO AID IN THE INVESTIGATION OF FALSE CLAIMS ACT CASES. THE CID PROVISIONS ARE PATTERNED AFTER AND ANALOGOUS TO THE AUTHORITY ALREADY EXERCISED BY THE ANTITRUST DIVISION UNDER THE HART-SCOTT-RODINO ACT. 15 U.S.C. 1311-1314. IF THE ASSISTANT ATTORNEY GENERAL OF THE CIVIL DIVISION BELIEVES THAT A PERSON HAS ACCESS TO INFORMATION RELATING TO A FALSE CLAIMS ACT INVESTIGATION, HE MAY, PRIOR TO FILING A COMPLAINT, REQUIRE THE PRODUCTION OF DOCUMENTS, ANSWERS TO INTERROGATORIES AND ORAL TESTIMONY. THE STANDARDS GOVERNING SUBPOENAS AND ORDINARY CIVIL DISCOVERY WOULD APPLY SO AS TO PROTECT AGAINST THE DISCLOSURE OF PRIVILEGED INFORMATION. THE CID COULD BE ENFORCED IN DISTRICT COURT, LIKE ANY OTHER SUBPOENA. THE USE OF CID AUTHORITY IN THE ANTITRUST CONTEXT HAS BEEN UPHELD AS CONSTITUTIONAL. HYSTER COMPANY V. UNITED STATES, 338 F.2D 183 (9TH CIR., 1964); PETITION OF GOLD BOND STAMP COMPANY, 221 F. SUPP. 391 (D. MINN. 1963), AFF'D., 325 F.2D 1018 (8TH CIR., 1964).

ALLOW ME NOW TO BRIEFLY DISCUSS THE PROGRAM FRAUD CIVIL PENALTIES LEGISLATION. H.R. 3335 IS INTENDED TO PROVIDE FEDERAL DEPARTMENTS AND AGENCIES WITH AN ADMINISTRATIVE OPTION TO LITIGATION IN SMALLER FRAUD CASES -- THOSE UNDER $100,000. FRANKLY, THE PROBLEM IS THAT THE DEPARTMENT OF JUSTICE CURRENTLY DOES NOT HAVE THE RESOURCES TO PROCEED WITH MANY OF THESE SMALL FRAUD CASES AND THE CROWDED FEDERAL COURT DOCKETS ALSO MAKE SUCH CASES A LOW PRIORITY.

THE PROPOSED PROGRAM FRAUD CIVIL PENALTIES ACT WOULD ESTABLISH, FOR THE FIRST TIME, A GOVERNMENT-WIDE ADMINISTRATIVE MECHANISM TO RESOLVE SMALL CIVIL FRAUD CASES, OUTSIDE THE COURTS. THESE CLAIMS INITIALLY WOULD BE DECIDED BY HEARING EXAMINERS. THE INSPECTORS GENERAL OF THE VARIOUS DEPARTMENTS AND AGENCIES WOULD INITIATE SUCH CLAIMS WHEN THE DEPARTMENT OF JUSTICE MAKES A DETERMINATION THAT THE FEDERAL GOVERNMENT HAS A VALID CLAIM BUT THAT IT HAS NEITHER THE TIME NOR THE AVAILABLE RESOURCES TO LITIGATE. ANY FINDING OF LIABILITY IN THE ADMINISTRATIVE PROCEEDING COULD BE APPEALED TO A FEDERAL CIRCUIT COURT.

I WANT TO EMPHASIZE THAT I STRONGLY BELIEVE THAT THIS LEGISLATION MUST AFFORD THE ACCUSED INDIVIDUAL OR COMPANY WITH FULL DUE PROCESS PROTECTIONS. THEREFORE, H.R. 3335 SHOULD BE AMENDED TO MAKE IT CLEAR THAT THESE PROCEEDINGS WILL BE "ON THE RECORD" BEFORE A QUALIFIED ADMINISTRATIVE LAW JUDGE. SECONDLY, THE LEGISLATION SHOULD MAKE IT ABUNDANTLY CLEAR THAT ALL THE PROTECTIONS CONTAINED IN THE ADMINISTRATIVE PROCEDURE ACT WOULD BE APPLICABLE IN THESE HEARINGS. THIS INCLUDES THE RIGHT TO ADEQUATE, FAIR NOTICE, THE RIGHT TO BE REPRESENTED BY COUNSEL AND THE RIGHT TO CROSS-EXAMINE. SENATOR COHEN'S BILL -- S. 1134 -- MAKES IT CLEAR THAT THESE DUE PROCESS PROTECTIONS ARE AVAILABLE TO ACCUSED PERSONS. (THAT BILL HAS BEEN FAVORABLY REPORTED BY THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS.) I RECOGNIZE THAT IN THE SENATE THERE HAS BEEN SOME CONTROVERSY OVER THE SCOPE OF THE INVESTIGATORY, TESTIMONIAL SUBPOENA POWER, AND I AGAIN WOULD DEFER TO THE EXPERTISE OF THIS SUBCOMMITTEE TO RESOLVE THAT PARTICULAR PROBLEM.

In conclusion, Mr. Chairman and Members of this Subcommittee, I want to commend you for holding these hearings so promptly. There is no question that Congress must seek out appropriate legislative mechanisms to insure that the taxpayers' money is well spent and protected from fraud and waste. Should this Subcommittee proceed to mark up this legislation, it would seem logical to me to merge the two proposals contained in H.R. 3334 and H.R. 3335 into one omnibus bill. Such a clean bill should be structured as an amendment to title 31, with the necessary cross references to title 5. My staff and I stand ready to work with the Subcommittee on crafting legislation that we all can support.

Thank you, again, for this opportunity to testify.

Mr. GLICKMAN. Thank you, Ham, I appreciate your statement. I think that you touch on all the issues very intelligently and very thoroughly.

Just for your information, I intend to introduce a bill which does do basically what you suggest at the end, which combines a variety of sections into one piece of legislation. Then what we will do is we will have several bills to look at as we go forward and make a decision into the markup process.

I do think that most of the ideas that are embodied in your suggestions are in the bill that I am considering and we will address these aspects in the in the course of our markup as all of these things kind of relate. I know that tbere's other legislation—as Mr. Berman indicated, he has some legislation as well. But I think generally we are on the same track on this thing. I don't think anybody is too far off that track.

We appreciate very much your testifying today and we will work together with you.

Mr. FISH. Thank you, Mr. Chairman.

Mr. GLICKMAN. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Thank you, Mr. Fish, I appreciate the good presentation.

I would like to ask a couple of questions just for clarification of intent. With respect to the Program Fraud Civil Penalties Act, is it intended that that would include tax returns and tax cases, and would they be subject to the administrative procedure that would be provided by this legislation? And, if so, is it intended to change the statute of limitations from 5 to 6 years?

Mr. FISH. Mr. Kindness, as I said, this is the first time a Governmentwide administrative mechanism has been proposed to deal with small fraud cases. I am told that it is based on a successful similar mechanism adopted by HHS a few years ago as a cost-savings method. There is no exclusion for tax cases in the legislation.

Mr. KINDNESS. I guess what I am getting at, would it be wise to do that since there is a set of procedures?

Mr. FISH. Yes; I think this is something that should be decided by the subcommittee. There is some problem with the application of the Administrative Procedure Act with respect to tax cases. And, as you say, there already is a mechanism of this kind in place.

Mr. KINDNESS. Another question concerning the program fraud aspect——

Mr. FISH. I beg your pardon?

Mr. KINDNESS. Another question concerning the program fraud aspect would be its application to such things as small business loans and whether it would be the intent of the author to have this approach apply in all cases such as that, as well as perhaps welfare cases, food stamps, and the like, where some provisions already exist in the law? That is, is it the intent of the author to preempt existing approaches?

Mr. FISH. The recovery may be different if it is not concluded under this. I don't see where the legislation would not cover the situations that you mentioned. I would think they would be correct.

Mr. KINDNESS. I am thinking of your recommendation with respect to the policy involved, and wbether you feel that is a desira-

ble approach to have it be applicable across the board with selected exceptions, perhaps such as tax cases.

Mr. FISH. Despite the fact that you have a Governmentwide program, you are going to have the hearings conducted by the respective agencies and departments. The example you gave me of the Small Business Administration, with their expertise and knowledge of the conduct of their programs—they would be the ones conducting investigations; they would be the ones bringing the matter to the attention of the Justice Department; and they would be the ones deciding whether to pursue it.

Mr. KINDNESS. I am thinking, for example, and you and your staff may have had such experiences, where we have attempted to assist people applying for small business loans—and particularly for the startup of a business—where they really don't have information all that accurate available to provide in an application, and some of it is, let's say, quite estimated, or terribly estimated. I have a little discomfort in applying this concept to cases of tbat nature.

Mr. FISH. I can understand that, Mr. Kindness. I think what we are talking about here is trying to reach intentional fraud and gross negligence.

I am sure we could all point to cases of which we have knowledge in where fairly innocent actions were involved.

Mr. KINDNESS. Just one more question if I might. As a matter of policy, in view of tbe type of action that is proposed here in the administrative remedy area, should administrative law judges who deal with these cases then be made much more independent than they are of the agencies with which they are associated today, and should they perhaps be made article 3 judges?

Mr. FISH. I noted that in my testimony, you recall, by referring to qualified administrative law judges. I understand that there are bills before your subcommittee that respond to this issue. In other cases we have tried to give a certain degree of independence, even within a department, to the judges, and I think this would enhance the credibility of administrative law judges.

Mr. KINDNESS. But basically, administrative law judges would be adequate, in your view, for the handling of these cases?

Mr. FISH. I think so. We are not talking about a judgment that is final. We are talking about lesser amounts of money recovery and by judges who will not make the final decision.

Mr. KINDNESS. One supplementary question, then. I believe the proposal is that the appeal from these administrative law judges' decisions would be to the court of appeals?

Mr. FISH. That is correct.

Mr. KINDNESS. And not to the district court where the standard of review would be that of an administrative proceeding. And if the individual who was affected took an appeal, there would, of course, not be any hearing de novo.

Are you comfortable with that concept in applying the penalties or the extra damages?

Mr. FISH. Could I at this time, Mr. Chairman—I have neglected to say—and ask at this point at the beginning of my remarks, that I identify Mr. Alan Coffey, chief minority counsel of the House Committee on the Judiciary as being present at the witness table

with me. With your permission, I will ask him if he would comment on this.

Mr. GLICKMAN. Of course. Mr. Coffey.

Mr. COFFEY. Mr. Kindness, two things. Under the program fraud civil penalties proposals, the administrative law judge, as I understand it, or the hearing examiner, under the language of the bill, would make a recommended decision and the agency would make the final decision, as is the case under the Administrative Procedure Act.

So, the appeal would really be on the final agency decision made by the Secretary or the Commissioner, or whatever.

Second, the standard of judicial review—Mr. Fish mentioned in his prepared testimony that the APA standards ought to apply across the board. There should be an amendment to the bill to make it clear that we are talking about the substantial evidence rule—arbitrary, capricious, and not supported by substantial evidence, that is the normal standard of judicial review in the courts for this kind of a case.

Mr. KINDNESS. Thank you.

Thank you, Mr. Chairman.

Mr. GLICKMAN. Thank you.

Mr. Berman, Mr. Staggers have any questions of Mr. Fish?

Mr. BERMAN. Just one.

Mr. GLICKMAN. Yes. Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. Fish, this is more in the way of a comment than a question. The bills you have been discussing are bills you have introduced on behalf of the Justice Department, I take it?

Mr. FISH. That is correct.

Mr. BERMAN. And as such, they reflect no changes in the qui tam provisions of the existing law?

Mr. FISH. That is correct.

Mr. BERMAN. I just hope as the process moves on, that we could be part of persuading you that some changes are warranted to make those more effective—and simply to point out that over on the Senate side a compromise has been struck, which I understand doesn't bow into the administration in their efforts here, but has been struck which accept some significant changes in that legislation in the bill that was reported out of the Senate Judiciary Committee.

Mr. FISH. I understand the gentleman's interest in this. And because it wasn't part of the recommended changes by the Department of Justice, I didn't go into it at any length, but I am aware that there is considerable sentiment for changing that as well as the civil fine.

Mr. BERMAN. Thank you.

Mr. FISH. Thank you.

Mr. GLICKMAN. Mr. Staggers.

Mr. STAGGERS. Mr. Fish, I want to compliment you for your interest and hard work in this varioum. And also, it has been a joy working with you on the full committee. I do have a couple questions.

Along the lines of what Mr. Kindness was getting into with the program and how broad is going to be the coverage, also with the

knowingly—you mentioned that section 101(c) would remove the ambiguity created by the case law.

Can you explain how you do that? Are you just removing?

Mr. FISH. We remove the intent, Mr. Staggers. This is found on page 3 of H.R. 3334, line 12, which states: "No proof of intent to defraud or proof of any other element of a claim for fraud at common law is required."

Mr. STAGGERS. So, there is intent. And then later in your testimony you talked about that any claim should cover all circumstances where the Government suffers financial loss. I think that appears fairly broad.

Mr. FISH. Yes; are you referring to the reverse false claim?

Mr. STAGGERS. Am I mixing apples and peaches?

Mr. FISH. Tell me what page of my testimony you are on.

Mr. STAGGERS. Page 7.

Mr. FISH. Yes; that is the reverse false claim. That is where a material misrepresentation is made to avoid paying money owed the Government.

Mr. STAGGERS. So, that's two different——

Mr. FISH. It is the other side of the coin to making a false claim for the receipt of payment by the Government.

Mr. STAGGERS. One other question. On page 7 you talk about the $2,000 raising it to $5,000.

Mr. FISH. Yes.

Mr. STAGGERS. And the chairman's opening comments, he talked about the value of the $2,000 would be substantially more than $5,000. Is that—someone said $17,000.

Mr. FISH. Let me leave that to the Department of Justice witness, may I, because they are aware of the fact that there is sentiment for $10,000—as the chairman said, $17,000 would be a purchase power equal.

Mr. STAGGERS. So, that is not something you are locked into?

Mr. FISH. No; I am not locked into this at all. This is another matter for the determination by the subcommittee.

Mr. STAGGERS. Thank you.

Thank you, Mr. Chairman.

Mr. GLICKMAN. Thank you, Mr. Fish, appreciated your testimony.

Mr. FISH. Thank you.

Mr. GLICKMAN. Our next two House Members are not here so we will now go to the Department of Justice testimony, Mr. Richard Willard, Assistant Attorney General.

Mr. Willard, you are becoming a regular before this subcommittee.

TESTIMONY OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. WILLARD. Thank you, Mr. Chairman.

I would like to express the appreciation of the administration and the Department for Mr. Fish's introduction of our two bills, and for his testimony this morning. We really appreciate his effort and concern in this area, and his courtesy to the Department in introducing these bills.

Mr. GLICKMAN. Mr. Willard, before you begin, first of all, your entire statement will appear in the record, and we appreciate your testifying.

My staff tells me we have had some difficulty getting your statements to us in a timely fashion. I would just mention that for the record because it helps us when we have it a little bit in advance so we can review it.

Mr. WILLARD. I understand, Mr. Chairman and I would like to apologize for that. Part of the problem is the folks at OMB are pretty jammed up this week with budgets and everything else, and we didn't get OMB clearance until yesterday afternoon.

Mr. GLICKMAN. OK.

Mr. WILLARD. We have tried to and hope to continue to work closely with your staff to keep them informed as to what we are up to, and to answer questions. Again, I apologize, though, for the tardiness of getting the statement up.

Mr. GLICKMAN. Very good. Why don't you proceed?

Mr. WILLARD. Mr. Chairman, I would propose just to summarize my statement since it is being included in the record. I would like to express my appreciation to you and this subcommittee for scheduling prompt hearings on the administration's antifraud legislation. We are looking forward to seeing your bill, Mr. Chairman.

We appreciate your comments about how we all seem to be moving along and very closely on track in addressing these problems.

As the Civil Division's oversight subcommittee, I always appreciate the chance to appear here. I am looking forward to coming back shortly for our authorization hearing and discussing more generally what we do.

But one of the most important things we do in the Civil Division is our civil fraud work. Over the last couple of years, we have expanded considerably the number of lawyers we have in this area. We currently have 853 pending matters involving fraud against the Government, and we are pursuing these potential and active cases vigorously. This is one of our highest priorities.

We are proud of the record that we have compiled, but we do think that legislation would allow us to pursue these cases more effectively.

Basically, the False Claims Act amendments, contained in administration's bill, H.R. 3334, provide a series of modifications and updates to this statute. As you observed, Mr. Chairman, this is an old statute. It was last amended in 1943, so we think it may be about time for a 43-year checkup on this act to make some changes. That is basically what we have done. None of our amendments would revolutionize the act. We believe basically the False Claims Act is a solid statute that has been effective.

But as with any other law, which has been in effect for a long period of time, certain changes can make it work better. Therefore, we have prepared amendments to eliminate some of what we think are erroneous judicial interpretations that have crept in the case law over the last 43 years.

Perhaps the two most significant amendments, which have already been discussed today to some extent, are a change in the

standard of knowledge required for a violation and a clarification of the burden of proof.

The standard of knowledge has been, we think, misconstrued by some courts to require actual knowledge or specific intent to defraud the Government. We believe this is more appropriate for a criminal rather than a civil remedy and, therefore, propose to change that standard.

Now, since the submission of our bill, this standard has been the subject of extensive discussion with the Senate Judiciary and Governmental Affairs Committees. In an effort to clarify this important definition, the two committees, in consultation with the Justice Department and members of the private bar, have adopted a modified formulation which we do recommend. This is discussed in my prepared statement, on pages 7 and 8.

The revised standard that we propose would cover the situation where a defendant "knows or has reason to know" a claim is false, this state of mind is defined as having actual knowledge that the claim is false—and I am quoting now—"if he 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 of statement."

The standard really achieves two goals. One is to make it clear that something more than mere negligence is necessary for the Government to have a cause of action under this statute. No one desires to use this act against someone who makes an inadvertent or innocent mistake in submitting a claim.

On the other hand, the standard is also designed to make it clear that people who submit claims to the Government have some burden to take reasonable steps to assure themselves that those claims are accurate, and that they cannot adopt a see no evil, hear no evil, speak no evil sort of attitude about claims they are submitting for Government money.

We think that this standard is a reasonable one, and it is explained in more detail in a Justice Department letter to Senator Mathias, dated December 11, 1985, which is attached to my prepared statement.

Second, we think some courts have gone off the path by requiring the Government to carry a very heavy burden of proof in many cases—clear, unequivocal, convincing evidence—the kind of standard that is appropriate for criminal, but we do not think for civil liability. Therefore, we propose to return to the traditional preponderance of the evidence standard.

Finally, the bill contains numerous other amendments which were designed to resolve specific problems that have come up in our enforcement of this act, particularly ones created by various judicial decisions.

One change, which we have already discussed, is raising the statutory penalty from $2,000 to $5,000.

Second, our bill amends the act to permit the United States to bring an action against a member of the Armed Forces as well as civilian employees.

Third, it contains an amendment to allow us to use the act to recover consequential damages as well as direct damages.

Fourth, the proposal provides that where an individual makes a material misrepresentation to avoid paying money, the Government would be able to seek redress under the act—what Mr. Fish referred to as the "reverse false claim" situation.

Fifth, the bill would allow the Federal Government to sue under the False Claims Act to prosecute frauds perpetrated on certain grantees, States, and other recipients of Federal assistance.

Sixth, the bill creates a new uniform remedy to permit the Government to seek preliminary injunctive relief to bar defendants from dissipating or transferring their assets prior to judgment.

Seventh, the bill modernizes the jurisdiction and venue provisions of the False Claims Act.

Eighth, the bill modifies the statute of limitations to include a discovery rule, to address situations where the Government does not learn about the falsity of the claim at the time it was submitted.

Finally, the bill provides that a nolo contendere plea in a criminal prosecution, like a guilty plea, would stop a defendant from denying liability in a civil suit involving the same transaction.

Finally, the last important amendment included in the bill is the grant of a civil investigative demand or a CID authority to the Civil Division for aid in investigating these cases. Our proposal is modeled on the authority which was granted to the Antitrust Division in the Hart-Scott-Rodino Act of 1976.

The only substantive difference is that our bill would allow the Civil Division to share information it obtains through CID's with other Federal agencies for use in furtherance of their statutory responsibilities, which could include enforcement of environmental and safety laws, banking regulatory laws and suspension and debarment actions.

The next point I would like to address is the citizen suit, or qui tam, provisions, which some have proposed to amend.

The administration bill does not change the existing law. While we believe that on occasion this provision has produced information that would otherwise not be available to the Government, we are concerned that the proposed changes would create additional problems. For example, one proposal would allow the party who makes the claim to continue to participate in litigation even if the case is taken over and is being litigated by the Justice Department. This would create the problem of two parties separately trying to conduct the same litigation.

It raises the possibility of collusive litigation as well as simply a diminution of the effectiveness of pursuing the claim.

In addition, there is the problem of the parasitic lawsuit in which bounty hunters filed suits based on information already known to the Government in order to obtain money. This, in fact, was one reason for the 1943 amendments by Congress to the False Claims Act.

Finally, there are several legitimate reasons why the Department may choose not to bring a civil action on the basis of information it may have. There may be an ongoing criminal case or investigation that would be jeopardized by a civil suit. Or, again by holding off and conducting a more detailed investigation, the Govern-

ment may be able to make a better case or bring in other defendants.

Finally, the allegations may involve conduct which is not improper, and which the Department, in the exercise of its prosecutorial discretion, does not believe should be pursued.

These proposed amendments are particularly troublesome because in recent years we have seen a growing number of frivolous qui tam actions brought against public figures for political motives. Members of Congress, executive branch officials, and even the President have been sued on the basis of information which raised questions about the expenditure of Federal money.

In conclusion, the Department has strong reservations about any change in the qui tam provisions of the act. Following lengthy discussions with members of the Senate Judiciary Committee, the qui tam provisions in S. 1562 were modified in a way that permitted the Justice Department to support Judiciary Committee passage of S. 1562. However, we still object to any change in the current statute.

Finally, I would like to turn very briefly to the Program Fraud Civil Penalties Act which would establish an administrative forum to prosecute the submission of false claims and statements of the United States. I believe Mr. Fish's statement and testimony described as well as I could the reasons why this kind of administrative remedy is important. I would like to point out that one of our later witnesses today—Inspector General Kusserow—will be able to explain how the Department of HHS has used similar authority granted to it under the Civil Money Penalty Law to collect over $18 million in fraudulent overcharges under Medicare and Medicaid.

I think the Inspector General and his entire department should be commended for their efforts in this area. We propose to extend the successful HHS Program Governmentwide.

In conclusion, Mr. Chairman, I would like to again state my appreciation to the subcommittee for holding these hearings and giving very serious consideration to the problem of fraud against the Government.

Thank you, Mr. Chairman. I am now prepared to answer any questions you or the other members of the subcommittee may have.

[The statement of Mr. Willard follows:]

STATEMENT OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Mr. Chairman and Members of the Subcommittee --

It is a pleasure to appear before the Subcommittee this morning to discuss the critical issue of improving our civil anti-fraud remedies. The legislation being considered today -- a part of the President's Management Improvement Program -- symbolizes the significant priority which the Administration places on an aggressive effort against economic crime. In conjunction with the increased investigative and prosecutorial resources which we have devoted to fraud cases, this legislation will greatly enhance our anti-fraud efforts. We strongly welcome the support of Members of Congress in this effort.

Since their announcement as part of our eight-bill package by the Attorney General last September, the two Administration bills which are before the Subcommittee today have received strong and bipartisan support. Senator Cohen's Program Fraud Civil Remedies Act, S. 1134, which is similar to the Administration's administrative remedies bill, was reported out of the Governmental Affairs Committee unanimously and may be considered by the full Senate shortly. Our False Claims Act Amendments have been incorporated, with some changes, in Senator Grassley's bill, S. 1562, which was ordered reported by the Senate Judiciary Committee last December. There, too, we hope for prompt Senate action.

I.

Before turning to H.R. 3334, H.R. 3335 and other bills, Mr. Chairman, I would like to place this legislation into context by reviewing the Justice Department's role in the investigation and prosecution of false and fraudulent claims. The need for this legislation becomes apparent when seen in relation to the Justice Department's large and growing responsibilities for the prosecution of complex, economic fraud cases. It is particularly critical that we be able to delegate the smaller civil fraud cases to departments and agencies if we are to meet our other obligations.

As I noted, over the last few years we have devoted additional resources to the civil fraud enforcement effort, and, as a consequence, have developed better and more significant cases. We have 853 cases currently pending in the Civil Division and our recoveries average in the neighborhood of $1 million for each case which we deem to warrant civil action. Additional hundreds of False Claims Act cases are delegated to the United States Attorneys' offices each year.

As you know, Mr. Chairman, the United States has both civil and criminal remedies which it may pursue in prosecuting

fraud. While we should never neglect the potential for criminal sanctions, especially in particularly egregious cases, civil sanctions can be equally powerful. As a general rule, our civil fraud prosecution effort is only as good as the criminal and administrative investigations on which nearly all civil fraud cases are based. FBI reports are one major source of leads. However, in recent years, the Inspectors General have provided a growing share of our civil fraud referrals.

The various civil remedies available to us provide a substantial deterrent to the submission of false and fraudulent claims. Because of the double-damages remedy in the False Claims Act, the government can often recover substantial sums in such prosecutions. Finally, because it requires a lower burden of proof, a civil action may be a more realistic course in close cases.

A diligent and tenacious anti-fraud effort serves to reinforce public confidence in the integrity and efficiency of government programs. At a recent speech in Boston, the Attorney General reiterated the need to aggressively prosecute economic crime. He noted that fraud committed against the United States, particularly fraud in defense procurement, has and will continue to receive high priority by the Department.

We are proud of our record in the area of economic crime and are confident that the record will show more major economic crime prosecutions in recent months than for any comparable period in the last decade. The Department of Justice has an unrelenting commitment to pursuing white-collar crime, and we believe an objective and informed review of the record will demonstrate that the dedicated and able prosecutors and investigators responaible for the large number of important and innovative prosecutions of recent months deserve accolades for their determination and imagination in attacking the frequently very complex patterns of such criminal conduct. The tools we have proposed in our Anti-Fraud Enforcement Initiative will provide genuine assistance in our common efforts to root out and punish fraudulent conduct.

II

Let me turn now to a discussion of the Administration's Falae Claims Act Amendmenta, H.R. 3334 and, where appropriate, to compare it with the other bills before the subcommittee. The False Claims Act currently permits the United States to recover double damages plus $2000 for each false or fraudulent claim. Enacted in 1863 in response to cases of contractor fraud perpetrated on the Union Army during the Civil War, this statute has been indispensible in defending the federal treasury againat

unscrupulous contractors and grantees. Although the government may also pursue common-law contract remedies, the False Claims Act is a much more powerful tool in deterring and punishing fraud.

A.

Since the Act was last amended in 1943, we have identified several areas where improvements are warranted, or where we believe judicial interpretations have been incorrect. Perhaps the most significant amendments contained in H.R. 3334 are two which go to the heart of the civil enforcement provisions of the Act: the standard of knowledge required for a violation and the burden of proof. As a civil remedy designed to make the government whole for losses it has suffered, the law currently provides that the government need only prove that the defendant knowingly submitted a false claim. However, this standard has been misconstrued by some courts to require that the government prove that the defendant had actual knowledge of the fraud, and even to establish that the defendant had specific intent to submit the false claim. Eg., United States v. Mead, 326 F.2d 118 (9th Cir. 1970). This standard is inappropriate in a civil remedy, and H.R. 3334 would clarify the law to remove this ambiguity.

The bill would also establish a standard of scienter, or intent, which punishes defendants who knowingly submit false claims. The key term "knowingly" is defined to punish a defendant who:

> (1) had actual knowledge; or
> (2) had constructive knowledge in that the defendant had reason to know that the claim or statement was false or fictitious;

This standard was crafted to permit the government to recover for frauds where the responsible officers of a corporation deliberately attempt to insulate themselves from knowledge of false claims being submitted by lower-level subordinates. This ostrich-like conduct may occur in large corporations, and the United States can face insurmountable difficulties in attempting to establish that responsible corporate officers had actual knowledge of the fraud. This standard would not punish mistakes or incorrect claims submitted through mere negligence, but it does recognize that those doing business with the government have an obligation to ensure that the claims which they submit are accurate.

We believe that this standard reflects well-developed scienter concepts which would fully protect honest

contractors. The False Claims Act has been in place since 1863, and we are unaware of any case under the Act in which a contractor has been punished for an honest dispute with the government. In particular, we would strongly oppose any effort to engraft upon the existing scienter standard another requirement that a knowingly false claim must be accompanied by an intent to defraud. In our experience, intent requirements in the civil area lead to confusion and impose an overly-stringent burden upon the government. The False Claims Act is not generally interpreted to require a showing of intent, see, e.g., United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973), and we do not believe that such an intent requirement should be imposed here.

Since the submission of our bill, the standard of constructive knowledge has been the subject of extensive discussion and negotiation by the Senate Judiciary and Governmental Affairs Committees. In an effort to clarify this important definition, the two committees, in consultation with the Justice Department and members of the private bar, have adopted a modified formulation which we recommend to this House. This revised standard provides that a defendant "knows or has reason to know" that a claim is false if he had actual knowledge that a claim is false or if he:

> ...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.

This standard achieves two goals. First, it makes clear that something more than mere negligence is required for a finding of liability. Second, it reaffirms the widely shared belief that anyone submitting a claim to the government has a duty -- which will vary depending on the nature of the claim and the sophistication of the applicant -- to make such reasonable and prudent inquiry as is necessary to be reasonably certain that he is, in fact, entitled to the money sought. This concept of an inherent duty to make reasonable inquiry before submitting a claim to the government is reflected in the better reasoned caselaw. See, eg., United States v. Cooperative Grain Supply Co., 472 F.2d 47 (8th Cir. 1973). A more detailed explanation of the Department's endorsement of this standard is set forth in the attached December 11, 1985 letter to Senator Charles McC.Mathias.

B.

The burden of proof in civil false claims cases is another area where legislative clarification is necessary to resolve ambiguities which have developed in the caselaw. Some courts have required that the United States prove a violation by clear

and convincing, or even clear, unequivocal and convincing, evidence, United States v. Ueber, 299 F.2d 310 (6th Cir. 1962), which we have found to be the functional equivalent of a criminal standard. Because the False Claims Act is basically a civil, remedial statute, the traditional "preponderance of the evidence" standard of proof is appropriate.

With respect to both of these points, it is important to keep in mind that the civil, double-damage remedy of the False Claims Act is remedial, designed to permit the government to recover money improperly paid out, and not penal or punitive. This was long ago recognized by the Supreme Court which held that:

> ...the chief purpose of the statutes here was 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.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 551-2 (1943). Single damages alone would not reimburse the government for its loss of the use of funds or costs of investigation and prosecution, nor would they serve the obvious deterrent purpose envisioned by Congress.

However, this crucial principle -- that a civil False Claims

Act prosecution is remedial and not punitive -- may be jeopardized by proposals to increase greatly the penalties which may be recovered. We have found that where judges perceive the penalties which may be assessed under the Act to be grossly disproportionate to the wrongdoing, they will rule against the government outright or subtly engraft criminal standards and procedural hurdles onto the civil portions of the Act. Consequently, we are very concerned about the proposals contained in some bills, notably H.R. 3317 and H.R. 3753, as well as S. 1562, to move to treble damages and a $10,000 forfeiture. We believe that double damages plus a $5,000-per-claim penalty is more appropriate and consistent with the fundamental purpose of the statute.

C.

The Administration's bill contains numerous other amendments which were designed to resolve specific problems which have arisen under the Act:

- First, as noted above, the Administration's bill raises the fixed statutory penalty for submitting a false claim from $2,000 to $5,000. The $2,000 figure has remained unchanged since the initial enactment of the False Claims Act in 1863.

° Second, our bill amends the Act to permit the United States to bring an action against a member of the armed forces, as well as against civilian employees. When the Act was first enacted in 1863, the military was excluded because the government had available more severe military remedies. Since then, however, experience has shown that the False Claims Act should be applied to servicemen who defraud the government -- just as it is to civilian employees.

° Third, the Administration's bill contains an amendment to the False Claims Act to permit the government to recover double the amount of any consequential damages it suffers from the submission of a false claim. For instance, where a contractor has sold the government defective ball bearings for use in military aircraft, the government could recover not only the cost of new ball bearings, but the much greater cost of replacing the defective ball bearings. See, United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972).

° Fourth, our proposal provides that an individual who makes a material misrepresentation to avoid paying money owed the government would be equally liable under the Act as

if he had submitted a false claim. For instance, the owner of a HUD-insured property or his agent may falsely understate income and overstate expenses in order to increase the Section 8 subsidy which must be paid by HUD at the end of each month. This amendment would eliminate current ambiguity in the caselaw by clearly authorizing the extension of liability to such misrepresentations.

° Fifth, the Administration's bill would allow the federal government to sue under the False Claims Act to prosecute frauds perpetrated on certain grantees, states and other recipients of financial assistance. A recent decision, United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981), has created some confusion with respect to whether the federal government may recover in grant cases where the federal contribution is a fixed sum. There is no dispute that the federal government may bring a False Claims Act case where its grant obligation is open-ended, since, in that case, every dollar lost to fraud will require an additional federal contribution. The amendment would make clear that the United States may bring an action even under grant programs involving a fixed sum.

° Sixth, our bill creates a new, uniform remedy to permit the government to seek preliminary injunctive relief to bar

a defendant from transferring or dissipating assets pending the completion of False Claims Act litigation. Currently, the government's prejudgment attachment remedies are governed by state law. A uniform federal standard would significantly enhance the government's remedies and avoid inconsistent results.

° Seventh, the Administration's bill modernizes the jurisdiction and venue provisions of the False Claims Act to permit the government to bring suit not only in the district where the defendant is "found," (the current standard) but also where a violation "occurred". Currently, when multiple defendants live in different districts, the government may be required to bring multiple suits, a time-consuming process that is wasteful of judicial resources.

° Eighth, the bill modifies the statute of limitations to permit the government to bring an action within six years of when the false claim is submitted (the current standard) or within three years of when the government learned of a violation, whichever date is later. Because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure that the government's rights are not lost through a wrongdoer's successful deception.

Finally, our bill provides that a nolo contendere plea in a criminal prosecution, like a guilty plea, would estop a defendant from denying liability in a civil suit involving the same transaction. Defendants who cheat the government by making false claims, and then enter a nolo plea, should not be able to relitigate the question for civil purposes.

D.

Another important amendment contained in the Administration's bill is the grant of Civil Investigative Demand, or CID, authority to the Civil Division to aid in the investigation of False Claims Act cases. As in all complex, white-collar fraud cases, investigative tools are critical to the success of a case. We currently rely in large part on FBI reports and matters referred for prosecution by the various Inspectors General. Our investigative capacity would be greatly aided if our attorneys could compel the production of documents or take depositions prior to filing suit. CID authority would permit us to focus our resources better as well as to winnow out those cases which have little merit.

The CID authority contained in section 105 of H.R. 3334 is nearly identical to that available to the Antitrust Division

under the Hart-Scott-Rodino Act of 1976, 15 U.S.C. 1311-1314. The statute would work as follows: where the Assistant Attorney General of the Civil Division believes that a person has access to information relating to a False Claims Act investigation, he may, prior to filing a complaint, require the production of documents, answers to interrogatories and oral testimony. The CID could, if necessary, be enforced in district court, like any other subpoena. The standards governing subpoenas and ordinary civil discovery would apply to protect against disclosure of privileged information.

In the only substantive difference from the Antitrust Division's authority, the Administration bill would permit the Civil Division to share CID information with any other federal agency for use in furtherance of that agency's statutory responsibilities. These might include enforcement of environmental and safety laws, banking regulatory laws and suspension and debarment actions.

In an effort to place some limited safeguards on the sharing of such information with other agencies of the government, the Senate Judiciary Committee amended the bill to require the Justice Department, as custodian of the CID information, to seek an order from a United States District Court before information could be shared with another agency. Such an order would only

be granted if the Department could show that the agency seeking the information had a "substantial need" for the information in the fulfillment of its statutory responsibilities. Presumedly, the Department could move for such an order on an ex parte basis.

This requirement would be burdensome to both the Department and the courts, without, in our view, adding any meaningful protection for those who submit information pursuant to a CID. Instead, we would suggest that where an agency seeks CID information from the Justice Department, it be required to file a written statement with the Department and that the Assistant Attorney General be required to make a determination that sharing the information would substantially aid the agency in carrying out its statutory responsibilities.

III

The next point I will address, Mr. Chairman, is that of the citizen suit, or qui tam,[1] provisions of H.R. 3317 -- identical to those contained in Senator Grassley's bill, S. 1562, as introduced. The False Claims Act, since its inception,

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[1] Qui tam is from the Latin, meaning "who as well". Thus, when an informer files such an action, it is said that he brings the action "for the state as well as for himself," because he may be personally awarded a portion of the judgment granted to the government.

has contained provisions permitting informers to come forward with evidence of fraud on the government, file suit in their own name, and keep a share of any recovery. These provisions were adopted at a time when the government had practically no investigative resources -- unlike today, when the FBI and the Inspectors General generate most of our cases. Nonetheless, the qui tam statute occasionally motivates an informer to come forward with a meritorious suit, which the Department can then prosecute in the name of the United States. Hence, we have not proposed any changes to the qui tam provisions of the Act in our bill. H.R. 3317, however, does propose a number of changes in the qui tam provisions of the Act, and we have serious objections to those proposed changes.

Our first concern is with that portion of the bill which provides that even after the Justice Department has stepped in to litigate a qui tam action on behalf of the United States, "the person bringing the action shall have a right to continue in the action as a full party on the person's own behalf." Since both the United States and the relator (the person who brought the action) are pursuing the same claim, this presents a serious problem, i.e., who will control the litigation?[2] It

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[2] We note that under the Federal Rules of Civil Procedure, unrelated parties may intervene in a lawsuit, (thus giving rise

(CONTINUED)

also creates the potential for collusive litigation, since an associate of the defendant could bring a qui tam suit and then remain in the action to frustrate effective prosecution. If enacted, this provision could create enormous difficulties and seriously hamper our civil fraud enforcement efforts.

If Congress wants to permit the relator to remain involved in the action in order to protect his stake, this could be done in another manner which does not raise these problems. We would suggest that the relator be kept abreast of developments in the case by receiving copies of all court filings and that he be permitted to file with the Court his objections or views on any proposed settlement by the government. This is analogous to a provision in the current statute which only permits a qui tam action to be dismissed if the Court and the Attorney General give written consent and their reasons for consenting. 31 U.S.C. § 3730(b)(1). Such a solution would provide an appropriate role for the relator without interfering with the Department's prosecution of the case.

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[2] (FOOTNOTE CONTINUED)

to litigation with several "parallel" plaintiffs) but each such "intervenor" represents a separate, distinct interest. We are aware of no precedent in which two parties represent the identical interest in the same suit.

Another serious problem is posed by the provision permitting a relator to bring an action based on evidence available to the government, and to proceed with the action even where the Justice Department chooses not to enter the suit. The Act currently forbids such "parasitic" actions by "bounty hunters" and, in fact, was amended by Congress in 1943 to address just this problem. In the early 1940's, a rash of suits were brought which merely restated the allegations in the government's criminal indictment in an effort to make a windfall. Such practices were criticized by Justice Jackson in U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 557-558 (1943) and moved the Attorney General to write to Congress proposing the deletion of the entire qui tam section. Congress responded by enacting the current prohibition on parasitic actions, codified at 31 U.S.C. § 3730(b)(4). See, United States v. Pittman, 151 F.2d 851, 853-54 (5th Cir. 1945) for a summary of the legislative history of the 1943 amendments.

H.R. 3317 would amend the Act by permitting the relator to proceed with an action based upon information known to the United States (including information disclosed in ongoing criminal or administrative proceedings as well as allegations arising out of congressional investigations and public information disseminated by any news media) if the Justice Department had not initiated any action within six months. The

language of the amendment would seem to permit the government to move for an extension of time in which to decide whether to take over an action upon a showing of good cause, but this provision would be difficult to apply in practice. In effect, the civil frauds section of the Justice Department would have to be aware of all allegations of fraud when they became public knowledge in order to protect the interests of the United States in such litigation.

There are several legitimate reasons why the Department might choose not to bring a civil action on the basis of information in its possession. There may be an ongoing criminal case or investigation which would be jeopardized by a civil suit. Or, by holding off and conducting a more detailed investigation, the government may be able to make a better case or bring in other defendants. Finally, the allegations may involve conduct which is not clearly improper, and hence, which the Department, in the exercise of its prosecutorial discretion, does not believe should be prosecuted.

It is this latter problem which is most troublesome. In recent years, we have seen a growing number of frivolous qui tam actions brought against public figures for political motives. Members of Congress, Executive Branch officials and even the President have been sued on the basis of publicly available

information which raises questions about the expenditure of federal money.

Most such cases have been dismissed on the basis of the current statute which prohibits the courts from exercising jurisdiction over any action which is "based on evidence or information the Government had when the action was brought". 31 U.S.C. 3730. However, if this section is deleted from the Act, (as it would be under H.R. 3317) we can expect a significant increase in frivolous, politically-motivated lawsuits. There is no evidence that the Justice Department is neglecting meritorious False Claims Act suits. Accordingly, we believe that such an open-ended expansion of private standing is entirely unjustified.

H.R. 3317 would also raise the relator's share in any recovery from the current maximum of 10% where the government takes the case and 25% where it does not, to 20% and 30% respectively. Obviously, any such recovery comes out of the federal treasury, and hence we strongly oppose any change. The bill also creates a new class of recovery for relators who can be said to have "substantially contributed to the prosecution of the action". Such persons would receive "at least 20% of the proceeds of the action". As an initial matter, we note that this provision, while providing an additional award to the more

diligent relator, will inevitably result in litigation over whether a relator's actions "substantially contributed" to the government's success. We believe the prospects for such collateral litigation (not unlike that we see in the attorneys fees area) is not a productive use of resources, and believe that any additional marginal incentive such a "substantially contributed" category would provide is outweighed by the confusion and litigation it would generate. In any case, if the "substantially contributed" category is retained, there should be an upward limit on the amount of the relator's recovery, just as there is for the relator who prosecutes the entire action himself.

In conclusion, the Department has strong reservations about any change in the qui tam provisions of the Act. Following lengthy discussions with members of the Senate Judiciary Committee, the qui tam provisions in S. 1562 were modified in a way that permitted the Justice Department to support Judiciary Committee passage of S. 1562. However, we still object to any change in the current statute. The qui tam provisions are particularly sensitive in that they grant automatic legal standing for any individual to bring a fraud action on behalf of the United States. This proviaion can be, and has been, abused to bring frivolous and politically motivated lawauits.

Finally, let me turn to the Program Fraud Civil Penalties Act. The Administration's bill, H.R. 3335, like H.R. 2264, would establish an administrative forum to prosecute the submission of false claims and false statements to the United States.

My comments on the legislation will be directed primarily to H.R. 3335, the Administration's bill. Congressman Heftel's bill, H.R. 2264, is nearly identical to S. 1566, Senator Roth's bill of the 98th Congress. While H.R. 2264 accomplishes much the same thing as H.R. 3335, we suggest that the Committee work from H.R. 3335 in its deliberations.

We believe that a mechanism for resolution of many fraud matters through administrative proceedings is long overdue. Many of the government's false claims and false statement cases involve relatively small amounts of money compared to matters normally subject to litigation. In these cases, recourse in the federal courts may be economically unfeasible because both the actual dollar loss to the government and the potential recovery in a civil suit may be exceeded by the government's cost of litigation. Moreover, the large volume of such small fraud cases which could be brought would impose an unnecessary burden on the dockets of the federal courts.

Several cases illustrate the types of matters for which these administrative proceedings are best suited.

> -- We brought a False Claims Act suit against several real estate brokers and a mortgage company for fraudulently inducing the Veterans Administration to guarantee three mortgage loans. The VA sustained damages of $13,100 on the three loans. While we ultimately recovered well in excess of that amount under the False Claims Act, the congested nature of the district court's docket meant that the litigation took over six years to conclude.
>
> -- Numerous matters are referred to the Department involving, for example, FHA-insured home improvement loans obtained through fraud, social security or CHAMPUS benefits obtained through misrepresentations regarding eligibility, or fraudulent overcharges on small contracts in which traditional civil and criminal litigation are simply impracticable because of the size of the government's claims and the large number of such cases.

Administrative resolution of such small cases will, in our view, address this problem by establishing an expeditious and inexpensive method of resolving them. At the same time, administrative resolution of smaller cases would permit a more efficient allocation of the resources of the Department of Justice, thus enhancing the Administration's efforts to control program fraud.

Fortunately, legislative efforts in this area can be guided by the experience of the Department of Health and Human Services under the Civil Money Penalty Law, 42 U.S.C. 1320a-7a, a similar administrative money penalty statute which has been in effect for several years. Under that law, HHS has recovered over $18 million in fraudulent overcharges under the medicare and medicaid programs. Inspector General Kusserow and the entire Department are to be commended for their efforts. HHS's successful experience testifies to the great savings which could be achieved if this authority were extended government-wide.

As with the False Claims Act Amendments, a particularly important issue posed by this legislation is the element of scienter necessary to prove a violation. Obviously, this bill should include the same standard as would apply under the False Claims Act. Therefore, we recommend that the Committee adopt the compromise, developed by the Senate, discussed in Part II of my testimony.

We believe that the administrative proceedings outlined in section 803 of H.R. 3335 preserve full due process rights, including the rights to notice, cross examination, representation by counsel and determination by an impartial hearing officer, and thus will withstand constitutional challenge. The use of a hearing examiner, or Administrative Law

Judge, to compile a factual record and make an initial determination is a common, legally unobjectionable method to administer federal programs. Critics of the use of hearing examiners can point to no legal precedent questioning this administrative hearing mechanism, and, in fact, it has consistently been upheld against court challenge. See, Butz v. Economou, 438 U.S. 478, 513-4 (1978); NLRB v. Permanent Label Corp., 687 F.2d 512, 527, (Aldisert, C.J., concurring).

Criticism of the hearing examiner's supposed lack of independence conveniently ignores these well established precedents as well as several protections built into H.R. 3335. While the hearing examiner would be an employee of the agency, section 803(f)(2)(C) of the bill assures the hearing examiner an appropriate level of independence by providing that he shall not be subject to the supervision of the investigating or reviewing official, and could not have secret communications with such officials. The bill thus incorporates the generally accepted protections required by the Administrative Procedure Act. And, of course, any adjudication of liability under this bill would be subject to independent review in the Court of Appeals by an Article III judge.

In light of the Supreme Court's holding in Atlas Roofing Co. v. Occupational Safety and Health Administration, 430

U.S. 442 (1977), we do not believe that these proceedings would violate the Seventh Amendment's guarantee of trial by jury. In Atlas Roofing, the Court rejected a Seventh Amendment challenge to the administrative penalty provisions of the Occupational Safety and Health Act of 1970 because it concluded that Congress had created new rights which did not exist at common law when the Amendment was adopted. The Court held that:

> when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law".

430 U.S. at 455. The rights created here are not co-extensive with any common law cause of action known when the Seventh Amendment was adopted. In addition, we believe that this statute may, like the False Claims Act, be characterized as a "remedial" statute imposing a "civil sanction". See United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). Given these considerations, the administrative proceedings do not deny unconstitutionally trial by jury.

With respect to this last point, I note that some have suggested that because this bill and our False Claims Act Amendments provide for double damages, they can no longer be viewed as "remedial" and, instead, must be classified as

"punitive", presumedly requiring a criminal standard of intent and burden of proof. However, this analysis of the bills is overly-simplistic and does not comport with traditional practice and applicable precedent, including several decisions of the Supreme Court.

Double damages serve an appropriate remedial purpose in several respects. Because of the deceptive and concealed nature of fraud, the government will rarely be able to prove the entirety of its loss. Thus, by establishing a form of "liquidated damages," this provision insures that the government will be made whole. Second, the double-damages provision partially compensates the government for its costs of investigation and prosecution. Finally, this provision has a socially useful deterrent effect.

In 1943, the Supreme Court was called upon to decide just this issue relative to a nearly identical provision in the False Claims Act. The Court unequivocally ruled that the double damage provision of thet Act was a permissible statutory enactment, civil and remedial in nature end consistent with other statutes, such as the treble damage provisions of the civil entitrust lews. Writing for the Court, Justice Bleck stated:

> We cannot say that the remedy now before us requiring payment of a lump sum and double

> damages will do more than afford the government complete indemnity for the injuries done it. *** Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from the frauds which may be practiced upon him.

U.S. ex. rel. Marcus v. Hess, 317 U.S. 537, 549-50 (1943). See also, Day v. Woodworth, 54 U.S. (13 Howard) 361, 371 (18561); Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 523 (1885).

Finally, questions were raised in the last Congress as to the effect which a finding of liability under this Act would have on a subsequent administrative proceeding to suspend or debar a contractor. In the past, such an amendment has been proposed with the stated objective of preventing the use of a civil penalty judgment in debarment or suspension proceedings. We believe that amending the bill to deny any evidentiary value to a civil penalty judgment in any administrative, civil or criminal proceeding is wholly inappropriate. The civil penalty proceedings envisioned by the bill will afford a full measure of due process protections, as well as the opportunity for judicial review of the proceedings. In view of this consideration, we believe that there is no justification for disturbing the normal rules of res judicata and collateral estoppel, and requiring another tribunal to go through the costly exercise of retrying

the same facts that have already been established under the same standard of proof in a civil penalty proceeding.

In addition, we believe that it is important to note that a contractor would always be free to argue the question of remedy in a suspension or debarment proceeding. According res judicate or collateral estoppel effect to the facts underlying a civil penalty judgment in a later suspension or debarment proceeding would not necessarily establish that suspension or debarment was the eppropriate remedy. A contractor would still have the opportunity to argue that he should not be suspended or debarred and that some lesser sanction -- or no sanction at all -- ehould be imposed.

Finally, the Department is strongly opposed to provisions, such as section 803(d)(2) of H.R. 2264, which permits Inspectors General and other investigatory officials to use compulsory process to obtain testimonial evidence as part of an investigation. Under the existing provisions of the Inspector General Act of 1978, Inspectors General are authorized to compel production of documentary evidence. Neither the Inspectors General, nor the Federal Bureau of Investigation -- the government's principal law enforcement investigatory agency -- currently issue investigative subpoenas to compel testimony. The potential for the unlimited exercise of testimonial subpoena

powers during investigations might raise due process issues as well as interfere with the criminal investigation process. In addition, there would be no central coordinating authority so as to ensure consistency of standards and implementation. In this manner, section 803(d)(2) could adversely affect coordinated law enforcement. Consequently, the Administration strongly urges the Committee to reject any proposal to grant the Inspectors General the power to compel testimony when investigating fraud allegations.

That concludes my prepared statement, and I would be happy to answer any questions.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 11 1985

Honorable Charles McC. Mathias
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

This is in response to your letter to Richard Willard of November 25, 1985 regarding the meaning and consistency of the various anti-fraud legislative proposals currently pending in the Senate. The two most significant bills -- Senator Grassley's False Claims Act Amendments (S. 1562) and Senator Cohen's Civil Fraud Remedies Act (S. 1134) -- are substantially similar to Justice Department proposals and are strongly supported by the Administration. We feel that it is particularly important that S. 1562 be acted upon by the Judiciary Committee in this session of the Congress so as to ensure that there is adequate time to complete congressional action next year.

As you know, the False Claims Act is the basic statute governing fraud against the United States. In the 122 years of its existence, we have identified several improvements which would enhance the ability of the United States to prosecute fraud. In addition, conflicting court decisions in the various circuits have created some confusion as to the required burden of proof and standard of knowledge, among other matters. Consequently, the False Claims Act Amendments proposed by the Department -- and largely incorporated in S. 1562 -- would resolve these inconsistencies and anomalies while also reinforcing our civil anti-fraud efforts.

However, we have also recognized that it is often not cost-effective to prosecute relatively small fraud cases in the federal courts. Consequently, we have supported Senator Cohen's Civil Fraud Remedies Act which would create a "mini-False Claims Act" authorizing an administrative remedy for frauds involving

under $100,000. This bill restates the relevant provisions of the False Claims Act while also creating an elaborate administrative mechanism for the enforcsment of such small fraud cases.

Because these two bills have besn considered by separate committees and because they were originally conceived independsntly, their terms are not always identical. The Department of Justice agrees that the bills should be in harmony in their essential features. To that end, we have encouraged the staffs of the two committees to consult in order to bring their bills into conformity. As there seems to be general agreement that this should be done, we are confident that the bills will be consistent by the end of the legislative process.

The seven different formulations of constructive knowledge attached to your letter are, in our view, fairly similar. They basically reflect various stages of the congressional debate and consideration of this complex issue, particularly in the progress of S. 1134 through the Governmental Affairs Committee. The fundamental issue in designing a standard of knowledge is to reach not only defendants with actual or constructive knowledge of a fraudulent claim, but also defendants who insulate themselves from that knowledge which a prudent person should have before submitting a claim upon the Government. It is this problem of defining constructive knowledge, or of dealing with the "ostrich" -- the individual who ignores or fails to inquire about readily discoverable facts which would alert him that fraudulent claims are being submitted -- that has led to the various formulations of the standard of knowledge.

At the start of the debate, there was a broad spectrum of possible standards of culpability, as is reflected in the seven different formulations attached to your letter: an intentional scheme to cheat, only actual knowledge of falsity, gross negligence, mere negligence, or a per se liability for any misstatement. After much study and debate, a strong consensus has evolved that it is appropriate to attach special civil remedies to those who have actual knowledge of falsity and those who have constructive knowledge of it. Even with this agreement in principle, an sxtraordinary amount of time has been devoted to crafting a statutory standard designed to assure the skeptical both that mere negligence could not be punished by an ovsrzealous agency and that artful defense counsel could not urge that the statute actually required some form of intent as an esssntial ingrsdient of proof.

Consideration of this issue has not always been furthered by hypotheticals, which participants in the debate sometimes have

used to demonstrate the "horrors" that might result under a proposed formulation. It is probably safe to say that black and white cases are not helpful in assessing shades of gray. Under any standard, the facts are critical; frequently the outcome is determined based on colorations, nuances of circumstantial evidence, or cumulative impreesions that sre difficult to articulate, let alone anticipate by legislative craftsmanship.

Eventually, these various hypotheticals focused more and more on the "busy executive syndrome," i.e., on the personal liability of a high level official in a large corporation who merely signs a claim or certification prepared by subordinates, and on the hapless bookkeeper, who simply prepares a claim for submission to the government based upon the records or instructions of others. In fact, the law has managed to assess and discern the differences between the cheat and the blameless, even under a less precise statutory standard currently contained in the False Claims Act. See, e.g., United States v. Aerodex, Inc., 469 F.2d 1001 (5th Cir. 1972) (corporate division head held liable, chief executive officer not liable); United States v. Priola, 272 F.2d 589 (5th Cir. 1959) (partner, having clerical duties, found not personally liable). The Committee's formulation in S. 1134 does not distort or bias that very fundamental assessment; it does help to refine it.

The Department's initial proposals -- both in the Program Fraud bill and the False Claims Act Amendments -- simply used the "knows or has reason to know" formula. The accompanying section by section analysis explained that this would reach someone who acted in "reckless disregard of the truth in submitting the false claim" -- a formulation which we believed would cover someone who insulated themselves by design from knowledge about the truth or falsity of a claim.

Our reference to "reckless disregard" reflected the shared assumption of the Department and the sponsors of the bills that mistake, inadvertence or mere negligence in the submission of a false claim would not be actionable under either bill. In other words, in either of these two civil proceedings, the Government would have to prove something more than mere negligence, but less than specific intent to defraud. We believe that "reckless disregard" (or "gross negligence," a phrase which we believe defines the same standard of conduct) accurately captures the proper level of knowledge. There are cases, however, in which reckless disregard is construed as requiring an intentional, deliberate, or willful act -- a considerable escalation of the scienter requirement. To avoid the risk of such a misconstruction, we subsequently urged the adoption of a gross negligence standard which appears to be less susceptible to this

miainterpretation. Generally, however, we found that each is used to define the other; i.e., reckless disregard often is defined as gross negligence and gross negligence frequently is said to require a reckless disregard. These terms, and "blind or total indifference," or "carelessness in the extreme," and the like all serve to focus, without any of them precisely delineating, the assessment required of the fact-finder.

Implicit in all these formulations however is our strongly-held belief that anyone submitting a claim to the Government has some duty -- which will vary depending on the nature of the claim and the sophistication of the applicant -- to make such reasonable and prudent inquiry as is necessary to be reasonably certain that he is in fact entitled to the money sought.

This concept of an affirmative responsibility or "duty" has been recognized in much of the caselaw interpreting the False Claims Act. In United States v. Cooperative Grain and Supply Co., 476 F.2d 47, 55 (8th Cir. 1973), the court held that "[t]he applicant for public funds has a duty to read the regulations or otherwise be informed of the basic requirements of eligibility." In United States v. Klein, Civ. No. 1035-51 (D. N.J. Feb. 2, 1953), a case involving a false claim arising out of the sale of substandard milk to the Government, the court noted:

> At no time did [the defendant] take it upon himself to make any investigation as to whether the milk that he was receiving was of the quality which he solemnly promised the United States Government under his contract it would receive. If he did not know that what he was delivering was not the kind of milk that was in the contract, it was the grossest kind of carelessness and negligence upon his part, for which he must assume the responsibility of knowledge.

It should be stressed that the duty of inquiry recognized in S. 1134 is expressly qualified to avoid oppressive requirements of verification. The phrase, "reasonable and prudent . . . under the circumstances," is intended by the drafters to establish a "light" obligation to inquire rather than to create a heavy duty to reverify.

Thus, the final formulation of the knowledge standard contained in S. 1134 as ordered reported by the Senate Governmental Affairs Committee embodies all of these concepts. Under it, a defendant "knows or has reason to know" that a claim was false if he had actual knowledge of its falsity or if he:

> ". . . 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.

This definition embodies the two fundamental concepts which any definition of constructive knowledge should contain: the Government must prove more than mere negligence and the defendant must make some limited inquiry to determine whether his claim is accurate.

One criticism lodged against this standard is based upon the inclusion of the phrase "reasonable and prudent," a term which is often associated with a simple negligence standard, the fear being that the inclusion of this phrase will result in something less than gross negligence. In fact, an assessment of gross negligence requires that the fact-finder first consider the simple negligence form of conduct against which the alleged gross deviation is to be measured. Thus, we do not view this formulation as contradictory; rather, it protects the potential defendant because it makes clear that the duty of inquiry is a limited one.

Nonetheless, if this continues to be a subject of concern, an alternative could be constructed which would provide, ". . . acts in gross negligence of the duty . . . to ascertain the true and accurate basis of the claim or statement". It could be made clear in the committee report that this is a reference to the inherent duty of a citizen to turn square corners when dealing with the government, and citing to Cooperative Grain and the other cases. Such a change would not appreciably affect the level of culpability, but would remove the initial (and false) impression that the formulation reaches conduct which does not rise to the level of gross negligenca because of the reference to reasonable and prudent inquiry, i.e., the apparent facial contradiction would be eliminated.

In conclusion, we believe that this last formulation of the constructive knowledge -- that contained in S. 1134 as ordered reported by the Senate Governmental Affairs Committee -- is the most precise and therefore should be adopted by the sponsors of both bills. We would be pleased to respond further should you have additional questions or wish to discuss these issues further.

The Office of Management and Budget advises us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Phillip D. Brady

PHILLIP D. BRADY
Acting Assistant Attorney General

cc: Senator Thurmond
Senator Biden
Senator Grassley
Senator Metzenbaum
Senator Roth
Senator Eagleton
Senator Cohen
Senator Levin

Mr. GLICKMAN. Thank you, Mr. Willard.

Before I get into the specifics of your statement, in Mr. Hertel's statement which he has submitted here and will be included in the record, he provides a survey of the Department of Defense statistics on efforts to curb waste, fraud, and abuse, and it is in the Secretary's annual report to Congress for fiscal 1986, and there was a chart in which it lists investigative cases: cases closed, cases referred for prosecutive or administrative action, convictions, and then fines. It just lists them all for that year.

I might give you just a chance to look at it quickly.

Now, my question is, is that when we list for the three fiscal years cases referred for prosecutive or administrative action there is—the numbers have shown, I guess, kind of a slight decline from fiscal 1982, 1983, and 1984; the number of convictions is about 10 percent of the cases referred. But the bottom part of Mr. Hertel's statement says: What is not immediately apparent from the chart is the dismal success rate for prosecutions: 5.7 percent for 1982; 8.2 percent for 1983, and 9.8 percent for 1984. Equally striking is the comparison of the average recovery per conviction and the average recovery per case referred for action.

He goes on on his next page to talk about the average recovery per conviction, and the average recovery per case. Now, I guess I would ask you what does this all mean? I wonder if you could shed any light? I realize you are looking at it for the first time, but what does it all mean? Is this one of the reasons why you have come here asking for beefing up the civil fraud provisions?

Mr. WILLARD. Mr. Chairman, I really can't comment on the statistics, having just seen them for the first time.

But it is certainly true that there is a need for us, at the Civil Division of the Justice Department and the U.S. attorney's offices to target our resources on the most important cases. We have a limited number of resources as does everyone in the Government today. We endeavor to target those resources as best we can on the cases that involve the largest amount of money, the most serious problems.

As a result, there are some smaller cases that simply can't be pursued profitably because if we go after the small cases it means leaving the bigger case unworked. That is one of the reasons we have proposed this administrative remedy, to allow agencies like the Department of Defense, through their own administrative processes, to take care of the smaller cases and leave us able to go after the really big ones.

Mr. GLICKMAN. What is the criteria by which you warrant that a case proceed now under the False Claims Act?

Mr. WILLARD. There is no rigid requirement. Basically, cases involving less than $200,000 are routinely referred to U.S. attorneys' offices for review and action. Many of those are brought by the U.S. attorneys' offices for those smaller amounts.

We consult with the client agencies and ask for their views before we decide whether to close a case or not. But as a practical matter, there are many smaller cases that we just cannot pursue because of limited resources or because we would spend more money pursuing the case than we could hope to get back.

Mr. GLICKMAN. So they are just dropped then, basically?

Mr. WILLARD. Yes, they have to be dropped.

But we don't have a rigid guideline. We do bring some small cases, especially where the client agency feels that it would serve an important deterrent purpose to pursue the smaller case.

Mr. GLICKMAN. In your statement you state that the penalty of $10,000 and treble damages would make the court construe the statute as penal rather than remedial in nature because the penalty would far outweigh the prohibited conduct.

I wanted to go back—the 1863 numbers were $2,000 and if you adjust that for inflation it is 8½ times that amount right now. How do you justify your categorization of a $10,000 civil fine as so high as to make the statute appear penal rather than remedial?

Mr. WILLARD. Mr. Chairman, I would like to clarify my statement; we are concerned what I would say that such a penalty might make the courts find that the statute is penal. This is obviously a line-drawing exercise in where you set the amount. Our concern is that if we go too far we run the risk of a court finding that it is penal. In prior decisions, the courts have clearly held that this act is remedial and not penal in nature. As Mr. Fish noted, we don't want to change that. We think it is very important to preserve that interpretation.

I can't say for sure the difference between $5,000 and $10,000 is going to be dispositive. What I really would like to emphasize is that there is a balancing of interest here. Obviously, we want to make sure that the Government is made whole, but as you get higher and higher, you run the risk courts might not agree that the law is merely remedial.

Mr. GLICKMAN. What if you put in, let's say, a range of $5,000 to $10,000?

Mr. WILLARD. That certainly is a possibility, Mr. Chairman, and I don't want this issue of $5,000 or $10,000 to become a sticking point. I think either version is fine. We have gotten a lot of criticism from the contractor community that $5,000 is too much, and is onerous.

So, it really is a matter of balancing the interest and coming up with a number.

Mr. GLICKMAN. OK. Along the same line, the antitrust laws and the RICO violations contain treble damage provisions. I wonder how you would describe the recovery under the False Claims are different? How would they differ civilly from RICO or the antitrust violations in this same vein?

Mr. WILLARD. Again, Mr. Chairman, I don't want to say that treble damages would change the nature of the act. I don't think it necessarily would. This is still a line-drawing problem. I can't say that treble damages are punitive and double damages remedial. I think you could argue treble damages is remedial also under this circumstance.

Again, I think what this committee needs to do is balance the interests and come up with a judgment. It is our judgment that leaving double damages and raising tbe forfeiture to $5,000 is a reasonable change. I do think that it is the kind of thing the committee can take one step at a time. We can make some increases, and then if that still doesn't seem to be adequate, we can come back later and increase it further.

Mr. GLICKMAN. OK. Let me move to another area quickly.

You have proposed a modification of the current statute of limitations in the act, false claims law—adding a provision to toll the statute to within 3 years of when the Government learned of the violation seems to be a bit vague in the context of fraud litigation.

Is there a precedent in Federal law for such a statute of limitations that you are aware of?

Mr. WILLARD. Actually, Mr. Chairman, there is. The general statute of limitations for the Federal Government, 28 U.S.C. 2416(c) does include a tolling provision. The problem is the False Claims Act, as I understand it at least, has its own statute of limitations and is not subject to the general provision.

So what we are proposing to do is to conform the False Claims Act to the general rule under common law in most States, and for that matter, for the Federal Government, to provide this limited tolling period where the fraudulent conduct has been concealed, as it frequently is, from the Government, and we don't find out about it until later.

I can say, Mr. Chairman, that I frequently see requests to sue come in right on the brink of the statute of limitations, and sometimes beyond, causing us to miss out on some of the claims we could otherwise bring because it has just taken that long to discover the fraud and get a case ready to pursue. This amendment would give us a little more flexibility in bringing some cases that otherwise would be barred.

Mr. GLICKMAN. Moving quickly to the knowledge of the falsity of the claim. How would you react to language that said with respect to a claim the terms "knowing" and "knowingly" mean either that you have actual knowledge of the claim or the statement is false, or that you act in reckless disregard 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 statement or record?

That is slightly different than the language that is in your testimony. I am not sure that the intent is any different.

Mr. WILLARD. I don't think it is either, Mr. Chairman. I think it is very close to what we suggested and is certainly a reasonable way of drawing the line.

The language we have suggested is what had been worked out on the Senate side and sometimes it is helpful if there aren't major differences to try to use the same words to facilitate getting legislation enacted.

The purpose, though, is the one that to make sure that there is some duty imposed on the contractors to take steps to assure that they are not submitting false claims. We do not want to permit them to adopt an ostrichlike attitude of pretending ignorance, or of arranging to be ignorant of the truth or falsity of the claims they submit.

On the other hand, we certainly don't want a situation where, for example, someone I'm applying for an SBA loan, makes good faith statements, and then is later held liable for what were good faith statements which turned out to be wrong. That is something we don't intend to reach, and I don't think either of the statements you read——

Mr. GLICKMAN. No, it doesn't.

Mr. WILLARD [continuing]. Or the standard in our testimony would reach that situation.

Mr. GLICKMAN. OK. I just have a couple more questions for you.

The cap on administrative remedies—the $100,000 cap—I am not necessarily sure that that cap is absolutely needed. But I am just wondering what happens to a case that is just over the cap for which the Department of Justice declines to prosecute. Does putting a cap in there in effect create a class of cases that would go unprosecuted, or unlitigated?

Mr. WILLARD. Again, as I said before, Mr. Chairman, a lot of these line-drawing exercises can be done differently. And certainly if the committee came up with a slightly different cap, that would be very reasonable. We sort of picked that number because it seemed to us to be about right.

We don't think that number would create a class of cases that would go unprosecuted. While we don't have fixed dollar criteria for bringing cases, we chose that number having in mind the normal burdens of civil litigation. It did seem to be a reasonable cutoff between an administrative and a court process, but certainly if the number were drawn differently that would be reasonable.

I do suggest that there be a cap. The purpose of the administrative remedy is to deal with the smaller cases. I think that if we had multimillion dollar cases in the administrative process, that that would result in a lot of accretions of procedure and other burdens on the administrative process that would cause it to bog down the way the courts sometimes have.

Mr. GLICKMAN. Mr. Willard, I had more questions for you but I think we will probably try to pursue these through staff so that we can get them clarified again for the record; they are factual questions. I appreciate your testimony.

Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Thank you, Mr. Willard. I would like to add the comment that the institutional practice of the Department of Justice not having their written testimony available, whether it is OMB's practice or the Department of Justice practice, makes it very difficult to utilize that testimony. In fact, at the moment, I find it of no value at all. If I touch upon things that you have covered in your written statement in my questioning, I am afraid I must attribute it to that. I don't know how this practice could possibly be changed, but it continues to be a source of great concern to members of, I think, all committees where this occurs.

I think with the subject matter before us this morning, it is quite understandable that there has been a short time period, for you to prepare, however this is an administration initiative that is under consideration here. I should think that the administration would know what it thinks about it. My comment is not directed so much to you, of course, personally, as to the overall institutional refusal that has persisted in one administration after another to make testimony pertinent and timely. I would certainly hope and I know you and I have had this discussion before, and there is nothing personal about it—that we can work to change it. I would certainly appreciate any suggestions as to the person or persons at OMB or elsewhere to whom to direct further comment. But in any event it

does seem to me that it is entirely inappropriate for the practice to continue with great regularity. I am sorry to have to mention it again, but I will each time this comes up.

Mr. WILLARD. I understand, Mr. Kindness. I, again, apologize to the committee for that. I think you are right to be concerned about the problem. It has happened before, and I have been doing everything I can to try to get our testimony in the pipeline early enough so that it can be cleared. I indicated the problem this time, but we will keep pushing and trying to improve our record certainly insofar as our appearances before this subcommittee are concerned.

Mr. KINDNESS. I certainly appreciate that.

Mr. WILLARD. I think you are very right to be complaining about it, and I really don't have an excuse.

Mr. KINDNESS. I realize there are various people involved in the process and it doesn't fall just on your shoulders.

I believe that someone much wiser than myself commented that in our Republic, if we expect to have a Government of laws and not of men, that we must rely upon compliance with the law rather than enforcement of the law.

I have been sitting here thinking about the Government Contract Disputes Act of 1978 and how it would be wiped out by the enactment of legislation like this. The administration, no matter who is in the White House, since 1978, has, it seems to me, done everything possible to avoid implementing what I believe to be the intent of the Contract Disputes Act of 1978. There are those who say, well, I think there are some improvements that were made by that—such as making a more level playing field. But certainly legislation such as this would seem to me to completely gut the Contract Disputes Act.

I would like to ask whether you believe that a contract dispute—a claim that was being pursued before a Board of Contract Appeals—might conceivably be pre-empted by the provisions of either one of these two bills proposed by the administration? For example, during the process of a Board of Contract Appeals proceeding, if the Government claimed that there was fraud instead of a good faith dispute, wouldn't the Contract Disputes Act procedure be made useless?

Has there been consideration of that in the Department of Justice?

Mr. WILLARD. Mr. Kindness, I don't believe that this legislation materially changes the legal landscape that we have. When the Contract Disputes Act was adopted in 1978, I don't believe that it was intended to supplant the False Claims Act. The False Claims Act was in existence long before then.

The purpose of this legislation is to fine-tune the False Claims Act to make it more effective by eliminating what we think have been some erroneous judicial interpretations that have sprung up over the years.

Mr. KINDNESS. Would you have any idea of how many cases under the Contract Disputes Act involve claims that the claim is either based on a misrepresentation, or fraud? Is there a fairly significant number of cases?

Mr. WILLARD. I don't know, Mr. Kindness, the exact numbers that are involved. I don't think that it is a significant number of

cases, when you consider the total number of contracting actions that take place, and the number of disputes that arise and are resolved under the Contract Disputes Act mechanism, I think that most disputes do involve good faith and not fraud.

Mr. KINDNESS. That isn't the institutional attitude at the Department of Justice, though, is it, or at the Department of Defense, or at OMB?

Mr. WILLARD. Mr. Kindness, I feel I am getting it a little bit from both sides here today. On the one hand, the statement of Mr. Hertel is that we are not pursuing enough cases—that we are only pursuing a trivial number of cases of fraud against the Government. Now I hear the suggestion that we are pursuing too many, and that we are trying to turn ordinary commercial disputes into fraud cases. It can't be both.

Mr. KINDNESS. Yes, I suppose it could be. I think what we are talking about is the manner in which the resources of the Department of Justice are employed, and the resources of other departments, in dealing with the problem. I don't think it is a matter of saying too much or too little. I think really it is how the problems are dealt with.

I think a good faith effort has been put forward by the administration to suggest ways in which to accomplish it. I am just trying to examine carefully whether we are in the process likely to do away with something else that is appropriate and worthwhile.

Mr. WILLARD. I think your concern is certainly legitimate because we do have, as you have observed, an underlying problem of Government contracting and a need to maintain those relationships in an orderly manner. I think most Government contractors are honest and want to do a good job. It certainly is not in our interest to transform the atmosphere between the Government and its contractors into one of hostility and unnecessary adversarialness. I think that the vast majority of these disputes can be resolved under the mechanisms of the Contract Disputes Act.

It is really only a small minority of the cases that are referred to us and pursued as fraud cases. We do not propose to change that basic structure. We think the False Claims Act is a sound law, generally. It has stood the test of time. What we want to do is to fine-tune the act so that it will apply the way we think it ought to apply and eliminate some of these erroneous judicial interpretations of the act, and then to create in addition an alternative dispute resolution mechanism, if you will, an administrative remedy, under the False Claims Act. The same legal standards would apply to the administrative remedy. It would not be some new standard. It would be the same as the False Claims Act, but it would be a different mechanism.

Mr. KINDNESS. Would you be in favor of making that two-way? Or a simpler approach to claims against the Government being handled in a simpler administrative way?

Mr. WILLARD. If you are talking about government fraud on contractors, I don't think that you can say there needs to be, or should be, absolute equivalence. One of the problems the Government has is that it is not a profit-making enterprise. So the Government's relationship with a contractor is not the same as an ordinary commercial relationship between two corporations.

We have to have—and I think our laws have recognized for many years, since the time of the False Claims Act—special provisions to protect the Government and the taxpayer against having their money wasted or taken by fraud. These are aside from the normal commercial remedies that companies have when they deal with each other.

Mr. KINDNESS. I would certainly agree. We definitely want to have appropriate ways to promptly deal with problems of fraud—program fraud or individual cases, whatever it may be. In contract law, I would think we have one set of circumstances that can deal with that. And in criminal law, maybe there is the need for improvement. But this area of civil remedies is the area I think that most concerns me particularly since it seems that we are trying to create a hybrid, which may be kind of treacherous to deal with. I think we need to examine it closely.

Let's turn away from contracts now to those situations in which the Program Fraud. I mentioned in discussing the matter with Mr. Fish, small business loan applications. But let's test a broader variety of areas: veterans' benefit cases, Social Security benefit cases, disability cases and the like. In particular, perhaps; I am interested in any of a great variety of areas of interaction between the United States and citizens which would seem to be covered by the provisions of these bills but particularly the Program Fraud bill—and that would include tax cases, presumably as well.

Would you care to comment as to whether as a matter of policy it is intended by the administration to extend this bill that broadly, or are we really talking about a more restricted application?

Mr. WILLARD. It is intended to apply broadly. Now, with regard to tax cases, it is my understanding that under the Internal Revenue Code, IRS already has administrative and civil remedies that are actually more draconian than what we are proposing in these bills. So it is highly unlikely that the IRS would want to use these remedies when they have even better remedies already available to them.

However, for that reason, I can't see any problem in exempting tax matters from coverage by this legislation on the theory that other remedies exist.

But with regard to the other variety of Government programs that you are stating, it is certainly our intention to cover those. We already, under the False Claims Act, go after people who try to defraud the Government—not only defense contractors, but people who are Government grantees and beneficiaries, people who try to defraud us in the Small Business Administration, or EDA Loan Programs, and other programs of that nature.

Basically, this act is intended to apply broadly, anyone who fits within the standards of the act and is trying to defraud the Government of money. It would supplement whatever other remedies may exist under the specific laws dealing with those programs.

Mr. KINDNESS. OK. Just one other area of concern here, I guess.

Administrative law judges—the use of administrative law judges in the Program Fraud Civil Penalties Act. Does the administration have any reservations about the independence of administrative law judges with respect to the handling of such cases? And is there

any need to establish greater independence of administrative law judges in the context of this H.R. 3335?

Mr. WILLARD. I don't believe so. Administrative law judges and hearing examiners already consider matters of enormous importance and significance around the government cases ranging from Social Security claims all the way up to cases involving international trade issues, and rate regulation involving millions of dollars. It is not at all unusual for administrative law judges to hear very important and significant cases.

We are satisfied that they can handle this kind of case under existing law without any changes.

Mr. KINDNESS. Even though they would be, in these cases, dealing with a lot of the rights of individuals, presumably on a wholesale basis, with a review being only to a Court of Appeals in the Federal court system with the administrative standard of review applicable? Unless an amendment were to be made; here, are you certain that an adequate level of protection of individual rights exist?

Mr. WILLARD. I believe so, Mr. Kindness. This system applies with regard to all kinds of other cases that involve individual rights that are adjudicated under this pattern now. The Federal Trade Commission, for example, can impose rather serious penalties administratively. And those matters are decided by administrative law judges and reviewed by the courts under the same standard. It is a rather common feature of the way our Government operates.

The reason we would oppose any change in the standard of review witb regard to these cases is that as you start adding on more and more of these safeguards, it begins to look more and more like a Federal District Court proceeding. The purpose here is to create an inexpensive alternative remedy for dealing with these smaller cases. For example, if you had de novo review of these cases in the Federal courts then you really might as well have the cases heard by the courts in the first instance in Federal court. That is why we think the standard of review and the procedural safeguards currently contained in the bill are proper.

Mr. KINDNESS. Thank you.

Mr. Chairman, I realize my time is expired. I would just like to make it clear that I am greatly concerned about the whole thrust of these proposals, and will strongly urge the subcommittee to not act too precipitously on marking up these bills. We are treading a path that is going to be one that needs to be tread very cautiously, I think, particularly as to welfare recipients, food stamp recipients, small business loan applicants, and other such federal program recipients. All of those things that have to be considered in this very broadly applicable legislation and not just government contractors.

This seems to me to be one of the most sweeping ideas for reducing the Federal budget that I have ever come across. I congratulate the administration on coming up with such an idea. I am a little concerned about its application, however.

I yield back, Mr. Chairman.

Mr. GLICKMAN. I might just point out for the record that some of your concerns may be for naught if the administration's budget requests get their way because you won't have a Small Business Ad-

ministration and you might not have a lot of other government agencies, so there won't be anybody to worry about in those cases.

Mr. KINDNESS. Anyone with common sense wouldn't want to do business with them under these conditions, I think.

Mr. GLICKMAN. Mr. Berman?

Mr. BERMAN. That would be a way to handle them.

Mr. Willard, a couple of questions regarding your prepared testimony on the qui tam provisions.

I am trying to understand the concern you have about letting the taxpayer plaintiff continue with the litigation after the Justice Department joins it. Aren't there many situations now where through processes of intervention people with similar interests participate in civil litigation? What is the nature of the problem? Is this so unusual that the individual who discovered the information—perhaps at great risk to his or her personal livelihood and has come forth with it, and has moved ahead with it—and the Justice Department now decides there is merit in that case and joins it, why should we drop the individual plaintiff from that litigation?

Mr. WILLARD. For one thing, under existing law, intervention normally requires independent basis of standing. Just because someone doesn't like the way the Justice Department is litigating a case, they can't—even as a taxpayer—intervene and try to handle the case differently.

Now, obviously, this statute gives them a piece of the action—a percentage stake in the recovery—which would be adequate to give them standing. But there still is the problem of the handling of litigation, which in this area can be quite complex.

In my experience as a trial lawyer, I have found that it is very difficult to try a case by committee, where you have different people pulling in different ways. Of course, it is sometimes unavoidable where you have multiple parties.

It is our view that the best way to prosecute a case is with a unity of control and strategy in terms of deciding who should be deposed, what kinds of questions to answer, what kinds of discovery to engage in, what theory of the case to try. If you have the private party participate separately, there is the possibility of infighting, and of different strategies being pursued with the defendant ultimately ending up as the beneficiary, able to play one side off against another.

In addition, I raised the possibility of collusion, whereby someone who is not entirely unfriendly to the defendant will file one of these claims as a way of pre-empting the government from filing its own False Claims Act suit thereby permitting him to deliberately interfere with the efficient conduct of the case.

Mr. BERMAN. That confuses me a little. You are saying that a person will bring information to the Justice Department that they may not have had regarding fraud that is so persuasive that it will convince the Justice Department to sue to recover under the False Claims Act. And that there is a reasonable or likely prospect that that person was doing it in fact to be able to participate in that litigation, in order to scuttle the litigation that arose from the information that he brought to the Justice Department which convinced the Justice Department that fraud was taking place?

Mr. WILLARD. He might figure that the Justice Department would stand a good chance of uncovering the information anyway, and do that as a pre-emptive strike. I am not saying this is going to happen every day but it is a possibility.

Mr. BERMAN. In the calendar year 1985, how many False Claims Act judgments did the Justice Department obtain?

Mr. WILLARD. I don't have that statistic here. We can supply it for the record.

Mr. BERMAN. I think it would be useful.

[The information follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

10 APR 1986

Congressman Dan Glickman
Chairman
Subcommittee on Administrative
Law and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of February 24, 1986 requesting information about the Department's handling of civil False Claims Act cases.

The following statistics on our civil fraud caseload is subject to several caveats. First, our statistics are kept by fiscal year rather than calendar year, and for some of the requested categories, we have no figures. Although we believe that our statistics for Fiscal Years 1984 and 1985 are complete and accurate, statistics for Fiscal Year 1983 are incomplete and less accurate. Moreover, the most recently compiled statistics are through the end of Fiscal Year 1985. We also maintain no statistics on the disposition of matters that we delegate to the United States Attorney's offices, which are generally matters involving less than $100,000.

Our statistics on "matters received for review" includes a formal written request from a Governmental agency that we initiate suit, or a copy of a memorandum prepared by the FBI that we routinely review for possible civil fraud aspects of the matter reported, or an early report by the Defense Contract Audit Agency (DCAA) of suspected irregular conduct. However, we exclude matters where we receive no written communication and all matters under $100,000 that are taken directly to a United States Attorney. Naturally, the likelihood that a matter will develop into a civil fraud action varies greatly among these sources of referral.

Our initial review of a matter results in it being either opened and assigned to an attorney to be personally handled out of the Civil Division, referred to a United States Attorney to handle under our supervision, delegated to a United

States Attorney for handling in his sole discretion, or closed or declined for civil fraud purposes. Some of the matters that are opened are assigned to a non-attorney to monitor while further investigation of fraud continues.

Even after a matter is opened and assigned, further investigation may result in its closing without litigation. The reasons for closing are varied. We close cases because the allegations are insufficient to state a claim, the allegations are not substantiated or there is insufficient evidence of fraud, there was no loss or claim for federal funds, the amount is de minimus, uncollectible, or restitution is being made, the matter is more appropriately handled administratively, or because civil action is otherwise not warranted or advisable.

Once a matter is assigned and if it is not closed, it can be settled either before or after suit is filed. After suit is filed, we obtain recoveries through either settlement or judgments. In this context, the following table sets forth the relevant numbers requested:

ACTION TAKEN	FY 1983	FY 1984	FY 1985
Matters received for review	3690	2850	2734
Matters delegated to United States Attorneys	487	232	224
Matters opened and assigned to DOJ Attorney	204	194	212
Matters in which suit was authorized	N/A	31	59
Complaints filed	N/A	21	36
Matters settled or judgments obtained	N/A	70	54
Open, assigned matters pending at year-end	1029	736	918
Matters for which review was not complete at year-end	1626	1580	1093

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* Settlements may involve cases which were authorized for suit the previous year or which were actually filed in court in previous years. While most settlements occur after suit has been authorized, some precede that authorization and the proposed settlement is the first official action recorded.

We do not have precise statistics on qui tam suits filed under the False Claims Act. Nonetheless, we have identified a large enough number of such cases so that the overall picture, described below, should be accurate and reliable.

I. Cases Brought by Private Citizens in Which a Recovery Was Obtained

United States ex rel. Hollander v. Congressman William Clay, 420 F. Supp. 853 (D.C. 1976). This case was brought by a law student based upon an article in the Wall Street Journal. The suit contended that the defendant had falsified claims to Congress for reimbursement of his travel to and from his district. The Department took over the case and, after the defeat of defendant's several legal challenges to the Government's claim discussed in the cited opinion, the defendant paid the Government's full loss, which was $1,754. We also recovered similar amounts from approximately seven other congressmen prior to suit arising from the same general allegations.

United States ex rel. Sita v. Litton, Civil No. S-81-0440(C) (S.D. Miss.). This suit was brought by a former Litton employee who alleged that the company was charging costs associated with commercial seagoing oil rigs to Navy contracts. The Government took over the lawsuit and eventually settled with the contractor for $149,796.

United States ex rel. Gravitt v. General Electric Company, Civil No. C-1-84-1610 (S.D. Ohio). A former employee charged that G.E mischarged overhead costs to Government contracts as direct costs and altered timecards to switch direct labor expenses from commercial to Government contracts. We assumed responsibility for the case and now propose to settle it for $234,000. The relator has challenged the basis of the settlement and the issue is pending now before the court.

II. Cases Brought by State Authorities under the False Claims Act's Qui Tam Provisions

Under the Medicare/Medicaid program, both state and Federal funds finance payments to medical providers. A number of states with active medical care integrity programs have sued to recover fraudulently obtained overpayments, utilizing state law to recover the state's contribution and the qui tam provision to recover the Federal share, thereby combining in one Federal district court lawsuit a demand for the entire loss incurred under the program. In some of these cases, the United States has taken over the lawsuit; in others, the state has been

allowed to prosecute the action. Briefly, these cases may be summarized as follows:

State	Principal Defendant	Amount Recovered or Judgment Obtained
Colorado	Buss	$ 8,249
	Bushanan	100,000
	Sancier	40,000
	Stein	76,000
Oklahoma	Okla. Children's Shelter	630,000
	Koronis	63,600
Ohio	Merit Drugs	37,577
	Newark Nursing	3,375
	Sandy's Ambulance	76,000
	Stallings Ambulance	12,041
Illinois	Dr. Alaska	1,121,551

The Dr. Alaska judgment is of dubious collectibility, but is nonetheless of interest because Illinois has a state False Claims Act which mirrors the Federal Act's substantive provisions, while allowing the recover of treble damages and forfeitures. The decision is reported as, United States ex rel. Fahner v. Dr. St. Barth Alaska, 591 F. Supp. 794 (N.D. Ill. 1984).

III. Other Qui Tam Cases

The following cases might be considered "frivolous"; whether that characterization is accurate or not, they appear to have purposes other than or in addition to the recovery of money for the United States.

Lippincott ex rel. United States v. McGovern, Humphrey, Muskie, McCloskey, Civil No. _____ (D. D.C.). Plaintiff contended that defendants wrongfully accepted pay and other emoluments from the United States Congress while engaged in non-legislative duties; i.e., a campaign for the presidential nomination.

United States ex rel. Tecton v. James E. Carter, Civil No. 76-799-A (E.D. Va.). Stripped of what the court termed "abusive language," the complaint asserted that defendant President-elect Jimmy Carter violated the False Claims Act by accepting peanut crop subsidies and payments under the Federal Election Campaign Act.

United States ex rel. Thompson v. Wayne Hays, 432 F. Supp. 253 (D. D.C. 1976). This suit, and two others filed within five days of each other, charged Congressman Hays with the submission

of false claims in connection with the employment of Elizabeth Ray; one relator also sought to obtain all royalties from Ray's book.

United States ex rel. Anthony R. Martin-Trigona v. Gerald Ford, Civil No. 76-1374 (D. D.C.). This suit charged presidential candidates Ford, Carter, and Reagan with accepting illegal campaign contributions which were then "matched" under the Federal Election Campaign Act, and sued President Carter for using Government property; to wit, Air Force One, for personal or political campaign purposes.

Using the False Claims Act, Mr. Trigona has also sued Richard Daley, Mayor of Chicago (Civil No. 76-1164, N.D. Ill.); Arthur Burns and the Federal Reserve Board (Civil No. 76-0455, D. D.C.); and others.

United States ex rel. Joel Joseph v. Howard Cannon, 642 F.2d 1373 (D.C. Cir. 1981). Here, plaintiff alleged that Senator Cannon utilized a Senate employee, his administrative assistant, for his re-election campaign and paid him with Federal funds in violation of the False Claims Act.

United States ex rel. W. Edward Thompson v. Paul Pendergast, Civil No. 76-7006 (D. D.C.). This suit charged that the House of Representatives' Sergeant-at-Arms and an Assistant Sergeant-at-Arms accepted Federal pay in return for performing no House-related duties or for assisting the Democratic Campaign Committee.

United States ex rel. U.S.-Namibia v. African Funds, 585 F. Supp. 632 (S.D.N.Y. 1984). This suit challenged an apparent rival organization's entitlement to receive funds from the United Nations in alleged violation of the False Claims Act. In the next case, the same plaintiff challenged the defendant's tax-exempt status, also under the False Claims Act. 588 F. Supp. 1350 (S.D.N.Y. 1984).

Public Interest Bounty Hunters v. Board of Governors of Federal Reserve System, 548 F. Supp. 157 (D.C. Ga. 1982). This lawsuit attempted to utilize the False Claims Act to compel bank regulators to examine allegedly unsound banking practices at non-party banks.

Uberoi and the United States v. University of Colorado, Civil No. 82-M-806 (D. Colo.). This 100-page complaint names 65 present or former officials or faculty members as defendants and evidently arises because of the denial of a tenured position to plaintiff. Plaintiff's False Claims Act theory apparently derives from the fact that some employee salaries and other university costs are defrayed by Government contracts and

research grants and plaintiff was denied the opportunity to audit such costs.

Some of the above cases were dismissed under the former version of what is now 31 U.S.C. § 3730(b)(4), which provides for dismissal if the Government does not take over the lawsuit and it had the information or evidence before suit was filed. In many cases, however, it was necessary for the defendants to retain private counsel to deal with the litigation. It is this consistent misuse of the existing statute to support frivolous, and often politically-motivated litigation which forms the basis for our strong opposition to changes which would further liberalize the qui tam provisions of the Act.

We do not have precise statistics on the number of claims under the fraud provisions of the Contract Disputes Act. Nevertheless, we are aware of only two such claims that have been litigated in the courts: United States v. Thompkins, (W. D. Okla.) unreported, and United States v. Williams, Civil Action No. 81-1459 (W. D. La.). We also currently have under consideration several matters where there is a possible fraud claim under the CDA. It is not yet clear whether any of these matters will result in suit being authorized for such a claim.

Sincerely,

John R. Bolton
Assistant Attorney General

Mr. BERMAN. I have talked to staff of the subcommittee and they are going to ask you to get these statistics and this information for us. I think the extent of the weight that should be given to these concerns is best determined by how the Justice Department has done without those provisions of qui tam and those changes in qui tam that you are opposing here. I think that will give us the best evidence of some of your arguments in that regard.

Second, I would be interested in this question of frivolous claims—your concern regarding the ability of the taxpayer to bring suit when the government had evidence or information available to it that it wasn't pursuing.

Do you find the Federal Rules of Civil Procedure inadequate in the area of the ability of courts to impose sanctions on frivolous suits of this kind?

Aren't there serious remedies available, and used to a much greater extent than ever before by the courts to protect against those kinds of frivolous suits?

Mr. WILLARD. Certainly, there are remedies available under the Federal Rules where it can be shown that a suit was truly frivolous. A lot of unmeritorious cases that are brought, however, and impositions of sanctions under the Federal Rule is fairly rare. Again, I don't have the statistics but I think the number of times that unsuccessful plaintiffs, or their lawyers have actually been subjected to these sanctions have been few.

In the Civil Division, we win the vast majority of cases that are brought against us and yet, it is very rare that the people who bring those unmeritorious cases are actually subjected to sanctions.

Mr. BERMAN. We are not talking about suits here against the Justice Department, as I understand it.

The Grassley bill has a provision which gives specific statutory authority to the judge to order attorney's fees to the defendant. Where a suit is found to be frivolous or brought for harassment, wouldn't that take care of the problem?

Mr. WILLARD. I don't know that it would take care of it. I think there would still be the potential for abuse of it. That provision certainly is a help.

Mr. BERMAN. The existence of courts and the right to bring suit provides the potential for abuse. We are looking for disincentives to frivolous suits, and your suggestion is don't let the suit be brought. I am suggesting as an alternative, provide a significant and meaningful financial deterrent to the bringing of frivolous suits or suits for harassment purposes.

Mr. WILLARD. I understand, and I think that that is certainly a reasonable safeguard to try to include in a bill.

I think the best safeguard, against frivolous, litigation against Government contractors or employees, or other people that receive Federal grants or loans, is the one that we normally rely upon: To have the Department of Justice make a decision about whether or not to pursue these claims on behalf of the taxpayer, as we do in most other cases.

Mr. BERMAN. Then why not repeal the qui tam provisions?

Mr. WILLARD. They are tbere. We don't think that under existing law they cause so much trouble that it is necessary to repeal them, and they may occasionally draw forth additional information. But

quite frankly, I don't think the qui tam provisions of existing law contribute very much at all to this effort.

Mr. GLICKMAN. Would the gentleman yield?

Mr. BERMAN. I would be happy to yield.

Mr. GLICKMAN. I don't know if there is any information in the record as to how many times these provisions have been used, but I think we ought to get that information, and I don't know if you have that or whether our staff does, but somebody.

Mr. WILLARD. Sir, we will certainly try to see if we can find it.

Mr. BERMAN. I think Mr. Willard's last comment is a very accurate one, and that is that, by and large, we do not think the present provisions of qui tam are very meaningful, and that is absolutely correct. That is at the nub of the problem—there is a general belief that as wonderful as the Justice Department is, that some combination of demands on its time, a natural tendency of large bureaucracies to insulate themselves and any other reasons that might apply, without regard to which particular party is in control, result in cases not being brought.

Now, a large number of potentially serious frauds in the area of Government contracting have taken place which have not been acted upon and qui tam offers a real potential to do something about that, to motivate the Justice Department to provide that prodding, that nudging, that will get the Justice Department into some of these areas. I think that is the whole theory of that.

In other words, would you suggest that the only reason the Justice Department has not pursued every potential fraud in the area of Government contracting is because the Justice Department was right?

Mr. WILLARD. I guess I cannot claim to be perfect—very few people can. I do think, though, that on balance we try to make a reasonable decision about protecting the taxpayers' interest in all of these cases and we do pursue claims where the Government has been defrauded.

We are currenty handling, in the Civil Division alone, about 50,000 cases involving upward of $60 to $80 billion in claims. In most of those areas, the taxpayers' protection depends upon our doing our job right, and this subcommittee and other committees of Congress conducting oversight to see that that occurs. That is the normal way the taxpayers' financial interest is protected, rather than by giving private citizens bounties for suing on behalf of the Government when they think they have a case.

I think the qui tam provisions as they now exist are largely an anachronism in an earlier age, at a time before we had an FBI and the kind of investigative resources that are now available to the Government.

Mr. BERMAN. I think the chairman's suggestion regarding getting some information on the effectiveness of the existing provisions and how much the Justice Department has pursued these false claims actions to successful conclusion in recent years will help the subcommittee to make its own judgment on that question.

I thank the chairman for the time.

Mr. GLICKMAN. Thank you. Thank you, Mr. Willard, for your testimony.

Mr. WILLARD. Thank you, Mr. Chairman.

Mr. GLICKMAN. We are kind of running with a tight schedule now. Our colleague Mr. Hertel is here, and I would ask him to come up and testify. I would tell you that we are going to try to enforce the 5-minute rule on questions from now on in order to accelerate the testimony. I think Mr. Hertel, then the HHS Inspector General, and then our private sector panel, and I think DOD as well. We will do our best to be out of here by 1:30 if we can meet this schedule.

Mr. Hertel.

STATEMENT OF HON. DENNIS M. HERTEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. HERTEL. Thank you, Mr. Chairman. I really thank the subcommittee for the opportunity to testify before you on the topic of false claims and Program Fraud Civil Penalties legislation.

I commend the subcommittee for taking up this issue and I salute my colleagues, particularly Chairman Glickman, and also the ranking member, Mr. Fish, and Senator Cohen, Senator Roth, for their work and leadership on this issue.

What we are talking about is something that all people and all people in Congress are upset about and that is waste, abuse and fraud. Specifically, in my area and what I have learned, we are talking about the protection of this Nation and national defense.

The problem really came to me a couple of years ago as a member of the House Armed Services Committee. We saw an analysis of the Department of Defense statistics on efforts to curb waste, fraud and abuse in Secretary Weinberger's annual report to Congress, which reveals a dismal success rate for prosecutions, which was earlier discussed in the testimony: 5.7 percent for fiscal year 1982; 8.2 percent for 1983; 9.8 percent for 1984. Equally striking is the comparison of the average recovery per conviction and the average recovery per case referred for prosecution or administrative action.

In fiscal year 1982, the average recovery per conviction was $35,880. The average recovery per case referred for action was $2,060. In 1983, the average recovery per conviction dropped to $22,500. The average recovery per case referred for action also dropped to a mere $1,845.

In 1984, the average recovery per conviction did increase to $53,250. The average recovery per case referred for action increased to $5,260. The number of cases referred for action, however, dropped 2,477 cases from the previous year, or 31 percent, from 1983 to 1984.

These figures have twofold significance. The first aspect is an apparent failure of legal deterrence. The Congress has made vast resources available for our Nation's defense. Three hundred billion dollars have gone to the Nation's defense in their yearly budget.

From 1981 to 1983, the backlog of unspent funds awaiting selection of a contractor rose by 79 percent from $24 billion to $43 billion. Figures for 1984 show no decrease in this problem.

This creates a fertile environment for corruption. The chances of being convicted are small, or penalties are only a few thousand dol-

lars, the risk versus financial reward weighs heavily in favor of charging $9,000 for a single allen wrench.

The second aspect of DOD waste, fraud, and abuse statistics bear directly upon today's hearing. It is clear that the average case pursued by DOD and Justice falls far below the jurisdictional cap of $100,000 found in any of the Program Fraud Civil Penalties bills.

In May 1981, GAO issued a study that indicated 61 percent of the cases referred to the Justice Department were declined for prosecution. Budget cutbacks since 1981 and projected through the remainder of the decade show little hope for improvement. Assessing both the GAO and DOD statistics, there is little doubt that our Government's efforts to stem waste, abuse, and fraud have not been effective.

It is vital that we pass Program Fraud Civil Penalties legislation. We must enact the tools for expeditious but fair prosecution of these cases. To fail to act is a genuine threat to our national security both economically and militarily, because clearly this money that is taken in fraud and wrongful use could be used for our Nation's defense.

Finally, it is essential that protection for employees who report violations must be strengthened. The front line in law enforcement is always the honesty and integrity of our citizens. Deterrence really is the key and I support the committee taking up this issue and acting effectively on this bill and other ideas. The fact is that we are talking about something that is not brought up very often. These employees who work for these companies are painted with the same brush when fraud is committed by certain defense contractors—and they are very patriotic Americans, too, and they are proud of their jobs.

The employees in the Defense Department and also in private industry feel maybe even more outraged than average citizens because they are so close to the problem, and they try to do so much in other ways—that when they see people doing wrongful billing, they see fraud committed, they are outraged.

It was pointed out before that there is a difference as to how the government does business versus private business. If it was private business and there was fraud committed, the contract would be vitiated even though there was not a fraud clause in that contract. That is in contract law and common law—it has always been there, because fraud is so abhorrent to our system.

What we have seen from these statistics very clearly is, there is very little risk to the type of outrageous scandals and frauds that we have seen done especially in DOD.

I believe this type of bill should be applied as written to all departments to stem waste, abuse and fraud, using it as the basis of deterrence even with smaller Justice Department resources now and possibly in the future.

[The statement of Mr. Hertel follows:]

Statement of the Honorable
Dennis M. Hertel
Before the Subcommittee on
Administrative Law and
Government Relations of the
Committee on the Judiciary

February 5, 1986

MR CHAIRMAN:

I thank the Subcommittee for the opportunity to testify before you on the topic of false claims and program fraud civil penalties legislation.

I commend the subcommittee for taking up this issue and I salute my colleagues, particularly the ranking member of the Judiciary Committee Mr. Fish and Senator Cohen for their work and leadership on this issue.

I came to this problem a number of years ago as a member of the House Armed Services Committee. A survey of the Department of Defense statistics on efforts to curb waste, fraud and abuse in Secretary Weinberger's Annual Report to Congress for fiscal year 1986 is presented in the following chart:

	FY 1984	FY 1983	FY 1982
INVESTIGATIVE CASES			
--Cases closed	15,837	16,357	13,668
--Cases referred for prosecutive or administrative action	5,436	8,023	6,688
--Convictions	548	657	384
--Fines, penalties, restitutions and recoveries collected from referrals:			
----Justice Dept.	$18,031,000	$5,228,100	$6,717,500
----Military depts.	$11,151,000	$9,577,800	$7,062,300

What is not immediately apparent from the chart is the dismal success rate for prosecutions: 5.7% for FY 1982; 8.2% for FY 1983 and 9.8% for FY 1984. Equally striking is the comparison of the average recovery per conviction and the average recovery per case referred for action.

In FY 1982, the average recovery per conviction was $35,880. The average recovery per case referred for action was 2,060. In FY 1983, the average recovery per conviction dropped to $22,500. The average recovery per case referred for action also dropped to a mere $1,845. In FY 1984, the average recovery per conviction increased to $53,250. The average recovery per case referred for action increased to $5,260. The number of cases referred for action, however, dropped 2477 cases from the previous year, or 31%.

These figures have twofold significance. The first aspect is an apparent failure of legal deterrence. The Congress has made vast resources available for our nation's defense. Three hundred billion dollars have inundated a procurement system which has been unable to properly manage it. From 1981 to 1983, the backlog of unspent funds awaiting selection of a contractor rose by 79% from $24 billion to $43 billion. Figures for 1984 show no decrease in this problem. This creates a fertile environment for corruption. When the chances of being convicted are small, or penalties are only a few thousand dollars, the risk versus financial reward weighs heavily in favor of charging $9,000 for a single allen wrench.

The second aspect of DoD waste, fraud and abuse statistics bear directly upon today's hearing. It is clear that the average case pursued by DoD and Justice falls far below the jurisdictional cap of $100,000 found in any of the program fraud civil penalties bills.

In May of 1981, GAO issued a study "Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?" That study indicated 61% of the cases referred to the Justice Department were declined for prosecution. Budget cutbacks since 1981 and projected through the remainder of the decade show little hope for improvement. Assessing both the GAO and the DoD statistics, there is little doubt that our government's efforts to stem waste, abuse and fraud have not been effective.

It is vital that we pass program fraud civil penalties legislation. We must enact the tools for expeditious but fair prosecution of these cases. To fail to act is a genuine threat to our national security both economically and militarily.

There are other tools I hope the Committee also acts upon. I applaud my colleagues who have introduced "qui tam" legislation. This type of legislation has a fine tradition dating back to President Lincoln. It could be a very effective anti-waste weapon allowing individuals to proceed where the government has not.

Finally, it is essential that protection for employees who report violations must be strengthened. The front line in law enforcement is always the honesty and integrity of our citizens. We must encourage and protect their honesty. In conclusion, I thank you for the opportunity to address you and I ask that you act swiftly and effectively.

Mr. GLICKMAN. Dennis, we want to thank you for your testimony as well as the statistics that you have contained in it. It is my judgment that we will move legislation this year along these lines. It is helpful that the Justice Department is cooperative in terms, at least sending down some language that forms the foundation for what we want to do. I appreciate the leadership that you have taken generally on defense and procurement areas. These issues affect the entire government, not just defense. In fact, we are going to have HHS testify right after you.

But the work that you have done, I think, lays a very significant foundation for the work product we finally end up with, so we appreciate it very much.

Mr. HERTEL. I appreciate the opportunity and your support, and say that I am finally at the right place. Every time we bring these issues up in the Armed Services Committee we talk about your committee's jurisdiction, so I really appreciate your taking up the bill.

Mr. GLICKMAN. Mr. Berman.

Mr. BERMAN. No questions, Mr. Chairman. I look forward to working with you on this.

Mr. GLICKMAN. Thank you very much.

Our next witness is Mr. Richard Kusserow, Inspector General, Department of Health and Human Services, Office of Inspector General.

We appreciate seeing you again. I have seen you in about two or three different committees and you have been most helpful to us. We are still working on this computer security issue. I do not want to forget about that one.

STATEMENT OF RICHARD P. KUSSEROW, INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED RY D. McCARTY THORNTON, SUPERVISORY TRIAL ATTORNEY, OFFICE OF GENERAL COUNSEL, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. KUSSEROW. Thank you, Mr. Chairman.

The last two times, in fact, I appeared before you was on the subject of securing Government computers against fraud and abuse, and I guess we are shifting a little bit here now in providing testimony on how we can secure Government expenditures against fraud and abuse. So I think we are still on the same rough track.

Mr. GLICKMAN. We are delighted to have you here. I know that you have been busy. I saw your name mentioned in connection with another issue—the Medicare issue, in this morning's press. So we are delighted to have you here. You may feel free to summarize as you wish. Your entire statement will appear in the record.

Mr. KUSSEROW. Thank you, Mr. Chairman. In fact, I would like to summarize and leave maximum time for questioning.

Let me first introduce Mac Thornton who is with the Office of General Counsel for the Department of Health and Human Services, who has among his responsibilities the prosecution of civil monetary penalty cases through the administrative processes under the civil monetary penalty authority that we have pursuant to Public Law 97-35.

I trust, Mr. Chairman, that our testimony arrived in time. I would confess, though, that I did not send it over to OMB, so probably that is the reason why we did get it in timely.

In June of last year, I was called to testify before the Senate Governmental Affairs Committee on Senator Cohen's bill, S. 1134, on the Program Fraud Civil Penalties Act of 1985.

At that time, I voiced our strong support for Government-wide authority to impose administrative civil penalties against individuals or entities who would defraud the Federal Government. In addition, on behalf of the President's Council on Integrity and Efficiency, I communicated the unanimous endorsement of the entire Inspectors General community for such an authority. Our support continues, Mr. Chairman.

As the Federal officials charged with the responsibility for preventing and detecting and addressing fraud and abuse issues in our respective agencies, the Inspectors General firmly believe that civil monetary penalties authority will provide a critical tool in the ongoing efforts to combat fraud against the U.S. Government.

As you know, since 1981, our Department, the Department of Health and Human Services, has enjoyed statutory authority to exercise civil monetary penalty authority and thereby levy administrative assessments and penalties against those who file false or otherwise improper claims for payment in the Medicare, Medicaid and Maternal and Child Health Programs. This represents about 10 percent of the Federal budget. This is, in fact, the first such authority and parallels very strongly all of the bills in which you are considering at this time.

I think the most tangible indication of the success of the program is the money that is being recovered as a result of this authority from fraudulent health care providers. In this regard, I am pleased to inform the subcommittee that the Department, with the positive support and cooperation of the Department of Justice, has successfully negotiated and/or imposed penalties and assessments of an average of nearly $1 million per month over the life of the authority that we have had in the Department. This has resulted in nearly $23 million from individual health service providers who abuse and defrauded our programs, and enabled that money to be returned to the Medicare trust funds and to the general revenue funds relating to those programs.

I would also like to add that the Department has prevailed in those five cases that have been administratively adjudicated before an administrative law judge with appropriate due process rights and privileges.

I would like to give a couple of examples of the kinds of cases that have gone through the process to give some sense as to how it has been applied.

We had, for example, in Florida, a chiropractor who owned and operated a clinic engaged in a large scale scheme to defraud the Medicare Program by falsely representing ineligible chiropractic services as reimbursable medical services.

In executing this scheme, that spanned several years and involved thousands of claims, the chiropractor billed for unallowable services under the names of physicians who not only never per-

formed the services in question, but in the course of the investigation, it was determined that often times they were not even employed at the clinic at the time the claims were submitted.

As a result of that, an administrative law judge handed down a decision awarding the Department under this authority $1.8 million in penalties and assessments against that individual.

We also had another case where we had $156,000 in penalties and assessments against a Kansas nursing home operator who had included numerous false items in the cost reports and services that were in fact not being provided to the beneficiaries of the program.

We had a case of a doctor in Texas who controlled a hospital, billing Medicare for days where he did not visit particular patients and for patient visits by his daughter, who was not licensed to practice medicine in Texas. That resulted in $106,000 in penalties and assessments.

The Department also recovered $83,000 from a California psychologist, who had filed claims for 50-minute individual therapy sessions for a large number of patients. In fact, he had rendered either sessions of much shorter duration or they were group therapy sessions, both of which are reimbursed at a much lower level.

Given the record at the Department of Health and Human Services, it is not surprising that we would be strong advocates for extension of similar authority to other programs administered by our Department as well as for other agencies of the Federal Government.

For too long, many providers of goods and services to the Government have been playing a game of "catch me if you can," knowing full well that even if caught, the crowded Federal court docket minimizes their chances of being prosecuted and penalized.

We are convinced that this administrative authority is a sorely needed alternative to an overloaded Federal court system.

We are also equally convinced that a Government-wide authority, modeled along the lines of our own prototype, would provide a significant Government-wide deterrent to those who would defraud the United States.

As chairman of the Legislative Committee of the President's Council on Integrity and Efficiency, I have consulted with the IG community and asked them to supply examples of how this kind of authority could be applied in their own agencies. With your permission, Mr. Chairman, we will submit that for the record.

Mr. KUSSEROW. Several of the bills introduced to date have included a cap, which we have heard so much about today, such that there would be no jurisdiction under the bill if it were determined that the amount of money or the value of the property falsely claimed exceeded a given dollar figure. And we have heard most frequently the number $100,000 as being mentioned.

Alternatively, some bills have provided that the dollar cap applies to entire groups of related claims.

We believe that either limitation would be superfluous and would potentially gut the effectiveness of the civil monetary penalties authority.

First, existing procedures common to all of the bills would ensure that the Department of Justice has every opportunity to review each and every case and determine its suitability for civil monetary penalty action.

Prior to commencing any civil penalty proceeding, an agency must initially refer the case to the Department of Justice. The Department of Justice then has the absolute discretion to take jurisdiction of the case and proceed under criminal prosecution or under the civil False Claims Act as they see fit. Only when the Department of Justice opts not to exercise either of the options and defers this matter over, may the agency commence administrative proceedings.

To establish an additional requirement that the false claims in these cases not exceed a given dollar amount would be meaningless in itself and possibly be deterimental to the programs involved. In such cases, the discretion of the Department of Justice would be unnecessarily constrained.

In other cases involving complex programs, Justice may feel that the administrative procedures are more appropriate since the administrative law judges develop substantial experience and expertise in specialized programs under their limited jurisdiction.

Another possible unfortunate side effect of any jurisdictional cap might be that it would strip agencies of the authority to impose civil monetary penalties in those cases that should be pursued most aggressively. In short, a cap would create a possible privileged class of wrongdoers. Even in cases where the Department of Justice has declined to proceed in the court system, or for whatever reason, and has approved civil monetary penalties action, no case could be administratively brought if the amount defrauded from the Federal Government is too large. This, I think, would be an open invitation to people to say, we will steal large and get over the cap and see if you can get under the Department of Justice and thereby avoid any kind of sanction or procedure.

In effect, the cap implies the departments and agencies are not capable of rendering fair and just decisions in cases involving large amounts of money. This proposition is completely at odds with the authorities that Congress has already entrusted to a variety of governmental bodies. For example, the Office of Hearings and Appeals at the Department of Energy has been adjudicating cases worth up to a half a billion dollars per case. The Grant Appeals Board in our own Department adjudicates grant disallowance of up to $100 million. Many agencies handle administrative cases worth many millions of dollars, such as the EPA Superfund litigation, the Department of Transportation airline route litigation, FTC antitrust litigation, the Department of Labor fair labor standards, civil rights litigation, and so forth.

Even our so-called small cases in our own department, such as Social Security disability cases, involve payments worth $74,000 on the average, and that is discounted to current dollar value.

With respect to the knowledge standard, the Congress has the opportunity to enact a landmark piece of legislation—namely, to authorize the Government to impose civil monetary penalties and assessments when an individual doing business with the Government

submits claims or statements that he knows or has reason to know are false.

In doing so, Congress would state that the claimants for public funds have an affirmative duty to ascertain the true and accurate basis for their claims on which the Government is asked to rely.

This duty has the primary objective of reaching those who play ostrich; that is, those who would avoid finding out the true facts underlining their claims, or the content of the applicable rules and regulations, and then seek to hide behind their ignorance. Too often we hear the plea that "The billing clerk did it," and that they really did not know what the low level people do in their own organization; and, "Nobody told me what the rules are," and things of that sort.

It is also important to make clear that those who make honest mistakes or are involved in good-faith disputes with the Government will not be penalized. As with our CMPL statute at HHS, the burden of proof is on the Government to demonstrate knowledge or a reason to know of either the false claims or the willful concealment of material information.

In order to protect himself, an executive of a company needs only to conduct such steps as are reasonable or prudent under the circumstances to assure the accuracy of their claims.

The third issue of particular concern to the IG's is the the testimonial subpoena power for investigating officials. For the following reasons we believe strongly that such authority would provide a critical tool ininvestigating fraud against the Government.

Successful fraud investigations require proof that, one, certain representations were made; two, those representations were false, and; three, the person making the representations had actual or constructive knowledge of tbeir falsity.

Except inthose rare cases in which one obtains a direct confession from the subject, knowledge or intent is very difficult to prove. Typically, knowledge is proved by showing the facts and circumstances surrounding the preparation and submission of the claims. However, few wrongdoers leave a sufficient paper trail to enable proof of knowledge through the documents alone. Therefore, an investigator must obtain information concerning directions, instructions, and conversations among the subjects and their employees, clients, business associates, and so forth.

In most cases, witnesses and participants in the conversation are under the influence or control of the subject as a result of employment or contractual relations. They are, as a rule, reluctant to injure their position with tbe subject. Where these employees and other witnesses feel that they are not in a position to submit voluntarily to an interview, testimonial subpoena authority would provide an essential tool to overcome their reluctance to provide evidence.

Three additional points should be noted with respect to testimonial subpoenas. First, the authority to compel attendance and testimony of witnesses in the course of investigations is by no means unusual in the executive branch of Government. Congress has conferred such power in 68 specific statutes upon a number of Federal departments and agencies.

Second, legitimate due process safeguards to protect the individual whose testimony is compelled may be included in the grant of subpoena power.

Third, a subpoena could not be enforced independently. An IG would have to seek, first, the concurrence and assistance of the Justice Department, and then a Federal district court would have to be persuaded to issue an order enforcing the subpoena.

Finally, I wish to discuss the basis for calculating the penalty amount under civil monetary penalties authority. The statute in effect at the Department of Health and Human Services authorizes the imposition of a $2,000 penalty for each item or service falsely claimed. However, some of the bills under consideration by Congress would authorize only a single penalty of $5,000 or $10,000 for the entire claim, regardless of the number of false line items or statements included therein.

Thus, where a contractor submits a progress report containing dozens of false line items valued at hundreds of thousands of dollars, he may nonetheless be subject to only one $5,000 or $10,000 penalty for the entire claim.

Failure to authorize a penalty for each false item or source would invite aggregating some of these claims in order to beat the system and this represents a possible major loophole.

In conclusion, Mr. Chairman, let me again emphasize our support for extension of civil monetary penalties authority to all agencies throughout the Federal Government in a manner that is modeled on our existing experience at HHS.

Based upon that experience, we believe that such legislation, if enacted, would greatly enhance the ability of the United States to remedy and ultimately to deter fraud. We are, of course, ready to provide any assistance we can to you and the subcommittee to further refine the language in any of the bills that you have under consideration.

[The statement of Mr. Kusserow follows:]

STATEMENT OF RICHARD P. KUSSEROW

BEFORE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND

GOVERNMENTAL RELATIONS

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

February 5, 1986

Mr. Chairman and members of the subcommittee, I am Richard P. Kusserow, Inspector General of the Department of Health and Human Services. I would like to thank you for the opportunity to appear before you this morning to provide you with an overview of our civil monetary penalties program (CMP) established under P.L. 97-35. From our experience, we may be able to offer some suggestions for developing a similar Government-wide program.

In June of last year, I testfied before the Senate Governmental Affairs Committee on the bill, S. 1134, the "Program Fraud and Civil Penalties Act of 1985." At that time I voiced my strong support for Government-wide authority to impose administrative civil penalties against individuals or entities who defraud the Federal Government. In addition, on behalf of the President's Council on Integrity and Efficiency, I communicated the

unanimous endorsement of entire statutory Inspectors General (IG) community for such authority. Our support continues, Mr. Chairman. As the Federal officials charged with the responsibility for preventing and detecting fraud and abuse in our respective agencies, the IGs firmly believe that civil monetary penalties authority will provide a critical tool in the ongoing efforts to combat fraud against the United States.

As you know, since 1981, the Department of Health and Human Services (HHS) has enjoyed statutory authority to exercise civil monetary penalty authority and thereby levy administrative assessments and penalties against those who file false or otherwise improper claims for payment in the Medicare, Medicaid and Maternal and Child Health programs. This first civil monetary penalty statute can serve as a prototype for possible Government-wide application. Through the combined efforts of the various components of the Department - the Office of Inspector General, the Office of the General Counsel, the Grants Appeal Board, and the Office of the Under Secretary - the program, to date, has proved to be a highly useful tool in sanctioning wrongdoers and recouping for the health trust funds and general revenue, those unjust enrichments acquired through false or fraudulent claims. Furthermore, evidence suggests that our program is having a significant effect on deterring fraudulent and abusive conduct in our programs.

The most tangible indication of the success of this program is the money recovered from fraudulent health care providers. In this regard, I am pleased to inform the Subcommittee that the Department, with the positive support and cooperation of the Department of Justice, successfully negotiated and/or imposed penalties and assessments of an average of nearly $1 million per month since the implementation of the program. The following table itemizes and indicates the stages of the proceeding at which the penalties or settlements were recovered or obligated.

175: Total Cases In Which Action Has Been Completed

161 cases:	Settled prior to issuance of a Demand letter	$19,347,824.25
14 cases:	Demand Letters issued	
1 case:	respondent defaulted	468,524.00
8 cases:	settled after receipt of demand letter and prior to hearing	388,300.00
5 cases:	where hearing is completed	2,181,012.00
		$22,385,660.25
		Total

In addition, another 23 cases involving an estimated $2.3 million have been retained by the Civil Division of the Department of Justice for possible recovery under the False Claims Act.

The above table is noteworthy for two reasons. First and foremost, it demonstrates the success of the program in dollars and cents. Second, the table illustrates that the vast majority of cases have been settled prior to an hearing, thereby minimizing administrative costs.

I would also like to point out that the Department has prevailed in those five cases that have been administratively adjudicated before an Administrative Law Judge with appropriate due process rights and privileges. The following cases are illustrative of the kinds of fraudulent conduct that may be successfully sanctioned under our CMPL authority:

- A chiropractor who owned and operated a clinic in Florida, engaged in a large scale scheme to defraud the Medicare program by falsely representing ineligible chiropractic services as reimbursable medical services. In executing this scheme, that spanned several years and involved thousands of claims, the chiropractor billed for unallowable services under the names of physicians who not only never performed the services in question, but were no longer employed by the clinic at the time the services were rendered. The Administrative Law Judge handed down a decision awarding the Department nearly $1.8 million in penalties and assessments against the chiropractor. The criminal aspects of the investigation are still on-going, pending grand jury review.

- The Department was also awarded $156,136 in penalties and assessments against a Kansas nursing home operator who had included numerous false items in his cost reports. The operator created false invoices to support fictitious entries in the reports. There had been a successful criminal prosecution in this case; however, without CMPL, much of the unjust enrichment wouldn't have been recouped.

- A Texas doctor, who controlled a hospital, billed Medicare for days where he did not visit particular patients and for patient visits by his daughter, who was not licensed to practice in Texas. The Department was awarded $106,000 in penalties and assessments. I would like to point out that the U.S. Attorney deferred criminal prosecution in favor of proceeding administratively under CMPL.

- The Department also recovered $83,776 from a California psychologist, who had filed claims for 50-minute individual therapy sessions for large number of patients. In fact, he had rendered either sessions of much shorter duration or group therapy sessions, both of which are reimbursed at a much lower rate per patient. The psychologist also pled guilty to numerous criminal charges brought against him by the State Attorney General.

Given the record of the CMPL program at HHS, it is not surprising that we are strong advocates for the extension of similar authority to other programs administered by our Department as well as to other agencies throughout the Federal Government. For too long, many providers of goods and services to the Government have been playing a game of "catch me if you can", knowing full well that even if caught, the crowded Federal court docket minimized their chances of being prosecuted and penalized. We are convinced that this administrative authority is a sorely needed resolution alternative to an overloaded Federal court system. We are equally convinced that such Government-wide authority, modeled along the lines of our prototype, would provide a significant Government-wide deterrent to those who would defraud the United States.

As chairman of the Legislative Committee of the PCIE, I have consulted with the IG community on the proposed legislative alternatives. The following is a brief description of some broad categories of cases that would appear appropriate for administrative resolution.

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

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

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

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

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

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

The above categories in which imposition of civil monetary penalties might have been suitable and efficacious is by no means exhaustive. We have included many examples in a joint statement submitted by all statutory Inspectors General in support of Government-wide authority for the civil monetary penalties for fraud. This statement was submitted to the Senate Committee on Governmental Affairs during their June 18, 1985 hearing on S. 1134. I have included a copy of this joint statement as an attachment to my written testimony today. The examples included in the joint statement bring home the fact

that authority to impose administrative penalties for fraud is not merely a desirable adjunct to criminal and civil court action; in some cases, it would be our only effective sanction against entities who defraud the Government.

During the last several years, in response to the above demonstrated need for an effective administrative sanction against fraud, a number of bills authorizing the imposition of civil monetary penalties have been considered by various Committees of the Congress. Last year, under the leadership of Senators Cohen and Roth, the Senate Committee on Governmental Affairs completed work on S.1134, the "Program Fraud Remedies Act of 1985,". Similar bills have been introduced in the House indicating growing support for such legislation. The Administration has also been a strong supporter of a civil monetary penalties bill.

The debate on the various bills have centered on several provisions that we believe are critical to the efficiency of any Government-wide civil penalties authority. These principal areas of dispute are: (1) the jurisdictional limitation or "cap" on liability for a single claim or group of related claims that may be brought under the civil penalties authority; (2) the standard of knowledge necessary for imposition of penalties and assessments, (3) testimonial subpoena power for investigating officials, and (4) the basis for calculating the amount of the

penalty against a wrongdoer. We believe that the position taken on each of these issues may well determine the ultimate utility and effectiveness of civil monetary penalties authority. Therefore, each is discussed in some detail below.

Several of the bills introduced to date that would authorize the imposition of civil monetary penalties, have included a "cap," such that there would be no jurisdiction under the bill if it were determined that the amount of money or the value of property falsely claimed exceeded a given dollar figure (typically $100,000). Alternatively, some bills have provided that the dollar cap applies to entire groups of "related" claims. In the latter case, jurisdiction would not lie where the aggregate false portion of all "related" claims exceeds $100,000. For the following reasons, we believe that either limitation would be superfluous, and would potentially gut the effectiveness of the civil monetary penalties authority.

First, existing procedures common to all of the bills would ensure that the Department of Justice has every opportunity to review each case and determine its suitability for civil monetary penalties action. Prior to commencing any civil penalty proceeding, an agency must initially refer the case to the Department of Justice (DOJ). DOJ then has absolute discretion to "take jurisdiction" of the case and proceed as a criminal prosecution or under the civil False Claims Act (31

U.S.C 3729) as they see fit. Only when DOJ opts not to exercise either of their options and defer the matter over, may an agency commence administrative proceedings. Further, some proposed bills on this subject would authorize DOJ to disapprove cases for civil monetary penalties proceedings, even when DOJ declines to proceed under the False Claims Act. Under these bills, an agency may only impose penalties in cases that were not accepted by DOJ for court action, and were approved by DOJ for administrative civil monetary penalties proceedings. To establish an additional requirement that the false claims in these cases not exceed a given dollar amount would be meaningless in itself and possibly detrimental to the programs involved. In such cases, the discretion of the Department of Justice would be unnecessarily restrained. In other cases involving complex programs, Justice may believe that administrative procedures are more appropriate since ALJ's develop substantial experience and expertise in programs under their limited jurisdiction.

A second possible unfortunate side effect of any jurisdictional cap might be that it would strip agencies of the authority to impose civil monetary penalties in those cases that should be pursued most aggressively. In short a cap would create a possible privileged class of wrongdoers. Even in cases where DOJ has declined court proceedings (for whatever reason), and has approved civil monetary penalties action, no case could be

administratively brought where the amount defrauded from the Federal Government is too large. This result would be tantamount to a license for wrongdoers to "steal big" and avoid the consequences. It would clearly be an invitation to game the system.

Many of those who are in favor of a cap, offer a due process argument, in effect stating that the Departments and agencies are not capable of rendering fair and just decisions in cases involving large amounts of money. This proposition is completely at odds with the authorities the Congress has already entrusted to a variety of governmental bodies. For example, the Office of Hearings and Appeals at the Department of Energy has been adjudicating cases worth up to one half billion dollars per case. The Grant Appeals Board at our Department adjudicates grant disallowances of as much as $100 million. And many agencies handle administrative cases worth many many millions of dollars, such as EPA superfund litigation, the Department of Transportation airline route litigation, FTC anti-trust litigation, and the Department of Labor fair labor standards and civil rights litigation. At HHS, even our so-called "small" administrative cases, the Social Security disability cases, involve payments worth $74,000 on the average, and that is discounted to current dollar value. In short, we cannot understand the distrust of the administrative process which the "cap" represents.