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 so doing, the Congress would state that claimants for public funds have an affirmative duty to ascertain the true and accurate basis for their claims on which the Government is asked to rely. The duty should encompass both the factual basis of claims, as well as their legal basis (that is, statutory, regulatory or contractual). However, their duty should be limited to what is reasonable and prudent under the circumstances.

The genesis of this idea was the case of U.S. v Cooperative Grain and Supply Co., 476 F.2d 47 (8th Cir. 1973), where the court said that:

> The applicant for public funds has a duty to . . . be informed of the basic requirements of eligibility.

476 F.2d at 60. The court further stated:

> . . .a citizen cannot digest all the manifold regulations nor can the Government adequately and individually inform each citizen about every regulation, but there is a corresponding duty to inform and be informed.

Id at 55. This duty has the primary objective of reaching those who play "ostrich"; that is, those who avoid finding out the true facts underlining their claims, or the content of the applicable rules and regulations, and then seek to hide behind their ignorance. Too often we hear the plea that "The billing clerk did it," or "They did that out in the field," or "No one told me what the rules were."

Typically, it is the claimants who control their claim processes, and who are in a position to conduct reasonable checks to ensure that appropriate financial and billing controls for their own businesses are in place. It is unreasonable for the Government to be expected to know those claims that are proper and those that are not, to bear the risks of claims generated by sloppy procedure or untrained personnel. We might allude to the fact that IRS requires that books and records be maintained to justify various business and personal claims. Therefore, we believe the burden of making reasonably sure that claims are correct, should be placed on those who make claims upon the treasury of the United States.

It is important to understand what we are not saying here. We believe that the legislative record should be clear that those who make honest mistakes or who are involved in good faith disputes with the Government will not be penalized. As with our CMPL statute at HHS, the burden of proof is on the Government to demonstrate knowledge or a reason to know of either false claims or 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 executive would have to have reasonably competent people for his billing process and see that they received appropriate training. Further, he should have in place appropriate audit controls and insure that periodic checks were made to see that the work was being done correctly. These are simple concepts,ones that a reasonable and prudent executive would do anyway. The statute would not add to these normal business responsibilities.

The third issue of particular concern to the IGs is that of testimonial subpoena power for investigating officials. The bills introduced to date have varied considerably on this issue, ranging from no such testimonial subpoena power, to relatively broad authority to compel the attendance and testimony of witnesses in the course of investigations. For the following reasons, we believe strongly that such authority would provide a critical tool in investigating fraud against the Government.

Successful fraud investigations require proof that (1) certain representations were made, (2) those representations were false, and (3) the person making the representations had actual or constructive knowledge of their falsity. Except in those rare cases in which one obtains a direct confession from the subject,

knowledge or intent is difficult to prove. Typically, knowledge is proved by proving the facts and circumstances surrounding the preparation and submission of the claims. However, few wrongdoers leave a sufficient "paper trail" to enable proof of knowledge through documents alone. Therefore, an investigator must obtain information concerning directions, instructions and conversations among the subjects and their employees, clients, business associates, etc. In most cases ,witnesses and participants in the conversation are under the influence or control of the subjects as result of employment or contractual relations. They are, as a rule, reluctant to injure their position with the subject. Where these employees and 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, such as the Department of Justice Antitrust Division, and the Department of Transportation, Commerce, Labor, Interior, Treasury, Engery, Agriculture, HUD, and HHS. A list of these

authorities was compiled at the request of Senate Subcommittee on Oversight of Government Management and is available from the Subcommittee.

Second, legitimate due process safeguards to protect the individual whose testimony is compelled may be included in the grant of subpoena power. For example, specific provisions for the assistance of counsel, right of access to transcripts, right to a general statement of the scope of the investigation, and some degree of confidentiality all seem to be appropriate protections for the witness. In this regard, the safeguards included in H.R. 3334, the "False Claims Act Amendments of 1985," with respect to Civil Investigative Demands authority for the Department of Justice are an excellent model and would seemingly be adaptable to testimonal subpoena authority for IGs.

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.

The final issue I wish to discuss concerns 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 <u>each</u> 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 penalty for the entire claim. It does not make sense to permit only a single penalty simply because the false line items are aggregated in one claim, when, had the claims been submitted separately, a penalty could be levied with respect to each. Failure to authorize a penalty for each false item or source this would invite aggregating claims to "beat the system" and represent a major "loophole." This seems a classic case of elevation of form over substance.

In addition, to calculate the penalty based on each false item or service submitted, more closely tailors the penalty to the culpability of the claimant. For example, the contractor in the above example should justifiably expect to face a higher penalty than would an individual who falsifies a single line item of a claim resulting in a much lesser loss to the Government.

In conclusion, let me again emphasize our support for extension of civil monetary penalties authority to all agencies throughout the Federal Government in a manner modeled on our existing

experience with the CMPL at HHS. Based on that experience, we believe that such legislation, if enacted, would greatly enhance the ability of the United States to remedy and ultimately to deter, fraud. We are, of course, ready to provide any assistance I can to your Committee in its efforts to craft a strong, effective and fair bill that will meet with approval and prompt passage.

# JOINT STATEMENT ON BEHALF OF TRE STATUTORY INSFECTORS GENERAL IN SUFPORT OF GOVERNMENT-WIDE AUTHORITY FOR IMFOSITION FOR CIVIL MONETARY PENALTIES FOR FRAUDS AGAINST THE GOVERNMENT

June 18, 1985

Submitted by Richard F. Kusserow
Chairman, Legislation Committee
Fresident's Council on Integrity
and Efficiency

With thie etatement, the etetutory Inspectors General[1] hereby offer their unanimous eupport for a government-wide administrative mechenism to impoee civil monetary penalties for false claims and statements made to the United States. As tbe Federal officiels who are charged with tbe formidable task of preventing and detecting fraud and abuse in their respective egencies, the Inspectors General strongly believe that the proposed civil monetary penelties authority will provide an invaluable tool in their efforts to combat fraud against the United Stetes. It will also contribute to furthering the Administration's management reform initiativea, known as Reform 88.

Under current law, the principal remedies for frsud ageinst the Federal government are criminsl prosecution and civil litigation. Botb sanctions require the participation of the Department of Justice end resort to the Federal courts. However, the Justice Department simply does not possese the resources necessary to prosecute all cases referred to it by the Inspectors Generel and othere. Further, certain cases may lack prosecutive merit for a variety of reaeone -- for example, loss to the government ie small or impoesible to

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[1]A liet of the Inspectors General contributing comments for this Joint Statement is included as an Appendix bereto.

celculete; insufficisnt jury appsal; insufficient evidence to support a criminal prosscution; and a host of other factors. And, where the dollar value of a case is relatively small, civil litigation under the False Claims Act may he inappropriate since the Government'e cost of litigation would exceed any potential recovery. Often, then, the Governmsnt is left only with the adminiatrative remedies of suspension and deharment. Though important, these aanctione are frequently inappropriate, and do not offer the United States the opportunity to recoup ita losses, hoth actual damagss and consequential damages such as costs of detection and investigation. As a result, many instances of fraud against the government go unpuniehed.

Where the Department of Justice does opt to take civil action against a wrongdosr, litigation often takes an inordinate time to puraue through the U.S. District Courts. Such "justice delayed" not only costs the government dearly in the expenses associated with protracted litigation, hut alao, we helieve, dilutee the daterrent effect of the remedial action.

The hill under coneideration hy the Committee today, S. 1134, offere an alternative to judicial remedies for fraud -- an alternative that promises numerous benefite to the Federal government. First, the civil monetary penalty

authority would act as a powerful deterrent, particularly in those types of cases in which the Department of Justice does not pursue civil action or criminal prosecution. Vigorous use of this sanction authority by all Federal agencies would dispel the perception that "small" frauds against the United States may be committed with impunity. Second, an administrative mechanism for resolution of fraud cases is both expeditious and relatively inexpensive. Thus, victimized agencies may move swiftly to penalize fraud, thereby protecting the integrity of the programs against ongoing fraud. Third, an administrative alternative will relieve the Department of Justice of the burden of "smaller" fraud cases, thereby freeing that Department to more effectively allocate its own resources. Such a distribution of responsibility can only strengthen the overall efforts of the Federal government to control fraud. And finally, the proposed civil monetary penalties authority would provide the government with the means of recovering sums that have heretofore been irretrievably lost to fraud.

For the above reasons, the Inspectors General would welcome civil monetary penalties as an additional tool to recover federal funds misspent as a result of false claims and statements, and to deter future fraud.

In order to emphasize the utility of and need for an administrative mechanism for resolution of fraud cases,

vsrious Inspectors Generel have suhmittsd the following examplea of casea -- some very specific, others, general descriptions of categories of casee -- thet would eppear euitahla for soch administrative proceedings:

National Aeronautics and Space Administration

- The Preaident of a Small Business eection 8(a) Contractor, a Chepter S Corporation, charged personal expenses through the company'e overhsad accounts to a NASA cost-reimbursahle contract. These personal expanaes consisted of false claims on puhlic vouchers of approximately $27,000. The expensas were purportedly related to official huainess, when in fact they consisted of costs associated with personal use of a Mercedes Banz and a Cadillac hy the corporate president and his spouse. Since government auditors diaallowed the expenaes on the NASA contract, the Assietant U.S. Attorney declined proeecution on the ground thet there was, therefore, no finenciel loes to tha governmant. Under the proposed program freud legielation, the corporation and/or individual could he liahla for a civil penalty of up to $10,000 for each false claim plua sn edministrative aseeasment of not more than douhle any emounts claimed.

- A contractor employee was transferred cross country to work on a NASA contract. He submitted a receipt, signed by the purported landlord, for claimed rental expenses to be reimbursed by his employer. These costs would ultimately be borne by the government under the NASA contract. In fact, the employee did not rent the apartment but merely moved in with his girlfriend. The landlord signed the false receipt as a "favor to a friend." Afterwards, the employee doctored the original receipt in order to receive additional reimbursement on a second claim. Prosecution was declined because the employee is making restitution, he had no prior criminal record, there was "minimal federal interest," and there would be a necessity to transport witnesses cross country at a cost disproportionate to the false claims totalling $1,626. Under the program fraud bill, penalties and assessments could be levied.

Department of Energy

- Based on questions raised in a DCAA audit report, the IG engaged in a two year investigation of a contractor to a DOE grantee. The contract was to provide an energy storage system to the grantee to be used in connection with a solar-powered building funded by the Department of Energy. Investigation

showed that the contrector had charged numeroue personel expenses to the contract. These expenses included the repayment of private, personel loens and purchase and maintenence of a Cessna aircreft ae well ae payment for personal travel and legal eervices. Due to perceived evidentiary problems, i.e., lack of identity of Federal funds, the Department of Justice declined hoth criminal and civil action. The proceduree provided in the program fraud hill would have facilitated recovery of the euhstantial loss in this case.

Department of Trensportation

o The hill would eppear to free Federal agencies from eome legel ohstructions that presently exist within title 18 of the U.S. Code and the False Claims Act, such as the requirement thet an injury must he austained hy a Federel agency or department. Thus, under the proposed S. 1134, the Depertment of Transportation would be able to hring false claims actions egainet hid riggers on Federel-aid highwey and eirport projects, notwitbetanding the decieion in U.S. v. Azzarelli Construction Company, 647 F.2d 757 (1981). In Azzerelli, the U.S. Court of Appeels held that in view of the fact that the Federal contrihution to highwey construction in Illinois for

the year in question was e fixed sum, there was no monetary injury sustained by the United States to permit e recovery despite ths fect thet project costs had been inflated due to the bid rigging conspiracy. Where the felse claims do not axceed $100,000, action could ba brought undar the proqram fraud bill. This could result in substantial direct dollar recoveries for tha Department, as bid rigging invastigations ars their highest priority end most successful erea of invastigation.

Vatarans Administration

- Tha proposed civil monetary panalties authority could be ussd to redress bsneficiary entitlament freud. The Dapertment of Justice has been reluctant to pursua criminal proaecution of recipients involved in baneficiary entitlement fraud since they ara often elderly or disabled. For exampls, during the past year, 293 VA casas involving fraud in axcees of $1,000 each were dsclined by the Depertment of Justica, including 224 compensation and pension cases. The proposed penaltiee and assesamente in this lagislation could be applied in some of thesa cases, where the beneficiaries hava financial resourcee to pey.

Depertment of Commerce

o Civil penalties authority will help in cases wbere no doller loss to the government can be readily ascertained. For example, the Department bas ceses wbere contrects or finencial eseietence ewerde are besed on documents tbet contain falee etetements. In many ceses, tbe Department cannot determine the connection between tbe false statement and the Depertment'e decision to enter into the contrect, grant or loan. Although such an award results in no monetery loss to the government, the integrity of tbe procurement or finenciel essistence process is greetly damaged once the false statement has been uncovered. These contrectors ehould be held responsible for their actions. A monetary penalty for this type of corruption would ect as a deterrent to otbers who would aeek to misleed tbe government.

Department of the Interior

• Tbe following are exemples of cases tbat have been declined for criminel prosecution end civil action, tbat would be eppropriate for impoaition of civil penelties under the program fraud bill. Firet, a contractor with the Bureau of Indian Affairs submitted inflated billings in connection with services performed under the contrect. Totel

overbillings were in the vicinity of $40,000. Potential assessment under the civil monetary penalties hill would he approximately $80,000. Second, an insurance company suhmitted inflated false financial statements required to ohtain a license to do business, resulting in government approval of the license application. Tbe potential assesement under the civil monetary penalties hill would he approximately $40,000.

Department of Housing and Urhan Development

- The cases at HUD that could hest henefit from the proposed legislation would he diversion of funds from multifamily projects in violation of 12 U.S.C. 1715z-4, end rentel essistance and single family HUU/FHA insured loan fraud cases. Penalties and asseesments which could he proposed through this legislation, if enacted, could he suhatantial.

General Servicee Administretion

- GHA has developed e special computer program to identify cesee tbet would be potential candidetee for action under the proposed civil money panaltiea autbority. Tbe cbart below depicts tbe number of GSA OIG cases egainet hueinees enterpriaes for which civil and criminal action was declined by the

Departmant of Juetice. Duplication of caeee has heen eliminatad, as hava cases with identifiad lossas in excess of $100,000.

| 1982 | 1983 | 1984 | 1985 (to 4/30) |
|---|---|---|---|
| 25 | 22 | 40 | 13 |

Individual caee examples from GSA follow. Thare are other sampla cases availehle should tha Committee wish to review tham.

e Invastigation disclosad 28 instancas of false hillings hy a GSA auto repair contrsctor during an 18 month period with a total astimate loss to the Govarnmant of $1,042. A United Statas Attornay declined proeacution, hecausa of tha low dollar amount. GSA suhsequently settlad with the contractor for $215. As five fslsa invoices were involved, penaltias of $50,000, and an assassmant of $2,084, for a total of $52,084, could have heen proposed, if the program fraud hill wera law.

o In connaction with a courtroom renovation contract, a judga requeeted walnut, as oppoaad to hirchwood, cahinets. An investigation disclosad that the prima contractor suhmittad a change order which was inflatad hy approximataly $15,000. In an interviaw, the suhcontrector who did the work, indicated thst

the prime had auhsequently increased its eetimate for a changs order hy misquoting the figures eubmitted hy him. Prosecution was declined. Since only one false claim wae involved, the penalty under the program fraud hill would he $2,000, and the assesament, $30,000, for a total poesihle recovery of $34,000.

Department of Lahor

- In Philadalphia, a physician was indicted on 5 counts of filing false claime and 13 counts of mail fraud. A two-year investigation hy the Lahor OIG and Poatal Inspection Service found that he had verified and treated disahling, work-relatad injuries for aeveral poetal employeea, including undercover agents who were not sick hut claimed they wanted time off for vacations and other reasons. The doctor had instructed his patients on how to fake injuries and how to prevent their supervisore from catching them. The doctor was eentenced to four years prohation, fined $7,500 and ordered to pay $900 in reatitution. Se wee the certifying phyeician on 129 dieability claime, many of them fraudulent, filed hy USPS employees. Under the propoaed civil panalty authority, the government could have followed this criminal prosecution with adminiatrative proceedinge to recoup ita losaas dua to thiu fraudulant echema.

Environmental Protection Agency

- In one case, tha EPA discovered that a local agancy delibarately submitted falaa claims to EPA. Tba Department of Justice was unwilling to pursue tbe case on eitbar a civil or criminal basia, laaving no penalty for sucb wrongdoing. Tbe proposad lagialation would allow the Federal governmant to tske action in cases such as this, wbera no judicial relief is available.

Small Business Administration

- At SBA, civil monetary penalties autbority could be extremaly usaful in combatting fraud against tbe Small Businass Sat-Asida program, wharain large companies fraudulantly certify themsalves as small in order to receive awards. Sucb cssas are difficult to proaecuts becausa loss to the government often cannot be substantiatad. In addition, the civil penaltias authority could be used to penalize and deter frauds against tbe Bmall Business Invastmant Corporation program.

Department of Education

- Tbe greatest banefit of having civil panalty authority would ba realized in the Education Department student assistance program. Whila

thousands of post secondary schools and millions of students participate in these loan guarantee and grant programs, and while student aid appropriations account for approximately half of the Department's annual budget, dollar amounts for individual fraud cases are relatively small. These "small dollar" cases are often declined for prosecution by the Department of Justice, and in rare instances where prosecution is pursued, related costs far outweigh benefits. Audit and investigative experiences indicate that significant amounts have been obtained fraudulently under these programs. Given the alternative to adjudicate these offenses administratively, the Department could not only recoup lost funds, but could reduce instances of fraud, merely by publicizing the Department's authority to impose administrative assessments and penalties.

Department of Health and Human Services

- Current Civil Monetary Penalties authority at HHS extends only to the Medicare, Medicaid and Maternal and Child Health Programs. The proposed bill would extend this authority to all other programs administered by the Department, among them, Social Security, Public Health, Food and Drug and many

othera. The proposed authority would prove veluahle in recovering from certain heneficiaries undsr entitlement programs. For exemple, we are currently inveatigating a physician who has been collecting disehility insurance under Social Sscurity for e number of years. Investigation has revealed that thie physician hilled Medicare and Mediceid in excess of $70,000 in one yeer while he claimed to he disahled. Should the Department of Justice ultimately decline prosecution in this case, it would he eppropriete for civil monetary penalties under the proposed legislation.

We helieve that the ahove case examples, as wall as those presented hy Mr. Sherick, the Inspector General for the Depertment of Defense in his testimony today, amply demonstrete the need for e civil penelty euthority.

Certain provieions of S. 1134 of particular significence to the Inspectors Generel merit some comment here. First, many IGs are concerned ahout the provision of section 809(e) thet requiree eech investigeting official to prepare and euhmit to the egsncy head en annuel report that eummarizes (1) mettere referred to the reviewing official, (2) eatters transmitted to the Attorney General, (3) all heerings conducted, end (4) ections teken. Given the dietrihution of responsihility

under the Act, the investigating official can easily provide current, accurate information only with respect to the first itsm. The remaining thres matters concern ections ovsr which the Inspsctors General have no control (e.g., hearings and collection activities.) Therefore, we recommend that this provieion he modified to transfer reporting responsibility to the appropriate officials. And, should the IG's retain reporting responsihility for "matters referred to the reviewing official," we suggest that this information he included in ths Semi-Annual Reports of the Inspectors General.

The Inspectors General are slso concerned ahout the inclusion in section 803(s)(2) of a "prohable cause" standard for referrals hy the reviewing official to the hesring examinsr. Because "prohahle cause" ie a term of art used most often in the context of criminal law, we helieve that it may cause some confusion in this civil penalties hill. Therefore, in order to avoid any confusion over the use of the term, we strongly recommend that the Committee include a definition of thie standard in ite Committee Report.

Finally, in section 804(a)(2) the suhpoena duces tecum authority granted to the investigating official haa been modified to cover only documentary evidence "not otherwise readily available to the authority." We helieve that such limiting language adds nothing to the existing

requirements that all adminietrativa subpoenaa must be "reeeonable," and will only spawn needlaee litigetion. Currant IG eubpoena authority containe no auch limitation. Thus, en Inspector General who iasues a eubpoena for information that is relevant to a number of possible proceadings (e.g., civil monatary penaltias, tarmination of henefite, recovery of overpayments, etc.), may be in the position of needlaesly arguing under whicb eubpoena autbority be or eha proceeded to obtain documente. We therefore euggest that this language be stricken and that tbe teet of reasonablenaes remain implicit.

In conclueion, we strongly urge this Committee to act favorably and expeditiously on S. 1134. At a time of great concern over bigb budget daficits, we owa it to tha taxpayere and the heneficiariee of our federal programs to do wbatever we can to make certain that avery federal dollar ia properly spent. We believe S. 1134 is one aura means of moving ua toward that objective.

APPENDIX

The attached statement was drafted by the Legislation Committee of the President's Council on Integrity and Efficiency, based on comments received from the following Inepectors Genaral:

Honorable Paul Adams
Department of Housing and
Urban Davelopment

Honorable Herbert Heckington
Agency for Intarnational Development

Honorable Robert W. Heuley (Acting)
Department of the Interior

Honorable Hill Colvin
Hational Aeronautics and Space
Administration

Honorable Sherman Funk
Department of Commerca

Honorable Charles R. Gillum
General Services Administration

Honorable John Graziano
Dspartment of Agriculture

Honorable William C. Harrop
Department of State

Honorable J. Hrian Hyland
Department of Labor

Honorable Richard P. Kusserow
Department of Health and
Human Servicee

Honorable John C. Martin
Environmental Protection Agency

Honorable James R. Richards
Department of Energy

Honorable Frank S. Sato
Veterans Administration

Honorable Joseph Sherick
Department of Defense
(See separate teetimony)

Honorable James H. Thomas
Department of Education

Honorable Joseph P. Welsch
Department of Transportation

Honorable Mary F. Wieeeman
Small Husiness Adminietration

Mr. GLICKMAN. Thank you.

Just on your last point, I want to make sure I understand you—that you want to be in a position where if a contractor or somebody having business with the Government is to be penalized under this law, the penalty, the $5,000, whatever the penalty would be, would be on a per-claim basis or a per-violation basis?

Let's say I file a claim with HHS. I am the chiropractor in question. Let's say the claim is actually based upon maybe years of improper claims. Am I going to be penalized $5,000 for each improper claim or times—so it would be 5,000 times 229, or it would be one $5,000 claim?

Mr. KUSSEROW. The way it works under existing legislation in our Department would be that each and every false item or service that you have filed is a separate penalty offense, and you can be penalized for that. So what that guards against is the chiropractor in your example, hypothetical example, that might wish to avoid getting around each item or service by batching them into a single claim and thereby having a penalty which is far less than the total aggregate amount being claimed. Whereas, now, in the case of the chiropractor, each and every item or service he submits for payment would represent a separate penalty offense.

Mr. GLICKMAN. That is a definitional matter that we need to take care of.

Mr. KUSSEROW. We would be happy to work with the committee on that, Mr. Chairman.

Mr. GLICKMAN. OK.

The results of your civil money penalty program are impressive. Would most of these cases have gone unsanctioned were it not for the existence of that program?

Mr. KUSSEROW. Yes, Mr. Chairman, I think virtually all of them would have gone unsanctioned. Where you have a situation where the alternatives for remedy, for wrongful behavior, is either prosecution in the U.S. district court for criminal sanction, or for civil sanction, or nothing at all, that leaves a lot of cases that just don't make the screen.

So all the cases that we have had, in fact, did not make the screen. In fact, every single case that we had followed through for administrative assessment did go through the Department of Justice first and they did defer to us for administrative remedy rather than try to proceed under the False Claims Act.

Mr. GLICKMAN. Now, one final question I have for you. I want to know what knowledge standard do you use in your application of these cases.

Mr. KUSSEROW. The standard that we use is that they knew or had reason to know.

Mr. GLICKMAN. Is that a standard permitted under the statute?

Mr. KUSSEROW. That is correct. And by regulation it is all described as to what that constitutes.

Mr. GLICKMAN. You make the point that we had a great opportunity to do that implying that that is not, obviously, the current state of the law under the False Claims Act.

Mr. KUSSEROW. Basically what it means is that all those cases that fail to meet the criteria necessary for the False Claims Act, that the opportunity exists to take all of those cases and to bring

them within the ability of the Government to recover the unjust enrichment from wrongdoers.

Mr. GLICKMAN. I want to tell you, I appreciate your statement. Also, I appreciate the staff work that your staff has been cooperative with our office. My staff has told me how helpful the IG's office has been on these matters. I am sure we are going to try to utilize your expertise as we work up the legislative process.

Mr. KUSSEROW. Thank you, Mr. Chairman. We in fact will continue to provide any assistance that you may feel is warranted.

Mr. GLICKMAN. Thank you.

Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman. I apologize for having to be absent for a short while.

I might ask, it appears the first time I was aware of your written testimony being available was tbis morning. Could you tell me when it was submitted, by any chance?

Mr. KUSSEROW. We gave it yesterday afternoon at 2 o'clock.

Mr. KINDNESS. I see. We continue to have such a problem.

Mr. KUSSEROW. Mr. Kindness, I will apologize if that wasn't timely enough, but I can assure you I can't blame it on OMB because I didn't send it to them. It isn't their fault that that wasn't very timely. I can't blame anybody else if we needed it sooner.

Mr. KINDNESS. Thank you very much.

If I go over an area that has already been covered I will apologize for that.

I would like to ask whether these decisions are made in these cases under the existing law applicable to HHS, that is wbether these decisions are made by administrative law judges?

Mr. KUSSEROW. That is correct. There is a special administrative law judge under the Grants and Appeals Board that hears these cases.

Mr. KINDNESS. Are tbose administrative law judges sort of a separate corps? Are they assigned primarily to that——

Mr. KUSSEROW. Absolutely. They are set aside from all other systems of administrative law judges in our Department or in the government. It is a separate branch to hear only these cases.

Mr. KINDNESS. Is there any different procedure that is applicable to their decisions by way of review before the agency decision is provided?

Mr. KUSSEROW. Yes, we have a long due process method that we follow to eventually resolve—and if you like, Mr. Kindness, I can just walk tbrough the entire due process of the civil monetary penalties legislation we have in our own programs. The first is that when the investigators from the inspector general's office encounter false claims that have been submitted, and when the full extent of that falsity has been determined and the evidence is at band, we permit the individual and their selected counsel to review the facts and evidence that we have. Then we attempt to reach settlement with them.

Should that fail in the process—we will say that in most cases that resolves the case, that there is an amicable agreement. Actually, I don't know how amicable it is, but it is agreed to, and that ends it.

Mr. KINDNESS. Excuse me, at that point, has there been any discovery or suhpoena?

Mr. KUSSEROW. No, we don't have subpoena authority to compel testimony, although we do have the authority under the Inspector General's Act to compel production of documents. At this point, this is where the investigation has proceeded very substantially. We feel that we want to confront the individual or their counsel, show them what the facts are, and see if we can reach settlement.

If we cannot reach settlement, then we will issue a demand letter and they have a right at that point to go to an administrative hearing before an administrative law judge. The prosecutor for the government at that point is the Office of General Counsel, which is in a separate part of the Department from the inspector general. They have a due process hearing at that time. The administrative law judge renders a decision. If the individual is not satisfied with the decision, has the right to appeal to the Under Secretary of the Department, and state reasons why they feel the decision is incorrect.

If they are dissatisfied still with the result of that process, they now have a dual opportunity here. If they are dissatisfied because there is an exclusion attached to the penalty, that is, that they are going to be excluded from participation in Medicare and Medicaid as a result of this, then they go into U.S. district court and appeal on that; or if they are just concerned about the monetary amount that was decided, then they have a right to immediately go to the U.S. Court of Appeals.

So there is a tremendous numher of opportunities for due process to be had before the final adjudication of the issues.

Mr. KINDNESS. In the district court, in the event that path is pursued, is that a de novo proceeding?

Mr. KUSSEROW. It goes into the Court of Appeals if it is on the issue of the amount. In other words, they may say that they have a question as to the procedures or as to what evidence was omitted, or whether they had an opportunity to exercise their due process rights, and they can appeal that directly into the Court of Appeals. In the district court it is only for the issue of the period of exclusion.

But in either case, it is not a de novo hearing.

Mr. KINDNESS. Right. Their access to the district court is strictly on——

Mr. KUSSEROW. Appeal.

Mr. KINDNESS [continuing]. Exclusion from a benefit for the future?

Mr. KUSSEROW. From participation in the programs. The Court of Appeals is for the penalties assigned under the legislation.

Mr. KINDNESS. Thank you. Thank you, Mr. Chairman, I yield back.

Mr. GLICKMAN. Thank you. I appreciate your testifying. We will be wDrking with you as we develop this legislation.

Mr. KUSSEROW. Thank you, Mr. Chairman.

Mr. GLICKMAN. I am aware that our last panel is in a bit of time bind so why we don't go ahead and take yDu now and then the last witness will be the inspector general of the Department of Defense. So, Mr. Cross and Mr. Menaker, why don't you come up here?

I think that also Paul Besozzi is accompanying you. Mr. Cross, you are accompanied by?

Mr. CROSS. Ellen Brown, U.S. Chamber.

Mr. GLICKMAN. With the U.S. Chamber. Mr. Cross, why don't you go ahead and begin and then after you Mr. Menaker. You may feel free to summarize your statements because they will be included in the record in their entirety.

**STATEMENTS OF CHRISTOPHER T. CROSS, PRESIDENT AND CHIEF OPERATING OFFICER, UNIVERSITY RESEARCH CORP., ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, ACCOMPANIED BY ELLEN B. BROWN, REGULATORY AFFAIRS ATTORNEY, U.S. CHAMBER OF COMMERCE; AND FRANK H. MENAKER, JR., VICE PRESIDENT AND GENERAL COUNSEL, MARTIN MARIETTA, ON BEHALF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., ACCOMPANIED BY PAUL BESOZZI, PARTNER, LAW FIRM OF HENNESSEY, STAMBLER & SIEBERT**

## STATEMENT OF CHRISTOPHER T. CROSS

Mr. CROSS. Fine. Thank you, Mr. Chairman. We certainly appreciate your courtesy in arranging the schedule.

I am Christopher Cross, president and chief operating officer of University Research Corp. I appear here today on behalf of the U.S. Chamber of Commerce. As I mentioned, I am accompanied on my right by Ellen Brown, who is the chamber's regulatory affairs attorney.

As you know, the chamber is the world's largest business federation of companies. Ninety-one percent of the chamber members are small firms with fewer than 100 employees, and 57 percent have fewer than 10 employees.

Many chamber members are involved in a variety of government programs through contracts, loans, and grants. We believe that the discovery and elimination of fraud in these programs are laudable goals. Moreover, we recognize that many small cases of fraud are neither investigated nor prosecuted in Federal court due to a lack of resources at the Department of Justice.

Therefore, we do not oppose the establishment of an administrative mechanism to remedy these cases. However, we must be certain that the methods adopted to achieve the goals do not overreach the government's authority over its citizens.

A variety of legislation—proposing a new administrative mechanism or amendments to the False Claims Act—have been introduced to address this complicated and frustrating problem of fraud against government agencies.

The longstanding position of the chamber is that everyone should be protected against arbitrary deprivation of their rights and that such protection should be of paramount importance to Congress in framing laws creating new remedies for administrative agencies.

In order to adequately protect individual rights, lawmakers must consider the following concepts:

First, a proper balance between governmental authority to protect the public interest and individual rights to due process in an administrative proceeding.

Second, a definition of fraud based upon intent and culpability rather than mere negligence or inadvertence.

Third, we are concerned about the lack of procedural safeguards in these administrative proceedings, to wit, no independent prosecutorial review and unlimited testimonial subpoena power.

If this legislation does not effectively address these issues—and we think the current bills in the House and the Senate both suffer from not addressing these—then we believe Congress must take great care in redrafting these provisions.

Other witnesses have gone into many of the specific legal issues of concern to all businesses. I know you have another hearing tomorrow where you will hear additional witnesses.

From a small business standpoint, I would add the following comments:

I have no problem with being held liable for intentional actions done with actual knowledge. But a statute that makes me liable for acts done negligently imposes on me a standard of conduct that is fundamentally unfair. Four of the principal proposals all seek to do just that. A business owner must have the right to rely on the word and judgment of his employees, unless he has a specific reason to disbelieve them. A standard of liability on the basis of some duty to investigate employees' actions creates a burden that no business owner can afford to implement.

We believe that legislation must provide sufficient procedural safeguards to assure equitable and impartial agency actions. These include the effective separation of quasi-judicial functions from other functions, such as investigatory or prosecutory functions.

The Government has an important responsibility when charging a company or individual with fraud. A judgment of fraud has devastating effects on a small business: lines of credit disappear; customers cease their patronage; the community's goodwill toward this business ceases.

If the judgment has been reached in accordance with due process, no business owner reasonably can complain. If, however, the judgment is reached without affording the accused the ability to prepare for trial, without ensuring independent prosecutorial review, or without providing adequate judicial review, these effects will occur unjustly.

All of the legislation currently before the Congress would create due process problems in many of these respects. For example, H.R. 3334 and the Senate bills provide government investigators with new unfettered subpoena and discovery powers to compel sworn testimony prior to the initiation of legal proceedings and without protections currently provided by law.

While one bill, S. 1134, has taken a step toward adequate appellate review, none of the bills completely ensures against abuse of the process by government officials. We believe this offends the standards of justice we take for granted in this country.

In conclusion, Mr. Chairman, we appreciate the difficult and frustrating struggle of eliminating fraud in government programs, and we commend the efforts of Congress in attempting to solve the problem. But in drafting solutions to a difficult problem, we must not permit the Federal Government to become overly powerful or abusive of important individual rights.

Thank you for this opportunity to testify. I would be pleased to answer your questions.

[The statement of Mr. Cross follows:]

# Statement of the Chamber of Commerce of the United States

ON: FALSE CLAIMS ACT AMENDMENTS AND PROGRAM FRAUD CIVIL PENALTIES

TO: SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS OF THE HOUSE COMMITTEE ON THE JUDICIARY

BY: CHRISTOPHER T. CROSS

DATE: FEBRUARY 5, 1986

The Chamber of Commerce of the United States ia the world's largest federation of buainess companies and aasociations and ia the principsl spokesman for the American buainass community. It represents almost 180,000 buainesses plua aeveral tbousand organizationa, such sa local/state chambers of commerce snd trade/professional associationa.

More than 91 percant of the Chamber'a members sre amall buainesa firms with fewer than 100 employees, 57 percent with fewer than 10 employees. Yet, virtually all of the nation'a lsrgast companies are slso sctive members. We sre particularly cognizant of the problems of amaller businesses, ss well aa iasues fscing the busineas community at lsrge.

Besides representing a cross section of the American buainess community in terms of number of employees, the Chamber reprasents s wide management spectrum by type of business and location. Each major claasification of American bnainesa--manufacturing, retailing, services, construction, wholessling, and finsnce--numbers more than 12,000 membera. Yet no one group constitutes sa much as 29 percent of the total membership. Further, the Chamber hes aubstantial membership in sll 50 states.

The Chamber's international reacb is substantial as well. It believea that global interdependence provides sn opportunity, not a tbreat. In addition to the 54 American Chambers of Commerce Abroad, an incressing number of members are engaged in the export and import of both goods and services and have ongoing inveatment sctivitiea. The Chamber favors strengthened international competitiveness and oppoaes srtificial U.S. and foreign barriera to international businesa.

Positiona on national issuea are developed by s cross section of its members serving on committeea, subcommittees snd task forces. Currently, some 1,800 buainess people participate in tbis process.

STATEMENT
on
FALSE CLAIMS ACT AMENDMENTS
AND
PROGRAM FRAUD CIVIL PENALTIES
before the
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
of the
HOUSE COMMITTEE ON THE JUDICIARY
for the
U.S. CHAMBER OF COMMERCE
by
Christopher T. Cross
February 5, 1986

I am Christopher T. Cross, President and Chief Operating Officer of University Research Corporation, appearing here todsy on behalf of the U.S. Chamber of Commerce. I sm sccompanied by Ellen B. Brown, the U.S. Chamber's Regulatory Affsirs Attorney.

The Chamber is the world's largest business federstion of companies, chambers of commerce, and trsde snd professionsl sssociations. More than 91 percent of the Chamber's membera sre small firms with fewer than 100 employees, 57 percent with fewer than 10 employees. Moreover, virtuslly all of the nstion's largest companies are slso active members. We particularly are cognizsnt of the problems of smaller businessea, ss well ss issues facing the business community at large. My company is a small business, so my comments reflect that perspective.

Many Chamber members are involved in s variety of government programs through contracts, losns, snd grants. We helieve that the diacovery and elimination of frsud in these progrsms are laudable goals. Moreover, we recognize that many small cases of fraud are neither investigated nor

prosecuted in federal court due to a lack of resources at the Department of Justice. Therefore, we do not oppose the establishment of an administrative mechanism to remedy those cases. However, we must be certain that the methods adopted to achieve the goals do not overreach the government's authority over its citizens.

A variety of legislation — proposing a new administrative mechanism or amendments to the False Claims Act — has been introduced to address this complicated and frustrating problem of fraud against government agencies. The long-standing position of the Chamber is that everyone should be protected against arbitrary deprivation of their rights and that such protection should be of paramount importance to Congress in framing laws creating new remedies for administrative agencies.

In order to protect adequately individual rights, lawmakers must consider the following concepts:

- the proper balance between governmental authority to protect the public interest and individual rights to due process in an administrative proceeding;
- a definition of fraud based upon intent and culpability rather than mere negligence or inadvertence;
- the lack of procedural safeguards in these administrative proceedings, e.g., no independent prosecutorial review and unlimited testimonial subpoena power.

If this legislation does not address effectively these issues -- and we think the current bills in both the House and Senate do not -- then Congress must take great care in redrafting its provisions.

Other witnesses, I am sure, will address many of the specific legal issues of concern to all businesses. From a small business standpoint, I would add the following comments:

I have no problem with being held liable for intentional actions done with actual knowledge. But a statute that makes me liable for acts done negligently imposes on me a standard of conduct that is fundamentally unfair. Four of the principal proposals -- S. 1134, S. 1562, H.R. 3317 and H.R. 3334 -- all seek to do just that. A business owner must have the right to rely on the word and judgment of his employees, unless he has a specific reason to disbelieve them. A standard of liability on the basis of some duty to investigate employees' actions creates a burden that no business owner can afford.

We believe that legislation must provide sufficient procedural safeguards to assure equitable and impartial agency actions. These include the effective separation of quasi-judicial functions from other functions, such as investigatory or prosecutory functions. The government has an important responsibility when charging a company or individual with fraud. A judgment of fraud has devastating effects on a small business: lines of credit disappear; customers cease their patronage; the community's goodwill towards the business ceases. If the judgment has been reached in accordance with due process, no business owner reasonably can complain. If, however, the judgment is reached without affording the accused the ability to prepare for trial, without ensuring independent prosecutorial review, or without providing adequate judicial review, these effects will occur unjustly.

All of the legislation currently before the Congress would create due process problems in many of these respects. For example, S. 1134, S. 1562, and H.R. 3334 provide government investigators with new unfettered subpoena and discovery powers to compel sworn testimony prior to the initiation of legal proceedings and without protections currently provided by law. While one bill, S. 1134, has taken a step toward adequate appellate review, none of the bills completely ensures against abuse of the process by government officials. We believe this offends the standards of justice we take for granted in America.

In conclusion, Mr. Chairman, we appreciate the difficult and frustrating struggle of eliminating fraud in government programs, and we commend the efforts of Congress in attempting to solve the problem. But in drafting solutions to a difficult problem, we must not permit the federal government to become overly powerful or abusive of important individual rights.

Thank you for this opportunity to present our views, and I would be pleased to answer any questions.

SUMMARY OF STATEMENT
on
FALSE CLAIMS ACT AMENDMENTS AND PROGRAM FRAUD CIVIL PENALTIES
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SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
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Many U.S. Chamber of Commerce members are involved in a variety of government programs through contracts, loans, and grants. We believe that the discovery and elimination of fraud in these programs are laudable goals. Moreover, we recognize that many small cases of fraud are neither investigated nor prosecuted in federal court due to a lack of resources at the Department of Justice. Therefore, we do not oppose the establishment of an administrative mechanism to remedy those cases. However, we must be certain that the methods adopted to achieve the goals do not overreach the government's authority over its citizens.

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If this legislation does not address effectively these issues — and we think the current bills in both the House and Senate do not — then Congress must take great care in redrafting its provisions.

We appreciate the difficult and frustrating struggle of eliminating fraud in government programs, and we commend the efforts of Congress in attempting to solve the problem. But in drafting solutions to a difficult problem, we must not permit the federal government to become overly powerful or abusive of important individual rights.

Mr. GLICKMAN. Thank you, Mr. Cross. I want to thank you for your concise statement where I think you made all your points without spending pages and pages and pages discussing them.

Mr. CROSS. Thank you. I might note, we had our statement here on Monday morning at 10 as well. [Laughter.]

Mr. GLICKMAN. OK. I guess the Office of Management and Budget could——

Mr. CROSS. Doesn't have to worry about us, that's right.

Mr. GLICKMAN. Mr. Menaker.

Mr. MENAKER. Thank you.

Mr. Chairman and members of the subcommittee: My name is Frank Menaker. I am the vice president and general counsel of Martin Marietta Corp. Accompanying me today is Paul Besozzi who is a partner in the Washington, DC, law firm of Hennessey, Stambler & Siebert. We are representing today the Aerospace Industries Association of America.

The AIA believes that the goal which you are pursuing, which is to attempt to find a more effective mechanism for detecting and punishing fraudulent claims against the Government is certainly an appropiate one. We believe that this goal must be balanced against the need to maintain fundamental principles of due process in the standards and procedures employed by the Government in enforcing the law.

The association strongly believes that the Congress should proceed with deliberate caution when it comes to removing the inherent protections afforded by the judicial system.

AIA is concerned that in a number of fundamental respects the proposals disrupt this essential equilibrium and that they will lead to the erosion of fundamental due process rights.

This concern is greatest when it comes to removing the inherent protections afforded by the judicial process and substituting an administrative mechanism where the allegedly wronged agency serves as the prosecutor, the investigator, the judge, and the appellate authority.

We have four specific concerns that we are going to address, with three subconcerns. Probably no other element of the program fraud bill, and now the False Claims Act proposals, has been the subject of greater discussion and interpretation than the standard of intent or knowledge required to establish liability.

Indeed, in the AIA view, this element of these legislative proposals is probably the most critical and potentially has the most far-reaching impact.

AIA believes that a person should not be held liable for a false or fraudulent claim unless that person acts with conscious culpability. The person must have acted with actual knowledge that the claim was false, or with reckless disregard for the falsity of that claim. No lesser standard should be approved, especially for application in a broad administrative apparatus.

Reckless disregard under such a standard would cover the person who consciously and deliberately shields himself from information necessary to assess the falsity of a claim.

Reckless disregard also could encompass the person who, faced with a significant and clear risk of falsity, such as a signal that something is wrong, deliberately proceeds in conscious disregard of that risk.

AIA believes that it would be unreasonable to apply a broader standard, such as one which would generally penalize negligence or, more specifically, the failure to conduct an investigation that a reasonable and prudent person should or would conduct. Such a standard drifts far afield from traditional common law concepts of fraud.

Furthermore, application of such an inherenty subjective definition would have decidedly practical implications.

Adoption of some form of negligence standard, wrapped in a duty to investigate, could require that business people constantly—and I mean constantly—question their ability to rely upon the judgment of their fellow employees, even their most trusted associates.

Negligence, mistake, inadvertence, indeed, honest disputes with the Government, these are not the stuff on which claims or fraud should be based and severely penalized—whether it be in court or in an administrative proceeding. The standard of intent or knowledge adopted by the subcommittee should very clearly and precisely exclude such unwitting conduct from its scope.

Let me now talk about the element of the burden of proof.

The various proposals would permit the Government to establish liability for a false or fraudulent claim—whether in a court or administrative proceeding—based merely on a preponderance of the evidence. This is a clear dilution of the Government's burden of proof as currently required.

The association believes that the damage provisions of the civil False Claims Act and its administrative progeny, the program fraud bill, would fall somewhere between the criminal penalty and comprehensive recovery under a contract or common law.

In AIA's view, it is unprecedented and unfair to permit what amounts to punitive damages without a higher level of proof than that required for compensatory damages. Similar penalty levels are included in the pending program fraud proposals.

In AIA's views, these changes, when coupled with a lightening of the burden of proof, would permit the Government in effect to obtain what amounts to punitive damges without a higher level of proof than that required for compensatory damages.

We believe that the Government's burden of proof should be retained at the clear and convincing evidence level under both civil False Claims Act and any program fraud bill.

The issue of the availability of testimonial subpoena power to government investigating officials arises in two contexts in the proposals now pending before the subcommittee. In both cases, AIA's paramount concern is the need for such a powerful investigatory tool, the potential for abuse and the protections afforded those who might be the target for such subpoenas.

The first context in which this issue arises is the engrafting of a civil investigative demand mechanism for potential court proceedings brought under the civil False Claims Act.

A CID mechanism, with or without testimonial subpoena power, applied in the civil False Claims Act arena should include each and

every protective mechanism afforded under the existing antitrust laws and its interpretive cases.

Finally, the subcommittee should closely examine the extent to which testimony taken in this prejudicial context should be automatically shared with other government investigators, especially those seeking to impose penalties through administrative adjudications.

The second context in which the testimonial subpoena power issues arises is the grant of such authority directly to investigators preparing for potential administrative proceedings under a program fraud statute.

AIA is opposed to such a grant, even if it is restricted to the departmental inspectors general themselves. There is just no evidence to show that such investigators truly need such independent subpoena authority to do their jobs successfully.

Moreover, without clear and precise limits on the use of such subpoenas and the data gathered thereunder, AIA believes that there is a potential for misuse in an administrative environment, where there would be decidedly less protections than afforded under the CID structure.

For example, based on the pending proposals, in the CID context the target of such a subpoena would be told up front of the allegations of conduct violating the law and would be able to seek a court ruling quashing the demand. In addition, any information collected by a CID would be specifically exempt under the Freedom of Information Act. Finally, subpoenaed testimony under such a CID could only concern documentary material or information. To AIA's knowledge, none of these fundamental protections has been included in any of the proposals for testimonial subpoena power in the program fraud context.

The import of granting testimonial subpoena power to th e government's investigators is even more significant in light of the limited discovery rights available to the target of such a subpoena. There are no minimum discovery rights provided to the accused enabling adequate trial preparation.

The administration, as you heard today, wisely has been opposed to granting testimonial subpoena power to administrative investigating officials under a program fraud bill.

There also is a need for an independent assessment of prosecutorial merit. The program fraud mechanisms before the Congress generally leave to the agency allegedly wronged the task of both investigating and referring to prosecution the offenses charged. In addition, officials of the wronged agency would try the cases and the agency head generally would sit as the initial appellate judge of a decision by a subordinate.

AIA recognizes that the combination of such functions in a single agency is not without precedent in administrative law. Still, in light of the stigma of the accusations, and the severity of the penalties, at some point in the administrative process—prior to prosecution by the agency—an independent assessment should be made of the merits of the case. Most of the pending program fraud bills pay lip service to this suggestion by providing for passive approval by the Department of Justice. In our view, that is not enough. At a

minimum, there should be a requirement for active approval or disapproval by the Department of Justice.

In addition to these four major items, we would like to provide comments on three other areas of concern, which include the following:

First, the program fraud proposals before the subcommittee would suggest adopting a relatively narrow standard for appellate court review. We would suggest that the Administrative Procedure Act standard be the standard required for review. Second, with regard to qui tam suits—this is a difficult subject for me to discuss. I think in principle we would agree that a qui tam suit might lie in certain cases. The problem we have with it is that it probably will encourage, or be a mechanism, for encouraging over-enthusiastic lawsuits against the defendants. I look at it as another full employment act for lawyers. I think we have to find some way to discourage that kind of activity.

We would recommend that as a mechanism for tempering such citizen prosecutors, perhaps the Congress could require that plaintiffs pay defendant's costs of fending off any qui tam suit deemed by a court to be without substantial basis.

Third, traditionally access to grand jury materials outside the criminal prosecutor's office and the court has been limited to a select group of individuals. The law and courts have been reluctant to grant expanded access to such sensitive materials without specified showings. AIA would urge the subcommittee to proceed with caution when it comes to proposals to expand such access beyond traditional borders.

Finally, there is another aspect to our position which we think warrants your consideration. It is different in the sense that it is not couched in legal terminology. Rather, it is a simple and direct appeal to the fundamental concepts of fair play and evenhandedness. While seemingly mundane, these concepts are the very underpinnings of a process in which the Government, stepping down from its sovereign throne, enters into the free marketplace to transact the business of doing business with the private sector. This is an arena in which those engaged have elected consciously and voluntarily to provide the services and material essential to our national defense.

If in the conduct of business with the Government, industry employees are obliged to assume unconscionable risk or are burdened through law or intimidation with penalties and punishments disproportionate to any offense or intended wrongdoing, then industry employees will be discouraged from participating in the arena of defense contracting. I emphasize employees.

Given the complexity of that business, the volume of transactions, the potential for innocent error, the uncertainty and vagueness of so many of the rules, the risks to industry and its employees become unbearable and could become prohibitive. This is not a threat. It is an appeal to reason.

Congress must and should discern the meaningful distinction between the risk to an individual submitting but one personally relevant claim to the Government, and the risk to the Government contractor and the Government contractor employee, who, within the course of a single contract, asserts literally thousands—hun-

dreds of thousands, sometimes a million—transactions, each one of which can constitute a distinct claim.

When aggregated, the potential for penalty is unbounded—far greater than the penalty would be under comparative criminal and civil statutes in which the accused is assured of all the normal safeguards of due process. Quite frankly, the statistical probability for getting caught up in an accusation of civil or program fraud now appears to be inevitable.

Should you think I exaggerate the magnitude of the problem, let me note the recently accomplished OSD Task Force Conference Report on Cost Principles dated November 8, 1985. We can provide you with a copy of that report.

It was written by 20 defense "costing experts"—government employees—examining existing regulations, of which there are 48 in total. It found 38 of those 48 defective in one or more significant ways: Specificity, clarity, practicality, and effectivity—and made more than 71 distinct recommendations for DAR Council actions with the DOD.

We are not dealing with a precise science, but with general principles subject to individual interpretation colored by perception—interpretations over which even specialists and experts can and do disagree in the majority of cases. While there is room for improvement, and I believe that improvement is going on right now, and I believe that progress can and will be made, but there will always be significant areas that are imprecise.

I exhort this subcommittee to ponder the good sense and fairness of reserving the opportunity to deal with these areas in a nonadversarial forum, through discussion and negotiation at the level of the contracting officer and the auditor, as has been the past practice, rather than taint the procurement process with the aura of administrative actions prescribed by a bureaucratic tribunal dictating severe penalties, stigmatizing industry, and its employees, and making no distinction between willful misconduct, contract clause interpretations made in good faith, and honest errors of judgment.

Mr. Chairman, that concludes the AIA's prepared statement. I would ask that my full statement be included in the record. We appreciate very much your giving us this opportunity to share our opinions with you. If you have any questions we will be glad to answer them.

[The statement of Mr. Menaker follows:]

SUMMARY OF TESTIMONY OF THE AEROSPACE INDUSTRIES ASSOCIATION (AIA)

The AIA believes that the goal of ferreting out and punishing fraud against Government programs is a laudable one. But the Congress must be careful, in the process of strengthening the Government's investigatory and prosecutorial tools, not to neglect the fundamental principles and protections of due process.

AIA has fundamental concerns about elements in the bills pending before the Subcommittee (1) to amend the civil False Claims Act and (2) to establish an administrative bureaucracy for prosecuting small fraud cases.

First and foremost, a person should not be penalized for false claims based on negligent, unpurposeful conduct. There should be no liability without a showing of actual knowledge of falsity or, at a minimum, reckless disregard (involving a conscious culpability) for the falsity of a claim.

Second, the Government should be required to prove its case by clear and convincing evidence, whether in court or the administrative tribunal. This is generally the present standard under the civil False Claims Act; it should not be diluted at the same time as other elements of the Government's job in proving civil fraud are being made easier and penalties are being made more severe.

Third, there is no demonstrated need to grant testimonial subpoena power to investigating officials preparing administrative cases involving false claims. The Administration opposes these "extraordinary powers" as being without "demonstrable justification." AIA agrees. Any use of civil investigative demands authorized under the civil False Claims Act should be subjected to all of the same protections incorporated in the Antitrust Civil Process Act.

Fourth, a genuinely active, independent assessment of the merits should be made before a false claim case is tried in an administrative forum. This is not too much to ask for in return for the elimination of the inherent protections found in the judicial process.

In addition to these key areas, the Subcommittee must give careful scrutiny to the proposals on qui tam suits and greater access to grand jury materials. No changes should be approved which open the door for potential abuses justified solely on the grounds of pursuit of fraud.

STATEMENT OF FRANK B. MENAKER, JR.

ON BEHALF OF THE

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

FEBRUARY 5, 1986

CONCERNING AMENDMENTS TO THE

FALSE CLAIMS ACT, INCLUDING

THE PROGRAM FRAUD CIVIL

PENALTIES ACT

Mr. Chairman and members of the Subcommittee, my name is Frank H. Menaker, Jr. . I am the Vice President and General Counsel of Martin Marietta. I am appearing here today on behalf of the Aerospace Industries Association of America, Inc. ("AIA" or "Association"), the trade association which includes among its members this Nation's leading manufacturers of commercial, military and business aircraft, as well as helicopters, aircraft engines, missiles, spacecraft and an array of related components and equipment. Accompanying me is Paul C. Besozzi, a partner in the Washington, D.C. law firm of Hennessey, Stambler & Siebert. AIA appreciates the opportunity to participate this morning and present its views on a most important topic. The Association is presumably only one of many organizations with opinions about today's subject matter. We hope that in developing its recommendations the Subcommittee will consider the views of a broad spectrum of aimilar interested parties and their representatives. I would ask that my full statement be included in the record of these hearings.

## I. INTRODUCTION

No one in good conscience can logically criticize any reasonable effort, legislative or otherwise, to prevent or root out fraudulent claims against Government programs. AIA is no exception.

There are many laws and regulations on the books designed to deal with possible fraudulent activity in Government programs. Indeed, according to the American Bar Association's ("ABA") Section of Public Contract Law, the government contract area, for example, is "already covered by more than 400 statutes, and regulations that provide the Government with criminal, civil and administrative remedies" for fraud. 1/

## II. REASON FOR HEARINGS: PERCEIVED NEED TO STRENGTHEN AND IMPROVE ENFORCEMENT TOOLS

We understand that the primary reason for this hearing is a growing perception that at least some of our laws dealing with

felee or fraudulent claims, such as the civil False Claims Act (31 U.S.C. 3729 et seq.), are in nead of retooling and strengthening. For some tima there have been periodic proposals to establiah a Govarnment-wida administrative mechanism, outside the judicial system, for dealing with allegedly fraudulent claims involving emaller aums, especially in the various Government-administered loan and benefit programs. The proponents of this Program Fraud legislation argue that in many ceaes the amounts involved cannot justify the allocation of valuable prosecutorial resourcas; therafore, many of thesa amaller cases go unprosecuted.

Together, these perceptions and opinions have produced a number of bills now pending before thie Subcommittee. 2/ Others, with aimilar or identical goals, are pending in tha Senate. 3/

## III. ESSENCE OF PROPOSALS: INCREASE PENALTIES, EASE THE PROSECUTOR'S BURDEN AND REACH UNPROSECUTED FRAUDS

Among other things, the pending bills would eignificantly

increase monetary penalties under the existing civil False Claims Act, overturn or diluta court-established standards of knowledga and proof under this statute, substantially enhance the Government's investigatory tools and powers in the false claims area, and provida certain graatar accass to grand jury materials, presumably to aid in civil fraud proaecutions. Moat significantly, the Program Fraud proposals would establish an additional government-wide administrative bureaucracy for dealing with elleged false claims involving less than $100,000, primarily on the theory that many such frauds currently ara going unproaecuted. 4/ In theory, the cumulative effect -- and apparent primary goal -- of all thesa proposals would ba to make the Government's task of detecting and punishing a fraudulent claim, at least in the civil context, an easier ona.

## IV. AIA'S GENERAL PERSPECTIVES AND SPECIFIC CONCERNS

There is nothing inherently wrong with such a goal. Sut AIA believes that this eim muat ba balanced with the nead to maintain

fundamental principles of due process in the standards and procedures employed by the Government in enforcing the laws.

The Association recognizes that an administrative process may be the needed mechanism for handling large numbers of smaller fraud cases. However, the Association strongly believes thst legislators should proceed with deliberate caution when it comes to removing the inherent protections afforded by the judicial syatem. AIA is concerned that, in a number of fundamental respects, the proposals disrupt this essential equilibrium and would lead to erosion of fundamental due process rights. This concern is greatest when it comes to removing the inherent protections afforded by the judicial process and substituting an administrative mechsnism where the allegedly wronged agency serves as investigator, prosecutor, judge and initial appellate authority. 5/ The dangers inherent in such an approach are obvious.

The Associetion has closely followed the development of the Program Fraud bills in the Congresa. In addition to AIA's

overall concern with the creation of a new "civil fraud" bureaucracy, AIA's daepest concerns with thase proposals lia in the following key areas:

A. The standard of intent or knowledga necessary to estabiiah civil liability under a judicial or adminiatrative framework for prosecuting false or fraudulent claima.

B. The Government's burden of proof in establishing that a claim is false or fraudulent under aither such framework.

C. The availability of testimonial subpoena power to Government officials investigating allagations of false or fraudulent claims, especially in an administrative context whare tha investigatory target may have only limited access to the nature of the charges and evidence against him.

D. The lack of any requirement for activa, truly independent, proaecutorial raview and approval befora proceeding to try falea claims allagations in an administrative forum.

## A. The Standard of Intent or Knowledge

Probably no other element of the Program Fraud, and now the civil False Claims Act, proposals has been the subject of greater discussion and interpretation than the standard of intent or knowledge required to establish liability. Indeed, in AIA's view, this element of these legislative proposals is probably the most critical and potentially far-reaching in impact.

AIA believes that a person should not be held liable for a false or fraudulent claim (or statement) unless he acts with conscious culpability. The person must have acted (1) with actual knowledge that the claim was false or (2) with "reckless disregard" for the falsity of that claim. No lesser standard should be approved, especially for application in a broadly employed administrative apparatus.

Reckless disregard under such a standard would cover the person who consciously and deliberately shields himself from information necessary to assess the falsity of a claim. This is

the "ostrich" or "head-in-the-sand" scenario which should not be permitted as a convenient avoidance of liability. Reckless disregard also could encompass the person who, faced with a significant and clear risk of falsity (i.e., a signal that something is amiss), deliberately proceeds in conscious disregard of that risk. 6/ The concept of "reckless disregard" is not a new one in the context of Program Fraud proposals. Previous versions of such bills have included this term. 7/

AIA believes that it would be unreasonable to apply any broader standard, such as one that generally would penalize negligence or, more specifically, the failure to conduct an investigation that a "reasonable and prudent man" should or would conduct. Such a standard drifts far afield of traditional common law concepts of fraud. Moreover, as compared with existing court precedent, it would appear to impose a most lenient and broadest interpretation of the civil False Claims Act. 8/

Furthermore, application of such an inherently subjective definition would have decidedly practical implications. In this

day and age it is reasonable for a businessman to rely on the actions of responsible employees who assist in the preparation of claims against the Government. Adoption of some form of negligence standard, wrapped in a duty to investigate, could make it no longer reasonable for that businessman to rely at all on his employees, even his most trusted ones.

Negligence, mistake, inadvertence, indeed, honest disputes with the Government, these are not the stuff on which judgments of fraud or falsity should be based--whether it be in a court or in an administrative proceeding. The standard of intent or knowledge adopted by the Subcommittee should very clearly and precisely exclude such unwitting conduct from its ecope.

### B. The Government's Burden of Proof In Establishing That A Claim Ie False or Fraudulent

The various proposals before the Subcommittee would permit the Government to establish liability for a false or fraudulent claim--whether in a court or administrative proceeding--based

merely on a preponderance of the evidence. This is a clear dilution of the Government's burden of proof as currently required. 9/

AIA has previously noted that the proposals pending before the Subcommittee would significantly increase the substantial monetary penalties currently applied to false or fraudulent claims. The Association believes that the damage provisions of the civil False Claims Act--and its administrative progeny, the Program Fraud bill--would fall somewhere between the criminal penalty available to the Government under the criminal False Claims Act and a compensatory recovery under a contract or common law. Currently, under the civil False Claims Act, the Government can recover double damages, plus penalties and costs of the civil action. Under the pending proposals, the penalty amounts would be increaeed anywhere from 2 and a half to 5 times the present level. In AIA's view, it is unprecendented and unfair to permit what amounts to punitive damages without a higher level of proof than that required for compensatory damages. Similar penalty

levels ere included in the pending Program Fraud proposala.

In AIA's view, these changes, when coupled with a lightening of the burden of proof, would permit the Government in effect to obtain what amounts to punitive damages, without a higher level of proof thsn that required for compensatory damages. The fact is that the clear and convincing standard of proof is frequently epplied in cases involving fraud allegations or severe administrative penalties. 10/ For all these reasons, AIA believes that the Government's burden of proof should be retained at the "clear end convincing evidence" level under both the civil False Claims Act and any Program Fraud bill.

### C. The Availability of Testimonial Subpoena Power To Government Inveatigeting Officiels

Thie issue erisss in two contexts in the proposals now pending before the Subcommittee. In both cases, AIA's paramount concern ie the need for euch a powerful investigatory tool, the potentiel for ebuee end the protectione efforded thoee who might be

the targets of such subpoenas.

The first context in which this issue arises is the engrafting of a civil investigative demand mechaniam for potential court proceedings brought under the civil False Claims Act. Authority for government lawyers to issue civil investigative demands ("CIDs") already exists in one area of the U.S. code--antitrust law. 11/ The Subcommittee should carefully assess whether the factors which justified the grant of CID authority in that context are equally applicable here. In any case, a CID mechanism, with or without testimonial subpoena power, applied in the civil False Claims Act arena should include each and every protective mechanism afforded under the existing antitrust law and its interpretive cases. Finally, the Subcommittee should closely examine the extent to which testimony taken in this pre-judicial context should be automatically shared with other government investigators, especially those seeking to impose penalties through administrative adjudications.

This second context in which the testimonial subpoena power

issue arises is the grant of such authority directly to investigators preparing for potential administrative proceedings under a Program Fraud statute. AIA is unalterably opposed to such a grant, even if it is restricted to the Inspectore General themaelves. There is little or no evidence to show that such investigators truly need such independent subpoena euthority to do their jobs euccessfully.

Moreover, without clear and preciee limits on the use of euch subpoenas (and the data gathered thereunder), AIA believes that there is e potential for misuse in an administrative environment, where there would be decidedly less protections than afforded under the CID etructure. For example, based on the pending proposals, in the CID context the target of such a subpoena would be told up front of the allegatione of conduct violating the lew and would be able to eeek a court ruling quashing the demand. In eddition, information collectad by a CID would be specifically exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Finally, subpoenaed testimony under

such a CID must be "concerning documentary material or information." To AIA's knowledge, none of these fundsmental protections has been included in any of the proposals for testimonial subpoena power in the Program Fraud context.

The import of grsnting testimonial subpoena power to the Government's investigators is even more significant in light of the limited discovery rights that would be available to the target of such a subpoena. Under most of the Program Fraud proposals, the person would have no right to obtain the notice sent to the Attorney General as the basis for the administrative case. In fact, unlike the CID mechanism, when subpoened to testify by an investigator, the person would not have to be given any specific information on the nature of the allegations against him. The accused's discovery rights at the hearing stage generally would be limited and left to the discretion of the hesring examiner. There are no minimum discovery rights provided to the accused enabling adequate trial preparation.

The Administration wisely has been (and remains) opposed to

granting testimonial subpoena power to administrative investigating officials under a Program Fraud bill. In a letter dated November 4, 1985, concerning S. 1134, a Program Fraud proposal currently pending in the Senate, the Justice Department states unequivocally.

> "...[t]he Department of Justice and the Administration continue to object to...authorizing the Inspectors General to compel the testimony of witnesses. We do not believe that there is a demonstrable justification for such extraordinary powers and we are seriously concerned with the potential this provision creates for interference with ongoing criminal investigations. While we recognize that the proponents of S. 1134 have made efforts to accommodate our concerns on this issue, the proposed procedure for Department of Justice review of testimonial subpoenas is simply unworkable." (emphasis added). 12/

AIA wholeheartedly agrees with that stand and, to date, is aware of no change in this Administration position. The Inspectors General have been quite successful in their efforts to

ferret out fraudulent or false claims without this unprecedented power, which is not even possessed by the Federal Bureau of Investigation. 13/ It should not be included in any Program Fraud bill approved by the Congress.

## D. THE NEED FOR AN INDEPENDENT ASSESSMENT OF PROSECUTORIAL MERIT

The Program Fraud mechanisms before the Congress generally leave to the agency allegedly wronged the task of both investigating and referring to prosecution the offenses charged. In addition, employees of the wronged agency would try the cases and the agency head generally would sit as the initial appellate judge of a decision by one of his underlings.

AIA recognizes that the combination of such functions in a single agency is not without precedent in administrative law. Moreover, some of the Program Fraud bills have attempted to create a greater degree of independence within the agency, for hearing examiners trying these cases. And where there are egency ad-

ministrative law judges, this may ba lass of a potantial problem.

Still, in light of tha stigma of the accusations and the severity of tha penalties, at some point in the administrative process--prior to prosecution by the agency--an indapendant assessment should ba made of tha merits of the case. Most of the panding Program Fraud bills pay lip service to this suggestion by providing for "passive approval" by the Dapartment of Justice of an administrative proceading. In AIA's view, this is not enough. At a minimum, there should be a requirement for "active" approval or disapproval by the Departmant of Justica. 14/ That is tha only way to ensure that the merits of these cases are baing evaluated closaly by the Attorney Ganeral. AIA notes that the ABA's Section of Public Contract Law, among others, has takan a similarly strong position on this matter. 15/ The Association believes that the Subcommittee should give this issue the highast consideration.

## E. Additional AIA Concerns

In addition to these four major items, AIA wants to provide comments on aeveral other areas of concern about the proposals pending before the Subcommittee.

1. Administrative Liability and The Standard of Appellate Review -- The Program Fraud proposels before the Subcommittee would adopt a relatively narrow stenderd for appellate court review of the hearing examiner's fectual findings. Generally, these findings are limited to review for support by substantial evidence in the record. On the other hand, the Administrative Procedure Act ("APA") (5 U.S.C. 706) ellows an appellate court to set aside "agency action, findings and conclusions found to be arbitrary, capricious, an abuse of diacretion, or otherwise not in accordance with law." The Contrect Disputes Act (41 U.S.C. 609) offers another, more comprehensive, atandard of appellate court review. AIA sees no reason why Program Fraud adminiatrative decisions, with their potential for substantiel penalties end as-

sessments, should be subjected to any lesser standard of appellate review. Any Program Fraud bill approved by the Subcommittee should include a standard at least equal to that in the APA.

2. Qui Tam Suits -- There are proposals in Congress, including some in H.R. 3317 now pending before the Subcommittee, to modify the qui tam provisions of the civil False Claims Act. 16/ Generally, the apparent intent of these revisions would be to provide a greater incentive for use of this existing statutory mechanism.

The concept of private attorneys general is hardly a new one, but AIA must offer a word of caution. The Subcommittee should take care to avoid adopting provisions that could stimulate a raft of flimsy actions which only serve to soak up the courts' (and the Government's) time without a genuine basis. If qui tam suits are to be encouraged, there should be a mechanism for tempering the overenthusiastic citizen prosecutor, perhaps by requiring that he pay the defendants' costs of fending off any qui tam suit deemed by the court to be without a substantial

basis. The provisions of the Equal Access To Justice Act afforded an analogous remedy in the case of certain government legal actions. 17/

3. Access To Grand Jury Materials -- Although these proposals do not amend the civil False Claims Act, they apparently have been put forward in the interest of enhancing the government's ability to prosecute fraud in the civil forum. Traditionally, access to grand jury materials outside the criminal prosecutor's office and the court has been limited to a select group of individuals. The law and courts have been reluctant to grant expanded access to such sensitive materials without specified showings. 18/ AIA would urge the Subcommittee to proceed with special caution when it comes to the proposals to expand such access beyond traditional borders. Learned members of the bar have reportedly axpressed deep concerns about aimilar initiatives pending in the other House. 19/ AIA beliaves that those concerns are justified.

## V. CONCLUSION: A FINAL PERSPECTIVE

There is another aspect to AIA's concerns which warrants the Subcommittee's consideration. It is different in the sense in thet it is not couched in legal terminology. Rather, it is a simple end direct appeal to the fundamental concepts of feir plsy and even-handedness. While seemingly mundame, these concepts ere the very underpinings of a process in which the Government, stepping down from its sovereign throne, enters into the free market place to trensact the business of doing business with the private sector. This is an arena in which those engaged have elected consciously and voluntarily to provide the services and material essential to our national defense.

Admittedly, this election is not totelly altruistic. Induetry contemplates a fair and reasoneble return on its investment of human end material resources. Without such a return, it could not compete to ettrect the capital and inveetment required to accumulate the fecilities, plant end

personnel essential to performance. We believe that this arrangement has served both industry and this Government well. Both have prospered and we look forward to the continuance of thia relationship in the future. However, if in the conduct of businees with the Government, industry is obliged to assume unconscionable risk or is burdened through law or intimidetion with penelties and punishments dieproportionete to eny offense or intended wrongdoing, industry will be discouraged from participating in the arena of defense contracting. Given the complexity of that business, the volume of transactions, the potential for innocent error, the uncertainty end vagarity of so many of the rules, the risks to industry become unbearable and prohibitive. This is not a threat, but an appeal to reason.

Congress must and should discern the meaningful distinction between the risk to en individual aubmitting but one claim to the Government dealing with but one and, in the terms of reference to thet individual, significant matter and with a defense contractor who, within the course of a single contract, aaserta literally

hundreds of thousands if not millions of transactions...each one of which can constitute a distinct claim. When aggregated, the potential for penalty is unbounded--far greater than the penalty would be under like criminal and civil statutes in which the accused is assured of all the normal safeguards of due process. And quite frankly, the statistical probability for getting caught up in an accusation of civil or Program Fraud is almost inevitable.

I cannot tell you how disconcerting and disruptive to a defense contractor is any such charge. Not only does it taint the nature of our relationship with the customer and do uncalculable damage to our corporate image, but it generates a host of activity totally unrelated to accomplishment of the final objective--contract performance--the cost of which is required to be absorbed by the contractor even when innocent of the charge.

Should you think I exaggerate the magnitude of the problem, let me note the recently accomplished report of the OSD Task Force Conference Report on Cost Principles dated 8 November 1985.

It was written by 20 Defense "costing experts" examining existing regulations--of which there are 48 total. It found 38 of those 48 defectiva in ona or more significant waye (specificity, clarity, practicality, or effectivity) and made more than 71 distinct racommendations for DAR Council action.

Wa are not daaling with a precise ecience but with general principles subject to individual intarpretation colored by parception--intarpretations ovar which even specialists and experts can and do disagree in the majority of cases. While there is room for improvement, and I believe some progress can and will be made, there will always be significant areas of "gray". I exhort this Subcommittee to ponder the good sense fairness of reserving the opportunity to deal with these gray areas in a non-adversarial forum through discussion and negotiation at the level of the contracting officer and auditor, as has bean our past practice, rathar than taint them with the aura of administrative actions prescribed by a bureaucratic tribunal dictating severa penalties, etigmatizing industry, and

making no distinction between willful misconduct and honest errors of judgment.

That concludes AIA's prepared statement. Again, the Association has appreciated this chance to share it opinions with you. AIA certainly stands ready to formally or informally assist the Subcommittee as it further considers the proposals. I am now prepared to answer any questions that you might have. Thank you for your attention.

**FOOTNOTES**

1/ Letter From Thomas E. Abernathy, Chairman, Section of Public Contract Law, American Bar Association, To Senator William V. Roth Jr., July 20, 1984, at 1; see Hearing Before Sub-comm. on Oversight of Govt. Mgmt. of Senate Comm. on Governmental Affairs on S. 1134, (June 18, 1985), at 88 (Testimony of Karen Hastie Williams) (hereinafter "Senate Hearings, at ____").

2/ See, e.g., H.R. 2264, H.R. 3317, H.R. 3334, H.R. 3335 (all 99th Congress, 1st Session).

3/ See, e.g., S. 1134, S. 1562, S. 1673 (all 99th Cong., 1st Session).

4/ There has been much discussion of the need for an administrative mechanism being driven by the Juatice Department'e lack of resources. See S. Rep. No. 212, 99th Cong., 1st Sess., at 5, 38, 39 (hereinafter "Senete Report, at ____"). No suggestion has been made that some of the proeecutorial burden might be assumed by the defreuded agenciee' own lewyers. See Federal Crop Insurence Corporation v. Heeter, 765 F.2d 723 (8th Cir. 1985) (FCIC epparently eucceeefully brought its own suit on false claims of $25,639.90).

Setting up, staffing and running a government-wide administrative program presumably also would consume substantial Governmental resources.

5/ Other members of Congress have voiced analogous concerns. See Senate Report, at 68-69 (Minority Views of Senator Cochran); 132 Cong Rec. 5299-300 (daily ed. January 21, 1986) (Remarks of Senator Hawkins).

6/ In the Senate Hearings, a key Administration witness agreed that beyond actual knowledge, these were the types of conduct that should be covered by the term "reason to know" that a claim (or statement) was false. See Senate Hearings at 15 (Testimony of Acting Assistant Attorney General Richard K. Willard).

7/ See, e.g., S. 1780, 97th Cong., 2d Sess. (1981).

8/ Several Federal Circuits require a showing of specific intent to defraud under the civil False Claims Act. See, e.g., United States v Aerodex, 469 F.2d 1003, 1007 (5th Cir. 1972); United States v Mead, 426 F.2d 118, 122 (9th Cir. 1970). Others require a showing of actual knowledge of feleity, and nothing lass. See, e.g., United States v Hughes, 585 F.2d 284, 286-287 (7th Cir. 1978); United States v Ekelman & Associates, 532 F.2d 545, 548 (6th Cir. 1976). Even the decision in United States v Cooperative Grain and

Supply Co., 476 F.2d 47 (8th Cir. 1973), off-cited in support of a nagligence-type standard, found that the dafendants' conduct was "extremaly caraless and foolish," noting that it "approaches fraud, an intentional misrspresentation" sinca "the intent to deceive of a fraudulent misrepresentation may includs a reckless disregard for the truth or falsity of a belief." 476 F.2d at 60.

9/ See, e.g., United States v Ekelman & Associates, supra, 532 F.2d at 548 (6th Cir. 1976); United States v Foster Wheeler Corporation, 447 F.2d 100, 101 (2d Cir. 1971); United States v Mead, supra, 426 F.2d at 123 (9th Cir. 1970); aee also Bageny V United States, 570 F.2d 924 (Ct. Cl. 1978).

10/ See, e.g., Woodby v INS, 385 U.S. 276, 285-286( 1966) (deportation). Sea Island Broadcasting Corp. of S.C. v FCC, 627 F.2d 240, 244 (D.C. Cir.), cert. deniad, 449 U.S. 834 (1980) (revocation of radio license); Loftin and Woodward, Inc. v United Statea,, 577 F.2d 1206, 1236-37 (5th Cir. 1978) (incoma tax fraud).

11/ Sea 15 U.S.C. 1311-1314 (antitruat civil procees).

12/ Senate Report at 37 (Lettar from Acting Assistant Attorney General Phillip P. Brady).

13/ See Senate Hearings at 28 (Testimony of Acting Assistant Attorney General Richard K. Willard).

14/ Even under the present system, the Justice Department was apparently able to make some determinations that many of these cases "had no prosecutive merit." Senate Report at 35 (Letter of Milton J. Socolar).

15/ See Senate Hearings, at 99-100 (Statement of Karen Hastie Williams).

16/ See 31 U.S.C. 3730.

17/ See, e.g., former 5 U.S.C. 504.

18/ See generally Federal Rule of Criminal Procedure 6(e); U.S. v Sells Engineering, Inc., 463 U.S. 418 (1983).

19/ Federal Contracts Report, Vol. 44, No. 21, 948-949 (November 25, 1985).

Mr. GLICKMAN. Thank you both. That was an excellent statement as well.

I would just comment, Mr. Menaker, on page 17, when you talk about the review standard—the appellate review standard——

Mr. MENAKER. Yes, sir.

Mr. GLICKMAN [continuing]. I think the standard that you cite there is the standard for review of rulemaking decisions. It is my understanding from staff that the standard for on-the-record adjudicative review is the basic substantial evidence rule, which I think is a—at least that is what I have been advised—which is a more complete review, and the burden is not quite as great as it would be under the arbitray andcapricious standard for rulemaking.

Mr. MENAKER. I thank you for pointing that out.

Mr. GLICKMAN. I just make that point for you, so it is not quite as bad as you thought it was, is what I was trying to say there.

I would like to go to the issue that you both talk to—it has to do with the state of mind involved in a false claim. I guess the question here is: Actual knowledge—I think all of us could agree, that if, or either of you, willfully, intentionally as either any lay person would describe that, and with malice of forethought, try to go in and defraud the Government by doctoring up a claim, that would be a satisfactory definition for the purposes of the False Claims Act.

The question would be, is it has to do with constructive knowledge, or the kind of should-have-known, but didn't know, but not necessarily negligence either. We are talking about a middle standard that, as an example, an individual says, "Don't tell me what you are doing, I tell my staff people, but if you have to play around with those claims, fine, but I don't want to know anything specific about it."

How do you feel about a should-have-known standard that is not a negligence standard, but some kind of standard which says that if you acted in reckless disregard of the truth but you might not have had actual in front of you type of knowledge; should that not also be covered under the False Claims Act?

Mr. CROSS. I think something like reckless disregard certainly is fine. I think the question of should-have-known is really open to what does that mean. In the case of my company, and I am certain in the case of the other companies represented, that the number of offices you might have and the number of different projects ongoing are quite great. I mean, we are a company of less than 200 people. We have five offices in Maryland, offices in Pennsylvania, Hawaii, and three overseas. And trying to, just from a company of our size, keep track of what might be going on that might lead to a claim at some point down the road is a burden of impossibility if it is not very tight in terms of constructive knowledge or something of that sort.

Mr. GLICKMAN. You would want a definitional standard of should-have-known that would be clear enough and severe enough so that it would not lead to an unnecessarily vague interpretation that might push you down toward the negligence standard?

Mr. CROSS. That is correct.

Mr. GLICKMAN. OK. Mr. Menaker.

Mr. MENAKER. Yes, sir. Certainly actual knowledge and reckless disregard would be a standard that we would advocate very strongly. When you asked about should-have-known, it causes me even greater distress. In our corporation, for example, we have 67,000 employees. They are located all over the country, very actively engaged in the Government contracting process. When you combine the work that they do, particularly in the administrative area, with the lack of precision that does exist with regard to understanding a number of these regulations and interpreting them, it would worry me, and I think it would worry a lot of people in our organiztion to say should have known.

Mr. GLICKMAN. I think that you make a good point there and I think that that is something we are going to have to deal with. I am sensitive to this particular situation.

I don't think either of you addressed the issue of raising the damage amount from $2,000—maybe you did, I don't recall—to $10,000. I wonder if either of you have any—on a per claim basis—do you have any feeling about that? Mr. Menaker, or Mr. Cross, either one of you?

Mr. MENAKER. I don't have a view on that. Certainly $2,000 is a minimal amount. If you are looking at it from a deterrent effect, a higher amount would have a more deterrent effect.

Mr. CROSS. I think from our viewpoint it is the procedural issues that concern us, not the amount of thespecific damages.

Mr. GLICKMAN. I was going to ask you some questions about the due process points but I think you have covered them in your statement, both of you, but particularly Mr. Menaker, pretty carefully. We will work with you on this.

It is my intention to move ahead legislatively. The Senate is moving ahead and we will also, but we will do so reasonably, so we will keep you informed of what is going on.

Mr. CROSS. We appreciate that, thank you.

Mr. GLICKMAN. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman. I have no further questions.

Mr. GLICKMAN. OK.

Mr. CROSS. I might say, from my viewpoint, Mr. Kindness, we appreciate your sensitivity in your earlier questioning of some of the witnesses on the small business concerns, because it is a real issue, as I pointed out in our statement, about how some of these features would affect small businesses, and how they could possibly defend themselves in some of these cases. Thank you.

Mr. KINDNESS. Mr. Chairman, if I might just ask one question.

Mr. GLICKMAN. Sure.

Mr. KINDNESS. I envision cases that we are talking about under program fraud bill in particular, perhaps, involving a number of incidents—for example, timecards, allocable to one contractor or another in which, as I understand it, we would be talking about separate counts, so to speak, that might be quite numerous in total, but would come under the program fraud, the administrative type of approach. And if we were talking about a thousand or something like that, which could conceivably and apparently has occurred—where they were misallocated as to hours, or misallocated as to one

contract or another—you could have a very substantial amount of potential penalties involved in a somewhat unified proceeding.

In such a case, of course, I would imagine that a $2,000 maximum, or a $5,000 maximum, would make it at least a 100-percent difference in what is involved. So, I would certainly urge there be consideration by the subcommittee of how such cases ought to be dealt with, whether they should be joined in one action—as presumably they should. But when they are joined, should they come under the administrative process or the normal judicial process. That one is a question that is left open here, I think.

I would also urge, Mr. Chairman, that the record remain open on these hearings for some time here—10 days or so, I think. I would like to ask if Mr. Menaker could provide for the record, as he indicated, a copy of the report referred to in his testimony at about the last page or so.

Mr. MENAKER. Yes, sir, I will be delighted to do that.

Mr. GLICKMAN. We will keep the record open for an additional 10 days if anybody wants to supply additional material for the record.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. GLICKMAN. Thank you. I appreciate you both testifying.

Mr. MENAKER. Thank you.

Mr. CROSS. Thank you.

Mr. GLICKMAN. The last witness is Mr. Howard Cox, Deputy Assistant Inspector General, Department of Defense.

Mr. Cox, we appreciate your cooperating with us and with the previous panel on time. Sorry it has taken so long but it is a complicated subject.

## TESTIMONY OF HOWARD W. COX, DEPUTY ASSISTANT INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Mr. COX. Frankly, sir, I look forward to any way we can demonstrate that the Defense Department and industry can get along, and if this will perhaps help in that regard we are glad to do it.

Mr. GLICKMAN. Perhaps, as Mao Tse-tung said, "A long march starts with a single step." Maybe it has started today.

Mr. COX. Mr. Chairman, with your permission, I would like to insert my prepared statement for the record and summarize it.

Mr. GLICKMAN. Your entire statement will appear in the record and you may summarize if you wish.

Mr. COX. Thank you, sir.

If I may commence my remarks with just an observation. It is interesting to notice perhaps how far we have come since the GAO report, that you referred to in your opening statement, was originally issued. At that time, I was a member of the Senate Governmental Affairs Committee staff and we considered putting in a program fraud bill. We had representatives of an aerospace company who appeared before our committee at that time and represented in 1981 that there was no such thing as procurement fraud in the Department of Defense.

I think the last 5 years have proven that the accuracy of that particular representation and hopefully the growing need for this particular kind of legislation—a program fraud bill.

I would like to thank you for the opportunity to appear on behalf of the Office of the Inspector General. I would like to make it clear that I am appearing on Mr. Sherick's behalf. He is unfortunately recuperating from an operation, otherwise he would appear, as he has in two previous Congresses, to support this particular piece of legislation. My comments represent only the views of the Office of the Inspector General and not of the administration. Mr. Willard's comments do that.

The Office of the Inspector General continues to support, as we have in the past, the establishment of an administrative penalty mechanism to address false claims and false statements submitted to DOD and the development and aggressive use of civil, administrative, and contractual remedies for fraud.

Traditionally, criminal prosecution has been treated as the primary weapon against fraud, and in many instances, as a precursor to any other actions taken. This has sometimes led to the practice that when a prosecution has been declined, there was no subsequent attempt to seek any other form of address from the offender.

We in the Inspector General's Office have, through a number of efforts, attempted to stop this practice, and improve the way we address fraud in our programs.

We have issued a DOD directive to establish a single authority in each military department to coordinate criminal, civil, administrative, and contractual remedies in fraud cases.

We have encouraged simultaneous civil and criminal referrals of fraud cases to the Department of Justice.

We have designed and presented a fraud training program for auditors, investigators, contracting officers, and the like, to heighten everyone's awareness as to where fraud exists in DOD programs.

Furthermore, we have increased efforts in providing fraud training to program officials, particularly personnel assigned to contracting responsibilities.

Each of these efforts has yielded improvements in the use of existing remedies for fraud. They have also clearly shown us that additional remedies are needed, which is why the Program Fraud Civil Penalties Act is so important.

Many of the cases referred to the Department of Justice for criminal prosecution are declined by DOJ for a variety of reasons. Many of these cases clearly involve false claims and false statements.

I believe the GAO report that you referred to identified that of all the fraud cases that were referred during the period they looked at, two-thirds were declined by the Department of Justice. However, GAO concluded that two-thirds of tbose cases were probably good cases, that is, that someone did indeed submit a false claim or false statement. But the Justice Department for a variety of reasons decided not to prosecute.

We certainly can't dictate the priorities to the Department of Justice from the Department of Defense. But ultimately, we in the Department of Defense are responsible for the integrity of our own programs. We believe that false representations, people lying to get benefits they are not entitled to from DOD, lying to get contracts,

or contract payments that they are not entitled to in DOD, deserves an appropriate response by the Department of Defense.

There are several examples illustrating the need for civil penalty authority, particularly in the procurement area. I have included a number of examples in my prepared statement. I would just like to add an additional two.

We recently had a case in Michigan where a contractor on an Air Force base submitted a false claim for $900,000. The entire claim was false. He did not do any of the work equaling $900,000. We caught the claim before it was paid and, therefore, we did not pay the claim. We presented the case to the local U.S. attorney for criminal prosecution, who declined because the Government did not lose any money. Loss is one of the usual things that the Department of Justice legitimately uses as a criteria. But yet, we have an individual who boldly sought to get almost $1 million from the Department of Defense, and goes virtually without any kind of penalty because of the gap that exists in these particular areas.

We had another case in another U.S. attorney's office where an Air Force contractor had submitted $50,000, again, for a claim for work he had not at all performed. That case, too, was declined, again, based upon the dollar cutoff level and the fact that the claim was not paid. This, by the way, was with a U.S. attorney who just before that had prosecuted an individual for fishing with the wrong kind of worm in a Federal park.

I am not here to dictate his priorities. He has needs and concerns. But, again, the Department of Defense has needs and concerns. Clearly, the criminal justice process cannot respond to all of our needs and concerns, nor would we necessarily want it to. We think that this civil program will provide an adequate closing of this loophole that exists between those serious cases that we feel are serious and those that can't get adjudicated through the criminal justice process.

There are a number of particularly important aspects to H.R. 3335 on which I would like to comment. First, the bill includes false statements as well as false claims. This is extremely important in the area of contract fraud, especially when a contractor certifies a variety of different things that the Government requires a contractor to certify to as part of doing business.

For example, we require contractors to certify whether or not he is or is not a small business. Large businesses traditionally have sought to overcome or to circumvent this requirement by falsely certifying that they are small businesses, thereby cheating good-faith small businesses out of these kinds of contracts.

Traditionally, if the contract is successfully performed by the large business, we don't get a criminal prosecution because the U.S. attorney will say, the Government wasn't harmed. You wanted a clean building, you got a clean building even if he did lie to get the contract.

These are traditionally the kinds of cases we feel this particular penalty would be very, very valuable in.

These kinds of certifications are traditionally accepted by the Government in contracting, at face value, and are rarely questioned, because much of the Federal contracting process relies upon us relying on the integrity of the contractor.

We do business in DOD with more than 250,000 prime contractors and more than 400,000 subcontractors. To police the claims and certifications and deliveries that these people present, the Department has approximately 10,000 auditors and 8,000 inspectors and investigators. There is no way we could or we would even want to police on a regular basis that kind of performance, which is why we must rely upon the truthfulness and the integrity of those who are presenting us with goods, or presenting claims for money.

When we find that someone has misrepresented the facts, has done so knowingly, or in gross negligence, we feel that we should be allowed to respond with an appropriate penalty.

Second, we believe that the knowledge standard provided for here—"knows or has reason to know"—is an appropriate one for a finding of liability under the act. We favor this general intent provision over a requirement to establish specific intent to defraud in order to make a finding of liability. This general intent standard has been generally accepted in the majority of civil cases that have been litigated under the False Claims Act and in other administrative matters.

One aspect of tremendous importance which is found in S. 1134, Senator Cohen's bill, but is absent from the House proposal, concerns the availability of testimonial subpoenas to the investigating official—in our case the DOD inspector general.

The need for such authority is critical to our successfully uncovering false claims and false statement schemes. Proof of knowledge, be it constructive or actual, is particularly difficult in fraud cases, where conspiracies often exist and form the basis for the undertaking of the deception.

We have no way to pierce these kinds of conspiracies unless we can get those who are responsible to come before us and talk to us.

Many DOD contractors currently are aggressively seeking to limit of our ability to speak with corporate personnel, which makes the need for this authority even more critical. And, contrary to assertions made by others who are interested in not having this bill become law, there is ample precedent for the testimonial administrative subpoenas by Federal agencies.

As the Senate Governmental Affairs Committee report points out, there are over 60 statutes which grant testimonial subpoena authority to administrative adjudicatory bodies as well as investigatory bodies.

I should also point out that the inspector general community has had documentary subpoena power since 1978, and there is not a single documented instance where that subpoena authority has been abused. I think that there are adequate performance records to show that the investigators who would be using this authority are trained professionals. For those few instances where an abuse might be present—and, again, it is speculative, as I said, there has been no identified abuse—any U.S. district court certainly has the authority to require the inspector general to respond to a motion to quash or require the inspector general to go to court to demonstrate the legitimacy of an investigation, the fact that the testimony is reasonably related to that legitimate investigation and that it would not be burdensome upon the individual to provide that kind

of testimony. It is just standard judicial review of administrative subpoenas.

We also believe that a potential penalty of $10,000 is a more useful deterrent than the $5,000 penalty currently provided in H.R. 3335. It should be noted that Congress, in passing the Defense Authorization Act, recently allowed DOD to impose an administrative penalty of up to $20,000 when certain DOD employees fail to report employment offers by DOD contractors. Certainly, the submission of a false claim or a false statement by contractors to obtain benefits and taxpayer funds deserves no less than that kind of a potential penalty.

The provisions of the act dealing with notice, hearings and determinations of liability will serve to protect the right to a fair trial and reasonable hearing for any person alleged to be liable, and provide adequate due process for all parties concerned. Indeed, it may be argued that the utility of the bill might be substantially undermined if it costs the Government $50,000 in administrative costs in order to impose a $5,000 penalty.

It should be noted that the recently enacted Defense Procurement Improvement Act allows DOD to impose far greater administrative penalties for certain kinds of contract fraud in a more expeditious and less costly manner.

Finally, as regards the various proposals to amend the False Claims Act, I will simply outline certain certain improvements which the inspector general's office believes are essential.

First, the act, we believe, should be clarified to state that a finding of liability should be based upon a preponderance of the evidence standard, demonstrating that the accused knew or should have known of the falsity of the submission. The preponderance of the evidence standard has been adopted by the majority of Federal circuits which have examined the False Claims Act. We feel that the act should be amended to make thisthe standard across the board.

Second, we believe that the penalty should be raised from $2,000 to $10,000, and that the Government should be able to recover treble, rather than double damages. Again, under the Defense Procurement Improvement Act, a contractor who submits a false claim to DOD on a DOD contract is liable for treble damages under the False Claims Act.

It doesn't make any sense whatsoever to hold DOD out as the only organization that can take benefit of this treble damage provision. Fraud in HHS or the Department of Agriculture is just as important there, and they, too, should enjoy the benefits that we have with regards to treble damages.

In conclusion, we believe that the Program Fraud bill will provide an important weapon to the Department of Defense, as similar provisions have already been of great assistance to the Department of Health and Human Services in their campaign against medical fraud. It is ironic that HHS has had this authority to combat fraud in health programs, but that DOD does not have this authority to deal with fraud on Government contracts.

We are willing to work with Congress and look forward to providing any assistance that we can.

If I may, sir, just one final observation. There was some discussion earlier, as the impact of these kinds of statutes upon the application of the Contract Disputes Act, and would fraud on these particular areas have any adverse impact upon the orderly disputes resolution process under the Contract Disputes Act.

In our opinion, sir, it would not. Section 6 of the Contract Disputes Act and the Boards of Contract Appeals decisions interpreting section 6 clearly hold that fraud takes the matter out of the contract disputes process. If fraud is indeed involved, the disputes process has no application to the resolution of the issue. That is always appropriate outside of tbe contract disputes process.

We feel that this act is consistent with that.

When that act was considered in 1978 and some antifraud provisions placed in it act, a number of contractors represented that this would somehow allow contracting officers to raise tbe specter of fraud, to cloud contract negotiations, and that contract negotiations would come to a standstill if contracting officials were allowed us to raise fraud on an easy basis.

I tbink the documented history of the Contract Disputes Act since 1978 has shown such that horror, stories have never taken place, that fraud is only alleged in contract disputes negotiations when it is reasonable to do so, and when it is a proper matter for consideration by the Department of Justice and those investigative organizations tbat have the responsibility for looking at fraud. Clearly, a contracting officer has an obligation to be sensitive to fraud but he is not in the job of raising that as a defense or arguing it in the context of a contractual dispute.

[The statement of Mr. Cox follows:]

STATEMENT OF HOWARD W. COX, DEPUTY ASSISTANT INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

MR CHAIRMAN AND MEMBERS OF THE COMMITTEE

I would like to thank you for this opportunity to appear on behalf of the Office of the Inspector General of the Department of Defense and provide our comments on an important legislative matter, the proposed Program Fraud Civil Penalties Act, H.R. 3335. My comments represent only the views of the Office of the Inspector General, DoD, since the Administration's views are being presented to this Committee by the Department of Justice. This legislation will permit the Inspectors General to more effectively combat fraud, waste and abuse, and further implement the Administrations's initiatives in this area.

The Office of the Inspector General continues to support, as we have in the past two Congresses, the establishment of an administrative penalty mechanism to address false claims and false statements submitted to the Department of Defense and the development and aggressive use of civil, administrative and contractual remedies for fraud in conjunction with or in lieu of criminal prosecution. Traditionally, criminal prosecution has been treated as the primary weapon against fraud, and in many instances, as a precursor to any other action to be taken. This has sometimes led to the practice that when prosecution was declined, there was no subsequent attempt to seek administrative action to punish offenders, protect the Government and recover funds lost through fraud. This practice seemed to favor a one shot remedy, the criminal case, at the expense of any other related efforts.

We in the Inspector General's Office have, through a number of efforts, attempted to stop this practice, and improve the way we address fraud in our programs. Our efforts have been directed at achieving a coordinated approach to the investigation of fraud and the timely imposition of appropriate remedies for fraud available to us. We have taken several decisive steps in this area:

o We have issued a DoD Directive requiring the establishment of a single authority in each Military Department and Defense Agency to monitor fraud investigations and to coordinate criminal, civil, administrative and contractual remedies for fraud.

o We have encouraged simultaneous civil and criminal referrals of fraud cases to the Department of Justice.

o We have designed and presented a fraud training program for auditors, investigators and attorneys. This program familiarizes the participants with DoD contracting procedures, fraud investigative techniques, and relationships with the Department of Justice. Further, the program describes and stressess the need for coordinated application of administrative, civil, contractual, and criminal remedies for fraud. We have now presented this program 16 times with over 650 attendees.

o Increased efforts have been made in providing fraud awareness training to program officials, particularly personnel assigned to procurement responsibilities. During the last two years, the Inspector General and the military criminal investigative organizations have made over 6,800 fraud awareness presentations to over 255,000 attendees worldwide. These briefings stress improved recognition of potential fraud and more effective use of available remedies.

Each of these efforts has yielded improvement in the use of existing remedies for fraud. They have also clearly shown us that additional remedies are needed, which is why the Program Fraud Civil Penalties Act is so important. The Act offers a mechanism for an appropriate Government response to instances of fraud that occur but are not now addressed by the Government for a variety of reasons.

Many of the cases referred to the Department of Justice by DoD are declined for prosecution. Many of these cases clearly involve false claims and false statements. However, there are many reasons for not prosecuting these cases, including the evidentiary standard required to prove criminal violations, as well as other priorities to which the Department of Justice must devote its resources.

In making these resource allocation determinations, one criteria which is used is the dollar value of the loss to the Government in the case. Therefore, some United States Attorneys have established thresholds below which, absent special circumstances, fraud cases will generally not be accepted for prosecution. While the Department of Justice is clearly responsible for such prosecution decisions, the integrity of DoD programs must ultimately be the responsibility of the Department of Defense. Accordingly, we believe it is necessary to have a procedure within the Department of Defense to appropriately address those instances of fraud which the Department of Justice does not prosecute, but which clearly impact upon the integrity of our programs.

There are several examples illustrating the need for a civil penalty authority, particularly in the procurement area, which is a primary area of interest for the Inspector General. An administrative penalty mechanism could have been utilized in the following closed cases:

- Based on a GAO report, a Department of Justice and Naval Investigative Service investigation identified over $600,000 in fraudulent overpayments on a base maintenance contract in the Norfolk, Virginia, area. The contractor was found to have deliberately overbilled the Navy on numerous items. Because of evidentiary problems,

a decision was made to seek criminal prosecution on only $25,000 in false claims. Subsequently, the Department of Justice determined that $25,000 was too small an amount to justify prosecution, and the case was declined for both criminal and civil action. An administrative penalty in this case could have facilitated a recovery of a substantial loss.

- A contractor engaged in a conspiracy with a DoD contracting officer in order to be awarded a DoD contract. The contracting officer falsified the need for a sole source procurement and, in collusion with the contractor, allowed the contractor to write the Government's sole source justification for the award. While prosecution was declined, in part because DoD discovered the scheme before the actual award of the contract and before there was a dollar loss to the Government, a conspiracy to defraud was clearly evident. Again, an administrative penalty would have been appropriate to punish this attack on the integrity of the procurement process.

- A medical supply company, in concert with a military doctor who was a part owner in the company, arranged to have a medical device purchased from the company on a sole source basis. Using his position as a senior medical advisor, the military doctor succeeded in recommending that this product be purchased DoD-wide on a sole source basis. The device was ultimately determined to be defective by the Food and Drug Administration, and possibly dangerous to use. It was withdrawn from DoD supply channels. The

military doctor was convicted of related charges in Federal court and administratively reduced in rank at retirement. No criminal action was taken against the company or its officials. An administrative penalty against the company would have been appropriate in view of its collusion to defraud DoD.

- A painting contractor was required to use enamel and oil based paints and apply them with rollers and brushes to portions of structures exposed to the elements on a military installation. A quality assurance inspector caught the contractor applying latex water base paint with a sprayer. The contractor was stopped from performing the balance of the work, thereby limiting the amount of monetary loss to the Government. The Department of Justice declined prosecution of the case since we stopped the contractor early and prevented an extensive loss which would have given the case greater prosecutive merit. An administrative penalty would clearly have been appropriate here.

- A contractor was to erect and paint fences on a military installation. The contractor was discovered using Government equipment and property to do part of the work and then failing to comply with contract specifications in the rest of the work. The Department of Justice declined prosection in favor of administrative and contractual remedies, which could have included an administrative penalty hearing, had the Act been in effect at the time.

- In the CHAMPUS area, we have identified numerous cases where both claimants and medical service providers have submitted false claims and statements for treatments which were never provided, or for fraudulent overtreatment. In those cases where we have obtained prosections, our efforts to recover the funds have been successful. However, many CHAMPUS fraud cases are not prosecuted because, even though fraud has been proven, the loss to the Government is under $5,000 and criminal prosection in such cases is declined in favor of higher dollar cases. Given the fact that CHAMPUS is a program exceeding $1 billion annually with a substantial vulnerability to fraud, the imposition of an administrative penalty in such cases is a valuable tool to ensure recoveries of losses due to fraud.

- A contractor operated a parts store on 10 different military bases. He illegally inflated parts prices on each contract. While the total fraud amounted to over $50,000, no single base was defrauded for more than $6,000. Each case was presented to nine separate United States Attorneys, and was declined at each office because the dollar value was too low.

There are a number of particularly important aspects to H.R. 3335 on which we would like to comment. First, the bill includes false statements as well as false claims. This is extremely important in the contract fraud area, especially when a contractor falsely makes a variety of certifications, such as:

- a certification of small business size status;
- a certification of minority status;
- a certification regarding allowability of overhead costs;
- a certification regarding the completeness and accuracy of cost and pricing data.

These certificates are usually accepted at face value and are rarely questioned because much of the Federal contracting process relies upon the integrity of DoD contractors to accurately provide such information. When a false certification is discovered it undermines this essential relationship. These cases are rarely prosecuted, and unlike false claims, there is no civil statutory remedy for false statements. This bill will close this existing loophole, and allow DoD to penalize contractors who undermine the integrity of the contracting process.

Of equal importance is the need for a false statement provision for use in noncontractor cases. False certifications by individuals which permit them access to such programs as VA mortgage benefits, GI bill education participation and the like not only undermines the integrity of those programs, but results in increased program costs in direct payments as well as administration expense.

Secondly, we believe the knowledge standard provided for --"knows or has reason to know"-- is an appropriate one for a finding of liability under the Act. We favor this "general intent" provision over a requirement to establish specific intent to defraud in order to make a finding of liability. This general intent standard has general acceptability in civil cases litigated under the False Claims Act and in administrative matters.

In light of concerns raised by some interest groups that the legislation should make clear that mere mistakes or inadvertence are not actionable under this bill, we would endorse certain clarifying language, such as that contained in the reported version of S.1134, Senator Cohen's bill. That bill states clearly that, absent actual knowledge regarding falsity, only gross negligence from the accepted reasonable man duty to ensure claims or statements are accurate will cause liability to attach. This is a reasonable requirement and one which directly attacks the problems of certifiers "burying their heads" so as not to be informed of the basis of their submissions.

One aspect of tremendous importance which is found in S.1134 but is absent from the House proposal concerns the availability of testimonial subpoenas to the investigating official. The need for such authority is critical to our successfully uncovering false claims and false statement schemes. Proof of knowledge, be it constructive or actual, is particularly difficult in fraud cases, where conspiracies often form the basis for undertaking the deception. Documents alone don't always supply the link necessary to establish responsibility. Proof of knowledge is more often established by the testimony of coworkers, inspectors, accountants, subordinates, or others. Many DoD contractors are aggressively seeking to limit our ability to speak with such persons, which makes the need for this authority even more critical. And, contrary to assertions made by others who are interested in not having this bill become law, there is ample precedent for testimonial administrative subpoenas by Federal agencies. The Securities and Exchange Commission uses it as does the Antitrust Division of the Department of Justice, the Department of Housing and Urban Development, and the Federal Trade Commission. Congress itself has recognized the need for subpoenaing witnesses before its investigative committees when documents alone don't tell the whole story. Finally, it should

be noted that Inspectors General have issued hundreds of documentary subpoenas under the Inspector General Act of 1978, and there is not a single reported instance of abuse of this power.

We also believe that a potential penalty of $10,000 is a more useful deterent than the $5,000 penalty provided in H.R. 3335. That figure, of course, is not a mandatory imposition but rather affords the trier of fact flexibility in setting an appropriate penalty in the most egregious case. It should be noted that Congress recently allowed DoD to impose an administrative penalty of up to $10,000 when certain DoD employees fail to report employment offers by contractors. Certainly, the submission of false claims and false statements by contractors to obtain benefits and taxpayer funds deserves no less a potential penalty.

The provisions of the Act dealing with notice, hearings and determinations of liability will serve to protect the right to a fair and reasonable hearing for any person alleged to be liable, and provide adequate due process for all parties concerned. Indeed it may be argued that the utility of the bill might be substantiately undermined if it costs the Government $50,000 in administrative costs in order to impose a $5,000 penalty. It should be noted that the recently enacted Defense Procurement Improvement Act allows DoD to impose far greater administrative penalties for certain kinds of contract fraud in a more expeditious and less costly fashion.

Finally, as regards the various proposals to amend the False Claims Act, I will simply outline certain improvements which the Inspector General's Office believes are essential.

First, the Act should be clarified to state that a finding of liability should be based on a preponderance of the evidence

standard, demonstrating that the accused knew or should have known that the submission was false. To require a showing of specific knowledge is inappropriate in a noncriminal forum. Further, the inclusion of the better reasoned standards encompassing constructive knowledge for liability will end the confusion presently found in the circuit courts.

Second, we believe that the penalty should be raised from $2,000 to $10,000, and that the Government should be able to recover treble, rather than double damages. Under the Defense Procurement Improvement Act, a contractor who submits a false claim on a DoD contract is liable under the False Claims Act for treble damages, plus costs of the civil action. There is no legitimate reason to restrict this penalty only to false claims on DoD contracts.

In conclusion, we believe that the Program Fraud Bill will provide an important weapon to the Department of Defense, as similar provisions have already been of great assistance to the Department of Health and Human Services (HHS) in their campaign against fraud. It is ironic that HHS has had this authority to combat fraud in health programs, but that Department of Defense has not had this authority to deal with fraud on Defense contracts.

The Inspector General is eager to work with Congress in developing a mechanism which will provide due process and enable the Government to effectively combat fraud.

Mr. Chairman, this concludes my statement. I am prepared to address your questions.

Mr. GLICKMAN. Thank you, Mr. Cox, for an excellent statement.

Mr. KINDNESS. I wonder if I might just ask one question to follow up on the last point.

Mr. GLICKMAN. Sure.

Mr. KINDNESS. I would appreciate having your view on that matter of an interaction with the Contract Disputes Act. If I understood what you said correctly, there would be, since it is easier to prove fraud under the bills we are talking about here, it would be much easier to yank cases out from under the Contract Disputes Act procedure, would it not?

Mr. Cox. That would be correct, sir. With the Contract Disputes Act, and legislative history that I have seen, sir, we are dealing with the orderly resolution of normal business disputes. When we are talking about fraud, we are talking about one party intentionally deceiving the other party, or improperly deceiving the other party for the purpose of an unfair benefit. Clearly, that is not something that the normal disputes process should address.

Mr. KINDNESS. No, I agree there. If the question is raised—let's say that there was a false statement on the part of a contractor who had a claim pending, a false statement with respect to minority employment or equal opportunity, or some other of the many, many things that are supposed to be certified in a bid, that would, I take it, remove the case from a contract disputes procedure and it would become moot for the moment at least, I think.

Mr. Cox. I believe, sir, that under the decisions that have come up from the Armed Services Board of Contract Appeals, they will not remove the issue unless the fraud directly concerns the claim under discussion.

Mr. KINDNESS. Thank you. Thank you, Mr. Chairman.

Mr. GLICKMAN. I think it is a good point, though. I don't think we want the whole series of cases being enforced here that don't relate to unlawfully taking more money from the Government in dollars than you are entitled to, so we may want to explore that in some way.

I just have one question. As I understand, the Department of Defense considers itself exempt from the Administrative Procedure Act and, therefore, does not utilize administrative law judges. How will the Department of Defense handle the hearing examiner so as to ensure fairness?

Mr. Cox. With regard to the application of the Administrative Procedures Act and these particular bills, both the Senate bill and the House bill require that the hearing officials meet certain standards with regards to independence, certain standards with regards to background training, and the like.

I believe the Department of Defense is more than willing to create or draw upon existing resources to find those kinds of people which exist within DOD.

The Senate bill requires certain requirements. It requires, for example, that people be in a grade level of GM-16 and the like.

In the Department of Defense, we have, for example, military judges who have been certified as judges and have served in criminal trials who have authority to adjudicate the death penalty. We should not be precluded from calling upon this corps of trained individuals to serve in this kind of a factfinding capacity. We would

in no way want to delete—would dilute the necessary independence and requirements for training and background. But we would also ask that since we have certain individuals of special skills in DOD that we would like to be able to draw upon.

Mr. GLICKMAN. That raises another interesting question. The fraud that may be pursued under this bill is fraud within a military department. What you are saying is, we would have military personnel entering decisions affecting civilian people.

Mr. Cox. That is correct, sir.

In that regard there may be some current concern that this somehow violates the Posse Comitatus Act or a variety of other things—some people talk about using military authorities to enforce civilian laws. It may be some concern that in the legislative history that point should be specifically addressed.

We in DOD would like to use those skilled people. We also understand the concerns of Congress and civilians at large of somehow subjecting civilians to, if you will, military authority.

The point is, sir, in contracts, for example, we have a number of military officers who are contracting officers. Clearly, a contracting officer's decision under the Contract Disputes Act has a direct impact upon the contractor. No one has ever alleged that a military contracting officer is incapable of making that kind of a decision. I would ask for similar considerations with regard to this.

Mr. GLICKMAN. In the Contracts Disputes Act, he is not in a position to enter a so-called judgment against the other party, is he, for damages?

Mr. Cox. A contracting officer's final dsecision would be a final judgment unless the contractor sought to appeal it to the court of appeals or the Board of Contract Appeals.

Mr. GLICKMAN. But it doesn't have any penalty assessment, does it? I am just trying to determine if we have some sticking point that is far more serious than I had dreamt about.

Mr. Cox. The only thing, sir, I can analogize it to both the Army and the Air Force, in the area of suspension and debarment, the ultimate suspension and debarment decision which has an impact at least as equal to this, by both the Army and the Air Force is made by a military officer. Their capability to do it has been specifically upheld by Federal circuit courts which have examined that particular issue.

Mr. GLICKMAN. OK. I don't know whether debarment, which relates to future actions or suspension, which relates to current actions, is the same in a penalty procedure in which you are trying to get something affirmatively from a civilian entity. I just think that is something we have to look into.

Mr. Cox. We would request clear guidance on it.

Mr. GLICKMAN. I am concerned about it.

Mr. Kindness, do you have any additional questions?

Mr. KINDNESS. No, thank you, Mr. Chairman.

Mr. GLICKMAN. We thank you, Mr. Cox.

[The statement of Mr. Stark, and the combined statement of Senators Cohen, Roth, and Levin, follow:]

STATEMENT OF CONGRESSMAN FORTNEY H. (PETE) STARK
BEFORE
TME SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
HOUSE JUDICIARY COMMITTEE
FEBRUARY 5, 1986

Mr. Chairman, Members of the Committee:

I appreciate the opportunity to testify. I will be very brief.

I urge the Subcommittee to develop more effective incentives for government and contractor employees to "blow the whistle" on fraud against the Government. I've introduced a bill, HR 1975, which I believe can help.

1863 FALSE CLAIMS AND QUI TAM ACT

This bill takes the 1863 false claim and qui tam idea and tries to restore it to life through amendments that override a number of judicial decisions that have made the ancient qui tam concept toothless.

ln short summary, the false claims/qui tam concept provides that a citizen can bring an action against someone cheating the public, on behalf of the government and himself as a taxpayer/citizen. The bill became essentially inoperative through a series of court decisions which held that no one could bring a qui tam action on the basis of information already in the hands of the government--and in this day and age, that is arguably ALL information! [The Law Review articles of Northwestern University (Vol 67, No. 446 (1972)) and UCLA (Vol. 20, No. 778 (1973)) describe in detail the history of the Act and how it was emasculated by the time of World War II.]

HR 1975: AMENDMENTS TO RESTORE TME 1863 ACT

I've attached a Ramseyer of the current law and how the bill I've introduced would change the law. In short, in the false claims section of the law my bill would (1) subject military personnel to the prohibitions on participating in a false claim, (2) make it clear that the sale to the U.S. of defective or improperly tested products would constitute a false claim, and (3) increase the penalty for such actions.

In the qui tam section, it would make it clear that (1) an action against the filer of a false claim may not be dismissed if the Government does not institute appropriate action to correct the violation, (2) a case may not be dismissed just on the grounds that the information was in the hands of the government, (3) the rewards for bringing a qui tam should be more realistic in light of what would otherwise be grossly excessive rewards on a large contract, and (4) court costs may be authorized from the defendant to the bringer of the action.

## REASONS FOR THE 1863 ACT REPEATED TODAY

I've also attached a description of the origin of the bill. The Civil War, which saw the first billion dollar Congress, was of course a time of rushed, massive spending on the military. The flood of spending brought out a rash of crooks and shoddy contractors. The parallels with today are striking! Our great-grandfather predecessors decided to fight fire with fire: if so much money was flowing that many were tempted to cheat, then we should enlist citizens to fight corruption and offer rewards to those who put their careers and even their lives on the line by reporting corruption.

With today's massive flows of money to the Pentagon, NASA, and others, I think it is worth trying again. Would it work? I think so.

## POSSIBLE AMENDMENTS

I would suggest that the ideas in my bill could be sunset in, say, five years, which would give your Committee time to see how useful the proposal is in operation and what its impact on the courts might be.

You may also want to add language clarifying that there has to be some "knowledge" that a defective product is being sold to the government.

## SENATE ACTION

Senator Grassley has a similar but longer bill in the Senate Judiciary Committee. Attached is a summary of some of the differences between his bill and mine. His bill has been reported from Subcommittee to the full Committee. There are rumors that some in the Senate want to block the bill. If true, I would suggest that is a compliment to what an important tool this could be to ensure that contractors give the public a full dollar's value. I would urge the House to take up this fight as soon as possible.

## CONCLUSION

I firmly believe that being able to win a significant reward for reporting malfeasance will provide the economic freedom to enable more employees to do their civic duty.

FALSE CLAIMS AND QUI TAM ACT AS AMENDED BY H.R. 1975
A RAMSEYER

31 USC 3729 False Claims

A person ~~not a member of an armed force of the United States~~ is liable to the United States Government for a civil penalty of ~~$2,000~~ $10,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person--

(1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim or a claim for a defective or improperly tested product for payment or approval;

(2)-(6) [no change]

31 USC 3730 Civil actions for false claims

(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person. The person may be arrested and bail set for an amount of not more than $2,000 and 2 times the amount of damages sworn to in an affidavit of the Attorney General.

(b)(1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The district courts of the United States have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action may be dismissed only if the court and the Attorney General give written consent and their reaons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. USC). The Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government--

(A) by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter, the action; or

(B) does not proceed with the action with reasonable diligence

within 6 months after entering an appearance, or within additional time the court allows after notice.

(3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

(4) ~~Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought~~. [If the Government does not proceed with the action, the court shall dismiss an action brought by the person unless the person demonstrates--

(A) that the person informed the head of the department or agency concerned of the evidence or information on which the action is based; and

(B) that the Government has not, within six months thereafter, instituted appropriate action to correct the violation.]

(c)(1) If the Government proceeds with the action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have or had failed to act upon when the action was brought. The amount may not be more than ~~10~~ 1 percent of the proceeds of the action or settlement of a claim or such greater amount not to exceed $1,000,000 as the court determines to be fair and reasonable compensation, and shall be paid out of those proceeds. The person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount may not be more than ~~25~~ 1 percent of the proceeds of the action or settlement , or such greater amount not to exceed $1,000,000 as the court determines to be fair and reasonable compensation and shall be paid out of those proceeds. The person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

(d) The Government is not liable for expenses a person incurs in bringing an action under this section.

## OF TOILET SEATS AND SWAYBACK MULES

HON. FORTNEY H. (PETE) STARK
OF CALIFORNIA
IN THE HOUSE OF REPRESENTATIVES

*Monday, April 22, 1985*

● Mr. STARK. Mr. Speaker, every day it seems there is a new horror story of screwups in the purchase of weapons, of excessive charges, of shoddy equipment, of falsified or illegal billings.

I have just introduced a bill to help stop this parade of abuse by substantially encouraging whistleblowing over false charges, defective equipment, and other frauds against the taxpayer and Federal Government. This bill, H.R. 1975, amends the False Claims Act of 1863 to make it easier for a citizen to be rewarded for bringing a civil suit, on behalf of the entire Government, against a person defrauding the Nation's taxpayers. My bill amends what is known as the qui tam process.

It is sort of fun to examine the orkgins of the 1863 law. There are many parallels to today's situation.

The Civil War, of course, resulted in an explosive growth in Federal spending, and we reached our first billion-dollar Congress. The War Department was totally unprepared for war and for what became the total mobilization of the Nation. While hundreds of thousands of Americans died bravely, and several million of our then small population served honorably in uniform, the war also brought out the worst in people. Contractors appeared who sold shoddy, dangerous, or worthless merchandise. There were military men who extorted contractors or took kickbacks and gratuities from contractors, and politicians who participated in the uncontrolled spending.

Today, we again have a massive military buildup, greater in real dollar spending than our spending during the Korean and Vietnamese Wars. Today, we have contractors who knowingly sell defective microchips to our armed services for use in life and death situations. We also have contractors who take money meant to buy defense and spend it on advertisements and model ships and planes for the desks of politicians. We have military men who are contract liaison officers for particular giant corporations who resign and take jobs with those companies. Today we have officers who cover up how poorly major weapons system work rather than admit the failures and shoddiness which will kill thousands of our men on some battlefield of the future. Today, we have a War Department which allows builders to certify the quality of their own work, with no safeguards on behalf of the taxpayer. Today, we have politicians who urge the purchase of weapons which are unneeded or obsolete in order to bring home "the bacon" to hometown companies.

The immediate origin of the 1863 False Claims Act was a report (37th Congress, H. Rept. 49) by a special committee of the House "appointed to inquire into all the facts and circumstances connected with contracts and agreements by or with the Government growing out of its operations in suppressing the rebellion." In best congressional style, the committee collected over 3,000 pages of material and held field hearings—and did result in saving the Government millions of dollars. The main part of their report was 61 charges (of which 26 were upheld in court-martial) against a Maj. Justus McKinstry, Quartermaster for the U.S. Army at St. Louis.

McKinstry was clearly a cad—and in the circumstances, the equivalent of a traitor. But what he did then, and what caused an outraged Congress to pass a qui tam law, are duplicated in today's shoddy sales, cover-ups, and kickbacks.

Let me list just three of the charges:

Major Justus McKinstry, on or about the twentieth day of August, 1861, having need to purchase a large number of artillery horses and cavalry horses for his department, did not and would not purchase the same in the market nor for the market value, but without any advertisement for proposals, authorized one Benjamin F. Fox . . . to furnish the same to him at one hundred and nineteen dollars each for cavalry horses, and one hundred and fifty dollars each for artillery horses . . . the market value of which was about ninety dollars each and . . . one hundred dollars each respectively].

Sounds like sole source procurement, that ends up with absurd, sweetheart deals for coffeemakers, toilet seats, and other excessive costs.

Major McKinstry did on the first day of July 1861, and on divers days between that day and the sixth October . . . purchase for his department a large number of mules at one hundred and nineteen dollars each—viz: altogether about one thousand mules—which were unfit for the service, and almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out, or diseased . . . Major McKinstry, acting in that behalf in gross carelessness and disregard of the interest of the service, to the waste and squandering of the public funds.

At least the men in the field could eat the mules. What the modern Army will do with the new Divad air defense gun in a battle is more questionable. Those who avoid battlefield condition tests of the Divad and the Bradley Armored Personnel Carrier are more than buying worthless mules—they are buying weapons that will kill our own forces.

McKinstry, on or about the 27th September, 1861, at St. Louis, having need to purchase overcoats for his department, did not and would not purchase the same in the market nor for the market price; but, without any advertisement for proposals, authorized Child, Pratt & Fox to furnish the same to him; and when they had purchased them *and there from* Martin & Brothers 802 overcoats for the price of seven dollars and fifty cents each, he, said McKinstry, then and there purchased the same 802 overcoats from Child, Pratt & Fox for $10.50 each . . . He, said McKinstry, thereby then and there intending to secure to Child, Pratt & Fox, and others in collusion with them, large gains, to the waste of the public funds.

Once more a lack of competitive bids and sweetheart deals. I wonder what the difference is from this and contracting officers who refuse to buy the best product at the lowest price—whether it be the Northrup Tigershark or new Israeli armor technologies, but instead insist on working with the contractors they have always known and loved.

The qui tam bill made sense in 1863 to deal with the McKinstry's of the world. The courts over a century have made it an inoperable law. In this new, and similar era of wild military spending, we should renew the old False Claims Act to bring more integrity to Government procurement.●

United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510

STATEMENT OF

SENATOR WILLIAM S. COHEN

SENATOR WILLIAM V. ROTH

AND

SENATOR CARL LEVIN

Before the

HOUSE JUDICIARY SUBCOMMITTEE ON ADMIMISTRATIVE LAW

AND GOVERMMENTAL RELATIONS

February 5, 1986

Mr. Chairman, we want to commend you for holding these hearings to address what many of us consider to be an extremely serious problem -- fraud against the government. We appreciate the opportunity to present testimony this morning on legislation we've proposed, S. 1134, the Program Fraud Civil Remedies Act, that we believe goes a long way toward solving this problem.

Fraud in federal programs is pervasive, affecting benefit and assistance programs, as well as programs for mortgage insurance, crop subsidies, disaster relief, and the like. Procurement fraud, in particular, has seemingly flourished in the past few years with the plethora of reports on mischarging, cross-charging, and egregious overcharging.