P.L. 99-562, ****5266 FALSE CLAIMS AMENDMENTS ACT OF 1986**
DATES OF CONSIDERATION AND PASSAGE
Senate August 11, October 3, 1986
House September 9, October 7, 1986
Senate Report (Judiciary Committee) No. 99-345,
July 28, 1986 [To accompany S. 1562]
House Report (Judiciary Committee) No. 99-660,
June 26, 1986 [To accompany H.R. 4827]
Cong. Record Vol. 132 (1986)
The Senate bill was passed in lieu of the House bill. The Senate Report is set out below.

SENATE REPORT NO. 99-345
July 28, 1986

***1** The Committee on the Judiciary, to which was referred the bill (S. 1562) to amend the False Claims Act, and title 18 of the United States Code regarding penalties for false claims, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

I. PURPOSE OF THE BILL

The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government. While it may be difficult to estimate the exact magnitude of fraud in Federal programs and ***2** procurement, the recent proliferation of cases among some of the largest Government contractors indicates that the problem is severe. This growing pervasiveness of fraud necessitates modernization of the Government's primary litigative tool for combatting fraud; the False Claims Act (31 U.S.C. 3729, 3730). The main portions of the act have not been amended in any substantial respect since signed into law in 1863. In order to make the statute a more useful tool against fraud in modern times, the Committee believes the statute should be amended in several significant respects.

The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage ****5267** any individual knowing of Government fraud to bring that information forward. In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. S. 1562 increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.

The False Claims Reform Act also modernizes jurisdiction and venue provisions, increases recoverable damages, raises civil forfeiture and criminal penalties, defines the mental element required for a successful prosecution and clarifies the burden of proof in civil false claims actions.

II. BACKGROUND STATEMENT

A. NEED FOR LEGISLATION

Evidence of fraud in Government programs and procurement is on a steady rise. In 1984, the Department of Defense conducted 2,311 fraud investigations, up 30 percent from 1982. Similarly, the Department of Health and Human Services has nearly tripled the number of entitlement program fraud cases referred for prosecution over the past 3 years.

Detected fraud is, of course, an imprecise measure of how much actual fraud exists. The General Accounting Office in a 1981 study found that 'most fraud goes undetected.' [FN1] Of the fraud that is detected, the study states, the Government prosecutes and recovers its money in only a small percentage of cases.

Fraud permeates generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs. [FN2] While fraud is obviously not limited to any one Government agency, defense procurement fraud has received heightened attention over the past few years. In 1985, the Department of Defense Inspector General, Joseph Sherick, testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. [FN3] Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors, General Electric, GTE, Rockwell and Gould, ***3** have been convicted of criminal offenses while another, General Dynamics, has been indicted and awaits trial. [FN4]

No one knows, of course, exactly how much public money is lost to fraud. Estimates from those who have studied the issue, including the General Accounting Office, Department of Justice, and Inspectors General, range from hundreds of millions of dollars to more than $50 billion per year.

****5268** The 1981 GAO report on fraud estimated that loss to the Government from 77,000 reported cases over 2 1/2 years would total between $150 and $200 million. But the report went on to note:

These losses are only what is attributable to known fraud and other illegal activities investigated by the Federal agencies in this study. It does not include, of course, the cost of undetected fraud which is probably much higher because weak internal controls allow fraud to flourish. [FN5]

The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget. [FN6] Taking into account the spending level in 1985 of nearly $1 trillion, fraud against the Government could be costing taxpayers anywhere from $10 to $100 billion annually.

In the Defense Department procurement budget alone, we may be losing anywhere from $1 to $10 billion if the Justice Department estimate is accurate. Defense Department Inspector General Joseph Sherick estimated that DOD loses more than $1 billion just from fraudulent billing practices. [FN7]

The cost of fraud cannot always be measured in dollars and cents, however. GAO pointed out in its 1981 report that fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. [FN8] Even in the cases where there is no dollar loss--for example where a defense contractor certifies an untested part for quality yet there are no apparent defects--the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scenerio exists where in the above example the part is defective and causes not only a serious threat to human life, but also to national security.

Fraud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence. GAO concluded in its 1981 study that most fraud goes undetected due to the failure of Governmental agencies to effectively ensure accountability on the part of program recipients and Government contractors. The study states:

For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . The sad truth is that crime against the Government often does pay. [FN9]

****5269 *4** Many changes have been made since 1981 which have brought about some encouraging improvements in the Government's efforts against fraud. With the inception of Inspectors General, an increased number of fraud allegations are being addressed. However, available Department of Justice records show most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected. [FN10]

In 1984, the Economic Crime Council of the Department of Justice targeted two major Federal programs--defense procurement and health care benefits--as economic crime areas in which stronger enforcement and deterrence were needed. In the Council's April, 1985 report to the Attorney General, it concluded that while some progress had been made, the level of enforcement in defense procurement fraud remains inadequate. [FN11]

Through hearings and research on Government fraud, the Committee has sought and is continuing to seek out the reasons why fraud in Government programs is so pervasive yet seldom detected and rarely prosecuted. It appears there are serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools. In an effort to correct some of those weaknesses, the Committee has reviewed the Government's remedies against false claims and developed the legislative improvements embodied in S. 1562.

The False Claims Act currently permits the United States to recover double damages plus $2,000 for each false or fraudulent claim. Enacted in 1863 in response to cases of contractor fraud perpetrated on the Union Army during the Civil War, this statute has been used more than any other in defending the Federal treasury against unscrupulous contractors and grantees. Although the Government may also pursue common law contract remedies, the False Claims Act is a much more powerful tool in deterring fraud.

Since the act was last amended in 1943, several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute. The Committee's amendments contained in S. 1562 are aimed at correcting restrictive interpretations of the act's liability standard, burden of proof, qui tam jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud.

Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities.

In 1983, the U.S. Merit Systems Protection Board conducted a survey of approximately 5,000 Federal Government employees to determine to what extent observed fraud, waste, and abuse was going unreported. The Merit Systems Board reported that 69 percent of those who believed they had direct knowledge of illegalities failed to report the information. Those employees who chose not to report fraud were then asked why they failed to come forward. The ****5270 *5** most frequently cited reason given (53 percent) was the belief that nothing would be done to correct the activity even if reported. Fear of reprisal was the second most cited reason (37 percent) for nonreporting. [FN12]

In hearings before the Subcommittee on Administrative Practice and Procedure, individuals who had 'blown the whistle' on their Government contractor employers offered several reasons for what one termed the 'conspiracy of silence' among contractor employees. [FN13]

Robert Wityczak, a triple-amputee veteran who exposed mischarging practices at Rockwell International, said his 'ethical principles' were tested to the limit when faced with the difficult choice of either keeping quiet about mischarging he witnessed or risking the loss of his job.

I agonized over my decision to step forward. I have a wife, five children and a house mortgage * * * Yet once I made the decision to tell the truth about what was going on, I found no one inside or outside the company willing to act on the information. [FN14]

Wityczak said his initial efforts to report the mischarging started what was to result in a long-term harassment campaign by his superiors which finally resulted in Wityczak being discharged. Wityczak said:

I told my supervisors * * * I would no longer mischarge on my time cards. They reacted angrily, calling me antimanagement, anti-Rockwell, and a pain in the ass * * * Gradually, I was squeezed out of the work I was doing. I was stripped of my confidential security, my access to documents was limited, I was excluded from meetings and was put to work doing menial tasks outside my job description, such as sweeping, making coffee and cleaning a 50 gallon coffee pot. [FN15]

Wityczak said he has concluded not only from his own experience but from talking to his fellow workers that there is 'absolutely no encouragement or incentive' for individuals working in the defense industry to report fraud. Instead, he said, there is a great disincentive due to employer harassment and retaliation. 'Contractor employees are generally all for exposing fraud, but most individuals just simply cannot and will not put their head on the chopping block,' Wityczak said. [FN16]

Wityczak's comments were echoed by Mr. John Gravitt, another witness who testified in regard to time card mischarging at a General Electric plant in Ohio. Gravitt agreed that most individuals working in defense contractor plants are afraid to expose fraud. Gravitt also pointed out that without cooperating employees, Government ***6 **5271** auditors would rarely detect abuses. Gravitt explained that notice of an impending audit normally travels through the contractor plant 'like wildfire' and 'everybody straightens up their act.' Wityczak said his experience with Government audits was similar in that all departments were put on 'red alert' when auditors came through. [FN17]

The Committee believes changes are necessary to half the socalled 'conspiracy of silence' that has allowed fraud against the Government to flourish. John Phillips, co-director of the Center for Law in the Public Interest, a nonprofit law firm specializing in assisting 'whistleblowers', testified that more effective fraud detection will only occur if changes are made at the basic employee level. Phillips said people who are unwilling participants in fraudulent activity must be given an opportunity to speak up and take action without fear and with some assurance their disclosures will lead to results. [FN18]

Hearing testimony also suggested that the collection of information which leads to successful fraud recoveries is hampered by the Government's inadequate investigative tools. Justice Department witnesses stated that as in all complex white-collar fraud matters, investigative tools are critical to successful prosecutions. Mr. Jay Stephens, Associate Deputy Attorney General, testified that in civil false claims cases the Department's civil attorneys rely in large part on FBI reports and information gathered by the various Inspectors General, [FN19] but that civil investigative capacity is often hampered, however, in two ways. First, the civil attorneys themselves have no authority to compel production of documents or depositions prior to filing suit. Currently, some cases are weeded out and not filed because information is missing--information that might have turned up through pre-suit investigation if the tools were available. [FN20]

Second, information is often incomplete due to the existence of a prior grand jury investigation resulting in evidence protected by Rule 6(e) of the Federal Rules of Criminal Procedure. On June 30, 1983, the Supreme Court ruled in United States v. Sells Engineering, Inc., 103 S. Ct. 3133 [FN20a] (1983), that Department of Justice attorneys handling civil cases are not 'attorneys for the government' for the purposes of Rule 6(e) of the Federal Rules of Criminal Procedure. Therefore, they may not obtain grand jury materials that pertain to their cases without a court order; and such an order may be granted only upon a showing of 'particularized need.' The court further held that the 'particularized need' standard was not satisfied by a showing that nondisclosure would cause lengthy delays in litigation or would require substantial duplication of an investigation already conducted by the Government using scarce investigative and audit resources.

Compounding the investigative problems are also various litigative hurdles. As a civil remedy designed to make the Government whole for fraud losses, the civil False Claims Act currently provides ***7 **5272** that the Government need only prove that the defendant knowingly submitted a false claim. However, this standard has been construed by some courts to require that the Government prove the defendant had actual knowledge of fraud, and even to establish that the defendant had specific intent to submit the false claim, [FN21] for example, United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972). The Committee believes this standard is inappropriate in a civil remedy and presently prohibits the filing of many civil actions to recover taxpayer funds lost to fraud.

The Committee's interest is not only to adopt a more uniform standard, but a more appropriate standard for remedial actions. Currently, in judicial districts observing an 'actual knowledge' standard, the Government is unable to hold responsible those corporate officers who insulate themselves from knowledge of false claims submitted by lower-level subordinates. This 'ostrich-like' conduct which can occur in large corporations poses insurmountable difficulties for civil false claims recoveries.

The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence. But the Committee does believe the civil False Claims Act should recognize that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate.

The burden of proof in civil false claims cases has also evolved through caselaw into an ambiguous standard. Some courts have required that the United States prove a violation by clear and convincing, or even clear, unequivocal and convincing evidence, United States v. Ueber, 299 F.2d 310 (6th Cir. 1962), which the Justice Department has testified is the 'functional equivalent of a criminal standard.' [FN22]

In addition to detection, investigative and litigative problems which permit fraud to go unaddressed, perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies. Unlike most other types of crimes or abuses, fraud against the Federal Government can be policed by only one body--the Federal Government. State and local law enforcement are normally without jurisdiction where Federal funds are involved.

Taking into consideration the vast amounts of Federal dollars devoted to various complex and highly regulated assistance and procurement programs, Federal auditors, investigators, and attorneys are forced to make 'screening' decisions based on resource factors. [FN23] Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient. And with current budgetary constraints, it is unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase.

****5273 *8** An additional problem noted by hearing witnesses, exists when large, profitable corporations are the subject of a fraud investigation and able to devote many times the manpower and resources available to the Government. This resource mismatch was recognized by DOD Inspector General Joseph Sherick who said that in far too many instances the Government's enforcement team is overmatched by the legal teams major contractors retains. [FN24]

The Committee believes that the amendments in S. 1562 which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort. The idea of private citizen aid in false claims actions is, of course, not a new one, but dates back to the original enactment of the False Claims Act in 1863. Additionally, in other areas of enforcement such as antitrust and securities violations, the number of private enforcement actions far exceeds those brought by the Government. [FN25]

B. HISTORY OF THE FALSE CLAIMS ACT AND COURT INTERPRETATIONS

The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts. Originally the act provided for both civil and criminal penalties assessed against one who was found to knowingly have submitted a false claim to the Government. The civil penalty provided for payment of double the amount of damages suffered by the United States as a result of the false claim, plus a $2,000 forfeiture for each claim submitted.

In its present form, the False Claims Act empowers the United States to recover double damages from those who make, or cause to be made, false claims for money or property upon the United States, or who submit false information in support of claims. In addition the United States may recover one $2,000 forfeiture for each false claim submitted in support of a claim. The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false. The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages. Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965). A forfeiture may be recovered from one who submits a false claim though no payments were made on the claim. United States v. American Precision Products Corp., 115 F. Supp. 823 (D. N.J. 1953). The False Claims Act reaches all parties who may submit false claims. The term 'person' isused in its broad sense to include partnerships, associations, and corporations--United States v. Hanger One, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977); United States v. National Wholesalers, Inc., 236 F.2d 944 (9th Cir. 1956)--as well as States and political subdivisions thereof. Cf. Ohio v. Helvering, 292 U.S. 360, 370 (1934); Georgia v. Evans, 316 U.S. 153, 161 (1942); Monell v. Department of Social Services of the City of New York, 436 U.S. 658 [FN25a] (1978).

****5274 *9** The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay our sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation. For example, United States v. Bornstein, 423 U.S. 303 [FN26] (1976); United States v. National Wholesalers, 236 F.2d 944 (9th Cir. 1956), cert. denied, 353 U.S. 930 (1957); Henry v. United States, 424 F.2d 677 (5th Cir. 1970). A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the act, Peterson v. Weinberger, supra, as is a false application for a loan from a Government agency, United States v. Neifert-White Co., 390 U.S. 228 (1968), or a false claim in connection with a sale financed by the Agency for International Development or Export-Import Bank, United States v. Chew, 546 F.2d 309 (9th Cir. 1978), and such claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program, or though payments on the Government loan are current, if by means of false statements the Government was induced to lend an inflated amount. A false claim may take other forms, such as fraudulently cashing a Government check, which was wrongfully or mistakenly

obtained. United States v. Veneziale, 268 F.2d 504 (3rd Cir. 1956). A fraudulent attempt to pay the Government less than is owed in connection with any goods, services, concession, or other benefits provided by the Government is also a false claim under the act. See Smith v. United States, 287 F.2d 299 (5th Cir. 1961); United States v. Garder, 73 F. Supp. 644 (N.D. Ala. 1947). For example, the Committee considers a false application for reduced postal rates to be a false claim for postal services, and agrees with the well-reasoned decision in United States ex rel. Rodriguez v. Weekly Publications, Inc., 68 F. Supp. 767, 770 (S.D. N.Y. 1946), that whether such benefits are received by means of a reduction in the amount paid by the Government or by means of subsequent claims for reimbursement is a matter of bookkeeping rather than of substance, and therefore, rejects the contrary result reached in United States v. Marple Community Record, Inc., 335 F. Supp. 95 (E.D. Pa. 1971); see also, United States v. Howell, 318 F.2d 162 (9th Cir. 1963).

Each separate bill, voucher or other 'false payment demand' constitutes a separate claim for which a forfeiture shall be imposed, see, for example, United States v. Bornstein, 423 U.S. 303 [FN25b] (1976), United States v. Collyer Insulated Wire Co., 94 F. Supp. 493 (D.R.I. 1950), and this is true although many such claims may be submitted to the Government at one time. For example, a doctor who completes separate Medicare claims for each patient treated will be liable for a forfeiture for each such may be submitted to the entries even though several such forms may be submitted to the fiscal intermediary to one time. Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim. For example, all claims submitted under a contract obtained through collusive bidding are false and actionable under the act--**5275*10Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)--as are all Medicare claims submitted by or on behalf of a physician who is ineligible to participate in the program. Peterson v. Weinberger, supra.

A claim upon any Government agency or instrumentability, quasi-governmental corporation, or nonappropriated fund activity is a claim upon the United States under the act. In addition, a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States. United States v. Lagerbusch, 361 F.2d 449 (3rd Cir. 19666); Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953). For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States. See, for example, United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943); United States ex rel. Davis v. Long's Drugs, 411 F. Supp. 1114 (S.D. Cal. 1976).

The original False Claims Act also contained a provision allowing private persons, or 'relators', to bring suit under the act. After providing for general subject matter jurisdiction and venue for all actions brought under the act, the statute provided that a suit 'may be brought and carried on by any person, as well for himself as for the United States.' The 1863 law, R.S. 3492, provided that:

> the (action) shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

The original statute also provided that the private relator who prosecuted the case to final judgment would be entitled to one half of the damages and forfeitures recovered and collected. If successful, the relator would also be entitled to an award of his costs.

Therefore, under the provisions of the original act, suits to redress fraud against the Government could be instituted as easily by a private individual, as by the Government's representative. Moreover, once the action was

commenced by the relator, no one could interfere with its prosecution. The act contained no provision for the Government to take over the action and, in fact, the relator's interest in the action was viewed, at least in one instance, as a property right which could not be divested by the United States if it attempted to settle the dispute with the defendant. United States v. Griswold, 30 Fed. Reg. 762 (Cir. Ct., D. Ore. 1887).

In the early 1940s, several qui tam actions were brought regarding World War II defense procurement fraud. Some suits brought by private citizens appeared to be based on criminal indictments brought by the Government. In one such suit, United States ex rel Marcus v. Hess, 317 U.S. 537 (1943), the Government contended that an action brought by an informer who based his civil action on a criminal indictment should be barred under the provisions of the False Claims Act because he brought no information of his own to the suit, thereby thwarting the spirit of the act. The Government also contended that such suits created a race to the courthouse between ***11 **5276** the Government's civil lawyers and private parties, and infringed upon the Attorney General's control over criminal and civil fraud actions. The Court rejected the Government's contentions and ruled that the statute, as then written, did not require the relator to bring original information to the suit or that the Attorney General should have exclusive control over the Government's civil fraud litigation. Writing for the Court, Justice Black stated that qui tam suits have been 'frequently permitted by legislative action and have not been without defense by the courts.' Id. at 541.

Justice Black also referred to an earlier decision, United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885) in which the Court said:

The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

The factual issue of whether the private relator in Marcus v. Hess had actually performed an independent investigation or merely copied a criminal indictment in order to bring his suit, was never reached by the Court. The Court did fund that:

Even if * * * the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed. The suit results in a net recovery to the government of $150,000, three times as much as fines imposed in the criminal proceedings. Id. at 545.

The Marvus v. Hess decision prompted then Attorney General Francis Biddle to request that Congress repeal the qui tam provisions of the act. The House of Representatives passed repeal legislation, but the Senate passed an amendment to the House bill providing for the retention of qui tam suits, with restrictions. The Senate debated at length regarding the advisability of leaving all Government fraud cases solely in the hands of the Attorney General. Senator Langer of North Dakota vehemently objected to any amendments to the qui tam law, citing Government delay in fraud cases and resource constraints for adequate enforcement. Langer argued:

I submit that the present statute now on the books is a most desirable one. What harm can there be if 10,000 lawyers in America the assisting the Attorney General of the United States in digging up war frauds? In any case, the Attorney General can protect himself by filing a (civil) lawsuit at the time when he files the indictment. 89 Cong. Rec. 7607 (Sept. 17, 1943).

****5277 *12** The Senate specifically provided that jurisdiction would be barred on qui tam suits based on information in the possession of the Government unless the relator was the original source of that information. Without explanation, the resulting conference report dropped the clause regarding original sources of allegations and courts have since adopted a strict interpretation of the jurisdictional bar as precluding any qui tam suit based on information in the Government's possession, despit the source. That jurisdictional bar, however, has been applied only to private qui tam suits, and not those suits taken over by the Government. United States v. Pittman, 151 F.2d 851 (5th Cir. 1946).

Despite considerable judicial adherence to the plain language of the jurisdictional bar in the statute, it is unclear whether Congress fully understood the clause that had been fashioned through the conference committee compromise. Senator Van Nuys who was chairman of the Senate Judiciary Committee which proposed the Senate amendments and who also served on the conference committee, stated in floor debate that the proposal 'protects the honest informer as nearly we can do it by statute (and) * * * would not prevent an honest informer from coming in.' 89 Cong. Rec. 7609 (1943). Similarly, Representative William Kefauver in summarizing the final proposal on the House floor stated, '(If) the average, good American citizen * * * has the information and he gives it to the Government, and the Government does not proceed in due course, provision is made here where he can get some compensation.' 89 Cong. Rec. 10846 (1943).

The conference committee bill went on to provide that in the event the Government took over an action brought by a relator, the Court could award, out of the proceeds collected, fair and reasonable compensation, not to exceed 10 percent of the proceeds, to the relator for his disclosure of information and evidence not in the possession of the United States when the suit was brought. In suits not carried on by the United States, the court could award the person who brought the action and prosecuted it up to 25 percent of the proceeds.

The conference report was accepted by both House of Congress without amendment, and signed by President Roosevelt on Dec. 21, 1943. The provisions of the statute were codified at 31 U.S.C. 232 which has recently been recodified along with the entirely of the False Claims Act at 31 U.S.C. 3729-3731.

The jurisdictional bar prohibiting suits based on information in the possession of the Government has been invoked several times over the past four decades. Once a qui tam litigant has been found an improper relator due to this jurisdictional bar, he is no longer a part of the litigation and is precluded not only from receiving a portion of the proceeds, but also forfeits any rights to challenge the Government's 'reasonable diligence' or object to settlements and dismissals. Courts have also found the jurisdictional bar to apply even if the Government makes no effort to investigate or take action after the original allegations were received, United States ex rel Lapin v. International Business Machines Corp., 490 F. Supp. 244 (D. Hi. 1980).

Additionally, in United States ex rel State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984), the Court refused to allow the State ****5278 *13** of Wisconsin to act as a qui tam relator in a Medicaid fraud action even though the investigation had been conducted solely by the State of Wisconsin. The Court found that the Federal Government was in possession of the information due to the State disclosures of the fraud to the Department of Health and Human Services. The State was required to make such disclosures under Federal law government Medicare programs. Interestingly, the Federal Government in this case not only declined to intervene and take over the suit, but filed a brief with the Court indicating its belief that Wisconsin was a proper relator. In rejecting the views of both the Federal Government and the State of Wisconsin, the Court noted that:

If the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption. Id. at 1106.

The National Association of Attorneys General adopted a resolution in June of 1984 stating that 'to prohibit sovereign states from becoming qui tam plaintiffs because the U.S. Government was in possession of information provided to it by the State and declines to intercede in the State's lawsuit, unnecessarily inhibits the detection and prosecution of fraud on the Government.' The resolution goes on to strongly urge that Congress amended the False Claims Act to rectify the unfortunate result of the Wisconsin v. Dean decision.

III. HISTORY OF S. 1562

The False Claims Reform Act, S. 1562, which was introduced on August 1, 1985 by Senators Charles E. Grassley (R, Ia.), Dennis DeConcini (D, Az.), and Carl Levin (D, Mich.), contains in large part amendments to the False Claims Actf first proposed by the U.S. Department of Justice in 1979 and once again in the Department's Anti-Fraud Enforcement Package announced by Attorney General Edwin Meese III in September of 1985. As reported by the Committee, S. 1562 amends the civil False Claims Act, 31 U.S.C. 3729 and 3730, to increase forfeiture and damages for those found liable by a 'preponderance of the evidence'. The standard for liability is clarified as one who 'knows or has reason to know' that the claim submitted to the Government is false. The bill also allows a qui tam, or private citizen relator, increased involvement in suits brought by the relator but litigated by the Government. Additionally, the relator could receive up to 30 percent of any judgment arising from his suit and is afforded protection from retaliation for his actions.

Senator DeConcini had sponsored a related measure, S. 1981, in the 96th Congress. While that legislation was reported favorably by the Senate Judiciary Committee in 1980, it failed to receive consideration by the full Senate before the adjournment of the 96th Congress. Evidence of rampant fraud in Government programs since that time has renewed the effort to legislate a more effective statute.

On September 17, 1985, the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure held a hearing on S. 1562 and S. 1673, a similar bill proposed by the administration. Testifying at that hearing were Jay Stephens, Associate ****5279 *14** Deputy Attorney General, Department of Justice accompanied by Stuart E. Schiffer, Deputy Assistant Attorney General for the Civil Division, Department of Justice; John R. Phillips, Co-Director, Center for Law in the Public Interest; D. Wayne Silby, Business Executives for National Security; and three individuals, Mr. John Michael Gravitt; Mr. James B. Helmer, Jr.; and, Mr. Robert Wityczak.

All of these witnesses expressed strong support for amendments to the False Claims Act. Mr. John Phillips, testifying on behalf of the Center for Law in the Public Interest, focused his remarks on the necessity for enhancing the qui tam provisions under the False Claims Act, saying that an effective vehicle for private individuals to disclose fraud is necessary both for meaningful fraud deterrence and for breaking the current 'conspiracy of silence' among Government contractor employees.

Two individuals who had exposed mischarging at defense contractor plants also expressed support for the amendments contained in S. 1562. Mr. John Gravitt, who filed a qui tam false claims suit against General Electric, testified that the changes in S. 1562 were necessary to encourage workers directed to participate in fraudulent schemes to expose that wrongdoing. Mr. Robert Wityczak, a former Rockwell International employee who also exposed falsification of time cards, stated that the false claims reforms in S. 1562 are imperative 'to encourage employees like myself who know first-hand of fraudulent misconduct to step forward.'

Mr. D. Wayne Silby, testifying on behalf of Business Executives for National Security, said the business association supports S. 1562 because the bill 'is supportive of improved integrity in military contracting. The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes the sensible approach of increasing penalties for wrongdoing, and rewarding those private individuals who take

significant personal risks to bring such wrongdoing to light.'

Mr. Jay Stephens, testifying for the Justice Department, stated that the Department was very supportive of False Claims Act reforms and would recommend the consideration of supplemental provisions included in the administration-proposed S. 1673. Additionally, Stephens expressed some concern regarding the broadness of the qui tam amendments contained in S. 1562, but added that the Justice Department was willing to work with the Committee on developing a 'practical solution' for legislation giving 'long overdue weapons to deal with the problem of fraud.'

In response to Justice Department concerns, S. 1562, and specifically the qui tam provision, was significantly revised at the subcommittee level and a substitute bill was reported favorably to the full Judiciary Committee on November 7, 1985. The S. 1562 substitute contained several provisions adopted from S. 1673:

First, the original constructive knowledge standard defined as 'acting in reckless disregard of the truth' was changed to the S. 1673 definition of 'reason to know that the claim or statement was false or fictitious.' While the two definitions are very similar, the Justice Department suggested that the definition from S. 1673 provided greater clarity and was better crafted to address the problem ***15 **5280** of the 'ostrich-like' refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know.

Second, the subcommittee adopted a provision allowing the full litigation of False Claims Act counterclaims asserted against an offender who initiates a case in U.S. Claims Court.

Third, the subcommittee added a provision permitting the United States to bring an action against a member of the armed forces, as well as civilian employees. The military has been excluded from False Claims Act liability since 1863 when the Government had available more severe military remedies. The subcommittee agreed, however, that military code remedies are inadequate to ensure full recoveries for fraudulent acts by servicepersons and such persons should therefore not be exempt from False Claims Act coverage.

Fourth, the subcommittee added a clarification that an individual who makes a material misrepresentation to avoid paying money owed the Government should be equally liable under the Act as if he had submitted a false claim. The Justice Department testified that recent court rulings had produced an ambiguity as to whether such 'reverse false claims' were covered by the False Claims Act, and the subcommittee agreed that such matters should be addressable under the Act.

Fifth, the subcommittee added a new uniform remedy to permit the Government to seek preliminary injunctive relief to bar a defendant from transferring or dissipating assets pending the completion of a false claims action. Currently, the Government's prejudgment attachment remedies are governed by State law and the subcommittee agreed that a uniform Federal standard would significantly enhance the Government's remedies as well as avoid inconsistent results.

Sixth, the subcommittee adopted a provision allowing the Federal Government to sue under the False Claims Act to prosecute frauds perpetrated on certain grantees, States and other recipients of Federal financial assistance. A recent decision, United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981), created some confusion with respect to whether the Federal Government may recover in grant cases where the Federal contribution is a fixed sum. The subcommittee agreed with the Justice Department's recommendation that it be made clear the United States may bring an action whether the grant obligation is open-ended or fixed.

Seventh, the subcommittee added a modification of the statute of limitations to permit the Government to

bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when the Government learned of a violation, whichever is later. The subcommittee agreed that because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure the Government's rights are not lost through a wrongdoer's successful deception.

Eighth, the subcommittee adopted a provision granting Civil Investigative Demand, or CID, authority to the Justice Department Civil Division to aid in the investigation of False Claims Act cases. The subcommittee noted that the CID authority from S. 1673 is nearly identical to that available to the Antitrust Division under the Hart-Scott-Rodino Act of 1976, 15 U.S.C. 1311-1314. The subcommittee ***16 ****5281** agreed with the Justice Department suggestion to add this carefully crafted investigative tool in an effort to produce more efficient and complete Government investigations.

Finally, the subcommittee agreed to several changes in the qui tam provisions of S. 1562:

First, in response to Justice Department concerns that qui tam complaints filed in open court might tip off targets of ongoing criminal investigations, the subcommittee adopted a 60-day seal provision for all qui tam complaints.

Second, the Justice Department expressed concerns that the broadening of qui tam provisions under S. 1562 might provoke a greater number of frivolous suits and specifically a greater number of actions filed merely for political purposes. The subcommittee agreed to an amendment which limits the application of qui tam suits against political officials to only those cases involving information not already in the government's possession. As a further prevention of frivolous actions, the subcommittee adopted attorneys fees sanctions to be charged against any qui tam plaintiff who brings a clearly frivolous or vexatious suit. Additionally, the subcommittee amendment specifically provides that where an action appears to be brought in bad faith the court may half the litigation pending assurances that the qui tam plaintiff can make payment of any legal fees and expenses the court may award.

Also in response to Department of Justice concerns that three levels of qui tam award portions would provoke additional litigation, the subcommittee adopted a simplified two-tier approach allowing 10-20 percent awards if the Government takes over the action and 20-30 percent if the qui tam plaintiff proceeds alone. In addition, so as to prevent any 'windfalls' for persons who may not have had direct involvement with investigating or exposing alleged false claims that are the basis of a qui tam suit, in the very limited area where the qui tam action is brought at least 6 months after a public disclosure, the Government has failed to act, and the suit succeeds, the individual who brought the action would only receive 'up to 10 percent' depending on his role in advancing the case to litigation.

The subcommittee substitute also added a provision authorizing the Attorney General to grant awards to informants who contribute to successful false claims suits. And finally, in response to comments from the National Association of Attorneys General, the subcommittee adopted a provision allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence.

On November 7, the Subcommittee on Administrative Practice and Procedure met and voted to report favorably to the full Senate Judiciary Committee S. 1562 as amended by a subcommittee substitute offered by Chairman Grassley. The subcommittee voted 4 to 0 to report S. 1562 with Chairman Grassley and Senators Heflin, Specter and East voting in favor of the bill.

While the original S. 1562, as well as the subcommittee substitute, contained amendments to Rule 6(e) of the Federal Rules of Criminal Procedure regarding access to grand jury information, Chairman Grassley announced at the November 7 mark-up that ****5282 *17** the full Senate Judiciary Committee would be addressing that issue separately and that Rule 6(e) amendments would be removed from S. 1562. On December 14, 1985, the full Senate Judiciary Committee voted by unanimous consent to favorably report S. 1562 to the Senate floor with the following amendments which came in respone to suggestions offered by other Committee members and then offered by Senator Grassley:

First, as already noted, grand jury access amendments were removed.

Second, language was added to further define the constructive knowledge definition so that it paralleled that found in S. 1134, the Program Fraud and Civil Penalties Act as reported favorably from the Governmental Affairs Committee. While the standards were already ready very similar, S. 1134 contained further clarifying language and the Committee thought it unwise to allow the possibility of confusion and the lack of a uniformly applied standard in administrative and judiciary civil false claims actions.

Third, the Committee adopted new language under the whistleblower protection provision to ensure that remedies afforded under the act will not be abused by employees acting in bad faith or who are discharged, demoted, etc. for legitimate reasons unrelated to any whistleblowing activity.

And finally, the CID authority was amended to require that other agencies seeking access to information obtained through CIDs must demonstrate to the appropriate Federal district court that they have a 'substantial need' for the information rather than allowing the Justice Department alone to determine outside agency access.

IV. SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 of the bill amends section 3729 of title 31, United States Code, in several respects.

31 U.S.C. 3729, SUBSECTION (a)

Section 1, paragraphs (1) and (2) of the bill create a new subsection (a) of section 3729 and amend section 3729 to raise the fixed statutory penalty for submitting a false claim from $2,000 to $10,000. The $2,000 figure has remained unchanged since the initial enactment of the False Claims Act in 1863. The Committee reaffirms the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments.

Section 1, paragraph (3) of the bill amends section 3729 to increase the Government's recoverable damages from double to treble. The Committee adopts the treble damage level to comport with legislation passed earlier in the 99th Congress (P.L. 99-145, Department of Defense Authorization Act, 1986) which established treble damage liability for false claims related to contracts with the Department of Defense.

****5283 *18** Section 1, paragraph (4) of the bill amends section 3729 to permit the United States to bring an action against a member of the armed forces as well as against civilian employees. When the Act was first

enacted, in 1863, the military was excluded because the Government had available more severe military remedies. Under the 1863 statute, Act of March 2, 1863, chapter 62, section 1, any person in the Army, Navy, or militia who was charged with submitting a false claim could be held for trial by a court-martial and, if found guilty, punished by any level of fine or imprisonment felt proper. Only the death penalty was precluded. However, currently, while the Government might institute court-martial proceedings against a member of the armed services found guilty of fraud, it cannot seek monetary recovery under the False Claims Act and must instead rely on less effective common law remedies.

Section 1, paragraphs (5) and (6) of the bill make technical changes in section 3729 of title 31.

Section 1, paragraph (7) of the bill amends section 3729 to provide that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money.

The question of whether the False Claims Act covers situations where, by means of false financial statements or accounting reports, a person attempts to defeat or reduce the amount of a claim or potential claim by the United States against him, has been the subject of differing judicial interpretations. Although it is now apparent that the False Claims Act does not apply to income taxes cases, and the Committee does not intend that it should be so used, the act's earlier history serves to illustrate the problem which has come to be known as the 'reverse false claim;' i.e., claims to avoid a payment to the Government. Thus, courts have held that there is no violation of the False Claims Act by the filing of a fraudulent Federal tax return (seeking to avoid payment of income tax) as distinguished from a fraudulent claim for a tax refund (seeking to obtain an inflated refund payment). Olson v. Mellon, 4 F. Supp. 947, 948 (W.D. Pa. 1933), aff'd sub nom., United States ex rel. Knight v. Mellon, 71 F.2d 1021 (3d Cir.), cert. denied, 293 U.S. 615 (1934). Cf. United States ex rel. Roberts v. Western Pac. R. Co., 190 F.2d 243, 247 (9th Cir. 1951), cert. denied, 342 U.S. 906 (1952). In the few contract or lease arrangement cases in which the issue arose, several courts have applied the same rationale, with the result that a person's fraudulent attempt to reduce the amount payable by him to the United States was considered not to constitute a violation of the False Claims Act. United States ex rel. Kessler v. Mercut Corp., 83 F.2d 178 (2d Cir.), cert denied, 299 U.S. 576 (1936); United States v. Howell 318 F.2d 162 (9th Cir. 1963), aff'g on this point, United States v. Elliott, 205 F. Supp. 581 (N.D. Cal. 1962); United States v. Brethauer, 222 F. Supp. 500 (W.D. Mo. 1963).

A better reasoned result was reached in Smith v. United States, 287 F.2d 299 (5th Cir. 1961). In that case, a nonprofit housing project was operated by a municipal housing authority under a lease from the U.S. Public Housing Administration as lessor. The lessee (housing authority) was obligated to remit quarterly to PHA as rent the excess of the lessee's revenues from the project over its ****5284 *19** operation expenses and PHA was obligated to advance to the lessee such funds as might be necessary to cover anticipated deficits if the project's revenues were insufficient to defray expenses. Quarterly reports of the project's revenues and expenses were required to be submitted by the lessee to PHA. The manager of the local housing authority fraudulently inflated the project's operating expenses in each of two quarterly reports filed with PHA. The report for the first quarter showed a deficit in the project operations and the PHA paid the amount of such deficit to the local housing authority. The report for the second quarter showed a surplus in the project operations and the amount of such surplus was remitted by the local housing authority to PHA. The United States sued the project manager under the False Claims Act, demanding a forfeiture for each false report and asserting as its damage (subject to doubling) the amount of the fraudulent inflation of the project's operating expenses in each of the two quarterly reports. The Fifth Circuit affirmed judgment for the United States for double damages and forfeitures with respect to both reports, declaring that the False Claims Act was violated (a) by the fraud in the first report, but for which the Government 'would have made a lesser payment,' and (b) by the fraud in the second report, but for which the

Government 'would have received more rent.' 287 F.2d, at 304. This same rationale was adopted in the more recent case of United States v. Peter Vincent Douglas, 626 F. Supp. 621 (E.D.Va. 1985).

The Supreme Court's opinion in United States v. Neifert-White Co, 390 U.S. 228 (1968), indicated that the False Claims Act 'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.' The Committee strongly endorses this interpretation of the act and, to remove any ambiguity, has included this amendment to resolve the current split in the caselaw relating to such material misrepresentations.

Section 1, paragraph (7) of the bill also amends section 3729 to permit the Government to recover any consequential damages it suffers from the submission of a false claim. For instance, where a contractor has sold the Government defective bearings for use in military aircraft, the Government could recover not only the cost of new ball bearings, but the much greater cost of replacing the defective ball bearings. See, United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972). The court's conclusion in that case was based on a narrow and form-bound interpretation of the act:

Upon careful analysis, we hold that the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods. The statute assesses double damages attributable to the 'act,' which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claims, caused the consequential damages. Id. at 1011.

****5285 *20** 31 U.S.C. 3729, SUBSECTION (b)

New paragraph (1) of subsection (b) of the statute includes damages that the Government would not have sustained but for its entry into a grant or contract as a result of a material false statement. When the Government changes its position, and commits its financial resources based upon a material false statement, it should be able to recover the resulting losses, but, under some court interpretations, it may not. For instance, in United States v. Hibbs, 568 F.2d 347 (3rd Cir. 1977), the FHA agreed to insure a mortgage based upon a representation, which was false, that the residence was habitable and in compliance with the housing code. The Government will not issue insurance to a non-code-conforming house. However, the court ruled that the default on the mortgage occurred because the borrower lost his job, and therefore could not meet his monthly payments--that the default was not related to the false statement. While the court may have been technically correct, the Committee believes that this position is unsound public policy. The act should cover representations which cause the Government to change its position and pledge its full faith and credit, including the risk of insurable loss, based upon another, but material false statement. This provision is not intended, however, to provide additional penalties where only a false statement has occurred.

31 U.S.C. 3729, SUBSECTION (c)

New subsection (c) of section 3729 clarifies the standard of intent for a finding of liability under the act. This language establishes liability for those 'who know, or have reason to know' that a claim is false. In order to avoid varying interpretations, the Committee further defined the standard as making liable those who have 'actual knowledge that the claim is false, fictitious, or fraudulent, or acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim.'

While it is clear that actual knowledge of a claim's falsity will confer liability, courts have split on defining what type of 'constructive knowledge', if any, is rightfully culpable. In fashioning the appropriate standard of knowledge for liability under the civil False Claims Act, S. 1562 adopts the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek. A rigid definition of that 'duty', however, would ignore the wide variance of circumstances under which the Government funds its programs and the correlating variance in sophistication of program recipients. Consequently, S. 1562 defines this obligation as 'to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim.' Only those who act in 'gross negligence' of this duty will be found liable under the False Claims Act.

The standard in S. 1562 is identical to that in S. 1134, the Program Fraud and Civil Remedies Act which was reported favorably by the Senate Governmental Affairs Committee in November of 1985 and is probably indistinguishable from the knowledge standard ***21 **5286** found in H.R. 4560, reported favorably from the House Judiciary Subcommittee on Administrative Law and Governmental Relations in May of 1986. The Committee believes that the definition of knowledge under the False Claims Act should not differ from the definition of knowledge for any administrative adjudications regarding false claims. In both bills, the constructive knowledge definition attempts to reach what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted. While the Committee intends that at least some inquiry be made, the inquiry need only be 'reasonable and prudent under the circumstances', which clearly recognizes a limited duty to inquire as opposed to a burdensome obligation. The phrase strikes a balance which was accurately described by the Department of Justice as 'designed to assure the skeptical both that mere negligence could not be punished by an overzealous agency and that artful defense counsel could not urge that the statute actually require some form of intent as an essential ingredient of proof.'

31 U.S.C. 3729, SUBSECTION (d)

New subsection (d) clarifies that the statute permits the Government to sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of Federal funds.

Some courts have concluded that once the United States has made the grant to the State, local government unit, or other institution, it substantially relinquishes all control over the disposition of the money or commodities and requires only that the grantee shall make periodic reports of its disbursements and activities. Where this is the case, the judicial determination may follow that a fraud against the grantee does not constitute a fraud against the Government of the United States with the result that the False Claims Act is inapplicable. Cf. United States ex rel. Salzman v. Salant & Salant, Inc., 41 F. Supp. 196 (S.D.N.Y. 1938) (fraud against the Red Cross).

More recently, the question has arisen whether claims under the Medicare and Medicaid programs are claims 'upon or against the Government of the United States or any department or officer thereof.' Under the Medicare program, claims are not submitted directly to the Federal agency, but rather to private intermediaries--usually insurance companies--which are subsequently reimbursed by the United States. However, false Medicare claims have been uniformly held to be within the ambit of the False Claims Act, though the claims were actually filed with, and paid by insurance companies. See Peterson v. Weinberger, 508 F.2d 45 (5th Cir. 1975), cert. denied, 423 U.S. 830 (1975). Numerous cases involving criminal False Claims Act (18 U.S.C. 287) prosecutions hold to the same effect. For example, in United States v. Beasley, 550 F.2d 261, 271 (5th Cir. 1977), the court, relying on United States ex. rel. Marcus v. Hess, 317 U.S. 537 (1942), stated:

****5287 *22** Case law supports federal jurisdiction and a violation of Federal criminal law when false claims are presented to the United States by an intermediary.
See also the extensive discussion at pages 272-273 relating to analogous situations under HUD and other programs; and United States v. Catena, 5000 F.2d 1319 (3d Cir. 1974).

Although the Federal involvement in the Medicaid program is less direct, claims submitted to State agencies under this program have also been held to be claims to the United States under the False Claims Act. In United States ex rel. Davis v. Long's Drugs, Inc., 411 F. Supp. 1144, 1146-1147 (S.D. Cal. 1976), the Court held that, although MediCal (California's Medicaid program) is administered by the State, and only 50 percent of the funds are obtained from the United States, the Federal funding and extensive Federal regulations and control are sufficient to bring claims submitted to MediCal within the False Claims Act, stating:

Although the California Medical program is administered by a state agency, this program and all state programs which qualify for Federal funds have substantial contacts with the Federal Government. As indicated above, MediCal was apparently enacted so that California could qualify for Federal Medicaid funds * * *. Disbursements to state medical assistance programs through Medicaid are subject to a myriad of Federal regulations. * * *

Further evidence that the Federal Government has significant contacts with claims submitted under state Medicaid programs is given by the fact that Congress has made it a crime to submit false Medicaid claims (42 U.S.C. § 1396h) * * * It is difficult to perceive why false Medicaid claims, where 50 percent of the funds originate with the Federal Government, should not constitute claims against the United States when Congress has seen fit to designate the same conduct as a Federal crime.

Similar reasoning should apply in other circumstances where claims are submitted to State, local, or private programs funded in part by the United States where there is significant Federal regulation and involvement.

Finally, in United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981), the court held that because the Federal contribution to highway construction was a fixed sum rather than openended (as is the case with Medicare and Medicaid), the Federal Government could not sue the contractors who had engaged in a bid-rigging conspiracy. This narrow reading of the act throws the entire burden of prosecuting fraud on State officials who may not have the powerful remedies available to the United States under the False Claims Act or the sophisticated investigative resources necessary to even establish the fraud. Thus, the Committee intends the new subsection (d) to overrule Azzarelli and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds.

****5288 *23** 31 U.S.C. 3729, SUBSECTION (e)

Section 2729 is amended to add new subsection (e), providing for uniform provisional remedies in False Claims Act suits. Under Rule 64, Federal Rules of Civil Procedure, the Government's prejudgment attachment remedies are governed by State law in the district in which the district court is held. A uniform Federal standard for the employment of these remedies in cases brought under the False Claims Act would significantly enhance the Government's litigating ability in this area, by avoiding the whims and vagaries of the widely varying State procedures for attachment. The bill contains effective remedies to prevent a potential defendant's dissipation of assets pending litigation. These remedies flow from the district court's inherent power to grant injunctions.

The bill is not intended to exclude the Government's utilization, where appropriate, of other existing

prejudgment remedies. While the bill provides for provisional remedies comparable to those provided for under Rule 65, Federal Rules of Civil Procedure, it is intended that the Government shall be required only to show likelihood of success on the merits as a precondition to obtaining relief. Other traditional prerequisites to granting equitable relief, such as adequacy of remedy at law, irreparable harm and the like, shall not be required.

SECTION 2

Section 2 of the bill rewrites section 3730 of title 31, United States Code.

31 U.S.C. 3730, SUBSECTION (a)

Subsection (a) of 3730, which authorizes the Government to bring a civil action for violations of section 3729, remains unchanged.

31 U.S.C. 3730, SUBSECTION (b)

Subsection (b)(1) of 3730, under current law, authorizes a 'person' to bring a civil action for a violation of section 3729 on behalf of the Goverment. Additionally, current law provides that when a private person brings an action under this subsection, the action will be dismissed only if the court and the Attorney General consent to the dismissal. Subsection (b)(1) remains unchanged except for those portions of the paragraph dealing with jurisdiction and venue which are amended and incorporated into a new section 3732 of this title.

Subsection (b)(2) of section 3730 provides, as under current law, that the Government be served with a copy of the complaint filed by a person under this subsection as well as 'substantially all material evidence.' Paragraph (2) is amended to impose a new requirement that all qui tam actions will be filed in camera and remain under seal for at least 60 days, and to clarify that the 60 day period does not begin to run until both the complaint and material evidence are received--a point of some, albeit minor, confusion previously.

The Committee's overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement ****5289 *24** suits. The Justice Department raised a concern, however, that a greater number of private suits could increase the chances that false claims allegations in civil suits might overlap with allegations already under criminal investigation. The Justice Department asserted that the public filing of overlapping false claims allegations could potentially 'tip off' investigation targets when the criminal inquiry is at a sensitive stage. While the Committee does not expect that disclosures from private false claims suits would often interfere with sensitive investigations, we recognize the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters.

Keeping the qui tam complaint under seal for the initial 60-day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action. Nothing in the statute, however, precludes the Government from intervening before the 60- day period expires, at which time the court would unseal the complaint and have it served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

By providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way. Once the court has unsealed the complaint, the defendant will be served as required under Rule 4 of Federal

Rules of Civil Procedure and will not be required to respond until 20 days after being served. This also corrects a current anomaly, under which the defendant may be forced to answer the complaint 2 days after being served, without knowing whether his opponent will be a private litigant or the Federal Government. The initial 60-day sealing of the allegations has the same effect as if the qui tam relator had brought his information to the Government and notified the Government of his intent to sue. The Government would need an opportunity to study and evaluate the information in either situation. Under this provision, the purposes of qui tam actions are balanced with law enforcement needs as the bill allows the qui tam relator to both start the judicial wheels in motion and protect his own litigative rights. If the individual who planned to bring a qui tam action did not file an action before bringing his information to the Government, nothing would preclude the Government from bringing suit first and the individual would no longer be considered a proper qui tam relator. Additionally, much of the purpose of qui tam actions would be defeated unless the private individual is able to advance the case to litigation. The Committee feels that sealing the initial private civil false claims complaint protects both the Government and the defendant's interests without harming those of the private relator.

Subsection (b)(3) of section 3730 establishes that the Government may petition the Court for extensions of both the 60-day evaluatory period and the time during which the complaint remains under seal. Extensions will be granted, however, only upon a showing of 'good cause'. The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an ****5290 *25** adequate amount of time to allow Government coordination, review and decision. Consequently, 'good cause' would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint. While a pending criminal investigation of the allegations contained in the qui tam complaint will often establish 'good cause' for staying the civil action, the Committee does not intend that criminal investigations be considered an automatic bar to proceeding with a civil fraud suit.

The Committee believes that if an initial stay is granted based on the existence of a criminal investigation, the court should carefully scrutinize any additional Government requests for extensions by evaluating the Government's progress with its criminal inquiry. The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the qui tam litigation.

Subsection (b)(4) of section 3730 restates current law which provides that within the initial 60-day period, or before expiration of any stays granted by the court, the Government must indicate whether it will intervene and proceed with the action or decline to enter. If the Government takes over the civil false claims suit, the litigation will be conducted solely by the Government. If the Government declines, the suit will be litigated by the individual who brought the action.

Subsection (b)(5) of section 3730 further clarifies that only the Government may intervene in a qui tam action. While there are few known instances of multiple parties intervening in past qui tam cases, United States v. Baker-Lockwood Manufacturing Co., 138 F.2d 48 (8th Cir. 1943), the Committee wishes to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances.

31 U.S.C. 3730, SUBSECTION (c)

Subsection (c)(1) of section 3730 allows the private individual who brought the false claims suit to take a more active role in the litigation if he chooses. Current law presents an often times self-defeating 'all or nothing' proposition both for the person bringing the action and for the Government. If the Government intervenes and

takes over the suit within the 60-day period, the action is controlled solely by the Government. The person who brought the action has virtually no guaranteed involvement or access to information about the false claims suit.

The Committee recognizes that in many cases, individuals knowing of fraud are unwilling to make disclosures in light of potential personal and financial risk as well as a lack of confidence in the Government's ability to remedy the problem. Witnesses in hearings on S. 1562 testified that incentives for exposing false claims against the Government would be enhanced if individuals who make disclosures are able to more directly participate in seeing that the fraud is remedied.

Subsection (c)(1) provides qui tam plaintiffs with a more direct role not only in keeping abreast of the Government's efforts and ****5291 *26** protecting his financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly delay, or drop the false claims case without legitimate reason. Specifically, paragraph (1) provides that when the Government takes over a privately initiated action, the individual who brought the suit will be served, upon request, with copies of all pleadings filed as well as deposition transcripts. Additionally, the person who brought the action may formally object to any motions to dismiss or proposed settlements between the Government and the defendant.

Any objections filed by the qui tam plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the qui tam relator shows a 'substantial and particularized need' for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations.

Subsection (c)(1) also provides that the qui tam plaintiff may request that the court allow him to take over the suit if the Government has not proceeded with 'reasonable diligence' within 6 months of intervening in the action. While this provision reflects current law, the Committee reaffirms the right of the qui tam plaintiff to intervene if the Government fails to adequately pursue the individual's allegations of false claims. To date, there is no known caselaw guidance on how courts should evaluate 'reasonable diligence' in civil false claims suits. The Committee believes 'reasonable diligence' should be evaluated in light of the amount of Government investigative and prosecutive activity in relation to the length of time the Government has been aware of the allegations as well as the magnitude of the alleged fraud. Additionally, courts should weight the resources willing to be devoted by both the Government and the individual who brought the action as well as the relative experience and expertise possessed by each party. While in most cases the Government's resources will likely appear to exceed the qui tam plaintiff's resources, the Committee recognizes that the often heavy, sporadic workload of Government attorneys may create a situation where a qui tam plaintiff is better able to conduct the litigation in a timely manner.

Subsection (c)(2) of section 3730, provides that the person who brought the false claims action may proceed with the litigation if the Government elects not to intervene and take over the suit within the 60-day time period. Under current law, the Government is barred from reentering the litigation once it has declined to intervene during this initial period. The Committee recognizes that this limited opportunity for Government involvement could in some cases work to the detriment of the Government's interests. Conceivably, new evidence discovered after the first 60 days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the qui tam relator to litigate alone. In those ****5292 *27** situations where new and significant evidence is found and the Government can show 'good cause' for intervening, paragraph (2) provides that the court may allow the Government to take over the suit. Upon request, the Government may also be served with copies of all pleadings and depositions associated with any qui

tam action it declines to take over.

Subsection (c)(3) of section 3730 clarifies that the Government, once it intervenes and takes over a false claim suit brought by a private individual, may elect to pursue any alternate remedy for recovery of the false claim which might be available under the administrative process. The Department of Health and Human Services is currently authorized to use administrative proceedings for the recovery of some false claims. Earlier in this Congress, the Senate Government Affairs Committee favorably reported S. 1134, the Program Fraud Civil Penalties Act, which would extend this type of administrative mechanism for addressing false claims to all Executive agencies. The Committee intends that if civil monetary penalty proceedings are available, the Government may elect to pursue the claim either judicially or through an administrative civil penalty proceeding. In the event that the Government chooses to proceed administratively, the qui tam relator retains all the same rights to copies of filings and depositions, to objections of settlements or dismissals, to taking over the action if the Government fails to proceed with 'reasonable diligence', as well as to receiving a portion of any recovery. If the Government proceeds administratively, the district court shall stay the civil action pending the administrative proceeding and any petitions by the relator, in order to exercise his rights, will be to the district court. While the Government will have the opportunity to elect its remedy, it will not have an opportunity for dual recovery on the same claim or claims. In other words, the Government must elect to pursue the false claims action either judicially or administratively and if the Government declines to intervene in a qui tam action, it is estopped from pursing the same action administratively or in a separate judicial action.

31 U.S.C. 3730, SUBSECTION (d)

Subsection (d) of section 3730 delineates the qui tam relator's right to a portion of any recovery resulting from a successful false claims suit initiated by the relator.

Subsection (d)(1) provides that when the Government has intervened, taken over the suit, and produced a recovery either through a settlement agreement or a judgment, the relator will receive between 10 and 20 percent of the recovery.

Subsection (d)(2) provides that if the relator has litigated the false claims action successfully and the Government did not take over the suit, the relator will be awarded between 20 and 30 percent of the judgment or settlement proceeds.

Current law allows relator awards of up to 10 percent in suits the Government takes over, and up to 25 percent where the relator litigates without the Government. The new percentages found in subsection (d)(1) and (2) do not substantially increase the possible recovery available to a qui tam relator, but do create a guarantee ****5293 *28** that relators will receive at least some portion of the award if the litigation proves successful. Hearing witnesses who themselves had exposed fraud in Government contracting, expressed concern that current law fails to offer any security, financial or otherwise, to persons considering publicly exposing fraud. If a potential plaintiff reads the present statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds to the person who brought the action, the potential plaintiff may decide it is too risky to proceed in the face of a totally unpredictable recovery.

The Committee acknowledges the risks and sacrifices of the private relator and sets a minimum 10 percent or 20 percent level of recovery depending on whether the Government or the relator litigates the action. The setting of such a definite amount is sensible and can be looked upon as a 'finder's fee' which the person bringing the case should receive as of right. The Government will still receive up to 90 percent of the

proceeds--substantially more than the zero percent it would have received had the person not brought the evidence of fraud to its attention or advanced the case to litigation.

The Committee does not, however, believe that the court should be left without discretion on the percentage of award granted a qui tam relator. Obviously, the contribution of one person might be significantly more or less than the contribution of another. Consequently, we have stagged the allowable percentages of recovery so that courts may take various factors into consideration and use discretion in determining awards within those ranges.

Subsection (d)(3) specifies factors courts should take into account when determining recoveries as follows:

(A) the significance of the information provided to the Government;

(B) the contribution of the person bringing the action to the result obtained; and

(C) whether the information which formed the basis for the suit was known to the Government.

Subsection (d)(4) provides that a court may award up to 10 percent of an action's proceeds to persons bringing suits based on public information. The award ranges specified in (d)(1) and (2) do not apply to qui tam relators whose false claims disclosures were derived solely from public hearings, reports, or the news media. New subsection (e)(4) of section 3730 prohibits a suit based solely on previous public disclosures unless the Government has failed to act within 6 months of the public disclosure. The Committee recognizes that guaranteeing monetary compensation for individuals in this category could result in inappropriate windfalls where the relator's involvement with the evidence is indirect at best. However, in the event an action of this type results in a Government recovery, subsection (d)(4) provides that the court may award up to 10 percent of the proceeds, taking into account the significance of the information and the role of the person in advancing the case to litigation. The Committee believes a financial reward is justified in these circumstances if but for the relator's suit, the Government may not have recovered.

****5294 *29** Subsection (d)(5) of section 3730 provides that prevailing qui tam relators may be awarded reasonable attorneys fees in addition to any other percentage of award recovered. The existing False Claims Act does not contain a specific authorization for fees. Such fees will be payable by the defendant in addition to the forfeiture and damages amount. Unavailability of attorneys fees inhibits and precludes many private individuals, as well as their attorneys, from bringing civil fraud suits. Paragraph (5) also clarifies that the Government will in no way be liable for fees or expenses incurred by a private individual who brings a civil false claims action.

Subsection (d)(6) provides that the prevailing defendants in a civil False Claims Act case brought by a party other than the Government, may also be eligible for reasonable attorneys fees if the court finds that the private plaintiff's action was 'clearly frivolous, vexatious, or brought for purposes of harassment.' This standard reflects that which is found in section 1988 of the Civil Rights Attorneys Fees Awards Act of 1976. The Committee added this language in order to create a strong disincentive and send a clear message to those who might consider using the private enforcement provision of this Act for illegitimate purposes. The Committee encourages courts to strictly apply this provision in frivolous or harassment suits as well as any applicable sanctions available under the Federal Rules of Civil Procedure. Additionally, where the court determines that the private plaintiff is motivated by bad faith or bringing a clearly frivolous action, the court shall require the plaintiff to make assurances that payment of legal fees and expenses can be made before allowing the litigation to proceed.

Subsection (d)(7) requires the relator to apply for any award under this act within 60 days of the final judgment or settlement. The same 60-day time period applies where the Government has chosen to pursue its claim through an administrative civil money penalty proceeding. All petitions shall be filed with the appropriate Federal district court.

31 U.S.C. 3730, SUBSECTION (e)

Subsection (e)(1) of section 3730 prohibits qui tam actions among members of the armed services where such actions arise out of any such persons' service in the armed forces. This provision only prohibits servicemen and women from suing each other under the False Claims Act and in no way exempts them from liability under the act if the government brings an action against them.

Subsection (e)(2) disallows qui tam actions against members of Congress, the Judiciary, or Senior Executive branch officials when the Government is already aware of the allegation on which the action is based. This provision actually reflects current law in that any qui tam suit based on information already known to the Government is currently without jurisdiction. While S. 1562 repeals that jurisdictional bar for most suits, the Committee, at the request of the Justice Department, retained the bar for those suits which might be politically motivated. The Committee acknowledges that a statutory remedy for wrongdoing by public officials does exist under the Ethics in Government Act (28 U.S.C. 591). Paragraph (2) does not excuse the class identified from suits brought by the Government ***30 **5295** for violation of the False Claims Act or for suits based on information not in the possession of the Government.

Subsection (e)(3) defines 'senior executive branch officials' as those listed in section 201(f) of Appendix IV of title 5.

Subsection (e)(4) prohibits qui tam suits based on allegations which are already the subject of a civil suit brought by the Government. Additionally, paragraph (4) disallows jurisdiction for qui tam actions based on allegations disclosed in a criminal, civil or administrative hearing, a congressional or General Accounting Office report or hearing, or from the news media, unless the action is brought 6 months after the public disclosure and the Government has failed to take any action.

31 U.S.C. 3730, SUBSECTION (f)

Subsection (f) of section 3730 grants jurisdiction in Federal district court for any action arising under State law for the recovery of money paid by State or local governments if that action grows out of the same transaction or occurrence as an action brought by either the Government or a qui tam plaintiff under the False Claims Act.

31 U.S.C. 3730, SUBSECTION (g)

Subsection (g) of section 3730 authorizes the Attorney General to grant awards to persons who assist in successful civil recoveries under this section or successful criminal convictions under 18 U.S.C. 286, 18 U.S.C. 287, or 18 U.S.C. 1001. The Committee strongly encourages private individuals to come forward with any information regarding fraud against the Government, regardless of the forum in which they make their disclosures. For those individuals who do not wish to entagle themselves in litigation by bringing a civil false claims suit, but instead disclose their allegations directly to the Government, the Committee believes they too should be granted

some reward for their efforts. Further, incentives for exposing fraud should be available in as many forms as is possible. The awards under this section will be made at the discretion of the Attorney General and reported to Congress on an annual basis.

SECTION 3

31 U.S.C. 3731, subsection (a) remains unchanged by the bill.

31 U.S.C. 3731, SUBSECTION (b)

Subsection (b) of section 3731 of title 31, as amended by section 3 of the bill, would include an explicit tolling provision on the statute of limitations under the False Claims Act. The statute of limitations does not begin to run until the material facts are known by an official within the Department of Justice with the authority to act in the circumstances.

31 U.S.C. 3731, SUBSECTION (c)

Section 3 of the bill amends section 3731 by adding a new subsection (c) to make clear that in civil fraud actions, the Government is required to prove all essential elements of the cause of action by a ****5296 *31** preponderance of the evidence. Traditionally, the burden of proof in a civil action is by a preponderance of the evidence. However, this point is not expressly addressed in the current act, and the caselaw is fragmented and inconsistent. Inasmuch as False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages, the Committee believes that the appropriate burden of proof devolving upon the United States in a civil False Claims Act suit is by a preponderance of the evidence. United States v. Gardner, 73 F. Supp. 644 (N.D. Ala. 1947).

Some courts have required that the United States prove its case by clear and convincing, or even by clear, unequivocal and convincing evidence. United States v. Ueber, 299 F.2d 310 (6th Cir. 1962), which is the functional equivalent of a criminal standard. This line of authority, beginning in the early case of United States v. Shapleigh, 54 Fed 126 (8th Cir. 1893), is predicated on its premise that the civil False Claims Act is penal in nature. The Supreme Court's rejection of the underlying premise in United States ex rel Marcus v. Hess, 317 U.S. 537 (1943), necessarily carried with it the repudiation of that conclusion as the burden of proof, and the subsequent decisions under the False Claims Act have generally rejected the criminal standard of 'beyond a reasonable doubt.'

The 'preponderance of the evidence' standard of proof in S. 1562 is, according to the Justice Department, the standard applied in most civil and administrative litigation. The Eighth Circuit recently held in Federal Crop Insurance Corp. v. Hester, 765 F.2d 723 (8th Cir. 1985) that 'preponderance of the evidence' is the appropriate standard for the False Claims Act, stating: 'Because the Act neither requires a showing of fraudulent intent nor is punitive in nature, we find no justification for applying a burden of proof higher than a preponderance of evidence.' In testimony before the Senate Judiciary Committee on September 17, 1985, Jay Stephens, Associate Deputy Attorney General, stated that 'because the False Claims Act is basically a civil, remedial statute, the traditional 'preponderance of evidence' standard of proof is appropriate.'

Thus, notwithstanding the fact that the act permits a treble recovery, it would be governed by the traditional civil burden of proof. The Committee notes in support of this proposition that the U.S. Supreme Court

has upheld such a burden in the areas of securities fraud and antitrust violations, which involve related forms of misconduct and civil remedies. Herman & McLean v. Huddleston, 459 U.S. 375, 388-89 [FN25c] (1983).

31 U.S.C. 3731, SUBSECTION (d)

Section 3 of the bill amends section 3731 of title 31 by adding a new subsection (d) providing that a nolo contendere plea in a criminal fraud case shall have collateral estoppel effect in a subsequent civil fraud action. Without this amendment, the well-settled rule that a nolo plea would have no collateral estoppel effect in related civil proceedings would apply. This common law principle is now embodied in Rule 410, Federal Rules of Evidence, and in Rule 11 (e)(6), Federal Rules of Criminal Procedure, which states:

****5297 *32** * * * evidence of * * * a plea of nolo contendere * * * is not admissible in any civil or criminal proceedings against the person who made the plea or offer.

The Committee feels that given the high priority which should be afforded to the effective prosecution of procurement fraud cases, an exception to this general rule should be made for False Claims Act cases. Moreover, even when the criminal prosecutor wants to pursue his case fully and gain a guilty verdict, the court could still accept a nolo plea over the Government's objection, thus requiring the Civil Division to relitigate the issue. The Committee believes that this would be an unacceptable result; individuals who cheat the Government should not be able to hide behind a nolo plea.

SECTION 4

31 U.S.C. 3732, SUBSECTION (a)

Section (4) of the bill adds a new section 3732 of title 31 to modernize the jurisdiction and venue provisions of the False Claims Act, by recognizing the existence of multi-defendant and multi-district frauds against the Government. The bill provides that jurisdiction and venue in suits under the False Claims Act shall be proper in any district in which either: (a) any defendant resides, transacts business, is doing business, or can be found; or (b) in any district in which any of the following acts occurred: (i) the false claim was made or presented, or (ii) any other act constituting a violation of the False Claims Act occurred.

Under existing law, a False Claims Act suit must be commenced in the district where the defendant can be 'found'. This considerably hinders the Government's litigative effort in cases involving multiple defendants. Many suits brought under the Act involve several defendants and only infrequently can all defendants be 'found' in any one district. Many False Claims Act suits are brought after criminal litigation involving the same or similar conduct. Typically, for a variety of reasons, the individuals involved have moved from the area where the wrongdoing occurred and where they once were 'found'. This, in turn, may force the Department of Justice to file multiple suits involving the same scheme or pattern or fraudulent conduct against each defendant in the district in which he or she may be found at the time suit is commenced. Multiple suits, of course, increase the cost to the Government to pursue these cases and have a comparable impact upon the judicial resources required for a complete adjudication.

This expansion of jurisdiction and venue is made with a view to more effective litigation by the Government as well as convenience and fairness. It is basically a form of long-arm statute with many familiar counterparts in State law. However, the Committee is aware of the potential for abuse of this section. Choice of

venue could turn more upon which court had provided a previous favorable decision to the Government than upon other factors of convenience or fairness. The Committee will remain sensitive to these potential abuses. Of course, a defendant could always move to transfer a case where appropriate 'in the interest of justice and for the convenience of the parties' (28 U.S.C. 1404).

****5298 *33** 31 U.S.C. 3732, SUBSECTION (b)

Subsection (b) of new section 3732 provides that the Claims Court shall have jurisdiction over any False Claims Act suit brought by the United States by way of a counterclaim. This provision will promote the economy of judicial resources by facilitating the resolution of all aspects of a given contract dispute--including any Government fraud claims--in a single judicial proceeding.

SECTION 5

31 U.S.C. 3733, SUBSECTION (a)

Section 5 of the bill adds a new section 3733 to title 31 which would authorize the Justice Department to issue Civil Investigative Demands (CID) for documents or testimony relevant to a False Claim Act investigation. This authority is nearly identical to that currently available to the Justice Department's Antitrust Division under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 1311-14).

Currently, the Civil Division of the Department relies primarily on two sources for investigation of civil fraud cases: the work of agency Inspectors General (IGs) and material developed in criminal investigations, usually through the use of grand jury subpoenas. However, since the Supreme Court's decision in United States v. Sells Engineering Co., 31 S. Ct. 3133 [FN25d] (1983), interpreting Rule 6(e) of the Rules of Criminal Procedure, the Civil Division has been largely unable to gain access to the information developed before the grand jury. Therefore, in addition to supplementing the investigative powers of the IGs, CID authority would permit the Civil Division to gain access to evidence of fraud which might currently be unavailable to it due to the Supreme Court's interpretation of Rule 6(e).

With the single exception of sharing information with other agencies (discussed below), the CID authority granted by the bill is identical to that available to the Antitrust Division, and the Committee intends that the legislative history and caselaw interpreting that statute (15 U.S.C. 1311-14), fully apply to this bill. Briefly, the CID statute would work as follows. Where the responsible Assistant Attorney General believes that an individual or corporation has access to information relating to a False Claims Act investigation, he may, prior to the institution of litigation, issue a CID. The demand may require the production of documents, written answers to interrogatories and/or oral testimony. The standards governing subpoenas and ordinary civil discovery shall apply to protect against disclosure of information subject to a privilege, such as those privileges recognized by the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and those recognized by Hickman v. Taylor, 329 U.S. 495 (1946), and its progeny. The Department may enforce compliance with the CID in district court and its order shall be final and hence, subject to appeal under 28 U.S.C. 1291.

The Committee notes that the use of CID authority has long been upheld against constitutional challenges. Hyster Company v. United States, 338 F.2d 183 (9th Cir. 1964); ****5299*34**Petition of Gold Bond Stamp Company, 221 F. Supp. 391 (D. Minn. 1963), aff'd 325 F.2d 1018 (8th Cir. 1964).

The single noteworthy difference from the Hart-Scott-Rodino Act is subsection 3733(j)(3)(c), which authorizes the Department to share information obtained through a CID with any other agency of the United States for use by that agency in furtherance of its statutory responsibilities. However, such information could only be provided if the requesting agency, acting through the Department of Justice, obtained a court order upon a showing of substantial need. This proceeding would be conducted ex parte. The Committee feels that this protection will be adequate to ensure that only agencies with legitimate interests in fulfilling their most significant statutory responsibilities would have access to the information.

SECTION 6

31 U.S.C. 3734

Section 6 of the bill establishes a new section 3734 under the False Claims Act to provide for 'whistleblower' protection.

The Committee recognizes that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation. With the provisions in section 3434, the Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence 'whistleblowers', as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.

In forming these protections, the Committee was guided by the whistleblower protection provisions found in Federal safety and environmental statutes including the Federal Surface Mining Act, 30 U.S.C. 1293, Energy Reorganization Act, 42 U.S.C. 5851, Clean Air Act, 42 U.S.C. 7622, Safe Drinking Water Act, 42 U.S.C. 300j-9, Solid Waste Disposal Act, 42 U.S.C. 6971, Water Pollution Control Act, 33 U.S.C. 1367, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, and Toxic Substances Control Act, 15 U.S.C. 2622.

New section 3734 provides 'make whole' relief for anyone who is 'discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against' by his employer due to his involvement with a false claims disclosure. The 'protected activity' under this section includes any 'good faith' exercise of an individual 'on behalf of himself or others of any option offorded by this Act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act.' Consequently, the Committee believes protection should extend not only to actual qui tam litigants, but those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be interpreted broadly.

As is the rule under other Federal whistleblower statutes as well as discrimination laws, the definitions of 'employee' and 'employer' should be all-inclusive. Temporary, blacklisted or discharged workers should be considered 'employees' for purposes of this act. ****5300 *35** Additionally, 'employers' should include public as well as private sector entities.

Section 3734 provides relief only if the whistleblower can show by a preponderance of the evidence that the employer's retaliatory actions resulted 'because' of the whistleblower's participation in a protected activity. Under other Federal whistleblower statutes, the 'because' standard has developed into a two-pronged approach. One, the whistleblower must show the employer had knowledge the employee engaged in 'protected activity' and, two, the retaliation was motivated, at least in part, by the employee's engaging in protected activity. Once these

elements have been satisfied, the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity. Deford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); Mackwiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162-1164 (9th Cir. 1984); Consolidated Edison of N.Y. Inc. v. Donovan, 673 F.2d 61, 62 (2nd Cir. 1982).

Additionally, as in the Safe Drinking Water Act, Clean Air Act, and Federal Water Pollution Act, the employer would not have to be proven in violation of the False Claims Act in order for this section to protect the employee's actions. However, the actions of the employee must result from a 'good faith' belief that violations exist.

Section 3734 provides 'make whole' relief including 'reinstatement with full seniority rights, backpay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys fees.' In addition, the court could award double back pay, special damages or punitive damages if appropriate under the circumstances.

Jurisdiction for any actions under section 3734 of the False Claims Act shall be in Federal district court.

SECTION 7

Section 7 of the bill raises criminal penalties as well as possible imprisonment for criminal violations involving false claims. Subsection (a) of the bill amends section 286 of title 18, conspiracy to defraud the Government with respect to claims, and increases the penalty from $10,000 to $1 million. Subsection (b) of the bill amends section 287 of title 18, false, fictitious or fraudulent claims, and increases the $10,000 penalty to $1 million as well as increases the allowable prison sentence from 5 years to 10 years. Earlier in the 99th Congress, a $1 million level was set for submitting false claims related to contracts with the Department of Defense (P.L. 99- 145, Department of Defense Authorization act, 1986). The amendments in section 7 of this bill would apply that criminal penalty level across-the-board to any criminal false claims violations.

SECTION 8

Section 8 of the bill establishes that the amendments made by this act will be effective upon the date of enactment.

****5301 *36 V. AGENCY VIEWS**

U.S. DEPARTMENT OF JUSTICE,

OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,

Washington, DC, December 11, 1985.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is to express the Justice Department's strong support for the False Claims Act amendments contained in S. 1562 as reported out of the Subcommittee on Administrative Practice and

Procedure on November 7. We believe that these amendments will provide a significant enhancement to our ability to detect and prosecute economic crime.

As stated in our previous testimony, the Department does not believe that any changes are necessary in the 'qui tam,' or citizen suit, portions of the False Claims Act. However, the current langauge of S. 1562, a result of negotiations between representatives of the Department and subcommittee staff, is not objectionable in the context of the bill's other beneficial amendments to the False Claims Act.

However, the Department continues to oppose any amendment to Rule 6(e) of the Federal Rules of Criminal Procedure that would permit congressional access to grand jury information. We also recommend that administrative agencies be permitted to obtain access to grand jury information only at the request of an attorney for the Department of Justice on a showing of substantial need. Therefore, in an effort to expedite action on this vital anti-fraud initiative, we would urge the Committee to act to report out the False Claims Act amendments contained in S. 1562 separate from the grand jury reforms, which would seem to require more deliberation and discussion. Prompt action by your Committee may be crucial to ensuring ultimate passage of some anti-fraud legislation in the 99th Congress.

Additionally, we urge you to take action on the other Administration anti-fraud bills pending in the Committee. In particular, S. 1675, the Bribes and Gratuities Act, is directly related to the False Claims Act amendments, and would provide a valuable supplement to the enhanced anti-fraud remedies contained in S. 1562.

The Administration remains prepared to work with the Committee on this initiative and compliments you and Senator Grassley on your leadership in this area.

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

Sincerely,
PHILLIP D. BRADY,

Acting Assistant Attorney General.

VI. COST ESTIMATE

The Congressional Budget Office has reviewed S. 1562 and does not expect the bill to result in any additional costs to the Government.

****5302 *37** U.S. CONGRESS,

CONGRESSIONAL BUDGET OFFICE,

Washington, DC, June 12, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewd S. 1562, a bill amending the False Claims Act, and Title 18 of the United States Code regarding penalties for false claims, as ordered reported by the Senate Committee on the Judiciary, December 12, 1985.

S. 1562 would increase penalties and damages to which defendants under the False Claims Act are liable, broaden the scope of liability under that act, give the Department of Justice the authority to issue investigative demands prior to filing a complaint, and make a number of procedural changes for the conduct of false claims suits. These amendments are expected to involve no significant costs to the federal government or to state or local governments. The federal government may receive increased revenues as a result of increased penalties and damages authorized by this bill, but the amount cannot be estimated with precision.

Section 1 of S. 1562 increases the liability for false claims from $2,000 plus two times the damages sustained by the government to $10,000 plus three times the damages sustained by the government. According to the Department of Justice, collections of penalities and damages under the False Claims Act currently average about $40 million each year, although this amount fluctuates widely. The imposition of treble damages could potentially increase this amount by 50 percent. The increase might be lower, however, due to the possible reluctance of courts to impose more severe penalties. Conversely, collections could be even greater due to provisions in this bill making it easier for the government to win convictions for false claims, encouraging individuals to initiate false claims suits and establishing a uniform federal prejudgment standard. Because the provisions of the bill would apply only to claims made subsequent to enactment, no revenues would be realized until 1989 or 1990.

We expect that other sections of S. 1562 could affect costs of the Department of Justice. Section 5 of the bill gives Justice Department civil attorneys the authority for discovery of evidence prior to a complaint. The new authority may reduce duplication of investigative time and effort, and result in cost savings. Increased costs for litigation would offset some of the increased revenues produced by this bill, if it results in an increased number of false claims actions, particularly those brought by individuals.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,
RUDOLPH G. PENNER, Director.

**5303 *38 VII. REGULATORY IMPACT STATEMENT

Pursuant to the requirements of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact or paperwork impact will result from the enactment of S. 1562.

VIII. VOTE OF COMMITTEE

The Committee favorably reported S. 1562, as amended, by unanimous consent on December 12, 1985.

FN1 GAO Report to Congress, 'Fraud in Government Programs: How Extensive is it? How Can it be Controlled?', 1981.

FN2 See Id. at 8-15.

FN3 Hearings on Federal Securities Laws and Defense Contracting before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, 99th Congress, 1st session (1985).

FN4 Hearings on White Collar Crime before the Senate Committee on the Judiciary, 99th Congress, 2d session (1985).

FN5 GAO Report, at 1.

FN6 Hearings on the Departments of State, Justice and Commerce before the Subcommittee on the Departments of State, Justice and Commerce, the Judiciary and Related Agencies of the House Committee on Appropriations, 96th Congress, 2d session (1980).

FN7 Hearings on Federal Securities Laws and Defense Contracting before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, 99th Congress, 1st session (1985).

FN8 GAO Report, at 19.

FN9 GAO Report, at cover.

FN10 Department of Justice Civil Division records show 2,850 fraud referrals in fiscal year 1984 and just 21 complaints filed and 70 settlements or judgments. In fiscal year 1985, the Division received 2,734 fraud referrals, filed 36 complaints and obtained 54 settlements or judgments.

FN11 Report of the Economic Crime Council to the Attorney General, 'Investigation and Prosecution of Fraud in Defense Procurement and Health Care Benefits Programs', April 30, 1985.

FN12 'Blowing the Whistle in the Federal Government', Report of the United States Merit Systems Protection Board, Oct. 1984.

FN13 Hearing on S. 1562, the False Claims Reform Act, before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Congress, 1st session, September 17, 1985.

FN14 Id. at 80.

FN15 Id. at 81.

FN16 Id. at 85.

FN17 Id. at 82.

FN18. Id. at 87.

FN19. Id. at 39.

FN20. Id. at 39.

FN20a. 463 U.S. 418, 77 L.Ed.2d 743.

FN21 Id. at 34.

FN22 Id. at 35.

FN23 Hearings on Defense Procurement Fraud Law Enforcement before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Congress, 1st session (1985).

FN24 Id. at 18.

FN25 See United States Department of Justice Source Book of Criminal Justice Statistics, 1981 at 431.

FN25a. 98 S.Ct. 2018, 56 L.Ed.2d 611.

FN25b. 96 S.Ct. 523, 46 L.Ed.2d 514.

FN25c. 103 S.Ct. 683, 74 L.Ed.2d 548.

FN25d. 463 U.S. 418, 77 L.Ed.2d 743.

S. REP. 99-345, S. Rep. No. 345, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5266, 1986 WL 31937 (Leg.Hist.)

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